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DISTRICT COURT

CLARK COUNTY, NEVADA

JON GRUDEN, Plaintiff, vs. THE NATIONAL FOOTBALL LEAGUE, Defendant.	CASE NO. A-21-844043-B DEPT. XVII

BEFORE THE HONORABLE NANCY ALLF, DISTRICT COURT JUDGE

WEDNESDAY, MAY 25, 2022

TRANSCRIPT OF HEARING
ALL PENDING MOTIONS

APPEARANCES:

For the Plaintiff:	ADAM HOSMER-HENNER, ESQ. JEFFREY A. SILVESTRI, ESQ. CHELSEA TK LATINO, ESQ. RORY KAY, ESQ.
For the Defendant:	MAXIMILIEN D. FETAZ, ESQ. KANNON K SHANMUGAM, ESQ. TIANA VOEGELIN, ESQ.

RECORDED BY: VELVET WOOD, COURT RECORDER

TRANSCRIBED BY: MANGELSON TRANSCRIBING

Las Vegas, Nevada, Wednesday, May 25, 2022

[Case called at 10:16 a.m.]

THE COURT: Let's take appearances starting with plaintiff.

MR. HOSMER-HENNER: Adam Hosmer-Henner of McDonald Carano, on behalf of Plaintiff Jon Gruden, who's here with me today.

THE COURT: Thank you. Welcome.

MS. LATINO: Good morning, Your Honor. Chelsea Latino with McDonald Carano on behalf of Mr. Gruden.

THE COURT: Thank you.

MR. KAY: Good morning, Judge. I'm Rory Kay of McDonald Carano, on behalf of Mr. Gruden as well.

THE COURT: Thank you.

MR. SILVESTRI: Good morning, Your Honor. Jeff Silvestri, on behalf of Mr. Gruden.

THE COURT: Thank you. And for the Defendants.

MR. FETAZ: Good morning, Your Honor. Maximilien Fetaz on behalf of Defendants, The National Football League and Roger Goodell. With me today is Mr. Shanmugam who is appearing *pro hac vice*, as well as Ms. Voegelin who is *also pro hac vice*. And sitting to my left is Ms. DiBella, who is Vice President of Legal Affairs for The National Football League. And Mr. Shanmugam will be handling argument today.

THE COURT: Thank you. And welcome.

All right. So we have first the Defendant's Motion to Seal, which I understand from the papers that the Constitution would not be sealed, and the contract would be. That's what I understand from the papers.

MR. FETAZ: That's correct, Your Honor. I think we resolved any dispute that we would have there.

THE COURT: And are you the spokesperson?

MR. FETAZ: That's correct, Your Honor.

THE COURT: All right. So the motion will be granted in part and denied in part so that the contract will be sealed; the Constitution will not be sealed.

All right. So our next motion for -- and I'm kind of taking them arbitrarily, but I think it's appropriate to look at the Motion to Compel Arbitration next. And your motion, please.

MR. SHANMUGAM: Great, thank you. Your Honor, is it all right if I use the podium?

THE COURT: Wherever --

MR. SHANMUGAM: Great.

THE COURT: -- people are the most comfortable.

MR. SHANMUGAM: Great. Well, thank you, again, Your Honor. Kannon Shanmugam with Paul Weiss for the Defendants.

May it please the Court, when Jon Gruden entered into the richest contract for a head coach in NFL history, he agreed to broad arbitration provisions that cover all disputes arising out of his employment agreement or involving conduct detrimental to the

League.

Gruden's claims stem from his resignation in the wake of the publication of racist, sexist, and homophobic emails that he wrote and broadly circulated, and those claims are subject to arbitration. That is most clearly the case under the terms of the NFL Constitution, which were unambiguously incorporated in Gruden's employment agreement.

The arbitration provision in the NFL Constitution covers, quote, any employees of the members of the League, end quote, and extends to broad categories of disputes including those that involve, quote, conduct detrimental to the best interest of the League and professional football, end quote.

Now Gruden does not seriously argue that his claims fall outside the scope of that provision, instead he primarily argues that by virtue of his decision to artfully plead into the Commissioner as a Defendant, the provision is somehow unenforceable or otherwise unconscionable. Gruden is incorrect and the Motion to Compel Arbitration should therefore be granted.

Now, as a preliminary matter, there can be no real debate here that the NFL Constitution was effectively incorporated by reference into Gruden's employment agreement. In the critical paragraph of the employment agreement, paragraph 10, and that can be found at page 4 of Exhibit 2, Gruden agreed that he would abide by and legally be bound by the Constitution, and he went so far as to acknowledge that he has read the Constitution and

understands its meaning.

While Gruden claims that he was never provided with a copy of the current version of the Constitution, all that California law requires is that an incorporated document be readily available. And Gruden himself concedes that the Constitution is widely accessible to anyone with any internet connection.

There is no requirement that the employment agreement specifically incorporate the arbitration provision and it would be especially peculiar to impose such a rule whereas here, the Agreement contains an arbitration provision of its own.

There can also be no real debate that the relevant provision of the NFL Constitution in that Section 8.3(e), which can be found at page 30 of Exhibit 3, covers this dispute. By its terms that provision applies to any dispute involving any employees of the members of the League that in the opinion of the Commissioner constitutes conduct detrimental to the best interests of the League or professional football.

Now Gruden seems to suggest that the provision requires the Commissioner to issue some sort of formal opinion that Gruden's conduct was detrimental before invoking the arbitration provision, or that the provision somehow does not apply because Gruden is no longer an employee. But there's no requirement that the Commissioner issue a formal opinion and any contrary argument would be for the arbitrator to decide in the first instance under the Supreme Court's decision in *BG Group*.

Gruden's conduct here, the dissemination of these racist, sexist, and homophobic emails, including vile comments about the head of the NFL Players' Association was basally conduct that was detrimental to the best interest of the League. And while Gruden may no longer be an employee, his claims concern the termination of his employment agreement and if it were not clear that they are covered, the Federal Arbitration Act instructs that any doubts about the scope of an arbitration provision must be resolved in favor of arbitration.

Now as I said at the outset, Gruden's primary argument before this Court is not that the Constitution's arbitration provision does not apply by its terms but rather that it is unenforceable and therefore unconscionable. But even under California law, Gruden must show that the provision is both procedurally and substantively unconscionable and I'd argue he cannot show either.

Now as to procedural unconscionability, Gruden really doesn't spend a lot of time on this in his response, but I'd argue, he can't really argue that he was subject to unequal bargaining power or coercive bargaining tactics; after all, Gruden was the very definition of a sophisticated actor here. He had worked in various positions in the League over the course of decades. He had secured a record one-hundred-million-dollar contract from the Raiders, and he was represented by perhaps the leading agent for NFL coaches.

And while Gruden suggests that he was unable to negotiate the terms of the NFL Constitution, that would not be

sufficient to render the Agreement unenforceable, for instance, as a contract of adhesion. And not only did Gruden agree to be bound, but as I said earlier, he went so far as to acknowledge that he had read and understood the Constitution's terms.

