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 Event: Remote Motion Hearing
May 15, 2025 at 2:00pm

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT GEMINI TRUST COMPANY, LLC'S MOTION TO COMPEL ARBITRATION

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I. INTRODUCTION

Defendant Gemini Trust Company, LLC ("Gemini") seeks to force Plaintiff National Association of Consumer Advocates, Inc. ("NACA") into arbitration based on agreements that NACA never signed, never agreed to, and which do not govern this lawsuit. The motion rests on an erroneous premise that Gemini's arbitration agreements extend beyond their contractual scope to foreclose NACA's independent statutory claims. This argument is legally unsound and must be rejected.

The D.C. Consumer Protection Procedures Act ("CPPA"), D.C. Code § 28-3901 et seq., explicitly grants public interest organizations such as NACA the right to bring consumer protection lawsuits. *See Animal Legal Def. Fund v. Hormel Foods Corp*., 258 A.3d 174 (D.C. 2021) (holding that if an organization meets the CPPA's criteria, it does not need to establish any additional basis for standing). The federal court's remand order in this case reaffirmed this point, emphasizing that the CPPA is a distinct statutory enforcement mechanism operating outside of federal Article III standing requirements. NACA v. Gemini. *Nat'l Ass'n of Consumer Advocs. v. Gemini Tr. Co., LLC*, No. CV 24-2356 (JDB), 2024 WL 4817122, at *1 (D.D.C. Nov. 18, 2024).

Despite this, Gemini attempts to misuse arbitration principles to block this lawsuit, arguing that NACA is bound by arbitration agreements allegedly signed by Gemini users and that the FAA preempts the CPPA's grant of authority. These arguments fail. First, NACA is not bound by Gemini's arbitration agreement because it never agreed to arbitrate. Second, NACA is not bound by consumers' purported arbitration agreements because its right to proceed under the CPPA is separate, and does not flow, from any consumer's contractual rights. Third, Gemini's argument that consumers waived NACA's right to file an action under the CPPA is invalid and contrary to public policy. Fourth, the delegation clause does not apply to non-signatory NACA. And finally,

the arbitration agreement is procedurally and substantively unconscionable under D.C. law. For these reasons, Gemini's motion should be denied.

II. ARGUMENT

A. NACA has not agreed to and is not bound by Gemini's UA.

"[T]he first question in any arbitration dispute must be: What have these parties agreed to?" *Coinbase, Inc. v. Suski*, 602 U.S. 143, 148 (2024). Here, the answer is clear: NACA has not agreed to arbitrate anything. There is no dispute that NACA is not a signatory to the agreement. That alone should end the inquiry and compel denial of Gemini's Motion.

It is blackletter law that, before a court can enforce an arbitration agreement, it must first determine that the parties agreed to arbitrate. Section 4 of the Federal Arbitration Act (FAA) provides that a federal court can compel arbitration only "upon being satisfied that the making of the agreement for arbitration . . . is not in issue." 9 U.S.C. § 4. "[A] party may not be compelled under the FAA to submit to . . . arbitration unless there is a contractual basis for concluding the party agreed to do so." *Viking River Cruises, Inc. v. Moriana,* 596 U.S. 639, 651 (2022).

Here, NACA has not signed an arbitration agreement, and the Supreme Court has repeatedly held that parties who have not agreed to arbitrate cannot be forced to. For example, in *EEOC v. Waffle House*, the Supreme Court held that the EEOC could not be compelled to arbitrate because it was not a signatory to the arbitration contract and had an independent statutory basis for bringing suit. *EEOC v. Waffle House, Inc*., 534 U.S. 279, 294 (2002). The Court held that "nothing in the [FAA] authorizes a court to compel arbitration of any issue, or by any parties, that are not already covered in the agreement." *Id*. at 289. The Court was clear: "It goes without saying that a contract cannot bind a nonparty." *Id*. at 294. Similarly in *Air Line Pilots Assoc*., the Supreme Court held that non-union members who were not bound by the union membership agreement that contained an arbitration clause could not be compelled to arbitrate their claims. *Air Line Pilots*

Assoc. v. Miller, 523 U.S. 866, 876 (1998) ("Ordinarily, arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.") (cleaned up).

Under *Waffle House* and *Air Line Pilots Association*, neither of which Gemini addresses, NACA cannot be forced into an arbitration it never agreed to.[1] *See Waffle House*, 534 U.S. at 294; *Air Line Pilots Assoc.*, 523 U.S. at 876; *Bailey v. Fed. Nat'l Mortg. Ass'n*, 209 F.3d 740, 746-47 (D.C. Cir. 2000) (refusing to compel plaintiff's claims to arbitration where plaintiff had not agreed to arbitrate); *Jung v. Ass'n of Med. Colleges*, 300 F. Supp. 2d 119, 156 (D.D.C. 2004) ("It also seems self evident that entities that are not parties to a contract containing an arbitration agreement are not entitled to arbitrate their disputes.").

B. D.C. consumers' purported arbitration agreements do not bind NACA.

Since Gemini cannot show that NACA agreed to arbitrate its claims, it instead argues that NACA is bound by D.C. consumers' purported agreements to arbitrate. Gemini argues that the Gemini Users "accepted the User Agreement" and its arbitration clause when *they* registered *their* accounts on the Gemini platform. Motion, p.8. Indeed, the vast majority of Defendant's Motion is grounded on the purported arbitration agreement between Gemini and Gemini Users. But whether or not Gemini Users agreed to arbitrate their claims – and as discussed below, that is disputed – NACA is the plaintiff in this lawsuit and did not agree to arbitrate. Gemini cannot rewrite fundamental contract principles by assertion alone.

