No. 21-CV-896

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

ADORIA DOUCETTE

Appellant,

v.

NEUTRON HOLDINGS, INC.
d/b/a LIME

Appellee.

Appeal from the Superior Court of the District of Columbia,
Civil Division, No. 2020 CA 005118 B
(Hon. Hiram E. Puig-Lugo)

BRIEF OF APPELLEE

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Neutron Holdings, Inc. d/b/a Lime

IN THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

ADORIA DOUCETTE	)	
	)	
Appellant	)	
	)	
v.	)	**No. 21-CV-896**
	)	
NEUTRON HOLDINGS, INC. d/b/a LIME	)	**2020 CA 005118 B**
	)	
	)	
Appellee	)	

CERTIFICATE REQUIRED BY RULE 28(a)(2)(A) OF THE RULES OF THE DISTRICT OF COLUMBIA COURT OF APPEALS

The undersigned, counsel of record for Appellee, Neutron Holdings, Inc., d/b/a Lime hereby certifies that the following listed parties and their counsel appeared before the Superior Court, and appear on appeal:

Plaintiff/Appellant Adoria Doucette	*Represented by* Tony Graham, Esq. SMITH, GRAHAM & CRUMP, LLC 7404 Executive Place, Suite 275 Lanham, MD 20706
Defendant/Appellee Neutron Holdings, Inc. d/b/a Lime	*Represented by:* Russell S. Drazin, Esq. PARDO & DRAZIN, LLC 4400 Jennifer Street, N.W., Suite 2 Washington, DC 20015

/s/ Russell S. Drazin

Russell S. Drazin (#470091)
Counsel for Appellee
Neutron Holdings, Inc. d/b/a Lime

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	)	
	)	
Appellee	)	

STATEMENT REQUIRED BY RULE 26.1(a) OF THE RULES OF THE DISTRICT OF COLUMBIA COURT OF APPEALS

The undersigned, counsel of record for Appellee, Neutron Holdings, Inc., d/b/a Lime hereby states that there are no parent corporations or publicly held corporations that own 10% or more of its stock (membership interests).

/s/ Russell S. Drazin

Russell S. Drazin (#470091)
Counsel for Appellee
Neutron Holdings, Inc. d/b/a Lime

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ASSERTION REQUIRED BY RULE 28(a)(5) OF THE RULES OF THE DISTRICT OF COLUMBIA COURT OF APPEALS

This is an appeal of an October 25, 2021 order from the Superior Court of the District of Columbia granting a motion to compel arbitration. That order may be appealed pursuant to this Court's decision in Andrew v. Am. Imp. Ctr., 110 A.3d 626, 630 (D.C. 2015) (holding that the Court has jurisdiction to consider an appeal under D.C. Code § 11-721(a)(2)(A) "where a consumer is claiming that [an] arbitration clause in a contract of adhesion is unconscionable"); and pursuant to D.C. Code §16-4427(a)(1) (authorizing an appeal from "an order denying or granting a motion to compel arbitration").

STATEMENT OF THE ISSUES

Whether the Superior Court was correct in ordering Appellant, Adoria Doucette ("Doucette") to arbitrate, rather than litigate, her claims against Appellee, Neutron Holdings, Inc. d/b/a Lime ("Lime") pursuant to a written arbitration agreement which Doucette admittedly accepted, and which the Superior Court concluded was enforceable because it was not unconscionable under the circumstances, and as a matter of District of Columbia law.

STATEMENT OF THE CASE

This appeal involves the continuing efforts by Doucette to avoid her obligation to arbitrate a personal injury claim she asserted against Lime in the Superior Court. After careful consideration, the court found that the parties'

arbitration agreement was enforceable, notwithstanding that it may have been included within an agreement which the court construed as a consumer contract of adhesion. Despite that fact, the Superior Court correctly concluded that the arbitration agreement itself was not unconscionable, and that it was binding on the parties. Doucette raises no meaningful arguments to warrant reversing the Superior Court's decision, and, therefore, it must be affirmed by this Court on appeal.

As explained below, Lime is an environmentally friendly micro-mobility company that provides dockless bicycle and electric scooter rentals to metropolitan areas and universities around the world. Before any person can rent and use Lime's bicycles and scooters, he or she must first agree to certain written terms and conditions which, among other things: governs the relationship between the parties; establishes the permitted use of Lime's property and technology (and explains the risk associated with such use); and mandates arbitration of claims and disputes that might arise between any user and Lime.

Despite assenting to Lime's user agreement, Doucette has refused arbitration at every turn. Rather than commencing arbitration proceedings, Doucette filed suit against Lime in the Superior Court. Rather than consenting to Lime's motion to compel arbitration, Doucette opposed it and contended that the arbitration agreement was so one-sidedly in favor of Lime that it was unconscionable, and, therefore, unenforceable. The Superior Court rejected Doucette's argument at least

twice, and on appeal she simply repeats it while avoiding ***any*** discussion of this Court's precedent upon which the Superior Court's decision was predicated.

Because the Superior Court correctly concluded after holding an evidentiary hearing that the arbitration agreement between Lime and Doucette was not unconscionable, that it was binding on both parties equally, and that it covered Doucette's personal injury claim, its order granting Lime's motion to compel arbitration must be affirmed.

STATEMENT OF FACTS

Lime provides dockless bicycle and electric scooter rentals in the District of Columbia. Lime's mission is to provide residents with cost-effective and accessible transportation options that advance sustainability. Lime's goals are achieved by using wireless technologies to make mobility universally available and affordable, with a network that is flexible and customizable. This includes the Lime App, which allows Lime and its users to establish and define their relationship. When Doucette registered to use the Lime App, she agreed to the express terms set forth in Lime's User Agreement and Terms of Service (the "User Agreement"). Among the terms of the User Agreement was an arbitration provision (the "Arbitration Agreement") which equally bound both Doucette and Lime to arbitrate (rather than litigate) disputes between them.

