In the

Supreme Court of South Carolina

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SOUTH CAROLINA COURT OF APPEALS

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

RECEIVED
Nov 13 2020
S.C. SUPREME COURT

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

Plaintiff,

v.

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

Defendants,

And

SCANA CORP.,

Nominal Defendant.

TERESA PARLER, derivatively on behalf of
SCANA CORPORATION,

Plaintiff,

v.

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

Defendants,

And

SCANA CORP.,

Nominal Defendant,

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

And

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

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

John A. Massalon (SC Bar # 10279)
Wills Massalon & Allen, LLC
Post Office Box 859
Charleston, South Carolina 29402
(843) 727-1144
jmassalon@wmalawfirm.net

C. Scott Greene (pro hac vice)
John R. Bielema (pro hac vice)
Michael P. Carey (pro hac vice)
Bryan Cave Leighton Paisner LLP
One Atlantic Center, 14th Floor
1201 W. Peachtree St., N.W.
Atlanta, GA 30309-3471
(404) 572-6978
scott.greene@bclplaw.com
john.bielema@bclplaw.com
michael.carey@bclplaw.com

Barbara A. Smith (pro hac vice)
Bryan Cave Leighton Paisner LLP
One Metropolitan Square
211 N. Broadway, Suite 3600
St. Louis, Missouri 63102
(314) 259-2000
barbara.smith@bclplaw.com

Counsel for Defendants-Appellants Gregory E. Aliff; James Bennett; John F.A.V. Cecil; Sharon A. Decker; D. Maybank Hagood; Lynne M. Miller; James W. Roquemore; Maceo K. Sloan; and Alfredo Trujillo

Steven J. Pugh (SC Bar # 14341)
Benjamin P. Carlton (SC Bar # 101142)
Richardson Plowden
& Robinson, P.A.
Post Office Drawer 7788 (29202)
1900 Barnwell Street
Columbia, South Carolina 29201
(803) 771-4400
spugh@richardsonplowden.com
bcarlton@richardsonplowden.com

I.S. Leevy Johnson (SC Bar # 3020)
George C. Johnson (SC Bar # 9308)
Johnson Toal & Battiste, P.A.
1615 Barnwell Street
Columbia, South Carolina 29201
(803) 252-9700
islj@jtbpa.com
George@jtbpa.com

Brian D. Schmalzbach (pro hac vice)
Brian E. Pumphrey (pro hac vice)
McGuireWoods LLP
800 East Canal Street
Richmond, VA 23219
(804) 775-7745
bschmalzbach@mcguirewoods.com
bpumphrey@mcguirewoods.com

Counsel for Nominal Defendant-Appellant SCANA Corporation

William A. Coates (SC Bar # 1289)
Roe Cassidy Coates & Price P.A.
1052 North Church Street
Post Office Box 10529
Greenville, South Carolina 29603
(864) 349-2600
wac@roecassidy.com

John A. Jordak, Jr. (pro hac vice)
Meredith J. Kingsley (pro hac vice)
Alston & Bird
1201 West Peachtree Street
Atlanta, Georgia 30309
(404) 881-7000
john.jordak@alston.com
meredith.kingsley@alston.com

Counsel for Defendant-Appellant Jimmy Addison

James M. Griffin (SC Bar # 9995)
Margaret N. Fox (SC Bar # 76228)
Griffin Davis
4408 Forest Drive, Suite 300
Columbia, SC 29206
(803) 744-0800
jgriffin@griffindavislaw.com
mfox@griffindavislaw.com

James F. Wyatt, III (pro hac vice)
Robert A. Blake, Jr. (pro hac vice)
Wyatt & Blake, LLP
435 East Morehead Street
Charlotte, NC 28202
(704) 331-0767
jwyatt@wyattlaw.net
rblake@wyattlaw.net

Counsel for Defendant-Appellant Stephen A. Byrne

J. Brady Hair (SC Bar # 9040)
Derk Van Raalte (SC Bar # 9286)
Law Offices of J. Brady Hair
2500 City Hall Lane
Post Office Box 61896
North Charleston, SC 29419
(843) 572-8700
Brady@bradyhair.com
Derk@bradyhair.com

Anne M. Tompkins (pro hac vice)
Jonathan M. Watkins (pro hac vice)
Aaron C. Lang (pro hac vice)
Cadwalader, Wickersham & Taft LLP
227 West Trade Street
Charlotte, NC 28202
(704) 348-5222
Anne.Tompkins@cwt.com
Jonathan.Watkins@cwt.com
Aaron.Lang@cwt.com

Counsel for Defendant-Appellant Kevin B. Marsh

INDEX

Page

Order Granting Teresa Parler's Motion to Intervene and Denying Defendants' Motion to Dismiss (Mar. 18, 2020) 1

Federal Derivative Opinion Granting Defendants' Motion for Judgment on the Pleadings (D.S.C., Case No. 3:17-cv-03166) (Sept. 3, 2019) 14

Letter from Lawrence P. Eagel to Judge Hayes re: Pending Motions (Jan. 29, 2018) 19

Transcript of Hearing on Motion to Stay (Feb. 15, 2018) 22

Defendants' Motion for Judgment on the Pleadings and Memorandum of Law in Support (Jan. 7, 2019) 57

Exhibit A, Articles of Merger 70

Proposed Complaint of Teresa Parler (May 6, 2019) 156

Motion to Intervene of Teresa Parler (May 6, 2019) 177

Defendants' Opposition to Motion to Intervene (May 31, 2019) 185

Exhibit B to Defendants' Reply in Support of Motion for Judgment on the Pleadings (July 10, 2019) 198

Letter from Stephen J. Pugh to Judge Hayes re: Dismissal of Federal Derivative Case (Sept. 3, 2019) 216

Transcript of Hearing on Derivative Standing (Nov. 14, 2019) 218

Order Granting *Pro Hac Vice* Admission for Attorneys William R. Mitchelson, Jr., John A. Jordak, Jr., Meredith Jones Kingsley, James F. Wyatt III, Robert A. Blake, Jr., and Anne Magee Tompkins (Feb. 5, 2018) 259

Order Granting *Pro Hac Vice* Admission for Attorney Brian D. Schmalzbach (July 18, 2019) 264

Order Granting Pro Hace Vice Admission for Attorney Brian E. Pumphrey (May 13, 2020) 267

SCANA Corporation, Restated Articles of Incorporation, dated Apr. 26, 1989 270

Defendants' Notice of Appeal (Apr. 16, 2020) 286

Initial Appellants' Brief (June 9, 2020) 290

Designation of Matter to be Included in the Record on Appeal (June 9, 2020) 328

Respondent's Motion to Dismiss (June 9, 2020) 333

Appellants' Return to Motion to Dismiss (June 12, 2020) 337

Order Granting Respondent's Motion to Dismiss (July 29, 2020) 343

Order Denying Petition for Writ of Certiorari (Supreme Court of South Carolina) (Aug. 7, 2020) 346

Appellants' Petition for Rehearing Under Rule 221(a) (Aug. 12, 2020) 348

Request for Return to Petition for Rehearing (Sept. 16, 2020) 371

Respondent's Return to Petition for Rehearing (Sept. 29, 2020) 373

Exhibit A, Transcript of Hearing on Derivative Standing (Nov. 14, 2019) 387

Exhibit B, Byrne Plea Agreement 429

Exhibit C, Byrne Criminal Information 442

Appellants' Reply in Support of Petition for Rehearing (Sept. 29, 2020) 455

Exhibit 1, *In re SCANA Corp. Securities Litig.* Release Scope Agreement 472

Order Denying Petition for Rehearing (Oct. 14, 2020) 481

ELECTRONICALLY FILED - 2020 Mar 18 3:52 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621

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

AMENDED CAPTION

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

ELECTRONICALLY FILED - 2020 Mar 18 3:52 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621

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

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

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

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

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

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

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

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

---

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

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

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

ELECTRONICALLY FILED - 2020 Mar 18 3:52 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621

ELECTRONICALLY FILED - 2020 Mar 18 3:52 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621

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

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

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

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

ELECTRONICALLY FILED - 2020 Mar 18 3:52 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621

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

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

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

ELECTRONICALLY FILED - 2020 Mar 18 3:52 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621

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

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

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

---

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

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

ELECTRONICALLY FILED - 2020 Mar 18 3:52 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621

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

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

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

---

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

ELECTRONICALLY FILED - 2020 Mar 18 3:52 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621

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

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

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

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

---

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

ELECTRONICALLY FILED - 2020 Mar 18 3:52 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621

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

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

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

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

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

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

ELECTRONICALLY FILED - 2020 Mar 18 3:52 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621

ELECTRONICALLY FILED - 2020 Mar 18 3:52 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621

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

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

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

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

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

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

ELECTRONICALLY FILED - 2020 Mar 18 3:52 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621

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

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

IT IS SO ORDERED.

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

Date: March 18, 2020.

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

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

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

ELECTRONICALLY FILED - 2020 Mar 18 3:52 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621

ELECTRONICALLY FILED - 2019 Sep 03 7:51 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621

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

IN RE: SCANA CORPORATION DERIVATIVE LITIGATION	))	C/A No. 3:17-3166-MBS

ORDER AND OPINION

The within action arises from a series of events that began in 2007, when Nominal Defendant SCANA Corporation ("SCANA") received legislative approval to construct a nuclear power facility at the V.C. Summer Nuclear Generating Station in Fairfield County, South Carolina. SCANA and its partner spent approximately $9 billion on the project, which ultimately was abandoned. Plaintiffs Colleen Witmer and Richard Wickstrom, derivatively on behalf of SCANA Corporation, filed separate actions that were consolidated by order filed January 23, 2018.[1] Plaintiffs filed an amended derivative complaint on January 30, 2018, and a corrected amended derivative complaint on July 9, 2018. Plaintiffs allege that SCANA lost billions of dollars in write-downs and unrecoverable costs, lost billions in market capitalization, and has been exposed to civil and criminal liabilities. Plaintiffs contend Defendants Kevin B. Marsh, Gregory E. Aliff, James A. Bennett, John F.A.V. Cecil, Sharon A. Decker, D. Maybank Hagood, Lynne M. Miller, James W. Roquemore, Maceo K. Sloan, Alfredo Trujillo, Stephen A. Byrne, James M. Micali, Harold C. Stowe, and Jimmy E. Addison, officers and directors of SCANA,

> breached their fiduciary duties to [SCANA] and its shareholders and acted in bad faith by, among other things, overseeing, sanctioning, and participating in the grossly mismanaged Nuclear Project; purposefully concealing material information about the Nuclear Project, including findings of the Bechtel Reports, from regulators and the public, in violation of state and federal law; consciously disregarding the many red flags related to the Nuclear Project's inevitable failure; failing to maintain proper internal controls; and accepting incentive compensation tied to their management of

[1] The cases were *Witmer v. Aliff*, C/A No. 3:17-3166-MBS, and *Wickstrom v. Aliff*, C/A No. 3:17-3181-MBS. SCANA was Nominal Defendant in each case.

ELECTRONICALLY FILED - 2019 Sep 03 7:51 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621

the Nuclear Project.

ECF No. 115, ¶ 24.

On January 2, 2018, SCANA entered into an Agreement and Plan of Merger Agreement (the "Merger Agreement").by which SCANA would become a wholly-owned subsidiary of Dominion Energy, Inc. ("Dominion"). ECF No. 172-2. Pursuant to the Merger Agreement, each share of SCANA common stock was exchanged for 0.669 shares of common stock in Dominion. The merger was consummated effective January 1, 2019. SCANA's outstanding shares of common stock were canceled and SCANA became a wholly-owned subsidiary of Dominion. On January 7, 2019, Defendants filed a motion for judgment on the pleadings, asserting that, because Plaintiffs no longer possess SCANA stock, they no longer have standing to maintain this action. Plaintiffs filed a response in opposition on February 5, 2019, to which Defendants filed a reply on February 26, 2019. The court heard arguments on April 4, 2019.

DISCUSSION

In reviewing a motion for judgment on the pleadings made pursuant to Federal Rule of Civil Procedure 12(c), the court applies the same standard used for motions made pursuant to Rule 12(b)(6). *Burbach Broad. Co. v. Elkins Radio Corp.*, 278 F.3d 401, 405-06 (4th Cir. 2002). To survive a 12(b)(6) motion, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1955 (2007)). When a court is tasked with "weighing the sufficiency of the complaint" as it is upon motions for judgment on the pleadings, it must "accept[] all well-pled facts as true and construe[] these facts in the light most favorable to the plaintiff[.]" *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 255 (4th Cir. 2009). However, the court is not required to defer to allegations in the complaint to the extent that they

ELECTRONICALLY FILED - 2019 Sep 03 7:51 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621

"contradict matters properly subject to judicial notice or by exhibit." *Demetry v. Lasko Prods., Inc.*, 284 F. App'x 14, 15 (4th Cir. 2008) (quoting *Veney v. Wyche*, 293 F.3d 726, 730 (4th Cir. 2002)).

Under South Carolina common law,

> [t]he right of a stockholder to maintain a derivative action against the directors of a corporation 'inheres in and attaches to his ownership of its stock and does not exist apart from such ownership.' 150 19 C.J.S., Corporations, § 824, page 228. It is a right which depends on status. If there is a loss of status, the action abates so far as the stockholder bringing the action is concerned, although the cause of action itself survives. *Kehaya v. Axton*, D.C., 32 F. Supp. 266. Accordingly, it has been held that where such a derivative action is instituted by preferred stockholders and thereafter the preferred stock is retired, the plaintiffs have no further standing, whether the action is abated or not. *Hayman v. Morris*, Sup., 46 N.Y.S.2d 482. . . . It is our conclusion that the right of the plaintiff to continue to prosecute this action depends upon her retaining her status as a stockholder and if she ceased to be a stockholder, the cause of action abated so far as she is concerned. There would be no one left in court with the capacity to continue the litigation. She cannot prosecute an action as a member of a class to which she does not belong.

Johnson v. Baldwin, 69 S.E.2d 585, 589 (S.C. 1952).

The holding in *Johnson* was reaffirmed in *Davis v. Hamm*, 387 S.E.2d 676, 678 (S.C. Ct. App. 1989). The rule that standing for shareholder derivative actions generally requires a plaintiff to maintain continuous stock ownership also is recognized in other states. *See, e.g.*, *Judson C. Ball Revocable Trust v. Phoenix Orchard Group I, L.P.*, 431 P.3d 589 (Ariz. Ct. App. 2018); *Calif. State Teachers' Ret. Sys. v. Blankenship*, 814 S.E.2d 549 (W. Va. 2018); *In Re Massey Energy Co. Derivative & Class Action Litig.*, 160 A.3d 484 (Del. 2017); *Rael v. Page*, 222 P.3d 678 (N.M. Ct. App. 2009); *Bacigalupo v. Kohlhepp*, 240 S.W.3d 155 (Ky. Ct. App. 2007); *Timko v. Triarsi*, 896 So. 2d 89 (Fla. Ct. App. 2005); *Grace Bros., Ltd. v. Farley Indus., Inc.*, 450 S.E.2d 814 (Ga. 1994). The court concludes that, pursuant to the continuous ownership rule articulated in *Johnson*,

ELECTRONICALLY FILED - 2019 Sep 03 7:51 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621

Plaintiffs no longer possess standing to pursue a derivative action against SCANA.[2]

Some jurisdictions recognize exceptions to this rule of standing as it applies to mergers. Under Delaware law, the one of the recognized exceptions to the rule is where the merger itself is the subject of a claim of fraud. *Lewis v. Anderson*, 477 A.2d 1040, 1046, n.10 (Del. 1984)(citing cases). At the hearing, Plaintiffs conceded that the complaint does not list "a whole litany of frauds related to the merger itself" or "descriptions saying that the . . . merger was entered into solely by fraudulent purposes[.]" ECF No. 189, 17. Rather, Plaintiffs urged the court to fashion its own equitable remedy to prevent Defendants from escaping liability. Specifically, Plaintiffs contend that shareholders who did not choose to have their standing stripped from them by the conduct of the directors should be allowed to proceed with their litigation. The court declines to fashion such a remedy.

As with any derivative action, "the liability of directors for loss to a corporation due to their mismanagement is an asset of the corporation and any recovery on such a cause of action belongs solely to the corporation. The stockholder in an action of this kind is only a nominal plaintiff, the

---

[2] Some federal jurisdictions have also inferred the "continuous ownership" requirement from the procedural requirements of Fed R. Civ. P. 23.1(a) (requiring plaintiffs in a derivative action to "fairly and adequately represent the interests of shareholders . . . who are similarly situated in enforcing the right of the corporation or association"). *See Quinn v. Anvil Corp.*, 620 F.3d 1005 (9th Cir. 2010). "[T]he continuous ownership requirement stems from the equitable nature of derivative litigation which allows a shareholder 'to step into the corporation's shoes and to seek in its right the restitution he could not demand in his own.'" *Lewis v. Chiles*, 719 F.2d 1044 (9th Cir. 1983) (quoting *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 548 (1949)). South Carolina adopted Rule 23.1 as S.C. Rule Civ. P. 23(b)(1). Rule 23(b)(1), which allows "'courts called on to interpret the new South Carolina rule [to] have a large body of federal precedent from which to draw.'" *Carolina First Corp. v. Whittle*, 539 S.E.2d 402, 407 (S.C. Ct. App. 2000) (quoting S.C. Code Ann. § 33-7-400 South Carolina Reporters' Comments (1990)); *see also* S.C. Code Ann. § 33-7-400 providing that "derivative suits may be maintained on behalf of South Carolina corporations in federal and state court in accordance with the applicable rules of civil procedure"). The court need not address the genesis of the continuous ownership rule, as the same result is reached under the procedural prerequisites of Rule 23.1(a) as under South Carolina's common law articulated in *Johnson*.

ELECTRONICALLY FILED - 2019 Sep 03 7:51 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621

corporation being the real party in interest." *Johnson*, 69 S.E.2d at 588 (citing cases). By virtue of the merger, the asset represented by the within derivative litigation vested in Dominion. *See* S.C. Code Ann. § 33-31-1105(2). It is Dominion's prerogative to pursue an action against Defendants.

CONCLUSION

For the reasons stated, Defendants' motion for judgment on the pleadings (ECF No. 172) is **granted**. The complaint is dismissed without prejudice for lack of standing.

IT IS SO ORDERED.

/s/ Margaret B. Seymour
Senior United States District Judge

Columbia, South Carolina

August 26, 2019

B|E|S BRAGAR EAGEL & SQUIRE, P.C.

Lawrence P. Eagel
885 Third Avenue
Suite 3040
New York, NY 10022
Tel: (212) 308-5858
Fax: (212) 486-0462
eagel@bespc.com

January 29, 2018

VIA EMAIL

The Honorable J. Mark Hayes, II
Circuit Court Judge
Spartanburg County Courthouse
180 Magnolia Street
Spartanburg, SC 29306

Re: *R. Wayne Todd, Derivatively on Behalf of SCANA, Corp. v. Kevin Marsh, et al.*, Civil Action No. 2017-CP-40-06621

Dear Judge Hayes:

We represent plaintiff Wayne Todd ("Todd"), and write to address two motions pending before Your Honor: (i) the Motion of Plaintiffs Firemen's Retirement System of St. Louis ("Firemen's") and John Crangle ("Crangle") (together, the "Harpootlian Plaintiffs") to (1) Consolidate Related Actions; (2) Appoint Richard A. Harpootlian, P.A. as Lead Counsel; (3) Appoint Robbins Arroyo LLP as Co-Lead Counsel; and (4) Appoint Griffin & Davis, LLC as Liaison Counsel (the "Leadership Motion"); and (ii) Defendant SCANA's Motion to Stay Derivative Litigation Pending Resolution of Parallel Proceedings ("Motion to Stay").

Brief Procedural History

Presently before the Court are three related derivative actions filed for the benefit of SCANA Corporation ("SCANA" or the "Company").[1]

On January 11, 2018, the Harpootlian Plaintiffs filed the Leadership Motion, seeking to be appointed lead counsel to the exclusion of Todd. The Harpootlian Plaintiffs also filed an Amended Stockholder Derivative and Class Action Complaint for Breach of Fiduciary Duty, Waste of Corporate Assets, and Unjust Enrichment (the "Amended Complaint"), which added direct claims on behalf of SCANA's public shareholders challenging the proposed transaction announced on January 3, 2018 whereby Dominion Energy, Inc. ("Dominion") will acquire SCANA in a stock-

[1] Civil Action No. 2017-CP-40-05791, Sept. 26, 2017 (the "*Crangle* Action"); Civil Action No. 2017-CP-40-06621, Oct. 30, 2017 (the "*Todd* Action"); and Civil Action No. 2017-CP-40-07547, Dec. 13, 2017 (the "*Firemen's* Action" and, collectively, the "Related Actions").

for-stock transaction (the "Proposed Transaction").[2] On January 16, 2018, SCANA filed the Motion to Stay.

Consolidation is Not Appropriate

As briefly discussed on the January 16, 2018 teleconference, because the Amended Complaint adds direct claims not present in either the *Crangle* Action or the *Todd* Action, consolidation is not proper under Rule 42(a) of the South Carolina Rules of Civil Procedure ("SCRCP"). In addition, asserting both derivative claims and direct claims in the same action raises the concern of an "inherent conflict of interest" for the Harpootlian Plaintiffs' counsel which may ultimately lead the Court "to bifurcate[e] the litigation or dismiss[] either the direct or derivative claims." *In re Ebix, Inc. Stockholder Litig.*, 2014 Del. Ch. LEXIS 132, *53-54 (Del. Ch. July 24, 2014). South Carolina courts look to Delaware law to interpret South Carolina corporate law.[3]

Stay of Derivative Claims is Appropriate

Plaintiff Todd does not oppose the Motion to Stay insofar as a stay of the derivative claims is appropriate given the announcement of the Proposed Transaction, which if consummated likely will moot the derivative claims. Thus, litigating the derivative claims while the Proposed Transaction is pending would be an enormous waste of judicial resources, and Todd's derivative claims will not be prejudiced by a stay. Todd is currently in discussions with Defendants regarding a stipulation concerning a stay of his derivative claims until a Registration Statement is filed regarding the Proposed Transaction.

Motion to Appoint Lead Structure is Premature

As the Court noted on the January 16, 2018 teleconference, any decision or further briefing on the Leadership Motion will wait until after the Motion to Stay has been decided, which if granted will obviate the need to appoint a leadership structure at this time. Because Todd believes that a stay of the derivative claims is appropriate and that consolidation of the Related Actions is not proper given the direct claims in the Amended Complaint, we respectfully submit that appointing a leadership structure is premature. If the stay is granted, there is no reason to address the leadership structure, thus conserving judicial resources and saving counsel for the parties from expending unnecessary time and expense.

---

[2] The *Firemen's* Action is not properly before the Court, as the verification filed with the original derivative complaint is not notarized, in violation of SCRCP 11, and the Amended Complaint is not verified at all, in violation of SCRCP 23(b)(1).

[3] *See Carolina First Corp. v. Whittle*, 539 S.E.2d 402, 413 (S.C. App. 2000) (applying Delaware law to shareholder derivative action against directors of South Carolina corporation); *Santee Oil Co., Inc. v. Cox*, 217 S.E.2d 789, 791 (S.C. 1975) ("the courts of Delaware, the home of so many corporations, have had fairly frequent occasion to define and apply such term under corporation law similar to ours").

We remain willing and able to work with the Harpootlian Plaintiffs and should the Court deny the Motion to Stay, we request that, at the appropriate time, if we cannot reach agreement, the Court allow plaintiff Todd the opportunity to respond to the Harpootlian Plaintiffs' Leadership Motion.[4]

Counsel is available to answer any questions the Court may have.

Respectfully submitted,

Lawrence P. Eagle

cc: Ben Carlton
Michael R. Smith
Alexandra S. Peurach
I.S. Leevy Johnson
George C. Johnson
William A. Coates
Anne M. Tompkins
Kyle DeYoung
John A. Jordak, Jr.
William R. Mitchelson, Jr.
James F. Wyatt, III
Robert A. Blake, Jr.
Richard A. Harpootlian
Christopher P. Kenney
Herbert W Louthian, Jr.
M. David Scott
James M. Griffin
Margaret M. Fox
Steven J. Pugh
Craig W. Smith
Brian J. Robbins
Gregory E. Del Gaizo
Melissa A. Fortunato
Todd H. Henderson

[4] Plaintiff Todd's counsel, Bragar Eagle & Squire, P.C. has a proven track record of successfully litigating shareholder derivative claims throughout the country, including securing the largest derivative lawsuit settlement in history when the Delaware Chancery Court approved a $275 million settlement in *In Re Activision Blizzard Stockholder Litigation*, Cons. C.A. No. 885-VCL (Del. Ch. May 21, 2015).

STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

COUNTY OF RICHLAND

2017-CP-40-5791

John Crangle, et al

vs.

Kevin March, et al

Spartanburg, South Carolina

February 15th , 2018

Before the Honorable Mark Hayes

APPEARANCES

For the Plaintiffs: Harpootlian, Eagel

For the Defendants: Pugh, Smith

Reported by: Michael C. Watkins

Official Court Reporter

THE COURT: This is court cases of John Crangle, et al, versus Marsh, et al, and SCANA Corp. I have that we're here on some motions, I believe we're here, and this is my list, if y'all want to do them in a different order I will be more than happy to consider it, but I've got first we have plaintiff's motion to consolidate?

MR. HARPOOTLIAN: Yes, sir. I don't believe there's any objection, is there, I. S.? Do you object?

MR. JOHNSON: We do not object. Thank you for recognizing me, Mr. Harpootlian.

THE COURT: All right. Who is going to argue that one?

MR. HARPOOTLIAN: I think, Your Honor, that there's no objection so --

THE COURT: There's no objection, I was wondering if it would be -- so there's no objection to not only doing it first but also no objection to the motion.

MR. HARPOOTLIAN: Well, this is the co-plaintiff --

MR. EAGEL: Lawrence Eagel, if I may, Your Honor?

THE COURT: Yes, sir.

MR. EAGEL: We represent Wayne Todd in the Todd litigation. Our understanding was that any leadership and/or motion to consolidate was not going to be argued today, that today was going to be the argument concerning the motions for a stay, and that any arguments concerning consolidation or leadership were going to be put off for a later date. I don't

believe anybody filed papers on that. We don't -- as a practical matter there are a number of cases before this Court both with respect to this derivative case, there's also cases involving merger -- a separate merger case, and so I think our understanding was that the issue of consolidation was going to be deferred and not handled today, I think we put it in a letter.

THE COURT: All right.

MR. PUGH: Good morning, Judge. Steve Pugh with Richards/Plowden here for the SCANA defendants and some more defendants. With me is my cocounsel Michael Smith with King and Spalding, we represent the same parties, I think he may have just a few thoughts on it.

MR. HARPOOTLIAN: Your Honor, before he speaks our understanding was that we were only going to deal with the stay today and deal with consolidation later on so we don't have a problem with that if y'all agree with that.

MR. SMITH: That's fine. If we want to kick that can -- I mean, it's really up to the Court. I think that the cases should be consolidated, SCANA filed its motion for consolidation quite awhile ago, back in November, and it's clear the cases, the three derivative cases assert the same claims on behalf of the same parties, they should be consolidated. Two of the plaintiffs agree with that, one case has objected to that. I'm happy to proceed as however Your

Honor would like, we can argue that today or take it up at a different time.

THE COURT: Okay. Well, I mean, if y'all are prepared just to argue the stay I'll be more than happy to hear that as well. My understanding, though, is that the stay was being asked in order to stay the discovery pending the decisions on the issue of consolidation.

MR. SMITH: Your Honor, SCANA brought the motion to stay, we're seeking to stay proceedings in all of the cases, certainly you could consolidate them and take up the stay motion, but it wasn't just as to a particular discovery. We actually filed two motions, I guess, we filed a motion to stay all proceedings in all three of the derivative cases, and then one of the cases, the Crangle case, they had begun to issue subpoenas and we filed a motion in the alternative for a protective order, if the cases were not stayed a motion for a protective order pending consolidation, appointment of a lead plaintiff and all of that. We took the position that we shouldn't pursue any discovery until the cases were consolidated and lead plaintiff is chosen.

MR. HARPOOTLIAN: Your Honor, we take the position, we just argue the stay motion and the protective order motion, once you made your decision we can deal with that. We're not taking any aggressive action on those subpoenas until Your Honor has an opportunity to hear the protective order motion.

THE COURT: Okay. Well, then let's do the protective order motion.

MR. HARPOOTLIAN: Well, no, no, the stay motion.

THE COURT: Well, his stay motion I understand is an alternative for a protective order.

MR. SMITH: No, it's the other way around, I'm sorry, Your Honor. The stay is the big motion that I think we're all ready to address here this morning and it may obviate the need to address the protective order motion.

THE COURT: Okay. So who is going to argue that?

MR. PUGH: Your Honor, Steve Pugh again on behalf of SCANA. I'm going to just kind of give a brief outline of what brings us here today. Again, I'm joined at counsel table by Michael Smith of King and Spalding and I. S. Leevy Johnson, we represent the same defendants, those being SCANA and certain directors on the board. Briefly, Your Honor, as we're all aware, what brings us here was in 2007 the legislature passed what's called the Base Load Review Act which was the act upon which these two additional nuclear reactors were being built, and that act was specifically enacted to "spur investment, new clean energy and provide for recovery of prudently incurred costs." As a result of the passage of that Base Load Review Act by the legislature SC&G, a 55 percent -- or SCANA, a 55 percent owner of the project, and Santee Cooper, a 45 percent owner of the project, entered into what's called an Engineering

Procurement Construction agreement, a EPC with Westinghouse and Chicago Bridge and Iron as the main contractors for that project. Keep in mind, Your Honor, this is with regard to reactors two and three at the Jenkinsville site. Reactor one has been in operation since the late 80's again with the same ownership, SCANA 55 percent, Santee Cooper 45. Over the course of the next however many years, four or five, obviously this project had to seek approval of the PSC, and for the PSC to approve it it had to be determined that the project approved was reasonable and necessary. As you can well imagine that seeking to build two new nuclear reactors in South Carolina in 2008 or 2009 drew some strenuous objection, some of which was the Friends of the Earth Group and a group called the South Carolina Energy User Commission. Those cases went all of the way to the South Carolina Supreme Court, came back to the PSC. And so between 2008 and 2016 there were five separate PSC proceedings regarding updates or changes in the project's scheduled, and for each of those to be approved the PSC had to determine that certain costs, overruns and construction delays were due to outside factors and not caused by imprudence by SCANA or Santee Cooper in their management, and therefore the PSC on each occasion approved those requested updates and changes. Between 2009 and 2016 there were also eight separate rate proceedings filed in the PSC, and again the PSC through the Office of Regulatory Staff had to determine the project was

being constructed in compliance with cost schedules previously determined to be reasonable and prudent by the PSC and each one of those on each occasion was prudent. Now, unit number two, concrete was poured in March of 2013, and that date is recognized as the date on which construction was deemed officially under way, unit number three was about eight months later, November of 2013. We're all aware based on what we've read in numerous and sundry sources, some of which may be true and some which may not be so true, that there were a number of issues with this construction. There were issues with the consortium that was building it between Westinghouse and Chicago Bridge and Iron. In October of 2015 Fluor, a local company in the upstate, was brought in to replace Chicago Bridge and Iron, and thereafter the EPC became a fixed price contract in an attempt to address some of the prior issues. Unfortunately in March of 2017 Westinghouse went bankrupt. Westinghouse's parent company is Toshiba or Toshiba, depending on how you want to pronounce it, and I think we're all well aware of the -- and I do some work for Japanese companies, I think we're all aware of the Japanese view of nuclear power and plant and construction following the unfortunate incident with Fukushima. In June of 2017 a group called Friends of the Earth filed another PSC proceeding seeking rate relief, and on July 31 of 2017 the public announcement was made by Santee Cooper and SCANA that the project being constructed will be abandoned.

Now, as a result of that what has happened quickly since July 31? On August 1st there was a PSC abandonment prudency determination filed by SCANA, that was subsequently withdrawn upon request. We have had since that time five ratepayer class actions filed in state court. It's no secret that we, being SCANA, have also received a number of subpoenas either from the U.S. Attorney's Office, we have had a SLED investigation and we've received subpoenas from the Securities and Exchange Commission. The Crangle case that we're on was filed on September 26th of 2017. As Your Honor just heard in talking about the potential consolidation, there are at least two other matters, that being Todd, which Mr. Eagle and Mr. Newman represent, and they have filed or sent a letter to the Court consenting to the relief sought by this motion, and then also a case called Firemen's Retirement Systems of St. Louis. There have also been subsequent ORS proceedings, or Officer Regulatory Staff proceedings, filed with the PSC. And also, Your Honor, we have a number of federal securities actions that were filed, those are pending before the United States District Court Judge Seymour, those cases are Norman Evans Fox, West Palm Beach Firefighters. There have also been several federal derivative actions filed, those were filed in November of last year, those are the Whitmire and Wixdrum (phonetically) cases. Finally, Your Honor, there are -- at last check I think there are somewhere in the ballpark of 300 to 400 million dollars in

mechanics liens that have been filed. Perhaps sometimes Your Honor is mistaken with Judge John Hayes but I am here to tell you thankfully you're not Judge Hayes. Judge Hayes has the mechanics lien actions, and the last time they had a meeting or hearing they had to have it at the bar conference room, it was the only thing big enough to hold that many lawyers. There are also the ratepayer cases, those are in front of Judge John Hayes. On January of this year the Dominion merger was announced. There's one other case I forget to tell you about, Judge, and that is filed by Fairfield County against SCANA on what's called a fee in lieu of taxation agreement. Why that's important is Fairfield County and SCANA had entered into an agreement prior to construction that "Hey, we're not going to tax you ad valorem taxes while this project is being built, and at the end of the project you're going to agree to pay us 75 million dollars a year for 30 years. That lawsuit is now seeking 2.25 billion dollars times three because of South Carolina Unfair Trade Practices Act, plus attorneys fees. January 12 of 2018, Your Honor, the PSC joint abandonment prudency determine was filed. And then finally a case was filed on January 23 of 2018 by the City of Warren Police and Fire Retirement System, that was filed in state court. I presume, Your Honor, that that case will make its way to you in due course, and that is a breach of fiduciary duty action like the ones we're here today. So that is kind of the lay of the

land, Judge, of what got us here and why SCANA believes that it is absolutely critical that these cases be stayed, because to prevail here the plaintiffs would have to seek a -- to make a record through discovery, that would be irreparably harmful to SCANA in the numerous other proceedings that I outlined. So proceeding here the plaintiffs would seek to make a record against SCANA that would then be used by others in the other pending cases to the detriment of SCANA. As to the substance or meat of the motion, Your Honor, I'll turn it over to my cocounsel, Mr. Smith.

MR. SMITH: Thank you. Good morning, Your Honor. So just to follow-up on what Mr. Pugh said, just to lay some additional context for what these suits are, these three suits before Your Honor are shareholder derivative suits, they are brought derivatively by shareholders but in the interest of, on behalf of, for the benefit of SCANA corporation. So they assert claims which belong to SCANA, they seek relief which will go to SCANA, not to individual shareholders but to SCANA and SCANA would also bear the costs of the litigation. Now, individual shareholders can't make decisions who SCANA gets to sue, that is a decision for the company's board of directors, for the company's management team. And we have already filed the motion, we SCANA, and the defendants have filed a motion pointing out that the plaintiffs failed to make a demand on the board, that the board take up this matter and we do not believe

they have sought legal excuse to do so, but that's for another day and we're here today on the stay motion. So these cases, which are again on behalf of SCANA and for the benefit of SCANA, they seek to threaten SCANA with billions of dollars of liability in these others proceedings that Mr. Pugh outlined, the PSC proceedings, the ratepayer class actions, the 10B5 class actions, the securities class actions, these tax matters, the government investigations by SLED, by DOJ, SEC. They really depend in significant part on liability being established in those other actions, and more importantly and the fundamental reason we're seeking a stay here is because going forward with these derivative cases right now when the company is seeking to defend itself against potentially billions of dollars of liability in these other actions is not in the best interest of SCANA. So I just want to highlight one particular paragraph from one of the complaints that really narrows down and shows how these derivative cases depend on and are really based on liability being found in these other proceedings, and that's paragraph 154 from the Firemen's case, what we call the Firemen's case, I think it's the name of the plaintiff is the Firemen's Retirement System of St. Louis. So in paragraph 154 the complaint alleges that as a direct and proximate result of the individual defendants actions SCANA has expended and will continue to expend significant sums of money. These expenditures include but are not limited to; A, costs

incurred from defending and paying any settlement in the class actions for violations of federal securities laws; B, costs incurred from defending and paying any settlement and various pending litigation filed by SCANA's ratepayers; C, costs incurred from any criminal or civil damages as a result of actions filed by the South Carolina Attorney General, or the South Carolina -- U. S. Attorney's Office for the District of South Carolina; and D, costs incurred from the SEC, the South Carolina State Senate and SLED investigations. So, Your Honor, it is clear that these derivative suits are primarily based on these other proceedings. It's clear that going forward in this proceeding will cause harm to the company, the company whose benefit on behalf of these cases are brought, and we seek to have them stayed for these reasons. So the primary reasons are the prejudice to SCANA, going forward now will waste the Court's resources as well as the parties' resources, and then finally there's really no prejudice to the plaintiffs from the stay. So I am going to quickly just go through those particular things. So prejudice to SCANA. These plaintiffs because these cases are brought on behalf of SCANA, they are fiduciaries to SCANA, they are obligated to act in the best interest of SCANA. And we think we have shown here that it's not in the best interest to go forward, because proceeding here will actually undermine the company's defenses in these particular -- these other four, five or six actions that we've

talked about. Let me give you just a specific example. To prevail on their claim here plaintiffs have to prove their allegations that the SCANA board members and directors officers lacked integrity, that they made false and misleading statements regarding the project status, regarding construction schedules and the like. So in, for example, paragraph eight of the Firemen's complaint, amended complaint, it alleges that SCANA's fiduciaries created a false impression for investors and state regulators that the project was running smoothly within a reasonable budget and on schedule. As the goals and price continued to shift the individual defendants continued to make false and misleading statements and omitted material information about the nuclear project's progress. So they will have to prove that. They will have to develop evidence on that, that's the same evidence and impugning the integrity of SCANA's directors and officers is exactly what would cause SCANA to have liability, billions of dollars of liability in the pending parallel proceedings, before the PSC, ratepayer class action, security class actions and other government investigations. So it's clearly not in the best interest of SCANA to have these cases proceed at this time. Secondly, nor is it efficient nor is it a good use of Court's resources and the parties' resources to move forward on these cases. So as we pointed out through my reference to paragraph 154 of the Firemen's case, the damages and the liability, virtually all of

the damages that they seek in this case are dependent on the outcome of these other proceedings. So let's let these other proceedings play out and they'll either be dismissed, they'll either result in some kind of finding or adjudication and then that can be addressed at a later time. Moving forward now not only is against SCANA's best interest but it's unnecessary, it's inefficient, it really raises this specter of inconsistent rulings, findings, adjudications, endless fights over well, what is the preclusive effect of this fact or that fact, and it's just not in the parties' best interest. Second, and this is a point made very clearly by Plaintiff Todd, the plaintiff in one of these three cases -- by the way, Plaintiff Todd agrees that it makes sense to stay these actions -- but Plaintiff Todd points out that there is a proposed merger pending between Dominion and SCANA that was announced in January, it offered a premium to SCANA shareholders of 30 percent based on the then trading prices of the stock. Just yesterday Dominion and SCANA filed with the Securities and Exchange Commission a lengthy, lengthy document, registration statement and proxy solicitation materials that are the first step in getting the SCANA shareholders the opportunity to vote as to whether or not they want to accept this merger. But as Plaintiff Todd points out, if this merger goes through, if the SCANA shareholders approve the merger and the other conditions to the merger are met and it goes forward, these derivative

cases evaporate, they go away, plaintiffs lose their standing to maintain these derivative actions. The claims don't go away, the ownership of those claims just goes to another party. But it's absolutely inefficient and not in anybody's best interest to spend time and money litigating these cases, cases that, by the way, are going to be contrary to SCANA's best interest when in just a few months the merger may occur and these cases just go away and all this work, all of this time, effort, energy and money will have been for no use or purpose whatsoever. So that's the second reason is because of the inefficiency. And then finally, when the Court has a request for a stay it is required to balance the hardships. We've outlined for you the hardship to SCANA, we've outlined to you the hardship frankly to the Court and all the parties dealing with these cases prematurely. But finally there really has been no identified prejudice to a stay. The plaintiffs, at least the plaintiffs who were opposing the stay, mistakenly thought that SCANA was seeking to stay not only the derivative claims, which is the only focus of the motion, but claims challenging the Dominion/SCANA merger. We're not seeking to stay those claims. Those claims will go on a separate track, we're not seeking to stay those. That's the only prejudice they identified and we're not seeking that, so there's no prejudice there. SCANA has undertaken enormous efforts to preserve all of the documents that relate to the matters at

issue in this suit and frankly in the umpteen other ongoing proceedings, and there's no concern over loss of evidence. Believe me, an abundant record is going to be made in all of these proceedings about what happened and who knew what and when. So for all of these reasons, Your Honor, the prejudice to SCANA going forward at this time with this derivative litigation, the waste and inefficiency of the Court's and the parties' resources in dealing with these cases now, and the lack of prejudice to plaintiffs SCANA requests that its motion for a stay be granted. Thank you.

THE COURT: All right. Thank you, sir.

MR. HARPOOTLIAN: Please the Court, Your Honor? Dick Harpootlian for the plaintiffs except for the Todd plaintiff whose has agreed to go along with the stay. Your Honor, I have heard several things in the last few minutes that are facts that were not contained in the pleadings that he's asked you to take judicial notice of, I suppose. But this is about a stay and we've done no factual discovery, and the burden is on -- there's no balancing test here, the burden is clearly under the Tally case -- and by the way, as you go through these briefs, look for how many South Carolina cases were cited by either side. Defendants, zero. Plaintiffs cite the Tally case and the Lexington Water case, both of which set out with the standards in South Carolina, not Georgia, not Delaware, not Oregon, but South Carolina. And it's very clear from the Tally

case that a stay is "properly only under the most exceptional circumstances." In Carolina Water while the granting or refusing of a stay is discretionary, a stay should "be exercised with caution after balancing competing interests." Now, the burden is on the movant to show how it would be prejudicial, and let me -- and it is fascinating to me that -- and, of course, we found this out in reply, that they don't oppose the stay on what I'm going to call the merger lawsuit, I think you could call it all kinds of things, as opposed to derivative lawsuit. And I think what's important about that is it just shows how disingenuous SCANA is being with the Court. The merger, Your Honor -- and two things, one it cannot happen, cannot go into effect until January of 2019, that will be the earliest day if everything went according to plan. And Your Honor reads the newspapers -- and again, these are facts that are not in the record, it's got a bumpy road at best, and there's a significant chance it won't happen. The same people -- and we're not suing SCANA, they're right about that, in the derivative suit, they're a nominal defendant, we're suing on their behalf, in the merger lawsuit SCANA is not even mentioned. We're suing the board of directors and the managers who we believe stole money, put it in their pocket to the detriment of SCANA which ends up being to the detriment of the stockholders and ultimately to the detriment of the ratepayers. We're the only lawsuit, Your Honor, in state court suing to put

money into SCANA, not take it out. Now, there seems to be some concern that if we develop -- and these are facts we'll be developing, whether they're preclusive or non-preclusive, the facts are the facts. If I take the deposition of any one of these defendants and obtain their testimony under oath or a document, that document is not going to change, and I suspect their lawyers are at least going to tell them not to change their testimony under oath. We have a terms for that, gentleman and ladies that are not from here, it's called perjury, lying under oath. So the facts are not going to change, and somehow letting somebody else develop those same facts at some later date is going to be better for somebody. Well, it's not better for SCANA. It may be better for those individuals who he mentions that are being investigated by some criminal authorities, attorney general, U.S. attorney, whoever, and it may be better for them but it's not better for SCANA. We're suing to get back -- and by the way, the lawsuit by Mr. Crangle is the only lawsuit that asks for the return of the executive compensation that these folks, these board members and managers got, mostly the management people, tens of millions of dollars for doing such a great job on developing these power plants. We now know they weren't doing a great job and they knew they weren't doing a great job. These folks drove the company in the ditch and they want you to stay our lawsuits against those individuals to -- so that somewhere,

somehow, some other court can deal with this or put it off. I might also point out that we're trying to get our money from two sources; one would be the individual assets by -- and by the way, there's billions of losses, billions of dollars of losses, the individual assets of the defendants represented by the lawyers here today, the folks we believe submitted documents that were untrue took steps to snooker regulatory authorities to put money in their pocket, they got money. The second place we can get money is there is insurance, and we're not in front of a jury so I can say this, we believe hundreds of millions of dollars of insurance that we can get and put it back in SCANA to help them stay afloat, although based on a number of lawyers I see today, Your Honor, they're getting bled on these issues to a large extent, they will have costs involved. But staying us isn't going to diminish those costs. And by the way, these folks have filed motions to stay all the lawsuits in federal court, not all of them but most of them, so they come here telling you some other judge in some other place at some other time is going to deal with this. The other point is this, they did not move to stay the merger case. In the merger case all the evidence that there's needed in the -- well, the evidence that we would show of malfeasance on the part of these folks in the derivative case will be shown, will have to be developed in the merger case because they put no value on these cases in the merger, number one. Number two,

they have agreed to protect and indemnify these defendants in the merger for any -- we believe we read the merger agreement correctly to say they're prohibited from settling individual defendants, SC&G is prohibited from settling any of these cases before the merger. In addition to that, I find this fascinating, SC&G has agreed to pay $250 million to Dominion if the deal doesn't go through. If the PSC doesn't approve it or if the legislature doesn't approve it, if the shareholders don't approve it, $250 million, for what? For what? They've got no skin in the game. They've spent a lot of money on advertising, I see it whenever I turn the TV on, you don't see it up here because you're Duke Power but in Columbia we see it every 15 minutes, and it says look, if this gets approved the average ratepayer is going to get $1,000. Well, I mean, we need to investigate all of that, but to do that, to value this -- the derivative claim as part of the merger claim, we're going to have to do the same discovery. And this is like somebody that asks -- and Your Honor, you've had these, somebody says let's bifurcate discovery in a class case, we'll just do class discovery and then we'll do merits discovery or vice versa. And what happens in that, and I've done a bunch of them, is that you go to a deposition and you ask a question, objection, that's merits discovery, not class, and then we have to get the judge on the phone or we have to make a motion to determine what's merits, what's class. Here it is going to be

what's merger, what's derivative if you grant the stay on the derivatives. And, Your Honor, we might as well go ahead take up a couple of rooms in this courthouse to go ahead and do the depositions so you can come down and rule on these as we're doing the depositions because it's not going to be more efficient, it's not going to be more -- matter of fact, it's going to be so much less efficient that we'll never get anything done. I've seen it happen in many, many class cases, and most judges I deal with now don't bifurcate discovery so they don't have to be a referee on a day to day basis. Now, a couple other points I would like to make. One is that in this process of trying to find the liability and assets of the individuals, again, we're not looking to get money out of SC&G, we're going to be going through a process that will be replicate, I agree, or maybe not, maybe -- you know, in federal court what they ought to do is agree to use the record we develop in any of these other cases, there's nothing to prohibit them from doing that if they want to. But for somehow to argue that we have what are -- the facts we develop have some preclusive affect on the facts they may develop later on, you know, again, I think the facts will be the facts, if we miss a fact I'm sure somebody else will discover that, but that's not a preclusive affect. Two other things I would like to say, that if this idea that if you look at the thing that you probably should consider, the possible damage that might

result from granting a stay. Well, possible damage is we're going to be going forward on the merger case and the possible damage is if they again are going to say -- they're going to object and say that goes to the derivative case and we're not going to be able to get in the derivative case to prove the merger case so we have the prejudice. This is going to prejudice our ability to develop the merger case in a rational way, and Your Honor, you're going to be a referee on that every day. The hardship and equity a party may suffer going forward without a stay. SC&G. It is sort of interesting to me, SC&G said we're going to be harmed by this, the real people harmed by this are the defendants who ripped off SC&G that we're trying to get their money back into SC&G and we're trying to get whatever insurance they have into SC&G. And then the third one is the orderly course of judicial justice measured in terms of simplifying or complicating of issues proved and questions of law that result in the stay. Well, the delay isn't going to in any way assist anything -- I don't quite understand SC&G saying, "This is going to cost us more money, this is going to some how -- us developing the facts in a case -- and by the way, there may be at some point after you deny their motion to dismiss and after we get these things consolidated where there are evidentiary issues Your Honor can rule on and deal with as we go on a broad basis, not in the middle of a deposition and not on motions to compel, but on maybe motions to compel where

Your Honor will have an opportunity to develop those evidentiary issues. But they're just saying pulling facts out of the sky this may happen, that may happen, this could happen, this might be a problem. Your Honor, you've got this case, we filed first, we filed earliest, and in these derivative cases they're talking about in federal court, most of those cases are about for a very small sliver of SC&G stockholders who are claiming that because of the conduct of these folks the stock dropped and they suffered a loss from point A to point B on the calendar. That's not our lawsuit, that's a different lawsuit. And in addition to that there are other securities cases up there, I'm not about to tell you that I quite understand most of them, but I will tell you this is a pretty simple case. This is a simple, adverse and greed drove these folks to deny the facts, paper over the facts, cover up the facts so they could put money in their pocket. And by the way, if the merger goes through they're going to put more money in their pocket based on the way we read it, but we're not here today to litigate the merger. The only reason I respond to that is that counsel indicates that this is a great deal, going to add value. I don't think so and many of the members of the legislature don't think so, it ain't a done deal and there's no reason to use the argument of stay so the merger goes through which is going to make things better for SC&G. Beg the Court's indulgence.

(Break in proceedings.)

MR. HARPOOTLIAN: Mr. Griffin said I did okay so I guess I'll sit down.

MR. SMITH: Your Honor, brief rebuttal if I can. Well, I think Mr. Harpootlian said he didn't quite understand all of these other cases, and I think that's become clear. Let me just talk about a couple of these other cases because it's important. He mentioned the federal securities fraud class action cases and said that they were small or on behalf of a small sliver of plaintiffs. Those cases seek to recover billions of dollars from SCANA for what they allege to be false and misleading statements about the construction, the schedule, the delays, et cetera, billions of dollars, the ratepayer class action cases seek billions of dollars in past payments that the ratepayers have made under the BLRA towards the project. Same with the ongoing PSC proceedings which involve potentially billions of dollars to SCANA. So they say something, well, like we ought to move ahead because nobody is suggesting that these individuals they're suing, by the way, the directors and officers of SCANA have billions of dollars in assets. What they say is, well, there may be -- of course they don't know this and they say it without any factual underpinning whatsoever -- there may be up to hundreds of millions of dollars of insurance that they want to get. So they're asking for the right to go forward and completely undermine SCANA's

defenses in all of these other parallel proceedings, they want to undermine those defenses, they want to prove their claims that the directors and officers lacked integrity, that they concealed problems with the project, so -- and thereby expose SCANA to potentially billions of dollars of liability so they can recover hundreds of millions of dollars? That makes no sense, Your Honor, and it would be completely prejudicial to SCANA, the group on whose behalf they were supposed to act. So in addition, just quickly responding to some of the other points, they chastise the defense for not citing South Carolina law but they're pulling out no difference between the law we cited and the cases they do. Your Honor clearly has discretion to enter the stay, Your honor clearly has control over these cases and your own docket and no question has the power to enter a stay. They say all this is is about facts, and facts won't change. But, Your Honor, these are facts that, as I pointed out time and time again, will undermine and harm SCANA in these other proceedings. He even said, "Your Honor, they tried to snooker the regulators." That's exactly what is at issue in the PSC, that's exactly what's at issue in the ratepayer class actions, exactly what's at issue in the federal securities class actions that they seek billions of dollars. So he also mentioned that there was a motion to stay in federal court. Yes, we filed the motion to stay the derivative suits. Not only are there these three state court derivative suits,

there are two federal court derivative suits which have already been consolidated into one suit. And yes, we have sought to stay that case for the same reason as these cases. Finally, on the merger claims, that's a different bucket of claims. Those are claims that challenge the board's decision to approve the merger so that the shareholders could decide whether or not they want this premium opportunity to cash out perhaps the only way the shareholders will get value out of their investment in this company. So they want to stop the shareholders from having the opportunity to decide whether or not to accept this premium offer from Dominion, but that's a totally different set of claims. We don't need to get into the history of all of the years of construction and when were there delays and who knew what and when, that's not an issue. What's at issue is is it in the best interest of SCANA shareholders to go forward. Did the board disclose everything fairly in this enormous document that was just filed with the SEC yesterday. So the merger claims will go forward, we're not seeking to stay those. Your Honor, as Mr. Harpootlian referenced, there are two other merger class action cases that we are seeking without any opposition so I believe it will happen, to have transferred to business where I imagine they will be assigned to you. Those cases are going to go forward, we're not seeking to stay those, there's not going to be any impact on discovery in those cases other than the general standard of it has got to be relevant to

the merger cases, so that's not an issue. So Your Honor, in short I heard nothing that refuted the argument that going forward in this action, trying to establish facts that undermine SCANA's position in these other actions, I've heard nothing to say that that won't happen, that our argument about potential prejudice to SCANA are not well taken. You absolutely have heard nothing about the fact that Plaintiff Todd has pointed out that these cases may disappear if the merger goes forward. These cases -- plaintiffs will all lose standing, these claims will have to go away. We've heard nothing about the enormous waste of court resources and party resources to go forward while this merger is pending. And finally, Your Honor, there was really again nothing concrete addressed on plaintiffs -- any prejudice to plaintiff. And for all of those reasons we ask that Your Honor grant SCANA's motion for a stay.

MR. HARPOOTLIAN: Your Honor, briefly. How is not losing standing not prejudicial to the plaintiff? He just said if you stay this long enough the plaintiffs won't have a case left, it seems to me that that's the prejudice at the minimum to the plaintiff. Secondly, and I quote to you paragraph 20 of the amended stockholder derivative complaint filed by Firemen's Retirement System, "The proposed consideration" -- this is paragraph 20 -- "undervalues the company. Though defendants are able to claim the proposed consideration is at a premium at

SCANA's current stock price, that is only because the individual defendants destroyed so much of the company's value by their faithless and illegal acts. The proposed consolidation actually represents a 12.4 discount to the company's stock price before July 31, 2017. This significant discount demonstrates proposed consideration fails to take into account the valuable derivative claims currently being pursued against the individual defendants." So one of the things alleged in the merger cause of action is the defendant's conduct that significantly, and I quote again on -- "The significant discount demonstrates the proposed consideration fails to take into account the valuable derivative claims currently being pursued." Now, we have to prove in the merger case the value of the valuable derivative claims, it's the same discovery. It's the class action they want to bifurcate by merits and class. It is again going to be one discovery dispute -- we're agreeing that they have not asked to stay the merger case, that we're going to -- because of the allegations in this complaint have to prove that the individual actions were -- would have been for the X, and that that devalued and were not considered in the merger, it's clear. Secondly, in his analysis of these other cases he says, well, facts are facts. Facts are facts, documents are documents. Now, how they're used in different cases, I agree, would be perhaps different. But the stockholder derivative claims in federal

court, the ones that are not similar to this but they're trying to stay, if they want -- if they go forward and they take the deposition of a witness, they'll have -- either we go first or they go first, it's very common, and we'll have that -- we may concede that if they'll allow us to use that deposition, or they may conceded that we use our depositions. It's no prejudice to them -- and again, the stay -- they say we want to stay this case until the merger goes through and their claims are mooted. Really? He said a few months, can't be before January of 2019. So, I mean, one minute it's three months, the next moment -- I didn't hear them address that January of 2019, which is in the merger agreement. So we believe that -- and again, in terms of the South Carolina cases, the Tally case especially it has got to be exceptional circumstances and they have not met that. The prejudice only acts against the plaintiff by losing their standing to bring the case. Thank you.

MR. SMITH: Briefly, I guess we're the movant so I'll try to get in the last word here. He said that there would be prejudice to the plaintiffs because they'll lose standing. I'm afraid plaintiff's counsel forgets momentarily that this claim is not his claim, it's not his plaintiff's claim, it is SCANA's claim and it is for SCANA, and it's only plaintiff's standing to maintain the claim, not the claim itself that will be extinguished by the merger, so that's not prejudice --

THE COURT: Let me ask you a question. With your theory of wanting the stay then any derivative lawsuit will always be stayed.

MR. SMITH: No.

THE COURT: If the allegations being made through the derivative lawsuit led potentially to liability of the corporation.

MR. SMITH: No. And let me explain.

THE COURT: All right.

MR. SMITH: A derivative suit as we've discussed is for the benefit of SCANA, it seeks to assert SCANA's claims. So its only win in our circumstance, we've got this whole landscape of other claims which unlike this claim are against SCANA.

THE COURT: Due to the fact of allegations that the management of SCANA acted wrongfully.

MR. SMITH: Those are allegations in all of those parallel proceedings.

THE COURT: And so in any type of litigation that involved those types of allegations you would always stay the derivative suit.

MR. SMITH: You would also stay them if the nature of the derivative suit was such that it would establish facts and positions that would harm the company while it's trying to defend these other cases that seek to impose billions of

liability on them. In that circumstance, yes, but that's not always the case in derivative litigation. Here we've got this incredibly unique situation where there are multiple proceedings seeking to impose billions of dollars of liability on SCANA, and they come in and they say, "We want to essentially establish facts that are going to harm SCAN in all of these other proceedings.

THE COURT: In ruling on this motion to stay, is there a standard of review that I have to apply that limits me to the four corners of the complaints that have been filed?

MR. SMITH: I think you should in deciding that. We, of course, have not only -- no, not the four corners of the complaint because we've attached to our motion and you're entitled to consider all of these other proceedings; the PSC proceedings, the federal 10B5 class action, the ratepayers class actions, the government investigations. Those are both mentioned in the complaints because that's what they seek. They say as I have cited paragraph 154, they're seeking to recover damages which haven't yet been established in all of those parallel proceedings. So you can consider the four corners of the complaint, you can consider material that we've attached to our motion.

THE COURT: So I guess clarify or ask a better question, then for purposes of this motion I examine the complaint within its four corners and I consider the allegations that are made

to be true.

MR. SMITH: Yes. This isn't a motion to dismiss per se, but you can consider the facts alleged in the complaint, you can consider that the complaint seeks to recover as yet not established damages from these other proceedings, and you can consider the material that we've put in there. So briefly on the other things, Mr. Harpootlian says repeatedly that the merger can't close before January 2019. There is no fact in the record about that, no one knows exactly when this merger will close. He referenced something in the merger agreement and I think he obviously is talking about a termination date, which is like, well, there are certain termination rights if the merger hasn't closed within a year, okay? That isn't saying that the merger cannot close before January of 2019, and he doesn't know that, no one knows precisely when all of the conditions will be met for the merger shareholder approval and certain regulatory approvals. Finally, he addressed again that there are merger claims and that there will be probably -- the merger claims are separate, we're not seeking to stay those claims, he's talking about theoretical discovery fights in the merger action, that's not before us. And, you know, they can go forward with the merger actions once they are consolidated, once a lead plaintiff is appointed and all that has to happen there, but that has no bearing on whether or not to stay the derivative claims. And again, because of the clear prejudice

to the company, the inefficiency in going forward on claims that may evaporate in a few short months, there's no reason to go forward and we respectfully request that the motion for stay be granted.

MR. EAGEL: Your Honor, because I'm here representing Plaintiff Todd, I did want to add our position on the motion is focused mainly on the fact that the case has now shifted to the merger and so that -- and that really should be the focus of proceedings going forward, and the derivative case and that's why we didn't oppose the motion for a stay. Because the motion for a stay was focused strictly on the derivative case, and the derivative case now takes a back seat to the merger litigation. There are, as Your Honor knows, two other litigations that have been brought to your attention, our firm is involved in one of those. There was a quick amendment to add the merger claim to the derivative claims, we filed the derivative claims as did Plaintiff Crangle and we filed on behalf of Plaintiff Todd, the merger got announced after those derivative claims were filed. At that point in time what these plaintiffs chose to do was to quickly amend the complaint and add a direct claim at the same time, it was a derivative claim. There's an inconsistency between the two claims, yet they've added both direct and derivative claims. So we've pointed out that for Your Honor, and we've understood that the motion for a stay was strictly limited to the derivative claims. We don't disagree with Mr.

Harpootlian that yes, there will be some discovery about the fact in the merger case about the facts concerning what is alleged in the derivative case and what the board of directors did to assess the strengths and weaknesses of that derivative claim and to obtain value for that derivative claim, that will certainly be part of the merger litigation, that will certainly be part of the discovery in the merger litigation, and we will seek to do that discovery and that litigation on an expedited basis. That is different than that discovery that is being sought wholesale in the derivative case. There is an issue as to standing, unfortunately we were involved in a case we litigated for years and there was a merger announced, the merger closed, we lost standing and the Delaware Supreme Court said to us, "Counsel, your job is to object to the merger in these circumstances, you're going to lose standing in your derivative cases." So I think for those reasons when we were approached about the motion for a stay and it was explained to us that it was only going to be limited to the derivative claim and not going to be to stay the merger claim, which we think is where the litigation has to be right now we said okay to that. So I wanted to explain what the basis of our position is. We certainly think there's a whole lot of wrongdoing here, we support everything that Mr. Harpootlian said concerning the actions that were alleged and we alleged in our complaint, but we think the focus ought to be on the litigation involving the

merger. Thank you, Your Honor.

THE COURT: All right. Thank you, gentlemen, I'll take a look at it and let you know.

(End of the hearing.)

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
JOHN CRANGLE, derivatively on behalf of SCANA CORP., Plaintiff, v. KEVIN MARSH, GREGORY ALIFF, JAMES BENNETT, JOHN CECIL, SHARON DECKER, MAYBANK HAGOOD, LYNN MILLER, JAMES ROQUEMORE, MACEO SLOAN, ALFREDO TRUJILLO, JIMMY ADDISON, and STEPHEN BYRNE, Defendants, and SCANA Corp., Nominal Defendant.	Civil Action No. 2017-CP-40-05791 **DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS AND MEMORANDUM OF LAW IN SUPPORT THEREOF**

Pursuant to Rule 12(c) of the South Carolina Rules of Civil Procedure, Defendants in the above-captioned action hereby move for judgment on the pleadings as to all claims asserted by the nominal Plaintiffs in this consolidated derivative action on the ground that Plaintiffs no longer have standing to pursue the derivative claims alleged because they are no longer SCANA stockholders.

On July 31, 2018, SCANA shareholders holding greater than the required two-thirds supermajority of SCANA's shares voted to approve the stock-for-stock merger (the "Merger") between SCANA Corp. ("SCANA" or the "Company") and Dominion Energy, Inc. ("Dominion"). *See* Articles of Merger (Ex. A) at 1. The parties received approval of the Merger from the South Carolina Public Service Commission on December 14, 2018, and thereafter consummated the Merger effective January 1, 2019. *Id*., at 2. Upon the January 1, 2019 effective date of the Merger, SCANA became a wholly-owned subsidiary of Dominion and all

outstanding shares of SCANA common stock were canceled and converted into a right to receive shares of Dominion common stock. *Id.* As a result, the nominal Plaintiffs in this case ceased to be shareholders of SCANA on January 1, 2019.

Under unequivocal South Carolina Supreme Court authority, only shareholders who hold stock "continuously" from the time of the alleged wrongs through the conclusion of the derivative litigation have standing to assert derivative claims on behalf of a company. *Johnson v. Baldwin*, 221 S.C. 141, 157 (1952). Accordingly, because Plaintiffs are no longer SCANA shareholders and have therefore lost standing to assert derivative claims on behalf of SCANA, this Court should grant Defendants' Motion for Judgment on the Pleadings and enter judgment in Defendants' favor on all claims in this action.

I. INTRODUCTION

This is a consolidated civil action in which two now-former shareholders of SCANA are asserting derivative claims on behalf of the Company. Plaintiffs are not suing to recover for harms allegedly caused directly to them, but rather are suing derivatively on behalf of SCANA for harms Plaintiffs contend were caused to SCANA by certain current and former officers and directors of the Company. Plaintiffs therefore seek to stand in SCANA's shoes and prosecute derivatively claims which belong to SCANA.

It is black-letter law in South Carolina that a shareholder has no standing to sue derivatively on behalf of a corporation unless he or she ***continuously*** owns shares in that corporation starting from the time of the alleged wrongdoing through the completion of the litigation. *See Johnson v. Baldwin*, 221 S.C. 141, 149–50 (1952). As the South Carolina Supreme Court held, "[i]t is our conclusion that the right of the plaintiff to continue to prosecute this [derivative] action depends upon her retaining her status as a stockholder and if she ceased to be a stockholder, the cause of action abated so far as she is concerned." *Id.* at 151.

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

The plaintiff in *Johnson,* like the nominal Plaintiffs in this case, ceased to be a stockholder of the company at issue as a result of a merger, and, thus, had "no standing" to continue the derivative action on behalf of that company. *Id.* at 158. Here, by virtue of the Merger with Dominion, the nominal Plaintiffs in this action no longer own SCANA stock and consequently have no standing to prosecute the derivative claims on SCANA's behalf. Indeed, in earlier filings in this action, co-lead counsel for Plaintiffs acknowledged that completion of this Merger would divest them of standing to press these claims. Accordingly, judgment on the derivative claims must now be entered in Defendants' favor.

II. STATEMENT OF FACTS

On January 2, 2018, SCANA publicly announced that it had entered into an Agreement and Plan of Merger (the "Merger Agreement") with Dominion. *See* SCANA Form 8-K at 1 (Jan. 4, 2018) (Ex. B); Merger Agreement attached to Articles of Merger (Ex. A). The Merger Agreement provided for a stock-for-stock merger in which SCANA would become a wholly-owned subsidiary of Dominion and SCANA shareholders would receive 0.6690 shares of Dominion common stock for each share of SCANA common stock that they owned. Merger Agreement at 3, attached to Articles of Merger (Ex. A). That merger consideration represented an implicit price of $54.23 per share of SCANA stock—a 36.3% premium—based on SCANA's and Dominion's closing stock prices on December 29, 2017, the last trading day prior to the announcement of the Merger. A vote in favor of the Merger by at least two-thirds of SCANA's outstanding stock was required to approve the Merger. On July 31, 2018, the required supermajority of SCANA stockholders approved the Merger. *See* SCANA Form 8-K at 1 (July 31, 2018) (Ex. C); Articles of Merger (Ex. A) at 1.

Following receipt of the last required regulatory approval from the South Carolina Public Service Commission necessary to consummate the Merger on December 14, 2018, the parties

consummated the Merger effective January 1, 2019. *See* Articles of Merger (Ex. A) at 2; Dominion Form 8-K (Jan. 2, 2019) (Ex. D). Per the Merger Agreement, upon consummation of the Merger, SCANA's outstanding shares of common stock were canceled and Sedona Corp., a wholly-owned subsidiary of Dominion, merged with and into SCANA, making SCANA a wholly-owned subsidiary of Dominion. *See* Merger Agreement at 1, 3, attached to Articles of Merger (Ex. A); Dominion Form 8-K (Jan. 2, 2019) (Ex. D). As a result, SCANA is no longer a publicly-traded company and has no public shareholders. The SCANA shares once owned by nominal plaintiffs no longer exist, having been canceled and converted into the right to receive shares of Dominion common stock.

III. ARGUMENT AND CITATIONS OF AUTHORITY

Because it is beyond dispute that the nominal Plaintiffs are no longer SCANA shareholders as a result of the Merger, the Court should grant Defendants' Motion for Judgment on the Pleadings. "A judgment on the pleadings shall be granted 'where there is no issue of fact raised by the complaint that would entitle the plaintiff to judgment if resolved in plaintiff's favor.'" *Home Builders Ass'n of S.C. v. Sch. Dist. No. 2 of Dorchester Cty.*, 405 S.C. 458, 460 (2013) (quoting *Sapp v. Ford Motor Co.*, 386 S.C. 143 (2009)). "When considering such motion, the court must regard all properly pleaded factual allegations as admitted" and may not typically "consider matters outside the pleadings." *See e.g.*, *Falk v. Sadler*, 341 S.C. 281, 287 (S.C. Ct. App. 2000). However, a circuit court may consider matters that it has judicially noticed without converting the motion into one for summary judgment. *See Doe v. Bishop of Charleston*, 407 S.C. 128, 134 n.2 (2014).

As explained below, the fact that Plaintiffs are no longer SCANA shareholders is subject to judicial notice because both the occurrence of the Merger and its effect of canceling all previously outstanding shares of SCANA common stock are capable of accurate and ready

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

determination through documents filed with governmental entities, the accuracy of which cannot reasonably be questioned. Because nominal Plaintiffs are no longer shareholders, it is clear under South Carolina law that they lack standing to pursue the derivative claims alleged. Judgment on the pleadings is therefore appropriate because the Complaint does not and cannot set forth allegations for which Plaintiffs might be entitled to judgment.

A. The Court Should Take Judicial Notice of the Fact that Nominal Plaintiffs Are No Longer SCANA Shareholders.

Defendants request, pursuant to Rule 201 of the South Carolina Rules of Evidence, that this Court take judicial notice of the Articles of Merger and Merger Agreement and the fact that the nominal Plaintiffs are no longer SCANA shareholders. Under Rule 201, "[j]udicial notice may be taken at any stage of the proceeding" and "[a] court shall take judicial notice if requested by a party and supplied with the necessary information." Rule 201(d), (f), SCRE. Judicial notice is appropriate whenever a fact is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Rule 201(b), SCRE.

In this case, the fact that Plaintiffs no longer own SCANA common stock can be readily and accurately determined based on the Merger Agreement and the Articles of Merger, which have been filed with the Securities and Exchange Commission and Secretary of State of South Carolina, respectively. *See* Merger Agreement, attached to Articles of Merger (Ex. A); SCANA Form 8-K at 1 (Jan. 4, 2018) (Ex. B). These documents reflect that, upon the January 1, 2019 effective date of the Merger, SCANA ceased to be a publicly-traded company and became a wholly-owned subsidiary of Dominion. Merger Agreement, attached to Articles of Merger (Ex. A), at 1, 3. They also reflect that upon the January 1, 2019 Merger effective date, all SCANA shares previously owned by the nominal Plaintiffs were canceled and converted into a right to receive 0.6690 shares of Dominion common stock for each share of SCANA common stock

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

previously owned—leaving the nominal Plaintiffs and all other former SCANA shareholders with no continuing ownership interest in SCANA. *Id.,* at 3. Consequently, the nominal Plaintiffs ceased to be SCANA shareholders as of January 1, 2019.

The case law in South Carolina and elsewhere supports taking judicial notice under these circumstances. Indeed, numerous state and federal courts have taken judicial notice of mergers and their effects based on precisely the kinds of merger documentation SCANA is submitting with this motion under identical or substantially similar rules.[1] *See e.g., Cal. State Teachers' Retirement Sys. v. Blankenship*, 814 S.E.2d 549 (W. Va. 2018) (fact that plaintiffs were "no longer Massey shareholders" was "subject to judicial notice based upon the corporate merger documents on file with governmental entities"); *Kohan Prod. Ltd. v. Comerica Bank*, No. 10–0034, 2010 WL 956402, at *1 n.1 (C.D. Cal. Mar. 11, 2010) ("The court takes judicial notice of the merger agreements under Federal Rule of Evidence 201(d) because they are 'capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.'"); *Chevron Corp. v. Salazar*, 807 F. Supp. 2d 189, 193 n. 5 (S.D.N.Y. 2011) (noting which company survived merger because "[b]oth the Merger Agreement and the Certificate of Merger filed with the Delaware Secretary of State, of which the Court also takes judicial notice, so reflect."); *Miller on behalf of Witness Sys., Inc. v. Gould*, No. 06-2039, 2008 WL 11407240, at *1 (N.D. Ga. Mar. 20, 2008) (taking judicial notice of merger agreement and circumstances surrounding merger "based on documents legally required by and publicly filed with the

---

[1] The relevant portions of Rule 201, SCRE, are "identical to the federal rule." Note S.C. Rule of Evid. 201. Under such circumstances, courts in South Carolina often look to federal interpretations of analogous rules for guidance. *See e.g., State v. Wills*, 762 S.E.2d 3, 12 (S.C. 2014) (looking to federal interpretation of FRE 410 for "guidance" because "Federal Rule of Evidence 410 and our Rule 410 are substantially similar"); *State v. Garcia*, 512 S.E.2d 507, 509 (S.C. 1999) (relying on federal interpretation of FRE 803(3) because the South Carolina rule "is identical to its counterpart in the Federal Rules of Evidence.").

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

Securities and Exchange Commission"); *Roosevelt Irr. Dist. v. Salt River Project Agr. Imp. & Power Dist.*, 39 F. Supp. 3d 1059, 1067 (D. Ariz. 2014) (taking "judicial notice of the fact that Reynolds Metal Company is a wholly owned subsidiary of Alcoa" as "evidenced by Reynolds' Form 8–K . . . filed with the Securities and Exchange Commission").

Indeed, in South Carolina, courts have long approved taking judicial notice of a corporation's public acts based upon public filings of corporate documents. *See Simpson v. S.C. Mut. Ins. Co.*, 59 S.C. 195, 37 S.E. 18, 19 (1900) ("We take judicial notice of the charter of the defendant company, since it is made a public act."); *Parker v. Carolina Sav. Bank*, 53 S.C. 583, 31 S.E. 673, 674 (1898) ("In this case it appears that the 'Act to amend and renew the charter of Carolina Savings Bank . . . is made a public act'" and thus, because "[t]he validity of this act not being in question, the Court would take judicial notice of the fact of defendant's corporate existence."). Thus, it is appropriate for the Court to take judicial notice of the fact that nominal Plaintiffs are no longer SCANA shareholders based on the Articles of Merger, the Merger Agreement, and Dominion's 8-K announcing completion of the Merger.

B. Loss of Stock Ownership Extinguishes Plaintiffs' Standing to Maintain this Derivative Lawsuit.

South Carolina law establishes that a corporation's shareholders may assert the rights of the corporation against corporate officers and directors in a derivative action. S.C. Code Ann. § 33-7-400.[2] But, fundamentally, "[t]he right of a stockholder to maintain a derivative action

---

2 South Carolina law controls the question of Plaintiffs' standing to maintain a derivative action because it is the state of SCANA's incorporation. On corporate law issues, South Carolina courts follow the choice of law rule known as the internal affairs doctrine, "'which provides that the internal matters of corporate governance are governed by the law of the state of incorporation.'" *Pertuis v. Front Roe Restaurants, Inc.*, 423 S.C. 640, 649–50 (2018) (quoting 1 William Meade Fletcher et al., Fletcher Cyclopedia of the Law of Corporations § 43.72 (perm. ed., rev. vol. 2015)). These "internal affairs" consist of "'the relations inter se of

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

against the directors of a corporation 'inheres in and attaches to his ownership of its stock and does not exist apart from such ownership.'" *Johnson v. Baldwin*, 221 S.C. 141, 149–150 (1952) (internal citations omitted). Thus, "[i]f there is a loss of status, the action abates so far as the stockholder bringing the action is concerned." *Id.* The rule announced in *Johnson* applies where the loss of shareholder status is a result of a merger. As the *Johnson* court held:

> Having ceased to be a stockholder in the Brandon Corporation [by virtue of its merger into another corporation], plaintiff under the authorities reviewed earlier in this opinion has no standing to continue this action against the directors for mismanagement and waste.

Id. at 157.

This same reasoning was followed by Judge Roger Young of the South Carolina Business Court to dismiss derivative litigation in 2013 on behalf of Charleston-based Force Protection, Inc. following Force Protection's merger into General Dynamics. In that Force Protection derivative action, Judge Young granted Defendants summary judgment on the derivative claims due to plaintiffs' loss of standing under Nevada law[3] following the merger under the continuous ownership rule. Judge Young also held that:

> To the extent that South Carolina law is relevant to the question of Plaintiffs' standing, this Court concludes that South Carolina would impose the "continuous ownership rule," which is the law in Nevada, Delaware, the federal courts, and is the overwhelming majority rule.

---

the corporation, its shareholders, directors, officers or agents.'" *Id.* (quoting Restatement (Second) of Conflict of Laws § 302 cmt. a (1971)). Because derivative suits clearly implicate precisely these relations, the internal affairs doctrine dictates the application of South Carolina law. Plaintiffs apparently agree that South Carolina law governs as they themselves have cited South Carolina law as the appropriate standard governing their claims. *See* Plaintiff's Omnibus Opp'n to Motions to Dismiss at 27–29 (June 6, 2018).

3 Force Protection was incorporated under Nevada law.

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

Estate of Jacquelin K. Stevenson v. Kavanaugh, 2013 WL 673728, (South Carolina Court of Common Pleas for the Ninth Judicial Circuit, January 18, 2013, Roger M. Young, Sr., Business Court J.) (order attached as Ex. E).

The courts of Delaware and those of virtually all other states also apply the continuous ownership rule to dismiss shareholder derivative litigation following loss of the derivative plaintiffs' share ownership and standing following a merger. *See, e.g.*, *Lewis v. Anderson*, 477 A.2d 1040, 1049 (Del. 1984); *Feldman v. Cutaia*, 951 A.2d 727, 731 (Del. 2008); *In re Massey Energy Co. Derivative & Class Action Litig.*, 160 A.3d 484, 497 (Del. Ch. 2017); *Sound Infiniti, Inc. v. Snyder*, 237 P.3d 241, 247 (Wash. 2010) (Washington law); *Timko v. Triarsi*, 898 So. 2d 89, 91 (Fla. Dist. Ct. App. 2005) (Florida law); *A-Plus Janitorial & Carpet Cleaning v. Employers' Workers' Comp. Ass'n*, 936 P.2d 916, 923–25 (Okla. 1997) (Oklahoma law); *Christopher v. Liberty Oil & Gas Corp.*, 665 So. 2d 410, 411–12 (La. Ct. App. 1995) (Louisiana law); *Bronzaft v. Caporali*, 616 N.Y.S.2d 863, 865 (N.Y. Sup. Ct. 1994) (New York law); *Grace Bros., Ltd. v. Farley Indus., Inc.*, 450 S.E.2d 814, 816 (Ga. 1994) (Georgia law); *White v. Banes Co.*, 866 P.2d 339, 342 (N.M. 1993) (New Mexico law); *U.S. Fidelity & Guar. Co. v. Griffin*, 541 N.E.2d 553, 555 (Ind. Ct. App. 1989) (Indiana law); *Weil v. Northwest Indus., Inc.*, 522 N.E.2d 172, 174 n.1 (1988) (Illinois law); *Metal Tech Corp. v. Metal Teckniques Co.*, 703 P.2d 237, 242 (Or. Ct. App. 1985) (Oregon law); *Yanow v. Teal Indus., Inc.*, 422 A.2d 311, 323 (Conn. 1979) (Connecticut law).

Because Plaintiffs are no longer SCANA shareholders by virtue of the completed Merger, they no longer have "standing to pursue derivative claims on behalf of [SCANA]," which passed "by operation of law to the surviving corporation." *Ward*, 852 A.2d at 901. The nominal Plaintiffs have admitted in prior filings or hearings that their derivative claims would be

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

extinguished upon consummation of the Merger. *See* Plaintiff Crangle's Opp'n to Def. SCANA's Mot. to Stay at 2–3, 13 (Jan. 29, 2018) (noting that completion of the Merger would "extinguish the derivative claims asserted by Plaintiffs," causing the claims to "become the property of Dominion." (citing *Anderson*, 477 A.2d at 1049)); Plaintiff Todd's Letter Responding to Mot. to Stay (Jan. 29, 2018) (arguing that "litigating the derivative claims while the Proposed Transaction is pending would be an enormous waste of judicial resources" because, "if consummated[,] [the Merger] likely will moot the derivative claims"); Transcript of February 15, 2018 motions hearing before Honorable Mark Hayes, at 34 (Todd's counsel acknowledging issue of loss of standing if merger is completed).

Based on the incontrovertible fact that Plaintiffs no longer own SCANA shares as a result of the Merger, and the South Carolina Supreme Court *Johnson* case holding that a shareholder loses standing to continue a derivative action once he no longer owns shares, this Court should grant Defendants' Motion for Judgment on the Pleadings because "'there is no issue of fact raised by the complaint that would entitle the plaintiff to judgment if resolved in plaintiff's favor.'" *Home Builders Ass'n of S.C.*, 405 S.C. at 460 (citations omitted); *Johnson,* 221 S.C. at 157; *see also Cal. State Teachers' Ret. Sys.*, 814 S.E.2d at 564 (affirming dismissal of derivative claims because, "[t]o dismiss the Amended Complaint for lack of standing, the circuit court needed just one fact that was outside of the four corners of that pleading: the petitioners are no longer Massey shareholders," which is "readily subject to judicial notice based upon the corporate merger documents on file with governmental entities.").

