STATE OF SOUTH CAROLINA **COUNTY OF RICHLAND**	)	**IN THE COURT OF COMMON PLEAS** **FOR THE FIFTH JUDICIAL CIRCUIT**
R. WAYNE TODD, derivatively on behalf of SCANA CORPORATION, Plaintiff, v. KEVIN MARSH, GREGORY ALIFF, JAMES BENNETT, JOHN CECIL, SHARON DECKER, MAYBANK HAGOOD, LYNN MILLER, JAMES ROQUEMORE, MACEO SLOAN, ALFREDO TRUJILLO, JIMMY ADDISON, and STEVEN BYRNE, Defendants, -and- SCANA CORP., Nominal Defendant.	)	Civil Action No.: 2017-CP-40-06621 **ORDER GRANTING MOTION TO INTERVENE AND DENYING MOTION TO DISMISS**

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SC Court of Appeals

AMENDED CAPTION

STATE OF SOUTH CAROLINA **COUNTY OF RICHLAND**	)	**IN THE COURT OF COMMON PLEAS** **FOR THE FIFTH JUDICIAL CIRCUIT**
TERESA PARLER, derivatively on behalf of SCANA CORPORATION, Plaintiff, v. KEVIN MARSH, GREGORY ALIFF, JAMES BENNETT, JOHN CECIL, SHARON DECKER, MAYBANK HAGOOD, LYNN MILLER, JAMES ROQUEMORE, MACEO SLOAN, ALFREDO TRUJILLO, JIMMY ADDISON, and STEVEN BYRNE,	)	Civil Action No.: 2017-CP-40-06621 **ORDER GRANTING MOTION TO INTERVENE AND DENYING**

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)	**MOTION TO DISMISS**
Defendants,)	
)	
-and-)	
)	
SCANA CORP.,)	
)	
Nominal Defendant.)	
)	

The case is before the Court on two (2) motions; the defendants' SCRCP Rule 12 (c) Motion to Dismiss, and Teresa Parler's SCRCP Rule 24 Motion to Intervene.

Defendants claim that a Rule 12 (c) dismissal of the underlying shareholder derivative action is proper because all SCANA shares of stock were eliminated by the merger of SCANA into Dominion Energy, Inc. Defendants contend that only shareholders who hold stock "continuously" from the time of the alleged wrong through the conclusion of the derivative litigation have standing to assert derivative claims. The defendants assert the rule in *Johnson v Baldwin* applies to the present case. 221 S.C. 141, 645 S.E.2d 585 (1952). The *Johnson v. Baldwin* rule provides that the right of a stockholder to maintain a derivative action against the directors attaches to the ownership of stock and does not exist apart from such ownership. If the shares are loss, the action survives, but it is abated as to the former shareholder. Where a derivative action is instituted, and thereafter the stock retired, the plaintiffs have no standing to maintain the action. *Id.*

The defendants assert because of the merger, no person remains who can have standing as a shareholder to seek civil redress for the alleged wrongful conduct committed by SCANA's Board of Directors and Officers.[1] Defendants seek not only to have their motion to dismiss granted,

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[1] Once the merger occurred, SCANA became a wholly – owned subsidiary of Dominion and all outstanding shares of SCANA common stock were canceled and converted into a right to receive Dominion common shares. Defendant's memo. p. 2-3.

they also seek an entry of judgement in the defendants' favor on all claims based on a determination of a lack of standing.

Teresa Parler, a holder of SCANA stock at all times relevant hereto prior to the merger and, subsequent to the merger a Dominion shareholder, moves pursuant to SCRCP Rule 24 (a) and 24 (b) to have herself substituted as Plaintiff in the case brought by R. Wayne Todd. Todd disposed of his stock prior to the merger. The defendants' opposition to Parler's Motion to Intervene is not based on a substantive challenge to her "right" (subsection a) to intervene or that an abuse of discretion would occur granting her permission (subsection b) to intervene. Instead, their challenge is because of, once again, the merger. They attack her capacity to sue, arguing that she lacks standing to intervene now that the merger is final. The defendants' argument opposing intervention is substantively the same argument supporting their SCRCP Rule 12 (c) Motion to Dismiss.[2]