Now as to substantive unconscionability, Gruden's primary argument is that the arbitration provision did not provide for a neutral arbitrator, but it has long been the practice of the NFL, like other major professional sports leagues for the Commissioner to arbitrate claims brought by current or former employees of the League's clubs and Courts around the country have upheld the Commissioner's ability to arbitrate appeals from his own disciplinary determinations and disputes involving the League. We cite the *NFL Management Commission Council* and the *Peterson* cases, among others on the Federal Court of Appeals level.

And I'd argue that is particularly appropriate here because there was no cognizable basis for naming Commissioner Goodell as a Defendant in the first place. And I'd argue Gruden pleaded him into this action in an obvious attempt to create the appearance of a conflict.

But in any event, our principal submission to this Court is that any argument that the Commissioner would be an improper arbitrator here is premature and, in any event, provides no basis for voiding the entire arbitration provision. And that's for the simple reason that the Commissioner has the power to designate a different arbitrator to hear disputes within his jurisdiction as the

Commissioner has done on multiple occasions in the past. And we cite the *Peterson and Williams* cases as examples of that.

And even if the Commissioner did elect to hear this dispute himself, it is clear that the proper forum in which to challenge the partiality of the arbitrator is in the context of the arbitration itself and if necessary, in a motion to vacate the ensuing arbitral award on grounds of evident partiality under the federal arbitration. It's not appropriate to do that before the arbitrator has even been designated. And even if it were otherwise, the proper remedy would be to sever the provision's designation of the arbitrator, not to allow Gruden to evade his contractual obligation to arbitrate altogether.

Now one final point on substantive unconscionability, Your Honor. Gruden also suggest that the arbitration provision is invalid because it is somehow not mutual or illusory, but the Raiders, no less than Gruden signed the employment agreement and therefore agreed to be subject to the NFL Constitution's terms. And the Constitution itself by its terms binds the NFL's member clause as well.

The mere fact that an arbitration is triggered by the Commissioner's opinion that the underlying conduct is detrimental, does not create any sort of circularity for the simple reason that any ultimate determination by the arbitrator on the merits of Gruden's tort claims would not invalidate the opinion by the Commissioner that triggered the arbitration.

And any effort to suggest that state law imposes substantive limitations on arbitration provisions beyond the generally applicable doctrine of unconscionability would violate the Federal Arbitration Act.

Now finally on this motion, Gruden's claims would also be covered by the arbitration provision in his employment agreement. Now there's no need for the Court to reach the terms of the arbitration provision in the employment agreement if the Court agrees that the, perhaps in some respects broader, provision in the NFL Constitution applies.

But again, I would just make two very quick points with regard to the provision and the employment agreement. The first is that Gruden does not seriously argue that his claims fall outside the substantive scope of the arbitration provision. That provision covers, quote, without limitation any dispute arising from the terms of this agreement, end quote. And it is long settled -- we cite the *Hansen* case, among others, that tort claims, including claims for intentional interference with contract are within the scope of similarly worded and broadly worded arbitration provisions.

Instead, here, Gruden's primary argument is that the arbitration provision in his employment agreement applies by its terms only to matters in dispute between Gruden and the Raiders. But we submit that on the unusual facts of this case, the Defendants are entitled to invoke the arbitration provision under the doctrine of equitable estoppel which is of course one of the doctrines under

which non-signatories are entitled to invoke arbitration provisions.

Now in this case, the NFL Defendants aren't really even true non-signatories because the Commissioner himself signed the Agreement and so I think that the Defendants can be --

THE COURT: But not as a party.

MR. SHANMUGAM: Not as a party, that's --

THE COURT: Yeah.

MR. SHANMUGAM: -- correct. In his capacity as the Commissioner, and we would certainly concede that the Agreement is an agreement by its terms between Gruden and the Raiders.

But I think for purposes of the doctrine of equitable estoppel, our submission is that Gruden's claims rely on and really presume the existence of the contract and I think that there would be no real dispute that if Gruden had proceeded with his claims against the Raiders, rather than settling those claims first, and done so together with the claims against the NFL Defendants, that all for the claims would have been sent to arbitration. And our submission is that the mere fact that Gruden settled his claims against the Raiders should not alter the outcome.

But again, I would just underscore that with regard to the NFL Constitution there's no such limitation with regard to the parties; the dispute here is really about whether other doctrines would limit the application of that arbitration provision or that Gruden should somehow not be bound by it and so this issue would only apply in the event that the Court disagreed with our

arguments on that score.

Unless the Court has any questions, I'll yield to my colleague on the other side and of course, happy to --

THE COURT: I don't.

MR. SHANMUGAM: -- address any other points on rebuttal.

THE COURT: Thank you.

MR. SHANMUGAM: Great. Thank you.

THE COURT: Opposition, please.

MR. HOSMER-HENNER: Your Honor, again, Adam Hosmer-Henner with McDonald Carano, on behalf of Plaintiff Jon Gruden.

The fact that Jon Gruden settled his claims with the Raiders very much does impact this case because the question I want to pose first is whether Jon Gruden could have filed a demand for arbitration in November of 2021, on the same day that he filed his Complaint, and the answer is no.

That employment agreement was terminated. The dispute resolution clause in that employment agreement was terminated and it was replaced with a separate settlement agreement. And that settlement agreement, which is highly confidential, all I'll say about it now is it definitely doesn't include an arbitration provision where the Commissioner of the NFL gets to decide a dispute between the Raiders and Jon Gruden.

So on -- in November of 2021, Jon Gruden had a

settlement agreement with the Raiders providing for a different dispute resolution agreement. He could not have filed a demand for arbitration as they suggest he could have. Not only that, in November 2021, the Commissioner of the NFL had not made a determination that any of the conduct, whether it's Jon Gruden's emails or whether it's their intentional leaking of these emails to the press, or whether it's Commissioner Goodell himself as an individual calling the Raiders to demand that Jon Gruden be fired, no determination had been made that any of that conduct was conduct detrimental to the League.

So how could Jon Gruden have filed a demand for arbitration that early in the process when the only people that can decide whether this dispute is arbitrable, according to Defendants, is Defendant themselves. There is no basis for Jon Gruden to seek to compel arbitration or demand arbitration in November 2021, and there's no basis to do so today. No Court has ever compelled arbitration in a case like this and this Court should not be the first to do so.

Defendants are asking this Court to decide without an opinion from Commissioner Goodell that it would be his opinion that this represents conduct detrimental to the League and to refer the case to Commissioner Goodell so that he can decide for himself whether his conduct was wrongful.

They didn't provide Jon Gruden any notice or hearing, they didn't follow any of their own internal procedures or policies

but today they're still asking for Jon to follow those same policies and procedures by sending this case to arbitration in front of Commissioner Goodell. The record simply isn't before this Court. Neither Jon nor the Raiders could have submitted this dispute to arbitration under the provisions that the NFL is now trying to enforce. Those have been terminated and have been replaced by a separate dispute resolution clause.

The NFL claims that it's a signatory but not a party to the employment agreement, but they can't keep that employment agreement in place or prevent the parties from replacing it with a separate settlement agreement, which is why they cannot invoke and stand in the shoes of either of the parties and try to compel this case to arbitration, when neither Jon Gruden nor the Raiders could send this dispute to arbitration under the clauses they invoked today.

