IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, INC., *Plaintiff,* v. GEMINI TRUST COMPANY, LLC, *Defendant.*	Case No. 2024-CAB-003999 Judge Maribeth Raffinan Next Court Date: May 15, 2025 Event: Status Conference

GEMINI TRUST COMPANY, LLC'S MOTION TO COMPEL ARBITRATION

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Defendant Gemini Trust Company, LLC ("Gemini"), submits this motion to compel arbitration and stay the action brought by Plaintiff National Association of Consumer Advocates, Inc. ("NACA" or "Plaintiff"), pending the outcome of that arbitration.

INTRODUCTION

Gemini offers an online platform for buying, selling, transferring, and storing cryptocurrencies. NACA does not itself claim to be a user of Gemini's online platform but attempts to file this lawsuit in a representative capacity on behalf of the District of Columbia users of the Gemini platform ("Gemini Users").

NACA asserts that the User Agreement between Gemini and its Users—which governs the use of the Gemini platform—misrepresents the Gemini Users' rights and obligations governing unauthorized access to their accounts and violates the federal Electronic Fund Transfer Act ("EFTA"), 15 U.S.C. § 1693, *et seq*., thus creating an unfair and deceptive trade practice under the District of Columbia Consumer Protection Procedures Act, D.C. Code § 28-3901, *et seq*. (the "CPPA").

Gemini has strong defenses to NACA's claims. For example, the EFTA does not apply to cryptocurrencies. Even if it did, NACA's allegations are insufficient to state a viable claim under the CPPA or the EFTA.

But this Court cannot reach the merits of NACA's claims or lack thereof. Rather, this motion presents a threshold procedural issue: NACA cannot bring claims on behalf of the Gemini Users in this Court because the Gemini Users whom NACA purports to represent agreed to arbitrate "*any controversy, claim, or dispute arising out of or relating to this User Agreement or [each User's] relationship with Gemini.*" This valid and enforceable arbitration agreement applies with equal force to NACA's claims made on their behalf. There is no question that NACA's

challenge to the terms of Gemini's User Agreement is a dispute "arising out of or relating to" the User Agreement, requiring arbitration of those claims.

Section 28-3905(k)(1)(D)(i) grants a public interest organization standing to sue "on behalf of the interests of a consumer or a class of consumers" only "if the consumer or class could bring an action" under the CPPA. An "action" is a "judicial proceeding." *Bd. of Trs. of Univ. of D.C. v. Joint Rev. Comm. On Educ. In Radiologic Tech.*, 114 A.3d 1279, 1286 (D.C. 2015) (quoting BLACK'S LAW DICTIONARY (10th ed. 2014)). And "[a]rbitration is not a 'judicial proceeding.'" *McDonald v. City of W. Branch*, 466 U.S. 284, 288 (1984). Because the Gemini Users are bound by the arbitration agreement and cannot bring an "action," neither can NACA. This conclusion applies with even greater force given that, by its terms, the arbitration agreement at issue here waives private attorney general or class action relief.

To the extent D.C. Code § 28-3905(k)(1)(D)(i) could be read to allow NACA to escape arbitration, despite no statutory language supporting that interpretation, it conflicts with the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* (the "FAA"), which preempts state laws hostile to arbitration. Accordingly, Gemini's motion to compel arbitration should be granted and this action should be stayed.

FACTS

I. The User Agreement

Gemini offers an online platform for buying, selling, transferring, and storing cryptocurrencies. Compl. ¶ 1; Decl. ¶ 3.[1] To use the Gemini platform, each customer must create a Gemini account and agree to the terms of the User Agreement. Compl. ¶ 2 ("Gemini requires its

[1] Declaration of Kate Thomas, attached as Exhibit A. Cites to Exhibits 1-3 refer to the exhibits attached to the Declaration.

users to assent to its User Agreement . . . as a condition of creating a Gemini account and buying, selling, or trading cryptocurrency on the Gemini platform."); Decl. ¶ 3.

Every Gemini User with an address in the District of Columbia accepted the User Agreement. Decl. ¶¶ 4, 7, Ex. 2. To register and begin using the Gemini platform, the Gemini Users had to use Gemini's account registration webpage. *Id*. ¶ 5, Ex. 1. On this webpage, the Gemini Users were prompted and required to enter their full name, email address, and a password. *Id*. The Gemini Users were then presented with the following disclosure: "By clicking the 'Create account' button, you agree to Gemini's USER AGREEMENT and PRIVACY POLICY." *Id*. ¶ 5, Ex. 1. This text appeared immediately above the "create account" button the user had to actively click to continue the registration process. *Id.* The capitalized and underlined phrases USER AGREEMENT and PRIVACY POLICY each hyperlinked to the full text of the respective document on Gemini's website so the individual could review it before proceeding. *Id*. At all times, it has been impossible for an individual to create an account without being alerted that the individual accepts the User Agreement by registering an account at Gemini. *Id*. ¶ 6.