[1] Gemini may argue in Reply, as it argued before the federal court, that *Waffle House* could be distinguished because it involved a government agency. But *Waffle House*'s reasoning did not turn on the fact that the EEOC was a government agency; rather, the Supreme Court's analysis relied on the principle that "a contract cannot bind a nonparty," 534 U.S. at 294, and that the EEOC (like NACA here) had statutory authorization to bring actions in the public interest that the Federal Arbitration Act did not require it to "relinquish . . . if it had not agreed to do so." *Id.* at 294-96.

1. Consumers' agreements do not bind NACA because NACA's right to bring this lawsuit is statutory, not contractual.

a. The CPPA confers independent enforcement authority rather than derivative rights.

First, consumers' purported agreements to arbitrate cannot bind NACA to arbitration because the CPPA confers independent standing. NACA's right to bring this action comes from an independent grant of statutory standing to enforce D.C. consumer protection law. Thus, NACA is not acting as a stand-in for any particular consumer, but as a private attorney general. That fact distinguishes this case from the representative scenarios that NACA raises in its motion and strongly counsels against compelling arbitration here.

The legislative history of the CPPA confirms that public interest organizations bringing suit under § 3905(k)(1)(D) act as government enforcers rather than proxies for consumers. The CPPA authorizes public interest organizations like NACA to bring claims "on behalf of the interests of a consumer or a class of consumers" for relief from a trade practice in violation of a law of the District. *See* D.C. Code § 28-3905(k)(1)(D). The law does not require the public interest organization to stand in the shoes of the consumer; a public interest organization like NACA need not show that it has the same rights or responsibilities with respect to the defendant as the "consumer or [] class of consumers." Rather, all that is required is a "nexus to the interests involved" sufficient to "adequately represent those interests." *Id.*

In this regard, NACA can bring this action so long as its mission is sufficiently related to the subject matter of the lawsuit; its right under the CPPA to act "on behalf of the interests of" consumers does not flow from consumers' agreements. This makes sense: at the time the D.C. Council enacted the public interest enforcement provisions of the CPPA, the Council envisioned that interested persons could step not into the shoes of individual consumers but into the shoes of the Department of Consumer and Regulatory Affairs:

> [B]eginning in 1994, as the result of budget shortfalls, the City Council indefinitely suspended the Department's enforcement authority. In April 1999, the Antitrust, Trade Regulation and Consumer Affairs Section of the D.C. Bar published a report titled Consumer Protection in the District of Columbia Following the Suspension of DCRA Enforcement of the Consumer Protection Procedures Act ("Bar Report") … That report cited "critical shortfalls" in the District's consumer protection system. It also noted that "suspension of DCRA's authority removed the primary mechanism for halting unlawful trade practices["] … The report recommended, among other things, that public interest organizations and the private bar "be statutorily enabled to seek injunctive relief and disgorgement of illegal proceeds.
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> Following issuance of the Bar Report, representatives of the District of Columbia Bar, DCRA, and the Office of Corporation Counsel, among others, worked together to propose legislation to address the perceived inadequacies in the system for consumer protection enforcement in the District of Columbia.

Margolis v. U-Haul Intern., 2009 WL 5788369 (D.C. Super. Dec. 17, 2009).

The proposed legislation became the CPPA, which was later explicitly amended to allow public interest organizations to bring suit even where they were not themselves injured. *See generally Animal Legal Defense Fund v. Hormel Foods Grp.*, 258 A.3d 174 (D.C. 2021) (describing legislative history of § 28-3905(k)(1)(D)). The Council was careful to ensure that public interest organizations like NACA could "act as private attorneys general for the public under circumstances that ensure the organization has a sufficient stake *of its own* to pursue the case with appropriate zeal." *See* Report on Bill 19-0581, D.C. Council Comm. On Pub. Servs. & Cons. Aff., at 2 (Nov. 28, 2012). The Council recognized that organizations like NACA "can have a special suitability for promoting" consumer interests "*through court action* in appropriate circumstances, and may be able to do so in situations where it is not feasible for the affected consumers to do so personally." *Id.* at p. 6 (emphasis added). In this way, the Council explicitly created a statutory enforcement authority for public interest organizations that did not depend on consumers' individual acts or agreements.

b. Since NACA's right to bring this action is independent, it is not limited by individual consumers' contracts.

Because NACA's right to bring this action comes from an independent grant of statutory enforcement authority it is not limited by individual consumers' contracts and need not arbitrate. The Council's grant of enforcement authority to NACA does not turn NACA into a one-to-one proxy for any individual consumers.

This is precisely the reasoning adopted by the D.C. Court of Appeals in *Animal Legal Def. Fund v. Hormel Foods Corp.*, 258 A.3d 174, 185 (D.C. 2021), which held that the CPPA's organizational standing provision is a deliberate departure from traditional Article III standing and representative action requirements. As a result, NACA's role is not equivalent to the shareholders, executors, subrogees and assignees that Gemini describes in its motion. *See* Motion, p. 11. Each of the categories of common-law representatives that Gemini lists derives its authority to act directly from the persons they represent, can bind those persons, and can be bound by them. And each of those examples seeks to enforce the rights of another.

