THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2010-CP-10-523

Christopher T. Landers, ... Respondent,

v.

Atlantic Bank and Trust, Atlantic Banc Holdings, Inc., and Neal Arnold, ... Appellants.

BRIEF OF APPELLANTS

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I. Once the trial court found the arbitration clause in the employment agreement to be enforceable, was it error not to compel arbitration of other claims when the factual allegations offered in support of those claims repeatedly implicated the employment relationship?

II. When the parties had agreed that any claim arising from or relating to their employment agreement or the breach thereof would be decided by arbitration, and the court had compelled arbitration of Respondent's claim for breach of that agreement, was it error not also to compel arbitration of torts allegedly committed in the workplace and claims that arose from his status as a director and shareholder, all of which bore a "significant relationship" to his employment or, at the very least, "touched upon" his employment?

III. Did the trial court err in using a "foreseeability" test that has no application to a broad arbitration clause in an employment agreement when the allegations underlying the claims bear a "significant relationship" to or "touch upon" the employment agreement?

IV. Did the trial court err when it compelled arbitration of one claim but tacitly denied Appellants' motion to stay by ordering the remaining claims to proceed in the Court of Common Pleas?

STATEMENT OF THE CASE

On January 21, 2001, Respondent filed a Complaint alleging three claims, breach of contract, slander and intentional infliction of emotional distress.

In response to the original Complaint, Appellants filed their Motion to Compel Arbitration and to Dismiss or Stay the case on January 22, 2010. The motion was based upon the parties' agreement that "any controversy or claim arising out of or relating to [Respondent and the Bank's Employment Contract], or the breach thereof, shall be settled by binding arbitration." Respondent filed the Amended Complaint asserting a fourth claim, for an alleged proxy violation, on March 1, 2010; in response, on March 22, 2010, Appellants filed a Motion to Strike the Amended Complaint, to Compel Arbitration and to Dismiss or Stay All Proceedings, Including Discovery. Respondent filed a Second Amended Complaint asserting the fifth claim, for wrongful removal as a director, on June 11, 2010; in response, Appellants filed a Motion to Compel Arbitration and to Dismiss or Stay on June 25, 2010.

On June 25, 2010, the Court heard Appellants' motions. On July 16, 2010, the Appellants filed their Answer to the Second Amended Complaint. The trial court filed its September 7, 2010 Order on September 8, 2010. That order granted Appellants' Motion to Compel Arbitration on the claim for "breach of contract/constructive termination" because "this claim was foreseeable at the time the contract was entered into." (Order at 2; R. 2). The Court, however, denied the motion as it related to the claims for slander, intentional infliction of emotional distress, illegal proxy solicitation, and wrongful expulsion as a director because there was "not a significant relationship

between these claims and the contract containing the arbitration agreement," and these claims were "unforeseeable at the time the parties entered into the agreement to arbitrate." (*Id.* at 3; R. 3). The order "stay[ed] [the] cause of action [for breach of contract/wrongful termination] so that it may proceed in arbitration," and ordered that "the remaining claims shall proceed in the Court of Common Pleas."

Appellants filed and served their notice of appeal of the trial court's order on September 17, 2010.

STATEMENT OF FACTS

Christopher T. Landers ("Respondent") is a former officer and employee of Appellant Atlantic Bank and Trust ("Bank"). During the relevant period, he was, as he is now, a shareholder of Appellant Atlantic Banc Holdings, Inc., the Bank's holding Company ("Holding Company"). Although he has since resigned, during the pertinent period he was also a member of the board of directors of the Bank and the Holding Company. Respondent's boss at the time was Appellant Neal Arnold, then, as now, the Bank's Chief Executive Officer.

On February 20, 2007, Respondent and Appellant Bank entered into a written employment contract. ("Agreement")(Compl. ¶7 & Ex. 1; R. 7 & 16-32). Among other things, the Agreement provided for an initial term of three years (Agreement ¶1.15; R. 19), automatic extension for successive one-year periods unless either party gave not less than sixty days' written notice of an intent not to extend (Agreement ¶3.1; R. 20-21), a "golden parachute" payment of 2.99 times Respondent's base pay in the event his employment terminated within a year after a change of control, as defined in

the Agreement (Agreement ¶3.3; R. 22-23), and an option for Respondent to purchase 65,000 shares of the Holding Company's common stock. (Agreement ¶4.3; R. 24).

On the first page of the Agreement, in underlined, bold, capital letters appears the following:

THIS AGREEMENT CONTAINS A BINDING, IRREVOCABLE AGREEMENT TO ARBITRATE AND IS SUBJECT TO ARBITRATION PURSUANT TO TITLE 15, CHAPTER 48 (UNIFORM ARBITRATION ACT) OF THE CODE OF LAWS OF SOUTH CAROLINA.

(Compl., Ex. 1 at p. 1; R. 16). Paragraph 15 of the Agreement explicitly provides that "**any controversy or claim arising out of or relating to this contract, or the breach thereof**, shall be settled by binding arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association." (*Id.* ¶15; R. 28-29 (emphasis added)).

The Agreement specified that Respondent was Executive Vice President and Chief Mortgage Officer. During the term of the Agreement, Respondent became acting CEO of the Bank; after Neal Arnold was chosen as CEO, Respondent was named President. On December 18, 2009, while he was the Bank's President, Respondent wrote and delivered a letter notifying the Bank that he considered himself to have been terminated effective that date. A month later, attaching a copy of the Agreement to the Complaint and asserting Appellants had breached it, Respondent sued the Bank, the Holding Company, and CEO Neal Arnold.

In the original Complaint, the claims were that Appellants: (1) breached the Employment Agreement attached to the Complaint as Exhibit 1 ("Agreement"); (2) slandered him with statements, *inter alia*, that he "was incompetent to perform his job"

(Compl. ¶12; R. 7-8) and was "incapable of effectively communicating with anyone in performing his job" (Compl. ¶12; R. 7-8); and (3) intentionally inflicted emotional distress on him by making these and other statements in front of bank managers and co-employees. (Compl. ¶¶14 & 36; R. 8 & 13) The Amended Complaint added a claim that: (4) while he was employed, Appellants made misrepresentations to him as later revealed in a misleading proxy statement that violated S.C. CODE §33-7-220(i) (Am. Compl. ¶¶49-52; R. 91-92), and he further asserted that but for the proxy solicitation and other misrepresentations he "would not have questioned material omissions" that "[led] to his termination." (Am. Compl. ¶55; R. 92). The Second Amended Complaint added a final claim that Appellants: (5) "froze[] [him] out" of his director role and wrongfully expelled him after he filed his original Complaint. (2d Am. Compl. ¶61; R. 106).