IV. CONCLUSION

Plaintiffs lost standing to pursue this derivative litigation on behalf of SCANA when they ceased to be SCANA shareholders on January 1, 2019 as a result of the completion of the Merger. Thus, Defendants respectfully request that this Court grant Defendants' Motion for

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

Judgment on the Pleadings and enter judgment in Defendants' favor on all claims. A proposed Order granting this motion is attached as Exhibit F.

Respectfully submitted this 7th day of January, 2019.

s/ Steven J. Pugh
Steven J. Pugh (SC Bar No. 14341)
Benjamin P. Carlton (SC Bar No. 101142)
Richardson Plowden & Robinson, P.A.
Post Office Drawer 7788 (29202)
1900 Barnwell Street
Columbia, South Carolina 29201
(803) 771-4400
spugh@richardsonplowden.com
bcarlton@richardsonplowden.com

I.S. Leevy Johnson (SC Bar No. 3020)
George C. Johnson (SC Bar No. 9308)
Johnson Toal & Battiste, P.A.
1615 Barnwell Street
Columbia, South Carolina 29201
(803) 252-9700
islj@jtbpa.com
George@jtbpa.com

Michael R. Smith (*pro hac vice*)
Lisa Bugni (*pro hac vice*)
King & Spalding, LLP
1180 Peachtree Street, NE
Atlanta, Georgia 30309
(404) 572-4824
mrsmith@kslaw.com

Counsel for Nominal Defendant SCANA Corporation

s/ John A. Massalon
John A. Massalon (SC Bar #10279)
Wills Massalon & Allen, LLC
Post Office Box 859
Charleston, South Carolina 29402
(843) 727-1144
jmassalon@wmalawfirm.net

John R. Bielema (*pro hac vice*)

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

Michael P. Carey (*pro hac vice*)
Bryan Cave Leighton Paisner, LLP
One Atlantic Center, 14th Floor
1201 West Peachtree Street, N.W.
Atlanta, Georgia 30309
(404) 572-6600
john.bielema@bclplaw.com
michael.carey@bclplaw.com

Barbara A. Smith (*pro hac vice*)
Bryan Cave Leighton Paisner, LLP
One Metropolitan Square
211 N. Broadway, Suite 3600
St. Louis, Missouri 63102
(314) 259-2000
barbara.smith@bclplaw.com

Counsel for Outside Directors

s/ William A. Coates
William A. Coates, Esquire (SC Bar No. 1289)
Roe Cassidy Coates & Price, P.A.
1052 North Church Street
Post Office Box 10529 (29603)
Greenville, South Carolina 29601
(864) 349-2600
wac@roecassidy.com

Anne M. Tompkins, Esquire (*pro hac vice*)
Jonathan M. Watkins, Esquire (*pro hac vice*)
Aaron C. Lang, Esquire (*pro hac vice*)
Cadwalader, Wickersham & Taft, LLP
227 West Trade Street
Charlotte, North Carolina 28202
(704) 348-5222
Anne.Tompkins@cwt.com
Jonathan.Watkins@cwt.com
Aaron.Lang@cwt.com

Jared Stanisci, Esquire (*pro hac vice*)
Cadwalader, Wickersham & Taft, LLP
200 Liberty Street
New York, New York 10281
Jared.Stanisci@cwt.com

Counsel for Defendant Kevin B. Marsh

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

s/ William A. Coates
William A. Coates, Esquire (SC Bar No. 1289)
Roe Cassidy Coates & Price, P.A.
1052 North Church Street
Post Office Box 10529 (29603)
Greenville, South Carolina 29601
(864) 349-2600
wac@roecassidy.com

Robert A. Blake, Jr. (*pro hac vice*)
James F. Wyatt, III (*pro hac vice*)
Wyatt & Blake, LLP
435 East Morehead Street
Charlotte, North Carolina 28203
(704) 331-0767
rblake@wyattlaw.net
jwyatt@wyattlaw.net

Counsel for Defendant Stephen Byrne

s/ William A. Coates
William A. Coates, Esquire (SC Bar No. 1289)
Roe Cassidy Coates & Price, P.A.
1052 North Church Street
Post Office Box 10529 (29603)
Greenville, South Carolina 29601
(864) 349-2600
wac@roecassidy.com

OF COUNSEL:
John A. Jordak, Jr., Esquire (*pro hac vice*)
William R. Mitchelson, Jr., Esquire (*pro hac vice*)
Meredith J. Kingsley, Esquire (*pro hac vice*)
Alston & Bird
1201 West Peachtree Street
Atlanta, Georgia 30309
(404) 881-7000
john.jordak@alston.com
mitch.mitchelson@alston.com
meredith.kingsley@alston.com

Counsel for Defendant Jimmy Addison

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

EXHIBIT A

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

File ID: 181231-1619271
Filing Date: 12/31/2018

STATE OF SOUTH CAROLINA
SECRETARY OF STATE

ARTICLES OF MERGER
Corporation – Domestic and Foreign

Pursuant to Section 33-11-105 of the 1976 S.C. Code of Laws, as amended, the undersigned as the surviving corporation in a merger, hereby submits the following information:

1. The name of the surviving corporation is

SCANA Corporation

2. Attached hereto and made a part of hereof is a copy of the Merger (see S.C. Code of Laws, Title 33, Chapter 11). Duplicate copies of the Plan of Merger must be attached in order for this form to be filed.

3. Complete the following information to the extent it is relevant with respect to each corporation which is a party to the transaction.

(a) Name of the corporation:

SCANA Corporation

Complete either (1) or (2), whichever is applicable.

(1) ☐ Shareholder approval of the merger was not required (see S.C. Code of Laws §33-11-103(h))

(2) ☒ The Plan of Merger was duly approved by shareholders of the corporation as follows:

Voting Group	Number of Outstanding Shares	Number of Votes Entitled to be Cast	Number of Votes Represented at the Meeting	Total Number of Votes Cast* For	-AND-	Against
Common	142,916,917	142,916,917	103,205,601	101,384,707*		

*NOTE: Pursuant to S.C. Code of Laws §33-11-105(a)(3)(ii), the corporation can alternatively state the total number of undisputed votes cast for the Plan of Merger separately by each voting group with a statement that the number of votes cast for the plan by each voting group was sufficient for approval by that voting group.

*The number of votes cast for the plan by the holders of common stock was sufficient for approval by that voting group.

Form Revised by South Carolina Secretary of State, September 2018
F0053

SC Secretary of State
Mark Hammond

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

SCANA Corporation

Name of Surviving Corporation

(b) Name of the corporation:

Sedona Corp.

Complete either (1) or (2), whichever is applicable.

(1) ☐ Shareholder approval of the merger was not required [see S.C. Code of Laws §33-11-103(h)].

(2) ☒ The Plan of Merger was duly approved by shareholders of the corporation as follows:

Voting Group	Number of Outstanding Shares	Number of Votes Entitled to be Cast	Number of Votes Represented at the Meeting	Total Number of Votes Cast* For	-AND-	Against
Common	100	100	100	100		0

*NOTE: Pursuant to S.C. Code of Laws §33-11-105(a)(3)(ii), the corporation can alternatively state the total number of undisputed votes cast for the Plan of Merger separately by each voting group with a statement that the number of votes cast for the plan by each voting group was sufficient for approval by that voting group.

4. Unless a delayed date is specified, the effective date of this document shall be the date it is accepted for filing by the Secretary of State [see S.C. Code of Laws §33-1-230(b)]. The effective date and time of these Articles of Merger shall be January 1, 2019 at 12:01 a.m.

Date: December 31, 2018

Name of the Surviving Corporation:

SCANA Corporation

(Signature)

Jimmy E. Addison

(Print Name)

Chief Executive Officer

(Office)

Form Revised by South Carolina Secretary of State, September 2018
F0053

Execution Version

AGREEMENT AND PLAN OF MERGER

by and among

DOMINION ENERGY, INC.,

SEDONA CORP.

and

SCANA CORPORATION

Dated as of January 2, 2018

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

TABLE OF CONTENTS

Page

ARTICLE I

THE MERGER

SECTION 1.01. The Merger 1
SECTION 1.02. Closing 2
SECTION 1.03. Effective Time 2
SECTION 1.04. Articles of Incorporation; Bylaws 2
SECTION 1.05. Directors and Officers 2
SECTION 1.06. Plan of Merger 3

ARTICLE II

EFFECT OF THE MERGER ON THE CAPITAL STOCK OF THE CONSTITUENT CORPORATIONS

SECTION 2.01. Effect on Capital Stock 3
SECTION 2.02. Treatment of Company Equity Awards 3
SECTION 2.03. Exchange of Company Shares 4
SECTION 2.04. Withholding Rights 7
SECTION 2.05. No Dissenters' Rights 8
SECTION 2.06. Adjustments 8

ARTICLE III

REPRESENTATIONS AND WARRANTIES

SECTION 3.01. Representations and Warranties of the Company 8
SECTION 3.02. Representations and Warranties of Parent and Merger Sub 21

ARTICLE IV

COVENANTS RELATING TO CONDUCT OF BUSINESS

SECTION 4.01. Conduct of Business Pending the Merger 28
SECTION 4.02. Acquisition Proposals 33

ARTICLE V

ADDITIONAL AGREEMENTS

SECTION 5.01. Proxy Statement/Prospectus; Shareholders Meeting 36
SECTION 5.02. Filings; Other Actions; Notification 38
SECTION 5.03. Access and Reports; Confidentiality 41
SECTION 5.04. Stock Exchange Delisting and Listing 42

SECTION 5.05. Publicity 42
SECTION 5.06. Employee Matters 42
SECTION 5.07. Expenses 44
SECTION 5.08. Indemnification; Directors' and Officers' Insurance 44
SECTION 5.09. Financing 46
SECTION 5.10. Rule 16b-3 47
SECTION 5.11. Parent Consent 47
SECTION 5.12. Merger Sub and Surviving Corporation Compliance 48
SECTION 5.13. Takeover Statutes 48
SECTION 5.14. Control of Operations 48
SECTION 5.15. Resignation of Directors 48
SECTION 5.16. Additional Matters 48
SECTION 5.17. Shareholder Litigation 48
SECTION 5.18. Advice of Changes 49
SECTION 5.19. Certain Tax Matters 49

ARTICLE VI

CONDITIONS

SECTION 6.01. Conditions to Each Party's Obligation to Effect the Merger 49
SECTION 6.02. Additional Conditions to Obligations of Parent and Merger Sub 50
SECTION 6.03. Additional Conditions to Obligation of the Company 52
SECTION 6.04. Frustration of Closing Conditions 52

ARTICLE VII

TERMINATION

SECTION 7.01. Termination 52
SECTION 7.02. Effect of Termination and Abandonment 54

ARTICLE VIII

MISCELLANEOUS

SECTION 8.01. Non-Survival 56
SECTION 8.02. Modification or Amendment 56
SECTION 8.03. Waiver 56
SECTION 8.04. No Other Representations or Warranties. 56
SECTION 8.05. Notices 57
SECTION 8.06. Definitions 58
SECTION 8.07. Interpretation 58
SECTION 8.08. Counterparts 59
SECTION 8.09. Parties in Interest 59
SECTION 8.10. Governing Law 59
SECTION 8.11. Entire Agreement; Assignment 60
SECTION 8.12. Specific Enforcement; Consent to Jurisdiction 60
SECTION 8.13. WAIVER OF JURY TRIAL 61
SECTION 8.14. Severability 61

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

SECTION 8.15. Transfer Taxes 61
SECTION 8.16. Disclosure Letters 61

Appendices

Appendix A – SCPSC Petition

Exhibits

Exhibit A – Definitions

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

AGREEMENT AND PLAN OF MERGER

This AGREEMENT AND PLAN OF MERGER, dated as of January 2, 2018 (this "Agreement"), is entered into by and among DOMINION ENERGY, INC., a Virginia corporation ("Parent"), SEDONA CORP., a South Carolina corporation and a wholly-owned Subsidiary of Parent ("Merger Sub") and SCANA CORPORATION, a South Carolina corporation (the "Company").

RECITALS

WHEREAS, the board of directors of Parent has approved this Agreement and the transactions contemplated by this Agreement, including the merger of Merger Sub with and into the Company (the "Merger"), on the terms and subject to the conditions set forth in this Agreement;

WHEREAS, the board of directors of the Company (the "Company Board") has (a) determined that it is in the best interests of the Company and the shareholders of the Company that the Company enter into this Agreement and consummate the Merger and the other transactions contemplated by this Agreement on the terms and subject to the conditions set forth in this Agreement, (b) adopted this Agreement and approved the transactions contemplated by this Agreement, including the Merger, (c) directed that the approval of this Agreement be submitted to a vote at a meeting of the shareholders of the Company and (d) resolved to recommend that the shareholders of the Company approve this Agreement;

WHEREAS, the board of directors of Merger Sub has (a) determined that it is in the best interests of Merger Sub and the sole shareholder of Merger Sub that Merger Sub enter into this Agreement and consummate the Merger and the other transactions contemplated by this Agreement on the terms and subject to the conditions set forth in this Agreement, (b) adopted this Agreement and approved the transactions contemplated by this Agreement, including the Merger and (c) resolved to recommend that the sole shareholder of Merger Sub approve this Agreement;

WHEREAS, for U.S. federal income tax purposes, the Merger is intended to qualify as a "reorganization" within the meaning of Section 368(a) of the Code (the "Intended Tax Treatment"), and this Agreement is intended to be a "plan of reorganization" for purposes of Sections 354 and 361 of the Code; and

WHEREAS, the Company, Parent and Merger Sub desire to make certain representations, warranties, covenants and agreements in connection with the Merger and also to prescribe various conditions to the Merger.

NOW, THEREFORE, in consideration of the premises, and of the representations, warranties, covenants and agreements contained in this Agreement, and intending to be legally bound hereby, the Company, Parent and Merger Sub hereby agree as follows:

ARTICLE I

THE MERGER

SECTION 1.01. The Merger. Upon the terms and subject to the conditions set forth in this Agreement and in accordance with the SCBCA, at the Effective Time, Merger Sub shall be merged with and into the Company and the separate corporate existence of Merger Sub shall thereupon cease and the Company shall continue as the surviving corporation in the Merger (the "Surviving Corporation") and

a wholly-owned Subsidiary of Parent. The Merger shall have the effects set forth in this Agreement and in the applicable provisions of the SCBCA.

SECTION 1.02. Closing. The closing of the Merger (the "Closing") shall take place at the offices of Mayer Brown LLP, 71 South Wacker Drive, Chicago, Illinois 60606, at 9:00 a.m., local time, on the third (3rd) Business Day following the day on which all of the conditions set forth in Article VI (other than those conditions that by their nature are to be satisfied at the Closing, but subject to the satisfaction or waiver of those conditions at the Closing) have been satisfied or waived in accordance with this Agreement, or at such other time and place as the Company and Parent may agree in writing. The date on which the Closing occurs is referred to in this Agreement as the "Closing Date".

SECTION 1.03. Effective Time. As soon as practicable on the Closing Date, the Company and Parent will cause the Merger to become effective by filing the articles of merger (the "Articles of Merger") with the Secretary of State of the State of South Carolina, which Articles of Merger will be executed and filed in accordance with the applicable provisions of the SCBCA. The Merger shall become effective at the time when the Articles of Merger have been duly filed with the Secretary of State of the State of South Carolina or at such later time as may be agreed by Parent and the Company in writing and specified in the Articles of Merger (the "Effective Time").

SECTION 1.04. Articles of Incorporation; Bylaws.

(a) At the Effective Time, the articles of incorporation of the Company, as in effect immediately prior to the Effective Time, shall be the articles of incorporation of the Surviving Corporation until thereafter amended in accordance with the provisions thereof and applicable Law; provided, however, that no such amendment shall be inconsistent with the obligations of Parent under Section 5.08(b).

(b) At the Effective Time, the bylaws of the Company, as in effect immediately prior to the Effective Time, shall be amended as of the Effective Time to be in the form of the bylaws of Merger Sub as of the date hereof (except with respect to the name of the Company, which shall be "SCANA Corporation"), with any changes necessary so that such bylaws shall be in compliance with Section 5.08 and, to the extent not inconsistent with any of the foregoing, such other changes as Parent deems necessary or appropriate) and as so amended shall be the bylaws of the Surviving Corporation until thereafter amended as provided therein or by applicable Law; provided, however, that no such amendment shall be inconsistent with the obligations of Parent under Section 5.08(b).

SECTION 1.05. Directors and Officers.

(a) The directors of Merger Sub will be appointed by Parent pursuant to applicable Law to be the directors of the Surviving Corporation after the Effective Time following the resignation or removal of the individuals serving as directors of the Company prior to the Effective Time in accordance with Section 5.15, with such directors appointed by Parent to serve until their respective successors have been duly elected or appointed and qualified or until their earlier death, resignation or removal in accordance with the articles of incorporation and the bylaws of the Surviving Corporation.

(b) The officers of the Company as of immediately prior to the Effective Time shall, from and after the Effective Time, be the officers of the Surviving Corporation until their respective successors have been duly elected or appointed and qualified or until their earlier death, resignation or removal in accordance with the articles of incorporation and the bylaws of the Surviving Corporation.

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

SECTION 1.06. Plan of Merger. This Agreement will constitute a "plan of merger" for purposes of the SCBCA.

ARTICLE II

EFFECT OF THE MERGER ON THE CAPITAL STOCK OF THE CONSTITUENT CORPORATIONS

SECTION 2.01. Effect on Capital Stock. At the Effective Time, by virtue of the Merger and without any action on the part of the Company, Parent, Merger Sub or the holders of any shares of capital stock of the Company, Parent or Merger Sub:

(a) Merger Consideration. Each Company Share issued and outstanding immediately prior to the Effective Time (other than the Cancelled Shares, which shall be treated in accordance with Section 2.01(b)) shall cease to be outstanding, shall be cancelled and shall cease to exist, and each such Company Share, whether represented by a certificate ("Certificate") or in non-certificated form and represented by book-entry ("Book-Entry Share"), shall automatically be converted into the right to receive 0.6690 validly issued, fully paid and non-assessable Parent Shares (the "Merger Consideration"). Following the Effective Time, the holders of Company Shares as of immediately prior to the Effective Time shall cease to have any rights with respect thereto, except for the rights set forth in Section 2.03(b)(v).

(b) Cancellation of Cancelled Shares. Each Company Share owned by Parent, Merger Sub or any other wholly-owned Subsidiary of Parent and each Company Share owned by the Company or any wholly-owned Subsidiary of the Company (collectively, the "Cancelled Shares") shall cease to be outstanding, shall be cancelled without payment of any consideration therefor and shall cease to exist.

(c) Capital Stock of Merger Sub. Each share of common stock, without par value, of Merger Sub issued and outstanding immediately prior to the Effective Time shall be converted into and become one (1) validly issued, fully paid and non-assessable share of common stock, without par value, of the Surviving Corporation, and all such shares together shall constitute the only outstanding shares of capital stock of the Surviving Corporation.

SECTION 2.02. Treatment of Company Equity Awards.

(a) Treatment of Performance Shares. At the Effective Time, each performance share award granted under a Company Equity Award Plan that is outstanding immediately prior to the Effective Time (a "Company Performance Share Award") shall fully vest at the target level of performance and shall be cancelled and converted automatically into the right to receive the Equity Award Consideration in respect of each Company Share underlying such Company Performance Share Award.

(b) Treatment of Restricted Stock Units. At the Effective Time, each restricted stock unit award in respect of Company Shares granted under a Company Equity Award Plan that is outstanding immediately prior to the Effective Time (a "Company RSU") shall fully vest and shall be cancelled and converted automatically into the right to receive the Equity Award Consideration in respect of each Company Share underlying such Company RSU.

(c) Treatment of Deferred Units. At the Effective Time, each deferred unit in respect of Company Shares credited or deemed credited to the Company stock ledger under the Director

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

Compensation and Deferral Plan or the Executive Deferred Compensation Plan that is outstanding immediately prior to the Effective Time (a "Company Deferred Unit") shall be converted automatically into a number of deferred unit(s) in respect of Parent Shares equal to the product of (x) the Company Deferred Unit multiplied by (y) the Merger Consideration, to be payable pursuant to the terms of the applicable plan.

(d) Payment. The Surviving Corporation shall pay the Equity Award Consideration as required under Section 2.02(a) and Section 2.02(b) as soon as reasonably practicable after the Effective Time (but in any event within three (3) Business Days thereafter); provided, however, that to the extent any such payment relates to any Company Performance Share Awards or Company RSUs that are nonqualified deferred compensation subject to Section 409A of the Code, the Surviving Corporation shall make such payment at the earliest time permitted under, and in accordance with, the terms of the applicable award agreement or other relevant documents and in accordance with Section 409A of the Code.

(e) Corporate Actions. At or prior to the Effective Time, the Company, the Company Board or any authorized committee thereof, as applicable, shall adopt any resolutions and take any actions that are necessary to effectuate the provisions of Section 2.02(a), Section 2.02(b) and Section 2.02(c). The Company shall take all actions necessary to ensure that, from and after the Effective Time, neither Parent nor the Surviving Corporation will be required to deliver Company Shares or other capital stock of the Company to any Person pursuant to or in settlement of Company Performance Share Awards, Company RSUs, Company Deferred Units or any other awards under any Company Equity Award Plan.

SECTION 2.03. Exchange of Company Shares.

(a) Exchange Agent. Prior to the Effective Time, Parent shall select a paying and exchange agent reasonably acceptable to the Company (the "Exchange Agent") and enter into an agreement with such Exchange Agent in form and substance reasonably acceptable to the Company pursuant to which the Exchange Agent will (i) act as agent for the shareholders of the Company in connection with the Merger and receive payment and delivery of the Merger Consideration to which the shareholders of the Company shall become entitled pursuant to Section 2.01(a) and (ii) act as agent for Parent in transmitting the Merger Consideration to such shareholders following the occurrence of the Effective Time in accordance with this Agreement. At or prior to the Effective Time, Parent shall deposit, or cause to be deposited, with the Exchange Agent, in trust for the benefit of the holders of Company Shares, an amount of Parent Shares in book-entry form sufficient for the Exchange Agent to pay and deliver the Merger Consideration required to be paid and delivered by Parent in accordance with Section 2.01(a). In addition, Parent shall deposit, or cause to be deposited, with the Exchange Agent, from time to time after the Effective Time, (A) any dividends or other distributions payable pursuant to Section 2.03(g) and (B) cash in lieu of any fractional Parent Shares payable pursuant to Section 2.03(h). All cash and Parent Shares, together with any dividends or other distributions, deposited with the Exchange Agent pursuant to this Section 2.03(a) shall be referred to as the "Exchange Fund."

(b) Exchange Procedures.

(i) Transmittal Materials and Instructions. Promptly after the Effective Time (and in any event within three (3) Business Days thereafter), Parent shall cause the Exchange Agent to mail or otherwise provide to each holder of record of Company Shares (other than holders of Cancelled Shares) (A) transmittal materials, including a letter of transmittal in form as agreed by Parent and the Company, specifying that delivery shall be effected, and risk of loss and title shall

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

pass, with respect to Book-Entry Shares, only upon delivery of an "agent's message" regarding the book-entry transfer of Book-Entry Shares (or such other evidence, if any, of the transfer as the Exchange Agent may reasonably request), and with respect to Certificates, only upon delivery of the Certificates (or affidavits of loss in lieu of the Certificates as provided in Section 2.03(f) to the Exchange Agent), such transmittal materials to be in such form and have such other provisions as Parent and the Company may reasonably agree, and (B) instructions for use in effecting the surrender of the Book-Entry Shares or Certificates (or affidavits of loss in lieu of the Certificates as provided in Section 2.03(f)) to the Exchange Agent.

(ii) Certificates. Upon surrender of a Certificate (or affidavit of loss in lieu of the Certificate as provided in Section 2.03(f)) to the Exchange Agent in accordance with the terms of transmittal materials and instructions referred to in Section 2.03(b)(i), the holder of such Certificate shall be entitled to receive in exchange therefor (A) a cash amount in immediately available funds equal to (1) any dividends and other distributions such holder has the right to receive pursuant to Section 2.03(g) plus (2) any cash in lieu of any fractional Parent Shares such holder has the right to receive pursuant to Section 2.03(h) and (B) the number of Parent Shares, in uncertificated book-entry form, equal to the number of Company Shares represented by such Certificate (or affidavit of loss in lieu of the Certificate as provided in Section 2.03(f)) multiplied by the Merger Consideration. No interest will be paid or accrued on any cash amount payable upon due surrender of the Certificates.

(iii) Book-Entry Shares. Notwithstanding anything to the contrary contained in this Agreement, any holder of Book-Entry Shares shall not be required to deliver a Certificate or an executed letter of transmittal to the Exchange Agent to receive the aggregate Merger Consideration that such holder is entitled to receive as a result of the Merger pursuant to Section 2.01(a). In lieu thereof, each holder of record of one or more Book-Entry Shares (other than Cancelled Shares) shall upon receipt by the Exchange Agent of an "agent's message" in customary form (it being understood that the holders of Book-Entry Shares shall be deemed to have surrendered such Company Shares upon receipt by the Exchange Agent of such "agent's message" or such other evidence, if any, as the Exchange Agent may reasonably request) be entitled to receive, and Parent shall cause the Exchange Agent to pay and deliver as promptly as practicable after the Effective Time, (A) a cash amount in immediately available funds equal to (1) any dividends and other distributions such holder has the right to receive pursuant to Section 2.03(g) plus (2) any cash in lieu of any fractional Parent Shares such holder has the right to receive pursuant to Section 2.03(h) and (B) the number of Parent Shares, in uncertificated book-entry form, equal to the number of Company Shares represented by such Book-Entry Shares multiplied by the Merger Consideration. No interest will be paid or accrued on any cash amount payable upon due surrender of the Book-Entry Shares.

(iv) Unrecorded Transfers; Other Payments. In the event of a transfer of ownership of Company Shares that is not registered in the transfer records of the Company or if payment and delivery of the Merger Consideration and the other payments contemplated by Section 2.01(a) and this Section 2.03 is to be made to a Person other than the Person in whose name the surrendered Certificate or Book-Entry Share is registered, such Certificate or Book-Entry Share may be exchanged in accordance with this Article II if the Certificate or Book-Entry Share formerly representing such Company Shares is presented to the Exchange Agent accompanied by all documents required to evidence and effect such transfer and to evidence that any applicable transfer or other similar Taxes have been paid or are not applicable.

(v) Rights of Holders of Company Shares; Expenses. Until surrendered or exchanged pursuant to this Section 2.03(b), each Certificate or Book-Entry Share shall be deemed at any

time after the Effective Time to represent only the right to receive upon such surrender or exchange the Merger Consideration pursuant to Section 2.01(a), any dividends and other distributions pursuant to Section 2.03(g) and any cash in lieu of any fractional Parent Shares pursuant to Section 2.03(h). Parent shall pay all charges and expenses, including those of the Exchange Agent, in connection with the exchange of Company Shares pursuant to this Article II.

(c) Termination of the Exchange Fund; No Liability. Any portion of the Exchange Fund (including the proceeds of any investment thereof) that remains undistributed one (1) year after the Effective Time shall be delivered to Parent or the Surviving Corporation, upon demand by Parent. Any holders of Company Shares (other than Cancelled Shares) who have not theretofore complied with this Article II shall thereafter be entitled to look only to Parent and the Surviving Corporation for payment and delivery of the Merger Consideration pursuant to Section 2.01(a), any dividends and other distributions pursuant to Section 2.03(g) and any cash in lieu of any fractional Parent Shares pursuant to Section 2.03(h) upon surrender of their Certificates or exchange of their Book-Entry Shares in accordance with the provisions set forth in Section 2.03(b), and Parent and the Surviving Corporation shall remain liable for (subject to applicable abandoned property, escheat or other similar Law) payment of their claims for the Merger Consideration payable upon surrender of their Certificates or exchange of their Book-Entry Shares. Notwithstanding the foregoing, none of the Surviving Corporation, Parent, the Company, the Exchange Agent or any other Person shall be liable to any former holder of Company Shares for any amount properly delivered to a public official pursuant to applicable abandoned property, escheat or other similar Law.

(d) Investment of the Exchange Fund. The Exchange Agent shall invest the cash portion of the Exchange Fund as directed by Parent; provided, however, that such investments shall be in obligations of or guaranteed by the United States of America, in commercial paper obligations rated A-1 or P-1 or better by Moody's Investors Service, Inc. or Standard & Poor's Corporation, respectively, in certificates of deposit, bank repurchase agreements or banker's acceptances of commercial banks with capital exceeding $1 billion, or in money market funds which are invested in instruments that consist of U.S. Treasury obligations and repurchase agreements collateralized by U.S. Treasury obligations or having a rating in the highest investment category granted by a recognized credit rating agency at the time of acquisition or a combination of the foregoing and, in any such case, no such instrument shall have a maturity that could prevent or delay payments to be made pursuant to this Agreement. Subject to Section 2.03(c), to the extent that there are losses with respect to such investment of the cash portion of the Exchange Fund, or the cash portion of the Exchange Fund diminishes for other reasons, such that the amount of cash in the Exchange Fund is below the level required to make prompt cash payment of any dividends and other distributions pursuant to Section 2.03(g) and any cash in lieu of any fractional Parent Shares pursuant to Section 2.03(h), Parent shall promptly replace or restore the cash in the Exchange Fund lost through such investments or other events so as to ensure that the Exchange Fund is at all applicable times maintained at a level sufficient to make such cash payments. Any interest and other income resulting from such investment shall become a part of the Exchange Fund, and any amounts in excess of the aggregate amount of the payments described in the immediately preceding sentence will be promptly returned to Parent or the Surviving Corporation, as requested by Parent. The Exchange Fund shall not be used for any purpose other than as contemplated by Section 2.03(a) and this Section 2.03(d).

(e) Transfers. From and after the Effective Time, the stock transfer books of the Company shall be closed and there shall be no transfers on the stock transfer books of the Company of the Company Shares that were outstanding immediately prior to the Effective Time. If, after the Effective Time, acceptable evidence of a Certificate or Book-Entry Share is presented to the Surviving Corporation, Parent or the Exchange Agent for transfer, (i) in the case of Certificates, the holder of such Certificate shall be given a copy of the transmittal materials and instructions referred to in Section

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

2.03(b)(i) and instructed to comply with the instructions thereto in order to receive the Merger Consideration pursuant to Section 2.01(a) and (ii) in the case of Book-Entry Shares, such Book-Entry Share shall be cancelled and exchanged as contemplated by this Article II.

(f) Lost Certificates. In the case of any Certificate that has been lost, stolen or destroyed, upon the making of an affidavit of that fact by the Person claiming such Certificate to be lost, stolen or destroyed and, if required by the Exchange Agent or Parent, the posting by such Person of a bond in a reasonable amount as indemnity against any claim that may be made against it with respect to such Certificate, the Exchange Agent shall pay and deliver in exchange for such Certificate the Merger Consideration pursuant to Section 2.01(a), any dividends or other distributions payable pursuant to Section 2.03(g) and any cash in lieu of any fractional Parent Shares pursuant to Section 2.03(h).

(g) Dividends.

(i) Certificates. No dividends or other distributions declared or made with respect to Parent Shares with a record date after the Effective Time shall be paid to the holder of any Certificate with respect to the Parent Shares that such holder would be entitled to receive upon surrender of such Certificate, until such holder shall surrender such Certificate in accordance with Section 2.03(b)(ii). Subject to applicable Law, following surrender of any such Certificate, there shall be paid to the holder of Parent Shares issued in exchange therefor, without interest, (A) promptly after the time of such surrender, the amount of dividends and other distributions with a record date after the Effective Time but prior to such surrender and a payment date prior to such surrender payable with respect to such Parent Shares and (B) at the appropriate payment date, the amount of dividends and other distributions with a record date after the Effective Time but prior to such surrender and a payment date subsequent to such surrender payable with respect to such Parent Shares.

(ii) Book-Entry Shares. Subject to applicable Law, there shall be paid to the holder of Parent Shares issued in exchange for Book-Entry Shares in accordance with Section 2.03(b)(iii), without interest, (A) promptly upon receipt by the Exchange Agent of an "agent's message" (or such other evidence, if any, of surrender as the Exchange Agent may reasonably request), the amount of dividends and other distributions with a record date after the Effective Time but prior to such receipt and a payment date prior to such receipt payable with respect to such Parent Shares and (B) at the appropriate payment date, the amount of dividends and other distributions with a record date after the Effective Time but prior to such receipt and a payment date subsequent to such receipt payable with respect to such Parent Shares.

(h) Fractional Shares. No certificates or scrip representing fractional Parent Shares shall be issued upon the conversion of the Company Shares into the Merger Consideration pursuant to Section 2.01(a), and such fractional share interests shall not entitle the owner thereof to vote or to any rights of a holder of Parent Shares. For purposes of this Section 2.03(h), all fractional shares to which a single record holder would be entitled shall be aggregated and calculations shall be rounded to four (4) decimal places. In lieu of any such fractional Parent Shares, each holder of Company Shares who would otherwise be entitled to such fractional Parent Shares shall be entitled to receive an amount in cash, without interest, rounded to the nearest cent, equal to the product of (i) the amount of such fractional Parent Share and (ii) the Average Price.

SECTION 2.04. Withholding Rights. Each of Parent and the Surviving Corporation shall be entitled to deduct and withhold from the consideration otherwise payable pursuant to this Agreement to any holder of Company Shares, Company Performance Share Awards and Company RSUs

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

such amounts as it is required to deduct and withhold with respect to the making of such payment under the Code or any other applicable state, local or foreign Tax Law, taking into account any applicable exemption under such Law. To the extent that amounts are so withheld by Parent or the Surviving Corporation, as the case may be, such withheld amounts (a) shall be promptly remitted by Parent or the Surviving Corporation, as applicable, to the applicable Governmental Entity and (b) shall be treated for all purposes of this Agreement as having been paid to the holder of Company Shares, Company Performance Share Awards and Company RSUs (as applicable) in respect of which such deduction and withholding were made by the Surviving Corporation or Parent, as the case may be.

SECTION 2.05. No Dissenters' Rights. In accordance with Section 33-13-102(B) of the SCBCA, no holder of Company Shares shall be entitled to exercise dissenters' rights, appraisal rights or other similar rights in connection with the Merger and the other transactions contemplated by this Agreement.

SECTION 2.06. Adjustments. In the event of any change to the Company Shares or Parent Shares (or securities convertible thereto or exchangeable or exercisable therefor) issued and outstanding in the period between the date of this Agreement and the Effective Time as a result of a reclassification, stock split (including a reverse stock split), stock dividend or distribution, recapitalization, exchange or readjustment of shares, merger, issuer tender or exchange offer, or other similar transaction, the Merger Consideration and any other payments to be made pursuant to this Article II shall be equitably adjusted, without duplication, to provide the holders of Company Shares, Company Performance Share Awards, Company RSUs and Company Deferred Units the same economic effect contemplated by this Agreement prior to such change; provided, however, that nothing in this Section 2.06 shall be construed to permit the Company, Parent, any of their respective Subsidiaries or any other Person to take any action that is otherwise prohibited by the terms of this Agreement; and provided, further, that any adjustment pursuant to this Section 2.06 to any Company Performance Share Awards, Company RSUs and Company Deferred Units shall be done in all respects in accordance with Section 409A of the Code, if applicable, and the terms of the applicable Company Equity Award Plan.

ARTICLE III

REPRESENTATIONS AND WARRANTIES

SECTION 3.01. Representations and Warranties of the Company. Except (x) as disclosed in the SEC Reports of the Company or South Carolina Electric & Gas Company (each, a "Reporting Company") filed with or furnished to the SEC since January 1, 2016 and publicly available at least twenty-four (24) hours prior to the date of this Agreement (excluding any disclosures set forth in any risk factor section or in any other section to the extent such disclosures are forward-looking statements or are cautionary, predictive or forward-looking in nature) or (y) as set forth in the Company Disclosure Letter (it being agreed that disclosure of any item in any section or subsection of the Company Disclosure Letter shall also be deemed disclosed with respect to any other section or subsection of this Agreement to which the relevance of such item is reasonably apparent), the Company represents and warrants to Parent and Merger Sub as follows:

(a) Organization, Standing and Corporate Power. The Company is a corporation duly incorporated and validly existing under the Laws of the State of South Carolina and has all requisite corporate power and authority to carry on its business as currently conducted and is duly qualified or licensed to do business and is in good standing (where such concept is recognized under applicable Law) in each jurisdiction where the nature of its business or the ownership, leasing or operation of its properties or assets makes such qualification or licensing necessary, other than where the failure to be so qualified, licensed or in good standing has not had and would not reasonably be

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

expected to have, individually or in the aggregate, a Company Material Adverse Effect. Each of the Company's Subsidiaries is a legal entity duly organized, validly existing and in good standing (where such concept is recognized under applicable Law) under the Law of its jurisdiction of organization and has all requisite corporate or similar power and authority to carry on its business as currently conducted, and each of the Company's Subsidiaries is duly qualified or licensed to do business and is in good standing (where such concept is recognized under applicable Law) in each jurisdiction where the nature of its business or the ownership, leasing or operation of its properties or assets makes such qualification or licensing necessary, other than where the failure to be so qualified, licensed or in good standing has not had and would not reasonably be expected to have, individually or in the aggregate, a Company Material Adverse Effect. The Company has made available to Parent a true and complete copy of the Restated Articles of Incorporation of the Company and any amendments thereto (collectively, the "Company Articles of Incorporation") and the Amended and Restated Bylaws of the Company (the "Company Bylaws" and together with the Company Articles of Incorporation, the "Company Organizational Documents").

(b) Subsidiaries. Section 3.01(b) of the Company Disclosure Letter sets forth a list of all Subsidiaries of the Company. All of the outstanding shares of capital stock of, or other equity interests in, each Subsidiary of the Company have, in all cases, been duly authorized and validly issued and are fully paid, non-assessable and not subject to preemptive rights, and are wholly-owned, directly or indirectly, by the Company free and clear of all pledges, liens, charges, mortgages, encumbrances, adverse claims and interests, licenses, purchase options, call options, rights of first offer and rights of first refusal, easements, rights-of-way, security interests and other use agreements, covenants and encroachments of any kind or nature whatsoever (including any restriction on the right to vote or transfer the same, except for such transfer restrictions of general applicability as may be provided under the Securities Act, the "blue sky" Laws of the various States of the United States or similar Law of other applicable jurisdictions) (collectively, "Liens"), other than transfer restrictions contained in the articles of incorporation, bylaws and limited liability company agreements (or any equivalent constituent documents) of such Subsidiary. Except for its interests in its Subsidiaries, the Company does not own, directly or indirectly, any capital stock of, or other equity interests in, any Person. The Company has made available to Parent true and complete copies of the articles of incorporation, bylaws and limited liability company agreements (or equivalent constituent documents) of each Subsidiary of the Company as in effect on the date of this Agreement.

(c) Capital Structure.

(i) The authorized capital stock of the Company consists of 200,000,000 Company Shares. The Company is not authorized to issue any preferred stock. At the close of business on December 29, 2017, there were (A)(1)142,916,916.594 Company Shares issued and outstanding and (2) 269,647.326 Company Shares held by the Company in its treasury, (B) 454,325 Company Shares underlying the outstanding Company Performance Share Awards (assuming target level performance), (C) 215,200 Company Shares underlying the outstanding Company RSUs (assuming achievement of required performance measure(s)) and (D) 269,647.326 Company Shares underlying ledgers pursuant to the Director Compensation and Deferral Plan. Except as set forth in the immediately preceding sentence, at the close of business on December 29, 2017, no shares of capital stock or other voting securities of the Company were issued or outstanding or subject to outstanding awards under the Company Equity Award Plans. Since December 29, 2017 to the date of this Agreement, (x) there have been no issuances by the Company of shares of capital stock or other voting securities of the Company other than pursuant to the exercise or vesting of equity awards under the Company Equity Award Plans, in each case, outstanding as of December 29, 2017 and (y) there have been no issuances by the Company of options, warrants, other rights to acquire shares of capital stock of the Company or other rights that give the holder

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

thereof any economic interest of a nature accruing to the holders of Company Shares. All outstanding Company Shares are, and all such Company Shares that may be issued prior to the Effective Time will be when issued, duly authorized, validly issued, fully paid and non-assessable and not subject to preemptive rights.

(ii) No Subsidiary of the Company owns any Company Shares or other shares of capital stock of the Company. There are no bonds, debentures, notes or other Indebtedness of the Company or of any of its Subsidiaries that give the holders thereof the right to vote (or that are convertible into, or exchangeable for, securities having the right to vote) on any matters on which holders of Company Shares may vote ("Voting Company Debt"). Except for any obligations pursuant to this Agreement or as otherwise set forth in Section 3.01(c)(i), as of December 29, 2017, there are no options, warrants, rights (including preemptive, conversion, stock appreciation, redemption or repurchase rights), convertible or exchangeable securities, stock-based performance units, Contracts or undertakings of any kind to which the Company or any of its Subsidiaries is a party or by which any of them is bound (A) obligating the Company or any of its Subsidiaries to issue, deliver or sell, or cause to be issued, delivered or sold, additional shares of capital stock or other securities of, or equity interests in, or any security convertible or exchangeable for any capital stock or other security of, or equity interest in, the Company or any of its Subsidiaries or any Voting Company Debt, (B) obligating the Company or any of its Subsidiaries to issue, grant or enter into any such option, warrant, right, security, unit, Contract or undertaking to declare or pay any dividend or distribution or (C) that give any Person the right to subscribe for or acquire any securities of the Company or any of its Subsidiaries, or to receive any economic interest of a nature accruing to the holders of Company Shares or otherwise based on the performance or value of shares of capital stock of the Company or any of its Subsidiaries. As of the date of this Agreement, there are no outstanding obligations of the Company or any of its Subsidiaries to repurchase, redeem or otherwise acquire any shares of capital stock or other equity interest of the Company or any of its Subsidiaries, other than pursuant to the Company Equity Award Plans. There are no voting agreements, voting trusts, shareholders agreements, proxies or other agreements to which the Company or any of its Subsidiaries is bound with respect to the voting of the capital stock or other equity interests of the Company, or restricting the transfer of, or providing registration rights with respect to, such capital stock or equity interests.

(d) Authority; Noncontravention.

(i) The Company has all requisite corporate power and authority to execute and deliver, and perform its obligations under, this Agreement and to consummate the transactions contemplated by this Agreement, subject, in the case of the Merger only, to receipt of the Company Requisite Vote. The execution, delivery and performance of this Agreement by the Company and the consummation by the Company of the transactions contemplated by this Agreement have been duly authorized by all necessary corporate action on the part of the Company, subject, in the case of the Merger only, to receipt of the Company Requisite Vote. This Agreement has been duly executed and delivered by the Company and, assuming the due authorization, execution and delivery by each of the other parties hereto, constitutes a legal, valid and binding obligation of the Company, enforceable against the Company in accordance with its terms, subject, as to enforceability, bankruptcy, insolvency and other Law of general applicability relating to or affecting creditors' rights and to general equity principles. The Company Board has duly and validly adopted resolutions (A) determining that it is in the best interests of the Company and the shareholders of the Company that the Company enter into this Agreement and consummate the Merger and the other transactions contemplated by this Agreement on the terms and subject to the conditions set forth in this Agreement, (B) adopting this Agreement and

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

approving the transactions contemplated by this Agreement, including the Merger, (C) directing that the approval of this Agreement be submitted to a vote at a meeting of the shareholders of the Company and (D) recommending that the shareholders of the Company approve this Agreement (the "Company Board Recommendation"), which resolutions, as of the date of this Agreement, have not been rescinded, modified or withdrawn in any way.

(ii) The execution, delivery and performance by the Company of this Agreement do not, and the consummation of the Merger and the other transactions contemplated by this Agreement and compliance with the provisions of this Agreement will not, conflict with, or result in any violation of, or default (with or without notice or lapse of time, or both) under, or give rise to any right (including a right of termination, cancellation or acceleration of any obligation or any right of first refusal, participation or similar right) under, or cause the loss of any benefit under, or result in the creation of any Lien (other than Permitted Liens) upon any of the properties or assets of the Company or any of its Subsidiaries under, any provision of (A) the Company Organizational Documents or the comparable organizational documents of any of the Company's Subsidiaries or (B) subject to the filings and other matters referred to in Section 3.01(d)(iii), (1) any Contract, or (2) any Law, in each case, applicable to the Company or any of its Subsidiaries or any of their respective properties or assets, other than, in the case of the foregoing clause (B), any such conflicts, violations, defaults, rights, losses or Liens that have not had and would not reasonably be expected to have, individually or in the aggregate, a Company Material Adverse Effect.

(iii) No Consent of, or registration, declaration or filing with, or notice to, any Governmental Entity is required to be obtained or made by or with respect to the Company or any of its Subsidiaries in connection with the execution, delivery and performance of this Agreement by the Company or the consummation by the Company of the Merger and the other transactions contemplated by this Agreement, except for (A) the Regulatory Conditions and any other Consents of or under, and compliance with any other applicable requirements of, (1) the HSR Act, (2) the Federal Energy Regulatory Commission (the "FERC"), (3) the U.S. Nuclear Regulatory Commission (the "NRC"), (4) the Federal Communications Commission (the "FCC"), (5) the North Carolina Utilities Commission (the "NCUC"), and (6) the Georgia Public Service Commission (the "GPSC") (the items set forth in this clause (A), collectively, the "Company Regulatory Clearances"), (B) the filing with the SEC of such reports and other documents (including the filing of the Proxy Statement/Prospectus) under, and compliance with all other applicable requirements of, the Securities Act or the Exchange Act and the rules and regulations promulgated thereunder and any applicable state securities, takeover and "blue sky" Laws, (C) the filing of the Articles of Merger with the Secretary of State of the State of South Carolina, (D) any filings under, and compliance with all other applicable requirements of, the rules and regulations of the NYSE and (E) such other Consents, registrations, declarations, filings and notices, the failure of which to be obtained or made has not had and would not reasonably be expected to have, individually or in the aggregate, a Company Material Adverse Effect and would not reasonably be expected to prevent, or materially impair or delay, the consummation of the Merger or any of the other material transactions contemplated by this Agreement.

(e) Applicable Company SEC Reports; Financial Statements; Undisclosed Liabilities.

(i) The Reporting Companies have filed or furnished, as applicable, all SEC Reports such companies were required or otherwise obligated to file with or furnish to the SEC since June 30, 2016 (such SEC Reports, the "Applicable Company SEC Reports"). As of their respective dates of filing, or, if amended or superseded by a subsequent filing made prior to the date of this Agreement, as of the date of the last such amendment or superseding filing prior to the date of

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

this Agreement, the Applicable Company SEC Reports complied in all material respects with the applicable requirements of the Securities Act, the Exchange Act and the Sarbanes-Oxley Act, as the case may be, and the applicable rules and regulations promulgated thereunder, each as in effect on the date of any such filing. As of the time of filing with the SEC (or, if amended prior to the date of this Agreement, as of the date of such amendment), none of the Applicable Company SEC Reports so filed contained any untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary in order to make the statements therein, in light of the circumstances under which they were made, not misleading, except to the extent that the information in such Applicable Company SEC Reports has been amended or superseded by a later Applicable Company SEC Report.

(ii) As of their respective dates, the audited and unaudited financial statements (consolidated, as applicable, and including any related notes thereto) of each of the Reporting Companies and their Subsidiaries, as applicable, included in the Applicable Company SEC Reports have been prepared in all material respects (except, as applicable, as permitted by Form 10-Q of the SEC or other applicable rules and regulations of the SEC) in accordance with United States generally accepted accounting principles ("GAAP") applied on a consistent basis during the periods involved (except as may be indicated in the notes thereto) and fairly present in all material respects the consolidated financial position of each Reporting Company and its Subsidiaries, as applicable, as of the respective dates thereof (taking into account the notes thereto) and the consolidated results of their operations and cash flows for the periods indicated (taking into account the notes thereto) and subject, in the case of unaudited financial statements, to normal year-end adjustments.

(iii) Each Reporting Company maintains disclosure controls and procedures required by Rule 13a-15(e) or Rule 15d-15(e) under the Exchange Act and such disclosure controls and procedures are effective in all material respects to ensure that information required to be disclosed by such Reporting Company in the SEC Reports it files or submits under the Exchange Act is recorded, processed, summarized and reported on a timely basis to the individuals responsible for the preparation of such Reporting Company's SEC Reports and other public disclosure documents. Each Reporting Company maintains internal control over financial reporting required by Rule 13a-15(f) or Rule 15d-15(f) under the Exchange Act and such internal control is effective in all material respects in providing reasonable assurance regarding the reliability of such Reporting Company's financial reporting and such Reporting Company's preparation of financial statements for external purposes in accordance with GAAP. Each Reporting Company has disclosed, based on its most recent evaluation prior to the date of this Agreement, to such Reporting Company's outside auditors and the audit committee of such Reporting Company's board of directors, (A) any significant deficiencies and material weaknesses in the design or operation of internal control over financial reporting (as defined in Rule 13a-15(f) under the Exchange Act) that are reasonably likely to adversely affect such Reporting Company's ability to record, process, summarize and report financial information and (B) to the Knowledge of the Company, any fraud that involves management or other employees of such Reporting Company who have a significant role in such Reporting Company's internal control over financial reporting.

(iv) There are no liabilities or obligations of any Reporting Company or any Subsidiary of any Reporting Company of a nature that would be required under GAAP to be reflected or reserved on a balance sheet (consolidated, as applicable) of such Reporting Company, other than (A) liabilities or obligations reflected or reserved against in such Reporting Company's most recent balance sheet (including the notes thereto) included in the Applicable Company SEC Reports filed prior to the date hereof, (B) liabilities or obligations incurred in the ordinary course

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

of business consistent with past practice since September 30, 2017, (C) liabilities or obligations incurred under or in accordance with this Agreement or in connection with the transactions contemplated by this Agreement and (D) liabilities or obligations that have not had and would not reasonably be expected to have, individually or in the aggregate, a Company Material Adverse Effect.

(f) Absence of Certain Changes or Events.

(i) Since January 1, 2017, there have not been any changes, developments, circumstances, effects, events or occurrences (changes, developments, circumstances, effects, events and occurrences being collectively referred to as "Changes") that have had or would reasonably be expected to have, individually or in the aggregate, a Company Material Adverse Effect.

(ii) Since January 1, 2017, except as contemplated or required by this Agreement, the Company and its Subsidiaries have conducted their respective businesses in all material respects in the ordinary course of business consistent with past practice.

(g) Litigation. There is no (i) material suit, action, arbitration, mediation or legal, arbitral, administrative or other proceeding (a "Proceeding") pending or, to the Knowledge of the Company, threatened against the Company or any of its Subsidiaries, (ii) to the Knowledge of the Company, pending or threatened material investigation or inquiry by a Governmental Entity of the Company or any of its Subsidiaries and (iii) Order, decree or writ of any Governmental Entity outstanding or, to the Knowledge of the Company, threatened to be imposed against the Company or any of its Subsidiaries.

(h) Contracts. Except for this Agreement and the Contracts set forth in Section 3.01(h) of the Company Disclosure Letter and Company Benefit Plans, as of the date of this Agreement, neither the Company nor any of its Subsidiaries is a party to any Company Material Contract. Each Company Material Contract required to be filed by the Company as a "material contract" pursuant to Item 601(b)(10) of Regulation S-K under the Securities Act has been so filed. Each of the Company Material Contracts is valid and binding on the Company or the Subsidiary of the Company party thereto and, to the Knowledge of the Company as of the date hereof, each other party thereto, and is in full force and effect, except for such failures to be valid and binding or to be in full force and effect that have not had and would not reasonably be expected to have, individually or in the aggregate, a Company Material Adverse Effect. There is no default under any Company Material Contract by the Company or any of its Subsidiaries or, to the Knowledge of the Company as of the date hereof, by any other party thereto, in each case except for such defaults that have not had and would not reasonably be expected to have, individually or in the aggregate, a Company Material Adverse Effect.

(i) Compliance with Law; Permits. Since January 1, 2016, the Company and each of its Subsidiaries have been in compliance with and have not been in default under or in violation of any applicable Law, except where such non-compliance, default or violation has not had and would not reasonably be expected to have, individually or in the aggregate, a Company Material Adverse Effect. Since January 1, 2016, neither the Company nor any of its Subsidiaries has received any written notice from any Governmental Entity regarding any actual or possible violation of, or failure to comply with, any Law, except as has not had and would not reasonably be expected to have, individually or in the aggregate, a Company Material Adverse Effect. The Company and its Subsidiaries are in possession of all franchises, grants, permits, easements, variances, exceptions, Consents, certificates, permissions, qualifications and registrations and Orders of all Governmental Entities (collectively, "Permits"), and have filed all tariffs, reports, notices, and other documents with all Governmental Entities, necessary for

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

the Company and its Subsidiaries to own, lease and operate their properties and assets and to carry on their businesses as currently conducted, except where the failure to possess any of such Permits or make any such filings has not had and would not reasonably be expected to have, individually or in the aggregate, a Company Material Adverse Effect. All such Permits are valid and in full force and effect and there are no pending or, to the Knowledge of the Company, threatened administrative or judicial Proceedings that would reasonably be expected to result in modification, termination or revocation thereof, except where the failure to be in full force and effect or any modification, termination or revocation thereof has not had and would not reasonably be expected to have, individually or in the aggregate, a Company Material Adverse Effect. Since January 1, 2016, the Company and each of its Subsidiaries have been in compliance with the terms and requirements of such Permits, except where the failure to be in compliance has not had and would not reasonably be expected to have, individually or in the aggregate, a Company Material Adverse Effect.

(j) Labor and Employment Matters.

(i) Neither the Company nor any of its Subsidiaries is a party to any collective bargaining agreement or other similar agreement with a labor union, works council or similar organization. To the Knowledge of the Company, as of the date hereof, (A) there are no union or other labor organizing activities occurring concerning any employees of the Company or any of its Subsidiaries and (B) there are no labor strikes, slowdowns, work stoppages or lockouts pending or threatened in writing against the Company or any of its Subsidiaries, except, in each case, as has not had and would not reasonably be expected to have, individually or in the aggregate, a Company Material Adverse Effect. Since January 1, 2016, the Company and its Subsidiaries have not engaged in any action that required any notifications under the Workers Adjustment and Retraining Notification (WARN) Act of 1989, as amended, except as has not had and would not reasonably be expected to have, individually or in the aggregate a Company Material Adverse Effect.

(ii) The Company and its Subsidiaries are in compliance with all applicable Law respecting labor, employment, discrimination in employment, payroll, worker classification, wages and hours, occupational safety and health and employment practices, other than instances of non-compliance that have not had and would not reasonably be expected to have, individually or in the aggregate, a Company Material Adverse Effect.

(iii) The list that has been provided by the Company to Parent prior to the date of this Agreement of each employee of the Company and its Subsidiaries setting forth (as applicable) each employee's annual base salary or base wage rate, target annual cash bonus, target long term incentive and other employee data is complete and accurate in all material respects as of the date of this Agreement.

(k) Employee Benefit Matters.

(i) Section 3.01(k)(i) of the Company Disclosure Letter sets forth a complete and accurate list of each material Company Benefit Plan. The Company has made available to Parent correct and complete copies of, to the extent applicable: (A) the current plan document for each material Company Benefit Plan, (B) the most recent annual report on Form 5500 required to be filed with the Department of Labor with respect to each material Company Benefit Plan, (C) the most recent summary plan description for each material Company Benefit Plan, (D) the most recent actuarial reports and financial statements for each material Company Benefit Plan, (E) each trust agreement relating to any material Company Benefit Plan, and (F) the most recent determination or opinion letter, as applicable, for each Qualified Plan.

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

(ii) Except as has not had and would not reasonably be expected to have, individually or in the aggregate, a Company Material Adverse Effect, (A) each Company Benefit Plan (and any related trust or other funding vehicle) has been established, operated and administered in accordance with its terms and is in compliance with ERISA, the Code and all other applicable Law, (B) all contributions or other amounts payable by the Company or any Commonly Controlled Entity with respect to each Company Benefit Plan in respect of current or prior plan years have been paid or accrued in accordance with GAAP, (C) each Company Benefit Plan (and any related trust) that is intended to be qualified under Section 401(a) of the Code (each, a "Qualified Plan") is the subject of a favorable determination or opinion letter issued by the Internal Revenue Service, and, to the Knowledge of the Company, no condition exists that would reasonably be expected to result in the loss of any such Qualified Plan's qualified status and (D) to the Knowledge of the Company, there has been no non-exempt prohibited transaction (as defined in Section 4975 of the Code or Section 406 of ERISA) or breach of fiduciary duty under Section 404 of ERISA with respect to any Company Benefit Plan.

(iii) Except as has not had and would not reasonably be expected to have, individually or in the aggregate, a Company Material Adverse Effect, as of the date hereof, (A) no Proceedings (other than routine claims for benefits in the ordinary course of business) are pending or, to the Knowledge of the Company, threatened relating to or otherwise in connection with any Company Benefit Plan or the assets thereof and (B) to the Knowledge of the Company, there are no pending or threatened administrative investigations, audits or other administrative Proceedings by the Department of Labor, the Pension Benefit Guaranty Corporation, the Internal Revenue Service or other Governmental Entity relating to any Company Benefit Plan.

(iv) None of the Company or any Commonly Controlled Entity has, within the past six (6) years, sponsored, maintained, contributed to or been required to maintain or contribute to, or has any liability under, any employee benefit plan (within the meaning of Section 3(3) of ERISA) that is (and no Company Benefit Plan is) subject to Section 302 or Title IV of ERISA or Sections 412 or 4971 of the Code, or is otherwise a defined benefit plan (as defined in Section 4001 of ERISA). With respect to any plan set forth in Section 3.01(k)(iv) of the Company Disclosure Letter, the Pension Benefit Guaranty Corporation (the "PBGC") has not instituted Proceedings to terminate any such plan (and, to the Knowledge of the Company, no condition exists that would reasonably be expected to result in such Proceedings being instituted) and the Company and its Commonly Controlled Entities do not have any material liability to the PBGC with respect to such plan other than premium payments required by ERISA. Neither the Company nor any Commonly Controlled Entity has, within the past six (6) years, sponsored, maintained, contributed to or been required to maintain or contribute to, nor has any liability under, any multiemployer plan (as defined in Section 3(37) of ERISA).

(v) The Company has no liability for providing health, medical or life insurance or other welfare benefits after retirement or other termination of employment (other than for continuation coverage required under Section 4980(B)(f) of the Code or other similar applicable Law), except for such liabilities that have not had and would not reasonably be expected to have, individually or in the aggregate, a Company Material Adverse Effect. With respect to any plan set forth in Section 3.01(k)(v) of the Company Disclosure Letter, to the Knowledge of the Company, the Company has the right to amend or terminate such plan in its discretion without the consent of any participant.

(vi) None of the execution and delivery of this Agreement, obtaining the Company Requisite Vote or the consummation of the Merger (alone or in conjunction with any other event, including any termination of employment on or following the Effective Time) would reasonably

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

be expected to (A) entitle any current or former director, officer, employee or independent contractor of the Company or any of its Subsidiaries to any compensation or material benefit, (B) accelerate the time of payment or vesting, or trigger any payment or funding, of any compensation or material benefits or trigger any other material obligation under any Company Benefit Plan, (C) result in any material breach or violation of, or material default under, or limit the Company's right to amend, modify, terminate or transfer the assets of, any Company Benefit Plan, (D) directly or indirectly cause the Company to transfer or set aside any assets to fund any benefits, or otherwise give rise to any material liability, under any Company Benefit Plan or (E) result in payments to any "disqualified individual" (as defined for purposes of Section 280G(c) of the Code) which would not be deductible under Section 280G of the Code.

(l) Taxes.

(i) All material Tax Returns required to be filed by or with respect to the Company or any of its Subsidiaries have been timely filed (taking into account any extension of time within which to file) and all such Tax Returns are correct and complete in all material respects.

(ii) All material Taxes of the Company and its Subsidiaries that are required to be paid or discharged, other than Taxes being contested in good faith by appropriate proceedings, have been timely paid and discharged.

(iii) No material deficiency with respect to Taxes has been proposed, asserted or assessed against the Company or any of its Subsidiaries which has not been fully paid or adequately reserved in the SEC Reports filed or furnished by the applicable Reporting Company to the SEC.

(iv) There are no material Tax Liens, other than Permitted Liens, on any asset of the Company or any of its Subsidiaries.

(v) Neither the Company nor any of its Subsidiaries has executed any outstanding waiver of any statute of limitations for the assessment or collection of any material Tax.

(vi) As of the date hereof, no audit or other examination or Proceeding of, or with respect to, any material Tax Return or material amount of Taxes of the Company or any of its Subsidiaries is pending and, between January 1, 2016 and the date hereof, no written notice thereof has been received by the Company or any of its Subsidiaries.

(vii) None of the Company or any of its Subsidiaries (A) is a party to any material Tax allocation, Tax sharing, or Tax indemnity agreement (other than commercial Contracts the primary purpose of which is not Taxes) or (B) is under an obligation under Treasury Regulation Section 1.1502-6 (or any similar provision of state, local or non-U.S. Law) or as transferee or successor, such that, in each case, the Company or any of its Subsidiaries is, after the date hereof or after the Closing (as the case may be), liable for any material amount of Taxes of another Person (other than the Company or any of its Subsidiaries).

(viii) There are no material closing agreements, private letter rulings, technical advice memoranda or rulings that have been entered into or issued by any Tax authority with respect to the Company or any of its Subsidiaries which are still in effect as of the date of this Agreement.

(ix) Neither the Company nor any of its Subsidiaries has "participated" within the meaning of Treasury Regulation Section 1.6011-4(c)(3)(i)(A) in any "listed transaction" within

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

the meaning of Section 6011 of the Code and the Treasury Regulations thereunder, as in effect and as amended by any guidance published by the Internal Revenue Service for the applicable period.

(x) Each of the Company and its Subsidiaries has properly and timely withheld or collected and timely paid over to the appropriate Governmental Entity (or each is properly holding for such timely payment) all material amounts of Taxes required to be withheld, collected and paid over by applicable Law.

(xi) To the Knowledge of the Company, the Company and its Subsidiaries have complied with the normalization rules described in Section 168(i)(9) of the Code and any other applicable provisions of the Code or the Treasury Regulations thereunder with respect to any "public utility property" (as defined in Section 168(i)(10) of the Code).

(xii) Neither the Company nor any of its Subsidiaries has taken any action or knows of any fact that would reasonably be expected to prevent the Merger from qualifying for the Intended Tax Treatment.

(m) Environmental Matters. Except for those matters that have not had and would not reasonably be expected to have, individually or in the aggregate, a Company Material Adverse Effect, (i) each of the Company and its Subsidiaries is, and since January 1, 2016 has been, in compliance with all applicable Environmental Law and, as of the date hereof, neither the Company nor any of its Subsidiaries has received any written notice from any Governmental Entity alleging that the Company or any of its Subsidiaries is in violation of, or has any liability under, any Environmental Law, (ii) each of the Company and its Subsidiaries possesses and is in compliance with all Permits required under applicable Environmental Law to conduct its business as currently conducted, and all such Permits are valid and in good standing and neither the Company nor any of its Subsidiaries has received notice from any Governmental Entity seeking to modify, revoke or terminate any such Environmental Permits, (iii) there are no Proceedings pursuant to any Environmental Law pending or, to the Knowledge of the Company, threatened against the Company or any of its Subsidiaries, (iv) there have been no releases of Hazardous Materials at or on any property owned, leased or operated by the Company or any of its Subsidiaries, in each case, in a manner that would reasonably be expected to result in any obligation to conduct any investigation, remediation or other corrective or responsive action by the Company or any of its Subsidiaries and (v) neither the Company nor any of its Subsidiaries is subject to any consent decrees, Orders, settlements or compliance agreements that impose any current or future obligations on the Company and its Subsidiaries under Environmental Law.

(n) Insurance. The Company and its Subsidiaries maintain, or are entitled to the benefits of, insurance in such amounts and against such risks as the Company believes to be customary for companies of a comparable size in the industries in which it and its Subsidiaries operate. Except as has not had and would not reasonably be expected to have, individually or in the aggregate, a Company Material Adverse Effect, all material insurance policies carried by or covering the Company and its Subsidiaries with respect to their business, assets and properties are in full force and effect, and, to the Knowledge of the Company, no notice of cancellation has been given with respect to any such policy.

(o) Real Property.

(i) Subject, as to enforceability, to bankruptcy, insolvency and other Law of general applicability relating to or affecting creditors' rights and to general equity principles, each Contract under which the Company or any Subsidiary thereof is the tenant, subtenant or occupant

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

(each, a "Company Real Property Lease") with respect to material real property leased, subleased, licensed or otherwise occupied (whether as tenant, subtenant or pursuant to other occupancy arrangements) by the Company or any of its Subsidiaries (collectively, including the improvements thereon, the "Company Leased Real Property") is valid and binding on the Company or the Subsidiary of the Company party thereto, and, to the Knowledge of the Company, each other party thereto, and is in full force and effect, except for such failures to be valid and binding or to be in full force and effect that have not had and would not reasonably be expected to have, individually or in the aggregate, a Company Material Adverse Effect. There is no uncured default of any material provision of any Company Real Property Lease by the Company or any of its Subsidiaries or, to the Knowledge of the Company, by any other party thereto, and no event has occurred that with the lapse of time or the giving of notice or both would reasonably be expected to constitute a default thereunder by the Company or any of its Subsidiaries or, to the Knowledge of the Company, by any other party thereto, in each case except for such defaults and events that have not had and would not reasonably be expected to have, individually or in the aggregate, a Company Material Adverse Effect.

(ii) The Company or one of its Subsidiaries has good and valid title to all material real property currently owned by the Company or any of its Subsidiaries (collectively, "Company Owned Real Property") free and clear of all Liens (other than Permitted Liens), except where absence of good and valid title or any such Lien has not had and would not reasonably be expected to have, individually or in the aggregate, a Company Material Adverse Effect.

(iii) Each of the Company and its Subsidiaries has such consents, easements, rights-of-way, permits and licenses with respect to any real property (collectively, "Rights-of-Way") as are sufficient to conduct its business in the manner described, and subject to the limitations, qualifications, reservations and encumbrances contained, in any Applicable Company SEC Report, except for such Rights-of-Way the absence of which has not had and would not reasonably be expected to have, individually or in the aggregate, a Company Material Adverse Effect. All pipelines and electric transmission assets owned or operated by the Company and its Subsidiaries are subject to Rights-of-Way, there are no encroachments or encumbrances or other Rights-of-Way that affect the use thereof and there are no gaps in the Rights-of-Way that are material for such pipelines or electric transmission assets, except as has not had and would not reasonably be expected to have, individually or in the aggregate, a Company Material Adverse Effect.

(iv) Each of the Company and its Subsidiaries have sufficient rights with respect to their Company Leased Real Property and Company Owned Real Property and under their Rights-of-Way to conduct its business as currently conducted, except where a failure to have such rights would not have and would not reasonably be expected to have, individually or in the aggregate, a Company Material Adverse Effect.

(p) Intellectual Property, Privacy, and Information Technology.

(i) The Company and its Subsidiaries own or have the right to use all Intellectual Property necessary for the operation of the business of the Company and its Subsidiaries, except where the failure to own or have the right to use such Intellectual Property has not had and would not reasonably be expected to have, individually or in the aggregate, a Company Material Adverse Effect. To the Knowledge of the Company, the operation of the business of the Company and its Subsidiaries does not infringe upon or misappropriate any Intellectual Property of any other Person as of the date of this Agreement, except for such matters that have not had and would not reasonably be expected to have, individually or in the aggregate, a Company

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

Material Adverse Effect. The Company and its Subsidiaries have taken commercially reasonable precautions to protect the secrecy and confidentiality of the trade secrets owned by the Company and its Subsidiaries, except where the failure to take reasonable precautions has not had and would not reasonably be expected to have, individually or in the aggregate, a Company Material Adverse Effect.

(ii) Except as has not had and would not reasonably be expected to have, individually or in the aggregate, a Company Material Adverse Effect, (A) to the Knowledge of the Company, the Company has not suffered any security breach of its IT Systems that has caused any loss of data, disruption or damage to the Company's operations, (B) the Company has not experienced any security breaches of personal data or IT Systems that required or would require law enforcement or Governmental Entity notification or any remedial action under applicable Law or any Data Privacy Legal Requirement, (C) to the Knowledge of the Company, since January 1, 2016, there has been no unauthorized access to, or other misuse of, personal data or IT Systems and (D) there are no pending or expected complaints, claims, actions, fines, or other penalties facing the Company in connection with any of the foregoing.

(iii) Except as has not had and would not reasonably be expected to have, individually or in the aggregate, a Company Material Adverse Effect, the Company has security, back-ups, disaster recovery arrangements, and administrative, physical, and technical safeguards in place that are reasonably appropriate for a company in the business in which the Company is engaged and the Company has implemented security patches or upgrades that are reasonably available for the IT Systems where such patches or upgrades are reasonably required to maintain the security of such IT Systems.

(q) Regulatory Matters.

(i) All filings (other than immaterial filings) required to be made by the Company or any of its Subsidiaries since January 1, 2016 with the FERC, the Department of Energy (the "DOE"), the NRC, the FCC, the North American Electric Reliability Corporation (the "NERC"), the SCPSC, the SCORS, the NCUC, the GPSC, the United States Pipeline Hazardous Materials Safety Administration (the "PHMSA") and the United States Department of Transportation (the "DOT"), as the case may be, have been made, including all forms, notices, statements, reports, agreements and all documents, exhibits, amendments and supplements appertaining thereto, including all rates, tariffs and related documents, and all such filings complied, as of their respective dates, or, if amended or superseded by a subsequent filing made prior to the date of this Agreement, as of the date of the last such amendment or superseding filing prior to the date of this Agreement, with all applicable requirements of applicable statutes and the rules and regulations promulgated thereunder, except for filings the failure of which to make or the failure of which to make in compliance with all applicable requirements of applicable statutes and the rules and regulations promulgated thereunder, has not had and would not reasonably be expected to have, individually or in the aggregate, a Company Material Adverse Effect.

(ii) Since January 1, 2016, none of the Company or any of its Subsidiaries has received any written notice or, to the Company's Knowledge, any other communication from the FERC, the DOE, the NRC, the FCC, the NERC, the SCPSC, the SCORS, the NCUC, the GPSC, the PHMSA or the DOT regarding any actual or possible material violation of, or material failure to comply with, any Law.

(iii) To the Knowledge of the Company, except as has not had and would not reasonably be expected to have a material impact on the Company and its Subsidiaries, the

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

operations of the Virgil C. Summer Nuclear Station in Jenkinsville, South Carolina (the "Summer Station"), including the operation of the NND Project and the construction, and cessation of the construction, of such project, are and have been conducted in compliance with applicable health, safety, regulatory and other requirements under applicable Laws.

(iv) Except as has not had and would not reasonably be expected to have, individually or in the aggregate, a Company Material Adverse Effect, the financial assurance for decommissioning relating to the Summer Station provided to comply with NRC's requirements in 10 CFR 50.75 and 72.30 consists of one or more trusts that are validly existing and in good standing under the Laws of their respective jurisdictions of formation with all requisite authority to conduct their affairs as currently conducted.

(r) Voting Requirements. Assuming the accuracy of the representations and warranties set forth in Section 3.02(n), the affirmative vote of holders of at least two-thirds of the outstanding Company Shares entitled to vote thereon at the Shareholders Meeting or any adjournment or postponement thereof to approve this Agreement (the "Company Requisite Vote") is the only vote of the holders of any class or series of capital stock of the Company necessary for the Company to approve this Agreement and approve and consummate the Merger and the other transactions contemplated by this Agreement.

(s) Brokers and Other Advisors. No broker, investment banker, financial advisor or other Person, other than Morgan Stanley & Co. LLC and RBC Capital Markets, LLC, is entitled to any broker's, finder's or financial advisor's fee or commission in connection with the Merger and the other transactions contemplated by this Agreement based upon arrangements made by or on behalf of the Company.

(t) Opinions of Financial Advisors. The Company Board has received the oral opinions of Morgan Stanley & Co. LLC and RBC Capital Markets, LLC to the effect that, as of the date of such opinions and based upon and subject to the various matters, limitations, qualifications and assumptions set forth therein, the Merger Consideration is fair, from a financial point of view, to the holders of Company Shares (other than Cancelled Shares). Signed, true and complete written copies of such opinions will be made available to Parent, which Parent and Merger Sub acknowledge and agree (i) are being provided to Parent for informational purposes only and (ii) may not be relied upon by Parent or Merger Sub.

(u) State Takeover Statutes. Assuming the accuracy of the representations and warranties set forth in Section 3.02(n), the Company Board has taken all action necessary to render inapplicable to this Agreement and the transactions contemplated by this Agreement all potentially applicable state anti-takeover statutes or regulations and any similar provisions in the Company Articles of Incorporation and the Company Bylaws. Assuming the accuracy of the representations and warranties set forth in Section 3.02(n), as of the date of this Agreement, no "fair price", "business combination", "moratorium", "control share acquisition" or other state takeover Law or similar Law (collectively, "Takeover Statutes") enacted by any state will prohibit or impair the consummation of the Merger or the other transactions contemplated by this Agreement.

(v) Information Supplied. None of the information supplied by the Company specifically for inclusion or incorporation by reference in the registration statement on Form S-4 in connection with the issuance by Parent of the aggregate Merger Consideration (the "Form S-4") or the Proxy Statement/Prospectus, at (i) the time the Form S-4 is declared effective, (ii) the date the Proxy Statement/Prospectus is first published or mailed to the holders of Company Shares or (iii) the time of the Shareholders Meeting (except, with respect to the foregoing clauses (i) through (iii), to the extent

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

that any such information is amended or superseded by any subsequent SEC Reports of Parent or the Company), will contain any untrue statement of material fact or omit to state any material fact required to be stated therein or necessary to make the statements therein, in light of the circumstances under which they are made, not misleading.

SECTION 3.02. Representations and Warranties of Parent and Merger Sub. Except (x) as disclosed in the SEC Reports of Parent or its wholly-owned Subsidiaries filed with or furnished to the SEC since January 1, 2016 and publicly available at least twenty-four (24) hours prior to the date of this Agreement (excluding any disclosures set forth in any risk factor section or in any other section to the extent such disclosures are forward-looking statements or are cautionary, predictive or forward-looking in nature) or (y) as set forth in the Parent Disclosure Letter (it being agreed that disclosure of any item in any section or subsection of the Parent Disclosure Letter shall also be deemed disclosed with respect to any other section or subsection of this Agreement to which the relevance of such item is reasonably apparent), Parent and Merger Sub represent and warrant to the Company as follows:

(a) Organization, Standing and Corporate Power. Each of Parent and Merger Sub is a corporation duly incorporated, validly existing and in good standing (where such concept is recognized under applicable Law) under the Laws of the Commonwealth of Virginia, in the case of Parent, and the Laws of the State of South Carolina, in the case of Merger Sub, and has all requisite corporate power and authority to carry on its business as currently conducted and is duly qualified or licensed to do business and is in good standing (where such concept is recognized under applicable Law) in each jurisdiction where the nature of its business or the ownership, leasing or operation of its properties or assets makes such qualification or licensing necessary, other than where the failure to be so qualified, licensed or in good standing has not had and would not reasonably be expected to have, individually or in the aggregate, a Parent Material Adverse Effect. Each of Parent's Subsidiaries is a legal entity duly organized, validly existing and in good standing (where such concept is recognized under applicable Law) under the Law of its jurisdiction of organization and has all requisite corporate power and authority to carry on its business as currently conducted, and each of Parent's Subsidiaries is duly qualified or licensed to do business and is in good standing (where such concept is recognized under applicable Law) in each jurisdiction where the nature of its business or the ownership, leasing or operation of its properties or assets makes such qualification or licensing necessary, other than where the failure to be so qualified, licensed or in good standing has not had and would not reasonably be expected to have, individually or in the aggregate, a Parent Material Adverse Effect. Parent has made available to the Company a true and complete copy of the organizational documents of Parent (the "Parent Organizational Documents"), and the comparable organizational documents of Merger Sub, in each case as amended and in effect as of the date of this Agreement.

(b) Subsidiaries. All of the outstanding shares of capital stock of, or other equity interests in, each wholly-owned Subsidiary of Parent have, in all cases, been duly authorized and validly issued and are fully paid, non-assessable and not subject to preemptive rights, and are wholly-owned, directly or indirectly, by Parent free and clear of all Liens, other than transfer restrictions contained in the articles of incorporation, bylaws and limited liability company agreements (or any equivalent constituent documents) of such wholly-owned Subsidiary.

(c) Capital Structure.

(i) The authorized capital stock of Parent consists of 1,000,000,000 Parent Shares and 20,000,000 shares of preferred stock (such preferred stock, the "Parent Preferred Stock"). At the close of business on December 29, 2017, there were (A) 644,571,202 Parent Shares issued and outstanding and (B) no shares of Parent Preferred Stock issued or outstanding. Except as set forth in the immediately preceding sentence, at the close of business on December 29, 2017, no shares

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

of capital stock or other voting securities of Parent were issued or outstanding. Since December 29, 2017 to the date of this Agreement, (x) there have been no issuances by Parent of shares of capital stock or other voting securities of Parent other than pursuant to the exercise or vesting of equity awards under any Parent equity award plans or pursuant to Parent's dividend reinvestment and direct stock purchase plan, in each case, outstanding as of December 29, 2017 and (y) there have been no issuances by Parent of options, warrants, other rights to acquire shares of capital stock of Parent or other rights that give the holder thereof any economic interest of a nature accruing to the holders of Parent Shares. All outstanding Parent Shares are, and all such Parent Shares that may be issued prior to the Effective Time will be when issued, duly authorized, validly issued, fully paid and non-assessable and not subject to preemptive rights.

(ii) No Subsidiary of Parent (it being understood and agreed that, for purposes of this Section 3.02(c)(ii), Subsidiaries of Parent shall not include (x) any benefit plan maintained by Parent or any of its Subsidiaries or (y) any nuclear decommissioning trusts maintained by Parent or any of its Subsidiaries) owns any Parent Shares or other shares of capital stock of Parent. There are no bonds, debentures, notes or other Indebtedness of Parent or of any of its Subsidiaries that give the holders thereof the right to vote (or that are convertible into, or exchangeable for, securities having the right to vote) on any matters on which holders of Parent Shares may vote ("Voting Parent Debt"). Except for any obligations pursuant to this Agreement or as otherwise set forth in Section 3.02(c)(i), as of December 29, 2017, there are no options, warrants, rights (including preemptive, conversion, stock appreciation, redemption or repurchase rights), convertible or exchangeable securities, stock-based performance units, Contracts or undertakings of any kind to which Parent or any of its Subsidiaries is a party or by which any of them is bound (A) obligating Parent or any of its Subsidiaries to issue, deliver or sell, or cause to be issued, delivered or sold, additional shares of capital stock or other securities of, or equity interests in, or any security convertible or exchangeable for any capital stock or other security of, or equity interest in, Parent or any of its wholly-owned Subsidiaries or any Voting Parent Debt, (B) obligating Parent or any of its wholly-owned Subsidiaries to issue, grant or enter into any such option, warrant, right, security, unit, Contract or undertaking to declare or pay any dividend or distribution or (C) that give any Person the right to subscribe for or acquire any securities of Parent or any of its wholly-owned Subsidiaries, or to receive any economic interest of a nature accruing to the holders of Parent Shares or otherwise based on the performance or value of shares of capital stock of Parent or any of its wholly-owned Subsidiaries. As of the date of this Agreement, there are no outstanding obligations of Parent or any of its wholly-owned Subsidiaries to repurchase, redeem or otherwise acquire any shares of capital stock or other equity interest, other than pursuant to any Parent equity award plans. There are no voting agreements, voting trusts, shareholders agreements, proxies or other agreements to which Parent or any of its Subsidiaries is bound with respect to the voting of the capital stock or other equity interests of Parent, or restricting the transfer of, or providing registration rights with respect to, such capital stock or equity interests.

(d) Authority; Noncontravention.