The User Agreement has at all times included, and continues to include, a broad arbitration clause stating that "[the user] and Gemini agree and understand that any controversy, claim, or dispute arising out of or relating to this User Agreement or [the user's] relationship with Gemini—past, present, or future—shall be settled solely and exclusively by binding arbitration." *Id*. ¶ 8, Ex. 3 at 56.

In addition, the User Agreement has at all times included, and continues to include, a waiver of class and representative actions:

> **You and Gemini agree to arbitrate solely on an individual basis, and agree and understand that this User Agreement does not permit class action or private attorney general litigation or arbitration of any claims brought as a plaintiff or class member in any class or representative arbitration proceeding or**

litigation ("Representative and Class Action Waiver").

Id. ¶ 9, Ex. 3 at 59 (emphasis in the original).

The User Agreement also includes a choice of law clause selecting New York law:

> This User Agreement, your use of Gemini, your rights and obligations, and all actions contemplated by, arising out of or related to this User Agreement shall be governed by the laws of the State of New York, as if this User Agreement is a contract wholly entered into and wholly performed within the State of New York.

Id. ¶ 9, Ex. 3 at 56 (emphasis in original).

II. This Lawsuit

NACA attempts to bring this action "*on behalf of* all District of Columbia Gemini users who have been subject to Gemini's unfair and deceptive trade practices" alleged in the Complaint, *i.e.*, the allegedly unlawful provisions in the User Agreement. Compl. ¶ 63 (emphasis added); *see also id.* ¶¶ 4, 10, 57, 61, 67. NACA relies on D.C. Code § 28-3905(k)(1)(D)(i):

> [A] public interest organization may, *on behalf of* the interests of a consumer or a class of consumers, bring an action seeking relief from the use by any person of a trade practice in violation of a law of the District *if the consumer or class could bring an action* under subparagraph (A) of this paragraph for relief from such use by such person of such trade practice.

See id. ¶ 57 (emphasis added).

According to NACA, the User Agreement violates the EFTA because Gemini Users agree: (i) to be responsible for managing and maintaining the security of their accounts[2] and for monitoring their transaction history; (ii) not to hold Gemini liable for unauthorized access or other loss resulting from their own disclosure of their login credentials to third parties; and (iii) that similar contractual clauses conflict with the EFTA. *Id*. ¶¶ 2, 26-39.

[2] Plaintiff misrepresents the content of the User Agreement. In reality, it provides that the Gemini Users agree to be responsible only for managing and maintaining the security of their "*User Account login credentials and any other required forms of authentication*[.]." Ex. 3 at 4-5 (emphasis added and in original).

Based on these allegations, NACA brings a single cause of action for violations of the CPPA asserting that "Gemini, through its [User Agreement], violated the EFTA . . . which is a violation of the CPPA," and "Gemini's [User Agreement] provisions represented that its transaction conferred or involved rights, remedies, or obligations which it did not have or involve, or which were prohibited by law" also in violation of the CPPA. *Id*. ¶ 67 (citing D.C. Code § 28-3905(b)(2) and § 28-3904(e)(1))[3].

On behalf of the Gemini Users, NACA seeks an order permanently enjoining Gemini from enforcing the challenged provisions of the User Agreement, declaring that the provisions violate the EFTA and CPPA, and awarding NACA's reasonable attorney's fees and costs. *Id*. ¶ 70.

LEGAL STANDARD

The Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1, *et seq.*, broadly favors the right of a party to agree to arbitration as an alternative dispute-resolution mechanism. The FAA provides arbitration contracts "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. If a party refuses to arbitrate, the aggrieved party may petition the court for an order directing the parties to proceed in arbitration in accordance with the terms of an arbitration agreement. 9 U.S.C. § 4. New York arbitration law is analogous. *See* N.Y. C.P.L.R. § 7503(a). So is the law in D.C. *See* D.C. Code §§ 16-4401.

Under New York law, which applies here due to the parties' choice of law provision, the party seeking to compel arbitration bears the initial burden of establishing the existence of an arbitration agreement by a preponderance of the evidence. *Wu v. Uber Techs., Inc.*, No. 90, 2024

[3] It is unclear why NACA cites this provision, which applies only to prosecution of the CPPA claims *by the District*, not by a private entity such as NACA. D.C. Code § 28-3905(b)(2) ("The Director [of the Department of Licensing and Consumer Protection] may, in his or her discretion, decline to prosecute certain cases as necessary to manage the Department's caseload and control program costs.").

WL 4874383, at *5 (N.Y. Nov. 25, 2024). To the extent D.C. law could apply, the movant's burden of proof may be even lower: "When a motion to compel arbitration . . . is supported by an affidavit identifying an arbitrable dispute, the affidavit will be enough to defeat an opposing motion for summary judgment and require arbitration." *Friend v. Friend,* 609 A.2d 1137, 1139 (D.C. 1992).

ARGUMENT

The parties in interest, *i.e.*, the Gemini Users, agreed to arbitrate "any" claim relating to the User Agreement and their use of the Gemini platform. NACA asserts claims on the Gemini Users' behalf and should not be allowed to use D.C. law to displace the users' agreement to arbitrate such claims or assert rights greater than those of the people they purport to represent. D.C. law does not, and could not, disadvantage arbitration and eviscerate an arbitral agreement. Consequently, the Court should compel arbitration, as required by the FAA.