Respondent's two amended Complaints were filed after Appellants moved to compel arbitration. In the Second Amended Complaint, the only pleading the trial court considered,[1] Respondent included all five causes of action and allegations, outside the breach of contract claim, that can be logically divided into two general categories, workplace-related torts and corporate claims.

Workplace-Related Torts: Alleging tort claims for slander and intentional infliction of emotional distress that arose in the workplace and which led in one way or another to his termination, Respondent asserted the following facts in the Second

[1] Appellants, in response to each Complaint, filed a motion to compel arbitration, dismiss or stay. Because they had not filed a "pleading," the trial Court found that S.C.R. Civ. P. 15 placed no temporal or other restriction on Respondent's filing amended pleadings; thus the trial Court based its decision on the Second Amended Complaint.

Amended Complaint: that his boss, Appellant Arnold, at all pertinent times "acting within the scope of his agency on behalf of the corporate [Appellants]" (2d Am. Compl. ¶3; R. 95), began in 2009 to "discredit, belittle, demean, and constructively terminate" him. (2d Am. Compl. ¶11; R. 96). He claims Arnold "routinely" called him names in front of other bank employees (2d Am. Compl. ¶¶12 & 14; R. 96-97), and published these and other allegedly defamatory statements to employees throughout the Bank. (2d Am. Compl. ¶¶12 & 39; R. 96 & 103). Respondent asserted Arnold once threatened him in a "highly aggressive and volatile manner" during a bank committee meeting, and was "abusive" to Respondent. (2d Am. Compl. ¶13; R. 97). Respondent was "stripped of much of his authority as President, defamed, and then terminated by Atlantic Bank." (2d Am. Compl. ¶¶22 & 27; R. 99-101).

Corporate Claims: Alleging two other claims that emanate from his role as director or shareholder, and which touch upon his employment and its termination, Respondent alleged that despite Arnold's assurances that his position as a director would be safe following the Bank's anticipated recapitalization, those assurances proved to be untrue. (2d Am. Compl. ¶¶16 & 18; R. 98). Claiming that he was never told he would no longer be a director after the recapitalization, *id.*, Respondent asserts that in the proxy statement he saw that "control and ownership of [the Holding Company] and the Bank [were to] be turned over to the new investors." (2d Am. Compl. ¶24; R. 100). Moreover, while he was still employed at the Bank, Respondent, as a director and shareholder, signed the investor agreement authorizing voting of his shares in favor of recapitalization. (2d Am. Compl. ¶21; R. 99). Although Respondent asserts he repeatedly sought documentation regarding the anticipated recapitalization (2d Am.

Compl. ¶18; R. 98), it was never provided to him; for this reason, he asserts, he did not have accurate information about the recapitalization and the proxy when he authorized the Holding Company to vote his shares in favor of the transaction. (2d Am. Compl. ¶¶18 & 20; R. 98-99). He claims the proxy statement that subsequently went to shareholders, explaining the anticipated transaction and noting that it had the unanimous support of the directors, was misleading. (2d Am. Compl. ¶26 & Compl. Ex. 2 at 6-7; R. 100 & 38-39). According to Respondent's allegations, it was the Bank's intent "to terminate him by stripping him of his authority as President, by defaming him, and by providing false assurances and information." (2d Am. Compl. ¶¶22 & 27; R. 99-101). The factual allegations in the Second Amended Complaint conclude: "In an ongoing effort to freeze [him] out and strip him of his authority, [Respondent] has been excluded from his role as a Director of the Atlantic Bank Board of Directors," and he "is no longer [being] provided the necessary information" to serve as a Director. (2d Am. Compl. ¶¶29 & 30; R. 101).

ARGUMENT SUMMARY

The scope of this court's review of the trial court's arbitrability determination is *de novo*. *Grant v. Magnolia Manor-Greenwood, Inc.*, 383 S.C. 125, 129, 678 S.E.2d 435, 437 (2009)

The Agreement in question involves interstate commerce, thus the Federal Arbitration Act ("FAA") applies to its interpretation. The purpose of the FAA is "to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts . . .." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). The Supreme Court has held

that in determining arbitrability, the FAA leaves no place for a trial court's exercise of discretion; instead, the FAA mandates that trial courts direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed. *Dean Witter Reynolds v. Byrd*, 470 U.S. 213, 221 (1985) . The FAA establishes a "liberal federal policy favoring arbitration agreements," *Gilmer*, 500 U.S. at 25, and this requires that courts "rigorously enforce agreements to arbitrate." *Shearson/American Exp., Inc. v. McMahon*, 482 U.S. 220 (1987)(*citing Dean Witter Reynolds Inc. v. Byrd, supra*). Under §4 of the FAA, the trial court must order arbitration if it is satisfied that the making of the agreement for arbitration is not in issue. Therefore, the trial court can determine only whether a written arbitration agreement exists, and if it does, enforce it in accordance with its terms. When an arbitration clause expressly governs, as this one does, disputes "arising out of or related to" the underlying employment contract between the parties, both federal and South Carolina law dictate it is to be read broadly to encompass a wide range of issues.

The presumption in favor of arbitrability applies with special force to clauses that use the "broad" language such as that employed in the Agreement here. The United States Supreme Court, applying the presumption of arbitrability, has interpreted broad clauses requiring arbitration of claims "related to" the contractual relationship to encompass all claims that "touch matters" concerning the same, unless expressly excluded. "Foreseeability," a guidepost used by the trial court here, is not a factor in determining the scope of an arbitration clause contained in an employment contract, and application of such limitation in that context has been soundly rejected by at least three federal circuit courts of appeal.

Under one or both of these standards, *i.e.*, the "significant relationship" standard previously applied by the Supreme Court or the "touch matters" standard applied by federal courts, all five claims Respondent has asserted are arbitrable. The allegations of Respondent's pleadings demonstrate that the facts relating to his claims are so interwoven with the issue of his employment, his employment agreement, and its alleged breach, that they all have a "significant relationship" with and/or "touch matters," covered by the parties' employment agreement. Because Respondent has chosen to include all allegations in support of all claims, this leads inescapably to the conclusion that all claims he has asserted are properly arbitrated.

The narrow standard applied by the trial court limits the scope of intentionally broad arbitration clauses, and thus undermines the ability of employers and employees to rely on existing arbitration provisions contained in countless employment contracts in this State. This Court should adopt the "touch matters" rule, reject the element of foreseeability, at least in the context of employment contracts, and compel arbitration of all claims in this case. To do otherwise is to create conflicting state and federal rules on substantive arbitration law and to cast existing employment arbitration provisions into flux.