(i) Each of Parent and Merger Sub has all requisite corporate power and authority to execute and deliver, and perform its obligations under, this Agreement and to consummate the transactions contemplated by this Agreement, subject, in the case of the Merger, to the delivery by Parent of the written consent, as sole shareholder of Merger Sub, referenced in Section 5.11. The execution, delivery and performance of this Agreement by Parent and Merger Sub and the consummation by Parent and Merger Sub of the transactions contemplated by this Agreement have been duly authorized by all necessary corporate action on the part of each of Parent and Merger Sub, subject, in the case of the Merger, to the delivery by Parent of the written consent, as

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

sole shareholder of Merger Sub, referenced in Section 5.11. This Agreement has been duly executed and delivered by each of Parent and Merger Sub and, assuming the due authorization, execution and delivery by the Company, constitutes a legal, valid and binding obligation of each of Parent and Merger Sub, enforceable against each of Parent and Merger Sub in accordance with its terms, subject, as to enforceability, to bankruptcy, insolvency and other Law of general applicability relating to or affecting creditors' rights and to general equity principles. The board of directors of Parent has duly and validly adopted resolutions approving this Agreement and the transactions contemplated by this Agreement, including the Merger, and the board of directors of Merger Sub has duly and validly adopted resolutions (A) determining that it is in the best interests of Merger Sub and its sole shareholder that Merger Sub enter into this Agreement and consummate the Merger and the other transactions contemplated by this Agreement on the terms and subject to the conditions set forth in this Agreement, (B) adopting this Agreement and approving the transactions contemplated by this Agreement, including the Merger and (C) recommending that the sole shareholder of Merger Sub approve this Agreement, which resolutions of Parent and Merger Sub, in each case, have not been rescinded, modified or withdrawn in any way.

(ii) The execution, delivery and performance by Parent and Merger Sub of this Agreement do not, and the consummation of the Merger and the other transactions contemplated by this Agreement and compliance with the provisions of this Agreement will not, conflict with, or result in any violation of, or default (with or without notice or lapse of time, or both) under, or give rise to any right (including a right of termination, cancellation or acceleration of any obligation or any right of first refusal, participation or similar right) under, or cause the loss of any benefit under, or result in the creation of any Lien (other than Permitted Liens) upon any of the properties or assets of Parent or Merger Sub or any of their respective Subsidiaries under, any provision of (A) the Parent Organizational Documents or the comparable organizational documents of any of Parent's Subsidiaries, including Merger Sub or (B) subject to the filings and other matters referred to in Section 3.02(d)(iii), (1) any Contract or (2) any Law, in each case, applicable to Parent or Merger Sub or any of their respective Subsidiaries or any of their respective properties or assets, other than, in the case of foregoing clause (B), any such conflicts, violations, defaults, rights, losses or Liens that have not had and would not reasonably be expected to have, individually or in the aggregate, a Parent Material Adverse Effect.

(iii) No Consent of, or registration, declaration or filing with, or notice to, any Governmental Entity is required to be obtained or made by or with respect to Parent or Merger Sub or any of their respective Subsidiaries in connection with the execution, delivery and performance of this Agreement by Parent and Merger Sub or the consummation by Parent and Merger Sub of the transactions contemplated by this Agreement, except for (A) the Regulatory Conditions and any other Consents of or under, and compliance with any other applicable requirements of, (1) the HSR Act, (2) the FERC, (3) the NRC, (4) the FCC, (5) the NCUC, and (6) the GPSC (the items set forth in this clause (A), collectively, the "Parent Regulatory Clearances" and together with the Company Regulatory Clearances, the "Regulatory Clearances"), (B) the filing with the SEC of such reports and other documents (including the filing of the Form S-4) under, and compliance with all other applicable requirements of, the Securities Act or the Exchange Act and the rules and regulations promulgated thereunder and any applicable state securities, takeover and "blue sky" Laws, (C) the filing of the Articles of Merger with the Secretary of State of the State of South Carolina, (D) any filings under, and compliance with all other applicable requirements of, the rules and regulations of the NYSE and (E) such other Consents, registrations, declarations, filings and notices, the failure of which to be obtained or made has not had and would not reasonably be expected to have, individually or in the aggregate, a Parent Material Adverse Effect and would not reasonably be expected to prevent, or

materially impair or delay, the consummation of the Merger or any of the other material transactions contemplated by this Agreement.

(e) Applicable Parent SEC Reports; Financial Statements; Undisclosed Liabilities.

(i) Parent and its Subsidiaries have filed or furnished, as applicable, all SEC Reports such companies were required or otherwise obligated to file with or furnish to the SEC since June 30, 2016 (such SEC Reports, the "Applicable Parent SEC Reports"). As of their respective dates of filing, or, if amended or superseded by a subsequent filing made prior to the date of this Agreement, as of the date of the last such amendment or superseding filing prior to the date of this Agreement, the Applicable Parent SEC Reports complied in all material respects with the applicable requirements of the Securities Act, the Exchange Act and the Sarbanes-Oxley Act, as the case may be, and the applicable rules and regulations promulgated thereunder, each as in effect on the date of any such filing. As of the time of filing with the SEC (or, if amended prior to the date of this Agreement, as of the date of such amendment), none of the Applicable Parent SEC Reports so filed contained any untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary in order to make the statements therein, in light of the circumstances under which they were made, not misleading, except to the extent that the information in such Applicable Parent SEC Reports has been amended or superseded by a later Applicable Parent SEC Report.

(ii) As of their respective dates, the audited and unaudited financial statements (consolidated, as applicable, and including any related notes thereto) of each of Parent and its Subsidiaries, as applicable, included in the Applicable Parent SEC Reports have been prepared in all material respects (except, as applicable, as permitted by Form 10-Q of the SEC or other applicable rules and regulations of the SEC) in accordance with GAAP applied on a consistent basis during the periods involved (except as may be indicated in the notes thereto) and fairly present in all material respects the consolidated financial position of Parent and its Subsidiaries, as applicable, as of the respective dates thereof (taking into account the notes thereto) and the consolidated results of their operations and cash flows for the periods indicated (taking into account the notes thereto) and subject, in the case of unaudited financial statements, to normal year-end adjustments.

(iii) Parent maintains disclosure controls and procedures required by Rule 13a-15(e) or Rule 15d-15(e) under the Exchange Act and such disclosure controls and procedures are effective in all material respects to ensure that information required to be disclosed by Parent in the SEC Reports it files or submits under the Exchange Act is recorded, processed, summarized and reported on a timely basis to the individuals responsible for the preparation of Parent's SEC Reports and other public disclosure documents. Parent maintains internal control over financial reporting required by Rule 13a-15(f) or Rule 15d-15(f) under the Exchange Act and such internal control is effective in all material respects in providing reasonable assurance regarding the reliability of Parent's financial reporting and Parent's preparation of financial statements for external purposes in accordance with GAAP. Parent has disclosed, based on its most recent evaluation prior to the date of this Agreement, to Parent's outside auditors and the audit committee of Parent's board of directors (A) any significant deficiencies and material weaknesses in the design or operation of internal control over financial reporting (as defined in Rule 13a-15(f) under the Exchange Act) that are reasonably likely to adversely affect Parent's ability to record, process, summarize and report financial information and (B) to the Knowledge of Parent, any fraud that involves management or other employees of Parent who have a significant role in Parent's internal control over financial reporting.

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

(iv) There are no liabilities or obligations of Parent or any of its Subsidiaries of a nature that would be required under GAAP to be reflected or reserved on a financial statement (consolidated, as applicable) of Parent, other than (A) liabilities or obligations reflected or reserved against in such entity's most recent balance sheet (including the notes thereto) included in the Applicable Parent SEC Reports filed prior to the date hereof, (B) liabilities or obligations incurred in the ordinary course of business consistent with past practice since September 30, 2017, (C) liabilities or obligations incurred under or in accordance with this Agreement or in connection with the transactions contemplated by this Agreement and (D) liabilities or obligations that have not had and would not reasonably be expected to have, individually or in the aggregate, a Parent Material Adverse Effect.

(f) Absence of Certain Changes or Events.

(i) Since January 1, 2017, there have not been any Changes that have had or would reasonably be expected to have, individually or in the aggregate, a Parent Material Adverse Effect.

(ii) Since January 1, 2017, except as contemplated or required by this Agreement, Parent and its wholly-owned Subsidiaries have conducted their respective businesses in all material respects in the ordinary course of business consistent with past practice.

(g) Litigation. Except as has not had and would not reasonably be expected to have, individually or in the aggregate, a Parent Material Adverse Effect, there is no (i) Proceeding pending or, to the Knowledge of Parent, threatened against Parent or any of its Subsidiaries, (ii) to the Knowledge of Parent, pending or threatened material investigation or inquiry by a Governmental Entity of Parent or any of its Subsidiaries and (iii) Order, decree or writ of any Governmental Entity outstanding or, to the Knowledge of Parent, threatened to be imposed against Parent or any of its Subsidiaries.

(h) Compliance with Law. Since January 1, 2016, Parent and each of its Subsidiaries have been in compliance with and have not been in default under or in violation of any applicable Law, except where such non-compliance, default or violation has not had and would not reasonably be expected to have, individually or in the aggregate, a Parent Material Adverse Effect. Since January 1, 2016, neither Parent nor any of its Subsidiaries has received any written notice from any Governmental Entity regarding any violation of, or failure to comply with, any Law, except as has not had and would not reasonably be expected to have, individually or in the aggregate, a Parent Material Adverse Effect.

(i) Taxes.

(i) All material Tax Returns required to be filed by or with respect to Parent or any of its wholly-owned Subsidiaries have been timely filed (taking into account any extension of time within which to file) and all such Tax Returns are correct and complete in all material respects.

(ii) All material Taxes of Parent and its wholly-owned Subsidiaries that are required to be paid or discharged, other than Taxes being contested in good faith by appropriate proceedings, have been timely paid and discharged.

(iii) There are no material Tax Liens, other than Permitted Liens, on any asset of Parent or any of its wholly-owned Subsidiaries.

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

(iv) Neither Parent nor any of its wholly-owned Subsidiaries has executed any outstanding waiver of any statute of limitations for the assessment or collection of any material Tax.

(v) As of the date hereof, no audit or other examination or Proceeding of, or with respect to, any material Tax Return or material amount of Taxes of Parent or any of its wholly-owned Subsidiaries is pending and, between January 1, 2016 and the date hereof, no written notice thereof has been received by Parent or any of its wholly-owned Subsidiaries.

(vi) None of Parent or any of its wholly-owned Subsidiaries (A) is a party to any material Tax allocation, Tax sharing, Tax indemnity or similar agreement or (B) is under an obligation under Treasury Regulation Section 1.1502-6 (or any similar provision of state, local or non-U.S. Law) or as transferee or successor, such that, in each case, Parent or any of its wholly-owned Subsidiaries is, after the date hereof or after the Closing (as the case may be), liable for any material amount of Taxes of another Person (other than Parent or any of its wholly-owned Subsidiaries).

(vii) There are no material closing agreements, private letter rulings, technical advice memoranda or rulings that have been entered into or issued by any Tax authority with respect to Parent or any of its wholly-owned Subsidiaries which are still in effect as of the date of this Agreement.

(viii) Neither Parent nor any of its wholly-owned Subsidiaries has "participated" within the meaning of Treasury Regulation Section 1.6011-4(c)(3)(i)(A) in any "listed transaction" within the meaning of Section 6011 of the Code and the Treasury Regulations thereunder, as in effect and as amended by any guidance published by the Internal Revenue Service for the applicable period.

(ix) Neither Parent nor any of its Subsidiaries has taken any action or knows of any fact that would reasonably be expected to prevent the Merger from qualifying for the Intended Tax Treatment.

(j) Regulatory Matters.

(i) All filings (other than immaterial filings) required to be made by Parent or any of its Subsidiaries since January 1, 2016 with the FERC, the DOE, the NRC, and the NERC, as the case may be, have been made, including all forms, notices, statements, reports, agreements and all documents, exhibits, amendments and supplements appertaining thereto, including all rates, tariffs and related documents, and all such filings complied, as of their respective dates, or, if amended or superseded by a subsequent filing made prior to the date of this Agreement, as of the date of the last such amendment or superseding filing prior to the date of this Agreement, with all applicable requirements of applicable statutes and the rules and regulations promulgated thereunder, except for filings the failure of which to make or the failure of which to make in compliance with all applicable requirements of applicable statutes and the rules and regulations promulgated thereunder, has not had and would not reasonably be expected to have, individually or in the aggregate, a Parent Material Adverse Effect.

(ii) Since January 1, 2016, none of Parent or any of its wholly-owned Subsidiaries has received any written notice or, to Parent's Knowledge, any other communication from the FERC, the DOE, the NRC or the NERC regarding any actual or possible material violation of, or material failure to comply with, any Law.

(k) No Vote Required. Other than the approval of this Agreement by the sole shareholder of Merger Sub referenced in Section 5.11, no vote or consent of the holders of any class or series of capital stock of Parent or any of its Affiliates is necessary for Parent and Merger Sub to approve this Agreement and approve and consummate the Merger and the other transactions contemplated by this Agreement.

(l) Brokers and Other Advisors. Except for fees or commissions to be paid by Parent, no broker, investment banker, financial advisor or other Person is entitled to any broker's, finder's or financial advisor's fee or commission in connection with the Merger and the other transactions contemplated by this Agreement based upon arrangements made by or on behalf of Parent or Merger Sub.

(m) Ownership and Operation of Merger Sub. The authorized capital stock of Merger Sub consists solely of one thousand (1,000) shares of common stock, without par value, one hundred (100) of which are validly issued and outstanding as of the date hereof. All of the issued and outstanding capital stock of Merger Sub is, and at and immediately prior to the Effective Time will be, owned by Parent. Merger Sub has been formed solely for the purpose of engaging in the transactions contemplated by this Agreement and prior to the Effective Time will have engaged in no other business activities and will have no assets, liabilities or obligations of any nature other than those incident to its formation and its entry into this Agreement and the consummation of the Merger and the other transactions contemplated by this Agreement.

(n) Ownership of Shares. None of Parent, Merger Sub or any of their Subsidiaries (it being understood and agreed that, for purposes of this Section 3.02(n), Subsidiaries of Parent and Merger Sub shall not include (x) any benefit plan maintained by Parent or any of its Subsidiaries or (y) any nuclear decommissioning trusts maintained by Parent or any of its Subsidiaries) is, directly or indirectly, a "beneficial owner" (as such term is defined in Rule 13d-3 under the Exchange Act) of any (i) Company Shares, (ii) securities that are convertible into or exchangeable or exercisable for Company Shares, or (iii) any rights to acquire or vote any Company Shares, or any option, warrant, convertible security, stock appreciation right, swap agreement or other security, contract right or derivative position, whether or not presently exercisable, that provides Parent, Merger Sub, or any of their respective Subsidiaries with an exercise or conversion privilege or a settlement payment or mechanism at a price related to the value of Company Shares or a value determined in whole or part with reference to, or derived in whole or part from, the value of the Company Shares, in any case without regard to whether (A) such derivative conveys any voting rights in such securities to such Person, (B) such derivative is required to be, or capable of being, settled through delivery of securities or (C) such Person may have entered into other transactions that hedge the economic effect of such derivative, other than any Company Shares or securities, rights, options, warrants, agreements and derivatives with respect to any Company Shares in an amount equal to, in the aggregate, less than five percent (5%) of the total number of issued and outstanding Company Shares.

(o) Information Supplied. None of the information supplied by Parent specifically for inclusion or incorporation by reference in the Form S-4 or the Proxy Statement/Prospectus, at (i) the time the Form S-4 is declared effective, (ii) the date the Proxy Statement/Prospectus is first published or mailed to the holders of Company Shares or (iii) the time of the Shareholders Meeting (except, with respect to the foregoing clauses (i) through (iii), to the extent that any such information is amended or superseded by any subsequent SEC Reports of Parent or the Company), will contain any untrue statement of material fact or omit to state any material fact required to be stated therein or necessary to make the statements therein, in light of the circumstances under which they are made, not misleading.

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

(p) Financial Ability. Parent has, and at the Closing Parent will have, sufficient immediately available funds and the financial ability to pay all amounts payable to holders of Company Performance Share Awards and Company RSUs pursuant to Section 2.02 and any repayment or refinancing of then outstanding Indebtedness of the Company or any of its Subsidiaries, which repayment or refinancing is required as a result of the Merger, as set forth in Section 3.02(p) of the Company Disclosure Letter, after taking into account any consents or waivers obtained from any holder of such Indebtedness prior to the Effective Time.

ARTICLE IV

COVENANTS RELATING TO CONDUCT OF BUSINESS

SECTION 4.01. Conduct of Business Pending the Merger.

(a) Conduct of Business by the Company. From the date of this Agreement until the earlier of the Effective Time and the termination of this Agreement in accordance with Article VII, except as otherwise expressly contemplated by this Agreement, set forth in Section 4.01(a) of the Company Disclosure Letter, required by applicable Law, required by a Governmental Entity or with the prior written consent of Parent (such consent not to be unreasonably withheld, conditioned or delayed), (x) the Company shall, and shall cause each of its Subsidiaries to, conduct its business in all material respects in the ordinary course consistent with past practice and shall use commercially reasonable efforts to preserve substantially intact its current business organizations, maintain adequate and comparable insurance coverage, and preserve its relationships with its employees, counterparties, customers and suppliers and Governmental Entities with jurisdiction over the Company or any of its Subsidiaries and (y) without limiting the foregoing, the Company shall not, and shall not permit any of its Subsidiaries to:

(i) declare, set aside or pay any dividends on, or make any other distributions (whether in cash, stock or property) in respect of, any of its capital stock, other than (A) regular quarterly cash dividends payable by the Company in respect of Company Shares not in excess of the amount set forth in Section 4.01(a)(i) of the Company Disclosure Letter and (B) dividends or distributions by a Subsidiary of the Company to the Company or to any wholly-owned Subsidiary of the Company;

(ii) split, combine or reclassify any of its capital stock, other ownership interests or voting securities, or securities convertible into or exchangeable or exercisable for any such shares of capital stock, interests or securities, or issue or authorize the issuance of any other securities in respect of, in lieu of or in substitution for shares of its capital stock, other ownership interests or voting securities, other than transactions solely between or among the Company and its wholly-owned Subsidiaries or between or among the Company's wholly-owned Subsidiaries;

(iii) purchase, redeem or otherwise acquire any of its or its Subsidiaries' shares of capital stock, other ownership interests or voting securities, or securities convertible into or exchangeable or exercisable for any such shares of capital stock, interests or securities, or any rights, warrants or options to acquire any such shares of capital stock, interests or securities, other than (A) the withholding of Company Shares to satisfy Tax obligations or the exercise price with respect to awards granted pursuant to the Company Equity Award Plans or settlement of awards granted pursuant to the Company Equity Award Plans and (B) the acquisition by the Company of awards granted pursuant to the Company Equity Award Plans in connection with the forfeiture or settlement of such awards or rights, in each case, that are outstanding as of the date hereof and in

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

accordance with their terms as of the date hereof or granted after the date hereof in accordance with this Agreement;

(iv) issue, deliver, sell, pledge, dispose of, encumber or subject to any Lien, any shares of its capital stock, other ownership interests or voting securities (other than the issuance of shares by a wholly-owned Subsidiary of the Company to the Company or another wholly-owned Subsidiary of the Company), or any securities convertible into, exercisable or exchangeable for, or any rights, warrants or options to acquire, any such shares of capital stock, interests or voting securities or any "phantom" stock, "phantom" stock rights, stock appreciation rights or stock-based performance units, other than upon the exercise, vesting or settlement of awards granted pursuant to the Company Equity Award Plans that are outstanding as of the date hereof or granted after the date hereof in accordance with this Agreement, in each case, exercised, vested or settled in accordance with their terms;

(v) amend (A) any of the Company Organizational Documents or (B) the comparable organizational documents of any Subsidiary of the Company, other than, in the case of this clause (B), amendments that effect solely ministerial changes to such documents;

(vi) acquire (whether by merger, consolidation, purchase of property or assets (including equity interests) or otherwise) any corporation, partnership or other business organization or division thereof or any material assets or interests in any Person with a value in excess of $50 million in the aggregate, other than transactions solely between or among the Company and its wholly-owned Subsidiaries or between or among the Company's wholly-owned Subsidiaries;

(vii) sell, license, lease, transfer, assign, divest, cancel, encumber, abandon or otherwise dispose of any of its properties, rights or assets which (A) are material to the Company and its Subsidiaries, taken as a whole, or (B) have a value in excess of $25 million, other than (1) sales, transfers and dispositions of obsolete, non-operating or worthless assets or properties and (2) sales, leases, transfers or other dispositions made in connection with (x) any immaterial transactions in the ordinary course of business consistent with past practice or (y) any transactions solely between or among the Company and its wholly-owned Subsidiaries or between or among the Company's wholly-owned Subsidiaries;

(viii) incur, redeem, prepay, defease, cancel, or, in any material respect, modify any indebtedness for borrowed money, issue or sell any debt securities or warrants or other rights to acquire any debt securities of the Company or any of its Subsidiaries, guarantee, assume or endorse or otherwise as an accommodation become responsible for any such indebtedness or any debt securities or other financial obligations of another Person or enter into any "keep well" or other agreement to maintain any financial statement condition of another Person (collectively, "Indebtedness"), other than (A) borrowings under existing revolving credit facilities (or replacements thereof on comparable terms, including in regards to maturity) or commercial paper programs in the ordinary course of business, (B) other than as set forth in the foregoing clause (A) and in Section 4.01(a)(viii) of the Company Disclosure Letter, incurring any Indebtedness in the ordinary course of business (including interest rate swaps on customary commercial terms consistent with past practice) not in excess of $200,000,000, (C) other than as set forth in Section 4.01(a)(viii) of the Company Disclosure Letter, redeeming, prepaying, defeasing, cancelling or modifying any Indebtedness in the ordinary course of business (including interest rate swaps on customary commercial terms consistent with past practice) not to exceed $200,000,000, (D) incurring, redeeming, prepaying, defeasing, cancelling or modifying any Indebtedness among the Company or any of its Subsidiaries, (E) incurring any Indebtedness to replace, renew, extend,

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

refinance or refund any existing Indebtedness in the same principal amount of such existing Indebtedness and upon the maturity of such existing Indebtedness and to the extent such existing Indebtedness is Indebtedness of the Company, on terms that can be redeemed or prepaid at any time upon payment of the outstanding principal amount plus accrued interest without any make whole or similar prepayment penalty, and (F) providing guarantees and other credit support by the Company with respect to the obligations of any of its Subsidiaries; provided, however, no such Indebtedness shall contain any term that would accelerate the payment thereof or require its immediate repayment due to the transactions contemplated by this Agreement;

(ix) settle any claim, investigation or Proceeding with a Governmental Entity or third party, in each case, threatened, made or pending against the Company or any of its Subsidiaries, which (A) provides injunctive relief which is material to the Company or any of its Subsidiaries or (B) requires payment in excess of $10 million in the aggregate, other than the settlement of any claims, investigations or Proceedings made in the ordinary course of business or for an amount (excluding any amounts that are covered by any insurance policies of the Company or its Subsidiaries, as applicable) not in excess of the amount reflected or reserved therefor in the most recent financial statements (or the notes thereto) of the Company included in the Company's SEC Reports; provided, however, that neither the Company nor any of its Subsidiaries shall settle any claim, investigation or Proceeding with a Governmental Entity or third party, in each case, threatened, made or pending against the Company or any of its Subsidiaries relating to or arising out of (A) the construction (or cessation of the construction), abandonment or disposal of nuclear power Units 2 and 3 at the Summer Station, (B) the bankruptcy of Westinghouse Electric Company, LLC (including the settlement agreement entered into with Toshiba Corporation and any Contract relating to the proceeds thereof), or (C) any other aspect of the NND Project (collectively, the "NND Project Litigation") (it being understood and agreed that this proviso shall not apply to (x) the termination of any Contract related to the NND Project so long as such termination results in no additional liability of the Company or any of its Subsidiaries in excess of $5 million in the aggregate or (y) any immaterial amendment of any Contract related to the NND Project) other than as follows: (a) except as set forth in subclause (b) below, neither the Company nor any of its Subsidiaries shall settle any claim, investigation or Proceeding with a third party who is not a Governmental Entity relating to or arising out of the NND Project Litigation without prior consent of Parent (such consent not to be unreasonably withheld, conditioned or delayed), (b) the Company or its Subsidiaries may, after prior notice to Parent, settle any mechanic liens related to the cessation of construction of the NND Project including those more specifically described as item 1(y) of Section 3.01(g) of the Company Disclosure Letter (it being understood and agreed that the $10 million limitation referred to in the fourth line of this Section 4.01(a)(ix) shall not apply to such settlement of mechanic's liens) and (c) neither the Company nor its Subsidiaries may settle any claim, investigation or Proceeding with a Governmental Entity relating to or arising out of the NND Project Litigation without prior consent of Parent (such consent not to be unreasonably withheld, conditioned or delayed);

(x) make or agree to make any capital expenditure in any fiscal year, except (A) for capital expenditures made in accordance with the capital expenditures plan set forth in Section 4.01(a)(x) of the Company Disclosure Letter in an amount not to exceed $50 million in excess of the amounts set forth in such capital expenditure plan during any calendar year, (B) for capital expenditures related to operational emergencies, equipment failures or outages or expenditures that the Company reasonably determines are then necessary to maintain the safety and integrity of any asset or property in response to any unanticipated or unforeseen and subsequently discovered events, occurrences or developments, or (C) as required by Law or a Governmental Entity;

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

(xi) except as required pursuant to the terms of any Company Benefit Plan or other written agreement, in each case, in effect on the date hereof, (A) grant to any director or officer any increase in compensation or pay, or award any bonuses or incentive compensation, including in the case of any Company officer, any changes associated with promotions or other position changes, regardless of whether such promotions or changes were previously announced, (B) grant to any current or former director, officer or employee any increase in severance, retention or termination pay, (C) grant or amend any equity awards, (D) enter into any new, or modify any existing, employment or consulting agreement with any current or former director or officer or enter into any new, or modify any existing, employment or consulting agreement with any individual consultant pursuant to which the annual base salary of such individual under such agreement exceeds $250,000.00 or the term of which exceeds twelve (12) months, (E) establish, adopt, enter into or amend in any material respect any material collective bargaining agreement or material Company Benefit Plan, (F) take any action to accelerate any rights or benefits under any Company Benefit Plan, or (G) hire or promote any new officer (other than any officer whose hiring or promotion has previously been publicly announced, but that has not yet taken effect as of the date hereof); provided, however, that, other than as set forth in subclause (A), the foregoing shall not restrict the Company or any of its Subsidiaries from entering into or making available to newly hired employees or to employees in the context of promotions based on job performance or workplace requirements, in each case, in the ordinary course of business, plans, agreements, benefits and compensation arrangements (including incentive grants, whether cash or equity, but excluding any individual severance arrangements) that have a value that is consistent with its past practice of making compensation and benefits available to newly hired or promoted employees in similar positions and under similar circumstances;

(xii) other than as required (A) by GAAP (or any interpretation thereof), including pursuant to standards, guidelines and interpretations of the Financial Accounting Standards Board or any similar organization or (B) by a Governmental Entity or Law (including pursuant to any applicable SEC rule or policy), make any change in accounting methods, principles or practices where such changes would reasonably be expected to be material to the Company and its Subsidiaries, taken as a whole;

(xiii) (A) make, change or rescind any material Tax election, any Tax accounting period, or adopt or change any material method of Tax accounting, (B) settle or compromise any material Tax liability or consent to any material claim or assessment or obtain any material ruling relating Taxes, (C) file any amended material Tax Return or (D) enter into any material closing agreement relating to Taxes;

(xiv) other than in the ordinary course of business consistent with past practice, materially amend, modify or terminate, or waive any material rights under, or enter into any Contract which if entered into prior to the date of this Agreement would have been deemed, a Company Material Contract;

(xv) adopt or enter into a plan of complete or partial liquidation, dissolution, merger, consolidation, restructuring, recapitalization or other reorganization, other than the Merger and any other mergers, consolidations, restructurings, recapitalizations or other reorganizations solely between or among the Company and its wholly-owned Subsidiaries or between or among the Company's wholly-owned Subsidiaries;

(xvi) materially change or enter into any IT Systems or cyber-security Contracts that are material to the Company and its Subsidiaries (other than routine maintenance and upgrades to existing IT Systems); or

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

(xvii) authorize any of, or commit or agree to take any of, the foregoing actions prohibited pursuant to clauses (i) through (xvi) of this Section 4.01(a).

(b) Conduct of Business by Parent. From the date of this Agreement until the earlier of the Effective Time and the termination of this Agreement in accordance with Article VII, except as otherwise expressly contemplated by this Agreement, set forth in Section 4.01(b) of the Parent Disclosure Letter, required by applicable Law, required by a Governmental Entity or with the prior written consent of the Company (such consent not to be unreasonably withheld, conditioned or delayed), (x) Parent shall, and shall cause each of the Parent Significant Subsidiaries to, conduct its business in all material respects in the ordinary course of business consistent with past practice and shall use commercially reasonable efforts to preserve substantially intact its current business organizations, maintain adequate and comparable insurance coverage and preserve its relationships with its employees, counterparties, customers and suppliers and Governmental Entities with jurisdiction over Parent or any of the Parent Significant Subsidiaries and (y) without limiting the foregoing, Parent shall not:

(i) declare, set aside or pay any dividends on, or make any other distributions (whether in cash, stock or property) in respect of, any of its capital stock, other than regular quarterly cash dividends payable by Parent in respect of Parent Shares;

(ii) split, combine or reclassify any of its capital stock, other ownership interests or voting securities, or securities convertible into or exchangeable or exercisable for any such shares of capital stock, interests or securities, or issue or authorize the issuance of any other securities in respect of, in lieu of or in substitution for shares of its capital stock, other ownership interests or voting securities, other than transactions solely between or among Parent and its wholly-owned Subsidiaries;

(iii) purchase, redeem or otherwise acquire any of its or the Parent Significant Subsidiaries' shares of capital stock, other ownership interests or voting securities, or securities convertible into or exchangeable or exercisable for any such shares of capital stock, interests or securities, or any rights, warrants or options to acquire any such shares of capital stock, interests or securities, other than (A) the withholding of Parent Shares or any of Parent's Subsidiaries' capital stock to satisfy Tax obligations or the exercise price with respect to awards granted pursuant to any of Parent's equity award plans or (B) purchasing, redeeming or acquiring any of Parent's equity awards pursuant to any of Parent's equity award plans;

(iv) except for any Parent Shares issued in an offering for cash at a price no lower than ninety-five percent (95%) of the market price for Parent Shares on the NYSE at the time of such offering, issue, deliver, sell, pledge, dispose of, encumber or subject to any Lien, any shares of its capital stock, other ownership interests or voting securities, or, except for equity units or mandatorily convertible securities issued in an offering for cash with a conversion premium, any securities convertible into, exercisable or exchangeable for, or any rights, warrants or options to acquire, any such shares of capital stock, interests or securities or any "phantom" stock, "phantom" stock rights, stock appreciation rights or stock-based performance units, other than upon the exercise, vesting or settlement of awards granted pursuant to any Parent equity award plans or pursuant to Parent's dividend reinvestment and direct stock purchase plan;

(v) amend (A) any of the Parent Organizational Documents or (B) the comparable organizational documents of any Parent Significant Subsidiary, in each case, in a manner that would materially adversely affect the holders of Company Shares whose Company Shares shall, pursuant to Section 2.01(a), convert in part into Parent Shares at the Effective Time; or

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

(vi) authorize any of, or commit or agree to take any of, the foregoing actions prohibited pursuant to clauses (i) through (v) of this Section 4.01(b).

(c) From the date of this Agreement until the earlier of the Effective Time and the termination of this Agreement in accordance with Article VII, neither the Company nor Parent shall take or permit any of their respective Subsidiaries to take any action that would reasonably be expected to prevent, or materially impair or delay, the consummation of the Merger or any of the other transactions contemplated by this Agreement.

SECTION 4.02. Acquisition Proposals.

(a) The Company agrees that, except as permitted by this Section 4.02, neither it nor any of its Subsidiaries, or any of their respective directors or officers, shall, and it shall instruct and use its reasonable best efforts to cause its and its Subsidiaries' employees, investment bankers, attorneys, accountants and other advisors or representatives (collectively, "Representatives") not to, directly or indirectly (i) initiate, solicit or knowingly encourage any Acquisition Proposal or the making of any inquiry, indication of interest, proposal or offer that constitutes, or could reasonably be expected to lead to, an Acquisition Proposal, (ii) engage in, continue or otherwise participate in any discussions or negotiations regarding any inquiry, indication of interest, proposal or offer that constitutes, or could reasonably be expected to lead to, an Acquisition Proposal, (iii) furnish or provide any information or data to any Person in connection with any inquiry, indication of interest, proposal or offer that constitutes, or could reasonably be expected to lead to, an Acquisition Proposal, (iv) otherwise knowingly facilitate any effort or attempt with respect to the foregoing. Any violation of the restrictions set forth in this Section 4.02 by any director, officer or investment banker of the Company or any of its Subsidiaries shall be deemed to be a breach of this Section 4.02 by the Company.

(b) The Company agrees that it and its Subsidiaries and their respective directors, officers, and employees, shall, and it shall instruct and use its reasonable best efforts to cause its and its Subsidiaries' Representatives to, immediately (i) cease and cause to be terminated any solicitation, discussions, negotiations or knowing facilitation or encouragement with any Person that may be ongoing with respect to any inquiry, indication of interest, proposal or offer that constitutes, or could reasonably be expected to lead to, an Acquisition Proposal, (ii) terminate any such Person's access to any physical or electronic data rooms and (iii) request that any such Person and its Representatives promptly return or destroy all confidential information concerning the Company and its Subsidiaries theretofore furnished thereto by or on behalf of the Company or any of its Subsidiaries, and destroy all analyses and other materials prepared by or on behalf of such Person that contain, reflect or analyze such information, in each case, to the extent required by, and in accordance with, the terms of the applicable confidentiality agreement between the Company and such Person.

(c) The Company shall promptly (but in any event within forty-eight (48) hours) notify Parent in writing of the receipt of any inquiry, indication of interest, proposal or offer that constitutes, or could reasonably be expected to lead to, any Acquisition Proposal, indicating (i) the identity of the Person making such Acquisition Proposal and (ii) the material terms and conditions of such Acquisition Proposal and providing Parent with the most current version (if any) of such inquiry, indication of interest, proposal or offer and all related material documentation. With respect to any Acquisition Proposal described in the immediately preceding sentence, the Company shall keep Parent reasonably informed, on a prompt basis (but in any event within forty-eight (48) hours of any such event), of (x) any changes or modifications to the terms of any such Acquisition Proposal and (y) any communications from such Person to the Company or from the Company to such Person with respect to any changes or modifications to the terms of any such Acquisition Proposal. Except as required by applicable Law, the Company shall not terminate, amend, modify, waive or fail to enforce any

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

provision of any standstill or similar obligation with respect to any class of equity securities of the Company or any of its Subsidiaries.

(d) Notwithstanding anything to the contrary contained in Section 4.02(a) or Section 4.02(b), prior to the Company Requisite Vote, in response to an unsolicited bona fide written Acquisition Proposal that did not result from a breach of this Section 4.02, if the Company Board determines in good faith (x) after consultation with the Company's financial advisors and outside legal counsel, that such Acquisition Proposal is, or could reasonably be expected to lead to, a Superior Proposal and (y) after consultation with the Company's outside legal counsel, that the failure to take such action would reasonably be expected to be inconsistent with its fiduciary duties under applicable Law, the Company may, subject to providing Parent prior notice, (i) furnish or provide information (including non-public information or data) regarding, and afford access to, the business, properties, assets, books, records and personnel of, the Company and its Subsidiaries, to the Person making such Acquisition Proposal and its Representatives; provided, however, that the Company shall as promptly as is reasonably practicable make available to Parent any non-public information concerning the Company or its Subsidiaries that is provided to any Person pursuant to this clause (i) to the extent such information was not previously made available to Parent and (ii) engage in discussions and negotiations with such Person and its Representatives with respect to such Acquisition Proposal; provided, further, that, prior to taking any of the actions set forth in the foregoing clauses (i) or (ii) above, the Person making such Acquisition Proposal has entered into an Acceptable Confidentiality Agreement (it being understood that the negotiation of such Acceptable Confidentiality Agreement shall not be deemed to be a breach of Section 4.02(a) or Section 4.02(b)).

(e) Except as set forth in Section 4.02(f) and Section 4.02(g), the Company shall not, and the Company Board (and each committee thereof) shall not (i) (A) withdraw, change, qualify, withhold or modify, or propose to do any of the foregoing, in a manner adverse to Parent or Merger Sub, the Company Board Recommendation, (B) adopt, approve or recommend, or propose to adopt, approve or recommend, any Acquisition Proposal, (C) fail to include the Company Board Recommendation in the Proxy Statement/Prospectus, (D) fail to recommend against any Acquisition Proposal subject to Regulation 14D promulgated under the Exchange Act in any solicitation or recommendation statement made on Schedule 14D-9 within ten (10) Business Days after Parent so requests in writing, (E) if an Acquisition Proposal or any material modification thereof is made public or sent to the holders of Company Shares, fail to issue a press release that reaffirms the Company Board Recommendation within ten (10) Business Days after Parent so requests in writing or (F) agree or resolve to take any action set forth in the foregoing clauses (A) through (E) (any action set forth in this clause (i), a "Company Adverse Recommendation Change") or (ii) authorize, cause or permit the Company or any of its Affiliates to enter into any letter of intent, memorandum of understanding, agreement in principle, definitive agreement, or other similar commitment that would reasonably be expected to lead to an Acquisition Proposal (other than an Acceptable Confidentiality Agreement) (an "Alternative Acquisition Agreement").

(f) Notwithstanding anything to the contrary in this Agreement, at any time prior to obtaining the Company Requisite Vote, the Company Board may make a Company Adverse Recommendation Change (and, solely with respect to a Superior Proposal, terminate this Agreement pursuant to Section 7.01(c)(i)) if (i) the Company has received a Superior Proposal other than as a result of a breach of this Section 4.02 and the Company Board (or a duly authorized committee thereof) determines in good faith, after consultation with the Company's outside legal counsel, that the failure to make a Company Adverse Recommendation Change in response to the receipt of such Superior Proposal would reasonably be expected to be inconsistent with its fiduciary duties under applicable Law and (ii) (A) the Company provides Parent prior written notice of its intent to make any Company Adverse Recommendation Change or terminate this Agreement pursuant to Section 7.01(c)(i) at least

four (4) Business Days prior to taking such action to the effect that, absent any modification to the terms and conditions of this Agreement that would cause the Superior Proposal to no longer be a Superior Proposal, the Company Board has resolved to effect a Company Adverse Recommendation Change or to terminate this Agreement pursuant to Section 7.01(c)(i), which notice shall specify the basis for such Company Adverse Recommendation Change or termination, shall provide the material terms and conditions of such Superior Proposal and shall attach the most current draft of any Alternative Acquisition Agreement, and any other material documents with respect to the Superior Proposal that (x) include any terms and conditions of the Superior Proposal and (y) were not produced by the Company, any of its Subsidiaries or any of its or their Representatives solely for internal purposes, if applicable (a "Notice of Recommendation Change") (it being understood that such Notice of Recommendation Change shall not in itself be deemed a Company Adverse Recommendation Change and that any change in price or material revision or material amendment to the terms of a Superior Proposal, if applicable, shall require a new notice to which the provisions of clauses (A), (B) and (C) of this Section 4.02(f) shall apply *mutatis mutandis* except that, in the case of such a new notice, all references to four (4) Business Days in this Section 4.02(f) shall be deemed to be two (2) Business Days), (B) during such four (4) Business Day period, if requested by Parent, the Company shall make its Representatives reasonably available to negotiate in good faith with Parent and its Representatives regarding any modifications to the terms and conditions of this Agreement that Parent proposes to make and (C) at the end of such four (4) Business Day period and taking into account any modifications to the terms of this Agreement proposed by Parent to the Company in a written, binding and irrevocable offer, the Company Board determines in good faith (x) after consultation with the Company's financial advisors and outside legal counsel, that such Superior Proposal still constitutes a Superior Proposal and (y) after consultation with the Company's outside legal counsel, that the failure to make such a Company Adverse Recommendation Change would reasonably be expected to be inconsistent with its fiduciary duties under applicable Law.

(g) Notwithstanding anything to the contrary in this Agreement, other than in connection with an Acquisition Proposal (which shall be governed by Section 4.02(f)), at any time prior to obtaining the Company Requisite Vote, the Company Board may make a Company Adverse Recommendation Change if (i) an Intervening Event occurs and in response thereto the Company Board determines in good faith, after consultation with the Company's outside legal counsel, that the failure to take such action would reasonably be expected to be inconsistent with its fiduciary duties under applicable Law and (ii) (A) the Company provides Parent prior written notice of its intent to make any Company Adverse Recommendation Change at least four (4) Business Days prior to taking such action to the effect that the Company Board has resolved to effect a Company Adverse Recommendation Change, which notice shall specify the basis therefor and include a reasonably detailed description of the Intervening Event, (B) during such four (4) Business Day period, if requested by Parent, the Company shall make its Representatives reasonably available to negotiate in good faith with Parent and its Representatives regarding any modifications to the terms and conditions of this Agreement that Parent proposes to make and (C) at the end of such four (4) Business Day period and taking into account any modifications to the terms of this Agreement proposed by Parent to the Company in a written, binding and irrevocable offer, the Company Board determines in good faith, after consultation with the Company's outside legal counsel, that the failure to make such a Company Adverse Recommendation Change would reasonably be expected to be inconsistent with its fiduciary duties under applicable Law. Each time there is a material change to the facts or circumstances relating to the Intervening Event prior to obtaining the Company Requisite Vote, the Company will be required to deliver to Parent prompt written notice of such material change (which notice shall include a reasonably detailed description of such material change) and the Company will provide Parent with an additional two (2) Business Day period prior to making a Company Adverse Recommendation Change, such period shall begin upon the date of Parent's receipt of the notice of such material change.

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

(h) Nothing contained in this Section 4.02 or elsewhere in this Agreement shall prohibit the Company or any of its Subsidiaries from (i) complying with its disclosure obligations under U.S. federal or state Law, (ii) making any "stop, look or listen" communication to the shareholders of the Company pursuant to Rule 14d-9(f) promulgated under the Exchange Act (or any similar communications to the shareholders of the Company) or (iii) making any other disclosure to its shareholders if the Company Board determines in good faith after consultation with the Company's outside legal counsel that the failure to make such disclosure would be inconsistent with its fiduciary duties under applicable Law.

ARTICLE V

ADDITIONAL AGREEMENTS

SECTION 5.01. Proxy Statement/Prospectus; Shareholders Meeting.

(a) As soon as reasonably practicable following the date of this Agreement, but in any event within thirty (30) Business Days thereafter, (i) the Company and Parent shall jointly prepare and cause to be filed with the SEC the proxy statement/prospectus (together with any amendment or supplement thereto, the "Proxy Statement/Prospectus"), as part of the Form S-4, that includes (A) a proxy statement of the Company for use in the solicitation of proxies for the Shareholders Meeting and (B) a prospectus with respect to the issuance of Parent Shares in the Merger and (ii) Parent shall prepare and cause to be filed with the SEC the Form S-4. The Company and Parent shall use their respective reasonable best efforts to (A) have the Form S-4 declared effective under the Securities Act as promptly as practicable after the Form S-4 is filed, (B) ensure that the Form S-4 and the Proxy Statement/Prospectus complies in all material respects with the applicable provisions of the Securities Act, the Exchange Act and the rules and regulations thereunder and (C) keep the Form S-4 effective for as long as may be reasonably requested in connection with the preparation, filing and distribution of the Form S-4 and the Proxy Statement/Prospectus. As promptly as practicable after the date of this Agreement, each of the Company and Parent will furnish or cause to be furnished to the other party the information relating to itself and its Subsidiaries, and cooperate with the other party, as may reasonably be requested, in connection with the preparation, filing and distribution of the Form S-4 and the Proxy Statement/Prospectus. The Form S-4 and Proxy Statement/Prospectus shall include all information reasonably requested by the parties hereto pursuant to the immediately preceding sentence.

(b) Each party hereto shall promptly notify the other parties of the receipt of any comments of the SEC to the Form S-4 or the Proxy Statement/Prospectus and of any request by the SEC for any amendment or supplement thereto or for additional information in connection therewith. As promptly as practicable after receipt of any such comment or request from the SEC, the party that received such comment or request shall provide the other parties copies of all correspondence between the receiving party and its Representatives, on the one hand, and the SEC, on the other hand, regarding such comments or request. The Company and Parent shall each use its reasonable best efforts to promptly provide responses to the SEC with respect to all comments received on the Form S-4 or the Proxy Statement/Prospectus from the SEC.

(c) Notwithstanding the foregoing, prior to filing the Form S-4 (or any amendment or supplement thereto) or mailing the Proxy Statement/Prospectus (or any amendment or supplement thereto) or responding to any comments of the SEC with respect thereto, each of the Company and Parent shall (i) provide the other party an opportunity to review and comment on such document or response (including the proposed final version of such document or response) and shall consider such comments in good faith and (ii) promptly provide the other party with a copy of any such document or response.

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

(d) Each of the Company and Parent shall advise the other, promptly after receipt of notice thereof, of the time of effectiveness of the Form S-4, the issuance of any stop order relating thereto or the suspension of the qualification of the Parent Shares to be issued in connection with the consummation of the transactions contemplated by this Agreement for offering or sale in any jurisdiction. Each of the Company and Parent shall use its reasonable best efforts to have any such stop order or suspension lifted, reversed or otherwise terminated. Each of the Company and Parent shall also take any other action required to be taken under the Securities Act, the Exchange Act, any applicable foreign or state securities or "blue sky" laws and the rules and regulations thereunder in connection with the Merger and the issuance of the Parent Shares to be issued in connection with the consummation of the transactions contemplated by this Agreement.

(e) If, prior to the Effective Time, any event occurs with respect to any party hereto or any of its Subsidiaries, or any change occurs with respect to other information supplied by such party for inclusion in the Form S-4 or the Proxy Statement/Prospectus, which is required to be described in an amendment of, or a supplement to, the Form S-4 or the Proxy Statement/Prospectus, such party shall promptly notify the other parties hereto of such event, and the Company and Parent shall cooperate (i) in the prompt filing with the SEC of any necessary amendment or supplement to the Form S-4 or the Proxy Statement/Prospectus so that such documents would not include any misstatement of a material fact or omit to state any material fact required to be stated therein or necessary in order to make the statements made therein, in light of the circumstances under which they are made, not misleading and (ii) to the extent required by Law, in disseminating the information contained in such amendment or supplement to the holders of Company Shares.

(f) Subject to the fiduciary duties of the Company Board under applicable Law, the Company will take, in accordance with applicable Law and the Company Organizational Documents, all action necessary to call, give notice of, convene and hold a meeting of holders of Company Shares (the "Shareholders Meeting") as promptly as practicable after the Form S-4 is declared effective under the Securities Act, to consider and vote upon the approval of this Agreement. Subject to Section 4.02, the Company Board shall recommend such approval and shall take all lawful action to solicit and obtain the Company Requisite Vote. Notwithstanding anything to the contrary in this Agreement, the Company may, but shall not be required to, adjourn or postpone the Shareholders Meeting (i) to the extent necessary to ensure that any necessary supplement or amendment to the Proxy Statement/Prospectus (including with respect to an Acquisition Proposal) is provided to the holders of Company Shares a reasonable amount of time in advance of a vote on the approval of this Agreement, (ii) if the Company reasonably believes it is necessary and advisable to do so in order to solicit additional proxies in order to obtain the Company Requisite Vote, (iii) if, as of the time for which the Shareholders Meeting is originally scheduled, there are insufficient Company Shares represented (either in person or by proxy) to constitute a quorum necessary to conduct the business of such meeting or (iv) as required by applicable Law.

(g) Parent shall use its reasonable best efforts to cause to be delivered to the Company two (2) letters from Parent's independent accountants, one dated a date within two (2) Business Days before the date on which the Form S-4 shall become effective and one dated a date within two (2) Business Days before the Closing Date, each addressed to the Company, in form and substance reasonably satisfactory to the Company and customary in scope and substance for comfort letters delivered by independent public accountants in connection with registration statements similar to the Form S-4.

(h) The Company shall use its reasonable best efforts to cause to be delivered to Parent two (2) letters from the Company's independent accountants, one dated a date within two (2) Business Days before the date on which the Form S-4 shall become effective and one dated a date

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

within two (2) Business Days before the Closing Date, each addressed to Parent, in form and substance reasonably satisfactory to Parent and customary in scope and substance for comfort letters delivered by independent public accountants in connection with registration statements similar to the Form S-4.

SECTION 5.02. Filings; Other Actions; Notification.

(a) Subject to the terms and conditions set forth in this Agreement, each of the Company, Parent and Merger Sub shall (and shall cause its respective Subsidiaries to) cooperate and use its respective reasonable best efforts to (i) promptly make any required submissions and filings under applicable Law or to Governmental Entities with respect to the Merger and the other transactions contemplated by this Agreement, (ii) promptly furnish information requested in connection with such submissions and filings to such Governmental Entities or under such applicable Law, (iii) keep the other parties reasonably informed with respect to the status of any such submissions and filings to such Governmental Entities or under such applicable Law, including with respect to: (A) the occurrence or receipt of any Consent under such applicable Law, (B) the expiration or termination of any waiting period, (C) the commencement or proposed or threatened commencement of any investigation, litigation or administrative or judicial action or proceeding under such applicable Law, and (D) the nature and status of any objections raised or proposed or threatened to be raised under such applicable Law with respect to the Merger or the other transactions contemplated by this Agreement, (iv) obtain all Consents and Permits from any Governmental Entity (including the Regulatory Clearances) or any other Person necessary to consummate the transactions contemplated by this Agreement as soon as practicable, and (v) take or cause to be taken all other actions, and do or cause to be done all other things, reasonably necessary to consummate and make effective the Merger and the other transactions contemplated by this Agreement as soon as practicable.

(b) In furtherance and not in limitation of the foregoing: each of the Company, Parent and Merger Sub shall (i) (A) make an appropriate filing of a Notification and Report Form pursuant to the HSR Act with respect to the transactions contemplated by this Agreement as promptly as reasonably practicable following the date of this Agreement (and in any event within fifteen (15) Business Days after the date hereof (unless the parties otherwise agree)), (B) furnish as soon as practicable any additional information and documentary material that may be required or requested pursuant to the HSR Act and (C) use its reasonable best efforts to take, or cause to be taken, all other actions consistent with this Section 5.02 necessary to cause the expiration or termination of the applicable waiting periods under the HSR Act (including any extensions thereof) as soon as practicable and (ii) (A) make or cause to be made the appropriate filings (including notice filings) as soon as practicable (and in any event by the date with respect to each such filing set forth in Section 5.02(b) of the Company Disclosure Letter (unless the parties otherwise agree)) with the FERC, the NRC, the FCC, the SCPSC, the NCUC and the GPSC relating to the transactions contemplated by this Agreement, (B) supply as soon as practicable any additional information and documentary material that may be required or requested by the FERC, the NRC, the FCC, the SCPSC, the SCORS, the NCUC and the GPSC, as applicable, in connection with the Regulatory Clearances and (C) use its reasonable best efforts to take or cause to be taken all other actions consistent with this Section 5.02 as necessary to obtain any necessary Consents and Permits from the FERC, the NRC, the FCC, the SCPSC, the NCUC and the GPSC, as applicable, in connection with the Regulatory Clearances as soon as practicable.

(c) In furtherance and not in limitation of the foregoing, as promptly as reasonably practicable following the date of this Agreement, the Company and Parent shall (i) work together in good faith the finalize the terms of the SCPCS Petition and (ii) jointly file the SCPSC Petition. Each of the Company, Parent and Merger Sub shall furnish as soon as practicable any additional information and documentary material that may be required by the SCPSC or any other Government Entity in connection with the SCPSC Petition and use its reasonable best efforts to take, or cause to be taken, all

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

other actions consistent with this Section 5.02 and as set forth in the SCPSC Petition necessary to obtain the SCPSC Petition Approval as soon as practicable.

(d) The Company, Parent and Merger Sub shall, subject to applicable Law relating to the exchange of information: (i) promptly notify the other parties of (and if in writing, furnish the other parties with copies of) any communication to such Person from any third party (other than a Representative of any of the parties hereto or any of their respective Subsidiaries) or any Governmental Entity regarding the filings and submissions described in this Section 5.02 and permit the other parties to review and discuss in advance (and to consider in good faith any comments made by the others in relation to) any proposed written response to any communication from any third party (other than a Representative of any of the parties hereto or any of their respective Subsidiaries) or any Governmental Entity regarding such filings and submissions, (ii) keep the other parties reasonably informed of any developments, meetings or discussions with any third party (other than a Representative of any of the parties hereto or any of their respective Subsidiaries) or any Governmental Entity in respect of any filings, submissions, investigations, or inquiries concerning the transactions contemplated by this Agreement and (iii) not independently participate in any meeting or discussion with any third party (other than a Representative of any of the parties hereto or any of their respective Subsidiaries) or any Governmental Entity in respect of any filings, submissions, investigations or inquiries concerning the transactions contemplated by this Agreement without giving the other party or parties hereto prior notice of such meeting or discussions to the extent it is reasonably practical to do so and, unless prohibited by such third party or Governmental Entity or otherwise not reasonably practical, the opportunity to attend or participate; provided, however, that (x) the Company, Parent and Merger Sub shall be permitted to redact any correspondence, filing, submission or communication prior to furnishing it to the other parties to the extent such correspondence, filing, submission or communication contains competitively or commercially sensitive information, including information relating to the valuation of the transactions contemplated by this Agreement and (y) for the avoidance of doubt, the foregoing clause (iii) shall not prohibit the Company, Parent or Merger Sub from independently participating in meetings and discussions with third parties or Governmental Entities that solely relate to an explanation of the terms of this Agreement, including the conditions set forth in Article VI.

(e) In furtherance and not in limitation of the foregoing, but subject to the other terms and conditions of this Section 5.02, Parent, Merger Sub and the Company agree to take promptly any and all steps necessary to avoid, eliminate or resolve each and every impediment to and obtain all Consents under applicable Laws that may be required by any Governmental Entity (including any Regulatory Clearances and the SCPSC Petition Approval), so as to enable the parties to consummate the Merger and the other transactions contemplated by this Agreement as soon as practicable, including committing to and effecting, by consent decree, hold separate orders, trust, or otherwise, (i) selling, licensing, holding separate or otherwise disposing of assets or businesses of Parent or the Company or any of their respective Subsidiaries, (ii) terminating, relinquishing, modifying, or waiving existing relationships, ventures, contractual rights, obligations or other arrangements of Parent or the Company or any of their respective Subsidiaries and (iii) creating any relationships, ventures, contractual rights, obligations or other arrangements of Parent or the Company or any of their respective Subsidiaries (each, a "Remedial Action"); provided, however, that any Remedial Action may, at the discretion of the Company or Parent, be conditioned upon consummation of the transactions contemplated by this Agreement.

(f) In furtherance and not in limitation of the foregoing, but subject to the other terms and conditions of this Section 5.02, in the event that any Proceeding is commenced, threatened or is reasonably foreseeable challenging any of the transactions contemplated by this Agreement and such Proceeding seeks, or would reasonably be expected to seek, to prevent, materially impede or materially delay the consummation of such transactions, Parent shall use reasonable best efforts to take or cause to

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

be taken any and all action, including a Remedial Action, to avoid or resolve any such Proceeding as promptly as practicable. In addition, each of the Company, Parent and Merger Sub shall cooperate with each other and use its respective reasonable best efforts to contest, defend and resist any such litigation, action or proceeding and to have vacated, lifted, reversed or overturned any Order, whether temporary, preliminary or permanent, that is in effect and that prohibits, prevents, delays, interferes with or restricts consummation of the transactions contemplated by this Agreement as promptly as practicable.

(g) From the date hereof until the earlier of the Effective Time and the date this Agreement is terminated pursuant to Article VII, neither Parent, Merger Sub, nor Company shall, nor shall they permit their respective Subsidiaries to, acquire or agree to acquire any rights, assets, business, Person or division thereof (through acquisition, license, joint venture, collaboration or otherwise), if such acquisition would reasonably be expected to materially increase the risk of not obtaining, or would reasonably be expected to prevent or prohibit, or materially impede, interfere with or delay, obtaining, any applicable Consent under applicable Laws (including any Regulatory Clearance and the SCPSC Petition Approval) with respect to the transactions contemplated by this Agreement. Section 5.02(g) of the Company Disclosure Letter sets forth the approach to the coordination of matters related to the Company's pending acquisition described as Item 3 of Section 3.01(f) of the Company Disclosure Letter and matters related to this Agreement.

(h) The Company and its Subsidiaries (as applicable) shall, to the extent reasonably practicable, subject to applicable Law relating to the exchange of information and except as would be in violation of, or result in a waiver or loss of, the attorney-client privilege or work-product doctrine: (i) within 48 hours of receipt thereof, notify Parent of (and if in writing, furnish Parent with copies of) any material communication to the Company or its Subsidiaries from any Governmental Entity related to or arising out of any material claim, hearing, investigation or Proceeding, whether criminal or civil in nature, relating to or arising out of the construction, or cessation of the construction, of nuclear power Units 2 and 3 at the Summer Station or the bankruptcy of Westinghouse Electric Company, LLC (including the settlement agreement entered into with Toshiba Corporation and any Contract relating to the proceeds thereof) (collectively, "Nuclear Litigation") and permit Parent to review and discuss in advance (and consider in good faith any comments made by Parent in relation to) any proposed written response to any material communication from any Governmental Entity related to or arising out of any Nuclear Litigation, (ii) keep Parent reasonably informed of any developments, meetings or discussions with any Governmental Entity related to or arising out of any Nuclear Litigation, and (iii) use good faith efforts to give Parent notice (which notice shall be prior notice to the extent providing prior notice is reasonably practical) of any material meetings or discussions relating to or arising out of any Nuclear Litigation (and consider in good faith any comments or guidance from Parent in relation to such meeting or discussions) and, if appropriate in the Company's reasonable judgment, provide Parent the opportunity to attend or participate in such meetings or discussions.

(i) Notwithstanding anything set forth in this Agreement, Parent and its Affiliates shall not be required to and the Company and its Affiliates shall not be required to, unless conditioned on the Closing, and without the prior written consent of Parent (which consent may be withheld at Parent's sole discretion) the Company shall not and shall cause its Subsidiaries not to, in connection with obtaining any Consent or Permit, or with respect to any actions required under this Section 5.02, offer or accept, or agree, commit to agree or consent to, any undertaking, term, condition, liability, obligation, commitment or sanction (including any Remedial Action), that constitutes a Burdensome Condition.

(j) Notwithstanding anything set forth in this Agreement, Parent and its Affiliates shall not be required to and the Company and its Affiliates shall not be required to, unless conditioned on the Closing, and without the prior written consent of Parent (which consent may be withheld at

Parent's sole discretion) the Company shall not and shall cause its Subsidiaries not to, in connection with the SCPSC Petition, offer or accept, or agree, commit to agree or consent to, any undertaking, term, condition, liability, obligation, commitment or sanction (including any Remedial Action) that (i) materially changes the proposed terms, conditions, or undertakings set forth in the SCPSC Petition or (ii) significantly changes the economic value of the proposed terms set forth in the SCPSC Petition, in each case, as reasonably determined by Parent in good faith.

SECTION 5.03. Access and Reports; Confidentiality.

(a) Subject to applicable Law relating to the exchange of information, upon reasonable notice, the Company and Parent shall, and shall cause each of their respective Subsidiaries to, afford to the other party's Representatives reasonable access, during normal business hours throughout the period prior to the Effective Time, to its employees, properties, books, contracts and records. During such period, the Company and Parent shall, and shall cause each of their respective Subsidiaries to, furnish promptly to the other party (i) to the extent not publicly available, a copy of each report, schedule, registration statement and other document (A) filed by it during such period pursuant to applicable Law or (B) filed with, furnished to or sent to the SEC, the FERC, the FCC, the NRC, the SCPSC, the SCORS, the NCUC, the GPSC or any other federal or state regulatory agency or commission and (ii) all information concerning its business, properties and personnel as may reasonably be requested by the other party; provided, however, that no investigation pursuant to this Section 5.03(a) shall affect or be deemed to modify any representation or warranty made herein; provided, further, that the foregoing shall not require the Company and Parent to (A) permit any inspection, or to disclose any information, that in the reasonable judgment of such party, would result in the disclosure of any trade secrets of third parties or violate any of its obligations to a third party with respect to confidentiality if the Company or Parent, as applicable, shall have used commercially reasonable efforts to obtain the consent of such third party to such inspection or disclosure, (B) disclose any privileged information of such party or any of its Subsidiaries, (C) permit any invasive environmental testing or sampling at any property or (D) take or allow any action that would unreasonably interfere with such party's or any of its Subsidiaries' business or operations. All requests for information made pursuant to this Section 5.03 shall be directed to the executive officer or other Person designated by the Company or Parent, as applicable. Notwithstanding the foregoing, with respect to Parent and its Subsidiaries, the access to and exchange of information described in this Section 5.03(a) shall be limited to the extent reasonably necessary or related to the consummation of the Merger and the other transactions contemplated by this Agreement.

(b) Each of the Company, Parent and Merger Sub will comply with the terms and conditions of that certain letter agreement, dated October 8, 2017, between Parent and the Company (as may be amended from time to time, the "Confidentiality Agreement"), and will hold and treat, and will cause their respective Representatives to hold and treat, in confidence all documents and information exchanged pursuant to Section 5.03(a) in accordance with the Confidentiality Agreement, which Confidentiality Agreement shall remain in full force and effect in accordance with its terms.

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

SECTION 5.04. Stock Exchange Delisting and Listing.

(a) Prior to the Closing Date, the Company shall cooperate with Parent and use its reasonable best efforts to take or cause to be taken all actions, and do or cause to be done all things, reasonably necessary, proper or advisable on its part under applicable Law and rules and policies of the NYSE to enable the delisting by the Surviving Corporation of the Company Shares from the NYSE and the deregistration of the Company Shares under the Exchange Act as promptly as practicable after the Effective Time and in accordance with applicable Law.

(b) Parent shall use its reasonable best efforts to cause the Parent Shares to be issued in connection with the transactions contemplated by this Agreement to be approved for listing on the NYSE, subject to official notice of issuance, prior to the Closing Date.

SECTION 5.05. Publicity. The initial news release regarding the Merger shall be a joint news release reasonably agreed between Parent and the Company and, except with respect to any action taken pursuant to Section 4.02 or Section 7.01, thereafter the Company and Parent each shall consult with each other prior to issuing, and give each other the opportunity to review and comment upon, any news releases or otherwise making public announcements with respect to the Merger and the other transactions contemplated by this Agreement, except as such party may reasonably conclude may be required by Law or by obligations pursuant to any listing agreement with or rules of any national securities exchange or interdealer quotation service or as may be requested by any Governmental Entity.

SECTION 5.06. Employee Matters.

(a) Following the Effective Time and until December 31, 2019 (the "Continuation Period"), Parent shall provide, or shall cause the Surviving Corporation to provide, the individuals who are employed by the Company or any of its Subsidiaries immediately before the Effective Time and not covered by any collective bargaining agreement (the "Company Non-Union Employees") with (i) annual base compensation no less than the annual base compensation provided to such Company Non-Union Employees immediately prior to the Effective Time, (ii) annual target cash incentive opportunities that are no less than the annual target cash incentive opportunities provided to such Company Non-Union Employees immediately prior to the Effective Time, subject to the satisfaction of performance criteria determined by Parent (consistent with the form and terms and conditions (including performance criteria) of such awards provided to other similarly situated employees of Parent) and other terms and conditions of Parent's annual incentive program, (iii) long-term target incentive award opportunities that are no less than the long-term target incentive award opportunities provided to such Company Non-Union Employees immediately prior to the Effective Time (such long-term incentive awards to be provided in such a form, and subject to such performance and vesting criteria and other terms and conditions, as Parent shall determine, consistent with the form and terms and conditions (including performance criteria) of such awards provided to other similarly situated employees of Parent), (iv) employment within a 50-mile radius from each such Company Non-Union Employee's location of employment immediately prior to the Effective Time and duties and responsibilities similar to what such Company Non-Union Employee had immediately prior to the Effective Time, (v) severance benefits that are no less favorable than those set forth in Section 5.06(a) of the Company Disclosure Letter and (vi) other employee benefits that are substantially comparable in the aggregate to the employee benefits provided to such Company Non-Union Employees immediately prior to the Effective Time. Further Parent shall provide, or shall cause the Surviving Corporation to provide, the individuals who are employed by the Company or any of its Subsidiaries immediately before the Effective Time and who are covered by a collective bargaining agreement with (A) compensation and benefits and other terms and conditions of employment in accordance with the terms of such collective bargaining agreement or any subsequently adopted collective

bargaining agreement, as in effect from time to time, and (B) severance benefits that are no less favorable than those set forth in Section 5.06(a) of the Company Disclosure Letter.

(b) Without limiting the generality of Section 5.06(a) but subject to the obligations set forth in Section 5.06(a), from and after the Effective Time, Parent shall, or shall cause the Surviving Corporation to, assume, honor and continue during the Continuation Period or, if later, until all obligations thereunder have been satisfied, all of the Company's employment, severance, retention, termination, deferred compensation, and change in control plans, policies, programs, agreements and arrangements maintained by the Company or any of its Subsidiaries, in each case, as in effect at the Effective Time, including with respect to any payments, benefits or rights arising as a result of the transactions contemplated by this Agreement (either alone or in combination with any other event), and Parent or the Surviving Corporation may not amend, modify or terminate any such plan, policy, program, agreement or arrangement unless and solely to the extent permitted under the terms thereof as in effect at the Effective Time or otherwise as required to comply with applicable Law. In addition, to the extent required by the express terms of any Company Benefit Plan, Parent shall, or shall cause the Surviving Corporation to, expressly assume and agree to perform all obligations under and with respect to the terms of each such Company Benefit Plan. Notwithstanding anything to the contrary herein, Parent shall, or shall cause the Surviving Corporation to, maintain without amendment (other than as required to comply with applicable Law) for the duration of the Continuation Period each of the Company Benefit Plans listed on Section 5.06(b) of the Company Disclosure Letter. For avoidance of doubt, Parent shall assume, honor and continue the Company's change in control plans in accordance with the foregoing solely with respect to any payments, benefits or rights arising as a result of the transactions contemplated by this Agreement (either alone or in combination with any other event), and shall not be obligated to provide any additional payments, benefits or rights under such plans in connection with any subsequent change in control of Parent or the Surviving Corporation that may occur after the Merger.

(c) With respect to all plans maintained by Parent, the Surviving Corporation or their respective Subsidiaries in which the individuals who are employed by the Company or any of its Subsidiaries immediately before the Effective Time (the "Company Employees") are eligible to participate after the Closing Date (including any vacation, paid time-off and severance plans) for purposes of determining eligibility to participate, level of benefits and vesting (but not benefit accruals under any defined benefit pension plan), each Company Employee's service with the Company or any of its Subsidiaries (as well as service with any predecessor employer of the Company or any such Subsidiary, to the extent service with the predecessor employer is recognized by the Company or such Subsidiary) shall be treated as service with Parent, the Surviving Corporation or any of their respective Subsidiaries or any Commonly Controlled Entity, in each case, to the extent such service would have been recognized by the Company or its Subsidiaries under analogous Company Benefit Plans prior to the Effective Time; provided, however, that such service need not be recognized to the extent that such recognition would result in any duplication of benefits for the same period of service; and, provided further, that no Company Employee shall be entitled based on such prior credited service or otherwise to participate in any frozen or grandfathered plan or benefit formula of Parent or any of its Subsidiaries that would not be offered to employees first hired by Parent or its Subsidiaries after the Effective Time.

(d) Without limiting the generality of Section 5.06(a), Parent shall, or shall cause the Surviving Corporation to, waive any pre-existing condition limitations, exclusions, actively-at-work requirements and waiting periods under any welfare benefit plan maintained by Parent, the Surviving Corporation or any of their respective Subsidiaries in which Company Employees (and their eligible dependents) will be eligible to participate from and after the Effective Time, except to the extent that such pre-existing condition limitations, exclusions, actively-at-work requirements and waiting periods would not have been satisfied or waived under the comparable Company Benefit Plan immediately prior to the Effective Time; provided, however, that in the case of an insured plan, such waivers shall be made only to

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

the extent the insurer consents thereto, and Parent and the Surviving Corporation shall use commercially reasonable efforts to obtain such consent. Parent shall, or shall cause the Surviving Corporation to, recognize the dollar amount of all co-payments, deductibles and similar expenses incurred by each Company Employee (and his or her eligible dependents) during the calendar year or plan year in which the Effective Time occurs for purposes of satisfying such year's deductible and co-payment limitations under the relevant welfare benefit plans in which they will be eligible to participate from and after the Effective Time; provided, however, that in the case of an insured plan, such amounts shall be taken into account only to the extent the insurer consents thereto, and Parent and the Surviving Corporation shall use commercially reasonable efforts to obtain such consent.

(e) The provisions of this Section 5.06 are solely for the benefit of the parties to this Agreement, and no other Person (including any current or former employee of the Company or its Subsidiaries or any beneficiary or dependent thereof) shall be regarded for any purpose as a third-party beneficiary of this Section 5.06, and no provision of this Section 5.06 shall create such rights in any such Persons. Except as set forth in Section 5.06(b), no provision of this Agreement shall be construed (i) as a guarantee of continued employment of any employee of the Company or its Subsidiaries, (ii) to prohibit Parent or its Subsidiaries (including the Surviving Corporation) from having the right to terminate the employment of any such employee, (iii) to require Parent or its Subsidiaries to continue to pay or provide any such employee any compensation or benefits after such termination of employment, other than any severance benefits that may be provided pursuant to Section 5.06(a)(v); (iv) to permit the amendment, modification or termination of any Company Benefit Plan or employee benefit plan of Parent or its Subsidiaries (in each case solely to the extent any such amendment, modification or termination is prohibited in accordance with the terms of the applicable plan) or (v) as an amendment or modification of the terms of any Company Benefit Plan or employee benefit plan or Parent or its Subsidiaries.

SECTION 5.07. Expenses. Except as set forth in Section 5.09(c), whether or not the Merger is consummated, all costs and expenses incurred in connection with this Agreement and the Merger and the other transactions contemplated by this Agreement shall be paid by the party incurring such expenses.

SECTION 5.08. Indemnification; Directors' and Officers' Insurance.

(a) From and after the Effective Time, Parent shall indemnify and hold harmless, to the fullest extent permitted under applicable Law, each present and former director and officer of the Company and its Subsidiaries (in each case, when acting in such capacity) (collectively, the "Indemnified Parties") from and against any and all costs and expenses (including reasonable attorneys' fees), judgments, fines, losses, claims, damages and liabilities (collectively, "Costs") incurred in connection with any Proceeding or investigation, whether civil, criminal, administrative or investigative, arising out of or pertaining to matters existing or occurring at or prior to the Effective Time, including the transactions contemplated by this Agreement. From and after the Effective Time, Parent shall advance expenses to each Indemnified Party claiming indemnification pursuant to this Section 5.08 as incurred to the fullest extent permitted under applicable Law; provided, however, that such Indemnified Party provides an undertaking to repay such advances if it is ultimately determined that such Indemnified Party is not entitled to such indemnification.

(b) From and after the Effective Time, Parent shall cause the Surviving Corporation to honor the provisions regarding (i) exculpation of directors, (ii) limitation of liability of directors and officers, (iii) advancement of expenses and (iv) indemnification, in each case, contained in the Company Organizational Documents (as in effect as of the date hereof), the comparable organizational documents of any of the Company's Subsidiaries (as in effect as of the date hereof) or any indemnification Contract set forth in Section 5.08(b) of the Company Disclosure Letter between the

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

applicable Indemnified Party and the Company or any of its Subsidiaries existing immediately prior to the Effective Time (it being understood and agreed that, for the avoidance of doubt and without limiting the generality of the foregoing, the foregoing obligation of Parent shall apply with respect to, and remain in full force and effect as to any pending or future claim, hearing, investigation or Proceeding relating to or arising out of the construction, or cessation of the construction, of nuclear power Units 2 and 3 at the Summer Station or the bankruptcy of Westinghouse Electric Company, LLC (including the settlement agreement entered into with Toshiba Corporation and any Contract relating to the proceeds thereof)). For a period of three (3) years following the Effective Time, Parent shall cause the Surviving Corporation and its Subsidiaries not to amend, replace or otherwise modify the provisions regarding (A) exculpation of directors, (B) limitation of liability of directors and officers, (C) advancement of expenses and (D) indemnification, in each case, contained in their respective organizational documents; provided, however, that such three (3) year period shall be extended for so long as any Proceeding is pending or asserted against an Indemnified Party that implicates the rights set forth in the foregoing clauses (A) through (D); provided, further, that such prohibition on amendments, replacements and other modifications shall not apply to amendments, replacements and other modifications that are prospective in their application and exclude any effect on the Indemnified Parties.

(c) From and after the Effective Time, Parent shall cause the Surviving Corporation to maintain for a period of at least six (6) years following the Effective Time directors' and officers' liability insurance and fiduciary liability insurance policies (collectively, "D&O Insurance") from an insurance carrier with the same or better credit rating as the Company's current insurance carrier with benefits, levels of coverage and terms and conditions at least as favorable as the Company's D&O Insurance existing immediately prior to the Effective Time with respect to matters existing or occurring at or prior to the Effective Time, including for acts or omissions in connection with this Agreement and the consummation of the transactions contemplated by this Agreement. Notwithstanding the foregoing, in no event shall Parent or the Surviving Corporation be required to expend for such D&O Insurance coverage an annual premium amount greater than three hundred percent (300%) of the aggregate amount of the annual premiums currently paid by the Company for D&O Insurance immediately prior to the Effective Time (such aggregate amount of premiums currently paid, the "Maximum Annual Premium"). If the annual premiums of such D&O Insurance coverage exceed the Maximum Annual Premium, Parent and the Surviving Corporation shall obtain a policy with as much coverage as reasonably available for an annual cost not exceeding the Maximum Annual Premium.

(d) Notwithstanding Section 5.08(c), the Company may in its sole discretion obtain, prior to the Effective Time, six (6) year pre-paid "tail" insurance coverage, at an aggregate cost no greater than six times the Maximum Annual Premium, providing for D&O Insurance not materially less favorable than that described in Section 5.08(c). If the Company has obtained such policy pursuant to this Section 5.08(d), Parent will cause such policy to be maintained in full force and effect for its full term and cause all obligations thereunder to be honored by the Surviving Corporation, and Parent will have no further obligation to purchase or pay for insurance pursuant to Section 5.08(c).

(e) If Parent, the Surviving Corporation or any of their respective successors or assigns (i) consolidates or merges with or into any other Person and is not the continuing or surviving corporation or entity of such consolidation or merger or (ii) transfers all or substantially all of its properties and assets to any Person, then, and in each such case, proper provisions shall be made so that the successors and assigns of Parent or the Surviving Corporation, as applicable, shall assume and comply with all of the obligations applicable to Parent or the Surviving Corporation, respectively, set forth in this Section 5.08.

(f) The provisions of this Section 5.08 are intended to be for the benefit of, and shall be enforceable by, each of the Indemnified Parties. The obligations of Parent and the Surviving

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

Corporation in this Section 5.08 may not be terminated or modified in any manner that adversely affects any Indemnified Party without the consent of such Indemnified Party. Parent will honor, guaranty and stand as surety for, and will cause the Surviving Corporation and its Subsidiaries and successors to honor and comply with, the covenants contained in this Section 5.08.

(g) The rights of the Indemnified Parties under this Section 5.08 shall be in addition to, and not in limitation of, any rights such Indemnified Parties may have under the Company Organizational Documents or any of the comparable organizational documents of any of the Company's Subsidiaries, or under any applicable Contracts or Law.

SECTION 5.09. Financing.

(a) The Company shall, and shall cause its Subsidiaries to, (i) provide commercially reasonable assistance with the preparation of rating agency presentations and lender, underwriter and initial purchaser presentations, offering memoranda and prospectuses and any discussions regarding the business, financial statements, and management discussion and analysis of the Company and its Subsidiaries, all for use in connection with the financing activities of Parent, including any registration statement filed with the SEC where Parent determines that the inclusion of such information is required or desirable, and (ii) request that its independent accountants provide customary and reasonable assistance to Parent or any of its Subsidiaries, as applicable, in connection with providing customary comfort letters in connection with the financing activities of Parent; provided, further, that nothing in this Agreement shall require the Company to cause the delivery of (A) legal opinions or reliance letters or any certificate as to solvency or any other certificate necessary for such financing activities, other than as allowed by the preceding clause (ii), (B) any audited financial information or any financial information prepared in accordance with Regulation S-K or Regulation S-X under the Securities Act or any financial information in a form not customarily prepared by the Company with respect to any period or (C) any financial information with respect to a month or fiscal period that has not yet ended or has ended less than forty-five (45) days prior to the date of such request.

(b) Notwithstanding anything to the contrary contained in this Agreement (including this Section 5.09): (i) nothing in this Agreement (including this Section 5.09) shall require any such cooperation set forth in Section 5.09(a) to the extent that it would require the Company, any of its Subsidiaries or any of their respective Affiliates or Representatives to (A) pay any commitment or other fees, reimburse any expenses or otherwise incur any liabilities or give any indemnities prior to the Effective Time, (B) provide any cooperation that would unreasonably interfere with the ongoing business or operations of the Company, any of its Subsidiaries or any of their respective Affiliates or Representatives, (C) enter into or approve any agreement or other documentation effective prior to the Effective Time or agree to any change or modification of any existing agreement or other documentation that would be effective prior to the Effective Time, (D) require the Company to provide *pro forma* financial statements or *pro forma* adjustments reflecting the financing activities of Parent or any description of all or any component of such financing activities (it being understood that the Company shall use reasonable best efforts to assist in preparation of *pro forma* financial adjustments to the extent otherwise relating to the Company and required by the financing activities of Parent), (E) require the Company or the Subsidiaries of the Company to provide *pro forma* financial statements or *pro forma* adjustments reflecting transactions contemplated or required hereunder (it being understood that the Company shall use reasonable best efforts to assist in preparation of *pro forma* financial adjustments to the extent otherwise relating to the Company and required by the financing activities of Parent), (F) provide any cooperation or take any action that, in the reasonable judgment of the Company, would result in a violation of any confidentiality agreement or material agreement or the loss of any attorney-client or other similar privilege, (G) make any representation or warranty in connection with the financing activities of Parent or the marketing or arrangement thereof, (H) provide any

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

cooperation, or take any action, that would cause any representation or warranty in this Agreement to be breached or any condition to the Closing set forth in this Agreement to fail to be satisfied or (I) cause the Company, any of its Subsidiaries or any of their respective boards of directors (or equivalent bodies) to approve or authorize the financing activities of Parent, and (ii) no action, liability or obligation (including any obligation to pay any commitment or other fees or reimburse any expenses) of the Company, any of its Subsidiaries or any of their respective Affiliates or Representatives under any certificate, agreement, arrangement, document or instrument relating to the financing activities of Parent shall be effective until the Effective Time.

(c) Parent shall (i) promptly reimburse the Company for all reasonable and out-of-pocket costs or expenses (including reasonable and documented costs and expenses of counsel and accountants) incurred by the Company, any of its Subsidiaries and any of their respective Representatives in connection with any cooperation provided for in Section 5.09(a) and (ii) indemnify and hold harmless the Company, each of its Subsidiaries and each of their respective Representatives against any claim, loss, damage, injury, liability, judgment, award, penalty, fine, Tax, cost (including cost of investigation), expense (including fees and expenses of counsel and accountants) or settlement payment incurred as a result of, or in connection with, any cooperation provided for in Section 5.09(a) or the financing activities of Parent and any information used in connection therewith, unless the Company acted in bad faith or engaged in willful misconduct and other than in the case of fraud.

(d) Without limiting the generality of the foregoing, promptly following Parent's request, the Company shall deliver to each of the lenders with respect to the Indebtedness set forth in Section 5.09(d) of the Parent Disclosure Letter (the "Existing Loan Lenders") a notice (an "Existing Loan Notice") prepared by Parent, in form and substance reasonably acceptable to the Company, notifying each of the Existing Loan Lenders of this Agreement and the contemplated Merger. At Parent's election, the Existing Loan Notice with respect to one or more of the Existing Loan Lenders may include a request for a consent, in form and substance reasonably acceptable to the Company (an "Existing Loan Consent"), to (i) the consummation of the Merger and the other transactions contemplated by this Agreement, and (ii) certain modifications of (or waivers under or other changes to) any agreement or documentation relating to the Company's or its Subsidiaries', as applicable, relationship with such Existing Loan Lender; provided, however, that no such modifications, waivers or changes shall be effective prior to the Effective Time.