After review of the written materials and legal authorities offered to this Court, and considering the arguments of the attorneys, Defendants' SCRCP Rule 12 (c) Motion to Dismiss is

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[2] Originally, Defendants asserted a second ground in opposition to Parler's intervention. They asserted intervention was improper because of parallel and duplicative litigation in federal court. Other than arguments being presented, not many details are known about any pending federal case. This Court previously denied a SCRCP Rule 12 (b) (8) motion. The federal case known to this Court was dismissed without a decision being reached on the merits. No motion to intervene was made in that particular case. In the federal case presented to this Court, the judge referenced the "continuous ownership" rule from *Johnson v. Baldwin*, as being the "common law" in South Carolina. The "continuous ownership" rule from *Johnson v. Baldwin* can be referred to as the "common law" in South Carolina because the rule is "judicial precedent" or "judge-made". The common law *Johnson v. Baldwin* "continuous ownership rule" does not embrace a factually blind and strict application of the rule. In determining a loss of standing, the *Johnson v. Baldwin* case does not provide for a factually-void automatic default of standing exclusively in favor of the surviving post-merger corporation. See *Johnson*, wherein the Court stated, "[t]o hold one is barred, does not mean the cause of action disappeared....[A]nother with proper status must start a new". *Id*, p 150 – 151.

Through the lawsuits assigned to this Court as part of the South Carolina Business Court program (including *Crangle v. Marsh*, et.al., 2017-CP-40-05791 and *Todd v Marsh*, et.al., 2017-CP-40-06621, etc.), allowing the case to proceed in state court is the proper, more efficient and better approach.

Broadly speaking, derivative actions are equitable in nature. Equitable principles justify the granting of the motion to intervene. Prior class representative Todd sold his stock and did so prior to the closing of the merger. Parler, however, was an owner of stock at the time of the alleged civil, regulatory, and criminal wrongs complained of in the Complaint, and unlike Todd, did not actively sell her stock before the merger closed. The wrongs as alleged in the Complaint are serious. The substantive aspects of the claims against the defendants survive the merger of SCANA and Dominion. Unlike the assertion made by the Defendants that judgement should be entered in their favor, the better question may be "who should be named the representative to prosecute the civil claims asserted against the defendants?" Parler is now a Dominion shareholder due to, as she contends, the involuntary loss of her stock and forced merger. This Court previously addressed SCRCP Rules 12 (b) (6) and 23 (b) (1) motions.

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denied. Parler's SCRCP Rule 24 Motion to Intervene and to be substituted as Plaintiff for R. Wayne Todd, is granted.

The caption of this case is hereby amended as reflected in the above AMENDED CAPTION. Future reference to this case shall be as stated in the above AMENDED CAPTION and the Complaint attached to Parler's Rule 24 motion shall be designated as the Complaint in this matter.

Critical to this Court's decision is the standard of review to a SCRCP Rule 12 (c) motion to dismiss. In reviewing the defendants' 12 (c) motion, this Court is required to view the wrongful acts alleged in the Complaint against the defendants as true. The Complaint sets forth seventy eight (78) enumerated paragraphs that contain jurisdictional and factual recitations involving each of the defendants that relate to the failure of a more than nine billion dollar ($9,000,000,000.00) nuclear power construction project. As detailed in the Complaint, a direct and proximate result of the defendants' malfeasance and their subsequent acts of wrongful concealment and purposeful deception, SCANA lost over two billion dollars ($2,000,000,000.00) in value.

A brief review of the facts establish that the defendants were members of the board of directors and certain executive officers of SCANA, a South Carolina regulated public utility company. The allegations against the defendants date back to 2007 and include their million dollar plus efforts of effecting public policy in South Carolina by securing passage of legislation (South Carolina Base Load Rate Act—"BLRA"). This legislation allowed SCANA to pay for the construction of the multi-billion dollar project by increasing rates on SCANA's customers in advance of the actual construction. Moreover, in the event that the multi-billion dollar project had to be abandoned, the BLRA gave SCANA the opportunity to avoid the wasted cost and

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expenses of the failed construction by passing the cost and expenses onto the customers. All SCANA customers are persons or businesses in South Carolina and Georgia.