But as described above, NACA's authority comes from an independent statutory enforcement authority, not from individual consumers. And unlike Gemini's examples, NACA's acts on behalf of consumers do not bind the consumers. NACA has no right, for example, to enter into new contracts on behalf of D.C. Gemini users, as an executor could contract on behalf of an estate. NACA is not seeking damages for any individual breach of the UA or asking the Court to enforce the UA against Gemini, as an assignee could enforce a contract. By bringing this action, NACA is not enforcing any consumer's individual rights at all; it is acting in the role of a government enforcer. Unlike a shareholder derivative suit, subrogation claim, or executor action, NACA's standing is created by statute and exists regardless of whether an individual consumer chooses to bring a claim. The examples that Gemini gives—each of which seeks explicitly to

enforce the individual rights of another—have no relevance to the independent statutory authority that empowers NACA to act here.

The CPPA also does not say that NACA's right to sue is limited by the contractual defenses available to individual consumers as there is no requirement that NACA's claims be identical to those of particular consumers. *See, e.g.*, *Earth Island Institute v. Coca-Cola Co.*, 321 A.3d 654, 663 (D.C. 2024). Instead, public interest organizations have the authority to bring suit where the requirements of § 3905(k)(1)(D) are satisfied. For example, in *Earth Island Institute*, the Court of Appeals rejected the argument that a nonprofit plaintiff needed to show that any consumer had seen "the precise mélange of statements that Earth Island has pieced together in advancing its suit." 321 A.3d at 663. Whether any such consumer existed was "neither here nor there," because Earth Island had identified the group on whose behalf it was acting and had a sufficient nexus to the subject matter of the lawsuit. *See id.* Likewise here, there is no requirement that NACA's claims be identical to those of any consumer or that NACA serve as a stand-in for any particular consumer.

The District of D.C. applied similar logic in *Equal Rights Center v. Uber Techs., Inc.*, 525 F. Supp. 3d 62 (D.D.C.) in which it found that arbitration agreements did not preclude an action by a nonprofit membership organization on behalf of its members. *Id.* at 81. The court explained that the proposed representative action did not require individual participation that would be affected by the existence, or not, of arbitration agreements. *See id.* Moreover, since the plaintiff only sought "declaratory and injunctive relief on behalf of its members," which "do not require individualized proof," consumers' individual arbitration agreements had no bearing on the outcome. *See id.* Although this CPPA action asserts a different cause of action, the same reasoning applies. There is no requirement of individualized participation by consumers in this action such that arbitration agreements would bear on NACA's right to proceed.

The various versions of Gemini's UA that have existed over time illustrate why it is relevant that NACA's authority to act is separate from, rather than derivative from, consumer contracts. While Gemini's supporting declaration obscures this by broadly claiming that all versions of its UA contain an arbitration agreement, in fact, its arbitration agreements have changed over time. As of January 26, 2021, for example, Gemini's UA required signatories to arbitrate their agreements before JAMS.[2] Exhibit 2 to the Thomas declaration lists many consumers who created their accounts in 2021 when that version was operative. Yet Gemini does not explain how the Court is to decide *which* consumer's purported agreement to arbitrate binds NACA. Is NACA required to arbitrate before JAMS because one of the represented consumers agreed to arbitrate there, or before National Arbitration and Mediation as the current version provides? Gemini does not explain, nor could it: since NACA is not standing in for any particular consumer, no particular consumer's agreement can or should require NACA to arbitrate.

In short, NACA is not acting as a proxy for consumers or enforcing *their* rights, NACA's authority under the CPPA is simply separate from those agreements. And since arbitration is a matter of contract, those contracts cannot compel NACA to arbitrate.

c. NACA's independent authority to act under the CPPA does not derogate common law or expand consumers' rights.

The independent authority that the D.C. Council granted NACA and similar organizations also does not derogate common law or impermissibly expand consumers' rights. Gemini argues that the CPPA should not be interpreted to override arbitration agreements between Gemini and its users. But NACA is not asking the Court to "override" Gemini's arbitration agreements with consumers; those agreements simply don't bind NACA.

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[2] *See* https://web.archive.org/web/20210126144047/https://www.gemini.com/legal/user-agreement#section-governing-law

Nor is the CPPA in derogation of common law—it is an affirmative statutory grant of enforcement authority to ensure that consumer protections are meaningful. D.C. courts have already recognized the CPPA as a distinct enforcement mechanism that goes beyond private litigation. See *Morris v. Fort Myer Constr. Corp.*, 308 A.3d 73, 78 (D.C. 2023). Furthermore, § 28-3905(k)(1)(D) grants rights *to NACA*, not individual consumers. Accordingly, Gemini's attempt to frame the CPPA as improperly abrogating common law or expanding consumers' rights is misplaced. The statute was enacted precisely because common-law mechanisms were insufficient to fully protect consumers from deceptive practices, and it granted new enforcement rights to public interest organizations like NACA to enforce D.C. law.[3]

2. Gemini's attempt to force arbitration through equitable estoppel fails.

Gemini argues that consumers' purported agreements to arbitrate should bind NACA under equitable estoppel. This argument is meritless. Equitable estoppel applies only when a non-signatory seeks to enforce a contract while avoiding its arbitration clause. *See, e.g.*, *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 631 (2009). Here, NACA is challenging the legality of Gemini's contract, not seeking to enforce it. NACA does not need to enforce the Gemini User Agreement to succeed on the merits of its claim. Thus, the position that NACA must be equitably estopped from rejecting the arbitration agreement in Gemini's UA should be denied.

