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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

GRUDEN'S OPPOSITION TO DEFENDANTS' MOTION TO COMPEL ARBITRATION

Plaintiff Jon Gruden ("Gruden" or "Plaintiff") submits his Opposition to the Motion to Compel Arbitration ("Motion") filed by Defendants the National Football League ("NFL") and Roger Goodell ("Goodell" or "Commissioner") (collectively "Defendants"). This Opposition is based on the following memorandum of points and authorities and exhibits, the pleadings and papers on file, and any argument of counsel at a hearing on this Motion.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendants contend that the head of a sports league, not this Court, has the authority to require claims to be arbitrated. The Commissioner's power is apparently unchecked and could cover any dispute that, *in his opinion*, constitutes conduct detrimental to the best interests of the NFL or professional football. If the Commissioner decides that the dispute constitutes "conduct detrimental," which already predetermines the outcome of the arbitration, then the *Commissioner* would have the power to decide even those claims asserted against him personally. Unconscionable does not begin to describe this structure, which is why Defendants were unable to present even a single case where such an arbitration process was considered let alone enforced by a court.

Arbitration is a "matter of consent, not coercion." *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989). First, the NFL and Goodell try to demonstrate that Gruden agreed to arbitrate his tort claims against them through the employment contract between Gruden and the Raiders ("Agreement"). The arbitration provision of the Agreement, however, is strictly limited to disputes between Gruden and the Raiders and does not include these claims within its scope. Second, the NFL and Goodell then attempt to show that Gruden contractually agreed to arbitrate via Section 8.3(E) of the NFL Constitution and Bylaws ("NFL Constitution"). This document was never presented to Gruden when he was negotiating or signing the Agreement, even though some version of the NFL Constitution was purportedly incorporated by reference in the Agreement. Ex. 1, Gruden Decl. ¶ 2. Defendants contend that Section 8.3(E) permits Goodell to determine, in his sole discretion, whether certain conduct was detrimental to the interests of the NFL and therefore subject to mandatory arbitration with Goodell as the arbitrator. Yet Defendants failed to establish that Goodell ever made such a determination and failed to even include a declaration from Goodell that this dispute involves detrimental conduct. In every other case Defendants present, a player in the NFL was provided with notice and an opportunity to be heard through the NFL's standard disciplinary processes. Here, the NFL and Goodell acted completely outside of their own policies and procedures by selectively leaking documents to the press and threatening the Raiders that further documents would be released if the

Raiders did not fire Gruden. They cannot now claim that this dispute is an "internal" matter that must be confidentially decided under the NFL Constitution by Goodell when the conduct at issue in this dispute is their own tortious conduct.

Even if Defendants were able to get past the starting gate, the arbitration clauses here are so unconscionable that they could serve as a case study in invalidity. Nearly every basis that courts have used to invalidate arbitration clauses as unconscionable is present. First, the arbitration process is procedurally unconscionable as it does not meet the minimum requirements under California law, which governs the Agreement. Goodell can unilaterally determine all procedural aspects of the arbitration, including whether to permit discovery into his own wrongdoing. Second, the arbitration clauses are not mutual, Gruden must arbitrate before Goodell but Defendants and the Raiders did not similarly promise to do so. Third, the arbitration agreement is circular and invalid as Defendants contend that arbitrability is based on Goodell's opinion as to whether the dispute involves conduct detrimental to the NFL. If that opinion has already been reached, then the outcome is predetermined and Gruden seemingly could not prevail without undermining the initial basis for arbitration and rendering the dispute non-arbitrable. This is inherently unfair. Fourth, the arbitration clause in the NFL Constitution is illusory as Goodell has the sole discretion to deem something as "conduct detrimental" without standards or guidelines, thus Gruden has no basis on which he could reasonably anticipate which disputes could be covered by the arbitration clauses. Fifth, Goodell's power to require arbitration is unlimited in time or scope. Gruden is no longer an employee of the Raiders and therefore should be outside the ambit of the NFL Constitution. But Defendants' position is that if Goodell determines that any conduct – past or present – is detrimental to the NFL he can compel arbitration. The exact same logic would permit Goodell to deny access to the courts to the Dallas Cowboys cheerleaders who were spied upon and recorded by another Cowboys employee.[1] As Goodell also could unilaterally assert that these incidents involved conduct detrimental to the NFL and as they involved current or former employees of NFL teams,

[1] Don Van Natta Jr., *Cowboys Paid $2.4 Million to Settle Cheerleaders' Voyeurism Allegations Against Senior Team Executive*, ESPN (Feb. 16, 2022), https://www.espn.com/nfl/story/_/id/33231841/dallas-cowboys-paid-24-million-settle-cheerleaders-voyeurism-allegations.

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Defendants' position would let Goodell invoke Section 8.3(E) to keep these incidents confidential in arbitrations that he controls and deny these individuals access to the courts. This Court should not empower Goodell to conceal the NFL's wrongdoing by expanding the arbitration clauses beyond what any court has done before.

"There is no public policy favoring arbitration of disputes which the parties have not agreed to arbitrate." *Streeter v. Oakland Raiders*, No. A122994, 2009 WL 3327401, at *5 (Cal. Ct. App. Oct. 16, 2009) (quotations omitted). Defendants' Motion to Compel Arbitration does not present the question of whether Gruden's claims are in the right forum but whether they can exist at all. The arbitration process Defendants would require is so unfair and so biased that it would allow Goodell to determine whether the claims were arbitrable in the first place, to arbitrate them according to whatever procedure he determines, and then to decide the tort claims that were brought against him personally. Gruden never agreed to this process and it would be substantively and procedurally unconscionable to deny his access to the courts and to any meaningful relief.

II. RELEVANT BACKGROUND

This case is neither about Gruden's emails nor about the NFL's public policies or positions. Defendants devote significant time to attacking Gruden's character and his "blatantly offensive emails." Mot. 9. Defendants even claim that Gruden's emails, which were sent while he was a private individual and not an employee of the Raiders, "could have permitted the Commissioner himself to sanction and fire Gruden." Mot. 4. But the Commissioner did not take this action, which would have required due process in the form of notice and a hearing. Mot. Ex. 3, § 8.13(A). Instead, the Commissioner *himself* caused the selective leaking of these emails to the press and the *Commissioner* demanded through backchannel phone calls that the Raiders fire Gruden. Compl. ¶¶ 56, 58.

Defendants admit that "certain League employees were made aware of Gruden's emails, some of which were obtained and published by the media" but contend in direct contradiction to Gruden's allegations that the media obtained these emails "through no fault of the NFL Parties." Mot. 3. Defendants' use of the passive voice in their Motion is as incriminating as their actual admissions. *See, e.g.*, Mot. 8 ("Gruden's emails were released"). Defendants further admit that they

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"provided [materials] to aid in [the Raiders'] assessment" of Gruden. Mot. 7. As Defendants recognize, Gruden and his employer, the Raiders, reached a "confidential settlement." Mot. 9. No matter how hard Defendants try to make these claims seem like a wrongful termination action against the Raiders, this is not the case that Gruden has brought. Instead, the content of Gruden's emails is irrelevant as the litigation involves Defendants' conduct in selectively leaking documents and interfering with Gruden's contractual relationships.

