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.

INITIAL REPLY BRIEF OF APPELLANTS

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Respondent principally argues that a dispute is only arbitrable if it raises issues that require reference to or construction of the underlying employment contract. In his view, arbitration is only appropriate if his "claim implicates either the interpretation of the contract or the parties rights and obligations under it." Respondent's Brief at 10. As discussed below, The "claim implication" requirement that Respondent imposes is limited to "narrow" arbitration clauses. A "narrow" arbitration clause is one specifying that only claims "arising out of" a contract are arbitrable. A "broad" arbitration clause is one using "arising out of or relating to" language or the like. Because the arbitration clause in this case is "broad," as Respondent himself acknowledges, *id.*, the foundation for his argument is fatally flawed.

Federal law is clear that when, as here, the parties have a broad arbitration agreement, it is not necessary that the "claim implicates either the interpretation of the contract or the parties' rights and obligations under it" in order to be arbitrable. Indeed, the Fourth Circuit has squarely rejected the argument Respondent makes in his brief, reversing a trial court that had held a dispute was not arbitrable for the reason he asserts. The Fourth Circuit opined: "[T]he district court erred in concluding that [the plaintiff's] claims did not fall within the scope of the arbitration agreement because they did not turn upon the interpretation of the terms of the . . . agreement . . .. [T]he district court employed an improper legal standard... ." "[T]he broad arbitration clause ("any dispute, controversy, or claim arising out of or related to" the agreement) . . . rendered arbitrable all disputes having a **significant relationship** to the . . . agreement regardless of whether

those claims implicated [its] terms." *American Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 93 (4th Cir. 1996) (emphasis added).

Respondent's efforts to distinguish *Stokes v. Metropolitan Life Ins. Co.*, 351 S.C. 606, 571 S.E.2d 711 (S.C. App. 2002) are futile. Like the agreement here, the agreement in *Stokes* was broad, thus the rule the Court applied to the torts in *Stokes* is equally applicable to the torts and other claims made in this case, *to wit*: "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]. *Id.* at 612, 571 S.E.2d at 714-15 (citations omitted).

Respondent is also wrong when he suggests that the Court is required to analyze the scope of the agreement with regard to the parties' intentions and to determine whether the alleged wrongs were foreseeable. General state law governing the formation and validity of contracts applies only when there are grounds for outright revocation of the agreement to arbitrate. 9 U.S.C. §2. There is no suggestion the agreement here ought to be revoked, indeed, the trial court properly enforced the agreement. Thus, in this case under the FAA, substantive federal law relating to arbitration, not state law relating to contract revocation, applies when the issue is the arbitration agreement's scope, *i.e.*, what issues the parties agreed to arbitrate.

Finally, Respondent made no attempt to distinguish --- nor did he even mention --- two cases that are on point and that were discussed at length in Appellant's brief.[1] This

[1] *Hinson v. Jusco Co.*, 868 F. Supp. 145 (D.S.C. 1994) (Appellant's Brief at 24-26), was a case in which the plaintiffs each had four agreements with their employer; these included an employment agreement, an amendatory agreement, a shareholder agreement, and a change in control agreement. Although only the employment agreement had an arbitration clause, United States District Judge David Norton

should be taken as an admission that substantive federal law holds a wide array of issues to be arbitrable when the contracting parties, as here, entered into to a broad agreement to arbitrate "any controversy or claim arising out of or relating to this contract, or the breach thereof."

ARGUMENT

I. Respondent's reliance on state law is misplaced; it does not apply once a valid and enforceable arbitration agreement is found to exist. The scope of the parties' agreement to arbitrate here is to be determined under federal law which does not require that an issue refer to the arbitration agreement, or require that the issue involve construction of the arbitration agreement, to be arbitrable.

Respondent agrees the arbitration agreement in this case is broad. Yet he nonetheless asserts that a dispute is arbitrable only if it raises issues that require reference to or construction of the employment contract. However, the authorities Respondent cites for this argument - CORPUS JURIS SECONDUM[2] and Idaho case law - are

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nevertheless held that the broad arbitration clause in the employment agreement (providing that "any controversy or claim arising out of or relating to this Agreement" was arbitrable) made all claims arbitrable, including those for breach of the shareholder agreement and the change of control agreement, as well as numerous tort claims asserted. The court held the "heart of the dispute," the "gist" of the Complaint, was that the defendants deprived the plaintiffs of rights they were entitled to under their employment agreements, and thus those claims "arise out of" or "relate to" each individual's employment agreement. This case has particular application to the markedly similar claims made here. The other case Appellants cited that Respondent failed to address was *Prograph International v. Barhydt,* 928 F. Supp. 983 (N.D. Cal. 1996) (Appellants' Brief at 23-24), in which the federal court held that the plaintiff's claims as a shareholder were arbitrable under the arbitration clause contained in his employment agreement.

[2] This is the source Respondent cites for the argument that if an agreement provides for arbitration of claims "arising out of" the agreement (what is known as a "narrow" arbitration clause), then a claim must literally arise out of the Agreement to be arbitrable. However, the rule stated only applies to narrow arbitration clauses, and thus does not apply in this case. The arbitration clause here provides for the arbitration of all claims "arising out of **or relating to**" the agreement (emphasis added). The parties and legal authorities agree that this is a broad arbitration clause, to which an entirely different

only applicable to "narrow" arbitration clauses, and thus are irrelevant to any analysis of a "broad" clause like the one here.

A. The parties agree federal law applies.

Under the FAA, which all agree controls in this case, state contract law is properly applied to an arbitration clause only when the issue concerns the " validity, revocability, and enforceability of contracts generally." 9 U.S.C. §2. Once it is determined there is a valid agreement to arbitrate, then *what* the parties agreed to arbitrate, *i.e.,* the scope of the arbitration agreement, is determined under substantive federal arbitration law.[3] When the arbitration clause is broad, federal courts consistently reject the legal analysis Respondent urges the Court to apply in this case.

