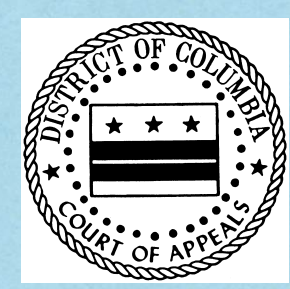

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 21-CV-896

ADORIA DOUCETTE

Appellant,

v **2020 CAB 5118**

NEUTRON HOLDINGS, INC.

Appellee.

On Appeal from the Superior Court
of the District of Columbia
The Honorable HIRAM E. PIUG-LUGO
Dated 10/25/21

Brief of the Appellant

Submitted by:

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GLOSSARY OF ABBREVIATIONS

Apx - appendix and page number where it is located

Compl. – Complaint

R. – Record of actual court filings

Trans. – transcript of court ruling.

¶ - paragraph

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

II. Whether the Trial Court Erred in its finding that the arbitration agreement was not unconscionable by not Addressing the adhesiveness of the contract and not finding that the contract was Egregious

CERTIFICATE OF PARTIES, RULINGS UNDER REVIEW AND RELATED CASES

I hereby certify that the parties to this to this Appeal are Adora Doucette, Appellant, and Neutron Holdings, Inc. Appellee, and the ruling under review is from the ruling of the Honorable Judge Hiram E. Puig-Lugo of the Superior Court of the District of Columbia granting the Appellee's motion to compel arbitration. There are no related cases to this action. Counsels in the lower court were:

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/s/ Tony Graham, Sr.
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STATEMENT OF THE CASE

This is an appeal by Adora Doucette of a decision of the D. C. Superior Court for the District of Columbia seeking a review of the Honorable Judge Hiram E. Puig-Lugo's decision granting the Appellee's motion to compel arbitration. The Appellant contends that the arbitration agreement she utilized in using the Appellee's electrical motor scooter was

unconscionable in that it was one of adhesion and should not have been enforced. The court ruled that the arbitration agreement was one of adhesion but is not unconscionable **(Court's ruling, R 62, trans 10/25/21, pg. 156,)** and therefore, granted the Appellee's motion to enforce the arbitration.

Procedural History

On or about December 22, 2020, the Appellant filed this complaint in this Court for negligence against the Appellant, Neutron Holding, d/b/a Lime, Inc., resulting from injuries sustained as the result of the scooter **R1, Apx 13.** On July 22, 2021, the Appellee filed its verified answer **(Apx 17,)**, followed by the motion to compel arbitration on 09/28/21. **R54, Apx 30.** On 10/12/21, the Appellant filed her opposition to the Appellee's motion to compel arbitration. **R57, Apx 110.** On October 25, 2021, the court granted the Appellant's motion to compel arbitration. **R62, Apx 156.** The court granted the Appellee's motion based on its analyst of *Keeton vs. Wells Fargo and Eastern Auto*, 987 A.2d 118, D.C., 2018. **Id.,** *Woodroof vs. Cunning*, 147 A.3d 777 (D.C. 2016), and *Andrews v. American Import Center,* 110 A.3d 626, **R 156, Apx 156.**

The court ruled that based on the procedural aspect of the arbitration agreement, it found that the arbitration agreement provided "both parties are bound by the outcome of the arbitration. The entity that would conduct the

arbitration is a neutral entity. It's not an entity that favors one side or the other., and the cost of the litigation will depend on what comes out of the arbitration. So both parties are essentially treated in the same way." **Apx 156, pg.** The court in its ruling "found that the contract here, although an adhesion contract is not unconscionable" **Id., Apx 169, ¶ 5-17** and granted the Appellee's motion to compel. *Court's October 25, 2021, motion hearing.* **R62, Apx 156.** On 11/22/21, the Appellant filed a motion to amend or in the alternative alter the court's ruling. **R65, Apx 173.** The court denied the Appellant's motion on **R 66, Apx 178.** On 12/30/21, the Appellant filed her notice of appeal. **R 69, Apx 180.**

Statement of Facts

That on or about July 7, 2018, the Appellant was on 5th Street, N.W., Washington, D. C. and rented one of the Appellee's electrical scooters (e-scooters), it had for rent in the Washington, D.C. area. The Appellant used the Appellee's application to rent said scooter. Said application apparently had an arbitration agreement consisting of 36 pages. **Apx 120.** The Appellant downloaded the application and completed the transaction consisted of using a credit card to purchase the use of said scooter. The Appellant was injured as she approached an enter section and attempted to brake, the scooter accelerated and the brakes failed and would not allow the

Appellant to stop. As a result, she collided with a cyclist and fell and fractured her leg. The Appellant sustained permanent injuries.