(e) Parent and Merger Sub acknowledge and agree that the obtaining of any Existing Loan Consent is not a condition to the Closing.

SECTION 5.10. Rule 16b-3. Prior to the Effective Time, each of the Company and Parent shall take such steps as may be reasonably necessary or advisable to cause (a) any dispositions of Company equity securities (including derivative securities) pursuant to the transactions contemplated by this Agreement by each individual who is subject to the reporting requirements of Section 16(a) of the Exchange Act with respect to the Company to be exempt under Rule 16b-3 promulgated under the Exchange Act and (b) any acquisitions of Parent equity securities (including derivative securities) pursuant to the transactions contemplated by this Agreement by each individual who may become subject to the reporting requirements of Section 16(a) of the Exchange Act with respect to Parent to be exempt under Rule 16b-3 promulgated under the Exchange Act.

SECTION 5.11. Parent Consent. Within twenty-four (24) hours after the execution of this Agreement, Parent shall execute and deliver, in accordance with Chapter 11 of the SCBCA and in its capacity as the sole shareholder of Merger Sub, a written consent approving this Agreement.

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

SECTION 5.12. Merger Sub and Surviving Corporation Compliance. Parent shall cause Merger Sub or the Surviving Corporation, as applicable, to comply with all of its respective obligations under this Agreement, and prior to the Effective Time, Merger Sub shall not engage in any activities of any nature except as provided in or in furtherance of, or contemplated by this Agreement.

SECTION 5.13. Takeover Statutes. If any Takeover Statute is or may become applicable to the Merger or the other transactions contemplated by this Agreement, Parent, Merger Sub, the Company and the Company Board shall use reasonable best efforts to take such actions as are necessary so that such transactions may be consummated as promptly as practicable on the terms contemplated by this Agreement and otherwise act to eliminate or minimize the effects of such Takeover Statute on such transactions.

SECTION 5.14. Control of Operations. Without limiting any party's rights or obligations under this Agreement, the parties hereto understand and agree that (a) nothing contained in this Agreement will give any party hereto, directly or indirectly, the right to control, direct or influence any other party's operations prior to the Effective Time and (b) prior to the Effective Time, each party will exercise, consistent with the terms and conditions of this Agreement, complete control and supervision over its operations.

SECTION 5.15. Resignation of Directors. The Company will cause each of the directors of the Company to submit at the Closing a letter of resignation in form reasonably satisfactory to Parent and effective as of the Effective Time. Notwithstanding the foregoing, the Company will not be in breach of this Section 5.15 if it fails to obtain the resignation of any such director if Parent will have the power, directly or indirectly, to remove any such Person from his or her position as a director of the Company without cause immediately after the Effective Time with no liability in excess of $500,000 in the aggregate.

SECTION 5.16. Additional Matters. Parent hereby confirms that, subject to the occurrence of the Effective Time, it:

(a) intends to maintain South Carolina Electric & Gas Company's corporate headquarters in Cayce, South Carolina;

(b) will make a good faith commitment to give the employees of the Company and its Subsidiaries due and fair consideration for other employment and promotion opportunities within the larger Parent organization, both inside and outside of South Carolina, to the extent any employment positions are re-aligned, reduced or eliminated in the future as a result of the Merger;

(c) intends that Parent's board of directors will take all necessary action as soon as practical after the Effective Time to appoint a mutually agreeable current member of the Company Board or the Company's executive management as a director to serve on Parent's board of directors; and

(d) intends to increase the Company's historic level of corporate contributions to charities identified by the Company's leadership by $1,000,000.00 per year for at least five (5) years after the Effective Time and to maintain or increase historic levels of community involvement, low income funding and economic development efforts in the Company's current operating area.

SECTION 5.17. Shareholder Litigation. The Company shall advise Parent promptly in writing of any Proceeding brought by a holder of Company Shares or any other Person against the Company or its directors or officers arising out of or relating to this Agreement or the transactions

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

contemplated by this Agreement (the "Shareholder Litigation") and shall keep Parent reasonably informed regarding any such matter. The Company shall not settle any such shareholder litigation without Parent's consent, not to be unreasonably withheld or delayed.

SECTION 5.18. Advice of Changes. Each of Parent and the Company will, to the extent not in violation of applicable Law, promptly advise the other of any Change of which it has Knowledge, (a) having or reasonably likely to have, individually or in the aggregate, a Parent Material Adverse Effect or a Company Material Adverse Effect, as the case may be, or (b) that would or would be reasonably likely to cause or constitute a material breach of any of its representations, warranties or covenants contained in this Agreement; provided, however, that (i) no such notification will operate as a waiver of or otherwise affect the representations, warranties or covenants of the parties or the conditions to the obligations of the parties under this Agreement, (ii) the delivery of any notice pursuant to this Section 5.18 shall not limit or otherwise affect the remedies available under this Agreement to the party receiving such notice and (iii) a failure to comply with this Section 5.18 shall not constitute the failure of any condition set forth in Article VI.

SECTION 5.19. Certain Tax Matters.

(a) Each of the parties shall use its reasonable best efforts to cause the Merger to qualify for the Intended Tax Treatment. None of the parties shall (and each of the parties shall cause their respective Subsidiaries not to) take any action (or fail to take any action) if taking (or failing to take) such action could reasonably be expected to cause the Merger to fail to qualify for the Intended Tax Treatment. The parties shall consider in good faith such amendments to this Agreement as may be reasonably required to cause the Merger to qualify for the Intended Tax Treatment.

(b) Each of the parties shall use its reasonable best efforts to obtain the Tax opinions to be attached as exhibits to the Proxy Statement/Prospectus and the Form S-4, including by (i) delivering to Morgan, Lewis & Bockius LLP and Mayer Brown LLP, prior to the filing of the Proxy Statement/Prospectus and the Form S-4, Tax representation letters in substantially the forms set forth in Section 5.19(b) of the Parent Disclosure Letter and Section 5.19(b) of the Company Disclosure Letter, respectively, and (ii) delivering to Morgan, Lewis & Bockius LLP and Mayer Brown LLP, dated and executed as of the Closing Date, Tax representation letters in substantially the forms set forth in Section 5.19(b) of the Parent Disclosure Letter and Section 5.19(b) of the Company Disclosure Letter, respectively. Each of the parties shall use its reasonable best efforts not to, and not permit any of its Affiliates to, take or cause to be taken any action that would cause to be untrue (or fail to take or cause not to be taken any action which inaction would cause to be untrue) any of the representations, warranties and covenants made to counsel in the Tax representation letters described in this Section 5.19(b).

(c) This Agreement is intended to constitute, and the parties hereto adopt this Agreement as, a "plan of reorganization" for purposes of Sections 354, 361 and 368 of the Code. The parties shall treat the Merger as a "reorganization" within the meaning of Section 368(a) of the Code for United States federal, state and other relevant Tax purposes.

ARTICLE VI

CONDITIONS

SECTION 6.01. Conditions to Each Party's Obligation to Effect the Merger. The respective obligation of each party hereto to effect the Merger is subject to the satisfaction or (to the extent permitted by Law) waiver at or prior to the Closing of each of the following conditions:

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

(a) Shareholder Approval. This Agreement shall have been duly approved by holders of Company Shares constituting the Company Requisite Vote;

(b) Orders. No Governmental Entity of competent jurisdiction shall have enacted, entered, promulgated or enforced any Law, executive order, ruling, judgment, injunction or other order (collectively, "Orders") that is in effect and restrains, enjoins, prevents or otherwise prohibits the consummation of the Merger or makes the consummation of the Merger illegal;

(c) Regulatory Conditions. Each of the conditions set forth in Section 6.01(c) of the Company Disclosure Letter with respect to the Consents described therein (the "Regulatory Conditions") shall have been satisfied;

(d) Approval of SCPSC Petition. The issuance by the SCPSC of an Order approving the SCPSC Petition (other than the request for the SCPSC to take the actions contemplated by Section 6.02(g), which actions are addressed in Section 6.02(g)), unless otherwise consented to by Parent in its sole discretion, without any (i) material changes to the proposed terms, conditions, or undertakings set forth in Sections 2 and 3 of the key terms summarized in Appendix A attached to this Agreement and incorporated in the SCPSC Petition or (ii) a significant change to the economic value of proposed terms set forth in Sections 2 and 3 of the key terms summarized in Appendix A attached to this Agreement and incorporated in the SCPSC Petition, in each case as reasonably determined by Parent in good faith (the "SCPSC Petition Approval") (it being understood and agreed that the condition set forth in this Section 6.01(d) shall be satisfied upon the issuance of such Order by the SCPSC without regard to any rehearing or appeals process (including the filing of any motion for reconsideration or petition for judicial review), or other judicial or administrative process, subsequent to the initial issuance of such Order);

(e) Listing. The Parent Shares to be issued in connection with the transactions contemplated by this Agreement shall have been approved for listing on the NYSE, subject to official notice of issuance; and

(f) Form S-4. The Form S-4 shall have been declared effective under the Securities Act and shall not be subject to any stop order or Proceeding seeking a stop order.

SECTION 6.02. Additional Conditions to Obligations of Parent and Merger Sub. The obligations of Parent and Merger Sub to effect the Merger are further subject to the satisfaction or (to the extent permitted by Law) waiver at or prior to the Closing of each of the following conditions:

(a) Representations and Warranties. (i) Each of the representations and warranties of the Company set forth in Section 3.01 (except for those contained in Section 3.01(c), Section 3.01(d)(i), Section 3.01(f)(i), Section 3.01(r) and Section 3.01(s)) shall be true and correct in all respects (disregarding all qualifications or limitations as to "materiality", "Company Material Adverse Effect" and words of similar import set forth therein) as of the date of this Agreement and as of the Closing Date as though made on and as of such date (except for any such representation or warranty that is made as of a specified date (including the date of this Agreement), in which case such representation or warranty shall be true and correct only as of such specified date), except where the failure of such representations and warranties to be so true and correct has not had and would not reasonably be expected to have, individually or in the aggregate, a Company Material Adverse Effect, (ii) each of the representations and warranties of the Company set forth in Section 3.01(c) shall be true and correct in all respects (except for de minimis inaccuracies) as of the date of this Agreement and as of the Closing Date as though made on and as of such date (except for any such representation or warranty that is made as of a specified date (including the date of this Agreement), in which case such representation or

warranty shall be true and correct only as of such specified date), (iii) each of the representations and warranties of the Company set forth in Section 3.01(d)(i) and Section 3.01(s) shall be true and correct in all material respects (disregarding all qualifications or limitations as to "materiality", "Company Material Adverse Effect" and words of similar import set forth therein) as of the date of this Agreement and as of the Closing Date as though made on and as of such date (except for any such representation or warranty that is made as of a specified date (including the date of this Agreement), in which case such representation or warranty shall be true and correct only as of such specified date) and (iv) each of the representations and warranties of the Company set forth in Section 3.01(f)(i) and Section 3.01(r) shall be true and correct in all respects as of the date of this Agreement and as of the Closing Date as though made on and as of such date (except for any such representation or warranty that is made as of a specified date (including the date of this Agreement), in which case such representation or warranty shall be true and correct only as of such specified date);

(b) Performance of Obligations of the Company. The Company shall have performed in all material respects all obligations required to be performed by it under this Agreement on or prior to the Closing Date;

(c) Certificate. Parent shall have received a certificate of the Chief Executive Officer or the Chief Financial Officer of the Company, certifying that the conditions set forth in Section 6.02(a) and Section 6.02(b) have been satisfied;

(d) Absence of Burdensome Condition. No Regulatory Clearance, other approval of a Governmental Entity or other Consent, in each case in connection with the Merger, or Order related to any of the foregoing, shall impose or require any undertakings, terms, conditions, liabilities, obligations, commitments or sanctions, or any structural or remedial actions (including a Remedial Action), that constitute a Burdensome Condition;

(e) No MAE. Since the date of this Agreement, there shall not have occurred any Change or Changes that have or would reasonably be expected to have, individually or in the aggregate, a Company Material Adverse Effect;

(f) No Actions Affecting SCPSC Petition. No Governmental Entity of competent jurisdiction shall have enacted any Order and no Change in Law (including no Change to the BLRA or the South Carolina Public Utility Laws) shall have been enacted, in each case which imposes any condition that would reasonably be expected to result in a (i) material change to the proposed terms, conditions, or undertakings set forth in the SCPSC Petition or (ii) a significant change to the economic value of the proposed terms set forth in the SCPSC Petition, in each case as reasonably determined by Parent in good faith;

(g) SCPSC Determination. The SCPSC shall have (i) approved the Merger with no material Changes to the terms of the Merger, (ii) made a finding that the Merger is in the public interest or (iii) made a finding that there is an absence of harm to South Carolina rate payers as a result of the Merger; and

(h) No Change in Law. Since the date of this Agreement, there shall not have occurred any (i) substantive Change in any applicable Law or any Order with respect to the BLRA, as in effect on the date of this Agreement, which has or would reasonably be expected to have an adverse effect on the Company or any of its Subsidiaries or (ii) substantive Change in any applicable Law or any Order with respect to any other South Carolina Public Utility Law, as in effect as of the date of this Agreement, which has or would reasonably be expected to have an adverse effect on the Company or any of its Subsidiaries (such Changes as set forth in (i) and (ii), the "SC Law Changes").

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

SECTION 6.03. Additional Conditions to Obligation of the Company. The obligation of the Company to effect the Merger is further subject to the satisfaction or (to the extent permitted by Law) waiver on or prior to the Closing of the following conditions:

(a) Representations and Warranties. (i) Each of the representations and warranties of Parent and Merger Sub set forth in Section 3.02 (except for those contained in Section 3.02(c), Section 3.02(d)(i), Section 3.02(f)(i), Section 3.02(k) and Section 3.02(l)) shall be true and correct in all respects (disregarding all qualifications or limitations as to "materiality", "Parent Material Adverse Effect" and words of similar import set forth therein) as of the date of this Agreement and as of the Closing Date as though made on and as of such date (except for any such representation or warranty that is made as of a specified date (including the date of this Agreement), in which case such representation or warranty shall be true and correct only as of such specified date), except where the failure of such representations and warranties to be so true and correct has not had and would not reasonably be expected to have, individually or in the aggregate, a Parent Material Adverse Effect, (ii) each of the representations and warranties of Parent and Merger Sub set forth in Section 3.02(c) shall be true and correct in all respects (except for de minimis inaccuracies) as of the date of this Agreement and as of the Closing Date as though made on and as of such date (except for any such representation or warranty that is made as of a specified date (including the date of this Agreement), in which case such representation or warranty shall be true and correct only as of such specified date), (iii) each of the representations and warranties of Parent and Merger Sub set forth in Section 3.02(d)(i) and Section 3.02(l) shall be true and correct in all material respects (disregarding all qualifications or limitations as to "materiality", "Parent Material Adverse Effect" and words of similar import set forth therein) as of the date of this Agreement and as of the Closing Date as though made on and as of such date (except for any such representation or warranty that is made as of a specified date (including the date of this Agreement), in which case such representation or warranty shall be true and correct only as of such specified date) and (iv) each of the representations and warranties of Parent and Merger Sub set forth in Section 3.02(f)(i) and Section 3.02(k) shall be true and correct in all respects as of the date of this Agreement and as of the Closing Date as though made on and as of such date (except for any such representation or warranty that is made as of a specified date (including the date of this Agreement), in which case such representation or warranty shall be true and correct only as of such specified date);

(b) Performance of Obligations of Parent and Merger Sub. Each of Parent and Merger Sub shall have performed in all material respects all obligations required to be performed by it under this Agreement at or prior to the Closing Date; and

(c) Certificate. The Company shall have received a certificate of the Chief Executive Officer or the Chief Financial Officer of Parent, certifying that the conditions set forth in Section 6.03(a) and Section 6.03(b) have been satisfied.

SECTION 6.04. Frustration of Closing Conditions. None of the Company, Parent or Merger Sub may rely on the failure of any condition set forth in Section 6.01, Section 6.02 or Section 6.03, as the case may be, to be satisfied if such failure was primarily caused by such party's breach of this Agreement.

ARTICLE VII

TERMINATION

SECTION 7.01. Termination. This Agreement may be terminated and the Merger may be abandoned at any time prior to the Effective Time, whether before or after (except as set forth below) the Company Requisite Vote is obtained:

(a) by mutual written consent of Parent and the Company;

(b) by either Parent or the Company:

(i) if the Merger shall not have been consummated on or before January 2, 2019 (the "Termination Date"); provided, however, that if any condition set forth in Section 6.01(b), Section 6.01(c) or Section 6.01(d) shall not have been satisfied at such time, the Termination Date shall automatically be extended to (and shall thereafter be deemed to be), without any action on the part of any party hereto, April 2, 2019; provided, further, that the right to terminate this Agreement pursuant to this Section 7.01(b)(i) shall not be available to any party if such party (or, in the case of Parent, Merger Sub) has breached its obligations under this Agreement in any manner that shall have been the principal cause of or resulted in the failure of a condition to any party's obligation to effect the Merger;

(ii) if at the Shareholders Meeting (or any adjournment or postponement thereof done in accordance with this Agreement), the Company Requisite Vote shall not have been obtained; or

(iii) if any Order permanently restraining, enjoining, preventing or otherwise prohibiting consummation of the Merger shall have become final and non-appealable; provided, however, that a party may not terminate this Agreement pursuant to this Section 7.01(b)(iii) if such party (or, in the case of Parent, Merger Sub) has breached its obligations under this Agreement in a manner that shall have been the principal cause of such Order;

(c) by the Company:

(i) if the Company Board has effected a Company Adverse Recommendation Change with respect to a Superior Proposal in accordance with Section 4.02(f) and shall have approved, and concurrently with the termination hereunder the Company shall have entered into, an Alternative Acquisition Agreement with respect to a Superior Proposal; provided, however, that such termination shall not be effective and the Company shall not enter into an Alternative Acquisition Agreement, unless (A) the Company shall have complied with the provisions of Section 4.02(f) and (B) the Company has paid the Company Termination Fee to Parent; provided, further, that the right to terminate this Agreement under this Section 7.01(c)(i) shall not be available after the Company Requisite Vote shall have been obtained; or

(ii) if Parent or Merger Sub shall have breached any of their respective representations or warranties or failed to perform any of their respective covenants or other agreements contained in this Agreement, where such breach or failure to perform (A) would give rise to the failure of a condition set forth in Section 6.03(a) or Section 6.03(b) and (B) cannot be cured by Parent or Merger Sub by the Termination Date, or if capable of being cured, is not cured prior to the earlier of (1) the thirtieth (30th) day after written notice thereof is given by the Company to Parent and (2) the third (3rd) Business Day immediately preceding the Termination Date; provided, however, that the Company shall not have the right to terminate this Agreement pursuant to this Section 7.01(c)(ii) if the Company is then in material breach of this Agreement;

(d) by Parent:

(i) if the Company Board (or a committee thereof) shall have effected a Company Adverse Recommendation Change; provided, however, that the right to terminate under this

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

Section 7.01(d)(i) shall not be available after the Company Requisite Vote shall have been obtained; or

(ii) if the Company shall have breached any of its representations or warranties or failed to perform any of its covenants or other agreements contained in this Agreement, where such breach or failure to perform (A) would give rise to the failure of a condition set forth in Section 6.02(a) or Section 6.02(b) and (B) cannot be cured by Company by the Termination Date, or if capable of being cured, is not cured prior to the earlier of (1) the thirtieth (30th) day after written notice thereof is given by Parent to the Company and (2) the third (3rd) Business Day immediately preceding the Termination Date; provided, however, that Parent shall not have the right to terminate this Agreement pursuant to this Section 7.01(d)(ii) if either Parent or Merger Sub is then in material breach of this Agreement.

SECTION 7.02. Effect of Termination and Abandonment.

(a) Except as provided in Section 7.02(b), in the event of termination of this Agreement and the abandonment of the Merger pursuant to this Article VII, this Agreement shall forthwith become void and of no effect and there shall be no liability or obligation on the part of any party hereto (or of any of its Representatives or Affiliates), except as provided in the last sentence of Section 5.02(c), Section 5.03(b), Section 5.07, Section 5.09(c), this Section 7.02 and Article VIII, which provisions shall survive such termination; provided, however, that subject to Section 7.02(b), Section 7.02(c), and Section 7.02(d), no such termination shall relieve any party hereto (treating Parent and Merger Sub as one party) of any liability for damages to any other party hereto resulting from any Willful Breach by the party (treating Parent and Merger Sub as one party) committing such Willful Breach prior to such termination, and the aggrieved party will be entitled to all rights and remedies available at law or in equity. The parties hereto acknowledge and agree that nothing in this Section 7.02 shall be deemed to affect their right to specific performance under Section 8.12.

(b) The Company shall pay or cause to be paid to Parent or its designee a non-refundable fee of $240,000,000 (the "Company Termination Fee") if:

(i) this Agreement is terminated by the Company pursuant to Section 7.01(c)(i);

(ii) (A) this Agreement is terminated (1) by Parent or the Company pursuant to Section 7.01(b)(i) or Section 7.01(b)(ii), or (2) by Parent pursuant to Section 7.01(d)(ii), (B) a bona fide Acquisition Proposal shall have been publicly announced or publicly disclosed and not have been withdrawn (1) in the case of a termination pursuant to Section 7.01(b)(i) or Section 7.01(d)(ii), prior to the date of such termination, and (2) in the case of a termination pursuant to Section 7.01(b)(ii), prior to the Shareholders Meeting, and (C) thereafter during the twelve (12) month period immediately following such termination, (1) the Company enters into an Alternative Acquisition Agreement or (2) an Acquisition Proposal is consummated; or

(iii) this Agreement is terminated by Parent pursuant to Section 7.01(d)(i);

If the Company Termination Fee becomes due pursuant to this Section 7.02(b), the Company shall pay Parent or its designee such Company Termination Fee by wire transfer of immediately available funds (x) in the case of a payment required by Section 7.02(b)(i), on the date of termination of this Agreement, (y) in the case of a payment required by Section 7.02(b)(ii), within two (2) Business Days after the earlier of the time when an Acquisition Proposal is consummated or an Alternative Acquisition Agreement is executed and (z) in the case of a payment required by Section 7.02(b)(iii), within two (2) Business Days of the date of termination of this Agreement, it being understood that in no event shall the Company be

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

required to pay the Company Termination Fee on more than one occasion. Parent shall provide to the Company notice designating an account for purposes of payment of the Company Termination Fee within forty-eight (48) hours of a request by the Company to provide such information. For purposes of Section 7.02(b)(ii), the term "Acquisition Proposal" shall have the meaning assigned to such term in Exhibit A, except that all references to 15% therein shall be deemed to be references to 50%.

(c) Parent shall pay or cause to be paid to the Company or its designee a non-refundable fee of $280,000,000 (the "Parent Termination Fee") if:

(i) this Agreement is terminated by Parent or the Company pursuant to Section 7.01(b)(i) and, at the time of any such termination (A) the condition set forth in Section 6.02(d) shall not have been satisfied or waived with respect to one or more Regulatory Conditions and (B) the conditions set forth in Section 6.01(a), Section 6.01(b) – (d) (unless such condition was not satisfied solely due to the proposal of a Burdensome Condition to which Parent has not agreed), Section 6.01(f), Section 6.02(a), Section 6.02(b) and Section 6.02(e) shall have been satisfied or waived (except for any such conditions that have not been satisfied as a result of a breach by Parent or Merger Sub of any of their respective obligations under this Agreement);

(ii) this Agreement is terminated by Parent or the Company pursuant to Section 7.01(b)(iii) and, at the time of any such termination (A) the condition set forth in Section 6.02(d) shall not have been satisfied or waived with respect to one or more Regulatory Conditions and (B) the conditions set forth in Section 6.01(a), Section 6.01(b) – (d) (unless such condition was not satisfied solely due to the proposal of a Burdensome Condition to which Parent has not agreed), Section 6.01(f), Section 6.02(a), Section 6.02(b) and Section 6.02(e) shall have been satisfied or waived (except for any such conditions that have not been satisfied as a result of a breach by Parent or Merger Sub of any of their respective obligations under this Agreement); or

(iii) this Agreement is terminated by the Company pursuant to Section 7.01(c)(ii) due to a material breach by Parent or Merger Sub of its obligations under Section 5.02 which breach has caused the failure of a condition set forth in Section 6.01(b), Section 6.01(c), Section 6.01(d) , Section 6.02(d), Section 6.02(f), Section 6.02(g) or Section 6.02(h) to be satisfied.

If the Parent Termination Fee becomes due pursuant to this Section 7.02(c), Parent shall pay the Company or its designee the Parent Termination Fee by wire transfer of immediately available funds within two (2) Business Days of the date of termination of this Agreement, it being understood that in no event shall Parent be required to pay the Parent Termination Fee on more than one occasion. The Company shall provide to Parent notice designating an account for purposes of payment of the Parent Termination Fee within forty-eight (48) hours of a request by Parent to provide such information.

(d) Notwithstanding anything to the contrary in this Agreement, if this Agreement is terminated under circumstances in which the Company is required to pay the Company Termination Fee pursuant to Section 7.02(b) and the Company Termination Fee is paid, the payment of the Company Termination Fee shall be Parent's and Merger Sub's sole and exclusive remedy against the Company and its Affiliates, and their respective shareholders and Representatives, relating to or arising out of this Agreement, any agreement entered into in connection herewith or the transactions contemplated by this Agreement or thereby. Notwithstanding anything to the contrary in this Agreement, if this Agreement is terminated under circumstances in which Parent is required to pay the Parent Termination Fee pursuant to Section 7.02(c) and the Parent Termination Fee is paid, the payment of the Parent Termination Fee shall be the Company's sole and exclusive remedy against Parent, Merger Sub and their respective Affiliates, and their respective shareholders and Representatives,

relating to or arising out of this Agreement, any agreement entered into in connection herewith or the transactions contemplated by this Agreement or thereby.

(e) Each party acknowledges that the agreements contained in Section 7.02(b) and Section 7.02(c) are an integral part of the transactions contemplated by this Agreement and that, without these agreements, such party would not enter into this Agreement. Accordingly, if the applicable party fails promptly to pay any amount due pursuant to Section 7.02(b) or Section 7.02(c), such party shall also pay any reasonable out-of-pocket costs, fees and expenses incurred by the other party (including reasonable legal fees and expenses) in connection with a Proceeding to enforce this Agreement that results in a final non-appealable Order for such amount against the party failing to promptly pay such amount. Any amount not paid when due pursuant to Section 7.02(b) or Section 7.02(c) shall bear interest from the date such amount is due until the date paid at a rate equal to the prime rate as published in *The Wall Street Journal, Eastern Edition*, in effect on the date of such payment.

ARTICLE VIII

MISCELLANEOUS

SECTION 8.01. Non-Survival. None of the representations, warranties, covenants and agreements in this Agreement or in any instrument delivered pursuant to this Agreement, including any rights arising out of any breach of such representations, warranties, covenants and agreements, shall survive the Effective Time, except for (a) those covenants and agreements contained herein that by their terms apply or are to be performed in whole or in part after the Effective Time and (b) those contained in this Article VIII.

SECTION 8.02. Modification or Amendment. Subject to the requirements of applicable Law, at any time prior to the Effective Time, the parties hereto (in the case of the Company or Merger Sub, by action of their respective boards of directors to the extent required by Law) may modify or amend this Agreement by written agreement, executed and delivered by duly authorized officers of the respective parties. No modification or amendment will be made which, pursuant to applicable Law or the rules of the NYSE, requires further approval by the holders of Company Shares or the holders of the Parent Shares, as applicable, without such further approval being obtained.

SECTION 8.03. Waiver. Subject to the requirements of applicable Law, at any time prior to the Effective Time, any party hereto may (a) extend the time for the performance of any of the obligations or other acts of the other parties, (b) waive any inaccuracies in the representations and warranties of the other parties contained herein or in any document delivered pursuant hereto, or (c) waive compliance by the other parties with any of the agreements or conditions contained herein; provided, however, that neither Parent nor Merger Sub may perform any of the actions set forth in the foregoing clauses (a), (b) or (c) with respect to Merger Sub or Parent, respectively. No extension or waiver will be made which, pursuant to applicable Law or the rules of the NYSE, requires further approval by the holders of Company Shares or the holders of the Parent Shares, as applicable, without such further approval being obtained. Any such extension or waiver shall be valid only if set forth in an instrument in writing signed by the party or parties to be bound thereby and specifically referencing this Agreement. The failure of any party hereto to assert any rights or remedies shall not constitute a waiver of such rights or remedies.

SECTION 8.04. No Other Representations or Warranties.

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

(a) Except for the representations and warranties set forth in Section 3.01, each of Parent and Merger Sub acknowledges and agrees that (i) none of the Company, its Subsidiaries or any other Person makes any other express or implied representation or warranty in connection with the transactions contemplated by this Agreement, (ii) it has relied solely on the representations and warranties of the Company expressly set forth in Section 3.01 and (iii) it has not been induced to enter into this Agreement by any representation, warranty or statement of or by the Company, any of its Subsidiaries or any other Person.

(b) Except for the representations and warranties set forth in Section 3.02, the Company acknowledges and agrees that (i) none of Parent, Merger Sub, any of Parent's other Subsidiaries or any other Person makes any other express or implied representation or warranty in connection with the transactions contemplated by this Agreement, (ii) it has relied solely on the representations and warranties of Parent and Merger Sub expressly set forth Section 3.02 and (iii) it has not been induced to enter into this Agreement by any representation, warranty or statement of or by Parent, Merger Sub, any of the other Subsidiaries of Parent or any other Person.

SECTION 8.05. Notices. All notices, requests, claims, demands and other communications hereunder shall be in writing and shall be deemed given if delivered personally, faxed (with confirmation), electronically mailed in portable document format (PDF) (with confirmation) or sent by overnight courier (providing proof of delivery) to the parties at the following addresses (or at such other address for a party as shall be specified by like notice):

if to Parent or Merger Sub, to:

Dominion Energy, Inc.
120 Tredegar Street
Richmond, Virginia 23219
Fax No.: (804) 819-2233
Attention: Mark O. Webb, Senior Vice President – Corporate Affairs and Chief Legal Officer
Carlos M. Brown, Vice President and General Counsel
Email: mark.webb@dominionenergy.com
carlos.m.brown@dominionenergy.com

with a copy to (which shall not constitute notice):

McGuireWoods LLP
Gateway Plaza
800 East Canal Street
Richmond, Virginia 23219
Fax No.: (804) 698-2090
Attention: Joanne Katsantonis
John L. Hughes, Jr.
Email: jkatsantonis@mcguirewoods.com
jhughes@mcguirewoods.com

if to the Company, to:

SCANA Corporation
220 Operation Way, Mail Code D-308
Cayce, South Carolina 29033

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

Fax No.: (803) 933-7676
Attention: Jim Stuckey, Senior Vice President and General Counsel
Email: jim.stuckey@scana.com

with a copy to (which shall not constitute notice):

Mayer Brown LLP
71 South Wacker Drive
Chicago, Illinois 60606
Fax No.: (312) 706-8183
Attention: Frederick B. Thomas
William R. Kucera
Email: fthomas@mayerbrown.com
wkucera@mayerbrown.com

SECTION 8.06. Definitions. Capitalized terms used in this Agreement have the meanings specified in Exhibit A.

SECTION 8.07. Interpretation.

(a) When a reference is made in this Agreement to an Article, a Section, an Appendix or an Exhibit, such reference shall be to an Article or a Section of, or an Appendix or an Exhibit to, this Agreement unless otherwise indicated. The table of contents and headings contained in this Agreement are for reference purposes only and shall not affect in any way the meaning or interpretation of this Agreement.

(b) Whenever the words "include", "includes" or "including" are used in this Agreement, they shall be deemed to be followed by the words "without limitation". The words "hereof", "herein" and "hereunder" and words of similar import when used in this Agreement shall refer to this Agreement as a whole and not to any particular provision of this Agreement. The word "or" when used in this Agreement is not exclusive.

(c) When a reference is made in this Agreement, the Company Disclosure Letter or the Parent Disclosure Letter to information or documents being "provided", "made available" or "disclosed" by a party hereto to another party or its Affiliates, such information or documents shall include any information or documents (i) included in the SEC Reports of such disclosing party which are publicly available at least twenty-four (24) hours prior to the date of this Agreement, (ii) furnished prior to the execution of this Agreement in the electronic "data room" maintained by such disclosing party and to which access has been granted to the other party and its Representatives at least twenty-four (24) hours prior to the date of this Agreement, or (iii) otherwise provided in writing (including electronically) to the other party or any of its Affiliates or Representatives at least twenty-four (24) hours prior to the date of this Agreement.

(d) The definitions contained in this Agreement are applicable to the singular as well as the plural forms of such terms and to the masculine as well as to the feminine and neuter genders of such term.

(e) Any agreement, instrument or statute defined or referred to herein means such agreement, instrument or statute as from time to time amended, modified or supplemented, including (in the case of agreements or instruments) by waiver or consent and (in the case of statutes) by

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

succession of comparable successor statutes, and all attachments thereto and instruments incorporated therein.

(f) References to a Person are also to its permitted successors and permitted assigns.

(g) Where this Agreement states that a party "shall", "will" or "must" perform in some manner, it means that the party is legally obligated to do so under this Agreement.

(h) When calculating the period of time before which, within which or following which any act is to be done or step taken pursuant to this Agreement, (i) the date that is the reference date in calculating such period shall be excluded and (ii) if the last day of such period is not a Business Day, the period in question shall end on the next succeeding Business Day.

(i) Unless otherwise specifically indicated, any reference herein to $ means U.S. dollars.

(j) The parties hereto have participated jointly in the negotiation and drafting of this Agreement. If an ambiguity or question of intent or interpretation arises, this Agreement shall be construed as jointly drafted by the parties hereto, and no presumption or burden of proof shall arise favoring or disfavoring any party by virtue of the authorship of any provision of this Agreement.

SECTION 8.08. Counterparts. This Agreement may be executed in one or more counterparts (including by facsimile or by attachment to electronic mail in portable document format (PDF)), and by the different parties hereto in separate counterparts, each of which when executed shall be deemed an original but all of which taken together shall be considered one and the same agreement and shall become effective when one or more counterparts have been signed by each of the parties hereto and delivered to the other parties hereto.

SECTION 8.09. Parties in Interest. This Agreement shall be binding upon and inure solely to the benefit of the parties hereto, and nothing in this Agreement, express or implied, is intended to or shall confer upon any other Person any rights, benefits or remedies of any nature whatsoever under or by reason of this Agreement, other than (a) after the Effective Time, with respect to the provisions of Section 5.08 which shall inure to the benefit of the Indemnified Parties who are intended to be third-party beneficiaries thereof, (b) after the Effective Time, the rights of the holders of Company Shares to receive the Merger Consideration in accordance with the terms and conditions of this Agreement, and (c) after the Effective Time, the rights of the holders of Company Performance Share Awards, Company RSUs and Company Deferred Units to receive the payments contemplated by the applicable provisions of Section 2.02, in each case, in accordance with the terms and conditions of this Agreement. The representations and warranties in this Agreement are the product of negotiations among the parties hereto and are for the sole benefit of such parties. Any inaccuracies in such representations and warranties are subject to waiver by the parties hereto in accordance with Section 8.03 without notice or liability to any other Person. In some instances, the representations and warranties in this Agreement may represent an allocation among the parties hereto of risks associated with particular matters regardless of the knowledge of any of the parties hereto. Consequently, Persons other than the parties hereto may not rely upon the representations and warranties in this Agreement as characterizations of actual facts or circumstances as of the date of this Agreement or as of any other date.

SECTION 8.10. Governing Law. This Agreement shall be governed by, and construed in accordance with, the internal Laws and judicial decisions of the State of Delaware applicable to agreements executed and performed entirely within such State, regardless of the Law that might otherwise govern under applicable principles of conflicts of law thereof, except that matters related to the

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

obligations of the Company Board under the SCBCA and matters that are specifically required by the SCBCA in connection with the transactions contemplated by this Agreement shall be governed by the laws of the State of South Carolina.

SECTION 8.11. Entire Agreement; Assignment. This Agreement (including the Appendices and Exhibits hereto, the Company Disclosure Letter and the Parent Disclosure Letter) and the Confidentiality Agreement constitute the entire agreement among the parties hereto with respect to the subject matter hereof and supersede all prior and contemporaneous agreements and undertakings, both written and oral, among the parties, or any of them, with respect to the subject matter hereof. Neither this Agreement nor any of the rights, interests or obligations hereunder may be assigned, in whole or in part, by operation of law or otherwise by any of the parties hereto without the prior written consent of the other parties hereto. Any purported assignment in contravention of this Agreement is and shall be null and void. Subject to the immediately preceding two sentences, this Agreement will be binding upon, inure to the benefit of and be enforceable by the parties hereto and their respective successors and permitted assigns.

SECTION 8.12. Specific Enforcement; Consent to Jurisdiction.

(a) The parties hereto agree that irreparable damage for which monetary damages, even if available, would not be an adequate remedy, would occur in the event that any of the parties hereto do not perform the provisions of this Agreement (including failing to take such actions as are required of it hereunder in order to consummate the transactions contemplated by this Agreement) in accordance with its specified terms or otherwise breach such provisions. The parties hereto acknowledge and agree that each party hereto shall be entitled to seek an injunction, specific performance and other equitable relief to prevent breaches of this Agreement and to seek to enforce specifically the terms and provisions hereof, this being in addition to any other remedy to which it is entitled at law or in equity. Each of the parties hereto further agrees that it will not oppose the granting of an injunction, specific performance and other equitable relief as provided herein on the basis that (A) the other party has an adequate remedy at law or (B) an award of specific performance is not an appropriate remedy for any reason at law or equity. Any party hereto seeking an Order to prevent breaches of this Agreement and to enforce specifically the terms and provisions of this Agreement shall not be required to provide any bond or other security in connection with any such Order.

(b) Each of the parties hereto irrevocably (i) submits itself to the personal jurisdiction of the federal courts located in the State of Delaware and any appellate court therefrom, in connection with any claim or matter directly or indirectly based upon, arising out of or relating to this Agreement or any of the transactions contemplated by this Agreement or the actions of Parent, Merger Sub or the Company in the negotiation, administration, performance and enforcement of this Agreement, (ii) agrees that it will not attempt to deny or defeat such personal jurisdiction by motion or other request for leave from any such court, (iii) agrees that it will not bring any action relating to this Agreement or any of the transactions contemplated by this Agreement in any court other than the federal courts located in the State of Delaware and (iv) agrees that the service of any process, summons, notice or document through the notice procedures set forth in Section 8.05 or by U.S. registered mail to the respective addresses set forth in Section 8.05 shall be effective service of process for any Proceeding in connection with this Agreement or the transactions contemplated by this Agreement. Each party hereto hereby irrevocably waives, and agrees not to assert, by way of motion, as a defense, counterclaim or otherwise, in any Proceeding with respect to this Agreement, any claim that (A) it is not personally subject to the jurisdiction of the above-named courts for any reason other than the failure to serve process in accordance with this Section 8.12(b), (B) it or its property is exempt or immune from jurisdiction of any such court or from any legal process commenced in such courts (whether through service of notice, attachment prior to judgment, attachment in aid of execution of judgment, execution of judgment or otherwise), (C) the Proceeding in any such court is brought in an inconvenient

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

forum, (D) the venue of such Proceeding is improper, or (E) this Agreement, or the subject matter hereof, may not be enforced in or by such courts. Furthermore, each of the Company, Parent and Merger Sub irrevocably waives, to the fullest extent permitted by applicable Law, the benefit of any defense that would hinder, fetter or delay the levy, execution or collection of any amount to which any party is entitled pursuant to the final judgment of any court having jurisdiction. Each party hereto expressly acknowledges that the foregoing waiver is intended to be irrevocable under the Law of the State of Delaware and of the United States of America; provided, however, that each such party's consent to jurisdiction and service contained in this Section 8.12 is solely for the purpose referred to in this Section 8.12 and shall not be deemed to be a general submission to said courts or to courts in the State of Delaware other than for such purpose.

SECTION 8.13. WAIVER OF JURY TRIAL. EACH PARTY HERETO ACKNOWLEDGES AND AGREES THAT ANY CONTROVERSY WHICH MAY ARISE UNDER THIS AGREEMENT IS LIKELY TO INVOLVE COMPLICATED AND DIFFICULT ISSUES, AND THEREFORE IT HEREBY IRREVOCABLY AND UNCONDITIONALLY WAIVES TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW ANY AND ALL RIGHT IT MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY PROCEEDING (WHETHER BASED ON CONTRACT, TORT OR OTHERWISE) DIRECTLY OR INDIRECTLY BASED UPON, ARISING OUT OF OR RELATING TO THIS AGREEMENT OR ANY OF THE TRANSACTIONS CONTEMPLATED BY THIS AGREEMENT OR THE ACTIONS OF PARENT, MERGER SUB OR THE COMPANY IN THE NEGOTIATION, ADMINISTRATION, PERFORMANCE AND ENFORCEMENT OF THIS AGREEMENT. EACH PARTY CERTIFIES AND ACKNOWLEDGES THAT (A) NO REPRESENTATIVE, AGENT OR ATTORNEY OF ANY OTHER PARTY HAS REPRESENTED, EXPRESSLY OR OTHERWISE, THAT SUCH OTHER PARTY WOULD NOT, IN THE EVENT OF LITIGATION, SEEK TO ENFORCE THE FOREGOING WAIVER, (B) IT UNDERSTANDS AND HAS CONSIDERED THE IMPLICATIONS OF SUCH WAIVER, (C) IT MAKES SUCH WAIVER VOLUNTARILY AND (D) IT HAS BEEN INDUCED TO ENTER INTO THIS AGREEMENT BY, AMONG OTHER THINGS, THE MUTUAL WAIVER AND CERTIFICATIONS IN THIS SECTION 8.13.

SECTION 8.14. Severability. If any term or other provision of this Agreement is found by a court of competent jurisdiction to be invalid, illegal or incapable of being enforced by any rule of Law or public policy, all other terms and provisions of this Agreement shall nevertheless remain in full force and effect. Upon such determination that any term or other provision is invalid, illegal or incapable of being enforced, the parties hereto shall negotiate in good faith to modify this Agreement so as to effect the original intent of the parties hereto as closely as possible in an acceptable manner to the end that the transactions contemplated by this Agreement are fulfilled to the fullest extent possible.

SECTION 8.15. Transfer Taxes. All transfer, documentary, sales, use, stamp, registration and other Taxes and fees (including penalties and interest) incurred in connection with the Merger shall be paid by Parent and Merger Sub when due.

SECTION 8.16. Disclosure Letters. Certain items and matters are listed in the Company Disclosure Letter and the Parent Disclosure Letter for informational purposes only and may not be required to be listed therein by the terms of this Agreement. In no event shall the listing of items or matters in the Company Disclosure Letter or the Parent Disclosure Letter be deemed or interpreted to broaden, or otherwise expand the scope of, the representations and warranties or covenants and agreements contained in this Agreement. No reference to, or disclosure of, any item or matter in any Section of this Agreement or any section or subsection of the Company Disclosure Letter or the Parent Disclosure Letter shall be construed as an admission or indication that such item or matter is material or that such item or matter is required to be referred to or disclosed in this Agreement or in the Company

Disclosure Letter or the Parent Disclosure Letter, as applicable. Without limiting the foregoing, no reference to, or disclosure of, a possible breach or violation of any Contract or Law in the Company Disclosure Letter or the Parent Disclosure Letter shall be construed as an admission or indication that a breach or violation exists or has actually occurred. Each section or subsection of the Company Disclosure Letter and the Parent Disclosure Letter, as the case may be, shall be deemed to qualify the corresponding section or subsection of this Agreement, irrespective of whether or not any particular section or subsection of this Agreement specifically refers to the Company Disclosure Letter or the Parent Disclosure Letter, as the case may be.

[*Signature Pages Follow*]

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

IN WITNESS WHEREOF, the Company, Parent and Merger Sub have caused this Agreement to be signed by their respective officers thereunto duly authorized, all as of the date first written above.

SCANA CORPORATION

By: _____

Name: Jimmy E. Addison
Title: Chief Executive Officer

[Signature page to Agreement and Plan of Merger]

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

DOMINION ENERGY, INC.

By: _____
Name: Thomas F. Farrell, II
Title: President and Chief Executive Officer

SEDONA CORP.

By: _____
Name: Mark F. McGettrick
Title: President

[Signature page to Agreement and Plan of Merger]

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

APPENDIX A

SCPSC PETITION

1. To meet commitments made by South Carolina Electric & Gas Company to the SCPSC, South Carolina Electric & Gas Company and Parent will jointly file the Petition on or before January 12, 2018.

2. The Petition will seek a ruling from the SCPSC (i) approving the Merger with no material changes to the terms of the Merger; (ii) making a finding that the Merger is in the public interest; or (iii) making a finding that there is an absence of harm to South Carolina rate payers as a result of the Merger.

3. The Petition will acknowledge that the Merger can only close if the SCPSC approves the jointly proposed NND Project cost recovery plan, with (x) no material change to the terms, conditions or undertakings set forth in the plan and (y) no significant change to the economic value of the plan, in each case as reasonably determined by Parent in good faith (except in each case unless otherwise consented to by Parent in its sole discretion), which shall include the following terms:

    a. There will be an aggregate up-front, one-time rate credit totaling $1.3 billion[1] to all current South Carolina Electric & Gas Company electric customers as of the date of Merger close. The rate credit will be apportioned to all retail electric customer classes based on their 2016 contribution to summer adjusted peak demand as prepared by South Carolina Electric & Gas Company. After the dollar apportionment per customer class and rate schedule is determined on this basis, a rate per kilowatt hour ($/kWh) will be derived by customer class and rate schedule by dividing the total kWh sales of electricity by customer class and rate schedule over a preceding 12-month period (the "Base Period") into the apportioned funding amount. The $/kWh rate will then be applied to each customer's kWh usage over the Base Period to determine the customer's up-front rate credit amount. The rate credit will be issued to eligible customers in the form of a check issued within 90 days of Merger close. Eligible customers shall be South Carolina Electric & Gas Company retail electric customers as of record on the date of the close of the Merger.

    b. South Carolina Electric & Gas Company will immediately upon Merger closing write down its investment in construction work in progress associated with the new nuclear development project by approximately $1.4 billion, which amount includes approximately $1.2 billion in assets that have not previously been subject to consideration in setting revised rates and approximately $200 million that have been so considered. The amounts written down would be permanently excluded from consideration in establishing retail electric rates going forward.

    c. South Carolina Electric & Gas Company will not seek recovery of the approximately $320 million in regulatory assets associated with the following items:

        i. The approximately $173 million regulatory asset associated with interest rate swap losses related to the debt that was not issued for the NND Project;

---

[1] The net proceeds of the Toshiba settlement were utilized by South Carolina Gas & Electric Company to repay indebtedness in 2017, and therefore those funds are unavailable for refund. A portion of the one time rate credit will be funded through issuance of debt and defeasement of the regulatory liability associated with the Toshiba settlement.

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

ii. The approximately $66 million regulatory asset associated with the NND Project Equity AFUDC;

iii. The approximately $52 million regulatory asset associated with the carrying costs on deferred tax assets related to nuclear construction; and

iv. The regulatory asset associated with foregone domestic production activities deductions will be written off and not be recovered from customers. The net regulatory asset associated with research and experimentation credit claims, interest, and legal costs expected to be incurred in defending these claims, will be borne by the shareholders and not returned to or collected from customers.

d. Parent will underwrite an approximately $575 million refund for amounts previously collected under the NND Project (regulatory liability) which is estimated to provide the 3.5% retail electric rate decrease from the 2017 rate level until accumulated amortization of the cost of abandoned plant lowers South Carolina Electric & Gas Company's revenue requirements. The refund amount is calculated to be sufficient to support the 3.5% retail electric rate reduction for approximately eight (8) years following the closing of the Merger. This amount of time is estimated to be sufficient to avoid a future retail electric rate increase resulting from new nuclear project costs when the refund amount is exhausted.

e. Parent will reduce retail electric rates further to reflect the impact of federal tax reform passed in December of 2017 which is estimated to lower rates an additional amount resulting in a total estimated rate reduction of approximately 5%.

f. An SCPSC finding, as necessary, that South Carolina Electric & Gas Company's investment in construction work in progress for new nuclear project in the amount of approximately $3.3 billion, which reflects the amount of that investment net of write-downs and offsets, was prudent; and that the capital costs and amortization of that $3.3 billion may be recovered through retail electric rates.

g. An SCPSC order directing that:

i. The approximately $3.3 billion of invested capital for the new nuclear development project shall be included in a regulatory asset and recovered through rates over a 20-year amortization and recovery period that is reflected in retail electric revenue requirements without offset or disallowance until the regulatory asset is fully recovered; and

ii. Until the balance in the regulatory asset is fully recovered, the capital costs associated with the unrecovered balance in that account shall be reflected in South Carolina Electric & Gas Company's cost of capital devoted to retail electric operations at a rate that reflects a return on common equity of 10.25%,[2] a weighted average cost of debt of 5.85%, and a capital structure consisting of 52.81% equity and 47.19% debt, with these percentages fixed over the 20-year amortization period.

[2] The current allowed blended ROE for NND is approximately 10.9% but the proposal is to adjust the rate down to South Carolina Gas & Electric Company's base ROE of 10.25%.

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

h. The deferred tax liability associated with the tax abandonment of the NND Project shall reduce the NND Project cost to be recovered from South Carolina Electric & Gas Company customers. The deferred tax asset for the net operating loss carryforward resulting from the tax abandonment of the NND Project shall be reflected as a rate base offset, dollar for dollar, to the deferred tax liability. Reductions in the deferred tax asset shall be subject to Parent's ability to use the net operating loss in filing its consolidated income tax returns and shall not be computed on a separate company basis.

i. Adjustments to the deferred tax liability and the deferred tax asset described in item (h) of this subsection resulting from a change in tax laws or tax treatment of the abandonment and/or Parent's ability to use the net operating loss will be returned to or recovered from South Carolina Electric & Gas Company customers in the following manner:

   i. The regulatory liability resulting from excess deferred tax liabilities on the tax abandonment will be returned to customers over the book recovery period of the property (*i.e.*, 20 years);

   ii. The regulatory asset resulting from excess deferred tax assets on the net operating loss will be recovered from customers in a manner that coincides with Parent's ability to use the net operating loss in filing its consolidated income tax returns and not on a separate company basis; and

   iii. As adjusted for any impacts related to the tax treatment of the abandonment loss

j. The approximately $180 million initial capital investment in the Columbia Energy Center, a 540-megawatt combined-cycle, natural gas-fired power plant located in Gaston, S.C., will be excluded from rate base and rate recovery, with only the ongoing costs such as fuel costs, operations and maintenance expense, and maintenance or improvement capital investments associated with the plant to be recovered in future base and fuel rates.

k. Transmission projects associated with the new nuclear project will be closed to rate base and removed from BLRA project costs. The revenue of approximately $32 million per year currently being recovered in base rates will continue to be recovered through base rates notwithstanding the Merger. The associated depreciation and operating and maintenance costs will be captured in a regulatory asset for future rate recovery.

l. Except for rate adjustments for fuel and environmental costs, demand side management costs and other rates routinely adjusted on an annual or biannual basis, retail electric base rates will remain frozen at current levels until January 1, 2021.

4. The parties shall request approval of the SCPSC Petition, including the NND Project cost recovery plan, within 6 months from the date of filing.

5. South Carolina Electric & Gas Company and Parent commit to support and advocate for SCPSC approval or adoption of the terms, both individually and collectively, and without modification, identified and described in Paragraphs (2) and (3) above (the "Merger Terms") and will take no action inconsistent with this commitment. In the Petition to be jointly filed on January 12, 2018, South Carolina Electric & Gas Company may also present alternative terms for NND Project cost recovery, consistent with and based on the terms publically disclosed by Mr. Kissam on November

16, 2017 and previously provided to Parent in a more comprehensive form in a proposed draft of the Petition (the "Alternative Terms"). South Carolina Electric & Gas Company may provide any necessary testimony, exhibits or supporting materials in order to meet prior commitments to the SCPSC concerning the substance of South Carolina Electric & Gas Company's January 12, 2018 filing or to show that the Alternative Terms, as a disfavored alternative to the Merger Terms, are nonetheless just, reasonable, lawful, fair and non-confiscatory and should be adopted by the SCPSC if the Merger is not approved. However, South Carolina Electric & Gas Company will not support or advocate for the Alternative Terms except as an expressly disfavored alternative to the Merger Terms and in each case where it discusses the Alternative Terms in testimony, exhibits or otherwise, will expressly state South Carolina Electric & Gas Company's overriding commitment to the Merger Terms as being in the best interest of customers and the State of South Carolina, and that the Alternative Terms are a disfavored alternative to be considered only if the Merger is disapproved. South Carolina Electric & Gas Company will not otherwise advocate for any other terms for NND cost recovery differing from those identified in Paragraphs (2) and (3) above (without prior consent of Parent), unless and until the Merger Agreement is terminated.

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

EXHIBIT A

DEFINITIONS

(a) The following terms have the following meanings:

"Acceptable Confidentiality Agreement" means a confidentiality agreement having provisions as to confidential treatment of the Company's information that are not materially less favorable to those contained in the Confidentiality Agreement.

"Acquisition Proposal" means any bona fide proposal or offer from any Person or group of Persons (other than Parent, Merger Sub or their respective Affiliates) relating to (i) any acquisition or purchase directly or indirectly, in a single transaction or series of transactions, of a business that constitutes more than 15% of the net revenues, net income or consolidated assets of the Company and its Subsidiaries, taken as a whole, or more than 15% of the total voting power of the equity securities of the Company, (ii) any tender offer or exchange offer that if consummated would result in any Person beneficially owning more than 15% of the total voting power of the equity securities of the Company or (iii) any merger, reorganization, consolidation, share exchange, business combination, recapitalization, liquidation, joint venture, partnership, dissolution or similar transaction involving directly or indirectly, in a single transaction or series of transactions, the Company (or any Subsidiary or Subsidiaries of the Company whose business constitutes more than 15% of the net revenues, net income or consolidated assets of the Company and its Subsidiaries, taken as a whole).

"Affiliate" means, with respect to any Person, any other Person that directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with, such first Person.

"Atomic Energy Act" means the Atomic Energy Act of 1954, as amended.

"Average Price" means the volume-weighted average price, rounded to four decimal places, of Parent Shares for the ten (10) consecutive trading days ending on and including the second (2^{nd}) trading day prior to the Effective Time.

"BLRA" means the South Carolina Base Load Review Act of 2007 as amended, S.C. Code Ann. § 58-33-210 *et seq*.

"Burdensome Condition" shall mean any undertakings, terms, conditions, liabilities, obligations, commitments or sanctions (including any Remedial Action) that, in the aggregate, would have or would reasonably be expected to have, a material adverse effect on the business, financial condition, assets, liabilities or results of operations of the Company and its Subsidiaries, taken as a whole, or of Parent and its Subsidiaries, taken as a whole; provided, however, that, for this purpose, Parent and its Subsidiaries, and after giving effect to the Merger, Parent and its Subsidiaries, shall be deemed to be a consolidated group of entities of the size and scale of a hypothetical company that is 100% of the size and scale of the Company and its Subsidiaries, taken as a whole as of immediately prior to the Effective Time; and provided, further, that any undertakings, terms, conditions, liabilities, obligations, commitments or sanctions relating to implementing, or otherwise arising or resulting from or imposed by, the Social Commitments, or any relief or other matters contemplated by the SCPSC Petition or the SCPSC Petition Approval, shall not constitute or be taken into account in determining whether there has been or is such a material adverse effect.

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

"Business Day" means any day other than a Saturday or Sunday or a day on which banks in the City of New York are required or authorized to be closed.

"Byproduct Material" means any radioactive material (except Special Nuclear Material) yielded in, or made radioactive by, exposure to radiation in the process of producing or utilizing Special Nuclear Material.

"Code" means the Internal Revenue Code of 1986, as amended.

"Commonly Controlled Entity" means, with respect to the Company, any other Person that, together with the Company, is treated as a single employer under Section 414 of the Code.

"Company Benefit Plan" means any (i) "employee benefit plan" (within the meaning of Section 3(3) of ERISA), (ii) bonus, incentive or deferred compensation or equity or equity-based compensation plan, program, policy or arrangement (including the Company Equity Award Plans), (iii) severance, change in control, employment, consulting, retirement, retention or termination plan, program, agreement, policy or arrangement or (iv) other compensation or benefit plan, program, agreement, policy, practice, Contract, arrangement or other obligation, whether or not in writing and whether or not subject to ERISA, in each case, sponsored, maintained, contributed to or required to be maintained or contributed to by the Company or any Commonly Controlled Entity or with respect to which the Company or any Commonly Controlled Entity had or has any present or future liability, in any case other than any (A) "multiemployer plan" (within the meaning of Section 3(37) of ERISA) or (B) plan, program, policy or arrangement mandated by applicable Law.

"Company Disclosure Letter" means the confidential disclosure letter dated as of the date of this Agreement delivered by the Company to Parent and Merger Sub.

"Company Equity Award Plans" means the 2015 Long-Term Equity Compensation Plan, the 2000 Long-Term Equity Compensation Plan, and the Director Compensation and Deferral Plan, each as amended and restated from time to time.

"Company Material Adverse Effect" means any Change that has a material adverse effect on the business, financial condition, assets, liabilities or results of operations of the Company and its Subsidiaries, taken as a whole; provided, however, that none of the following shall, either alone or in combination, constitute or contribute to a Company Material Adverse Effect: (i) Changes in the economy in the United States or elsewhere in the world, including as a result of changes in geopolitical conditions, (ii) Changes that affect any of the industries in which the Company or any of its Subsidiaries operate, (iii) Changes in the financial, debt, capital, credit or securities markets generally in the United States or elsewhere in the world, including changes in interest rates, (iv) any Change in the stock price, trading volume or credit rating of the Company or any of its Subsidiaries or any failure by the Company to meet published analyst estimates or expectations of its revenue, earnings or other financial performance or results of operations for any period, or any failure by the Company to meet its internal or published projections, budgets, plans or forecasts of its revenues, earnings or other financial performance or results of operations for any period (it being understood that the Changes underlying any such Change or failure described in this clause (iv) to the extent not otherwise excluded from the definition of a "Company Material Adverse Effect" may be considered in determining whether there has been a Company Material Adverse Effect), (v) Changes in Law, legislative or political conditions or policy or practices of any Governmental Entity (other than SC Law Changes), (vi) Changes in applicable accounting regulations or principles or interpretations thereof, (vii) an act of terrorism or an outbreak or escalation of hostilities or war (whether declared or not declared) or earthquakes, any weather-related or other force majeure events or other natural disasters or any national or international calamity or crisis, (viii) the announcement,

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

execution or delivery of this Agreement or the public announcement or pendency of the Merger or the other transactions contemplated by this Agreement, in each case, including any impact thereof on relationships, contractual or otherwise, with Governmental Entities or customers, suppliers, distributors, lenders, partners or employees of the Company and its Subsidiaries, (ix) actions taken or requirements imposed by any Governmental Entities, in connection with obtaining the Regulatory Clearances or the SCPSC Petition Approval, (x) any Shareholder Litigation or Changes with respect thereto and (xi) any Proceedings, claims, investigations or inquiries set forth in Section 3.01(g) of the Company Disclosure Letter (other than with respect to SC Law Changes) or any Changes with respect thereto , provided, further, that any Change set forth in the foregoing clauses (i), (ii), (iii), (v) or (vi), to the extent not otherwise excluded hereunder, may be taken into account in determining whether a Company Material Adverse Effect has occurred solely to the extent that such Change has a materially disproportionate adverse effect on the Company and its Subsidiaries, taken as a whole, as compared to other Persons engaged in the relevant business affected by such Change.

"Company Material Contract" means any Contract (i) required to be filed by the Company as a "material contract" pursuant to Item 601(b)(10) of Regulation S-K under the Securities Act, (ii) that provides for Indebtedness of the Company or any of its Subsidiaries of more than $50,000,000, (iii) that resulted in expenditures, receipts, liabilities, or payments by the Company or any of its Subsidiaries of more than $80,000,000 in the 2016 fiscal year or 2017 fiscal year or (iv) that requires the Company or any of its Subsidiaries to incur Indebtedness or liabilities, or to make payments or expenditures, of more than $80,000,000 in any one future fiscal year, in the case of the foregoing clauses (ii) and (iii), excluding (A) any Contracts that can be terminated for convenience on less than ninety (90) days' notice without material payment or penalty and (B) any Contracts for the supply of natural gas capacity or commodity.

"Company Share" means a share of common stock, without par value, of the Company.

"Consent" means any consent, clearance, approval, Order, authorization, waiver, license, notice filing, action or non-action.

"Contract" means a contract, purchase order, license, sublicense, lease, sublease, option, warrant, guaranty, indenture, note, bond, mortgage or other legally binding agreement or instrument, whether written or unwritten.

"control" (including in the terms "controlling", "controlled", "controlled by" and "under common control with") means the possession, directly or indirectly, of the power to direct or cause the direction of the management policies of a Person, whether through the ownership of voting securities, by Contract or otherwise.

"Data Privacy Legal Requirements" mean (i) all applicable requirements imposed by applicable Laws relating to (A) the security or privacy of information systems, networks, or data; (B) the use, collection, recording, storing, altering, retrieving, transferring, disclosing (whether authorized or unauthorized) or otherwise processing of data owned or used by the Company or its Subsidiaries; (C) the unauthorized access, acquisition, use, modification, disclosure or misuse of data; (D) the notification to affected parties, regulators, or credit reporting agencies as a result of any breach of systems, networks or data; or (E) any other cybersecurity or data privacy incident requiring reporting outside of the Company; (ii) all contractual standards, rules and requirements that the Company or any of its Subsidiaries is or has been contractually obligated to comply with; and (iii) each published external or internal, past or present Company privacy policy or security policy applicable to any information systems, networks, or data, including personal data and any published policy of the Company or its Subsidiaries relating to: (A) the privacy of any Person, (B) financial records or information pertaining to any Person, (C) the collection,

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

storage, disclosure, transfer, disposal, other processing or security of any personal data, or (D) personally identifying information, sensitive customer information, financial records, security records and associated information, about Persons.

"Director Compensation and Deferral Plan" means the Company Director Compensation and Deferral Plan.

"Environmental Law" means any Law relating to pollution or protection of the environment or natural resources, including ambient air, soil, surface water or groundwater, sediment, flora and fauna, or, as it relates to the exposure to hazardous, deleterious or toxic materials, human health or safety.

"Equity Award Consideration" means an amount in cash, without interest, equal to the product of (i) the Merger Consideration multiplied by (ii) the Average Price.

"ERISA" means the Employee Retirement Income Security Act of 1974, as amended.

"Exchange Act" means the Securities Exchange Act of 1934, as amended.

"Executive Deferred Compensation Plan" means the Company Executive Deferred Compensation Plan.

"Governmental Entity" means any federal, state, local, or non-United States government, any court or tribunal of competent jurisdiction, any administrative, regulatory (including any stock exchange) or other governmental or quasi-governmental agency, commission, branch or authority or other governmental entity or body (it being understood and agreed that no reference to "Governmental Entity" in this Agreement shall be deemed to include Santee Cooper in its capacity as a commercial counterparty of the Company in connection with the NND Project or otherwise).

"Hazardous Materials" means any substance, waste or material defined or regulated as hazardous, acutely hazardous or toxic or that could reasonably be expected to result in liability under any applicable Environmental Law currently in effect, including petroleum, petroleum products, High-Level Waste, Spent Nuclear Fuel, by-products and distillates, pesticides, dioxin, polychlorinated biphenyls, mold, biological hazards, asbestos and asbestos-containing materials.

"High-Level Waste" means (i) irradiated nuclear reactor fuel, (ii) liquid wastes resulting from the operation of the first cycle solvent extraction system, or its equivalent, and the concentrated wastes from subsequent extraction cycles, or their equivalent, in a facility for reprocessing irradiated reactor fuel and (iii) solids into which such liquid wastes have been converted.

"HSR Act" means the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended.

"Intellectual Property" means all intellectual property and proprietary rights, and applications with respect thereto, including (i) patents and patent applications, (ii) trademarks, service marks, trade dress, logos, Internet domain names, trade names and corporate names, whether registered or unregistered, and the goodwill associated therewith, together with any registrations and applications for registration thereof, (iii) copyrights and rights under copyrights, whether registered or unregistered, and any registrations and applications for registration thereof, (iv) trade secrets and other rights in know-how and confidential or proprietary information, including any technical data, specifications, techniques,

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

inventions and discoveries, in each case, to the extent that it qualifies as a trade secret under applicable Law and (v) all other intellectual property rights recognized by applicable Law.

"Intervening Event" means any material event, development or change in circumstances that materially affects the business, assets or operations of the Company and its Subsidiaries, taken as a whole, that first becomes known to the Company Board or any of the Persons set forth in Section 8.06 of the Company Disclosure Letter or their successors after the date of this Agreement but before the Company Requisite Vote is obtained, to the extent that such event, development or change in circumstances was not reasonably foreseeable as of or prior to the date of this Agreement or which would not reasonably be expected to have become known after reasonable investigation or inquiry as of or prior to the date of this Agreement; provided, however, that in no event will (i) the receipt, existence or terms of an Acquisition Proposal or any matter relating thereto or consequence thereof, (ii) any action taken by the parties pursuant to or in compliance with this Agreement, including any action taken in connection with seeking any Regulatory Clearances, (iii) any changes in Law or the settlement of any lawsuits, investigations, inquiries or Proceedings, (iv) changes in the market price or trading volume of the Company Shares or Parent Shares, or the Company or Parent or any their respective Subsidiaries meeting or exceeding internal or published projections, forecasts or revenue or earnings predictions for any period, (v) changes in the energy markets or industry or to rates, or (vi) any event, development or change relating solely to Parent or its Affiliates, in each case, constitute an "Intervening Event" or be taken into account in determining whether an Intervening Event has occurred or would reasonably be expected to result.

"IT Systems" means all computer systems, computer programs, networks, hardware, software, software engines, electronic databases and websites used to process, store, maintain and operate data, information and control systems owned, used or provided by the Company.

"Knowledge" means (i) with respect to the Company, the actual knowledge, after reasonable inquiry, of any of the Persons set forth in Section 8.06 of the Company Disclosure Letter and their successors and (ii) with respect to Parent or Merger Sub, the actual knowledge, after reasonable inquiry, of any of the Persons set forth in Section 8.06 of the Parent Disclosure Letter and their successors.

"Law" means any federal, state, local or non-United States law, statute, regulation, rule, ordinance, Order or decree of any Governmental Entity.

"Low-Level Waste" means radioactive material that (i) is not High-Level Waste, Mixed Waste, Spent Nuclear Fuel or Byproduct Material as defined in section 11e.(2) of the Atomic Energy Act, and (ii) the NRC classifies as low-level radioactive waste.

"Mixed Waste" means waste that (i) contains both a hazardous waste component regulated under the Resource Conservation and Recovery Act (42 U.S.C. § 6901 *et seq.*) and a radioactive component of Source Material, Byproduct Material or Special Nuclear Material and (ii) the NRC classifies as mixed waste or that constitutes "mixed waste" as defined in 42 U.S.C. § 6903(41).

"NND Project" means the New Nuclear Development Project under which the Company and Santee Cooper undertook to construct two Westinghouse AP1000 Advanced Passive Safety nuclear units in Jenkinsville, South Carolina.

"Nuclear Material" means Source Material, Special Nuclear Material, Low-Level Waste, High-Level Waste, the radioactive component of Mixed Waste, Byproduct Material and Spent Nuclear Fuel.

"NYSE" means the New York Stock Exchange.

"Parent Disclosure Letter" means the confidential disclosure letter dated as of the date of this Agreement delivered by Parent to the Company.

"Parent Material Adverse Effect" means any Change that has a material adverse effect on the business, financial condition, assets, liabilities or results of operations of Parent and its Subsidiaries, taken as a whole; provided, however, that none of the following shall, either alone or in combination, constitute or contribute to a Parent Material Adverse Effect: (i) Changes in the economy in the United States or elsewhere in the world, including as a result of changes in geopolitical conditions, (ii) Changes that affect any of the industries in which Parent or any of its Subsidiaries operate, (iii) Changes in the financial, debt, capital, credit or securities markets generally in the United States or elsewhere in the world, including changes in interest rates, (iv) any Change in the stock price, trading volume or credit rating of Parent or any of its Subsidiaries or any failure by Parent to meet published analyst estimates or expectations of its revenue, earnings or other financial performance or results of operations for any period, or any failure by Parent to meet its internal or published projections, budgets, plans or forecasts of its revenues, earnings or other financial performance or results of operations for any period (it being understood that the Changes underlying any such Change or failure described in this clause (iv) to the extent not otherwise excluded from the definition of a "Parent Material Adverse Effect" may be considered in determining whether there has been a Parent Material Adverse Effect), (v) Changes in Law, legislative or political conditions or policy or practices of any Governmental Entity (other than SC Law Changes), (vi) Changes in applicable accounting regulations or principles or interpretations thereof, (vii) an act of terrorism or an outbreak or escalation of hostilities or war (whether declared or not declared) or earthquakes, any weather-related or other force majeure events or other natural disasters or any national or international calamity or crisis, (viii) the announcement, execution or delivery of this Agreement or the public announcement or pendency of the Merger or the other transactions contemplated by this Agreement, in each case, including any impact thereof on relationships, contractual or otherwise, with Governmental Entities or customers, suppliers, distributors, lenders, partners or employees of Parent and its Subsidiaries, (ix) actions taken or requirements imposed by any Governmental Entities, in connection with obtaining the Regulatory Clearances or the SCPSC Petition Approval, (x) any Shareholder Litigation or any Changes with respect thereto, and (xi) any Proceedings, claims, investigations or inquiries set forth in Section 3.02(g) of the Parent Disclosure Letter or any Changes with respect thereto, provided, further, that any Change set forth in the foregoing clauses (i), (ii), (iii), (v) or (vi), to the extent not otherwise excluded hereunder, may be taken into account in determining whether a Parent Material Adverse Effect has occurred solely to the extent that such Change has a materially disproportionate adverse effect on the Parent and its Subsidiaries, taken as a whole, as compared to other Persons engaged in the relevant business affected by such Change.

"Parent Severance Program" means the severance program sponsored by Parent and described in the summary plan description attached as Section 5.06 of the Parent Disclosure Letter.

"Parent Share" means a share of common stock, without par value, of Parent.

"Parent Significant Subsidiaries" means the significant subsidiaries (as defined in Rule 1-02(w) of Regulation S-X) of Parent, excluding, if otherwise included, Dominion Energy Midstream Partners LP.

"Permitted Liens" means, with respect to any Person, (i) mechanics', materialmen's, carriers', workmen's, repairmen's, vendors', operators' or other like Liens, if any, that do not materially detract from the value of or materially interfere with the use of any of the assets of such Person and its Subsidiaries as currently conducted, (ii) Liens arising under original purchase price conditional sales

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

Contracts and equipment leases with third parties entered into in the ordinary course of business, (iii) title defects or Liens (other than those constituting Liens for the payment of Indebtedness), if any, that do not or would not, individually or in the aggregate, impair in any material respect the use or occupancy of the assets of such Person and its Subsidiaries, taken as a whole, (iv) Liens for Taxes that are not yet due or payable or that may thereafter be paid without penalty, (v) Liens supporting surety bonds, performance bonds and similar obligations issued in connection with the businesses of such Person and its Subsidiaries, (vi) Liens not created by such Person or its Subsidiaries that affect the underlying fee interest of a Company Leased Real Property, (vii) Liens that are disclosed on the most recent consolidated balance sheet of such Person included in its SEC Reports or notes thereto or securing liabilities reflected on such balance sheet, (viii) Liens arising under or pursuant to the organizational documents of such Person or any of its Subsidiaries, (ix) grants to others of rights-of-way, surface leases or crossing rights and amendments, modifications, and releases of rights-of-way, surface leases or crossing rights in the ordinary course of business, (x) with respect to rights-of-way, restrictions on the exercise of any of the rights under a granting instrument that are set forth therein or in another executed agreement, that is of public record or to which such Person or any of its Subsidiaries otherwise has access, between the parties thereto, (xi) Liens which an accurate up-to-date survey would show, (xii) Liens resulting from any facts or circumstances relating to, if such Person is the Company, Parent, Merger Sub or any of their Affiliates or, if such Person is Parent or Merger Sub, the Company or any of its Affiliates and (xiii) Liens that do not and would not reasonably be expected to materially impair the continued use of a Company Owned Real Property or a Company Leased Real Property as currently operated.

"Person" means an individual, corporation (including not-for-profit), Governmental Entity, general or limited partnership, limited liability company, joint venture, estate, trust, association, organization, unincorporated organization, other entity of any kind or nature or group (as defined in Section 13(d)(3) of the Exchange Act).

"Santee Cooper" means the South Carolina Public Service Authority, a body corporate and politic and agency of the State of South Carolina established under Chapter 31 of Title 58 of the Code of Laws of South Carolina, Annotated, as amended from time to time.

"Sarbanes-Oxley Act" means the Sarbanes-Oxley Act of 2002, as amended.

"SCBCA" means the South Carolina Business Corporation Act of 1988, as amended.

"SCORS" means the South Carolina Office of Regulatory Staff, the administrative and regulatory body established under Title 58, Chapter 4 of the Code of Laws of South Carolina, Annotated, as amended from time to time.

"SCPSC" means the South Carolina Public Service Commission, the regulatory commission established under Title 58, Chapter 3 of the Code of Laws of South Carolina, Annotated, as amended from time to time.

"SCPSC Petition" means a petition to be filed jointly by the Company and Parent with the SCPSC for approval of the Merger and for approval of terms for cost recovery and other regulatory matters with respect to the NND Project, including the key terms summarized in Appendix A attached to this Agreement.

"SEC" means the United States Securities and Exchange Commission.

"SEC Reports" means all forms, statements, certifications, reports and other documents a Person is required or otherwise obligated to file or furnish with the SEC, including (i) those filed or

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

furnished subsequent to the date of this Agreement and (ii) all exhibits and other information incorporated therein and all amendments and supplements thereto.

"Securities Act" means the Securities Act of 1933, as amended.

"Social Commitments" means the undertakings, terms, conditions, liabilities, obligations, commitments and sanctions set forth in Section 5.16.

"Source Material" means (i) uranium or thorium, or any combination thereof, in any physical or chemical form or (ii) ores that contain by weight one-twentieth of one percent (0.05%) or more of (A) uranium, (B) thorium or (C) any combination thereof.

"South Carolina Public Utility Laws" means the Laws of the State of South Carolina governing public utilities as contained in Title 58 of the Code of Laws of South Carolina, Annotated, as they may be amended from time, including the BLRA, the Laws providing for the organization, powers and terms of officials and members of the SCPSC and the SCORS, and the Laws providing for the establishment, review and adjustment of retail electric and natural gas rates and terms of conditions of service, as found in Title 58 of the Code of Laws of South Carolina, Annotated, in each case, as they may be amended from time to time.

"Special Nuclear Material" means plutonium, uranium-233, uranium enriched in the isotope-233 or in the isotope-235, and any other material that the NRC determines to be "Special Nuclear Material." Special Nuclear Material also refers to any material artificially enriched by any of the foregoing materials or isotopes. Special Nuclear Material does not include Source Material.

"Spent Nuclear Fuel" means fuel that has been withdrawn from a nuclear reactor following irradiation, and has not been chemically separated into its constituent elements by reprocessing. Spent Nuclear Fuel includes Special Nuclear Material, Byproduct Material, Source Material and other radioactive materials associated with nuclear fuel assemblies.

"Subsidiary" means, with respect to any Person, (i) any other Person (other than a partnership, joint venture or limited liability company) of which 50% or more of the total voting power of shares of stock or other equity interests entitled to vote in the election of directors, managers or trustees is at the time of determination owned or controlled, directly or indirectly, by such first Person and (ii) any partnership, joint venture or limited liability company of which (A) 50% or more of the capital accounts, distribution rights, total equity or voting interests or general or limited partnership interests, as applicable, are owned or controlled, directly or indirectly, by such Person, whether in the form of membership, general, special or limited partnership interests or otherwise or (B) such Person or any Subsidiary of such Person is a controlling general partner or otherwise controls such entity.

"Superior Proposal" means an unsolicited bona fide written Acquisition Proposal relating to any direct or indirect acquisition or purchase of (i) assets that generate more than 50% of the consolidated total revenues or operating income of the Company and its Subsidiaries, taken as a whole, (ii) assets that constitute more than 50% of the consolidated total assets of the Company and its Subsidiaries, taken as a whole or (iii) more than 50% of the total voting power of the equity securities of the Company, in each case, that the Company Board determines in good faith after consultation with the Company's financial advisors and outside legal counsel is more favorable to the Company's shareholders than the Merger, taking into account the Person making the Acquisition Proposal and all legal, financial and regulatory aspects of the Acquisition Proposal (including the likelihood that such Acquisition Proposal would be consummated in accordance with its terms) and all other relevant circumstances.

"Tax Return" means any return, declaration, report, election, claim for refund or information return or any other statement or form filed or required to be filed with any Governmental Entity relating to Taxes, including any schedule or attachment thereto, and including any amendment thereof.

"Taxes" means all forms of taxes or duties imposed by any Governmental Entity, or required by any Governmental Entity to be collected or withheld, including charges, together with any related interest, penalties and other additional amounts.

"Willful Breach" means, with respect to any breach or failure to perform any of the covenants or other agreements contained in this Agreement, a breach that is a consequence of an act or failure to act undertaken by the breaching party with actual knowledge that such party's act or failure to act would result in or constitute a breach of this Agreement. For the avoidance of doubt, the failure of a party hereto to consummate the Closing when required pursuant to Section 1.02, or, on the Closing Date, cause the Effective Time to occur pursuant to Section 1.03, shall be a Willful Breach of this Agreement.