Defendants and Jon Gruden did not enter any arbitration contract together. This is -- that alone separates this case from nearly every other arbitration case where the parties themselves are trying to enforce an arbitration agreement between themselves. Instead, Defendants tried to construct a valid agreement to arbitrate out of multiple links in a chain and flimsy connections.

First, they rely on that terminated employment agreement and I believe at least twice a -- the key portion of that employment agreement that is not broad that includes any dispute arising in the contract but specifically by its plain language. It only covers all

matters and dispute between Gruden and Club. They cannot rewrite that agreement to state that the Agreement covers all matters arising out of the Agreement or related to the Agreement; that limitation is critical.

And Courts have never allowed a non-signatory to expand the plain language of an arbitration clause beyond what it says in terms of its limitation scope. So we do seriously challenge whether this dispute falls within the scope of that arbitration clause, even to the extent that that arbitration clause is in effect between the Raiders and Gruden, which it isn't. That arbitration clause says it only covers all matters in dispute between Gruden and the Club.

So again, they try to rewrite this to claim that this is at root a wrongful termination claim or something that arises out of the contract. Not so. Not one of the claims advanced by Plaintiff Jon Gruden depends on the language of the employment agreement, which was terminated. Not one case that they've cited would extend the arbitration clause to cover claims brought under such context; where they both depend on an interpretation of the contract, on a breach of the contract, or anything related to the contract, except and so far as potential element of damages. Absent a clear agreement to submit these disputes to arbitration, the Court cannot compel arbitration.

So what really matters, again, is what the parties actually agreed to. After Jon Gruden was forced to resign from the Raiders, he entered into that separate settlement agreement and that

settlement agreement does not cover this dispute. So once that -- there are circumstances where a settlement agreement or a -- the termination of an arbitration clause could survive. But there's no survival clause in the employment agreement and there is no intent by the Raiders or Gruden to continue that dispute resolution clause in the employment agreement indefinitely.

In fact, the opposite is true because they specifically replace that with a separate dispute resolution clause which is outside of all of the NFL internal procedures. At an absolute minimum, absolute minimum, this case needs to at least proceed to a procedural stage where that settlement agreement could be introduced into evidence under a stipulated protective order where the Raiders are notified and given the opportunity to protect since their interests are implicated by that settlement agreement as well.

To the extent the Court finds though -- although there's no precedent that we can identify that the NFL and Roger Goodell are allowed to rely upon an arbitration clause and an agreement that's already been terminated by its parties, to the extent that's possible, even that agreement doesn't cover this dispute. We've pointed out that it only covers all matters in dispute between Gruden and the Club.

It doesn't say the opposite construction which was it covers all claims arising out of the settlement -- arising out of the employment agreement, including, without limitation disputes between Gruden and the Club; it's the opposite structure where it

only covers disputes between Gruden and the Raiders, including but not limited to claims arising out of the arbitration clause.

And they attempt to invoke the principle of equitable estoppel in order to allow themselves to intervene and be a party to that contract. That principle only applies where a party is essentially attempting to stand in the shoes of one of the signatory parties. Neither of the parties could invoke this contract so there's no inherent unfairness about not permitting the NFL to take advantage of this employment agreement and this arbitration clause when the parties themselves couldn't invoke the arbitration clause, again, because it's been terminated.

Even more, that principle only extends to situations where the cause of action is actually asserted against both the signatory and the non-signatory. So if Jon Gruden's claims were actually against the Raiders and the NFL, that principle could apply to prevent someone from artfully pleading claims against both of them and then settling with one Defendant.

But the causes of action against the NFL are not from the contract. We're not talking about disputes between Gruden and the Club that could be extended of what the NFL did. What the NFL did wasn't just release emails, wasn't just tortiously interfere with this contract but it was tortiously interfere with all perspective contracts of Mr. Gruden, including his sponsorship contracts.

The bulk of the NFL's arguments are about the NFL Constitution. The wording of that Constitution, again, by its plain

language doesn't cover a former member of the NFL. It could -- they could have inserted that language, but they didn't, and this makes sense because the NFL Commissioner is not intended to resolve all disputes until the end of time, for anyone who used to be a member of a football team, a coach, a player.

And if their reading is actually accepted what that would mean is that the NFL Commissioner, decades from now could still compel any civil suit to arbitration as long as at some point in time that player or coach signed an employment agreement that incorporated the NFL Constitution.

Their reading is so broad that it would cover any of these disputes that are making their rounds in the press, where a civil suit is brought by an employee of the Washington Football Team, by an employee of the Dallas Cowboys against the NFL, against the member clubs, and on the Commissioner's sole discretion, unilateral determination that that involves conduct detrimental to the League could take away that Plaintiff's right to a jury trial and move that into arbitration in front of the Commissioner himself.

Defendants describe our argument that Goodell must actually issue a formal opinion as a prerequisite that must be -- as a non-essential prerequisite that must be addressed by Commissioner Goodell himself. But that language of Section 8.3(e) itself only applies when the dispute itself constitutes conduct detrimental.

As much as Defendants try to argue that this case is about

Mr. Gruden's emails, it's not. The validity of those emails, the content of those emails is not going to be at issue in this case. What is going to be at issue is Defendant's tortious conduct; leaking those emails to the press selectively and then demanding that Mr. Gruden be fired by the Raiders and threatened to release emails that we haven't even seen that may not even exist. It's that course of conduct that forms the basis for our Complaint.

So the NFL would have to make a determination that its own conduct, Commissioner Goodell and the NFL Executives who pressured the Raiders to fire Gruden constituted conduct detrimental to the League.

There's a reason that Commissioner Goodell hasn't submitted a declaration in this case stating his opinions that this constitutes conduct detrimental to the League because in order to refer this dispute to arbitration, not the affirmative defenses that Defendants may have, but this dispute, they would have to decide that he himself committed conduct detrimental to the League in order for this case to arbitrate.

But how does this Court even fashion that order? We've thought a lot about how this Court could issue an order compelling arbitration based on what Defendants have introduced in the record. It could be this Court's opinion that Mr. Gruden's conduct, or for that matter Commissioner Goodell's conduct constituted conduct detrimental to the League. But Defendants argue that that opinion is irrelevant; that your opinion is irrelevant. The only

opinion that matters is Commissioner Goodell's.

How does this Court draft an order saying that arbitration should be compelled? Because in the opinion of Commissioner Goodell, who hasn't introduced a declaration, who hasn't provided testimony, who hasn't issued a formal opinion like every other case they cite where there actually is a formal disciplinary process with a notice and a hearing, how does this Court fashion an order that it is Commissioner Goodell's opinion without any admissible evidence that this dispute involves conduct detrimental to the League?

We couldn't do that in November 2021, because that determination hadn't existed. We couldn't have filed a demand for arbitration on that basis and neither can this Court issue a determination on that basis because that evidence is not before this Court. This Court cannot possibly substitute its opinion for Commissioner Goodell's, not according to our arguments but according to Defendant's.

On to unconscionability. We believe we're correct when we say no Court has ever ordered arbitration in these circumstances and this is why. For all the discussion about how Jon Gruden is a sophisticated coach and how he has a sophisticated agent, procedural unconscionability only requires a very small degree of procedural unconscionability when there's a sliding scale of substantive unconscionability.