Since NACA never agreed to the UA, it is not bound by the New York choice of law provision. But even under New York law, Gemini's argument fails. By bringing a lawsuit to enjoin enforcement of Gemini's unlawful and coercive UA, NACA is not trying to "have it both ways." Motion, p. 20. Exploitation of a contract in the context of estoppel means seeking to *enforce* the contract to benefit the non-signatory, not seeking judicial declarations and injunctions prohibiting

[3] In any event, it is well-established principle that legislatures have the authority to create new statutory rights that supersede common-law doctrines.

the contract's enforcement. Gemini's own cases confirm this.[4] *Fritch v. Bron*, 74 Misc. 3d 1217(A), at *3 (N.Y. Sup. Ct. Suffolk Cnty. 2022), and *Kramer Levin Naftalis & Frankel LLP v. Cornell*, 2016 WL 11067269, at *4 (N.Y. Sup. Ct. N. Y. Cnty. July 14, 2016) support NACA's position that a nonsignatory cannot be compelled to arbitrate where there is no evidence of any affirmative steps taken to exploit or derive a benefit flowing from the agreement.

NACA has not filed a breach of contract action or an action dependent on the rights and obligations of the contract. NACA's claim is expressly about the contract *itself* violating the law and Gemini engaging in an unfair and deceptive trade practice. NACA is not a party to the User Agreement. Gemini has not shown (and cannot show) that NACA ever received any benefits, direct or otherwise, from its UA. Nor has Gemini identified any cases stating that a lawsuit challenging the legality of a contract is a "benefit of" the contract.

Finally, it is not even clear that Gemini's estoppel cases remain good law after the Supreme Court's decision in *Morgan v. Sundance, Inc*., 596 U.S. 411, 418 (2022). *See Largan Precision Co., Ltd. v. Fisch Sigler LLP*, 610 F. Supp. 3d 209, 215 (D.D.C. 2022) (citing *Morgan v. Sundance, Inc.,* 596 U.S. at 418). As the *Largan* court explained, the "policy" of a presumption in favor of arbitrability was not to "favor arbitration over litigation," but to counter "the judiciary's longstanding refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts" 610 F. Supp. 3d at 215. "The Supreme Court has "never held that this policy overrides the principle that a court may submit to arbitration only those disputes that

[4] *See Nortek Inc. v. ITT LLC*, 2022 WL 656896, at *2 n. 6 (S.D.N.Y. March 4, 2022) (plaintiff sought to obtain benefits of indemnification under contract containing arb clause); *CMB Infrastructure Grp. IX, LP v. Cobra Energy Inv. Fin., Inc*., 572 F. Supp. 3d 950, 976 (D. Nev. 2021) (plaintiff sought to enforce guaranty included in contract); and *Carvant Fin. LLC v. Autoguard Advantage Corp*., 958 F. Supp. 2d 390, 396–97 (E.D.N.Y. 2013) (plaintiff "enjoyed a lien on each motor vehicle and thus received a 'direct benefit' from the agreements").

the parties have agreed to submit." *Id*. (cleaned up); *see also Mastrobuono v. Shearson Lehman Hutton, Inc*., 514 U.S. 52, 57 (1995) (stating that the federal "pro-arbitration policy does not operate without regard to the wishes of the contracting parties").

3. D.C. law does not recognize enforcement of arbitration agreements against non-signatory third parties.

As noted above, since NACA did not sign the UA, it is not bound by the New York choice of law provision and D.C. law should govern NACA's rights. D.C. law does not permit a party to a contract to enforce an arbitration provision against a third-party beneficiary. *See, e.g.*, *Jones v. Quintana*, 872 F. Supp. 3d 48, 57 n.3 (D.D.C. 2012) (noting that third-party beneficiary status "would only entitle Plaintiff to enforce the agreement against Defendants, not vice versa"); *Bradley v. Nat'l Collegiate Athletic Ass'n*, 249 F. Supp. 3d 149, 179 (D.D.C. 2017) (same); *Guttenberg v. Emergy*, 41 F. Supp. 3d 61, 68 (D.D.C. 2014) (same). Here, NACA is not even a third-party beneficiary of the UA. It has not benefited from Gemini's unlawful agreement. NACA does not have a Gemini account and has not sought to take advantage of Gemini's products or services. But even if it had, under D.C. law, Gemini cannot "through the backdoor of an arbitration clause turn [NACA] into a third-party beneficiary of Terms" to which it never agreed. *See Walker v. Uber Techs, Inc.*, 2024 WL 4553987, at *9 (D.D.C. Sept. 11, 2024).

C. Gemini's UA does not waive NACA's rights under the CPPA.

Defendant argues that the arbitration agreement prohibits representative actions and, therefore, bars NACA's lawsuit under the CPPA. However, this argument rests on a fundamental misunderstanding of both the nature of NACA's claims and the limits of the FAA's enforcement of arbitration agreements. As explained below, the arbitration clause's purported waiver of class and representative actions does not and cannot preclude NACA from pursuing this statutory public interest enforcement action.

1. Gemini's purported waiver of substantive rights is unenforceable.

Gemini asks the Court to find that NACA cannot bring claims under the CPPA because supposedly *consumers* agreed to waive the right to bring a representative action. Its argument goes beyond simply asking the Court to compel arbitration; instead, Gemini repeatedly argues that NACA has no right to bring this action because its UA requires users to arbitrate individually. *See* Motion, p. 10 (arguing that the arbitration agreement "precludes" all representative actions); *id.* at p. 15 (arguing that consumers "waived" the right to bring private attorney general actions); *id.* at 16 (explaining that Gemini intends to "preclude NACA from suing . . . because Gemini Users can, and do, arbitrate the EFTA claims").

