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: Remote Motion Hearing

GEMINI TRUST COMPANY, LLC'S REPLY IN SUPPORT OF MOTION TO COMPEL ARBITRATION

BAUGHMAN KROUP BOSSE PLLC

Andrew C. Bosse (DC Bar No. 90016021)
Allison Melton (DC Bar No. 1015822)
Maryia Jones (admitted pro hac vice)
500 E. Main Street – Suite 1400
Norfolk, VA 23510
(757) 904-5373
abosse@bkbfirm.com
amelton@bkbfirm.com
mjones@bkbfirm.com

Attorneys for Gemini Trust Company, LLC

TABLE OF CONTENTS

Gemini respectfully submits this reply in support of its motion to compel arbitration and stay this case pending the outcome of that arbitration (the "Motion").[1]

INTRODUCTION

This motion presents a simple question: does the arbitration provision in Gemini's User Agreement bind NACA? Under the CPPA's plain language, the clear answer is yes.

NACA's main argument—which it packages in various ways—is that the arbitration provision is irrelevant because NACA did not sign the User Agreement. The Court need only look at the CPPA's text to reject NACA's contention. The CPPA does not grant NACA any substantive rights—only standing to pursue claims "on behalf of" the Gemini Users. And that right is subject to a specific limitation: NACA can only bring an action that the Gemini Users "could bring" themselves. Because the arbitration provision means the Gemini Users could not bring this case, NACA cannot either. For that reason alone, the Court should grant the motion.

The Federal Arbitration Act provides a separate basis for compelling arbitration. The FAA preempts state laws that interfere with arbitration agreements. The preemption inquiry does not require that the state law facially prohibit or limit arbitration. Rather, it asks a practical question: does the state law have the *actual effect* of frustrating agreements to arbitrate? Here, the unambiguous answer is yes. Every Gemini User agreed to arbitrate disputes relating to the User Agreement. NACA's attempt to use the CPPA to elude that agreement is exactly the kind of "new device[] and formula[]" for evading arbitration that the Supreme Court has held the FAA preempts.

The Court should grant the motion, compel arbitration, and stay this case.

---

[1] All capitalized terms have the meaning given to them in the Motion.

ARGUMENT

I. NACA Must Arbitrate Its Claim, Because It—Like the Gemini Users It Is Suing On Behalf Of—Is Bound by the User Agreement

NACA is not suing to vindicate its own rights. Rather, it has sued "on behalf of" Gemini Users. Compl. ¶ 63.[2] Because the User Agreement requires those Users to arbitrate claims against Gemini, NACA must as well.

A. The Gemini Users Agreed to the User Agreement, Including the Arbitration Provision

It is undisputed that every Gemini User accepted the User Agreement and that every iteration of that agreement included a provision mandating arbitration of "any controversy, claim, or dispute arising out of or relating to the User Agreement." Thomas Decl. ¶¶ 6–7. Courts around the country have enforced this provision without exception. *See* Mot. 9.

The Court should reject NACA's perfunctory argument that the arbitration provision is unconscionable out of hand. A party asserting unconscionability "must prove both an absence of meaningful choice on the part of one of the parties (procedural unconscionability) and contract terms which are unreasonably favorable to the other party (substantive unconscionability)." *Archie v. U.S. Bank, N.A.*, 255 A.3d 1005, 1015 (D.C. 2021). NACA has produced no evidence on either element. It has not, for example, identified any evidence that Gemini used high-pressure tactics, provided misleading information about the agreement, or otherwise took advantage of the Gemini Users. *Id.* There is also no evidence that this bog-standard arbitration provision, which courts around the country have enforced and that allows Gemini Users to vindicate their rights, is substantively unconscionable. It is not.[3]

---

[2] Notably, NACA *could* have sued on its own behalf, *see* D.C. Code § 28-3905(k)(1)(C), but chose not to.

[3] Moreover, to the extent there are any disputes about the scope or enforceability of the User Agreement, those disputes must be resolved by the arbitrator. Mot. 16-18. So, too, must any arguments about whether the User Agreement prohibits NACA from bringing this case on a representative basis. Mot. 10, 16-18.

B. The User Agreement Is Binding on NACA because It Is Standing in the Gemini Users' Shoes

NACA filed this case under the CPPA. That statute allows public interest organizations to sue on behalf of consumers if—and only if—the consumer could have brought that action:

> [A] public interest organization may, *on behalf of the interests of a consumer or 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* [CPPA Section 3905(a)] for relief from such use by such person of such trade practice.

D.C. Code § 28-3905(k)(1)(D)(i) (emphasis added). This plain statutory text makes clear that an organization's ability to sue is subject to a critical limitation: that the consumer "could bring" the action themselves. *Id.* If the consumer cannot bring the action—for example, because she agreed to arbitrate her claims—the organization cannot bring it either. This rule is consistent with decades of precedent establishing that a party that brings a claim on behalf of another does so subject to the agreements of the person whose rights are being vindicated. Mot. 10-12.