(b) Each of the following terms is defined in the Section set forth opposite such term:

Term	Section
Agreement	Preamble
Alternative Acquisition Agreement	4.02(e)
Applicable Company SEC Reports	3.01(e)(i)
Applicable Parent SEC Reports	3.02(e)(i)
Articles of Merger	1.03
Book-Entry Share	2.01(a)
Cancelled Shares	2.01(b)
Certificate	2.01(a)
Changes	3.01(f)(i)
Closing	1.02
Closing Date	1.02
Company	Preamble
Company Adverse Recommendation Change	4.02(e)
Company Articles of Incorporation	3.01(a)
Company Board	Recitals
Company Board Recommendation	3.01(d)(i)
Company Bylaws	3.01(a)
Company Deferred Unit	2.02(c)
Company Employees	5.06(c)
Company Leased Real Property	3.01(o)(i)
Company Non-Union Employees	5.06(a)
Company Organizational Documents	3.01(a)
Company Owned Real Property	3.01(o)(ii)
Company Performance Share Award	2.02(a)
Company Real Property Lease	3.01(o)(i)
Company Regulatory Clearances	3.01(d)(iii)
Company Requisite Vote	3.01(r)
Company RSU	2.02(b)
Company Termination Fee	7.02(b)
Confidentiality Agreement	5.03(b)
Continuation Period	5.06(a)

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

Costs ..... 5.08(a)
D&O Insurance ..... 5.08(c)
DOE ..... 3.01(q)(i)
DOT ..... 3.01(q)(i)
Effective Time 1.03
Exchange Agent ..... 2.03(a)
Exchange Fund ..... 2.03(a)
Existing Loan Consent ..... 5.09(d)
Existing Loan Lenders ..... 5.09(d)
Existing Loan Notice ..... 5.09(d)
FCC ..... 3.01(d)(iii)
FERC ..... 3.01(d)(iii)
Form S-4 ..... 3.01(v)
GAAP ..... 3.01(e)(ii)
GPSC ..... 3.01(d)(iii)
Indebtedness ..... 4.01(a)(viii)
Indemnified Parties ..... 5.08(a)
Intended Tax Treatment ..... Recitals
Liens ..... 3.01(b)
Maximum Annual Premium ..... 5.08(c)
Merger ..... Recitals
Merger Sub ..... Preamble
Merger Consideration ..... 2.01(a)
NCUC ..... 3.01(d)(iii)
NERC ..... 3.01(q)(i)
NND Project Litigation ..... 4.01(a)(ix)
Notice of Recommendation Change ..... 4.02(f)
NRC ..... 3.01(d)(iii)
Nuclear Litigation ..... 5.02(h)
Orders ..... 6.01(b)
Parent ..... Preamble
Parent Organizational Documents ..... 3.02(a)
Parent Preferred Stock ..... 3.02(c)(i)
Parent Regulatory Clearances ..... 3.02(d)(iii)
Parent Termination Fee ..... 7.02(c)
PBGC ..... 3.01(k)(iv)
Permits ..... 3.01(i)
PHMSA ..... 3.01(q)(i)
Proceeding ..... 3.01(g)
Proxy Statement/Prospectus ..... 5.01(a)
Qualified Plan ..... 3.01(k)(ii)
Regulatory Clearances ..... 3.02(d)(iii)
Regulatory Conditions ..... 6.01(c)
Remedial Action ..... 5.02(e)
Reporting Company 3.01
Representatives ..... 4.02(a)
Rights-of-Way ..... 3.01(o)(iii)
SC Law Changes ..... 6.02(h)
SCPSC Petition Approval ..... 6.01(d)
Shareholder Litigation 5.17
Shareholders Meeting ..... 5.01(f)

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

Summer Station ..... 3.01(q)(iii)
Surviving Corporation 1.01
Takeover Statutes ..... 3.01(u)
Termination Date ..... 7.01(b)(i)
Voting Company Debt ..... 3.01(c)(ii)
Voting Parent Debt ..... 3.02(c)(ii)

ELECTRONICALLY FILED - 2019 Jan 07 7:09 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4005791

ELECTRONICALLY FILED - 2019 May 06 4:51 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

R. WAYNE TODD, Derivatively on Behalf of SCANA CORP, Plaintiff, v. KEVIN MARSH, GREGORY ALIFF, JAMES BENNETT, JOHN CECIL, SHARON DECKER, MAYBANK HAGOOD, LYNN MILLER, JAMES ROQUEMORE, MACEO SLOAN, ALFREDO TRUJILLO, JIMMY ADDISON, and STEVEN BYRNE, Defendants, -and- SCANA CORPORATION, Nominal Defendant.	Civil Action No.: 2017-CP-40-06621 VERIFIED SHAREHOLDER DERIVATIVE COMPLAINT JURY TRIAL DEMANDED
TERESA PARLER, Derivatively on Behalf of SCANA CORP, Intervenor-Plaintiff, v. KEVIN MARSH, GREGORY ALIFF, JAMES BENNETT, JOHN CECIL, SHARON DECKER, MAYBANK HAGOOD, LYNN MILLER, JAMES ROQUEMORE, MACEO SLOAN, ALFREDO TRUJILLO, JIMMY ADDISON, and STEVEN BYRNE, Defendants, -and- SCANA CORPORATION, Nominal Defendant.	Civil Action No.: 2017-CP-40-06621 VERIFIED SHAREHOLDER DERIVATIVE COMPLAINT JURY TRIAL DEMANDED

ELECTRONICALLY FILED - 2019 May 06 4:51 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621

Teresa Parler ("Plaintiff") is a shareholder of SCANA Corporation ("SCANA" or the "Company") and files this action on behalf of the Company to recover damages and seeks declaratory relief for breach of fiduciary duties, gross mismanagement, and unjust enrichment perpetrated by the officers and Board of Directors ("Board") of SCANA in connection with the construction of two nuclear reactors in Fairfield County, South Carolina. The Individual Defendants (as defined herein) mismanaged the construction project and proceeded to systematically mislead the investing public to conceal the complications surrounding the construction and financing of the project. As a direct and proximate result of their misdeeds, SCANA's value and goodwill have substantially suffered and the Company is now under investigation by state and federal authorities, including the Securities and Exchange Commission ("SEC"). The following allegations are based upon, *inter alia*, the investigation of Plaintiff and his counsel, including a review of legal and regulatory filings, corporate charters, press releases, and media reports.

NATURE OF THE ACTION

1. This is a shareholder derivative action seeking to remedy the wrongdoing committed by members of SCANA's Board and certain of its officers. Plaintiff asserts claims under state law for breach of the fiduciary duties of good faith, loyalty, and due care as well as unjust enrichment and waste of corporate assets.

2. SCANA is an energy-based holding company that is principally engaged, primarily via subsidiaries, in regulated electric and natural gas utility operations throughout the Carolinas and Georgia. SCANA is incorporated and has its corporate headquarters in Lexington County, South Carolina.

3. The Individual Defendants caused or allowed the Company to make false and/or misleading statements and failed to disclose material adverse facts and reports in connection with

the Company's business, operations, and prospects. Specifically, the Individual Defendants caused or allowed SCANA to make false and/or misleading statements and/or fail to disclose that: (i) the progress, cost, and completion schedule of the multi-billion dollar nuclear construction project at V.C. Summer Nuclear Station (the "Project") were inadequate and/or vastly inflated; (ii) the Company received an audit report from Bechtel Corporation (the "Bechtel Audit") on February 5, 2016, which revealed that the Project was facing serious design, construction, and cost headwinds – which was not disclosed to shareholders until 2017 when the South Carolina governor compelled its release; and (iii) despite the Individual Defendants' assurances to the contrary, a formal construction schedule for the Project was never in place and Defendants had serious concerns about the financial health of its lead contractor for the Project.

4. The Individual Defendants were on notice of the myriad shortcomings and risks associated with the Project after receiving the Bechtel Audit in February 2016. The Bechtel Audit detailed flaws ranging from project mismanagement to a lack of constructible design. Rather than make the Bechtel Audit available to shareholders, the Individual Defendants purposefully concealed the findings and did not release the Bechtel Audit until September 4, 2017, when they were compelled by the governor of South Carolina.

5. In addition, the SCANA Board approved millions of dollars in executive bonus compensation for its top executives even as those executives were in the midst of shirking their fiduciary obligations.

6. The wrongful acts and omissions committed by the Individual Defendants have inflicted significant monetary damages on SCANA and its shareholders, and have negatively affected SCANA's reputation and goodwill.

ELECTRONICALLY FILED - 2019 May 06 4:51 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621

ELECTRONICALLY FILED - 2019 May 06 4:51 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621

7. The Individual Defendants' breaches of their fiduciary duties have led to the initiation of investigations of SCANA by state and federal authorities, including the SEC. SCANA is also faced with a multitude of lawsuits from electricity consumers in South Carolina.

8. The Director Defendants and Officer Defendants (as defined herein) individually owe SCANA the fiduciary duties of good faith, loyalty, and due care with respect to the management of the Company. The actions of the Individual Defendants evince improper behavior which contravenes the responsibilities of their positions in the Company.

JURISDICTION AND VENUE

9. Jurisdiction is proper pursuant to South Carolina's Long Arm Statute, South Carolina Code § 36-2-803. SCANA is a South Carolina corporation, the non-resident Defendants are members of the Board and nearly all of the acts alleged in this complaint took place in South Carolina.

10. Venue is proper in Richland County. Many of the acts and omissions giving rise to this claim occurred in substantial part in Richland County and defendants Kevin Marsh ("Marsh") and James Bennett ("Bennett") reside in Richland County.

THE PARTIES

11. Plaintiff is a current holder of SCANA common stock and has continually held stock since 2000.

12. Nominal Defendant SCANA is a corporation existing and organized under the laws of South Carolina. The Company's principal place of business and executive offices are both located at 110 Operations Way, Cayce, South Carolina.

13. Defendant Marsh has served as Chief Executive Officer ("CEO") and Chairman of the Board of SCANA since December 2011. Before assuming the position of CEO, Marsh served as the Chief Operating Officer of SCANA beginning in January 2011 and the President of SCANA

ELECTRONICALLY FILED - 2019 May 06 4:51 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621

subsidiary, SCG&E, beginning in 2006. Marsh is a citizen and resident of Richland County, South Carolina.

14. Defendant Jimmy Addison ("Addison") has served as the Chief Financial Officer ("CFO") of SCANA since April 2006. Addison has also served as the Executive Vice President of SCANA since January 2012. Addison is a citizen and resident of Lexington County, South Carolina.

15. Defendant Steven Byrne ("Byrne") has served as an Executive Vice President of SCANA since 2009 and as President, Generation and Transmission and Chief Operating Officer of South Carolina Electric and Gas ("SCE&G") since 2011. Byrne is a citizen and resident of South Carolina.

16. Defendants Marsh, Addison, and Byrne are collectively referred to as the "Officer Defendants."

17. Defendant Gregory Afliff ("Afliff") has been a director of SCANA since October 2015. Afliff also serves as the Chairman of the Audit Committee and is a member of the Executive and Nominating Governance Committees. Afliff is a citizen and resident of Virginia.

18. Defendant Bennett has been a director of SCANA since 1997. Bennett is the Chairman of the Compensation Committee and a member of the Executive Committee. Bennett is a citizen and resident of Richland County, South Carolina.

19. Defendant John Cecil ("Cecil") has been a director of SCANA since 2003, and serves on both the Compensation Committee and the Audit Committee. Cecil is a citizen and resident of North Carolina.

20. Defendant Sharon Decker ("Decker") was a director of SCANA from 2005 until 2013 and again from 2015 through the present. Decker is a member of both the Compensation

Committee and the Nuclear Oversight Committee. Decker is a citizen and resident of North Carolina.

21. Defendant Maybank Hagood ("Hagood") has served as a director of SCANA since 1999. Hagood serves on the Nominating and Governance Committee, Nuclear Oversight Committee, and Executive Committee. Hagood is a citizen and resident of Charleston County, South Carolina.

22. Defendant Lynn Miller ("Miller") has been a director of SCANA since 1997. Miller serves on the Nominating and Governance Committee as well as the Audit Committee. Miller is a citizen and resident of Virginia.

23. Defendant James Roquemore ("Roquemore") has served as a director of SCANA since 2007. Roquemore is the Chairman of the Nuclear Oversight Committee and is a member of the Compensation Committee and the Executive Committee. Roquemore is a citizen and resident of Orangeburg County, South Carolina.

24. Defendant Maceo Sloan ("Sloan") has been a director of SCANA since 1997. Sloan is a member of the Nuclear Oversight Committee and the Compensation Committee. Sloan is a citizen and resident of North Carolina.

25. Defendant Alfredo Trujillo ("Trujillo") has been a director of SCANA since 2013. Trujillo is a member of the Nominating and Governance Committee and the Nuclear Oversight Committee. Trujillo is a citizen and resident of Georgia.

26. Defendants listed in paragraphs 13 and 17 through 25 are collectively referred to herein as the "Director Defendants" or the "Board" and the defendants listed in paragraphs 13 through 25 are collectively referred to herein as the "Individual Defendants."

ELECTRONICALLY FILED - 2019 May 06 4:51 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621

ELECTRONICALLY FILED - 2019 May 06 4:51 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621

FURTHER SUBSTANTIVE ALLEGATIONS

27. On March 27, 2008, SCE&G, a subsidiary of SCANA, applied for a Combined Construction and Operating License with the Nuclear Regulatory Commission, with the intention of constructing two nuclear reactors in Fairfield County, South Carolina.

28. The construction plan for the two plants was made possible, in large part, by the passage of the South Carolina Base Load Review Act ("BLRA") in 2007, which allowed SCANA to finance the nuclear reactors by increasing the utility rates charged to its customers. The Individual Defendants caused SCANA to play an active role in assuring the successful passage of the legislation by making campaign contributions and paying registered lobbyists: SCANA contributions to South Carolina lawmakers increased by nearly three-hundred percent in the year before the BLRA was passed.

29. Construction began on the nearly ten billion dollar project on March 9, 2013, with the reactors scheduled to come online by 2018. Problems soon arose. Westinghouse, the primary contractor on the Project, had not perfected its planned reactor design at the time of construction, so changes had to be made throughout the process. Within eighteen months, SCE&G announced a delay in construction and increase in cost of around 1.2 billion dollars.

30. Even as the billion dollar Project was unravelling, the Individual Defendants caused the Company to mislead the public as to the success and development of the Project. Press releases were distributed that gave the unmistakable impression that the Project was moving along successfully. For example, in a March 12, 2015 press release, defendant Marsh stated that "substantial progress has been made towards completion of the units" – a concept fundamentally at odds with the petition for construction schedule and capital cost updates filed by SCANA on the same day. The positive reports bolstered public confidence, as evidenced by artificially inflated stock prices.

ELECTRONICALLY FILED - 2019 May 06 4:51 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621

31. On January 19, 2016, the Individual Defendants caused or allowed SCANA to release a video entitled "Highlighting a Year of Progress for V.C. Summer Units 2 and 3" that claimed that the nuclear Project was moving along successfully and the "construction team concluded the year on a high note."

32. In February 2016, the engineering firm Bechtel presented SCANA with the Bechtel Audit of the nuclear project, which found that the contractor on the project, Westinghouse, did not have a reasonable construction schedule, used a reactor design that was not constructible, and employed contractors who were not commercially motivated to finish the project, among other problems. Specifically, the Report stated, among other things:

- [T]he V.C. Summer Unites 2 &3 project suffers from various fundamental EPC and major project management issues that must be resolved for project success:
- [. . .] the plans and schedules are not reflective of actual project circumstances.
- The Consortium's project management approach does not provide appropriate visibility and accuracy to the Owners on project progress and performance.
- The Consortium's forecasts for schedule durations, productivity forecaster manpower peaks and percent complete do not have a firm basis.
- There is a lack of a shared vision, goals, and accountability between Owners and the Consortium.
- The Consortium lacks the project management integration needed for a successful project outcome.
- The WEC-CB&I relationship is strained, caused to a large extent by commercial issues.
- The overall morale on the project is low.
- The Contract does not appear to be serving the Owners or the Consortium particularly well.
- The issued design is often not constructible resulting in a significant number of changes. The construction planning and constructability review efforts are not far enough out in front of the construction effort to minimize the impacts.

ELECTRONICALLY FILED - 2019 May 06 4:51 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621

- There is significant engineering and licensing workload remaining (currently over 800 engineers) ITAAC closure will be a significant effort.
- Emergent issues potentially requiring NRC approval of LARs remain a significant project concern.
- There is a significant disconnect between construction need dates and procurement delivery dates.
- The amount of stored material onsite is significant, creating the need for an extended storage and maintenance program.
- Construction productivity is poor for various reasons including changes needed to the design sustained overtime, complicated work packages, aging workforce, etc.
- The indirect to direct craft ratio is high.
- Field non-manual turnover is high.
- The Owners do not have an appropriate project controls team to assess/validate Consortium reported progress and performance.
- The schedule for the startup test program is in the early stages of development. The BIP turnover rate appears to be overly aggressive.

33. Rather than disclosing this vital information to investors, regulators, and other stakeholders, the Officer Defendants concealed the Bechtel Audit and only released it to the public in September 2017, after the Company was compelled to do so by South Carolina Governor, Henry McMaster. Notwithstanding the troublesome and unfavorable results of the Bechtel Audit, the SCANA Board paid themselves more than two million dollars in stocks and cash for 2016 – a twelve percent increase from 2015.

34. SCANA's deception continued after the issuance of the Bechtel Audit: CEO and Chairman, Marsh, wrote a letter to shareholders the following month with assurances that, "[SCANA] continued to move forward and make substantial progress on initiatives important to our company such as out new nuclear construction project." Not to be outdone by Marsh's fabrications, defendant Byrne held a conference call with analysts and investors on April 28, 2016,

ELECTRONICALLY FILED - 2019 May 06 4:51 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621

in which he stated that construction crews were doing a "tremendous job" and that a key component of the reactor was going to be "better than we expected":

> [Analyst]: [. . .] I think you mentioned on the nuclear that the current critical path item is the shield building. And I know that in your report that you filed in February that was mentioned there as well. I was just wondering if you could update us on the status of that in terms of the components that are being fabricated, and so forth.
>
> [Byrne]: Yes. Dan, the shield building is going probably better than we had anticipated. . . . So even though CB&I Power exited the Consortium, the CB&I Services folks who are doing the containment vessel welding and the shield building welding stay. They're doing a tremendous job. . . . So overall, I'd say the shield building's going a little better than we expected.

35. SCANA's reports to analysts and investors were similarly optimistic during the second and third quarter conference calls. This fact was made even more incongruous in light of a June 2016 letter from Marsh to the Executive Officer of Toshiba Corporation (Westinghouse's parent company) in which Marsh claimed that SCANA had been the "victim of financial malfeasance by Westinghouse and Toshiba."

36. During a July 28, 2016 conference call regarding the company's second quarter earnings for 2016, Byrne once again failed to be forthcoming about the true nature of the obstacles facing the Project:

> [Analyst]: So I wanted to follow up a little bit on the timeline and schedule on the project and specifically on the milestones, if you could provide a little bit more of an update there; and ultimately, if and/or when you expect to do – or hear back from Flour as to more of an integrated schedule update for the overall project.
>
> [Byrne]: Yes, Julien, this is Steve. The guaranteed substantial completion dates remain at August of 2019 for unit 2 and August of 2020 for unit 3. We don't see anything to change those. Flour's review of the schedule is really something that should conclude somewhere in the third quarter and they will be giving that to Westinghouse. And remember that on the project now, we're dealing just with Westinghouse; Flour is a subcontractor to Westinghouse. I don't expect anything necessarily to change from that review, save for perhaps the number of hours it might take and shifts that they would have to put on, that kind of thing. So the goal of that schedule review was to hold the dates constant and see what it would take to accomplish those dates. So I don't expect anything dramatic to come from that.

ELECTRONICALLY FILED - 2019 May 06 4:51 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621

37. Marsh's tone remained positive throughout the fall of 2016. In a September video at the "V.C. Summer Media Day" he stated, "I feel as strongly today, probably even stronger today, than I did back in 2008 that this is the solution for us for a clean energy future." He also enthused, "[w]e're excited about where we are, we've had challenges, we've been able to work through those challenges." The aforementioned statements, far from constituting an innocent "positive spin," were conscious manipulations of the truth in light of the Bechtel Audit.

38. Byrne and Marsh had ample opportunity to reveal the true nature of the nuclear Project's construction status, but instead deliberately decided to conceal the obstacles and failures plaguing the Project. Even after SCANA's February 14, 2017 quarterly report was issued – revealing a year-long delay in scheduled completion of the more than nine billion dollar Project– the Officer Defendants continued to make false and misleading statements to analysts and investors.

39. On the February 16, 2017 conference call on SCANA's fourth quarter 2016 earnings, Marsh continued to knowingly issue false assurances:

> We continue to monitor Toshiba's financial situation and their proposed recovery plans. Although ideally Toshiba would be without these stresses, we still anticipate completing our two new nuclear units, which will enable us to provide our customers with safe, reliable energy for decades to come. . . . As you can see from Steve's update, we are making substantial progress on these new plants and remain focused on continued progress toward their completion. Again we will continue to monitor this situation closely and will alert you if we are made aware of any changes.

40. On the same call, Byrne reiterated Marsh's assurances, stating that SCANA would still reach its 2020 deadline thanks to increased efficiency factors.

41. Although Westinghouse filed for Chapter 11 Bankruptcy on March 29, 2017, SCANA continued to claim that the construction of the reactors was nearing completion.

ELECTRONICALLY FILED - 2019 May 06 4:51 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621

42. The public did not become aware of the true status of the Project until July 31, 2017, when SCANA announced that they would abandon construction of the Project. At the time that the decision to abandon the project was announced – four years after construction began – the reactors were only forty percent complete. South Carolina Attorney General, Alan Wilson ("Wilson"), then announced an investigation into SCANA's abandonment of the project.

43. SCANA's value continued to fall on August 11, 2017 after damaging news articles were published detailing the nuclear project's failure.

44. On September 4, 2017, the Bechtel Audit was released to the press and revealed that the Independent Directors had caused SCANA to purposefully conceal the Bechtel report from the public for eighteen months. Soon after, a South Carolina House Committee held a hearing in which it lambasted SCANA officials, stating that the Bechtel Audit clearly showed that SCANA failed to effectively manage the Project and Westinghouse. House members went on to suggest that SCANA should "eat" the two billion dollars in remaining costs for the project.

45. On September 22, 2017, Wilson, along with the Speaker of the South Carolina House of Representatives, requested that the State Law Enforcement Division launch a criminal investigation related to the Project. Paramount to the investigation is the concealment of the Bechtel Audit from regulators and other state officials.

46. On October 17, 2017, SCANA reported that it received a subpoena from the SEC in connection with the Project. The SEC subpoena expands the increasingly long list of investigations and lawsuits faced by SCANA as a result of the Individual Defendants' malfeasance.

47. Since the abandonment of the Project was announced on July 31, 2017, SCANA's market capitalization has plummeted from $9.12 billion to $7.03 billion on October 16, 2017. Due

to the abject failure of the Individual Defendants to manage the Project responsibly or implement some managerial control to address the obstacles that the Project faced throughout its inception, SCANA's value has decreased by over two billion dollars.

THE INDIVIDUAL DEFENDANTS' FIDUCIARY DUTIES TO SCANA

48. As officers and/or directors of SCANA, the Individual Defendants owed the Company's shareholders, including Plaintiff, the fiduciary duties of good faith, loyalty, and due care. The Individual Defendants' fiduciary duties include the exercise of good business judgement; to act prudently in the operation of the Company's business; to discharge their actions in good faith and in accordance with all applicable law; and to act in the best interest of the Company and its shareholders.

49. To properly discharge their duties, the Individual Defendants were and are required to act in good faith and in furtherance of the best interests of the Company and its shareholders. Such duties dictate that the Individual Defendants were and are required to, among other things:

(a) Manage, conduct, supervise, and direct the business affairs of SCANA in accordance with all applicable law – including federal and state laws, government rules and regulations, and SCANA's corporate charter and bylaws;

(b) Neither violate nor knowingly permit any officer, director, or employee of SCANA to violate any applicable laws, rules, and/or regulations;

(c) Remain informed as to the status of SCANA's operations and, upon receipt of notice or information of imprudent or unsound practices, to make a reasonable inquiry in connection therewith, and take steps to correct such conditions or practices; and

(d) Maintain and implement an adequate, functioning system of internal controls, such that the Company's affairs and operations are conducted in accordance with all applicable laws, rules, and regulations.

ELECTRONICALLY FILED - 2019 May 06 4:51 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621

ELECTRONICALLY FILED - 2019 May 06 4:51 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621

50. SCANA's Board Charter enumerates the responsibilities of the Board which include:

(a) Selection of the CEO;

(b) Oversight of the CEO, including performance reviews, assessment of the CEO's administration of senior Company management, and implementation of a succession plan for the CEO and other senior executives;

(c) Review, oversight, and approval of central business strategies and corporate actions; and

(d) Review and assessment of serious risks faced by the Company and strategies for their mitigation.

51. The Compensation Committee and Nuclear Oversight Committee have duties and responsibilities beyond those required by the Board Charter.

52. The Compensation Committee Charter states that the committee is charged with assisting the Board in the oversight of matters relating to compensation plans, executive compensation, and long-term strategic plans and performance with respect to management of human resources.

53. The Compensation Committee's duties and responsibilities include:

(a) Recommend to the Board salary and compensation levels for all officers of SCANA and its subsidiaries;

(b) Review and make recommendations to the Board with respect to all SCANA executive compensation plans, including incentive compensation plans and equity based plans;

(c) Review SCANA's operating performance relative to the bonus and incentive programs;

(d) Review and approve corporate goals and objectives with respect to the compensation of the CEO, evaluate the CEO's performance in light of those goals and objectives, and, either as a committee or together with the other independent directors, determine and approve the CEO's compensation based on this evaluation;

(e) Produce an annual report on executive compensation for inclusion in SCANA's proxy statement, in accordance with applicable rules and regulations of the SEC;

(f) Review the investment policies of SCANA's Retirement Plan;

(g) Make recommendations to the Board about persons to serve as senior officers of SCANA and its subsidiaries;

(h) Review SCANA's overall succession and continuity planning with the CEO;

(i) Review SCANA's long range strategic plans and performance with regard to its management of all human resources, including safety, health, labor/employee relations, and equality of treatment;

(j) Review the level of SCANA stock ownership by SCANA's executive officers to determine whether each executive officer is in compliance with the Company's minimum ownership requirement;

(k) Review the status of significant risks, if any, for which oversight has been assigned to the Committee by the Board;

(l) Conduct an annual performance evaluation to compare the performance of the Committee to the requirements of this charter and any other duties or responsibilities delegated

ELECTRONICALLY FILED - 2019 May 06 4:51 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621

to the committee by the Board, and report to the Board the results of the evaluation, which may take the form of an oral presentation by a member of the committee to the Board; and

(m) Recommend to the Board any improvements to this charter that the committee deems to be necessary or appropriate.

54. The Nuclear Oversight Committee's responsibilities include oversight of the nuclear safety, operational and financial performance, operational risks, and long-term plans and strategies of the Company's nuclear power program and to make appropriate reports to the Board. The Nuclear Oversight Committee is also responsible for the oversight of the construction of the two nuclear reactors at the VC Summer Nuclear Station.

DERIVATIVE AND DEMAND FUTILITY ALLEGATIONS

55. Plaintiff incorporates by reference and realleges every allegation contained in the preceding and subsequent paragraphs as though fully set forth herein.

56. Plaintiff brings this action derivatively in the right and for the benefit of SCANA to redress injuries suffered and to be suffered by the Company as a result of the Individual Defendants' breaches of fiduciary duties, gross mismanagement, and unjust enrichment.

57. Plaintiff and his counsel will adequately and fairly represent the interests of SCANA and its shareholders in enforcing and prosecuting its rights.

58. Plaintiff is the owner of SCANA common stock, was the owner of SCANA common stock at all times relevant hereto, and has standing to bring this derivative action.

59. As a result of the facts set forth above and herein, Plaintiff has not made any demand on the SCANA Board to institute this action against the Individual Defendants.

60. Such demand is excused, as making a demand would be a futile and useless act because the Board is incapable of making an independent and disinterested decision to institute

ELECTRONICALLY FILED - 2019 May 06 4:51 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621

and vigorously prosecute this action, and because the wrongful conduct alleged herein is not subject to protection under the business judgment rule.

61. Where there is an even number of board members, a plaintiff need only allege that demand would be futile as to half of the board members. As described more fully below, at least eight of the ten SCANA Board members are incapable of exercising independent, disinterested business judgement in considering a litigation demand.

62. Each member of the Board is implicated in the wrongful acts that led to this claim.

63. The Director Defendants face a substantial likelihood of liability as their acts resulted in a breach of the duties of loyalty and good faith owed to the Company and its shareholders. This liability renders them interested for the purposes of considering a demand. Therefore, a litigation demand on the Board would be futile.

64. Defendant Marsh, as CEO, was well aware of the actual status of the Project from its inception but made, and authorized others to make, false or inaccurate statements to shareholders, South Carolina's regulatory authority, utility customers, and public investors. Marsh also received millions of dollars in bonus compensation which was approved by the Board's Compensation Committee. Marsh therefore faces significant professional and personal financial exposure with respect to these claims and is incapable of objectively considering a demand for its commencement.

65. In addition, Marsh is not disinterested for purposes of demand futility because his principal occupation is CEO and Chairman. According to the Company's SEC filings, between 2014 and 2016, Marsh made $5,710,448, $5,733,258, and $6,108,804, respectively, in annual salary.

ELECTRONICALLY FILED - 2019 May 06 4:51 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621

ELECTRONICALLY FILED - 2019 May 06 4:51 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621

66. The defendants on the Board's Compensation Committee, specifically defendants Bennett, Cecil, Roquemore, and Sloan, approved millions of dollars in executive bonus compensation despite possessing actual knowledge that the Officer Defendants were seriously mismanaging the Project. Although this mismanagement led to substantial delays in construction and acute budgetary inflation, the members of the Compensation Committee continued to approve executive bonuses through 2016. Consequently, Bennett, Cecil, Roquemore, and Sloan face personal liability for breaching the fiduciary duties owed to the Company and its shareholders. Bennett, Cecil, Roquemore, and Sloan are therefore incapable of disinterested consideration of a litigation demand.

67. Defendants Bennett, Maceo, and Miller have all served on the SCANA Board for two decades, since 1997. Defendant Hagood has served on the Board since 1999. Due to their lengthy tenures on the SCANA Board, each of these defendants is too fully entrenched in their relationship with SCANA to exercise truly independent decision making with respect to a litigation demand.

68. Assertions of liability for the Individual Defendants are bolstered by the colossal size of the Project: the Project was one of SCANA's largest and most complicated individual investments. It is therefore highly likely that the Project's associated risks, construction schedule, and completion status – among other topics – were reviewed and discussed regularly by members of the Board and SCANA's officers. Based on this knowledge, all the Director Defendants actively participated in the scheme to mislead the public about the Project.

69. If SCANA's current officers and directors are protected against personal liability for their breaches of fiduciary duties alleged in this complaint by Directors & Officers Liability Insurance ("D&O Insurance"), they caused the Company to purchase that insurance for their

protection with corporate funds, *i.e.*, monies belonging to the shareholders. However, Plaintiff is informed and believes that the D&O Insurance policies covering the Individual Defendants in this case contain provisions that eliminate coverage for any action brought directly by SCANA against the Individual Defendants, known as the "insured versus insured exclusion."

70. As a result, if the Director Defendants were to sue themselves or certain of the officers of SCANA, there would be no D&O Insurance protection, and thus, this is a further reason why they will not bring such a suit. On the other hand, if the suit is brought derivatively, as this action is brought, such insurance coverage exists and will provide a basis for the Company to effectuate recovery. Therefore, the Director Defendants cannot be expected to file the claims asserted in this derivative lawsuit because such claims would not be covered under the Company's D&O Insurance policy.

FIRST CLAIM FOR RELIEF
(Against All Individual Defendants For Breach Of Fiduciary Duty)

71. Plaintiff incorporates by reference and realleges each allegation contained in the preceding and subsequent paragraphs as though fully set forth herein.

72. The Individual Defendants, as SCANA's directors and/or officers were and are required to use their abilities to control and manage SCANA in a fair, just, and equitable manner. By their actions alleged above, the Individual Defendants violated their fiduciary duties to SCANA, including, without limitation, their duties of good faith, loyalty, due care, reasonable inquiry, and oversight.

73. SCANA has sustained significant damages as a direct and proximate result of the Individual Defendants' failure to perform their fiduciary duties.

ELECTRONICALLY FILED - 2019 May 06 4:51 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621

ELECTRONICALLY FILED - 2019 May 06 4:51 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621

SECOND CLAIM FOR RELIEF
(Against All Individual Defendants For Gross Mismanagement)

74. Plaintiff incorporates by reference and realleges each allegation contained in the preceding and subsequent paragraphs as though fully set forth herein.

75. By their actions alleged above, the Individual Defendants abandoned and abdicated their responsibilities and fiduciary duties with regard to prudently managing SCANA's assets and business in a manner consistent with the operations of a publicly held corporation.

76. As a result of said gross mismanagement, SCANA has sustained and will continue to sustain damages and injuries.

THIRD CLAIM FOR RELIEF
(Against Defendants Marsh, Addison, and Byrne For Unjust Enrichment)

77. Plaintiff incorporates by reference and realleges each allegation contained in the preceding and subsequent paragraphs as though fully set forth herein.

78. Plaintiff, as a shareholder and representative of the Company, seeks remuneration to the Company from the Officer Defendants for the bonus compensation they were awarded during periods in which each Officer Defendants failed to uphold the duties owed to SCANA and its shareholders.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for relief and judgment as follows:

A. Declaring that Plaintiff may maintain this action on behalf of SCANA and that Plaintiff is an adequate representative of SCANA;

B. Declaring that the Individual Defendants have breached and/or aided and abetted the breach of their fiduciary duties to SCANA;

C. Determining and awarding to SCANA the damages sustained by it as a result of the violations set forth above;

D. Awarding punitive damages;

E. Awarding Plaintiff the costs and disbursements of this action, including reasonable attorneys' and experts' fees, costs, and expenses; and

F. Granting such other and further equitable relief as this Court may deem just and proper.

DEMAND FOR TRIAL BY JURY

Plaintiff hereby demands a trial by jury.

Dated: May 6, 2019

Respectfully submitted,

CHAPPELL SMITH & ARDEN, P.A.

/s/ Mark D. Chapell
Mark D. Chappell
Graham L. Newman
2801 Devine Street, Suite 300
Columbia, SC 29205
Tel: 800-929-3600
Fax: 803-929-3604
mchappel@csa-law.com
gnewman@csa-law.com

Liaison Counsel for Plaintiff

BRAGAR EAGEL & SQUIRE, P.C.
Lawrence P. Eagel
Melissa A. Fortunato
885 Third Ave, Suite 3040
New York, New York 10022
Tel: 212-308-5858
Fax: 212-486-0462
eagel@bespc.com
fortunato@bespc.com

Counsel for Plaintiff

ELECTRONICALLY FILED - 2019 May 06 4:51 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621

ELECTRONICALLY FILED - 2019 May 06 4:51 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

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

Plaintiff,

v.

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

Defendants,

-and-

SCANA CORP.,

Nominal Defendant.

Civil Action No.: 2017-CP-40-06621

TERESA PARLER'S MOTION TO INTERVENE AND MEMORANDUM OF LAW IN SUPPORT THEREOF

Pursuant to Rule 24 of the South Carolina Rules of Civil Procedure ("Rule 24"), Teresa Parler (the "Proposed Intervenor") hereby moves to intervene in the above-captioned action on the grounds that intervention is necessary to maintain the derivative claims that have been brought for the benefit of nominal defendant SCANA Corporation ("SCANA" or the "Company").

I. INTRODUCTION

Presently before the Court is a shareholder derivative action filed on behalf of and for the benefit of SCANA (the "Action"). The Action seeks to remedy the wrongdoing committed by members of SCANA's Board of Directors (the "Board") and certain officers. Specifically, the Action seeks to recover damages for breach of fiduciary duties, gross mismanagement, and unjust enrichment perpetrated by the officers and directors of SCANA in connection with the failed multi-

year, multi-billion-dollar nuclear reactor project at SCANA's Virgil C. Summer Nuclear Generating Station in Fairfield County, South Carolina (the "Nuclear Project"). The Action asserts that the Individual Defendants[1] mismanaged the Nuclear Project and proceeded to systematically mislead the investing public to conceal the myriad problems surrounding the construction and financing of the project. As a direct and proximate result of their misdeeds, SCANA's value and goodwill substantially suffered, the Company faced investigation by state and federal authorities, including the Securities and Exchange Commission, and faces substantial liability in multiple lawsuits in state and federal court, including a federal derivative action that has survived a motion to dismiss.

In a transparent bid to escape liability, the Individual Defendants then negotiated and approved the sale of SCANA to Dominion Energy Inc. ("Dominion") for the inadequate consideration of 0.669 shares of Dominion stock to be exchanged for each share of SCANA stock (the "Merger") at a time when SCANA's stock price was depressed as a result of the Individual Defendants' wrongdoing in connection with the failed Nuclear Project. Rather than seeking to maximize shareholder value in the sale of the Company, the Individual Defendants sought to escape personal liability for their wrongdoing by selling the Company as quickly as possible for an inadequate price, without conducting an auction, appointing a special committee, or negotiating a collar to protect SCANA's shareholders from a falling Dominion stock price. The Individual Defendants negotiated an indemnification provision that goes so far as to protect them from liability related to criminal proceedings regarding the failed Nuclear Project. The deal was approved by SCANA shareholders on July 31, 2018 and the Merger closed on January 2, 2019.

[1] Kevin Marsh, Gregory Aliff, James Bennett, John Cecil, Sharon Decker, Maybank Hagood, Lynn Miller, James Roquemore, Maceo Sloan, Alfredo Trujillo, Jimmy Addison, and Steven Byrne.

ELECTRONICALLY FILED - 2019 May 06 4:51 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621

ELECTRONICALLY FILED - 2019 May 06 4:51 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621

This Court has sustained the Action in the face of the Individual Defendants' various motions to dismiss pursuant to SCRCP Rules 8(a), 12(b)(6), 12(b)(8), and 23(b)(1). Nevertheless, on January 7, 2019, the Individual Defendants moved for judgment on the pleadings on the grounds that plaintiffs R. Wayne Todd ("Todd" or "Plaintiff") and John Crangle ("Crangle") no longer have standing to pursue the derivative claims in this Action based on Delaware's "continuous ownership rule."

As Plaintiff's counsel informed the Court on February 8, 2019, Plaintiff intends to oppose the Individual Defendants' latest motion, however, intervention is necessary to do so for two reasons. First, Todd recently informed counsel that he sold his shares of SCANA stock prior to the Merger closing. Todd's affirmative action to dispose of his SCANA shares prevents him from continuing to pursue derivative claims on behalf of the Company. Second, Crangle has dismissed his derivative claims pursuant to Rule 41(a)(1) of the South Carolina Rules of Civil Procedure, thereby terminating the *Crangle* Action (defined below). Prior to the Merger, the Proposed Intervenor owned 2,402 shares of SCANA common stock, and has continuously held since SCANA shares since 2000, and as such has standing to pursue the derivative claims.

Accordingly, the Proposed Intervenor respectfully submits this Motion to protect the interests of herself and SCANA – the real party whose interests are at stake in the Action.[2]

[2] As stated succinctly in *In re MAXXAM, Inc./Federated Dev. S'holders Litig.*, 698 A.2d 949 (Del. Ch. 1996):

> A derivative claim belongs to the corporation, not to the shareholder plaintiff who brings the action. The shareholder plaintiff's interest is limited to compelling the corporation (by "standing in its shoes") to assert the corporation's right to seek redress for the alleged wrongdoing. The stockholder plaintiff's claim for redress in a derivative action is not personal. It is derivative, and exists solely because of the plaintiff's interest as a shareholder. Because the corporation is always the real party in interest, the identity of the specific representative shareholder plaintiff is not a paramount concern.

ELECTRONICALLY FILED - 2019 May 06 4:51 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621

Intervention is necessary to maintain the derivative suit, and the Proposed Intervenor should be permitted to step in as a representative of SCANA to pursue the Company's valuable derivative claims either via right or permission.

II. PROCEDURAL HISTORY

On September 26, 2017, Crangle filed a derivative action on behalf of SCANA captioned, Civil Action No. 2017-CP-40-05791 ("*Crangle* Action"). On October 30, 2017, Todd filed a derivative action on behalf of SCANA captioned, Civil Action No. 2017-CP-40-06621 ("*Todd* Action").[3] On January 16, 2018, defendants moved to stay both the *Crangle* and *Todd* Actions in favor of certain related class action lawsuits, regulatory proceedings, and government investigations involving the Company. The Court denied these motions on March 2, 2018.

As noted above, on September 6, 2018, the Court denied the Individual Defendants' motions to dismiss pursuant to Rule 12(b)(6) and Rule 23(b)(1), and the cases were consolidated under the *Crangle* caption on September 18, 2018. A hearing was held on December 6, 2018 regarding the Individual Defendants' motions to dismiss pursuant to Rule 12(b)(8), after which the Court asked Todd and Crangle to prepare a formal order denying the Rule 12(b)(8) motion. On January 7, 2019, the Individual Defendants moved for judgment on the pleadings, which Plaintiffs intend to oppose. Finally, as noted above, on February 20, 2019, Crangle and Defendants filed a Stipulation of Dismissal of Plaintiff Crangle *Without* Prejudice, thereby terminating the *Crangle* Action (the "Stipulation"). As noted in the Stipulation, the *Todd* Action has not been terminated. *See Sarvghad v. Sitton Buick Co.*, 312 S.C. 429,430, 440 S.E.2d 894, 895 (Ct. App. 1994) ("The

Id. at 956 (internal citations omitted).

[3] On December 13, 2017, plaintiff Firemen's Retirement System of St. Louis filed a derivative complaint on behalf of SCANA captioned, Civil Action No. 2017-CP-40-07547 (the "*Firemen's* Action"). On February 21, 2018, the *Firemen's* Action was removed to federal court and has since been voluntarily dismissed.

ELECTRONICALLY FILED - 2019 May 06 4:51 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621

actions, despite their consolidation, retained their separate identities."); *see also* note to Rule 42(a) SCRCP ("The parties and pleadings are not merged, and each action retains its own identity[.]").

III. ARGUMENT

Rule 24 provides two ways that a party can intervene in pending litigation with a timely motion; intervention of right and permissive intervention. SCRP 24; *Sauner v. Public Service of Authority of S.C.*, 354 S.C. 397, 410, 581 S.E.2d 161, 168 (2003). As explained below, the Proposed Intervenor satisfies all necessary requirements to intervene either via right or with permission, and has the ability to cure the standing deficiency of Todd's lack of standing.

A. The Proposed Intervenor Has A Right To Intervene In This Case

An applicant has a right to intervene in a case where he " claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may, as a practical matter, impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." SCRCP 24(a)(2). To satisfy the requirements of Rule 24, the Proposed Intervenor must: "(1) establish timely application; (2) assert an interest relating to the property or transaction which is the subject of the action; (3) demonstrate that it is in a position such that without intervention, disposition of the action may impair or impede its ability to protect that interest; and (4) demonstrate that its interest is inadequately represented by other parties." *Berkeley Elec. Coop., Inc. v. Mt. Pleasant*, 302 S.C. 186, 189, 394 S.E.2d 712, 714 (1990) (citation omitted). "Generally, the rules of intervention should be liberally construed where judicial economy will be promoted by declaring the rights of all affected parties." *Ex parte Gov't Emples. Ins. Co. v. Goethe*, 373 S.C. 132, 138, 644 S.E.2d 699, 702 (2007) (citing *Berkeley Elec.*, 302 S.C. at 189, 394 S.E.2d at 714).

Here, both the Proposed Intervenor and Plaintiff seek to represent SCANA in a derivative lawsuit concerning allegations of wrongdoing regarding the Company's failed Nuclear Project.

ELECTRONICALLY FILED - 2019 May 06 4:51 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621

The only question is whether Plaintiff can adequately represent the Proposed Intervenor's and SCANA's interests. Based on Todd's pre-closing sale of his SCANA stock, he cannot adequately represent the Proposed Intervenor and SCANA because his lack of standing results in him not being able to maintain the claims in the Action. Similarly, Crangle has stipulated to dismissal.

Moreover, the Federal Rules of Civil Procedure, which the SCRCP are modeled after,[4] have recognized the importance of adequate representation in the context of derivative lawsuits. Fed. R. Civ. P. 23.1, advisory committee's notes. Here, the Proposed Intervenor is entitled to intervene because Todd cannot protect SCANA's interest due to his lack of standing. *See Bushansky v. Armacost*, No. 12-cv-01597-JST, 2014 WL 5335255, at *2 (N.D. Cal. Oct. 17, 2014) (stockholder entitled to intervention where "existing parties do not already protect" stockholder's interest because original plaintiff "no longer has standing to prosecute this action."); *In re Extreme Networks, Inc. S'holder Derivative Litig.*, 573 F. Supp. 2d 1228, 1237 (N.D. Cal. 2008) ("another qualified shareholder can intervene on the grounds that their rights are no longer represented").

B. In The Alternative, The Court Should Permit Intervention

Even if the Court found—which it should not—that intervention as of right is not warranted, the Court should nonetheless permit the Proposed Intervenor to intervene in this case. In this regard, the Court may permit intervention " when an applicant's claim or defense and the main action have a question of law or fact in common." SCRCP 24(b)(2).

The Proposed Intervenor's potential derivative claims involve the same facts and law as the Action. As discussed below, no party will be prejudiced by allowing intervention here. In addition, any prolonging of the Action as a result of intervention is not undue because here the

[4] *See Teseniar v. Fenwick Plantation Tarragon, Ltd. Liab. Co.*, No. 2018-UP-420, 2018 S.C. App. Unpub. LEXIS 411, at *3 (Ct. App. Nov. 7, 2018) (noting that Federal Rule of Civil Procedure 24(a) [] is identical to Rule 24, SCRCP, in all relevant respects).

ELECTRONICALLY FILED - 2019 May 06 4:51 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621

purpose of intervention is merely to allow the Proposed Intervenor to continue forward with claims the Court has already found to be sufficient to defeat a motion to dismiss based on Rules 12(b)(6), 12(b)(8), and 23(b)(1) and to protect her (and SCANA's) rights. Because she shares the same claims as Plaintiff, the Proposed Intervenor's intervention will not cause prejudice or undue delay.

C. This Motion Was Timely Filed

Rule 24 requires that any motion to intervene be timely filed. Timeliness is determined based on four factors: "(1) the time that elapsed since the applicant knew or should have known of its interest in the action; (2) the reason for the delay; (3) the stage to which the action has progressed; and (4) the prejudice the original parties to the action would suffer from granting intervention and the applicant would suffer from denying intervention." *Teseniar*, 2018 S.C. App. Unpub. LEXIS 411, at *3 (citation omitted). "A motion to intervene is timely if it is filed promptly after a person obtains actual or constructive notice that a pending case threatens to jeopardize his rights." *Id.* (citation omitted).

Here, the Proposed Intervenor did not delay in filing her motion, but rather brought this Motion upon learning that Todd had sold his shares prior to the Merger closing and thus had lost standing and separately that Crangle intended to withdraw from the Action.

In addition, intervention will not cause any undue delay or prejudice to the existing parties' rights. A trial date has not yet been set, document discovery and depositions have not yet begun, and intervention would not require the Court to delay any aspect of the case. Accordingly, the parties to the Action face no prejudice as a result of the intervention and the Proposed Intervenor's Motion is timely.

D. The Proposed Intervenor Fulfills Rule 24(c)

Rule 24(c) requires that a motion to intervene, in addition to stating the grounds for intervention, "shall be accompanied by a pleading setting forth the claim or defense for which

intervention is sought." SCRCP 24(c). As explained herein, the Proposed Intervenor will merely cure the standing defect identified by counsel, the claims and the facts underlying those claims remain the same. In fact, simultaneously with the filing of this Motion, the Proposed Intervenor has attached a proposed amended complaint adding the Proposed Intervenor as a plaintiff. The Proposed Intervenor, therefore, has satisfied Rule 24(c)'s procedural requirements.

IV. CONCLUSION

For the foregoing reasons, the Proposed Intervenor's Motion to Intervene should be granted.

Dated: May 6, 2019

Respectfully submitted,

CHAPPELL SMITH & ARDEN, P.A.

/s/ Mark D. Chappell
Mark D. Chappell
Graham L. Newman
2801 Devine Street, Suite 300
Columbia, SC 29205
Tel: 803-929-3600
Fax: 803-929-3604
mchappell@@csa-law.com
gnewman@csa-law.com

BRAGAR EAGEL & SQUIRE, P.C.
Lawrence P. Eagel
Melissa A. Fortunato
885 Third Avenue, Suite 3040
New York, New York 10022
Tel: 212-308-5858
Fax: 212-486-0462
eagel@bespc.com
fortunato@bespc.com

Counsel for Plaintiff and Proposed Intervenor

ELECTRONICALLY FILED - 2019 May 06 4:51 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621

ELECTRONICALLY FILED - 2019 May 31 3:33 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE STATE OF SOUTH CAROLINA FOR THE FIFTH JUDICIAL CIRCUIT
R. Wayne Todd, derivatively on behalf of SCANA Corporation, Plaintiff, v. Kevin B. Marsh, Gregory Aliff, James Bennett, John Cecil, Sharon Decker, Maybank Hagood, Lynn Miller, James Roquemore, Maceo Sloan, Alfredo Trujillo, Jimmy Addison, and Steve Byrne, Defendants. and SCANA Corporation, Nominal Defendant.	Civil Action No. 2017-CP-40-06621 **DEFENDANTS' OPPOSITION TO TERESA PARLER'S MOTION TO INTERVENE**

INTRODUCTION

This is a shareholder derivative suit purportedly on behalf of SCANA Corporation, but neither the original plaintiff Todd nor the would-be intervenor Parler are SCANA shareholders. Todd no longer holds SCANA stock, and admits that disposing of his stock "prevents him from continuing to pursue derivative claims." Motion to Intervene 3. Yet Parler also holds no SCANA stock after the merger of SCANA and Dominion Energy, Inc. That undisputed fact dispels any standing to pursue these claims on SCANA's behalf.

But don't take our word for it. Since the merger announcement, counsel for Todd and (now Parler) has honorably admitted that the completion of the merger should end

ELECTRONICALLY FILED - 2019 May 31 3:33 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621

this derivative litigation. That is why counsel volunteered to the Court that the planned merger "likely will moot the derivative claims." Plaintiff Todd's Letter Responding to Mot. to Stay (Jan. 29, 2018). Counsel explained that "the focus ought to be on the litigation involving the merger" rather than the derivative claims because "[t]here is an issue as to standing" in the derivative case. Transcript of February 15, 2018 motions hearing before Honorable Mark Hayes, at 34.

Counsel has apparently switched sides on the standing issue, but was right the first time: Todd and Parler both lack standing under the South Carolina continuous ownership rule. As the South Carolina Supreme Court has long held, a shareholder's right to bring a derivative suit on a corporation's behalf under state law "inheres in and attaches to his ownership of its stock *and does not exist apart from such ownership*." *Johnson v. Baldwin*, 69 S.E.2d 585, 589 (S.C. 1952) (emphasis added). The Supreme Court's holding in *Johnson* is well-established. It accords with the overwhelming majority of states. Defs.' Motion for Judgment on the Pleadings 9. And it has not been questioned by any court. *Johnson* thus compels the denial of Parler's motion to intervene for lack of derivative standing.

Parler cannot meet her burden to intervene under South Carolina Rule of Civil Procedure 24 in any event. Parler has no right to intervene under SCRCP 24(a) because mandatory intervention is not allowed for duplicative litigation. Any derivative interest of Parler's is already represented by plaintiffs pursuing nearly identical derivative claims purportedly on SCANA's behalf in federal court. *See* Ex. A, Consolidated Amended Shareholder Derivative Complaint, *In re SCANA Corporation*

ELECTRONICALLY FILED - 2019 May 31 3:33 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621

Derivative Litigation, Doc. No. 115, No. 3:17-cv-3166-MBC (D.S.C. Nov. 21, 2017).[1] Both the state and federal shareholder derivative lawsuits allege that SCANA's officers and directors breached certain fiduciary duties relating to the V.C. Summer nuclear project. But Parler has not even tried to meet her burden of showing how the identically situated federal derivative plaintiffs pursuing nearly identical claims fail to represent her purported derivative interests. For the same reasons, the Court should not create duplicative litigation by granting permissive intervention under SCRCP 24(b). The Motion to Intervene should be denied.

ARGUMENT

I. Parler cannot intervene because she is not a SCANA shareholder and thus lacks shareholder derivative standing.

Parler admits that she is no longer a SCANA shareholder. *See* Decl. of Teresa Parler, at ¶2. She thus lacks "standing to intervene in an action pursuant to Rule 24." *Ex parte Gov't Emp.'s Ins. Co.*, 373 S.C. at 138, 644 S.E.2d at 702.

Johnson requires continuous ownership to maintain standing for a derivative action, and reached that conclusion by "inquir[ing] into the nature of th[is] cause of action." *Id.* at 588. Although brought by a stockholder, a derivative action "is an asset of the corporation,"[2] which is the "real party in interest." *Id.* A stockholder's right to pursue a derivative claim thus "inheres in and attaches to his ownership of its stock and

[1] SCANA and the individual defendants in the federal derivative action also filed a motion for judgment on the pleadings there, which remains pending. *See* Doc. No. 172 (Jan. 7, 2019).

[2] In another lawsuit filed just this month, Parler's counsel correctly recognized that "the derivative claims against the former officers and directors of SCANA . . . were transferred to Dominion in the Merger." Ex. B, Complaint ¶ 157, *KBC Asset Management NV v. Marsh et al.*; *id.* ¶ 159 (alleging that there are "valuable claims that Dominion can pursue against the Original Derivative Defendants and SCANA executives following the Merger").

ELECTRONICALLY FILED - 2019 May 31 3:33 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621

does not exist apart from such ownership." *Id.* at 589. The South Carolina Supreme Court analogized a non-shareholder derivative plaintiff to "a kind of self-appointed [master of the lawsuit], without interest, present or potential, in his subject matter, which is an anomalous situation involving gratuitous inquisition into the business of another." *Id.* The Court therefore held that the plaintiff at issue, who had ceased to be a shareholder after a merger, "cannot prosecute an action as a member of a class to which she does not belong." *Id.*; *accord Grosset v. Wenaas*, 42 Cal.4th 1100, 1114 (2008) ("[A]llowing a plaintiff to retain standing despite the loss of stock ownership would produce the anomalous result that a plaintiff with absolutely no 'dog in the hunt' is permitted to pursue a right of action that belongs solely to the corporation."). Previous statements to the Court by Parler's counsel reflect that *Johnson*'s continuous ownership rule eliminates derivative standing for former SCANA shareholders. *See* Plaintiff Todd's Letter Responding to Mot. to Stay (Jan. 29, 2018) ("[A] stay of the derivative claims is appropriate given the announcement of the Proposed Transaction, which if consummated likely will moot the derivative claims."); Transcript of February 15, 2018 motions hearing before Honorable Mark Hayes, at 34 (explaining why "[t]here is an issue as to standing" in post-merger derivative claims).

Parler nevertheless suggests that she should retain shareholder derivative standing—even though she is not a SCANA shareholder—because she did not take "affirmative action to dispose" of her SCANA stock. Motion to Intervene 3. But nothing in *Johnson* suggests that former shareholders lose derivative standing only when they *voluntarily* cease to be shareholders. To the contrary, *Johnson* expressly relied on cases holding that derivative plaintiffs lost standing even when they vigorously

ELECTRONICALLY FILED - 2019 May 31 3:33 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621

contested their loss of shareholder status. *Johnson*, 69 S.E.2d at 589. In *Hayman v. Morris*, for example, former shareholders lost derivative standing when their shares were retired even though they "refused to surrender" the shares and "resist[ed] lawful redemption of their stock . . . by clinging to the physical certificate of their shares." *Hayman v. Morris*, 46 N.Y.S.2d 482, 490, 495 (Sup. Ct. 1943) (discussed at *Johnson*, 69 S.E.2d at 589). *Johnson* also relied on *Kehaya v. Axton*, which concluded that a director suing his fellow directors could not maintain standing if they "succeed in ousting him" because "[i]f he is ousted as a director he no longer represents the corporation." 32 F. Supp. 266, 268 (S.D.N.Y. 1940). Both the logic of *Johnson* and the authorities it relied on show that Parler lacks standing. *See also Estate of Stevenson v. Kavanaugh*, 2013 WL 673728 (S.C. Ct. of Comm. Pleas Jan. 18, 2013) (concluding that South Carolina would apply the continuous ownership rule after a merger); *Grosset*, 42 Cal.4th at 1115-16 ("[P]laintiffs who lose their shares involuntarily have no greater interest in the continued well-being of the corporation than plaintiffs who willingly sell their shares.").

II. Intervention should be denied because there is no need for yet another derivative plaintiff.

In addition to her lack of derivative standing, Parler fails to meet the requirements under Rule 24 to intervene either as a matter of right or by permission of the Court. *See* SCRCP 24(a)-(b).

A. Parler has no right to intervene under Rule 24(a) because any shareholder derivative interests are already represented in the federal derivative litigation.

Rule 24(a) allows intervention as of right only when the applicant has an "interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his

ability to protect that interest, *unless the applicant's interest is adequately represented by existing parties*." SCRCP 24(a) (emphasis added). Under this Rule, a proposed intervenor must "1) establish timely application; 2) assert an interest relating to the property or transaction which is the subject of the action; 3) demonstrate that it is in a position such that without intervention, disposition of the action may impair or impede its ability to protect that interest; and 4) demonstrate that its interest is inadequately represented by other parties." *Ex parte Reichlyn*, 310 S.C. 495, 498, 427 S.E.2d 661, 663 (S.C. 1993).

As the would-be intervenor, Parler bears the burden of showing the inadequacy of existing representation. *In re Horry County State Bank*, 361 S.C. 503, 507 (S.C. Ct. App. 2004). But when an existing party has the same interests or ultimate objection in the litigation, that representation is presumptively adequate. *S.C. Tax Comm'n v. Union Cty. Treasurer*, 295 S.C. 257, 260–61, 368 S.E.2d 72, 74 (Ct. App. 1988) (citing *Commonwealth of Virginia v. Westinghouse Electric Corp.,* 542 F.2d 214 (4th Cir.1976)). To overcome this presumption, an applicant must establish inadequate representation by showing adversity of interest, collusion, nonfeasance, or the like. *S.C. Tax Comm'n*, 295 S.C. at 260.

The Court of Appeals highlighted the high bar for showing inadequate representation in *S.C. Tax Commission*, which held that the Commission could not intervene as a matter of right because its interests were adequately represented by the Auditor and the Treasurer as existing parties in a tax dispute the suit. 295 S.C. at 260-61. The court held that the Commission could not overcome the presumption that its interests were adequately represented by the existing parties because it shared their

ELECTRONICALLY FILED - 2019 May 31 3:33 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621

ELECTRONICALLY FILED - 2019 May 31 3:33 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621

objective to retain the tax for the county. *Id.* Because there was no difference in interest between the proposed intervenor and the existing parties, the Court upheld the trial court's denial of intervention. *Id.*

At least two federal courts have held that intervention is not appropriate under the nearly identical Rule 24(a) when the applicant's interests, like here, are adequately represented by a party in parallel derivative litigation.[3] *In re Bank of New York Derivative Litigation*, for example, denied a shareholder's motion to intervene because the interests of the proposed intervenor, the shareholders, and the nominal defendants would be protected in state court proceedings where plaintiffs were already asserting identical claims. 173 F. Supp. 2d 193, 194, 201 (S.D.N.Y. 2001), *aff'd*, 320 F.3d 291 (2d Cir. 2003). There was no need for intervention because derivative plaintiffs "represented by experienced counsel are pursuing virtually identical claims in a pending state court action." *Id.* at 194; *see Stadnicki on Behalf of LendingClub Corp. v. Laplanche*, No. C 16-03072 WHA, 2018 WL 4110553, at *4 (N.D. Cal. Aug. 29, 2018) (denying a shareholder's motion to intervene because of a parallel Delaware derivative suit).

Parler likewise cannot meet her burden of showing that the existing federal derivative plaintiffs inadequately represent her interests. Her proposed complaint asserts claims that are almost identical to the federal derivative plaintiffs' claims. Parler has the same interest as those represented by the plaintiffs in the federal derivative claim. *See In Re Ambac Fin. Grp. Derivative Litigation*, 257 F.R.D. 390, 393 (S.D.N.Y.

[3] "Because the South Carolina Rules of Civil Procedure closely parallel the Federal Rules of Civil Procedure," South Carolina courts look to the Federal Rules in interpreting Rule 24. *S.C. Tax Comm'n*, 295 S.C. at 260.

ELECTRONICALLY FILED - 2019 May 31 3:33 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621

2009) (denying permission to intervene in an existing derivative action since the plaintiffs and intervenors "share an identity of interest almost by definition, since the true party in interest is the corporation itself"). And Parler has not even tried to meet her burden of showing any adversity of interest, collusion, or nonfeasance by the federal derivative plaintiffs. *S.C. Tax Comm'n*, 295 S.C. at 260.

None of the cases cited by Parler suggest that intervention is required in a derivative action when there are already derivative proceedings in other courts. In fact, *Bushansky v. Armacost* allowed intervention but only after noting that the Delaware Court of Chancery had recently dismissed the parallel derivative suit. No. 12-cv-01597-JST, 2014 WL 5335255, at *2 (N.D. Cal. Oct. 17, 2014). Thus, there was no pending derivative suit at the time of the motion to intervene. *Id.* Because Parler's purported derivative interests are adequately represented by the plaintiffs in the federal derivative litigation, she has no right to intervene here.

None of this Court's previous rulings suggest that Parler has any right to intervene either. In 2018, the Court allowed this derivative litigation to proceed as scheduled rather than staying it pending resolution of the "Parallel Proceedings" in other courts. *See* Order Denying Motion to Stay (Mar. 2, 2018). But the federal derivative action was *not* part of those Parallel Proceedings. SCANA's Motion to Stay at 8-17 (Jan. 16, 2018). The Court also planned to deny a motion to dismiss under Rule 12(b)(8) on the grounds that "another action is pending between the same parties for the same claim." *See* Email to SCANA Derivative Litigation Counsel (Dec. 21, 2018) ("I ask plaintiff's counsel to prepare a formal order for me to sign denying the 12(b)(8)."). But Todd's counsel had argued that Rule 12(b)(8) did not apply to the federal derivative

proceedings only because "there is no identity of parties." Todd Opposition to SCANA's Motion to Dismiss at 36 (June 6, 2018). That consideration is irrelevant here. *In re Bank of New York Derivative Litigation* and *Stadnicki* both show that a motion to intervene in a parallel derivative action should be denied—when different shareholders seek to represent the same corporation derivatively—when that intervention would create the redundancy Parler seeks here.

B. The Court should not grant permission to intervene under Rule 24(b), which will create only duplicative litigation.

Because Parler has not satisfied Rule 24(a), she must persuade the Court to grant permission to intervene under Rule 24(b). The Court should deny that request. Permissive intervention would only duplicate the costs of litigation that is proceeding in federal court, with no corresponding benefit to SCANA or its sole shareholder, Dominion Energy. Parler has identified no other reason this Court should permit intervention, let alone a reason sufficiently compelling to overcome the additional costs. *See Ambac Fin. Grp.*, 257 F.R.D. at 394 ("[A]bsent good reason to do so, the Court is disinclined to add to the fulsome number of attorneys handling this matter.").

CONCLUSION

Proposed intervenor Teresa Parler thus lacks standing to intervene in this derivative action, and has not met her burden to intervene under Rule 24. The Motion to Intervene should be denied.

ELECTRONICALLY FILED - 2019 May 31 3:33 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621

ELECTRONICALLY FILED - 2019 May 31 3:33 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621

Respectfully submitted,

s/ Steven J. Pugh
Steven J. Pugh (SC Bar No. 14341)
Benjamin P. Carlton (SC Bar No. 101142)
Richardson Plowden & Robinson, P.A.
Post Office Drawer 7788 (29202)
1900 Barnwell Street
Columbia, South Carolina 29201
(803) 771-4400
spugh@richardsonplowden.com
bcarlton@richardsonplowden.com

I.S. Leevy Johnson (SC Bar No. 3020)
George C. Johnson (SC Bar No. 9308)
Johnson Toal & Battiste, P.A.
1615 Barnwell Street
Columbia, South Carolina 29201
(803) 252-9700
islj@jtbpa.com
George@jtbpa.com

Michael R. Smith (*pro hac vice*)
Lisa Bugni (*pro hac vice*)
King & Spalding, LLP
1180 Peachtree Street, NE
Atlanta, Georgia 30309
(404) 572-4824
mrsmith@kslaw.com

Brian E. Pumphrey (*pro hac vice* pending)
Brian D. Schmalzbach (*pro hac vice* pending)
McGuireWoods LLP
800 East Canal Street
Richmond, Virginia 23219
(804) 775-7745
bpumphrey@mcguirewoods.com
bschmalzbach@mcguirewoods.com

Counsel for Nominal Defendant SCANA Corporation

ELECTRONICALLY FILED - 2019 May 31 3:33 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621

s/ John A. Massalon
John A. Massalon (SC Bar No. 10279)
Wills Massalon & Allen, LLC
Post Office Box 859
Charleston, South Carolina 29402
(843) 727-1144
jmassalon@wmalawfirm.net

John R. Bielema (*pro hac vice*)
Michael P. Carey (*pro hac vice*)
Bryan Cave Leighton Paisner, LLP
One Atlantic Center, 14th Floor
1201 West Peachtree Street, N.W.
Atlanta, Georgia 30309
(404) 572-6600
john.bielema@bclplaw.com
michael.carey@bclplaw.com

Barbara A. Smith (*pro hac vice*)
Bryan Cave Leighton Paisner, LLP
One Metropolitan Square
211 N. Broadway, Suite 3600
St. Louis, Missouri 63102
(314) 259-2000
barbara.smith@bclplaw.com

Counsel for Defendants Gregory E. Aliff; James Bennett; John F.A.V. Cecil; Sharon A. Decker; D. Maybank Hagood; Lynne M. Miller; James W. Roquemore; Maceo K. Sloan; and Alfredo Trujillo

ELECTRONICALLY FILED - 2019 May 31 3:33 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621

s/ William A. Coates
William A. Coates (SC Bar No. 1289)
Roe Cassidy Coates & Price, P.A.
1052 North Church Street
Post Office Box 10529 (29603)
Greenville, South Carolina 29601
(864) 349-2600
wac@roecassidy.com

Anne M. Tompkins (*pro hac vice*)
Jonathan M. Watkins (*pro hac vice*)
Aaron C. Lang (*pro hac vice*)
Cadwalader, Wickersham & Taft, LLP
227 West Trade Street
Charlotte, North Carolina 28202
(704) 348-5222
Anne.Tompkins@cwt.com
Jonathan.Watkins@cwt.com
Aaron.Lang@cwt.com

Jared Stanisci (*pro hac vice*)
Cadwalader, Wickersham & Taft, LLP
200 Liberty Street
New York, New York 10281
Jared.Stanisci@cwt.com

Counsel for Defendant Kevin B. Marsh

ELECTRONICALLY FILED - 2019 May 31 3:33 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621

s/ William A. Coates
William A. Coates (SC Bar No. 1289)
Roe Cassidy Coates & Price, P.A.
1052 North Church Street
Post Office Box 10529 (29603)
Greenville, South Carolina 29601
(864) 349-2600
wac@roecassidy.com

Robert A. Blake, Jr. (*pro hac vice*)
James F. Wyatt, III (*pro hac vice*)
Wyatt & Blake, LLP
435 East Morehead Street
Charlotte, North Carolina 28203
(704) 331-0767
rblake@wyattlaw.net
jwyatt@wyattlaw.net

Counsel for Defendant Stephen Byrne

s/ William A. Coates
William A. Coates (SC Bar No. 1289)
Roe Cassidy Coates & Price, P.A.
1052 North Church Street
Post Office Box 10529 (29603)
Greenville, South Carolina 29601
(864) 349-2600
wac@roecassidy.com

OF COUNSEL:
John A. Jordak, Jr. (*pro hac vice*)
William R. Mitchelson, Jr. (*pro hac vice*)
Meredith J. Kingsley (*pro hac vice*)
Alston & Bird
1201 West Peachtree Street
Atlanta, Georgia 30309
(404) 881-7000
john.jordak@alston.com
mitch.mitchelson@alston.com
meredith.kingsley@alston.com

Counsel for Defendant Jimmy Addison

EXHIBIT B

ELECTRONICALLY FILED - 2019 Jun 21 12:42 PM - RICHLAND - COMMON PLEAS - CASE#2017CP400621
ELECTRONICALLY FILED - 2019 Jul 10 6:08 PM - RICHLAND - COMMON PLEAS - CASE#2017CP400621

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

R. WAYNE TODD, derivatively on behalf of SCANA CORPORATION, Plaintiff, v. KEVIN B. MARSH, GREGORY ALIFF, JAMES BENNETT, JOHN CECIL, SHARON DECKER, MAYBANK HAGOOD, LYNN MILLER, JAMES ROQUEMORE, MACEO SLOAN, ALFREDO TRUJILLO, JIMMY ADDISON, and STEVE BYRNE, Defendants, -and- SCANA CORP., Nominal Defendant.	Civil Action No.: 2017-CP-40-06621 **TERESA PARLER'S OPPOSITION TO DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS AND RESPONSE TO DEFENDANTS' OPPSITION TO THE MOTION TO INTERVENE**

Teresa Parler ("Parler" or the "Proposed Intervenor") respectfully submits this Opposition to Defendants' Motion for Judgment on the Pleadings filed on January 7, 2019 (the "Motion") and Response to Defendants' Opposition to Parler's Motion to Intervene filed on May 31, 2019 (the "Motion to Intervene").

I. INTRODUCTION

Presently before the Court is a derivative action filed on behalf of and for the benefit of SCANA Corporation ("SCANA" or the "Company") (the "Action"). Defendants[1] have been

[1] Kevin Marsh, Gregory Aliff, James Bennett, John Cecil, Sharon Decker, Maybank Hagood, Lynn Miller, James Roquemore, Maceo Sloan, Alfredo Trujillo, Jimmy Addison, and Steven Byrne.

ELECTRONICALLY FILED - 2019 Jun 21 12:42 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621
ELECTRONICALLY FILED - 2019 Jul 10 6:08 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621

waiting to file the Motion since the merger between SCANA and Dominion Energy, Inc. ("Dominion") was announced on January 3, 2018 (the "Merger"). Since that time, Defendants have used every device in their repertoire to prevent a court from considering their blatant breaches of fiduciary duty that destroyed billions of dollars of SCANA's value and allowed Dominion to acquire the Company at a sham "premium" while at the same time indemnifying Defendants for their wrongdoing. Defendants also rewarded themselves with tens of millions in unwarranted compensation. With various motions to stay and motions to dismiss, Defendants have sought to stall the litigation of this Action until the Merger closed so that they could then use the Merger as a means of finally disposing of the Action. The Court has already denied Defendants' motion to stay the Action and sustained the Action in the face of Defendants' various motions to dismiss pursuant to SCRCP Rules 8(a), 12(b)(6), 12(b)(8), and 23(b)(1).

Defendants now ask the Court to dismiss the Action pursuant to SCRCP Rule 12(c) on the grounds that plaintiffs R. Wayne Todd ("Todd") and John Crangle ("Crangle") and the Proposed Intervenor no longer have standing to pursue the derivative claims in this Action based on Delaware's "continuous ownership rule" whereby a derivative plaintiff's standing is deemed to have been extinguished by virtue of a merger. In so doing, Defendants ask this Court to apply law they wish controlled in South Carolina, rather than law which actually exists, by patching together inapposite South Carolina "authority" to create the impression that South Carolina has adopted and follows Delaware's strict application of the continuous ownership rule. Well-aware of the ample documentary evidence of their serious wrongdoing, Defendants look to the Merger as their chance to avoid accountability for their egregious misconduct.

As Defendants note, the Proposed Intervenor concedes that in the ordinary course, under Delaware law, where a plaintiff to a pending derivative action loses their status as a shareholder

due to a merger the plaintiff no longer has "standing" to maintain the derivative suit. *See El Paso Pipeline GP Co., L.L.C. v. Brinckerhoff*, 152 A.3d 1248, 1251 (Del. 2016) (reversing Chancery Court decision finding that merger did not destroy derivative standing) *but see Arkansas Teacher Ret. Sys. v. Countrywide Fin. Corp.*, 75 A.3d 888 (Del. 2013) (recognizing an exception to this rule when the merger in question is the product of fraud). The Proposed Intervenor recognizes that several other jurisdictions have elected to follow the rule requiring continuous ownership. But what Defendants refuse to concede is that still other jurisdictions have rejected the continuous ownership rule as impermissibly inequitable, particularly under the circumstances presented here. Moreover, South Carolina courts have explicitly declined to apply Delaware law where the result of such application would be "too restrictive" or "harsh." *See Carolina First Corp. v. Whittle*, 343 S.C. 176, 192, 539 S.E.2d 402, 411 (Ct. App. 2000).

In fact, the specific question of whether a plaintiff-shareholder of a South Carolina corporation loses standing to pursue a derivative action after being involuntarily stripped of their shares –having taken no affirmative steps to surrender their status as a shareholder – is one of first impression. Delaware's strict interpretation of the continuous ownership rule in the event of a merger, as adopted elsewhere, provides no flexibility for a court to ensure that dishonest corporate fiduciaries are held accountable or that there is a just or equitable outcome of derivative litigation. As detailed herein, other jurisdictions have declined to follow the continuous ownership rule in any context after a derivative action is commenced, while others acknowledge that in the scenario where a derivative plaintiff's shareholder status is stripped away via a merger, it would be patently unjust to see meritorious claims terminated due to a merger effectuated by the very individuals seeking to escape liability.

ELECTRONICALLY FILED - 2019 Jun 21 12:42 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621
ELECTRONICALLY FILED - 2019 Jul 10 6:08 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621

ELECTRONICALLY FILED - 2019 Jun 21 12:42 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621
ELECTRONICALLY FILED - 2019 Jul 10 6:08 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621

In concluding that South Carolina law permits this Action against Defendants to proceed post-Merger, this Court has the opportunity to send a powerful message to Defendants and to the directors, officers, and shareholders of all South Carolina corporations: South Carolina law will not permit those insiders who breach their fiduciary duties to the corporation, abuse the trust of shareholders, and lie to South Carolina citizens to ensure they are indemnified for their wrongdoing and escape accountability simply by selling off the Company they so severely damaged through their own misconduct.

II. PROCEDURAL HISTORY

On July 31, 2017, SCANA shocked shareholders and the market when it announced the abandonment of the construction of two nuclear reactors at the V.C. Summer Nuclear Station (the "Nuclear Project"), a $9 billion project that SCANA's officers and directors had pushed forward for almost two years after they were told it was in fundamentally jeopardy due to construction delays and cost overruns. The Action seeks to remedy the wrongdoing committed by members of SCANA's Board of Directors (the "Board") and certain officers. Specifically, the Action seeks to recover damages for breach of fiduciary duties, gross mismanagement, and unjust enrichment perpetrated by the officers and directors of SCANA in connection with the Nuclear Project. The Action asserts that Defendants mismanaged the Nuclear Project and proceeded to systematically mislead the investing public to conceal the myriad problems surrounding the construction and financing of the project. As a direct and proximate result of their misdeeds, SCANA's value and goodwill substantially suffered, the Company faced investigation by state and federal authorities, including the Securities and Exchange Commission, and substantial liability in multiple lawsuits in state and federal court.

ELECTRONICALLY FILED - 2019 Jun 21 12:42 PM - RICHLAND - COMMON PLEAS - CASE#2017CP400621
ELECTRONICALLY FILED - 2019 Jul 10 6:08 PM - RICHLAND - COMMON PLEAS - CASE#2017CP400621

On September 26, 2017, Crangle filed a derivative action on behalf of SCANA. Civil Action No. 2017-CP-40-05791 ("*Crangle* Action"). On October 30, 2017, Todd filed a derivative action on behalf of SCANA. Civil Action No. 2017-CP-40-06621 ("*Todd* Action").[2]

On January 3, 2018, SCANA announced that it had entered into a merger agreement whereby the Company would be acquired by Dominion using the exchange ratio of 0.669 of a share of Dominion stock per each share of SCANA stock. In a transparent bid to escape liability, Defendants negotiated and approved the sale of SCANA to Dominion for inadequate consideration at a time when SCANA's stock price was depressed as a result of their wrongdoing in connection with the failed Nuclear Project. The Individual Defendants negotiated an indemnification provision that goes so far as to protect them from liability related to criminal proceedings regarding the failed Nuclear Project.

On January 16, 2018, defendants moved to stay both the *Crangle* and *Todd* Actions in favor of certain related class action lawsuits, regulatory proceedings, and government investigations involving the Company. The Court denied these motions on March 2, 2018.

On September 6, 2018, the Court denied the Individual Defendants' motions to dismiss pursuant to Rule 12(b)(6) and Rule 23(b)(1), finding, *inter alia*, the allegations in both the *Crangle* and *Todd* Actions were "sufficient to make the required threshold showing of a substantial likelihood of personal director liability and, consequentially, to show a reasonable doubt that the board could have responded to demand with the exercise of independent and disinterested business judgment, thus excusing demand . . . . The Court concludes Plaintiffs' allegations create a

[2] On December 13, 2017, plaintiff Firemen's Retirement System of St. Louis filed a derivative complaint on behalf of SCANA captioned. Civil Action No. 2017-CP-40-07547 (the "*Firemen's* Action"). On February 21, 2018, the *Firemen's* Action was removed to federal court and has since been voluntarily dismissed.

ELECTRONICALLY FILED - 2019 Jun 21 12:42 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621
ELECTRONICALLY FILED - 2019 Jul 10 6:08 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621

reasonable doubt that a majority of SCANA's board of directors are disinterested and independent or that their decisions relating to the V.C. Summer project were products of a valid exercise of business judgment." The cases were consolidated under the *Crangle* caption on September 18, 2018, and the undersigned counsel was appointed Co-Lead Counsel of the Consolidated Action.

A hearing was held on December 6, 2018 regarding Defendants' motions to dismiss pursuant to Rule 12(b)(8), and on December 21, 2018, the Court asked plaintiffs' counsel to prepare a formal order denying the Rule 12(b)(8) motion.

On January 1, 2019, the Merger was consummated.

On January 7, 2019, the Individual Defendants moved for judgment on the pleadings. Plaintiffs informed the Court on February 8, 2019 that they intended to oppose the Motion.

On February 20, 2019, Crangle and Defendants filed a Stipulation of Dismissal of Plaintiff Crangle Without Prejudice, thereby terminating the *Crangle* Action (the "Stipulation"). As noted in the Stipulation, the *Todd* Action has not been terminated. *See Sarvghad v. Sitton Buick Co.*, 312 S.C. 429, 430, 440 S.E.2d 894, 895 (Ct. App. 1994) ("The actions, despite their consolidation, retained their separate identities."); *see also* note to Rule 42(a) SCRCP ("The parties and pleadings are not merged, and each action retains its own identity[.]").

Subsequently, plaintiff Todd informed counsel that he had sold his shares of SCANA prior to the Merger closing. Accordingly, Parler filed her Motion to Intervene on May 6, 2019, and she now opposes Defendants' Motion.

On May 22, 2019, the parties entered into a briefing schedule that consolidated the briefing for Parler's Opposition to Defendants' Motion to Dismiss and Parler's Response to Defendants' Opposition to Parler's Motion to Intervene.

ELECTRONICALLY FILED - 2019 Jun 21 12:42 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621
ELECTRONICALLY FILED - 2019 Jul 10 6:08 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621

III. ARGUMENT

"[A] judgment on the pleadings is considered to be a drastic procedure by our courts." *United Educ. Distribs., L.L.C. v. Educ. Testing Serv.*, 350 S.C. 7, 13, 564 S.E.2d 324, 328 (Ct. App. 2002) (quoting *Russell v. Columbia*, 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991)). A Rule 12(c) motion tests only the sufficiency of the complaint and does not resolve the merits of a plaintiff's claims or any factual disputes. *Massey v. Ojaniit*, 759 F.3d 343, 353 (4th Cir. 2014); *U.S. Bank Nat'l Ass'n v. Burr*, No. 2015-UP-091, 2015 S.C. App. Unpub. LEXIS 104, at *2 (Ct. App. Feb. 25, 2015) ("If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56") (quoting *Brown v. James*, 389 S.C. 41, 47 n.5, 697 S.E.2d 604, 607 n.5 (Ct. App. 2010)). While "[o]n review of the motion, the court may not consider matters outside the pleadings," *Falk v. Sadler*, 341 S.C. 281, 287, 533 S.E.2d 350, 353 (Ct. App. 2000), here, Parler does not dispute that her shares of SCANA stock were converted to shares of Dominion upon completion of the Merger.

A. South Carolina Is Not Bound By Delaware Law

South Carolina courts do not blindly follow Delaware corporate law. Indeed, South Carolina courts have explicitly declined to apply Delaware law where the result of such application would be "too restrictive" or "harsh." *See Whittle*, 343 S.C. at 191-92, 539 S.E.2d at 411 (declining to adopt the Delaware rule "that once a demand is made, the concept of demand futility is no longer applicable…because such a bright-line rule has no logical basis"). It would be difficult to imagine a more restrictive or harsh result for this Action, where (i) this Court has sustained Plaintiffs' claims for relief against Defendants in their entirety; (ii) this Court held that despite heightened pleading standards, pre-suit demand on SCANA's Board would have been futile; and (iii) where Plaintiffs have obtained documentary evidence corroborating their allegations and directly

implicating Defendants in the largest corporate disaster in South Carolina's history than one where Defendants are permitted to walk away and escape liability because of the Merger.

Delaware's strict interpretation of the continuous ownership rule in the event of a merger, as adopted elsewhere, provides no flexibility for a court to ensure that dishonest corporate fiduciaries are held accountable or that there is a just or equitable outcome of derivative litigation. Indeed, even the Delaware courts have acknowledged the harshness of the rule. In *In re El Paso Pipeline, L.P. Derivative Litigation*, 132 A.3d 67 (Del. Ch. 2015), after a trial in which plaintiffs secured a $171 million liability award for claims that were originally brought as derivative, a merger was effectuated that defendants argued stripped plaintiffs of standing. As the Chancery Court observed:

> Granting the motion to dismiss would generate a windfall for the General Partner at the expense of the unaffiliated limited partners for whose indirect benefit this suit originally was brought. Kinder Morgan, El Paso Parent, El Paso MLP, and the General Partner disclosed in the proxy statement issued in connection with the Merger that the consideration paid for the common units did not attribute any value to this litigation. Assuming for purposes of analysis that the consideration fairly valued El Paso MLP's operating business, it did not provide any value for the non-operating asset that the Liability Award represented. If the General Partner is correct about how the law operates, then the limited partners never will receive any benefit from the Liability Award, and the General Partner will evade accountability for breaching the LP Agreement.