Doucette admits that on July 7, 2018, she rented and operated a Lime Scooter whose brakes allegedly malfunctioned as she approached the intersection of 16th and U Streets, N.W., resulting in Doucette colliding with an individual riding a bicycle, falling to the ground, and allegedly injuring herself in the process. (Joint App. at p. 13.)

On December 22, 2020, Doucette filed a complaint in the Superior Court asserting a single count of negligence, and demanding millions of dollars in damages, along with attorneys' fees and costs. (Id. at p. 16.) Following briefing by the parties on issues not relevant to this appeal, on August 9, 2021, the Superior Court entered an order vacating default and default judgment as against Lime, and accepting Lime's July 22, 2021 verified answer to the Complaint as timely filed. (See Id. at p. 17.)

On September 28, 2021, Lime filed its motion to compel arbitration (the "Motion to Compel"). (Id. at p. 30.) On October 12, 2021, Doucette opposed the Motion to Compel. (Id. at p. 110). The Superior Court then held a hearing on October 25, 2021 which counsel for both parties attended.

At the hearing, the Superior Court thoroughly analyzed the relevant terms of the Arbitration Agreement, and questioned counsel, and determined that the agreement applied to both Doucette and Lime equally. On that basis, the court held that the Arbitration Agreement was neither procedurally nor substantively

unconscionable as a matter of District of Columbia law. As a result, the court granted Lime's motion, and stayed the case pending conclusion of arbitral proceedings. The Superior Court's rationale and order were memorialized in a transcript from the October 25, 2021 hearing which is included as part of the record before this Court (the "October 25 Order"). (Joint App. at p. 156.)

Undeterred, on November 22, 2021, Doucette filed a motion to alter or amend the October 25 Order (Id. at p. 173.) Days later, and without the need for briefing from Lime, the Superior Court denied Doucette's motion finding that it "largely restate[d] the arguments from her opposition" to Lime's Motion to Compel. (Id. at p. 178.) As a consequence, the October 25 Order was left undisturbed. On December 30, 2021, Doucette filed her notice of appeal. (Id. at p. 180.)

On April 12, 2022, this Court issued its briefing order. On May 20, 2022, Doucette purportedly filed and served her brief. However, on May 31, 2022, this Court entered an order explaining that it had not received properly-filed copies of Doucette's brief and the Joint Appendix. As a result, this Court ordered Doucette to file her brief within twenty days, along with a motion "set[ting] forth good cause for the failure to timely file the documents," and warning that failure to comply would result in dismissal of this action "without further notice."

On June 10, 2022, Doucette filed her brief. Lime's brief follows.

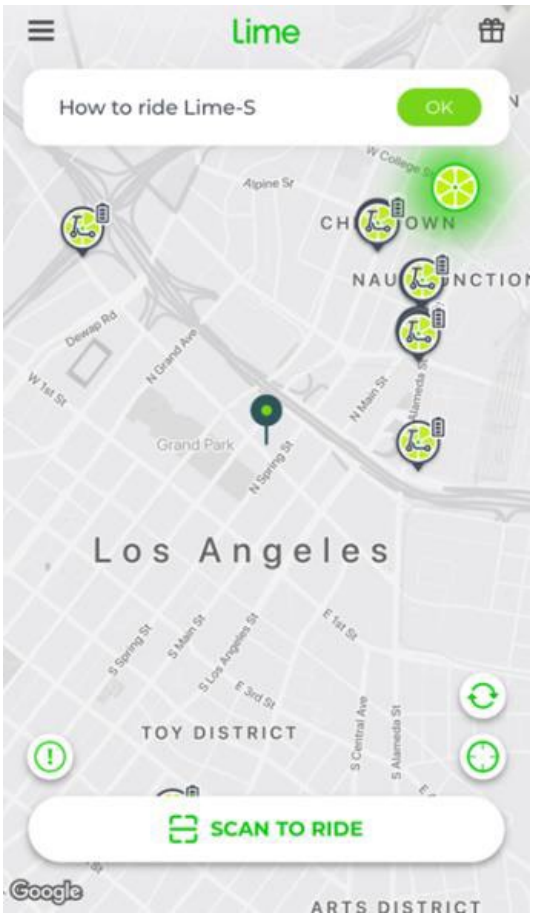
SUMMARY OF THE ARGUMENT

The Superior Court correctly held that while an agreement between two parties may be a contract of adhesion, if it is not procedurally or substantively unconscionable, then District of Columbia law will enforce the arbitration provisions included within that agreement. That conclusion, and the manner by which the Superior Court reached it, is entirely consistent with the precedent of this Court, and, therefore, the October 25 Order must be affirmed.

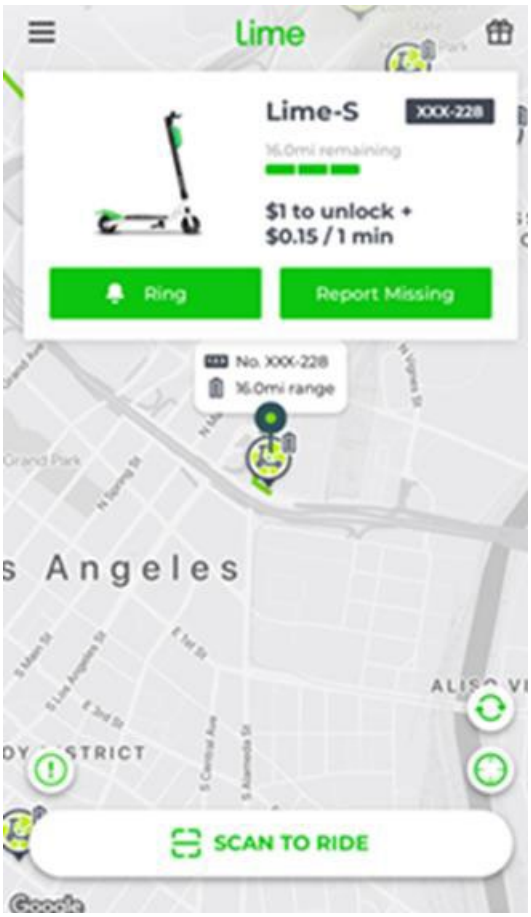
I. Using the Lime App to Rent Smart Bikes and E-Scooters

