

# The State of South Carolina In the Court of Appeals

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APPEAL FROM  
THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT,  
COUNTY OF RICHLAND

J. Mark Hayes, II, Circuit Court Judge

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Appellate Case No. 2020-000619  
Civil Action No. 2017-CP-40-06621

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**RECEIVED**

**Jun 09 2020**

**SC Court of Appeals**

R. WAYNE TODD, derivatively on behalf of  
SCANA CORPORATION,

*Plaintiff,*

v.

KEVIN MARSH, GREGORY ALIFF,  
JAMES BENNETT, JOHN CECIL,  
SHARON DECKER, MAYBANK HAGOOD,  
LYNNE MILLER, JAMES ROQUEMORE,  
MACEO SLOAN, ALFREDO TRUJILLO,  
JIMMY ADDISON, and STEVE BYRNE,

*Defendants,*

And

SCANA CORP.,

*Nominal Defendant.*

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 STEVE BYRNE,

*Defendants,*

And

SCANA CORP.,

*Nominal Defendant,*

Of Which SCANA CORPORATION, KEVIN MARSH, GREGORY  
ALIFF, JAMES BENNETT, JOHN CECIL, SHARON DECKER,  
MAYBANK HAGOOD, LYNN MILLER, JAMES ROQUEMORE,  
MACEO SLOAN, ALFREDO TRUJILLO, JIMMY ADDISON, and  
STEVE BYRNE are *Appellants,*

And

TERESA PARLER, derivatively on behalf of SCANA CORPORATION is  
the *Respondent.*

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**STATEMENT OF ISSUES ON APPEAL**

- I. The trial court erred by holding, contrary to *Johnson v. Baldwin*, 221 S.C. 141, 69 S.E.2d 585 (1952), that a former shareholder has standing to maintain a shareholder derivative action on behalf of a corporation when she is no longer a shareholder of that corporation.

## INTRODUCTION

The trial court held, for the first time under South Carolina law, that a non-shareholder may assert shareholder derivative claims seeking recovery on behalf of a corporation in which she does not hold shares. Any recovery from such derivative claims belongs to the corporation alone—*not* to the plaintiff. The nominal plaintiff here seeks recovery on behalf of SCANA Corporation (“SCANA”) *not* for injuries she suffered directly, but instead for injuries she claims certain former officers and directors of SCANA inflicted on the company. Plaintiff, however, is not a SCANA shareholder. After SCANA’s shareholders overwhelmingly approved the company’s merger, Dominion Energy, Inc. (“Dominion”) became SCANA’s sole shareholder. Plaintiff undisputedly ceased to hold SCANA stock after that merger was consummated. Yet she still sought to step into SCANA’s shoes, and the trial court deputized her as a derivative prosecutor of SCANA’s claims on the basis of arguments that *in Plaintiff’s words* were an “uphill battle.” [R. p. \_\_; Tr. of Deriv. Standing Hr’g p. 28:20.]

This Court should reverse because the trial court’s decision conflicts with the Supreme Court’s long-established, common-sense holding that only a shareholder can maintain a shareholder derivative lawsuit. *Johnson v. Baldwin* recognized that a derivative action is brought by a shareholder in the name of a corporation to recover a “loss to the corporation,” and “any recovery on such a cause of action belongs solely to the corporation.” 221 S.C. 141, 149, 69 S.E.2d 585, 588 (1952). The Supreme Court held that only shareholders who hold stock “continuously” from the alleged wrongs

through the conclusion of the derivative litigation have standing to assert derivative claims on behalf of a company. *Id.* at 149–50, 69 S.E.2d at 589. A shareholder’s standing to “maintain a derivative action . . . inheres in and attaches to his ownership of its stock and does not exist apart from such ownership.” *Id.* Thus, “the right of the plaintiff to continue to prosecute this [derivative] action depends upon her retaining her status as a stockholder and if she ceased to be a stockholder, the cause of action abated so far as she is concerned.” *Id.* at 151, 69 S.E.2d at 589. “She cannot prosecute an action as a member of a class to which she does not belong.” *Id.*

The trial court refused to apply *Johnson’s* holding here. Instead, the trial court gouged an exception in the continuous ownership rule based on, among other things, its perception that these derivative allegations were “very serious and substantial,” [R. p. \_; Order p. 6], and its belief (improper at this stage) in “the likelihood of the truth” of those allegations, [R. p. \_; Order p. 13.] But *Johnson* makes the trial court’s beliefs about the ultimate merits of the derivative claims irrelevant to derivative standing, which “does not exist apart from” ownership of company stock. 221 S.C. at 149, 69 S.E.2d at 589. If the trial court is not reversed, its decision will stand as a blueprint for subverting *Johnson* in future derivative cases.

The trial court’s error on this fundamental question of South Carolina corporate law threatens the integrity of South Carolina’s corporate law. The unprecedented ruling below invites non-shareholders who are at best indifferent to the interests of South Carolina corporations and shareholders to hijack derivative litigation for the non-shareholders’ own ends. Naturally, those non-shareholders will

discount or ignore harms to the company flowing from that derivative litigation, like running up indemnified litigation expenses and fostering litigation against the company *itself* in related non-derivative cases. And there will be no remedy for the harms caused by that usurpation of corporate claims even if non-shareholders are ultimately found to lack derivative standing on appeal after final judgment. The trial court's ruling thus threatens to make South Carolina companies worse off and turns the purpose of a derivative action on its head. To prevent that inversion of foundational South Carolina corporate law, this Court should reverse with instructions to dismiss the complaint without prejudice to Dominion's right to pursue these claims.