The allegations include that, using the parlance of the BLRA, the defendants abandoned their duty of oversite and accountability of the multi-billion dollar nuclear power construction project. Significantly, the allegations include that the defendants systematically mislead the investing public and that the defendants concealed the complications surrounding the construction and financing of the project. The allegations also include, among other serious items, the purposeful non-disclosure of information to regulators and shareholders, including the non-disclosure of a very critical audit report, the "Bechtel Audit." The allegations are that for over eighteen (18) months the substance of the Bechtel report was purposefully concealed until the defendants were forced to release the report by the governor. This report revealed the project was facing serious design, construction, and cost issues. The allegations also include that while the defendants were either making, or allowing to be made, false and material statements about the nuclear power plant construction project, the defendants' board paid "lavish bonuses" to certain five (5) executives as "performance bonuses" exceeding twenty one million dollars ($21,000,000.00). The allegations include that as a result of the civil, regulatory and/or criminal wrongdoings of the board and certain officers, the value of the stock substantially decreased and, significantly, a waste of nine billion dollars ($9,000,000,000.00) occurred.

Even though the parties have been before this Court on various motions, the defendants have made no challenge to the factual allegations. Again, the standard of review for the SCRCP Rule 12 (c) motion requires this Court to view all properly pleaded factual allegations as admitted by these defendants and as true. *Falk v. Sadler*, 341 S.C. 281, 533 S.E.2d 350 (Ct. App.

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2000).[3] Thus, based on the standard of review of a 12 (c) motion and the defendants' deafening silence to counter the very serious and substantial allegations of wrongdoing, malfeasance, self-reward, deception, and concealment made against them in the Complaint, this Court must scrutinize the present motion through a lens that views the specific acts of wrongful conduct as true and, thus, in doing so, concluding that the theories of culpability[4] asserted against the defendants as being substantially and materially supported by those facts. *Id.*

More specific to the present motion, the defendants assert that the "continuous ownership" rule from the *Johnson v. Baldwin* case can be used as a shield to protect them from civil accountability for the wrongful acts contained in the Complaint. They contend that the merger eliminated all SCANA stock, and thus, Todd, Parler and all other SCANA stockholders now lack standing to pursue the claims against the defendants. As a result, they desire the termination of this case without any inquiry into the merits of the allegation.

Broadly speaking, a shareholder derivative suit is an equitable action in which a plaintiff shareholder seeks to force a corporation to assert a corporate right when corporate management has refused to hold accountable the individuals who have harmed the corporation. By its nature, a derivative action contemplates the need for a third party to bring the action because the corporation will not sue itself. The shareholder derivative action provides a procedural vehicle by which a shareholder may obtain relief for a wrong to the corporation when the corporation is under the control of the persons who have committed the wrong. A shareholder, however, may

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3 A Rule 12 (c) dismissal is a drastic procedure; when a fact is well pleaded, any inference of law or conclusions of fact that may properly arise therefrom are to be regarded as embraced in the averment. Pleadings in a case should be construed liberally so that substantial justice is accomplished between the parties. A Rule 12 (c) motion admits the well pleaded facts in the Complaint and a court must take those facts as true. Generally, important questions of novel impression should not be decided on a motion to dismiss. This general rule against deciding a case on a motion to dismiss is more important and vital to the administration of justice when the development of the record is needed to aid in the proper resolution of the issues before a court. *See*, *Evans v. State*, 344 S.C.60, 543 S.E.2d 551(2001).