Lime developed the Lime App which allows users to locate and unlock its vehicle fleet. To use Lime, users open the Lime App to show nearby bicycles and e-scooters. (See Screenshot 1 below.) Riders then select their desired bike or e-scooter on the map, prompting the Lime App to show the rider information about their ride, including price, battery level, mileage range, and directions to the bike or e-scooter. (See Screenshot 2 below.)

Screenshot 1



Screenshot 2



Users then scan a QR code on the bike or e-scooter to unlock and start the ride.[1] At the conclusion of their ride, users park the bike or e-scooter near a bike rack or other proper parking location.

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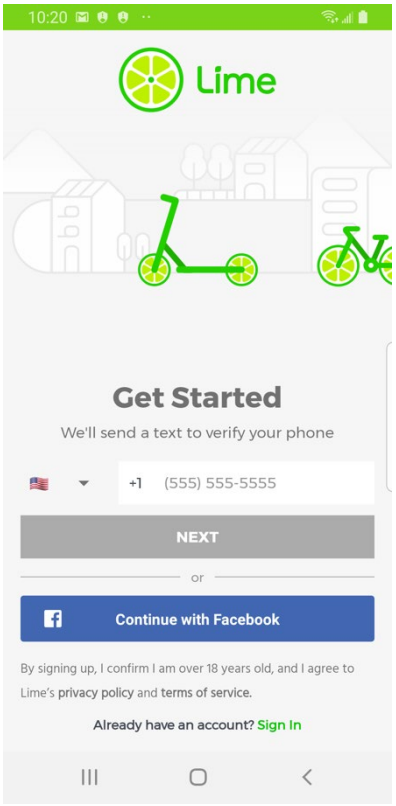
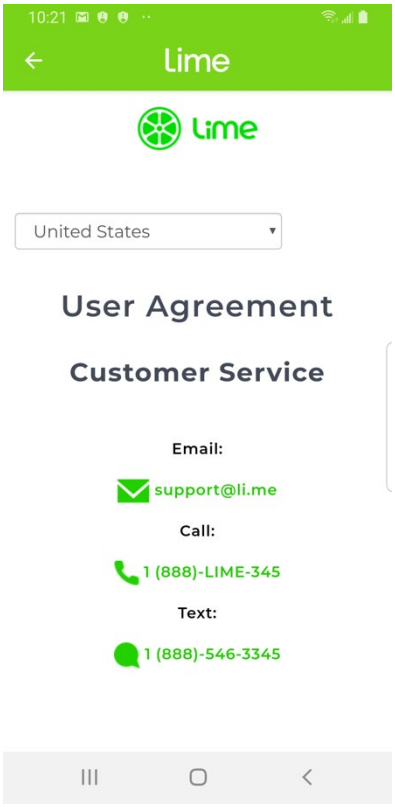
[1] A QR code is a machine-readable code consisting of an array of black and white squares, typically used for storing URLs or other information for reading by the camera on a smartphone. An example of one is provided below:

Before users can rent Lime's bikes or e-scooters as described above, upon downloading the Lime App for the first time, users are prompted to create an account and, like most smartphone applications, are prompted to agree to Lime's User Agreement. (See Screenshot 3, below.) Users enter a telephone number or use a Facebook link to populate their user information. The telephone and Facebook information inputs are located just a few millimeters above a conspicuous notice stating that: "By signing up, I confirm I am over 18 years old, and I agree to Lime's **privacy policy** and **terms of service**." The words "**terms of service**" are in darker boldface and provide a hyperlink to the Lime User Agreement. (Joint App. at p. 52, ¶ 13; and p. 56.)

Screenshot 3



Screenshot 4



II. The Clear and Binding Arbitration Agreement

When users click on the darker boldface "**terms of service**" hyperlink, users are then directed to a webpage containing Lime's User Agreement. (Joint App. at p. 58.) The very first thing they see is in **ALL-CAPS and boldface**, stating "**USER AGREEMENT**" (see Screenshot 4 above.) Id.

> 2. ARBITRATION; CLASS ACTION WAIVER; DISPUTE RESOLUTION.
> 2.1 Dispute Resolution: Certain portions of this Section 2 are deemed to be a "written agreement to arbitrate" pursuant to the Federal Arbitration Act. You and Lime expressly agree and intend that this Section 2 satisfies the "writing" requirement of the Federal Arbitration Act. This Section 2 can only be amended by mutual agreement.
>
> ***
>
> 2.3 Binding Arbitration : If We cannot resolve a Dispute as set forth in Section 2 (or agree to arbitration in writing with respect to an Excluded Dispute) within sixty (60) days of receipt of the notice, then ANY AND ALL DISPUTES ARISING BETWEEN YOU AND LIME (WHETHER BASED IN CONTRACT, LAW, STATUTE, RULE, REGULATION, ORDINANCE, TORT INCLUDING, BUT NOT LIMITED TO, FRAUD, ANY OTHER INTENTIONAL TORT OR NEGLIGENCE, COMMON LAW, CONSTITUTIONAL PROVISION, RESPONDEAT SUPERIOR, AGENCY AND/OR ANY OTHER LEGAL OR EQUITABLE THEORY), WHETHER ARISING BEFORE OR AFTER THE EFFECTIVE DATE OF THIS AGREEMENT, MUST BE RESOLVED BY FINAL AND BINDING ARBITRATION. THIS INCLUDES ANY AND ALL DISPUTES BASED ON ANY PRODUCT, SERVICE OR ADVERTISING CONNECTED TO THE PROVISION OR USE OF THE SERVICES. The Federal Arbitration Act ("FAA"), not state law, shall govern the arbitrability of all disputes between Lime and You regarding this Agreement (and any Additional Terms) and the Services, including the "No Class Action Matters" Section below. BY AGREEING TO ARBITRATE, EACH PARTY IS GIVING UP ITS RIGHT TO GO