JURISDICTION

D.C. Code § 11-721(a)(2)(A), 16-4427(a)(1). This appeal is from an order granting the Appellee's motion to compel arbitration.

STANDARD OF REVIEW

A trial court's findings are reviewed for clear error by the Court of Appeals, and its conclusions of law are reviewed *de novo. James v. United States,* 829 A.2d 963, 965 (D.C. 2003); *United States v. White,* 689 A.2d 535, 537 (D.C. 1997).

ARGUMENTS

I. The Trial Court Erred in its Findings that the arbitration agreement between the parties was not unconscionable .

The Court erred in its finding that the arbitration agreement was not unconscionable. The court in its analyst looked at the procedural aspect of the agreement and made its ruling based on its finding that the procedural aspects of the agreement were in essence fair. The court ruled that both parties are bound by the outcome of the arbitration, that the entity that would conduct the arbitration is a neutral entity, and the cost of the litigation will depend on what comes out of the arbitration; and that both parties are

essentially treated in the same way. **R.156 (Trans. of court's ruling dated 10/25/21).**

The court in making this determination as to the procedural aspect of the arbitration agreement used minimum aspects of the procedural sections in the arbitration agreement instead of analyzing the contract principles in making its determination and ruling.

An arbitration agreement is matter of contract since it is grounded on contract principles. The arbitration agreement that the Appellee is seeking to enforce is matter of contract. The United States Supreme Court stated that "generally applicable contract defenses, such as fraud, duress or unconscionability may be applied to invalidate arbitration agreements..." *Doctor's Associates, Inc. v. Casarotto,* 517 U.S. 681, 687, 116 S. Ct. 1652, L.ED. 2d 902 (1996). The Appellant is seeking to invalidate the arbitration agreement on the grounds of unconscionability. The Appellee in its arbitration agreement has included terms that is unjust, unreasonable and unconscionable to be deemed enforceable.

An unconscionable bargain or contract has been defined as one characterized by "extreme unfairness," which is made evident by "(1) one party's lack of meaningful choice, and (2) contractual terms that unreasonably favor the other party." BLACK'S LAW DICTIONARY (8th

ed. 2004). RESTATEMENT (SECOND) OF CONTRACTS §208 cmt. b (1981) (observing that, "traditionally, a bargain was said to be unconscionable in an action at law if it was 'such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other"). One of the leading treaties on the law of contracts describes what is meant by unconscionability"

> "the concept of unconscionability was meant to counteract two generic forms of abuses: the first of which relates procedural deficiencies in the contract formation process, such as deception or refusal to bargain over contract terms, today often analyzed in terms of whether the imposed-upon party had meaningful choice about whether and how to enter the transaction; and the second of which relates to the substantive contract terms to the substantive contract terms themselves and whether those terms that impair the integrity of the bargaining process or otherwise contravene the public interest or public policy; terms (usually of an adhesion or boilerplate nature) that attempt to alter in an impermissible manner fundamental duties otherwise imposed by the law, fine print terms or provisions that seek to negate the reasonable expectations of the non-drafting party, or unreasonably and unexpectedly harsh terms have nothing to do with price of other central aspects of the transaction."

8 Richard A. Lord, *Williston on Contracts* § 18:10 (4th ed. 1998).

The lower court did not review the arbitration agreement to determine if the terms were that of adhesion. The court basically looked at the procedure aspect of the agreement and made its determination that it was fair.

a. Under District of Columbia's Law This Court has Authority To Determine Whether The Parties Are Bound By The Arbitration Clause

The Appellant contends that the Court has the authority to determine whether the Parties are bound by the arbitration agreement. The Appellant contends that the lower court in its determination, failed to look at the particular characteristics of both the procedural and substantive terms of the contract in making its determination as to the unconscionability of the arbitration agreement. The Appellant contends that the arbitration agreement has many aspects of the agreement that was so one-sided in favor of the Appellee as to be deemed unjust and that the court failed to consider those aspects in its analyst.

