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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

JON GRUDEN,

Plaintiff,

v.

THE NATIONAL FOOTBALL LEAGUE; ROGER GOODELL; DOES 1-10; and ROE ENTITIES 11-20, inclusive,

Defendants.

CASE NO.: A-21-844043-B
DEPT. NO.: XXVII

MOTION TO COMPEL ARBITRATION

HEARING REQUESTED

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/ / /

MOTION TO COMPEL ARBITRATION

Defendants the National Football League ("NFL" or "League") and Roger Goodell ("Commissioner Goodell" or "Commissioner") (collectively, the "NFL Parties"), by and through their counsel of record, the law firms of Brownstein Hyatt Farber Schreck, LLP and Paul, Weiss, Rifkind, Wharton & Garrison LLP, hereby request that this Court compel Plaintiff Jon Gruden ("Gruden") to arbitrate his dispute with the NFL Parties pursuant to the provisions of his employment agreement and the NFL's Constitution and Bylaws, and in accordance with Section 2 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2. This Motion is made and based upon Plaintiff's Complaint, the attached Memorandum of Points and Authorities, and any oral argument entertained by the Court at the time of hearing.

DATED this 19th day of January, 2022.

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By: */s/ Mitchell J. Langberg*
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MEMORANDUM OF POINTS AND AUTHORITIES

I. PRELIMINARY STATEMENT

This action—brought by Jon Gruden to blame anyone but himself for the fallout from the publication of racist, homophobic and misogynistic emails that he wrote and broadly circulated—belongs in arbitration under the clear terms of Gruden's employment contract and the NFL's Constitution and Bylaws to which Gruden is bound.

Gruden is the former head coach of the Las Vegas Raiders ("Raiders" or "Club") and a longtime public figure in the sports world. His now-public emails show that, for a period of at least seven years, Gruden engaged in the routine practice of sending derogatory emails to groups of men, including the former president of the Washington Football Team ("WFT"). Gruden's emails, sent when he was not working at the NFL or any of its football teams, contain multiple examples of racist tropes and misogynistic and homophobic slurs, inflicting harm on public figures, NFL players, and anonymous women alike.

The NFL and Commissioner Goodell have long publicly condemned and prohibited offensive and discriminatory conduct by persons associated with the NFL and have continuously strengthened the NFL's diversity and workplace conduct policies, instituting wide-ranging policies to foster an inclusive environment. During an investigation into alleged workplace misconduct at the WFT (which was wholly unrelated to Gruden), certain League employees were made aware of Gruden's emails, some of which were obtained and published by the media (through no fault of the NFL Parties). Gruden's resignation from the Raiders followed swiftly.

Gruden's employment at the Raiders was governed by an employment agreement, in which he agreed to be bound by the NFL Constitution and Bylaws. Both documents contain broad arbitration agreements intended to cover all sorts of disputes between and among Gruden, the Raiders, and the NFL. As relevant here, the NFL Constitution expressly requires Gruden to arbitrate all disputes involving him that relate to conduct detrimental to the League or professional football, and the employment agreement—signed and approved by Commissioner Goodell—requires arbitration of all disputes arising out of that agreement.

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Notwithstanding Gruden's clear obligation to arbitrate this dispute, he filed the instant Complaint in this Court against the NFL Parties, painting himself as the victim in a fictional story and seeking money through baseless claims against the NFL. The crux of Gruden's Complaint is that somehow the NFL or the Commissioner "leaked" his non-confidential emails (which were already sitting in the hands of Gruden's many recipients and as to which Gruden had no colorable expectation of privacy) to, for some inexplicable reason, destroy his career and ruin his reputation, despite the fact that the emails precipitated numerous media stories critical of the League, and also negatively impacted the League and the Raiders in the middle of the football season. To that end, Gruden alleges that the NFL Parties misused emails it had obtained in connection with its internal investigation into the WFT in an effort to pressure the Raiders to fire Gruden as a result of his repugnant conduct. As set forth further in the NFL Parties' Motion to Dismiss,[1] there is no merit to Gruden's blame game.

For purposes of this Motion, Gruden is in the wrong forum and should be compelled to arbitration under settled law. The Federal Arbitration Act, Nevada state law, and federal and state court (including Supreme Court) precedent all strongly favor the enforcement of arbitration agreements. Indeed, the Court's role in this motion is limited to determining whether Gruden's binding arbitration agreement is even *susceptible* to an interpretation that requires arbitration of the claims in his Complaint.

That is plainly the case here. The NFL Constitution's broad arbitration provision squarely covers this dispute. First, it involves an employee of a member club, Gruden. Second, it is founded on conduct that is patently detrimental to the League and professional football—namely, Gruden's abhorrent emails that led to his resignation challenged in his kitchen-sink pleading against the NFL—and that, in all events, would have and could have permitted the Commissioner himself to sanction and fire Gruden. Gruden's employment agreement similarly requires arbitration of this dispute as all of Gruden's claims arise out of that agreement because they have a significant

[1] As discussed below, the NFL Parties' Motion to Dismiss and this case more broadly should be stayed pending determination of this Motion to Compel.

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relationship to, and touch matters covered by, the agreement. Lacking any legitimate excuse for ignoring his requirement to arbitrate, Gruden resorts to artful pleading and conclusory claims that this case somehow does not involve NFL "internal affairs." As courts have long recognized, artful pleading by a plaintiff clearly subject to an arbitration provision, as Gruden is here, cannot defeat the heavy presumption in favor of arbitration.

Accordingly, the NFL Parties request that this Court issue an order staying this action and compelling arbitration.