I. The FAA and New York law apply.

The FAA governs any arbitration agreement that is "written" and in a contract "evidencing a transaction involving commerce." 9 U.S.C. § 2. Here, both criteria are met: (i) the User Agreement is in writing, and (ii) it relates to the use of an online crypto-trading platform, which plainly involves interstate commerce. *See United States v. Konn*, 634 F. App'x 818, 821 (2d Cir. 2015) ("There can be no question that the Internet is a channel and instrumentality of interstate commerce."); *Gambo v. Lyft, Inc.*, 642 F. Supp. 3d 46, 53 (D.D.C. 2022) ("Plaintiff alleges that he rented the Lyft scooter in the District of Columbia . . . which is sufficient to establish a transaction involving commerce under the FAA."); *Camilo v. Lyft, Inc.*, 384 F. Supp. 3d 435, 439–40 (S.D.N.Y. 2019) (finding the FAA applied to online agreement containing an arbitration clause);. Moreover, the User Agreement specifically incorporates the FAA as applicable law. Ex. 3 at 57 ("You and Gemini agree that this arbitration provision evidences a transaction involving interstate

commerce and that the [FAA] will govern its interpretation and enforcement and proceedings pursuant thereto."). Under the FAA, a court is empowered to enter an order "in accordance with the terms of the [arbitration] agreement." 9 U.S.C. §§ 3, 4.

State law governs the threshold issue of whether an arbitration agreement exists. *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). In determining whether a valid arbitral agreement exists, courts must "apply ordinary state-law principles that govern the formation of contracts." *Id*. But state-law rules that "discriminat[e]" against or "disfavor[]" arbitration agreements are preempted by the FAA. *Kindred Nursing Ctrs. LP v. Clark*, 581 U.S. 246, 251 (2017); *see, e.g.*, *Progressive Cas. Ins. Co. v. C.A. Reaseguradora Nacional De Venezuela*, 991 F.2d 42, 46 (2d Cir. 1993) (finding that a New York's rule requiring a movant to demonstrate the existence of an "express, unequivocal agreement" to arbitrate, was preempted by the FAA because it improperly increases the burden on the movant).

The User Agreement contains a New York choice of law clause, which provides that the User Agreement should be considered "a contract wholly entered into and wholly performed within the State of New York." Ex. 3 at 56. Therefore, except to the extent it is preempted by the FAA, New York law applies to determine whether an agreement to arbitrate exists. *See, e.g., Kenerson v. Elemetal Direct USA, Inc*., No. 1:24-cv-00156-MSM-LDA, 2024 U.S. Dist. LEXIS 195244, at *4 (D.R.I. Oct. 28, 2024) (applying the state law selected in the agreement's choice of law clause to determine whether the agreement to arbitrate was formed); *Hetrick Cos. LLC v. Iink Corp.,* 710 F. Supp. 3d 467, 482 (E.D. Va. Jan. 3, 2024) (same).

New York has a "long and strong public policy favoring arbitration," because it conserves

the time and resources of the court and the contracting parties.[4] *Stark v. Molod Spitz DeSantis & Stark, P.C.*, 9 N.Y.3d 59, 66 (2007) (citation omitted); *Wu*, 2024 WL 4874383, at *4. And courts are directed to "interfere as little as possible with the freedom of consenting parties' to submit disputes to arbitration," and are "steadfastly discouraged . . . from becoming unnecessarily entangled in arbitrations or from serving as a vehicle to protract litigation." *Wu*, 2024 WL 4874383, at *4 (quotations omitted). Both New York law and the FAA require arbitration here.

II. The arbitration agreement is valid and enforceable as to each of the Gemini Users NACA seeks to represent.

This Complaint admits that the Gemini Users "assent to [the] User Agreement," and the sole claim brought against Gemini is based on the terms of the User Agreement. *See* Compl. ¶¶ 2, 25-39, 67-70. It is undisputed that the Gemini Users accepted the User Agreement and its arbitration clause. Thus, the agreement to arbitrate should be enforced.

But even if the Complaint questioned whether the Gemini Users accepted the User Agreement (it does not), the facts and the settled law dispel any doubts on that question because Gemini Users agreed to the User Agreement—and its arbitration clause—when they registered their accounts on the Gemini platform. Decl. ¶¶ 4-8, Exs. 1-3; *accord* Compl. ¶ 2 (admitting that "Gemini requires its users to assent to its User Agreement…as a condition of creating a Gemini account and buying, selling, or trading cryptocurrency on the Gemini platform."). New York courts consistently recognize the validity of agreements accepted online in circumstances like those presented here. *See, e.g., Meyer v. Uber Techs., Inc.*, 868 F.3d 66, 75–80 (2d Cir. 2017) (collecting cases regarding enforceability of agreements formed online); *Sultan v. Coinbase, Inc.*, 354 F. Supp. 3d 156, 162 (E.D.N.Y. 2019) (enforcing an arbitration clause in a cryptocurrency exchange's

[4] So does the District. *See, e.g., D.C. Pub. Emp. Rels. Bd. v. Fraternal Ord. of Police,* 987 A.2d 1205, 1209 (D.C. 2010) (discussing District of Columbia's "clear policy in favor of enforcing arbitration agreements").

website user agreement*); Fteja v. Facebook, Inc*., 841 F. Supp. 2d 829, 836-41 (S.D.N.Y. 2012) (enforcing a forum selection clause in Facebook's online agreement); *Wu*, 2024 WL 4874383, at *5 (affirming trial court order granting Uber's motion to compel arbitration).