> TO COURT AND HAVE ANY DISPUTE HEARD BY A JUDGE OR JURY. Lime and You agree, however, that State or federal law shall apply to, and govern, as appropriate, any and all claims or causes of action, remedies, and damages arising between You and Lime regarding this Agreement and the Services, whether arising or stated in contract, statute, common law, or any other legal theory, without regard to State's choice of law principles.

(Joint App. at p. 63-64.)

The Arbitration Agreement both explicitly and by reference calls for the arbitrator to decide all issues of arbitrability. First, the Arbitration Agreement provides: "All issues are for the Arbitrator to decide, including arbitrability." (Id. at p. 65.) Second, the Arbitration Agreement further states that any dispute will be governed by the JAMS Rules unless the parties later agree otherwise:

> A Dispute will be resolved solely by binding arbitration in accordance with the then-current Commercial Arbitration Rules of the Judicial Arbitration and Mediation Services Inc. ("JAMS") using JAMS' streamlined Arbitration Rules and Procedures, or by any other arbitration administration service that You and an officer or legal representative of Lime consent to in writing.

(Id. at p. 64.) The applicable JAMS Rules list, by way of example, the types of gateway arbitrability issues for the arbitrator to decide:

> Jurisdictional and arbitrability disputes, ***including disputes over the formation, existence, validity,*** interpretation or scope of the agreement under which Arbitration is sought, and who are proper Parties to the Arbitration, ***shall be submitted to and ruled on by the Arbitrator***. The Arbitrator has the authority to determine jurisdiction and arbitrability issues as a preliminary matter.

(Id. at p. 99.)

III. Doucette's Assent to the Arbitration Agreement

Lime's records confirm that Doucette agreed to Lime's User Agreement—by registering to use the Lime App via the sign-up screen—including the Arbitration Agreement therein on June 2, 2018. (Joint App. at p. 52; and p. 58-93.) By registering through the Lime App, Doucette agreed to Lime's User Agreement, and, therefore, agreed to arbitrate the claims asserted in her Complaint.

LEGAL ARGUMENT

I. Standard of Review

As it pertains to the Superior Court's October 25 Order finding that Lime's User Agreement and Arbitration Agreement were not unconscionable, and, therefore, enforceable: "[u]nconscionability of a contract is ultimately a legal conclusion, dependent on proof and findings of facts supporting such a determination. Thus, while [the Court will] treat the relevant factual findings as presumptively correct unless they are clearly erroneous or without foundation in the record, [the Court will] review de novo the trial court's ultimate holding . . . ." Simon v. Smith, 2022 D.C. App. LEXIS 123, *18 (Apr. 21, 2022).

II. District of Columbia Law Favors and Enforces Agreements to Arbitrate.

The District of Columbia's Revised Uniform Arbitration Act (RUAA) (D.C. Code § 16-4401, *et seq.*) provides that arbitration clauses are "valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the

revocation of a contract." D.C. Code § 16-4406(a). Thus, on a motion to compel arbitration, "the threshold question for the court (under both the RUAA and its predecessor) is 'whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.'" Menna v. Plymouth Rock Assurance Corp., 987 A.2d 458, 463 (D.C. 2010) (citations omitted). Once it is established that the parties intended a particular dispute to be arbitrated, "a court may not override that agreement by itself deciding such a dispute." Hercules & Co. v. Beltway Carpet Service, Inc., 592 A.2d 1069, 1072 (D.C. 1991) (citations omitted); see also D.C. Code § 16-4407 (upon a showing that an arbitration agreement exists and is enforceable, the trial court "shall order the parties to arbitrate").

With respect to the question of arbitrability, there is "a preference for arbitration such that when 'ambiguity as to whether a matter is within the scope of an arbitrator's authority [exists], any doubts are to be resolved in favor of arbitration.'" Jahanbein v. Ndidi Condominium Unit Owners Ass'n, 85 A.3d 824, 827 (D.C. 2014) (citing Hercules, 613 A.2d at 922); see also Umana v. Swidler & Berlin, Chtd., 745 A.2d 334, 345 (D.C. 2000) (noting there is a "well-established preference for arbitration when the parties have expressed a willingness to arbitrate," and that the policy favoring arbitration is identical under D.C. law and the Federal Arbitration Act) (citations omitted).

III. Doucette Agreed to Arbitrate Her Personal Injury Claim.

At no point did Doucette deny accepting the Arbitration Agreement. Indeed, she admits that she used the Lime App to rent an e-scooter (which, as noted above, requires a user to accept the User Agreement and Arbitration Agreement, but only after receiving opportunity to read those agreements). See Joint App. at p. 110 (Doucette admitting that "she used [Lime's] application to rent said scooter.") Rather, Doucette simply argues that agreement is unconscionable. However, whether a valid agreement to arbitrate exists is determined based on ordinary state-law contract principles. Bank of America, N.A. v. District of Columbia, 80 A.3d 650, 667 (D.C. 2013). "Under the District's common law, '[a] contract is formed when there is an offer, an acceptance, and valuable consideration' exchanged between the parties." Osvatics v. Lyft, Inc., 2021 U.S. Dist. LEXIS 77559, *16 (D.D.C. Apr. 22, 2021) (citing Dixon v. Midland Mortgage Co., 719 F.Supp.2d 53, 57 (D.D.C. 2010)).