Because the arbitrator's authority derives from the consent of the parties, it is the court's responsibility to settle "the basic contractual question" of whether "the parties are bound by a given arbitration clause." *Hossain v. JMU Props., LLC* 147 A.3d 816, 821 (D.C. 2016) quoting *Woodward v. JMU, Props., Ltd., Partnership v. Wulff,* 868 A. 2d 860, 864 (D.C. 2005). Here, Appellant submits that "where the element of unconscionability is present at the time a contract is made, the contract should not be enforced." *Williams v. Walker-Thomas Furniture, Co.,* 350 F.2d 445, 449 (D.C. 1965). An agreement "may be unconscionable either

because of the manner in which it was made or because of [its] substantive terms." *Urban Invs., Inc. v. Branham,* 464 A. 2d 93, 99 (D.C. 1983) quoting *Bennett v. Fun & Fitness, Inc.,* 434 A. 2d 476, 480 (D.C. 1981), or because of a combination of both. *Id.* Thus, a party seeking to avoid an agreement on the basis of unconscionability must prove both "an absence of meaningful choice on the part of one of the parties and "contract terms which are unreasonably favorable to the other party." *Williams v. Walker-Thomas Furniture, supra,* 350 F.2d at 449. But in "an egregious situation, either one or the other may suffice." *Bennett, supra,* 434 A.2d at 480 n. 4. The Appellant will discuss this further below.

b. Appellant had no meaningful choice with respect to the Arbitration agreement, thus rendering the contract unconscionable

Appellant contends she had no meaningful choice with respect to the agreement which she completed online and the terms set forth were unreasonably favorable to Appellee. Furthermore, a substantial part of the contract was so one-sidedly in favor of Appellant as to be egregiously unfair. The Appellant contends that the following sections of the arbitration agreement is one-sidedly in favor of the Appellee:

Section 2.1: This Section references the "Federal Arbitration Act" as governing the transaction but there is no indication that Appellant

received a copy of the Act or any explanationas to what it meant. **Apx 125.**

Section 2.8: By prohibiting class action lawsuits or lawsuits in representative capacity this section appears to impinge on Appellant's rights to bring a lawsuit in whatever capacity she so chooses. Recognizing that the provision may be unconscionable, this clause states "if, for any reason, any court with competent jurisdiction holds this restriction is unconscionable or unenforceable, then our agreement in Section 2 to arbitrate will not apply and the Dispute must be brought in court." **Apx 127-128**

Section 4.7. This provision is unconscionable in that Appellee arrogates exclusively to itselfthe right not to offer any refunds for "any subscriptions purchased through the Services, exceptin its sole and absolute discretion." **Apx 133**

Section 4.8 This provision demonstrates the power relationship between Appellee and Appellant insofar as it states "your receipt of an electronic or other form of order confirmation does not signify our acceptance of Your order, nor does it constitute confirmation of our offer tosell." Again, Appellee holds all the cards in this transaction. **Apx 133**

Section 4.9 This provision is titled NO RESPONSIBILITY TO

SELL MISPRICED PRODUCTS OR SERVICES. It notes that in the event of any errors related to pricing or specifications of any item, product or service, Appellee shall have the right to refuse or cancelany orders in its sole discretion and will issue a credit to the account. Appellee also notes "Additional terms may apply" without explaining what these terms may be. It goes on to state:"If a product You purchased from Lime is not as described...your sole remedy is to return it inunused condition, complete and undamaged in the original packaging." Nothing is said about who will bear the cost of such return. **Apx 133**

Section 5.1 This provision is titled Releases: In this provision Appellee attempted to release persons who were not parties to the agreement from all liability whatsoever for any damages, including consequential, compensatory, or punitive. The sheer breadth of this clause is astounding as "Released Persons means, collectively Lime and all its owners, managers, affiliates, employees, agents, representatives, successors and assigns, and (ii) every sponsor of any of the Services and all of the sponsor's owners, officers, directors, affiliates, employees, agents, representatives, successors, and assigns." It goes on to state "...You (acting for You and for all of Your family, heirs, agents, affiliates, representatives, successors, and assigns...hereby fully and forever release

and discharge all Released persons for any and all Claims that you have or may have against Released Persons." **Apx 134-135** This clause is unconscionable as it took advantage of Appellant's lack of knowledge and acumen about concerning legal liability.

