

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No. 2015-CP-26-8921

RECEIVED

SEP 29 2017

SC Court of Appeals

Marcus Kevin Grant,
individually and in a
representative capacity for all
others similarly situated,

Respondent,

v.

Jud Kuhn Chevrolet,

Appellant.

APPELLANT'S MEMORANDUM ADDRESSING
APPEALABILITY

Appellant Jud Kuhn Chevrolet ("Jud Kuhn") hereby submits its memorandum on the issue of appealability. This matter is properly before the Court pursuant to S.C. Code Ann. § 15-48-200(a)(1), which permits appeal of "an order denying an application to compel arbitration." *Id.* While the caption of the trial court's order states that the order is an "order compelling arbitration," implying that Jud Kuhn's motion to compel arbitration was granted, the caption is inaccurate. Jud Kuhn in fact moved to compel *bilateral* arbitration, and the trial court *denied* this relief. The trial court's denial of Jud Kuhn's motion to compel arbitration, in whole or in part, is immediately reviewable.

I. Section 15-48-200(a)(1) Permits Immediate Appeal of Orders Denying Motions to Compel Arbitration in Whole or in Part.

South Carolina's Uniform Arbitration Act provides that an appeal may be taken from "an order denying an application to compel arbitration." S.C. Code Ann. § 15-48-200(a)(1). An order denying a motion to compel arbitration is therefore immediately appealable. *Id.*; *Towles v. United HealthCare Corp.*, 338 S.C. 29, 34–35, 524 S.E.2d 839, 842 (Ct.App.1999). An order partially granting and partially denying a motion to compel arbitration is also immediately reviewable with respect to the portion denied. *E.g.*, *Green Tree Servicing, LLC v. Simmons*, 108 So.3d 476, 479 (Miss.App. 2013) (partial denial of motion to compel arbitration is immediately reviewable); see also the following cases in which partial denials of motions to compel arbitration were reviewed, *In re W.W Jarvis & Sons* 671 S.E.2d 534, 536 (N.C.App. 2009); *MDC 6 LLC v. NRG Investments Partners LLC*, 93 So.3d 1145, 1146 (Fla.App. 2nd Dist. 2012); *Old Republic Ins. Co. v. Lanier*, 644 So.2d 1258, 1258 (Ala. 1994).

II. The Substance, Rather than the Title, of the Trial Court's Order Controls.

The trial court's order is entitled "order compelling arbitration," but the title is not controlling with respect to appealability. *See Cape Romain Contractors, Inc. v. Wando E., LLC*, 405 S.C. 115, 747 S.E.2d 461 (2013). The plaintiff in *Cape Romain* argued that an order denying arbitration was not immediately appealable because the defendant's motion was not captioned as a motion to compel to compel arbitration. Justice Kittredge, writing for the majority, stated:

[w]e summarily reject Cape Romain's contention that this matter is not immediately appealable. An order denying arbitration is immediately appealable. Regardless of how the motion was styled or captioned, Appellants requested only that arbitration be compelled. Focusing, as we must, on *substance* rather than nomenclature, because Appellants sought only the precise relief afforded under the FAA, we find the trial court's refusal to compel arbitration is immediately appealable.

Id. at 121 n. 4, 747 S.E.2d at 463 n. 4 (internal citations omitted) (emphasis added). As explained in more detail below, the title of the trial court's order is misleading. It actually denied Jud Kuhn's

motion in whole or in part.

III. The Trial Court Denied Jud Kuhn's Motion.

Jud Kuhn moved to compel bilateral arbitration. In other words, it sought an order requiring Respondent to arbitrate his claims against Jud Kuhn individually. The very first sentence of Jud Kuhn's Amended Motion states that it is seeking "an order compelling Plaintiff Marcus Grant to *individually* arbitrate his claims." (Amended Motion at p. 1) (emphasis added). The trial court acknowledged the thrust of Jud Kuhn's motion when, in the first sentence of its order, it stated "[t]he Defendant moved to compel Bilateral (Non-Class) Arbitration." (Order of the Honorable Benjamin H. Culbertson, dated August 25, 2017 at p. 1) (capitalization in original). Jud Kuhn did not move to compel class arbitration. The only motion before the Court was the motion for individual arbitration.

The trial court denied this motion. The trial court stated that "[t]he Court finds that the case may proceed as a class action in arbitration." *Id.* By permitting class arbitration, it denied the request for individual arbitration.

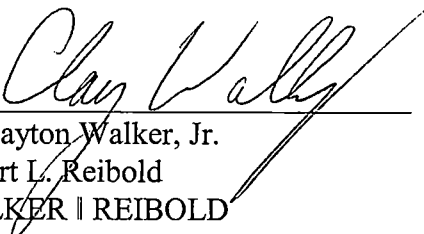
IV. At a Minimum, the Trial Court Partially Denied Jud Kuhn's Motion.

Courts have now recognized that the right to individual or bilateral arbitration is substantive. *E.g., Catamaran Corporation v. Towncrest Pharmacy*, 864 F.3d 966, 972 (8th Cir. 2017) (the question of class arbitration is a substantive question of arbitrability). As the United States Supreme Court has explained:

- the benefits of arbitration are substantially lessened in a class action arbitration proceeding; moving "from bilateral arbitration to class arbitration sacrifices the principal advantage of arbitration – its informality – and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 348 (2011);

- confidentiality is lost or becomes more difficult. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 686 (2010);
- class arbitration brings the bet-the-company stakes of class action litigation into the realm of arbitration without the safety net of multilayered judicial review. *Id.* at 686-87. The trial court's ruling here means that instead of exposure to the Appellant's claims, Jud Kuhn faces exposure to thousands of claims; and
- class arbitration raises important due process concerns. It purports to bind absent parties. *Id.* at 686.

Accordingly, it cannot reasonably be argued that the trial court at least partially denied Jud Kuhn's motion to compel individual arbitration on a substantive issue. This partial denial is immediately reviewable.¹



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September 29, 2017

COUNSEL FOR APPELLANT JUD
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¹ The issue of bilateral versus class arbitration is the only issue which Jud Kuhn intends to appeal.

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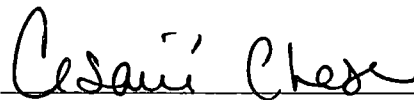
Appellant.

SC Court of Appeals

PROOF OF DELIVERY

I certify that I have served the Appellant's Memorandum Addressing Appealability on the date written below upon Respondent Marcus Kevin Grant, individually and in a representative capacity for all others similarly situated, by depositing a copy of the Memorandum in the United States mail, postage prepaid, addressed to his attorney of record L. Sidney Connor, IV, Esq. at the offices of Kelaher, Connell & Connor, P.C., PO Drawer 14547, Surfside Beach, SC 29587.

September 29, 2017



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September 29, 2017

VIA HAND-DELIVERY

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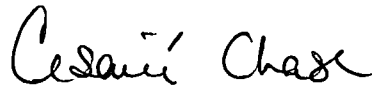
Re: Marcus Kevin Grant, Individually and in a representative capacity for all others similarly situated v. Jud Kuhn Chevrolet
C/A No.: 2015-CP-26-8921

Dear Ms. Kitchings:

Enclosed please find an original and copy of Appellant Jud Kuhn Chevrolet's Memorandum Addressing Appealability and Proof of Delivery for filing. Please time-stamp the enclosed copies and return same to the runner.

Thank you for your assistance with this matter.

Sincerely,



Cesaire N. Chase
Paralegal

:cnc

Enclosures

cc: L. Sidney Connor, IV, Esq.