II. BACKGROUND

Defendant NFL is the most popular sports league in the country. (Cplt. ¶ 17.) The NFL is an unincorporated association of 32 member clubs, including the Raiders, organized under the laws of New York. (*Id.* ¶ 11.) Defendant Roger Goodell is the Commissioner of the NFL, and was selected to serve in that position pursuant to a provision of the NFL Constitution and Bylaws requiring the League to "select and employ a person of unquestioned integrity to serve as Commissioner of the League." (*Id.* ¶ 18.) The NFL recognizes its role as an influential sports organization, and has long taken a hard stance against discriminatory or otherwise harassing practices. *See, e.g.*, *NFL Owners Endorse New Personal Conduct Policy*, NFL (Dec. 10, 2014).[2] The NFL has, in recent years, further strengthened its commitment to fighting discrimination, including by expanding its social justice commitments, developing innovative diversity, equity and inclusion policies, and instituting wide-sweeping training and other workplace policies to foster inclusivity. *See Expanded Social Justice Commitment*, NFL (June 12, 2020);[3] *NFL Makes Bold New Steps to Enhance Diversity*, NFL (May 19, 2020);[4] *NFL Collectively Celebrates Inspire*

[2] https://www.nfl.com/news/nfl-owners-endorse-new-personal-conduct-policy-0ap3000000441758.

[3] https://operations.nfl.com/updates/football-ops/expanded-social-justice-commitment/.

[4] https://operations.nfl.com/updates/football-ops/nfl-makes-bold-new-steps-to-enhance-diversity/.

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Change Initiative In-Season (Dec. 30, 2021);[5] Cody Benjamin, *NFL Expands Rooney Rule to Mandate In-Person Interviews with External Minority Candidates, Per Report*, CBS SPORTS (Oct. 26, 2021).[6]

Gruden is the former head coach of one of the NFL's member clubs, the Raiders. (Cplt. ¶ 10.) As the Complaint, the documents it references, and the public record detail, prior to his association with the Raiders, Gruden engaged in a long-standing practice of sending "insulting and derogatory" emails to a cohort of individuals, including Bruce Allen, the former president of the WFT. (*Id.* ¶¶ 2, 46, 49, 56); Ken Belson et al., *Raiders Coach Resigns After Homophobic and Misogynistic Emails*, N.Y. TIMES (Oct. 11, 2021 & updated Oct. 28, 2021) ("NYT Article").[7] In 2011, for example, Gruden sent an email using "a racist trope common in anti-Black imagery" to describe DeMaurice Smith, the executive director of the NFL Players Association and thus the leader of NFL players. *See* Andrew Beaton, *Jon Gruden Used Racial Trope to Describe NFLPA Chief DeMaurice Smith in 2011 Email*, WALL ST. J. (Oct. 8, 2021, 8:09 PM) ("WSJ Article").[8] Gruden sent a variety of similarly abhorrent emails to a half dozen recipients over a seven-year period, in which he denounced "the emergence of women as referees," and frequently used homophobic and sexist slurs to refer to Commissioner Goodell, then-Vice President Joseph Biden, a gay professional football player drafted in 2014, and others. *See* NYT Article. Gruden also exchanged several emails with Allen "and other men that included photos of women wearing only bikini bottoms." *Id.*

[5] https://www.nfl.com/news/nfl-collectively-celebrates-inspire-change-initiative-in-season#:~:text=%22The%20Players%20Coalition%20and%20the,advancement%20and%20criminal%20justice%20reform.

[6] https://www.cbssports.com/nfl/news/nfl-expands-rooney-rule-to-mandate-in-person-interviews-with-external-minority-candidates-per-report/.

[7] https://www.nytimes.com/2021/10/11/sports/football/what-did-jon-gruden-say.html.

[8] https://www.wsj.com/articles/jon-gruden-email-demaurice-smith-11633721045.

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Gruden's emails ultimately came to the NFL's attention in connection with its investigation into allegations of workplace misconduct at the WFT. (Cplt. ¶¶ 2, 43, 44, 49); *see also* NYT Article.

A. GRUDEN'S EMAILS BECOME PUBLIC

On October 8, 2021, *The Wall Street Journal* obtained and published Gruden's email regarding DeMaurice Smith. *See* WSJ Article. The Complaint speculates—without any supporting factual allegations and premised exclusively on the fact that the NFL (among many others) had access to the email—that either the NFL, an unnamed NFL employee, or Commissioner Goodell provided the email to the press in a putative effort to get Gruden fired. (Cplt. ¶¶ 50, 52.) As set forth in the NFL Parties' Motion to Dismiss, the Complaint does not and cannot allege the purported motivation for this supposed disclosure, other than the bald claim that the NFL and its Commissioner wanted to "hurt" Gruden (and despite the fact that, as further described below, such a disclosure would have been, and in fact was, completely at odds with the NFL's best interests and the interests of its member club). (*Id.* ¶ 9.)

The NFL immediately publicly denounced Gruden's email as "appalling, abhorrent and wholly contrary to the NFL's values." *See Raiders, NFL Condemn Jon Gruden for Using Racial Trope in 2011 Email to Describe NFLPA Executive Director DeMaurice Smith*, NFL (Oct. 8, 2021, 7:02 PM);[9] WSJ Article; NYT Article. The Raiders subsequently issued a statement noting that Gruden's email was "disturbing and not what the Raiders stand for," and that they were reviewing the email "along with other materials" the NFL provided to aid in their assessment. *Id.* For his part, Gruden nominally apologized publicly for his email upon its release, but nevertheless defended his statements by saying he was merely "upset" and just "used a horrible way of explaining it." WSJ Article.