Similarly, the NFL's political positions are irrelevant as Defendants did not take disciplinary action against Gruden. Defendants had Gruden's emails since June 2021, but failed to take any action until they leaked them in October 2021. Compl. ¶¶ 2, 5. This delay is not consistent with the NFL's grandstanding statements about 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." Mot. 5. These statements were nothing more than hollow corporate speak when made on January 19, 2022, but they appear quite foolish now after the torrent of revelations against the NFL and Goodell that have recently come to light. Former Miami Dolphins coach Brian Flores filed suit against the NFL accusing it of discrimination and racism in hiring practices.[2] Multiple NFL coaches accused team owners of either offering to pay them to intentionally lose games or otherwise incentivizing coaches to lose games.[3] Six former employees of the then-Washington Football Team made new allegations of pervasive sexual harassment and workplace misconduct against the owner of the team and other executives.[4] Congress's Oversight Committee has consistently criticized the NFL for covering up these incidents and obtained a "Common Interest Agreement" that could

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[2] Jim Trotter, *Brian Flores' Lawsuit Reflects Widespread Discontent Among Black Coaches over NFL Hiring Practices*, NFL (Feb. 10, 2022, 3:56 PM), https://www.nfl.com/news/brian-flores-lawsuit-reflects-widespread-discontent-among-black-coaches-over-nfl#:~:text=It%20is%20against%20that%20backdrop,the%20Dolphins%2C%20Broncos%20and%20Giants.

[3] Jacob Lev, *Hue Jackson Says He Wasn't Paid to Lose NFL Games with the Browns but His Situation Had Similarities to that of Brian Flores*, CNN (Feb. 5, 2022, 2:34 AM), https://www.cnn.com/2022/02/05/sport/hue-jackson-nfl-cleveland-browns-not-paid-spt/index.

[4] Cody Benjamin, *Six Former Washington Employees Make New Allegations Against Daniel Snyder at U.S. House Committee Hearing*, CBS Sports (Feb. 9, 2022, 3:06 PM), https://www.cbssports.com/nfl/news/six-former-washington-employees-make-new-allegations-against-daniel-snyder-at-u-s-house-committee-hearing/.

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permit the owner of the then-Washington Football Team to block the release of the investigation into the team's conduct and culture.[5] The Committee also found that their "investigation and the NFL's own legal documents raise serious doubts" as to whether the concealment of the then-Washington Football Team report was due to a need to protect the privacy of the witnesses as opposed to a desire to protect the owner of the team. And allegations that at least one employee of the Dallas Cowboys spied on and secretly recorded four Dallas Cowboys' cheerleaders resulted in a $2.4 million settlement.[6]

Defendants' Motion presents a version of the NFL Constitution but without any evidence that this version was in effect when Gruden entered into his Agreement or was provided to Gruden. Mot. Ex. 3. In reality, Gruden was never provided a copy of the NFL Constitution attached to Defendants' Motion. Ex. 1, Gruden Decl. ¶ 2. Gruden also never received a communication from the NFL or Goodell in which any allegation in the Complaint or any aspect of this dispute was deemed to be conduct detrimental to the best interests of the League or professional football. *Id.* ¶ 3. Further, he never received any notice of any disciplinary action by the NFL or Goodell regarding his emails, the leaking of his emails, or any related aspect of this dispute. *Id.* ¶ 4. Gruden incorporates the allegations in the Complaint and incorporates the relevant background from the contemporaneously filed Opposition to Motion to Dismiss as if set forth fully herein.

III. ARGUMENT

A. Legal Standards

1. Standard for Compelling Arbitration.

Under both the Federal Arbitration Act ("FAA") and Nevada Uniform Arbitration Act ("NUAA"), a court may order parties to arbitrate only when it finds that there is an enforceable agreement to arbitrate the asserted claims. *See* 9 U.S.C. § 2; NRS 38.221(1)(b); NRS 38.221(3) ("If the court finds that there is no enforceable agreement, it may not . . . order the parties to arbitrate."). Any policy "favoring arbitration cannot displace the necessity for a voluntary

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[5] Peter Hailey, *Document Shows Snyder Could Have Say in Wilkinson Report Release*, NBC Sports (Feb. 4, 2022), https://www.nbcsports.com/washington/commanders/document-shows-dan-snyder-could-have-say-release-wilkinson-report-details.

[6] Van Natta, *supra* note 1.

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agreement to arbitrate. Although the law favors contracts for arbitration of disputes between parties, *there is no policy* compelling persons to accept arbitration of controversies which they have not agreed to arbitrate. Absent a clear agreement to submit disputes to arbitration, courts will not infer that the right to a jury trial has been waived." *Remedial Constr. Servs., LP v. AECOM, Inc.*, 279 Cal. Rptr. 3d 909, 912 (Ct. App. 2021) (emphasis added). Accordingly, "a court may order arbitration of a particular dispute only where the court is satisfied that the parties agreed to arbitrate that dispute." *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 297 (2010).

Whether a dispute is arbitrable "is a matter of contract interpretation." *State ex rel. Masto v. Second Jud. Dist. Ct.*, 125 Nev. 37, 44, 199 P.3d 828, 832 (2009); *see also AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (recognizing "the 'fundamental principle that arbitration is a matter of contract'" (quoting *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 67 (2010))). When interpreting an arbitration agreement, courts will enforce the contract "as written where the language is clear and unambiguous," and discern the intent of the parties "from the four corners of the contract" and any writings incorporated therein by reference. *MMAWC, LLC v. Zion Wood Obi Wan Tr.*, 135 Nev. 275, 279, 448 P.3d 568, 571–72 (2019) (quotations omitted).

A "party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648 (1986) (quotations omitted). Arbitration will not be ordered where, as here, "the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *Id.* at 650; *accord Clark Cnty. Pub. Emps. Ass'n v. Pearson*, 106 Nev. 587, 591, 798 P.2d 136, 138 (1990); *see also Franklin v. Cmty. Reg'l Med. Ctr.*, 998 F.3d 867, 874 (9th Cir. 2021) ("Arbitration agreements are contracts, and the [FAA] does not 'purport[ ] to alter background principles of state contract law regarding the scope of agreements (including the question of who is bound by them).'" (second alteration in original) (quoting *Arthur Andersen v. LLP v. Carlisle*, 556 U.S. 624, 630 (2009))).

2. Defendants Overstate the Presumption in Favor of Arbitrability.

Defendants assert that there is a presumption in favor of arbitrability so strong that courts should compel arbitration absent "positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *AT&T Techs.*, 475 U.S. at 650 (quotations

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omitted); Mot. 13. This presumption, however, arose in the context of labor relations and grievances where courts defer heavily to collective bargaining. *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 78 (1998) ("In collective-bargaining agreements, we have said, 'there is a presumption of arbitrability in the sense that [a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.'" (quoting *AT&T Techs.*, 475 U.S. at 650))); *see also Loc. Joint Exec. Bd. v. Mirage Casino-Hotel, Inc.*, 911 F.3d 588, 596 (9th Cir. 2018) ("In disputes involving a collective bargaining agreement with arbitration provisions, the arbitrability inquiry begins with a presumption of arbitrability."). The presumption in favor of arbitrability applies "only where a *validly formed* and *enforceable* arbitration agreement *is ambiguous* about whether it covers the dispute at hand." *Granite Rock*, 561 U.S. at 301 (emphasis added).

