THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
J. Mark Hayes, II, Circuit Court Judge

RECEIVED
Sep 29 2020
SC Court of Appeals

Appellate Case No. 2020-000619

Teresa Parler, 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 Steven Byrne,

Defendents,

and

SCANA Corporation,

Nominal Defendant.

Of Whom:

Nominal Defendant SCANA Corporation and Defendants Kevin Marsh, Gregory Aliff, James Bennett, John Cecil, Sharon Decker, Maybank Hagood, Lynne Miller, James Roquemore, Maceo Sloan, Alfredo Trujillo, Jimmy Addison, and Steven Byrne are

Appellants,

And

Plaintiff Teresa Parler, derivatively on behalf of SCANA Corporation, is

Respondent.

RESPONDENT'S RETURN TO PETITION FOR REHEARING

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INTRODUCTION

The question before the Court is whether the "nature and effect" of the trial court's order denying the Appellants' Rule 12(c) motion for judgment on the pleadings is sufficiently distinct to except it from this Court's holding that "the denial of a motion for judgment on the pleadings is not directly appealable under S.C. Code Ann. § 14–3–330 (1976), even if it raises only a question of law." Appellate Order citing Rose v. Thrash, 291 S.C. 459, 459, 354 S.E.2d 378, 378 (1987). Defendants implore the Court to examine the "*substance* of the appealed order—rather than its *form*." (Petition at 1) (emphasis in original).

The "substance" of the appealed order declined to dismiss Plaintiff-Respondent Teresa Parler's ("Parler") derivative complaint on the basis that she lacked standing to maintain the action. Appellants argued, unsuccessfully, that, pursuant to the "continuous ownership rule," the merger of SCANA Corp. ("SCANA") and Dominion Energy, Inc. ("Dominion") (the terms of which converted Parler's SCANA stock into Dominion stock) divested Parler of standing to represent SCANA under Rule 23(b)(1), SCRCP. (Order Granting Motion to Intervene and Denying Motion to Dismiss ("Trial Court Order") at 3) The trial court found the application of the "continuous ownership rule" to the present set of facts to be "novel" and ultimately ruled:

> 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.

(Trial Court Order at 8) The trial court then ordered the case to proceed with discovery.

"As a general rule, only final judgments are appealable." Ex parte Wilson, 367 S.C. 7, 12, 625 S.E.2d 205, 208 (2005), citing Culbertson v. Clemens, 322 S.C. 20, 23, 471 S.E.2d 163, 164 (1996). "Any judgment or decree, leaving some further act to be done by the court before the rights

of the parties are determined, is interlocutory and not final." Ex parte Wilson at 12, 625 S.E.2d at 208, citing Mid–State Distribs., Inc. v. Century Importers, Inc., 310 S.C. 330, 336, 426 S.E.2d 777, 780 (1993). However, "there are certain interlocutory orders that are immediately appealable. . . . [T]he immediate appealability of an interlocutory order depends on whether the order falls within one of the several categories of appealable judgments, decrees, or orders listed in section 14-3-330." J. Toal, A. Walker, M. Baker, Appellate Practice in South Carolina (3d ed.) at 143. This is not such a case.

Appellants claim the trial court's decision is immediately appealable because it harms them in three ways: denying SCANA control of the litigation; denying SCANA the right to counsel of its choosing; and denying SCANA the right to choose defendants. These results, Appellants contend, bring the trial court's order within the purview of both Section 14-3-330(1) (orders "involving the merits") and Section 14-3-330(2) (orders "affecting a substantial right").

Appellants' argument fails for at least three reasons. First, the rights allegedly impaired do not belong to Appellants and thus can create no basis for appealability. Second, the right SCANA does possess—to challenge the adequacy of Parler's representation of the corporation—does not give rise to an appealable interlocutory order. And third, the nature and the substance of the Trial Court Order underlines the importance of this case proceeding to fact discovery prior to appeal. Appellants' parade of horribles (Petition at 2-3) is an attempt to distract the Court from the issue at hand, an improper interlocutory appeal.

ARGUMENT

I. The rights asserted by Appellants do not belong to them and thus form no basis for appealability

Appellants assert that SCANA possesses the "substantial rights" of controlling the litigation, choosing its counsel, and choosing the defendants in this litigation.[1] The unique relationship between the derivative plaintiff and the nominal defendant under Rule 23(b)(1), SRCP, however, defeats this assertion. The rule describes a derivative action as one "brought by one or more shareholders or members to enforce a right of a corporation . . . ." Rule 23(b)(1), SCRCP. This representative relationship gives rise to the "rule of corporate neutrality."

> [W]here directors are charged with misconduct in office and are sought to be held accountable, the corporation is required to take and maintain a wholly neutral position, taking sides neither with the complainant nor with the defending director.

Swenson v. Thibaut, 39 N.C. App. 77, 99, 250 S.E.2d 279, 293–94 (N.C. Ct. App. 1978), quoting Solimine v. Hollander, 129 N.J.Eq. 264, 19 A.2d 344 (N.J. Ch. 1941).[2] In other words, the right to control the litigation, to choose counsel, and to choose the defendants to be sued lie with Parler—not with SCANA.[3]

---

[1] Appellants do not assert that the individual director/officer defendants possess any such rights, and they do not. Appellants suggest that Dominion may, but Dominion is not a party to this litigation. Because "[o]nly a party aggrieved by an order, judgment, sentence or decision may appeal," Rule 201(b), SCACR, Appellants have no ability to invoke the rights of a third party.

[2] Swenson sets forth a lengthy string citation of supporting authority. Id. at 99, 250 S.E.2d 279, 294 (1978). For a more recent analysis, please see D. DeMott, Shareholder Derivative Actions: Law and Practice (2017-18 ed.) §1:1 at 2-3. See also Krakow Bus. Park v. Locke Lord, LLP, 135 F. Supp. 3d 770, 791 (N.D. Ill. 2015), aff'd sub nom. Domanus v. Locke Lord LLP, 847 F.3d 469 (7th Cir. 2017) ("In a shareholder's derivative suit, the corporation generally cannot participate in the merits of the defense."); Sobba v. Elmen, 462 F.Supp.2d 944, 947-948 (E.D. Ark. 2006) ("[T]he general rule for corporate participation in a derivative action is that '[u]nless the derivative action threatens rather than advances corporate interests, [the corporation] cannot participate in the defense on the merits.'").

[3] "Absent extraordinary circumstances, the lead plaintiff in a derivative suit selects lead counsel." D. DeMott, Shareholder Derivative Actions: Law and Practice (2017-18 ed.) § 6:2 at 856.

But this does not mean that Parler possesses unfettered control over the corporation or the litigation. The right that SCANA *does* possess is set forth in Rule 23(b)(1): "The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association." Rule 23(b)(1), SCRCP.

> This is not to say that in all cases and in all circumstances a corporation is powerless to resist a derivative action. In some situations, the corporation in whose interest the derivative action is purportedly brought will have interests adverse to those of the nominal plaintiffs bringing the action derivatively, and will of necessity be more than a nominal defendant. . . . Additionally, certain defenses which are properly asserted before trial on the merits of the action are peculiar to the corporation alone, and may be properly raised only by the nominal defendant who, for purposes of those matters, ceases to be a nominal defendant and becomes an actual party defendant. These defenses would include the lack of standing of the plaintiffs to sue derivatively for reasons of insufficient representation of shareholders and a failure on plaintiffs' part to make a demand upon the board of directors.

Swenson at 100, 250 S.E.2d at 294.

Of course, Appellants have moved to dismiss Parler's complaint for a lack of standing, and they were entitled to do so. But the right to challenge a plaintiff's lack of standing differs markedly from the right to control the litigation, the right to choose one's counsel, and the right to choose defendants. Thus, the question before the Court turns to whether the denial of Appellants' motion pertaining to Parler's standing gives rise to appellate jurisdiction pursuant to S.C. Code Ann. § 14-3-330. It does not.

II. The denial of a Rule 12(c) motion for judgment on the pleadings on the basis of standing does not give rise to appellate jurisdiction under S.C. Code Ann. § 14-3-330

Section 14-3-330 provides Appellants with two potential arguments that the Trial Court Order is immediately appealable, namely that it "involves the merits" of the case or "affects a

substantial right." The Trial Court Order does neither and therefore this appeal should be dismissed.

A. "Involving the Merits"

Section 14-3-330(1) provides for the appeal of "[a]ny intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas . . . ." S.C. Code Ann. § 14-3-330(1). Interpreting this subsection, the Supreme Court defines an order which "involves the merits" as "an order which 'must finally determine some substantial matter forming the whole or a part of some cause of action or defense . . . .'" Mid-State Distributors, Inc. at 334, 426 S.E.2d at 780, quoting Jefferson v. Gene's Used Cars, Inc., 295 S.C. 317, 318, 368 S.E.2d 456, 456 (1988); Knowles v. Standard Savings & Loan Ass'n, 274 S.C. 58, 59, 261 S.E.2d 49, 49 (1979).[4] Mid-State Distributors spoke directly of orders denying Rule 12 motions, such as that in this case, noting that "[a] party who is denied a dismissal under Rule 12 has forfeited nothing, they must simply continue to trial." Id. at 334-335, 426 S.E.2d at 780.

This is true here. The trial court's order merely declined to find that Parler's standing had been stripped by the SCANA/Dominion merger. All defenses remain open to Appellants. In fact, after the completion of discovery, should Appellants believe the facts of the case support the equitable application of the "continuous ownership rule," they would be free to reassert their position in a motion for summary judgment.

B. "Affecting a Substantial Right"

Section 14-3-330(2) sets forth three circumstances in which an order is deemed to affect a "substantial right" sufficient to give rise to appellate jurisdiction, but Appellants only argue that

[4] Chief Justice Toal later noted that in Mid-State Distributors "the Supreme Court greatly narrowed the definition of 'involving the merits'." J. Toal, A. Walker, and M. Baker, Appellate Practice in South Carolina (3d ed.) at 144.

subsection (2)(a) applies, that the Trial Court Order "[i]n effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action." S.C. Code Ann. § 14-3-330(2)(a). However, the Trial Court Order denying dismissal under Rule 12(c) has neither "determined the action" nor "discontinued the action," and therefore is not appealable.

"Generally, this subsection has only been used when the trial order affected the 'mode of trial' because if those orders are not immediately appealed, no appellate review is available to correct any error." Breland v. Love Chevrolet Olds, Inc., 339 S.C. 89, 93, 529 S.E.2d 11, 13 (2000). In Breland, the Supreme Court dismissed the interlocutory order denying a change of venue, finding:

> Already the progress of this case has been delayed several years over the issue of venue. Requiring a defendant to wait until after trial to appeal the issue of proper venue is the most appropriate course to take where any error in that decision will not prejudice the defendant anymore than other interlocutory orders which, if in error, would require a new trial.

Breland at 94, 529 S.E.2d at 14 (2000). Here, the facts are substantially similar. This action is now over three years old. Discovery has just finally begun, despite the substantial age of the case and the seriousness of the allegations. Permitting appeal on a question of standing will only succeed in delaying this matter further. In contrast, the question of Parler's standing remains appealable in the face of any potential judgment that might be rendered in the future.

Appellants insist, however, that their rights cannot be vindicated by any post-judgment appeal because SCANA "may be on the hook for the cost of defending against [the derivative claims]." (Petition at 9) As an initial matter, Breland specifically held that anticipated litigation expenses are insufficient to justify interlocutory appeal. Id. at 94, 529 S.E.2d at 14 ("Since any trial court error concerning venue will be correctable on appeal, the only damage a losing party will sustain is the expense of litigating in an improper county.") Beyond this point of law, however,

Appellants have already revealed that Dominion is both indemnifying Appellants in this litigation and paying the costs of litigation.[5]

> Trial Court: Then is it not a proper question for me to ask then, is Dominion indemnifying these people, the original people that are listed as the Defendants in the lawsuit present before the Court? Is Dominion indemnifying these people in these other litigations?
>
> Appellant's Counsel: "Yes, Your Honor. Dominion is indemnifying these Defendants in those cases I just described."