4 Theories of liability are Breach of Fiduciary Duties of good faith, loyalty, due and reasonable inquiry and oversight; Gross Mismanagement; and Unjust Enrichment as to Marsh, Addison and Byrne. (Complaint pp 19-20).

not maintain a derivative action unless the shareholder adequately represents the interests of the other shareholders in enforcing the rights of the corporation. Standing does not craft a remedy for the malfeasance or deception; it tests the appropriateness of the driver of the legal vehicle searching for a remedy.[5] SCRCP Rule 23 standing applies equitable principles in an effort to determine who is in the better position to prosecute the case.[6]

A determination of standing (who may be the named plaintiff in a derivative lawsuit) is made pursuant to SCRCP Rule 23. Adequate representation requires that the plaintiff in a derivative suit have interests substantially the same as other shareholders when the plaintiff purports to represent. To ensure a plaintiff attempting to bring a shareholder derivative action possesses the requisite interest to bring an action on behalf of the corporation, a plaintiff must satisfy certain standing requirements before she may maintain a derivative action. The rule from *Johnson* is just one equitable rule that assures that a plaintiff can fairly and adequately advocate for the rights of the shareholders affected by egregious managements and/or director's misconduct. From the information provided by the parties, no support can be found for the conclusion that the *Johnson v Baldwin* "continuous ownership" rule was meant to be used by egregiously offending officers and directors as a factually blind get-out-of-jail-free card[7] to automatically avoid accountability for their actions. As previously noted, *Johnson v Baldwin* does not kill the cause of action; it survives.

Whether the present claims against the defendants terminate based on the assertion of a lack of standing caused by the merger of SCANA into Dominion depends upon how South Carolina jurisprudence views the present merger and the accompanying conversion of stock upon

[5] *Contra*, In Re: SCANA Corporation Derivative Litigation, C/A No. 3:17-3:66 MBS, Order, August 26, 2019, p.4.
[6] The futility of demand on the corporate directors has already been addressed by this Court.
[7] Cambridge Dictionary, noun, meaning, something that allows you to avoid an unpleasant result of your actions, for example a punishment or duty. https://dictionary.cambridge.org/dictionary/english.

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a shareholder's right to maintain the derivative suit based upon the facts presently before this Court. In light of the admitted factual allegations from the Complaint, the reasonable inferences from these facts, the allegations that the merger and accompanying conversion of stock were orchestrated by the board of directors in an effort to avoid accountability, and the information, although limited at this juncture, that supports those allegations related to the merger, South Carolina jurisprudence and the *Johnson v. Baldwin* rule, will not terminate the present litigation.

The continuous ownership rule from *Johnson v. Baldwin* is significant to resolving the issue presently before this Court, but it is not, and should not be, the end of an analysis under South Carolina jurisprudence related to the present derivative litigation.

In other words, the question presented by the parties is whether South Carolina will follow an absolute and strict application of the so-called "continuous ownership rule," which requires the Plaintiff in a derivative suit to maintain their stock ownership at all times throughout the course of litigation divorced from the facts of a particular case; or follow an equitable application of the continuous ownership rule that considers the particular facts of a case; or will South Carolina not follow the continuous ownership rule at all. This Court's opinion is that South Carolina jurisprudence requires a fact based equitable analysis in applying the rule in an effort to determine who may properly serve as the representative party in this deviation shareholder litigation.[8]

As a baseline of analysis, South Carolina does not blindly adhere to Delaware corporate law. *Carolina First Corp. v. Whittle* clearly establishes the willingness of South Carolina courts

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[8] The answer to the question of how the *Johnson v. Baldwin* "continuous ownership" rule will apply to the factual scenario presented by the present litigation can be considered novel in South Carolina. Important questions of novel impression should not be decided on a motion to dismiss. Therefore, the better and proper approach, and the one adopted by this Court, is to deny the defendants' motion to dismiss. If the Johnson v. Baldwin rule were intended to be applied in an absolute and strict manner, the Supreme Court's factual analysis of a derivative shareholder's right of determining a fair market value would have not occurred. *Johnson* pp 590 – 592.

to diverge from Delaware's application of corporate law where a failure to do so would create a result that was either "too restrictive" or "harsh." *Carolina First Corp. V. Whittle*, 343 S.C. 176, 192, 539 S.E.2d 402, 411 (Ct. App. 2000).

