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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

REPLY IN SUPPORT OF MOTION TO COMPEL ARBITRATION

HEARING DATE: May 25, 2022

HEARING TIME: 10:00AM

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 submit their Reply in Support of their Motion to Compel Jon Gruden ("Plaintiff" or "Gruden") to arbitrate his dispute with the NFL Parties pursuant to the provisions of his employment agreement and the NFL's Constitution and Bylaws ("NFL Constitution" or "Constitution"), and in accordance with Section 2 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2 (the "Motion").

This Reply is made and based upon the following Memorandum of Points and Authorities, the pleadings and other papers on file herein, and any oral argument entertained by the Court at the time of hearing.

DATED this 4th day of April 2022.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Gruden's opposition brief—seeking to invalidate the arbitration provisions to which Gruden, a long-time and sophisticated NFL coach with the best advisors by his side, expressly and unequivocally agreed—does nothing to refute the NFL Parties' showing that this dispute belongs in arbitration.

As the NFL Parties demonstrated, this action, seeking to blame the NFL Parties for Gruden's resignation from the Raiders following the publication of his racist, homophobic and misogynistic emails, falls squarely within the scope of the broad arbitration provision contained in Gruden's employment agreement, which requires him to arbitrate all claims falling within the NFL Constitution's arbitration provision or otherwise arising under his agreement. The language of the relevant arbitration provisions is plain and unambiguous: they cover disputes that involve a coach and conduct detrimental to the League, and *all* disputes arising out of Gruden's employment agreement. That is precisely what Gruden purports to allege: that the publication of his emails espousing views detrimental to the NFL (and society at large) led to his resignation and the resulting termination of his agreement. Under governing law, and in particular the strong presumption of arbitrability under the FAA, there is no meritorious argument that this dispute is outside the scope of the subject arbitration provisions.

Lacking a viable response on the merits or any genuine ground to rescind his employment agreement, Gruden argues that the arbitration provisions it contains are somehow unenforceable or invalid. None of Gruden's arguments has merit.

First, Gruden seeks to disavow his agreement's express incorporation of the Constitution's arbitration provision, claiming the Constitution itself was not "presented" to him in the course of his contract negotiations and was not clearly and expressly incorporated by reference into his agreement. But the case law Gruden relies on proves the irrelevance of that assertion. The law requires only that the Constitution be available to Gruden and clearly incorporated into his agreement. Here, the agreement reflects that the Constitution was available to Gruden, as it contains his unequivocal representation that he read and understood the Constitution's terms. And

even without that representation, Gruden was previously an NFL coach who had ample access to the Constitution and had long been bound by the very same arbitration provision at issue here. The Constitution was also publicly available—Gruden even represented to this Court that it was available to "anyone with internet." The agreement also explicitly incorporates the Constitution by reference and "legally binds" Gruden to it. Any argument that more was required to incorporate the Constitution's arbitration provisions into Gruden's agreement contradicts the law on incorporation by reference and also runs headlong into the FAA, which preempts any state law that imposes more stringent requirements on arbitration provisions than on other types of contracts. Gruden's argument that this Court should impose prerequisites to arbitration should also be rejected, because they exist nowhere in the Constitution or elsewhere, and because any argument that arbitral prerequisites were not satisfied must be made to the arbitrator in the first instance.

Second, Gruden argues that the Constitution's arbitration provision, even if incorporated, is "unconscionable." To succeed Gruden must show both procedural oppression or undue surprise *and* substantive unconscionability in the form of unfairness that shocks the conscience. His arguments on both scores fall far short. Gruden signed numerous similar contracts with member clubs throughout his decades-long NFL career, and was represented throughout his negotiations with the Raiders by the "Godfather" of agents who has represented over 50 of the most successful coaches and general managers in the League.[1] Indeed, Gruden enjoyed such significant bargaining power that he was able to command a record 10-year, $100 million contract—one of the largest contracts for any coach in NFL history. Any argument that Gruden faced procedural unconscionability is rich indeed. Nor can Gruden establish substantive unconscionability. To that end Gruden argues, without support, that the arbitration provision is deficient as a matter of law, that Commissioner Goodell cannot hear this dispute, and that the arbitration provision otherwise fails as nonmutual or illusory. Gruden invokes California law setting out purported "requirements" that arbitration provisions must meet, but the case law he cites has since been effectively overruled by subsequent Supreme Court determinations, and in any event only ever applied to arbitration

[1] Liz Mullen, *Agent Bob LaMonte: The 'Godfather' for Gruden, McVay, Other Coaches*, SPORTS BUSINESS JOURNAL (February 5, 2018), https://www.sportsbusinessjournal.com/Journal/Issues/2018/02/05/Labor-and-Agents/Lamonte.aspx.

provisions that adjudicate "public rights"—not the case here. As for his complaint that arbitration would require Commissioner Goodell to hear claims brought against himself—albeit as a result of Gruden's artful pleading—any such concerns of bias are unfounded. Commissioner Goodell could designate a neutral arbitrator to hear the dispute, and in any event, neutrality concerns must be raised in arbitration or following the issuance of an arbitral award if not resolved—they do not allow Gruden to avoid arbitration altogether. Gruden's other substantive unconscionability arguments fare no better.

Third, Gruden attempts to escape the agreement's own straightforward arbitration provision by arguing that because it does not expressly name the NFL Parties, it does not cover this dispute. But as the Motion showed, the NFL Parties are far from third-party strangers to the employment agreement and thus are entitled to invoke the provision under settled principles of equitable estoppel. Gruden's arguments rest on inapposite cases. Indeed, as Gruden contends, the "linchpin" of equitable estoppel is "fairness." Here, fairness dictates that Gruden's claims against the NFL Parties—who are secondary defendants to Gruden's settled primary claim of wrongful constructive termination against the Raiders—should be sent to arbitration, as they would have been had Gruden's primary claims against the Raiders proceeded. Acknowledging as much, Gruden attempts to argue that his agreement's arbitration provision, too, is somehow "unconscionable," but that argument fails for the same reasons it does with respect to the Constitution's arbitration provision.

Ultimately, Gruden is a sophisticated actor who had extensive bargaining power and agreed on multiple occasions to be bound by two arbitration provisions that clearly cover this dispute. He cannot now rescind his end of the bargain. Accordingly, the NFL Parties request that this Court issue an order staying this action and compelling arbitration.

II. ARGUMENT

As the NFL Parties have established, Gruden's employment agreement (the "Agreement") contains an enforceable arbitration provision requiring him to arbitrate claims that, like those at issue here, fall within the scope of the NFL Constitution or arise under the Agreement. (Mot. at 13–18.) The NFL Parties further established that both federal and state law requires the Court to apply a strong presumption in favor of arbitrability, under which "any doubts concerning the scope

of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp.* v. *Mercury Const. Corp.*, 460 U.S. 1, 24–25 (1983); *see also, e.g.*, *Comedy Club, Inc.* v. *Improv W. Assocs.*, 553 F.3d 1277, 1284 (9th Cir. 2009); (Mot. at 11–13; Opp. at 5–8).[2] The Opposition does not show otherwise.

A. THE AGREEMENT REQUIRES GRUDEN TO ARBITRATE HIS CLAIMS PURSUANT TO THE TERMS OF THE NFL CONSTITUTION

The NFL Parties showed that Gruden (an experienced coach with superb agency representation) bargained for and agreed to a highly lucrative contract that expressly incorporated the NFL Constitution. The NFL Constitution contains an unambiguous arbitration provision covering "any . . . employees of the members of the League" and extending to broad categories of disputes, including those that involve "conduct detrimental to the best interests of the League or professional football." (Mot. at 13–16 (quoting Ex. 3, at § 8.3).)

Recognizing that this action clearly falls within the scope of the disputes he expressly agreed to arbitrate, Gruden now contends that the arbitration provision is somehow unenforceable or otherwise unconscionable. We address each of these contentions below.

1. Gruden Cannot Evade the NFL Constitution

Gruden first argues that the Constitution was not effectively incorporated by reference into his Agreement because (1) he was not "presented" with the Constitution, and (2) its incorporation was not "clear and unequivocal," "called to [his] attention" and "consent[ed]" to. (Opp. at 16–17 (quotations omitted) (citing *Remedial Constr. Servs., LP* v. *AECOM, Inc.*, 279 Cal. Rptr. 3d 909, 912–13 (Ct. App. 2021)).) Gruden's argument has no merit.