Although Respondent acknowledges federal law applies, he makes arguments based on case law of various states that conflicts with basic tenets of federal arbitration law. State contract law only applies when a party is attempting to revoke outright his agreement to arbitrate; thus state law does not apply to the issues in this case. [4] As Justice Ginsburg explained in *Doctor's Assocs. v. Casarotto*, 517 U.S. 681 (1996):

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rule applies. Indeed, the sub-title of the CJS section that Respondent quoted at page 10 of his brief accurately expresses the rule applicable when the clause is broad: **"An arbitration clause that includes matters arising from or related to the contract includes all matters touching the contract, including certain claims based on tort or criminal law."** 6 CJS § 48 (emphasis added)..

[3] "[T]he first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute. The court is to make this determination by applying the federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the [Federal Arbitration] Act." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985)(emphasis added).

[4] No one, including the trial court, ever questioned the validity or enforceability of the agreement to arbitrate, thus federal law applies to all issues presented. 9 U.S.C. §2; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 626 (1985); *Moses H. Cone v. Mercury Constr. Corp.,* 460 U.S. at 24-25. Section 2 of the

> Section 2 of the FAA provides that written arbitration agreements 'shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of *any* contract.' 9 U.S.C. § 2 (emphasis added). [T]he text of § 2 declares that **state law may be applied *'if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally**.' 482 U.S. at 493, n. 9. Thus, generally applicable **contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2.** See *Allied-Bruce,* 513 U.S. at 281; *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 483-484 (1989); *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 226 (1987).

Doctor's Assocs. v. Casarotto, 517 U.S. at 686-687 (emphasis in bold added).

To the extent the rules announced in the many state cases Respondent cites differ from federal law on the issue of how a court ought to determine the scope of an arbitration agreement, they are irrelevant to the issues presented in this case.[5]

B. What is arbitrable is determined by the parties' agreement: Is the arbitration clause "narrow" or "broad"?

Courts first categorize arbitration clauses as narrow or broad. A clause that requires arbitration of disputes that ***arise out of the contract*** is ordinarily considered a narrow clause.[6] A clause like the one in this case --- which applies to "***any dispute***

Federal Arbitration Act (FAA) provides that state law may be applied *only* to invalidate an agreement to arbitrate. Thus, a court may apply state law to revoke or invalidate an agreement to arbitrate under "general contract law principles." *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996)

[5] "Inasmuch as 'federal law applies to the interpretation of arbitration agreements,' once a court has found that there is a valid agreement to arbitrate, regardless of whether the action is in a federal or a state court the determination of whether 'a particular dispute is within the class of those disputes governed by the arbitration clause . . . is a matter of federal law.' *Century Indem. Co. v. Certain Underwriters at Lloyd's, London*, 584 F.3d 513, 524 (3d Cir. 2009) (citations omitted).

[6] Examples of narrow clauses are those providing for arbitration of disputes "arising under" the contract. *See Mediterranean Enters. v. Ssangyong Corp.*, 708 F.2d 1458, 1464 (9th Cir. 1983); *In re Petition of Kinoshita & Co.*, 287 F.2d 951, 953 (2d Cir. 1961). A narrow clause requires the dispute to literally "arise out of the contract"

arising out of or relating to this Agreement" --- is considered a broad clause.[7] The United States Supreme Court has held an arbitration agreement identical to the one here to be "broad." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 398 (1967) (labeling as "broad" a clause requiring arbitration of "[a]ny controversy or claim arising out of or relating to this Agreement, or the breach thereof . . .") Other courts agree.[8]

Respondent also agrees the arbitration agreement here is broad, but then ignores the critical distinction between broad and narrow arbitration clauses. Respondent's brief at 10. Yet this distinction is at the heart of federal cases interpreting the scope of parties' agreement to arbitrate. Indeed, Respondent urges this Court to apply rules to the broad arbitration clause here that federal case law makes clear only apply to narrow "arising

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and relate to the parties performance of the contract. *Pennzoil Exploration & Production Co. v. Rambo Energy*, 139 F.3d 1061, 1067 (5th Cir. 1998).

[7] Examples of broad arbitration clauses are those that cover: "any dispute or difference between the parties," or "any dispute ... with respect to the interpretation or performance of" the contract, or "any controversy or claim arising out of or relating to this Agreement." *See Pennzoil Exploration & Production Co. v. Rambo Energy*, 139 F.3d 1061, 1067 (5th Cir. 1998); *In re Complaint of Hornbeck Offshore Corp.*, 981 F.2d 752, 755 (5th Cir.1993); *see also Oldroyd v. Elmira Savings Bank, FSB*, 134 F.3d 72, 74 (2d Cir. 1988) ("Any dispute, controversy or claim arising under or in connection with this Agreement" was found to be "the prototypical broad arbitration provision."); *see also Seifert v. U.S. Home Corp.*, 750 So.2d 633, 637 (Fla. 1999) ("[T]he phrase 'arising out of or relating to' the contract has been interpreted broadly to encompass virtually all disputes between the contracting parties, including related tort claims.")

[8] The South Carolina Supreme Court and the Fourth Circuit have held such language is broad: "Courts typically characterize arbitration agreements purporting to govern disputes 'arising out of or related to' the underlying contract between the parties as 'broad' arbitration clauses encompassing a wide range of issues. *See J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 321 (4th Cir.1988)." *Aiken v. World Finance Corp. of South Carolina*, 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007) (arbitration clause applying to "all disputes . . .arising out of or in connection with" the agreement is a broad arbitration clause). Respondent concedes that the agreement here is a broad one. Respondent's Brief at 10.

out of this agreement" arbitration clauses. This is a fatal flaw in Respondent's analysis that must give way to well-settled federal law on this issue.