The presumption does not apply where, as here, the existence of a valid arbitration agreement is at issue. But even if Gruden were not contesting the existence of a valid arbitration agreement between himself and Defendants, the presumption would not apply because the scope of the Agreement is unambiguous. *Goldman, Sachs & Co. v. City of Reno*, 747 F.3d 733, 742 (9th Cir. 2014) ("[W]e do not apply the so called 'presumption in favor of arbitrability' in every case. . . . The presumption in favor of arbitrability applies only where the *scope* of the agreement is ambiguous as to the dispute at hand, and we adhere to the presumption and order arbitration only where the presumption is not rebutted.").

3. This Court Determines Gateway Questions of Arbitrability.

Gateway questions of arbitrability "are presumptively for the court, not the arbitrator, to resolve." *Principal Invs., Inc. v. Harrison*, 132 Nev. 9, 16, 366 P.3d 688, 693 (2016). These issues include whether an arbitration clause "applies to a particular type of controversy," as well as "whether the parties are bound by a given arbitration clause." *Id.* (quoting *BG Grp., PLC v. Republic of Argentina*, 572 U.S. 25, 34 (2014)). Because neither the Agreement nor the NFL Constitution provide otherwise, this Court is authorized to determine these gateway questions of arbitrability. *See Pearson*, 106 Nev. at 590, 798 P.2d at 137 (holding that the district court was

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authorized to make the determination regarding arbitrability where the parties did not "clearly and unmistakably provide otherwise in their agreement"). Defendants do not challenge this Court's ability to render a decision on arbitrability and indeed specifically ask the Court to decide these questions.

B. The Agreement Does Not Include Any Intent to Arbitrate Claims Between Gruden and Defendants.

The Agreement was entered into on January 8, 2018 "by and between the Oakland Raiders . . . and Jon Gruden." Mot. Ex. 2. These are the only two parties to the Agreement. The arbitration clause only covers disputes between these two parties: "Gruden and Club agree 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 . . . ." Mot. Ex. 2, ¶ 10 (emphasis added). Even though the Raiders are not a party to this lawsuit and there is no possible dispute between Gruden and the Raiders (as any potential claims have been settled), Defendants still attempt to invoke this arbitration clause to send these separate claims against the NFL and the Commissioner to be decided by the Commissioner. The plain language of the Agreement disallows this outcome.

1. The Arbitration Clause's Plain Language Only Covers Disputes Between Gruden and the Raiders.

The arbitration clause in the Agreement covers only "matters in dispute between Gruden and Club" with a dependent clause, "including without limitation any dispute arising from the terms of this Agreement," addressing only a subset of disputes between Gruden and the Raiders. Mot. Ex. 2, ¶ 10. This clause, which is subordinate to the "matters in dispute between Gruden and Club" clause, does not cover all claims "arising out of that agreement," let alone those asserted in Gruden's Complaint. Mot. 3. Instead, the arbitration clause in the Agreement expressly limits arbitration to disputes exclusively between Gruden and the Raiders. Defendants argue this provision only "nominally contemplates disputes between Gruden and the Club." Mot. 17. It is unclear what Defendants mean by "nominally" as the Agreement "exclusively" contemplates disputes between Gruden and the Club. Mot. Ex. 2, ¶ 10. *See Elijahjuan v. Super. Ct.*, 147 Cal. Rptr. 3d 857, 861 (Ct.

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App. 2012) ("The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties. If contractual language is clear and explicit, it governs." (citations omitted)); *Truck Ins. Exch. v. Palmer J. Swanson, Inc.*, 124 Nev. 629, 634, 189 P.3d 656, 660 (2008) (explaining that arbitration agreements "must not be so broadly construed as to encompass claims and parties that were not intended by the original contract"). As Defendants have not and cannot point to any ambiguity in the plain terms of the Agreement requiring arbitration of only those disputes "between Gruden and [the Oakland Raiders]," the plain language controls and no presumption of arbitrability applies. *Granite Rock*, 561 U.S. at 301.

Crucially, Defendants cite arbitration clauses with broader language than is found in the Agreement such as clauses covering any dispute arising from a contract as opposed to any dispute *between the parties* to a contract. Mot. 17. This distinction, which Defendants misleadingly elide, is fatal to their position. Defendants fail to acknowledge that the cited cases each involved an arbitration provision that, unlike here, was not limited by its own terms to the resolution of disputes between certain enumerated parties. *See Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 720 (9th Cir. 1999) (interpreting provisions requiring arbitration of "[a]ll disputes arising in connection with this Agreement"); *Rooyakker & Sitz, P.L.L.C. v. Plante & Moran, P.L.L.C.*, 742 N.W.2d 409, 413–14 (Mich. Ct. App. 2007) (involving accounting firm's request to enforce provision that stated, "[a]t the option of the Firm, any dispute or controversy arising out of or relating to this Agreement, may be settled by arbitration"); *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) (interpreting provision requiring arbitration of "[a]ny dispute or controversy arising from or related to this Agreement or the rights of the parties to this Agreement"); *Hous. NFL Holding L.P. v. Ryans*, 581 S.W.3d 900, 905 (Tex. App. 2019) (enforcing provision requiring arbitration of any dispute "arising after the execution of [the CBA] and involving the interpretation of, application of, or compliance with, any provision of [the CBA], the NFL Player Contract, the Practice Squad Player Contract, or any applicable provision of the NFL Constitution and Bylaws or NFL Rules pertaining to the terms and

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conditions of employment of NFL players").[7]

California law is replete with authorities rejecting Defendants' position and barring third-parties from enforcing arbitration clauses such as this one. *Yang v. Majestic Blue Fisheries, LLC*, 876 F.3d 996, 1001 (9th Cir. 2017) (holding that the clause permitted arbitration only of "differences which have arisen or which may arise between *them* . . . not disputes between a party and a non-party" (quotations omitted)); *Mundi v. Union Sec. Life Ins. Co.*, 555 F.3d 1042, 1045 (9th Cir. 2009) (stating that the "arbitration agreement is premised on a disagreement between Wells Fargo and the borrower" and so "any disagreement between the borrower and a third party, such as USLIC, is simply not within the scope of the arbitration agreement, even if it is related in some attenuated way to 'accounts, loans, services or agreements' subject to the arbitration provision"); *Webcor Constr. L.P. v. Lendlease (US) Constr., Inc.*, No. B299310, 2020 WL 7395951, at *7 (Cal. Ct. App. Dec. 17, 2020) (holding that a contract's "reference to disputes between Webcor and Lendlease establishes an intent to limit arbitration under the subcontract to those parties").

In a factually similar set of cases involving BMW of North America (the primary importer) and affiliated dealers and entities, California courts held that claims against BMW of North America

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[7] Defendants similarly rely on inapposite authority compelling arbitration of disputes exclusively between the parties to or specified in the relevant arbitration provision. *See* Mot. 15; *see also Foran v. Nat'l Football League*, No. 1:18-cv-10857 (ALC), 2019 WL 2408030, at *1 (S.D.N.Y. June 7, 2019) (compelling arbitration of claims brought by former security representatives, who contracted to provide security services to the NFL and alleged they were misclassified as independent contractors, pursuant to provision requiring arbitration of "any dispute arising out of or related to this Agreement or the services performed by Consultant pursuant to this Agreement"); *Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n*, 820 F.3d 527, 534 n.4 (2d Cir. 2016) (confirming arbitration award that upheld NFL Commissioner's disciplinary decision under collective bargaining agreement, which provided Commissioner authority to resolve "[a]ll disputes involving a fine or suspension imposed upon a player for conduct on the playing field (other than as described in Subsection (b) below) or involving action taken against a player by the Commissioner for conduct detrimental to the integrity of, or public confidence in, the game of professional football"); *Rosenbloom v. Mecom*, 478 So.2d 1375, 1376 (La. Ct. App. 1985) (involving action brought by former executive against the New Orleans Saints for breach of oral employment agreement, which dispute had already been arbitrated upon the executive's request under arbitration provision of NFL Constitution that covered "[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"); *Brinkman v. Buffalo Bills Football Club—Div. of Highwood Serv., Inc.*, 433 F. Supp. 699, 702–03 (W.D.N.Y. 1977) (ordering arbitration of former player's contract claims against the Buffalo Bills based on provision in player's contract requiring such a dispute to be "submitted to a disinterested physician to be selected by the Club Physician and Player's physician or, if they are unable to agree, by the Commissioner (of the NFL)" for resolution).