The NFL Constitution is an adhesion contract, it is not something that can be negotiated and that's enough to move to the

analysis of substantive unconscionability. And substantive unconscionability here is present in three very key areas. The first is the neutral arbitrator. Defendant's position is that Commissioner Goodell could decide not to hear this case and that he has the ability, despite the plain language of the NFL Constitution that invests the sole, absolute, unfettered discretion to resolve these cases with Commissioner Goodell. And they point to precedent where he is delegated to a supposedly neutral arbitrator.

But nothing in the plain language of this Constitution or the employment agreement requires him to do so. So this Court is faced with a determination of sending this case to the very person that Plaintiff is attempting to sue. That's unconscionable because -- and it doesn't just require the replacement of the arbitrator, it invalidates this process itself and it invalidates the arbitration clause.

The second is mutuality. Even -- for any employment agreement, any arbitration clause to survive, it has to contain a modicum of bilaterality. Here, Defendants are simply incorrect when they say that both the Raiders and Jon Gruden agreed to send disputes via the NFL Constitution to the arbitrator.

It says exactly what the *Sniezek versus Kansas City Chiefs Football Club* case held because even though the Raiders may in the abstract be bound by the NFL Constitution, they did not contractually agree to send any disputes with Jon Gruden to the Commissioner of the NFL. All they contractually agreed to do -- oh

and Gruden -- to be clear, Gruden was the only party in that dispute resolution provision that agreed to comply with the NFL Constitution and abide by its terms.

Defendants have argued that the Raiders had an obligation to comply with the NFL Constitution as well. It may be true, but they don't have a contractual obligation as the *Sniezek* Court found to respond to Gruden in the exact same fashion. That makes that clause non-mutual because only Gruden would be required under the contract to comply with the dispute resolution provisions in the NFL Constitution. That's why the Court did not order arbitration in *Sniezek* and that's why this Court should not either.

The third argument is about the circularity and the status of this arbitration clause is completely illusory. Section 8.3 of the NFL Constitution identifies disputes as arbitrable not if they involve conduct detrimental to the League, but if in the opinion of the Commissioner they involve conduct detrimental to the League. There is no way for Jon Gruden to have known the Commissioner's opinion in November 2021. But that opinion can also change.

It's circular because in order for this dispute to be arbitrable, the Commissioner must give the opinion that the conduct involved conduct detrimental to the League. That's like saying a dispute is arbitrable only if Plaintiff has breached the contract. That's not the scope of the arbitration, that's the result of the arbitration.

So only if Mr. Gruden did something wrong is this dispute arbitrable. And if it turns out his conduct was not detrimental to the League and the Commissioner's opinion was wrong, then that means the arbitration should -- that case should never have been sent to arbitration in the first place.

But no Court, again, has ever compelled arbitration where one party gets to solely and unilaterally determine the scope of the arbitration clause and that's what the Commissioner can do here. In his opinion -- and again, this is not bound by any principles in the NFL Constitution, Defendants vaguely try to argue that it's bounded by the principle of the implied covenant of good faith and fair dealing. But again, Gruden and the NFL are not parties to any contract so that implied covenant cannot be applied against the NFL in favor of Gruden.

But the arbitration clause is illusory if one party can unilaterally revoke it, unilaterally amend, unilaterally determine its scope. What predictability is there, what advance notice did Mr. Gruden have that his claims would be arbitrable when it depends on the NFL and the Commissioner's sole discretion in terms of the scope of that arbitration clause? Conduct detrimental isn't defined, it's not founded by any safeguards, it apparently can't be challenged according to Defendants, and this Court doesn't know whether it's conduct detrimental because Commissioner Goodell hasn't made that determination.

But we would actually ask this -- even though the Court

doesn't need to reach the employment agreement, doesn't need to reach the NFL Constitution, because these aren't contracts that can be enforced by Mr. Gruden, by the Raiders and so it certainly can't be enforced by the NFL. Even though the Court doesn't need to reach that question, we would ask that this Court go further and hold as a matter of principle that an arbitration contract just like any other contract in Nevada is illusory if one party has the unilateral right to determine its scope, to determine its terms, and decide whether they are going to comply with that agreement by determining something is contract detrimental or not agree and comply with that agreement by determining the contract is not detrimental.

To conclude, Your Honor, the plain language of this agreement -- of any agreement does not cover Mr. Gruden's claims against Defendants and there is no agreement to arbitrate, but we also do need to look at the practical reality here. It's not a circumstance where the dispute about the -- where this is a procedural dispute where about the same merits and the same discovery will take place in front of you or in front of Judge Togliatti at ARM.

This is about whether Jon Gruden can present his claims at all, about whether he can present them in a neutral form in front of someone who he's not directly suing, about whether he has the right to obtain any discovery because the NFL and Commissioner Goodell can shove that down at their sole discretion.

And the precedent created by such a decision, which would be new precedent would be so remarkable and so harrowing that going forward, the Commissioner of the NFL could refer any dispute by any employee, by any cheerleader, by any worker in the Washington Football Team to arbitration based on their unilateral opinion that it constitutes conduct detrimental to the League.

Not only that, that opinion doesn't need to be provided in a formal hearing, it doesn't need to be provided with notice, with a right to discovery, it doesn't need any safeguards at all. The second there is an employment claim brought by any member of any of these clubs, the Commissioner of the League can take their right to jury trial away and move that to private arbitration with no discovery in front of the Commissioner himself. Thank you very much.

THE COURT: Thank you.

Defendant's reply, please.

MR. SHANMUGAM: Thank you, Your Honor. I'll be relatively brief since I know we have one other motion before you today.

Let me turn first to the NFL Constitution. My friend, Mr. Hosmer-Henner doesn't really renew any argument today that that provision was somehow not incorporated in the employment agreement. Instead, other than unconscionability, he makes just two arguments that I want to address very briefly.

The first is this argument that the Commissioner

somehow needs to issue a formal opinion that there is conduct detrimental to the best interests of the League. Again, our submission is that by the plain terms of the NFL Constitution, that's not required.

To step back here, I think it's somewhat extraordinary for my friend to suggest that the Commissioner would not reach that conclusion. I think we can have a fair degree of confidence that the Commissioner indeed has reached that conclusion. After all, we've filed the Motion to Compel Arbitration on behalf of the Commissioner here.

But I think when you look at the underlying conduct here and I am not going to get into the content of these emails, they are not fit to be repeated in a public courtroom, I think there are -- no reasonable person can conclude that that is not conduct detrimental to the League to have --

THE COURT: But it was years ago. It was before he signed this contract.

MR. SHANMUGAM: That is correct, which is to say that the emails were sent before he signed the contract. But the terms of the contract between Gruden and the Raiders made clear that is conduct for which he can be discharge for cause. And so I think the fact that that conduct took place before he was employed and continued to have effect while he was employed does not preclude the application of either of the arbitration provisions at issue here.

And what I would add to that is to the extent that the

second point that my friend makes is this point about the chronology here. The fact that this conduct had nex -- a nexus to his role as the coach of the Raiders is sufficient to eliminate any concern that this provision could be invoked in perpetuity as to conduct that has nothing to do with an employee's role as an employee of the League.