II. Because the arbitration agreement here is broad, it must be analyzed under the federal law applicable to broad arbitration clauses; this means all claims that bear a "substantial relationship" to the contract or that "touch matters covered by" the contract fall within its scope.

A. A broad clause reaches all aspects of the relationship; arbitrability of an issue does not depend upon reference to or construction of the contract.

Respondent argues that his workplace tort and corporate claims do not fall within the scope of the arbitration provision because they do not require reference to or construction of the Employment Agreement. Respondent's Brief at 11 & 13. This is not the federal rule applicable to broad arbitration clauses; in fact, the rule as Respondent has stated it has been soundly rejected by the federal courts, including the Fourth Circuit.

It could not be clearer that the federal rule applicable to broad arbitration clauses is exactly the opposite of the one propounded by Respondent in his brief. The Fourth Circuit reversed a trial court that refused to compel arbitration on those grounds: "[T]he district court erred in concluding that [the plaintiff's] claims did not fall within the scope of the arbitration agreement because they did not turn upon the interpretation of the terms of the . . . agreement" containing the arbitration clause. *American Recovery Corp. v. Computerized Thermal Imaging, Inc.*, *supra*, 96 F.3d at 93 (emphasis added).[9]

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[9] At least two other Fourth Circuit cases have affirmed the holding in *American Recovery*. In *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315 (4th Cir.1988), distinguishing narrow arbitration clauses that required the arbitration only of claims arising under the contract, the Fourth Circuit explained that broad arbitration clauses "*did not limit arbitration to the literal interpretation or performance of the contract* [,but] embrace[d] every dispute between the parties having a significant relationship to the contract regardless of the label attached to the dispute." *Id. at 321* (emphasis added); *see also American Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 94 (4th Cir. 1996) ("[T]he test for an arbitration clause of this breadth

Although Respondent's brief ignores the distinction, the difference between a broad and a narrow arbitration agreement is critical. When the agreement is broad, the court considers the factual underpinnings of the dispute and allows the arbitration agreement to embrace all disputes between the parties that have a "significant relationship to the contract regardless of the label attached to the dispute." *Pennzoil Exploration & Production Co., v. Rambo Energy*, 139 F.3d 1061, 1067 (5th Cir. 1998); *see also J.J. Ryan & Sons v. Rhone Poulenc Textile,* 863 F.2d 315, 321 (4th Cir. 1988). Indeed, federal law is that "[t]he dispute must only 'touch' matters covered" by the agreement. *Costanza v. Allstate Ins. Co.*, 2002 U.S. Dist. LEXIS 21991 (E.D. La. 2002), citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 625, n.14 (1985).

B. The "significant relationship" test, the "touches matters" test, and other analytical tools are applicable under federal arbitration law; any or all of them may be applied to analyze the scope of an arbitration clause.

Respondent's assessment of the "touch matters covered" analysis applied by federal courts varies. At one point he argues that the "significant relationship" analysis applies in lieu of the "touch matters" test, but then he suggests that the two tests are "synonymous." Respondent's Brief at 10 & 18.

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is not whether a claim arose under one agreement or another, but whether a significant relationship exists between the claim and the agreement containing the arbitration clause").

Five years later, in *Long v. Silver*, 248 F.3d 309, 313 (4th Cir. 2001), the court reiterated the rule that when there is a broad arbitration clause (there, "any dispute arising out of or relating to this Agreement" or its breach), an issue need not require reference to or the construction of some portion of the contract" to be arbitrable, as Respondent has argued here. "In *American Recovery*, we held that 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." *Id.* at 316.

Federal courts use these and similar tools to determine the scope of an arbitration agreement. *See Fleck v. E. F. Hutton Group, Inc.*, 891 F.2d 1047, 1052 (2d Cir. 1989) (where a broad arbitration clause was involved, discussing these tests as well as "pertaining to" and "involv[ing] significant aspects of the employment relationship" tests). One federal court has used both tests, holding that the liberal federal policy favoring arbitration agreements "requires that a district court send a claim to arbitration when presented with a broad arbitration clause. . . as long as the underlying factual allegations simply 'touch matters covered by' the arbitration provision" or when a "significant relationship exist[s] between plaintiff's claim and the arbitration provision." *3M Co. v. Amtex Security, Inc.*, 542 F.3d 1193, 1199 (8th Cir. 2008). Another federal court has analyzed a broad arbitration clause ("[a]ny dispute ... arising out of or in connection with or relating to this Agreement"), and held this means the parties "intend the clause to reach all aspects of the relationship." *Nauru Phosphate Royalties, Inc. v. Drago Daic Interests, Inc.*, 138 F.3d 160, 164-65 (5th Cir. 1998). The United States District Court for the District of South Carolina has opined that "when an arbitration clause employs the broad language employed here, the arbitration clause must be construed to have an expansive reach." *Carsonite Int'l. Corp. v. Energy Absorption Systems, Inc.*, 2004 U.S. Dist. LEXIS 28507 * 19 (D.S.C. 2004) (citations omitted).[10]

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[10] In a case involving an arbitration clause essentially identical to the one presented here, another federal court held that "the breadth of the language of the arbitration clause establishes that it was intended to apply to any claim, controversy or dispute **related to [the plaintiff's] business relationship with [the defendant], and not merely to disputes relating to specific provisions of the Agreement of breach thereof.**" *Gillespie v. Colonial Life & Accident Ins. Co.*, 2009 U. S. Dist. LEXIS 26310 (W.D. Pa. 2009) (emphasis added), *citing Hearon v. AstraZeneca,* 2003 U.S. Dist. LEXIS 6628, at *5. The court found that the term "'relating to' extends beyond disputes "arising under" the Agreement. The court also found that "this conclusion is consistent