On October 11, 2021, *The New York Times* published several other discriminatory emails that Gruden had sent. *See* NYT Article. Gruden contends that these emails, too, were selectively

[9] https://www.nfl.com/news/raiders-nfl-condemn-jon-gruden-for-using-racial-trope-in-2011-email-to-describe-.

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"leaked" by the NFL Parties to the press in an effort to get Gruden fired. (Cplt. ¶¶ 56, 58.) But, as the NFL Parties' Motion to Dismiss explains, Gruden does not allege anything other than naked assertions in support of this contention. And tellingly, the public record is inconsistent with his narrative.

The release of Gruden's emails was unequivocally against the NFL's best interests. The League—indeed, the entire country—had just emerged from the then-height of the COVID-19 pandemic and was in the first few weeks of a long-awaited football season that was poised to be "one of the most memorable . . . yet." Jordan Dajani, *2021 NFL Season: 17 Reasons It Will Be The Best One Ever, Including Brady-Belichick, Chiefs Reboot, 17 Games*, CBS SPORTS (Sept. 8, 2021).[10] The stadiums were full, the games were engaging, and the League was benefitting from buzz surrounding the Raiders' inaugural season in Las Vegas with fans in attendance. *Id.* The NFL had every interest in the Raiders' success and their ability to continue to generate positive fan response in Las Vegas and positive press for the League. Against this backdrop, Gruden's emails were released. The emails not only dampened the NFL's historic season, but also stood in stark contrast with the significant progress the League had made in recent years on diversity, equity and inclusion initiatives, and resulted in negative media coverage for the League. (*See supra* pp. 5–6.)[11]

In any event, had the NFL Parties wanted to fire Gruden, they had no need to resort to "leaks" to force his resignation (or to force the Raiders to fire him), because they themselves had the right to cancel Gruden's contract: the NFL Constitution grants the Commissioner the "complete authority to . . . [s]uspend and/or fine" or "[c]ancel any contract or agreement" of any "coach" "[w]henever the Commissioner, after notice and hearing, decides that" the coach "has either

[10] https://www.cbssports.com/nfl/news/2021-nfl-season-17-reasons-it-will-be-the-best-one-ever-including-brady-belichick-chiefs-reboot-17-games/.

[11] Indeed, Gruden's emails were not the only emails obtained and published by the press. *See* Ken Belson, *N.F.L.'s Top Lawyer Had Cozy Relationship With Washington Team President*, N.Y. TIMES (Oct. 14, 2021 & updated Oct. 26, 2021), https://www.nytimes.com/2021/10/14/sports/football/nfl-washington-emails-jeff-pash.html.

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violated the Constitution and Bylaws of the League or has been or is guilty of conduct detrimental to the welfare of the League or professional football." (Ex. 3, at § 8.13(A)(2).)

Ultimately unable to explain away his blatantly offensive emails as merely off-color expressions of "anger," as he had just a few days prior, Gruden quickly resigned and later entered into a confidential settlement with the Raiders. John Breech, *Raiders Reach Undisclosed Contract Settlement with Jon Gruden Just Weeks After Coach's Resignation Over Emails*, CBS SPORTS (Oct. 28, 2021).[12]

B. GRUDEN'S EMPLOYMENT AGREEMENT AND THE NFL CONSTITUTION

Gruden's employment as head coach of the Raiders was subject to the terms of his employment agreement with the Raiders (the "Agreement"). (*See* Decl. of Lawrence P. Ferazani, Jr., attached as **Exhibit 1** ("Ferazani Decl."), at ¶ 5; **Exhibit 2** (the Agreement).) Gruden's Agreement was entered into on January 8, 2018, and sets out the parameters of Gruden's association with the Club in detail, making clear that the Club's status as a member of the NFL is central to their arrangement. The Agreement states that: (1) the Club "is a member of the" NFL (Ex. 2, at 1); (2) the Agreement would become effective and binding only if it were ultimately "[]approved" by the NFL Commissioner" (*id.* ¶ 17)—indeed the agreement required the Commissioner's signature; and (3) the Agreement "shall be governed by and construed in accordance with the Constitution, Bylaws, rules, and regulations of the National Football League and the laws of the State of California." (*Id.* ¶ 16.)

Specifically, Gruden expressly agreed that:

> Gruden shall abide by and be *legally bound by the Constitution, Bylaws, and rules and regulations of the NFL* or any successor thereto, in their present form and as amended from time to time hereafter (including specifically but not limited to 2008 Resolution G5), *which are hereby made a part of this Agreement*, and by the decisions of the Commissioner thereof, which decisions shall be final, conclusive, and unappealable. . . . Gruden hereby *acknowledges that he has read the NFL*

[12] https://www.cbssports.com/nfl/news/raiders-reach-undisclosed-contract-settlement-with-jon-gruden-just-weeks-after-coachs-resignation-over-emails/.

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> *Constitution and By-Laws and applicable NFL rules and regulations, and understands their meaning.*

(*Id.* ¶ 10 (emphases added).)