Id. at 74-75, *overruled by El Paso Pipeline GP Co., L.L.C. v. Brinckerhoff*, 152 A.3d 1248, 1251 (Del. 2016). The Chancery Court continued:

> Under the General Partner's view of the world, it does not matter that Brinckerhoff proved at trial that the General Partner breached its contractual obligations under the LP Agreement. Nor does it matter that by breaching the LP Agreement, the General Partner shortchanged the Partnership by $171 million and conferred an unwarranted benefit on El Paso Parent in the same amount. It also does not matter that the Merger attributed no value to that claim. Brinckerhoff and the other unaffiliated limited partners in El Paso MLP are out of luck. Because a related-party merger closed before a final judgment could be entered and enforced, the General Partner owes nothing and the unaffiliated limited partners get nothing.

ELECTRONICALLY FILED - 2019 Jun 21 12:42 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621
ELECTRONICALLY FILED - 2019 Jul 10 6:08 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621

Id. at 81-82. On appeal, the Delaware Supreme Court reversed the Chancery Court's decision that the plaintiff maintained standing to pursue his derivative claims following the merger based on the continuous ownership rule but noted, "In this troubling case, we reverse." *El Paso Pipeline GP Co., L.L.C. v. Brinckerhoff*, 152 A.3d 1248, 1251 (Del. 2016). Fortunately, per *Whittle*, this Court need not so constrain itself and can reject any aspect of Delaware law that it deems too inflexible or harsh.

B. South Carolina Law Is Silent On The "Continuous Ownership Rule"

Contrary to Defendants' assertions, South Carolina law is silent as to whether a derivative plaintiff loses standing to prosecute claims against corporate fiduciaries where the subject corporation merges with another company during the pendency of the derivative action. Despite ample opportunity to do so, the South Carolina legislature has not elected to impose a continuous ownership requirement for shareholder derivative actions in S.C. Code § 33-7-400.

North Carolina, for example, has expressly declined the request to read such a requirement into their analogous statute:

> Defendants' argument assumes that a plaintiff who has filed suit pursuant to this statute is required to retain his shares throughout the course of litigation. However, there is no requirement in N.C.G.S. § 55–55 that a shareholder bringing suit remain a share owner "after" the time of the transaction complained about or "after" suit was filed. Reading this statute in a reasonable light and giving it an ordinary meaning, we find there is no requirement of continuing share ownership in order for an individual who is a shareholder at the time of the transaction about which he is complaining and at the time the action is filed, to proceed with a derivative action. Had the legislature intended to include such a requirement in the corporate statutes it would have done so. . . . This Court declines defendants' invitation to engraft a continuous share ownership requirement onto the statute.

Alford v. Shaw, 327 N.C. 526, 534–35, 398 S.E.2d 445, 449 (1990) (internal citations and footnotes omitted). Nevertheless, Defendants ask this Court to follow – or more accurately, create – a rule by which their liability would be effectively extinguished by the Merger, creating a perverse

ELECTRONICALLY FILED - 2019 Jun 21 12:42 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621
ELECTRONICALLY FILED - 2019 Jul 10 6:08 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621

ELECTRONICALLY FILED - 2019 Jun 21 12:42 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621
ELECTRONICALLY FILED - 2019 Jul 10 6:08 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621

incentive for directors and senior executives of South Carolina corporations to "sell off" their liability, rather than be made to answer for their breaches of fiduciary duty and other misconduct.

Defendants principally rely on *Johnson v. Baldwin*, 221 S.C. 141 (1952) to persuade this Court that South Carolina should adopt Delaware's strict continuous ownership rule. But the sixty-seven-year-old *Johnson* decision hardly represents the "black letter law" with respect to standing of derivative plaintiffs that Defendants argue it does. In *Johnson*, the derivative plaintiff submitted an irrevocable demand for the payment of her shares when the company at issue merged. *Id*. at 147. It was because of this affirmative demand for payment by the plaintiff that the Court noted: "she was bound by her election and may not now withdraw her demand and restore her status as a stockholder." *Id*. at 156. The Court reasoned that the plaintiff forfeited her standing to maintain derivative claims because she "made her demand [for payment of her shares] with full knowledge of the facts and under our statute plaintiff ceased to be a stockholder when she made her demand." *Id*. at 158. *Johnson* stands solely for the unremarkable proposition that when a shareholder derivative plaintiff affirmatively takes steps to dispose of their shares and ceases to be a shareholder, that plaintiff can no longer maintain a derivative suit, as noted by Parler in her Motion to Intervene. This distinction, between affirmatively disposing of one's shares and losing ownership through a merger, should be honored here.

North Carolina recognizes the distinction between the loss of share ownership as a result of a plaintiff's own affirmative decisions, on the one hand – such as electing to sell their shares of stock during the pendency of the derivative litigation – and that decision being thrust upon the shareholder by corporate insiders, on the other. As the North Carolina Supreme Court observed, exceptions to the continuous ownership rule are necessary:

> Moreover, although many jurisdictions do require plaintiffs who initiated a derivative suit to maintain continuous share ownership during the course of

> litigation, an exception to this general rule allows shareholders who initiate a derivative suit to retain standing when their share ownership is terminated through an allegedly fraudulent merger ***or one occurring as a result of breaches of fiduciary duties by those in control of the corporation***.

Alford, 327 N.C. at 535 (emphasis added).

Other states, such as Kansas, do not even recognize a distinction based on whether a shareholder voluntarily disposed of their shares of the corporation (as in *Johnson*) or were stripped of those shares as a result of a merger – they simply do not follow the continuous ownership rule at all. *See Smith v. Roger Smith & Sons, Inc.*, 277 P.3d 1193 (Kan. Ct. App. 2012); *White v. Barbieri*, 284 P.3d 375, at *11 (Kan. Ct. App. 2012) (observing that in *Smith*, the "court held that K.S.A. 60-223a allows a shareholder's derivative action to continue after the shareholder loses his or her ownership interest").

Defendants' other lead case is an unpublished decision applying Nevada law, not South Carolina law, and they rely purely on dicta in support of their effort to terminate the Action. In *In The Estate of Jacquelin K. Stevenson v. Kavanaugh*, No. 08-CP-10-1735, 2013 WL 673728 (S.C.Com.Pl. Jan. 17, 2013) the Court held, notably without citing *Johnson*, that Nevada follows Delaware's strict interpretation of the continuous ownership rule and opined in *dicta* that "to the extent that South Carolina law is relevant to the question" – which it was not – South Carolina would follow suit. *Id.* This dicta has no precedential value and is by no means controlling.

C. This Court Should Adopt A Modified Continuous Ownership Rule

Neither the South Carolina legislature nor its Courts have adopted a rule which directly addresses the situation currently before the Court. Absent such guidance, the Court is free to fashion a rule which rejects Delaware's harsh outcome. In similar circumstances, other states have elected to forego a strict application of the continuous ownership rule when the plaintiff-

ELECTRONICALLY FILED - 2019 Jun 21 12:42 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621
ELECTRONICALLY FILED - 2019 Jul 10 6:08 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621

ELECTRONICALLY FILED - 2019 Jun 21 12:42 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621
ELECTRONICALLY FILED - 2019 Jul 10 6:08 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621

shareholder is stripped of their shares in the subject corporation as a result of a merger. In addressing the potential application of this rule in Alabama, the Alabama Supreme Court opined:

> The defendants, however, would have this Court take this proposition one step further and apply the rule to these plaintiffs, who are now non-stockholders of Lexington because of its merger with Colonial. We decline to so hold. To so extend the rule is to materially change the rule and thus to violate one of the most basic tenets of jurisprudence: that lack of standing should not be applied to *abolish* an existing substantive right of action. Such a rule would allow an otherwise valid and actionable derivative suit against an officer of the corporation to be abated simply by effecting a merger with another corporation, as if the mere act of merger wipes out the alleged culpable conduct.

Shelton v. Thompson, 544 So. 2d 845, 848 (Ala. 1989) (emphasis in original). In response to the argument that other states, including Delaware, would reach the opposite conclusion, the Alabama Supreme Court incisively stated that those states "[b]y their blind adherence to the absolutism of the 'stockholder status' prerequisite . . . use 'lack of standing' to abolish the remedy. We refuse to adopt such a rule." *Id*. at 849.

Pennsylvania also does not permit the termination of a shareholder derivative suit as a result of a merger. In *Drain v. Covenant Life Ins. Co.*, 454 Pa. Super. 143, 151, 685 A.2d 119, 126-127 (1996), *aff'd*, 551 Pa. 570, 712 A.2d 273 (1998) the court held that where a shareholder plaintiff is divested of their shares during the pendency of litigation, that shareholder nonetheless retains standing to pursue their derivative claims. *See also Warden v. McLelland*, 288 F.3d 105, 111 (3d Cir. 2002) (the continuous ownership rule may be excused where "the failure to do so is the result of corporate action in which the holder did not acquiesce, and . . . the derivative action was commenced prior to the corporate action terminating the holder's status") (internal citations omitted).

As the Southern District of New York noted:

> [T]he shareholder's derivative action is usually considered to be an action in equity. It would appear to me that a grossly inequitable decision would be reached if I were to hold that a merged corporation and/or its shareholders are barred from suing

ELECTRONICALLY FILED - 2019 Jun 21 12:42 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621
ELECTRONICALLY FILED - 2019 Jul 10 6:08 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621

> where the very merger itself took place because of the allegedly wrongful activities of the directors of the old corporation and the management of the surviving corporation among others. To hold that the surviving corporation inherits a derivative right of action where said corporation has wrongfully taken part in the very acts complained of would be to reach an incongruous and highly inequitable result.

Miller v. Steinbach, 268 F. Supp. 255, 267 (S.D.N.Y. 1967) (citations omitted).

Defendants cannot credibly divorce their egregious misconduct giving rise to this Action, which led to the abandonment of the $9 billion Nuclear Project and massive damages to the Company, from the Merger made necessary by their own actions. As alleged with particularity in the Action, Defendants knew the Nuclear Project was doomed long before it was ever publicly acknowledged. Those same Defendants should not be permitted to sidestep shareholders' meritorious and zealous efforts to hold them accountable for the severe harm they caused SCANA because of their decision to sell the Company at a discount, a step which was only made necessary because of their own actions and abject fiduciary failures.

Public policy and equity should inform this Court's decision as to whether the Action proceeds post-Merger. As noted, the Proposed Intervenor agrees that a shareholder of a South Carolina corporation who voluntarily relinquishes their share ownership during the pendency of a derivative action should not be permitted to maintain that action. This is the precise reason the Motion to Intervene is necessary – because plaintiff Todd sold his SCANA stock prior to the Merger. But, when the very same individual defendants who have had claims for breaches of fiduciary duty sustained against them set into motion the mechanism by which all shareholders will be stripped of their status as shareholders, to terminate a meritorious derivative action is a quintessential example of the "restrictive" and "harsh" result the South Carolina Supreme Court strongly warned against in *Whittle* when instructing South Carolina courts to not blindly follow every aspect of Delaware corporate law. This Court would not be alone in ruling as such:

> Under these facts, even were continuous ownership a requirement under the statute, we hold that if in the course of a shareholder derivative suit defendants' actions terminate the plaintiffs' shareholder status and these actions are closely related to the grounds for the derivative suit, the plaintiffs would retain standing to continue prosecution of the suit they initiated. To hold otherwise, that is to hold that a merged corporation or its shareholders loses standing to sue in a situation in which the allegedly wrongful activities of the defendants forced the plaintiffs to lose their status as shareholders, would be highly inequitable.

Alford, 327 N.C. at 538.

It is hard to imagine that the intent of the South Carolina legislature was to allow for the possibility that a shareholder of a South Carolina corporation would initiate a derivative action, defeat motions to dismiss based on Rule 12(b)(6), 12(b)(8), and the heightened pleading standard of Rule 23.1, and review thousands of pages of documents obtained via a FOIA request corroborating the allegations asserted against the defendants, and incur significant costs in a zealous effort to prosecute the sustained claims, only to see the derivative action evaporate following a merger. Plaintiffs Todd and Crangle actively and aggressively litigated eminently meritorious derivative claims for over a year prior to the consummation of the Merger, and despite Defendants' regular attempts to dismiss the Action or slow its pace, Parler has the right to see the Action through to its conclusion and ensure that Defendants are held to account for the grave breaches of fiduciary duty that enabled the Nuclear Project to completely unravel and decimate the value of SCANA.

D. Parler's Motion to Intervene Should be Granted

1. Parler Has Standing to Pursue Derivative Claims

As discussed *supra*, the Court's equitable powers allow for adoption of a modified continuous ownership rule. Where, as here, a shareholder is divested of their ownership through a merger announced and consummated after the initiation of a derivative action which specifically indemnifies the defendants in the derivative action for their wrongdoing, not only should the cause

ELECTRONICALLY FILED - 2019 Jun 21 12:42 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621
ELECTRONICALLY FILED - 2019 Jul 10 6:08 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621

of action survive, but the shareholder should be permitted to retain standing to continue pursuit of the meritorious derivative claims.

2. Parler's Interests are not Adequately Protected by Federal Litigation

Defendants' argument that Parler's derivative interests are already protected by a parallel proceeding in federal court is yet another attempt to dispose of this action and escape liability. Defendants moved for judgment on the pleadings in the federal action on the same day they did so in this Court and that motion is fully briefed. If intervention is denied in favor of the federal action and that action is dismissed, Parler is left with no recourse, despite that both the *Crangle* and *Todd* Actions were filed before the federal derivative action, which notably asserts only state law claims. As noted, this Court has already denied Defendants' motion to dismiss pursuant to Rule 12(b)(8), and South Carolina state court continues to be the proper forum to adjudicate these derivative claims.

The federal cases Defendants cite are inapposite. For example, in *In re Bank of New York Derivative Litigation*, the motion to intervene was ultimately denied as untimely because the lawsuit had been pending for over two years with improper plaintiffs, *i.e.*, plaintiffs who were not shareholders at the time of the wrongdoing complained of. 173 F. Supp. 2d 193, 201 (S.D.N.Y. 2001) ("Finally, the unusual circumstances of this case militate against a finding of timeliness. All that transpired when the Kaliskis were the only plaintiffs is now rendered suspect because they were not proper plaintiffs. The addition of Drucker now -- two years after the fact -- will not eliminate those concerns."). Here, both Todd and Crangle were proper plaintiffs; Todd, specifically, owned SCANA stock continuously since 1999, long before the wrongdoing occurred. Similarly, Parler continuously owned SCANA stock from 2000 until the Merger divested her of her ownership. The *In re Bank of New York* Court ultimately dismissed the action, finding that no

ELECTRONICALLY FILED - 2019 Jun 21 12:42 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621
ELECTRONICALLY FILED - 2019 Jul 10 6:08 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621

prejudice would occur because of parallel proceedings in *state court* that had been filed *prior* to the federal action. *Id.* at 196-97, 200.

Similarly, in *Stadnicki v. Laplanche*, the court ultimately denied the motion to intervene on the grounds that it was untimely. No. C 16-03072 WHA, 2018 U.S. Dist. LEXIS 147572, at *11, 14-15 (N.D. Cal. Aug. 29, 2018). The proposed intervenor faced a statute of limitations defense in his case, so, to avoid dismissal, sought to intervene in an earlier case that had been erroneously dismissed. *Id.* at *6. There were parallel proceedings in Delaware state court asserting solely state law claims that been commenced nearly a year before the proposed intervenor filed his complaint, and the plaintiffs in that action had already received books and records from the company. *Id.* at *3-5. So while both the federal cases Defendants cite were deferential to parallel state court cases that had been filed before the federal derivative actions, here too both the *Crangle* Action (September 26, 2017) and *Todd* Action (October 30, 2017) assert only state law claims and were filed in state court before the complaints in the now consolidated federal derivative action, which were filed on November 20 and 21, 2017.

It is within the Court's discretion to allow intervention where, as here, the Proposed Intervenor and the plaintiff she seeks to replace are both proper plaintiffs, the litigation has proceeded for over a year despite Defendants' efforts to delay and dispose of the Action, and the Court has already determined not to dismiss this Action in favor of the federal derivative action (which may be dismissed imminently).

ELECTRONICALLY FILED - 2019 Jun 21 12:42 PM - RICHLAND - COMMON PLEAS - CASE#2017CP400621
ELECTRONICALLY FILED - 2019 Jul 10 6:08 PM - RICHLAND - COMMON PLEAS - CASE#2017CP400621

IV. CONCLUSION

For the foregoing reasons, Defendants' Motion for Judgment on the Pleadings should be denied and Proposed Intervenor's Motion to Intervene should be granted.

Dated: June 21, 2019

Respectfully submitted,

CHAPPELL SMITH & ARDEN, P.A.

*/s/ Mark D. Chappell*____

Mark D. Chappell
Graham L. Newman
2801 Devine Street, Suite 300
Columbia, SC 29205
Tel: 803-929-3600
Fax: 803-929-3604
mchappell@@csa-law.com
gnewman@csa-law.com

BRAGAR EAGEL & SQUIRE, P.C.
Lawrence P. Eagel
Melissa A. Fortunato
885 Third Avenue, Suite 3040
New York, New York 10022
Tel: 212-308-5858
Fax: 212-486-0462
eagel@bespc.com
fortunato@bespc.com

Counsel for Proposed Intervenor Teresa Parler

ELECTRONICALLY FILED - 2019 Jun 21 12:42 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621
ELECTRONICALLY FILED - 2019 Jul 10 6:08 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621

RICHARDSON PLOWDEN ROBINSON, P.A.
ATTORNEYS AT LAW

COLUMBIA P.O. Drawer 7788 • Columbia, SC 29202
1900 Barnwell St., Columbia, SC 29201 P 803.771.4400 F 803.779.0016

MYRTLE BEACH P.O. Box 3646 • Myrtle Beach, SC 29578
2103 Farlow St., Myrtle Beach, SC 29577 P 843.448.1008 F 843.448.1533

CHARLESTON P.O. Box 21203 • Charleston, SC 29413
235 Magrath Darby Blvd., Suite 100, Mt. Pleasant, SC 29464 P 843.805.6550 F 843.805.6599

www.RichardsonPlowden.com

REPLY TO: Columbia
E-Mail: spugh@richardsonplowden.com
Direct Dial: (803) 576-3721

ELECTRONICALLY FILED - 2019 Sep 03 7:51 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621

September 3, 2019

VIA E-MAIL AND E-FILING
The Honorable J. Mark Hayes, II
Spartanburg County Judicial Center
180 Magnolia Street
Spartanburg, South Carolina 39306

RE: *R. Wayne Todd, Derivatively on Behalf of SCANA Corp. v. Kevin Marsh, et al.*
Civil Action No. 2017-CP-40-06621
Our File No. 3637-066

Dear Judge Hayes:

On behalf of Nominal Defendant SCANA Corporation ("SCANA"), this letter is to update you on the dismissal of *In re: SCANA Corporation Derivative Litigation*, 3:17-cv-03166-MBS (D.S.C.) (the "Federal Derivative Action"), which is relevant to the above-captioned action pending before you (the "State Derivative Action").

Earlier today, Judge Seymour granted the defendants' Motion for Judgment on the Pleadings, holding that the plaintiffs had no standing to maintain a shareholder derivative action after the merger of SCANA with Dominion Energy, Inc. because the plaintiffs were no longer SCANA shareholders. A copy of Judge Seymour's Order and Judgment are attached, with hard copies to follow by mail.

As you are aware, a similar Motion for Judgment on the Pleadings (the "Motion"), based on the same lack of derivative standing, is pending in the State Derivative Action before you. A hearing on that Motion is scheduled for October 25, 2019. SCANA believes that Judge Seymour's Order will assist your review of the parties' arguments, which are nearly identical to those made in the Federal Derivative Action.

Should you have any questions or comments, or need any additional information, please feel free to contact counsel for the parties. Thank you, again, for your consideration and assistance.

Respectfully Submitted,



Steven J. Pugh

SJP:cam
Attachments

cc: Michael R. Smith, Esquire (via e-mail, w/ attach.)
David L. Balser, Esquire (via e-mail, w/ attach.)
Brandon Keel, Esquire (via e-mail, w/ attach.)
Lisa R. Bugni, Esquire (via e-mail, w/ attach.)
I.S. Leevy Johnson, Esquire (via e-mail, w/ attach.)
George C. Johnson, Esquire (via e-mail, w/ attach.)
Brian E. Pumphrey, Esquire (via e-mail, w/ attach.)
Brian D. Schmalzbach, Esquire (via e-mail, w/ attach.)
John R. Bielema, Esquire (via e-mail, w/ attach.)
Michael P. Carey, Esquire (via e-mail, w/ attach.)
Barbara A. Smith, Esquire (via e-mail, w/ attach.)
William “Bill” A. Coates, Esquire (via e-mail, w/ attach.)
Anne M. Tompkins, Esquire (via e-mail, w/ attach.)
Kyle DeYoung, Esquire (via e-mail, w/ attach.)
Jonathan Watkins, Esquire (via e-mail, w/ attach.)
John A. Jordak, Jr., Esquire (via e-mail, w/ attach.)
William R. Mitchelson, Jr., Esquire (via e-mail, w/ attach.)
Meredith J. Kingsley, Esquire (via e-mail, w/ attach.)
James F. Wyatt, III, Esquire (via e-mail, w/ attach.)
Robert Blake, Esquire (via e-mail, w/ attach.)
Graham Newman, Esquire (via e-mail, w/ attach.)
Lawrence P. Eagel, Esquire (via e-mail, w/ attach.)
Melissa A. Fortunato, Esquire (via e-mail, w/ attach.)

ELECTRONICALLY FILED - 2019 Sep 03 7:51 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621

STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	)	2017-CP-40-06621
	)	
	)	
	)	
	)	
	)	
R. WAYNE TODD, DERIVATIVELY	)	
ON BEHALF OF SCANA CORP.,	)	
PLAINTIFF,	)	
	)	
vs.	)	TRANSCRIPT OF RECORD
	)	
KEVIN MARSH, ET AL.,	)	
DEFENDANTS.	)	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:

LAWRENCE EAGEL, ESQ.
MARK D. CHAPPELL, JR., ESQ.
Attorneys for the Plaintiff

BRIAN D. SCHMALZBACH, ESQ.
Attorney for the Defendants

HOLLIE M. JENKINS
Circuit Court Reporter

I N D E X

(There were no witnesses called.)

E X H I B I T S

(There were no exhibits introduced.)

P R O C E E D I N G S

THE COURT: Good morning. Thank y'all all for joining us today.

If you would -- we have a court reporter that had to come in. And so if you would, announce yourselves on the record before you speak to help her out. She does have everybody's name, but that will be assured that we can make a good record of this.

I've got that we're here on two motions. One is a motion to dismiss, one is a motion to intervene. I would prefer to hear the motion to intervene first and then we'll take up the motion to dismiss.

So if that's agreeable to everybody, I'll receive the arguments.

MR. EAGEL: Good morning, Your Honor.

Lawrence Eagel --

THE COURT: How's your leg?

MR. EAGEL: It's better.

Thank you.

A lot better. I was able to fly. You know, my leg's okay. But I was able to fly. And I appreciate -- I want to, again, extend my thanks to the Court for -- it was really about this idea of I could get a -- supposedly get a blood clot if you fly too early after surgery.

THE COURT: That's not a good idea.

MR. EAGEL: No. So I was told not to do it. But I'm here and the leg is getting a lot better.

Thank you. I appreciate it.

THE COURT: All right. Yes, sir.

MR. EAGEL: Okay. The motion to intervene is based upon the fact that the original Plaintiff in the case, Wayne Todd, had sold his shares prior to the SCANA-Dominion merger. Consequently, Ms. Parler, who's been a shareholder since 2000 -- in fact, I believe her father worked for SCANA back in the day. But she's been a SCANA shareholder since 2000. She had approached us about the case. And she's sought to intervene in the case.

She is -- has submitted an affidavit saying she's prepared to fill responsibilities as a representative Plaintiff. She's continuously held her shares since 2000 until her shares were exchanged in the merger. She owns 2,402 shares.

And she asserts an interest in the property that is the subject of the action, namely the derivative action. This is a derivative action. She's trying -- stepping into the shoes of the prior Plaintiff. She's demonstrated that without intervention, the action may not be able to proceed. There would not be a representative Plaintiff in this derivative action.

And she's demonstrated through interest her

adequate -- are not adequately protected by other parties. At this juncture, she'd be the only -- this is the only derivative claim pending. And previously, the Court has concluded -- the Court had previously ruled on a 12(b)(8) motion that -- that this case was not the same as the district court case. And so she would then be -- step into the shoes as the derivative Plaintiff.

All of this sort of begs the question concerning the merger and concerning the effect of the merger. But we're seeking to move to intervene and continue the -- the case. I think that the -- you know, it's sort of a chicken and egg as to whether or not she, like every other SCANA shareholder, was cashed out in the merger.

So to the extent that she no longer has an interest in the property as a result of the merger, if the Court rules on the -- on the standing argument, then I think that effectively resolves the -- the intervention just -- just the same. Because if -- if the current Plaintiff Todd doesn't have it and she doesn't have it, that would be the same thing.

So that's -- that's largely the argument on the motion to intervene.

MR. SCHMALZBACH: Your Honor.

THE COURT: Yes, sir.

MR. SCHMALZBACH: Good morning, Your Honor.

I'm Brian Schmalzbach speaking for SCANA Corporation. And I'll be speaking today on behalf of all the Defendants.

Our argument against intervention was based on the fact that, at the time, there was a duplicative derivative lawsuit pending in federal court. That's not the case any more. Because Judge Seymour has addressed the exact same arguments that we were making here on the motion for judgment on the pleadings. And so she agreed with us on the standing issue and held that those federal derivative Plaintiffs have no standing.

And so I think -- rather than address the -- the motion to intervene, I think it -- it might be a good use of time to go straight to the motion for judgment on the pleadings. Because that's the real live issue that's presented today.

THE COURT: I mean, it -- he may be right. It may be the chicken versus the egg as to which comes fist. I just thought that it would logically be cleaner for me to understand it if we address the motion to intervene first, so. But it -- you may be right. It probably does [inaudible].

MR. SCHMALZBACH: Certainly. So I'll address the -- the derivative standing issue.

And so we're asking you to dismiss, to grant that

motion for judgment on the pleadings for the exact same reasons that Judge Seymour dismissed this case as federal derivative 20. That reason is that the Plaintiff is not a SCANA shareholder. And that fact is dispositive because of what a derivative action is.

We -- we like the Plaintiff's definition of a derivative action. This is on Page 3 of the motion to intervene. They said, A derivative claim belongs to the corporation, not to the shareholder Plaintiff who brings the action. The shareholder Plaintiff's interest is limited to compelling the corporation by standing in its shoes to assert the corporation's right to seek redress for the alleged wrongdoing. And so what's key is that any recovery on a derivative claim belongs solely to the corporation, not to the shareholder Plaintiff.

So that takes us to the black letter South Carolina law that resolves this case. And that's that you have to be a current shareholder to maintain a shareholder derivative lawsuit. That's called the continuous ownership rule.

And the South Carolina Supreme Court adopted that as the law of the land in a case called Johnson v. Baldwin. But once the merger between SCANA and Dominion closed, Plaintiff -- Ms. Parler was not a SCANA shareholder anymore. And so she could not stand in SCANA's shoes.

That's why Judge Seymour held after reading the same arguments that Ms. Parler presented to you, that, "Pursuant to the continuous ownership rule articulated in Johnson, Plaintiffs no longer possess standing to pursue a derivative action against SCANA." Judge Seymour was exactly right there. Johnson was and is the controlling law. And so this derivative action should be dismissed.

So I'll focus on Johnson because that's the case that Judge Seymour focused on because it controls this case. My colleagues on the other side didn't address the actual language of Johnson's holding. But Judge Seymour saw that that holding is worth a very careful read because it so clearly answers the question in this case.

This is what Johnson said, The right of a stockholder to maintain a derivative action does not exist apart from ownership of corporate stock. And it went on. The right of the Plaintiff to continue to prosecute this action depends upon her retaining her status as a stockholder. And if she ceased to be a stockholder, the cause of action abated so far as she is concerned.

Now, this holding has nothing to do with why a Plaintiff ceases to be a shareholder. Johnson simply holds she cannot prosecute an action as a member of a class to which she does not belong.

THE COURT: So because there -- the corporation sold

itself out to Dominion?

MR. SCHMALZBACH: Because of the merger with Dominion. And as a result of that merger, all of her SCANA stock disappeared and became Dominion stock.

THE COURT: Any -- any importance in the decision that I would make whether or not Dominion intends to pursue the claims?

MR. SCHMALZBACH: No, Your Honor. Because as Judge Seymour said, it is Dominion's prerogative to decide what to do with the claims.

THE COURT: But I thought then that -- that the rules in South Carolina have a little bit of deviation to it, or a little bit of variation to it. That would be one of the -- one of the requirements is it would lead to a harsh or -- or unconscionable result. I might be using the wrong terminology.

Aren't there qualifiers to that rule?

MR. SCHMALZBACH: I think Your Honor's referring to the Whittle case.

THE COURT: Yes.

MR. SCHMALZBACH: Which is a Court of Appeals case, not a South Carolina Supreme Court decision. But that -- that's not announcing a rule of law. That's explaining why in the context of demand futility, I believe.

THE COURT: Say it one more time. I'm sorry.

MR. SCHMALZBACH: In the context of demand futility.

THE COURT: Okay.

MR. SCHMALZBACH: South Carolina was just not going to adopt the Delaware rule. We're -- we're not -- to be clear, we're not asking you to look to Delaware law here. All you need to look at is Johnson v. Baldwin, which is the case that Judge Seymour held resolves this case. And so because Ms. Parler is no longer a member of the class of SCANA shareholders, she cannot prosecute this action under South Carolina law.

Now, in the Plaintiff's brief, which is the same brief that the federal derivative Plaintiffs filed, she asked the Court not to apply South Carolina law. She asked the Court to apply the law that North Carolina or one of the tiny -- states that does not require continuous ownership. But since the South Carolina Supreme Court has already spoken to this issue in Johnson, that's the law that controls here.

And just to address why it makes sense to apply this continuous ownership rule. It's because current shareholders have these important features for a derivative lawsuit. They have the right to vote on corporate leadership. They receive the benefit of good corporate decision-making. And they bear the burden of bad corporate decision-making through their ownership

stake in corporate stock. So they're the ones who are going to be hurt.

But former shareholders, which is to say non-shareholders like Ms. Parler, they have no right to vote. And they may have no financial stake at all in the corporation's success. So common sense says that former shareholders who have no dog in the hunt shouldn't get to make fundamental decisions like deciding whether, when, and how to sue former officers and directors.

THE COURT: But -- but correct me if I'm not right. Isn't the party that's seeking to intervene no longer a shareholder because Dominion merged with SCANA?

And the reason that Dominion merged with SCANA, aren't the allegations is because that the prior shareholders board of directors, officers engaged in conduct that is outlined in the complaint to be the kind that costs millions and millions of dollars and, therefore, reduced the value of the shares?

MR. SCHMALZBACH: So two responses to that, Your Honor. First, if you read the proposed intervener complaint that was filed on May 6th, you don't see anything about the merger. The complaint is silent as to the merger. The word "merger" doesn't appear.

THE COURT: Okay. That might be fine. But my point is that if we're not going to allow them to intervene, we

don't even take a look at the intervening complaint. But we take a look at the reason for the merger.

MR. SCHMALZBACH: You could, Your Honor. But the -- the upshot of Johnson is that it doesn't matter why she's no longer a shareholder --

THE COURT: So it doesn't matter if someone held a gun to the present shareholders and said, you are going to sell this company or else we're going to destroy this company?

MR. SCHMALZBACH: So in that --

THE COURT: You're going to lose all shareholder value if you do not allow us to come in and buy you out.

MR. SCHMALZBACH: So in that case, the shareholders would have, I think, an excellent claim that they were coerced into the merger and the merger itself was invalid. And, in fact, Mr. Eagel has a lawsuit challenging the merger. He doesn't say the merger is invalid, as I understand it. He just says the merger should have gotten more money.

THE COURT: So there's an exception to your continuous ownership rule?

MR. SCHMALZBACH: No, Your Honor. The -- the only question is, do they remain a shareholder? In -- in the lawsuit that -- that you just described, the --

THE COURT: Well, I'm trying to describe the lawsuit

that I have read that has been filed with this Court.

MR. SCHMALZBACH: Right. So I think if you look at Johnson, that addresses a similar scenario where the Plaintiff filed for her appraisal rights and then tried to withdraw them.

THE COURT: Okay. And -- and I'm not -- and I'm trying to be argumentative only to the point that I'm trying to understand where you're coming from. Because the litigation that has been filed with this Court, the allegations, we have never even reached the point of determining the merits of these allegations yet.

We have -- this Court has dealt with motion after motion after motion, which are proper for this Court to deal with. But the allegations, this Court continues to look at as true.

MR. SCHMALZBACH: Yes, Your Honor. So --

THE COURT: And so these allegations are disturbing to this Court. And then you're now asking me to engage in another motion that's now going to say that these allegations to which this Court has not had the opportunity to make any determination of the merits of these allegations so, therefore, this Court can deem them as true, we're just going to turn our backs to them.

MR. SCHMALZBACH: So what we're asking you to do is to give the owner of the right to bring this lawsuit the

decision whether, when, and how to bring them.

THE COURT: And my question to you previously was, has Dominion started something to continue these claims?

MR. SCHMALZBACH: So Dominion has not filed for those claims at this time. Because Dominion has contractual indemnity obligations to those Plaintiffs.

Now --

THE COURT: And the Plaintiffs being?

MR. SCHMALZBACH: I'm sorry. Not to the Plaintiffs, to the individual Defendants.

THE COURT: The individual Defendants being the same people that allegedly did the things that are complained of in the complaints?

MR. SCHMALZBACH: That's right, Your Honor.

THE COURT: Okay. I think -- okay.

All right. Go ahead.

MR. SCHMALZBACH: All right. So I think what -- the exception that the Plaintiff is asking -- that Ms. Parler is asking you to read into South Carolina law is this idea that if you involuntarily lose your shares, then you get to remain on as a derivative Plaintiff. But that's not what Johnson says.

Johnson says that the right to maintain that derivative lawsuit depends on shareholder status. And if there's a loss of status, then there's no right to

maintain that lawsuit. And the cases that the Supreme Court addressed, discussed, and relied on in Johnson, I think they, actually, get at this issue.

So in the Heyman [phonetic] case, for example, you had a derivative lawsuit brought by some preferred stockholders. And the company retired those preferred shares. So as a result of the companies decision to call in those preferred shares, to cash them out, they were no longer shareholders. And Heyman held that that ended their derivative standing. And that's the case that Johnson's relying on.

So I don't think it makes any sense to say that Johnson has an exception for the involuntary loss of shares. Because Johnson relies on this case dealing with the involuntary loss of shares.

And I understand Plaintiff's concern, which was the same concern that the federal derivative Plaintiffs made in Judge Seymour's case, that the Court has to make up some new rule granting them derivative standing so that they can hold these directors and officers accountable. But that would be unnecessary and improper.

It's unnecessary because there are plenty of non-derivative lawsuits seeking to hold these directors and officers liable. There's a securities case in federal court. There are rate payer cases in state and federal

court. And there's Mr. Eagel's case addressing the merger with Dominion.

And, in fact, the merger case has nearly identical allegations as here, and says that the Defendants were required to get a higher price from Dominion so that the shareholders could be compensated for the value of these derivative claims.

Now, to be clear, we think that allegation is meritless here and in the merger case. But there's no need to make up a new derivative standing rule that's already been foreclosed by the South Carolina Supreme Court to litigate a question that's already been presented in another case.

THE COURT: Does it make any -- is it an issue whether or not Dominion is indemnifying all of the parties that are listed in the original complaint filed in this Court in those other litigations?

MR. SCHMALZBACH: I --

THE COURT: Do you see -- do you understand my question, or should I rephrase it?

MR. SCHMALZBACH: Could I ask for clarification?

THE COURT: You sure may. My question is, you raised the issue of indemnification. So is it proper in my consideration that Dominion in these other litigations that you say is a reason for not creating an exception to

the Johnson rule is -- and you say that there's this other litigations out there that have stemmed from this merger. 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 this Court? Is Dominion indemnifying these people in these other litigations?

MR. SCHMALZBACH: Yes, Your Honor. Dominion is indemnifying these Defendants in those cases I just described. And I think it would be helpful just to get down to brass tacks what the practical effect of allowing this lawsuit to continuance.

THE COURT: Okay.

MR. SCHMALZBACH: Because Dominion is going to be -- at this time, Dominion is responsible for paying the cost of defense of this lawsuit. And any recovery on this lawsuit is going to go to Dominion. Ms. Parler has no right to any recovery that, ultimately, comes from this lawsuit.

So Dominion would get the benefit of the lawsuit. Dominion will bear the burden of the lawsuit. And so that's why it should be Dominion's decision whether to bring it. Because if, as Dominion has said, so far with its decision not to pursue these claims on its own, that it doesn't expect to make money. In fact, it expects to

lose money from the costs of defending this lawsuit compared to the -- the unlikelihood of recovering a judgment. That's why the derivative standing rules say that a former shareholder shouldn't get to force Dominion to make a decision that Dominion has decided is bad for it.

THE COURT: Is there -- and, again, my question stems from your pointing out that one of the reasons justifying not creating an exception to Johnson is the fact that there are these other litigation matters that are out there to which these people might be held responsible for, but, yet, Dominion is now indemnifying these people. Is there a way absent a litigation that which Dominion is indemnifying these people that were the original parties to this lawsuit to which these parties would be held responsible?

MR. SCHMALZBACH: The -- the indemnification obligation, which is on Page 34 of the merger agreement, if you're interested, it -- it covers these current lawsuits that are pending at this time. I -- I can't say that there would be some hypothetical lawsuit that -- I can't identify a hypothetical lawsuit that wouldn't be covered by it.

THE COURT: Can I try again at the question and see if I can ask it more clearly?

All right. We have, again, litigation filed in this Court. I've reviewed the allegations. The allegations seem to be substantial, seem to be -- seems to be disturbing that some people that have been part of SC&G SCANA -- other corporations have engaged in some pretty bad conduct.

And that the prior shareholders brought an action trying to hold them responsible, make them culpable for their actions. And Dominion's come in and Dominion's acquired the corporation. Dominion announces, okay, we want you to dismiss all these lawsuits because these people no longer have standing because they're no longer shareholders.

Part of your argument is that there are other litigations taking place out there that justifies the dismissal of this litigation. I now know that Dominion is indemnifying these people that were the original parties to this law school -- lawsuit that was in front of this Court.

My question to you, is there a legal way that these people -- if the allegations that were contained in the complaint was true as filed with this Court to which this Court has yet to be able to have any input on the merits of those allegations, that if they are true, is there a way legally that these people will ever be held

responsible to which Dominion is not indemnifying these people?

MR. SCHMALZBACH: Yes, Your Honor.

THE COURT: How is that? Help me understand that.

MR. SCHMALZBACH: Because Dominion itself is -- the indemnification obligation is not absolute. South Carolina law limits the extent to which a company can indemnify its former officers and directors.

And so if -- if it is determined that South Carolina law allows Dominion or requires Dominion not to continue indemnifying them, at that point, then not only would the indemnification cease, but Dominion itself would have the right to institute its own lawsuit against them.

But the -- the important part is that the law leaves that up to Dominion. Because Dominion is going to bear the burden of making that decision, not Ms. Parler.

THE COURT: So all the cards are held by Dominion now with whether these people would ever be held responsible, accountable, culpable, liable?

MR. SCHMALZBACH: As -- as to the indemnification obligation that Dominion has, yes, that's a right that Dominion bargained for. And it gets to decide when -- if and when it's not going to use it.

THE COURT: And I -- and I ask my question not as being critical of the fact that Dominion has secured that

as a contractual provision in the process of negotiations and acquiring this corporation. I'm simply trying to understand it. Because they're asking me to, if I understand their position correctly, create an exception or to read into Johnson an exception.

You're saying there is not that exception. And one of the reasons there should not be that exception is because there is these other spinoff litigations to which these people -- these people being referred to as the prior shareholders, officers of this corporation engaged in these alleged pretty substantial acts in the complaint that's present before this Court that they're never going to be held responsible for that now possibly they could be held responsible for, except for the fact that Dominion is indemnifying these people.

MR. SCHMALZBACH: Just to be clear as to our position. There should be no exception because Johnson admits no exception. The holding in Johnson is very clear about derivative standing, and for good reasons. And we're -- these arguments about alternate ways in which the Defendants might be held liable, that's just in response to the Plaintiffs request to create an exception that's already disallowed by Johnson.

THE COURT: I think they would probably disagree with your reading of Johnson. But I -- but thank you for

pointing that out.

Yes, sir. Go ahead.

MR. SCHMALZBACH: All right. And so for these reasons, we think Judge Seymour, who read the same briefs and heard the same arguments about the exact same factual scenario, got this just right.

So we ask you to apply the holding of Johnson v. Baldwin and grant the motion for judgment on the pleadings.

THE COURT: All right.

MR. CHAPPELL: Thank you, Your Honor.

Mark Chappell here on behalf of the Plaintiffs in this action.

We're going to divide our arguments into two parts.

THE COURT: Well, they really like Judge Seymour's order.

MR. CHAPPELL: Yes, sir.

THE COURT: And I've read it. And it's pretty substantial in regards to the issues in this case.

MR. CHAPPELL: Your Honor, in this -- this slow walked derivative action, I'm going to go through some of the procedural histories. And Mr. Eagel will address some of the substantive issues of law.

I think Your Honor gets it absolutely correct about the indemnifications, all of this slow walking they'll

never be held responsible issue in this Court. It's -- it's -- the Court's aware, and I think you pointed out, this lawsuit was filed over two years ago on October 30th, 2017.

November 29th, 2017, the Defendants moved for an extension of time to answer. Five days later, they moved to dismiss the complaint. January, SCANA and Dominion announced a merger. January of 2018, they moved to stay this litigation pending a merger. March 5th, 2018, this Court denied the motion to stay. September 6th, 2018, this Court denied the motion to dismiss.

September 30th, over a year ago, we served discovery responses in this matter -- discovery requests in the matter, Your Honor. There's not been one deposition, not one interrogatory answered, not one piece of paper exchanged.

We're standing here today two -- over two years after the complaint was filed. As Your Honor said, there's been no determination, no evidence presented yet by the opposing side on the merits of this case.

They, finally, answered the -- the complaint in October of 2018. Then they moved for protection from the discovery by a 12(b)(8) -- (b)(8) motion, which this Court denied. The merger went through January of this year. January 7th, they moved for judgment on the pleadings

arguing lack of standing.

Subsequently, Ms. Parler moved to intervene after Mr. Todd sold his shares. They have slow walked this case for two years, Your Honor. They have the same -- to make the same arguments in all these other pending cases that they can't move forward.

At some point, the -- the board members of SCANA have to be held accountable. We feel like this is the appropriate location at this time with Ms. Parler's action to intervene. And this is a derivative action. And we will speak to the -- to the substantive stuff. And I can assure the Court that Mr. Eagel is more prepared on the legal side of that argument than I am.

So, Larry.

MR. EAGEL: Good morning, Your Honor.

I'll -- I'll address -- address the Johnson case because I think that's clearly where the -- where the Defendants seek reliance in. It is what -- it is what the district court relied on in dismissing the derivative case in the district court and --

THE COURT: You need to distinguish. I apologize for interrupting. You need to distinguish, though. I have read Judge Seymour's order. Judge Seymour's -- while I might have taken a position that this case is different than Judge Seymour's case. Judge Seymour's order is -- is

pretty thorough.

MR. EAGEL: Understood, Your Honor. And, look, you know, we are here. We are fighting hard for our clients. And -- and Counsel's correct, there are other direct claims, you know.

In fact, the Defendants have worked hard not to be before this Court. They've removed two of the cases into federal court. That -- ultimately, those two cases went up to the Fourth Circuit after -- after Judge Seymour ordered the remand back to this Court. It was, originally, filed in this Court. There was -- they -- they ultimately -- Judge Seymour ordered remand. They went up to the Fourth Circuit.

THE COURT: I don't take it personal that they don't want to be here.

MR. EAGEL: Well, I'm just -- I'm just saying they are direct claims, though. And there is a -- this is a derivative claim. And -- and we have not -- the direct claims have been asserted in -- in those cases. And there is a third case -- another case that was filed in this Court. They removed that case. That case is subject to a motion to remand. Those are direct claims. These are -- this is a derivative case. Counsel is correct about that.

And it is -- it -- where I would distinguish Judge Seymour's decision is the fact that I think Judge Seymour

over reads what I would consider dicta in Johnson in that in Johnson, interestingly enough, there were two issues in Johnson. One issue was -- was the fact that the Plaintiff in -- in Johnson was the fact that the Plaintiff had elected to sell his shares since the appraisal rights -- exercised his rights to appraisal rights. And the fact that there was a merger that followed that.

In reading the decision, the decision is that the election to pursue the appraisal rights is the reason why -- this was a voluntary election, a purposeful act -- was the reason why the Plaintiff lost standing. Because that -- and the Court could have said it doesn't make a difference. The Court easily could have said it doesn't make a difference whether the Plaintiff took this voluntary act to sell the shares because there was a merger. And, therefore, he -- the shareholder lost standing one way or the other. It didn't -- it would have been just as easy to say in Johnson that -- and hold that all the shareholders lost standing. But that's not the holding in Johnson.

The holding in Johnson is the act of tendering the shares and seeking appraisal rights. That allows -- that results in -- and that's the voluntary act. And we have tried to distinguish Johnson on that basis.

The difference between the voluntary act of tendering

the shares, which was the basis for the holding in Johnson, versus the merger, which was not the basis for the -- for the holding in Johnson, but could have been the basis for the holding in Johnson and, yet, it wasn't.

So we do think there is that -- that sliver of -- of what I would call hope or opportunity in the Johnson decision that I think we -- we find as a reason for saying the Court has the ability and authority to adopt what we would call this exception or equitable rule. And it really relates to this involuntary termination under circumstances here where the continuous ownership rule -- I think South Carolina has adopted in Johnson the continuous ownership rule as it relates to voluntary terminations.

So Mr. Todd -- I'm sorry.

THE COURT: Can you entertain a question at this point?

MR. EAGEL: Sure.

THE COURT: All right. They're arguing some policy positions about why this is a good -- why their position is -- is good in that we have this black letter line or continuous ownership rule, no deviations. You are articulating and reading Johnson as a way of saying we have this line in the sand of continuous ownership, but there are exceptions or there should be exceptions. And

you point out a factual distinction in Johnson that they probably are going to say does not matter that you say does matter.

Why does that matter?

Help me understand a policy reason why that should matter.

MR. EAGEL: I think -- the policy reason, I think, Your Honor, had, actually, articulated it very well that the shareholders in -- in Johnson -- that the Plaintiff in Johnson -- and I'll address two -- two aspects of it.

The first aspect is the Plaintiff in Johnson, actually, sold his -- or elected to go with appraisal rights, therefore, did his own act. Much the same way that we have acknowledged that Plaintiff Todd, who sold his shares prior to the time of the merger -- we've acknowledged that Plaintiff Todd does not have standing to pursue this case.

So we agree on the -- we agree with the Defendants on that -- on that basis. And -- and it is -- it is -- certainly, as a policy matter, it's an uphill battle. So many courts, Delaware and others, have held that a continuous ownership that -- rule requires holding through the merger. There have been -- it's not as if this is --

THE COURT: Well, you say -- you say it's an uphill battle. Why? Simply because of the number of states that

recognize the continuous ownership rule versus the equitable reasons why you have that? Because North Carolina -- it's my understanding that North Carolina has, in fact, accepted -- made an exception.

MR. EAGEL: Correct.

THE COURT: Why --

MR. EAGEL: I was just -- I guess I was referring to the reliance of the Defendants on Delaware law, which does hold that -- that South Carolina often looks to Delaware law. And I think Your Honor correctly referred to the Whittle case in which -- in which -- where it's a harsh result that the Court should not blindly follow Delaware law.

And -- and Whittle was exactly a -- very -- has sort of a very interesting analogous facts. Because it was -- one of the rules in Delaware is either you make a demand on the board or you sue to argue that demand should be excused.

And in Delaware, if you -- if you make a demand on the board, then you ultimately -- then you then can't argue demand should be excused. Because by making the demand, you've acknowledged that the board has -- is, in fact, independent.

So it's a -- it's a -- it's a settled rule in Delaware that either you make -- if you make a demand, you

then, in effect, acknowledge the independence of the board, or if you argue demand excuse. We've argued demand excuse here. But the point in -- in Whittle -- in the Whittle case, the Court said that's -- that -- we don't -- we don't want to blindly follow Delaware law on that.

So that -- in that case, the Plaintiff made both a demand and then later argued demand excuse. We're not going to say just because the Plaintiff first made a demand and then followed up with a demand excused that his demand excused argument is -- is barred because of having made demands. So Whittle does say that South Carolina will recognize certain exceptions to Delaware law on those issues.

But this is -- the fact is that we are arguing that, at this stage in litigation, the Court should not -- should not dismiss the derivative claim. It is true there are direct claims. But the Court should not dismiss as a policy matter. And I think the -- well wise -- that policy matter should -- should the Court allow this case to continue notwithstanding the fact that Dominion has purchased it.

I think the Court has raised certain of the issues as to why the Plaintiff's ought to be allowed to continue this litigation. And it is -- it would be sort of an equitable exception that this Court's never had the

opportunity to test the litigation and the merits that have been alleged in the complaint that was filed two years ago. That as to any recovery, well, you know, that's for another day. We're talking now for today as to whether or not the Plaintiff here should be allowed to intervene or should lose standing. And it is -- it is sort of an equitable exception given the -- given where we are in the case.

So as a policy matter, I think Your Honor has correctly identified the fact that it's unlikely Dominion will continue the litigation. And I think as long as this group has shown an inclination to continue to press for a resolution of these claims that they ought to be -- continue the opportunity to do so.

THE COURT: Let me ask you a question. If you don't want to answer, that's fine. It might be that this is -- you feel it's a completely inappropriate question. Assuming, if you would, that the allegations that have been made in the complaint is true, and the allegations in the complaint are pretty substantial as far as the egregiousness of which the conduct could be seemed to include, you know, a loss of millions if not billions of dollars.

Assume as well that Counsel's position that Dominion has indemnified the people that are named as Defendants in

the litigation that's pending before this Court. Therefore, it's unlikely that from a legal standpoint these people will ever be held responsible, culpable, ever have to answer for the allegations that have been raised in this complaint. If you had to chose a venue that would be most appropriate for the Defendants in this litigation to be held, at least, to be required to answer for the conduct that is alleged in the complaint, where would your opinion be -- where would that opinion be?

MR. EAGEL: I would -- I would -- let me -- I guess I'd have to explain it in two forms.

THE COURT: Okay.

MR. EAGEL: And the first part would be that we filed cases in this Court three times. And they've been -- two of them have been removed. So I think that's sort of an indication of one -- of where we thought it was appropriate to file the case.

It's different, though. There is this difference between a direct and a derivative claim. We -- this is the only case -- the only claim we're pursuing here is the derivative claim. The direct is being pursued in the other litigations.

And there are -- the Defendants will invariably raise different defenses as to claims relating to the merger and claims relating to why I may -- may or may not be able to

assert defenses relating to direct claims. There's -- there are aspects in several -- you know, sort of a fraud claim. There are claims against these same Defendants, which they have identified. So those claims will go forward no matter what. Those are the direct claims.

Here, this is a derivative claim. We would like to go forward in both places and then -- and because we're asserting different defenses, these -- there are certain officers here who are not officers in that case.

So in terms of where to go, we would -- we would -- we believe they should go forward in both places in both cases, that the derivative claims should continue. And -- and, certainly, you know, the direct claim -- the Defendants are going to make their own motions in the Defendants -- in the direct case. And there are issues related to the merger. There are issues that might be present in this derivative case.

And so I hope that wasn't too long an answer. But, ultimately, we think it should go forward in both cases. One is a derivative case, one's direct. These are direct claims that the shareholders have -- different shareholders. We happen to be involved in certain -- the cases because we represent different shareholders. We're not the only Counsel involved representing different shareholders who are pursuing claims arising out of the --

the merger and -- and have asserted claims.

And we expect the Defendants to be responding to those claims. That's a different -- those are direct claims on behalf of the shareholders. Because that's not what's being pursued here. These are derivative claims that do, at the outset, belong to the corporation. But the question is where does it go at the end of the day is for another day. It isn't for this day. I think that's where we differ.

Again, this is for judgment on the pleadings where this Court's never had the opportunity to adjudicate the merits, principally a standing argument. It's a continuous ownership standing argument. And if Your Honor, you know, concurs with Judge Seymour, then I think that's -- that -- then, you know, this derivative case would terminate and the direct cases would continue.

At the same time, we think Your Honor should -- should -- a -- continue this case on the grounds that there's -- there -- there are, at least, reasons to continue the case because of an exception that -- that South Carolina law can find this exception under circumstances as those presented in this case.

And then in terms of where the outcome is of this derivative case and what happens with it is for another day. We're now here on judgment of the pleadings. We

haven't had any discovery. We haven't had any -- any sort of fact development.

So I hope that answered the question, Your Honor.

THE COURT: All right. Thank you.

MR. SCHMALZBACH: Thank you, Your Honor.

We have been accused of filing a parade of motions. And on that, I guess we have to plead guilty and beg for your mercy on the grounds that we're defense lawyers and that's what we do. But --

THE COURT: There's nothing wrong with that. It keeps me busy.

MR. SCHMALZBACH: But --

THE COURT: And if you'd see some of the other stuff I have to do, sometimes this is a blessing. These -- y'all are all very good lawyers, well prepared. And it is -- it's an honor to have you in front of me.

MR. SCHMALZBACH: Thank you, Your Honor. I appreciate that.

If I could, what makes this motion different, in addition to all the legal reasons that it's meritorious as Judge Seymour already held, is that Counsel for the Plaintiff, basically, invited this motion. As we recount on Page 2 of our brief in this case in a letter to this Court, Mr. Eagel volunteered that the planned merger "likely will moot the derivative claims."

Then at the hearing, he said, There's an issue as to standing in the derivative case. So this motion was invited by Mr. Eagel's recognition that there is a derivative standing defect after the merger.

Very quickly, I think we now hear with a little bit more clarity what exactly the -- the Plaintiff wants to have you do. And that's to create a new equitable exception that has never been recognized in South Carolina law. That's exactly what Judge Seymour refused to do.

And as to the policy argument that they offer for making that equitable exception, it's not enough to say that someone needs to hold these people accountable. As Mr. Eagel said, there are other direct claims that offer that mechanism.

But what a policy argument needs to offer here is a reason why Dominion should be dragooned into paying for a lawsuit.

THE COURT: Dragooned?

MR. SCHMALZBACH: Dragooned.

THE COURT: I'll have to look that up.

MR. SCHMALZBACH: Conscripted --

THE COURT: All right.

MR. SCHMALZBACH: -- into paying for this lawsuit that's purportedly on its behalf that it doesn't want to bring. That's what's unique about this case.

And to be clear as to indemnification, Dominion has not waived and does not waive its right to pursue these claims when it determines -- if and when it determines that's appropriate.

And, finally, as to your question about whether this case can be distinguished from the case that Judge Seymour heard and dismissed, I think by copying and pasting the federal derivative briefs and presenting them here, I think that tells you all you need to know about whether this case can be distinguished. It is the same case. And it deserves the same result that Judge Seymour reached.

THE COURT: Thank you, sir.

MR. SCHMALZBACH: Thank you.

MR. CHAPPELL: Very briefly in reply, Your Honor. You asked the question where should this case be -- where should we be. Your Honor, we should be in this Court. This is the only place where a derivative case is pending. We lose here, it's over.

Dominion has won. The corporation has cut a backdoor deal that covers for the board. She did not sell her shares. She did not give them up. They took her shares. I think that is the distinction in this case.

So they take her shares. They come in and argue for two years that this case doesn't exist. We lose on the derivative claim here, they win. This board walks away

scot-free. This is the only jurisdiction that's going to hold the board members accountable for stealing billions of dollars from their rate payers. This is the only place.

So if the Court were to rule against us on this motion, you know, they win. And I just think from the equitable standpoint, from the legal standpoint, that's just wrong, Your Honor. We ask that you deny their motion.

Thank you.

MR. SCHMALZBACH: May I say a quick word, Your Honor?

I don't know if Counsel misspoke when he said a "backdoor deal." But I want to be very clear that Dominion's agreement to indemnify these Defendants was 100 percent disclosed to SCANA's shareholders in the proxy statement, in the merger agreement. And those shareholders voted to approve this merger, 72 percent of the vote.

And so -- and as to the argument that this is the only Court that can hold them accountable. If Counsel are representing that they're going to dismiss the other direct actions that Mr. Eagel described, we'd be happy to accept that. But until that happens, Mr. Eagel described the other lawsuits very similar to this one, but framed as direct lawsuits where they are seeking to hold these same

Defendants accountable.

MR. EAGEL: Just two quick points.

THE COURT: Yes, sir.

MR. EAGEL: We, obviously, are strenuously pressing the direct claims and those claims will continue. And they -- we are seeking to -- seeking significant redress as a result. So they will, we hope, hold them accountable. They will raise other defenses in those claims. That's -- that is a -- that's -- so Counsel's correct. We are -- we are certainly very -- pressing those claims and intend to press them as hard as we can.

So in terms of -- there is no other derivative claim. I think that's -- that's the point. But there is a direct claim that's being pursued.

Second, I just -- on this invitation, I -- I -- invitation of -- of the argument of standing. I don't think that Counsel needed any invitation since that was the subject of the letter before I agreed and said, okay, we'd wait on discovery. And, ironically, Your Honor, it's -- they point to an issue that -- that was the Defendant's argument. At that time, there were two Plaintiffs and we were arguing about it.

And the Defendants argument wasn't that I invited it because they made the argument themselves. They said the action was being stayed. So they obviously -- that the

action was going to go away because of a loss of standing. So I didn't invite it. They said it. And, more importantly, Your Honor said, you know, tough. Your Honor, in fact, ordered discovery -- denied the motion for a stay and ordered the case to go forward.

So if, in fact, I -- I -- so whatever occurred back then, I think Your Honor was -- actually, addressed this issue back in -- in the motion for stay of discovery when the Defendants said that standing was going to be lost, we'll confront that issue when the time comes. And I guess that's what we're here for today.

But certainly nothing I said or did in the context of the Court deciding whether or not a motion to stay should go forward or not, or whether a party should conduct discovery has any bearing on where we are today having been a little bit more informed and having been a little bit more present concerning some of the issues here.

Thank you, Your Honor.

MR. SCHMALZBACH: Your Honor, if you have no more questions for me, thank you very much for your time today.

THE COURT: All right. Thank y'all very much.

I will let you know. In the event we're still together in three years, we'll have a new courthouse.

**********END OF TRANSCRIPT OF RECORD**********

CERTIFICATE OF REPORTER

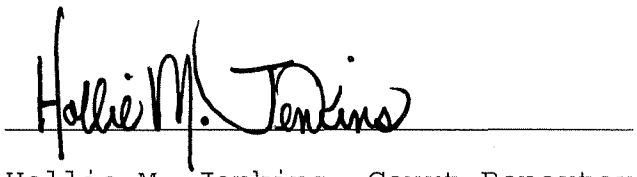
STATE OF SOUTH CAROLINA)

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

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
	FOR THE FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	
R. WAYNE TODD, Derivatively on Behalf of SCANA CORP., Plaintiffs,	Case No. 2017-CP-40-06621
v.	
KEVIN MARSH, GREGORY ALIFF, JAMES BENNETT, JOHN CECIL, SHARON DECKER, MAYBANK HAGOOD, LYNN MILLER, JAMES ROQUEMORE, MACEO SLOAN, ALFRED TRUJILLO, JIMMY ADDISON, and STEVEN BYRNE, Defendants,	**ORDER GRANTING *PRO HAC VICE* ADMISSION**
And	
SCANA CORP., Nominal Defendant.	

RICHLAND COUNTY FILED
2018 FEB -9 AM 11:50
JEANNETTE W. McBRIDE C.C.P. & G.S.

THIS MATTER COMES BEFORE this Court by motion of William A. Coates of the Roe Cassidy Coates & Price, P.A. law firm, who represents Defendants Jimmy Addison, Kevin Marsh, and Stephen Byrne in the above-captioned action, seeking the admission *pro hac vice* of William R. Mitchelson, Jr., John A. Jordak, Jr., and Meredith Jones Kingsley (as to Defendant Jimmy Addison); James F. Wyatt, III and Robert A. Blake, Jr. (as to Defendant Stephen Byrne); and Anne Magee Tompkins (as to Defendant Kevin Marsh). Counsel for Plaintiff consents to this motion.

THEREFORE, FOR GOOD CAUSE SHOWN, IT IS HEREBY ORDERED that William R. Mitchelson, Jr., John A. Jordak, Jr., Meredith Jones Kingsley, James F. Wyatt, III, Robert A. Blake, Jr., and Anne Magee Tompkins are admitted *pro hac vice* for purposes of this matter.

IT IS SO ORDERED.

J. Mark Hayes, II

Richland, South Carolina

DATED: February 5, 2018

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

RICHLAND COUNTY FILED
2018 FEB -9 AM 11:50
JEANNETTE W. McBRIDE C.C.P. & G.S.

THIS IS TO HEREBY CERTIFY that a copy of the **Order granting Pro Hac Vice Admission of William Mitchelson, John Jordak, and Meredith Kingsley** has been sent by e-mail and/or U.S. Mail, Postage Prepaid, First Class, addressed as follows:

Graham Newman, Esquire
Chappell Smith & Arden, P.A.
2801 Devine Street, Suite 300
Columbia, South Carolina 29205
gnewman@csa-law.com

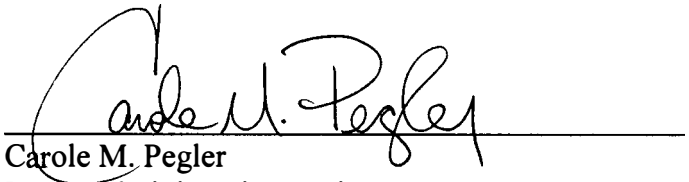
Lawrence P. Eagel, Esquire
Melissa A. Fortunato, Esquire
Todd H. Henderson, Esquire
Bragar Eagel & Squire, P.C.
885 Third Ave, Suite 3040
New York, New York 10022
eagel@bespc.com
fortunato@bespc.com
henderson@bespc.com

Steven J. Pugh, Esquire
Benjamin P. Carlton, Esquire
Richardson Plowden & Robinson, P.A.
Post Office Drawer 7788 (29202)
1900 Barnwell Street
Columbia, South Carolina 29201
spugh@richardsonplowden.com
bcarlton@richardsonplowden.com

I.S. Leevy Johnson, Esquire
George C. Johnson, Esquire
Johnson Toal & Battiste, P.A.
1615 Barnwell Street
Columbia, South Carolina 29201
islj@jbpa.com
George@jtbpa.com

Michael R. Smith, Esquire
Alexandra S. Peurach, Esquire
King & Spalding, LLP
1180 Peachtree Street, NE
Atlanta, Georgia 30309
mrsmith@kslaw.com
apeurach@kslaw.com

ROE CASSIDY COATES & PRICE, P.A.



Carole M. Pegler
Legal Administrative Assistant to
William A. Coates and V. Clark Price

Greenville, South Carolina

February 7, 2018

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND R. WAYNE TODD, derivately on behalf of SCANA CORP., Plaintiff, vs. STEVEN BYRNE, et al., and SCANA, Defendants.	)	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT CASE NO.: 2017-CP-40-06621 **MOTION AND ORDER INFORMATION FORM AND COVERSHEET**

Plaintiff's Attorney:	Defendant's Attorney:
Graham Newman, Bar No. _____ Address: 2801 Devine Street, Suite 300 Columbia, SC 29205 Phone: 800-929-3600 Fax 803-929-3604 E-mail: gnewman@csa-law.com Other: _____	William A. Coates, Bar No. 01289 Address: P.O. Box 10529, Greenville, SC 29603 Phone: 864-349-2600 Fax864-349-0303 E-mail: wac@roecassidy.com Other: _____

2018 FEB -9 AM 11:50
JEANNETTE W. GRAHAM
RICHLAND COUNTY
FILED

☐ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☒ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: **ORDER GRANTING PRO HAC VICE ADMISSION OF WILLIAM MITCHELSON, JOHN JORDAK and MEREDITH KINGSLEY**

Estimated Time Needed: _____ Court Reporter Needed: ☐ **YES**/☐ **NO**

SECTION II: Motion/Order Type

☐ Written motion attached
☒ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

William A. Coates 2/7/18

Signature of Attorney for ☐ Plaintiff /☒ Defendant Date Submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: $_____
☐ EXEMPT: (check reason)
- ☐ Rule to Show Cause in Child or Spousal Support
- ☐ Domestic Abuse or Abuse and Neglect
- ☐ Indigent Status ☐ State Agency v. Indigent Party
- ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
- ☐ Motion for Stay in Bankruptcy
- ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
- ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
  Name of Court Reporter: _____
- ☐ Other: _____

JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:	JUDGE CODE _____ Date:

MeHS ✓ 2/9/18 **CLERK'S VERIFICATION**

Collected by:_____ Date Filed: _____
☐ MOTION FEE COLLECTED: $ _____
☐ CONTESTED – AMOUNT DUE: $ _____

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2017CP4006621

R Wayne Todd	Kevin Marsh
SCANA Corp	Gregory Aliff
PLAINTIFF(S)	DEFENDANT(S)

Submitted by: _____ | Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

FILED RICHLAND COUNTY S.C. FEB 12 AM 9:12

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** *(CHECK REASON)*: ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other _____

☐ **ACTION STRICKEN** *(CHECK REASON)*: ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** *(CHECK APPLICABLE BOX)*: ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case. Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		$
		$
		$
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge _____ **Judge Code** _____ **Date** _____

For Clerk of Court Office Use Only

This judgment was entered on the ____ day of _____, 20 ____ and a copy mailed first class or placed in the appropriate attorney's box on this 12 day of Feb, 20 18 to attorneys of record or to parties (when appearing pro se) as follows:

Graham L. Newman

Steven James Pugh
Lawrence Eagel

William A. Coates
Todd H Henderson

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court Jeanette W. McBride

SCRCP Form 4C (10/2011)

ELECTRONICALLY FILED - 2019 Jul 18 2:36 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
R. Wayne Todd, Derivatively on Behalf of SCANA Corp., Plaintiff, v. Kevin Marsh, Gregory Aliff, James Bennett, John Cecil, Sharon Decker, Maybank Hagood, Lynn Miller, James Roquemore, Maceo Sloan, Alfredo Trujillo, Jimmy Addison and Steven Byrn, Defendants and SCANA Corporation, Nominal Defendant.	Civil Action No. 2017-CP-40-06621 **ORDER FOR ADMISSION OF BRIAN D. SCHMALZBACH *PRO HAC VICE* AS COUNSEL FOR DEFENDANT SCANA CORPORATION**

This matter comes before me on the Motion of Steven J. Pugh, Esquire, a member in good standing with this Court, whereby he moves the Court to enter an Order *Pro Hac Vice* admitting Brian D. Schmalzabach, Esquire of the law firm McGuire Woods, LLP, Gateway Plaza, 800 East canal Street, Richmond, Virginia 23219 to appear in this Court on behalf of Nominal Defendant SCANA Corporation. Based upon the Motion and the supporting Verified Application for Admission *Pro Hac Vice* in the State of South Carolina, I hereby find an conclude that good cause exists for granting the request.

Therefore, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Brian D. Schmalzabach, Esquire, non-resident attorney, shall be admitted to practice as an associate

of a resident attorney in this particular case and shall be prepared to try any aspect of this case.

AND IT IS SO ORDERED.

Jocelyn Newman
Chief Administrative Judge,
Fifth Judicial Circuit

June _____, 2019

ELECTRONICALLY FILED - 2019 Jul 18 2:36 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621

ELECTRONICALLY FILED - 2019 Jul 18 2:36 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621

Richland Common Pleas

Case Caption: R Wayne Todd , plaintiff, et al vs Kevin Marsh , defendant, et al

Case Number: 2017CP4006621

Type: Order/Pro Hac Vice

IT IS SO ORDERED

s/ J. Mark Hayes, II #2132

ELECTRONICALLY FILED - 2020 May 13 11:39 AM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
Teresa Parler, Derivatively on Behalf of SCANA Corp., Plaintiff, v. Kevin Marsh, Gregory Aliff, James Bennett, John Cecil, Sharon Decker, Maybank Hagood, Lynn Miller, James Roquemore, Maceo Sloan, Alfredo Trujillo, Jimmy Addison and Steven Byrn, Defendants and SCANA Corporation, Nominal Defendant.	Civil Action No. 2017-CP-40-06621 **ORDER FOR ADMISSION OF BRIAN E. PUMPHREY *PRO HAC VICE* AS COUNSEL FOR DEFENDANT SCANA CORPORATION**

This matter comes before me on the Motion of Steven J. Pugh, Esquire, a member in good standing with this Court, whereby he moves the Court to enter an Order *Pro Hac Vice* admitting Brian E. Pumphrey, Esquire of the law firm McGuire Woods, LLP, Gateway Plaza, 800 East Canal Street, Richmond, Virginia 23219 to appear in this Court on behalf of Nominal Defendant SCANA Corporation. Based upon the Motion and the supporting Verified Application for Admission *Pro Hac Vice* in the State of South Carolina, I hereby find an conclude that good cause exists for granting the request.

Therefore, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Brian E. Pumphrey, Esquire, non-resident attorney, shall be admitted to practice as an associate of a resident attorney in this particular case and shall be prepared to try any aspect of this case.

AND IT IS SO ORDERED.

The Honorable J. Mark Hayes, II

April _____, 2020

ELECTRONICALLY FILED - 2020 May 13 11:39 AM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621

ELECTRONICALLY FILED - 2020 May 13 11:39 AM - RICHLAND - COMMON PLEAS - CASE#2017CP4006621

Richland Common Pleas

Case Caption: R Wayne Todd , plaintiff, et al vs Kevin Marsh , defendant, et al

Case Number: 2017CP4006621

Type: Order/Pro Hac Vice

IT IS SO ORDERED

s/ J. Mark Hayes, II #2132

RESTATED ARTICLES OF INCORPORATION

OF

SCANA CORPORATION

Adopted April 26, 1989

SCANA CORPORATION
RESTATED ARTICLES OF INCORPORATION

TABLE OF CONTENTS

(This Table of Contents is not part of the Restated Articles of Incorporation and has been inserted herein for convenience only. Nothing contained in this Table of Contents shall be deemed to affect the meaning or construction of any of the provisions contained in the Restated Articles of Incorporation.)

Page

Recitals.....

Article 1
Name of Company.....

Article 2
Perpetual existence.....

Article 3
Number of shares authorized.....

Article 4
General powers clauses.....

Article 5
5.1 Preemtive rights prohibited.....
5.2 Cumulative Voting prohibited.....
5.3 Matters to be decided by majority vote.....
5.4 Vote required to remove directors.....
5.5 Vote required to amend Articles.....

Article 6
Vote required to purchase shares at a price above "Market Price" from a "Selling Shareholder".....

Article 7
Vote required for certain business combinations.....

Article 8
Term of office of Directors.....

Article 9
Provisions to eliminate or limit Directors' liability in certain circumstances.....

RECITALS

Section 101. The name of the corporation is SCANA Corporation.

Section 102. The registered office of the corporation is Palmetto Center, 1426 Main Street, located in the City of Columbia, County of Richland and the State of South Carolina, and the name of its registered agent at such address is E. C. Roberts.

Section 103. On October 1, 1984, the corporation was formed under the name of SCE&G Holding Company, Inc. and the Articles of Incorporation were duly filed with the Secretary of State of South Carolina, upon which date the corporation began its existence.

Section 104. On October 10, 1984, by written direction of the sole incorporator, the name of the corporation was changed to SCANA Corporation and the filing of a Restatement of the Articles of Incorporation was authorized and made in accordance with Section 33-15-80 of the South Carolina Business Corporation Act.

Section 105. At a meeting duly called and held July 24, 1985, the Board of Directors of the corporation authorized the adoption of a Restatement of the Articles of Incorporation of the corporation so as to integrate into a single document changes in the Articles of Incorporation authorized by the holders of the corporation's Common Stock at a meeting duly called and held on April 24, 1985, as provided in Section 33-15-80 of the South Carolina Business Corporation Act.

Section 106. At a meeting duly called and held April 22, 1987, the Board of Directors of the corporation authorized the adoption of a Restatement of the Articles of Incorporation of the corporation so as to integrate into a single document changes in the Articles of Incorporation authorized by the holders of the corporation's Common Stock at a meeting duly called and held o April 22, 1987, as provided in Section 33-15-80 of the South Carolina Business Corporation Act.

Section 107. At a meeting duly called and held April 26, 1989, the Board of Directors of the corporation authorized the adoption of a Restatement of the Articles of Incorporation of the corporation so as to integrate into a single document changes in the Articles of Incorporation authorized by the holders of the corporation's Common Stock at a meeting duly called and held o April 26, 1989, as provided in Section 33-15-80 of the South Carolina Business Corporation Act.

Section 108. These Restated Articles of Incorporation purport merely to restate but not to change materially the provisions of the original Articles as heretofore amended and supplemented and there is no material discrepancy between such provisions and the provisions of these Restated Articles of Incorporation.

Section 109. The corporation adopts the following Restated Articles of Incorporation of SCANA Corporation as heretofore amended and supplemented.

RESTATED
ARTICLES OF INCORPORATION
OF SCANA CORPORATION

1. The name of the corporation is SCANA Corporation.

2. The period of duration of the corporation shall be perpetual.

3. The corporation is authorized to issue shares of stock as follows:

Class of Shares	Authorized No.	Par Value
Common	75,000,000	No Par Value

4. The general nature of the business for which the corporation is organized is to acquire, own and/or sell capital stock and other interests in other companies, including, but not limited to, public utilities, and other lawful purposes.

5. Provisions which the corporate has elected to include in the Articles of Incorporation are as follows:

5.1 No preemptive rights shall apply to any shares of the capital stock of the corporation nor inure to any holder thereof.

5.2 There shall be no right to vote any share of stock cumulatively for any purpose.

5.3 The following matters shall be decided by the vote of a majority of shares of stock of the corporation entitled to vote: distributions from capital surplus; reduction of stated capital; and loans to directors and officers.

5.4 The vote of at least 80% of the shares of stock of the corporation entitled to vote shall be required to remove an incumbent member of the Board of Directors except for cause. As used in this Article 5.4, "for cause" shall mean fraudulent or dishonest acts, or gross abuse of authority in discharge of duties to the corporation and shall be established after written notice of specific charges and opportunity to meet and refute such charges.

5.5 These Restated Articles of Incorporation may be amended by the vote of the minimum number of shares permitted by South Carolina law at the time of such vote, but not less than a majority of share entitled to vote, provided, however, that any amendment of Article 5.4, Article 8 or Article 8 shall require

the vote of 80% of the share of stock of the corporation entitled to vote.

6. (a) The affirmative vote of the holders of not less than a majority of the Voting Stock (as hereinafter defined) of the corporation shall be required before the corporation may purchase any outstanding shares of Common Stock of the corporation at a price known by the corporation to be above Market Price (as hereinafter defined) from a person known by the corporation to be a Selling Stockholder (as hereinafter defined), unless the purchase is make by the corporation on the same terms and as a result of a duly authorized offer to purchase any and all of the outstanding shares of Common Stock of the corporation.

(b) For purposes of this Article 6:

(1) The term "Voting Stock" shall mean the outstanding shares of stock of the corporation entitled to vote in elections of directors of the corporation considered as one class.

(2) The majority vote required by Section (a), when applicable, shall be in addition to any lesser vote or not vote required or permitted by law or these Articles of Incorporation exclusive of this Article 6 and the shares of the Selling Stockholder shall, for this purpose, be counted as having abstained regardless of how they have been voted.

(3) The term "Market Price" shall mean the highest closing sale price, during the 30-day period immediately preceding the date in question, of a share of the Common Stock of the corporation on the Composite Tape for New York Stock Exchange Issues, or, if such stock is not quoted on the Composite Tape or is not listed on such Exchange, on the principal United States securities exchange registered under the Securities Act of 1934 on which such stock is listed, or, if such stock is not listed on any such exchange, the highest closing bid quotation with respect to a share of such stock during the 30-day period preceding the date in question on the National Association of Securities Dealers, Inc. Automated Quotations System or any system then in use, or if no such quotations are available, the fair market value on the date in question of a share of such stock.

(4) The term "Selling Stockholder" shall mean and include any person who or which is the beneficial owner of in the aggregate more than three percent of the outstanding shares of Common Stock of the corporation and who or which has purchased or agreed to purchase any of such shares within the most recent two-year period.

(5) A "person" shall mean any individual, firm, partnership, corporation or other entity.

(6) A person shall be the "beneficial owner" of any shares of Common Stock of the corporation:

(i) which such person or any of its Affiliates or Associates (as hereinafter defined) beneficially owns, directly or indirectly; or

(ii) which such person or any of its Affiliates or Associates has (a) the right to acquire (whether such right is conditional or exercisable immediately or only after the passage of time), pursuant to any agreement, arrangement or understanding or upon the exercise of conversion rights, exchange rights, warrants or options, or otherwise, or (b) the right to vote pursuant to any agreement, arrangement or understanding; or

(iii) which are beneficially owned, directly or indirectly, by any other person with which such person or any of its Affiliates or Associates has any agreement, arrangement or understanding for the purpose of acquiring, holding, voting or disposing thereof.

(7) The terms "Affiliate" and "Associate" shall have the respective meanings ascribed to such terms in Rule 12b-2 of the General Rules and Regulations under the Securities Exchange Act of 1934, as in effect on January 1, 1985.

(8) For the purposes of determining whether a person is a Selling Stockholder, the number of shares of Common Stock deemed to be outstanding and the number of shares beneficially owned by the person shall include shares respectively deemed owned through application of paragraph (6) of this Section (b) but shall not include any other shares of Common Stock which may be issuable pursuant to any agreement, arrangement or understanding, or upon exercise of conversion rights, warrants or options, or otherwise, or shares of the Selling Stockholder whose acquisition of more than three percent of the outstanding shares of Common Stock of the corporation within the most recent two year period results from other than a purchase or agreement to purchase or vote shares of the corporation.

(9) Noting contained in this Article 6 shall be construed to relieve any Selling Stockholder from any fiduciary obligation imposed by law.

(10) The Board of Directors of the corporation shall have the power to determine the application of or compliance with this Article 6, including, without limitation, (i) whether a

person is a Selling Stockholder; (ii) whether a person is an Affiliate or Associate of another; (iii) whether Section (a) is or has become applicable in respect of a proposed transaction; (iv) what is the Market Price and whether a price is above Market Price; and (v) when or whether a purchase or agreement to purchase any share or shares of Common Stock of the corporation has occurred and when or whether a person has become a beneficial owner of any share or shares of Common Stock of the corporation. Any decision or action taken by the Board of Directors arising out of or in connection with the construction, interpretation and effect of this Article 6 shall lie within their absolute discretion and shall be conclusive and binding except in circumstances involving bad faith.

7. A. Higher Vote for Certain Business Combinations. In addition to any affirmative vote of holders of a class or series of capital stock of the corporation required by law or these Restated Articles of Incorporation, and except as otherwise expressly provided in Paragraph B of this Article 8, the corporation shall not engage, directly or indirectly, in a Business Combination (hereinafter defined) with, or proposed by or on behalf of, a Related Person (as hereinafter defined) or an Affiliate or Associate (both as hereinafter defined) of a Related Person without the affirmative vote of the holders of at least eighty percent (80%) of the voting power of all outstanding voting stock of the corporation, voting together as a single class.