The United States Supreme Court has determined that when there is a broad arbitration clause, it is only necessary that a dispute "touch matters covered" by the agreement to be arbitrable. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625, n.14. Respondent questions the application of the *Mitsubishi* test on several bases. First, he asserts that this issue was not preserved because Appellants cited no South Carolina or Fourth Circuit authority "which actually apply the [*Mitsubishi*] standard." Respondent's brief at 18. Appellants do not understand Respondent's contention that "the argument should be deemed abandoned" on this basis. *Id.* Appellants cited no lesser authority than the United States Supreme Court for the standard; thus it is irrelevant whether South Carolina appellate courts or the Fourth Circuit have had occasion to apply it. Moreover, numerous federal courts have applied the "touch matters" analysis.[11]

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with South Carolina law." "[T]he arbitration clause is broad and the facts underlying all of [plaintiff's] claims are interwoven in that the claims are all related to her working environment and events allegedly occurred during her work relationship in violation of the Agreement." *Id.* *28-29.

[11] "With such a broad arbitration clause, it is only necessary that the dispute 'touch' matters covered by the [contract] to be arbitrable." *Pennzoil*, 139 F.3d at 1068; *see also, e.g., Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 721 (9th Cir. 1999) ("To require arbitration, [the plaintiff's] factual allegations need only 'touch matters' covered by the contract containing the arbitration clause and all doubts are to be resolved in favor of arbitrability."); *Commerce Park at DFW Freeport v. Mardian Constr. Co.*, 729 F.2d 334, 339 n.4 (5th Cir. 1984) ("A dispute may be subject to arbitration under a broad clause if it has a significant relationship to the contract or touches matters covered by the agreement."); *Budget PrePay, Inc. v. Qwest Communs. Corp.*, 2010 U.S. Dist. LEXIS 102723, 7-8 (W.D. La. Sept. 1, 2010); *Cedars-Sinai Med. Ctr. v. Global Excel Mgmt., Inc.*, 2010 U.S. Dist. LEXIS 139848, 14-15 (C.D. Cal. Mar. 19, 2010); *Orcutt v. Kettering Radiologists, Inc.*, 199 F. Supp. 2d 746 (S.D. Ohio 2002) (Courts have construed the phrase "arising out of or relating to" broadly, interpreting it to encompass all claims, contractual or tort, which touch upon matters covered by the agreement); *Currency Corp. v. Billing Info. Concepts, Inc.*, 1998 U.S. Dist. LEXIS 23676, 12-13 (W.D. Tex. May 29, 1998)).

Next, Respondent inexplicably dismisses *Mitsubishi* with the comment that the Supreme Court found "it need not review" whether the arbitration clause there covered statutory claims. Respondent's brief at 17. The full context in which the "touch matters" phrase followed that observation in the opinion, however, is important. After observing that it did not need to review the lower court's construction of the arbitration clause because the party resisting arbitration had not questioned its application to the disputes presented, the Court in *Mitsubishi **did*** feel the need to address that same party's attempt to narrow the scope of the broad arbitration clause. 473 U.S. at 625, n. 13. In resisting arbitration, the party had suggested that because the broad arbitration clause only referred to "certain matters" and specifically referred only to "Articles 1-B through V" of the agreement, it "should be read narrowly to exclude statutory claims." *Id.* The Supreme Court summarily rejected this argument in language that is pertinent here: "

> Contrary to [the party resisting arbitration]'s suggestion, the exclusion of some areas of possible dispute from the scope of an arbitration clause **does not** serve to **restrict** the reach of an **otherwise broad clause** in the areas in which it was intended to operate. Thus, 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. (emphasis added).

Thus, Respondent's protestations and dismissal of *Mitsubishi* notwithstanding, the fact is that under this applicable Supreme Court authority, a broad arbitration clause requires arbitration of any claims that "touch matters covered by" the arbitration agreement. Here, the trial court failed to employ this analysis and should be reversed.

III. The various scope-of-the-agreement analytical tools demonstrate that all issues are within the scope of the parties' agreement to arbitrate.

Offering nothing specific, Respondent repeatedly states that the claims before the Court are not significantly related to the agreement to arbitrate, or that they do not "touch matters covered" by that agreement;[12] however, in doing so he completely fails to recognize the substantial relationship between the claims and the Employment Agreement, and the many ways in which the allegations of the Complaint "touch on matters covered" by it.

A. The allegations of the Complaint show the factual underpinnings of all claims have a "substantial relationship" with termination of Respondent's employment.

The factual underpinnings of the Complaint here demonstrate Respondent's theories that all the wrongs he alleges led, in one way or another, to his termination, to a breach of the change in control provisions in his employment contract, and that the lawsuit itself led to his purported expulsion as a director. For example, Respondent alleged his boss, Appellant Arnold, began in 2009 to "discredit, belittle, demean, and constructively terminate" him (2d Am. Compl. ¶11; R. ___), that Arnold "routinely" called him names in front of other bank employees (*Id.* ¶¶12 & 14; R. ___), and that Arnold published these and other allegedly defamatory statements to employees throughout the Bank (*Id.* ¶¶12 & 39; R. ___). He also asserts that Arnold intentionally inflicted emotional distress upon him, and that he was "systematically and deliberately

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[12] Respondent suggests that because the corporate claims "are not even alleged to have occurred in the workplace or during the term of his employment, "this means they cannot be arbitrable. Respondent's Brief at 17, n. 3. The South Carolina Supreme Court has recently rejected this argument: "[W]e do not consider the timing of the [the defendant's] tortious conduct to be relevant to the arbitrability of [the plaintiff's] claim." *Aiken v. World Finance Corp. of South Carolina* 373 S.C. 144, 151, 644 S.E.2d 705, 709 (2007).