ARGUMENT

I. Applicable law requires a court determining the scope of an arbitration clause to focus on the allegations in the complaint; if those allegations bear a significant relationship to, or if they "touch matters" covered by the agreement containing the arbitration clause, then those issues are arbitrable; there is a strong presumption in favor of arbitration.

A. The Federal Arbitration Act applies, but it does not differ significantly from South Carolina law respecting the issues herein; both require construction in favor of arbitrability.

Because the Agreement involves interstate commerce[2] and provides that South Carolina and any applicable federal law applies,[3] the arbitration clause is governed by the Federal Arbitration Act ("FAA"). *Toler's Cove Homeowner's Association, Inc. v. Trident Construction Co.*, 355 S.C. 605, 586 S.E.2d 581 (2003)(State law of arbitration was supplanted by federal substantive law as it concerned an agreement that involved interstate commerce and contained no choice of law provision, but which provided it was "subject to arbitration under 15-48-10 S.C. Code of Laws [SC Uniform Arbitration Act]"); *Zabinski v. Bright Acres Associates*, 346 S.C. 580, 594, 553 S.E.2d 110, 117 (2001) ("[D]espite the inclusion of a governing law provision [providing that South Carolina law would govern] in an arbitration agreement, such a provision does not necessarily require the application of state, rather than federal, arbitration law."); *Smith Barney, Inc. v. Critical Health Sys. of North Carolina, Inc.*, 212 F.3d 858, 861 (4th

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[2] There is no serious question that interstate commerce is involved in this case. According to Plaintiff's own allegations, Atlantic Bank is a federally-charted savings bank with offices in both South Carolina and Georgia (Second Amended Complaint ¶2; R. 95).

[3] The choice of law provision in the Agreement provides it is to be "construed and enforced under and in accordance with South Carolina law and any applicable federal law." (Complaint, Ex. 1, at §17; R. 29).

Cir. 2000)(holding, in a case arising under an agreement containing a New York choice-of-law provision, that "because arbitration contracts must be construed in accordance with federal law, we are not bound by New York state decisions"); *but see, Simpson v. MSA of Myrtle Beach, Inc.* 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2007)(where party denies existence of arbitration agreement, South Carolina law applies if parties agree and validity of choice of law and preemption of South Carolina arbitration act are not issues); *Osteen v. T. E. Cuttino Const. Co.*, 315 S.C. 422, 434 S.E.2d 281 (1993)(wherein court held that "a governing law clause . . . indicates the parties' intention to have the validity and construction of the contract determined by the arbitrators according to the *substantive* law identified in the agreement," *Zabinski, supra*, 346 S.C. at 594, 553 S.E.2d at 117).

The distinction between the application of state or federal law in this case is not significant, however, because, as the court noted in *Simpson,* the applicable policies underlying the South Carolina Uniform Arbitration Act ("SCUAA") and the FAA, namely, arbitrability of claims, are essentially identical. 373 S.C. at 22, 644 S.E.2d at 667. Public policy in this State, like federal policy, favors arbitration. Because federal policy and the policy of this State are the same in this regard, it is appropriate to look to State cases as well as federal cases for guidance in determining whether Respondent's claims are arbitrable.

As have federal courts under the FAA, South Carolina appellate courts have identified a key aspect of the South Carolina Uniform Arbitration Act to be a strong policy in favor of arbitration. *See Zabinski v. Bright Acres Assocs.*, 346 S.C. at 596-97, 553 S.E.2d at 118-19. Under both the FAA and the SCUAA, once it is clear that

the parties have a contract that provides for arbitration of some issues between them, any doubts concerning the scope of the arbitration clause should be resolved in favor of arbitration of all issues. *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983); *South Carolina Public Service Authority v. Great Western Coal (Kentucky), Inc.*, 312 S.C. 559, 564, 437 S.E.2d 22, 25 (1993); *Towles v. United Healthcare Corp.*, 338 S.C. 29, 41, 524 S.E.2d 839, 846 (S.C. App. 1999). "[U]nless the court can say with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the dispute, arbitration should be ordered." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *South Carolina Public Service Authority v. Great Western Coal (Kentucky), Inc.*, 312 S.C. at 564, 437 S.E.2d at 25. Indeed, there is a "strong presumption favoring arbitration of disputes." *Carolina Care Plan, Inc. v. United HealthCare Services, Inc.* 361 S.C. 544, 553, 606 S.E.2d 752, 757 (2004).

South Carolina appellate courts have held that "[M]otions to compel arbitration should not be denied unless the arbitration clause is not susceptible of any interpretation that would cover the asserted dispute." *Towles v. United Healthcare Corp.*, 338 S.C. at 41, 524 S.E.2d at 846 (emphasis added). Based upon Respondent's pleadings, the arbitration clause here is susceptible of an interpretation that covers the dispute --- the factual allegations of workplace-related torts and corporate claims all arise from Respondent's employment in his position as President of the Bank.

B. An analysis of the scope of the arbitration clause begins with the factual allegations made in the Complaint.

When deciding whether an arbitration agreement encompasses a dispute, a court must first look at the factual allegations underlying it. *Zabinski v. Bright Acres Associates*, 346 S.C. at 597, 553 S.E.2d at 118; *South Carolina Public Service Authority v. Great Western Coal (Kentucky), Inc.*, 312 S.C. 559, 437 S.E.2d 22 (citing *Mitsubishi Motors*); *Partain v. Upstate Auto Group, Inc.*, 386 S.C. 488, 491, 689 S.E.2d 602, 604 (2010).

As the Court noted in *South Carolina Public Service Authority v. Great Western Coal (Kentucky), Inc.*, *supra*, "[t]o decide whether an arbitration agreement encompasses a dispute a court must determine whether the *factual allegations underlying the claim* are within the scope of the broad arbitration clause, regardless of the label assigned to the claim." 312 S.C. at 563, 437 S.E.2d 25 (emphasis added), *citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614; *see also*, *Zabinski,* 346 S.C. at 598, 553 S.E.2d at 119, n. 4 (noting that the test in some jurisdictions was to focus "on the factual allegations contained in the petition rather than on the legal causes of actions asserted"). The United States Supreme Court has couched the same rule in similar language: "[T]he question ... is not whether the arbitration clause mentions [a statute] or any other particular cause of action, but whether *the factual allegations underlying [the claims] --- and the [opponent]'s bona fide defenses to those [claims]* --- are within the scope of the arbitration clause, whatever the legal labels attached to those allegations." *Mitsubishi*, 473 U.S. at 622, n. 9 (emphasis added). An application of these standards leads to the conclusion that

arbitration of all claims in the Respondent's pleadings should have been compelled to arbitration.