(**Exhibit A:** November 19, 2019 Hearing Transcript at 17, ll. 3-10)

> Appellants' Counsel: "Because Dominion is going to be—at this time, Dominion is responsible for paying the cost of the defense of this lawsuit."

(**Exhibit A:** November 19, 2019 Hearing Transcript at 17, ll. 14-16) Thus, the purported financial threat to SCANA by the prospect of continuing litigation is illusory.

III. A case-specific analysis of the questions at hand supports factual development prior to appeal

An analysis of the "nature and effect" of the trial court's order declining to apply the "continuous ownership rule" reveals that dismissing this appeal would promote both judicial economy and the policy underlying the consideration of novel questions of law. Our courts recognize that improper interlocutory appeals harm judicial economy. "The basic policy behind denying immediate review of pretrial motions is avoidance of piecemeal litigation where the rights of the parties have not been substantially impacted." Breland at 94, 529 S.E.2d at 13, citing Knowles v. Standard Sav. and Loan Ass'n, 274 S.C. 58, 261 S.E.2d 49 (1979). At the same time, "[a]s a general rule, important questions of novel impression should not be decided on a Rule

[5] Dominion's indemnification of Appellants was revealed in the Articles of Merger attached to the Appellants' Rule 12(c) motion. The Trial Court Order denying that motion addressed the indemnification at length, noting "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." (Trial Court Order at 13, n. 9)

12(b)(6), SCRCP, motion to dismiss. Instead, a novel issue is best decided in light of the testimony to be adduced at trial."[6] Evans v. State, 344 S.C. 60, 68, 543 S.E.2d 547, 551 (2001), citing Tyler v. Macks Stores of South Carolina, Inc., 275 S.C. 456, 272 S.E.2d 633 (1980). Both policies are implicated here.

The trial court recognized that application of the "continuous ownership rule" in the face of the involuntary divestment of stock ownership and potential self-dealing by corporate management presented a novel question under South Carolina law.

> 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.

(Trial Court Order at 8, n.8) While the trial court did not have the advantage of documentation or testimony produced in discovery, it did note the "likelihood of the truth of the matters asserted in Parler's arguments" in holding that the case should proceed with discovery rather than enforcing a strict and rigid application of the "continuous ownership rule." Trial Court Order at 13.

[6] Appellants cite State v. Register, 308 S.C. 534, 419 S.E.2d 771 (1992) for the prospect that the novelty of the question at hand justifies interlocutory appeal. (Petition at 9) In that case, the Supreme Court agreed to hear the appeal of a 15 year-old girl who had been ordered by the trial court to provide samples of her blood, saliva, and pubic hair in the course of a murder investigation. The minor then petitioned the Supreme Court for a Writ of Supersedeas. The Court noted "[o]rdinarily, this type of order is not directly appealable," but went on to add "[h]owever, because we are dealing with a novel issue and the rights of a minor, we have chosen to address the merits of the petition." Id. at 536, n.1, 419 S.E.2d at 772.

The circumstances of this case are quite different. Appellants are not before the court on a petition for an extraordinary writ, this case does not involve the bodily integrity of a child, and (thankfully) the factual backdrop of this case does not involve a murder investigation. Therefore, to the extent that State v. Register established a common law "novelty and significance" basis for appellate jurisdiction, it would not apply to this case.

Publicly-revealed developments since this appeal was filed demonstrate how right the trial court was in desiring full discovery. On June 8, 2020—the date that Appellants filed their initial brief in this matter—Appellant Stephen Byrne entered a guilty plea in which he agreed to "plead guilty to an Information charging conspiracy to commit federal mail and wire fraud in violation of Title 18, United States Code, Section 371." (**Exhibit B:** Byrne Plea Agreement at 1) The Information to which Byrne pleaded guilty contains explosive allegations.

> The defendant, STEPHEN ANDREW BYRNE, along with others known and unknown to the United States Attorney, consisting of former SCANA Corporation ("SCANA") executives, employees, and the lawyers who advised them, led a failed effort to construct two nuclear power generators in Fairfield County, South Carolina. As construction problems mounted, costs rose, and schedules slipped, the defendant, STEPHEN ANDREW BYRNE, and others, hid the true state of the project. Through intentional and material misrepresentations and omissions, the defendant, STEPHEN ANDREW BYRNE, deceived regulators and customers in order to maintain financing for the project and to financially benefit SCANA. The members of the conspiracy's actions and the associated cover-up allowed the project to continue until the contractor went bankrupt and the project was abandoned, resulting in billions of dollars of loss.

(**Exhibit C:** Byrne Criminal Information at ¶1) Beyond Byrne's criminal culpability and that of his thus far unnamed co-conspirators, these are the central allegations of this derivative action in which Parler seeks to hold Appellants accountable for the extraordinary damage inflicted upon SCANA.

If our appellate courts are to consider whether to apply the "continuous ownership rule" or whether to adopt a modification of that rule, they will be much better positioned to consider the equities with a fully developed factual scenario. As the Byrne guilty plea shows, the actions within SCANA pertaining to the failed nuclear project rose far beyond mere corporate misconduct.

CONCLUSION

For the reasons stated above, the trial court's order is not immediately appealable under S.C. Code Ann. § 14-3-330. Appellants' petition for rehearing should be denied.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

Dated: September 28, 2020

EXHIBIT A

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)

COURT OF COMMON PLEAS
2017-CP-40-06621

R. WAYNE TODD, DERIVATIVELY ON BEHALF OF SCANA CORP.,
PLAINTIFF,

vs.

KEVIN MARSH, ET AL.,
DEFENDANTS.

TRANSCRIPT OF RECORD

ORIGINAL

November 14, 2019
Spartanburg, South Carolina

B E F O R E:

THE HONORABLE J. MARK HAYES, JUDGE.

A P P E A R A N C E S:

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(There were no witnesses called.)

EXHIBITS

(There were no exhibits introduced.)

1 P R O C E E D I N G S
2 THE COURT: Good morning. Thank y'all all for
3 joining us today.
4 If you would -- we have a court reporter that had to
5 come in. And so if you would, announce yourselves on the
6 record before you speak to help her out. She does have
7 everybody's name, but that will be assured that we can
8 make a good record of this.
9 I've got that we're here on two motions. One is a
10 motion to dismiss, one is a motion to intervene. I would
11 prefer to hear the motion to intervene first and then
12 we'll take up the motion to dismiss.
13 So if that's agreeable to everybody, I'll receive the
14 arguments.
15 MR. EAGEL: Good morning, Your Honor.
16 Lawrence Eagel --
17 THE COURT: How's your leg?
18 MR. EAGEL: It's better.
19 Thank you.
20 A lot better. I was able to fly. You know, my leg's
21 okay. But I was able to fly. And I appreciate -- I want
22 to, again, extend my thanks to the Court for -- it was
23 really about this idea of I could get a -- supposedly get
24 a blood clot if you fly too early after surgery.
25 THE COURT: That's not a good idea.

1 MR. EAGEL: No. So I was told not to do it. But I'm
2 here and the leg is getting a lot better.
3 Thank you. I appreciate it.
4 THE COURT: All right. Yes, sir.
5 MR. EAGEL: Okay. The motion to intervene is based
6 upon the fact that the original Plaintiff in the case,
7 Wayne Todd, had sold his shares prior to the
8 SCANA-Dominion merger. Consequently, Ms. Parler, who's
9 been a shareholder since 2000 -- in fact, I believe her
10 father worked for SCANA back in the day. But she's been a
11 SCANA shareholder since 2000. She had approached us about
12 the case. And she's sought to intervene in the case.
13 She is -- has submitted an affidavit saying she's
14 prepared to fill responsibilities as a representative
15 Plaintiff. She's continuously held her shares since 2000
16 until her shares were exchanged in the merger. She owns
17 2,402 shares.
18 And she asserts an interest in the property that is
19 the subject of the action, namely the derivative action.
20 This is a derivative action. She's trying -- stepping
21 into the shoes of the prior Plaintiff. She's demonstrated
22 that without intervention, the action may not be able to
23 proceed. There would not be a representative Plaintiff in
24 this derivative action.
25 And she's demonstrated through interest her

1 adequate -- are not adequately protected by other parties.
2 At this juncture, she'd be the only -- this is the only
3 derivative claim pending. And previously, the Court has
4 concluded -- the Court had previously ruled on a 12(b)(8)
5 motion that -- that this case was not the same as the
6 district court case. And so she would then be -- step
7 into the shoes as the derivative Plaintiff.
8 All of this sort of begs the question concerning the
9 merger and concerning the effect of the merger. But we're
10 seeking to move to intervene and continue the -- the case.
11 I think that the -- you know, it's sort of a chicken and
12 egg as to whether or not she, like every other SCANA
13 shareholder, was cashed out in the merger.
14 So to the extent that she no longer has an interest
15 in the property as a result of the merger, if the Court
16 rules on the -- on the standing argument, then I think
17 that effectively resolves the -- the intervention just --
18 just the same. Because if -- if the current Plaintiff
19 Todd doesn't have it and she doesn't have it, that would
20 be the same thing.
21 So that's -- that's largely the argument on the
22 motion to intervene.
23 MR. SCHMALZBACH: Your Honor.
24 THE COURT: Yes, sir.
25 MR. SCHMALZBACH: Good morning, Your Honor.

1 I'm Brian Schmalzbach speaking for SCANA Corporation.
2 And I'll be speaking today on behalf of all the
3 Defendants.
4 Our argument against intervention was based on the
5 fact that, at the time, there was a duplicative derivative
6 lawsuit pending in federal court. That's not the case any
7 more. Because Judge Seymour has addressed the exact same
8 arguments that we were making here on the motion for
9 judgment on the pleadings. And so she agreed with us on
10 the standing issue and held that those federal derivative
11 Plaintiffs have no standing.
12 And so I think -- rather than address the -- the
13 motion to intervene, I think it -- it might be a good use
14 of time to go straight to the motion for judgment on the
15 pleadings. Because that's the real live issue that's
16 presented today.
17 THE COURT: I mean, it -- he may be right. It may be
18 the chicken versus the egg as to which comes fist. I just
19 thought that it would logically be cleaner for me to
20 understand it if we address the motion to intervene first,
21 so. But it -- you may be right. It probably does
22 [inaudible].
23 MR. SCHMALZBACH: Certainly. So I'll address the --
24 the derivative standing issue.
25 And so we're asking you to dismiss, to grant that

1 motion for judgment on the pleadings for the exact same
2 reasons that Judge Seymour dismissed this case as federal
3 derivative 20. That reason is that the Plaintiff is not a
4 SCANA shareholder. And that fact is dispositive because
5 of what a derivative action is.
6 We -- we like the Plaintiff's definition of a
7 derivative action. This is on Page 3 of the motion to
8 intervene. They said, A derivative claim belongs to the
9 corporation, not to the shareholder Plaintiff who brings
10 the action. The shareholder Plaintiff's interest is
11 limited to compelling the corporation by standing in its
12 shoes to assert the corporation's right to seek redress
13 for the alleged wrongdoing. And so what's key is that any
14 recovery on a derivative claim belongs solely to the
15 corporation, not to the shareholder Plaintiff.
16 So that takes us to the black letter South Carolina
17 law that resolves this case. And that's that you have to
18 be a current shareholder to maintain a shareholder
19 derivative lawsuit. That's called the continuous
20 ownership rule.
21 And the South Carolina Supreme Court adopted that as
22 the law of the land in a case called Johnson v. Baldwin.
23 But once the merger between SCANA and Dominion closed,
24 Plaintiff -- Ms. Parler was not a SCANA shareholder
25 anymore. And so she could not stand in SCANA's shoes.