stripped of his authority as President of Atlantic Bank. (*Id.* ¶¶13-15, R. ___). "*As a result of all of these actions, together with the clear intention of Atlantic Bank and Arnold to terminate him by stripping him of his authority as President, by defaming him, and by providing false assurances and information, [Respondent] confirmed his constructive termination* by his letter dated December 18, 2009. (*Id.* ¶22; R. ___)(emphasis added). Moreover, the alleged slander, Respondent asserts, was "intended to discredit [him] and create an impression that he was in [*sic*] *incapable of performing his job effectively.*" (*Id.* ¶39; R. ___)(emphasis added). Similarly, the Complaint alleges that the purportedly illegal proxy did not accurately report that there would be a change in control at the bank, and, *when Respondent pressed on this issue, "he was forced out.*" (*Id.* ¶56; R. ___) (emphasis added). Moreover, he alleges *"[b]ut for" the proxy solicitation, he "would not have questioned the material omissions leading to his termination.*" (*Id.* ¶¶56 & 57; R. ___) (emphasis added). Finally, Respondent asserts that because he filed suit for breach of the Employment Agreement, he was wrongfully expelled as a director. (*Id.* ¶61; R. ___).

B. Analysis of the Employment Agreement itself shows that the claims "touch matters covered" in that agreement.

The claims Respondent has made also "touch matters covered" by the Agreement. The Agreement, incorporated in each of his three Complaints, sets forth the rights and duties of Respondent's employment and provides that he is "subject to the direction of the Chief Executive Officer," co-Defendant Arnold. (*Id.*, Ex. A, §2.1; R. ___). It affirms that Respondent would be justified in terminating his employment for cause if there is "a material diminution in [his] powers, responsibilities, [or] duties," something Respondent asserts occurred when Arnold allegedly mistreated and slandered

him. (*Id.* §§1.6.2(a) & 3.2.2(a); R. ___). The Agreement also sets forth Respondent's compensation and other benefits of employment, including stock options.

Section 3.3 of the Agreement provides for payment of 2.99 times Respondent's base pay in the event the Bank terminated him without cause or he terminated his employment for cause within one year of a "change in control," as defined in section 1.7. That he was not paid this sum is one of the claims set forth in the Second Amended Complaint, ¶19, and is a factual allegation upon which Respondent relies under each of the five causes of action. (2d Am. Compl ¶¶35, 42, 47, & 60; R. ___).

Claims in the Complaint indeed do "touch matters covered" by the Employment Agreement, and thus they should be deemed to be arbitrable.

IV. There is no support under federal law for Respondent's claim that torts are not arbitrable if they are outside the contemplation of the parties or if they are unforeseeable. Under a broad clause providing for arbitration of claims that "arise out of or relate to" an agreement, tort claims are routinely held arbitrable, and this includes claims for intentional infliction of emotional distress and slander.

A. A broad arbitration agreement has been held to include tort claims.

When the arbitration agreement is broad, as it is here, tort, statutory, and other extra-contractual claims are arbitrable if they bear a significant relationship to the contract or "touch matters covered by" it.[13] Courts that have analyzed analogous

[13] Federal cases on this point are legion. *CD Partners, LLC v. Grizzle*, 424 F.3d 795, 800 (8th Cir. 2005) ("Broadly worded arbitration clauses . . . are generally construed to cover tort suits arising from the same set of operative facts covered by a contract between the parties to the agreement."); *P&P Indus., Inc. v. Sutter Corp.*, 179 F.3d 861, 871-72 (10th Cir. 1999) (arbitration clause which provided that "[a]ny controversy, claim, or breach arising out of or relating to this agreement" shall be arbitrable, was broad enough to encompass tort claims where the tort allegations were closely connected to breach of contract action); *Richardson v. Virgin Island Port Authority*, 2010 U.S. Dist. LEXIS 40787 at *33 (D.V.I. 2010) ("It is equally well established that where separate tort claims arise out of the same facts as clearly arbitrable

arbitration provisions uniformly construe them broadly to govern both contractual claims and extra-contractual claims such as fraud, fraudulent inducement, civil conspiracy, breach of implied covenant of good faith and fair dealing, contribution/indemnification, negligent infliction of emotional distress, negligence, gross negligence, and bad faith. *See, e.g., Ford Motor Co. v. Ables,* 207 Fed. Appx. 443, 447 (5th Cir. 2006) (clause mandating arbitration of "any Claim related to" the contract governed a myriad of tort claims including fraud); *In re Complaint of Hornbeck Offshore Corp.*, 981 F.2d 752, 755 (5th Cir. 1993) (clause providing that "should any dispute arise between them, the matter shall be referred to arbitration" governed a claim for contribution/indemnification); *Neal v. Hardee's Food Systems, Inc.*, 918 F.2d 34, 36 (5th Cir. 1990) (clause in which parties agreed "that any and all disputes between them, and any claim by either party that cannot be amicably settled, shall be determined solely and exclusively by arbitration" governed claims for fraud, deception, bad practice, breach of contract, and breach of good faith).