If construed as Gemini asks, the agreement is an impermissible waiver of NACA's substantive statutory rights and effective repeal of § 28-3905(k). *See, e.g.*, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 637 n.19 (1985) ("[I]n the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies . . . we would have little hesitation as condemning the agreement as against public policy."); *Hengle v. Treppa*, 19 F.4th 324, 334-35 (4th Cir. 2021) ("[W]here an arbitration agreement prevents a litigant from vindicating federal substantive statutory rights, courts will not enforce the agreement."). But no private agreement between Gemini and consumers can deprive NACA of the substantive rights that the D.C. Council conferred upon public interest organizations to protect the public. *Cf. Cole v. Burns Intern. Sec. Servs.*, 105 F.3d 1465, 1482 (D.C. Cir. 1997) (explaining that an agreement purporting to waive substantive protections would be unenforceable).

Contrary to Gemini's arguments, courts recognize that substantive statutory rights that protect the public generally cannot be waived. *See, e.g.*, *Cole*, 105 F.3d at 1482; *Owens v. Intern. Bus. Machine Corp.*, 2024 WL 2991203, at *3 (D.D.C. 2024) (recognizing that "individuals may

not waive substantive antidiscrimination rights guaranteed by the ADEA"); *Vahey v. Gen. Motors Corp.*, 2012 WL 9390844, at *5-6 (D.D.C. Mar. 1, 2012) (noting plaintiff could not waive substantive rights under Uniformed Services Employment and Reemployment Act of 1994 by private agreement). *Cf. Wash. Hosp. Ctr. v. D.C. Dep't of Emp't Servs.*, 983 A.2d 961, 968 (D.C. 2009) (citing D.C. statute prohibiting parties from agreeing to waive right to compensation).

Gemini cites no law or case to support the position that D.C. courts or the CPPA permit a business and its customers to waive by private agreement the substantive right of a non-signatory organization to bring an action under section 3905(k)(1)(D). And there is no reason to believe that the D.C. Council intended for a carveout allowing private parties to circumvent the CPPA in this way. Indeed, permitting an individual consumer or other private party to contract away the rights of non-signatory third parties like NACA to bring public interest actions under the CPPA could effectively repeal the CPPA. Any consumer could purport to agree—separate altogether from an arbitration agreement—with Gemini to waive his or her statutory rights under the CPPA, and by Gemini's logic, that agreement would be enforceable against NACA and "preclude" this lawsuit. But that is not what the law allows. *See First Am. Corp. v. Al-Nahyan*, 2 F. Supp. 58, 64 n.7 (D.D.C. 1998) (noting that parties generally cannot waive statutory rights where "a question of public policy is involved, or where rights of third parties, which the statute was intended to protect, are involved"); *cf. Air Line Pilots Ass'n, Intern. v. Northwest Airlines, Inc.*, 199 F.3d 477, 484-85 (D.C. Cir. 1999) (explaining that while individuals may bargain away certain of their own rights, unions may not bargain away the rights of those they represent). Instead, accepting Gemini's argument would allow corporations to contract their way out of consumer protection enforcement altogether, an outcome that no court has endorsed.

Gemini's argument that consumers' rights can be vindicated by bringing their own

individual EFTA claims in arbitration does not save it. As explained above, NACA's right to proceed under the CPPA does not derive from consumers' rights but is an independent grant of statutory enforcement authority. The Court need not decide whether an individual consumer could waive his or her *own* right to bring a CPPA claim; the law does not allow a consumer to waive *NACA*'s independent statutory basis for a CPPA claim by way of a private agreement with Gemini.

2. Gemini's purported waiver of the right to bring a representative action is not enforceable just because it appears in an arbitration agreement.

The fact that the purported waiver appears in an arbitration agreement does not alter this logic. The Supreme Court has never held that courts must enforce arbitration clauses that purport to waive statutory enforcement mechanisms. The FAA "does not require courts to enforce contractual waivers of substantive rights and remedies." *Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639, 653 (2022). *See also Cedeno v. Sasson*, 100 F.4th 386, 397 (2d Cir. 2024) (explaining that the Supreme Court "has repeatedly recognized the general principle that provisions within an arbitration agreement that prevent a party from effectively vindicating statutory rights are not enforceable"). Rather, an enforceable arbitration agreement "does not alter or abridge substantive rights; it merely changes how those rights will be processed." *Id.* Thus, even where a party agrees to arbitrate a statutory claim, the party does not "forgo the substantive rights afforded by [] statute; it only submits to their resolution in an arbitral forum." *Id.* (quoting *Preston v. Ferrer*, 552 U.S. 346, 359 (2008)). *See also, e.g.*, *McNeill v. Intern. Bus. Machine Corp.*, 2023 WL 7214668, at *3 (D.D.C. Nov. 2, 2023) ("[I]n agreeing to arbitrate his ADEA claims, he did not waive any of the substantive rights afforded to him by that statute.").