The Agreement also contains an unequivocal and broad arbitration provision, expressly providing that "all matters in dispute between Gruden and Club, including without limitation any dispute arising from the terms of this Agreement, shall be referred to the NFL Commissioner for binding arbitration, and his decision shall be accepted as final, conclusive, and unappealable." *Id.*

The NFL Constitution and Bylaws, to which Gruden is indisputably bound, further require that he arbitrate an even broader set of disputes. To that end, section 8.3(E) of the operative NFL Constitution and Bylaws provides that "[t]he Commissioner shall have the *full, complete, and final jurisdiction* and authority to arbitrate . . . *[a]ny dispute involving* a member or members in the League or *any* players or *employees of the members of the League* or any combination thereof that in the opinion of the Commissioner *constitutes conduct detrimental to the best interests of the League or professional football*." (Ferazani Decl., at ¶ 6; **Exhibit 3**, at § 8.3(E) (NFL Constitution and Bylaws (emphases added) (the "NFL Constitution")).)

C. THE COMPLAINT

Notwithstanding his clear obligation to arbitrate this dispute, on November 11, 2021, Gruden filed the Complaint in this Court, alleging a litany of ill-pleaded actions for intentional interference with contractual relations, tortious interference with prospective economic advantage, negligence, negligent hiring, negligent supervision, civil conspiracy, and aiding and abetting. These actions rest on Gruden's bald speculation that the NFL, Commissioner Goodell, and/or other "employees and professionals" (Cplt. ¶¶ 100, 104) "leaked," or otherwise failed to prevent from disclosure to the press, his offensive emails and pressured the Raiders to fire him. Specifically, Gruden alleges that as part of its internal investigation into the WFT, the NFL Parties gained access to Gruden's emails that he had sent to a WFT-hosted email account and over which he had no reasonable expectation of privacy (*id.* ¶¶ 44–46, 49), that the NFL's investigation of and reporting on the WFT matter was somehow improper or negligent (*id.* ¶¶ 33–40, 42, 96–97, 105, 109, 115),

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and that the NFL "misus[ed]" Gruden's emails by "leaking" some of them to the press (*id.* ¶¶ 5, 6, 44, 48, 50, 56, 104, 111, 115), and then "pressured the Raiders to fire Gruden" as a result of his conduct exhibited in his emails (*id.* ¶¶ 5, 52).

For the reasons set forth below, Gruden's Complaint falls squarely under the arbitration provisions Gruden agreed to and is bound by, and should be compelled to arbitration.

III. LEGAL ARGUMENT

This Court should compel arbitration of this dispute—involving an NFL coach and the NFL, and arising out of conduct detrimental to the League and professional football—because the law and Nevada state policy favor arbitration and the clear and broad terms of the arbitration provisions in the NFL Constitution and Gruden's employment agreement require it.

A. THE LAW AND NEVADA STATE POLICY FAVOR ENFORCEMENT OF ARBITRATION AGREEMENTS

The FAA provides that a written arbitration agreement involving interstate commerce, such as the NFL Constitution and Agreement, "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2; *see also Tallman* v. *Eighth Jud. Dist. Ct.*, 131 Nev. 713, 724, 359 P.3d 113, 121 (2015) ("So long as 'commerce' is involved, the FAA applies.").[13] Motions to compel arbitration may be brought pursuant to the FAA in state court. *See, e.g.*, *U.S. Home Corp.*, 134 Nev. at 192, 415 P.3d at 42 (remanding state court case for an order directing parties to arbitration pursuant to a motion to compel invoking the FAA); *see also Southland Corp.* v. *Keating*, 465 U.S. 1, 12 (1984) ("[T]he substantive law the [FAA] created was applicable in state and federal court. . . . We thus read the underlying issue of arbitrability to be a question of substantive federal law: Federal law in the

[13] It is well settled that the NFL is engaged in "interstate commerce," which is construed liberally for purposes of the FAA. *See, e.g.*, *Radovich* v. *Nat'l Football League*, 352 U.S. 445, 452 (1957) ("the volume of interstate business involved in organized professional football place[d] it within" the purview of federal antitrust laws); *U.S. Home Corp.* v. *Michael Ballesteros Tr.*, 134 Nev. 180, 186–87, 415 P.3d 32, 38–39 (2018) (interstate commerce is interpreted broadly for purposes of the FAA); *Alexander* v. *Minn. Vikings Football Club, LLC*, 649 N.W.2d 464, 466 (Minn. Ct. App. 2002) (FAA governed enforcement of an NFL arbitration agreement).

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terms of the Arbitration Act governs that issue in either state or federal court." (internal quotations omitted)).[14]

The United States Supreme Court, the Ninth Circuit, and Nevada federal and state courts have uniformly endorsed a strong, liberal policy favoring arbitration, and rigorously enforce agreements to arbitrate. *See, e.g.*, *Moses H. Cone Mem'l Hosp.* v. *Mercury Const. Corp.*, 460 U.S. 1, 24 (1983) (the FAA "is a congressional declaration of a liberal federal policy favoring arbitration agreements . . ."); *Comedy Club, Inc.* v. *Improv W. Assocs.*, 553 F.3d 1277, 1284 (9th Cir. 2009) ("It is well established that where the contract contains an arbitration clause, there is a presumption of arbitrability." (internal quotations omitted)); *Raebel* v. *Tesla, Inc*., 451 F. Supp. 3d 1183, 1187 (D. Nev. 2020); *Phillips* v. *Parker*, 106 Nev. 415, 417, 794 P.2d 716, 718 (1990) ("There is a strong public policy favoring contractual provisions requiring arbitration as a dispute resolution mechanism. Consequently, when there is an agreement to arbitrate we have said that there is a presumption of arbitrability." (internal quotations omitted)).