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were not arbitrable because the clauses were limited to disputes between the actual contracting parties. *Zamora v. BMW of N. Am., LLC*, No. Cv 20-00838-CJC (GJSx), 2020 WL 5219565, at *4 (C.D. Cal. July 8, 2020) ("The terms of the Lease Agreement do not show an intent to benefit BMW NA. The arbitration clause provides that '[e]ither [lessor] or [Plaintiff] may choose to have any dispute between us decided by arbitration.'" (first alteration in original)); *see also Vincent v. BMW of N. Am., LLC*, No. CV 19-6439 AS, 2019 WL 8013093, at *5 (C.D. Cal. Nov. 26, 2019) ("[E]ven though the provision may contemplate disputes that 'arise[] out of or relate[] to … relationship[s] with' non-signatories, it does not extend to claims against non-signatories such as Defendant, nor does it confer any rights or benefits on Defendant." (alterations in original)); *Jurosky v. BMW of N. Am., LLC*, No. 19cv706 JM (BGS), 2020 WL 1024899, at *7 (S.D. Cal. Feb. 27, 2020) ("[T]his language refers to types of disputes between Plaintiff and the dealership that may be arbitrated, and does not demonstrate an intent to confer some direct benefit on BMW."). As the *Zamora* court held, the "arbitration clause does not cover disputes with BMW NA and does not expressly confer any rights or benefits on BMW NA." 2020 WL 5219565, at *4. Further, and just like the Agreement, if the parties' intent had been to include BMW of North America within the arbitration clause, then the language could have specifically referenced disputes with BMW of North America. *Id.* Similarly, if the Raiders and Gruden had intended to send any disputes between themselves and Defendants to arbitration, the Agreement could have expressly provided so. But it did not, and Defendants cannot now rewrite it simply to sweep the unforeseen consequences of their actions into arbitration and out of public view.

Finally, Defendants also cite *Hanson v. Cable*, No. A138208, 2015 WL 1739487 (Cal. Ct. App. Apr. 15, 2015), which is the only authority in the Motion involving a similar arbitration provision but which forecloses Defendants' argument about the scope of the Agreement. In *Hanson*, the court considered a contract between a former assistant coach, Randy Hanson, and the Oakland Raiders. *Id.* at *5. Pursuant to that agreement, Hanson agreed "that all matters in dispute between Hanson and [the Raiders], including without limitation any dispute arising from the terms of this Agreement, shall be referred to the NFL Commissioner for binding arbitration." *Id.* at *1. Hanson also agreed to "abide by and be legally bound by the Constitution, Bylaws, and rules and regulations

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of the NFL," including Section 8.3(C) of the NFL Constitution, which required arbitration of disputes between coaches. *Id.* The court concluded that these provisions covered the tort claims Hanson asserted against the Oakland Raiders and its former head coach Tom Cable, "arising from a verbal and physical altercation between Hanson and Cable that occurred at the Raiders' training camp in 2009." *Id.* In doing so, the court rejected Hanson's argument that the agreement's only definition of a covered claim was "any dispute arising from the terms of this Agreement," explaining that this language was but one example given "of a dispute between Hanson and the Raiders that would be subject to arbitration." *Id.* at *6. The *Hanson* decision contradicts Defendant's interpretation of "including without limitation any dispute arising from the terms of this Agreement." Mot. Ex. 2, ¶ 10. The *Hanson* court concluded that that dependent clause was one example of a "dispute between Hanson and the Raiders," implicitly rejecting Defendant's interpretation that the language expanded the scope of the arbitration clause to any dispute *regardless* of whether it was between the Raiders and Gruden.

Here, this Court should likewise reject Defendants' arguments seeking to rewrite the scope of the arbitration provision in the Agreement. While covered matters could include a dispute "between Gruden and Club" that "aris[es] from the terms of the Agreement," nothing in the Agreement even remotely supports Defendants' suggestion that Gruden agreed to arbitrate disputes between Gruden and Defendants before Defendant Goodell. Mot. Ex. 2, ¶ 10. Because the Agreement's arbitration provision is not susceptible of an interpretation that Gruden agreed to arbitrate any disputes except those "between Gruden and [the Oakland Raiders]," Defendants cannot establish that it covers Gruden's claims against Defendants. *Id.*

2. The Agreement Does Not Encompass These Tort Claims Against Defendants.

Tellingly, Defendants continuously try to recast and rewrite the claims in the Complaint to fit the arbitration clause rather than address whether the claims that were asserted are arbitrable. Mot. 16 ("this entire dispute is founded in quintessential conduct detrimental to football"); Mot. 17 ("Gruden's claims, including his tort claims, squarely 'aris[e] from the terms of [his] Agreement . . . [and] are expressly centered on the termination of that Agreement"). All of Gruden's contractual

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claims under the Agreement have been resolved via settlement with the Raiders. Mot. 9. "A long line of California and federal cases holds that claims framed in tort are subject to contractual arbitration provisions when they arise out of the contractual relationship between the parties." *Molecular Analytical Sys. v. Ciphergen Biosystems, Inc.*, 111 Cal. Rptr. 3d 876, 892 (Ct. App. 2010). Gruden's claims do not arise out of contractual obligations in the Agreement but are solely targeted at Defendants' independent tortious conduct. For example, one aspect of Gruden's damages is the loss of the balance of his contract. Compl. ¶ 70. But another equally important aspect are the losses of his endorsement contracts with third-parties such as Skechers. Compl. ¶ 71. If Gruden was still the coach of the Raiders, he could still maintain this action against Defendants as no part of the claims rise or fall on the interpretation of the Agreement. Instead, he could show that Defendants, intentionally or negligently, caused the loss of his contract with Skechers and many other reputational injuries. Whether Defendants threatened the Raiders or threatened Skechers is immaterial as their tortious conduct falls outside the arbitration clause in the Agreement.

3. Defendants Cannot Compel Arbitration of Gruden's Claims Under the Agreement Pursuant to Equitable Principles.

Recognizing the Agreement is not broad enough to encompass any disputes other than those between Gruden and the Raiders, Defendants attempt to force arbitration under equitable principles. In doing so, Defendants self-servingly mischaracterize what the Complaint actually alleges to reach the strained conclusion that "Gruden's claim is, at bottom, for wrongful termination against the Raiders." Mot. 18. This is false and the plain language of the Complaint clearly and unmistakably identifies that Gruden has not asserted any claims against the Raiders for wrongful termination or any other cause of action. Rather, every allegation and cause of action is against Defendants for their own tortious conduct related to their selective disclosure of the emails at issue and their related threats. This is not the strategic-pleading-to-avoid-arbitration situation that Defendants cast it to be, and unlike in the authority on which they rely,[8] Defendants have not and cannot establish that

[8] Defendants rely on factually and legally distinguishable authority that, unlike here, involved disputes between signatories to broad arbitration provisions in which claims asserted against a signatory were so intertwined with additional claims asserted against non-signatories. *See Hays v. HCA Holdings, Inc.*, 838 F.3d 605, 608, 612–13 (5th Cir. 2016) (involving action—which originally

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Gruden sued Defendants to avoid arbitrating or litigating "disputes between Gruden and [the Oakland Raiders]" under the terms of the Agreement. Defendants' attempts to shoehorn the Complaint into the scope of the Agreement's arbitration provision are without merit and should be rejected.