If, you know, someone from the NFL 20 years from now got into a car accident with Coach Gruden, that might be a different situation but here this is conduct for which Coach Gruden could have been terminated by the Raiders; he, of course, chose to resign instead and therefore, it falls within the ambit of the arbitration provision. And after all, the claims that we're going to be talking about on the Motion to Dismiss here, are all claims that involve interference with the contractual relationship in some way, shape, or form.

So that takes me to the unconscionability argument, so I'll just make a couple of additional points because I think most of our arguments have already been heard.

So first of all, with regard to procedural unconscionability, it is certainly true that under California law, it is a sliding scale. But here, in our view, there is no procedural unconscionability and I think that the law with regard to contracts of adhesion is quite clear.

We cite the *Rockcliff* case for the proposition that a contract is only a contract of adhesion if it involves, you know, a standard form that is drafted and imposed by a party with superior

bargaining strength. This is not that situation and I think that in order to have a contract of adhesion, at a minimum Mr. Gruden would have to have alleged that the only options that he had were either to reject the contract or to agree to the terms of the Constitution and he has not done so here.

I want to focus primarily on substantive unconscionability because I think that that's where my friend, Mr. Hosmer-Henner spent most of his time. And I want to address the two primary arguments that he made with regard to substantive unconscionability.

First, with regard to bilaterality, he cites the *Sniezek versus Kansas City Chiefs* case, but I think that the fundamental difference in that case was that the Constitution was not incorporated into the Agreement at issue. And so the Court -- the Missouri Court in that case expressed concern that the team in that case really wasn't bound by the arbitration provision because the Constitution could potentially be amended and because it did not agree to any obligation at the time it entered into the contract. I think this is a different situation.

With regard to this issue of circularity, first of all, I think it's crucial to keep in mind that the claims that are going to be resolved in arbitration are not claims that require a determination that there is conduct detrimental to the League. These are standard state law claims, the elements of which obviously vary from claim to claim. But the determination that's going to be made is a much

different determination about the merits of Mr. Gruden's substantive claims.

I don't think that there is anything substantively unconscionable about the fact that the Commissioner has to make a determination in order to remit the claim to arbitration. After all, as is true for a number of the other provisions in the NFL Constitution, in the arbitration section, Section 8.3, if the provision didn't have that restriction, I don't think that there would be any argument that there's something unconscionable about a blanket provision that requires all disputes to be remitted to arbitration. The fact that one party to this case has the ability to make a determination that remits the claim to arbitration doesn't render the analysis any different.

The final thing I would say is just a couple of points with regard to the employment agreement. First, Mr. Hosmer-Henner started his argument by focusing on the terms of the settlement agreement between Mr. Gruden and the Raiders. He suggests that that agreement somehow terminated the arbitration provision in the original employment agreement.

That argument is nowhere to be found in the Opposition to the Motion to Compel and so we're really hearing that argument for the first time today. My understanding is that there is nothing in that settlement agreement that somehow abrogates the existing arbitration provisions. At most, there is an arbitration provision in the settlement agreement itself, which I think would properly be understood to apply if there are any disputes arising out of the

settlement agreement by its terms.

But ultimately, our fundamental submission with regard to the arbitration provision in the employment agreement is yes, it does contain a limitation with regard to the parties, unlike the provision in the NFL Constitution. That's where the doctrine of equitable estoppel comes into play.

And our fundamental submission is that under these circumstances where you have claims that clearly by their terms arise from the contractual relationship between Mr. Gruden and the Raiders and because the doctrine of equitable estoppel ultimately relies on the concept of fairness, it would be quite inequitable for the NFL Defendants not to be able to invoke that provision where the claims rely on the contract solely by virtue of the fact that Mr. Gruden has reached a settlement with the Raiders here.

And so for that reason, the fact that the provision contains that limitation is only the start of the analysis, it's not the end of the analysis because the whole point of the doctrine of equitable estoppel is that it creates an exception to the rule that parties' limitations in their arbitration provisions as to who is going to be able to invoke arbitration will ordinarily be respected.

Unless the Court has any further questions, we rest on our pleadings.

THE COURT: I don't, thank you.

All right. This is the Defendant's Motion to Compel Arbitration. It's going to be denied for the following reasons. The

employment contract was terminated before this Complaint was filed. And the Complaint, as drafted, the only allegations are -- is that there was an inter -- intentional interference with the contract. That's the only fact that really mitigates in favor of Defendant's argument.

The Complaint, just -- the Complaint, as drafted is not going to be subject to arbitration. It doesn't really relate to any allegation of detrimental conduct during the time that he was under the contract with the Raiders. I'm concerned with the Commissioner having the sole power to determine any employee disputes.

I do find that there -- the enforcement of the arbitration would be unconscionable both procedurally, as well as substantive. And the arbitration provision does not cover former employees. I just -- all of the facts mitigate against this case staying in this Court.

So Mr. Hosmer-Henner and team to prepare an order. You may do findings if you choose that are consistent with your papers.

And then Mr., I want to say this right, Shanmugam?

MR. SHANMUGAM: Yes, that's correct.

THE COURT: All right. So you and your team to approve the form of the order. If you can't approve the form, then file an objection. Mr. Fetaz knows the procedure. File an objection and then we take it --- the law clerk and I take it from there.

All right. Now are we ready now to do the Motion to

Dismiss?

MR. SHANMUGAM: All right. Thank you, again, Your Honor. On the Motion to Dismiss our submission is obviously that the claims here should be dismissed under Rule 12(b)(5).

Of course the NFL categorically denies Gruden's baseless claim that he -- that it was responsible for leaking his vile emails to the news media. But our submission on this motion is that even under the familiar notice pleadings standard of Rule 8, Gruden has failed to allege crucial elements of each of his claims and he is thus not entitled to relief even if the nonconclusory allegations in the Complaint are taken as true. And for that reason, we submit that the Motion to Dismiss should be granted.

Now I'd like to start with the intentional tort claims and as Your Honor is aware, our submission is that those claims fail for three primary reasons.

First, the truth is an absolute defense to claims for intentional interference with an existing contract and tortious interference with respective economic advantage. While Mr. Gruden is correct that the Nevada Courts have never specifically addressed the issue, the almost universal rule in other jurisdictions is that truthful statements cannot give rise to a cause of action for intentional interference.

Now that defense is rooted in the First Amendment. It's rooted in the notion that a claim founded on the provision of truthful information, whether that claim comes in the form of a

defamation claim or a claim for intentional interference would infringe on the free speech rights of the speaker. Defendants have cited numerous cases that extend the truth defense to claims for intentional interference with existing contracts, as well as claims for interference with prospective economic advantage.

Now Gruden does not offer a valid rationale as to why a Nevada Court should not adopt truth as a defense to intentional interference claims. Nor does he dispute that the leaked emails were his own and thus that any speech by Defendant would have been truthful. Instead, he now argues that the leaked emails were somehow misleading, and that the NFL pressured the Raiders to fire him. In fact, Mr. Hosmer-Henner went so far as to suggest that this allegation is not in the Complaint; that the Commissioner called the Raiders in order to apply that pressure.