B. When Higher Vote is Not Required. The provisions of Paragraph A of this Article 8 shall not be applicable to a particular Business Combination, and such Business Combination shall require only such affirmative vote, if any, as in required by law or any other provision of these Restated Articles of Incorporation, the By-Laws of the corporation or otherwise, if all of the conditions specified in any one of the following Paragraphs (1), (2) or (3) are met:

(1) Approval by Directors. The Business Combination has been approved by a vote of a majority of all the Continuing Directors (as hereinafter defined); or

(2) Combination with Subsidiary. The Business Combination is solely between the corporation and a subsidiary of the corporation and such Business Combination does not have the direct or indirect effect set forth in Paragraph C(2)(e) of this Article 8; or

(3) Price and Procedural Conditions. All of the following conditions have been met:

(a) The aggregate amount of (x) cash and (y) fair market value (as of the date of the consummation of the Business Combination) of consideration other than cash, to be received per share of Common Stock, or any other class or series of stock of the corporation (any such class or series of stock being referred to herein as "preferred stock"), in such Business Combination by holders thereof shall be at least equal to the highest per share price (including any brokerage commissions, transfer taxes and soliciting dealers' fees) paid by or on behalf of the Related Person for any shares of such class or series of stock acquired by it, provided, however, that if the highest preferential amount per share of a series of preferred stock to which the holders thereof would be entitled in the event of any voluntary or involuntary liquidation, dissolution or winding-up of the affairs of the corporation (regardless of whether the Business Combination to be consummated constitutes such an event) is greater than such aggregate amount, holders of such series of preferred stock shall receive an amount for each such share at least equal to the highest preferential amount applicable to such series of preferred stock. The provisions of this Paragraph b(3) shall be required to be met with respect to every class or series of preferred stock, whether or not the Related Person has previously acquired beneficial ownership of any shares of a particular class or series of preferred stock.

(b) The consideration to be received by holders of a particular class or series of outstanding Common Stock or preferred stock shall be in cash or in the same form as the Related Person has previously paid for shares of such class or series of stock. If the Related Person has paid for shares of any class or series of stock with varying forms of consideration, the form of consideration given for such class or series of stock in the Business Combination shall be either cash or the form used to acquire the largest number of shares of such class or series of stock previously acquired by it. The prices determined in accordance with Paragraph B(3)(a) above shall be subject to an appropriate adjustment in the event of any stock dividend, stock split, subdivisions, combination of share or similar event.

(c) No Extraordinary Event (as hereinafter defined) shall have occurred after the Related Person has become a Related Person and prior to the consummation of the Business Combination.

(d) A proxy or information statement describing the proposed Business Combination and complying with the requirements of the Securities Exchange Act of 1934, as amended, any the rules and regulations thereunder (or any subsequent provisions replacing such Act, rules or regulations) shall have been mailed to public stockholders of the corporation at least 30

days prior to the consummation of such Business Combination (whether or not such proxy or information statement is required pursuant to such Act or subsequent provisions).

C. Certain Definitions.

For purposes of this Article 7:

(1) A "person" shall mean any individual, firm, partnership, corporation or other entity, or a group of "persons" acting or agreeing to act together in the manner set forth in Rule 13d-5 under the Securities Exchange Act of 1934, as in effect on March 1, 1987.

(2) The term "Business Combination" shall mean any of the following transactions, when entered into by the corporation or a subsidiary of the corporation with, or upon a proposal by or on behalf of, a Related Person:

(a) the merger or consolidation or consummation of a plan of exchange of the corporation or any subsidiary of the corporation; or

(b) the sale, lease, mortgage, pledge, transfer or other disposition (in one or a series of transactions) of any assets of the corporation or any subsidiary of the corporation having an aggregate fair market value of $10,000,000 or more, except for sales of goods and services made in the ordinary course of the corporation's business; or

(c) the issuance or transfer by the corporation or any subsidiary of the corporation (in one or a series of transactions) of any Securities of the corporation or that subsidiary, except proportionately to all stockholders of the corporation or such subsidiary; or

(d) the adoption of a plan or proposal for the liquidation or dissolution of the corporation; or

(e) the reclassification of securities (including a reverse stock split), recapitalization, consolidation or any other transaction (whether or not involving a Related Person) which has the direct or indirect effect of increasing the voting power, whether or not then exercisable, of a Related Person in any class or series of capital stock of the corporation or any subsidiary of the corporation; or

(f) any agreement, contract or other arrangement providing directly or indirectly for any of the foregoing.

(3) The term "Related Person" shall mean any person (other than the corporation, a subsidiary of the corporation or any pension, profit sharing, employee stock ownership or other employee benefit plan of the corporation or a subsidiary of the corporation or any trustee of or fiduciary with respect to any such plan acting in such capacity) who is the direct or indirect beneficial owner (as defined in Rule 13d-3 and Rule 13d-5 under the Securities Exchange Act of 1934, as in effect on March 1, 1987) of more than ten percent (10%) of the outstanding capital stock of the corporation entitled to vote for the election of directors, and any Affiliate or Associate of any such person.

(4) The term "Continuing Director" shall mean any member of the Board of Directors who is not a Related Person, an Affiliate or Associate or representative of a Related Person and who was a member of the Board of Directors immediately prior to the time that the Related Person became a Related Person, and any successor to a Continuing Director who is not a Related Person or an Affiliate or Associate of a Related Person and is recommended to succeed a Continuing Director by a majority of Continuing Directors who are then members of the Board of Directors.

(5) "Affiliate" and "Associate" shall have the respective meanings ascribed to such terms in Rule 12b-2 under the Securities Exchange Act of 1934, as in effect on March 1, 1987.

(6) The term "Extraordinary Event" shall mean, as to any Business Combination and Related Person, any of the following events that is not approved by a majority of all Continuing Directors:

(a) any failure to declare and pay at the regular date therefore any full quarterly dividend (whether or not cumulative) on any outstanding preferred stock; or

(b) any reduction in the annual rate of dividends paid on the Common Stock (except as necessary to reflect any stock split, stock dividend or subdivision of the Common Stock); or

(c) any failure to increase the annual rate of dividends paid on the common Stock as necessary to reflect any reclassification (including any reverse stock split), recapitalization, reorganization or any similar transaction that has the effect of reducing the number of outstanding shares of the Common Stock; or

(d) the receipt by the Related Person, after such Related Person has become a Related Person, of a direct or indirect benefit (except proportionately as a shareholder) from

any loans, advances, guarantees, pledges or other financial assistance or any tax credits or other tax advantages provided by the corporation or any subsidiary of the corporation, whether in anticipation of or in connection with the Business Combination or otherwise; or

(e) any increase in the number of shares of Common stock or preferred stock of which the Related Person is the beneficial owner, except as part of the transaction that results in such Related Person becoming a Related Person and except in a transaction that, after giving effect thereto, would not result in any increase in the Related Person's percentage beneficial ownership of any class or series of Common Stock or preferred stock.

D. Matters to be Determined by Continuing Directors. A majority of all Continuing Directors shall have the power to determine, on the basis of information known to them after reasonable inquiry, all questions arising under this Article 7, including, without limitation, the transactions that are Business Combinations, the persons who are Related Persons, whether a person is an Affiliate or Associate of another, and the fair market value of, or price paid for, any assets, securities or other property, and any such determinations of such directors shall be conclusive and binding.

E. Fiduciary Obligations of Related Persons. Nothing contained in this Article 7 shall be construed to relieve any Related Person from any fiduciary obligation imposed by law.

F. Fiduciary Obligations of Directors. The fact that any Business Combination complies with the provisions of Section B of this Article 7 shall not be construed to impose any fiduciary duty, obligation or responsibility on the Board of Directors, or any member thereof, to approve such Business Combination or recommend its adoption or approval to the stockholders of the corporation, nor shall such compliance limit, prohibit or otherwise restrict in any manner the Board of Directors, or any member thereof, with respect to evaluations or of actions and responses taken with respect to such Business Combination.

G. Board Consideration of All Relevant Factors. The Board of Directors of the corporation, when evaluating any offer of another party to (a) make a tender or exchange offer for any equity security of the corporation, (b) merge or consolidate the corporation with another corporation, or (c) purchase or otherwise acquire all or substantially all of the properties and assets of the corporation, may, in connection with the exercise of its judgment in determining what is in the best interests of the corporation and its stockholders, give due consideration to

(i) all relevant factors, including without limitation the social, legal, environmental and economic effects on the employees, customers, suppliers and other affected persons, firms and corporations and on the communities and geographical areas in which the corporation and its subsidiaries operate or are located and on any of the businesses and properties of the corporation or any of its subsidiaries, as well as such other factors as the directors deem relevant, and (ii) not only the consideration being offered in relation to the then current market price for the corporation's outstanding shares of capital stock, but also in relation to the then current value of the corporation in a freely negotiated transaction and in relation to the Board of Directors' estimate of the future value of the corporation (including the unrealized value of its properties and assets) as an independent going concern.

H. Amendment, Repeal, etc. The affirmative vote of the holders of at least eighty percent (80%) of the voting power of all outstanding voting stock of the corporation, voting together as a single class, shall be required in order to amend or repeal this Article 7 or to adopt any provision inconsistent therewith.

8. A. The number of directors of the corporation which shall constitute the entire Board of Directors shall be fixed from time to time by or pursuant to the provisions of the By-Laws of the corporation. Any such provision shall continue in effect unless and until changed by the Board of Directors, but not such changes shall affect the term of any director then in office. Upon the adoption of this Article 8, the directors shall be divided into three classes (I, II and III) as nearly equal in number as possible. The initial term of officer for members of Class I shall expire at the Annual meeting of stockholders in April 1988; the initial term of office for members of Class II shall expire at the Annual meeting of stockholders in April 1989; and the initial term of office for members of Class III shall expire at the Annual meeting of Stockholder in April 1990. At each annual meeting of stockholders following such initial classification and election, directors elected to succeed those directors whose terms expire shall be elected for a term of office to expire at the third succeeding Annual meeting of stockholders after their election, and shall continue to hold office until their respective successors are elected and qualified. In the event of any increase in the number of directors fixed by the Board of Directors, the additional directors shall be so classified that all classes of directors have as nearly equal numbers of directors as may be possible. In the event of any decrease in the number of directors of the corporation, all classes of directors shall be decreased equally as nearly as may be possible. The term of office of any director who is not a salaried employee of the corporation shall expire at the annual

meeting next preceding the date on which such directors attains age 70 and the term of office of any director who is a salaried employee of the corporation shall expire upon such director attaining age 65 or upon his retirement from active service with the corporation, whichever is earlier, except that the term of office of a director who is Chief Executive Officer shall not expire as a result of attaining age 65 or prior retirement from active service with the corporation.

B. Newly created directorships resulting from any increase in the authorized number of directors or any vacancies in the Board of Directors resulting from death, resignation, retirement, disqualification, removal from office or any other cause shall be filled only by the Board of Directors then in office, although less than a quorum. Directors elected to fill a newly created directorship or other vacancies shall hold office for the remainder of the full term of the class of directors in which the new directorship was created or the vacancy occurred and until such director's successor has been elected and has qualified.

C. Notwithstanding any other provisions of these Restated Articles of Incorporation or the By-Laws of the corporation (and notwithstanding the fact that a lesser percentage or separate class vote may be specified by law, these Restated Articles of Incorporation, the By-Laws of the corporation or otherwise), the affirmative vote of the holders of at least eighty percent (80%) of the voting power of all outstanding voting stock shall be required to adopt any provision inconsistent with, or to amend or repeal, Paragraphs A through C, inclusive, of this Article 8.

D. Notwithstanding the foregoing, if at any time the holders of any one or more classes or series of preferred stock issued by the corporation shall have the right, voting separately by class or series, to elect directors at an annual or special meeting of stockholders, the election, term of office, filling of vacancies and other features of such directorships shall be governed by the terms of these Restated Articles of Incorporation applicable thereto, and such directors so elected shall not be divided into classes pursuant to this Article 8 unless expressly provided by such terms.

9. No director of the corporation shall be personally liable to the corporation or its shareholders for monetary damages for breach of his fiduciary duty as a director occurring after the effective date hereof; provided, however, the foregoing shall not eliminate or limit the liability of a director (i) for any breach of the director's duty of loyalty to the corporation or its shareholders; (ii) for acts or omissions not in good faith or which involve gross negligence, intentional misconduct, or a knowing violation of law; (iii) imposed for unlawful

distributions as set forth in Section 33-8-330 of the South Carolina Business Corporation Act of 1988, as amended from time to time (the "BCA"), or (iv) for any transaction from which the director derived an improper personal benefit. This provision shall eliminate or limit the liability of a director only to the maximum extent permitted from time to time by the BCA or any successor law or laws. Any repeal or modification of the foregoing protection by the shareholders of the corporation shall not adversely affect any right or protection of a director of the corporation existing at the time of such repeal or modification.

DATED: April 26, 1989

SCANA CORPORATION

By: /s/ John A. Warren
JOHN A. WARREN
Chairman of the Board
and Chief Executive Officer

ATTEST:

(SEAL)

/s/ Barbara D. Blair
BARBARA D. BLAIR
Secretary

STATE OF SOUTH CAROLINA)
) ss:
COUNTY OF RICHLAND)

The undersigned JOHN A. WARREN and BARBARA D. BLAIR do hereby certify that they are the duly elected and acting Chairman of the Board and Chief Executive Officer and Secretary, respectively, of SCANA Corporation and are authorized to execute this verification; that each of the undersigned for himself or herself does hereby further certify that he/she has read the foregoing document, understands the meaning and purport of the statements therein contained and the same are true to the best of his/her information and belief.

Dated at Columbia, S. C., this 26th day of April, 1989.

/s/ John A. Warren
JOHN A WARREN
Chairman of the Board
and Chief Executive Officer

/s/ Barbara D. Blair
BARBARA D. BLAIR
Secretary

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
Apr 16 2020
SC Court of Appeals

C.A. No.: 2017-CP-40-06621

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,

Defendants,

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.

NOTICE OF APPEAL

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 (collectively, "Defendants") appeal the order in this matter filed on March 18, 2020, denying Defendants' SCRCP Rule 12(c) motion to dismiss for lack of derivative standing and granting Teresa Parler's motion to intervene. The order is immediately appealable because it "involv[es] the merits," S.C. Code § 14-3-330(1), and "affect[s] a substantial right," § 14-3-330(2).[1]

This notice of appeal is timely. SCANA received written notice of the entry of the order on March 18, 2020. A copy of the order is attached to this Notice as Exhibit A.

[REMAINDER OF PAGE LEFT BLANK INTENTIONALLY]

[1] Defendants are also filing a petition for a writ of certiorari in the Supreme Court of South Carolina relating to the same order.

Dated: April 16, 2020 Respectfully submitted,

s/ *John A. Massalon*
John A. Massalon
Wills Massalon & Allen, LLC
Post Office Box 859
Charleston, South Carolina 29402
(843) 727-1144
jmassalon@wmalawfirm.net

Counsel for Defendants-Appellants Gregory E. Aliff; James Bennett; John F.A.V. Cecil; Sharon A. Decker; D. Maybank Hagood; Lynne M. Miller; James W. Roquemore; Maceo K. Sloan; and Alfredo Trujillo

s/ *William A. Coates*
William A. Coates
Roe Cassidy Coates & Price P.A.
1052 North Church Street
Post Office Box 10529
Greenville, South Carolina 29603
(864) 349-2600
wac@roecassidy.com

John A. Jordak, Jr. (*pro hac vice*)
Meredith J. Kingsley (*pro hac vice*)
Alston & Bird
1201 West Peachtree Street
Atlanta, Georgia 30309
(404) 881-7000
john.jordak@alston.com
meredith.kingsley@alston.com

Counsel for Defendant-Appellant Jimmy Addison

s/ *Steven J. Pugh*
Steven J. Pugh
Benjamin P. Carlton
Richardson Plowden
& Robinson, P.A.
Post Office Drawer 7788 (29202)
1900 Barnwell Street
Columbia, South Carolina 29201
(803) 771-4400
spugh@richardsonplowden.com
bcarlton@richardsonplowden.com

I.S. Leevy Johnson
George C. Johnson
Johnson Toal & Battiste, P.A.
1615 Barnwell Street
Columbia, South Carolina 29201
(803) 252-9700
islj@jtbpa.com
George@jtbpa.com

Brian D. Schmalzbach (*pro hac vice*)
Brian E. Pumphrey (*pro hac vice* pending)
McGuireWoods LLP
800 East Canal Street
Richmond, VA 23219
(804) 775-7745
bschmalzbach@mcguirewoods.com
bpumphrey@mcguirewoods.com

Counsel for Nominal Defendant-Appellant SCANA Corporation

s/ *Derk Van Raalte*
J. Brady Hair
Derk Van Raalte
Law Offices of J. Brady Hair
2500 City Hall Lane
Post Office Box 61896
North Charleston, SC 29419
(843) 572-8700
Brady@bradyhair.com
Derk@bradyhair.com

Anne M. Tompkins (*pro hac vice*)
Jonathan M. Watkins (*pro hac vice* pending)
Aaron C. Lang (*pro hac vice* pending)
Cadwalader, Wickersham & Taft LLP
227 West Trade Street
Charlotte, NC 28202
(704) 348-5222
Anne.Tompkins@cwt.com
Jonathan.Watkins@cwt.com
Aaron.Lang@cwt.com

Counsel for Defendant-Appellant Kevin B. Marsh

s/ *James M. Griffin*
James M. Griffin
Margaret N. Fox
Griffin Davis
4408 Forest Drive, Suite 300
Columbia, SC 29206
(803) 744-0800
jgriffin@griffindavislaw.com
mfox@griffindavislaw.com

James F. Wyatt, III (*pro hac vice*)
Robert A. Blake, Jr. (*pro hac vice*)
Wyatt & Blake, LLP
435 East Morehead Street
Charlotte, NC 28202
(704) 331-0767
jwyatt@wyattlaw.net
rblake@wyattlaw.net

Counsel for Defendant-Appellant Stephen A. Byrne

Other Counsel of Record:

Mark D. Chappell
Graham L. Newman
Chappell Smith & Arden, P.A.
2801 Devine Street, Suite 300
Columbia, SC 29205
mchappell@csa-law.com
gnewman@csa-law.com

Lawrence P. Eagel
Melissa A. Fortunato
Bragar Eagel & Squire, P.C.
885 Third Avenue, Suite 3040
New York, New York 10022
eagel@bespc.com
fortunato@bespc.com

Counsel for Plaintiff-Respondent Teresa Parler

The State of South Carolina
In the Court of Appeals

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

J. Mark Hayes, II, Circuit Court Judge

RECEIVED
Jun 09 2020
SC Court of Appeals

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

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

Plaintiff,

v.

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

Defendants,

And

SCANA CORP.,

Nominal Defendant.

TERESA PARLER, derivatively on behalf of
SCANA CORPORATION,

Plaintiff,

v.

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

Defendants,

And

SCANA CORP.,

Nominal Defendant,

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

And

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

INITIAL APPELLANTS' BRIEF

John A. Massalon (SC Bar # 10279)
Wills Massalon & Allen, LLC
Post Office Box 859
Charleston, South Carolina 29402
(843) 727-1144
jmassalon@wmalawfirm.net

C. Scott Greene (*pro hac vice*)
John R. Bielema (*pro hac vice*)
Michael P. Carey (*pro hac vice*)
Bryan Cave Leighton Paisner LLP
One Atlantic Center, 14th Floor
1201 W. Peachtree St., N.W.
Atlanta, GA 30309-3471
(404) 572-6978
scott.greene@bclplaw.com
john.bielema@bclplaw.com
michael.carey@bclplaw.com

Barbara A. Smith (*pro hac vice*)
Bryan Cave Leighton Paisner LLP
One Metropolitan Square
211 N. Broadway, Suite 3600
St. Louis, Missouri 63102
(314) 259-2000
barbara.smith@bclplaw.com

Counsel for Defendants-Appellants Gregory E. Aliff; James Bennett; John F.A.V. Cecil; Sharon A. Decker; D. Maybank Hagood; Lynne M. Miller; James W. Roquemore; Maceo K. Sloan; and Alfredo Trujillo

Steven J. Pugh (SC Bar # 14341)
Benjamin P. Carlton (SC Bar # 101142)
Richardson Plowden
& Robinson, P.A.
Post Office Drawer 7788 (29202)
1900 Barnwell Street
Columbia, South Carolina 29201
(803) 771-4400
spugh@richardsonplowden.com
bcarlton@richardsonplowden.com

I.S. Leevy Johnson (SC Bar # 3020)
George C. Johnson (SC Bar # 9308)
Johnson Toal & Battiste, P.A.
1615 Barnwell Street
Columbia, South Carolina 29201
(803) 252-9700
islj@jtbpa.com
George@jtbpa.com

Brian D. Schmalzbach (*pro hac vice*)
Brian E. Pumphrey (*pro hac vice*)
McGuireWoods LLP
800 East Canal Street
Richmond, VA 23219
(804) 775-7745
bschmalzbach@mcguirewoods.com
bpumphrey@mcguirewoods.com

Counsel for Nominal Defendant-Appellant SCANA Corporation

William A. Coates (SC Bar # 1289)
Roe Cassidy Coates & Price P.A.
1052 North Church Street
Post Office Box 10529
Greenville, South Carolina 29603
(864) 349-2600
wac@roecassidy.com

John A. Jordak, Jr. (*pro hac vice*)
Meredith J. Kingsley (*pro hac vice*)
Alston & Bird
1201 West Peachtree Street
Atlanta, Georgia 30309
(404) 881-7000
john.jordak@alston.com
meredith.kingsley@alston.com

Counsel for Defendant-Appellant Jimmy Addison

James M. Griffin (SC Bar # 9995)
Margaret N. Fox (SC Bar # 76228)
Griffin Davis
4408 Forest Drive, Suite 300
Columbia, SC 29206
(803) 744-0800
jgriffin@griffindavislaw.com
mfox@griffindavislaw.com

James F. Wyatt, III (*pro hac vice*)
Robert A. Blake, Jr. (*pro hac vice*)
Wyatt & Blake, LLP
435 East Morehead Street
Charlotte, NC 28202
(704) 331-0767
jwyatt@wyattlaw.net
rblake@wyattlaw.net

Counsel for Defendant-Appellant Stephen A. Byrne

J. Brady Hair (SC Bar # 9040)
Derk Van Raalte (SC Bar # 9286)
Law Offices of J. Brady Hair
2500 City Hall Lane
Post Office Box 61896
North Charleston, SC 29419
(843) 572-8700
Brady@bradyhair.com
Derk@bradyhair.com

Anne M. Tompkins (*pro hac vice*)
Jonathan M. Watkins (*pro hac vice* pending)
Aaron C. Lang (*pro hac vice* pending)
Cadwalader, Wickersham & Taft LLP
227 West Trade Street
Charlotte, NC 28202
(704) 348-5222
Anne.Tompkins@cwt.com
Jonathan.Watkins@cwt.com
Aaron.Lang@cwt.com

Counsel for Defendant-Appellant Kevin B. Marsh

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES ON APPEAL 1

INTRODUCTION 2

STATEMENT OF THE CASE 4

JURISDICTIONAL STATEMENT 7

STANDARD OF REVIEW 13

ARGUMENT 14

I. The trial court erred by holding, contrary to *Johnson v. Baldwin*, that a former shareholder has standing to bring a shareholder derivative action on behalf of a corporation when she is no longer a shareholder of that corporation. 14

A. *Johnson v. Baldwin* requires continuous stock ownership for derivative standing. 14

B. The trial court flouted Johnson's continuous ownership requirement. 16

1. The trial court erred in viewing *Johnson* as Delaware law it could reject in favor of North Carolina law. 17

2. The trial court erred by using irrelevant "equitable" concerns to create an unbounded exception to the controlling continuous ownership rule. 22

a. The trial court wrongly rejected *Johnson* based on its belief in the ultimate merits of Plaintiff's allegations. 22

b. The trial court incorrectly set aside *Johnson* based on unpleaded arguments about potential motivations for the merger. 24

C. The trial court's error transforms an asset of South Carolina companies into a liability. 26

CONCLUSION 28

TABLE OF AUTHORITIES

Page

Cases

A-Plus Janitorial & Carpet Cleaning v. Employers' Workers' Comp. Ass'n,
936 P.2d 916 (Okla. 1997) 15

Alford v. Shaw,
398 S.E.2d 445 (N.C. 1990) 19

Ark. Teacher Ret. Sys. v. Mozilo,
705 F.3d 973 (9th Cir. 2013) 10

Arkansas Teacher Ret. Sys. v. Countrywide Fin. Corp.,
75 A.3d 888 (Del. 2013) 25

Bronzaft v. Caporali,
616 N.Y.S.2d 863 (N.Y. Sup. Ct. 1994) 15

Brown v. Stewart,
348 S.C. 33, 557 S.E.2d 676 (Ct. App. 2001) 26

Carolina First Corp. v. Whittle,
343 S.C. 176, 539 S.E.2d 402 (Ct. App. 2000) 17

Chester v. S.C. Dep't of Pub. Safety,
388 S.C. 343, 698 S.E.2d 559 (2010) 12

Christopher v. Liberty Oil & Gas Corp.,
665 So. 2d 410 (La. Ct. App. 1995) 15

Davis v. Hamm,
300 S.C. 284, 387 S.E.2d 676 (Ct. App. 1989) 18

Doe v. Bishop of Charleston,
407 S.C. 128, 754 S.E.2d 494 (2014) 13

Falk v. Sadler,
341 S.C. 281, 533 S.E.2d 350 (Ct. App. 2000) 13

Gabhart v. Gabhart,
370 N.E.2d 345 (Ind. 1977) 25

Grace Bros., Ltd. v. Farley Indus., Inc.,
450 S.E.2d 814 (Ga. 1994) 15

Grosset v. Wenaas,
42 Cal.4th 1100 (Cal. 2008) 27

In re Groupon Deriv. Litig.,
882 F. Supp. 2d 1043 (N.D. Ill. 2012) 12, 27-28

Hagood v. Sommerville,
362 S.C. 191, 607 S.E.2d 707 (2005) 8-9, 11

Hambrick v. GMAC Mortg. Corp.,
370 S.C. 118, 634 S.E.2d 5 (2006) 13

Hayman v. Morris,
46 N.Y.S.2d 482, 490 (N.Y. Sup. Ct. 1943) 21

Home Builders Ass'n of S.C. v. Sch. Dist. No. 2 of Dorchester Cty.,
405 S.C. 458, 748 S.E.2d 230 (Ct. App. 2013) 13

Johnson v. Baldwin,
221 S.C. 141, 69 S.E.2d 585 (1952) ..... *passim*

KBC Asset Mgmt. NV v. Marsh,
No. 2019-CP-40-02522 (Richland County) 10, 12

Kehaya v. Axton,
32 F. Supp. 266 (S.D.N.Y. 1940) 9, 21, 27

Lewis v. Anderson,
477 A.2d 1040 (Del. 1984) 15

Metal Tech Corp. v. Metal Teckniques Co.,
703 P.2d 237 (Or. Ct. App. 1985) 15

Mims Amusement Co. v. S.C. Law Enf't Div.,
366 S.C. 141, 621 S.E.2d 344 (2005) 18

Neeltec Enterprises, Inc. v. Long,
397 S.C. 563, 725 S.E.2d 926 (2012) 8, 12

Parler v. SCANA Corp.,
Appellate Case No. 2020-000616 (S.C. filed Apr. 16, 2020) 7

In re SCANA Corporation Derivative Litigation,
No. 3:17-cv-03166-MBS (D.S.C.) 5

In re SCANA Corporation Public Shareholder Litig.,
No. 3:18-cv-505 (D.S.C.) 10, 12

In re Sea-Land Corp. Shareholders Litig.,
642 A.2d 792 (Del. Ch. 1993), *aff'd sub nom. Sea-Land Corp. S'holder Litig. v. Abely*, 633 A.2d 371 (Del. 1993) 25

Sound Infiniti, Inc. v. Snyder,
237 P.3d 241 (Wash. 2010) 15

State v. Register,
308 S.C. 534, 419 S.E.2d 771 (1992) 10

Tillman v. Tillman,
420 S.C. 246, 801 S.E.2d 757 (Ct. App. 2017) 8

Timko v. Triarsi,
898 So. 2d 89 (Fla. Dist. Ct. App. 2005) 15

U.S. Fid. & Guar. Co. v. Griffin,
541 N.E.2d 553 (Ind. Ct. App. 1989) 15

Weil v. Nw. Indus., Inc.,
522 N.E.2d 172 (Ill. Ct. App. 1988) 15

White v. Banes Co.,
866 P.2d 339 (N.M. 1993) 15

Yanow v. Teal Indus., Inc.,
422 A.2d 311 (Conn. 1979) 15

Statutes

S.C. Code Ann. § 14-3-330 7-8

S.C. Code Ann. § 33-2-102(e) 25

S.C. Code Ann. § 33-8-510 ..... 12, 25

Other Authorities

2 McLaughlin on Class Actions
§ 9:5 (16th ed. 2019) 20

Rule 12(c), SCRCP 5-6, 21

Rule 41(a)(1), SCRCP 6

S.C. Const. Article V, § 9 18

STATEMENT OF ISSUES ON APPEAL

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

INTRODUCTION

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

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

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

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

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

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

STATEMENT OF THE CASE

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

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

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

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

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

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

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

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

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

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

JURISDICTIONAL STATEMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

STANDARD OF REVIEW

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

ARGUMENT

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

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

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

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

prosecute an action as a member of a class to which she does not belong." *Id.* at 151, 69 S.E.2d at 589.[2]

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

---

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

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

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

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

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

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

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

Pervading the trial court's order is the court's incorrect view that *Johnson* articulates an equitable rule of Delaware law that the court could choose not to apply. The trial court asserted that *Johnson*'s "continuous ownership rule" was "simply implied in South Carolina law through the influence of Delaware law." [R. p._; Order p. 9.] And it reserved the right "to diverge from Delaware's application of corporate law where a failure to do so would create a result that was either 'too restrictive' or 'harsh.'" [R. p._; Order p. 9 (quoting *Carolina First Corp. v. Whittle*, 343 S.C. 176, 192, 539 S.E.2d 402, 411 (Ct. App. 2000)).]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Dated: June 8, 2020

Respectfully submitted,

s/ *John A. Massalon*
John A. Massalon (SC Bar # 10279)
Wills Massalon & Allen, LLC
Post Office Box 859
Charleston, South Carolina 29402
(843) 727-1144
jmassalon@wmalawfirm.net

C. Scott Greene (*pro hac vice*)
John R. Bielema Jr. (*pro hac vice*)
Michael P. Carey (*pro hac vice*)
Bryan Cave Leighton Paisner LLP
One Atlantic Center, 14th Floor
1201 West Peachtree Street, N.W.
Atlanta, Georgia 30309
(404) 572-6600
scott.greene@bclplaw.com
john.bielema@bclplaw.com
michael.carey@bclplaw.com

Barbara A. Smith (*pro hac vice*)
Bryan Cave Leighton Paisner LLP
One Metropolitan Square
211 N. Broadway, Suite 3600
St. Louis, Missouri 63102
(314) 259-2000
barbara.smith@bclplaw.com

Counsel for Defendants-Appellants Gregory E. Aliff; James Bennett; John F.A.V. Cecil; Sharon A. Decker; D. Maybank Hagood; Lynne M. Miller; James W. Roquemore; Maceo K. Sloan; and Alfredo Trujillo

s/ *Steven J. Pugh*
Steven J. Pugh (SC Bar # 14341)
Benjamin P. Carlton (SC Bar # 101142)
Richardson Plowden
& Robinson, P.A.
Post Office Drawer 7788 (29202)
1900 Barnwell Street
Columbia, South Carolina 29201
(803) 771-4400
spugh@richardsonplowden.com
bcarlton@richardsonplowden.com

I.S. Leevy Johnson (SC Bar # 3020)
George C. Johnson (SC Bar # 9308)
Johnson Toal & Battiste, P.A.
1615 Barnwell Street
Columbia, South Carolina 29201
(803) 252-9700
islj@jtbpa.com
George@jtbpa.com

Brian D. Schmalzbach (*pro hac vice*)
Brian E. Pumphrey (*pro hac vice*)
McGuireWoods LLP
800 East Canal Street
Richmond, VA 23219
(804) 775-7745
bschmalzbach@mcguirewoods.com
bpumphrey@mcguirewoods.com

Counsel for Nominal Defendant-Appellant SCANA Corporation

s/ *William A. Coates*
William A. Coates (SC Bar # 1289)
Roe Cassidy Coates & Price P.A.
1052 North Church Street
Post Office Box 10529
Greenville, South Carolina 29603
(864) 349-2600
wac@roecassidy.com

John A. Jordak, Jr. (*pro hac vice*)
Meredith J. Kingsley (*pro hac vice*)
Alston & Bird
1201 West Peachtree Street
Atlanta, Georgia 30309
(404) 881-7000
john.jordak@alston.com
meredith.kingsley@alston.com

Counsel for Defendant-Appellant Jimmy Addison

s/ *James M. Griffin*
James M. Griffin (SC Bar # 9995)
Margaret N. Fox (SC Bar # 76228)
Griffin Davis
4408 Forest Drive, Suite 300
Columbia, SC 29206
(803) 744-0800
jgriffin@griffindavislaw.com
mfox@griffindavislaw.com

James F. Wyatt, III (*pro hac vice*)
Robert A. Blake, Jr. (*pro hac vice*)
Wyatt & Blake, LLP
435 East Morehead Street
Charlotte, NC 28202
(704) 331-0767
jwyatt@wyattlaw.net
rblake@wyattlaw.net

Counsel for Defendant-Appellant Stephen A. Byrne

s/ *Derk Van Raalte*
J. Brady Hair (SC Bar # 9040)
Derk Van Raalte (SC Bar # 9286)
Law Offices of J. Brady Hair
2500 City Hall Lane
Post Office Box 61896
North Charleston, SC 29419
(843) 572-8700
Brady@bradyhair.com
Derk@bradyhair.com

Anne M. Tompkins (*pro hac vice*)
Jonathan M. Watkins (*pro hac vice* pending)
Aaron C. Lang (*pro hac vice* pending)
Cadwalader, Wickersham & Taft LLP
227 West Trade Street
Charlotte, NC 28202
(704) 348-5222
Anne.Tompkins@cwt.com
Jonathan.Watkins@cwt.com
Aaron.Lang@cwt.com

Counsel for Defendant-Appellant Kevin B. Marsh

The State of South Carolina
In the Court of Appeals

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

J. Mark Hayes, II, Circuit Court Judge

RECEIVED
Jun 09 2020
SC Court of Appeals

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

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

Plaintiff,

v.

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

Defendants,

And

SCANA CORP.,

Nominal Defendant.

TERESA PARLER, derivatively on behalf of
SCANA CORPORATION,

Plaintiff,

v.

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

Defendants,

And

SCANA CORP.,

Nominal Defendant,

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

And

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

DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

Defendants and Nominal Defendant SCANA Corporation, Appellants in the above-captioned matter, propose the following to be included in the Record on Appeal:

1. Order Granting Teresa Parler's Motion to Intervene and Denying Defendants' Motion to Dismiss, filed March 18, 2020;

2. Federal Derivative Opinion Granting Defendants' Motion for Judgment on the Pleadings, No. 3:17-cv-03166 (D.S.C. Sept. 3, 2019);

3. Order Granting Pro Hac Vice Admission for Attorneys William R. Mitchelson, Jr., John A. Jordak, Jr., Meredith Jones Kingsley, James F. Wyatt III, Robert A. Blake, Jr., and Anne Magee Tompkins, dated February 5, 2018;

4. Order Granting Pro Hac Vice Admission for Attorney Brian D. Schmalzbach, dated July 18, 2019;

5. Order Granting Pro Hac Vice Admission for Attorney Brian E. Pumphrey, dated May 13, 2020;

6. Defendants' Motion for Judgment on the Pleadings and Memorandum of Law in Support, filed January 7, 2019;

7. Proposed Complaint of Teresa Parler, filed May 6, 2019;

8. Motion to Intervene of Teresa Parler, filed May 6, 2019;

9. Defendants' Opposition to Motion to Intervene, filed May 31, 2019;

10. Transcript of Hearing on Motion to Stay, held on February 15, 2018;

11. Transcript of Hearing on Derivative Standing, held on November 14, 2019;

12. Exhibit A to Defendants' Motion for Judgment on the Pleadings, Articles of Merger, filed January 7, 2019;

13. SCANA Corporation, Restated Articles of Incorporation, dated April 26, 1989;

14. Exhibit B to Defendants' Reply in Support of Motion for Judgment on the Pleadings, filed July 10, 2019;

15. Letter from Lawrence P. Eagel to Judge Hayes re: Pending Motions, dated January 29, 2018;

16. Letter from Stephen J. Pugh to Judge Hayes re: Dismissal of Federal Derivative Case, dated September 3, 2019.

I certify that this designation contains no matter which is irrelevant to this appeal.

Dated: June 8, 2020

Respectfully submitted,

s/ *John A. Massalon*
John A. Massalon (SC Bar # 10279)
Wills Massalon & Allen, LLC
Post Office Box 859
Charleston, South Carolina 29402
(843) 727-1144
jmassalon@wmalawfirm.net

C. Scott Greene (*pro hac vice*)
John R. Bielema Jr. (*pro hac vice*)
Michael P. Carey (*pro hac vice*)
Bryan Cave Leighton Paisner LLP
One Atlantic Center, 14th Floor
1201 West Peachtree Street, N.W.
Atlanta, Georgia 30309
(404) 572-6600
scott.greene@bclplaw.com
john.bielema@bclplaw.com
michael.carey@bclplaw.com

Barbara A. Smith (*pro hac vice*)
Bryan Cave Leighton Paisner LLP
One Metropolitan Square
211 N. Broadway, Suite 3600
St. Louis, Missouri 63102
(314) 259-2000
barbara.smith@bclplaw.com

Counsel for Defendants-Appellants Gregory E. Aliff; James Bennett; John F.A.V. Cecil; Sharon A. Decker; D. Maybank Hagood; Lynne M. Miller; James W. Roquemore; Maceo K. Sloan; and Alfredo Trujillo

s/ *Steven J. Pugh*
Steven J. Pugh (SC Bar # 14341)
Benjamin P. Carlton (SC Bar # 101142)
Richardson Plowden
& Robinson, P.A.
Post Office Drawer 7788 (29202)
1900 Barnwell Street
Columbia, South Carolina 29201
(803) 771-4400
spugh@richardsonplowden.com
bcarlton@richardsonplowden.com

I.S. Leevy Johnson (SC Bar # 3020)
George C. Johnson (SC Bar # 9308)
Johnson Toal & Battiste, P.A.
1615 Barnwell Street
Columbia, South Carolina 29201
(803) 252-9700
islj@jtbpa.com
George@jtbpa.com

Brian D. Schmalzbach (*pro hac vice*)
Brian E. Pumphrey (*pro hac vice*)
McGuireWoods LLP
800 East Canal Street
Richmond, VA 23219
(804) 775-7745
bschmalzbach@mcguirewoods.com
bpumphrey@mcguirewoods.com

Counsel for Nominal Defendant-Appellant SCANA Corporation

s/ *William A. Coates*
William A. Coates (SC Bar # 1289)
Roe Cassidy Coates & Price P.A.
1052 North Church Street
Post Office Box 10529
Greenville, South Carolina 29603
(864) 349-2600
wac@roecassidy.com

John A. Jordak, Jr. (*pro hac vice*)
Meredith J. Kingsley (*pro hac vice*)
Alston & Bird
1201 West Peachtree Street
Atlanta, Georgia 30309
(404) 881-7000
john.jordak@alston.com
meredith.kingsley@alston.com

Counsel for Defendant-Appellant Jimmy Addison

s/ *James M. Griffin*
James M. Griffin (SC Bar # 9995)
Margaret N. Fox (SC Bar # 76228)
Griffin Davis
4408 Forest Drive, Suite 300
Columbia, SC 29206
(803) 744-0800
jgriffin@griffindavislaw.com
mfox@griffindavislaw.com

James F. Wyatt, III (*pro hac vice*)
Robert A. Blake, Jr. (*pro hac vice*)
Wyatt & Blake, LLP
435 East Morehead Street
Charlotte, NC 28202
(704) 331-0767
jwyatt@wyattlaw.net
rblake@wyattlaw.net

Counsel for Defendant-Appellant Stephen A. Byrne

s/ *Derk Van Raalte*
J. Brady Hair (SC Bar # 9040)
Derk Van Raalte (SC Bar # 9286)
Law Offices of J. Brady Hair
2500 City Hall Lane
Post Office Box 61896
North Charleston, SC 29419
(843) 572-8700
Brady@bradyhair.com
Derk@bradyhair.com

Anne M. Tompkins (*pro hac vice*)
Jonathan M. Watkins (*pro hac vice* pending)
Aaron C. Lang (*pro hac vice* pending)
Cadwalader, Wickersham & Taft LLP
227 West Trade Street
Charlotte, NC 28202
(704) 348-5222
Anne.Tompkins@cwt.com
Jonathan.Watkins@cwt.com
Aaron.Lang@cwt.com

Counsel for Defendant-Appellant Kevin B. Marsh

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
Jun 09 2020
SC Court of Appeals

C.A. No.: 2017-CP-40-06621

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 MOTION TO DISMISS

Plaintiff/Respondent Teresa Parler ("Parler"), derivatively on behalf of SCANA Corporation ("SCANA"), moves to dismiss this interlocutory appeal because the Court of Appeals possesses no appellate jurisdiction over this matter pursuant to S.C. Code Ann. § 14-3-330. For the reasons set forth below, this motion should be granted.

FACTS

This is a derivative action alleging that misconduct by the Appellant-Board Members led to the collapse of the V.C. Summer nuclear project and irreversible damage to SCANA. Subsequent to the filing of the complaint, SCANA merged with Dominion Energy, Inc. in a manner in which the Appellants contend divested Parler both of her ownership of SCANA stock and of her standing to maintain this derivative action. On this basis, the Appellant-Board Members moved to dismiss this action pursuant to a Rule 12(c), SCRCP motion for judgment on the pleadings.

On March 18, 2020, the trial court denied the Appellant-Board Members' motion and ordered that the case proceed to discovery. (Order at 12) Despite the interlocutory nature of this order, the Appellant-Board Members filed the instant appeal. Simultaneously, the Appellant-Board Members filed a petition for writ of certiorari seeking the Supreme Court's interlocutory review of the trial court's order. (Exhibit One) This petition remains pending.

STANDARD OF REVIEW

"Appeal may be taken, as provided by law, from any final judgment, appealable order or decision." Rule 201(a), SCACR. "An interlocutory order is not immediately appealable unless it involves the merits of the case or affects a substantial right." Burkey v. Noce, 398 S.C. 35, 37, 726 S.E.2d 229, 230 (Ct. App. 2012). "To avoid circuitous litigation and needless appeals, we construe section 14-3-330 narrowly, eyeing the nature and effect of the order, not merely its label." Tillman v. Tillman, 420 S.C. 246, 250–51, 801 S.E.2d 757, 760 (Ct. App. 2017), citing Morrow v.

Fundamental Long-Term Care Holdings, LLC, 412 S.C. 534, 538, 773 S.E.2d 144, 146 (2015); Thornton v. S.C. Elec. & Gas Corp., 391 S.C. 297, 302–04, 705 S.E.2d 475, 478–79 (Ct. App. 2011).

ANALYSIS

Initially, Appellants' appeal should be dismissed because South Carolina precedent establishes "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." Rose v. Thrash, 291 S.C. 459, 459, 354 S.E.2d 378, 378 (1987).

Despite the binding precedent of Rose, Appellants insist that "[t]he order is immediately appealable because it 'involv[es] the merits,' S.C. Code § 14-3-330(1), and 'affect[s] a substantial right,' § 14-3-330(2)." Whereas neither is the case, this appeal should be dismissed.

"An order involves the merits when it 'finally determine[s] some substantial matter forming the whole or a part of some cause of action or defense....'" Tillman v. Tillman, 420 S.C. 246, 249, 801 S.E.2d 757, 759 (Ct. App. 2017), citing Mid-State Distribs., Inc. v. Century Importers, Inc., 310 S.C. 330, 334, 426 S.E.2d 777, 780 (1993).

> If there is some further act which must be done by the court prior to a determination of the rights of the parties, then the order is interlocutory. If a judgment determines the applicable law while leaving open questions of fact, it is not a final judgment.

Mid-State Distributors, Inc. at 335, 426 S.E.2d at 780. In the trial court's order now on appeal, the court denied the Appellants' motion for judgment on the pleadings and ordered that "the case proceed with discovery." (Order at 12) Thus questions of fact remain open, final judgment has not been issued on any issue (much less the case itself), and the order is not appealable under S.C. Code § 14-3-330(1).

An order affecting a substantial right "is when such order would discontinue an action, prevent an appeal, grant or refuse a new trial, or strike out an action or defense." Mid-State Distributors, Inc. at 335, n.4, 426 S.E.2d at 780, citing Shields v. Martin Marietta Corp., 303 S.C. 469, 402 S.E.2d 482 (1991). In this case, the order on appeal does not implicate any of the instances referenced in Mid-State Distributors, Inc. Rather the trial court merely has ordered the case proceed to discovery. All defenses available to the Appellants remain available once fact discovery is complete.

As noted above, pursuant to the precedent of Rose, the Court should dismiss this appeal of the trial court's denial of a Rule 12(c) motion for judgment on the pleadings. Furthermore, an analysis of subsections (1) and (2) reveals that this appeal falls under neither the "involves the merits" nor "affects a substantial right" exceptions to the appealability of an interlocutory order. Therefore this appeal should be dismissed.

Respectfully submitted,

s/ Graham L. Newman
Mark D. Chappell
Graham L. Newman
CHAPPELL, SMITH & ARDEN, P.A.
2801 Devine Street, Suite 300
Columbia, South Carolina 29205
(803) 929-3600
(803) 929-3604 (facsimile)

Lawrence P. Eagel (*pro hac vice admission*)
Melissa A. Fortunato (*pro hac vice admission*)
BRAGAR, EAGEL & SQUIRE, P.C.
885 Third Avenue, Suite 3040
New York, New York 10022
(212) 308-5858
(212) 486-0462 (facsimile)

ATTORNEYS FOR RESPONDENT

Dated: June 9, 2020

The State of South Carolina
In the Court of Appeals

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

J. Mark Hayes, II, Circuit Court Judge

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

RECEIVED
Jun 12 2020
SC Court of Appeals

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

Plaintiff,

v.

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

Defendants,

And

SCANA CORP.,

Nominal Defendant.

TERESA PARLER, derivatively on behalf of
SCANA CORPORATION,

Plaintiff,

v.

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

Defendants,

And

SCANA CORP.,

Nominal Defendant,

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

And

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

APPELLANTS' RETURN TO MOTION TO DISMISS AND OPPOSED MOTION TO ADDRESS APPELLATE JURISDICTION IN THE PARTIES' SCACR 208 BRIEFS

Defendants and Nominal Defendant SCANA Corporation, Appellants in the above-captioned matter, move the Court for an order directing the parties to address appellate jurisdiction in their briefs under SCACR 208 in lieu of filing returns and replies under SCACR 240(e)-(f) to Respondent Teresa Parler's Motion to Dismiss. In

the alternative, Appellants incorporate by reference the Jurisdictional Statement in the Initial Appellants' Brief as their return in opposition to the Motion to Dismiss under SCACR 240(e).

On Monday, June 8, Appellants electronically filed and served their Initial Brief, which includes a Jurisdictional Statement explaining why this Court has jurisdiction under S.C. Code Ann. § 14-3-330(1)-(2). As that Initial Brief explains, the trial court's order denying the motion to dismiss this non-shareholder plaintiff's derivative action for lack of shareholder derivative standing is appealable because it both involves the merits and denies SCANA the substantial right to control its own litigation, or at least to have that litigation controlled by a current shareholder. This Court also has jurisdiction because, in nature and effect, the trial court's order is like other orders held appealable under § 14-3-330 that effectively deny a party its choice of counsel or deny a party its right to choose its own defendants. *See* Appellants' Initial Brief 7-13. As the Initial Brief makes clear, the reasons why this Court has jurisdiction are intertwined with the substance of the trial court's unprecedented ruling.

The day after the deadline for the Initial Appellants' Brief, Respondent served a four-page motion to dismiss the appeal that did not acknowledge or respond to Appellants' Jurisdictional Statement. Rather than engage in duplicative motions practice in response to a motion that could have been filed many weeks ago, it would serve the interests of economy and provide the Court with a fuller understanding of the merits that inform the jurisdictional issues if the parties address these

jurisdictional questions in their SCACR 208 briefs. Respondent opposes the motion to address appellate jurisdiction in the parties' SCACR 208 briefs.

In the alternative, and to avoid unnecessary filings, Appellants incorporate by reference the Jurisdictional Statement in the Initial Appellants' Brief, pages 7-13, as their return in opposition to Respondent's Motion to Dismiss for purposes of SCACR 240(e).

Dated: June 12, 2020

Respectfully submitted,

s/ *John A. Massalon*
John A. Massalon (SC Bar # 10279)
Wills Massalon & Allen, LLC
Post Office Box 859
Charleston, South Carolina 29402
(843) 727-1144
jmassalon@wmalawfirm.net

C. Scott Greene (*pro hac vice*)
John R. Bielema Jr. (*pro hac vice*)
Michael P. Carey (*pro hac vice*)
Bryan Cave Leighton Paisner LLP
One Atlantic Center, 14th Floor
1201 West Peachtree Street, N.W.
Atlanta, Georgia 30309
(404) 572-6600
scott.greene@bclplaw.com
john.bielema@bclplaw.com
michael.carey@bclplaw.com

Barbara A. Smith (*pro hac vice*)
Bryan Cave Leighton Paisner LLP
One Metropolitan Square
211 N. Broadway, Suite 3600
St. Louis, Missouri 63102
(314) 259-2000
barbara.smith@bclplaw.com

Counsel for Defendants-Appellants Gregory E. Aliff; James Bennett; John F.A.V. Cecil; Sharon A. Decker; D. Maybank Hagood; Lynne M. Miller; James W. Roquemore; Maceo K. Sloan; and Alfredo Trujillo

s/ *Steven J. Pugh*
Steven J. Pugh (SC Bar # 14341)
Benjamin P. Carlton (SC Bar # 101142)
Richardson Plowden
& Robinson, P.A.
Post Office Drawer 7788 (29202)
1900 Barnwell Street
Columbia, South Carolina 29201
(803) 771-4400
spugh@richardsonplowden.com
bcarlton@richardsonplowden.com

I.S. Leevy Johnson (SC Bar # 3020)
George C. Johnson (SC Bar # 9308)
Johnson Toal & Battiste, P.A.
1615 Barnwell Street
Columbia, South Carolina 29201
(803) 252-9700
islj@jtbpa.com
George@jtbpa.com

Brian D. Schmalzbach (*pro hac vice*)
Brian E. Pumphrey (*pro hac vice*)
McGuireWoods LLP
800 East Canal Street
Richmond, VA 23219
(804) 775-7745
bschmalzbach@mcguirewoods.com
bpumphrey@mcguirewoods.com

Counsel for Nominal Defendant-Appellant SCANA Corporation

s/ *William A. Coates*
William A. Coates (SC Bar # 1289)
Roe Cassidy Coates & Price P.A.
1052 North Church Street
Post Office Box 10529
Greenville, South Carolina 29603
(864) 349-2600
wac@roecassidy.com

John A. Jordak, Jr. (*pro hac vice*)
Meredith J. Kingsley (*pro hac vice*)
Alston & Bird
1201 West Peachtree Street
Atlanta, Georgia 30309
(404) 881-7000
john.jordak@alston.com
meredith.kingsley@alston.com

Counsel for Defendant-Appellant Jimmy Addison

s/ *James M. Griffin*
James M. Griffin (SC Bar # 9995)
Margaret N. Fox (SC Bar # 76228)
Griffin Davis
4408 Forest Drive, Suite 300
Columbia, SC 29206
(803) 744-0800
jgriffin@griffindavislaw.com
mfox@griffindavislaw.com

James F. Wyatt, III (*pro hac vice*)
Robert A. Blake, Jr. (*pro hac vice*)
Wyatt & Blake, LLP
435 East Morehead Street
Charlotte, NC 28202
(704) 331-0767
jwyatt@wyattlaw.net
rblake@wyattlaw.net

Counsel for Defendant-Appellant Stephen A. Byrne

s/ *Derk Van Raalte*
J. Brady Hair (SC Bar # 9040)
Derk Van Raalte (SC Bar # 9286)
Law Offices of J. Brady Hair
2500 City Hall Lane
Post Office Box 61896
North Charleston, SC 29419
(843) 572-8700
Brady@bradyhair.com
Derk@bradyhair.com

Anne M. Tompkins (*pro hac vice*)
Jonathan M. Watkins (*pro hac vice* pending)
Aaron C. Lang (*pro hac vice* pending)
Cadwalader, Wickersham & Taft LLP
227 West Trade Street
Charlotte, NC 28202
(704) 348-5222
Anne.Tompkins@cwt.com
Jonathan.Watkins@cwt.com
Aaron.Lang@cwt.com

Counsel for Defendant-Appellant Kevin B. Marsh

The South Carolina Court of Appeals

R. Wayne Todd, derivatively on behalf of SCANA Corporation, Plaintiff,

v.

Kevin Marsh, Gregory Aliff, James Bennett, John Cecil, Sharon Decker, Maybank Hagood, Lynn Miller, James Roquemore, Maceo Sloan, Alfredo Trujillo, Jimmy Addison, and Steven Byrne, Defendants,

And SCANA Corp., Nominal Defendant.

Teresa Parlor, derivatively on behalf of SCANA Corporation, Plaintiff,

v.

Kevin Marshall, Gregory Aliff, James Bennett, John Cecil,Sharon Decker, Maybank Hagood, Lynn Miller, James Roquemore, Maceo Sloan, Alfredo Trujillo, Jimmy Addison, and Steven Byrne, Defendants,

And

SCANA Corp., Nominal Defendant,

Of Which SCANA Corporation, Kevin Marsh, Grefory 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 Teresa Parlor, derivatively on behalf of SCANA Corporation is the Respondent.

Appellate Case No. 2020-000619

ORDER

Appellants have appealed the denial of a motion to dismiss. Respondent has moved to dismiss this appeal. After careful consideration of the parties' filings, the motion to dismiss is granted because the underlying order on appeal is not immediately appealable. *See* S.C. Code Ann. § 14-3-330 (2017); *Rose v. Thrash*, 291 S.C. 459, 459, 354 S.E.2d 378, 378 (1987) ("[T]he denial of a motion for judgment on the pleadings is not directly appealable . . . , even if it raises only a question of law."). The remittitur will be sent as required by Rule 221(b), SCACR.

FOR THE COURT

Columbia, South Carolina

cc:
Steven James Pugh, Esquire
Benjamin Palmer Carlton, Esquire
I.S. Leevy Johnson, Esquire
George Craig Johnson, Esquire
Brian D. Schmalzbach, Esquire
Brian E. Pumphrey, Esquire
William A. Coates, Esquire
John A. Jordak, Jr., Esquire
Meredith J. Kingsley, Esquire
John A. Massalon, Esquire
J. Brady Hair, Esquire
Derk Van Raalte, IV, Esquire
Anne M. Tompkins, Esquire
Jonathan M. Watkins, Esquire
Aaron C. Lang, Esquire
James Mixon Griffin, Esquire
Margaret Nicole Fox, Esquire
James F. Wyatt, III, Esquire

FILED
Jul 29 2020

Robert A. Blake, Esquire
Mark D. Chappell, Esquire
Graham L. Newman, Esquire
Lawrence P. Eagel, Esquire
Melissa A. Fortunato, Esquire

The Supreme Court of South Carolina

Teresa Parler, derivatively on behalf of SCANA CORPORATION,
Plaintiff-Respondent,

v.

SCANA CORPORATION,
Nominal Defendant-Petitioner,

and

Kevin B. Marsh, Gregory Aliff, James Bennett, John Cecil,Sharon Decker, Maybank Hagood ,Lynn Miller, James Roquemore, Maceo Sloan, Alfredo Trujillo, Jimmy Addison, and Steve Byrne,Defendants-Petitioners

Appellate Case No. 2020-000616

ORDER

An appeal is currently pending in the court of appeals in this matter. Petitioners ask this Court to issue a writ of certiorari to decide the issues on appeal. The petition for a writ of certiorari is denied.

_____ C.J.

_____ J.

_____ J.

_____ J.

_____ J.

Columbia, South Carolina
August 7, 2020

cc: J. Brady Hair, Esquire
Derk Van Raalte, IV, Esquire
James Mixon Griffin, Esquire
Margaret Nicole Fox, Esquire
Steven James Pugh, Esquire
Benjamin Palmer Carlton, Esquire
I.S. Leevy Johnson, Esquire
George Craig Johnson, Esquire
William A. Coates, Esquire
John A. Massalon, Esquire
Brian D. Schmalzbach, Esquire
John A. Jordak, Jr., Esquire
Meredith J. Kingsley, Esquire
James F. Wyatt, III, Esquire
Robert A. Blake, Esquire
Anne M. Tompkins, Esquire
Jonathan M. Watkins, Esquire
Aaron C. Lang, Esquire
Brian E. Pumphrey, Esquire
Mark D. Chappell, Esquire
Graham L. Newman, Esquire
Lawrence P. Eagel, Esquire
Melissa A. Fortunato, Esquire
The Honorable Jenny Abbott Kitchings

The State of South Carolina
In the Court of Appeals

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

J. Mark Hayes, II, Circuit Court Judge

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

RECEIVED
Aug 12 2020
SC Court of Appeals

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

Plaintiff,

v.

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

Defendants,

And

SCANA CORP.,

Nominal Defendant.

TERESA PARLER, derivatively on behalf of
SCANA CORPORATION,

Plaintiff,

v.

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

Defendants,

And

SCANA CORP.,

Nominal Defendant,

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

And

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

PETITION FOR REHEARING
UNDER RULE 221(a)

John A. Massalon (SC Bar # 10279)
Wills Massalon & Allen, LLC
Post Office Box 859
Charleston, South Carolina 29402
(843) 727-1144
jmassalon@wmalawfirm.net

C. Scott Greene (*pro hac vice*)
John R. Bielema (*pro hac vice*)
Michael P. Carey (*pro hac vice*)
Bryan Cave Leighton Paisner LLP
One Atlantic Center, 14th Floor
1201 W. Peachtree St., N.W.
Atlanta, GA 30309-3471
(404) 572-6978
scott.greene@bclplaw.com
john.bielema@bclplaw.com
michael.carey@bclplaw.com

Barbara A. Smith (*pro hac vice*)
Bryan Cave Leighton Paisner LLP
One Metropolitan Square
211 N. Broadway, Suite 3600
St. Louis, Missouri 63102
(314) 259-2000
barbara.smith@bclplaw.com

Counsel for Defendants-Appellants Gregory E. Aliff; James Bennett; John F.A.V. Cecil; Sharon A. Decker; D. Maybank Hagood; Lynne M. Miller; James W. Roquemore; Maceo K. Sloan; and Alfredo Trujillo

Steven J. Pugh (SC Bar # 14341)
Benjamin P. Carlton (SC Bar # 101142)
Richardson Plowden
& Robinson, P.A.
Post Office Drawer 7788 (29202)
1900 Barnwell Street
Columbia, South Carolina 29201
(803) 771-4400
spugh@richardsonplowden.com
bcarlton@richardsonplowden.com

I.S. Leevy Johnson (SC Bar # 3020)
George C. Johnson (SC Bar # 9308)
Johnson Toal & Battiste, P.A.
1615 Barnwell Street
Columbia, South Carolina 29201
(803) 252-9700
islj@jtbpa.com
George@jtbpa.com

Brian D. Schmalzbach (*pro hac vice*)
Brian E. Pumphrey (*pro hac vice*)
McGuireWoods LLP
800 East Canal Street
Richmond, VA 23219
(804) 775-7745
bschmalzbach@mcguirewoods.com
bpumphrey@mcguirewoods.com

Counsel for Nominal Defendant-Appellant SCANA Corporation

William A. Coates (SC Bar # 1289)
Roe Cassidy Coates & Price P.A.
1052 North Church Street
Post Office Box 10529
Greenville, South Carolina 29603
(864) 349-2600
wac@roecassidy.com

John A. Jordak, Jr. (*pro hac vice*)
Meredith J. Kingsley (*pro hac vice*)
Alston & Bird
1201 West Peachtree Street
Atlanta, Georgia 30309
(404) 881-7000
john.jordak@alston.com
meredith.kingsley@alston.com

Counsel for Defendant-Appellant Jimmy Addison

James M. Griffin (SC Bar # 9995)
Margaret N. Fox (SC Bar # 76228)
Griffin Davis
4408 Forest Drive, Suite 300
Columbia, SC 29206
(803) 744-0800
jgriffin@griffindavislaw.com
mfox@griffindavislaw.com

James F. Wyatt, III (*pro hac vice*)
Robert A. Blake, Jr. (*pro hac vice*)
Wyatt & Blake, LLP
435 East Morehead Street
Charlotte, NC 28202
(704) 331-0767
jwyatt@wyattlaw.net
rblake@wyattlaw.net

Counsel for Defendant-Appellant Stephen A. Byrne

J. Brady Hair (SC Bar # 9040)
Derk Van Raalte (SC Bar # 9286)
Law Offices of J. Brady Hair
2500 City Hall Lane
Post Office Box 61896
North Charleston, SC 29419
(843) 572-8700
Brady@bradyhair.com
Derk@bradyhair.com

Anne M. Tompkins (*pro hac vice*)
Jonathan M. Watkins (*pro hac vice* pending)
Aaron C. Lang (*pro hac vice* pending)
Cadwalader, Wickersham & Taft LLP
227 West Trade Street
Charlotte, NC 28202
(704) 348-5222
Anne.Tompkins@cwt.com
Jonathan.Watkins@cwt.com
Aaron.Lang@cwt.com

Counsel for Defendant-Appellant Kevin B. Marsh

TABLE OF CONTENTS

Page

INTRODUCTION 1

BACKGROUND 3

ARGUMENT 4

I. The dismissal order overlooks that an order's substance, rather than its label, makes an order appealable. 5

II. The dismissal order's threshold error made it overlook why the nature and effect of the trial court's order make it appealable. 7

A. The trial court's decision allowing a non-shareholder to pursue the derivative action involves the merits and denies SCANA's substantial right to control its litigation asset. 7

B. The trial court also effectively denied SCANA the right to select its counsel. 10

C. The decision below effectively denies SCANA and Dominion's right to select its defendants. 11

CONCLUSION 12

TABLE OF AUTHORITIES

Page(s)

Cases

Ark. Teacher Ret. Sys. v. Mozilo,
705 F.3d 973 (9th Cir. 2013) 2

Chester v. S.C. Dep't of Pub. Safety,
388 S.C. 343, 698 S.E.2d 559 (2010) 11

In re Groupon Deriv. Litig.,
882 F. Supp. 2d 1043 (N.D. Ill. 2012) 10

Hagood v. Sommerville,
362 S.C. 191, 607 S.E.2d 707 (2005) 2, 8, 10

Johnson v. Baldwin,
221 S.C. 141, 69 S.E.2d 585 (1952) 2, 3, 7, 8, 9

KBC Asset Mgmt. NV v. Marsh,
No. 2019-CP-40-02522 (Richland County) 9, 10

Kehaya v. Axton,
32 F. Supp. 266 (S.D.N.Y. 1940) 8

Kubic v. MERSCORP Holdings, Inc.,
416 S.C. 161, 785 S.E.2d 595 (2016) 6

Neeltec Enterprises, Inc. v. Long,
397 S.C. 563, 725 S.E.2d 926 (2012) 2, 11

Rose v. Thrash,
291 S.C. 459, 354 S.E.2d 378 (1987) 4

In re SCANA Corporation Public Shareholder Litig.,
No. 3:18-cv-505 (D.S.C.) 8, 10

State v. Register,
308 S.C. 534, 419 S.E.2d 771 (1992) 9

Stone v. Thompson,
426 S.C. 291, 826 S.E.2d 868 (2019) 1, 5, 6

Tillman v. Tillman,
420 S.C. 246, 801 S.E.2d 757 (Ct. App. 2017) 1, 4, 5, 6

Statutes

S.C. Code Ann. § 14-3-330 ..... 1, 4, 5, 6

S.C. Code Ann. § 14-3-330(1)-(2) 4

S.C. Code Ann. § 33-8-510 11

Other Authorities

Rule 221(a) 1, 12

INTRODUCTION

This appeal's dismissal merits rehearing under Rule 221(a), SCACR, because the dismissal order overlooked or misapprehended that the *substance* of the appealed order—rather than its *form*—determines whether that order is appealable. The dismissal order addressed a single basis for dismissal: that the appealed order was, *in form*, the denial of a motion for judgment on the pleadings. That approach—judging the book by its cover—conflicts with this Court's holding that it is "the nature and effect of the order, not merely its label," that makes an order appealable under S.C. Code Ann. § 14-3-330. *Tillman v. Tillman*, 420 S.C. 246, 250, 801 S.E.2d 757, 760 (Ct. App. 2017). The dismissal order truncated the appealability determination before the necessary "case-by-case" inquiry into appealability, *Stone v. Thompson*, 426 S.C. 291, 295, 826 S.E.2d 868, 870 (2019), and thus overlooked the compelling reasons—never rebutted or even addressed by the respondent—why the nature and effect of the order make it immediately appealable.

This appeal is from an unprecedented order permitting a non-shareholder to seize control of a shareholder derivative action belonging to a corporation in which she holds no shares. In substance, the trial court's order both "involv[es] the merits" and denies SCANA Corp. ("SCANA") a "substantial right" under § 14-3-300(1)-(2) because it strips SCANA of the right to control its own litigation or, at least, to have that litigation controlled by a *current* shareholder. The trial court's refusal to apply the binding South Carolina law in *Johnson v. Baldwin*, 221 S.C. 141, 149, 69 S.E.2d 585, 588 (1952), that vests such control only in current shareholders is also like other

appealable orders that effectively deny a party its choice of counsel, *Hagood v. Sommerville*, 362 S.C. 191, 197–98, 607 S.E.2d 707, 710 (2005), or deny a party its right to choose its own defendants, *Neeltec Enterprises, Inc. v. Long*, 397 S.C. 563, 566, 725 S.E.2d 926, 928 (2012). For the same reasons that saddling a party with unchosen attorneys or undesired defendants throughout the trial court litigation affects substantial rights and makes an order immediately appealable, the decision here is appealable because of its impact on SCANA's substantial rights (and those of its sole shareholder Dominion Energy, Inc. ("Dominion")). This Court should grant rehearing and address the merits of the trial court's order flouting the South Carolina Supreme Court's long-established, common-sense holding that only a shareholder can maintain a shareholder derivative lawsuit. *See Johnson*, 221 S.C. at 149, 69 S.E.2d at 588.

The importance of this underlying fundamental question of South Carolina corporate law requires getting this appealability determination right, and without delay. *See Ark. Teacher Ret. Sys. v. Mozilo*, 705 F.3d 973, 975 (9th Cir. 2013) (certifying a derivative standing question to a state Supreme Court because "disputes regarding shareholder derivative standing implicate significant issues of state public policy best resolved by reference to clear rules of state law"). The unprecedented ruling below invites non-shareholders who are at best indifferent to the interests of South Carolina corporations and their shareholders to hijack derivative litigation for the non-shareholders' own ends. Naturally, those non-shareholders will discount or ignore harms to the company flowing from that derivative litigation, like running up

indemnified litigation expenses, eroding insurance otherwise available to satisfy the claims of shareholders who have standing, and fostering litigation against the company *itself* in related non-derivative cases. And there will be no remedy for the harms caused by that usurpation of corporate claims even if non-shareholders are ultimately found to lack derivative standing on appeal after final judgment. The trial court's ruling thus threatens to make South Carolina companies worse off and turns the purpose of a derivative action on its head. That inversion of foundational South Carolina corporate law deserves rehearing so that this Court can address whether South Carolina companies have any practical remedy for the unwarranted transfer of their litigation assets into hostile hands.

BACKGROUND

After SCANA's shareholders overwhelmingly approved its merger with Dominion and received Dominion common stock in exchange for their SCANA shares, [R. p. _; Ex. A. to Defs.' Mot. for Judgment on the Pleadings ("Mot. for Judgment") pp. 1-2, 9], SCANA and the other defendants moved to end derivative litigation arising from unsuccessful efforts to construct two new nuclear power units. Defendants explained that because the putative derivative plaintiffs were no longer SCANA shareholders, they lacked derivative standing under *Johnson*. [R. p. __; Mot. for Judgment pp. 1–2.] In the parallel federal derivative action, the District of South Carolina agreed and granted the defendants' motion for judgment on the pleadings following *Johnson*. Yet the trial court allowed a non-shareholder to intervene and denied the derivative standing motion, improperly casting *Johnson* as "just one

equitable rule" relevant to derivative plaintiff standing—rather than *the* controlling rule in South Carolina. [R. p._; Order p. 7.]

Defendants timely served a notice of appeal and then electronically filed and served their Initial Brief on June 8, 2020. That Brief included a Jurisdictional Statement explaining why this Court has jurisdiction under S.C. Code Ann. § 14-3-330(1)-(2). The day after the deadline for the Initial Appellants' Brief, Respondent Teresa Parler served a four-page motion to dismiss the appeal that ignored the Jurisdictional Statement. This Court granted Parler's motion on July 29, 2020. In its brief order, the Court stated that the trial court's order was not immediately appealable under § 14-3-330, citing a decision finding the denial of a motion for judgment on the pleadings not immediately appealable. Order at 2 (citing *Rose v. Thrash*, 291 S.C. 459, 459, 354 S.E.2d 378, 378 (1987)).

Defendants also petitioned the Supreme Court of Carolina for a writ of certiorari. *See Parler v. SCANA Corp.*, Appellate Case No. 2020-000616 (S.C. filed Apr. 16, 2020). The Supreme Court denied the petition on August 7, 2020, stating that this appeal "is currently pending" in this Court. Ex. 1.

ARGUMENT

By dismissing this appeal, this Court overlooked the rule that an order's "nature and effect," not its label, determine its appealability. *Tillman*, 420 S.C. at 250, 801 S.E.2d at 760. Because of that threshold error, the Court also overlooked or misapprehended the reasons why the trial court's order is immediately appealable. Rehearing should be granted because the trial court's decision allowing a non-

shareholder to pursue derivative claims on behalf of a corporation in which she does not hold shares involves the merits and denies SCANA's substantial right to control its litigation asset, or at least have a properly aligned current shareholder exercise control. The decision below also parallels the kinds of orders held appealable under § 14-3-330, including those in which a party is denied its substantial rights to select its counsel and its defendants. Rehearing is warranted to address whether SCANA must wait until *after* lawyers it has not chosen have fully litigated SCANA's claims against defendants it has not sued, before SCANA may appeal the denial of those substantial rights.

I. The dismissal order overlooks that an order's substance, rather than its label, makes an order appealable.

South Carolina courts decide whether an order is immediately appealable by examining "the nature and effect of the order" to determine whether the order fits S.C. Code Ann. §14-3-330's parameters. *Tillman*, 420 S.C. at 250, 801 S.E.2d at 760. That provision grants this Court jurisdiction over appeals from:

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

Nothing in the text or application of § 14-3-330 excludes any one procedural variety of order from its scope. Instead, the statute's terms look to an order's *substance*—whether the order "affect[s] a substantial right" and is thus immediately

appealable. *Id.* Because the appealability of an order hinges on its "nature and effect" rather than on its title, *Tillman*, 420 S.C. at 250, 801 S.E.2d at 760, "the question of whether an order is immediately appealable is determined on a case-by-case basis." *Stone*, 426 S.C. at 295, 826 S.E.2d at 870. Courts must evaluate "the particular circumstances" of each order and case to decide an order's appealability. *See id.*

This Court overlooked these guiding principles by substituting a truncated inquiry based on the label assigned to the trial court's order. The Court treated orders denying motions for judgment on the pleading as a categorical exclusion from § 14-3-330's jurisdiction. And so it did not even ask the required question: whether the particular circumstances of the decision below or the nature and effect of that decision make it appealable.

Section 14-3-330's case-by-case inquiry does not permit such blanket treatment based on the label assigned to an underlying order. *Stone*, 426 S.C. at 295, 826 S.E.2d at 870. That label cannot and does not decide appealability under §14-3-330—the specific nature and circumstances of the trial court's order do. *Tillman*, 420 S.C. at 250, 801 S.E.2d at 760. Even if the denial of certain motions is presumptively not appealable, *see Kubic v. MERSCORP Holdings, Inc.,* 416 S.C. 161, 167, 785 S.E.2d 595, 598 (2016) ("The denial of a motion to dismiss is *ordinarily* not immediately appealable[.]" (emphasis added)), § 14-3-300 requires analyzing whether the nature

and effect of any *particular* order rebuts that presumption. Rehearing should be granted because the dismissal order here overlooked that necessary analysis.

II. The dismissal order's threshold error caused it to overlook why the nature and effect of the trial court's order make it appealable.

Because the dismissal order overlooked and misapprehended the relevant appealability inquiry of *substance* rather than *form*, it further overlooked why the nature and effect of the trial court's order make it appealable. Three aspects of the decision require this Court to exercise its jurisdiction over this appeal. The dismissal order's failure to evaluate these case-specific issues warrants rehearing.

A. The trial court's decision allowing a non-shareholder to pursue the derivative action involves the merits and denies SCANA's substantial right to control its litigation asset.

The dismissal order overlooked that the trial court's order is immediately appealable because it both involves the merits and impacts a substantial right. By allowing a non-shareholder to pursue the derivative action meant to benefit SCANA, the trial court stripped SCANA and Dominion, SCANA's only current shareholder, of control over that asset and gave that control to a party who does not represent SCANA's interests. That decision involves the merits and deprives SCANA of the substantial right to control its own litigation, or at least to have a properly aligned current shareholder exercise control.

By its nature, a derivative action contemplates that a corporation will not always have exclusive control over its asset. But even if the corporation is not actively exercising its right of control, the corporation remains "the real party in interest" in the derivative action. *Johnson*, 221 S.C. at 149, 69 S.E.2d at 588. As a result, only a

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

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

That transfer of the right to control the company's litigation cannot be remedied by an appeal after final judgment. *See Hagood*, 362 S.C. at 197, 607 S.E.2d at 710 (holding an order appealable where "an appeal after final judgment would not adequately protect a party's interests"). The pre-existing *de rigueur* agreement to indemnify SCANA's former officers and directors survived the merger. So Plaintiff's decision to pursue these derivative claims means that SCANA—which is supposed to

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

The novelty and significance of the trial court's decision to vest control of SCANA's litigation in a non-shareholder confirm that this Court can and should exercise jurisdiction. *See State v. Register*, 308 S.C. 534, 536 n.1, 419 S.E.2d 771, 772 n.1 (1992) ("[B]ecause we are dealing with a novel issue . . . we have chosen to address the merits of the petition."). The trial court acknowledged that this matter of derivative standing is an "[i]mportant question[] of novel impression." [R. p. __; Order p. 8 n.8.] Indeed, the trial court is the first South Carolina court to permit a non-shareholder to maintain a derivative action, upending decades of precedent and threatening to embroil derivative actions in novel standing disputes. The trial court also created a direct split of authority with the District of South Carolina on this

important question of South Carolina law. Rehearing is needed to address how these overlooked effects of the trial court's order render it appealable.

B. The trial court also effectively denied SCANA the right to select its counsel.

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

The trial court's order effectively denies SCANA and its sole shareholder Dominion this established substantial right. As the real party in interest, SCANA has a right to representation by counsel that will promote and protect its interests. Counsel representing its sole shareholder Dominion would qualify. But Parler's counsel, like Parler, lacks any interest in protecting SCANA. In fact, Parler's counsel is incentivized to *harm* SCANA through this litigation, because Parler's counsel has

brought direct actions against SCANA and Dominion and SCANA's former officers and directors involving the same facts and legal arguments as here. *See* Complaint, *Metzler Asset Mgmt. GmbH v. Aliff*, Doc. No. 1-1, No. 3:18-cv-505 (D.S.C. Feb. 21, 2018); *In re SCANA Corporation Public Shareholder Litig.*, No. 3:18-cv-505 (D.S.C.); *KBC Asset Mgmt. NV v. Marsh*, No. 2019-CP-40-02522 (Richland County). Parler's counsel's representation of the plaintiff in the derivative action will thus involve developing the same facts and legal arguments that could *increase* SCANA's liability in the direct actions, to counsel's direct benefit and SCANA's direct detriment. *See, e.g.*, *In re Groupon Deriv. Litig.*, 882 F. Supp. 2d 1043, 1052 (N.D. Ill. 2012) ("Prosecution of [the] derivative action would involve taking actions designed to refute the merits of the Company's defense of the Securities Class Action.").

SCANA has also indemnified defendant officers and directors in these direct actions consistent with South Carolina law. *See* S.C. Code Ann. § 33-8-510. As a result, pursuing this derivative action will help Parler's counsel prosecute her direct claims—claims that may be SCANA's obligation to pay. The trial court's decision thus threatens to prejudice SCANA in a way a later appeal cannot remedy. This Court overlooked this feature of the trial court's order that further cements its appealability. Rehearing should be granted to correct this oversight.

C. The decision below effectively denies SCANA and Dominion's right to select its defendants.

The dismissal order also overlooked that the trial court's order effectively denies SCANA and its sole shareholder Dominion's right to choose the defendants to pursue in a derivative action meant to benefit SCANA. *Chester v. S.C. Dep't of Pub.*

Safety, 388 S.C. 343, 345, 698 S.E.2d 559, 560 (2010) ("It is well-settled that a plaintiff has the sole right to determine which [defendants] [it] will sue."). The Supreme Court held in *Neeltec* that this common law right is a substantial one, the denial of which is immediately appealable. 397 S.C. at 566, 725 S.E.2d at 928.

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

This Court's dismissal order, however, overlooked that the trial court's order had such an effect—one that makes the order immediately appealable regardless of its label. This Court should grant rehearing because the nature and effect of the decision below make that decision appealable.

CONCLUSION

For these reasons, this Court should grant this Petition for Rehearing under Rule 221(a), review the merits of this appeal, and reverse the trial court's order with instructions to dismiss the complaint without prejudice to the right of Dominion to pursue these claims.

Dated: August 12, 2020

Respectfully submitted,

s/ *John A. Massalon*
John A. Massalon (SC Bar # 10279)
Wills Massalon & Allen, LLC
Post Office Box 859
Charleston, South Carolina 29402
(843) 727-1144
jmassalon@wmalawfirm.net

C. Scott Greene (*pro hac vice*)
John R. Bielema Jr. (*pro hac vice*)
Michael P. Carey (*pro hac vice*)
Bryan Cave Leighton Paisner LLP
One Atlantic Center, 14th Floor
1201 West Peachtree Street, N.W.
Atlanta, Georgia 30309
(404) 572-6600
scott.greene@bclplaw.com
john.bielema@bclplaw.com
michael.carey@bclplaw.com

Barbara A. Smith (*pro hac vice*)
Bryan Cave Leighton Paisner LLP
One Metropolitan Square
211 N. Broadway, Suite 3600
St. Louis, Missouri 63102
(314) 259-2000
barbara.smith@bclplaw.com

Counsel for Defendants-Appellants Gregory E. Aliff; James Bennett; John F.A.V. Cecil; Sharon A. Decker; D. Maybank Hagood; Lynne M. Miller; James W. Roquemore; Maceo K. Sloan; and Alfredo Trujillo

s/ *William A. Coates*
William A. Coates (SC Bar # 1289)
Roe Cassidy Coates & Price P.A.
1052 North Church Street
Post Office Box 10529
Greenville, South Carolina 29603
(864) 349-2600

s/ *Steven J. Pugh*
Steven J. Pugh (SC Bar # 14341)
Benjamin P. Carlton (SC Bar # 101142)
Richardson Plowden
& Robinson, P.A.
Post Office Drawer 7788 (29202)
1900 Barnwell Street
Columbia, South Carolina 29201
(803) 771-4400
spugh@richardsonplowden.com
bcarlton@richardsonplowden.com

I.S. Leevy Johnson (SC Bar # 3020)
George C. Johnson (SC Bar # 9308)
Johnson Toal & Battiste, P.A.
1615 Barnwell Street
Columbia, South Carolina 29201
(803) 252-9700
islj@jtbpa.com
George@jtbpa.com

Brian D. Schmalzbach (*pro hac vice*)
Brian E. Pumphrey (*pro hac vice*)
McGuireWoods LLP
800 East Canal Street
Richmond, VA 23219
(804) 775-7745
bschmalzbach@mcguirewoods.com
bpumphrey@mcguirewoods.com

Counsel for Nominal Defendant-Appellant SCANA Corporation

s/ *Derk Van Raalte*
J. Brady Hair (SC Bar # 9040)
Derk Van Raalte (SC Bar # 9286)
Law Offices of J. Brady Hair
2500 City Hall Lane
Post Office Box 61896
North Charleston, SC 29419
(843) 572-8700

wac@roecassidy.com

John A. Jordak, Jr. (*pro hac vice*)
Meredith J. Kingsley (*pro hac vice*)
Alston & Bird
1201 West Peachtree Street
Atlanta, Georgia 30309
(404) 881-7000
john.jordak@alston.com
meredith.kingsley@alston.com

Counsel for Defendant-Appellant Jimmy Addison

s/ *James M. Griffin*
James M. Griffin (SC Bar # 9995)
Margaret N. Fox (SC Bar # 76228)
Griffin Davis
4408 Forest Drive, Suite 300
Columbia, SC 29206
(803) 744-0800
jgriffin@griffindavislaw.com
mfox@griffindavislaw.com

James F. Wyatt, III (*pro hac vice*)
Robert A. Blake, Jr. (*pro hac vice*)
Wyatt & Blake, LLP
435 East Morehead Street
Charlotte, NC 28202
(704) 331-0767
jwyatt@wyattlaw.net
rblake@wyattlaw.net

Counsel for Defendant-Appellant Stephen A. Byrne

Brady@bradyhair.com
Derk@bradyhair.com

Anne M. Tompkins (*pro hac vice*)
Jonathan M. Watkins (*pro hac vice* pending)
Aaron C. Lang (*pro hac vice* pending)
Cadwalader, Wickersham & Taft LLP
227 West Trade Street
Charlotte, NC 28202
(704) 348-5222
Anne.Tompkins@cwt.com
Jonathan.Watkins@cwt.com
Aaron.Lang@cwt.com

Counsel for Defendant-Appellant Kevin B. Marsh

The Supreme Court of South Carolina

Teresa Parler, derivatively on behalf of SCANA CORPORATION,
Plaintiff-Respondent,

v.