II. The Agreement contains a "broad" arbitration clause; thus a wide range of claims fall within its scope, including workplace-related torts that bear a "significant relationship" to the Agreement.

The arbitration provision here expressly governs "any controversy or claim arising out of or relating to this contract." The South Carolina Supreme Court has held that "arbitration agreements purporting to govern disputes 'arising out of or related to' the underlying contract between the parties [are] 'broad' arbitration clauses encompassing a wide range of issues." *Aiken v. World Finance Corp. of S.C.*, 373 S.C. 144, 149, 644 S.E.2d 705, 708, n. 2, *cert. denied* 552 U.S. 991 (2007). Federal courts agree. *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 321 (4th Cir. 1988); *see also Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967)(labeling as "broad" a clause that required arbitration of "any controversy or claim arising out of or relating to this Agreement.")

Even if one or more claims are deemed not to "arise" directly under the employment agreement, the arbitration clause may still require arbitration. "A broadly-worded arbitration clause applies to disputes that do not arise under the governing contract when a 'significant relationship' exists between the asserted claims and the contract in which the arbitration clause is contained." *Zabinski v. Bright Acres Associates*, 346 S.C. at 598, 553 S.E.2d at 119 (citing *Long v. Silver,* 248 F.3d 309, 316 (4th Cir. 2001)). Thus, a claim is deemed to fall within the scope of an arbitration clause if it is encompassed by the language of the clause or if a "significant relationship" exists between the claim and the contract containing the arbitration clause.

The significance of the relationship between Respondent's workplace-related tort allegations and the agreement here is at least equal to the significance of the relationship the Court of Appeals found in *Stokes v. Metropolitan Life Ins. Co.* 351 S.C. 606, 612, 571 S.E.2d 711, 714 - 715 (S.C. App. 2002). In *Stokes,* a discharged employee sued his employer and its agent claiming that his termination breached his employment contract; in addition, he alleged that that acts of the agent constituted trespass and conversion. The defendants moved to compel arbitration of all three claims under the arbitration clause in the employment agreement and to stay all proceedings. As did the trial court here, the trial court in *Stokes* granted the motion to compel arbitration of the breach of contract claim, but denied the motion as to the trespass and conversion claims. The trial court held the factual issues supporting the tort claims were distinct from those alleged in the breach of contract claim and were not directly related to the plaintiff's employment. The trial court also denied the defendants' motion to stay and ordered discovery on the two remaining claims to proceed.

The Court of Appeals reversed both the trial court's refusal to compel arbitration of the two workplace-related tort claims and its denial of the defendants' motion to stay:

> As the alleged trespass and conversion appear inextricably linked to Stokes' employment and termination, we conclude they fall within the scope of the arbitration clause in [the employment agreement]. *See Volt,* 489 U.S. at 476, 109 S. Ct. 1248 (holding any ambiguity regarding scope of arbitration clause must be resolved in favor of arbitrability); *Zabinski,* 346 S.C. at 597, 553 S.E.2d at 118 ("Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. Furthermore, unless the court can say with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should be ordered.")(citations omitted).

Id. at 612, 571 S.E.2d at 714–715.

Here, as in *Stokes*, the claims between the parties arose in the workplace. Moreover, certain allegations in the Complaint here, especially those relating to his claims for slander and intentional infliction of emotional distress, demonstrate that they are, as the appellate held were the allegations in *Stokes*, "inextricably linked to [Respondent's] employment and termination," *to wit:*

- Respondent's boss, Appellant Arnold, was hired as CEO in 2009 and at that time began to "discredit, belittle, demean and constructively terminate" Respondent (Compl. ¶¶8 & 11; R. 7);

- Arnold, at all pertinent times "acting within the scope of his agency on behalf of the corporate Appellants" (Compl. ¶3; R. 6), "routinely" called Respondent names in front of other bank employees (Compl. ¶14; R. 8) and Respondent was "systematically and deliberately stripped of his authority" (Compl. ¶15; R. 8-9);

- During a bank committee meeting, Arnold threatened Respondent in a highly aggressive and volatile manner" and throughout the meeting was "abusive" to Respondent (Compl. ¶13; R. 8);

- "[A]s a result of [Respondent's] concerns [about a recapitalization effort at the bank], stated to Arnold and others within Atlantic Bank, related to the active campaign by Arnold to provide incorrect information," Respondent was "stripped of much of his authority as President, defamed, and then terminated by Atlantic Bank." (Compl. ¶27; R. 11-12).

All of the above allegations bear a significant relationship to Respondent's employment, his powers, duties, rights and responsibilities as President the Bank, and events that allegedly occurred at work that led to termination of his employment. In addition, the *Stokes* court's directives --- that: 1) any ambiguity regarding the scope of an arbitration clause be resolved in favor of arbitrability; 2) all doubts concerning the scope of arbitrable issues be resolved in favor of arbitration; and 3) unless it can be said with

positive assurance that the arbitration clause is not susceptible to an interpretation that covers the claims, then arbitration should be ordered ---- all demonstrate it was error for the trial court to deny Appellant's motion to compel arbitration of the workplace-related tort claims.

The same rule applies under federal law. In *Summer Rain v. Donning Co./Publishers*, 964 F.2d 1455 (4th Cir. 1992), plaintiffs, a group of authors, sued their publisher and other defendants despite clear agreements to arbitrate. The plaintiffs asserted sixteen causes of action including tort claims for fraud, conspiracy, conversion, and tortious interference with contractual rights. The court, after reviewing the petition, found that the "gravamen" of the plaintiffs' Complaint was "nothing more than breach of contract." The appellate court held that all of plaintiffs' claims were arbitrable (except certain claims expressly exempted from the arbitration agreement). *Id.* at 1459, 1461. In so doing, the court considered the factual allegations underlying the claim to determine what was "the heart of the dispute." *Id.* at 1459.

What is at the heart of the dispute here is Respondent's status as President, actions he claims stripped him of his presidential authority, defamed him, and led to his termination, and his contention he is due payment under the "change of control" provisions of his employment agreement. Even if there remains some question about the corporate claims, at least Respondent's workplace-related tort claims arose in the workplace, and relate purely to his employment as President of the Bank. These claims are thus significantly related to his employment, and thus to the Agreement, and this means at least the two workplace-related tort claims are arbitrable along with the contract claim.