The defendants argue, though, that the "continuous ownership" rule is not simply implied in South Carolina law through the influence of Delaware law – they maintain that the rule is actually followed under binding South Carolina law. In support of this notion, the defendants refer this Court to an opinion written by Judge Roger M. Young of South Carolina Circuit Court. This opinion is useful to the defendants only for its dicta. Judge Young acknowledges that the case dealt with Nevada law rather than South Carolina law and speculated that "South Carolina would impose the 'continuous ownership rule.'" *Estate of Jacquelin K. Stevenson v. Kavanaugh*, 2013 WL 673728 (South Carolina Court of Common Pleas for the Ninth Judicial Circuit, January 18, 2013, Roger M. Young, Sr., Business Court J.). Anecdotally, Judge Young recognized the present defendants' argument of the wide adherence to the continuous ownership rule, noting that the rule was, "the law in Nevada, Delaware, the federal courts, and is the overwhelming majority rule." *Estate of Jacquelin K. Stevenson v. Kavanaugh*. Importantly, a close examination of Judge Young's decision gives comfort and support to this Court's decision to deny the present 12 (c) motion. The motion presented to Judge Young necessitated him to perform a SCRCP Rule 56 motion for summary judgment analysis. In addressing the "fraud" exception, Judge Young noted that each of the four (4) former directors were deposed prior to his grant of the motion to dismiss.

As previously referenced, the defendants rest their arguments upon the strict application of the *Johnson v. Baldwin* rule. In *Johnson* the plaintiff sought to hold accountable the directors of a corporation in which the plaintiff was a shareholder through a derivative suit. As here, the

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corporation merged into another. On the surface, *Johnson* is factually similar and the Court does remark on the requirement of ownership to standing in a derivative suit.

The Court in *Johnson* cited no South Carolina authorities in its discussion of the ownership requirement for maintaining derivative suits. Despite the similarities between the present case and *Johnson*, the plaintiff's argument is that the cases are distinguishable. This Court agrees. In *Johnson* the plaintiff exercised his appraisal rights upon learning of the merger; like the former plaintiff in the present lawsuit, the plaintiff in *Johnson* made an affirmative act to divest himself of his shares in the corporation before the merger. Plaintiff argues this makes *Johnson* distinguishable. Other courts have agreed to examine facts underlying the plaintiff's loss of shares and chosen to apply a modified continuous ownership rule rather than Delaware's strict rule. Under the modified continuous ownership rule, followed by North Carolina and some other states, a plaintiff who takes affirmative steps to divest himself of stock ownership does indeed lose standing; on the other hand, if the plaintiff objects to the merger, but maintains stock ownership, even as stock is converted into shares in the new merged corporation, the plaintiff can maintain his derivative suit. Generally, this Court agrees and this approach seems more appropriate, equitable and fair.

This Court observes that South Carolina's business court system and corporate code are more akin to North Carolina's than to Delaware's. In the few cases mentioned, though, South Carolina case law provides more compelling justification for following North Carolina's lead. In *Johnson*, for instance, the Court's understanding of a loss of standing in a derivative suit was such that, "If there is a loss of status, the action abates so far as the stockholder bringing the action is concerned, although the case of action itself survives." *Id.* The defendants' assert that the *Johnson* court cited cases in which shareholders had, in fact, done their best to maintain their

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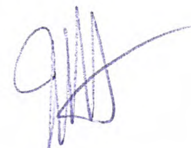
stock ownership. However, the Johnson Court's acknowledgement of the cause of action's survival, albeit through a different plaintiff, seems inapposite with the facts of the present case, wherein a merger involuntarily divests all shareholders of stock in the old corporation, and thus extinguishes all standing to sue derivatively on behalf of the former corporation, no matter what actions its directors had taken. Under the facts of the present case, a strict application of rule, as is discussed herein, allows the culpable directors who have admittedly caused serious harm to the corporation to, once again, harm the corporation by manipulation of the merger process with their own self intent to avoid accountability by the assertion of "lack of standing."