1 That's why Judge Seymour held after reading the same
2 arguments that Ms. Parler presented to you, that,
3 "Pursuant to the continuous ownership rule articulated in
4 Johnson, Plaintiffs no longer possess standing to pursue a
5 derivative action against SCANA." Judge Seymour was
6 exactly right there. Johnson was and is the controlling
7 law. And so this derivative action should be dismissed.
8 So I'll focus on Johnson because that's the case that
9 Judge Seymour focused on because it controls this case.
10 My colleagues on the other side didn't address the actual
11 language of Johnson's holding. But Judge Seymour saw that
12 that holding is worth a very careful read because it so
13 clearly answers the question in this case.
14 This is what Johnson said, The right of a stockholder
15 to maintain a derivative action does not exist apart from
16 ownership of corporate stock. And it went on. The right
17 of the Plaintiff to continue to prosecute this action
18 depends upon her retaining her status as a stockholder.
19 And if she ceased to be a stockholder, the cause of action
20 abated so far as she is concerned.
21 Now, this holding has nothing to do with why a
22 Plaintiff ceases to be a shareholder. Johnson simply
23 holds she cannot prosecute an action as a member of a
24 class to which she does not belong.
25 THE COURT: So because there -- the corporation sold

1 itself out to Dominion?
2 MR. SCHMALZBACH: Because of the merger with
3 Dominion. And as a result of that merger, all of her
4 SCANA stock disappeared and became Dominion stock.
5 THE COURT: Any -- any importance in the decision
6 that I would make whether or not Dominion intends to
7 pursue the claims?
8 MR. SCHMALZBACH: No, Your Honor. Because as Judge
9 Seymour said, it is Dominion's prerogative to decide what
10 to do with the claims.
11 THE COURT: But I thought then that -- that the rules
12 in South Carolina have a little bit of deviation to it, or
13 a little bit of variation to it. That would be one of
14 the -- one of the requirements is it would lead to a harsh
15 or -- or unconscionable result. I might be using the
16 wrong terminology.
17 Aren't there qualifiers to that rule?
18 MR. SCHMALZBACH: I think Your Honor's referring to
19 the Whittle case.
20 THE COURT: Yes.
21 MR. SCHMALZBACH: Which is a Court of Appeals case,
22 not a South Carolina Supreme Court decision. But that --
23 that's not announcing a rule of law. That's explaining
24 why in the context of demand futility, I believe.
25 THE COURT: Say it one more time. I'm sorry.

1 MR. SCHMALZBACH: In the context of demand futility.
2 THE COURT: Okay.
3 MR. SCHMALZBACH: South Carolina was just not going
4 to adopt the Delaware rule. We're -- we're not -- to be
5 clear, we're not asking you to look to Delaware law here.
6 All you need to look at is Johnson v. Baldwin, which is
7 the case that Judge Seymour held resolves this case. And
8 so because Ms. Parler is no longer a member of the class
9 of SCANA shareholders, she cannot prosecute this action
10 under South Carolina law.
11 Now, in the Plaintiff's brief, which is the same
12 brief that the federal derivative Plaintiffs filed, she
13 asked the Court not to apply South Carolina law. She
14 asked the Court to apply the law that North Carolina or
15 one of the tiny -- states that does not require continuous
16 ownership. But since the South Carolina Supreme Court has
17 already spoken to this issue in Johnson, that's the law
18 that controls here.
19 And just to address why it makes sense to apply this
20 continuous ownership rule. It's because current
21 shareholders have these important features for a
22 derivative lawsuit. They have the right to vote on
23 corporate leadership. They receive the benefit of good
24 corporate decision-making. And they bear the burden of
25 bad corporate decision-making through their ownership

1 stake in corporate stock. So they're the ones who are
2 going to be hurt.
3 But former shareholders, which is to say
4 non-shareholders like Ms. Parler, they have no right to
5 vote. And they may have no financial stake at all in the
6 corporation's success. So common sense says that former
7 shareholders who have no dog in the hunt shouldn't get to
8 make fundamental decisions like deciding whether, when,
9 and how to sue former officers and directors.
10 THE COURT: But -- but correct me if I'm not right.
11 Isn't the party that's seeking to intervene no longer a
12 shareholder because Dominion merged with SCANA?
13 And the reason that Dominion merged with SCANA,
14 aren't the allegations is because that the prior
15 shareholders board of directors, officers engaged in
16 conduct that is outlined in the complaint to be the kind
17 that costs millions and millions of dollars and,
18 therefore, reduced the value of the shares?
19 MR. SCHMALZBACH: So two responses to that, Your
20 Honor. First, if you read the proposed intervener
21 complaint that was filed on May 6th, you don't see
22 anything about the merger. The complaint is silent as to
23 the merger. The word "merger" doesn't appear.
24 THE COURT: Okay. That might be fine. But my point
25 is that if we're not going to allow them to intervene, we

1 don't even take a look at the intervening complaint. But
2 we take a look at the reason for the merger.
3 MR. SCHMALZBACH: You could, Your Honor. But the --
4 the upshot of Johnson is that it doesn't matter why she's
5 no longer a shareholder --
6 THE COURT: So it doesn't matter if someone held a
7 gun to the present shareholders and said, you are going to
8 sell this company or else we're going to destroy this
9 company?
10 MR. SCHMALZBACH: So in that --
11 THE COURT: You're going to lose all shareholder
12 value if you do not allow us to come in and buy you out.
13 MR. SCHMALZBACH: So in that case, the shareholders
14 would have, I think, an excellent claim that they were
15 coerced into the merger and the merger itself was invalid.
16 And, in fact, Mr. Eagel has a lawsuit challenging the
17 merger. He doesn't say the merger is invalid, as I
18 understand it. He just says the merger should have gotten
19 more money.
20 THE COURT: So there's an exception to your
21 continuous ownership rule?
22 MR. SCHMALZBACH: No, Your Honor. The -- the only
23 question is, do they remain a shareholder? In -- in the
24 lawsuit that -- that you just described, the --
25 THE COURT: Well, I'm trying to describe the lawsuit

1 that I have read that has been filed with this Court.
2 MR. SCHMALZBACH: Right. So I think if you look at
3 Johnson, that addresses a similar scenario where the
4 Plaintiff filed for her appraisal rights and then tried to
5 withdraw them.
6 THE COURT: Okay. And -- and I'm not -- and I'm
7 trying to be argumentative only to the point that I'm
8 trying to understand where you're coming from. Because
9 the litigation that has been filed with this Court, the
10 allegations, we have never even reached the point of
11 determining the merits of these allegations yet.
12 We have -- this Court has dealt with motion after
13 motion after motion, which are proper for this Court to
14 deal with. But the allegations, this Court continues to
15 look at as true.
16 MR. SCHMALZBACH: Yes, Your Honor. So --
17 THE COURT: And so these allegations are disturbing
18 to this Court. And then you're now asking me to engage in
19 another motion that's now going to say that these
20 allegations to which this Court has not had the
21 opportunity to make any determination of the merits of
22 these allegations so, therefore, this Court can deem them
23 as true, we're just going to turn our backs to them.
24 MR. SCHMALZBACH: So what we're asking you to do is
25 to give the owner of the right to bring this lawsuit the

1 decision whether, when, and how to bring them.
2 THE COURT: And my question to you previously was,
3 has Dominion started something to continue these claims?
4 MR. SCHMALZBACH: So Dominion has not filed for those
5 claims at this time. Because Dominion has contractual
6 indemnity obligations to those Plaintiffs.
7 Now --
8 THE COURT: And the Plaintiffs being?
9 MR. SCHMALZBACH: I'm sorry. Not to the Plaintiffs,
10 to the individual Defendants.
11 THE COURT: The individual Defendants being the same
12 people that allegedly did the things that are complained
13 of in the complaints?
14 MR. SCHMALZBACH: That's right, Your Honor.
15 THE COURT: Okay. I think -- okay.
16 All right. Go ahead.
17 MR. SCHMALZBACH: All right. So I think what -- the
18 exception that the Plaintiff is asking -- that Ms. Parler
19 is asking you to read into South Carolina law is this idea
20 that if you involuntarily lose your shares, then you get
21 to remain on as a derivative Plaintiff. But that's not
22 what Johnson says.
23 Johnson says that the right to maintain that
24 derivative lawsuit depends on shareholder status. And if
25 there's a loss of status, then there's no right to

1 maintain that lawsuit. And the cases that the Supreme
2 Court addressed, discussed, and relied on in Johnson, I
3 think they, actually, get at this issue.
4 So in the Heyman [phonetic] case, for example, you
5 had a derivative lawsuit brought by some preferred
6 stockholders. And the company retired those preferred
7 shares. So as a result of the companies decision to call
8 in those preferred shares, to cash them out, they were no
9 longer shareholders. And Heyman held that that ended
10 their derivative standing. And that's the case that
11 Johnson's relying on.
12 So I don't think it makes any sense to say that
13 Johnson has an exception for the involuntary loss of
14 shares. Because Johnson relies on this case dealing with
15 the involuntary loss of shares.
16 And I understand Plaintiff's concern, which was the
17 same concern that the federal derivative Plaintiffs made
18 in Judge Seymour's case, that the Court has to make up
19 some new rule granting them derivative standing so that
20 they can hold these directors and officers accountable.
21 But that would be unnecessary and improper.
22 It's unnecessary because there are plenty of
23 non-derivative lawsuits seeking to hold these directors
24 and officers liable. There's a securities case in federal
25 court. There are rate payer cases in state and federal

1 court. And there's Mr. Eagel's case addressing the merger
2 with Dominion.
3 And, in fact, the merger case has nearly identical
4 allegations as here, and says that the Defendants were
5 required to get a higher price from Dominion so that the
6 shareholders could be compensated for the value of these
7 derivative claims.
8 Now, to be clear, we think that allegation is
9 meritless here and in the merger case. But there's no
10 need to make up a new derivative standing rule that's
11 already been foreclosed by the South Carolina Supreme
12 Court to litigate a question that's already been presented
13 in another case.
14 THE COURT: Does it make any -- is it an issue
15 whether or not Dominion is indemnifying all of the parties
16 that are listed in the original complaint filed in this
17 Court in those other litigations?
18 MR. SCHMALZBACH: I --
19 THE COURT: Do you see -- do you understand my
20 question, or should I rephrase it?
21 MR. SCHMALZBACH: Could I ask for clarification?
22 THE COURT: You sure may. My question is, you raised
23 the issue of indemnification. So is it proper in my
24 consideration that Dominion in these other litigations
25 that you say is a reason for not creating an exception to

1 the Johnson rule is -- and you say that there's this other
2 litigations out there that have stemmed from this merger.
3 Then is it not a proper question for me to ask then, is
4 Dominion indemnifying these people, the original people
5 that are listed as the Defendants in the lawsuit present
6 before this Court? Is Dominion indemnifying these people
7 in these other litigations?
8 MR. SCHMALZBACH: Yes, Your Honor. Dominion is
9 indemnifying these Defendants in those cases I just
10 described. And I think it would be helpful just to get
11 down to brass tacks what the practical effect of allowing
12 this lawsuit to continuance.
13 THE COURT: Okay.
14 MR. SCHMALZBACH: Because Dominion is going to be --
15 at this time, Dominion is responsible for paying the cost
16 of defense of this lawsuit. And any recovery on this
17 lawsuit is going to go to Dominion. Ms. Parler has no
18 right to any recovery that, ultimately, comes from this
19 lawsuit.
20 So Dominion would get the benefit of the lawsuit.
21 Dominion will bear the burden of the lawsuit. And so
22 that's why it should be Dominion's decision whether to
23 bring it. Because if, as Dominion has said, so far with
24 its decision not to pursue these claims on its own, that
25 it doesn't expect to make money. In fact, it expects to

1 lose money from the costs of defending this lawsuit
2 compared to the -- the unlikelihood of recovering a
3 judgment. That's why the derivative standing rules say
4 that a former shareholder shouldn't get to force Dominion
5 to make a decision that Dominion has decided is bad for
6 it.
7 THE COURT: Is there -- and, again, my question stems
8 from your pointing out that one of the reasons justifying
9 not creating an exception to Johnson is the fact that
10 there are these other litigation matters that are out
11 there to which these people might be held responsible for,
12 but, yet, Dominion is now indemnifying these people. Is
13 there a way absent a litigation that which Dominion is
14 indemnifying these people that were the original parties
15 to this lawsuit to which these parties would be held
16 responsible?
17 MR. SCHMALZBACH: The -- the indemnification
18 obligation, which is on Page 34 of the merger agreement,
19 if you're interested, it -- it covers these current
20 lawsuits that are pending at this time. I -- I can't say
21 that there would be some hypothetical lawsuit that -- I
22 can't identify a hypothetical lawsuit that wouldn't be
23 covered by it.
24 THE COURT: Can I try again at the question and see
25 if I can ask it more clearly?