In Osvatics,[2] the district court enforced an arbitration agreement contained in Lyft's terms of service, which the plaintiff agreed to through the Lyft App, finding that "each of the elements of contract formation [were] satisfied." Id., 2021 U.S.

[2] This Court has explained that "[f]ederal court decisions construing and applying the Federal Arbitration Act may be regarded as persuasive authority in construing and applying the corresponding provisions of the District of Columbia Arbitration Act." Bolton v. Bernabei & Katz, PLLC, 954 A.2d 953, 960, n.5 (D.C. 2008) (internal citations omitted).

Dist. LEXIS 777559 at *15-17 (holding that plaintiff's "express agreement to abide by Lyft's Terms of Service, along with her failure to opt out of the arbitration agreement at any time, is sufficient to establish a binding agreement between Osvatics and Lyft concerning the submission of disputes to arbitration in lieu of litigation"). There is nothing unusual about enforcing a contract entered into online or through an app, such as Lime's. Indeed, two common forms of online contracts are widely enforced and recognized across the country: "browsewrap" agreements and "clickwrap" agreements.

A browsewrap agreement is one in which an internet user accepts a website's terms of use merely by browsing the site. Selden v. Airbnb, Inc., 2016 U.S. Dist. LEXIS 150863, *10 (D.D.C. Nov. 1, 2016) *aff'd*, 2021 U.S.App. LEXIS 20532 (D.C. Cir. Jul. 13, 2021). Clickwrap agreements require users to expressly assent to an agreement by clicking a button above, next to, or below a statement asking the user to accept a proposed contract. See, e.g., Nacco Materials Handling Group, Inc. v. Lilly Co., 278 F.R.D. 395, 397 n. 2 (W.D. Tenn. 2011); Cubria v. Uber Technologies, Inc., 242 F.Supp.3d 541, 548 (W.D. Tex. 2017); Selden, 2016 U.S. Dist. LEXIS 150863 at *5; Meyer v. Uber Technologies, Inc., 868 F.3d 66, 80 (2d Cir. 2017); Hotels.com, L.P. v. Canales, 195 S.W.3d 147, 154-57 (Tex. App. 2006); and Forrest v. Verizon Communications, Inc., 805 A.2d 1007, 1010–11 (D.C. 2002). Moreover, courts have acknowledged that "we need not presume that

the user never before encountered an app or entered into a contract using a smartphone" and "must consider the perspective of a reasonably prudent smartphone user." Meyer, *supra*, 868 F.3d at 78.

Recently, in Phillips v. Neutron Holdings, Inc., 2019 U.S. Dist. LEXIS 171313, *12-13 (N.D. Tex. Oct. 2, 2019), the district court held that the ***exact*** Lime sign-in screen used by Doucette provided Lime users with sufficient notice to form a valid contract, and agreement to arbitrate. Id. The Phillips court classified the agreement as a "sign-in-wrap" — a hybrid between a clickwrap and a browsewrap. Id. To determine if the sign-in-wrap created a valid contract, the court considered whether the existence of terms would be "reasonably conspicuous" from the "perspective of a reasonably prudent smartphone user." Id.

The Phillips court held that "'a reasonably prudent smartphone user' would understand that by signing up for Lime, he or she assented to the User Agreement" and, thus, a valid agreement was formed:

> Here, the [c]ourt finds that the hyperlink to the User Agreement on Lime's sign-up screen was reasonably conspicuous and placed Stoneking on notice of the User Agreement. The sign-up screen is visible on one page, and the hyperlink is "in close proximity" to the two sign-up buttons. Moreover, the notice is legible, and the hyperlinked words **"User Agreement & Terms of Service"** are in dark, bold font, making them stand out from both the white screen and the surrounding gray text. Based on these circumstances, a "reasonably prudent smartphone user" would understand that by signing up for Lime, he or she is assenting to the User Agreement.

Id. (internal citations omitted) (emphasis added).

On February 11, 2020, another federal court reached the same conclusion, and granted Lime's motion to compel arbitration. See Walker v. Neutron Holdings, Inc., 2020 U.S. Dist. LEXIS 24845 (W.D. Tex. Feb. 11, 2020), *R&R adopted*, 2020 U.S. Dist. LEXIS 132511 (W.D. Tex. Apr. 8, 2020) (concluding that "[h]ere, a reasonable user would view the Lime App sign-in screen and see that the User Agreement is part of the offer to proceed with the transaction by clicking 'NEXT' or 'Continue with Facebook.'").

In Doucette's case, the sign-up screen was free of clutter; it only contained buttons allowing her to sign up by entering her phone number or connecting her Facebook account. (Joint App. at p. 56.) The entire page was visible at once. (Id.) It directed Doucette to read the User Agreement and signaled that her accepting the benefit of registration was subject to the terms. (Id.) The screen's notice statement contained the language—"[b]y signing up, I confirm I . . . agree to Lime's . . . **terms of service.**" (Id.) The notice statement was appended to the "NEXT" and "Continue with Facebook" buttons on the sign-up screen. Id. The text "**terms of service**" was a conspicuous hyperlink that contrasted with the surrounding text: the darker font contrasts with the light background, and the hyperlink is in boldface. (Id.) Doucette did not have to scroll beyond what was immediately visible to see any of the language noted above.