This plain text refutes NACA's argument that it is not bound by the User Agreement because it did not sign that agreement. Indeed, that argument is beside the point. Section 28-3905(k)(1)(D)(i) does not give NACA a substantive claim against Gemini. All it does is empower NACA to stand in the Gemini Users shoes and vindicate their rights—but only to the extent those Users could do so themselves. Where the Gemini Users' rights are constrained, so are NACA's. As relevant here, that means the Gemini Users' agreement to arbitrate claims "arising out of or relating to the User Agreement" constrains NACA to the same extent it does the Users.[4]

The cases NACA cites do not support its position. For example, in *EEOC v. Waffle House*,

[4] The CPPA's plain text also refutes NACA's argument that it is standing in the government's shoes, not the Gemini Users', in bringing this claim. Opp. 4-5. The CPPA specifically grants the Attorney General for the District of Columbia the power to bring enforcement actions, *see* D.C. Code § 28-3905(i)(4), but the section under which NACA sues makes no mention of the Attorney General, only consumers, *id.* § 28-3905(k)(1)(D)(i).

534 U.S. 279 (2002), the EEOC sued under section 107(a) of the Americans with Disabilities Act and Section 102 of the Civil Rights Act of 1991. *Id.* at 283. Those statutes empowered the EEOC to bring claims on its own behalf and (unlike the CPPA) placed no limits based on the employee's rights or agreements. *See* 42 U.S.C. § 1981(d)(1); 42 U.S.C. § 12117(a). Because of this different statutory text, *Waffle House* does not help NACA. *Air Line Pilots Association v. Miller* is also inapt, as that case held only that union arbitration rules did not bind non-union pilots suing on their own behalf. 523 U.S. 866, 879–80 (1998).

NACA's other attempts to avoid arbitration fare no better.

First, NACA tries to use legislative history to undermine the CPPA's clear language. Opp. 4-5. This attempt violates fundamental rules of statutory construction. "In interpreting a statute, [courts] first look to the plain meaning of its language, and if it is clear and unambiguous and will not produce an absurd result, [they] will look no further." *Beaner v. United States*, 845 A.2d 525, 534 (D.C. 2004). As demonstrated above, the CPPA's text is clear and unambiguous: NACA cannot bring this case in court because the Gemini Users cannot bring this case in court. And there is nothing absurd about this result, which allows the Users to sue in the parties' agreed-upon forum.

Second, NACA asserts that the User Agreement's arbitration provision is not binding here because the CPPA creates a statutory right to pursue this claim. This argument fails because it conflates creating *standing* to pursue the rights of others (which the CPPA does) with creating *substantive rights* (which the CPPA does not). Indeed, in this respect, NACA's position is inconsistent: in some places, it says the CPPA creates statutory standing, *see* Opp. 4, and in others an independent claim, *see* Opp. 6–8. Only the first position is right: the CPPA grants NACA standing to pursue the consumers' claims—nothing more. Once again, the distinction between the statutory text at issue in *Waffle House* and the CPPA is illustrative. In *Waffle House*, the EEOC

was acting pursuant to a "substantive statutory prerogative." 534 U.S. at 295 n.10. Here, NACA's rights are explicitly dependent on the rights of the consumer. *Supra* 3-4.

The cases NACA cites on pages 6 and 7 of its Opposition say nothing different. Those cases held that the plaintiff organizations had standing to pursue the claims of others. *See Animal Legal Def. Fund v. Hormel Foods Corp.*, 258 A.3d 174, 190 (D.C. 2021) (CPPA gave plaintiff organization standing); *Earth Island Inst. v. Coca-Cola Co.*, 321 A.3d 654, 663 (D.C. 2024) (same); *Equal Rights Center v. Uber Techs., Inc.*, 525 F. Supp. 3d 62, __ (D.D.C. Mar. 15, 2021) (agreement to arbitrate by some of plaintiff organization's members did not defeat associational standing under Article III; case did not concern, and says nothing about, the CPPA). None held that the CPPA granted organizations like NACA independent statutory claims separate and apart from the claims of the consumers they purport to represent.[5]

Finally, NACA argues that estoppel principles do not bar its attempt to avoid arbitration because it is "challenging [the User Agreement's] legality" rather than "seeking to enforce it." Opp. 9–10. This distinction makes no difference. Basic contract principles hold that estoppel binds nonsignatories who "assert[s] claims that must be determined by reference to that contract." 21 Williston on Contracts, § 57:19 (4th ed. May 2024 update) (citations omitted) (emphasis added). That is the scenario facts here, where NACA's entire claim is based on the User Agreement.[6]

II. The Federal Arbitration Act Preempts the CPPA

Because NACA's ability to bring this case is bound by the same constraints as the Gemini

[5] NACA's other argument—that changes in the arbitral forum in different iterations of the User Agreement somehow means NACA's "authority to act" is not derivative of the Gemini Users'—has no basis in the CPPA's text. Opp. 8.