As Defendants themselves acknowledge, Goodell's "consent was required" for the approval of the Agreement. Mot. 18; Mot. Ex. 2, ¶ 17 (providing the Agreement shall be effective and binding "unless disapproved by" Goodell). In other words, Goodell could have disapproved of the Agreement if he disagreed with the plain terms of the arbitration provision. Instead, Goodell approved the Agreement. Mot. Ex. 2, at 7. Defendants' Motion does not cite to a single case applying equitable estoppel in the manner Defendants request here, which would be inimical both to the essence of equitable estoppel and the primary purpose of the FAA. "The linchpin of equitable estoppel is equity—fairness," but there is no basis in equity to apply the doctrine to allow Defendants to avoid litigating claims that fall outside the scope of an arbitration provision they approved. *Goldman v. KPMG, LLP*, 92 Cal. Rptr. 3d 534, 543 (Ct. App. 2009); *see also B.C. Rogers Poultry, Inc. v. Wedgeworth*, 911 So. 2d 483, 493 (Miss. 2005) ("Equity comes to the aid of those

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was commenced against signatory employer and sought declaratory relief to invalidate employment agreement requiring "any disputes relating to the Agreement be submitted to mandatory, binding arbitration"—where plaintiff repeatedly asserted "virtually indistinguishable" factual allegations, treating signatory and non-signatory defendants in arbitration and litigation "as a single unit" and "as if they were interchangeable"); *Wolf v. Rawlings Sporting Goods Co.*, No. 10 CIV. 3713 JSR, 2010 WL 4456984, at *2 (S.D.N.Y. Oct. 26, 2010) (ordering arbitration of baseball player's claims against employer, other baseball entities, and helmet manufacturer, where player alleged joint and several liability for injuries pursuant to arbitration provision covering "[a]ll disputes and controversies related in any way to professional baseball between Clubs or between a Club(s) and any Major League Baseball entity(ies) (including in each case, without limitation, their owners, directors, employees and players)"); *Parfi Holding AB v. Mirror Image Internet, Inc.*, 817 A.2d 149, 151 (Del. 2002) (addressing arbitrability of claims between parties to an underwriting agreement requiring arbitration of any "dispute, controversy or claim arising out of or in connection with this Agreement, or the breach, termination or invalidity thereof" (quotations omitted)); *In re Merrill Lynch Tr. Co. FSB*, 235 S.W.3d 185, 188–91 (Tex. 2007) (requiring parties to arbitrate claims against signatory's employee whose alleged conduct was within course and scope of employment and, thus, attributable to signatory employer, but declining to compel arbitration against other affiliates and third parties where it "would effectively rewrite their contracts"); *Hurley v. Emigrant Bank*, No. 3:19-CV-0011-B, 2019 WL 5537330, at *2 (N.D. Tex. Oct. 25, 2019) (involving action arising from forced-sale process in LLC Agreement with binding arbitration provision, where, after signatory and related non-signatory defendants moved to compel arbitration, the plaintiffs amended the complaint to remove the signatory defendant and merely attributed their previous allegations to the non-signatory defendants).

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who may not or cannot protect themselves."). Stated differently, it would be fair to require that Defendants litigate this action in court (and not in arbitration) when the Agreement expressly limits arbitration to disputes "between Gruden and [the Oakland Raiders]" and Defendants themselves consented to that Agreement. Mot. Ex. 2, ¶ 10. Indeed, as Gruden "cannot be required to submit to arbitration any dispute which he has not agreed so to submit," requiring Defendants to litigate would be entirely consistent with the FAA's fundamental principle that arbitration is strictly a matter of consent. *AT&T Techs.*, 475 U.S. at 648.

Furthermore, equitable estoppel does not apply to expand the scope of disputes that the parties agreed to arbitrate. A non-signatory therefore cannot compel arbitration of a plaintiff's claims unless the court decides both that (1) the claims fall within the scope of the contract's arbitration clause, and (2) the plaintiff is equitably estopped from escaping the contract. *Franklin v. Cmty. Reg'l Med. Ctr.*, 998 F.3d 867, 872 (9th Cir. 2021). As detailed above, the scope of the arbitration provision in the Agreement is limited to disputes "between Gruden and [the Oakland Raiders]." Mot. Ex. 2, ¶ 10. Thus, a plain reading of the Agreement's arbitration provision compels the conclusion that it does not cover the dispute between Gruden and Defendants. *See, e.g.*, *Daphne Auto., LLC v. E. Shore Neurology Clinic, Inc.*, 245 So. 3d 599, 605–06 (Ala. 2017) (holding that "regardless of whether the third-party-beneficiary exception or the equitable-estoppel exception might otherwise apply, the narrow scope of the arbitration agreements precludes the plaintiffs from being required to arbitrate their claims against the [non-signatory] dealership because those agreements are limited by their terms to disputes between the signatories").

C. The NFL Constitution Does Not Cover Gruden's Claims.

Defendants contend that Section 8.3(E) of the NFL Constitution "clearly" requires this Court to force Gruden to arbitrate his claims against Defendants. Mot. 13. Yet Defendants could not present a single case, not one, where similar claims were sent to arbitration under Section 8.3(E). Goodell claims the authority to arbitrate the disputes enumerated under Section 8.3, titled "Jurisdiction to Resolve Disputes," as follows:

> (A) Any dispute involving two or more members of the League or involving two or more holders of an ownership interest in a member club of the League, certified to him by any of the disputants;

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(B) Any 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;

(C) Any 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;

(D) Any dispute between a player and any official of the League;

(E) Any 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.

Mot. Ex. 3, § 8.3. As the dispute between Gruden and Defendants does not fall within any of the other sections, Defendants resort to relying exclusively on a strained interpretation of the catch-all provision, Section 8.3(E). Mot. 13.

1. Defendants' Cannot Satisfy the Fundamental Requirement as to the Existence of an Arbitration Agreement.

At "a very minimum, an employer must be able to demonstrate, by a preponderance of the evidence, that the employee actually received the arbitration agreement." *Estrada v. Auto. Club of S. Cal.*, No. G054134, 2018 WL 2326752, at *8 (Cal. Ct. App. May 23, 2018). Defendants include a declaration from Lawrence P. Ferazani, Jr., who is the "General Counsel of the NFL Management Council." Mot. Ex. 1, ¶ 4. The NFL Management Council seems to be a "non-profit association of the member clubs of the NFL" and acts as the "sole and exclusive bargaining representative of present and future employer member clubs" in collective bargaining negotiations with the NFL Players Association.[9] Mr. Ferazani's only averment is that "Exhibit 3 to the Motion is a true and correct copy of the Constitution and Bylaws of the NFL." Mot. Ex. 1, ¶ 6. He does not make any statement concerning Gruden and based on his position he would lack personal knowledge of the Raiders' contracts with coaches. Defendants do not demonstrate that they ever actually presented the NFL Constitution to Gruden before he executed the Agreement nor do they aver that Exhibit 3

[9] *See* Complaint ¶ 4, *Ariz. Cardinals Football Club LLC v. Pace*, No. 2:10CV01823 (D. Ariz. Aug. 25, 2010), 2010 WL 3478639; *see also* Collective Bargaining Agreement xvi (Mar. 15, 2020), https://nflpaweb.blob.core.windows.net/website/PDFs/CBA/March-15-2020-NFL-NFLPA-Collective-Bargaining-Agreement-Final-Executed-Copy.pdf.