1 All right. We have, again, litigation filed in this
2 Court. I've reviewed the allegations. The allegations
3 seem to be substantial, seem to be -- seems to be
4 disturbing that some people that have been part of SC&G
5 SCANA -- other corporations have engaged in some pretty
6 bad conduct.
7 And that the prior shareholders brought an action
8 trying to hold them responsible, make them culpable for
9 their actions. And Dominion's come in and Dominion's
10 acquired the corporation. Dominion announces, okay, we
11 want you to dismiss all these lawsuits because these
12 people no longer have standing because they're no longer
13 shareholders.
14 Part of your argument is that there are other
15 litigations taking place out there that justifies the
16 dismissal of this litigation. I now know that Dominion is
17 indemnifying these people that were the original parties
18 to this law school -- lawsuit that was in front of this
19 Court.
20 My question to you, is there a legal way that these
21 people -- if the allegations that were contained in the
22 complaint was true as filed with this Court to which this
23 Court has yet to be able to have any input on the merits
24 of those allegations, that if they are true, is there a
25 way legally that these people will ever be held

1 responsible to which Dominion is not indemnifying these
2 people?
3 MR. SCHMALZBACH: Yes, Your Honor.
4 THE COURT: How is that? Help me understand that.
5 MR. SCHMALZBACH: Because Dominion itself is -- the
6 indemnification obligation is not absolute. South
7 Carolina law limits the extent to which a company can
8 indemnify its former officers and directors.
9 And so if -- if it is determined that South Carolina
10 law allows Dominion or requires Dominion not to continue
11 indemnifying them, at that point, then not only would the
12 indemnification cease, but Dominion itself would have the
13 right to institute its own lawsuit against them.
14 But the -- the important part is that the law leaves
15 that up to Dominion. Because Dominion is going to bear
16 the burden of making that decision, not Ms. Parler.
17 THE COURT: So all the cards are held by Dominion now
18 with whether these people would ever be held responsible,
19 accountable, culpable, liable?
20 MR. SCHMALZBACH: As -- as to the indemnification
21 obligation that Dominion has, yes, that's a right that
22 Dominion bargained for. And it gets to decide when -- if
23 and when it's not going to use it.
24 THE COURT: And I -- and I ask my question not as
25 being critical of the fact that Dominion has secured that

1 as a contractual provision in the process of negotiations
2 and acquiring this corporation. I'm simply trying to
3 understand it. Because they're asking me to, if I
4 understand their position correctly, create an exception
5 or to read into Johnson an exception.
6 You're saying there is not that exception. And one
7 of the reasons there should not be that exception is
8 because there is these other spinoff litigations to which
9 these people -- these people being referred to as the
10 prior shareholders, officers of this corporation engaged
11 in these alleged pretty substantial acts in the complaint
12 that's present before this Court that they're never going
13 to be held responsible for that now possibly they could be
14 held responsible for, except for the fact that Dominion is
15 indemnifying these people.
16 MR. SCHMALZBACH: Just to be clear as to our
17 position. There should be no exception because Johnson
18 admits no exception. The holding in Johnson is very clear
19 about derivative standing, and for good reasons. And
20 we're -- these arguments about alternate ways in which the
21 Defendants might be held liable, that's just in response
22 to the Plaintiffs request to create an exception that's
23 already disallowed by Johnson.
24 THE COURT: I think they would probably disagree with
25 your reading of Johnson. But I -- but thank you for

1 pointing that out.
2 Yes, sir. Go ahead.
3 MR. SCHMALZBACH: All right. And so for these
4 reasons, we think Judge Seymour, who read the same briefs
5 and heard the same arguments about the exact same factual
6 scenario, got this just right.
7 So we ask you to apply the holding of Johnson v.
8 Baldwin and grant the motion for judgment on the
9 pleadings.
10 THE COURT: All right.
11 MR. CHAPPELL: Thank you, Your Honor.
12 Mark Chappell here on behalf of the Plaintiffs in
13 this action.
14 We're going to divide our arguments into two parts.
15 THE COURT: Well, they really like Judge Seymour's
16 order.
17 MR. CHAPPELL: Yes, sir.
18 THE COURT: And I've read it. And it's pretty
19 substantial in regards to the issues in this case.
20 MR. CHAPPELL: Your Honor, in this -- this slow
21 walked derivative action, I'm going to go through some of
22 the procedural histories. And Mr. Eagel will address some
23 of the substantive issues of law.
24 I think Your Honor gets it absolutely correct about
25 the indemnifications, all of this slow walking they'll

1 never be held responsible issue in this Court. It's --
2 it's -- the Court's aware, and I think you pointed out,
3 this lawsuit was filed over two years ago on October 30th,
4 2017.
5 November 29th, 2017, the Defendants moved for an
6 extension of time to answer. Five days later, they moved
7 to dismiss the complaint. January, SCANA and Dominion
8 announced a merger. January of 2018, they moved to stay
9 this litigation pending a merger. March 5th, 2018, this
10 Court denied the motion to stay. September 6th, 2018,
11 this Court denied the motion to dismiss.
12 September 30th, over a year ago, we served discovery
13 responses in this matter -- discovery requests in the
14 matter, Your Honor. There's not been one deposition, not
15 one interrogatory answered, not one piece of paper
16 exchanged.
17 We're standing here today two -- over two years after
18 the complaint was filed. As Your Honor said, there's been
19 no determination, no evidence presented yet by the
20 opposing side on the merits of this case.
21 They, finally, answered the -- the complaint in
22 October of 2018. Then they moved for protection from the
23 discovery by a 12(b)(8) -- (b)(8) motion, which this Court
24 denied. The merger went through January of this year.
25 January 7th, they moved for judgment on the pleadings

1 arguing lack of standing.
2 Subsequently, Ms. Parler moved to intervene after
3 Mr. Todd sold his shares. They have slow walked this case
4 for two years, Your Honor. They have the same -- to make
5 the same arguments in all these other pending cases that
6 they can't move forward.
7 At some point, the -- the board members of SCANA have
8 to be held accountable. We feel like this is the
9 appropriate location at this time with Ms. Parler's action
10 to intervene. And this is a derivative action. And we
11 will speak to the -- to the substantive stuff. And I can
12 assure the Court that Mr. Eagel is more prepared on the
13 legal side of that argument than I am.
14 So, Larry.
15 MR. EAGEL: Good morning, Your Honor.
16 I'll -- I'll address -- address the Johnson case
17 because I think that's clearly where the -- where the
18 Defendants seek reliance in. It is what -- it is what the
19 district court relied on in dismissing the derivative case
20 in the district court and --
21 THE COURT: You need to distinguish. I apologize for
22 interrupting. You need to distinguish, though. I have
23 read Judge Seymour's order. Judge Seymour's -- while I
24 might have taken a position that this case is different
25 than Judge Seymour's case. Judge Seymour's order is -- is

1 pretty thorough.
2 MR. EAGEL: Understood, Your Honor. And, look, you
3 know, we are here. We are fighting hard for our clients.
4 And -- and Counsel's correct, there are other direct
5 claims, you know.
6 In fact, the Defendants have worked hard not to be
7 before this Court. They've removed two of the cases into
8 federal court. That -- ultimately, those two cases went
9 up to the Fourth Circuit after -- after Judge Seymour
10 ordered the remand back to this Court. It was,
11 originally, filed in this Court. There was -- they --
12 they ultimately -- Judge Seymour ordered remand. They
13 went up to the Fourth Circuit.
14 THE COURT: I don't take it personal that they don't
15 want to be here.
16 MR. EAGEL: Well, I'm just -- I'm just saying they
17 are direct claims, though. And there is a -- this is a
18 derivative claim. And -- and we have not -- the direct
19 claims have been asserted in -- in those cases. And there
20 is a third case -- another case that was filed in this
21 Court. They removed that case. That case is subject to a
22 motion to remand. Those are direct claims. These are --
23 this is a derivative case. Counsel is correct about that.
24 And it is -- it -- where I would distinguish Judge
25 Seymour's decision is the fact that I think Judge Seymour

1 over reads what I would consider dicta in Johnson in that
2 in Johnson, interestingly enough, there were two issues in
3 Johnson. One issue was -- was the fact that the Plaintiff
4 in -- in Johnson was the fact that the Plaintiff had
5 elected to sell his shares since the appraisal rights --
6 exercised his rights to appraisal rights. And the fact
7 that there was a merger that followed that.
8 In reading the decision, the decision is that the
9 election to pursue the appraisal rights is the reason
10 why -- this was a voluntary election, a purposeful act --
11 was the reason why the Plaintiff lost standing. Because
12 that -- and the Court could have said it doesn't make a
13 difference. The Court easily could have said it doesn't
14 make a difference whether the Plaintiff took this
15 voluntary act to sell the shares because there was a
16 merger. And, therefore, he -- the shareholder lost
17 standing one way or the other. It didn't -- it would have
18 been just as easy to say in Johnson that -- and hold that
19 all the shareholders lost standing. But that's not the
20 holding in Johnson.
21 The holding in Johnson is the act of tendering the
22 shares and seeking appraisal rights. That allows -- that
23 results in -- and that's the voluntary act. And we have
24 tried to distinguish Johnson on that basis.
25 The difference between the voluntary act of tendering

1 the shares, which was the basis for the holding in
2 Johnson, versus the merger, which was not the basis for
3 the -- for the holding in Johnson, but could have been the
4 basis for the holding in Johnson and, yet, it wasn't.
5 So we do think there is that -- that sliver of -- of
6 what I would call hope or opportunity in the Johnson
7 decision that I think we -- we find as a reason for saying
8 the Court has the ability and authority to adopt what we
9 would call this exception or equitable rule. And it
10 really relates to this involuntary termination under
11 circumstances here where the continuous ownership rule --
12 I think South Carolina has adopted in Johnson the
13 continuous ownership rule as it relates to voluntary
14 terminations.
15 So Mr. Todd -- I'm sorry.
16 THE COURT: Can you entertain a question at this
17 point?
18 MR. EAGEL: Sure.
19 THE COURT: All right. They're arguing some policy
20 positions about why this is a good -- why their position
21 is -- is good in that we have this black letter line or
22 continuous ownership rule, no deviations. You are
23 articulating and reading Johnson as a way of saying we
24 have this line in the sand of continuous ownership, but
25 there are exceptions or there should be exceptions. And

1 you point out a factual distinction in Johnson that they
2 probably are going to say does not matter that you say
3 does matter.
4 Why does that matter?
5 Help me understand a policy reason why that should
6 matter.
7 MR. EAGEL: I think -- the policy reason, I think,
8 Your Honor, had, actually, articulated it very well that
9 the shareholders in -- in Johnson -- that the Plaintiff in
10 Johnson -- and I'll address two -- two aspects of it.
11 The first aspect is the Plaintiff in Johnson,
12 actually, sold his -- or elected to go with appraisal
13 rights, therefore, did his own act. Much the same way
14 that we have acknowledged that Plaintiff Todd, who sold
15 his shares prior to the time of the merger -- we've
16 acknowledged that Plaintiff Todd does not have standing to
17 pursue this case.
18 So we agree on the -- we agree with the Defendants on
19 that -- on that basis. And -- and it is -- it is --
20 certainly, as a policy matter, it's an uphill battle. So
21 many courts, Delaware and others, have held that a
22 continuous ownership that -- rule requires holding through
23 the merger. There have been -- it's not as if this is --
24 THE COURT: Well, you say -- you say it's an uphill
25 battle. Why? Simply because of the number of states that