But whatever the specific allegations, they don't matter for the following simple reason. Gruden has not alleged in his Complaint or explained even in the briefing on this motion what it was that rendered the leaked emails misleading. He does not allege that other emails would somehow have had a bearing on the meaning of the leaked emails or provided any context that would have affected his employment status.

The mere fact that the NFL did not leak all of the emails involved with the WF -- or did not release all of the emails involved with the WFT investigation, does not render Gruden's emails misleading. And Gruden's claim, really an unelaborated claim that

the NFL somehow put pressure on the Raiders does not affect the Defendant's ability to invoke truth as a defense. Because the emails that Gruden sent that led to his resignation were fully his own, as were the sentiments -- the vile and offensive sentiments expressed in them, any claim based on the provision of those emails is subject to the absolute defense of truth.

Now second, and belatedly, Gruden has failed to plead that Defendants lack privilege or justification for interfering with his existing contract or prospective economic advantage. While the Nevada Courts have so far held only that the absence of privilege is an element to a claim for tortious interference with prospective advantage, Gruden offers no reason why a Nevada Court should not extend that requirement to a claim of intentional interference with an existing contract. In both instances there are certain justifications that have sufficient social value to justify interference with existing or prospective contractual relations.

Here, the NFL had an obvious and unequivocal interest in rooting racism, sexism, and homophobia out of professional football. Indeed both the NFL and the Raiders had the ultimate power to terminate Gruden for his conduct, which reflects the NFL's interest memorialized in the Constitution in taking action against anyone who engages in conduct detrimental to the League. And Defendants had an especially strong interest here because the primary contract at issue was not with some unaffiliated third-party, but rather with one of the League's member clubs.

Now third, Gruden fails sufficiently to allege one of the elements of the claim, the specific intent required for a claim of intentional interference. And under settled Nevada law we cite the *JJ Industries* case for this proposition, Gruden must plead the Defendants intended to induce the Raiders to breach their contract with him or to prevent him from obtaining future economic opportunities. On this issue Gruden offers only conclusory and inconsistent allegations intent.

It is wholly unreasonable to infer that Commissioner Goodell specifically intended to interfere with Gruden's contracts simply because Gruden used derogatory terms to refer to him, nor is it reasonable to infer that Defendants collectively had the requisite intent based simply on the fact that there were negative stories in the press concerning the NFL's investigation into the Washington Football Team. Even under Nevada's notice pleadings standard, Gruden has failed to allege any actual facts supporting an inference that Defendants acted with the requisite intent.

Now Gruden's negligence-based claims and those are claims for negligence, negligent hiring, and negligent supervision are also invalid. Most fundamentally, Gruden has failed to allege that Defendants owed him a duty to protect him from the public disclosure of the vile emails that he sent to NFL accounts.

Notably, the NFL did not affirmatively collect those emails from Gruden's own account. Instead, he voluntarily sent those emails to various other individuals' accounts with no reasonable

expectation that those emails would remain confidential. And the mere fact that Defendants chose not to release other emails they collected in connection with the WFT investigation does not entail the conclusion the Defendants owed an affirmative duty to Gruden, who had no connection to that investigation.

But in any event, even if such a duty existed, it was obviated because as a matter of law, Gruden assumed the risk that his non-private would be disclosed. And the *Turner* case, among others, teaches us that this is indeed a question of law and not a question of fact.

Now here there's no dispute about the relevant facts because Gruden does not allege that he had any sort of understanding with the recipients of the emails that they would be kept confidential. As with letters, there's no expectation of privacy with emails upon delivery. At most, Gruden alleges that he willingly sent emails to a third-party recipient at a WFT address, that the WFT in turn sent those emails to the NFL and that the NFL thereafter disclosed them. That cannot sustain a claim of negligence because again, Gruden assumed the risk.

In addition, with regard specifically to the claims for negligent hiring and negligent supervision, those claims fail because Gruden has not alleged that Defendants knew that any employee had a dangerous propensity or was otherwise unfit for the employment position. That's the crux of any negligent hiring or supervision claim and Gruden does not seriously suggest

otherwise. And of course, Gruden's Complaint contains no specifics concerning who the negligently hired or supervised employees were or what their role was in the alleged leak.

And finally, Gruden's remaining claims, his claims for aiding and abetting and for civil conspiracy are entirely derivative of his substantive tort claims, his intentional tort and negligence claims. And if those primary liability claims are dismissed, the secondary liability claims should be dismissed as well because Gruden has to allege either an unlawful objective in the case of conspiracy, or a wrongful act in the case of aiding and abetting in order for those secondary liability claims to proceed.

In addition, with regard to the claim for conspiracy, employers and employees cannot conspire together when they're acting on behalf of the company. And to the extent that Gruden makes an allegation that Commissioner Goodell was somehow not acting on behalf of the NFL, that's at odds with his other allegations. And while of course --

THE COURT: They do allege that in the Complaint; that he acted in his accord.

MR. SHANMUGAM: Yes, together with allegations that he was acting in -- on behalf of the NFL. And while of course alternative pleading is permitted in Nevada, these allegations are so inconsistent that it really renders it impossible for the Defendants to know precisely what it is that Gruden is alleging here.

In any event, the only way that Gruden can avoid the

doctrine that employees within a single company cannot conspire is really by resting on that allegation.

So our fundamental submission is that for the reasons that we stated in the papers and that I've stated today that the claims are legally defective then we would submit that if the Court agrees with us that the Motion to Dismiss should be granted with prejudice and that's for the simple reason that there are no amendments that can address the fundamental legal deficiencies with Gruden's claims here.

And of course Gruden cannot add allegations that would contradict the allegations in the existing Complaint. And that's why we think that dismissal with prejudice would be the appropriate remedy.

THE COURT: Thank you.

MR. SHANMUGAM: Thank you, Your Honor.

THE COURT: Opposition, please.

MR. HOSMER-HENNER: Your Honor, the motion filed by Defendants doesn't challenge the pleading that we filed; it challenges the pleading that they wish we had filed. This case is not about Mr. Gruden's emails, it's not about a wrongful termination case. If you ask us if we want to go to settlement afterwards and one of the options is that Gruden becomes the head coach of the Las Vegas Raiders again, maybe we'll consider that, but this is not that case. This case is about Defendant's tortious conduct.

Sometime around 2021 -- June 2021, the NFL Executives obtained Gruden's emails as part of an investigation into the misconduct of the Washington Football Team in June 2021. Those emails represented a small fraction of the 650,000 emails gathered in that investigation and predated Gruden's hiring by the Raiders and occurred at a time when he was no longer at the Raiders, dating all the way back to 2011.

Those emails were deemed so confidential by the NFL that they refused to release them in response to a congressional request. And between June 2021 and October 2021, Defendants took no action whatsoever with respect to those emails. On October 7th, 2021, Jon Gruden was the head coach of the Las Vegas Raiders and first place in the division and then on October 8th, 2021, Defendants leaked a selection of these emails to the press and to the Wall Street Journal. Those emails have never been made public, we haven't introduced them into the record, we've seen them only as a reflection of what the journalist reported.