Indeed, multiple courts have already compelled arbitration based on Gemini's user agreement and account registration process. *See Picha v. Gemini Trust Co., LLC*, No. 22-cv-10922, 2024 WL 967182 (S.D.N.Y. Mar. 5, 2024) (granting Gemini's motion to compel arbitration in a putative class action and rejecting all contract formation challenges); *Griffin v. Gemini Trust Co., LLC*, No. 22-cv-1747-CRB (N.D. Cal. Jul. 29, 2022) (same); *Chablaney v. Gemini Trust Co., LLC*, Index No. 650076/2023, Order (Sup. Ct. N.Y. Cnty. Sept. 7, 2023) (same); *Ciceron v. Gemini Trust Co., LLC*, Index No. 652075/2021 (Sup. Ct. N.Y. Cnty. Dec. 3, 2021) (granting Gemini's motion to compel arbitration).[5]

Just like the above cases, the User Agreement that the Gemini Users entered into is an equally valid agreement. *See* Decl. ¶¶ 3-8. At all times, the registration page on Gemini's website notified users that, by creating an account with Gemini, the users "agree to Gemini's USER AGREEMENT." *Id.* ¶¶ 5, Ex. 1. The Gemini Users on whose behalf NACA is suing opened their Gemini accounts using the registration webpage of Gemini's website. Decl. ¶ 3-8, Ex. 2. When doing so, they necessarily accepted the terms of the hyperlinked User Agreement, including its arbitration clause. *Id*., Exs. 2-3. Therefore, a valid and enforceable arbitration agreement exists between Gemini and the Gemini Users, the people whose legal rights are the subject of this litigation. The agreement to arbitrate should be enforced.

[5] Copies of the *Griffin, Chablaney*, and *Ciceron* Orders are attached as **Exhibits B-D** because they are not readily available on Lexis or Westlaw.

III. The arbitration agreement precludes representative actions.

The Gemini Users "agree[d] to arbitrate solely on an individual basis" and waived their right to have their interests litigated or arbitrated by another party. Ex. 3 at 59. The arbitration agreement "**does not permit class action or private attorney general litigation or arbitration of any claims … in any class or representative arbitration proceeding or litigation ('Representative and Class Action Waiver')**." *Id*. at 55-56 (bold font in the original).

The U.S. Supreme Court has repeatedly and emphatically upheld the validity of similar class and collective action waivers in consumer and employment agreements. *See, e.g., Lamps Plus, Inc. v. Varela*, 587 U.S. 176, 189 (2019); *Epic Sys. Corp. v. Murphy Oil USA*, 584 U.S. 497, 525 (2018); *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 232–35 (2013); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344-51 (2011).

Further, both federal and state courts have enforced Gemini's class and representative action waivers. *See Picha*, 2024 WL 967182, at *14; Ex. B at 1, 18; Ex. C at 1, 4. Accordingly, a valid and enforceable class and representative action waiver exists in this case, and it should be enforced by compelling this matter to an individual arbitration.

IV. The CPPA cannot be read in derogation of common law to grant NACA rights greater than the legal rights of the Gemini Users they purport to represent.

In refusing to arbitrate a claim about the User Agreement, NACA contends that it possesses greater legal rights than the individual Gemini Users it purports to represent. While any individual Gemini User bringing claims arising under EFTA or a state consumer protection statute would be bound to the User Agreement's arbitration clause and compelled to arbitrate on an individual basis (as noted in the preceding section), NACA claims that it is not so bound. NACA's novel premise finds no support in the law.

It is a long-settled maxim of common law that a party acting in a representative capacity acquires no greater legal rights than those held by the person they are representing. For example, when a shareholder brings a derivative action on behalf of a corporation, the shareholder is bound by an arbitration agreement that binds the corporation. *In re Salmon Inc. S'holders Derivative Litig.*, 1994 WL 533595, *4 (S.D.N.Y. 1994); *Frederick v. First Union Secs., Inc.*, 100 Cal. App. 4th 694, 701 (2002). Likewise, an "executor stands in the shoes of the deceased and can have no greater rights than the deceased himself." *In re Hanson*, 210 F. Supp. 377, 385 (D.D.C. 1962); *Barnhart v. Am. Concrete Steel Co*., 227 N.Y. 531, 535 (1920) (finding that a contract binding on a decedent is equally binding on his representatives). A subrogee acquires no greater rights than those possessed by the subrogor. *Gov't Emps. Ins. Co. v. Grp. Hospitalization Med. Servs., Inc*., 602 A.2d 1083, 1086 (D.C. 1992); *Millennium Holdings LLC v. Glidden Co*., 176 A.D.3d 423, 423 (1st Dep't 2019). The assignee of a contract can have no greater rights than the assignor. *Rojas v. Cigna Health & Life Ins. Co*., 793 F.3d 253, 258 (2d Cir. 2015) (under New York law); *2301 M St. Coop. Ass'n v. Chromium LLC,* 209 A.3d 82, 93 (D.C. 2019). The list goes on.