#### **STATEMENT OF THE CASE**

This derivative action arose from the now-abandoned construction of two new nuclear power units at the V.C. Summer facility in Fairfield County. [R. p. \_; Compl. p. 2.] Soon after SCANA and Santee Cooper announced their abandonment of that nuclear project in 2017, then-SCANA shareholders filed two putative derivative actions against some of SCANA's officers and directors. [R. p. \_; Order p. 3 n.2.] Those lawsuits, filed on September 26 and October 30 of 2017 and later consolidated in the Richland County Court of Common Pleas, alleged that the defendants mismanaged the nuclear project and misled investors about its delays and cost overruns. [R. p. \_; Parler Mot. to Intervene p. 2.] The derivative actions sought to recover damages *for SCANA* from the alleged breaches of fiduciary duty, mismanagement, and unjust enrichment by certain of its then-officers and directors.

[R. p. \_\_; Parler Mot. to Intervene p. 1.] Parallel derivative lawsuits that mirrored those same allegations and same causes of action were separately consolidated in federal court as *In re SCANA Corporation Derivative Litigation*, No. 3:17-cv-03166-MBS (D.S.C.). [R. p. \_\_; Fed. Deriv. Op. p. 1.]

In January 2018, SCANA announced it had agreed to a stock-for-stock merger with Dominion. [R. p. \_\_; Parler Mot. to Intervene p. 2.] A 72% supermajority of SCANA shareholders voted to approve that merger. [R. p. \_\_; Ex. A. to Defs.’ Mot. for Judgment on the Pleadings (“Mot. for Judgment”) p. 1.] After the merger announcement, counsel for one of the original derivative plaintiffs (also Plaintiff’s current counsel) admitted that the completion of the merger should end this derivative litigation, volunteering that the planned merger “likely will moot the derivative claims.” [R. p. \_\_; Letter from L. Eigel to Judge Hayes p. 2.] Counsel explained that “the focus ought to be on the litigation involving the merger” rather than the derivative claims because “[t]here is an issue as to standing” in the derivative case. [R. p. \_\_; Tr. of Hr’g on Mot. to Stay pp. 34:10–11; 34:25–35:1.]

The merger became effective on January 1, 2019. [R. p. \_\_; Ex. A to Defs’ Mot. for Judgment p. 2.] On that date, SCANA became a wholly owned subsidiary of Dominion. [R. p. \_\_; Ex. A to Defs.’ Mot. for Judgment pp. 7–8.] All outstanding shares of SCANA common stock were canceled and converted into a right to receive shares of Dominion common stock. [R. p. \_\_; Mot. for Judgment pp. 1–2; Ex. A to Mot. for Judgment p. 9.] Following the merger, SCANA and the other defendants moved for judgment on the pleadings under Rule 12(c), SCRCPP, because the putative derivative

plaintiffs were no longer SCANA shareholders, and thus lacked derivative standing under *Johnson*. [R. p. \_\_; Mot. for Judgment pp. 1–2.] SCANA simultaneously moved for judgment on the pleadings in the federal derivative action. [R. p. \_\_; Fed. Deriv. Op. p. 2.]

Soon after the defendants moved for judgment on the pleadings in the trial court below, one of the original derivative plaintiffs voluntarily dismissed his lawsuit under Rule 41(a)(1), SCRCF. [R. p. \_\_; Parler Mot. to Intervene p. 3.] The other disclosed that he had sold his SCANA stock before the merger, and thus admitted that he lacked derivative standing. [R. p. \_\_; Parler Mot. to Intervene p. 3.]

Teresa Parler then moved to intervene in the trial court below as nominal plaintiff on May 6, 2019. [R. p. \_\_; Parler Mot. to Intervene p. 1.] Parler argued that she had standing to intervene and continue the derivative action because she had owned SCANA common stock before the merger. [R. p. \_\_; Parler Mot. to Intervene p. 3.] The defendants opposed Parler’s motion to intervene and maintained that she, like the other nominal plaintiffs, lacked standing to pursue a derivative action on SCANA’s behalf because she no longer owned SCANA stock. [R. p. \_\_; Opp. to Parler Mot. to Intervene p. 1.]

Meanwhile, in September 2019, the District of South Carolina granted the Rule 12(c) motion in the federal derivative case. [R. p. \_\_; Fed. Deriv. Op. p. 5.] The court held that, under *Johnson’s* continuous ownership rule, the federal plaintiffs lost standing to pursue a derivative action against SCANA after the Dominion merger. [R. p. \_\_; Fed. Deriv. Op. pp. 3–4.] SCANA promptly notified the trial court of this

federal derivative decision and its correct application of the Supreme Court’s decision in *Johnson*. [R. p. 1; Letter from S. Pugh to Judge Hayes p. 1.]

Yet the trial court refused to grant the same motion for judgment on the pleadings. In denying that motion and granting Parler’s motion to intervene on March 18, 2020, the trial court rejected *Johnson*, casting it as “just one equitable rule” relevant to derivative plaintiff standing—rather than *the* controlling rule in South Carolina. [R. p. 1; Order p. 7.] The court declined to “follow an absolute and strict application” of that continuous ownership rule, opining that South Carolina law instead requires “a fact based equitable analysis.” [R. p. 1; Order p. 8.] Based on the trial court’s assessment of such factors, including its view on “the likelihood of the truth of the matters asserted in Parler’s arguments,” the court held that it would be more “appropriate, equitable, and fair” not to apply *Johnson* here. [R. p. 1; Order pp. 10, 13.]<sup>1</sup> Defendants timely served a notice of appeal on April 16, 2020.

### **JURISDICTIONAL STATEMENT**

The trial court’s order is appealable under S.C. Code Ann. § 14-3-330, which grants this Court jurisdiction over:

- (1) Any intermediate judgment, order or decree in a law case involving the merits . . . ; [and]
- (2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action.

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<sup>1</sup> Defendants have also petitioned the Supreme Court of South Carolina for a writ of certiorari. *See Parler v. SCANA Corp.*, Appellate Case No. 2020-000616 (S.C. filed Apr. 16, 2020).