As the courts found in Phillips and Walker, a reasonably prudent smartphone user would understand that by clicking "NEXT" or "Continue with Facebook" on Lime's sign-up screen, she was agreeing to the terms hyperlinked in the notice statement directly below. And by pressing "NEXT," Doucette affirmed that she had read the User Agreement, which includes the Arbitration Agreement. (Joint App. at p. 52; and p. 58-93.) Therefore, Doucette assented to the User Agreement's terms, a valid contract was formed under District of Columbia law, as the Superior Court correctly found.

IV. The User Agreement Clearly and Unmistakably Delegates Questions Concerning Arbitrability Exclusively to the Arbitrator.

When a contract expressly addresses gateway arbitrability, the terms of the contract govern. See Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524, 527 (2019). "The [FAA] allows parties to agree by contract that an arbitrator, rather than a court, will resolve threshold arbitrability questions as well as underlying merits disputes." Id. "When the parties' contract delegates the arbitrability question to an arbitrator, the courts must respect the parties' decision as embodied in the contract." Id., 139 S. Ct. at 528. The Supreme Court of the United States recently explained:

> We must interpret the [FAA] as written, and the [FAA] in turn requires that we interpret the contract as written. When the parties' contract delegates the arbitrability questions to an arbitrator, a court may not override the contract. In those circumstances, a court possesses no power to decide the arbitrability issue. That is true even

> if the court thinks that the argument that the arbitration applies to a particular dispute is wholly groundless.

Id., 139 S. Ct. at 529; see also Rent-A-Center W., Inc. v. Jackson, 561 U.S. 63, 72-73 (2010) (holding allegations of procedural and substantive unconscionability under state law are properly delegated to the arbitrator); Prima Paint Corp. v. Flood & Conklin MFG., Co., 388 U.S. 395, 403-04 (1967) (finding that a claim that the entire contract was induced by fraud is for the arbitrator, not court, to decide).

The Lime User Agreement delegates all issues of arbitrability to the arbitrator in two significant ways. First, the contract clearly and unmistakably provides: "***All issues are for the arbitrator to decide, including arbitrability.***" (Joint App. at p. 65) (emphasis added). Second, even without the express arbitrability language in the Lime User Agreement, courts are in agreement that reference to arbitration rules in an arbitration agreement is sufficient to delegate questions of arbitrability to the arbitrator where the cited rules delegate such authority. See KONE, Inc. v. Chenega Worldwide Support, LLC, 2021 U.S. Dist. LEXIS 39745, *19-20 (D.D.C. Mar. 3, 2021) (enforcing parties' agreement to arbitrate, include the gateway question of arbitrability based on arbitrator's "power to rule on his or her own jurisdiction, including any objections with respect to . . . the arbitrability of any claim or counterclaim;" and explaining that the District of Columbia Circuit and twelve of its sister circuits "have held that the incorporation

of standard rules of arbitration that delegate determinations to the arbitrator is 'clear and unmistakable evidence' that the parties intended for an arbitrator, rather than a court, to determine whether a particular grievance is subject to arbitration") (citations omitted); Blanton v. Domino's Pizza Franchising, LLC, 962 F.3d 842, 847 (6th Cir. 2020) (collecting cases from federal courts of appeals holding that "incorporation of AAA Rules (or similarly worded arbitral rules) provides 'clear and unmistakable evidence' that the parties agreed to arbitrate 'arbitrability;'" and "officially" joining that holding); Cooper v. WestEnd Capital Mgmt., LLC, 832 F.3d 534, 546 (5th Cir. 2016) (arbitration agreement adopting same JAMS rules Doucette agreed to is clear and unmistakable evidence to arbitrate arbitrability); Simply Wireless, Inc v. T-Mobile, US, Inc., 877 F.3d 522, 527-528 (4th Cir. 2017) (same), *abrogated on other grounds by* Schein, *supra,* 139 S.Ct. at 524; Petrofac, Inc. v. DynMcDermott Petro. Operations Co., 687 F.3d 671, 675 (5th Cir. 2012) (reference in agreement to AAA rules sufficient to arbitrate arbitrability); Qualcomm Inc. v. Nokia Corp., 466 F.3d 1366, 1372-73 (Fed. Cir. 2006) (same); Terminix Int'l Co., LP v. Palmer Ranch Ltd. P'ship, 432 F.3d 1327, 1332-33 (11th Cir. 2005) (same, collecting cases from Illinois, Florida, Arizona, California, and New York); and Contec Corp. v. Remote Solution Co., 398 F.3d 205, 208 (2d Cir. 2005) (same).

The JAMS rules incorporated into the Lime User Agreement unmistakably provide that the arbitrator hears all arbitrability disputes:

> Jurisdictional and arbitrability disputes, including disputes over the formation, existence, validity, interpretation or scope of the agreement under which Arbitration is sought, and who are proper Parties to the Arbitration, shall be submitted to and ruled on by the Arbitrator. The Arbitrator has the authority to determine jurisdiction and arbitrability issues as a preliminary matter.

(Joint App. at p. 99.)

Because the parties agreed to delegate all arbitrability issues to the arbitrator, the Superior Court properly concluded that any dispute concerning the formation, existence, validity, interpretation, or scope of the agreements between Lime and Doucette were matters for the arbitrator to decide.

V. After Holding an Evidentiary Hearing, the Superior Court Correctly Decided That Although the User Agreement Was a Contract of Adhesion, the Arbitration Agreement Was Not Procedurally or Substantively Unconscionable, and, Therefore, It Was Enforceable Against the Parties, and Doucette Was Obligated to Arbitrate Her Personal Injury Claim.

The straight-forward and settled precedent of this Court establishing what factors and the manner in which they must be considered by a trial court in determining whether a contract is unconscionable were properly followed in this case. Doucette's principal contention is that the Arbitration Agreement is "invalid . . . on the grounds of unconscionability" because Lime "included terms that [are] unjust, unreasonable, and unconscionable to be deemed enforceable." (Brief at p.