To effectuate this strong policy in favor of arbitration, courts "resolve all doubts concerning the arbitrability of the subject matter of a dispute in favor of arbitration." *Clark Cty. Pub. Emps. Ass'n* v. *Pearson*, 106 Nev. 587, 591, 798 P.2d 136, 138 (1990); *see also Moses H. Cone*, 460 U.S. at 24–25 ("The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration"); *U.S. Home Corp.* v. *Harris*, 134 Nev. 1024, 419 P.3d 700 (2018) (unpublished) (courts "must presume the [arbitration] agreement is enforceable"). "In the absence of any express provision excluding a particular grievance from arbitration, . . . only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail." *AT&T Techs., Inc.* v. *Commc'ns Workers of Am.*, 475 U.S. 643, 650 (1986) (Marshall, J. concurring) (alteration in original).

[14] Nevada state law similarly permits a motion to compel arbitration "showing an agreement to arbitrate and alleging another person's refusal to arbitrate pursuant to the agreement." NRS 38.221. Even if Nevada law governed the issue, and it does not, Gruden would similarly be compelled to arbitrate his claims.

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As a result, "[t]he standard for demonstrating arbitrability is not a high one; in fact, a . . . court has little discretion to deny an arbitration motion, since the [Federal Arbitration] Act is phrased in mandatory terms." *Republic of Nicar*. v. *Std. Fruit Co.*, 937 F.2d 469, 475 (9th Cir. 1991). The scope of the Court's inquiry is thus constrained: courts should compel arbitration absent "positive assurance that the arbitration clause is not susceptible [to] an interpretation that covers the asserted dispute." *AT&T Techs.*, 475 U.S. at 650 (internal quotations omitted); *see also Clark Cty.*, 106 Nev. at 591, 798 P.2d at 138.

The NFL Parties easily meet that standard here.

B. THE AGREEMENT AND NFL CONSTITUTION REQUIRE GRUDEN TO ARBITRATE

Gruden expressly agreed to valid and binding arbitration provisions that clearly require—and at the very least are certainly susceptible to an interpretation that requires—arbitration of the instant action.

1. The NFL Constitution's Arbitration Provision Governs This Dispute

The NFL Constitution to which Gruden agreed to be bound contains an unambiguous arbitration provision covering broad categories of disputes, including those involving member club employees that constitute conduct detrimental to the League or professional football. (Ex. 2, at ¶ 10 ("Gruden shall abide by and be *legally bound by the Constitution, Bylaws, and rules and regulations of the NFL*" (emphasis added)); Ex. 3, at § 8.3 (granting the Commissioner "the *full, complete, and final jurisdiction* and authority to arbitrate" various categories of disputes, including those involving "any . . . employees of the members of the League," such as Gruden, that "constitute[] conduct detrimental to the best interests of the League or professional football" (emphasis added)).) Thus, there can be no dispute that a valid and binding arbitration agreement exists.

Nor is there any question that this dispute falls squarely under that agreement.

The NFL Constitution's arbitration provisions—both 8.3(E) and others in Section 8.3—are broad and manifest the clear intent to encompass any internal dispute, including tort claims,

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involving the NFL, member clubs, or any employee thereof. *See Wolf* v. *Rawlings Sporting Goods Co.*, No. 10 CIV. 3713 JSR, 2010 WL 4456984, at *2 (S.D.N.Y. Oct. 26, 2010) (interpretation of an arbitration agreement should "accord[] with the stated intention of the parties" where "the provision is exceedingly broad, and . . . clearly intends to encompass all disputes between all relevant parties."); *Zolezzi* v. *Dean Witter Reynolds, Inc.*, 789 F.2d 1447, 1449 (9th Cir. 1986) ("The Supreme Court held that tort claims are within the scope of arbitration agreements and that express exclusion of tort claims in a broadly worded arbitration agreement is required."); *Hanson* v. *Cable*, No. A138208, 2015 WL 1739487, at *5–6 (Cal. Ct. App. Apr. 15, 2015) (unpublished) (compelling plaintiff to arbitrate his tort claims against an NFL member club based on "[a] long line of California and federal cases hold[ing] that claims framed in tort are subject to contractual arbitration provisions" and the court's finding that plaintiff's tort claims fell under the "all matters in dispute" language found in his employment contract).

This is unsurprising, as constitutions governing unincorporated associations constitute "a contract between the association and its members, and the rights and duties of the members as between themselves and in their relation to the association, *in all matters affecting its internal government and the management of its affairs*, are measured by the terms of such constitution and by-laws." *Andrews Farms* v. *Calcot, Ltd.*, 258 F.R.D. 640, 648 n.1 (E.D. Cal. 2009) (internal quotations omitted) (emphasis added). Indeed, there is a longstanding and settled "principle of judicial noninterference in internal disputes of voluntary associations." *Scheire* v. *Int'l Show Car Ass'n (ISCA)*, 717 F.2d 464, 465 (9th Cir. 1983). This principle encourages courts to "decline to descend into the dismal swamp of resolving complex matters involving professional football that are best left to the voluntary unincorporated association that is the NFL." *Oakland Raiders* v. *NFL*, 131 Cal. App. 4th 621, 646 (Cal. Ct. App. 2005) (internal citation and quotations omitted). This is particularly true in the context of sports leagues, where courts defer to sports league commissioners' interpretation of their own league's policies, including, specifically, commissioner determinations regarding the type of conduct that is detrimental to the interests of the league. *See, e.g.*, *Charles O. Finley & Co.* v. *Kuhn*, 569 F.2d 527, 537 (7th Cir. 1978) ("Standards such as the best interests of baseball, [or] the interests of the morale of the players and the honor of the game, . . . are not

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necessarily familiar to courts and obviously require some expertise in their application. While it is true that professional baseball selected as its first Commissioner a federal judge, it intended only him and not the judiciary as a whole to be its umpire and governor.").