The language of *Johnson*, and its statement that the causes of action survives, does not contemplate the total erasure of the rights of shareholders. *Johnson* does not establish South Carolina's unflinching adherence to Delaware's strict continuous ownership rule. Moreover, and probably more important to the present decision, prior to applying a strict application of the rule, the *Johnson* defendants, as in *Stevenson v Kavanaugh* case, had to explain their conduct to the Court. In making this determination, the Court looks, again at *Whittle*, at whether the adherence to Delaware law would result in an outcome either "too restrictive" or "harsh." *Carolina First Corp. v. Whittle*, 343 S.C. 176, 192, 539 S.E.2d 402, 411 (Ct. App. 2000). Compounding the harshness in the present case is the use of the legislature in funding the project through the passage of the BLRA, and that these defendants purposely mislead the members of state government when they knew the project was failing. Additionally, as a result of the defendants' misconduct, the company's financial value became depressed by billions of dollars.

As mentioned, concerns that dictate denial of the invocation of a lack of standing with the present motions are the issues raised about the defendants' alleged manipulation of the merger as



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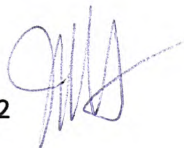
a means to wrongfully shield themselves from accountability and to escape liability. Plaintiff asserts that;

> [I]n a transparent bid to escape liability, Defendants negotiated and approved the sale of SCANA to Dominion for inadequate consideration at a time when SCANA's stock price was depressed as a result of their wrongdoing in connection with the failed nuclear project. The individual defendants negotiated an indemnification provision that goes so far to protect them from liability related to criminal proceedings regarding the failed nuclear project.

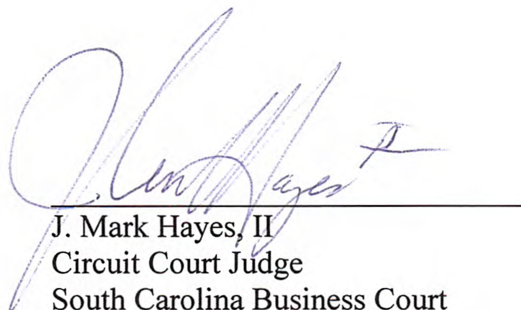
The above quoted language appeared in part of the plaintiff's argument opposing the granting of the defendant's motion. Therefore, as an argument the language does not carry the weight of the admitted facts derived from the uncontested allegations of the Complaint. Nevertheless, the defendants offered the actual merger document to this Court. The above language and the inference of inappropriate self-motivated manipulation of the merger by the defendants is made more true due to plain language from the merger document contained in Section 508, Indemnification: Directors' and Officers' Insurance. These defendants negotiated and obtained from Dominion "full indemnity" and are "held harmless" from any and all claims or proceedings, including "criminal," and any and all cost and expenses, including attorney fees. One of many obligations Dominion promised these defendants was to maintain a "D&O Insurance" policy that they agreed to pay a premium of up to 300% of the aggregate amount of



the annual premium currently paid by SCANA.[9] Based on the likelihood of the truth of the matters asserted in Parler's arguments, the defendants 12 (c) motion should be denied and the case proceed with discovery.

Based on the above, the defendants' Motion to Dismiss is denied and Parler's Motion to Intervene is granted.

IT IS SO ORDERED.



J. Mark Hayes, II
Circuit Court Judge
South Carolina Business Court

Date: March 18, 2020.

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9 The plain language of this Indemnification weighs, from an equitable position, against a strict application of the Delaware rule to the present case. Moreover, this provision from the merger agreement can be read as the defendants having anticipated the claims of prior shareholders because they created a provision in the merger agreement addressing the payment of them. Weighing the equities, it appears the burden upon the defendants will be insignificant with the case moving forward. On its face, the indemnification language gave the defendants substantial benefits that extend well beyond the life of the corporation. The indemnification language has no rational relationship to any value received by SCANA or its shareholders.

The indemnification language raises more issues of self-dealing and conflicts-of-interest than it solves. On its face, the merger document reads that it extended additional benefits and protection to the culpable officers in addition to their twenty-one million dollars ($21,000,000.00) performance bonuses.

A factual concern is the weaponization of the merger by these defendants in an effort to improperly shield themselves from any accountability. The proper inquiry will examine the degree of which the merger has been contaminated by a self-serving and unethical motivation related to the underlying litigation's original claims and how those facts effect who properly may, or may not, have standing to pursue the claims against the defendants.