As an initial matter, Gruden's claim that he should be excused from his agreement to arbitrate because he was not "provided" with the Constitution is flatly contradicted by Gruden's

[2] Gruden concedes this presumption exists, but argues that it should be limited to "labor relations and grievances where courts defer heavily to collective bargaining." (Opp. at 6, 13–18.) That is not so. It has long been settled that the presumption in favor of arbitrability routinely arises and is applicable outside the context of collective bargaining. *State ex rel. Mastro* v. *Second Judicial Dist. Court of State*, 125 Nev. 37, 199 P.3d 828 (2009) (case involving the enforcement of a master settlement agreement); *Phillips* v. *Parker*, 106 Nev. 415, 794 P.2d 716 (1990) (case involving the enforcement of an arbitration provision in an agreement to start a business); *Exber, Inc.* v. *Sletten Constr. Co.*, 92 Nev. 721, 558 P.2d 517 (1976) (case involving a construction contract).

Opposition, the Agreement, governing federal law (the FAA), and Gruden's other submissions to this Court. As Gruden's own brief explains, a document need not be formally provided to a contracting party to be incorporated by reference. (Opp. at 17.) Rather, "'the terms of the incorporated document must'" merely "'be known or easily available to the contracting parties.'" (*Id.* (quoting *Remedial*, 279 Cal. Rptr. at 913).) Gruden cannot claim that the terms of the Constitution were not "known" to him, having signed onto a provision in the Agreement stating: "Gruden hereby acknowledges that he has read the NFL Constitution and By-Laws and applicable NFL rules and regulations, and understands their meaning." (Ex. 2 at ¶ 10.) Nor can Gruden credibly claim that the Constitution was not "easily available" to him, having been a coach in the NFL for decades and having represented to this Court that the NFL Constitution is "widely accessibl[e] to anyone with an internet connection." (Opp. to Mot. to Seal at 3.)

Estrada v. *Automobile Club of Southern California* (unpublished and non-citable) is not to the contrary. (Opp. at 16.) Critically, *Estrada* did not address an arbitration provision governed by the FAA. No. G054134, 2018 WL 2326752, at *4–5 (Cal. Ct. App. May 23, 2018). Under settled United States Supreme Court precedent, the FAA preempts the application of any "stricter requirement[s] on arbitration agreements than [are applied to] other contracts generally." *MMAWC, LLC* v. *Zion Wood Obi Wan Tr.*, 135 Nev. 275, 277, 448 P.3d 568, 570 (2019); *see also, e.g.*, *Epic Systems Corp.* v. *Lewis*, 138 S. Ct. 1612, 1622 (2018) (citations omitted); *Kindred Nursing Centers L.P.* v. *Clark*, 137 S. Ct. 1421, 1426 (2017). Thus, *Estrada*'s holding cannot be extended to the NFL Constitution's arbitration provision as a matter of binding law.[3]

Gruden next argues that the Constitution's incorporation into his Agreement was not sufficiently "clear," "unequivocal" or "consented to." (Opp. at 17.) The express terms of the Agreement belie this argument. The Agreement states: (1) "Gruden shall abide by and be legally

[3] *Estrada* is, in any event, distinguishable on its facts. There, the employee objecting to arbitration represented that he was unaware he would be legally bound by the incorporated agreement. *Estrada*, 2018 WL 2326752, at *9. Here, Gruden expressly acknowledged he would be "legally bound" by the Constitution. (Ex. 2 at ¶ 10.) Moreover, the contracting party in *Estrada* represented that he had never even seen the agreement at issue. *Estrada*, 2018 WL 2326752, at *2. Tellingly, Gruden carefully chooses his words, claiming only that "prior to signing [his] employment agreement" he was never "provided" with a copy of this "version" of the Constitution. (Opp. Ex. 1 at ¶ 2.)

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 . . . *which are hereby made a part of this Agreement* . . . ." (Ex. 2 at ¶ 10 (emphasis added)); and (2) "[t]his 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). It is difficult to imagine a clearer and more unequivocal incorporation by reference. *See Royer* v. *Baytech Corp.*, No. 3:11-CV-00833-LRH, 2012 WL 3231027, at *4 (D. Nev. Aug. 3, 2012) ("It is difficult to imagine language that more clearly and unambiguously expresses the intent to integrate documents into a contract than language that provides that the exhibits are 'incorporated herein and made a part hereof as if fully set forth at length herein.'").

And while Gruden contends that "courts usually require that the arbitration clause be specifically called out in the incorporation by reference," the only case he cites in support of this proposition—*Chan* v. *Drexel Burnham Lambert Inc.*, 223 Cal. Rptr. 838, 843 (Ct. App. 1986)—has since been confined to its facts: In *Chan*, there was no arbitration provision in the agreement itself, and the agreement vaguely referenced the rules of "three separate securities organizations" it purported to incorporate. *Spellman* v. *Sec., Annuities & Ins. Servs., Inc.*, 10 Cal. Rptr. 2d 427, 430 (Cal. Ct. App. 1992). Here, the Agreement contained an arbitration provision, expressly referenced the NFL's Constitution and Bylaws within that arbitration provision, and required Gruden to acknowledge that he had read the terms of the Constitution itself. *Id.*; (*see supra* pp. 4–6; *infra* p. 23.) To the extent *Chan* imposes more stringent requirements on the incorporation of an arbitration provision than any other document, the FAA preempts those requirements as applied here. (*See supra* p. 5.)

Finally, Gruden contends that the NFL Parties must "affirmatively establish that Exhibit 3" was the specific version of the Constitution that was integrated into the Agreement to rely on its arbitration provision. (Opp. at 17.) In so doing, Gruden ignores the clear facts that are before him and this Court. Exhibit 3 is a true and correct copy of the currently governing NFL Constitution (Ferazini Decl. at ¶ 6), which was "Effective February 1, 1970" and "Revised as of September 14, 2016"—two years prior to the execution of Gruden's contract incorporating it. (Ex. 3 at 1.) Exhibit

3 is thus the Constitution that governed when Gruden executed his Agreement, agreed to be bound by the NFL Constitution "in [its] present form *and as amended from time to time hereafter*," and represented that he had read and knew its terms. (Ex. 2 at ¶ 10 (emphasis added).)[4]

Ultimately, as Gruden concedes, "the parties' intent must be 'discerned from the four corners of the contract,'" and "[w]ritings which are made a part of the contract by . . . reference will be so construed." *MMAWC, LLC* v. *Zion WoodObi Wan Tr.*, 135 Nev. 275, 279, 448 P.3d 568, 572 (2019) (citations omitted); *see also* (Opp. at 6). Here, it is indisputable from the face of the Agreement and governing law that the NFL Constitution attached as Exhibit 3 was integrated into the Agreement, and Gruden's self-serving attempts to disavow it are entirely baseless.

2. Section 8.3(E) of the NFL Constitution Covers This Dispute

As the NFL Parties also showed, the arbitration provision in the NFL Constitution is broad and clearly encompasses any dispute that—as here—involves an NFL coach and conduct detrimental to the League. (Mot. at 13–16.) Indeed, Gruden's claims for tortious interference hinge on allegations that the NFL Parties wrongfully interfered with Gruden's employment contract and prospective benefits to retaliate for his hateful conduct that was detrimental to the League on its face. (*Id.* at 15–16.) Effectively acknowledging that he is bound by the Constitution's arbitration provision, Gruden argues for loopholes that do not exist. Specifically, Gruden asserts that the NFL Parties cannot invoke Section 8.3(E) because (1) they purportedly failed to satisfy nonexistent prerequisites to the provision, and (2) Gruden's misconduct occurred in the limited few-year span where he was not affiliated with the NFL. (Opp. at 17–23.) Neither argument can be reconciled with the language of the provision or the presumption in favor of arbitrability by providing "positive assurance" that the provision is not "susceptible of an interpretation that covers the asserted

[4] The single case Gruden cites for the proposition that the NFL Parties have not met their purported burden in this regard, *Avery* v. *Integrated Healthcare Holdings*, 159 Cal. Rptr. 3d 444, 450, 453 (Cal. Ct. App. 2013), is inapposite. There, the court declined to enforce new arbitration procedures that were incorporated into an integrated document *after* the underlying contract had already been executed, and *after* the claims at issue had already accrued. *See Avery*, 159 Cal. Rptr. 3d at 450, 453. That indisputably did not happen here. Moreover, the prior version of the Constitution contained the exact same Article 8.3(E) that the NFL Parties invoke. *See* Constitution and Bylaws of the National Football League (2006 Rev.), *available at* https://onlabor.org/wp-content/uploads/2017/04/co_.pdf (last visited Mar. 16, 2022).

dispute." *See AT&T Techs., Inc.* v. *Commc'ns Workers of Am.*, 475 U.S. 643, 650 (1986) (citation and internal quotation marks omitted).