Courts have thus refused to enforce arbitration agreements that interfere with the effective vindication of statutory rights. *See, e.g.*, *Smith v. Bd. of Directors of Triad Mfg., Inc.,* 13 F.4th 613, 623 (7th Cir. 2021) ("[W]e hold only that the 'effective vindication' exception bars application of

the plan's arbitration provision to claims under § 1132(a)(2)"); *see also Harrison v. Envision Mgmt. Holding, Inc. Bd. of Directors*, 59 F.4th 1090, 1101 (10th Cir.), cert. denied, 144 S. Ct. 280 (2023) ("[T]he arbitration provisions of the Plan Document effectively prevent Harrison from vindicating many of the statutory remedies that he seeks in his complaint under ERISA § 502(a)(2).").[5]

Viking River Cruises is also instructive. There, the Supreme Court considered and rejected the argument that Gemini makes here—that an arbitration agreement can waive altogether the substantive right to bring a representative action under a duly enacted state law. *See Viking River Cruises*, 596 U.S. at 662. While the defendant was entitled to compel the plaintiff's claims to arbitration, the provision purporting to waive representative claims "was invalid [under California law] if construed as a wholesale waiver of PAGA claims." *Id.* And the Court held that the Federal Arbitration Act did not preempt the aspect of California law rendering that "wholesale waiver" invalid. The FAA only preempted the aspect of state law that would have prevented arbitration of the plaintiff's claims; it required the Court to enforce her agreement to process her rights in the arbitral forum, not to enforce a waiver of her claim altogether. *See id.* at 662-63.[6]

Here, Gemini ignores the Supreme Court's instruction that arbitration agreements that purport to waive substantive rights need not be enforced. Gemini instead asks the Court to enforce an arbitration agreement that purports to *waive altogether* the right to bring a representative action.

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[5] *See also, e.g.*, *Hengle v. Treppa*, 19 F.4th 324, 335 (4th Cir. 2021) (noting that courts have refused to enforce arbitration agreements that limit a party's substantive claims in order to prevent them from bringing federal claims (citing *Williams v. Medley Opportunity Fund II, LP*, 965 F.3d 229, 238 (3d Cir. 2020))); *Blair v. Rent-a-Center, Inc.*, 928 F.3d 819, 828-29 (9th Cir. 2019) (declining to enforce arbitration provision that purported to waive the right to seek public injunctive relief in any forum).

[6] Since there was no mechanism for a court to adjudicate the remaining claims (for harms the plaintiff had not herself experienced), those claims could be dismissed. *See id.* Here, in contrast, the CPPA provides the mechanism for adjudication of NACA's claims.

In fact, the purported waiver here goes well beyond the waiver in *Viking River Cruises* because if Gemini is right, then D.C. consumers have waived not only *their* rights but also the rights of nonsignatories, like NACA, to sue under D.C. Code 28-3905(k)(1)(D). Gemini asks the court to enforce its arbitration agreement in a way that "preclude[s]" NACA from bringing suit in favor of individual consumers bringing EFTA claims in arbitration. Motion, p. 16. Gemini's argument cannot be reconciled with *Viking River Cruises*, which makes clear that the Federal Arbitration Act does not require such wholesale waivers of substantive statutory rights.

Gemini's argument would also create a dangerous loophole, allowing businesses to insulate themselves from CPPA enforcement simply by including arbitration clauses in consumer contracts. This directly contradicts the legislative intent of the CPPA, which was designed to ensure that deceptive trade practices can be challenged "through court action" even when individual consumers face barriers to litigation. *See* Report on Bill 19-0581, D.C. Council Comm. On Pub. Servs. & Cons. Aff., at 6 (Nov. 28, 2012). As the Supreme Court recognized in *Waffle House*, allowing private arbitration agreements to block public enforcement actions would undermine the regulatory structure designed to protect consumers.

Gemini relies on *Lamps Plus, Inc. v. Varela*, 587 U.S. 176 (2019), *Epic Systems Corp. v. Murphy Oil USA*, 584 U.S. 497 (2018), and similar cases to argue that representative waivers are always enforceable. However, those cases (which predate *Viking River Cruises*) involved private employment and consumer contracts—not statutory public interest enforcement actions like those authorized under the CPPA. They are not relevant and do not compel a conclusion that D.C. consumers' purported waiver of the right to bring a representative action prevents this lawsuit.

3. The CPPA's language does not support Gemini's argument.

Gemini claims that the CPPA limits NACA's authority by stating that it can only bring an action "if the consumer or class could bring an action," and that consumers cannot bring "an

action" because of its arbitration agreement. Not so. NACA can sue in court if a consumer or class of consumers "could bring an action" no matter the forum.

To begin, the Supreme Court has held that a statutory reference to the right to bring "an action" are consistent with requirement to arbitrate. *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 100-02 (2012) (noting that a "'provision's repeated use of the terms 'action,' 'class action', and 'court' did not prevent arbitration and that "contractually required arbitration of claims satisfies the statutory prescription of civil liability in court."). See also, *Hee Ryang Kim v. Evergreen Adult Day Care in NY Inc.*, No. 22-CV-548 (AMD) (CLP), 2024 U.S. Dist. LEXIS 40365, at *5 (E.D.N.Y. Mar. 6, 2024) (discussing "whether all or part of an action should be submitted to arbitration").

Indeed, it is precisely because the term "an action" is consistent with bringing a claim either in court or arbitration that Gemini's own user agreement refers to a "court action" when it wants to refer to actions brought in court (ECF 22-2, p. 114) and an "arbitration action" (*id*. at p. 63) when it wants to refer to actions brought in arbitration.