In deciding whether an order is immediately appealable, South Carolina courts examine “the nature and effect of the order, not merely its label.” *Tillman v. Tillman*, 420 S.C. 246, 250, 801 S.E.2d 757, 760 (Ct. App. 2017). The trial court’s unprecedented order is appealable because it both involves the merits and denies SCANA the substantial right to control its own litigation, or at least to have that litigation controlled by a *current* shareholder. This Court also has jurisdiction because, in nature and effect, the trial court’s order is like other orders held appealable under § 14-3-330 that effectively deny a party its choice of counsel, *Hagood v. Sommerville*, 362 S.C. 191, 197–98, 607 S.E.2d 707, 710 (2005), or deny a party its right to choose its own defendants, *Neeltec Enterprises, Inc. v. Long*, 397 S.C. 563, 566, 725 S.E.2d 926, 928 (2012).

*First*, by allowing a non-shareholder to pursue the derivative action meant to benefit SCANA, the trial court stripped SCANA and Dominion, SCANA’s only current shareholder, of control over that asset and gave that control to a party who does not represent SCANA’s interests. That decision involves the merits and deprives SCANA of the substantial right to control its own litigation, or at least to have a properly aligned current shareholder exercise control. By its nature, a derivative action contemplates that a corporation will not always have exclusive control over its asset. But even if the corporation is not actively exercising its right of control, the corporation remains “the real party in interest” in the derivative action. *Johnson*, 221 S.C. at 149, 69 S.E.2d at 588. As a result, only a party with the necessary interest in the corporation’s recovery can exercise control over its derivative asset, because

only that party will use the asset to the company's benefit. And the only party with that necessary interest is a current shareholder. Here, Dominion, SCANA's sole remaining shareholder, is the singular party that can adequately represent SCANA's interests. In contrast, a non-shareholder lacks *any* "interest, present or potential," in the company's wellbeing. *Id.* As a result, a derivative action pursued by a non-shareholder is a mere "gratuitous inquisition into the business of another," one "fraught . . . with the dangerous possibilities always inherent in irresponsibility." *Id.* (quoting *Kehaya v. Axton*, 32 F. Supp. 266, 268 (S.D.N.Y. 1940)).

The trial court's order permits just such a fraught inquisition into SCANA's business by an adverse party untethered to SCANA or its interests. It thereby takes from SCANA its right to control its litigation asset, or at the very least, to benefit from a current shareholder's use of that asset on SCANA's behalf. And it gives that control to a non-shareholder that, unlike SCANA's sole shareholder Dominion, lacks any interest in the company's potential recovery.

That transfer of the right to control the company's litigation cannot be remedied by an appeal after final judgment. *See Hagoood*, 362 S.C. at 197, 607 S.E.2d at 710 (holding an order appealable where "an appeal after final judgment would not adequately protect a party's interests"). SCANA and its sole shareholder Dominion retain the pre-existing *de rigueur* agreement to indemnify SCANA's former officers and directors. Plaintiff's decision to pursue these derivative claims means that SCANA—which is supposed to benefit from those claims—may be on the hook for the cost of defending against them. And even worse, Plaintiff's counsel has already sued

Dominion over the same allegations as in this case. *See* Complaint, *Metzler Asset Mgmt. GmbH v. Aliff*, Doc. No. 1-1, No. 3:18-cv-505 (D.S.C. Feb. 21, 2018). And that same counsel is currently pursuing two lawsuits over the same allegations against SCANA's indemnitees. *See In re SCANA Corporation Public Shareholder Litig.*, No. 3:18-cv-505 (D.S.C.); *KBC Asset Mgmt. NV v. Marsh*, No. 2019-CP-40-02522 (Richland County). There is no doubt that the prosecution of these derivative claims will be used to help the same counsel prosecute direct claims that may be SCANA's obligation to pay. The company and its shareholders will thus pay the hefty price for the trial court's error unless this Court reverses now.

The novelty and significance of that decision to vest control of SCANA's litigation in a non-shareholder confirm that this Court can and should exercise jurisdiction. *See State v. Register*, 308 S.C. 534, 536 n.1, 419 S.E.2d 771, 772 n.1 (1992) (“[B]ecause we are dealing with a novel issue . . . we have chosen to address the merits of the petition.”). The trial court acknowledged that this matter of derivative standing is an “[i]mportant question[] of novel impression.” [R. p. \_\_; Order p. 8 n.8.] Indeed, the trial court is the first South Carolina court to permit a non-shareholder to maintain a derivative action, upending decades of precedent and threatening to embroil derivative actions in novel standing disputes. That shows why this Court's review is needed. *See Ark. Teacher Ret. Sys. v. Mozilo*, 705 F.3d 973, 975 (9th Cir. 2013). (“[D]isputes regarding shareholder derivative standing implicate significant issues of state public policy best resolved by reference to clear rules of state law.”).

*Second*, the trial court’s decision effectively denies SCANA and its sole shareholder Dominion the right to choose the counsel that will litigate a derivative action meant to benefit the company. *See Johnson*, 221 S.C. at 149, 69 S.E.2d at 588 (a derivative action is by nature “an asset of the corporation,” which is the “real party in interest”). The Supreme Court held that denial of the substantial right to representation by an attorney of one’s choosing is immediately appealable in *Hagood*. The Court reasoned that “the right to be represented by one’s preferred attorney is closely related to the right to a particular mode of trial, a well-established right.” 362 S.C. at 198, 607 S.E.2d at 710. Further, denying this right “would affect the attorney-client relationship, which is extremely important in our adversarial system.” *Id.* And a later appeal of the denial “would not adequately protect a party’s interests because it would be difficult or impossible . . . to ascertain by any objective standard whether prejudice resulted.” *Id.*

The trial court’s order effectively denies SCANA and Dominion this established substantial right. As the real party in interest, SCANA has a right to representation by counsel that will promote and protect its interests. Counsel representing its shareholder Dominion would qualify. But Parler’s counsel, like Parler, lacks any interest in protecting SCANA. In fact, Parler’s counsel is incentivized to *harm* SCANA through this litigation, because Parler’s counsel has brought direct actions against SCANA’s parent company Dominion and SCANA’s former officers and directors involving the same facts and legal arguments as here. *See* Complaint, *Metzler Asset Mgmt. GmbH v. Aliff*, Doc. No. 1-1, No. 3:18-cv-505 (D.S.C. Feb. 21,