III. The corporate claims also fall within the scope of the arbitration provision when, as here, the factual allegations supporting all claims in the Complaint "touch matters" covered by the parties' agreement.

In determining whether a particular claim falls within the scope of the parties' arbitration agreement, the United States Supreme Court has directed courts to focus on the factual allegations in the Complaint rather than the legal causes of action asserted; if those factual allegations "touch matters" covered by the parties' agreement, then those claims must be arbitrated, whatever the legal labels attached to them. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U. S. at 624, n. 13 (1985)(where the arbitration provision was a "broad clause," "insofar as the allegations underlying the statutory claims **touch matters** covered by the enumerated articles, the Court of Appeals properly resolved any doubts in favor of arbitrability." *Id.* at 624, n. 13 (emphasis added). South Carolina appellate courts cited *Mitsubishi* with approval in *Lackey v. Green Tree Financial Corp.*, 330 S.C. 388, 498 S.E.2d 898 (Ct. App. 1998), *consolidated to* 351 S.C. 244, 569 S.C. 349 (S.C. 2002), *vacated and remanded sub nom. Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003) and in the *South Carolina Public Service Authority* case, *supra*.

Moreover, a number of federal circuit courts, in keeping with the language of the Supreme Court in *Mitsubishi*, have held that once the reviewing court has focused on the factual allegations underlying the claims in the Complaint, it should then establish the scope of a broad arbitration clause by determining whether those allegations "touch matters" covered by the parties' agreement. *See 3M Co. v. Amtex Sec., Inc.*, 542 F.3d 1193, 1199 (8th Cir. 2008)(FAA "requires that a district court send a claim to arbitration when presented with a broad arbitration clause like the one

here as long as the underlying factual allegations simply 'touch matters covered by' the arbitration provision")(citation omitted); *Brayman Constr. Corp. v. Home Ins. Co.,* 319 F.3d 622, 626 (3d Cir. 2003); *CK Witco Corp. v. Paper Allied Indus.,* 272 F.3d 419, 422 (7th Cir. 2001); *Simula, Inc. v. Autoliv, Inc.,* 175 F.3d 716, 721 (9th Cir. 1999)(holding defamation claims arising out of performance of the parties' agreement to be arbitrable); *Campaniello Imports, Ltd. v. Saporiti Italia S.p.A.*, 117 F.3d 655 (2d Cir. 1997), *cited with approval in Carolina Care Plan, Inc. v. United HealthCare Services, Inc.*, 361 S.C.544, 606 S.E.2d 752; *Genesco, Inc. v. T. Kakiuchi & Co.*, 815 F.2d 840, 846 (2d Cir. 1987), *cited with approval in Hinson v. Jusco Co., Ltd.,* 868 F. Supp. 145 (D.S.C. 1994).

Because the "touch matters" standard appears to be broader than the "significant relationship" standard heretofore applied by the Supreme Court in determining arbitrability of particular claims, Appellants believe the court ought to apply it to the corporate claims if there remains any question about arbitrability of those claims under the "significant relationship" standard. If the Court, despite the heavy presumption in favor of arbitration, is unconvinced that Respondent's corporate claims are arbitrable under the "significant relationship," the application of the "touch matters" standard demonstrates more clearly how the allegations underlying Respondent's corporate claims "touch matters covered by the parties' agreement," thus making the claims arising from those allegations arbitrable.

The detailed factual allegations Respondent made in his original Complaint, as repeated verbatim in the Amended Complaint and the Second Amended Complaint, do indeed "touch matters" relating to the employment agreement and its breach, and thus

are arbitrable under *Mitsubishi* and other federal precedent cited with approval by the Supreme Court. The following excerpts from Respondent's pleadings aptly demonstrate how the allegations supporting his two corporate claims --- *i.e.*, that Appellants issued a misleading proxy statement and that Respondent was wrongfully expelled as a director --- "touch matters" relating to his employment agreement and its breach:

- Respondent was not told that he would no longer be a director of the Bank after the anticipated recapitalization designed to bring in capital, but the proxy statement later revealed that "control and ownership of [the Holding Company] and the bank [would] be turned over to the new investors" and a group of new directors, a group that did not include him (2d Am. Compl. ¶¶16 & 24; R. 98 & 100);

- "But for the proxy solicitation and other misleading information, Landers would not have questioned the material omissions leading to his termination" (2d Am. Compl. ¶57; R. 106)(emphasis added);

- Although Respondent repeatedly sought documentation regarding the anticipated recapitalization, this was never provided to him (2d Am. Compl. ¶17; R. 98);

- During his employment, he was pressed as a director to authorize the voting of his shares in favor of recapitalization; however, he did not have accurate information when he authorized the Holding Company to vote his shares in favor of the recapitalization (2d Am. Compl. ¶¶17, 19, 20, 21; R. 98-99);

- After Respondent, as a director, and while still employed as President, voted in favor of recapitalization, the proxy statement sent to shareholders, representing that the vote of the board had been unanimously in its favor and explaining the anticipated transaction was misleading (2d Am. Compl. ¶¶24, 26, 49, & Ex. 2 at 3 & 7; R. 100, 104, 35 & 39);

- Respondent was forced out of the Bank because of concerns he stated; as a result, he was stripped of authority and terminated by the Bank (2d Am. Compl. ¶27; R. 100-101);

- It was the Bank's intent "to terminate him by stripping him of his authority as President, by defaming him, and by providing false assurances and information" (2d Am. Compl. ¶22; R. 99-100).

There were also additional facts alleged only in the Second Amended Complaint:

- "In an ongoing effort to freeze [him] out and strip him of his authority, [Respondent] has been excluded from his role as a Director of the Atlantic Bank Board of Directors," and he "is no longer provided the necessary information" to serve as a Director. (2d Am. Compl. ¶¶29 & 30; R. 101).

With these detailed allegations, Respondent has drawn a clear connection between the corporate claims made in the two Amended Complaints and the employment relationship, workplace torts, and breach of the Agreement asserted in the original one. (Compls. ¶¶ 21, 22, 24, 25, 27, 42 & 47; R. 10-12, 14, 86-88, 90-91, & 103-104).

Moreover, it was in the original Complaint, asserting only the workplace-related claims, that Respondent first alleged[4] that his boss and the chairman of the board pressed him to sign the voting agreement that led to the issuance of the proxy that he alleges was wrongfully solicited and, ***as a result***, he was stripped of his authority as President, defamed, and constructively terminated. (Compl. ¶¶21 & 22; R. 10-11). Respondent even went so far as to attach the proxy statement itself and related documents as exhibits to the original Complaint.[5] Because this pleading alleged only breach of contract and the two workplace-related torts, Respondent has demonstrated

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[4] The same allegations were made in both Amended Complaints.