1 recognize the continuous ownership rule versus the
2 equitable reasons why you have that? Because North
3 Carolina -- it's my understanding that North Carolina has,
4 in fact, accepted -- made an exception.
5 MR. EAGEL: Correct.
6 THE COURT: Why --
7 MR. EAGEL: I was just -- I guess I was referring to
8 the reliance of the Defendants on Delaware law, which does
9 hold that -- that South Carolina often looks to Delaware
10 law. And I think Your Honor correctly referred to the
11 Whittle case in which -- in which -- where it's a harsh
12 result that the Court should not blindly follow Delaware
13 law.
14 And -- and Whittle was exactly a -- very -- has sort
15 of a very interesting analogous facts. Because it was --
16 one of the rules in Delaware is either you make a demand
17 on the board or you sue to argue that demand should be
18 excused.
19 And in Delaware, if you -- if you make a demand on
20 the board, then you ultimately -- then you then can't
21 argue demand should be excused. Because by making the
22 demand, you've acknowledged that the board has -- is, in
23 fact, independent.
24 So it's a -- it's a -- it's a settled rule in
25 Delaware that either you make -- if you make a demand, you

1 then, in effect, acknowledge the independence of the
2 board, or if you argue demand excuse. We've argued demand
3 excuse here. But the point in -- in Whittle -- in the
4 Whittle case, the Court said that's -- that -- we don't --
5 we don't want to blindly follow Delaware law on that.
6 So that -- in that case, the Plaintiff made both a
7 demand and then later argued demand excuse. We're not
8 going to say just because the Plaintiff first made a
9 demand and then followed up with a demand excused that his
10 demand excused argument is -- is barred because of having
11 made demands. So Whittle does say that South Carolina
12 will recognize certain exceptions to Delaware law on those
13 issues.
14 But this is -- the fact is that we are arguing that,
15 at this stage in litigation, the Court should not --
16 should not dismiss the derivative claim. It is true there
17 are direct claims. But the Court should not dismiss as a
18 policy matter. And I think the -- well wise -- that
19 policy matter should -- should the Court allow this case
20 to continue notwithstanding the fact that Dominion has
21 purchased it.
22 I think the Court has raised certain of the issues as
23 to why the Plaintiff's ought to be allowed to continue
24 this litigation. And it is -- it would be sort of an
25 equitable exception that this Court's never had the

1 opportunity to test the litigation and the merits that
2 have been alleged in the complaint that was filed two
3 years ago. That as to any recovery, well, you know,
4 that's for another day. We're talking now for today as to
5 whether or not the Plaintiff here should be allowed to
6 intervene or should lose standing. And it is -- it is
7 sort of an equitable exception given the -- given where we
8 are in the case.
9 So as a policy matter, I think Your Honor has
10 correctly identified the fact that it's unlikely Dominion
11 will continue the litigation. And I think as long as this
12 group has shown an inclination to continue to press for a
13 resolution of these claims that they ought to be --
14 continue the opportunity to do so.
15 THE COURT: Let me ask you a question. If you don't
16 want to answer, that's fine. It might be that this is --
17 you feel it's a completely inappropriate question.
18 Assuming, if you would, that the allegations that have
19 been made in the complaint is true, and the allegations in
20 the complaint are pretty substantial as far as the
21 egregiousness of which the conduct could be seemed to
22 include, you know, a loss of millions if not billions of
23 dollars.
24 Assume as well that Counsel's position that Dominion
25 has indemnified the people that are named as Defendants in

1 the litigation that's pending before this Court.
2 Therefore, it's unlikely that from a legal standpoint
3 these people will ever be held responsible, culpable, ever
4 have to answer for the allegations that have been raised
5 in this complaint. If you had to chose a venue that would
6 be most appropriate for the Defendants in this litigation
7 to be held, at least, to be required to answer for the
8 conduct that is alleged in the complaint, where would your
9 opinion be -- where would that opinion be?
10 MR. EAGEL: I would -- I would -- let me -- I guess
11 I'd have to explain it in two forms.
12 THE COURT: Okay.
13 MR. EAGEL: And the first part would be that we filed
14 cases in this Court three times. And they've been -- two
15 of them have been removed. So I think that's sort of an
16 indication of one -- of where we thought it was
17 appropriate to file the case.
18 It's different, though. There is this difference
19 between a direct and a derivative claim. We -- this is
20 the only case -- the only claim we're pursuing here is the
21 derivative claim. The direct is being pursued in the
22 other litigations.
23 And there are -- the Defendants will invariably raise
24 different defenses as to claims relating to the merger and
25 claims relating to why I may -- may or may not be able to

1 assert defenses relating to direct claims. There's --
2 there are aspects in several -- you know, sort of a fraud
3 claim. There are claims against these same Defendants,
4 which they have identified. So those claims will go
5 forward no matter what. Those are the direct claims.
6 Here, this is a derivative claim. We would like to
7 go forward in both places and then -- and because we're
8 asserting different defenses, these -- there are certain
9 officers here who are not officers in that case.
10 So in terms of where to go, we would -- we would --
11 we believe they should go forward in both places in both
12 cases, that the derivative claims should continue. And --
13 and, certainly, you know, the direct claim -- the
14 Defendants are going to make their own motions in the
15 Defendants -- in the direct case. And there are issues
16 related to the merger. There are issues that might be
17 present in this derivative case.
18 And so I hope that wasn't too long an answer. But,
19 ultimately, we think it should go forward in both cases.
20 One is a derivative case, one's direct. These are direct
21 claims that the shareholders have -- different
22 shareholders. We happen to be involved in certain -- the
23 cases because we represent different shareholders. We're
24 not the only Counsel involved representing different
25 shareholders who are pursuing claims arising out of the --

1 the merger and -- and have asserted claims.
2 And we expect the Defendants to be responding to
3 those claims. That's a different -- those are direct
4 claims on behalf of the shareholders. Because that's not
5 what's being pursued here. These are derivative claims
6 that do, at the outset, belong to the corporation. But
7 the question is where does it go at the end of the day is
8 for another day. It isn't for this day. I think that's
9 where we differ.
10 Again, this is for judgment on the pleadings where
11 this Court's never had the opportunity to adjudicate the
12 merits, principally a standing argument. It's a
13 continuous ownership standing argument. And if Your
14 Honor, you know, concurs with Judge Seymour, then I think
15 that's -- that -- then, you know, this derivative case
16 would terminate and the direct cases would continue.
17 At the same time, we think Your Honor should --
18 should -- a -- continue this case on the grounds that
19 there's -- there -- there are, at least, reasons to
20 continue the case because of an exception that -- that
21 South Carolina law can find this exception under
22 circumstances as those presented in this case.
23 And then in terms of where the outcome is of this
24 derivative case and what happens with it is for another
25 day. We're now here on judgment of the pleadings. We

1 haven't had any discovery. We haven't had any -- any sort
2 of fact development.
3 So I hope that answered the question, Your Honor.
4 THE COURT: All right. Thank you.
5 MR. SCHMALZBACH: Thank you, Your Honor.
6 We have been accused of filing a parade of motions.
7 And on that, I guess we have to plead guilty and beg for
8 your mercy on the grounds that we're defense lawyers and
9 that's what we do. But --
10 THE COURT: There's nothing wrong with that. It
11 keeps me busy.
12 MR. SCHMALZBACH: But --
13 THE COURT: And if you'd see some of the other stuff
14 I have to do, sometimes this is a blessing. These --
15 y'all are all very good lawyers, well prepared. And it
16 is -- it's an honor to have you in front of me.
17 MR. SCHMALZBACH: Thank you, Your Honor. I
18 appreciate that.
19 If I could, what makes this motion different, in
20 addition to all the legal reasons that it's meritorious as
21 Judge Seymour already held, is that Counsel for the
22 Plaintiff, basically, invited this motion. As we recount
23 on Page 2 of our brief in this case in a letter to this
24 Court, Mr. Eagel volunteered that the planned merger
25 "likely will moot the derivative claims."

1 Then at the hearing, he said, There's an issue as to
2 standing in the derivative case. So this motion was
3 invited by Mr. Eagel's recognition that there is a
4 derivative standing defect after the merger.
5 Very quickly, I think we now hear with a little bit
6 more clarity what exactly the -- the Plaintiff wants to
7 have you do. And that's to create a new equitable
8 exception that has never been recognized in South Carolina
9 law. That's exactly what Judge Seymour refused to do.
10 And as to the policy argument that they offer for
11 making that equitable exception, it's not enough to say
12 that someone needs to hold these people accountable. As
13 Mr. Eagel said, there are other direct claims that offer
14 that mechanism.
15 But what a policy argument needs to offer here is a
16 reason why Dominion should be dragooned into paying for a
17 lawsuit.
18 THE COURT: Dragooned?
19 MR. SCHMALZBACH: Dragooned.
20 THE COURT: I'll have to look that up.
21 MR. SCHMALZBACH: Conscripted --
22 THE COURT: All right.
23 MR. SCHMALZBACH: -- into paying for this lawsuit
24 that's purportedly on its behalf that it doesn't want to
25 bring. That's what's unique about this case.

1 And to be clear as to indemnification, Dominion has
2 not waived and does not waive its right to pursue these
3 claims when it determines -- if and when it determines
4 that's appropriate.
5 And, finally, as to your question about whether this
6 case can be distinguished from the case that Judge Seymour
7 heard and dismissed, I think by copying and pasting the
8 federal derivative briefs and presenting them here, I
9 think that tells you all you need to know about whether
10 this case can be distinguished. It is the same case. And
11 it deserves the same result that Judge Seymour reached.
12 THE COURT: Thank you, sir.
13 MR. SCHMALZBACH: Thank you.
14 MR. CHAPPELL: Very briefly in reply, Your Honor.
15 You asked the question where should this case be -- where
16 should we be. Your Honor, we should be in this Court.
17 This is the only place where a derivative case is pending.
18 We lose here, it's over.
19 Dominion has won. The corporation has cut a backdoor
20 deal that covers for the board. She did not sell her
21 shares. She did not give them up. They took her shares.
22 I think that is the distinction in this case.
23 So they take her shares. They come in and argue for
24 two years that this case doesn't exist. We lose on the
25 derivative claim here, they win. This board walks away

1 scot-free. This is the only jurisdiction that's going to
2 hold the board members accountable for stealing billions
3 of dollars from their rate payers. This is the only
4 place.
5 So if the Court were to rule against us on this
6 motion, you know, they win. And I just think from the
7 equitable standpoint, from the legal standpoint, that's
8 just wrong, Your Honor. We ask that you deny their
9 motion.
10 Thank you.
11 MR. SCHMALZBACH: May I say a quick word, Your Honor?
12 I don't know if Counsel misspoke when he said a
13 "backdoor deal." But I want to be very clear that
14 Dominion's agreement to indemnify these Defendants was
15 100 percent disclosed to SCANA's shareholders in the proxy
16 statement, in the merger agreement. And those
17 shareholders voted to approve this merger, 72 percent of
18 the vote.
19 And so -- and as to the argument that this is the
20 only Court that can hold them accountable. If Counsel are
21 representing that they're going to dismiss the other
22 direct actions that Mr. Eagel described, we'd be happy to
23 accept that. But until that happens, Mr. Eagel described
24 the other lawsuits very similar to this one, but framed as
25 direct lawsuits where they are seeking to hold these same

1 Defendants accountable.
2 MR. EAGEL: Just two quick points.
3 THE COURT: Yes, sir.
4 MR. EAGEL: We, obviously, are strenuously pressing
5 the direct claims and those claims will continue. And
6 they -- we are seeking to -- seeking significant redress
7 as a result. So they will, we hope, hold them
8 accountable. They will raise other defenses in those
9 claims. That's -- that is a -- that's -- so Counsel's
10 correct. We are -- we are certainly very -- pressing
11 those claims and intend to press them as hard as we can.
12 So in terms of -- there is no other derivative claim.
13 I think that's -- that's the point. But there is a direct
14 claim that's being pursued.
15 Second, I just -- on this invitation, I -- I --
16 invitation of -- of the argument of standing. I don't
17 think that Counsel needed any invitation since that was
18 the subject of the letter before I agreed and said, okay,
19 we'd wait on discovery. And, ironically, Your Honor,
20 it's -- they point to an issue that -- that was the
21 Defendant's argument. At that time, there were two
22 Plaintiffs and we were arguing about it.
23 And the Defendants argument wasn't that I invited it
24 because they made the argument themselves. They said the
25 action was being stayed. So they obviously -- that the