2018); *In re SCANA Corporation Public Shareholder Litig.*, No. 3:18-cv-505 (D.S.C.); *KBC Asset Mgmt. NV v. Marsh*, No. 2019-CP-40-02522 (Richland County). Parler’s counsel’s representation of the plaintiff in the derivative action will thus involve developing the same facts and legal arguments that could *increase* SCANA’s liability in the direct actions, to counsel’s benefit and SCANA’s detriment. *See, e.g., In re Groupon Deriv. Litig.*, 882 F. Supp. 2d 1043, 1052 (N.D. Ill. 2012) (“Prosecution of [the] derivative action would involve taking actions designed to refute the merits of the Company’s defense of the Securities Class Action.”). SCANA also has indemnified the defendant officers and directors in these direct actions consistent with South Carolina law. *See* S.C. Code Ann. § 33-8-510. As a result, pursuing this derivative action will help Parler’s counsel prosecute his direct claims—claims that may be SCANA’s obligation to pay. The trial court’s decision thus threatens to prejudice SCANA in a way a later appeal cannot remedy.

*Third*, the trial court’s order effectively denies SCANA and its sole shareholder Dominion’s right to choose the defendants to pursue in a derivative action meant to benefit SCANA. *Chester v. S.C. Dep’t of Pub. Safety*, 388 S.C. 343, 345, 698 S.E.2d 559, 560 (2010) (“It is well-settled that a plaintiff has the sole right to determine which [defendants] [it] will sue.”). The Supreme Court held in *Neeltec* that this common law right is a substantial one, the denial of which is immediately appealable. 397 S.C. at 566, 725 S.E.2d at 928.

The trial court’s order here undermines SCANA’s right to choose which defendants it may pursue for harming the company. SCANA, as it was entitled to do,

has indemnified the directors and officers named in this derivative action. SCANA and its sole shareholder Dominion should decide whether prosecuting derivative claims against these indemnified parties serves SCANA's interests. The trial court instead placed that power in the hands of a non-stockholder with no stake in SCANA's corporate health. In doing so, the trial court effectively denied SCANA's substantial—and exclusive—right to determine the defendants sued on its behalf.

### **STANDARD OF REVIEW**

In reviewing the trial court's ruling on the motion for judgment on the pleadings, this Court applies the same standard of review as the trial court. *Hambrick v. GMAC Mortg. Corp.*, 370 S.C. 118, 122, 634 S.E.2d 5, 7 (2006). Under that standard, a court must dismiss a complaint that raises “no issue of fact . . . that would entitle the plaintiff to judgment if resolved in plaintiff's favor.” *Home Builders Ass'n of S.C. v. Sch. Dist. No. 2 of Dorchester Cty.*, 405 S.C. 458, 460, 748 S.E.2d 230, 231 (Ct. App. 2013). The court “must regard all properly pleaded factual allegations as admitted.” *Falk v. Sadler*, 341 S.C. 281, 286, 533 S.E.2d 350, 353 (Ct. App. 2000). The court may also may consider judicially noticeable matters without converting the motion into one for summary judgment. *See Doe v. Bishop of Charleston*, 407 S.C. 128, 134 n.2, 754 S.E.2d 494, 497 n.2 (2014).

## ARGUMENT

I. The trial court erred by holding, contrary to *Johnson v. Baldwin*, that a former shareholder has standing to bring a shareholder derivative action on behalf of a corporation when she is no longer a shareholder of that corporation.

A. *Johnson v. Baldwin* requires continuous stock ownership for derivative standing.

In *Johnson*, the South Carolina Supreme Court adopted the “continuous ownership” rule of derivative standing: a plaintiff who loses her stock ownership loses her right to maintain a derivative shareholder action. *Johnson* reached that conclusion by “inquir[ing] into the nature of the [derivative] cause of action.” 221 S.C. at 149, 69 S.E.2d at 588. Although brought by a stockholder, a derivative action “is an asset of the corporation,” which is the “real party in interest.” *Id.* A stockholder’s right to pursue a derivative claim thus “inheres in and attaches to his ownership of its stock and does not exist apart from such ownership.” *Id.* at 149, 69 S.E.2d at 589. The right to maintain a derivative claim is inseparable from stock ownership because “[i]t is a right which depends on status. If there is a loss of status, the action abates so far as the stockholder bringing the action is concerned, although the cause of action itself survives.” *Id.* at 150, 69 S.E.2d at 589.

The Supreme Court analogized a non-shareholder derivative plaintiff to “a kind of self-appointed *dominus litis* [master of the lawsuit], without interest, present or potential, in his subject matter, which is an anomalous situation involving gratuitous inquisition into the business of another.” *Id.* The Court therefore held that the plaintiff at issue, who ceased to be a shareholder after a merger, “cannot

prosecute an action as a member of a class to which she does not belong.” *Id.* at 151, 69 S.E.2d at 589.<sup>2</sup>

The Supreme Court’s holding in *Johnson* left no doubt that a shareholder who loses her stock loses her derivative plaintiff status. That is the same common-sense rule applied by nearly all other jurisdictions, including the District of South Carolina in the federal derivative action.<sup>3</sup> That rule should have made this an easy case: because Plaintiff’s SCANA shares were surrendered in the merger, Parler lacks derivative standing to pursue derivative claims on SCANA’s behalf.

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<sup>2</sup> In another related lawsuit, the same counsel representing Parler correctly recognized that “the derivative claims against the former officers and directors of SCANA . . . were transferred to Dominion in the Merger.” [R. p. \_; Opp. to Parler Mot. to Intervene p. 3 n.2; *id.* (stating that there are “valuable claims that Dominion can pursue against the Original Derivative Defendants and SCANA executives following the Merger”).] Parler’s counsel’s previous statements to the trial court reflect that *Johnson*’s continuous ownership rule eliminates derivative standing for former SCANA shareholders. *See* [R. p. \_; Letter from L. Eigel to Judge Hayes p. 2 (“[A] stay of the derivative claims is appropriate given the announcement of the Proposed Transaction, which if consummated likely will moot the derivative claims.”); R. p. \_; Tr. of Hr’g on Mot. to Stay p. 34:10-11 (explaining why “[t]here is an issue as to standing” in post-merger derivative claims).]