In arguing now against the understanding of the meaning of the term "an action" reflected in its own contract, Gemini relies on *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). But *Joint. Rev. Comm. On. Educ*. did not address arbitration at all, finding only that a third party complaint constituted a "civil action" for purposes of removal of Higher Education Act claims to federal court.[7]

[7] Gemini also cites to *McDonald v. City of W. Branch*, 466 U.S. 284, 288 (1984) for the proposition that an "[a]rbitration is not a 'judicial proceeding.'" The term "judicial proceeding" is not at issue, here. Nor does it appear that *McDonald* -- a case pre-dating much of the Supreme Court's modern arbitration jurisprudence which held that arbitrations did not have preclusive effect -- remains good law. See, e.g. *Burkybile v. Bd. of Educ.*, 411 F.3d 306, 311 (2d Cir. 2005) ("the *McDonald* line of cases has been called into question by a more recent line of Supreme Court cases that permit

The CPPA does not say that NACA is subject to all the procedural limitations that might apply to individual consumers. Instead, it merely requires that the conduct challenged by NACA must be actionable under the CPPA—which it is—and that NACA has a sufficient stake in the "controversy to obtain a judicial resolution." *Animal Legal Def. Fund*, 258 A.3d at 183.

The CPPA also does not say that public interest organizations inherit the contractual restrictions of individual consumers. If the D.C. Council had intended such a sweeping limitation, it would have stated so explicitly. Instead, the D.C. Court of Appeals has repeatedly interpreted the CPPA broadly, emphasizing its role in empowering organizations like NACA to challenge unlawful business practices even before harm has occurred. *Id*., at 186 (plaintiff adequately identified the class of consumers it sought to represent as District of Columbia consumers who "have been or will be misled"); also *see, e.g.*, *Center For Inquiry v. Walmart*, 283 A.3d 109, 115 (D.C. 2022).

Gemini's interpretation of the CPPA is also inconsistent with the D.C. Arbitration Act, which provides that "a provision for mandatory binding arbitration within a consumer arbitration agreement is void and unenforceable except to the extent federal law provides for its enforceability." D.C. Code § 16-4403(d). The FAA does not "provide for" the "enforceability" of arbitration agreements that waive substantive rights. Thus, to the extent Gemini's arbitration agreement "precludes" NACA from bringing claims under the CPPA, as Gemini claims, the FAA does not require its enforcement and it is "void and unenforceable" under D.C. law.

4. The FAA does not preempt the CPPA's substantive provision authorizing representative actions by public interest organizations.

Finally, Defendant argues that the FAA preempts the CPPA, to the extent that the CPPA

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arbitration agreements to foreclose access to federal courts.").

allows a public interest organization like NACA to bring claims in court even though consumers signed arbitration agreements. Motion p. 13. This argument misstates the law of preemption under the FAA, NACA's vested statutory role under the CPPA, and misconstrues the CPPA.

The FAA preempts state law only when it "actually conflicts with federal law." *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 477 (1989). Thus, only when a state law specifically disfavors arbitration, which the CPPA does not, does the FAA preempt state law. See, e.g., *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341-44 (2011). But state laws that do not "disfavor" arbitration are not preempted because they do not require arbitration in every instance. *See*, *e.g.*, *Blair*, 928 F.3d at 828-29 (California rule prohibiting waiver of right to seek public injunctive relief did not conflict with FAA); *Noohi v. Toll Bros, Inc.*, 708 F.3d 599, 612-13 (4th Cir. 2013) (Maryland statute requiring arbitration agreements to be supported by consideration was not preempted by FAA).

Gemini relies on *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 at 339 (2011), to bolster its preemption argument. Motion, p. 12. However, *Concepcion* was decided eleven years before *Morgan v. Sundance, Inc.* when the Supreme Court clarified that the presumption in favor of arbitration was intended to result in arbitration contracts being treated "like all others, not about fostering arbitration." *Morgan v. Sundance, Inc.*, 596 U.S. at 418. Even so, *Concepcion* is distinguishable as the plaintiffs there did not dispute the existence of a contract. Here, in contrast, NACA disputes that it has an agreement to arbitrate claims against Gemini.

Gemini's argument that the CCPA is preempted because it specifically disfavors and targets arbitration fails. First, § 28-3905(k)(1)(D) does not uniquely disfavor arbitration. Indeed, it has no impact on whether Gemini may or may not be able to force its customers into arbitration. Instead, the CPPA specifically authorizes NACA's suit as an organization that exists to protect consumer's

interests.

Second, while Gemini relies on *Viking River Cruises*, its reliance goes too far. In *Viking River*, the Supreme Court found that California's Private Attorneys General Act (PAGA) improperly structured representative actions in conflict with the FAA by requiring courts to join claims that were otherwise subject to arbitration. But the CPPA does not impose this requirement; it simply permits public interest organizations the ability to enforce consumer protection laws. Unlike PAGA, the CPPA does not force courts to override an arbitration agreement between private parties. And *Viking River* even explicitly instructs that "[n]othing in the FAA establishes a categorical rule mandating waivers of standing to assert claims on behalf of absent principals. Non-class representative actions in which a single agent litigates on behalf of a single principal are part of the basic architecture of much substantive law." *Viking River Cruises*, 596 U.S. at 657.

Finally, if the CPPA truly "targeted" arbitration, one would expect language in the statute restricting arbitration, but no such language exists in the statute or the voluminous statutory history. If the court adopts Gemini's position, it will have to read into the CCPA an intent to target arbitration that does not exist. Courts should not impute a conflict where none exists, especially given the broad remedial nature of the CPPA. This court should reject Gemini's attempts to do so.