As a result, courts have consistently affirmed the rights of sports leagues (both the NFL and others) and member clubs to arbitrate under similar agreements. *See Hanson*, 2015 WL 1739487, at *1 (unpublished) (affirming order compelling former employee of the Raiders to arbitrate his claims against the Club); *Foran* v. *Nat'l Football League*, No. 1:18-CV-10857 (ALC), 2019 WL 2408030, at *3 (S.D.N.Y. June 7, 2019) (granting the NFL's motion to compel plaintiffs' employment-related benefits and privilege claims to arbitration to determine arbitrability); *see also Nat'l Football League Mgmt. Council* v. *Nat'l Football League Players Ass'n*, 820 F.3d 527, 548 (2d Cir. 2016) (confirming arbitration award, as determined by Commissioner Goodell, in a case involving an NFL player's involvement in a scheme to deflate footballs); *Rosenbloom* v. *Mecom*, 478 So. 2d 1375, 1378 (La. Ct. App. 1985) (affirming NFL Commissioner's jurisdiction to arbitrate suit by former executive vice president and general manager of a member team against that member team for damages resulting from alleged breach of employment contract); *Brinkman* v. *Buffalo Bills Football Club—Div. of Highwood Serv., Inc.*, 433 F. Supp. 699, 703–04 (W.D.N.Y. 1977) (former player's claim against a member team was barred by his failure to follow the arbitration procedure set out in his contract); *Wolf*, 2010 WL 4456984, at *1 (granting multiple defendants', including baseball league's, motions to compel arbitration of plaintiff baseball player's claims, including claims, of negligence based on arbitration agreement in player's contract); *Houston NFL Holding L.P.* v. *Ryans*, 581 S.W.3d 900, 911 (Tex. App. 2019) (compelling a former NFL player to arbitrate his premises liability claims against a member club).

So, too, here.

The Complaint's allegations make clear that this is the precise genre of dispute that is covered by the subject arbitration provision. First, the Complaint alleges that the NFL interfered with Gruden's contract with the Raiders. (Cplt. ¶ 70.) In turn, as set forth in detail in the NFL Parties' Motion to Dismiss, Gruden's claims for tortious interference hinge on allegations that the NFL Parties took wrongful action to interfere with Gruden's employment contract and prospective

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economic benefits to retaliate for his hateful views espoused in widely circulated emails. That determination is the epitome of an internal unincorporated association matter that courts refrain from interfering in, and it also squarely rests on the impropriety of Gruden's conduct. Thus, at bottom, this entire dispute is founded in quintessential conduct detrimental to football: homophobia, racism, and sexism. (*See* Ex. 3, at § 8.3 (mandating arbitration of all disputes involving "any . . . employees of the members of the League" that "constitute[] conduct detrimental to the best interests of the League or professional football.").) Indeed, it would be hard to imagine conduct more detrimental to football than the use by a football coach of a racist trope to describe the leader of NFL Players Association. *See* WSJ Article. For that reason, the NFL Parties had the clear authority under the NFL Constitution to cancel Gruden's contract for his conduct detrimental to football, and the terms of the arbitration agreement would have indisputably covered any dispute regarding that determination as it would have, on its face, involved conduct the Commissioner deemed detrimental to football. (Ex. 3, at § 8.13(A)(2) (granting Commissioner Goodell "complete authority to . . . [s]uspend and/or fine" or "[c]ancel any contract or agreement" of any "coach" "[w]henever the Commissioner, after notice and hearing, decides that" he "has either violated the Constitution and Bylaws of the League or has been or is guilty of conduct detrimental to the welfare of the League or professional football."); *id.* § 8.3(E).) Second, the Complaint alleges that the NFL purportedly negligently conducted its internal investigation of the WFT in a way that somehow harmed Gruden—a claim that centers squarely on the internal affairs of the NFL. (Cplt. ¶ 97.)

2. <u>The Agreement's Arbitration Provision Governs This Dispute</u>

Gruden is also required to arbitrate this dispute under the terms of the Agreement. The Agreement provides that "all matters in dispute between Gruden and Club, *including without limitation any dispute arising from the terms of this Agreement*, shall be referred to the NFL Commissioner for binding arbitration, and his decision shall be accepted as final, conclusive, and unappealable." (Ex. 2, at ¶ 10 (emphasis added).) As noted above, the Agreement, including its arbitration provision, was approved and signed by Commissioner Goodell. Thus, there can be no dispute that a valid and binding arbitration agreement also exists in the Agreement itself.

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Nor is there any question that this dispute falls squarely under that provision.