[5] Attached to his original Complaint, the pleading that alleged only the workplace-related claims, are the January 4, 2010 Notice of Special Meeting of Shareholders, the Proxy Statement for Special Meeting of Shareholders to be Held on January 27, 2010, an Investment Presentation for the Special Meeting of Shareholders, and a red-line version of the proposed amendments to The Holding Company's articles of incorporation. (Compl. Ex. 2; R. 33-80). These documents were referenced *verbatim* in the Amended Complaints.

that the proxy vote and his corporate claim for issuance of a misleading proxy bear a significant relationship to and "touch matters" relating to the parties' employment relationship.

While the newly asserted causes of action purport to arise out of a fraudulent solicitation of a proxy and his expulsion as a director, Respondent asserts that it was his objection to the contents of that proxy that led to his termination, and his expulsion as a director. It is thus clear that the proxy issue and his status as a director relate to Respondent's employment relationship with Atlantic Bank, and that relationship, in turn, is governed by the underlying employment agreement that requires all disputes to be resolved through arbitration.

Respondent himself has affirmatively linked allegations underlying the proxy claim and the expulsion claim with the termination of his employment and the Agreement. Based on the statements contained in the Complaint, Respondent's allegations in the two newer causes of action are expressly tied to his employment under the Agreement and the termination of that employment. For example, in Paragraphs 54 and 55 of his amended pleadings, Respondent claims that ***because*** he stated his concerns about the transaction described in the allegedly misleading proxy, "he was forced out of Atlantic Bank causing him further injury." (Am. Compl. ¶¶27 & 54; R. 87 & 92). He also asserts that "[b]ut for the proxy solicitation and other misleading information, Landers would not have questioned the material omissions ***leading to his termination***." (*Id.* ¶55; R. 92) (emphasis added).

If the proxy statement about which he complains in the fourth cause of action and for which he voted as a director, are indeed unrelated to his breach of contract

claim, then why would Respondent have attached them to the original Complaint asserting only the workplace claims? These documents also note that the proposal has the unanimous support of the Board of Directors, of which Respondent was then a member, and make numerous references to the board and the proxy statement, including, as mentioned above, a copy of the statement itself. Respondent had access to these documents by virtue of his employment as President of the Bank, apart from his role as director and shareholder.

In short, because Respondent supported all claims in his pleadings with factual allegations that "touch matters" relating to his employment agreement, this requires that all his claims be submitted to arbitration. This conclusion is strongly supported by the holding in *Prograph International, Inc. v. Barhydt*, 928 F. Supp. 983 (N. D. Cal. 1996). There a shareholder who was also a former employee brought suit against his former employer. His employment contract contained an arbitration clause that "any dispute or difference between the parties in connection with this agreement shall be referred to non-binding mediation . . .. If the mediator fails to resolve the dispute within one day, the matter will be referred to arbitration." In addition to employment-related claims for bad faith breach of the employment contract, fraudulent conveyance, breach of fiduciary duty, intentional infliction of emotional distress, fraud and deceit and a demand for an accounting, Respondent also alleged that the defendants had breached fiduciary duties owed to shareholders (of which he was one), and had fraudulently conveyed assets to the detriment of shareholders (such as himself).

The court, noting that the latter claims were "clearly based on [his] claim as a shareholder [which] at first glance . . . would seem not to fall within the scope of the

arbitration agreement," nevertheless found these claims were subject to arbitration. The court held that because the plaintiff had included allegations relating to his employment agreement in the facts he alleged in support of the shareholder claims, the "claims are thus intertwined with, and in connection with, the employment agreement." The *Prograph International* court thus concluded "that all of [the plaintiff's] claims fall within the scope of the arbitration agreement" and were arbitrable. *Id.* at 990.

The circumstances for arbitration of all claims asserted here are even more compelling than those presented in *Prograph International.* First, the scope of the arbitration clause in *Prograph International, i.e.,* "in connection with this agreement," is not nearly as broad as the scope of the arbitration clause in this case, *i.e.,* "any controversy or claim arising out of or relating to this contract." As did the plaintiff in *Prograph International*, Respondent here intertwined the facts relating to his employment with his corporate-related claims. Respondent even attached the proxy statement to the original Complaint that alleged only employment, workplace-related torts. Moreover, he alleged that "[b]ut for the proxy solicitation and other misleading information, [he] would not have questioned the material omissions leading to his termination." (2d Am. Compl. ¶57; R. 106). Additionally, he suggests it was his filing of his employment-related claims on January 21, 2010, that led to his being "frozen out" as a director. (*Id.* ¶61; R. 106).

Additional support for the arbitrability of all claims here is also found in *Hinson v. Jusco Co., Ltd.*, 868 F. Supp. 145 (D.S.C. 1994). There the plaintiffs, each an executive employed by Revman, one of the defendants, entered into four agreements with that employer between 1988 and 1993 --- an employment agreement; amendatory

agreements extending the term of employment, increasing pay, and providing for stock and cash bonuses; a shareholder agreement; and a change in control agreement providing for the plaintiffs in the event their employment was adversely affected by change in control as a result of an anticipated recapitalization. Only the employment agreement, however, contained an arbitration clause.

The plaintiffs filed suit, claiming that the dispute arose out of the change of control agreement and the shareholder agreement, not out of the employment agreement that alone contained an arbitration clause. Moreover, they argued, the employment agreement had expired. In addition to their breach of contract claims arising from the change in control and shareholder agreements, the plaintiffs asserted a panoply of tort theories, including fraud, conspiracy, conversion, fraudulent conveyance, breach of fiduciary duty, tortious interference with contractual rights, and breach of contract accompanied by a fraudulent act.

Citing *Mitsubishi*, the court considered the "factual allegations underlying the claims" and held that all of them, including the tort-based claims, arose out of the alleged breach of the various contracts and thus were arbitrable. For example, the court quoted the language of the cause of action for fraud:

> The Defendants, intending to deceive Plaintiffs, made certain false representations to the Plaintiffs, including but not limited to, that Plaintiffs would be fully compensated for their employment with Defendants, would receive full value for all interest Plaintiffs held in Revman, and would retain their positions at a level of compensation equal to or greater than their current level, and concealed certain material facts, including but not limited to, the full consideration paid by Defendant JUSCO-USA and the fact that Defendant JUSCO-USA and its affiliates were the primary or sole party that intended to purchase the shares of Defendant Laura Ashley-USA in Defendant Revman .... The Plaintiffs had a right to rely on the said false representations made by Defendants and on Defendants' silence with regard to the matters

> concealed because of their contractual relationships with Defendants, their position as a shareholder with Defendants, and because of Defendants' privileged position which enable [*sic*] them to have such information.