B. A broad arbitration agreement in an employment contract has been held to include workplace torts.

Respondent relies upon a 26-year old federal case, *McMahon v. RMS Electronics, Inc.,* 618 F. Supp. 189 (S.D.N.Y 1985), to argue that the employment torts here are not arbitrable. Respondent asserts that *McMahon* is "indistinguishable from the present case." Respondent's Brief at 16. Respondent is wrong. Crucially, the arbitration clause in *McMahon* was not a "broad" clause but a "narrow" one, requiring arbitration of "all disputes and claims arising in connection with this Agreement." Second, the rule adopted by the New York federal district court in that decision, *i.e.*, that the slander claim there

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claims, a broadly worded arbitration provision embodies such claims."); *A.G.K. Sarl v. A.M. Todd Co.*, 2008 U.S. Dist. LEXIS 21266 (E.D. Pa. 2008) (tort claims are arbitrable where interwoven with the clearly arbitrable claims).

was not arbitrable because it "does not require reference to the underlying contract" and does "not require an interpretation of the contractual agreement between the two parties," applies only to narrow clauses like the one in that case. Applying *McMahon*'s holding to a broad arbitration clause would lead to a result that the Fourth Circuit "explicity[ly] [and] unambiguous[ly] reject[ed]" in *American Recovery, supra,* and *Long v. Silver. Long v. Silver,* 248 F.3d at 317.

Contrary to *McMahon*, the broad language here, applying to any claim "arising out of or relating to this agreement" in an employment contract, has been held to apply to any claim, controversy or dispute "related to Plaintiff's employment relationship with Defendant," and is not limited to disputes relating to a specific provision of the Agreement. *Nova CTI Caribbean v. Edwards*, 2004 U.S. Dist. LEXIS 41 at *6 (E.D. Pa. 2004) (Tortious interference with contact "arises out of and relates to the terms and conditions" of the Agreement). Tort claims between employee and employer are routinely held covered by "arising out of or relating to" language. *Gilmer* v. *Interstate/Johnson Lane, Corp.,* 500 U.S. 20 (1991) (registered securities representatives' age discrimination claim[14] was subject to arbitration.). *See Fleck* v. *E.F. Hutton Group, Inc.,* 891 F.2d 1047 (2d Cir. 1989) (employee's claim against employer applies to torts claims that involve significant aspects of employment relationship). The same broad language that is in the agreement here was held to include an employee's claims for battery, as well as her claims for sexual harassment, retaliation, and breach of contract in *Gillespie v. Colonial Life & Accident Ins. Co.*, 2009 U. S. Dist. LEXIS 26310 (W.D. Pa. 2009).

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[14] An age discrimination claim is a statutory tort. *Staub v. Proctor Hospital,* ___ U.S. ___ (No. 09-400)(March 1, 2011).

In *Gillespie*, an identical arbitration clause to that here was held to include claims for intentional infliction of emotional distress that arose in the employment setting. This claim was found to be inextricably intertwined with the claimant's breach of contract claim because "it arises from Defendant's allegedly wrongful treatment of Plaintiff during the course of [his] employment. *Id.; see also Stanton v. Prudential Life Ins. Co.*, 1999 U.S. Dist LEXIS 5547 (E.D. Pa. 1999*); Huong Le v. Gentle Dental of Ore.*, 2010 U.S. Dist. LEXIS 88521 *29 (D. Or. 2010) (identical language of arbitration clause, applying to "[a]ny controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be settled by arbitration," included former employee's claims of lost wages, severe emotional distress, and other general and consequential damages claimed against former employer as well as similar claims the plaintiff made against the employer's president); *see also Orcutt v. Kettering Radiologist, Inc.,* 199 F. Supp. 2d 746, 753 (S. D. Ohio 2002) (intentional infliction of emotional distress, False Claims Act, and various other claims by former employee against her former employer and co-workers was arbitrable under identical language wherein the plaintiff agreed to arbitrate "any controversy or claim arising out of or relating to this Agreement or the breach thereof," because this and other claims arose "during the course of her employment" and thus "clearly arise out of or relate to her employment agreement" with her employer); *Richardson v. Virgin Islands Port Authority,* 2010 U.S. Dist. LEXIS 40787 (D.V.I. 2010) *35 (Agreement provided parties would arbitrate "any controversy, dispute or claim arising out of or relating to this Agreement, or its interpretation, application, implementation, breach or enforcement . . . ," thus plaintiff's claim for intentional infliction of emotional distress was "inextricably intertwined with her discrimination and

breach of contract claims, as it arises from Defendant's allegedly wrongful treatment of Plaintiff during the course of her employment"); *see also Zandford v. Prudential-Bache Sec.*, 112 F.3d 723 (4th Cir. 1997).

Federal courts have specifically held slander claims arising in the workplace to be arbitrable under broad arbitration clauses. "[N]on-contractual tort claims for wrongful termination and post-termination defamation respecting an employee's job performance have been held arbitrable under Rule 347[15] because they necessarily involve an evaluation of the employer's or the employee's performance during their employment relationship." *Zandford* (citations omitted). Even the court in *McMahon* noted that the slander claim there was more likely to have been held arbitrable had the language of the agreement been "arising out of the employment or termination of employment" instead of the narrower language it actually contained. 618 F. Supp. at 192.)

V. Once the arbitration clause is determined to be valid, the parties' intent and foreseeability are irrelevant except under limited circumstances not present here.