First, Gruden argues that he cannot be required to arbitrate under Section 8.3(E) absent a "formal opinion" from Commissioner Goodell, announced in "formal disciplinary proceedings," that this dispute constitutes conduct detrimental to the League and must be arbitrated. (Opp. at 17–18.) Gruden similarly contends that various other provisions in the NFL Constitution that "authoriz[e]" Commissioner Goodell to take certain measures if he so chooses—including "hir[ing] legal counsel" and "tak[ing] various disciplinary actions" after "notice and hearing"— somehow *require* the Commissioner to take those steps prior to invoking arbitration. (Opp. at 20–21.) That is not what the provision says and, tellingly, Gruden cannot point to any provision that requires the Commissioner to issue a "formal" opinion or take *any* other steps prior to invoking Section 8.3(E). None exists. Gruden points exclusively to provisions that provide the Commissioner discretion, as well as cases in which Commissioner Goodell chose (or was required by, for example, the Collective Bargaining Agreement that governs the NFL's relationship with NFL players), to undertake additional processes before or in addition to arbitration. (Opp. at 21–22.)

And even if these prerequisites existed and were not satisfied, that would not prevent arbitration and warrant this Court's intervention; rather, Gruden would have to raise that threshold issue with the arbitrator through arbitration. *See, e.g.*, *BG Grp., PLC* v. *Republic of Argentina*, 572 U.S. 25, 34–35 (2014) ("[C]ourts presume that the parties intend arbitrators, not courts, to decide disputes about the meaning and application of particular procedural preconditions for the use of arbitration . . . includ[ing] the satisfaction of prerequisites such as time limits, notice, laches, estoppel and other conditions precedent to an obligation to arbitrate." (citations and internal quotation marks omitted)).

In sum, Gruden agreed to arbitrate "[a]ny 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 and professional football." (Ex. 3 at § 8.3(E).) Gruden's discriminatory commentary about the leader of the NFL Players' Association—among many others—is facially conduct detrimental to the best interests of the League.

Second, Gruden contends that the arbitration provision cannot be triggered absent a finding that the *NFL Parties*, rather than Gruden, engaged in conduct detrimental to the League, because: (1) "[t]his is not an action about the content of Gruden's emails or about whether Gruden's statements constituted conduct detrimental to the NFL," and (2) Gruden is no longer an "employee" for purposes of Section 8.3(E). (Opp. at 18–19.) But contrary to Gruden's self-serving contention, the dispute at issue here is whether it would have been wrongful for the NFL Parties to interfere with Gruden's prospective and existing contracts, while he was an employee of the Raiders, on the basis of his misconduct. (*See* Mot. at 15–16.) This dispute "in the opinion of the Commissioner" constitutes conduct detrimental to the League and is thus substantively encompassed by Section 8.3(E). And that Gruden is no longer an employee is plainly irrelevant. As Gruden concedes, "arbitration clauses may survive the termination of an employment agreement." (Opp. at 23.) What Gruden ignores is that this is invariably true for claims that "have their roots in the relationship between the parties which was created by the contract" including, specifically, claims "centering on the 'wrongful' termination or expiration" of that contract. *Bos. Material Handling, Inc.* v. *Crown Controls Corp.*, 137 Cal. App. 3d 99, 105–06 (Ct. App. 1982) (citations omitted); *accord Hallstrom* v. *Barker*, No. B149409, 2002 WL 31259890, at *12 (Cal. Ct. App. Oct. 9, 2002) (unpublished).

In all events, at most these arguments raise doubts about the *scope* of the Constitution's arbitration provision, which, as Gruden concedes (Opp. at 7), must be "resolved in favor of arbitration." *Moses H. Cone*, 460 U.S. at 24–25; (*see also* Mot. at 11–13). None of Gruden's contrived arguments overcomes that presumption.

3. <u>The Constitution's Arbitration Provision Is Not Unconscionable</u>

Left with no viable argument that Section 8.3(E) does not cover this dispute, Gruden contends that the arbitration provision he, a sophisticated actor, knowingly and willfully agreed to is unenforceable because it is somehow unconscionable. That argument also lacks merit.

As Gruden's own authority explains, unconscionability is a "rigorous and demanding" analysis that requires both procedural and substantive unconscionability, though they "need not be present in the same degree." *OTO, L.L.C.* v. *Kho*, 447 P.3d 680, 689–90 (2019). Procedural

unconscionability deals exclusively with the circumstances of the contract's negotiation and formulation, such as oppression or undue surprise, while substantive unconscionability probes whether the provisions are so one-sided or unfair as to "shock the conscience." *Sanchez* v. *Valencia Holding Co., LLC*, 353 P.3d 741, 748–49 (2015). Critically, "[a] party cannot avoid a contractual obligation merely by complaining that the deal, in retrospect, was unfair or a bad bargain." *Id.* at 749. Gruden cannot show either here.[5]

a. <u>The Constitution's Arbitration Provision Is Not Procedurally Unconscionable</u>

Gruden cannot establish procedural unconscionability. Gruden has been an NFL coach for nearly two decades, was represented in his contract negotiations by "the most-powerful agent for football coaches,"[6] and was able to extract a contract that secured him an unprecedented $100 million over 10 years. (*See* Ex. 2.)[7] There can simply be no argument that he was in any way unduly "oppress[ed] or surprise[d] due to unequal bargaining power," or the victim of "deceptive or coercive" bargaining tactics, as required. *OTO*, 447 P.3d at 690.

Indeed, Gruden's only assertion of procedural unconscionability is a single paragraph noting that he could not negotiate the Constitution's terms, and claiming it was "impossible to ascertain the dispute resolution processes and rules to which [he] purportedly agreed" in the Constitution. (Opp. at 26.) That the Constitution's terms could not be negotiated is irrelevant and Gruden does not cite a single case for his contention to the contrary. Indeed, the Court's adoption

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[5] Critically, although unconscionability determinations with respect to arbitration provisions are not barred *per se* by the FAA, the FAA carefully limits courts' analyses of unconscionability by prohibiting them from (1) "imposing procedural requirements that 'interfere with fundamental attributes of arbitration,' especially its lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes" *id.* at 750 (quoting *Concepcion*, 563 U.S. at 344); and (2) imposing additional requirements on arbitration provisions that are not required for other types of contracts (or that have a disproportionately burdensome effect on arbitration provisions). *Id.*

[6] *The Double Agent: Meet the Power Broker Behind Jon Gruden's $100M Deal with Raiders*, SAN FRANCISCO EXAMINER (Jan. 5, 2018), https://www.sfexaminer.com/sports/the-double-agent-meet-the-power-broker-behind-jon-grudens-100m-deal-with-raiders/.

[7] *See also Who are the Highest Paid Coaches in the NFL This Season*, NBC SPORTS (Oct. 24, 2021), https://www.nbcsports.com/boston/patriots/who-are-highest-paid-coaches-nfl-2021-season.

of this argument would nullify all contracting parties' ability to incorporate pre-existing documents into their agreement by reference—it would *de facto* render the entire practice procedurally unconscionable. Moreover, Gruden has not claimed (and cannot) that the terms of his Agreement, in which he repeatedly agreed to be bound by the Constitution regardless, could not be negotiated.

And in *Hewitt* v. *Kerr*—the single and inapposite case Gruden cites in support of his argument that he could not "ascertain the dispute resolution processes and rules"—the court determined that certain formal dispute resolution procedures could not be enforced where the contracting party had not assented to them in his contract. *Id.* (citing 461 S.W.3d 798, 811 (Mo. 2015)). Here, by contrast, Gruden expressly assented to and affirmatively acknowledged that he read and understood the terms of the NFL Constitution. (Ex. 2 at ¶ 10 ("Gruden hereby acknowledges that he has read the NFL Constitution and By-Laws and applicable NFL rules and regulations, and understands their meaning.").) Gruden was represented by savvy advisors and was himself a sophisticated actor with experience in the NFL—if he needed more information, he could and should have obtained it. Unlike in *Hewitt*, the NFL Parties are not invoking or relying on any procedures or processes that were unknown to Gruden at the time of contracting—to the contrary, it is Gruden who attaches and raises in his Opposition a set of dispute resolution procedures and guidelines that were supposedly not incorporated into his Agreement. (Opp. Ex. 3.)[8]

Ultimately, Gruden does not and cannot suggest the slightest indication of procedural unconscionability. The Court's assessment of unconscionability should thus end there. While courts apply a "sliding scale" such that the more substantive unconscionability is present the less procedural unconscionability is required, the black letter law still requires (and Gruden cannot show) "both" forms of unconscionability. *Sanchez, LLC*, 353 P.3d at 748.

[8] Gruden contends that the Constitution's arbitration provision was "hidden" by being "incorporat[ed] by reference" rather than "attach[ed] to" his Agreement, and was thus a "surprise," which suggests procedural unconscionability. (Opp. at 29.) This argument fails in the face of Gruden's decades of NFL experience and acknowledgment that he "read" and "underst[ood]" the Constitution. (Ex. 2 at ¶ 10.) Gruden's (unpublished and uncitable) case *Veitenhans* v. *Hikvision USA, Inc.* is inapposite; there, the arbitration rules at issue were not even identified for the employee, who had far less bargaining power than the employer and who (unlike Gruden (*see infra* pp. 21–22)) signed an adhesion contract. B302552, 2021 WL 2153773, at *2, 9 (Cal. Ct. App. May 27, 2021).

b. The Constitution's Arbitration Provision Is Not Substantively Unconscionable

Gruden has also failed to establish substantive unconscionability. Indeed, his arguments rest exclusively on inapplicable standards of law, considerations that are preempted by the FAA, and speculation that Commissioner Goodell will be the arbitrator when one has not yet been determined.