It is equally well-settled that statutes in derogation of common law must be strictly construed. *Osbourne v. Capital City Mortg. Corp*., 727 A.2d 322, 325 (D.C. 1999); *accord Morris v. Snappy Car Rental*, 84 N.Y.2d 21, 28 (N.Y. 1994). "Indeed, 'no statute is to be construed as altering the common law, farther than its words import.'" *Osbourne*, 727 A.2d at 325 (quoting *Monroe v. Foreman*, 540 A.2d 736, 739 (D.C. 1988)). For example, in *Osborne,* a consumer argued that the CPPA's remedial nature lowered a consumer litigant's burden of proof, such that the consumer was not required to offer the clear and convincing evidence traditionally required to plead and prove fraud claims at common law. *Id.* at 325. Finding that nothing in the CPPA

modified the common law rule because the CPPA was silent on the subject, the Court rejected the consumer's effort to read words into the CPPA that were not there. *Id.*

The same logic applies here. As in *Osborne,* there is no express language in Section 28-3905(k)(1)(D)(i) of the CPPA (or elsewhere) modifying the long-settled common law rule that a party acting in a representative capacity has not greater rights than the person whose interests they represent. Indeed, this presents a simpler case than *Osborne*, which concerned an issue upon which the CPPA was silent. Here, the CPPA text explicitly rejects any notion that the common law rule is abrogated, by confirming that NACA may only act "*on behalf of* the interests of a consumer or a class of consumers" and can only bring an action "*if the consumer or class could bring an action*." D.C. Code § 28-3905(k)(1)(D)(i) (emphasis added). The statutory language is clear that NACA's rights to sue, if any, derive from and cannot exceed those of the individuals they hope to represent. These individuals—the Gemini Users—cannot "bring an action" because an "action" is a "judicial proceeding." *Bd. of Trs. of Univ. of D.C.*, 114 A.3d at 1286 (quoting BLACK'S LAW DICTIONARY (10th ed. 2014)). The Gemini Users, however, have agreed to resolve their disputes with Gemini exclusively by arbitration, and "[a]rbitration is not a 'judicial proceeding.'" *McDonald*, 466 U.S. at 288 (1984).

To sum up, NACA "must identify 'a consumer or a class of consumers' that could bring suit in their own right." *Ctr. for Inquiry Inc. v. Walmart*, 283 A.3d 109, 115 (D.C. 2022) (citing *Animal Legal Def. Fund v. Hormel Foods Corp.*, 258 A.3d 174, 185 (D.C. 2021)). NACA cannot do so. The Gemini Users are bound by the User Agreement's arbitration clause, and NACA cannot rely on Section 28-3905(k)(1)(D)(i) to litigate an action on behalf of those Gemini Users. The Court should compel arbitration of this matter.

V. The FAA Preempts D.C. Code § 28-3905(k)(1)(D)(i) to the extent the statute is read as allowing NACA to evade the Gemini Users' agreement to arbitrate.

NACA's theory is that CPPA § 28-3905(k)(1)(D)(i) supersedes the arbitration agreement between Gemini and the Gemini Users, allowing NACA to sue in court in instances where the people it purports to represent could not. This argument fails as a matter of law because, to the extent CPPA § 28-3905(k)(1)(D)(i) can even be read to let NACA avoid arbitration (which it cannot, for reasons noted above), it would conflict with the FAA and be preempted.

Congress enacted the FAA to "reverse the longstanding judicial hostility to arbitration," *Green Tree Fin. Corp.-Ala. v. Randolph,* 531 U.S. 79, 89 (2000), and to "ensure the enforcement of arbitration agreements according to their terms so as to facilitate informal, streamlined proceedings." *Concepcion,* 563 U.S. at 344. And in seeking to address hostility to arbitration, the FAA prohibits state law from displacing arbitration agreements through novel means. "Just as judicial antagonism toward arbitration before the [FAA's] enactment 'manifested itself in a great variety of devices and formulas declaring arbitration against public policy,' *Concepcion* teaches that we must be alert to new devices and formulas that would achieve much the same result today." *Epic*, 584 U.S. at 509 (quoting *Concepcion*, 563 U.S. at 342).

The provisions of the FAA also "ensure that private agreements to arbitrate are enforced according to their terms,*" Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.,* 559 U.S. 662, 682 (2010) (citation and internal quotation omitted), and the FAA preempts state-law rules that would interfere with such enforcement. *Am Exp. Co. v. Italian Colors Rest.,* 570 U.S. 228, 233 (citations, alterations, and emphasis omitted).