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was actually the version of the NFL Constitution that was in effect in January 2018 or that Gruden was provided this version of the document. And the reason is simple: Gruden was never provided a copy of the version of the NFL Constitution and Bylaws that was attached to Defendants' Motion to Compel Arbitration as Exhibit 3.

While incorporating documents by reference is potentially valid, California law establishes that the documents must actually be provided to the employee and form part of the contract. *Remedial Constr. Servs., LP v. AECOM, Inc.*, 279 Cal. Rptr. 3d 909, 912–13 (Ct. App. 2021). Parties may "incorporate by reference into their contract the terms of some other document" but that "the reference must be clear and unequivocal, the reference must be called to the attention of the other party and he must consent thereto, and the terms of the incorporated document must be known or easily available to the contracting parties." *Id.* (quotations omitted). Additionally, courts usually require that the arbitration clause be specifically called out in the incorporation by reference. *Chan v. Drexel Burnham Lambert Inc.*, 223 Cal. Rptr. 838, 843 (Ct. App. 1986) (holding that because the contract did not specifically identify the rule where the arbitration clause was located by name, the court found the reference amorphous, and did not clearly and unequivocally refer to the incorporated document).

Unless Defendants can affirmatively establish that Exhibit 3 was provided to Gruden, it cannot rely on the recitations in the Agreement to satisfy this burden. *Avery v. Integrated Healthcare Holdings, Inc.*, 159 Cal. Rptr. 3d 444, 448 (Ct. App. 2013) (refusing to compel arbitration because the movant failed to establish that the plaintiff employees agreed to the specific arbitration agreement the employer submitted to the trial court: "Without sufficient evidence of the actual arbitration policy to which Plaintiffs agreed when they signed the acknowledgements and other documents, we may not enforce the policy against Plaintiffs.").

2. The Commissioner Has Not Made Any Determination That Could Invoke Section 8.3(E).

Section 8.3(E) applies to a dispute that "in the opinion of the Commissioner" constitutes conduct detrimental to the NFL. Mot. Ex. 3, § 8.3(E). As the Commissioner's tortious conduct toward Gruden was outside his individual capacity and was outside his scope and authority as

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Commissioner, there is no record establishing that Goodell has a formal opinion on whether this dispute "constitutes conduct detrimental" to the NFL. *Id.* Goodell failed to initiate normal disciplinary proceedings in response to reviewing Gruden's emails, and those proceedings could have included a finding that Gruden's conduct was detrimental to the NFL. Goodell also failed to even submit a declaration in support of the Motion that would provide his opinion. While Defendants' counsel states "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 the NFL Players Association," this comment is not a substitute for the "opinion" of the Commissioner and neither would be any conclusion reached by the Court.[10]

Gruden never received any communication from the NFL or Goodell in which any allegation in the Complaint or any aspect of the above-captioned dispute was deemed to be conduct detrimental to the best interests of the League or professional football. Ex. 1, Gruden Decl. ¶ 3. It is too late for Defendants to attempt to submit such a declaration in their Reply as this would constitute a new argument and indeed new purported basis for arbitration that should have been raised in the Motion. Really, this opinion should have been announced in the NFL's standard disciplinary proceedings, but Defendants, for reasons that will become clear in discovery, avoided taking this route choosing instead to target Gruden through improper means.

3. Section 8.3(E) Would Apply Only if Defendants Determined that Their Conduct Was Detrimental to the NFL.

Defendants simply cannot rewrite Gruden's Complaint to make it say what they wish it did. This is not an action about the content of Gruden's emails or about whether Gruden's statements constituted conduct detrimental to the NFL. He is no longer an employee of the Raiders or associated with the NFL. Instead, this case is solely about Defendant's conduct and their selective leaking of Gruden's emails, their intent to harm Gruden, and their threats to release further documents unless the Raiders fired Gruden. Compl. ¶ 43. For this dispute to be arbitrable under

[10] Defendants' comment was hyperbolic at the time but now seems even more poorly considered in light of the claims by Brian Flores, made after the filing of the Motion, that the NFL engaged in a pattern of racist hiring practices. Trotter, *supra* note 2.

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Defendants' theory, Goodell would have to opine that his own conduct – leaking emails to the press and threatening the Raiders and Gruden – constituted conduct detrimental to the NFL.

Section 8.3(E) is not written broadly to cover any dispute that relates to or arises from "conduct detrimental." Mot. Ex. 3, § 8.3(E). Instead, it applies only when the "dispute" itself "constitutes conduct detrimental." *Id.* The "dispute" here is limited to the claims Gruden has asserted and those claims relate exclusively to the actions of Goodell and the NFL. In order to arbitrate this dispute under Section 8.3(E), Goodell must have determined that the selective leaking of Gruden's emails and his interference with Gruden's contracts constituted conduct detrimental to the NFL and to professional football. As he has not taken this position, this dispute must remain in this Court.

4. Section 8.3(E) Applies Only When the NFL Follows its Own Procedures and Rules.

Defendants' try to categorize the claims and conduct at issue as an "internal dispute" affecting the "internal government" and management of Defendants' affairs, Mot. 13–14, which they somehow claim makes these allegations arbitrable. This is wrong, and, in doing so, Defendants continue to ignore that their own affirmative conduct – allegations that they acted outside their authority and maliciously leaked emails to damage Gruden specifically – is at issue here. Mot. 13. Defendants make a post-hoc attempt to convert their malicious actions of leaking the emails into an alleged arbitrable "internal dispute" by claiming that they "had clear authority under the NFL Constitution to cancel Gruden's contract for his conduct detrimental to football" and that any such action would have been arbitrable under Section 8.13 of the NFL Constitution. Mot. 16. But Defendants never used their own "internal rules" to cancel the Agreement.

This is the crux of the argument: rather than use the powers they possessed under their own Constitution to discipline Gruden and then allow the standard process to unfold (and which likely would have required disclosure to Gruden of the entire Washington Football Team investigation or at least the entire set of emails), they engaged in tortious conduct that in no way can be considered an "internal dispute." Recognizing that there is no valid arbitration clause installing Goodell as the final arbiter of any and all claims *asserted against himself and the NFL*, Defendants misrepresent

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the scope and applicability of the NFL Constitution just as they did with the Agreement.

Despite not using their own "internal rules," Defendants rely on *Oakland Raiders v. National Football League*, 32 Cal. Rptr. 3d 266 (Ct. App. 2005) as if this Court must abstain from resolving "complex matters involving professional football" in favor of arbitration. Mot. 14. But *Oakland Raiders* and the abstention cases they cite involved decisions made in accordance with the governing constitution but had nothing to do with arbitration. *See, e.g.*, *Oakland Raiders*, 32 Cal. Rptr. 3d at 282–84 (analyzing abstention by California courts from exercising jurisdiction over "intra-association disputes" concerning propriety of decisions made under association's own rules and bylaws); *Scheire v. Int'l Show Car Ass'n (ISCA)*, 717 F.2d 464, 465 (9th Cir. 1983) (considering whether the ISCA plainly contravened its bylaws or construed them in an arbitrary and unreasonable manner); *Charles O. Finley & Co., Inc. v. Kuhn*, 569 F.2d 527, 535–39 (7th Cir. 1978) (involving a challenge to the Commissioner of Major League Baseball's decision made pursuant to the provisions of the Major League Agreement). This Court is readily capable and authorized to resolve Gruden's claims.