(1) State Law Does Not and Cannot Impose Requirements on FAA-Governed Arbitration Provisions

As an initial matter, Gruden is wrong that California law requires all employment agreement arbitration provisions to (1) provide for "neutral arbitrators," (2) provide "more than minimal discovery," (3) require a "written award," (4) allow for "all of the types of relief that would otherwise be available in court," and (5) not require parties to pay unreasonable costs or fees. (Opp. at 27 (citing *Armendariz* v. *Found. Health Psychare Servs., Inc.*, 6 P.3d 669, 682 (Cal. 2000)).)

As several courts in California have recognized, the *Armendariz* requirements were abrogated in effect by the Supreme Court's subsequent decision in *Concepcion*, which established that courts cannot impose requirements that infringe on the FAA's "fundamental attributes of arbitration," like efficiency and cost reduction—including specifically, as an example, parameters on discovery. 563 U.S. 333, 342–44 (2011); *see also, e.g.*, *Juarez* v. *Wash Depot Holdings, Inc.*, 1199, 235 Cal. Rptr. 3d 250, 252 (2018) (citing *Armendariz* for a separate proposition and noting it was "overruled on other grounds by [*Concepcion*]"); *Ashcraft* v. *Challenger Sheet Metal, Inc.*, No. E065660, 2017 WL 2953363, at *8 n.2 (Cal. Ct. App. July 11, 2017) ("It is possible the [*Armendariz*] holding concerning the five minimum requirements has been abrogated by the United States Supreme Court in [*Concepcion*]."). The *Armendariz* requirements similarly run afoul of the Supreme Court's "equal-treatment rule" for arbitration contracts by imposing special rules for arbitration agreements that do not exist for other contracts. *Epic Systems Corp.*, 138 S. Ct. at 1622.

Moreover, even if they had not been overruled in effect by *Concepcion* and *Epic Systems*, *Armendariz*'s requirements never applied to the "private rights" Gruden asserts here (those impacting solely the individual). *Abramson* v. *Juniper Networks, Inc.*, 9 Cal. Rptr. 3d 422, 433

(2004) ("Where the plaintiff's claims arise from unwaivable public rights, whether statutory or nonstatutory, the arbitration agreement must satisfy the minimum requirements set forth in *Armendariz* . . . where the plaintiff asserts private rights rather than (or in addition to) unwaivable public rights, the agreement to arbitrate those claims is tested only against conscionability standards."); *see also Fitz* v. *NCR Corp*., 13 Cal. Rptr. 3d 88, 93 (Ct. App. 2004) (quoting *Abramson* and defining public rights as "those that affect 'society at large' rather than the individual'" (internal citations omitted)).

In sum, Gruden's reliance on *Armendariz* is entirely misplaced.

(2) <u>Gruden's Neutrality Argument Rests on a Misguided Assumption and Is Not Ripe</u>

Gruden's argument that the arbitration clause is unconscionable because it does not provide for a neutral arbitrator is equally unavailing. (Opp. at 25–26.)

As Gruden knows well, it is a well-accepted practice in the NFL and other sports leagues for the league Commissioner to arbitrate claims brought by current and former member club employees—even those involving the Commissioner—and Gruden expressly agreed to it. In *National Football League Management Council* v. *National Football League Players Association*, for example, the Second Circuit determined that Commissioner Goodell could hear a player's appeal through arbitration of a disciplinary determination rendered by Commissioner Goodell and the League, finding that doing so did not meet the FAA's standard of improper "evident partiality" on behalf of an arbitrator. 820 F.3d 527, 548 (2d Cir. 2016). The court explained:

> [T]he parties contracted . . . to specifically allow the Commissioner to sit as the arbitrator in all disputes brought . . . . They did so knowing full well that the Commissioner had the sole power of determining what constitutes 'conduct detrimental,' and thus knowing that the Commissioner would have a stake both in the underlying discipline and in every arbitration brought . . . . Had the parties wished to restrict the Commissioner's authority, they could have fashioned a different agreement.

Id. The Eighth Circuit similarly found that a designee of the Commissioner's choosing can properly arbitrate appeals of the Commissioner's own disciplinary decisions under the FAA, even where that dynamic "presents an actual or apparent conflict of interest," because "the parties bargained

for this procedure." *Nat'l Football League Players Ass'n on behalf of Peterson* v. *Nat'l Football League*, 831 F.3d 985, 988 (8th Cir. 2016); *see also Williams* v. *Nat'l Football League*, 582 F.3d 863, 886 (8th Cir. 2009) (holding that under the FAA, the Commissioner's designee, the general counsel of the NFL, could appropriately arbitrate the appeal of a disciplinary determination rendered by the League). And further still, courts have upheld the Commissioner as an appropriate arbitrator for disputes involving the League. *See, e.g.*, *Holmes* v. *Nat'l Football League*, 939 F. Supp. 517, 527 (N.D. Tex. 1996) (upholding Commissioner's arbitral ruling affirming an NFL disciplinary determination); *Nat'l Football League Mgmt. Council*, 820 F.3d at 548–49.

League Commissioners retain jurisdiction to hear, or designate the appropriate arbitrator to hear, league disputes for good reason: sports leagues have a critical interest in ensuring the accurate and uniform interpretation of its governing rules and standards. *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 necessarily familiar to courts and obviously require some expertise in their application."); *Nat'l Basketball Ass'n* v. *Nat'l Basketball Players Ass'n*, No. 04 Civ. 9528(GBD), 2005 WL 22869, at *7–8 (S.D.N.Y. Jan. 3, 2005) (it is the province of the Commissioner of the League to determine what constitutes "any act . . . [that] has been prejudicial to or against the best interests of the Association or the game of basketball"); *STP Corp.* v. *United States Auto Club, Inc.*, 286 F. Supp. 146, 170 (S.D. Ind. 1968) ("Courts will not interfere with the internal affairs of an association except in case of fraud, illegality or violation of a civil or property right."); *Allison* v. *Am. Bowling Cong.*, No. CV-86-4719-PAR, 1988 WL 1256, at *5 (C.D. Cal. Jan. 6, 1988) ("One concern in such cases is that judicial attempts to construe ritual or obscure rules and laws of private organizations may lead the courts into what Professor Chafee called the 'dismal swamp.'").

Recognizing that his dispute against the NFL belonged in arbitration and could rightfully be arbitrated by Commissioner Goodell, Gruden artfully pleaded the Commissioner into this action in another obvious attempt to evade his contractual obligations by creating the appearance of a conflict. Indeed, Gruden's intentional tort, conspiracy, and aiding and abetting claims against Commissioner Goodell are premised exclusively on the bare allegation that Gruden has, at times,

used derogatory terms to refer to the Commissioner (among many other prominent figures). (Mot. to Dismiss at 17.) And Gruden's negligence claims cannot properly be asserted against Commissioner Goodell because even if a duty existed it would be owed by the *NFL*—not Commissioner Goodell individually. (*Id.* at 22–23.) Gruden thus had no cognizable basis for naming Commissioner Goodell in this action, and the Court should reject this maneuver by Gruden to evade his contractual obligation to arbitrate. (Mot. at 18–20); *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))).

Even more fundamentally, this improper attempt fails because it is not a foregone conclusion that Commissioner Goodell would arbitrate this claim. Nothing in the NFL Constitution or otherwise requires Commissioner Goodell alone to arbitrate disputes falling within Section 8.3(E). Rather, as Section 8.3(E) states, Commissioner Goodell has "full, complete, and final *jurisdiction* and *authority* to arbitrate" relevant disputes. Commissioner Goodell can designate a different arbitrator to hear disputes falling within his jurisdiction, as he has done on multiple occasions in the past. *See, e.g.*, *Peterson*, 831 F.3d at 989–90; *Williams*, 582 F.3d at 886.