In the next few days, our Complaint alleges that NFL Executives and Roger Goodell himself, collectively we're calling them Defendants, in paragraph 52 and 55 of our Complaint, communicated with the Raiders and demanded that they fire him. They pressured the Raiders to fire him. And when the Raiders didn't, letting him coach through that weekend, Defendants continue to threaten that more documents would be leaked until Mr. Gruden was fired.

There's a stunning admission in the motion practice submitted by Defendants that in between October 8th and October 11th, 2021, they concede that they directly provided Gruden's emails and summaries of these emails to the Raiders, despite their overall position, which is that we didn't do this but we could have if we wanted to but we definitely didn't do it, but we'd be privileged to leak these emails if we wanted to.

They've admitted in their motion practice they had the emails conveniently prepared between October 8th and October 11th, 2021, and provided those and summaries of Gruden's emails directly to the Raiders, Jon Gruden's employer as part of their communications demanding that the Raiders fire Jon Gruden. That's quintessential tortious interference that true -- and the truth of that -- those documents can't possibly be established at this stage of the proceedings.

When the Raiders still had not fired Gruden in October 11th, 2021, the Defendants leaked more documents to the New York Times and continued that pressure until he ultimately was forced to resign on that same day, October 11th, 2021, when some of his endorsement deals and sponsorships were canceled as well.

They want to make this case about the content of the emails but it's simply not. And they want to make this case just about the release of non-public emails that they say Mr. Gruden has no expectation of privacy about. But it's not just about the emails themselves, it's not even about the ones that were released; it's

about their threats to the Raiders to continue releasing more emails, whether they're from this archive of 650,000 emails or not until they got their way and until they intimidated, threatened the Raiders in order to force them to fire and terminate Mr. Gruden.

The Court is well aware of the standard of dismissal in Nevada. I won't belabor any issues about their comments about the reasonableness of allegations or conclusory allegations. They simply get Nevada law wrong on those points. But each of our claims not only survives a Motion to Dismiss but the arguments that they're raising now are really ones that should be raised, not even at summary judgment but at trial as they involve disputed facts.

The first defense they raise is that truth is an absolute defense, and they fail to recognize that that is not the overwhelming authority in all of the jurisdictions. Certainly in some jurisdictions, truth is an absolute defense but that's usually in the context of when honest advice is requested and there's nothing more than the truthful publication of facts related to a claim for tortious interference.

In the first place, that's not just what our claim is; our claim isn't just about the disclosure of truthful information, it's about the pressure put by the Defendants onto the Raiders. So truth has no bearing on those threats and those pieces of intimidation.

The second argument is that this is really an affirmative

defense that Defendants must plead and prove. And to do so at this stage would at least require them to introduce the emails and prove that they're true. The emails aren't in the record, we don't have Bates Stamps to point to, we certainly don't have the emails that they sent to the Raiders, and we don't have the summaries they sent to the Raiders and have no way of admitting or verifying they're true.

Our Complaint definitely doesn't admit that these documents are true or represent Gruden's specific emails. All it does is reflect the public reports by journalists that are summaries of the underlying emails. So we cannot affirmatively admit, and neither can Defendants that any of these documents are truthful.

That -- again, this goes back to how this Court can craft an order saying that our claims should be dismissed at this stage because the underlying communications were truthful, when the underlying communications haven't been provided to us, or to this Court.

The next argument is that the partial disclosure of these emails is misleading in and of itself. This was an archive of information that was collected by Defendants to produce some of the emails and single Jon Gruden out and not even all of the communications that we believe they had, is a misleading representation to the public and a misleading representation to the Raiders.

This isn't just a situation where a portion of an email is

produced, but we have no idea of knowing whether they produced the entire email thread, the entire chain, to show the context of these communications. They could have selectively curated them; we don't know because we haven't seen them

But when you produce a small section of that archive of emails, you make Jon Gruden look to be the only person who's communicating in this fashion in the entire NFL. The effect of dropping that entire archive, 650,000 emails to the press all at once, it would be dramatically different than releasing six or seven of Mr. Gruden's emails by themselves and indicating that he stands apart from the rest of that archive.

More importantly, on the issue of first impression of whether truth is an absolute defense here, that position has never been recognized in Nevada. This Court absolutely can decide issues of first impression, but to do so now at this stage of the pleading, when the documents aren't before you, to announce a rule on documents that aren't there, we believe would not be in the interest of judicial economy.

The second defense that Defendants raise is about privilege. Now that defense would only apply in the context of intentional interference with prospective economic advantage. And they say there's no logical reason why this Court should not extend it to an intentional interference with an existing contract.

Well, one of the reasons is the Nevada Supreme Court has ruled on and they're asking this Court to essentially overrule the

elements for the intentional interference with the contract that the Supreme Court has laid out. It's laid out five elements without privilege with respect to intentional interference with existing contracts; five elements for prospective contracts that includes privilege as an element. It's not just extending a general principle to something the Court hasn't ruled on. The Nevada Supreme Court has had ample opportunities to determine that privilege is one of the elements of intentional interference with existing contracts and it's never done so. In fact, it's laid out the opposite by separating those two causes of action.

But even if privilege were to apply here to show that the NFL had a privilege to disclose these emails to threaten the Raiders, our argument with respect to prospective economic advantage is this, it matters that the NFL had policies and procedures for addressing misconduct that they chose not to employ. To claim that you have a privilege to act in a way that is contrary to the NFL Constitution, to -- contrary to the notice and hearing of due process procedures set forth in the NFL Constitution, would mean that those procedures are meaningless within the NFL's own policies and procedures.

If they could tortiously interfere with prospective economic advantage, because they're privileged to do so outside of their contractual documents, that would vitiate those contractual documents and allow them to do whatever they want without any notice or hearing to any of the employees of any member leagues.

They'd be able to circumvent those provisions.

And they argue that with respect to either of these torts, I believe, we haven't pleaded specific intent. One, I believe this Court -- it's been a while but in *Business Benefits versus Clark County School District*, specifically -- this Court specifically held that intent only needs to be pleaded generally. That's specifically what the Nevada Rules of Civil Procedure state.

And more importantly, we have it throughout our Complaint that Defendants did act intentionally, we're aware of the contracts, and intended to disrupt it; no clearer example than in paragraphs 52 and 55 where they actually demanded that the contract be terminated.

Briefly on negligence and the accessory torts. On negligence, clearly these are alternative causes of action and to claim that we need to identify the specific individuals' propensity to dangerous conduct at this stage goes against Nevada law of the pleading stage.

We don't know who leaked these documents because we believe that Defendants intentionally did. But if we -- if discovery shows that there was a negligent action at some point, that's when the obligation to produce propens -- knowledge of propensity or investigate in the hiring. And that's exactly what the *Hall* case and the Nevada Supreme Court held which was when in the course of discovery the individual was trying to determine the circumstances surrounding the hiring of a bouncer. And that discovery was

foreclosed, the case was reversed and sent back to the Trial Court.

But when at the pleadings stage they require us not only to identify something that needs to be determined in discovery, but then show why that person's hiring, which we have no access to at this point, is dangerous, that goes too far under Nevada law. What we've alleged is that a harm occurred in the alternative and certainly have the ability to pursue discovery on that aspect alone.