Id. at 150.

Noting the strong federal policies favoring arbitration, the court concluded "[i]t is clear from these allegations that the "heart of the dispute" is that Defendants deprived Plaintiffs of their claimed rights under their Agreements with Revman. Despite their various labels, all of Plaintiffs' claims arise out of or relate to the either [*sic*] employment agreements, as amended, or the change in control agreements, which extended the Employment Agreements, and are therefore arbitrable."

The allegations in the instant case have much in common with those the plaintiffs made in *Hinson*. Here, there was an anticipated recapitalization, and Respondent claims, as did the plaintiffs in *Hinson*, that misrepresentations were made to him in connection with that transaction, *e.g.*, that he would be paid pursuant to the change in control provision in his employment agreement. Here, as in *Hinson*, these allegations make it clear that the "heart of the dispute" arises out of the employment agreement. In fact, those allegations are even clearer in the instant case: unlike those in *Hinson*, the change in control provisions here are found in the very agreement that contains the arbitration clause, and, also unlike *Hinson*, there is no suggestion that the agreement containing the arbitration provision is no longer operational.

Thus the trial court erred in this case when it found that the interconnected facts supporting all five claims only had a significant relationship to one of them, the claim for breach of contact. The facts as alleged by Respondent demonstrate that his claims --- as an employee, as a shareholder, and as a member of the board of directors --- are all

inextricably linked with, and thus have a "significant relationship" with and "touch" the employment contract and its alleged breach.

By denying arbitration of all claims, the trial court ignored the well-established presumption in favor of arbitration, paid no heed to the rule that arbitration agreements are to be rigorously enforced, and disregarded the admonition that when an arbitration clause expressly governs disputes "arising out of or related to" the underlying employment contract between the parties, it is to be read broadly to encompass a wide range of issues. Indeed, under the circumstances, it was impossible for the trial court to have had the requisite "positive assurance that the arbitration clause is not susceptible to any interpretation that covers the dispute," *Aiken v. World Fin. Corp. of S.C.,* 373 S.C. at 149, 644 S.E.2d at 708, and thus it committed error when it failed to compel arbitration of all claims between the parties here.

IV. The trial court erred in holding that because the wrongful acts alleged by a former employee against the employer were not foreseeable, they were not subject to arbitration under the broad arbitration clause in the parties' employment agreement.

The South Carolina Supreme Court has displayed a reluctance to enforce arbitration clauses in unconscionable adhesion contracts involving outrageous torts that are unforeseeable "to a reasonable **consumer**" (emphasis added) in the context of normal business dealings (*see, e.g., Partain v. Upstate Automotive Group,* 386 S.C. 488, 491, 689 S.E.2d 602, 603 (2010) (consumer could not have foreseen that the defendant would substitute an entirely different truck for the one he had bought); *Aiken v. World Finance Corp.,* 373 S.C. at 151, 644 S.E.2d at 709 (misuse of consumer's personal financial information by lender's employees was outrageous and unforeseeable

by reasonable consumer). That the Supreme Court has ruled that a broad arbitration clause does not apply to "outrageous torts that are unforeseeable to a reasonable **consumer** in the context of normal business dealings," *id.*, should be of no relevance here, however. That ruling is expressly limited to consumer transactions, and should not apply to employment contracts, particularly those between a company and an individual such as Respondent who, in addition to being an employee, is an officer, director and shareholder of the employer or its holding company.

Indeed, South Carolina appellate courts have shown no reluctance to enforce arbitration clauses in the context of employment or partnership agreements, and have regularly reversed trial courts that have refused to compel arbitration in that context. *See, e.g, Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 553 S.E.2d 110; *Thornton v. Trident Medical Center, L.L.C.,* 357 S.C. 91, 592 S.E.2d 50 (S.C. App. 2003); *Stokes v. Metropolitan Life Ins. Co.* 351 S.C. 606, 571 S.E.2d 711; *Towles v. United Healthcare Corp.,* 338 S.C. at 41, 524 S.E.2d at 846 (S.C. App. 1999). Thus the trial court erred when it found that cases involving torts unforeseeable to the "reasonable consumer" have any application in the context of an employment agreement between an employer and one of its executives.

This rationale also conflicts with federal cases rejecting the consideration of foreseeability in determining arbitrability in the non-consumer context. *Tenaglia v. Ryan's Family Steak Houses, Inc.*, 2003 U. S. Dist. LEXIS 26322 (D.S.C.)(employment agreement)(finding "unpersuasive" plaintiff's argument that pregnancy discrimination claim was not arbitrable because it was not reasonably foreseeable nor within the contemplation of the parties when the arbitration agreement

was executed); *see also Masco Corp. v. Zurich Ams. Ins. Co.*, 382 F.3d 624, 627 (6th Cir. 2004) (insurance contract) ("Our task, of course, is limited to enforcing the parties' agreement as written, and we have no license to write a 'foreseeability' limitation into the arbitration agreement... . [W]hether a claim is subject to arbitration depends on the contractual language, and in this case the arbitration clause did not limit its scope to reasonably foreseeable claims.")(citations omitted); *Hilti, Inc. v. Oldach*, 392 F.2d 368, 373 (1st Cir. 1968) (sales representative agreement).

The two arbitration cases in which the Supreme Court has considered foreseeability as a factor were both expressly limited to "'**illegal and outrageous** acts' **unforeseeable** to a reasonable **consumer** in the context of normal **business dealings**." *Partain v. Upstate Auto. Group,* 386 S.C. at 491, 689 S.E.2d at 605 (emphasis added); *Aiken v. World Fin. Corp.,* 373 S.C. 144, 644 S.E.2d 705 (not foreseeable that company's employees would steal client's identity). The foreseeability rule as set forth in these two cases should not be extended beyond the express limitations the Supreme Court has placed upon it, and it would be unwise to do so. Indeed, the Court recently declined to extend the rule in *Timmons v. Starkey*, 389 S.C. 375, 378, 698 S.E.2d 809, 810 (2010). There the plaintiff, whose daughter was her attorney-in-fact and worked for an investment services company as a broker, brought an action against her daughter and the company, asserting tort and contract claims regarding daughter's alleged conversion of client's investment account funds. The trial court denied the defendants' motion to compel arbitration. The company appealed and the Supreme Court reversed, holding that the theft was not an illegal or outrageous act of the defendant company, thus plaintiff was not excused from her agreement with the company to arbitrate all claims.