And even if Commissioner Goodell elected to hear the dispute himself, the FAA, and settled law interpreting it, is clear that any argument that he is not fit to do so is properly asserted in arbitration and *post*-arbitration (if not resolved in the course of arbitration) through a motion to vacate the determination under the FAA. *See, e.g.*, 9 U.S.C. § 10(a)(2) ("In any of the following cases the United States court in and for the district *wherein the award was made* may make an order *vacating the award* upon the application of any party to the arbitration . . . where there was evident partiality or corruption in the arbitrators." (emphasis added).); *Aviall, Inc.* v. *Ryder Sys. Inc.*, 110 F.3d 892, 895 (2d Cir. 1997) ("Although the FAA provides that a court can vacate an award 'where there was evident partiality or corruption in the arbitrators,' . . . it does not provide for pre-award removal of an arbitrator." (quoting 9 U.S.C. § 10(a)(2))); *Gulf Guar. Life Ins. Co.* v. *Conn. Gen. Life Ins. Co.*, 304 F.3d 476, 490 (5th Cir. 2002) ("[E]ven where arbitrator bias is at issue, the FAA

does not provide for removal of an arbitrator from service prior to an award, but only for potential vacatur of any award . . . . [T]he FAA appears not to endorse court power to remove an arbitrator for any reason prior to issuance of an arbitral award."); *Petition of Dover S.S. Co.*, 143 F. Supp. 738, 740–41 (S.D.N.Y. 1956) (arbitration's central purpose "is to expedite the disposition of commercial disputes without the restrictive conditions characteristic of judicial proceedings;" as such, challenges to arbitrators "at the outset or in the course of the proceedings . . . would tend to defeat the very purpose of such arbitration agreement"); *PK Time Grp., LLC* v. *Robert*, No. 12 Civ. 8200 PAC, 2013 WL 3833084, at *2 (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"); *Henry* v. *New Orleans Louisiana Saints L.L.C.*, No. CV 15-5971, 2016 WL 2901775, at *9 (E.D. La. May 18, 2016) ("Even where arbitrator bias is at issue, the FAA does not provide for removal of an arbitrator from service prior to an award, but only for potential vacatur of any award." (citation omitted)).

National Football League Management Council is particularly instructive of proper process. *See* 820 F.3d at 548. There, as discussed, Commissioner Goodell arbitrated an appeal of disciplinary measures he himself had imposed. *Id.*; (*see also supra* p. 13). Only *after* an arbitral decision was rendered did the player (ultimately unsuccessfully) challenge the decision in court on the basis of evident partiality under the FAA. *Id.* Nothing in Gruden's cited cases supports a different process here.

Gruden cites *Graham* v. *Scissor-Tail*, 623 P.2d 165, 177 (1981) for the proposition that a contract is *de facto* invalid where one of the contractual parties is designated as the arbitrator of all disputes. (Opp. at 25.) Again, by contrast, Commissioner Goodell is not the destined arbitrator here. Gruden's case of *Pokorny* v. *Quixtar*, 601 F.3d 987, 996, 1003 (9th Cir. 2010) is similarly inapposite, as the Court found that "both" substantive *and* procedural unconscionability were "present to a high degree," including because, among *many* other reasons, the arbitrator *had* to be selected from a list of individuals, all of whom had been trained by the defendant. Here, by contrast, there is *no* procedural unconscionability, and it is wholly possible that Commissioner Goodell could

choose a different arbitrator; if for some reason there is evident partiality, Gruden retains his rights to challenge an award.[9] (*See supra* pp. 15–16.)

Moreover, even if the Court were to find that the mere possibility that Commissioner Goodell could serve as arbitrator renders the applicable arbitration provision unconscionable, the proper remedy would be to sever the provision's designation of arbitrator and direct the Commissioner to appoint another arbitrator—not to allow Gruden to evade his contractual obligation to arbitrate altogether. *See Dennison* v. *Rosland Cap. LLC*, 47 Cal. App. 5th 204, 212–13 (2020), *review denied* (July 15, 2020).

> In deciding whether to sever terms rather than to preclude enforcement of the provision altogether, the overarching inquiry is whether the interests of justice would be furthered by severance; *the strong preference is to sever* unless the agreement is 'permeated' by unconscionability. . . . An agreement to arbitrate is considered 'permeated' by unconscionability where it contains *more than one* unconscionable provision. . . . [or] if there is no single provision a court can strike or restrict in order to remove the unconscionable taint from the agreement. *Id.* (emphasis added) (citations omitted).

Here, the provision is far from permeated by unconscionability.

Indeed, courts have found substitution of the arbitrator (not invalidation of arbitration altogether) to be the proper remedy in the limited situations where they did take issue with a commissioner serving as arbitrator. *See, e.g.*, *Hewitt*, 461 S.W.3d at 813 ("[t]he unconscionability of the terms regarding the arbitrator does not invalidate the entire agreement to arbitrate. Instead, those unconscionable terms [may be] replaced by relevant provisions" allowing for the substitution of a new arbitrator). And Gruden's reliance on *Reddam* v. *KPMG LLP* for his claim that the Court could *not* sever any designated arbitrator to appoint a neutral is misplaced. (Opp. at 26 n.13.) *Reddam* only confirms that the Court *must* still enforce the arbitration provision even if it finds its current choice of arbitrator unenforceable. 457 F.3d 1054, 1060–61 (9th Cir. 2006). The district

[9] Similarly, in *Nostalgic Partners* the court declined to grant arbitration on grounds that included the belief that the Commissioner of Major League Baseball "should not arbitrate a dispute of claims that are asserted against" the league because it gave the "appearance of impropriety." (Opp. at 25–26 (citing *Nostalgic Partners, LLC* v. *N.Y. Yankees P'ship*, No. 656724/2020, slip op. at 2 (N.Y. Sup. Ct. Dec. 17, 2021)).) But again, Commissioner Goodell may not be the ultimate arbitrator. And in any event, *Nostalgic* is a recently issued slip opinion in a non-binding jurisdiction that provides no rationale; it cannot serve as a basis for the drastic step of finding unconscionability under California or Nevada law based on a mere "appearance of impropriety."

court in *Reddam* had denied a motion to compel arbitration, finding that the choice of arbitrator was integral to the arbitration provision and that, as a result, the arbitrator's refusal to hear the case invalidated that agreement altogether. *Id.* at 1060. The Ninth Circuit *reversed* because, as here, "there was not even an express statement that the [arbitrator who refused to hear the case] would be the arbitrator." *Id.* As the Court noted in *Reddam*, "[s]omething more direct is required before we, in effect, annihilate an arbitration agreement." *Id.* at 1061.

(3) The Arbitration Agreement Is Mutual

Gruden's next argument that the arbitration agreement in the NFL Constitution is not "mutual" because the Raiders are not bound to the Constitution "by the Agreement" itself, fares no better. (Opp. at 27.) As Gruden concedes, all that is required to sustain an arbitration provision under California law is a "'modicum of bilaterality.'" (Opp. at 27 (quoting *Ting* v. *AT&T*, 319 F.3d 1126, 1149 (9th Cir. 2003)).) And parties may "contract for asymmetrical remedies and arbitration clauses of varying scope" subject to the unconscionability assessment of whether a "strong party" has "impose[d] the arbitration forum on the weaker party without accepting that forum for itself." *Ting*, 319 F.3d at 1149.

As an initial matter, even this lenient arbitration-specific standard has been called into doubt post-*Concepcion*. *See, e.g.*, *Royee* v. *Casino 580, LLC*, No. A144464, 2016 WL 775523, at *7 n.4 (Cal. Ct. App. Feb. 29, 2016) (noting lingering doubt in California courts as to "whether an unconscionability defense based on lack of mutuality survives *Concepcion*") (citation omitted). While mutuality of consideration is required to sustain a contract as a whole, California's approach of carving out arbitration clauses and requiring an *additional* layer of mutuality specific to those provisions appears, on its face, to run afoul of *Concepcion*'s bar on imposing additional requirements on arbitration provisions that are not required for other types of contracts. (*See supra* p. 12.) Regardless, here there is far more bilaterality than the "modicum" California law purports to require.

Gruden contends that the Raiders, though bound "in some respect to the same documents" as Gruden, are "not bound to them by the Agreement and not in a way that would provide Gruden with adequate contractual rights." (Opp. at 27.) Gruden is wrong. The Agreement is signed by

the Raiders and expressly and fully incorporates the NFL Constitution and all of its terms. (Ex. 2 ¶ 10.) And even if the Raiders were not bound to the Constitution by the Agreement itself, the Constitution separately reflects that the Raiders (an NFL "member") are expressly bound to its terms: the League's members "agree to be bound by all of the terms and provisions of the Constitution and Bylaws of the League as now or hereafter in effect." (Ex. 3 at Art. III (G).) The Constitution's arbitration provision is also bilateral, mandating (as but one example) that the Raiders arbitrate "[a]ny dispute between any player, coach, and/or other employee of any member of the League (or any combination thereof) and any member club or clubs." (Ex. 3 at § 8.3(B).)[10]

The inapposite case of *Sniezek* v. *Kansas City Chiefs Football Club* does not compel a different result. (Opp. at 27–28.) In *Sniezek*, the Missouri state court of appeals refused to enforce an arbitration provision found in an employment agreement—*not* the Constitution—that was, on its face, one-sided, requiring only the employee, but not the employer club, to acknowledge: "*I* agree that all matters in dispute between me and the Club shall be referred to the Commissioner . . . ." 402 S.W.3d 580, 584 (Mo. Ct. App. 2013) (emphasis added). The Constitution came into play only because the club in *Sniezek* argued that its one-sided employment contract with the employee