The Supreme Court has also repeatedly held that the FAA preempts state laws that prohibit class arbitration waivers in consumer contracts. *Concepcion*, 563 U.S. at 344-51 (holding the FAA preempted California's judicial rule regarding unenforceability of class arbitration waivers in

consumer contracts); *see also Italian Colors Rest.*, 570 U.S. 228 at 235–38 (finding that the FAA does not permit courts to invalidate a contractual waiver of class arbitration on the ground that plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery). And the Supreme Court has squarely rejected that arbitration agreements may be cast aside by claiming that they are adhesive: "the times in which consumer contracts were anything other than adhesive are long past." *Concepcion*, 563 U.S. at 346–47 (rejecting the argument that class arbitration waivers should not be enforced in consumer contracts of adhesion); *Carbajal v. H & R Block Tax Servs., Inc.*, 372 F.3d 903, 906 (7th Cir. 2004) ("[F]ew consumer contracts are negotiated one clause at a time."). Contrary to NACA's suggestion that standard agreements harm consumers, Compl. ¶ 9, "[f]orm [agreements] reduce transactions costs and benefit consumers because, in competition, reductions in the cost of doing business show up as lower prices." *Carbajal*, 372 F.3d at 906.

The Supreme Court has similarly rejected that an individual whose arbitration agreement is silent on the issue of class arbitration may nonetheless be compelled to arbitrate on a class basis. *Lamps Plus, Inc.*, 587 U.S. at 189. "[The] shift from individual to class arbitration is a 'fundamental' change . . . that 'sacrifices the principal advantage of arbitration' and 'greatly increases risks to defendants.'" *Id*. at 182 (holding that a party may not be compelled under the FAA to submit to class arbitration unless the party *agreed* to do so) (citing *Concepcion*, 563 U.S. at 348). In keeping with this rule, the Supreme Court upheld the waivers of collective actions under the Fair Labor Standards Act. *Epic*, 584 U.S. 497, 524–25 (upholding the parties' right to individualized arbitration proceedings rather than class or collective action procedures).[6]

[6] The federal policy in favor of individual arbitrations has proven wise, and the empirical evidence of the benefits of arbitration is plentiful: consumers spend less time and money *and* recover higher awards in individual arbitrations

The indisputable enforceability of arbitration agreements, the prohibition on class arbitration when arbitration agreements do not provide for it, and the FAA's preemption of rules that seek to disadvantage arbitration through "new devices and formulas" frame the preemption issue here. *Epic*, 584 U.S. at 509 (quoting *Concepcion*, 563 U.S. at 342). Against that backdrop, the FAA not only preempts "any state rule discriminating on its face against arbitration," but also can preempt "rules that are generally applicable as a formal matter." *Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639, 650 (2022) (citations omitted).

Here, NACA seeks to use a general provision of D.C. law addressing standing, D.C. Code § 28-3905(k)(1)(D)(i), to avoid arbitration provisions that the consumers that it seeks to represent have accepted. As explained above, there is no question that the Gemini Users that NACA seeks to represent are obliged to use arbitration for the claims that NACA seeks to pursue. And there is also no question that the Gemini Users that NACA seeks to represent have chosen to waive relief through a private attorney general action—a waiver that captures NACA's suit. In short, this case involves a multiparty, representative, private dispute on behalf of multiple Gemini Users who entered into an arbitration agreement with Gemini. This is the exact scenario that the Supreme Court has repeatedly found inconsistent with both the letter and spirit of the FAA—and is therefore preempted by it—because NACA's lawsuit takes away Gemini and Gemini Users' "valid, irrevocable, and enforceable" right to arbitrate. 9 U.S.C. § 2.

The fact that D.C. Code § 28-3905(k)(1)(D) does not expressly target arbitration by name is irrelevant. By giving NACA statutory standing to bring in court otherwise arbitrable claims, Section 28-3905(k)(1)(D) "target[s] arbitration . . . by more subtle methods, such as by 'interfering

than in litigation. *See, e.g.,* Nam D. Pham & Mary Donovan, NDP Analytics, *Fairer, Faster, Better III: An Empirical Assessment of Consumer and Employment Arbitration* (March 2022).

with fundamental attributes of arbitration.'" *Epic*, 584 U.S. at 497–98 (quoting *Concepcion*, 563 U.S. at 344). Such rules are "not immune to preemption by the FAA." *Viking River Cruises, Inc.*, 596 U.S. at 650–51 (citations omitted). The FAA's "right to enforce arbitration agreements . . . would not be a right to *arbitrate* in any meaningful sense if . . . state law could be used to transform 'traditiona[l] individualized . . . arbitration' into the 'litigation it was meant to displace.'" *Id.* (quoting *Epic*, 584 U.S. at 508–09); *see also Fantastic Sams Franchise Corp. v. FSRO Ass'n, Ltd.*, 824 F. Supp. 2d 221, 225 (D. Mass. 2011) (compelling the association's lawsuit on behalf of its members to individual arbitrations and agreeing with the defendant that the lawsuit was an "'attempted end-run around' a specific prohibition against class-wide or collective action in the [members'] agreements").