1 action was going to go away because of a loss of standing.
2 So I didn't invite it. They said it. And, more
3 importantly, Your Honor said, you know, tough. Your
4 Honor, in fact, ordered discovery -- denied the motion for
5 a stay and ordered the case to go forward.
6 So if, in fact, I -- I -- so whatever occurred back
7 then, I think Your Honor was -- actually, addressed this
8 issue back in -- in the motion for stay of discovery when
9 the Defendants said that standing was going to be lost,
10 we'll confront that issue when the time comes. And I
11 guess that's what we're here for today.
12 But certainly nothing I said or did in the context of
13 the Court deciding whether or not a motion to stay should
14 go forward or not, or whether a party should conduct
15 discovery has any bearing on where we are today having
16 been a little bit more informed and having been a little
17 bit more present concerning some of the issues here.
18 Thank you, Your Honor.
19 MR. SCHMALZBACH: Your Honor, if you have no more
20 questions for me, thank you very much for your time today.
21 THE COURT: All right. Thank y'all very much.
22 I will let you know. In the event we're still
23 together in three years, we'll have a new courthouse.
24 ****************END OF TRANSCRIPT OF RECORD***************
25

CERTIFICATE OF REPORTER

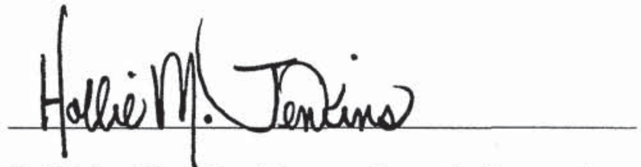
STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

I, HOLLIE JENKINS, Official Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete Transcript of Record of the proceedings had and the evidence introduced in the captioned case, relative to appeal, in the Court of Common Pleas for Spartanburg County, South Carolina, on the 14th day of November, 2019.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

January 29, 2020



Hollie M. Jenkins, Court Reporter

My Commission Expires: 09/24/20

EXHIBIT B

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

UNITED STATES OF AMERICA v. **STEPHEN ANDREW BYRNE**	Criminal No: 3:20-335 **PLEA AGREEMENT**

General Provisions

This PLEA AGREEMENT is made this 21st day of May, 2020, between the United States of America, as represented by United States Attorney Peter McCoy and Assistant United States Attorneys Jim May, Brook Andrews, Winston Holliday, and Emily Limehouse; the Defendant, **STEPHEN ANDREW BYRNE**, and Defendant's attorneys, Jim Griffin, Maggie Fox, and Matt Martens.

IN CONSIDERATION of the mutual promises made herein, the parties agree as follows:

1. The Defendant agrees to waive Indictment and arraignment, and plead guilty to an Information charging conspiracy to commit mail and wire fraud in violation of Title 18, United States Code, Section 371.

   In order to sustain its burden of proof, the Government is required to prove the following:

Count 1

A. the Defendant agreed with one or more persons;

B. to commit mail and wire fraud;

C. the Defendant did so knowingly; and

D. an overt act in furtherance of the conspiracy was committed in the District of South Carolina.

The penalty for this offense is:

up to 5 years in prison, a fine of up to $250,000, supervised release of up to 3 years, and a special assessment of $100.

2. The Defendant understands and agrees that monetary penalties [i.e., special assessments, restitution, fines and other payments required under the sentence] imposed by the Court are due immediately and subject to enforcement by the United States as civil judgments, pursuant to 18 USC § 3613. The Defendant also understands that payments made in accordance with installment schedules set by the Court are minimum payments only and do not preclude the Government from seeking to enforce the judgment against other assets of the Defendant at any time, as provided in 18 USC §§ 3612, 3613 and 3664(m).

The Defendant further agrees to enter into the Bureau of Prisons Inmate Financial Repayment Program if sentenced to a term of incarceration with an unsatisfied monetary penalty.

The Defendant further understands that any monetary penalty imposed is not dischargeable in bankruptcy.

A. Special Assessment: Pursuant to 18 U.S.C. § 3013, the Defendant must pay a special assessment of $100.00 for each felony count for which he is convicted. This special assessment must be paid at or before the time of the guilty plea hearing, or during participation in the Bureau of Prisons Inmate Financial Repayment Program if this plea results in incarceration.

B. Forfeiture: The Defendant and the Government agree that the Defendant is to forfeit the proceeds of his criminal conduct as an executive officer at SCANA/SCE&G. Both parties agree that: (1) this amount will be determined at sentencing; (2) the United States will not seek in excess of $1,031,981; and (3) the amount of forfeiture does not represent the actual or intended loss amount of the conspiracy. This amount shall be paid to the Clerk of Court within 90 days of sentencing.

C. Restitution:

i. Customers: The parties agree that any restitution amount as related to customers should be offset by approximately $4,000,000,000 dollars of ratepayer remedial value paid by Dominion Energy, Inc. ("Dominion") and agreed to pursuant to the Executed

Cooperation Agreement of December 27, 2018, attached. The offset by Dominion does not affect the actual or intended loss amount attributable to the conspiracy.

ii. Shareholders: The parties agree pursuant to 18 U.S.C. § 3663A(c)(3)(A) that, due to the large number of identifiable investors and (B) the complex issues of fact related to the amount of investors' losses, if any, that would complicate or prolong the sentencing process – including: timing when shares were purchased and sold, the SEC civil enforcement action, the shareholders' state and federal law suit(s), the dividends paid to the shareholders during the time of the conspiracy, and the premium paid to the shareholders upon Dominion's acquisition of SCANA – the need to provide restitution to victims, if any, is outweighed by the burden on the sentencing process and the Mandatory Restitution Act should not apply as related to shareholders' losses, if any. Both parties agree that any loss as to relevant conduct may be applied in the determining of the conspiracy's loss amount.

All agreements related to restitution are not binding upon the Court.

D. Fines: The Defendant understands that the Court may impose a fine pursuant to 18 U.S.C. §§ 3571 and 3572.

3. The Defendant understands that the obligations of the Government within the Plea Agreement are expressly contingent upon the Defendant's abiding by federal and state laws and complying with any bond executed in this case. In the event that the Defendant fails to comply with any of the provisions of this Agreement, either express or implied, the Government will have the right, at its sole election, to void all of its obligations under this Agreement and the Defendant will not have any right to withdraw his plea of guilty to the offense(s) enumerated herein.

Cooperation

4. The Defendant agrees to be fully truthful and forthright with federal, state and local law enforcement agencies by providing full, complete and truthful information about all criminal activities about which he has knowledge. The Defendant must provide full, complete and truthful debriefings about these unlawful activities and must fully disclose and provide truthful information to the Government including any books, papers, or documents or any other items of evidentiary value to the investigation. The Defendant

must also testify fully and truthfully before any grand juries and at any trials or other proceedings if called upon to do so by the Government, subject to prosecution for perjury for not testifying truthfully. The failure of the Defendant to be fully truthful and forthright at any stage will, at the sole election of the Government, cause the obligations of the Government within this Agreement to become null and void. Further, it is expressly agreed that if the obligations of the Government within this Agreement become null and void due to the lack of truthfulness on the part of the Defendant, the Defendant understands that:

A. the Defendant will not be permitted to withdraw his plea of guilty to the offenses described above;

B. all additional charges known to the Government may be filed in the appropriate district;

C. the Government will argue for a maximum sentence for the offense to which the Defendant has pleaded guilty; and

D. the Government will use any and all information and testimony provided by the Defendant pursuant to this Agreement, or any prior proffer agreements, in the prosecution of the Defendant of all charges.

5. The Defendant agrees to submit to such polygraph examinations as may be requested by the Government and agrees that any

such examinations shall be performed by a polygraph examiner selected by the Government. Defendant further agrees that his refusal to take or his failure to pass any such polygraph examination to the Government's satisfaction will result, at the Government's sole discretion, in the obligations of the Government within the Agreement becoming null and void.

6. The Government agrees that any self-incriminating information provided by the Defendant as a result of the cooperation required by the terms of this Agreement, although available to the Court, will not be used against the Defendant in determining the Defendant's applicable guideline range for sentencing pursuant to the U.S. Sentencing Commission Guidelines. The provisions of this paragraph shall not be applied to restrict any such information:

   A. known to the Government prior to the date of this Agreement;

   B. concerning the existence of prior convictions and sentences;

   C. in a prosecution for perjury or giving a false statement;

   D. in the event the Defendant breaches any of the terms of the Plea Agreement; or

   E. used to rebut any evidence or arguments offered by or on behalf of the Defendant (including arguments made or issues raised *sua sponte* by the District Court) at any

stage of the criminal prosecution (including bail, trial, and sentencing).

7. Provided the Defendant cooperates pursuant to the provisions of this Plea Agreement, and that cooperation is deemed by the Government as providing substantial assistance in the investigation or prosecution of another person, the Government agrees to move the Court for a downward departure or reduction of sentence pursuant to United States Sentencing Guidelines §5K1.1, Title 18, United States Code, § 3553(e) or Federal Rule of Criminal Procedure 35(b). Any such motion by the Government is not binding upon the Court, and should the Court deny the motion, the Defendant will have no right to withdraw his plea.

Merger and Other Provisions

8. The Defendant represents to the court that he has met with his attorneys on a sufficient number of occasions and for a sufficient period of time to discuss the Defendant's case and receive advice; that the Defendant has been truthful with his attorneys and related all information of which the Defendant is aware pertaining to the case; that the Defendant and his attorneys have discussed possible defenses, if any, to the charges in the Information including the existence of any exculpatory or favorable evidence or witnesses, discussed the Defendant's right to a public trial by jury or by the Court,

the right to the assistance of counsel throughout the proceedings, the right to call witnesses in the Defendant's behalf and compel their attendance at trial by subpoena, the right to confront and cross-examine the Government's witnesses, the Defendant's right to testify in his own behalf, or to remain silent and have no adverse inferences drawn from his silence; and that the Defendant, with the advice of counsel, has weighed the relative benefits of a trial by jury or by the Court versus a plea of guilty pursuant to this Agreement, and has entered this Agreement as a matter of the Defendant's free and voluntary choice, and not as a result of pressure or intimidation by any person.

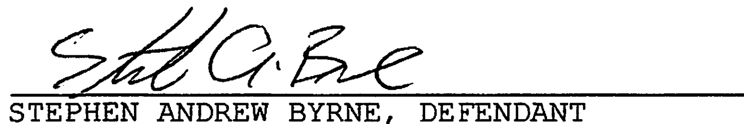
9. The Defendant is aware that 18 U.S.C. § 3742 and 28 U.S.C. § 2255 afford every defendant certain rights to contest a conviction and/or sentence. Acknowledging those rights, the Defendant, in exchange for the concessions made by the Government in this Plea Agreement, waives the right to contest either the conviction or the sentence in any direct appeal or other post-conviction action, including any proceedings under 28 U.S.C. § 2255. This waiver does not apply to claims of ineffective assistance of counsel, prosecutorial misconduct, or future changes in the law that affect the Defendant's conviction or sentence. This agreement does not affect the rights or obligations of the Government as set forth in 18

U.S.C. § 3742(b). Nor does it limit the Government in its comments in or responses to any post-sentencing matters.

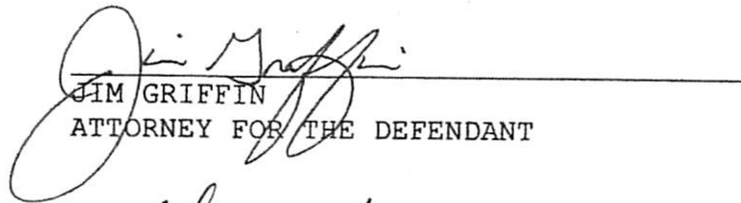
10. The Defendant waives all rights, whether asserted directly or by a representative, to request or receive from any department or agency of the United States any records pertaining to the investigation or prosecution of this case, including without limitation any records that may be sought under the Freedom of Information Act, 5 U.S.C. § 552, or the Privacy Act of 1974, 5 U.S.C. § 552a.

11. The parties hereby agree that this Plea Agreement contains the entire agreement of the parties; that this Agreement supersedes all prior promises, representations and statements of the parties; that this Agreement shall not be binding on any party until the Defendant tenders a plea of guilty to the court having jurisdiction over this matter; that this Agreement may be modified only in writing signed by all parties; and that any and all other promises, representations and statements, whether made prior to, contemporaneous with or after this Agreement, are null and void.