[10] Gruden does not, because he cannot, assert any actual argument that mutuality is lacking with respect to the NFL Parties, save for a conclusory assertion in the preliminary statement that he "must arbitrate before Goodell but Defendants and the Raiders did not similarly promise to do so." (Opp. at 2.) The NFL Parties are signatories to the Agreement, which incorporates their own Constitution that they are of course bound to in any event. *See Andrews Farms* v. *Calcot, Ltd.*, 258 F.R.D. 640, 648 n.1 (E.D. Cal. 2009) (constitutions governing unincorporated associations "constitute a contract between the association and its members, . . . in all matters affecting its internal government and the management of its affairs"). That Constitution requires arbitration of all manner of disputes that could involve the League or Commissioner Goodell (including this one), far beyond satisfying the "modicum" of bilaterality required pursuant to which the parties' commitment to arbitrate can be asymmetrical or vary in scope. (*See, e.g.*, Ex. 3 at § 8.3 (requiring arbitration of, for example, "*any dispute involving* two or more members of the League . . . certified to [the Commissioner] *by any of the disputants*" with no exclusion for disputes that involve the League or Commissioner himself (emphasis added)).) And in any event, even "a one-sided [arbitration] contract is not necessarily unconscionable" if it "provides the party with superior bargaining strength a type of extra protection for which it has a legitimate commercial need"—such as where the outcome of the court action could have a "broad impact" on "business." *Sanchez*, 353 P.3d at 753 (upholding an arbitration provision that allowed additional arbitral review if injunctive relief were at issue, even though the provision favored only one of the parties (a car company) in effect). Here, as discussed, the NFL Parties have a legitimate interest in the uniform interpretation and application of its rules. (*See supra* p. 14.)

was nevertheless acceptable because the employer club would be compelled by the NFL Constitution—which, unlike here, was not integrated into the agreement at issue—to arbitrate disputes similar to those covered by the one-sided employment contract. *Id.* The court held that the non-integrated Constitution could not save the one-sided arbitration provision in the employment agreement, in part because "if the NFL had amended its constitution and bylaws to eliminate the [Constitution's] arbitration provision, there [was] nothing in the plain language of the Agreement [that the club was seeking to invoke] that would have required the [club] to arbitrate any dispute it might have had with" its employee. *Id.* The *Sniezek* court (which is out of this jurisdiction in any event) never held that the Constitution's arbitration provision is non-mutual when incorporated by reference into a binding employment agreement (it is not).[11]

(4) <u>The Arbitration Agreement Is Not Circular or Illusory</u>

Gruden's contention that the Constitution's arbitration agreement is "circular" and "illusory" and thus unconscionable is also unavailing.

Gruden first contends that the Constitution's arbitration provision is "circular" because Gruden would have to show that his conduct was *not* detrimental to the League in order to win any arbitration of this dispute, which would, in turn "invalidat[e] the arbitration process" that had been premised on Commissioner Goodell's "opinion" that the dispute constitutes conduct detrimental to the League. (Opp. at 28.) Gruden offers no support for this contention because there is none. Nothing in case law or otherwise indicates that mere "circularity" is a basis for a finding of unconscionability. And the Constitution's provision is not circular in any event. The trigger for arbitration is Commissioner Goodell's "opinion" that the dispute constitutes conduct detrimental to the League. (Ex. 3 at § 8.3(E).) Nothing in the Constitution suggests that his opinion needs to be confirmed in the resulting arbitration to have been valid. As a result, any ultimate determination by the chosen arbitrator finding that Gruden's conduct did not in fact substantively constitute conduct detrimental to the League would not invalidate the "opinion" that triggered the arbitration.

[11] *Sniezek* similarly does not compel a finding that the arbitration provision in Gruden's employment agreement is not mutual (*see supra* pp. 19–20), as Gruden's employment contract (unlike the agreement at issue in *Sniezek*) is expressly mutual. (Ex. 2 at ¶ 10 ("Gruden *and Club* agree" to arbitrate all disputes).)

Gruden next argues that the Constitutional arbitration provision is "illusory" because it covers "whatever Goodell says" it does and thus improperly "allow[s] one party the unfettered right to alter the arbitration agreement's existence or [its] scope." (Opp. at 28–29 (citing *Jean* v. *Bucknell Univ.*, No. 4:20-CV-01722, 2021 WL 1521724, at *13 (M.D. Pa. Apr. 16, 2021)).) Gruden relies solely on an out-of-circuit case applying Pennsylvania law because there is no support for his argument under governing law.[12] California courts expressly abrogated the rule that unilaterally modifiable contracts are illusory, holding that prospective expansions of scope are permissible because they are *de facto* bounded by the "good faith and fair dealing implied covenant." *Harris* v. *TAP Worldwide, LLC*, 203 Cal. Rptr. 3d 522, 534–35 (Cal. Ct. App. 2016) (arbitration provision in employee handbook that could be unilaterally modified by employer was not illusory). Thus, even if the NFL Parties could effectively "alter [the] scope" of the provision through determinations by the Commissioner or amendments to the Constitution, that would not render the provision illusory. (Opp. at 30.)[13]

Gruden argues that the Constitution's arbitration provision is illusory for the additional reason that he "had no opportunity to negotiate over the terms of the NFL Constitution" rendering it "effectively" a "contract of adhesion." (Opp. at 28–29.) An arbitration clause is only a contract of adhesion if, unlike here, "it lies within a standardized form drafted and is imposed by a party with superior bargaining strength, leaving plaintiffs with only the option of adhering to the contract or rejecting it." *Laymon* v. *J. Rockcliff, Inc.*, 219 Cal. Rptr. 3d 185, 195 (2017) (citation and internal

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[12] *Jean* is also inapposite. 2021 WL 1521724, at *13. The court was grappling with a provision allowing a unilateral amendment to the governing provision without any changes being "formalized in writing," and the court was concerned about "open[ing] the door for informal modifications and alterations to a binding agreement," thereby "imposing obligations on a party without its consent." *Id*. Here, Gruden purports to take issue with an express term of the NFL Constitution, which he read, understood, and agreed to be bound by. (*See supra* p. 5.) Moreover, the Constitution requires a formalized and documented process for any amendment to its terms. (Ex. 3 at §§ 5.3(B), 8.14(C).)

[13] *Sniezek* does not change this result. 402 S.W.3d 580, 584 (Mo. Ct. App. 2013). As discussed, that case merely reflects a Missouri state court's refusal to use the Constitution (which had not been incorporated by reference into an employment agreement) to cure an employment agreement's expressly one-sided arbitration provision. (*See supra* p. 20.) It did not hold that the Constitution's arbitration provision was in any way illusory or unenforceable, particularly where, as here, it was expressly incorporated by reference into Gruden's Agreement.

quotation marks omitted). Gruden has not alleged that his only options were to reject his coaching contract or agree to the Constitution. And as discussed, he certainly cannot claim that he suffered in any way from weaker "bargaining strength." (*See supra* p. 2.) In any event, even if this Court accepted Gruden's characterization of the Constitution as a contract of adhesion, that fact alone would not render it unenforceable without a concomitant showing of unconscionability on other grounds, which Gruden cannot make for the reasons discussed above. *Cty. of Solano* v. *Lionsgate Corp.*, 24 Cal. Rptr. 3d 362, 368 (2005) ("[A]n arbitration provision in an adhesion contract is legally enforceable unless the provision (1) does not fall within the reasonable expectations of the weaker party, or (2) is unduly oppressive or unconscionable." (citation omitted)).

(5) <u>The Arbitration Agreement Is Not Void as Against Public Policy</u>

Having failed to establish unconscionability, Gruden tries to establish that the NFL Constitution's arbitration provision violates "public policy." (Opp. at 29.) Gruden has not, however, pointed to a single public policy that counsels against the enforcement of arbitration here.[14] There is none. Public policy squarely *favors* arbitration, and counsels *against* judicial interference in the affairs of unincorporated associations. (*See supra* pp. 4, 14; Mot. at 11–13.)

* * *

In sum, Gruden, armed with decades of experience in the NFL and represented by a leading sports agent, extracted some of the most favorable—indeed, unprecedented—contractual terms enjoyed by *any* coach in the NFL. In extracting those terms, Gruden knowingly and willingly agreed to be bound by the NFL Constitution and acknowledged that he had read and understood its terms; he cannot now claim to have somehow been tricked by some "superior" bargaining power such that he can evade his binding contractual obligation to arbitrate. His arguments to that end should be roundly rejected.

. . .

. . .

[14] Gruden vaguely cites *Armendariz* once again, and implies the arbitration provision at issue would sharply "curtail[] employees' rights." (Opp. at 29.) As discussed, however, *Armendariz* imposed requirements on arbitration provisions that are preempted by the FAA. (*See supra* pp. 12–13.)