<sup>3</sup> *See, e.g., Lewis v. Anderson*, 477 A.2d 1040, 1049 (Del. 1984) (Delaware law); *Sound Infiniti, Inc. v. Snyder*, 237 P.3d 241, 247 (Wash. 2010) (Washington law); *Timko v. Triarsi*, 898 So. 2d 89, 91 (Fla. Dist. Ct. App. 2005) (Florida law); *A-Plus Janitorial & Carpet Cleaning v. Employers’ Workers’ Comp. Ass’n*, 936 P.2d 916, 923–25 (Okla. 1997) (Oklahoma law); *Christopher v. Liberty Oil & Gas Corp.*, 665 So. 2d 410, 411–12 (La. Ct. App. 1995) (Louisiana law); *Bronzaft v. Caporali*, 616 N.Y.S.2d 863, 865 (N.Y. Sup. Ct. 1994) (New York law); *Grace Bros., Ltd. v. Farley Indus., Inc.*, 450 S.E.2d 814, 816 (Ga. 1994) (Georgia law); *White v. Banes Co.*, 866 P.2d 339, 342 (N.M. 1993) (New Mexico law); *U.S. Fid. & Guar. Co. v. Griffin*, 541 N.E.2d 553, 555 (Ind. Ct. App. 1989) (Indiana law); *Weil v. Nw. Indus., Inc.*, 522 N.E.2d 172, 174 n.1 (Ill. Ct. App. 1988) (Illinois law); *Metal Tech Corp. v. Metal Techniques Co.*, 703 P.2d 237, 242 (Or. Ct. App. 1985) (Oregon law); *Yanow v. Teal Indus., Inc.*, 422 A.2d 311, 323 (Conn. 1979) (Connecticut law).

**B. The trial court flouted *Johnson's* continuous ownership requirement.**

Yet the trial court refused to apply *Johnson's* holding, accepting arguments that *even Plaintiff* admitted were an “uphill battle” that left only a “sliver of hope.” [R. p. 1; Tr. of Deriv. Standing Hr’g pp. 27:5–28:20.] Although the trial court acknowledged that “*Johnson* is factually similar” and “remark[ed] on the requirement of ownership to standing in a derivative suit,” [R. p. 1; Order p. 10], the court questioned whether the continuous ownership rule was a feature of South Carolina law rather than Delaware law. *See* [R. p. 1; Order p. 13 n.9 (rejecting a “strict application of the Delaware rule to the present case”); *see also* R. p. 1; Order p. 10 (“The Court in *Johnson* cited no South Carolina authorities in its discussion of the ownership requirement for maintaining derivative suits.”).] The trial court opined that the *Johnson* rule “should not be[] the end of an analysis under South Carolina jurisprudence related to the present derivative litigation,” [R. p. 1; Order p. 8], and that it is “just one equitable rule” among others, [R. p. 1; Order p. 7]. It then tried to distinguish *Johnson* and ultimately denied the SCRC 12(c) motion “[b]ased on the likelihood of the truth of the matters asserted in Parler’s arguments.” [R. p. 1; Order p. 13.]

None of the trial court’s proposed reasons for abandoning *Johnson's* continuous ownership rule justify the rejection of binding precedent. The trial court misread *Johnson*, ignored that case’s controlling status to adopt irrelevant North Carolina precedent, and then proceeded to place undue weight on an irrelevant factor—the Court’s belief in the merits of Plaintiff’s claims. The trial court treated *Johnson* as a decision it could take or leave depending on its subjective view of the equities of the

case. But *Johnson* controls in South Carolina and here, and does not permit a trial court to allow a claim to proceed simply because of the Court’s view of the underlying merits. The trial court erred by allowing its assessment of what is “appropriate, equitable, and fair” to overcome *Johnson*’s controlling rule.

**1. The trial court erred in viewing *Johnson* as Delaware law it could reject in favor of North Carolina law.**

Pervading the trial court’s order is the court’s incorrect view that *Johnson* articulates an equitable rule of Delaware law that the court could choose not to apply. The trial court asserted that *Johnson*’s “continuous ownership rule” was “simply implied in South Carolina law through the influence of Delaware law.” [R. p. 7; Order p. 9.] And it reserved the right “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.’” [R. p. 7; Order p. 9 (quoting *Carolina First Corp. v. Whittle*, 343 S.C. 176, 192, 539 S.E.2d 402, 411 (Ct. App. 2000)).]

But *Johnson* is long-established, black-letter *South Carolina* law. South Carolina’s Supreme Court decided *Johnson* under South Carolina law in an action involving South Carolina companies. *See Johnson*, 221 S.C. at 145–46, 69 S.E.2d at 587. The Court did not cite Delaware law to support its adopting the continuous ownership rule.<sup>4</sup> The Court instead evaluated relevant treatise and case law before reaching its “conclusion that the right of the plaintiff to continue to prosecute this

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<sup>4</sup> The *Johnson* decision cited Delaware law only after the Court articulated the continuous ownership rule, and did so for a proposition unrelated to that rule. 221 S.C. at 155, 69 S.E.2d at 591.

action depends upon her retaining her status as a shareholder.” *Id.* at 149–151, 69 S.E.2d at 589. This conclusion articulates binding South Carolina law. And for decades, lower courts in South Carolina have applied *Johnson* as controlling authority in derivative shareholder cases. *See, e.g., Davis v. Hamm*, 300 S.C. 284, 288, 387 S.E.2d 676, 678 (Ct. App. 1989) (*Johnson*’s “well-established principle[]” that a derivative action “is an asset of the corporation” remains “sound and viable today”).