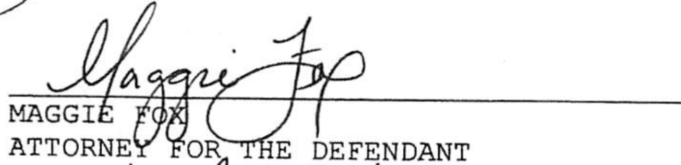
5/8/20
DATE


STEPHEN ANDREW BYRNE, DEFENDANT

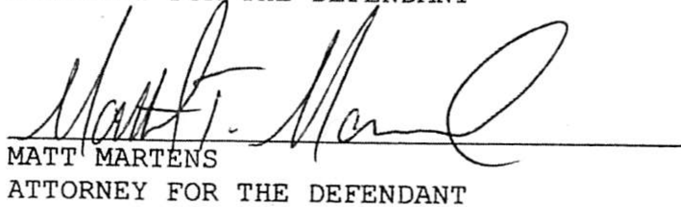
May 11, 2020
DATE


JIM GRIFFIN
ATTORNEY FOR THE DEFENDANT

May 11, 2020
DATE

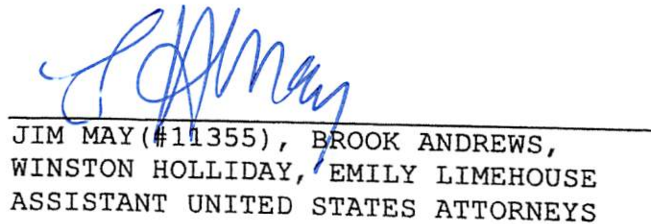

MAGGIE FOX
ATTORNEY FOR THE DEFENDANT

May 13, 2020
DATE


MATT MARTENS
ATTORNEY FOR THE DEFENDANT

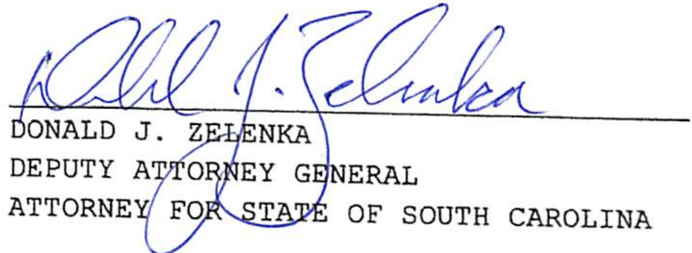
PETER M. MCCOY, JR.
UNITED STATES ATTORNEY

May 21, 2020
DATE


JIM MAY(#11355), BROOK ANDREWS,
WINSTON HOLLIDAY, EMILY LIMEHOUSE
ASSISTANT UNITED STATES ATTORNEYS

ALAN M. WILSON
SOUTH CAROLINA ATTORNEY GENERAL

May 21, 2020
DATE


DONALD J. ZELENKA
DEPUTY ATTORNEY GENERAL
ATTORNEY FOR STATE OF SOUTH CAROLINA

U.S. DEPARTMENT OF JUSTICE
Statement of Special Assessment Amount

This statement reflects your special assessment only. There may be other penalties imposed at sentencing. This Special Assessment is due and payable at the time of the execution of the plea agreement.

ACCOUNT INFORMATION	
CRIM. ACTION NO.:	
DEFENDANT'S NAME:	STEPHEN ANDREW BYRNE
PAY THIS AMOUNT:	$100.00
PAYMENT DUE ON OR BEFORE:	(date plea agreement signed)

MAKE CHECK OR MONEY ORDER PAYABLE TO:
CLERK, U.S. DISTRICT COURT

PAYMENT SHOULD BE SENT TO:
Clerk, U.S. District Court
Matthew J. Perry, Jr. Courthouse
901 Richland Street
Columbia, SC 29201

OR HAND DELIVERED TO:
Clerk's Office
Matthew J. Perry, Jr. Courthouse
901 Richland Street
Columbia, SC 29201 (Mon. - Fri. 8:30 a.m.- 4:30 p.m.)

INCLUDE DEFENDANT'S NAME ON CHECK OR MONEY ORDER ***(Do Not send cash)***

ENCLOSE THIS COUPON TO INSURE PROPER and PROMPT APPLICATION OF PAYMENT

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

UNITED STATES OF AMERICA	CR. NO.: 3:20-335
v.	18 U.S.C. § 371 18 U.S.C. § 1341 18 U.S.C. § 1343 18 U.S.C. § 981(a)(1)(C) 18 U.S.C. § 982(a)(1) 18 U.S.C. § 982(a)(2) 28 U.S.C. § 2461
STEPHEN ANDREW BYRNE	INFORMATION

THE UNITED STATES ATTORNEY CHARGES:

At all times relevant to this Information:

1. The defendant, STEPHEN ANDREW BYRNE, along with others known and unknown to the United States Attorney, consisting of former SCANA Corporation ("SCANA") executives, employees, and the lawyers who advised them, led a failed effort to construct two nuclear power generators in Fairfield County, South Carolina. As construction problems mounted, costs rose, and schedules slipped, the defendant, STEPHEN ANDREW BYRNE, and others, hid the true state of the project. Through intentional and material misrepresentations and omissions, the defendant, STEPHEN ANDREW BYRNE, deceived regulators and customers in order to maintain financing for the project and to financially benefit SCANA. The members of the conspiracy's actions and the associated cover-up allowed the project to continue until the contractor went bankrupt and the project was abandoned, resulting in billions of dollars of loss.

Background

2. SCANA was a publicly-traded holding company engaged, through subsidiaries, in electric and natural gas utility operations and other energy-related businesses. SCANA was incorporated in South Carolina and maintained its principal executive offices at 220 Operation Way, Cayce, South Carolina 29033-3701.

3. SCANA's principal subsidiary, South Carolina Electric and Gas Company ("SCE&G"), was a regulated public utility engaged in the generation, transmission, distribution and sale of electricity, primarily in South Carolina. SCE&G, a monopoly, had approximately 700,000 electricity customers and 350,000 natural gas customers in South Carolina (hereinafter, SCANA and SCE&G will be referred to collectively as "SCANA").

4. The Public Service Commission ("PSC") was the state regulatory authority vested with the power and jurisdiction to set rates for public utilities in South Carolina. Composed of seven members elected by the General Assembly, the PSC retained the ultimate authority to approve or deny the rates SCANA charged its customers, and to adjudicate all related rate disputes.

5. The Office of Regulatory Staff ("ORS") was a state agency responsible for inspecting, auditing, and examining public utilities. The ORS had a dual function: (1) it represented South Carolina's public interest in utility regulation before the PSC, the court system, the South Carolina General Assembly, and federal regulatory bodies; and (2) it advanced the utilities' interests. In fulfilling these dual roles, ORS performed the investigative, legal, prosecutorial, and educational roles of utility regulation, while at the same time acting as an advocate for the utilities.

6. As a regulated monopoly subject to the exclusive rate-setting regulatory authority of the PSC, SCANA was required to truthfully report the costs, schedule, and status of the project to the ORS and the PSC.

7. The defendant, STEPHEN ANDREW BYRNE, was SCANA's Executive Vice President and the Chief Operating Officer ("COO").

8. The South Carolina Public Service Authority ("Santee Cooper") was a state-owned utility that provided power and water to citizens of the South Carolina Lowcountry and to approximately twenty cooperative power companies. SCANA and Santee Cooper (together "the Owners") were majority and minority partners, respectively, in the V.C. Summer new nuclear development.

9. Westinghouse Electric Company ("Westinghouse") was a Pennsylvania-based company that was traditionally an engineering firm. Westinghouse designed the AP-1000, a next-generation, modular-based nuclear power plant.

10. The Consortium was the group of companies operating under an Engineering, Procurement, and Construction ("EPC") contract with the Owners. It included Westinghouse and various construction companies hired by Westinghouse to construct AP-1000 units, to include Shaw Group ("Shaw") and Chicago Bridge and Iron ("CB&I").

11. Westinghouse purchased CB&I's nuclear subsidiary, Stone & Webster, at the end of 2015. Stone & Webster was thereafter known as WECTEC.

12. Fluor Corp. ("Fluor") was an engineering, procurement, construction, and project management company headquartered in Irving, Texas.

13. The Bechtel Corporation ("Bechtel") was an engineering, procurement, construction, and project management company headquartered in Reston, Virginia.

<u>The Nuclear Project</u>

14. In May 2008, SCANA and Santee Cooper agreed to construct two AP-1000 nuclear reactors ("the Nuclear Project") at the V.C. Summer site in Jenkinsville, South Carolina.

15. Under the agreement, SCANA held the majority ownership interest of 55%, while Santee Cooper held the remaining 45% ownership interest. SCANA and Santee Cooper's arrangement allowed SCANA to effectively control the daily operations and management of the Nuclear Project.

16. SCANA did not have the capital to directly finance the cost of the Nuclear Project, initially estimated at $9.8 billion. Instead, SCANA obtained financing for the project through rates paid by its customers, as provided under the Base Load Review Act ("BLRA"), S.C. Code Ann. §§ 58-33-210, et seq.

17. In addition, the Energy Policy Act of 2005 ("Energy Policy Act"), 42 U.S.C. § 15801, et seq., provided SCANA with tax incentives to make the construction of the two new nuclear facilities financially viable. If the V.C. Summer new nuclear units were producing power by January 1, 2021, SCANA would qualify for tax credits worth approximately $1.4 billion.

18. The BLRA provided SCANA with additional financial incentives to build the Nuclear Project. Passed by the South Carolina General Assembly in 2007, the BLRA permitted utility companies to petition the PSC to raise utility rates to cover the construction financing costs during the project rather than wait for project completion to raise rates. However, to raise rates to cover the construction financing costs under the BLRA, SCANA was required to demonstrate that the decision to incur preconstruction costs was "prudent." S.C. Code Ann. §§ 58-33-210 et seq. SCANA was required to truthfully report the construction schedule and the capital costs to justify the proposed rate increases.

19. In May 2008, SCANA and Santee Cooper signed the EPC contract with the Consortium, which established Westinghouse as the lead contractor for the Nuclear Project. Westinghouse initially selected Shaw, later CB&I, as supporting contractor.

20. On May 30, 2008, SCANA submitted its first application to the PSC under the BLRA requesting rate increases to cover the construction financing costs of the Nuclear Project. In February 2009, the PSC approved SCANA's petition. In July 2009, SCANA submitted a revised construction schedule to the PSC, which the PSC approved in January 2010. During the course of the approval process, SCANA executives vowed to be transparent in the updates they provided to the PSC.

21. In March 2012, the United States Nuclear Regulatory Commission ("NRC") approved SCANA and Santee Cooper's request to commence the Nuclear Project. Construction began in March 2013. In its initial BLRA filing with the PSC, SCANA projected that Unit 2 would be generating power by April 2016, and that Unit 3 would be generating power by January 2019.

22. From its inception, the Nuclear Project was plagued by schedule delays and cost increases. By September 2013, emails between SCANA and the Consortium stated that Westinghouse's "missed deadlines put potentially unrecoverable stress on the milestone schedule" approved by the PSC. Within six months, by May 2014, SCANA and Santee Cooper executives sent a letter to Westinghouse executives outlining their complaints and criticizing the Consortium for poor performance and recurring design and schedule delays. According to SCANA and Santee Cooper executives, the Consortium had "made promise after promise, but fulfilled few of them."

23. In October 2015, SCANA and Santee Cooper signed an amendment to the EPC with Westinghouse. Westinghouse obtained CB&I's nuclear subsidiary and agreed to bring in Fluor as the subcontractor on the Nuclear Project.

24. At various times, SCANA provided the PSC different substantial completion dates for the units. The following schedule shows each event, followed by the nuclear reactor number and the date of completion submitted to the PSC for that reactor:

Order 2009-104(A)	Unit 2	April 1, 2016	Unit 3	January 1, 2019
Order 2012-884	Unit 2	March 15, 2017	Unit 3	May 5, 2018
Docket 2015-103-E	Unit 2	June 19, 2019	Unit 3	June 16, 2020
Docket 2016-223-E	Unit 2	August 31, 2019	Unit 3	August 31, 2020

25. The construction complete percentages provided to SCANA by the Consortium showed that the Nuclear Project was woefully behind schedule, averaging less than 0.6 percent complete per month for over four years.