B. THE AGREEMENT REQUIRES GRUDEN TO ARBITRATE HIS CLAIMS BECAUSE THEY ARISE FROM IT

So, too, should Gruden's argument that he does not have to arbitrate his claims pursuant to his Agreement's provision requiring 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).) Unable to assert any cognizable reason that this provision is unenforceable, Gruden instead claims that its ostensible reference to disputes between "Gruden and Club" places this dispute outside of its scope. In so arguing, however, Gruden flouts and misrepresents governing case law that permits even non-signatories to avail themselves of arbitration provisions like this one, where, as here, equity requires.

1. The Provision Encompasses Gruden's Tort Claims

As the NFL Parties established, the tort claims here—hinging on Gruden's claims that the NFL Parties got him fired, notwithstanding that he actually resigned—arise out of the Agreement and his employment thereunder (as do his alleged endorsement or other prospective contracts which were derivative of that employment). (Mot. at 13–14.) It is long settled that tort claims—including specifically those for intentional interference—are within the scope of broadly worded arbitration clauses. *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."); *Hansen* v. *Musk*, No. 3:19-cv-00413-LRH-WGC, 2020 WL 4004800, at *3–4 (D. Nev. July 15, 2020) (there can be "little doubt" that plaintiff's claim for interference with contract falls under the arbitration agreement); *Marayonk* v. *Country Mut. Ins. Co.*, Case No. 2:12-cv-00017-KJD-PAL, 2012 WL 1898877, at *3 (D. Nev. May 23, 2012) (granting a motion to compel arbitration of intentional interference with prospective and existing contract claims). The language in the Agreement's arbitration clause—"*all matters* in dispute between Gruden and Club, including without limitation *any dispute arising from* the terms of this Agreement" (Ex. 2, at ¶ 10 (emphasis added))—is decidedly "broad." *See Sedco, Inc.* v. *Petroleos Mexicanos Mexican Nat. Oil Co.* (Pemex), 767 F.2d 1140, 1144 n.8, 1145

(5th Cir. 1985), *holding modified by Freudensprung* v. *Offshore Tech. Servs., Inc*., 379 F.3d 327 (5th Cir. 2004) (arbitration clause requiring that "any dispute or difference between the parties *arising out of* this [Agreement]" be arbitrated was "of the broad type" (emphasis added)); *R.J. Wilson & Assocs., Ltd.* v. *Underwriters at Lloyd's London*, No. CIVA 08-0322 DRH ARL, 2009 WL 3055292, at *5 (E.D.N.Y. Sept. 21, 2009) ("The term '*all matters*' lends to a broad reading of the arbitration clause." (emphasis added)); *JLM Indus., Inc.* v. *Stolt–Nielsen SA*, 387 F.3d 163, 167 (2d Cir. 2004) (finding the following to be broad: "[a]ny and all differences and disputes of whatsoever nature *arising out of* this Charter shall be put to arbitration" (emphasis added)). Moreover, and as discussed, "only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail." *AT&T*, 475 U.S. at 650; *Jackson* v. *Tic--The Indus. Co.*, No. 1:13-cv-02088-AWI-JLT, 2014 WL 1232215, at *11 (E.D. Cal. Mar. 24, 2014) (same) (citation and internal quotation marks omitted).

Understanding as he must that his claims—the "crux" of which, as he argues, are allegations that Defendants pressured the Raiders to terminate his Agreement—clearly "aris[e] from . . . the Agreement," Gruden focuses here on his alleged "endorsement contracts with third-parties such as Skechers." (Opp. to Mot. to Dismiss at 12–13.) Specifically, Gruden argues that, if he had brought claims only for "the loss of his contract with Skechers and many other reputational injuries," such claims would not have fallen within the scope of the Agreement's arbitration clause. (*Id.* at 13.) That is not so, and is irrelevant because it is not the claim that Gruden purports to assert. Gruden has alleged that the NFL Parties' purported interference with his Raiders contract resulted in his ultimate resignation and, as a result, the loss of his endorsement deals. (Cplt. ¶¶ 70–72.) Each of these claims at bottom "arise[s] out of the contractual relationship." (Opp. at 13 (internal quotation and citation omitted).)

2. <u>The NFL Parties Can Invoke the Provision Under Principles of Equitable Estoppel</u>

As the NFL Parties' Motion established, because Gruden's tort claims "arise under" his Agreement, all of his claims—including his secondary claims against the NFL Parties—would have been swept to arbitration under the plain terms of his Agreement had the Raiders been named in

this dispute. (Mot. at 16–18.) As a result, and as the NFL Parties further showed, equitable estoppel prevents Gruden from evading arbitration of his claims against the NFL Parties, which are at bottom derivative of his primary claim of wrongful termination against the Raiders, which he has settled. (*Id.* at 18–19.) Although Gruden conclusorily contends that the NFL Parties cannot pursue arbitration under a theory of equitable estoppel, he offers nothing persuasive in support of that contention.

Equitable estoppel applies in two relevant circumstances. "First, equitable estoppel applies when the signatory to a written agreement containing an arbitration clause must rely on the terms of the written agreement in asserting its claims against the nonsignatory. Second, application of equitable estoppel is warranted when the signatory to the contract containing the arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract." *Hansen*, 2020 WL 4004800, at *3 (quoting *Hard Rock Hotel, Inc.* v. *Eighth Jud. Dist. Ct. of State in & for Cty. of Clark*, 133 Nev. 1019, 390 P.3d 166, 2017 WL 881877, at *2 (2017)); *see also 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." (citation and internal quotation marks omitted)). Both are the case here.

First, a court will find that a plaintiff "rel[ies] on the terms of the written agreement" for purposes of equitable estoppel when, as here, his claims "make[] reference to" or "presume[] the existence of" the written agreement. *Boucher* v. *All. Title Co.*, 127 Cal. App. 4th 262, 271 (Cal. Ct. App. 2005) (citations omitted). *Boucher* involved a plaintiff who signed an arbitration agreement as part of his employment and was later terminated; the employee sued both the signatory employer and a non-signatory defendant (a company to whom all of the former employer's operations had been transferred) for claims arising out of his termination, and both defendants moved to compel arbitration. *Id.* at 271–72. Notably, the employee had asserted claims for tortious interference with his contract exclusively against the non-signatory defendant. *Id.* The

court sent those tortious interference claims to arbitration alongside the others, explaining that the focus of equitable estoppel "is on the nature of the claims asserted by the plaintiff against the nonsignatory defendant." *Id.* at 272–73. The court reasoned that the tortious interference claims "rel[ied] on, ma[de] reference to, and presume[d] the existence of the . . . employment agreement" that contained the arbitration clause, noting: "That the claims are cast in tort rather than contract does not avoid the arbitration clause." *Id.* at 272. So too, here: Gruden's claims against the NFL Parties—who have even greater standing as *actual* signatories—are for tortious interference with the Agreement that contains the arbitration provision.

Second, in determining whether claims against a non-signatory are interdependent with those against signatories, courts look "to the relationships of persons, wrongs and issues, in particular whether the claims that the nonsignatory sought to arbitrate were intimately founded in and intertwined with the underlying contract obligations." *Metalclad Corp.* v. *Ventana Environmental Organizational P'ship*, 109 Cal.App.4th, 1705, 1715–1713 (Cal. Ct. App. 2003) (internal quotations omitted) (citing *Choctaw Generation Ltd. Partnership* v. *American Home Assur. Co.*, 271 F.3d 403, 406 (2d Cir. 2001)). The "fundamental point" of the doctrine is to "prevent[] a party from playing fast and loose with its commitment to arbitrate, honoring it when advantageous and circumventing it to gain undue advantage." *Id.* at 1714; *see also IDS Life Ins. Co.* v. *SunAmerica, Inc.*, 103 F.3d 524, 530 (7th Cir. 1996) (where a party to an arbitration agreement seeks to avoid the agreement by suing a "related party with which it has no arbitration agreement . . . Such a maneuver should not be allowed to succeed").

Metalclad (like *Boucher*) involved claims against a non-signatory defendant who was corporately related to the party with whom plaintiff had signed the arbitration agreement at issue. There, plaintiff alleged that the holding company (a non-signatory to the arbitration provision) caused the signatory codefendant, a subsidiary, to breach the underlying contract. *Metalclad Corp.*, 109 Cal. App. 4th at 1717. Equitable estoppel applied due to the "nexus" between the claims against the non-signatory and "the underlying contract with" the signatory, "as well as the integral relationship between the" signatory and non-signatory. *Id.* at 1717–18. Here too the "nexus" of Gruden's claims is his employment agreement—he could have no claim for tortious interference

(or any of his other claims which are derivative thereof) without it. *Id.* Moreover, like in *Metalclad*, the NFL has an "integral relationship" with the Raiders, a member club in its League. *Id.* at 1718.