Additionally, the trial court's imposing a foreseeability limitation on a broad arbitration clause in the context of an employment agreement conflicts with federal substantive law and this also requires reversal. Federal circuit and state courts universally consider arbitration provisions covering all controversies "relating to" the contract, such as the provision contained in Respondent's employment contract, "the paradigm of a broad clause." *Collins v. Aikman Prods. Co. v. Building Sys., Inc.*, 58 F. 3d 116, 20 (2d Cir. 1995), *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U. S. at 398 (construing an arbitration clause with the language "[a]ny controversy or claim arising out of or relating to this Agreement as a broad one). "[A]lthough the intention of the parties is relevant, 'the intentions of parties to an arbitration agreement are generously construed in favor of arbitrability.'" *Long v. Silver*, 248 F.3d 309, 317 (4th Cir. 2001).

The narrowing standard applied by the trial court here to limit the scope of an intentionally broad arbitration clause undermines the ability of employers and employees to rely on existing arbitration provisions contained in countless of employment contracts throughout the State. Indeed the rapidly increasing use of pre-dispute arbitration agreements underscores the importance of this Court's reversal of the decision of the trial court. Over the past two decades, the percentage of employers in the private sector using arbitration to resolve employment disputes rose dramatically. See Elizabeth Hill, *AAA Employment Arbitration: A Fair Forum at Low Cost*, 58 Disp. Res. J. 8, 10 (2008)(finding that percentage of employers in the private sector using employment arbitration increased from 3.6 percent in 1991 to 19 percent in 1997). Between 1997 and 2001, the number of employees covered by employment

administration plans administered by AAA alone doubled from three to six million. *Id.* The rise in arbitration is largely a result of the favorable "economics of dispute resolution." *14 Penn Plaza LLC v. Piett*, 129 S. Ct. 1456, 1464 (2009). In fact, within the employment context, a key advantage of arbitration "over litigation is that the relatively high costs of litigation inhibit access to the courts by lower to mid-income range employees." *See* Alexander Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?* 11 Employee Rts. and Emp. Pol'y J. 405, 417 (2007).

The United States Supreme Court has expressly recognized the benefit of arbitration in the employment context because the fractional cost of arbitration allows employees to pursue claims against employers "which often involve[] smaller sums of money than disputes concerning commercial contracts." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001)("Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation").[6]

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[6] Cumulative empirical studies also show that approximately 62 percent of employees prevail in arbitration whereas only 43 percent of employees prevail in Court. See National Workrights Institute, *Employment Arbitration: What Does the Data Show* (2004), www.workrights.org/current/cd-arbitration.html. Arbitrated disputes involving consumer goods and employment claims take a median time of only 104 days to resolve and require a median cost of only $870. See B. Ostrom & N. Kauder, *Examining the Work of State Courts*, 1999-2000, at 39, National Center for State Courts (2000) http://www.ncsconline.org/D_Research/csp/1999-2000_Files/1999-2000_Tort-Contract_Section.pdf; *see also* Consumer and Employment Arbitration in California: A Review of Website Data Posted Pursuant to Section 1281.96 of the Code of Civil Procedure California Dispute Resolution Institute, August 2004, http://www.mediate.com/cdri/cdri_print_Aug_6.pdf. These disputes are resolved approximately 85% faster than litigating similar claims. *See id.*

Contracting parties that seek comprehensive arbitration of work-related claims for principally economic reasons conflicts with the exclusion of certain types of claims, as the trial court ruled. Carving out certain types of claims simply produces more expensive (and, as here) duplicative trials and proceedings.

The trial court's approach here leaves arbitration agreements indeterminate. Contracting parties cannot know in advance what claims a court --- engaging in idiosyncratic analysis not anchored in the contract itself --- might deem "significant" enough in their relationship to employment. It is impossible in many circumstances, and inefficient in all circumstances, for longstanding contracts to be constantly renegotiated to create express coverage of particular claims that various courts may have deemed excluded. And such a task would never be complete, depriving the contracting parties of the predictability that such standard language is intended to achieve. This leaves the contractual rights of both employer and employees in legal limbo. The trial court should be reversed.

V. It was error for the trial court to order the case to proceed in the circuit court after compelling arbitration of one claim; if arbitration of any claim is compelled, that ruling requires the remaining claims to be stayed.

In *Stokes v. Metropolitan Life*, 351 S. C. 606, 571 S.E.2d 711, the Supreme Court held the trial court erred when, after compelling arbitration of the contract claim, it ordered that discovery to proceed on the remaining claims:

> Having determined that Stokes' trespass and conversion actions are subject to arbitration, we next turn to the issues of the automatic stay and the trial court's order to compel discovery. The FAA clearly requires a court stay "any suit or proceeding" pending the arbitration of "any issue referable to arbitration under an agreement in writing for such arbitration" upon the application of one of the parties. 9 U.S.C. §3

(2000). As the FAA applies to all of Stokes' causes of action, all related state court proceedings are stayed pending resolution of the arbitration.

Id. at 612, 571 S.E.2d at 715.

The trial court's order violated the stay provisions of the FAA. Because the FAA applies in this case, and because the trial court declined to grant Appellants' motion to stay the claims it deemed were not arbitrable, that order must be reversed under the ruling announced in *Stokes*.

CONCLUSION

For all of the foregoing reasons, to the extent it denied Appellant's motion to compel arbitration and to stay or dismiss the case, the trial court's order should be reversed and this case dismissed so that arbitration of all claims may proceed accordingly.

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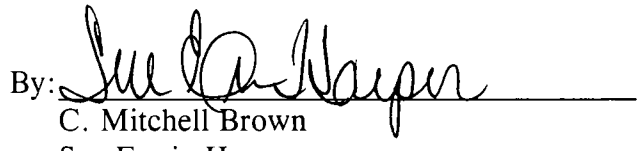
By: 

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Dated: May 19, 2011

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2010-CP-10-523

Christopher T. Landers, ... Respondent,

v.

Atlantic Bank and Trust, Atlantic Banc Holdings, Inc., and Neal Arnold, ... Appellants.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the Final Brief complies with Supreme Court Order dated August 13, 2007 regarding personal identifiers and sensitive information.

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PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Atlantic Bank and Trust, Atlantic Banc Holdings, Inc. and Neal Arnold, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

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