That the *Johnson* court lacked South Carolina case law to cite for the continuous ownership rule shows only that the Court exercised its authority to decide a novel question of South Carolina law “based on its assessment of which answer and reasoning best comport with the law and public policies of this state and the Court’s sense of law, justice, and right.” *Mims Amusement Co. v. S.C. Law Enf’t Div.*, 366 S.C. 141, 145, 621 S.E.2d 344, 346 (2005). In doing so, the Court looked to conflicting authority (none of it from Delaware) and chose what it viewed as the best rule for South Carolina. *Johnson*, 221 S.C. at 149–151, 69 S.E.2d at 589. After the Court thereby used its “final responsibility” to construe the “laws of this state,” no lower or foreign court could authorize the trial court to set aside that precedent. *Id.* at 149, 621 S.E.2d at 348; *see also* S.C. Const. art. V, § 9 (“The decisions of the Supreme Court shall bind the Court of Appeals as precedents.”). The Supreme Court announced the continuous ownership rule in *Johnson*, and the trial court was bound to follow that decision.

Yet the trial court believed itself able to discard *Johnson*’s controlling rule for North Carolina’s “modified continuous ownership rule.” [R. p. 10; Order p. 10.] That

foreign approach would allow Parler to maintain derivative shareholder standing because she did not voluntarily give up her stock. [R. p. 9; Order p. 10.] But North Carolina’s derivative standing doctrine is irrelevant to South Carolina law because it rejects the continuous ownership rule that *Johnson* requires: “[W]e find there is no requirement of continuing share ownership . . . to proceed with a derivative action.” *Alford v. Shaw*, 398 S.E.2d 445, 449 (N.C. 1990); *contra Johnson*, 221 S.C. at 157, 69 S.E.2d at 592 (“Having ceased to be a stockholder . . ., [the plaintiff] has no standing to continue this action.”). The governing South Carolina law here is clear. And even if it were not, South Carolina law should not be interpreted by reference to cases that reject South Carolina law, much less cases that stand as outliers among the majority of states that require continuous ownership. *See supra* at 15 n.3.

The trial court ignored these clear contradictions. In fact, the court pointed to *Johnson* as providing “compelling justification for following *North Carolina’s* lead” on derivative standing. [R. p. 9; Order p. 10 (emphasis added).] This assertion rests on a fundamental misreading of *Johnson*. The court reasoned that *Johnson* “does not contemplate the total erasure of the rights of shareholders” because it confirmed that the cause of action is not “extinguished” when a plaintiff loses her standing. [R. p. 9; Order p. 11.] In the trial court’s view, this language meant that *Johnson* did not require strictly applying its continuous ownership rule. [R. p. 9; Order p. 6; *see also* R. p. 9 Order p. 11.] Instead, the court believed, *Johnson* would permit standing for a non-shareholder plaintiff if no other shareholder plaintiff remained in court to press the claims.

But *Johnson* says the opposite: If Plaintiff “ceased to be a stockholder, the cause of action abated so far as she is concerned. *There would be no one left in court with the capacity to continue the litigation.*” 221 S.C. at 151, 69 S.E.2d at 589 (emphasis added). Instead, *the corporation*, and its remaining shareholder Dominion, retain the ability to pursue SCANA’s rights in litigation. *Id.* at 149, 69 S.E.2d at 588; *see also* [R. p. 1; Fed. Deriv. Op. p. 5 (after the merger “[i]t is Dominion’s prerogative to pursue an action against Defendants”)]; *accord* 2 McLaughlin on Class Actions § 9:5 (16th ed. 2019) (“Any existing derivative claims upon consummation of the merger pass to the surviving corporation in the merger.”). Contrary to the trial court’s reasoning, *Johnson* does not support applying North Carolina derivative standing law.

Further distinguishing South Carolina’s regime from North Carolina’s “modified” approach to standing is that how a plaintiff surrenders her stock does not matter in South Carolina. The trial court wrongly believed that, like North Carolina courts, it could modify *Johnson*’s continuous ownership rule based on the “facts underlying the plaintiff’s loss of shares.” [R. p. 1; Order p. 10.]. The court emphasized that Parler, unlike the plaintiff in *Johnson*, took no “affirmative act” to divest herself of company stock. [R. p. 1; Order p. 10.] On that basis, the court believed *Johnson* did not bar Parler from pursuing derivative claims.

But *Johnson* shows that derivative plaintiffs lose standing even when they vigorously contest their loss of shareholder status. 221 S.C. at 150, 69 S.E.2d at 589. In rejecting shareholder status for a plaintiff who voluntarily gave up her shares,

*Johnson* cited cases in which plaintiffs objected to losing their shares, yet still lost their status. In *Hayman v. Morris*, for example, former shareholders lost derivative standing when their shares were retired even though they “refused to surrender” the shares and “resist[ed] lawful redemption of their stock . . . by clinging to the physical certificate of their shares.” 46 N.Y.S.2d 482, 490 (N.Y. Sup. Ct. 1943) (discussed at *Johnson*, 221 S.C. at 150–51, 69 S.E.2d at 589). The *Johnson* court also relied on *Kehaya*, which concluded that a director suing his fellow directors could not maintain standing if they “succeed in ousting him” because “[i]f he is ousted as a director he no longer represents the corporation.” 32 F. Supp. at 268 (discussed at *Johnson*, 221 S.C. at 150-51, S.E.2d at 589). *Johnson*’s logic and its supporting authorities thus reject any “affirmative act” limitation.

The trial court consequently erred by rejecting South Carolina’s law for North Carolina’s contrary approach. Nothing in *Johnson* or South Carolina law permitted the trial court to adopt that foreign precedent, especially given the direct contradictions between that law and this state’s. *Johnson* instead required the trial court to apply its continuous ownership rule to reach one outcome here: granting SCANA’s Rule 12(c) motion for Parler’s lack of derivative standing. The trial court lacked the power to reject *Johnson* to reach the opposite outcome under foreign authority.