Gruden has settled his primary claims with the prospective defendant expressly named in the Agreement's arbitration provision (the Raiders), while continuing to pursue secondary claims against the NFL Parties. While the NFL Parties are not true "nonsignatories," they are—even more persuasively—*actual* signatories who were just not expressly named in the Agreement's arbitration provision. (Mot. at 3, 16.) As a result, and as established in the Motion, had Gruden's litigation against the Raiders proceeded against the NFL Parties and the Raiders jointly—as it would have but for the Raiders' settlement—his claims against the Raiders would have indisputably been sent to arbitration, and his secondary intertwined claims against the NFL Parties would have gone to arbitration alongside them under principles of equitable estoppel. (*Id.* at 19.) This may not be the quintessential fact pattern of an equitable estoppel argument, but it does not need to be. As Gruden concedes, "[t]he linchpin of equitable estoppel is equity—fairness." (Opp. at 14 (quoting *Goldman* v. *KPMG, LLP*, 92 Cal. Rptr. 3d 534, 543 (Ct. App. 2009)).)[15] Here, it is only fair for the NFL Parties to receive the same arbitral rights they would have received had the claims against the Raiders proceeded, and as they indisputably are entitled to under the Constitution.[16]

Gruden's case law is inapposite. Gruden claims that California law is "replete with" factually analogous cases where the Court rejected an argument that a "non-signatory" third party could enforce a "similar" agreement. (Opp. at 10.) The cases Gruden cites, however, are so dissimilar that they lack any persuasive value, or otherwise do not stand for the proposition Gruden

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[15] Contrary to Gruden's contention, the NFL Parties do not seek to expand the "scope" of the Agreement's arbitration provision; they merely seek to invoke equitable estoppel to avail themselves of the right to arbitration they would have had had the claims proceeded in the ordinary course against the Raiders, with the NFL Parties named only secondarily. This effort does not, as Gruden claims, "run afoul of the FAA." (Opp. at 14); *see Arthur Andersen LLP* v. *Carlisle*, 556 U.S. 624, 632 (2009) ("[W]e need not decide here whether the relevant state contract law recognizes equitable estoppel as a ground for enforcing contracts against third parties . . . . It suffices to say that no federal law bars the State from allowing petitioners to enforce the arbitration agreement against respondents.").

[16] Gruden's cited Alabama case of *Daphne* is inapposite here as it, like *Truck Ins.*, dealt with a signatory's attempt to avail itself of an arbitration provision *against a non-signatory*. *Daphne Auto., LLC* v. *E. Shore Neurology Clinic, Inc.*, 245 So. 3d 599, 601–02 (Ala. 2017).

suggests, including because they neglect to account for the NFL Parties' increased standing to assert the Agreement's arbitration provision as *actual signatories*.

First, Gruden cites *Truck Insurance Exchange* v. *Palmer J. Swanson, Inc.*, for the supposed proposition that arbitration agreements cannot be extended to parties beyond those "intended by the original contract." (Opp. at 9 (citing 124 Nev. 629, 634, 189 P.3d 656, 660 (2008).) But *Truck Insurance* explicitly acknowledges that "the obligation to arbitrate, which was executed by another party, may attach" even "to a nonsignatory" under various principles—including those of estoppel.[17] *Id.* at 636, 189 P.3d 661. Similarly, Gruden's cited case *Webcor Construction, L.P.* v. *Lendlease (US) Construction, Inc.* supports the notion that parties can be equitably estopped from "avoid[ing] enforcement" of arbitration even when they name "nonsignatories" in the litigation. No. B299310, 2020 WL 7395951, at *9 n.12 (Cal. Ct. App. Dec. 17, 2020), *review denied* (Mar. 24, 2021). The *Webcor* court noted that it would be possible to assert (though the parties had not asserted) "equitable estoppel" arguments requiring signatories to arbitrate their claims against even non-signatories. *Id.* (citation omitted).

Gruden also cites three cases involving BMW that it claims are "factually similar" to the present action. (Opp. at 10–11.) But they are not. Gruden cites and describes the portions of those cases dealing with the question of whether non-signatories were third party beneficiaries such that they could avail themselves of the relevant arbitration provisions. *Id.* The requirements expressed there and parroted by Gruden (a demonstrated "intent to benefit" the non-signatory or an "express[] confer[ring] [of] rights or benefits on" the non-signatory) are inapplicable in the context of equitable estoppel, which focuses instead on the "legal nexus between the plaintiff's claims and the underlying contracts." *Zamora* v. *BMW of N. Am.*, Cv-20-00838-CJC(GJSX), 2020 WL 5219565, at *3 (C.D. Cal. July 8, 2020). In *Zamora*, for example, equitable estoppel did not apply only because a non-signatory defendant (a BMW entity) sought to invoke an arbitration agreement

[17] While *Truck Ins.* did not extend the arbitration agreement to the non-signatory at issue, it was dealing with a reversed genre of estoppel—a motion to compel a *non-signatory's* claim to arbitration against a signatory—and only declined to apply it because the signatory did not show that the non-signatory received a benefit from the contract that contained the arbitration provision, as required for that type of estoppel. *Id.* at 635–638.

contained in a separate contract that was *not* at issue in the litigation, with a separate BMW entity that was also *not* involved in the litigation. 2020 WL 5219565, at *3. Here, by contrast, Gruden contends that the "crux" of his Complaint is his Agreement: that "Defendants pressured the Raiders to fire Gruden' and threatened to continue leaking documents to the press until the Raiders fired Gruden." (Opp. to Mot. to Dismiss at 2.) Gruden cannot say both that the "crux" of his complaint is that Defendants pressured the Raiders to terminate his employment agreement, and that his claim does not have a legal nexus to that very same Agreement. And again, the NFL Parties here have greater standing than a non-signatory, given that Commissioner Goodell actually did approve and sign the Agreement.

Finally, Gruden cites *Yang* v. *Majestic Blue Fisheries, LLC.*, which prevented invocation of an arbitration agreement, again by a *non-signatory*. (Opp. at 10 (citing 876 F.3d 996, 1001 (9th Cir. 2017), *abrogated by GE Energy Power Conversion France SAS, Corp.* v. *Outokumpu Stainless USA, LLC*, 140 S. Ct. 1637 (2020)).) *Yang* involved arbitration under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which imposes "additional prerequisites" beyond those of the FAA, and mandates that any "dispute at issue be one *between the* '*parties.*'" *Id.* at 1002 (emphasis added). The court noted the conflict between the FAA and the Convention "to the extent the FAA provides for arbitration of disputes with . . . non-parties." *Id.* at 1002. That Gruden tries to paper over this critical distinction is telling.[18]

In sum, nothing in Gruden's cases or otherwise prevents the NFL Parties from invoking equitable estoppel to prevent him from evading the clear intent of his Agreement's arbitration provision to govern "all matters" and all disputes that "arise" out of that Agreement.[19]

. . .

[18] Gruden cites another case, *Mundi* v. *Union Sec. Life Ins. Co*, which is too dissimilar to be instructive, involving a non-signatory's attempt to enforce an arbitration agreement against *another* non-signatory. 555 F.3d 1042, 1045, 1047 (9th Cir. 2009).

[19] To hold otherwise would inequitably allow Gruden to bypass the arbitration provision of his Agreement by pursuing secondary claims exclusively against the NFL Parties after settling out his primary claims against the Raiders.

3. The Provision Is Not Unconscionable

Gruden's arguments regarding unconscionability predominantly take issue with the Constitution's provisions, but are nominally directed also at the Agreement's provision. (Opp. at 23–24.) The NFL Parties showed that the NFL Constitution's arbitration provision is not unconscionable. (*See supra* pp. 9–22.) For those same reasons, the Agreement's arbitration provision, too, cannot be invalidated on grounds of unconscionability.[20]

III. CONCLUSION

Based on the foregoing, the NFL Parties respectfully request that the Court stay this action and compel Gruden to arbitrate this dispute.[21]

DATED this 4th day of April 2022.

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[20] The NFL Parties note that the Agreement's arbitration provision is worded differently than the NFL Constitution's, and refers "all matters in dispute between Gruden and Club . . . to the NFL Commissioner for binding arbitration, and his decision shall be accepted as final, conclusive, and unappealable." (Ex. 2 ¶ 10.) This does not change the result. There is no indication that Commissioner Goodell could not refer the arbitration to a designated neutral, and, as discussed, the FAA contemplates that any concerns regarding the neutrality of an arbitrator that is not cured in the course of arbitration will be raised *after* the arbitration is complete. (*See supra* pp. 15–16.)

[21] In all events, Nevada law requires the action to be stayed while this motion to compel arbitration remains pending. (Mot. at 20 n.5.)

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 **REPLY IN SUPPORT OF 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 4th day of April, 2022.

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