Moreover, precluding NACA from suing Gemini in court on behalf of Gemini Users who signed the arbitration agreement will not impede the CPPA's consumer protection function because Gemini Users can, and do, arbitrate the EFTA claims. *See Green Tree Fin. Corp.-Ala.*, 531 U.S. at 90 ("[S]o long as the prospective litigant effectively may vindicate his or her statutory cause of action in the arbitral forum, the statute serves its functions.") (internal punctuation); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991) ("So long as the prospective litigant effectively may vindicate his or her statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.") (citations and quotation marks omitted). The FAA preempts the operation of § 28-3905(k)(1)(D)(i) in this case, and NACA's claims should be compelled to arbitration.

VI. The threshold issues of arbitrability have been delegated to the arbitrator.

The Court should not decide any other issue beyond confirming that an arbitration agreement exists.

The United States Supreme Court has repeatedly held that "if a valid [arbitration] agreement exists, and if the agreement delegates the arbitrability issue to an arbitrator, *a court may not decide the arbitrability issue*." *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 586 U.S. 63, 69 (2019) (emphasis added); *see also Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 69–70 (2010) ("An agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other.").

Accordingly, "[j]ust as a court may not decide a merits question that the parties have delegated to an arbitrator, a court may not decide an arbitrability question that the parties have delegated to an arbitrator." *Henry Schein*, 586 U.S. at 69. And the Supreme Court "has consistently held that parties may delegate threshold arbitrability questions to the arbitrator, so long as the parties' agreement does so by 'clear and unmistakable' evidence." *Id.* (quoting *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)); *see also, e.g.*, *Contec Corp. v. Remote Sol., Co., Ltd.*, 398 F.3d 205, 209–11 (2d Cir. 2005) (enforcing agreement to delegate questions of "existence, scope or validity" of the agreement to the arbitrator); *Hidalgo v. Amateur Athletic Union of U.S., Inc.*, 468 F. Supp. 3d 646, 661 (S.D.N.Y. 2020) (enforcing delegation clause).

Thus, where an arbitration agreement includes a delegation clause, "neither the Supreme Court, nor this Court, nor *any* court, has the authority to decide whether and to what extent these parties' disputes are arbitrable." *Revis v. Schwartz*, 192 A.D.3d 127, 141 (2d Dep't 2020) (recognizing that it would be error to inquire into the scope of an arbitration agreement that includes a delegation clause) (emphasis in original), *aff'd*, 38 N.Y.3d 939 (2022). Indeed, if the parties delegated the "threshold arbitrability questions to [the] arbitrator," the court cannot refuse to send the dispute to the arbitration *even if* the argument that the arbitration agreement applies to

the particular dispute is wholly groundless." *Henry Schein,* 586 U.S. at 68–69.

The User Agreement expressly provides that "*any dispute about the scope of this User Agreement to arbitrate and/or the arbitrability of any particular dispute shall be resolved in arbitration in accordance with this section.*" Ex. 3 at 56 (emphasis added). This language is clear and unmistakable evidence of delegation. *See, e.g.*, *Bar-Ayal v. Time Warner Cable Inc.*, No. 03-cv-9905, 2006 WL 2990032, at **7–8 (S.D.N.Y. Oct. 16, 2006) (finding that a clause providing that "'the arbitrability of disputes shall be determined by the arbitrator' . . . constitutes sufficiently clear and unmistakable evidence that the parties intended to have issues of arbitrability decided by the arbitrator"); *accord Monarch Consulting, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 26 N.Y.3d 659, 669, 675–76 (2016) (enforcing a similar delegation clause). As a result of this delegation clause in the User Agreement, the Court need not go further to consider whether NACA, acting in a representative capacity, is bound by the arbitration agreement, and therefore should compel arbitration.

VII. NACA is bound by the arbitration agreement.

Even if the parties did not delegate the threshold arbitrability issues to the arbitrator and the Court were to address whether NACA is bound by the arbitration agreement, the answer remains the same: NACA cannot escape the arbitration clause of the User Agreement while NACA's claims flow directly from, and are based entirely on, this User Agreement.

The United States Supreme Court made clear that an arbitration agreement can be enforced against a non-party based on the "traditional principles of state law," including but not limited to "assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and *estoppel*." *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 631 (2009) (reversing the trial court's holding that nonparties were barred from enforcing an arbitration

agreement) (emphasis added, citations and internal quotations omitted). Because the User Agreement contains a New York choice of law provision, New York law applies to determining whether NACA is bound by the arbitration agreement despite being a non-party to it. *See Mars, Inc. v. Szarzynski*, No. CV 20-01344 (RJL), 2021 WL 2809539, at *6 (D.D.C. July 6, 2021) ("Whether Mars is required to arbitrate its claims against Szarzynski depends on whether Mars, despite being a nonsignatory, is bound by the [] Contract. This question is governed by the law of contract."); *see also Thomson-CSF, S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773, 776 (2d Cir. 1995) (explaining that "ordinary principles of contract and agency" determine whether a non-signatory is bound by an arbitration clause).