Accordingly, Gemini's arguments are a mischaracterization of the CPPA and FAA. The CPPA does not "target" arbitration but creates an independent statutory right to enforce consumer protections, just as other regulatory statutes do. The court should reject Gemini's attempt to manufacture a preemption argument where none exists.

D. Because there is no agreement to arbitrate, there is no agreement to the delegation clause.

The issue of whether an arbitration agreement was formed between the parties must always be decided by a court, regardless of whether the alleged agreement contained a delegation clause

or whether one of the parties specifically challenged such a clause. *Rent-a-Center, West, Inc. v. Jackson*, 561 U.S. 63, 71 (2010) ("If a party challenges the validity . . . of the precise agreement to arbitrate at issue, the federal court must consider the challenge before ordering compliance with that agreement . . . ."); *AT&T Technologies, Inc. v. Comm'ns Workers of Am.*, 475 U.S. 643, 648 (1986) ("Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."); "Consent is essential under the FAA [Federal Arbitration Act] because arbitrators wield only the authority they are given." *Lamps Plus, Inc. v. Varela*, 587 U.S. at 184 (2019). "[A] court," therefore, "may order arbitration of a particular dispute only where the court is satisfied that the parties agreed to arbitrate that dispute." *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 297 (2010).

Gemini claims that its delegation clause requires an arbitrator to decide whether arbitration applies, but delegation clauses cannot bind non-signatories unless there is clear and unmistakable evidence of agreement. *See Rent-a-Center, West, Inc*, 561 U.S. at 71. Rather, as with any other arbitration clause, before enforcing a delegation clause, a Court must be "satisfied" that (1) the parties "agreed" to arbitrate, and (2) the delegation clause is enforceable and "validly commit[s]" the parties' gateway dispute to the arbitrator. *Granite Rock*, 561 U.S. at 297. NACA never agreed to arbitrate any claims, let alone delegate arbitrability decisions.

The Supreme Court has held that a court must address a challenge to the delegation provision before compelling arbitration if the party specifically challenges the delegation provision. Here, NACA specifically challenges the delegation provision on the same grounds on which it challenges the arbitration provision overall—it did not sign it and it cannot be enforced against it. *See Coinbase, Inc. v. Suski*, 602 U.S. at 144. Thus, the court must resolve NACA's contract-formation challenge before compelling arbitration.

E. The UA is unconscionable.

NACA should not be bound by an agreement to arbitrate to which it is not a party. But even if this Court were to find that NACA was somehow required to abide by the User Agreement purportedly binding D.C. Gemini Users because it filed an action under the CPPA, it should still not be forced to arbitrate this dispute. The arbitration agreement is procedurally and substantively unconscionable under D.C. law. It is procedurally unconscionable because it is a contract of adhesion that lacks meaningful notice. *See Cullinane v. Uber Techs., Inc.*, 893 F.3d 53, 62 (1st Cir. 2018). It is substantively unconscionable because it imposes excessive costs and restrictions on consumers while limiting their legal remedies. *See Ruiz v. Millennium Square Residential Ass'n*, 156 F. Supp. 3d 176, 182 (D.D.C. 2016).

First, Gemini's online sign-up process does not provide reasonable notice of the arbitration agreement. Gemini has not carried its burden to show that consumers who sign up for its services are bound by the arbitration agreement (or delegation clause). The purported "notice" of a "dispute resolution" provision on the sign-up page does not mention arbitration and, depending on the resolution of a user's phone or computer screen, may not even be visible at the end of the overly long sign-up form. Then, the arbitration provision is buried at the bottom of the lengthy UA and the waiver of class and representative actions do not appear until three pages later. This visual flow does not provide reasonable notice of the arbitration agreement.

Moreover, there are numerous and distracting fields to fill out on the same sign-up form containing any purported "notice" of arbitration. *See Kauders v. Uber Technologies, Inc*., 486 Mass. 557, 159 N.E.3d 1033 (2021) (holding deficient notice of online consent to arbitration rendered agreement unenforceable where specific placement of statement explaining connection between creating account and agreeing to terms, "which would encourage opening and reviewing the terms," was displayed less prominently than other information on screen; notice more likely

reasonable where "the nature, including the size, of the transaction" suggests a contract is being entered into, [and] where "the notice conveys the full scope of the terms and conditions"). As the *Kauders* court explained, "[p]ut succinctly the presence of other terms on the same screen with a similar or larger size, typeface, and with more noticeable attributes diminished the hyperlink's capability to grab the user's attention." *Id.* at 578.

Second, it would be unconscionable to enforce the arbitration agreement, which, whether described as a click-wrap, browse-wrap, scroll-wrap, or sign-in wrap, was a contract of adhesion. "Whether an arbitration agreement is unconscionable is primarily a question of state contract law." *Ruiz*, 156 F. Supp. 3d at 180. In the District of Columbia, a party seeking to avoid a contract because of unconscionability must prove two elements: an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party. *Id*. (citing *Curtis v. Gordon*, 980 A.2d 1238, 1244 (D.C.2009)). Reasonable Gemini Users would not understand that by simply clicking the online button that allowed them to create an account, they were agreeing to waive rights granted to them under both District of Columbia and federal law, including the right to have their disputes heard as class actions and before juries in court. Thus, Gemini Users had an absence of meaningful choice and contract terms unreasonably favorable to Gemini.

III. CONCLUSION

For all the foregoing reasons, Plaintiff respectfully requests that the Court DENY Gemini's Motion to Compel Arbitration.

Date: March 7, 2025

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