SCANA CORPORATION,
Nominal Defendant-Petitioner,

and

Kevin B. Marsh, Gregory Aliff, James Bennett, John Cecil,Sharon Decker, Maybank Hagood ,Lynn Miller, James Roquemore, Maceo Sloan, Alfredo Trujillo, Jimmy Addison, and Steve Byrne,Defendants-Petitioners

Appellate Case No. 2020-000616

ORDER

An appeal is currently pending in the court of appeals in this matter. Petitioners ask this Court to issue a writ of certiorari to decide the issues on appeal. The petition for a writ of certiorari is denied.

C.J.

J.

J.

J.

J.

Columbia, South Carolina
August 7, 2020

cc: J. Brady Hair, Esquire
Derk Van Raalte, IV, Esquire
James Mixon Griffin, Esquire
Margaret Nicole Fox, Esquire
Steven James Pugh, Esquire
Benjamin Palmer Carlton, Esquire
I.S. Leevy Johnson, Esquire
George Craig Johnson, Esquire
William A. Coates, Esquire
John A. Massalon, Esquire
Brian D. Schmalzbach, Esquire
John A. Jordak, Jr., Esquire
Meredith J. Kingsley, Esquire
James F. Wyatt, III, Esquire
Robert A. Blake, Esquire
Anne M. Tompkins, Esquire
Jonathan M. Watkins, Esquire
Aaron C. Lang, Esquire
Brian E. Pumphrey, Esquire
Mark D. Chappell, Esquire
Graham L. Newman, Esquire
Lawrence P. Eagel, Esquire
Melissa A. Fortunato, Esquire
The Honorable Jenny Abbott Kitchings

The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
CHIEF DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211

1220 SENATE STREET
COLUMBIA, SOUTH CAROLINA 29201

TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

September 16, 2020

Mr. Benjamin Palmer Carlton, Esquire
1900 Barnwell St.
P.O. Drawer 7788
Columbia SC 29201

Re: R. Wayne Todd v. Kevin Marsh (SCANA)
Appellate Case No. 2020-000619

Dear Counsel:

This will acknowledge receipt of your Petition for Rehearing filed August 12, 2020.

By copy of this letter, opposing counsel is requested to file an original return to this petition no more than ten (10) days from the date of this letter.

Very truly yours,

V Claire Allen

CLERK

cc: Steven James Pugh, Esquire
I.S. Leevy Johnson, Esquire
George Craig Johnson, Esquire
Brian D. Schmalzbach, Esquire
Brian E. Pumphrey, Esquire

William A. Coates, Esquire
John A. Jordak, Jr., Esquire
Meredith J. Kingsley, Esquire
John A. Massalon, Esquire
J. Brady Hair, Esquire
Derk Van Raalte, IV, Esquire
Anne M. Tompkins, Esquire
Jonathan M. Watkins, Esquire
Aaron C. Lang, Esquire
James Mixon Griffin, Esquire
Margaret Nicole Fox, Esquire
James F. Wyatt, III, Esquire
Robert A. Blake, Esquire
Mark D. Chappell, Esquire
Graham L. Newman, Esquire
Lawrence P. Eagel, Esquire
Melissa A. Fortunato, Esquire

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

Appellate Case No. 2020-000619

RECEIVED
Sep 29 2020
SC Court of Appeals

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

Mark D. Chappell
Graham L. Newman

Chappell, Smith & Arden, P.A.
2801 Devine Street, Suite 300
Columbia, South Carolina 29205
(803) 929-3600
(803) 929-3604 (facsimile)

Lawrence P. Eagel (pro hac vice admission)
Melissa A. Fortunato (pro hac vice admission)
BRAGAR EAGEL & SQUIRE, P.C.
885 Third Avenue, Suite 3040
New York, New York 10022
(212) 308-5858
(212) 486-0462 (facsimile)

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF CONTENTS ……i

TABLE OF AUTHORITIES ……..ii

INTRODUCTION ……...1

ARGUMENT ……..3

I. The rights asserted by Appellants do not belong to them and thus form no basis for appealability ……3

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 ……...4

A. "Involving the Merits" ……5

B. "Affecting a Substantial Right" ……..6

III. A case-specific analysis of the questions at hand supports factual development prior to appeal ……..7

CONCLUSION ……...9

TABLE OF AUTHORITIES

Cases

Breland v. Love Chevrolet Olds, Inc., 339 S.C. 89, 529 S.E.2d 11 (2000) ……...….6, 7

Culbertson v. Clemens, 322 S.C. 20, 471 S.E.2d 163 (1996) ……...……..1

Evans v. State, 344 S.C. 60, 543 S.E.2d 547 (2001) …….……..8

Ex parte Wilson, 367 S.C. 7, 625 S.E.2d 205 (2005) …….1, 2

Jefferson v. Gene's Used Cars, Inc., 295 S.C. 317, 368 S.E.2d 456 (1988) ….……..5

Knowles v. Standard Savings & Loan Ass'n, 274 S.C. 58, 261 S.E.2d 49 (1979) .……5, 7

Krakow Bus. Park v. Locke Lord, LLP, 135 F. Supp. 3d 770 (N.D. Ill. 2015) …….…….3

Mid–State Distribs., Inc. v. Century Importers, Inc., 310 S.C. 330, 426 S.E.2d 777 (1993) …….

…….2, 5

Rose v. Thrash, 291 S.C. 459, 354 S.E.2d 378 (1987) …….……..……1

Sobba v. Elmen, 462 F.Supp.2d 944 (E.D. Ark. 2006) …….…….3

Solimine v. Hollander, 129 N.J.Eq. 264, 19 A.2d 344 (N.J. Ch. 1941) …….……3

State v. Register, 308 S.C. 534, 419 S.E.2d 771 (1992) ….…...……8

Swenson v. Thibaut, 39 N.C. App. 77, 250 S.E.2d 279 (N.C. Ct. App. 1978) ….…….3

Tyler v. Macks Stores of South Carolina, Inc., 275 S.C. 456, 272 S.E.2d 633 (1980) ….…….8

Statutes

S.C. Code Ann. § 14-3-330 ……..…….passim

Other Authorities

D. DeMott, Shareholder Derivative Actions: Law and Practice (2017-18 ed.) …….3

J. Toal, A. Walker, M. Baker, Appellate Practice in South Carolina (3d ed.) …...……2, 5

Rule 23, SCRCP ……...……..1, 3, 4

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,

s/ Graham L. Newman
Mark D. Chappell
Graham L. Newman
CHAPPELL, SMITH & ARDEN, P.A.
2801 Devine Street, Suite 300
Columbia, South Carolina 29205
(803) 929-3600
(803) 929-3604 (facsimile)

Lawrence P. Eagel (pro hac vice admission)
Melissa A. Fortunato (pro hac vice admission)
BRAGAR EAGEL & SQUIRE, P.C.
885 Third Avenue, Suite 3040
New York, New York 10022
(212) 308-5858
(212) 486-0462 (facsimile)

ATTORNEYS FOR RESPONDENT

Dated: September 28, 2020

EXHIBIT A

STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	)	2017-CP-40-06621
	)	
	)	
	)	
	)	
	)	
R. WAYNE TODD, DERIVATIVELY	)	
ON BEHALF OF SCANA CORP.,	)	
PLAINTIFF,	)	
	)	
vs.	)	TRANSCRIPT OF RECORD
	)	
KEVIN MARSH, ET AL.,	)	
DEFENDANTS.	)	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:

LAWRENCE EAGEL, ESQ.
MARK D. CHAPPELL, JR., ESQ.
Attorneys for the Plaintiff

BRIAN D. SCHMALZBACH, ESQ.
Attorney for the Defendants

HOLLIE M. JENKINS
Circuit Court Reporter

I N D E X

(There were no witnesses called.)

E X H I B I T S

(There were no exhibits introduced.)

P R O C E E D I N G S

THE COURT: Good morning. Thank y'all all for joining us today.

If you would -- we have a court reporter that had to come in. And so if you would, announce yourselves on the record before you speak to help her out. She does have everybody's name, but that will be assured that we can make a good record of this.

I've got that we're here on two motions. One is a motion to dismiss, one is a motion to intervene. I would prefer to hear the motion to intervene first and then we'll take up the motion to dismiss.

So if that's agreeable to everybody, I'll receive the arguments.

MR. EAGEL: Good morning, Your Honor.

Lawrence Eagel --

THE COURT: How's your leg?

MR. EAGEL: It's better.

Thank you.

A lot better. I was able to fly. You know, my leg's okay. But I was able to fly. And I appreciate -- I want to, again, extend my thanks to the Court for -- it was really about this idea of I could get a -- supposedly get a blood clot if you fly too early after surgery.

THE COURT: That's not a good idea.

MR. EAGEL: No. So I was told not to do it. But I'm here and the leg is getting a lot better.

Thank you. I appreciate it.

THE COURT: All right. Yes, sir.

MR. EAGEL: Okay. The motion to intervene is based upon the fact that the original Plaintiff in the case, Wayne Todd, had sold his shares prior to the SCANA-Dominion merger. Consequently, Ms. Parler, who's been a shareholder since 2000 -- in fact, I believe her father worked for SCANA back in the day. But she's been a SCANA shareholder since 2000. She had approached us about the case. And she's sought to intervene in the case.

She is -- has submitted an affidavit saying she's prepared to fill responsibilities as a representative Plaintiff. She's continuously held her shares since 2000 until her shares were exchanged in the merger. She owns 2,402 shares.

And she asserts an interest in the property that is the subject of the action, namely the derivative action. This is a derivative action. She's trying -- stepping into the shoes of the prior Plaintiff. She's demonstrated that without intervention, the action may not be able to proceed. There would not be a representative Plaintiff in this derivative action.

And she's demonstrated through interest her

adequate -- are not adequately protected by other parties. At this juncture, she'd be the only -- this is the only derivative claim pending. And previously, the Court has concluded -- the Court had previously ruled on a 12(b)(8) motion that -- that this case was not the same as the district court case. And so she would then be -- step into the shoes as the derivative Plaintiff.

All of this sort of begs the question concerning the merger and concerning the effect of the merger. But we're seeking to move to intervene and continue the -- the case. I think that the -- you know, it's sort of a chicken and egg as to whether or not she, like every other SCANA shareholder, was cashed out in the merger.

So to the extent that she no longer has an interest in the property as a result of the merger, if the Court rules on the -- on the standing argument, then I think that effectively resolves the -- the intervention just -- just the same. Because if -- if the current Plaintiff Todd doesn't have it and she doesn't have it, that would be the same thing.

So that's -- that's largely the argument on the motion to intervene.

MR. SCHMALZBACH: Your Honor.

THE COURT: Yes, sir.

MR. SCHMALZBACH: Good morning, Your Honor.

I'm Brian Schmalzbach speaking for SCANA Corporation. And I'll be speaking today on behalf of all the Defendants.

Our argument against intervention was based on the fact that, at the time, there was a duplicative derivative lawsuit pending in federal court. That's not the case any more. Because Judge Seymour has addressed the exact same arguments that we were making here on the motion for judgment on the pleadings. And so she agreed with us on the standing issue and held that those federal derivative Plaintiffs have no standing.

And so I think -- rather than address the -- the motion to intervene, I think it -- it might be a good use of time to go straight to the motion for judgment on the pleadings. Because that's the real live issue that's presented today.

THE COURT: I mean, it -- he may be right. It may be the chicken versus the egg as to which comes fist. I just thought that it would logically be cleaner for me to understand it if we address the motion to intervene first, so. But it -- you may be right. It probably does [inaudible].

MR. SCHMALZBACH: Certainly. So I'll address the -- the derivative standing issue.

And so we're asking you to dismiss, to grant that

motion for judgment on the pleadings for the exact same reasons that Judge Seymour dismissed this case as federal derivative 20. That reason is that the Plaintiff is not a SCANA shareholder. And that fact is dispositive because of what a derivative action is.

We -- we like the Plaintiff's definition of a derivative action. This is on Page 3 of the motion to intervene. They said, A derivative claim belongs to the corporation, not to the shareholder Plaintiff who brings the action. The shareholder Plaintiff's interest is limited to compelling the corporation by standing in its shoes to assert the corporation's right to seek redress for the alleged wrongdoing. And so what's key is that any recovery on a derivative claim belongs solely to the corporation, not to the shareholder Plaintiff.

So that takes us to the black letter South Carolina law that resolves this case. And that's that you have to be a current shareholder to maintain a shareholder derivative lawsuit. That's called the continuous ownership rule.

And the South Carolina Supreme Court adopted that as the law of the land in a case called Johnson v. Baldwin. But once the merger between SCANA and Dominion closed, Plaintiff -- Ms. Parler was not a SCANA shareholder anymore. And so she could not stand in SCANA's shoes.

That's why Judge Seymour held after reading the same arguments that Ms. Parler presented to you, that, "Pursuant to the continuous ownership rule articulated in Johnson, Plaintiffs no longer possess standing to pursue a derivative action against SCANA." Judge Seymour was exactly right there. Johnson was and is the controlling law. And so this derivative action should be dismissed.

So I'll focus on Johnson because that's the case that Judge Seymour focused on because it controls this case. My colleagues on the other side didn't address the actual language of Johnson's holding. But Judge Seymour saw that that holding is worth a very careful read because it so clearly answers the question in this case.

This is what Johnson said, The right of a stockholder to maintain a derivative action does not exist apart from ownership of corporate stock. And it went on. The right of the Plaintiff to continue to prosecute this action depends upon her retaining her status as a stockholder. And if she ceased to be a stockholder, the cause of action abated so far as she is concerned.

Now, this holding has nothing to do with why a Plaintiff ceases to be a shareholder. Johnson simply holds she cannot prosecute an action as a member of a class to which she does not belong.

THE COURT: So because there -- the corporation sold

itself out to Dominion?

MR. SCHMALZBACH: Because of the merger with Dominion. And as a result of that merger, all of her SCANA stock disappeared and became Dominion stock.

THE COURT: Any -- any importance in the decision that I would make whether or not Dominion intends to pursue the claims?

MR. SCHMALZBACH: No, Your Honor. Because as Judge Seymour said, it is Dominion's prerogative to decide what to do with the claims.

THE COURT: But I thought then that -- that the rules in South Carolina have a little bit of deviation to it, or a little bit of variation to it. That would be one of the -- one of the requirements is it would lead to a harsh or -- or unconscionable result. I might be using the wrong terminology.

Aren't there qualifiers to that rule?

MR. SCHMALZBACH: I think Your Honor's referring to the Whittle case.

THE COURT: Yes.

MR. SCHMALZBACH: Which is a Court of Appeals case, not a South Carolina Supreme Court decision. But that -- that's not announcing a rule of law. That's explaining why in the context of demand futility, I believe.

THE COURT: Say it one more time. I'm sorry.

MR. SCHMALZBACH: In the context of demand futility.

THE COURT: Okay.

MR. SCHMALZBACH: South Carolina was just not going to adopt the Delaware rule. We're -- we're not -- to be clear, we're not asking you to look to Delaware law here. All you need to look at is Johnson v. Baldwin, which is the case that Judge Seymour held resolves this case. And so because Ms. Parler is no longer a member of the class of SCANA shareholders, she cannot prosecute this action under South Carolina law.

Now, in the Plaintiff's brief, which is the same brief that the federal derivative Plaintiffs filed, she asked the Court not to apply South Carolina law. She asked the Court to apply the law that North Carolina or one of the tiny -- states that does not require continuous ownership. But since the South Carolina Supreme Court has already spoken to this issue in Johnson, that's the law that controls here.

And just to address why it makes sense to apply this continuous ownership rule. It's because current shareholders have these important features for a derivative lawsuit. They have the right to vote on corporate leadership. They receive the benefit of good corporate decision-making. And they bear the burden of bad corporate decision-making through their ownership

stake in corporate stock. So they're the ones who are going to be hurt.

But former shareholders, which is to say non-shareholders like Ms. Parler, they have no right to vote. And they may have no financial stake at all in the corporation's success. So common sense says that former shareholders who have no dog in the hunt shouldn't get to make fundamental decisions like deciding whether, when, and how to sue former officers and directors.

THE COURT: But -- but correct me if I'm not right. Isn't the party that's seeking to intervene no longer a shareholder because Dominion merged with SCANA?

And the reason that Dominion merged with SCANA, aren't the allegations is because that the prior shareholders board of directors, officers engaged in conduct that is outlined in the complaint to be the kind that costs millions and millions of dollars and, therefore, reduced the value of the shares?

MR. SCHMALZBACH: So two responses to that, Your Honor. First, if you read the proposed intervener complaint that was filed on May 6th, you don't see anything about the merger. The complaint is silent as to the merger. The word "merger" doesn't appear.

THE COURT: Okay. That might be fine. But my point is that if we're not going to allow them to intervene, we

don't even take a look at the intervening complaint. But we take a look at the reason for the merger.

MR. SCHMALZBACH: You could, Your Honor. But the -- the upshot of Johnson is that it doesn't matter why she's no longer a shareholder --

THE COURT: So it doesn't matter if someone held a gun to the present shareholders and said, you are going to sell this company or else we're going to destroy this company?

MR. SCHMALZBACH: So in that --

THE COURT: You're going to lose all shareholder value if you do not allow us to come in and buy you out.

MR. SCHMALZBACH: So in that case, the shareholders would have, I think, an excellent claim that they were coerced into the merger and the merger itself was invalid. And, in fact, Mr. Eagel has a lawsuit challenging the merger. He doesn't say the merger is invalid, as I understand it. He just says the merger should have gotten more money.

THE COURT: So there's an exception to your continuous ownership rule?

MR. SCHMALZBACH: No, Your Honor. The -- the only question is, do they remain a shareholder? In -- in the lawsuit that -- that you just described, the --

THE COURT: Well, I'm trying to describe the lawsuit

that I have read that has been filed with this Court.

MR. SCHMALZBACH: Right. So I think if you look at Johnson, that addresses a similar scenario where the Plaintiff filed for her appraisal rights and then tried to withdraw them.

THE COURT: Okay. And -- and I'm not -- and I'm trying to be argumentative only to the point that I'm trying to understand where you're coming from. Because the litigation that has been filed with this Court, the allegations, we have never even reached the point of determining the merits of these allegations yet.

We have -- this Court has dealt with motion after motion after motion, which are proper for this Court to deal with. But the allegations, this Court continues to look at as true.

MR. SCHMALZBACH: Yes, Your Honor. So --

THE COURT: And so these allegations are disturbing to this Court. And then you're now asking me to engage in another motion that's now going to say that these allegations to which this Court has not had the opportunity to make any determination of the merits of these allegations so, therefore, this Court can deem them as true, we're just going to turn our backs to them.

MR. SCHMALZBACH: So what we're asking you to do is to give the owner of the right to bring this lawsuit the

decision whether, when, and how to bring them.

THE COURT: And my question to you previously was, has Dominion started something to continue these claims?

MR. SCHMALZBACH: So Dominion has not filed for those claims at this time. Because Dominion has contractual indemnity obligations to those Plaintiffs.

Now --

THE COURT: And the Plaintiffs being?

MR. SCHMALZBACH: I'm sorry. Not to the Plaintiffs, to the individual Defendants.

THE COURT: The individual Defendants being the same people that allegedly did the things that are complained of in the complaints?

MR. SCHMALZBACH: That's right, Your Honor.

THE COURT: Okay. I think -- okay.

All right. Go ahead.

MR. SCHMALZBACH: All right. So I think what -- the exception that the Plaintiff is asking -- that Ms. Parler is asking you to read into South Carolina law is this idea that if you involuntarily lose your shares, then you get to remain on as a derivative Plaintiff. But that's not what Johnson says.

Johnson says that the right to maintain that derivative lawsuit depends on shareholder status. And if there's a loss of status, then there's no right to

maintain that lawsuit. And the cases that the Supreme Court addressed, discussed, and relied on in Johnson, I think they, actually, get at this issue.

So in the Heyman [phonetic] case, for example, you had a derivative lawsuit brought by some preferred stockholders. And the company retired those preferred shares. So as a result of the companies decision to call in those preferred shares, to cash them out, they were no longer shareholders. And Heyman held that that ended their derivative standing. And that's the case that Johnson's relying on.

So I don't think it makes any sense to say that Johnson has an exception for the involuntary loss of shares. Because Johnson relies on this case dealing with the involuntary loss of shares.

And I understand Plaintiff's concern, which was the same concern that the federal derivative Plaintiffs made in Judge Seymour's case, that the Court has to make up some new rule granting them derivative standing so that they can hold these directors and officers accountable. But that would be unnecessary and improper.

It's unnecessary because there are plenty of non-derivative lawsuits seeking to hold these directors and officers liable. There's a securities case in federal court. There are rate payer cases in state and federal

court. And there's Mr. Eagel's case addressing the merger with Dominion.

And, in fact, the merger case has nearly identical allegations as here, and says that the Defendants were required to get a higher price from Dominion so that the shareholders could be compensated for the value of these derivative claims.

Now, to be clear, we think that allegation is meritless here and in the merger case. But there's no need to make up a new derivative standing rule that's already been foreclosed by the South Carolina Supreme Court to litigate a question that's already been presented in another case.

THE COURT: Does it make any -- is it an issue whether or not Dominion is indemnifying all of the parties that are listed in the original complaint filed in this Court in those other litigations?

MR. SCHMALZBACH: I --

THE COURT: Do you see -- do you understand my question, or should I rephrase it?

MR. SCHMALZBACH: Could I ask for clarification?

THE COURT: You sure may. My question is, you raised the issue of indemnification. So is it proper in my consideration that Dominion in these other litigations that you say is a reason for not creating an exception to

the Johnson rule is -- and you say that there's this other litigations out there that have stemmed from this merger. 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 this Court? Is Dominion indemnifying these people in these other litigations?

MR. SCHMALZBACH: Yes, Your Honor. Dominion is indemnifying these Defendants in those cases I just described. And I think it would be helpful just to get down to brass tacks what the practical effect of allowing this lawsuit to continuance.

THE COURT: Okay.

MR. SCHMALZBACH: Because Dominion is going to be -- at this time, Dominion is responsible for paying the cost of defense of this lawsuit. And any recovery on this lawsuit is going to go to Dominion. Ms. Parler has no right to any recovery that, ultimately, comes from this lawsuit.

So Dominion would get the benefit of the lawsuit. Dominion will bear the burden of the lawsuit. And so that's why it should be Dominion's decision whether to bring it. Because if, as Dominion has said, so far with its decision not to pursue these claims on its own, that it doesn't expect to make money. In fact, it expects to

lose money from the costs of defending this lawsuit compared to the -- the unlikelihood of recovering a judgment. That's why the derivative standing rules say that a former shareholder shouldn't get to force Dominion to make a decision that Dominion has decided is bad for it.

THE COURT: Is there -- and, again, my question stems from your pointing out that one of the reasons justifying not creating an exception to Johnson is the fact that there are these other litigation matters that are out there to which these people might be held responsible for, but, yet, Dominion is now indemnifying these people. Is there a way absent a litigation that which Dominion is indemnifying these people that were the original parties to this lawsuit to which these parties would be held responsible?

MR. SCHMALZBACH: The -- the indemnification obligation, which is on Page 34 of the merger agreement, if you're interested, it -- it covers these current lawsuits that are pending at this time. I -- I can't say that there would be some hypothetical lawsuit that -- I can't identify a hypothetical lawsuit that wouldn't be covered by it.

THE COURT: Can I try again at the question and see if I can ask it more clearly?

All right. We have, again, litigation filed in this Court. I've reviewed the allegations. The allegations seem to be substantial, seem to be -- seems to be disturbing that some people that have been part of SC&G SCANA -- other corporations have engaged in some pretty bad conduct.

And that the prior shareholders brought an action trying to hold them responsible, make them culpable for their actions. And Dominion's come in and Dominion's acquired the corporation. Dominion announces, okay, we want you to dismiss all these lawsuits because these people no longer have standing because they're no longer shareholders.

Part of your argument is that there are other litigations taking place out there that justifies the dismissal of this litigation. I now know that Dominion is indemnifying these people that were the original parties to this law school -- lawsuit that was in front of this Court.

My question to you, is there a legal way that these people -- if the allegations that were contained in the complaint was true as filed with this Court to which this Court has yet to be able to have any input on the merits of those allegations, that if they are true, is there a way legally that these people will ever be held

responsible to which Dominion is not indemnifying these people?

MR. SCHMALZBACH: Yes, Your Honor.

THE COURT: How is that? Help me understand that.

MR. SCHMALZBACH: Because Dominion itself is -- the indemnification obligation is not absolute. South Carolina law limits the extent to which a company can indemnify its former officers and directors.

And so if -- if it is determined that South Carolina law allows Dominion or requires Dominion not to continue indemnifying them, at that point, then not only would the indemnification cease, but Dominion itself would have the right to institute its own lawsuit against them.

But the -- the important part is that the law leaves that up to Dominion. Because Dominion is going to bear the burden of making that decision, not Ms. Parler.

THE COURT: So all the cards are held by Dominion now with whether these people would ever be held responsible, accountable, culpable, liable?

MR. SCHMALZBACH: As -- as to the indemnification obligation that Dominion has, yes, that's a right that Dominion bargained for. And it gets to decide when -- if and when it's not going to use it.

THE COURT: And I -- and I ask my question not as being critical of the fact that Dominion has secured that

as a contractual provision in the process of negotiations and acquiring this corporation. I'm simply trying to understand it. Because they're asking me to, if I understand their position correctly, create an exception or to read into Johnson an exception.

You're saying there is not that exception. And one of the reasons there should not be that exception is because there is these other spinoff litigations to which these people -- these people being referred to as the prior shareholders, officers of this corporation engaged in these alleged pretty substantial acts in the complaint that's present before this Court that they're never going to be held responsible for that now possibly they could be held responsible for, except for the fact that Dominion is indemnifying these people.

MR. SCHMALZBACH: Just to be clear as to our position. There should be no exception because Johnson admits no exception. The holding in Johnson is very clear about derivative standing, and for good reasons. And we're -- these arguments about alternate ways in which the Defendants might be held liable, that's just in response to the Plaintiffs request to create an exception that's already disallowed by Johnson.

THE COURT: I think they would probably disagree with your reading of Johnson. But I -- but thank you for

pointing that out.

Yes, sir. Go ahead.

MR. SCHMALZBACH: All right. And so for these reasons, we think Judge Seymour, who read the same briefs and heard the same arguments about the exact same factual scenario, got this just right.

So we ask you to apply the holding of Johnson v. Baldwin and grant the motion for judgment on the pleadings.

THE COURT: All right.

MR. CHAPPELL: Thank you, Your Honor.

Mark Chappell here on behalf of the Plaintiffs in this action.

We're going to divide our arguments into two parts.

THE COURT: Well, they really like Judge Seymour's order.

MR. CHAPPELL: Yes, sir.

THE COURT: And I've read it. And it's pretty substantial in regards to the issues in this case.

MR. CHAPPELL: Your Honor, in this -- this slow walked derivative action, I'm going to go through some of the procedural histories. And Mr. Eagel will address some of the substantive issues of law.

I think Your Honor gets it absolutely correct about the indemnifications, all of this slow walking they'll

never be held responsible issue in this Court. It's -- it's -- the Court's aware, and I think you pointed out, this lawsuit was filed over two years ago on October 30th, 2017.

November 29th, 2017, the Defendants moved for an extension of time to answer. Five days later, they moved to dismiss the complaint. January, SCANA and Dominion announced a merger. January of 2018, they moved to stay this litigation pending a merger. March 5th, 2018, this Court denied the motion to stay. September 6th, 2018, this Court denied the motion to dismiss.

September 30th, over a year ago, we served discovery responses in this matter -- discovery requests in the matter, Your Honor. There's not been one deposition, not one interrogatory answered, not one piece of paper exchanged.

We're standing here today two -- over two years after the complaint was filed. As Your Honor said, there's been no determination, no evidence presented yet by the opposing side on the merits of this case.

They, finally, answered the -- the complaint in October of 2018. Then they moved for protection from the discovery by a 12(b)(8) -- (b)(8) motion, which this Court denied. The merger went through January of this year. January 7th, they moved for judgment on the pleadings

arguing lack of standing.

Subsequently, Ms. Parler moved to intervene after Mr. Todd sold his shares. They have slow walked this case for two years, Your Honor. They have the same -- to make the same arguments in all these other pending cases that they can't move forward.

At some point, the -- the board members of SCANA have to be held accountable. We feel like this is the appropriate location at this time with Ms. Parler's action to intervene. And this is a derivative action. And we will speak to the -- to the substantive stuff. And I can assure the Court that Mr. Eagel is more prepared on the legal side of that argument than I am.

So, Larry.

MR. EAGEL: Good morning, Your Honor.

I'll -- I'll address -- address the Johnson case because I think that's clearly where the -- where the Defendants seek reliance in. It is what -- it is what the district court relied on in dismissing the derivative case in the district court and --

THE COURT: You need to distinguish. I apologize for interrupting. You need to distinguish, though. I have read Judge Seymour's order. Judge Seymour's -- while I might have taken a position that this case is different than Judge Seymour's case. Judge Seymour's order is -- is

pretty thorough.

MR. EAGEL: Understood, Your Honor. And, look, you know, we are here. We are fighting hard for our clients. And -- and Counsel's correct, there are other direct claims, you know.

In fact, the Defendants have worked hard not to be before this Court. They've removed two of the cases into federal court. That -- ultimately, those two cases went up to the Fourth Circuit after -- after Judge Seymour ordered the remand back to this Court. It was, originally, filed in this Court. There was -- they -- they ultimately -- Judge Seymour ordered remand. They went up to the Fourth Circuit.

THE COURT: I don't take it personal that they don't want to be here.

MR. EAGEL: Well, I'm just -- I'm just saying they are direct claims, though. And there is a -- this is a derivative claim. And -- and we have not -- the direct claims have been asserted in -- in those cases. And there is a third case -- another case that was filed in this Court. They removed that case. That case is subject to a motion to remand. Those are direct claims. These are -- this is a derivative case. Counsel is correct about that.

And it is -- it -- where I would distinguish Judge Seymour's decision is the fact that I think Judge Seymour

over reads what I would consider dicta in Johnson in that in Johnson, interestingly enough, there were two issues in Johnson. One issue was -- was the fact that the Plaintiff in -- in Johnson was the fact that the Plaintiff had elected to sell his shares since the appraisal rights -- exercised his rights to appraisal rights. And the fact that there was a merger that followed that.

In reading the decision, the decision is that the election to pursue the appraisal rights is the reason why -- this was a voluntary election, a purposeful act -- was the reason why the Plaintiff lost standing. Because that -- and the Court could have said it doesn't make a difference. The Court easily could have said it doesn't make a difference whether the Plaintiff took this voluntary act to sell the shares because there was a merger. And, therefore, he -- the shareholder lost standing one way or the other. It didn't -- it would have been just as easy to say in Johnson that -- and hold that all the shareholders lost standing. But that's not the holding in Johnson.

The holding in Johnson is the act of tendering the shares and seeking appraisal rights. That allows -- that results in -- and that's the voluntary act. And we have tried to distinguish Johnson on that basis.

The difference between the voluntary act of tendering

the shares, which was the basis for the holding in Johnson, versus the merger, which was not the basis for the -- for the holding in Johnson, but could have been the basis for the holding in Johnson and, yet, it wasn't.

So we do think there is that -- that sliver of -- of what I would call hope or opportunity in the Johnson decision that I think we -- we find as a reason for saying the Court has the ability and authority to adopt what we would call this exception or equitable rule. And it really relates to this involuntary termination under circumstances here where the continuous ownership rule -- I think South Carolina has adopted in Johnson the continuous ownership rule as it relates to voluntary terminations.

So Mr. Todd -- I'm sorry.

THE COURT: Can you entertain a question at this point?

MR. EAGEL: Sure.

THE COURT: All right. They're arguing some policy positions about why this is a good -- why their position is -- is good in that we have this black letter line or continuous ownership rule, no deviations. You are articulating and reading Johnson as a way of saying we have this line in the sand of continuous ownership, but there are exceptions or there should be exceptions. And

you point out a factual distinction in Johnson that they probably are going to say does not matter that you say does matter.

Why does that matter?

Help me understand a policy reason why that should matter.

MR. EAGEL: I think -- the policy reason, I think, Your Honor, had, actually, articulated it very well that the shareholders in -- in Johnson -- that the Plaintiff in Johnson -- and I'll address two -- two aspects of it.

The first aspect is the Plaintiff in Johnson, actually, sold his -- or elected to go with appraisal rights, therefore, did his own act. Much the same way that we have acknowledged that Plaintiff Todd, who sold his shares prior to the time of the merger -- we've acknowledged that Plaintiff Todd does not have standing to pursue this case.

So we agree on the -- we agree with the Defendants on that -- on that basis. And -- and it is -- it is -- certainly, as a policy matter, it's an uphill battle. So many courts, Delaware and others, have held that a continuous ownership that -- rule requires holding through the merger. There have been -- it's not as if this is --

THE COURT: Well, you say -- you say it's an uphill battle. Why? Simply because of the number of states that

recognize the continuous ownership rule versus the equitable reasons why you have that? Because North Carolina -- it's my understanding that North Carolina has, in fact, accepted -- made an exception.

MR. EAGEL: Correct.

THE COURT: Why --

MR. EAGEL: I was just -- I guess I was referring to the reliance of the Defendants on Delaware law, which does hold that -- that South Carolina often looks to Delaware law. And I think Your Honor correctly referred to the Whittle case in which -- in which -- where it's a harsh result that the Court should not blindly follow Delaware law.

And -- and Whittle was exactly a -- very -- has sort of a very interesting analogous facts. Because it was -- one of the rules in Delaware is either you make a demand on the board or you sue to argue that demand should be excused.

And in Delaware, if you -- if you make a demand on the board, then you ultimately -- then you then can't argue demand should be excused. Because by making the demand, you've acknowledged that the board has -- is, in fact, independent.

So it's a -- it's a -- it's a settled rule in Delaware that either you make -- if you make a demand, you

then, in effect, acknowledge the independence of the board, or if you argue demand excuse. We've argued demand excuse here. But the point in -- in Whittle -- in the Whittle case, the Court said that's -- that -- we don't -- we don't want to blindly follow Delaware law on that.

So that -- in that case, the Plaintiff made both a demand and then later argued demand excuse. We're not going to say just because the Plaintiff first made a demand and then followed up with a demand excused that his demand excused argument is -- is barred because of having made demands. So Whittle does say that South Carolina will recognize certain exceptions to Delaware law on those issues.

But this is -- the fact is that we are arguing that, at this stage in litigation, the Court should not -- should not dismiss the derivative claim. It is true there are direct claims. But the Court should not dismiss as a policy matter. And I think the -- well wise -- that policy matter should -- should the Court allow this case to continue notwithstanding the fact that Dominion has purchased it.

I think the Court has raised certain of the issues as to why the Plaintiff's ought to be allowed to continue this litigation. And it is -- it would be sort of an equitable exception that this Court's never had the

opportunity to test the litigation and the merits that have been alleged in the complaint that was filed two years ago. That as to any recovery, well, you know, that's for another day. We're talking now for today as to whether or not the Plaintiff here should be allowed to intervene or should lose standing. And it is -- it is sort of an equitable exception given the -- given where we are in the case.

So as a policy matter, I think Your Honor has correctly identified the fact that it's unlikely Dominion will continue the litigation. And I think as long as this group has shown an inclination to continue to press for a resolution of these claims that they ought to be -- continue the opportunity to do so.

THE COURT: Let me ask you a question. If you don't want to answer, that's fine. It might be that this is -- you feel it's a completely inappropriate question. Assuming, if you would, that the allegations that have been made in the complaint is true, and the allegations in the complaint are pretty substantial as far as the egregiousness of which the conduct could be seemed to include, you know, a loss of millions if not billions of dollars.

Assume as well that Counsel's position that Dominion has indemnified the people that are named as Defendants in

the litigation that's pending before this Court. Therefore, it's unlikely that from a legal standpoint these people will ever be held responsible, culpable, ever have to answer for the allegations that have been raised in this complaint. If you had to chose a venue that would be most appropriate for the Defendants in this litigation to be held, at least, to be required to answer for the conduct that is alleged in the complaint, where would your opinion be -- where would that opinion be?

MR. EAGEL: I would -- I would -- let me -- I guess I'd have to explain it in two forms.

THE COURT: Okay.

MR. EAGEL: And the first part would be that we filed cases in this Court three times. And they've been -- two of them have been removed. So I think that's sort of an indication of one -- of where we thought it was appropriate to file the case.

It's different, though. There is this difference between a direct and a derivative claim. We -- this is the only case -- the only claim we're pursuing here is the derivative claim. The direct is being pursued in the other litigations.

And there are -- the Defendants will invariably raise different defenses as to claims relating to the merger and claims relating to why I may -- may or may not be able to

assert defenses relating to direct claims. There's -- there are aspects in several -- you know, sort of a fraud claim. There are claims against these same Defendants, which they have identified. So those claims will go forward no matter what. Those are the direct claims.

Here, this is a derivative claim. We would like to go forward in both places and then -- and because we're asserting different defenses, these -- there are certain officers here who are not officers in that case.

So in terms of where to go, we would -- we would -- we believe they should go forward in both places in both cases, that the derivative claims should continue. And -- and, certainly, you know, the direct claim -- the Defendants are going to make their own motions in the Defendants -- in the direct case. And there are issues related to the merger. There are issues that might be present in this derivative case.

And so I hope that wasn't too long an answer. But, ultimately, we think it should go forward in both cases. One is a derivative case, one's direct. These are direct claims that the shareholders have -- different shareholders. We happen to be involved in certain -- the cases because we represent different shareholders. We're not the only Counsel involved representing different shareholders who are pursuing claims arising out of the --

the merger and -- and have asserted claims.

And we expect the Defendants to be responding to those claims. That's a different -- those are direct claims on behalf of the shareholders. Because that's not what's being pursued here. These are derivative claims that do, at the outset, belong to the corporation. But the question is where does it go at the end of the day is for another day. It isn't for this day. I think that's where we differ.

Again, this is for judgment on the pleadings where this Court's never had the opportunity to adjudicate the merits, principally a standing argument. It's a continuous ownership standing argument. And if Your Honor, you know, concurs with Judge Seymour, then I think that's -- that -- then, you know, this derivative case would terminate and the direct cases would continue.

At the same time, we think Your Honor should -- should -- a -- continue this case on the grounds that there's -- there -- there are, at least, reasons to continue the case because of an exception that -- that South Carolina law can find this exception under circumstances as those presented in this case.

And then in terms of where the outcome is of this derivative case and what happens with it is for another day. We're now here on judgment of the pleadings. We

haven't had any discovery. We haven't had any -- any sort of fact development.

So I hope that answered the question, Your Honor.

THE COURT: All right. Thank you.

MR. SCHMALZBACH: Thank you, Your Honor.

We have been accused of filing a parade of motions. And on that, I guess we have to plead guilty and beg for your mercy on the grounds that we're defense lawyers and that's what we do. But --

THE COURT: There's nothing wrong with that. It keeps me busy.

MR. SCHMALZBACH: But --

THE COURT: And if you'd see some of the other stuff I have to do, sometimes this is a blessing. These -- y'all are all very good lawyers, well prepared. And it is -- it's an honor to have you in front of me.

MR. SCHMALZBACH: Thank you, Your Honor. I appreciate that.

If I could, what makes this motion different, in addition to all the legal reasons that it's meritorious as Judge Seymour already held, is that Counsel for the Plaintiff, basically, invited this motion. As we recount on Page 2 of our brief in this case in a letter to this Court, Mr. Eagel volunteered that the planned merger "likely will moot the derivative claims."

Then at the hearing, he said, There's an issue as to standing in the derivative case. So this motion was invited by Mr. Eagel's recognition that there is a derivative standing defect after the merger.

Very quickly, I think we now hear with a little bit more clarity what exactly the -- the Plaintiff wants to have you do. And that's to create a new equitable exception that has never been recognized in South Carolina law. That's exactly what Judge Seymour refused to do.

And as to the policy argument that they offer for making that equitable exception, it's not enough to say that someone needs to hold these people accountable. As Mr. Eagel said, there are other direct claims that offer that mechanism.

But what a policy argument needs to offer here is a reason why Dominion should be dragooned into paying for a lawsuit.

THE COURT: Dragooned?

MR. SCHMALZBACH: Dragooned.

THE COURT: I'll have to look that up.

MR. SCHMALZBACH: Conscripted --

THE COURT: All right.

MR. SCHMALZBACH: -- into paying for this lawsuit that's purportedly on its behalf that it doesn't want to bring. That's what's unique about this case.

And to be clear as to indemnification, Dominion has not waived and does not waive its right to pursue these claims when it determines -- if and when it determines that's appropriate.

And, finally, as to your question about whether this case can be distinguished from the case that Judge Seymour heard and dismissed, I think by copying and pasting the federal derivative briefs and presenting them here, I think that tells you all you need to know about whether this case can be distinguished. It is the same case. And it deserves the same result that Judge Seymour reached.

THE COURT: Thank you, sir.

MR. SCHMALZBACH: Thank you.

MR. CHAPPELL: Very briefly in reply, Your Honor. You asked the question where should this case be -- where should we be. Your Honor, we should be in this Court. This is the only place where a derivative case is pending. We lose here, it's over.

Dominion has won. The corporation has cut a backdoor deal that covers for the board. She did not sell her shares. She did not give them up. They took her shares. I think that is the distinction in this case.

So they take her shares. They come in and argue for two years that this case doesn't exist. We lose on the derivative claim here, they win. This board walks away

scot-free. This is the only jurisdiction that's going to hold the board members accountable for stealing billions of dollars from their rate payers. This is the only place.

So if the Court were to rule against us on this motion, you know, they win. And I just think from the equitable standpoint, from the legal standpoint, that's just wrong, Your Honor. We ask that you deny their motion.

Thank you.

MR. SCHMALZBACH: May I say a quick word, Your Honor?

I don't know if Counsel misspoke when he said a "backdoor deal." But I want to be very clear that Dominion's agreement to indemnify these Defendants was 100 percent disclosed to SCANA's shareholders in the proxy statement, in the merger agreement. And those shareholders voted to approve this merger, 72 percent of the vote.

And so -- and as to the argument that this is the only Court that can hold them accountable. If Counsel are representing that they're going to dismiss the other direct actions that Mr. Eagel described, we'd be happy to accept that. But until that happens, Mr. Eagel described the other lawsuits very similar to this one, but framed as direct lawsuits where they are seeking to hold these same

Defendants accountable.

MR. EAGEL: Just two quick points.

THE COURT: Yes, sir.

MR. EAGEL: We, obviously, are strenuously pressing the direct claims and those claims will continue. And they -- we are seeking to -- seeking significant redress as a result. So they will, we hope, hold them accountable. They will raise other defenses in those claims. That's -- that is a -- that's -- so Counsel's correct. We are -- we are certainly very -- pressing those claims and intend to press them as hard as we can.

So in terms of -- there is no other derivative claim. I think that's -- that's the point. But there is a direct claim that's being pursued.

Second, I just -- on this invitation, I -- I -- invitation of -- of the argument of standing. I don't think that Counsel needed any invitation since that was the subject of the letter before I agreed and said, okay, we'd wait on discovery. And, ironically, Your Honor, it's -- they point to an issue that -- that was the Defendant's argument. At that time, there were two Plaintiffs and we were arguing about it.

And the Defendants argument wasn't that I invited it because they made the argument themselves. They said the action was being stayed. So they obviously -- that the

action was going to go away because of a loss of standing. So I didn't invite it. They said it. And, more importantly, Your Honor said, you know, tough. Your Honor, in fact, ordered discovery -- denied the motion for a stay and ordered the case to go forward.

So if, in fact, I -- I -- so whatever occurred back then, I think Your Honor was -- actually, addressed this issue back in -- in the motion for stay of discovery when the Defendants said that standing was going to be lost, we'll confront that issue when the time comes. And I guess that's what we're here for today.

But certainly nothing I said or did in the context of the Court deciding whether or not a motion to stay should go forward or not, or whether a party should conduct discovery has any bearing on where we are today having been a little bit more informed and having been a little bit more present concerning some of the issues here.

Thank you, Your Honor.

MR. SCHMALZBACH: Your Honor, if you have no more questions for me, thank you very much for your time today.

THE COURT: All right. Thank y'all very much.

I will let you know. In the event we're still together in three years, we'll have a new courthouse.

**********END OF TRANSCRIPT OF RECORD**********

CERTIFICATE OF REPORTER

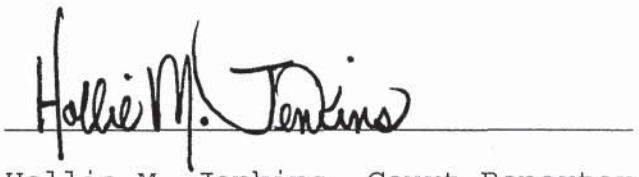
STATE OF SOUTH CAROLINA)

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
STEPHEN ANDREW BYRNE	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
	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.

The Nuclear Project

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

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

J. Mark Hayes, II, Circuit Court Judge

RECEIVED
Oct 05 2020
SC Court of Appeals

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

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

Plaintiff,

v.

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

Defendants,

And

SCANA CORP.,

Nominal Defendant.

TERESA PARLER, derivatively on behalf of
SCANA CORPORATION,

Plaintiff,

v.

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

Defendants,

And

SCANA CORP.,

Nominal Defendant,

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

And

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

REPLY IN SUPPORT OF PETITION FOR REHEARING UNDER RULE 221(a)

John A. Massalon (SC Bar # 10279)
Wills Massalon & Allen, LLC
Post Office Box 859
Charleston, South Carolina 29402
(843) 727-1144
jmassalon@wmalawfirm.net

C. Scott Greene (*pro hac vice*)
John R. Bielema (*pro hac vice*)
Michael P. Carey (*pro hac vice*)
Bryan Cave Leighton Paisner LLP
One Atlantic Center, 14th Floor
1201 W. Peachtree St., N.W.
Atlanta, GA 30309-3471
(404) 572-6978
scott.greene@bclplaw.com
john.bielema@bclplaw.com
michael.carey@bclplaw.com

Barbara A. Smith (*pro hac vice*)
Bryan Cave Leighton Paisner LLP
One Metropolitan Square
211 N. Broadway, Suite 3600
St. Louis, Missouri 63102
(314) 259-2000
barbara.smith@bclplaw.com

Counsel for Defendants-Appellants Gregory E. Aliff; James Bennett; John F.A.V. Cecil; Sharon A. Decker; D. Maybank Hagood; Lynne M. Miller; James W. Roquemore; Maceo K. Sloan; and Alfredo Trujillo

Steven J. Pugh (SC Bar # 14341)
Benjamin P. Carlton (SC Bar # 101142)
Richardson Plowden
& Robinson, P.A.
Post Office Drawer 7788 (29202)
1900 Barnwell Street
Columbia, South Carolina 29201
(803) 771-4400
spugh@richardsonplowden.com
bcarlton@richardsonplowden.com

I.S. Leevy Johnson (SC Bar # 3020)
George C. Johnson (SC Bar # 9308)
Johnson Toal & Battiste, P.A.
1615 Barnwell Street
Columbia, South Carolina 29201
(803) 252-9700
islj@jtbpa.com
George@jtbpa.com

Brian D. Schmalzbach (*pro hac vice*)
Brian E. Pumphrey (*pro hac vice*)
McGuireWoods LLP
800 East Canal Street
Richmond, VA 23219
(804) 775-7745
bschmalzbach@mcguirewoods.com
bpumphrey@mcguirewoods.com

Counsel for Nominal Defendant-Appellant SCANA Corporation

William A. Coates (SC Bar # 1289)
Roe Cassidy Coates & Price P.A.
1052 North Church Street
Post Office Box 10529
Greenville, South Carolina 29603
(864) 349-2600
wac@roecassidy.com

John A. Jordak, Jr. (*pro hac vice*)
Meredith J. Kingsley (*pro hac vice*)
Alston & Bird
1201 West Peachtree Street
Atlanta, Georgia 30309
(404) 881-7000
john.jordak@alston.com
meredith.kingsley@alston.com

Counsel for Defendant-Appellant Jimmy Addison

James M. Griffin (SC Bar # 9995)
Margaret N. Fox (SC Bar # 76228)
Griffin Davis
4408 Forest Drive, Suite 300
Columbia, SC 29206
(803) 744-0800
jgriffin@griffindavislaw.com
mfox@griffindavislaw.com

James F. Wyatt, III (*pro hac vice*)
Robert A. Blake, Jr. (*pro hac vice*)
Wyatt & Blake, LLP
435 East Morehead Street
Charlotte, NC 28202
(704) 331-0767
jwyatt@wyattlaw.net
rblake@wyattlaw.net

Counsel for Defendant-Appellant Stephen A. Byrne

J. Brady Hair (SC Bar # 9040)
Derk Van Raalte (SC Bar # 9286)
Law Offices of J. Brady Hair
2500 City Hall Lane
Post Office Box 61896
North Charleston, SC 29419
(843) 572-8700
Brady@bradyhair.com
Derk@bradyhair.com

Anne M. Tompkins (*pro hac vice*)
Jonathan M. Watkins (*pro hac vice* pending)
Aaron C. Lang (*pro hac vice* pending)
Cadwalader, Wickersham & Taft LLP
227 West Trade Street
Charlotte, NC 28202
(704) 348-5222
Anne.Tompkins@cwt.com
Jonathan.Watkins@cwt.com
Aaron.Lang@cwt.com

Counsel for Defendant-Appellant Kevin B. Marsh

TABLE OF CONTENTS

Page

TABLE OF AUTHORITY ii

INTRODUCTION 1

ARGUMENT 2

I. Parler agrees that the dismissal order's nature and effect, not its label, control its appealability 2

II. The nature and effect of the trial court's order giving control of this litigation to a hostile non-shareholder and her counsel make that order appealable 2

A. The trial court's order denies SCANA's substantial rights 3

B. The trial court's order involves the merits and effectively determines the action 5

III. The trial court's error should be remedied now. 7

CONCLUSION 9

CERTIFICATE OF SERVICE 12

TABLE OF AUTHORITY

Page(s)

Cases

Ark. Teacher Ret. Sys. v. Mozilo,
705 F.3d 973 (9th Cir. 2013) 7

Evans v. State,
344 S.C. 60, 543 S.E.2d 547 (2001) 8

Hagood v. Sommerville,
362 S.C. 191, 607 S.E.2d 707 (2005) 5

Johnson v. Baldwin,
221 S.C. 141, 69 S.E.2d 585 (1952) 4, 8

KBC Asset Mgmt. NV v. Marsh,
No. 2019-CP-40-02522 (Richland County) 6

Mid-State Distributors, Inc. v. Century Importers, Inc.,
310 S.C. 330, 426 S.E.2d 777 (1993) 5

In re SCANA Corporation Public Shareholder Litig.,
No. 3:18-cv-505 (D.S.C.) 6

State v. Register,
308 S.C. 534, 419 S.E.2d 771 (1992) 7

Swenson v. Thibaut,
39 N.C. App. 77, 250 S.E.2d 279 (1978) 3

Washington Frontier League Baseball, LLC v. Zimmerman,
2017 WL 10440087 (S.D. Ind. May 15, 2017) 4

Statutes

S.C. Code Ann. § 14-3-330 ..... 1, 3

INTRODUCTION

The order dismissing this appeal from an unprecedented trial court order handing control of a company's litigation over to a non-shareholder warrants rehearing because the dismissal order overlooked that the nature and effect of that trial court order make it appealable under S.C. Code Ann. § 14-3-330. Respondent Teresa Parler ("Parler") concedes that it is the *substance* of the order that determines its appealability. And Parler does not dispute that the dismissal order hinged on the *form* of the appealed order, which denied a motion to dismiss for lack of derivative standing. Those undisputed points alone require rehearing to engage in the analysis required by Supreme Court precedent.

Parler also agrees that the substance of the order below permitted Parler to pursue derivative claims meant to benefit SCANA Corp. ("SCANA") despite Parler's lack of any interest or stake in SCANA and its well-being. Granting that license to a non-shareholder effectively transfers control over corporate litigation, choice of counsel, and the selection of defendants outside the company. And Parler does not dispute that an order is immediately appealable if it denies a party's substantial rights to control its litigation asset, select its counsel, and choose its defendants.

Parler simply disagrees that SCANA or its sole shareholder Dominion Energy, Inc. ("Dominion") may exercise those substantial rights impaired by the decision below. Instead, Parler asserts that *she* somehow holds these rights and that a newly invoked (*i.e.*, not argued below) "corporate neutrality" doctrine that Parler now seeks to import from other states somehow bars SCANA from exercising its own rights in this litigation. That argument has no basis in South Carolina law or common sense.

SCANA's rights to control its derivative asset, including by deciding its counsel and defendants, are intertwined with Parler's inability to represent SCANA in this derivative litigation. Nothing in Parler's Return to Petition for Rehearing ("Return") overcomes SCANA's showing that the decision below is immediately appealable, and that rehearing should be granted to address this appeal on the merits.

ARGUMENT

I. Parler agrees that the dismissal order's nature and effect, not its label, control its appealability.

Parler does not dispute that the dismissal order overlooked or misapprehended that the *substance* of the trial court's order—rather than its *form*—determines whether the order is appealable. Pet. for Reh'g at 5–7. Instead, Parler readily admits that the proper inquiry is "whether the 'nature and effect' of the trial court's order" warrant an appeal. Return at 1. The dismissal order overlooked this controlling rule and dismissed the appeal based solely on the appealed order's label as a denial of a motion for judgment on the pleadings. That threshold error warrants rehearing.

II. The nature and effect of the trial court's order giving control of this litigation to a hostile non-shareholder and her counsel make that order appealable.

The dismissal order's threshold error also caused it to overlook that the nature and effect of the trial court's order warrant an immediate appeal. Although Parler concedes that the substance of the trial court's order is what matters—and that the dismissal order here misapprehended that rule—Parler argues that the trial court's

order neither involves the merits nor affects a party's substantial right as required by S.C. Code Ann. § 14-3-330. Parler is wrong on both counts.

A. The trial court's order denies SCANA's substantial rights.

Parler does not dispute that the rights to control one's litigation asset, choose one's counsel, and select one's defendants are substantial ones, the denial of which justifies immediate appeal. *See* Return at 3. Parler merely asserts that SCANA does not itself possess those rights in this derivative action. In Parler's view, *she* holds these rights, even though she is a non-shareholder who lacks standing to pursue the derivative action. *Id.*

Parler premises this assertion on a doctrine she invokes for the first time in this Court: the "rule of corporate neutrality." *See id.* But that rule has no basis in South Carolina law, and would not apply here even if it did.

Parler provides no authority showing that South Carolina courts have adopted the corporate neutrality principle. *See id.* (citing North Carolina and New Jersey decisions). There appears to be none. Especially given the trial court's erroneous adopting of foreign authority directly opposed to binding South Carolina law, *see* Appellants' Initial Br. at 18–19, this Court should not adopt this foreign rule here to reject an appeal that South Carolina law grants and permits.

Even if this principle existed under South Carolina law, it would neither apply here nor preclude SCANA's appeal. The corporate neutrality rule does *not* require a corporation to remain neutral in a derivative action if the corporation has "interests adverse to those of the nominal plaintiffs bringing the action derivatively." *Swenson*

v. Thibaut, 39 N.C. App. 77, 100, 250 S.E.2d 279, 294 (1978); *see also Washington Frontier League Baseball, LLC v. Zimmerman*, 2017 WL 10440087, at *4 (S.D. Ind. May 15, 2017) (the corporation can participate in the defense on the merits if "the derivative action threatens rather than advances corporate interests").[1]

Parler and her counsel's interests are adverse to SCANA's, and she scarcely contends otherwise. SCANA moved to dismiss based on Parler's non-shareholder status because her "gratuitous inquisition into [SCANA's] business" threatens SCANA's interests and wrests from it control of its own litigation asset. *Johnson v. Baldwin*, 221 S.C. 141, 149–50, 69 S.E.2d 585, 589 (1952) (quoting *Kehaya v. Axton*, 32 F. Supp. 266, 268 (S.D.N.Y. 1940)); *see also* Pet. for Reh'g at 7–8. So, too, do her counsel's efforts to use this derivative action to prosecute direct claims against Dominion and SCANA's indemnitees, which further undermine SCANA's rights to representation by non-hostile counsel and to choose its own defendants. *See* Pet. for Reh'g at 9, 10–11. Parler and her counsel even staked out the position (in defining which claims were released by a related securities class action) that *this very action* can include direct (and therefore potentially indemnifiable) claims against SCANA's indemnitees. *See* Ex. 1, *In re SCANA Corp. Securities Litig.* Release Scope Agreement at 3, ¶ 2.[2] So because Parler and her counsel are threatening SCANA's interests, the corporate neutrality doctrine does not apply on its face, and SCANA

[1] Nor does the neutrality principle apply when (as here) the alleged wrongdoers no longer control the corporation. *See Zimmerman*, 2017 WL 10440087, at *4.

[2] This document, which is publicly available on the District of South Carolina's docket and signed by Parler's counsel, is judicially noticeable under Rule 201, SCRE.

retains the substantial rights to control its own litigation assets, select its counsel, and choose which defendants to sue. By rejecting SCANA's standing challenge and allowing Parler to pursue this derivative action, the trial court's order deprived SCANA of those substantial rights. That result makes the order immediately and substantively appealable.

B. The trial court's order involves the merits and effectively determines the action.

Cementing this conclusion is the order's impact on the merits. The decision below effectively determines the action and necessarily involves the merits because the denial of SCANA's substantial rights cannot be remedied by an appeal after final judgment. *See Hagood v. Sommerville*, 362 S.C. 191, 197–98, 607 S.E.2d 707, 710 (2005) (holding an order appealable where "an appeal after final judgment would not adequately protect a party's interests"). Instead, SCANA will suffer irreversible harm because adverse counsel will prosecute the derivative action to SCANA's detriment not only in this action, but in multiple related actions for which SCANA will have to pay.

Mid-State Distributors, Inc. v. Century Importers, Inc., 310 S.C. 330, 335, 426 S.E.2d 777, 780 (1993), is not to the contrary. Unlike a denial of a motion to dismiss for lack of personal jurisdiction, there *is* "finality" in the trial court's order permitting a non-shareholder to litigate this derivative action. *Id.* Parler fails to show how "[a]ll defenses remain open to" SCANA going forward, Return at 5—an assertion at odds

with Parler's newfound contention that the corporate neutrality rule eliminates SCANA's ability to present most defenses.

Parler does not dispute that SCANA has indemnification obligations of its own, yet she suggests (based on an excerpt of a hearing below) that SCANA faces no financial threat because "Dominion" is providing indemnification. Return at 7. But as the omitted full context of that excerpt makes clear, the shorthand reference to "Dominion" included its wholly owned subsidiary SCANA, which is the entity to which "any recovery on this lawsuit is going to go." Return, Ex. A at 17:15–17 ("[A]t this time, Dominion is responsible for paying the cost of defense of this lawsuit. And any recovery on this lawsuit is going to go to Dominion."); *see also*, *e.g.*, [R. p. _; Ex. A. to Defs.' Mot. for Judgment on the Pleadings ("Mot. for Judgment") pp. 1–2, 9]. Nothing in that transcript changes the undisputed fact that *SCANA* is currently paying costs of defending against these claims. *See* Pet. for Reh'g at 8–11.

Parler's counsel, meanwhile, is litigating direct claims against SCANA's indemnitees—for which SCANA may be liable—simultaneously with this derivative action. *See In re SCANA Corporation Public Shareholder Litig.*, No. 3:18-cv-505 (D.S.C.); *KBC Asset Mgmt. NV v. Marsh*, No. 2019-CP-40-02522 (Richland County). If the trial court's order stands uncorrected, Parler's counsel will be able to prosecute this derivative action to help increase SCANA's indemnification liability in other actions. *See* Appellants' Initial Br. at 27–28. Even if a later appeal eventually corrects the trial court's erroneous grant of derivative standing, Parler's counsel will have had months or even years to extract ammunition from this case for battles in

other cases in which they are seeking *billions* from SCANA's indemnitees. A reversal after final judgment will provide no relief if Parler's counsel has already won those battles. Because the trial court's decision threatens to prejudice SCANA in a way a later appeal cannot remedy, it effectively decides the action, involves the merits, and requires interlocutory review.

III. The trial court's error should be remedied now.

As a final attack on appealability, Parler contends *both* that the vital question of South Carolina corporate law raised here is not novel or important enough to warrant immediate appeal, Return at 8 n.6, *and* at the same time that this question is *too* novel and important to decide on a motion to dismiss. *Id.* at 8–9. Neither argument succeeds.

First, the novelty of the trial court's ruling and its contradiction of the District of South Carolina on the same issue warrant an appeal. The trial court upended decades of precedent and threatened to embroil derivative actions in novel standing disputes. Parler errs in suggesting (at *id.* at 8 n.6) that *State v. Register*, 308 S.C. 534, 536 n.1, 419 S.E.2d 771, 772 n.1 (1992), somehow limits the need to review novel issues to the precise factual context of that case. To the contrary, *Register* sensibly recognized that the presence of "a novel issue" supports immediate appellate review. *Id.* And both the novelty and significance of the decision here justify this Court's review now. *See Ark. Teacher Ret. Sys. v. Mozilo*, 705 F.3d 973, 975 (9th Cir. 2013).

("[D]isputes regarding shareholder derivative standing implicate significant issues of state public policy best resolved by reference to clear rules of state law.").

Second, this Court's review does not require *any* factual development. Whether the trial court erroneously carved out an unprecedented "equitable" exception to *Johnson v. Baldwin*'s longstanding continuous ownership rule presents a pure question of law ripe for decision now. When a dispute hinges on "interpretation of the law, and development of the record will not aid in the resolution of the issues, it is proper to decide even novel issues on a motion to dismiss." *Evans v. State*, 344 S.C. 60, 68, 543 S.E.2d 547, 551 (2001). There is thus no reason for SCANA to suffer the loss of its substantial rights and substantial indemnified defense expenses through summary judgment, Return at 5, particularly when the trial court's order has already and impermissibly passed judgment on "the likelihood of the truth of the matters asserted in Parler's arguments." [R. p._; Order p. 13.]

No record development will change the single, undisputed fact relevant to this standing dispute under *Johnson*: Parler no longer owns any SCANA stock. As SCANA has explained, the trial court erred by letting its suspicion about the strength of Parler's allegations of corporate misconduct overcome the strict continuous ownership rule dictated by South Carolina law. *See* Appellants' Initial Br. at 22–24. Those allegations do not bear on the central question of whether Parler has lost standing because she lost her stock. No discovery is needed to decide that question.

This Court should review this case now to correct the trial court's fundamental error in holding otherwise.

CONCLUSION

For these reasons and those in SCANA's Petition for Rehearing, this Court should grant SCANA's Petition for Rehearing under Rule 221(a), review the merits of this appeal, and reverse the trial court's order with instructions to dismiss the complaint without prejudice to the right of Dominion to pursue these claims.

Dated: October 5, 2020

Respectfully submitted,

s/ *John A. Massalon*
John A. Massalon (SC Bar # 10279)
Wills Massalon & Allen, LLC
Post Office Box 859
Charleston, South Carolina 29402
(843) 727-1144
jmassalon@wmalawfirm.net

C. Scott Greene (*pro hac vice*)
John R. Bielema Jr. (*pro hac vice*)
Michael P. Carey (*pro hac vice*)
Bryan Cave Leighton Paisner LLP
One Atlantic Center, 14th Floor
1201 West Peachtree Street, N.W.
Atlanta, Georgia 30309
(404) 572-6600
scott.greene@bclplaw.com
john.bielema@bclplaw.com
michael.carey@bclplaw.com

Barbara A. Smith (*pro hac vice*)
Bryan Cave Leighton Paisner LLP
One Metropolitan Square
211 N. Broadway, Suite 3600
St. Louis, Missouri 63102
(314) 259-2000
barbara.smith@bclplaw.com

Counsel for Defendants-Appellants Gregory E. Aliff; James Bennett; John F.A.V. Cecil; Sharon A. Decker; D. Maybank Hagood; Lynne M. Miller; James W. Roquemore; Maceo K. Sloan; and Alfredo Trujillo

s/ *William A. Coates*
William A. Coates (SC Bar # 1289)
Roe Cassidy Coates & Price P.A.
1052 North Church Street
Post Office Box 10529
Greenville, South Carolina 29603
(864) 349-2600

s/ *Steven J. Pugh*
Steven J. Pugh (SC Bar # 14341)
Benjamin P. Carlton (SC Bar # 101142)
Richardson Plowden
& Robinson, P.A.
Post Office Drawer 7788 (29202)
1900 Barnwell Street
Columbia, South Carolina 29201
(803) 771-4400
spugh@richardsonplowden.com
bcarlton@richardsonplowden.com

I.S. Leevy Johnson (SC Bar # 3020)
George C. Johnson (SC Bar # 9308)
Johnson Toal & Battiste, P.A.
1615 Barnwell Street
Columbia, South Carolina 29201
(803) 252-9700
islj@jtbpa.com
George@jtbpa.com

Brian D. Schmalzbach (*pro hac vice*)
Brian E. Pumphrey (*pro hac vice*)
McGuireWoods LLP
800 East Canal Street
Richmond, VA 23219
(804) 775-7745
bschmalzbach@mcguirewoods.com
bpumphrey@mcguirewoods.com

Counsel for Nominal Defendant-Appellant SCANA Corporation

s/ *Derk Van Raalte*
J. Brady Hair (SC Bar # 9040)
Derk Van Raalte (SC Bar # 9286)
Law Offices of J. Brady Hair
2500 City Hall Lane
Post Office Box 61896
North Charleston, SC 29419
(843) 572-8700

wac@roecassidy.com

John A. Jordak, Jr. (*pro hac vice*)
Meredith J. Kingsley (*pro hac vice*)
Alston & Bird
1201 West Peachtree Street
Atlanta, Georgia 30309
(404) 881-7000
john.jordak@alston.com
meredith.kingsley@alston.com

Counsel for Defendant-Appellant Jimmy Addison

s/ *James M. Griffin*
James M. Griffin (SC Bar # 9995)
Margaret N. Fox (SC Bar # 76228)
Griffin Davis
4408 Forest Drive, Suite 300
Columbia, SC 29206
(803) 744-0800
jgriffin@griffindavislaw.com
mfox@griffindavislaw.com

James F. Wyatt, III (*pro hac vice*)
Robert A. Blake, Jr. (*pro hac vice*)
Wyatt & Blake, LLP
435 East Morehead Street
Charlotte, NC 28202
(704) 331-0767
jwyatt@wyattlaw.net
rblake@wyattlaw.net

Counsel for Defendant-Appellant Stephen A. Byrne

Brady@bradyhair.com
Derk@bradyhair.com

Anne M. Tompkins (*pro hac vice*)
Jonathan M. Watkins (*pro hac vice* pending)
Aaron C. Lang (*pro hac vice* pending)
Cadwalader, Wickersham & Taft LLP
227 West Trade Street
Charlotte, NC 28202
(704) 348-5222
Anne.Tompkins@cwt.com
Jonathan.Watkins@cwt.com
Aaron.Lang@cwt.com

Counsel for Defendant-Appellant Kevin B. Marsh

Exhibit 1

Teresa Parler ("Parler"); Kevin B. Marsh, Jimmy E. Addison, Stephen A. Byrne, D. Maybank Hagood, James W. Roquemore, and Harold C. Stowe (collectively, the "Securities Defendants"); and Gregory E. Aliff, James A. Bennett, John F.A.V. Cecil, Sharon A. Decker, Lynne M. Miller, Maceo K. Sloan, and Alfredo Trujillo (collectively with Marsh, Addison, Byrne, Hagood, and Roquemore, the "*Parler* Defendants"); and SCANA Corporation ("SCANA"), by their respective counsel, hereby enter into this agreement ("Release Scope Agreement") regarding application of the Stipulation and Agreement of Settlement dated December 20, 2019 (the "Stipulation") in *In re SCANA Corporation Securities Litigation*, No. 3:17-CV-2616-MBS (D.S.C.) ("*SCANA Securities*"). All capitalized words and terms not defined in this Release Scope Agreement shall have the meaning stated in the Stipulation. This Release Scope Agreement memorializes the parties' understanding of certain terms in the Stipulation, and their agreement on the appropriate application of those terms in the scenarios set forth below. It does not amend or change the meaning of the Stipulation.

WHEREAS:

A. Parler is intervenor-plaintiff in *Todd v. Marsh et al*., No. 2017-CP-40-06621 (S.C. Ct. Comm. Pls., Richland Cty.) (the "*Parler* Action").

B. Parler asserts claims in the *Parler* Action, against certain former officers and directors of SCANA, including certain *Parler* Defendants.

C. On January 7, 2020, the Stipulation was filed as an exhibit to Lead Plaintiffs' Unopposed Motion for an Order Preliminarily Approving Class Settlement in *SCANA Securities*. ECF 213-2.

E. The Stipulation states that "[s]ubject to the approval of the Court and the terms and conditions expressly provided herein," it "is intended to fully, finally, and forever compromise, settle, release, resolve, and dismiss with prejudice the Action and all Released Plaintiffs' Claims (defined below) against Defendants."

F. The Stipulation defines "Released Plaintiffs' Claims" as "all claims and causes of action of every nature and description, whether known claims or Unknown Claims, whether arising under federal, state, common, or foreign law, that Lead Plaintiffs or any other member of the Settlement Class (i) asserted in the Complaint, or (ii) could have asserted in the Action or any other forum that arise out of or are based upon the allegations, transactions, facts, matters or occurrences, representations, or omissions involved, set forth, or referred to in the Complaint and that relate to the purchase of SCANA common stock during the Class Period.

Released Plaintiffs' Claims do not cover, include, or release any of the Excluded Plaintiffs' Claims." Stipulation ¶ 1(vv).

G. The Stipulation defines "Excluded Plaintiffs' Claims" as: "(i) any claims asserted in any ERISA or derivative action, including, without limitation, the claims asserted in *In re: SCANA Corporation Derivative Litigation*, No. 3:17-cv-03166-MBS (D.S.C.), *Crangle v. Marsh et al.*, No. 2017-CP-40-05791 (S.C. Ct. Comm. Pls., Richland Cty.), *Todd v. Marsh et al*., No. 2017-CP- 40-06621 (S.C. Ct. Comm. Pls., Richland Cty.), *In re SCANA Corporation Public Shareholder Litigation*, Lead Case No. 3:18-cv-00505-MBS (D.S.C.), or *KBC Asset Management LV v. Marsh et al.*, No. 3:19-cv-1457-MBS (D.S.C.), or any cases consolidated into those actions; (ii) any claims by any governmental entity that arise out of any governmental investigation of Defendants relating to the conduct alleged in the Action, including, without limitation, the claims asserted in *Request of the Office of Regulatory Staff for Rate Relief to South Carolina Electric & Gas Company's Rates Pursuant to S.C. Code Ann. § 58-27-920*, S.C. PSC Dkt. No. 2017-305-E; (iii) any claims asserted in any ratepayer action, including, without limitation, the claims asserted in *Timothy Glibowski v. SCANA Corp*., No. 9:18-273-TLW (D.S.C.), *Lightsey et al. v. South Carolina Electric & Gas Co. et al.*, Case No. 2017-CP-25-00355 (S.C. Ct. Comm. Pls., Hampton Cty.), *Cleckley v. SCE&G*, No. 2017-CP-40-04833 (S.C. Ct. Comm. Pls., Richland Cty.), *Cook v. S.C. Pub. Serv. Auth.*, No. 2017-CP-25-00348 (S.C. Ct. Comm. Pls., Hampton Cty.), *Goodman v. SCANA Corp.*, No. 2017-CP-20-00300 (S.C. Ct. Comm. Pls., Fairfield Cty.), *Luquire v. Marsh et al.*, No. 5:19-cv-2516-TLW (D.S.C.), or any cases consolidated into those actions; (iv) any claims asserted in *Fairfield Co. v. South Carolina Electric & Gas Co*., No. 2017-CP-20-458 (S.C. Ct. Comm. Pls., Fairfield Cty.), *Fluor Enterprises, Inc. v. South Carolina Electric & Gas Company*, No. 2018-CP-0343 (S.C. Ct. Comm. Pls., Fairfield Cty.), or *Friends of the Earth and Sierra Club* v. *South Carolina Electric & Gas Company*, S.C. PSC Dkt. No. 2017-207-E, or any cases consolidated into those actions; (v) any claims relating to the enforcement of the Settlement; and (vi) any claims of any person or entity who or which submits a request for exclusion that is accepted by the Court." Stipulation ¶ 1(aa).

H. The District of South Carolina entered an order granting preliminary approval in *SCANA Securities* on February 11, 2020.

IT IS HEREBY AGREED AS FOLLOWS:

1. As set forth above, Excluded Plaintiffs' Claims include any claims asserted in any derivative action, including, without limitation, the claims asserted in the *Parler* Action.

2. In the event that the claims asserted in the *Parler* Action are determined to be direct claims of SCANA shareholders, through consolidation or otherwise, subject to ¶ 3 of this Release Scope Agreement, the *Parler* Defendants and Securities Defendants (collectively, "Defendants") agree that such claims asserted in the *Parler* Action or any cases consolidated into that action are Excluded Plaintiffs' Claims within the meaning of ¶ 1(aa) of the Stipulation. By signing this agreement, Defendants do not agree that claims asserted in the *Parler* Action are or could be direct claims. Defendants will oppose any attempt to add direct claims or to cast derivative as direct claims.

3. Parler agrees that, notwithstanding ¶ 2 of this Release Scope Agreement, claims in the *Parler* Action are not Excluded Plaintiffs' Claims to the extent they (i) are determined to be direct claims; (ii) seek damages arising from the diminution in value during the Class Period of SCANA common stock that was purchased during the Class Period; and (iii) are based upon alleged misrepresentations or omissions by Defendants during the Class Period, and that such claims are Released Plaintiffs' Claims subject to ¶ 5 of the Stipulation.

4. Parler agrees that she will not cause to be filed any objection to the *SCANA Securities* settlement.

5. This Release Scope Agreement may be executed in one or more counterparts, including by signature transmitted via facsimile, or by a .pdf/.tif image of the signature transmitted via email. All executed counterparts and each of them shall be deemed to be one and the same instrument.

IN WITNESS WHEREOF, Parler, the Securities Defendants, and the *Parler* Defendants have caused this Release Scope Agreement to be executed, by their duly authorized attorneys, as of June 12, 2020.

BRAGAR EAGEL & SQUIRE, P.C.

By: 
Lawrence P. Eagel
Melissa Fortunato
885 Third Avenue, Suite 3040
New York, NY 10022
Telephone: (212) 308-5858
Facsimile: (212) 486-0462
eagel@bespc.com

Mark D. Chappell
Graham L. Newman
CHAPPELL, SMITH & ARDEN, P.A.
2801 Devine Street, Suite 300
Columbia, South Carolina 29205
Telephone: (803) 929-3600
Facsimile: (803) 929-3604

Counsel for Teresa Parler

MCGUIREWOODS LLP

By: _____
Brian E. Pumphrey
800 East Canal Street
Richmond, VA 23219
Telephone: (804) 775-7745
Facsimile: (804) 698-2018
bpumphrey@mcguirewoods.com

Counsel for Dominion Energy, Inc. and Defendants SCANA Corporation, Harold C. Stowe, D. Maybank Hagood, and James W. Roquemore

BRYAN CAVE LEIGHTON PAISNER LLP

By: _____
John R. Bielema
One Atlantic Center, 14th Floor,
1201 W. Peachtree St., N.W.
Atlanta, GA 30309-3471
Telephone: (404) 572-4504
Facsimile: (404) 420 0504
john.bielema@bclplaw.com

Counsel for Defendants Gregory E. Aliff, James A. Bennett, John F.A.V. Cecil, Sharon A. Decker, Lynne M. Miller, Maceo K. Sloan, and Alfredo Trujillo

CADWALADER, WICKERSHAM & TAFT LLP

By: _____
Jonathan M. Watkins
227 West Trade St.
Charlotte, NC 28202
Telephone: (704) 348-5222
Facsimile: (704) 348-5200
jonathan.watkins@cwt.com

Counsel for Defendant Kevin Marsh

ALSTON & BIRD

By: _____
John A. Jordak, Jr.
1201 West Peachtree Street
Atlanta, GA 30309-3424
Telephone: (404) 881-7868
Facsimile: (404) 253-8358
john.jordak@alston.com

Counsel for Defendant Jimmy E. Addison

CADWALADER, WICKERSHAM & TAFT LLP

By: _____
Jonathan M. Watkins
227 West Trade St.
Charlotte, NC 28202
Telephone: (704) 348-5222
Facsimile: (704) 348-5200
jonathan.watkins@cwt.com

Counsel for Defendant Kevin Marsh

ALSTON & BIRD

By: _____
John A. Jordak, Jr.
1201 West Peachtree Street
Atlanta, GA 30309-3424
Telephone: (404) 881-7868
Facsimile: (404) 253-8358
john.jordak@alston.com

Counsel for Defendant Jimmy E. Addison

WILMER CUTLER PICKERING HALE AND DORR, LLP

By: Timothy Perla
Timothy Perla
60 State Street
Boston, MA 02109
Telephone: (617) 526-6696
Facsimile: (617) 526-5000
Timothy.Perla@wilmerhale.com

Counsel for Defendant Stephen Byrne

The South Carolina Court of Appeals

R. Wayne Todd, derivatively on behalf of SCANA Corporation, Plaintiff,

v.

Kevin Marsh, Gregory Aliff, James Bennett, John Cecil, Sharon Decker, Maybank Hagood, Lynn Miller, James Roquemore, Maceo Sloan, Alfredo Trujillo, Jimmy Addison, and Steven Byrne, Defendants,

And SCANA Corp., Nominal Defendant.

Teresa Parlor, derivatively on behalf of SCANA Corporation, Plaintiff,

v.

Kevin Marshall, Gregory Aliff, James Bennett, John Cecil,Sharon Decker, Maybank Hagood, Lynn Miller, James Roquemore, Maceo Sloan, Alfredo Trujillo, Jimmy Addison, and Steven Byrne, Defendants,

And

SCANA Corp., Nominal Defendant,

Of Which SCANA Corporation, Kevin Marsh, Grefory 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 Teresa Parlor, derivatively on behalf of SCANA Corporation is the Respondent.

Appellate Case No. 2020-000619

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

C.J.

J.

J.

Columbia, South Carolina

cc:
Steven James Pugh, Esquire
Benjamin Palmer Carlton, Esquire
I.S. Leevy Johnson, Esquire
George Craig Johnson, Esquire
Brian D. Schmalzbach, Esquire
Brian E. Pumphrey, Esquire
William A. Coates, Esquire
John A. Jordak, Jr., Esquire
Meredith J. Kingsley, Esquire
John A. Massalon, Esquire
J. Brady Hair, Esquire
Derk Van Raalte, IV, Esquire
Anne M. Tompkins, Esquire
Jonathan M. Watkins, Esquire
Aaron C. Lang, Esquire

FILED
Oct 14 2020

James Mixon Griffin, Esquire
Margaret Nicole Fox, Esquire
James F. Wyatt, III, Esquire
Robert A. Blake, Esquire
Mark D. Chappell, Esquire
Graham L. Newman, Esquire
Lawrence P. Eagel, Esquire
Melissa A. Fortunato, Esquire