Neither the parties' intent at the time of contracting nor their ability to foresee a particular event is an issue under the circumstances presented. See Appellant's Brief at 19-22. The parties' intent is relevant only when a court is determining whether an agreement to arbitrate continues in effect after the parties' contract has ended. "[W]hen an arbitration clause is invoked after the contractual relationship between the parties has ended, the parties' intent governs whether the clause's authority extends beyond the

[15] This is a reference to Rule 347 of the New York Stock Exchange which declares arbitrable disputes "arising out of . . . employment or termination of employment."

termination of the contract." *Zandford v. Prudential-Bache Securities, Inc.*, 112 F.3d at 727.[16]

The question of foreseeability has arisen only in South Carolina Supreme Court opinions when the Court was asked to invalidate the parties' agreement to arbitrate on "general principles of contract law," such as unconscionability. *Starkey, Partain* and *Aiken*. Indeed, the only grounds upon which the FAA provides for the application of state law is when "general contract principles" provide for revocation of an agreement to arbitrate. *Doctor's Assocs. v. Casarotto, supra*, 517 U.S. 681; *see also* footnote 4, *supra*. These are grounds that determine enforceability of an agreement, such as "mutual agreement, or a condition that vitiates the agreement *ab initio*, such as fraud, mistake, . . . duress, [or] unconscionability . . .." ; these grounds do not determine the scope of an arbitration agreement under federal law. *Id.* at 41, 72 P.3d at 881. Because no issue of revocability was presented to the trail court or this court, issues of intent, foreseeability or other grounds for revocation are not presented in this case.

VI. The burden is on Respondent to show the claims are not arbitrable, and he has failed to do so.

Under the facts alleged here, there is little doubt that a significant relationship exists between the arbitration agreement and the two workplace torts that, according to

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[16] Both the South Carolina Supreme Court and the Court of Appeals have also suggested that the parties' intent is an element of the analysis when the court must consider whether the parties meant for the "the arbitration agreement [to] extend[ ] beyond the termination of the contract." *Simpson v. World Fin. Corp.*, 367 S.C. 184, 191, 623 S.E.2d 877,880 (2005). The year after the Court of Appeals decided *Simpson*, the Supreme Court cited *Towles v. United Healthcare Corp.*, 338 S.C. 29, 41, 524 S.E.2d 839, 846 (App. 1999) in *Aiken* for the proposition that "[w]hen a party invokes an arbitration clause after the contractual relationship between the parties has ended, **the parties' intent** governs whether the clause's authority extends beyond the termination of the contract." *Aiken v. World Finance Corp. of South Carolina,* 373 S.C. 144, 151, 644 S.E.2d 705, 709 (2007)(citations omitted)(emphasis added).

the allegations of the Complaint, led to or perhaps caused the termination of his employment. The same can be said for the corporate claims which clearly "touch on matters covered" by the contract. Even if there remains some doubt regarding the arbitrability of these claims, however, the heavy presumption favoring arbitration under federal law requires the court to compel arbitration. *See, e.g., Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co.,* 867 F.2d 809, 812 (4th Cir.1989).

"In determining arbitrability under federal law, 'due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself must be resolved in favor of arbitration." *Volt Info. Scis., Inc. v. Board of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 476, (1989). "The heavy presumption of arbitrability requires that when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration." *Carsonite Int'l. Corp* at *21. The burden of proof is on Respondent as the party contesting arbitration, *Shearson/Am Express, Inc. v. McMahon*, 482 U.S. 220, 227 (1987, and the 'presumption of arbitrability' is particularly applicable where the clause is . . . broad." *AT&T Techs. v. Communications Workers*, 475 U.S. 643, 650 (1986); *see also Oldroyd v. Elmira Savings Bank,* 134 F.3d 72, 74 (2d Cir. 1988) ("Any dispute, controversy or claim arising under or in connection with this Agreement" is "the prototypical broad arbitration provision," that is "precisely the kind of broad arbitration clause that justifies a presumption of arbitrability").

The Fourth Circuit's decision in *Zandford v. Prudential-Bache Securities, Inc.*, 112 F.3d 723 (4th Cir. 1997) is instructive on how this presumption in favor of arbitration operates. Despite the Fourth Circuit's expressing the view that the application

of the arbitration clause ("arising out of employment or termination of employment") to the intentional infliction of emotional distress claim in *Zandford* was "doubtful," the court nevertheless held it was proper to "resolve doubts concerning the scope or arbitrability in favor of arbitration" under the rule announced by the Supreme Court in *Moses H. Cone Mem'l Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). The Fourth Circuit concluded that it was "required . . . to deny a claimed right to arbitration only when we have 'positive assurance' that the clause relied upon 'is not susceptible of an interpretation that covers the asserted dispute,' *United Steelworkers of America v. Warrior & Guld Navigation Co.*, 363 U.S. 574 (1960)." "Applying those mandates (of *Moses H. Cone Hospital* and *United Steelworkers*) to what is at most a doubtful question of coverage, we resolve it in favor of arbitration as to this claim as well as the two tort-based claims." The trial court failed to account for this presumption.

VII. Under South Carolina precedent interpreting applicable law, once the trial court found one claim arbitrable, it should have stayed the remaining claims pending arbitration under §3 of the FAA because they involve issues that are arbitrable.

If the Court determines that all issues presented are arbitrable, it need not reach the question of whether the lower court erred in denying the stay; if the trial court had found all claims were arbitrable and did not dismiss[17] the case, a stay would be automatic under §3 of the FAA.[18] "[T]he FAA requires a district court, upon motion by any party,

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[17] The Fourth Circuit has explained that "[n]otwithstanding the terms of § 3, . . . dismissal is a proper remedy when all of the issues presented in a lawsuit are arbitrable." *Choice Hotels Int'l, Inc. v. BSR Tropicana Resort, Inc.*, 252 F.3d 707, 710 (4th Cir. Md. 2001).

[18] Section 3 of the FAA provides, in pertinent part: In "any suit ... brought ...upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit ... is referable to arbitration under such an agreement, shall on

to stay judicial proceedings involving issues covered by written arbitration agreements." *Choice Hotels Int'l, Inc. v. BSR Tropicana Resort, Inc.*, 252 F.3d 707, 709 (4th Cir. Md. 2001) (citation omitted). If, on the other hand, this Court agrees with the trial court that one or more issues are not arbitrable, then it must decide whether and what issues ought to be stayed pending arbitration of those issues it determines are arbitrable.