8.) However, the Superior Court entertained and ultimately rejected Doucette's argument after carefully considering the terms of the Arbitration Agreement, and the relevant circumstances through the October 25, 2021 evidentiary hearing. In doing so, the Superior Court acted entirely consistent with the decisions of this Court, and Doucette offers no reason to find otherwise. As a consequence, the Superior Court's October 25 Order must be affirmed.

Beginning with Keeton v. Wells Fargo Corp., 987 A.2d 1118, 1121-1122 (D.C. 2010), this Court held that when a party alleges that an arbitration agreement within a standardized consumer contract of adhesion is unconscionable, the trial court is charged with performing a "strongly-fact dependent inquiry," and conducting "an 'expedited evidentiary hearing.'" Keeton, 987 A.2d at 1122. This Court reasoned that because a finding of unconscionability is so dependent on the facts, a trial court cannot properly make that judgment without a "more developed record," and that summary disposition of a motion to compel ***in that context*** is premature and amounts to reversable error. Id. Consequently, in Keeton, this Court remanded the case for "an evidentiary hearing to determine the unconscionability of the arbitration clause." Id. In reaching that decision, the Court also identified factors "central to a proper determination of unconscionability" which the Superior Court was ordered to assess, including: (A) the absence of meaningful choice by the consumer to avoid arbitration by securing goods or services elsewhere, and

imbalance between the parties with respect to arbitrator selection (procedural unconscionability); and (B) the availability of litigation avenues for some, but not all parties, along with the costs imposed on a consumer to commence arbitral proceedings (substantive unconscionability). Keeton, 987 A.2d at 1123.

This Court reiterated its Keeton decision in Andrew, *supra*, 110 A.3d 626. Like Keeton, in Andrew a consumer challenged the enforceability of an arbitration agreement between it and an automobile dealer arguing that the agreement was unconscionable. Id., 110 A.3d at 637. The Superior Court rejected the consumer-plaintiff's argument, concluded that she "had not presented a triable issue of material fact" relevant to the issue of unconscionability, and stayed the case pending arbitration. Id., 110 A.3d at 628. This Court disagreed, and reversed. Importantly, however, this Court concluded that an arbitration agreement embedded within a consumer contract of adhesion is not presumptively unenforceable, rather when a party alleges that the agreement is unconscionable, that determination "demands a more developed record," and it cannot be reached by a trial court merely "on the basis of limited pleadings" or without "an evidentiary hearing." Id., 110 A.3d at 639.

The issue of whether an arbitration agreement is enforceable despite an allegation of unconscionability from the party opposing arbitration was also

addressed by this Court in Woodruff v. Cunningham, 147 A.3d 777 (D.C. 2016).[3] As a preliminary matter, the Court explained that a "contract of adhesion is defined generally as one imposed upon a powerless party, usually a consumer, who has no real choice but to accede to its terms." Id., 147 A.3d at 789 (citing Andrew, *supra* 110 A.3d at 533, n.8) (quoting Association of Am. Med. Colleges v. Princeton Review, Inc., 332 F.Supp.2d 11, 16 (D.D.C. 2004)). It also reiterated that "a party seeking to avoid enforcement of a contract on the grounds of unconscionability usually must prove 'an absence of choice on the part of one of the parties ***together with*** contract terms which are unreasonably favorable to the other party.'" Woodruff, 147 A.3d at 789 (emphasis added) (quoting Woodfield v. Providence Hosp., 779 A.2d 933, 937 n.1 (D.C. 2001)). This Court concluded that because the issue of unconscionability had not been raised before the trial court, and there was no record to support the contention on appeal, the consumer failed to satisfy the standard to avoid enforcement of the arbitration agreement. Id.

In granting Lime's Motion to Compel, the Superior Court followed the above precedent, and it performed the requisite analysis and fact finding. On appeal, those findings are presumptively correct, particularly because Doucette has

[3] In fairness, the bulk of this Court's opinion in Woodruff centered on its jurisdiction to hear an appeal from an order granting a motion to compel arbitration under § 16-4427(a)(1) of the RUAA, and whether that statute violated the District of Columbia Home Rule Act (D.C. Code § 1-201.01, *et seq.*). Woodruff, 147 A.3d at 782. This Court held that it did not, and, therefore, it also reached a merits decision on the question of contractual unconscionability in that case. Id.

failed to demonstrate that they were clearly erroneous or without foundation in the record. See Simon, *supra*, 2022 D.C. App. LEXIS at *18.

Citing D.C. Code § 16-4407[4], the Superior Court's most basic inquiry was to "decide whether or not there is an enforceable agreement [to arbitrate.]" (Joint App. at p. 162.) Relying on Woodruff for the definition of a contract of adhesion, the Superior Court quickly dispensed with that question (finding that the User Agreement ***was*** an adhesion contact), but without any clear explanation for its conclusion. Critically, however, the Superior Court also correctly explained that "not all adhesion contracts are unconscionable. . ." but that "[i]t depends on the facts surrounding a particular situation." (Joint App. at p. 169.) Indeed, the Superior Court's finding that the User Agreement was a contract of adhesion was not determinative of whether it and the Arbitration Agreement were enforceable

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[4] In relevant part, § 16-4407(a) provides that:

> On motion of a person showing an agreement to arbitrate and alleging another person's refusal to arbitrate pursuant to the agreement:
>
> (1) If the refusing party does not appear or does not oppose the motion, the court shall order the parties to arbitrate; and
>
> (2) If the refusing party opposes the motion, the court shall proceed summarily to decide the issue and order the parties to arbitrate unless it finds that there is no enforceable agreement to arbitrate.

under District of Columbia law.[5] Instead, the court then narrowed its focus to examine if the agreement was ***also*** unconscionable, and the Superior Court properly concluded that it was not.