And on conspiracy and aiding and abetting, certainly those torts exist because the ability of Plaintiff Jon Gruden to state that Commissioner Goodell acted in his capacity as an individual is sufficient at this point to allege that he was acting outside of his capacity as an alternative argument within the context of our pleading in order to allow that motion to proceed without this Court determining in what capacity Commissioner Goodell was acting at the very beginning of this case as a matter of fact. Moreover, we have pleaded that there are roes and does that may have associated with active and in concert with Defendants.

Your Honor, when preparing for this case and this oral argument, it did feel like many of these arguments were more appropriately addressed in summary judgment and more appropriately addressed in trial. This is certainly something that we could spend a significant amount of the day, talking about these various arguments and the facts that we can eventually show and prove that are in our Complaint, but under Nevada's liberal notice pleading, we've done more than enough.

This is a case that we believe won't only win at this stage, but we'll win on summary judgment, and we'll win at trial. But certainly at this stage, this Court shouldn't foreclose any of our alternative causes of action before we're given a chance to get to the second gate. Thank you very much.

THE COURT: Thank you.

Reply, please.

MR. SHANMUGAM: Thank you, Your Honor.

So if I may, let me just start with the intentional tort claims and make a couple of points. First of all, with regard to the argument that the truth is a defense here, it is the law in the vast majority of jurisdictions that the truth is a defense to intentional interference claims, as well as defamation claims. And again, that law rests on the fundamental First Amendment principle that the provision of truthful information is protected.

To the extent that Gruden suggests otherwise, he identifies two cases which we address in footnote 1, of our Reply Brief, which in our view are distinguishable, for instance, because it involves a Federal Court sitting in diversity, making a prediction about state law.

And again, we would point this Court to the law from other jurisdictions and in particular, we would point this Court to the *Murphy* case from California which rejected any effort to draw a distinction between claims for interference with existing contracts on the one hand and claims for interference with prospective

economic advantage on the other.

Now I think with regard to the factual allegations here, I think in effort to get out from under the potential application of the truth as a defense, Gruden's Counsel really shifts the theory here from a theory concerning the leaking by Defendants of these emails and that is in paragraph 56 of the Complaint --

THE COURT: I have it out.

MR. SHANMUGAM: -- to a theory concerning pressure more generally.

But I think that with regard to this claim of pressure, the claim is really just a claim that Defendants provided emails to the Raiders. We heard talk about Defendants potentially having provided the emails to the Raiders but there's no suggestion that the Defendants engaged in any other conduct. And our submission is that even if you characterize the allegations in that fashion, you're still left with the fact that what we're talking about is the provision of the emails.

And we heard a lot about the standard on motions to dismiss and of course this is a notice pleading jurisdiction, but at the same time, it's Gruden himself who in paragraph 2, among other places of the Complaint concedes that these were his emails. There's no dispute about the fact that these were his emails. And when we're talking about the truth of the communications, that's what we mean; that these were in fact Gruden's emails and not for instance, someone else's.

And I would point the Court to the decision that we cited from I believe the Seventh Circuit, that's the *Westbrook* case for the proposition that even where there is a sustained campaign, in the words of the Seventh Circuit, to have the Plaintiff fired, where the statements that led to the termination were true, the truth applies as a defense.

And I would just say a couple of things with regard to the other arguments concerning intentional torts. The first is that to the extent that Counsel attempts to draw the distinction once again between claims for tortious interference with prospective advantage and claims for intentional interference with existing contracts, it is true that the Nevada Supreme Court has held that the absence of privilege is an element only as to the former type of claim, but Gruden simply offers no reason why those two types of claims should be treated differently for purposes of the application of the privilege doctrine; the notion that the absence of privilege is an element of the claim.

And again, I didn't hear Mr. Hosmer-Henner to suggest today that the eradication of racism, sexism, and homophobia would not be a valid justification if the doctrine of privilege is triggered with regard to the claims at issue here.

And with regard to the issue of intent, the only thing I would just emphasize is that our submission is that the intent that's required here is not some sort of generic intent to do harm; it is an intent to induce the Raiders to breach their contract with Gruden or

to prevent Gruden from obtaining future economic opportunities. And so while it may be true that you don't have to provide specific allegations, that's still the relevant intent, a so-called specific intent as to those claims.

Now with regard to the negligence claims, I think the only thing that I would say is we really didn't hear anything today on our arguments concerning either the existence of a duty, or the assumption of risk. At most, Mr. Hosmer-Henner really addressed the specific arguments with regard to negligent hiring and negligent supervision. But our arguments concerning the absence of a duty and the assumption of risk apply to all of the negligence-based claims here.

And again, there's really no explanation why as a matter of law, the NFL would have a duty to Gruden not to disclose these emails. There's a suggestion in the briefing that there's some sort of natural duty, but there's imply no legal support for that.

And with regard to the assumption of risk, we're simply resting on the principle that absent some specific allegation of a confidentiality agreement or the like, no one has an expectation of privacy in emails once they are sent to recipients. And to the extent there are cases suggesting the data that is provided to third parties is kept confidential, that's a very different situation from a situation where you send an email to a recipient, again, without a confidentiality agreement or some additional reason to believe that that email would not be disseminated to others. And I think we all

take notice of the fact that emails are often forwarded by recipients to other parties.

And finally, with regard to the claims for conspiracy and aiding and abetting, I think I would just sort of underscore the fact that those claims are dependent on the claims for intentional tort or negligence and therefore would only be able to proceed in the event that some of those claims survive.

Unless the Court has any further questions, we'd once again rest on our pleadings. Thank you.

THE COURT: All right. So the matter is submitted. This is the Defendant's Motion to Dismiss and it's going to be denied. It's just such a high bar in Nevada to dismiss from the beginning. It adequately pled causes of action which relief can be granted. I have to take all of the pleadings as true. We are a notice pleadings state.

With regard to the tort issue and the truth as the defense, it's an open issue in Nevada, so it hasn't been determined either way.

With regard to specific intent, Mr. Hosmer-Henner talked about paragraphs 52 through 50 -- and 55. I thought 44 through 59, taken as a whole could be supportive of specific intent.

Frankly, at this point, I don't think the Defendant has enough to proceed on conspiracy and I'm going to not distance it now to give them a chance because I know that if they can't support it, they'll drop it. So I -- you didn't say that, but you -- the lawyers

here are all frequent flyers here so they're of the highest caliber of -- they've brought in the highest caliber and so I have no concern about the Plaintiff pursuing a cause of action that he can't support at a later time.

So for those reasons the motion is denied. And again, Mr. Hosmer-Henner to prepare the order. Mr. Shanmugam and team to approve the form of the order. If you can't agree to the form, file an objection and the law clerk and I will take it from there.

Any questions about today? And questions that -- about any of the rulings?

MR. HOSMER-HENNER: No, Your Honor, not from Plaintiff.

THE COURT: Good enough.

MR. SHANMUGAM: And not from Defendants.

THE COURT: Good enough. Then everybody stay safe and healthy until I see you next.

[Hearing concluded at 11:29 a.m.]

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ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.

Brittany Mangelson
Independent Transcriber