Each of the authorities Respondent cites in support of his view that denial of the motion stay was proper can be distinguished.[19] In contrast, the court in *Stokes v. Metropolitan Life Ins. Co., supra*, specifically interpreted the stay provision of §3 of the FAA in a manner that suggests that once the trial court determined at least one claim was arbitrable, it should grant Appellant's motion to stay the remaining claims in the case. In *Stokes* the Court of Appeals reversed the trial court's denial of arbitration of the two of three claims it had found were not arbitrable and issued a stay, holding that

> the FAA clearly requires a court to stay 'any suit or proceeding' pending arbitration of 'any issue referable to arbitration under an agreement in writing for such arbitration upon the application of one of the parties.' As

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application of one of the parties stay the trial of the action until such arbitration has been had . . .." 9 U.S.C. §3.

[19] The Alabama case cited, *Allied-Bruce Terminix Cos. v. Dobson*, 684 So.2d 102, 111 (Ala. 1995), did not interpret the FAA, thus it has no application. Respondent's Brief at 22-23. Equally inapplicable is the South Carolina case Respondent cites, *Edwards v. SunCom*, 369 S.C. 91, 631 S.E.2d 529 (2006). *Id.* at 23. The FAA was not discussed in *Edwards,* and the case did not involve a stay pending arbitration; indeed, *Edwards* had nothing at all to do with arbitration; the "sole issue" in *Edwards* was whether an order granting a stay is immediately appealable," and the court held it was not. *Edwards v. SunCom* 369 S.C. 91, 93, 631 S.E.2d 529, 530 (2006). In both of the federal cases Respondent cites in support of his contention that the trial court properly denied Appellant's motion to stay, *Moses H. Cone* and *American Recovery Corp. (id.* at 23), there were parties involved in the litigation who had not agreed to arbitrate their disputes. As to those parties, the FAA provided no basis upon which to stay the action *See Mendez v. Puerto Rican International Companies, Inc.*, 553 F.3d 709 (3d Cir. 2009) (finding that the FAA was not intended to mandate curtailment of litigation rights of anyone who had not agreed to arbitrate any issues before the court).

> 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 714 (citation omitted).[20]

But even if §3 of the FAA required the trial court to stay only those "issue[s] referable to arbitration," that requirement dictates a stay of issues that share common questions of fact with those that are held to be arbitrable. Thus, should this Court determine that not all claims are arbitrable, then under §3 it is required to stay the trial of any "issues" that overlap between the arbitrable and non-arbitrable claims. Because, as set forth previously herein, Respondent makes a direct connection between the alleged tort claims, the proxy statement, the termination of his employment, and Appellant's alleged breach of the Employment Agreement, common questions of fact abound between the arbitrable contract claims and the claims the trial court held were not arbitrable.[21]

Many of these factual issues will relate to whether Respondent was justified in terminating his employment because Appellants' allegedly wrongful acts constituted a

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[20] In an attempt to distinguish *Stokes*, Respondent misstates its facts. Respondent's description of *Stokes* is that "the circuit court accordingly stayed plaintiff's suit pending the arbitration." Respondent's Brief at 23. Not only did the circuit court in *Stokes* **not** stay the two claims it found were not arbitrable, but the circuit court issued an order compelling discovery so that those two claims could proceed to trial. This is precisely what occurred here, thus the trial court should have applied *Stokes* and granted a stay in this case.

[21] For example, Respondent alleges that Appellants' acts "discredit[ed], belittle[d], [and] demean[ed]" him, [and] justified his "constructive[ ] terminat[ion]" and that "[a]s a result of all of these actions, together with the clear intention of Atlantic Bank and Arnold to terminate him by stripping him of his authority as President, by defaming him, and by providing false assurances and information," he "confirmed his constructive termination" by letter of December 18, 2009. (2d Am. Compl. ¶11; ¶¶56 & 57)(R. ___). Respondent also alleges when he pressed on the issue of the proxy's alleged inaccuracies, "he was forced out," and that that "[b]ut for" the proxy solicitation, he "would not have questioned the material omissions leading to his termination."

"material diminution" in his "powers, responsibilities, [and] duties," thereby justifying his termination of the Employment Agreement for "cause" under § 1.6.2(a) of the agreement. In order to decide these issues, the arbitrator must make a factual determination about whether Appellants actually committed those wrongful acts. Because §3 of the FAA provides for a stay of any "issue referable to arbitration," any "issues" relating to the breach of the contract claim are required to be stayed pending a determination of those issues by the arbitrator. *See Summer Rain v. Schiffer Publishing Ltd.*, 964 F.2d 1455, 1461-62 (4th Cir. 1992) (holding that "since ascertainment of [one issue] is subject to the resolution of arbitrable claims, such ascertainment . . . must await the result of the arbitration.") The trial court erred when it denied a stay of issues that arose under causes of action other than the breach of contract claims, but which clearly relate to an "issue referable to arbitration," and §3 of the FAA required that those issues be stayed.

CONCLUSION

The sole test for arbitrability is what issues the parties agreed to arbitrate, and this is determined by the parties' intentions as set forth in their arbitration agreement. If the arbitration agreement is broad, then the factual underpinnings of the Complaint are examined to determine whether the claims are interwoven with or have a significant relationship to the contract, or whether the claims touch matters covered under the contract. Clearly all the wrongs Respondent alleges he suffered in the workplace meet these tests. Moreover, Respondent has failed to overcome the presumption of arbitrability that the broad language of the arbitration agreement creates under applicable federal law. Finally, if the Court agrees that all issues are arbitrable, then a stay is

automatic under the FAA. If the Court does not agree, and determines some issues are arbitrable and some are not, then it should stay all issues that relate to arbitrable claims.

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Dated: April 1, 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.

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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