26. From its first petition in 2009 and throughout the construction of the Nuclear Project, SCANA documents show that it paid over $2.5 billion in dividends to its investors, more than $520 million of which came directly from SCANA customers through rate increases under the BLRA. Despite the Nuclear Project's failure, SCANA executives received millions of dollars in compensation. From 2015 to 2017, SCANA paid the defendant, STEPHEN ANDREW BYRNE, approximately $6.3 million in compensation bonuses and salary, PERSON A approximately $7 million in compensation bonuses and salary, and PERSON B approximately $15 million in compensation bonuses and salary.

The Scheme to Defraud Customers

27. From a time beginning in June 2016, and continuing until January 1, 2018, the defendant, STEPHEN ANDREW BYRNE, joined others, through SCANA, to engage in a scheme, plan, and artifice to defraud customers, and to obtain money and property by means of materially false and fraudulent pretenses, representations, and promises, by making false and misleading statements, and omitting facts necessary to make the statements truthful and not misleading.

28. The defendant, STEPHEN ANDREW BYRNE, and others, through SCANA, made materially false and misleading statements in an effort to continue the Nuclear Project by minimizing regulatory risk and avoiding state government oversight. Among other things, the defendant, STEPHEN ANDREW BYRNE, and others, made false and misleading statements to

the PSC, the ORS, the South Carolina State Government, the media, and to SCANA's customers. In addition, the defendant, STEPHEN ANDREW BYRNE, and others, withheld derogatory information from these entities regarding the status of the project and evaluation of the management. To further the scheme, members of the conspiracy:

a. Represented to regulatory agencies that V.C. Summer Unit 2 would be operational in 2019 and would qualify for the PTCs; when in truth members of the conspiracy knew that the schedule was unrealistic and that Unit 2 would not likely be completed in 2019.

b. Represented to regulatory agencies that V.C. Summer Unit 3 would be operational in 2020 and would qualify for the PTCs; when in truth members of the conspiracy knew that the schedule was unrealistic and that Unit 3 would not likely be completed in 2020.

c. Represented to regulatory agencies that V.C. Summer Units 2 and 3 would be operational in 2019 and 2020, when in truth members of the conspiracy had hired Bechtel to evaluate the project; Bechtel found the Nuclear Project to be significantly off-schedule and over-budget. Members of the conspiracy never provided this information to the regulatory agencies.

d. Represented to regulatory agencies costs of the project that were significantly and materially lower than what was expected.

e. Applied for and received rate increases based upon misrepresentations and misleading statements that lead to fraudulently inflated bills to customers for the stated purpose of financing the project.

f. Sent the above-referenced bills to customers, both electronically and in the mail.

g. Received payments from customers of inflated rates, both electronically and in the mail.

h. Provided customers misleading information regarding the progress of the construction of V.C. Summer Units 2 and 3.

i. Paid over $500 million of the $2.2 billion dollars customers paid to finance the construction project directly to shareholders in dividends.

j. Provided misleading information to state government officials regarding the progress of the Nuclear Project.

k. Commissioned Bechtel to conduct a comprehensive review of the status of the Nuclear Project in 2015, and when Bechtel provided data demonstrating that the Nuclear Project was failing catastrophically, bifurcated, edited, and buried the Bechtel report(s) and the information contained within under disingenuous representations of attorney-client privilege. The Bechtel conclusions were not made public until after abandonment of the Nuclear Project.

COUNT ONE

29. From a time beginning in June 2016, and continuing until January 1, 2018, in the District of South Carolina and elsewhere, the defendant, STEPHEN ANDREW BYRNE, and others, through SCANA, knowingly and intentionally combined, conspired, confederated, agreed, and had a tacit understanding to:

a. knowingly devise a scheme and artifice to defraud and to obtain money and property by means of false and fraudulent pretenses, representations, and promises, and in furtherance of this scheme, did use and cause to be used the United States

mail and common carriers, in violation of Title 18, United States Code, Section 1341; and

b. knowingly devised a scheme and artifice to defraud and to obtain money and property by means of false and fraudulent pretenses, representations, and promises, transmitted or caused to be transmitted by means of wire, radio, or television communication in interstate commerce, any writings, signs, signals, pictures or sounds for the purpose of executing the scheme and artifice, in violation of Title 18, United States Code, Section 1343.

The Object of the Conspiracy

30. The object of the conspiracy was for the defendant, STEPHEN ANDREW BYRNE, and others, through SCANA, to provide false representations and omit necessary facts in disclosures to the PSC, the ORS, the South Carolina State Government, the media, and to SCANA's customers, so that the construction of the Nuclear Project would continue, minimizing regulatory risk, and avoiding state government oversight, all to defraud customers through inflated bills.

Overt Acts

30. In furtherance of the conspiracy, the defendant, STEPHEN ANDREW BYRNE, and others known and unknown to the United States Attorney, committed the following overt acts in the District of South Carolina:

a. On or about July 1, 2016, the defendant, STEPHEN ANDREW BYRNE, submitted written testimony as follows: "SCE&G's construction experts have reviewed this schedule and found that its scope and sequencing is logical and appropriate…Consistent with its responsibility as owner, SCE&G has carefully

reviewed and evaluated all information that is available related to the project and schedule and finds it to be reasonable. It is my opinion that WEC and Fluor have a reasonable construction plan in place to achieve the GSCD . . . [A]ll these factors support the conclusion that the construction schedule . . . is a reasonable and prudent schedule for completing the units . . . [I]t is my considered opinion that [the construction schedule] represents a reasonable and prudent schedule for completing the project as envisioned by the BLRA," and that the costs for the Nuclear Project 'are prudent in every respect,'" which misrepresented the truth.

b. On or about July 1, 2016, PERSON A submitted written testimony as follows: "[T]he current schedules reflect the best information that is available about the anticipated costs and construction timetables for completing the project . . . as Mr. Byrne testifies, they are based on a careful review of the construction plans . . . [and] tasks required to complete them," which misrepresented the truth.

c. On or about July 1, 2016, PERSON B submitted written testimony as follows: "The federal tax credits that are available to the project are worth a total of $1.2 billion to customers. Both of our plants must produce power before the end of 2020 to qualify for the full amount of these credits. The GSCD for Unit 2 is now 16 months ahead of that deadline and the GSCD for Unit 3 is four months ahead of it...I can affirmatively testify, as I have testified in prior proceedings, that SCE&G is performing its role as project owner in a reasonable, prudent, and cost-effective manner," which misrepresented the truth.

All in violation of Title 18, United States Code, Section 371.

FORFEITURE

SPECIFIED UNLAWFUL ACTIVITIES:

Upon conviction of violating Title 18, United States Code, Section 371, as charged in the Information, the defendant, STEPHEN ANDREW BYRNE, shall forfeit to the United States, pursuant to Title 18, United States Code, Sections 981(a)(1)(C), 982(a)(2) and 982(a)(1) and Title 28, United States Code, Section 2461(c), any property, real or personal, which is involved in such violation or which constitutes or is derived from proceeds traceable to such property.

The property subject to forfeiture includes, but is not limited to, the following:

(1) Proceeds/Money Judgment:

(a) A sum of money equal to all proceeds the defendant, STEPHEN ANDREW BYRNE, obtained, directly or indirectly, from the offenses charged in Count 1 of the Information, that is, an amount to be determined by the Court at sentencing in United States currency, and all interest and proceeds traceable thereto, and/or that such sum equals all property involved in or traceable to the violations of 18 U.S.C. §§ 371, 1341, 1343.

(b) A sum of money equal to all property involved in the money laundering offenses charged in the Information, and all proceeds traceable thereto.

If any of the property described above as being subject to forfeiture, as a result of any act or omission of the defendant, STEPHEN ANDREW BYRNE -

(1) Cannot be located upon the exercise of due diligence;

(2) Has been transferred or sold to, or deposited with, a third person;

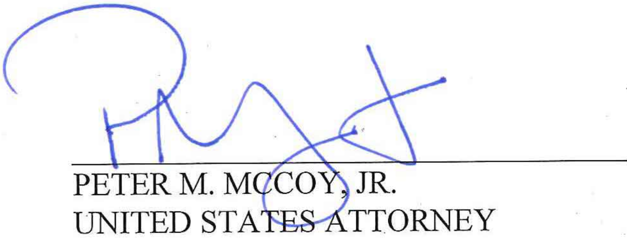
(3) Has been placed beyond the jurisdiction of the court;

(4) Has been substantially diminished in value; or

(5) Has been commingled with other property which cannot be subdivided without difficulty;

it is the intention of the United States, pursuant to Title 18, United States Code, Section 982(b)(1), incorporating Title 21, United States Code, Section 853(p), to seek forfeiture of any other property of the defendant, STEPHEN ANDREW BYRNE, up to the value of the forfeitable property;

Pursuant to Title 18, United States Code, Sections 981(a)(1)(C), 982(a)(1) and (a)(2), and Title 28, United States Code, Section 2461(c).



PETER M. MCCOY, JR.
UNITED STATES ATTORNEY

(JHM, BBA, EEL, WDHjr)

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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Sep 29 2020
SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
J. Mark Hayes, II, Circuit Court Judge

Appellate Case No. 2020-000619

Teresa Parler, 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 Steven Byrne,

Defendents,

and

SCANA Corporation,

Nominal Defendant.

Of Whom:

Nominal Defendant SCANA Corporation and Defendants Kevin Marsh, Gregory Aliff, James Bennett, John Cecil, Sharon Decker, Maybank Hagood, Lynne Miller, James Roquemore, Maceo Sloan, Alfredo Trujillo, Jimmy Addison, and Steven Byrne are

Appellants,

And

Plaintiff Teresa Parler, derivatively on behalf of SCANA Corporation, is

Respondent.

CERTIFICATE OF SERVICE

I, Graham L. Newman, an attorney practicing with Chappell, Smith & Arden, P.A., certify that on this day, pursuant to Section (g)(3) of the Supreme Court's Order in Appellate Case No.

2020-000447 (May 29, 2020), I served this *Return to Petition for Rehearing* 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.

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Dated: September 28, 2020

Graham Newman

From: Graham Newman
Sent: Monday, September 28, 2020 6:48 PM
To: Ben Carlton; Mark Chappell; eagel@bespc.com; fortunato@bespc.com
Cc: IS Leevy Johnson (islj@jtbpa.com); George Johnson (GEORGE@jtbpa.com); Steve Pugh; Charity McQueen; Carmen Ganjehsani; jmassalon@wmalawfirm.net; Bill Coates (wac@roecassidy.com); john.jordak@alston.com; meredith.kingsley@alston.com; Schmalzbach, Brian D.; Pumphrey, Brian E.; Brady@bradyhair.com; Derk@bradyhair.com; Anne.Tompkins@cwt.com; Jonathan.Watkins@cwt.com; Aaron.Lang@cwt.com; jgriffin@griffindavislaw.com; mfox@griffindavislaw.com; James Wyatt (JWyatt@wyattlaw.net); rblake@wyattlaw.net; scott.greene@bclplaw.com; john.bielema@bclplaw.com; michael.carey@bclplaw.com; barbara.smith@bclplaw.com
Subject: RE: Parler v. Marsh et al. - 2017-CP-40-00621; Appellate Case No. 2020-000619 (Court of Appeals) - Appellants' Return to MTD & Motion to Address Appellate Jurisdiction in the Parties' SCACR 208 Briefs
Attachments: Exhibit A.pdf; Exhibit B.pdf; Exhibit C.pdf; Return to Petition for Rehearing.pdf

Colleagues,

I hope this email finds you and your loved ones well during this time of Covid-19. Pursuant to the Supreme Court's order of May 29, 2020, I am serving the Respondent's Return to the Petition for Rehearing upon you via this email.

The file is somewhat large. If I receive a response from your email server that the email is being rejected I will follow up with a Dropbox link.

Graham Newman