[6] NACA's suggestion that *Morgan v. Sundance, Inc.*, 596 U.S. 411 (2022), undid this well-established rule, Opp. 10, is baseless and odd. *Morgan* concerned how to decide if a defendant that waits to move to compel arbitration waived the right to do so. *Id.* at 413. It says nothing about whether equitable estoppel applies in situations like this one.

Users'—and thus subject to the User Agreement's arbitration provision—the Court need never reach the issue of preemption. Nevertheless, were the Court to conclude differently, the Federal Arbitration Act preempts any right the CPPA gives NACA to bring this claim in court.

"The [FAA] establishes a national policy favoring arbitration when the parties contract for that mode of dispute resolution." *Preston v. Ferrer*, 552 U.S. 346, 349 (2008). It is "now well-established" that the FAA preempts state laws that impede this national policy. *Id.* at 353 (quoting *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272 (1995)).

The preemption analysis is practical, not formalistic. The FAA preempts both "state rule[s] discriminating on its face against arbitration" *and* "rules that are generally applicable as a formal matter" but, as applied, discriminate against arbitration. *Viking River Cruises, Inc.*, 596 U.S. at 650 (citations omitted). Indeed, the Supreme Court has specifically cautioned that courts "must be alert to new devices and formulas that" have the effect of nullifying or avoiding arbitration agreements. *Epic Sys. Corp.*, 584 U.S. at 509 (quoting *Concepcion*, 563 U.S. at 342).

NACA's attempt to use the CPPA to evade the User Agreement's arbitration provision is exactly the kind of situation that merits preemption. Under NACA's telling, the CPPA allows it to represent the Gemini Users' interest by bringing a claim based on the User Agreement *and also* allows it to disclaim those same Users' assent in that same User Agreement to arbitrate any disputes with Gemini. The practical effect of this purported arrangement—in which NACA has all of the Gemini Users' rights but is bound by none of their restrictions—is to avoid and disfavor arbitration. That is exactly what FAA preemption is designed to stop.

NACA's contrary arguments are not persuasive. *First*, NACA argues that preemption does not apply because the CPPA does not facially prevent arbitration. Opp. 18-20. This argument answers the wrong question. What matters is whether the statute has the *effect* of interfering with

an arbitration agreement. As demonstrated above, that test is satisfied here.

Second, NACA argues at various points that the FAA preemption does not apply because enforcing the User Agreement's arbitration provision would interfere with substantive statutory rights. Opp. 12-15, 18. The Supreme Court has said the opposite. In *Waffle House*, the Court explained that by agreeing to arbitrate "a party does not forgo the substantive rights afforded by the statute"—it simply agrees "to submit[] to their resolution in an arbitral, rather than a judicial, forum." 534 U.S. at 295 n.10 (citations omitted). The cases NACA cites are not to the contrary because they involve putative waivers of *substantive* rights.[7] Indeed, many of the cases NACA cites underscore why the Court *should* compel arbitration. In *CompuCredit Corp. v. Greenwood*, for example, the Supreme Court held that the lower court committed reversable error by denying defendant's motion to compel arbitration of statutory claims. 565 U.S. 95, 99–104 (2012).

Third, NACA suggests the Supreme Court's *Morgan* decision somehow inheres against preemption. Opp. 19. It does nothing of the sort. *Morgan* concerned what test courts should apply when deciding if a defendant has waived its right to move to compel arbitration by first litigating in district court. 596 U.S. at 415. It did not concern, and says nothing about, preemption. *Id.*

CONCLUSION

The CPPA makes clear that NACA's ability to pursue this claim is subject to the same limitations imposed on the Gemini Users. Those limitations include the requirement that all claims be litigated in arbitration. To the extent the CPPA undermines that agreement, the FAA preempts that statute and mandates mediation. The Court should grant the motion, compel arbitration, and stay this case.

---

[7] *See, e.g.*, *Smith v. Board of Directors of Triad Manufacturing, Inc.*, 13 F.4th 613, 615 (7th Cir. 2021) (refusing to enforce arbitration provision that "prohibit[ed] relief that ERISA expressly permits"); *Harrison v. Envision Management Holding, Inc. Board of Directors*, 59 F.4th 1090, 1096 (10th Cir. 2023) (same).

Dated: Norfolk, Virginia
March 21, 2025

BAUGHMAN KROUP BOSSE PLLC

By /s/ Andrew C. Bosse

Andrew C. Bosse (DC Bar No. 90016021)
Allison Melton (DC Bar No. 1015822)
Maryia Jones (admitted pro hac vice)
500 E. Main Street – Suite 1400
Norfolk, VA 23510
(757) 904-5373
abosse@bkbfirm.com
amelton@bkbfirm.com
mjones@bkbfirm.com

Attorneys for Gemini Trust Company, LLC