Turning to that question, the court expressly acknowledged its obligation to hold a "strongly fact-based inquiry and evidentiary hearing" consistent with this Court's decision in Andrews. (Joint App. at p. 163) (stating "which is why we set this hearing in order to comply with the Court of Appeals' directive"). The Superior Court then pivoted to addressing procedural and substantive unconscionability. (Id. at p. 168.)

On the first point (procedural unconscionability), the Superior Court explained that Doucette had not met her burden of demonstrating the absence of meaningful choice to avoid arbitration with Lime by obtaining similar mobility services elsewhere, a factor which this Court considered in Keeton and Andrew. (Id. at p. 168-169.) With respect to the selection of an arbitrator, neither the Arbitration Agreement nor the JAMS Rules exclusively reserved for Lime the right to unilaterally appoint any particular arbitrator, or to override Doucette's objections to a potential arbitrator. See, e.g. Joint App. at p. 63-66; and 100. In fact, the JAMS Rules referenced in the Arbitration Agreement expressly provided

[5] Moreover, that conclusion is not dispositive to this appeal, or, frankly, even at issue, although Lime does not necessarily agree with the Superior Court in that regard.

that the parties may select an arbitrator by agreement, that JAMS would facilitate reaching such an agreement, and if the parties could not ultimately agree (but only after ranking and striking from a list of potential arbitrators), then JAMS would "designate the Arbitrator." (Joint App. at p. 100). The Superior Court examined this issue at the October 25 hearing, and there was and is no basis in the record to find any imbalance of power between Lime and Doucette with respect to the selection of arbitrators under the Arbitration Agreement or applicable JAMS Rules.

With regard to substantive unconscionability, the Superior Court also analyzed the question, and correctly found no merit to Doucette's contention. Specifically, in reviewing Lime's Motion to Compel along with the Arbitration Agreement and the JAMS Rules, the Court found that: "there are no avenues for litigation reserved for the corporate entity [Lime] alone;" "both parties are bound by the same outcome of the arbitrator;" and that a "neutral entity" would conduct the arbitration that neither "favors one side or the other." (Id. at p. 169.) The Arbitration Agreement and the JAMS Rules bear out that conclusion as they require arbitration of "ANY AND ALL DISPUTES ARISING BETWEEN [DOUCETTE] AND LIME," and each party expressly agrees that they "GIVE[] UP [THEIR] RIGHT TO GO TO COURT AND HAVE ANY DISPUTE HEARD

BY A JUDGE OR JURY."[6] (Joint App. at p. 63-64) (capitalization in original). Further, both Doucette and Lime agreed that "EACH MAY BRING CLAIMS AGAINST THE OTHER ONLY IN YOUR OR ITS INDIVIDUAL CAPACITY, AND NOT AS A PLAINTIFF OR CLASS MEMBER." Id. (capitalization in original). Therefore, to the extent Doucette's judicial "avenues" for redress against Lime were limited under the Arbitration Agreement, and JAMS Rules, so too were Lime's against Doucette.

Finally, with respect to the cost of arbitration, the Superior Court inquired, and also concluded that both Lime and Doucette equally bore the risk for payment, depending on the outcome of that proceeding. Under the Arbitration Agreement, the "prevailing party in the arbitration shall be entitled to an award of attorneys' fees and costs, so long as the Arbitrator includes such an award of attorneys' fees and costs in the written decision." (Id. at p. 65.) Even absent that agreement, under applicable JAMS Rules, each party, as a default position, was responsible to pay its "pro rata share of JAMS Fees and expenses," and all parties were "jointly and severally liable for the payment of JAMS arbitration fees and Arbitration Compensation and expenses." (Id. at p. 105.) Further, if any one "party ha[d] paid

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[6] The Arbitration Agreement, does, however, permit either party to bring certain claims in "small claims courts of competent jurisdiction." (Joint App. at p. 65.) This provision further highlights the degree to which Lime and Doucette are "treated in the same way" with respect to their rights and obligations to arbitrate, or not.

more than its share of [arbitration and arbitrator] fees . . . the Arbitrator may award against any Party such fees, compensation, and expenses that such parties owes with respect to the Arbitration. (Joint App. at p. 105.) Ultimately, however, both Doucette and Lime are equals with respect to their obligations to pay arbitration fees and costs, "depend[ing] on what comes out of the arbitration." (Id. at p. 169.) In fact, as to Doucette's particular case, she arguably benefits from the Arbitration Agreement's 'prevailing party' fee language because even if she prevailed on her personal injury claim in the Superior Court, under the "American Rule," by default "each party is responsible for its own attorneys' fees." American Bldg. Maintenance Co. v. L'Enfant Plaza Properties, 655 A.2d 858, 862 (D.C. 1995) (citing Schlank v. Williams, 572 A.2d 101, 108 (D.C. 1990)).

In sum, the Superior Court found no bases to vitiate the parties' Arbitration Agreement as unconscionable. The record developed by that court supports its conclusion, and it requires affirming the October 25 Order in its entirety.

CONCLUSION

Appellee, Neutron Holdings, Inc., d/b/a Lime, respectfully requests that the Court affirm the October 25, 2021 order of the Superior Court granting its Motion to Compel Arbitration of the claims of Appellant, Adoria Doucette, as asserted in her Complaint, and staying proceedings in the Superior Court pending the conclusion of arbitration between the parties.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on July 7, 2022, I filed a copy of the foregoing Brief with the Clerk of the Court of Appeals through the Court's electronic filing system, which then served a notice of filing on:

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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/ Russell S. Drazin
Signature

21-CV-896
Case Number(s)

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Date

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