Section 6.1: This clause suffers from the same infirmity as Clause 5.1 insofar as it released unknown person not parties to the agreement from express and implied warranty of merchantability and fitness. There is no explanation in the agreement as to what is meant by thisnor is there any language advising Appellant to seek legal counsel prior to signing. **Apx 135**

Section 6.2 et seq.: This "as is" provision seeks to released persons from liability who are not signatories of the agreement. **Apx 136-137**

Section 7.2 This purported waiver is unconscionable as it is not based on any presentation of the risk attendant to such waiver. For example, Appellee is aware of specific risks Appellee faced based on its own data base of injuries arising from failure of the device but there is no indication that such information was shared with Appellant prior to her waiving her claims. **Apx 137**

Section 7.3 This provision titled Maximum Liability to Lime for a

total sum of $100.00 for any claim in contract, tort, or other grounds exemplifies the unconscionability of the agreement. **Apx 137**

Section 9.2 This provision states in part "At any time and from time to time, and without yourconsent, Lime may unilaterally terminate your right to use the Services, in Lime's sole discretionand without notice or cause." This clause is unconscionable insofar as Appellee can terminate the agreement unilaterally "without notice." Can Appellant do the same? Here is the answer: "You may terminate Your use of the Services at any time; provided, however, that (i) no refund will be provided by Lime, (ii) the term of this Agreement continues in accordance with this Agreement, and (iii) You may still be charged any applicable fees in accordance with this Agreement." Thus, Appellant may still be responsible to pay fees for services she no longer received. **Apx 139**

Section 9.2.1 This provision reinforces clause 9.2. **Apx 139**

Section 11.2 – 11.3 These provisions allow Appellee to send prerecorded messages and textmessages to Appellee for "marketing" purposes at Appellant's cost. **Apx 141**

Section 12.7 – 12.25.1 These entire provisions are unconscionable in that the take advantage of Appellant's lack of knowledge about issues related to licensing of one's image when she was merely renting a bike. The

scope of this license to use Appellant's photographs and images is broad: "...Your appearance and voice in photographs, videos, and other recordings related to Your use of the Services, on all websites and for all press, promotional, advertising, publicity, and other commercial purposes, including all formats and media, whether known or unknown or hereafter devised, throughout the world and in perpetuity." Although it recites that "good and valuable" consideration was paid, it does not state what the "consideration" was as there was no"consideration." **Apx 143-152**

All the factors that suggest unconscionability are present in the terms set forth Above; imbalance in acumen of the parties, unfairness of the sales practices, and unreasonable favorability to Appellee who alone drafted the agreement. Accordingly, the agreement is both procedurally and substantively unconscionable and should be unenforceable.

c. The Appellee's arbitration agreement is one of adhesion making it unconscionable and unenforceable

Appellant contends that the Appellee's arbitration agreement was one of adhesion in that it was drafted solely for the purpose to protect the interest of the Appellee. The Appellant contends that the terms of the arbitration agreements are so one-sided, as to render it one of adhesion and unenforceable. A contract of adhesion has been defined as one "that is drafted unilaterally by dominant party and then presented on a 'take-it-or-

leave-it'basis to the weaker party who has no real opportunity to bargain about its terms." Restatement (Second) of Conflict of Law § 187 cmt. b (1971); *see also* BLACK'S LAW DICTIONARY 342(8th ed. 2004) (defining "adhesion contract" as "a standard-form contract prepared by one party, to be signed by the party in a weaker position, [usually] a consumer, who adheres to the contractwith little choice about the terms"). The Appellant incorporates the previous arguments in above into this argument.