First, all of Gruden's claims, including his tort claims, squarely "aris[e] from the terms of [his] Agreement," (Ex. 2, at ¶ 10), as they "'touch matters' covered by the contract containing the arbitration clause"—indeed they are expressly centered on the termination of that Agreement. *Simula, Inc.* v. *Autoliv, Inc.*, 175 F.3d 716, 721 (9th Cir. 1999) ("Every court that has construed the phrase 'arising in connection with' in an arbitration clause has interpreted that language broadly, . . . factual allegations need only 'touch matters' covered by the contract containing the arbitration clause and all doubts are to be resolved in favor of arbitrability."); *Rooyakker & Sitz, P.L.L.C.* v. *Plante & Moran, P.L.L.C.*, 742 N.W.2d 409, 421 (Mich. Ct. App. 2007) ("In this case, the broad language of the arbitration clause—'any dispute or controversy arising out of or relating to' the agreement—vests the arbitrator with the authority to hear plaintiffs' tortious interference and defamation claims, even if they involve nonparties to the agreement."); *Nat'l Union Fire Ins. Co. of Pittsburgh, PA* v. *SharePoint360, Inc.*, No. 18CV249-L(AGS), 2019 WL 1382894, at *2 (S.D. Cal. Mar. 27, 2019) (arbitration clause which provided that "'[a]ny dispute or controversy *arising from or related to* this Agreement' . . . shall be settled by binding arbitration . . . does not limit arbitration to the literal interpretation or performance of the Agreement. Coupled with the policy favoring arbitration, the clause warrants expansive interpretation."); *Houston NFL Holding*, 581 S.W.3d at 907 ("when an arbitration agreement applies to 'any dispute' 'involving' the underlying contract, the agreement is considered broad" and is "not limited to claims that literally 'arise under the contract' but rather embrace all disputes between the parties having a significant relationship to the contract regardless of the label attached to the dispute").

Second, the fact that the arbitration provision at issue nominally contemplates disputes between Gruden and the Club does not prevent the NFL Parties from invoking the provision. In *MS Dealer Serv. Corp.* v. *Franklin*, for example, the Court held that even a *non-party* to an agreement could avail itself of contractual provisions requiring arbitration of disputes "between the parties" to the agreement where, as here, the signatory's claims "ar[o]se out of and relate[d] directly to the written agreement." 177 F.3d 942, 944, 947 (11th Cir. 1999), *abrogated on other grounds, Arthur Andersen LLP* v. *Carlisle*, 556 U.S. 624, 631 (2009). This outcome is all the more

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inescapable here, where Commissioner Goodell actually *did* sign—indeed his consent was *required* for—the Agreement.

3. Gruden Cannot Plead Around His Obligation to Arbitrate

Recognizing that his claims are squarely encompassed by the governing arbitration provisions, Gruden tries to evade his clear obligation to arbitrate and the established principle of judicial non-intervention by making the conclusory assertion that "[t]his is not an internal dispute." (Cplt. ¶ 24.) But it is well settled that Gruden's bald (and mistaken) allegation—just an unavailing attempt at artful pleading—cannot alleviate him of his obligation to arbitrate. *See Hays* v. *HCA Holdings, Incorp.*, 838 F.3d 605, 609, 613 (5th Cir. 2016) (compelling Plaintiff to arbitrate his claims, despite his attempts at artful pleading, because "[w]hether a claim seeks a direct benefit from a contract containing an arbitration clause turns on the substance of the claim, not artful pleading." (internal quotations omitted)); *Wolf*, 2010 WL 4456984, at *2 (interpretation of an arbitration agreement should "accord[] with the stated intention of the parties" where "the provision is exceedingly broad, and . . . clearly intends to encompass all disputes between all relevant parties."); *Houston NFL Holding*, 581 S.W.3d at 907 ("Arbitrability depends on the substance of the claim, not artful pleading. Thus, parties to an arbitration agreement 'may not evade arbitration through artful pleading.'" (internal citations omitted)); *Parfi Holding AB* v. *Mirror Image Internet, Inc.*, 817 A.2d 149, 159 (Del. 2002) ("The Vice Chancellor correctly engaged in an analysis to scrutinize causes of action carefully to search out artfully pleaded claims that attempt to avoid the arbitration clause to which the plaintiffs have agreed."); *In re Merrill Lynch Trust Co. FSB*, 235 S.W.3d 185, 188 (Tex. 2007) ("[P]arties to an arbitration agreement may not evade arbitration through artful pleading, such as by naming individual agents of the party to the arbitration clause and suing them in their individual capacity." (quoting *Ivax Corp.* v. *B. Braun of Am., Inc.*, 286 F.3d 1309, 1318 (11th Cir. 2002))); *Hurley* v. *Emigrant Bank*, No. 3:19-CV-0011-B, 2019 WL 5537330, at *7 (N.D. Tex. Oct. 25, 2019) ("[C]ourts look disfavorably on attempts to plead around arbitration.").

In fact, Gruden's claim is, at bottom, for wrongful termination against the Raiders—a claim indisputably covered both by Section 8.3(C) of the NFL Constitution and Paragraph 10 of the

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Agreement. (Ex. 3, at § 8.3(C) ("The Commissioner shall have full, complete, and final jurisdiction and authority to arbitrate . . . [a]ny dispute between or among players, coaches, and/or other employees of any member club or clubs of the League, other than disputes unrelated to and outside the course and scope of the employment of such disputants within the League."); Ex. 2, at ¶ 10.) Gruden did not name the Raiders in this dispute—choosing instead to settle his potential claims against the Club out of court prior to litigation—for that very reason. It is well-settled law that, where claims against one defendant are destined for arbitration, intertwined claims against another defendant must be arbitrated alongside them regardless of whether that other defendant is a party to the relevant arbitration provision. *See, e.g., JSM Tuscany, LLC* v. *Superior Ct.*, 123 Cal. Rptr. 3d 429, 442 (Cal. Ct. App. 2011) ("[T]he equitable estoppel doctrine applies when a party has signed an agreement to arbitrate but attempts to avoid arbitration by suing nonsignatory defendants for claims that are based on the same facts and are inherently inseparable from arbitrable claims against signatory defendants." (alteration in original) (internal quotations omitted)); *Wanek* v. *Am. Fam. Mut. Ins.*, 333 N.W.2d 733 (Wis. Ct. App. 1983) (claims against nonsignatory defendants must be arbitrated alongside claims against signatory defendants because "[t]he policy in favor of this expeditious alternative to the judicial system[—arbitration—]is thwarted if all disputed issues in an arbitration proceeding must be segregated into categories of arbitrable sheep and judicially triable goats." (internal quotations omitted)). Understanding this fact, Gruden attempted to style his grievance as (insufficiently pleaded) causes of action solely against the NFL Parties. This effort serves as further evidence of his misguided attempt to plead around his clear obligation to arbitrate this dispute under the NFL Constitution and his Agreement, and find a new means to the same end that countless courts have denounced: thwarting the strong public policy in favor of arbitration.