2. **The trial court erred by using irrelevant “equitable” concerns to create an unbounded exception to the controlling continuous ownership rule.**

The trial court also erred in letting its suspicion regarding the strength of Plaintiff’s allegations overcome the strict continuous ownership rule.

- a. **The trial court wrongly rejected *Johnson* based on its belief in the ultimate merits of Plaintiff’s allegations.**

The trial court first conflated the standard of review with the derivative standing inquiry. The court emphasized that it had to take Plaintiff’s allegations as true—which, at this preliminary stage, is correct—but also asserted that the defendant’s failure to “counter” those “serious” allegations meant the court should “scrutinize” the standing arguments based on its view that the alleged “specific acts of wrongful conduct” were true. [R. p.\_\_; Order pp. 5–6.]. But the defendants could not have rebutted Plaintiff’s allegations at this preliminary pleading stage. Nor did the defendants’ decision to focus on the legal question of derivative standing instead of on factual disputes somehow strengthen the potential truth of the complaint’s factual allegations. And the facts relevant to SCANA’s motion to dismiss for lack of derivative shareholder standing had nothing to do with the facts relevant to Plaintiff’s underlying claims about the nuclear project. Those undisputed facts concern only Plaintiff’s ownership of SCANA stock—or lack thereof.

Yet the trial court viewed that most essential fact—the question of continued stock ownership—as unimportant. The court instead allowed its suspicion—based on pleading-stage allegations—that the defendants likely engaged in serious wrongdoing to color its analysis of a standing issue untethered to the merits. The

court thus accused the defendants of using *Johnson* as a “shield” against liability and asserted that *Johnson* was distinguishable because the defendants there “had to explain their conduct to the Court” before the action was dismissed for lack of standing. [R. p. \_; Order pp. 11–12.] The trial court failed to explain how the *Johnson* defendants “explain[ed] their conduct” in any meaningful way. [R. p. \_; Order p. 11.] But *Johnson* arose in essentially the same procedural posture as this action. The plaintiff filed a complaint, the defendants an answer, the plaintiff a reply, and then a merger occurred that divested the plaintiff of her shares, and the defendants moved to dismiss. *Johnson*, 221 S.C. at 145–47, 69 S.E.2d at 586–87. There is no indication that the parties conducted discovery, or that any substantial inquiry into the merits of the plaintiff’s claims occurred.

More importantly, nothing in the *Johnson* decision requires a defendant to “explain” their conduct before moving to dismiss for lack of standing. There, as here, the plaintiff alleged wrongdoing by corporate management. Yet there, the Supreme Court did not view those allegations as relevant to derivative shareholder standing. The relevant issues were instead the derivative action’s nature—that of an action brought in the company’s interest—and the derivative plaintiff’s status as only a “nominal plaintiff” representing “the real party in interest.” *Id.* at 149, 69 S.E.2d at 588. The Court gave no weight to the plaintiff’s allegations or any equitable right to pursue them. Instead, it cast the plaintiff’s right as one “which depends on status.” *Id.* at 150, 69 S.E.2d at 589. Because the plaintiff lost her status—no matter why or under what circumstances—she lost her standing. *Id.*

The merits of Plaintiff’s derivative claims are plainly irrelevant to the question of derivative standing. And the trial court’s decision to prejudge the merits of those derivative claims is an error that compels this Court’s intervention.

**b. The trial court incorrectly set aside *Johnson* based on unpleaded arguments about potential motivations for the merger.**

The trial court compounded this error by relying on Plaintiff’s arguments that the defendants used the merger to avoid liability. [R. p. \_; Order pp. 11–12.] The court acknowledged that these contentions were mere “argument”—not even rising to the level of pleaded allegations. [R. p. \_; Order p. 12.] Yet the court held that these “concerns . . . dictate[d] denial” of SCANA’s motion to dismiss. [R. p. \_; Order p. 11.] And it reasoned that the merger document’s indemnification provision “made more true” the court’s “inference of inappropriate self-motivated manipulation of the merger.” [R. p. \_; Order p. 12.]

These “concerns” are irrelevant to the derivative standing inquiry, and certainly should not “dictate” that inquiry’s outcome. Under *Johnson*’s controlling rule, Plaintiff simply “cannot prosecute an action as a member of a class to which she does not belong.” *Johnson*, 221 S.C. at 151, 69 S.E.2d at 589. *Johnson* does not provide an exception for when a plaintiff asserts a merger is inequitable. And the trial court pointed to no authority showing that it does.

Even if the Supreme Court had adopted the “fraudulent merger” exception to the continuous ownership rule that some other courts have adopted—which it has not—the trial court’s novel theory bears no resemblance to that exception. The

fraudulent merger exception requires a plaintiff to plead in her complaint that the merger was designed “merely to deprive shareholders of their standing.” *Arkansas Teacher Ret. Sys. v. Countrywide Fin. Corp.*, 75 A.3d 888, 897 (Del. 2013); *see Gabhart v. Gabhart*, 370 N.E.2d 345, 357 (Ind. 1977) (finding a narrow exception when a merger is “solely for the purpose of shielding wrongdoers from liability” and is “devoid of a legitimate corporate purpose”). But Parler’s complaint says *not one word* about SCANA’s merger with Dominion, and certainly does not allege that the merger itself somehow was fraudulent. Nor could she: a supermajority of SCANA shareholders agreed that the merger had ample corporate purpose and benefits to shareholders. The trial court thus erred by relying on Parler’s unpleaded assertions about the merger to reject *Johnson’s* application.

The merger’s indemnification provision does not change this result. South Carolina law expressly authorizes the indemnification of officers and directors. S.C. Code Ann. § 33-8-510; *see also In re Sea-Land Corp. Shareholders Litig.*, 642 A.2d 792, 804 (Del. Ch. 1993), *aff’d sub nom. Sea-Land Corp. S’holder Litig. v. Abely*, 633 A.2d 371 (Del. 1993) (“[I]ndemnification has become commonplace in corporate affairs”). And again, the asserted motives behind a merger lack any relevance to *Johnson’s* straightforward analysis. But SCANA’s Restated Articles of Incorporation already afforded Defendants protection from liability to the limits of South Carolina law, [R. p. \_; SCANA Corp. Restated Arts. of Incorporation, art. 9]—protection that the South Carolina code encourages. *See* S.C. Code Ann. § 33-2-102(e). Defendants thus did not need to enter into the Merger to secure indemnification. In any event,

the only relevant question under *Johnson*'s derivative standing analysis is whether the plaintiff holds shares in the corporation. If she does not, how she lost those shares remains irrelevant.