The Appellant contends that the court did not look egregiousness of the contract in making its' determination. Appellant contends that the court focused solely on the procedural aspect of the contract and not the egregious terms as it relates to determining the liability of any conduct or injury caused by the Appellee and how one sided it is.

An agreement "may be unconscionable either because of the manner in which it was made or because of [its] substantive terms." *Urban Invs., Inc. v. Branham,* 464 A. 2d 93, 99 (D.C. 1983) quoting *Bennett v. Fun & Fitness, Inc.,* 434 A. 2d 476, 480 (D.C. 1981), or because of a combination of both. *Id.* While the court may have looked at the agreement on the terms of a meaningful choice on the part of the parties, Appellant contends it failed to look at the unconscionability as it relates to the contract terms which are

unreasonably favorable to the other party." *Williams v. Walker-Thomas Furniture,* 350 F.2d at 449.

The Appellant further contends that where an arbitration agreement is one that has "an egregious situation, the meaningful choices of the parties **or** the egregiousness of the contract may suffice" to void the contract on unconscionability. *Bennett, supra,* 434 A.2d at 480 n. 4. As the Appellant presented in her opposition, she contends that the terms of the agreement as it relates to injuries sustained by her or any other patron, and the responsibility that is negated by the Appellee in the arbitration agreement is egregious. The Appellant contends that a substantial part of the contract was so one-sidedly in favor of Appellee as to be egregiously unfair.

The arbitration agreement presented by the Appellee left no room for negotiation or modification of its terms. It was prepared by the Appellee and provide for terms that only favored itself. The terms of the contract under **section 1.14** thrust upon the consumer the assumption of all liability that results or could result from its use. This would include the malfunction of its product and any other possibilities that may result from its use. **Section 2.6** deprives the Appellant and other consumers of its right to bring an action within three (3) years as mandated by D.C. Code 12-301. **Apx 127.** D.C. Code §12-301(3) gives a person's rights to

remedy and a limitation of three (3) years to bring an action for the recovery of damages. **Section 2.6** of the arbitration agreement circumvents this right and limit that statutory period to one (1) year. **Id.**

Section 7.2 of the Appellee's agreement unilaterally has the Appellant waiving all claims, including negligence, even if Lime .... has been advised of the possibility of such. **Apx 137** This provision is clearly one-sided in favor of the Appellee

Section 7.3 of the Appellee's agreement imposes a maximum liability toLime for any and all claims, including those based in contract, tort (including negligence) in the amount of $100.00, while, as in the Appellant's case, the Appellee's incurred damages as the result ofLime's negligence in an amount far substantial than the $100.00. This too is a provision that is so one-sided and unfair, and should not be honored. **Apx 137.**

Section 7.4 of the Appellee's agreement imposes the assumption of risk on the Appellant and negates any responsibility on the Appellee. **Apx 137.** This too should not be honored.

CONCLUSION

The Appellant contends that the lower court erred with respect to his ruling on granting the Appellee's motion to enforce arbitration. The

Appellant contends that the arbitration agreement was so egregious and one-sided as to deem it one of adhesion and unconscionable.

WHEREFORE, the Appellant respectfully requests that this court overturn the lower court's decision, deem the arbitration agreement void, and remand this matter to the lower court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the Brief of the Appellant to be emailed this 7th day of June, 2022, in addition will cause copies of the Appellant's Brief to be delivered via electronic means to the Court of Appeals for the District of Columbia .

Respectfully submitted,

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District of Columbia
Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a "CV" docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:

   - An individual's social-security number
   - Taxpayer-identification number
   - Driver's license or non-driver's' license identification card number
   - Birth date
   - The name of an individual known to be a minor
   - Financial account numbers, except that a party or nonparty making the filing may include the following:

     (1) the acronym "SS#" where the individual's social-security number would have been included;
     (2) the acronym "TID#" where the individual's taxpayer-identification number would have been included;
     (3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
     (4) the year of the individual's birth;
     (5) the minor's initials; and
     (6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.

3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.

/s/ Tony Graham, Sr.	21-CV-896
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