First, NACA's claims are based entirely on the User Agreement. Under these circumstances, the well-accepted theories of estoppel compel NACA to arbitration:

> [A] nonsignatory can embrace a contract containing an arbitration clause, thus binding it to arbitration by seeking to enforce the terms of that contract *or asserting claims that must be determined by reference to that contract*. A nonsignatory may not cherry-pick beneficial contract terms while ignoring other provisions that do not benefit it or that it would prefer not to be governed by such as an arbitration clause.

21 Williston on Contracts, § 57:19 Obligations and rights of persons who are not parties to arbitration agreement (4th ed. May 2024 update) (citations omitted; emphasis added).

Consistent with the hornbook rule, in New York, "a nonsignatory who exploits a contract containing an arbitration clause is estopped from repudiating that clause." *Nortek Inc. v. ITT LLC*, No. 21-CV-03999 (PMH), 2022 WL 656896, at *2 n.6 (S.D.N.Y. Mar. 4, 2022) (citing cases). This rule applies "to situations in which a nonsignatory has obtained a real and tangible benefit from the relevant agreement . . . *by bringing an action of its own based upon the language of the contract* or . . . taking over performance thereunder." *Fritch v. Bron*, Index No. 605622-21, 2022

WL 610335, at *3 (N.Y. Sup. Ct. Suffolk Cnty. 2022) (finding no equitable estoppel where the non-signatory did *not* commence an action based on an agreement containing an arbitration clause) (emphasis added, citations omitted); *Kramer Levin Naftalis & Frankel LLP v. Cornell*, No. 653381/2016, 2016 WL 11067269, at *4 (Sup. Ct. N.Y. Cnty. July 14, 2016) (reiterating the same principle). "Plaintiffs cannot have it both ways. They cannot rely on the contract, when it works to their advantage, and repudiate it when it works to their disadvantage. To permit them to do so would not only flout equity, it would do violence . . . to the congressional purpose underlying the Federal Arbitration Act." *Tepper Realty Co. v. Mosaic Tile Co*., 259 F. Supp. 688, 692 (S.D.N.Y. 1966).

Here, NACA's entire Complaint is based on the User Agreement. According to NACA, multiple provisions of the User Agreement—which NACA quotes at length in the Complaint—violate the EFTA and by extension violate the CPPA. Compl. ¶¶ 27-39, 67-69. NACA would have no claim against Gemini at all if the users had not availed themselves of Gemini's services and entered into the User Agreement. Thus, NACA "exploits" the User Agreement by relying on it to support NACA's claims. Consequently, NACA is bound by the arbitration agreement.

VIII. NACA's claims against Gemini fall within the scope of the arbitration agreement.

Although the Court should not reach this issue in light of the User Agreement's delegation clause, NACA's claims do fall within the scope of the arbitration clause in the User Agreement. The User Agreement broadly provides that "any controversy, claim, or dispute arising out of or relating to this User Agreement or your relationship with Gemini—past, present, or future —shall be settled solely and exclusively by binding arbitration." Ex. 3 at 56.

The entire Complaint is premised exclusively on the User Agreement, Compl. ¶¶ 27-39, 67, and the Gemini Users' relationship with Gemini, Compl. ¶¶ 63-69. As such, NACA's claims

fall within the broad scope of the arbitration agreement. *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614, 624 n.13 (1985) ("[I]nsofar as the allegations underlying the statutory claims touch matters covered by the [the relevant agreement], the Court of Appeals properly resolved any doubts in favor of arbitrability.").

IX. This action should be stayed pending arbitration.

Section 3 of the FAA provides that courts "shall on application of one of the parties stay the trial of the action until such arbitration has been had." 9 U.S.C. § 3; *Smith v. Spizzirri*, 601 U.S. 472, 478 (2024). To the extent D.C. or New York state law applies—notwithstanding the Gemini Users' agreement that the FAA governs these "proceedings," Decl. Ex. 3 at 57—it also compels a stay of this action pending an arbitration. *See* D.C. Code Ann. § 16-4407(f); N.Y. C.P.L.R. § 7503(a). Accordingly, if the Court finds that arbitration is appropriate, this action should be stayed until an arbitration is completed and a final award has been issued.

CONCLUSION

For the foregoing reasons, Gemini Trust Company, LLC respectfully requests that the Court enter an order (i) compelling NACA's claims to arbitration in accordance with the User Agreement[7]; and (ii) staying further proceedings before this Court pending the outcome of the arbitration.

REQUEST FOR ORAL ARGUMENT

Gemini Trust Company, LLC respectfully requests an oral argument on this motion.

Dated: New York, New York
February 14, 2025

BAUGHMAN KROUP BOSSE PLLC

By /s/ Andrew C. Bosse

Andrew C. Bosse (DC Bar No. 90016021)
Allison Melton (DC Bar No.1015822)

[7] The arbitrator will decide whether NACA is allowed to pursue such claims in arbitration.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 14, 2025, a copy of the foregoing was served via EFile DC to all counsel of record.

By /s/ Andrew C. Bosse
Andrew C. Bosse