Nothing in the NFL Constitution "expressly requires Gruden to arbitrate all disputes involving him that relate to conduct detrimental to the League or profession football" as Defendants contend. Mot. 3. The NFL Constitution confers on Goodell discretionary authority over determining guilt for "conduct detrimental" to the NFL or professional football. But this authority is not as unfettered as Defendants contend. Where it involves persons unconnected with the NFL, for example, Goodell "is authorized, at the expense of the League, to hire legal counsel and take or adopt appropriate legal action or such other steps or procedures as he deems necessary . . . whenever any party or organization not a member of, employed by, or connected with the League or any member thereof is guilty of any conduct detrimental." Mot. Ex. 3, § 8.6. The NFL Constitution also authorizes Goodell to take various disciplinary action whenever he, "after notice and hearing, decides that an owner, shareholder, partner or holder of an interest in a member club, or any player, coach, officer, director, or employee thereof, or an officer, employee or official of the League has either violated the Constitution and Bylaws of the League or has been or is guilty of conduct detrimental." *Id.* § 8.13(A).

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These and other provisions in the NFL Constitution presuppose that Goodell actually determines that someone's conduct is detrimental before taking next steps to address such conduct, including (i) potential legal action by the NFL against a person not connected with the NFL (*id.* § 8.6); (ii) disciplinary action against persons connected with the NFL, but only "after notice and a hearing" and a final decision that can be appealed (*id.* § 8.13(A)), and (iii) arbitration where the dispute involves adversaries within the NFL, but not the NFL itself (*id.* § 8.3(E)).[11]

Defendants' own authority and other cases concerning Goodell's ability to address "conduct detrimental" compel the same conclusion. Following an investigation into deflated footballs used by the Patriots to gain unfair advantage and alter the outcome of the AFC Championship Game in January 2015, for example, Goodell determined that then-quarterback Tom Brady participated in the tampering of game balls and "authorized a four-game suspension of him . . . for engaging in 'conduct detrimental to the integrity of public confidence in the game of professional football.'" *Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n*, 820 F.3d 527, 534 (2d Cir. 2016). After Brady appealed the disciplinary decision, Goodell arbitrated the matter and ultimately affirmed the four-game suspension. *Id.* at 534–35. In a similar vein, Goodell's decision to discipline Dallas Cowboys player Ezekiel Elliot for conduct detrimental followed an

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[11] *See id.* § 8.13(B) (setting forth the procedure for suspending or terminating the membership of a member or the interest of any person owning a share or interest therein" where such person "is or has been guilty of conduct detrimental to the League or to professional football"); *id.* § 8.13(D) (authorizing the Commissioner to bar a person "from entry to any stadium or park" if the Commissioner finds such person "is guilty of conduct detrimental to the best interests of the League or professional football"); *id.* § 9.1(A) ("The violation of any of the provisions of this Article IX shall constitute conduct detrimental to the League and professional football."); *id.* § 15.4 ("The Commissioner shall have the power to disapprove any contract between a player and a club executed in violation of or contrary to the Constitution and Bylaws of the League or if either contracting party is or has been guilty of conduct detrimental to the League or to professional football."); *id.* § 17.12 ("The Commissioner may, on application of a club or on his own motion, declare ineligible a player who violates his contract, is guilty of conduct detrimental to the best interests of professional football, or who violates this Constitution and Bylaws or the rules and regulations of his club."); *id.* § 17.14(6) ("This is to confirm that the Commissioner may make use of the Exempt List in aid of his jurisdiction to address conduct detrimental, specifically violations of the Personal Conduct Policy that are under investigation."); *id.* at 2014-10 (recognizing that "the Commissioner is charged with responsibility under the Constitution and Bylaws to address conduct detrimental to the integrity of and public confidence in the National Football League and to impose discipline, if such a violation is proved, to address and deter such violations" and implementing a personal conduct policy "pursuant to [Goodell's] 'conduct detrimental' authority").

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investigation and written findings by Goodell that Elliot had violated the NFL's personal conduct policy, which "identifies behavior he considers 'detrimental to the league and professional football' and provides procedures for imposing discipline." *Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n*, 296 F. Supp. 3d 614, 617 (S.D.N.Y. 2017); *see also Nat'l Football League Players Ass'n ex rel. Peterson v. Nat'l Football League*, 831 F.3d 985, 989 (8th Cir. 2016) (considering petition to vacate arbitration award affirming Goodell's decision to "suspend[ ] Minnesota Vikings running back Adrian Peterson indefinitely for 'conduct detrimental to ... the game of professional football,' and fine[ ] Peterson a sum equivalent to six games' pay"); *Vilma v. Goodell*, 917 F. Supp. 2d 591, 595 (E.D. La. 2013) (considering defamation action about statements Goodell made "in conjunction with the investigation resulting in the now well-known discipline against Vilma," who later accepted "a revised discipline that still found he had engaged in conduct detrimental"); *Oakland Raiders v. Nat'l Football League*, 32 Cal. Rptr. 3d 266, 280 n.17 (Ct. App. 2005) (recognizing the "commissioner is empowered to take [disciplinary] action, after notice and hearing, where the commissioner decides that the person 'has either violated the [NFL constitution] . . . , or has been or is guilty of conduct detrimental'").

Unlike these cases and contrary to the provisions of the NFL Constitution, Defendants' actions at issue in this litigation "were taken outside of all standard procedures of the NFL." Compl. ¶ 47. Looking back, Defendants can only theorize that they *could have* cancelled Gruden's contract under the NFL Constitution, and had they done so, that Section 8.3(E) *might have* "covered any dispute regarding that determination as it would have, on its face, involved conduct the Commissioner deemed detrimental to football." Mot. 8–9, 16 (citing *id.* at Ex. 3, §§ 8.3(E), 8.13(A)). *But Defendants did not cancel Gruden's contract, let alone based on a "conduct detrimental" determination by Goodell after the notice and hearing required by Section 8.13(A).* Indeed, glaringly absent from the record before this Court is any admissible evidence establishing that Goodell made a "conduct detrimental" determination at all. Mot. Ex. 3, § 8.3(E). Arguments of counsel do not constitute evidence and are insufficient to bring Gruden's claims within the scope of disputes the parties agreed to arbitrate under Section 8.3(E). *See* Nev. Jury Instructions: Civil § 2.3 (2018) ("Statements, arguments and opinions of counsel are not evidence in the case."). As

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nothing in the NFL Constitution countenances such malignant manipulation of Goodell's "conduct detrimental" authority, Defendants cannot leverage the same in order to compel arbitration.