That Gruden artfully pleaded the Commissioner into this dispute is similarly no impediment to arbitration here, as it is well settled that any concern regarding the arbitrator's fitness to hear a dispute must be raised through arbitration. *See, e.g.*, *Aviall, Inc.* v. *Ryder Sys. Inc.*, 110 F.3d 892, 895 (2d Cir. 1997) (the FAA "does not provide for pre-award removal of an arbitrator" (citing 9 U.S.C. § 2)); *PK Time Grp., LLC* v. *Robert*, No. 12 CIV. 8200 PAC, 2013 WL 3833084, at *2

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(S.D.N.Y. July 23, 2013) (parties taking issue with the designated arbitrator "must proceed with arbitration and raise any objections in a motion to vacate the award"); *Serv. Partners, LLC* v. *Am. Home Assur. Co.*, No. CV-11-01858-CAS EX, 2011 WL 2516411, at *5 (C.D. Cal. June 20, 2011) (courts cannot hear challenges to the qualifications of the designated arbitrator prior to arbitration); Matthew Gaul, et al., *Recent Developments in Excess Insurance, Surplus Lines Insurance, and Reinsurance Law*, 47 Tort Trial & Ins. Prac. L.J. 185, 210 (2011) (courts have found that "arbitrator selection and qualification disputes are best handled within the arbitration itself").

Finally, if there were any ambiguity about whether the arbitration provision encompasses Gruden's actions—and there is not—any doubts should be resolved in favor of arbitrability. *See AT&T Techs.*, 475 U.S. at 650; *Clark Cty.*, 106 Nev. at 591, 798 P.2d at 138. Because the governing arbitration provision is at a very minimum "susceptible of an interpretation that covers" the instant dispute, it should be strictly enforced under the FAA, and arbitration should be compelled. *Clark Cty.*, 106 Nev. at 591, 798 P.2d at 138.

IV. CONCLUSION

Based on the foregoing, the NFL Parties respectfully request that the Court stay this action and compel Gruden to arbitrate this dispute.[15]

DATED this 19th day of January, 2022.

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By: */s/ Mitchell J. Langberg*
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BRAD S. KARP, ESQ. (*pro hac vice* pending)
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TIANA VOEGELIN, ESQ. (*pro hac vice* pending)
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
Attorneys for Defendants the National Football League and Roger Goodell

[15] In all events, Nevada law requires the action to be stayed while this motion to compel arbitration remains pending. *See* NRS 38.221 ("If a party makes a motion to the court to order arbitration, the court on just terms shall stay any judicial proceeding that involves a claim alleged to be subject to the arbitration until the court renders a final decision under this section.").

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Brownstein Hyatt Farber Schreck, LLP, and pursuant to NRCP 5(b), EDCR 8.05, Administrative Order 14-2, and NEFCR 9, I caused a true and correct copy of the foregoing **MOTION TO COMPEL ARBITRATION** to be submitted electronically for filing and/or service with the Eighth Judicial District Court via the Court's Electronic Filing System on the 19th day of January, 2022.

/s/ Wendy Cosby
An employee of Brownstein Hyatt Farber Schreck, LLP

Exhibit 1

DECLARATION OF LAWRENCE P. FERAZANI, JR. IN SUPPORT OF THE NFL PARTIES' MOTION TO COMPEL ARBITRATION

I, LAWRENCE P. FERAZANI, JR., declare and state as follows:

1. I am over the age of eighteen years and am competent to testify as to the matters set forth herein.

2. I have personal knowledge of the facts contained herein, except where stated upon information and belief, which facts I believe to be true.

3. I make this declaration in support of Defendants the National Football League ("NFL") and NFL Commissioner Roger Goodell (together, the "NFL Parties") in support of their Motion to Compel Arbitration (the "Motion").

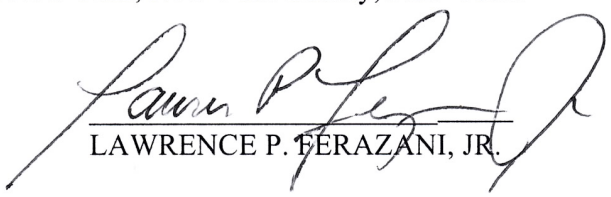
4. I am General Counsel of the NFL Management Council. I have served as counsel at the NFL since 2007.

5. Attached as **Exhibit 2** to the Motion is a true and correct copy of Plaintiff Jon Gruden's Employment Agreement with the Las Vegas Raiders, entered into on January 8, 2018.

6. Attached as **Exhibit 3** to the Motion is a true and correct copy of the Constitution and Bylaws of the NFL.

I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct.

Executed January 19, 2022, at New York, New York County, New York.



LAWRENCE P. FERAZANI, JR.

FILED UNDER SEAL

EXHIBIT 2

FILED UNDER SEAL

EXHIBIT 3