**C. The trial court's error transforms an asset of South Carolina companies into a liability.**

The trial court's erroneous decision to permit a non-shareholder to pursue derivative claims will harm South Carolina companies. This Court should correct that consequential error and preserve the longstanding law of South Carolina derivative standing.

As *Johnson* explained, a derivative action is an asset of the company and the company is the real party in interest. Derivative actions should "remedy a loss to the corporation" and thereby benefit the company as a whole, including its shareholders. *Brown v. Stewart*, 348 S.C. 33, 49, 557 S.E.2d 676, 684 (Ct. App. 2001). But "any recovery on such a cause of action belongs *solely* to the corporation," *Johnson*, 221 S.C. at 149, 69 S.E.2d at 588 (emphasis added), so a derivative plaintiff is playing with someone else's money. The derivative standing requirement, and *Johnson*'s continuous ownership rule, thus ensure that a derivative plaintiff will promote the company's interests and confer a benefit on the company through her action.

The trial court's ruling, however, transforms derivative claims from an asset into a serious potential liability by inviting non-shareholders to seize the corporate reins. The Supreme Court anticipated in *Johnson* that a non-shareholder derivative plaintiff would become a "self-appointed *dominus litis*, without interest, present or potential, in his subject matter, which is an anomalous situation involving gratuitous

inquisition into the business of another, and fraught . . . with the dangerous possibilities always inherent in irresponsibility.” 221 S.C. at 150, 69 S.E.2d at 589 (quoting *Kehaya*, 32 F. Supp. at 268); accord *Grosset v. Wenaas*, 42 Cal.4th 1100, 1114 (Cal. 2008) (“[A]llowing a plaintiff to retain standing despite the loss of stock ownership would produce the anomalous result that a plaintiff with absolutely no ‘dog in the hunt’ is permitted to pursue a right of action that belongs solely to the corporation.”). A non-shareholder derivative plaintiff lacks a “dog in the hunt” because any derivative recovery belongs “solely to the corporation” in which such a plaintiff does not own shares. *Johnson*, 221 S.C. at 149, 69 S.E.2d at 588.

The dangers of the “irresponsibility” threatened by non-shareholder derivative plaintiffs are predictable and substantial. *Id.* at 150, 69 S.E.2d at 589. Many South Carolina companies accept the invitation of South Carolina law to indemnify their officers and directors. *See supra* at 12–13. That indemnification means that rogue derivative lawsuits will rack up costly litigation fees that *the company* ultimate pays. On top of those fees, a non-shareholder plaintiff need not consider the company’s broader exposure to litigation. That is particularly problematic because derivative lawsuits are often tag-alongs to direct lawsuits *against the company* (or its indemnitees) based on the same allegations. So prosecuting a derivative lawsuit (purportedly for the company’s benefit) often requires developing the same facts and legal arguments that will *increase* the company’s liability elsewhere. *See, e.g., In re Groupon*, 882 F. Supp. 2d at 1052 (“Prosecution of [the] derivative action would

involve taking actions designed to refute the merits of the Company's defense of the Securities Class Action.").

This case shows that the dangers of hijacked derivative claims are quite real. SCANA has accepted the invitation of South Carolina law to indemnify its officers and directors, and so may be on the hook for the substantial cost of defending these derivative claims. *See supra* at 12–13. And the same counsel representing Plaintiff here are simultaneously pursuing similar claims elsewhere that SCANA may be responsible for indemnifying. *See supra* at 9–12. So expanding the rules of derivative standing here will harm the company's broader litigation interests. Giving a non-shareholder that power to take a company one step forward but two steps back defeats the point of derivative claims.

### CONCLUSION

For these reasons, this Court should reverse the trial court's order with instructions to dismiss the complaint without prejudice to the right of Dominion to pursue these claims.

Dated: June 8, 2020

s/ John A. Massalon

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**CERTIFICATE OF SERVICE**

I, Benjamin P. Carlton, an attorney practicing with Richardson Plowden & Robinson, P.A., certify that on this day, pursuant to Section (c)(13) of the Supreme Court's Order in Appellate Case No. 2020-000447 (Apr. 14, 2020), I served this *Initial Appellants' Brief* on the following counsel of record using the primary email addresses listed in the Attorney Information System (if applicable):

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A copy of the sent email is enclosed with this Proof of Service.

Dated: June 8, 2020

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**Subject:** RE: Parler v. Marsh et al. - 2017-CP-40-00621; Appellate Case No. 2020-000619 (Court of Appeals) - Initial Appellants' Brief & Appellants' Record Designations  
**Date:** Monday, June 8, 2020 5:12:00 PM  
**Attachments:** [Parler - Initial Appellants Brief.pdf](#)  
[Parler - Appellants' Record Designations.pdf](#)

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Counsel,

Please find attached a copy of Appellants' Initial Brief and Record Designations in the above-referenced matter, which are being filed contemporaneously herewith in accordance with the Court's Amended Order, No. 2020-05-29-02, regarding "Operation of the Appellate Courts During the Coronavirus Emergency (As Amended May 29, 2020)."

Thank you and have a nice evening,  
Ben Carlton

*Benjamin P. Carlton*  
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**Subject:** Parler v. Marsh et al. - 2017-CP-40-00621 - Defendants' Notice of Appeal

Counsel,

Please find attached a copy of Defendants' Notice of Appeal in the above-referenced matter, which is being filed contemporaneously herewith.

Thank you and stay safe.

Ben Carlton

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