5. Section 8.3(E) Does Not Cover Former Employees.

Section 8.3(E) applies to disputes "involving a member or members in the League or any players or employees of the members of the League or any combination thereof." Mot. Ex. 3. By its plain language, it applies only to current "players or employees of the members of the League" and not to every former player or employee. While arbitration clauses may survive the termination of an employment agreement or the termination of employment, there is no applicable termination provision or survival clause in the NFL Constitution. *Pacificare of Nev., Inc. v. Rogers*, 127 Nev. 799, 804, 266 P.3d 596, 599 (2011) (noting that the "expiration of a contract does not necessarily terminate arbitration provisions included therein"). Additionally, this dispute is not over any provision or obligation of the Agreement and therefore the unlimited incorporation of the NFL Constitution should be rejected. *Nolde Bros., Inc. v. Bakery Workers*, 430 U.S. 243, 252 (1977) ("[T]he parties' obligations under their arbitration clause survived contract termination when the dispute was over an obligation arguably created by the expired agreement.").

This leaves the Court with having to interpret Defendants' position as permitting the Commissioner to compel arbitration for any former player or coach at any point in the future if the Commissioner makes a unilateral conduct detrimental determination. If the Commissioner physically assaults an individual who last played football decades ago due to offensive language used by that individual, the Commissioner *could still* compel arbitration of that individual's civil claims on the same theories Defendants present now. The only reasonable interpretation of Section 8.3(E) is that it does not apply to this hypothetical or to Gruden because it is limited to disciplinary proceedings against current players or coaches.

D. The Arbitration Provisions Are Entirely Unconscionable.

Even though the above arguments readily dispose of Defendants' Motion, each of the next arguments demonstrate that even if the arbitration provisions were applicable, they should not be enforced. At least as it pertains to this litigation, the arbitration provisions in the Agreement and NFL Constitution are illusory, cannot be considered "a contract to arbitrate, but an engagement to

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capitulate," and "should be denied enforcement on grounds of unconscionability." *Graham v. Scissor-Tail, Inc.*, 623 P.2d 165, 176 (Cal. 1981).

An agreement to arbitrate may be invalidated as unconscionable if some degree of procedural and substantive unconscionability exist. *See OTO, L.L.C. v. Kho*, 447 P.3d 680, 689–90 (Cal. 2019) (recognizing that unconscionability "may be applied to invalidate arbitration agreements without contravening the FAA or California law" (internal quotation marks omitted)).[12] Substantive unconscionability "pertains to the fairness of an agreement's actual terms and to assessments of whether they are overly harsh or one-sided," whereas the "procedural element addresses the circumstances of contract negotiation and formation, focusing on oppression or surprise due to unequal bargaining power." *Id.* As the degree of each element is analyzed on a sliding scale, the stronger a showing of either procedural or substantive unconscionability, the less evidence is required for the other. *Id.* ("The more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to conclude that the term is unenforceable. Conversely, the more deceptive or coercive the bargaining tactics employed, the less substantive unfairness is required." (quotations and citations omitted)). "The ultimate issue in every case is whether the terms of the contract are sufficiently unfair, in view of all relevant circumstances, that a court should withhold enforcement." *Id.* (quoting *Sanchez v. Valencia Holding Co.*, 353 P.3d 741 (Cal. 2015)).

Defendants' arbitration agreements present a litany of issues, any one of which has been used to invalidate other California arbitration agreements. Arbitration agreements in the employer-

[12] Though the unconscionability analysis is the same under Nevada law, California law is appropriately applied here because the Agreement provides that California law will apply and is not contrary to Nevada public policy, and California has a substantial relationship with the Agreement insofar as the Oakland Raiders franchise was formed under California law. *See Progressive Gulf Ins. Co. v. Faehnrich*, 130 Nev. 167, 171, 327 P.3d 1061, 1063–64 (2014) (providing that Nevada courts will honor choice-of-law provision for purposes of determining the validity and effect of a contract where the situs fixed by the agreement has a substantial relationship with the transaction and the agreement comports with Nevada public policy); *see also FQ Men's Club, Inc. v. Doe Dancers I*, No. 79265, 2020 WL 5587435, at *2–5 (Nev. Sept. 17, 2020) (demonstrating that Nevada applies the same standards as California in determining the enforceability of an arbitration agreement); *D.R. Horton, Inc. v. Green*, 120 Nev. 549, 553–54, 96 P.3d 1159, 1162–63 (2004) (same), *overruled on other grounds by U.S. Home Corp. v. Michael Ballesteros Tr.*, 134 Nev. 180, 415 P.3d 32 (2018).

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employee context must provide for: "(1) neutral arbitrators, (2) more than minimal discovery, (3) a written award, (4) all types of relief that would otherwise be available in court, and (5) no additional costs for the employee beyond what the employee would incur if he or she were bringing the claim in court." *Fitz v. NCR Corp.*, 13 Cal. Rptr. 3d 88, 94 (Ct. App. 2004). These agreements fail nearly all of these requirements and are a case study in unconscionability and unfairness, which is why Defendants are trying so hard to channel this dispute to their extremely favorable home field.

1. The Arbitration Clauses Do Not Provide for a Neutral Arbitrator.

Defendants ask the Court to transfer this case to Goodell to serve as the arbitrator of a dispute where the NFL itself is being accused of tortious conduct, Goodell is directly implicated in the misconduct at issue, and Goodell will undoubtedly be a material fact witness.

The terms of the arbitration provisions on which Defendants rely are substantively unconscionable because they designate Defendant Goodell as the arbitrator. Mot. Ex. 2, ¶ 10; *id.* at Ex. 3, § 8.3. Defendant Goodell is the commissioner of co-defendant NFL, directly implicated in the tortious misconduct alleged in the Complaint, and a material fact witness, and he plainly has an interest in ensuring that he and the NFL avoid any liability in this action. These overly harsh and one-sided provisions not only exclusively favor Defendants and disfavor Gruden, but effectively foreclose any prospect of a meaningful and fairly conducted arbitration. *See also Pokorny v. Quixtar, Inc.*, 601 F.3d 987, 1003 (9th Cir. 2010) (concluding that arbitration provision was substantively unconscionable because it required selection of an arbitrator from a list of those who had received training from the defendant); *Graham*, 623 P.2d at 177 (providing that "a contract which purports to designate one of the parties as the arbitrator of all disputes arising thereunder is to this extent illusory the reason being that the party so designated will have an interest in the outcome which, in the view of the law, will render fair and reasoned decision, based on the evidence presented, a virtual impossibility" and that "a contractual party may not act in the capacity of arbitrator and a contractual provision which designates him to serve in that capacity is to be denied enforcement on grounds of unconscionability"); *Nostalgic Partners, LLC v. N.Y. Yankees P'ship*, No. 656724/2020, slip op. at 2 (N.Y. Sup. Ct. Dec. 17, 2021) ("Based on the appearance of impropriety, the Commissioner of Major League Baseball should not arbitrate a dispute of claims

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that are asserted against Major League Baseball in the Amended Complaint filed in this action.").

The arbitration provisions are also procedurally unconscionable because Gruden had no opportunity to negotiate the terms of the NFL Constitution, which can be amended only by member vote under Article 25. Mot. Ex. 3, §§ 25.1–.4. Aside from identifying Goodell as the arbitrator, neither the NFL Constitution nor the Agreement identify a set of procedures for the conduct of arbitral proceedings or for the selection of a neutral arbitrator for purposes of the dispute between Gruden and Defendants. It is impossible to ascertain the dispute resolution processes and rules to which Gruden purportedly agreed, insofar as any in fact exist. *See State ex rel. Hewitt v. Kerr*, 461 S.W.3d 798, 811 (Mo. 2015) (holding that player did not assent to arbitration guidelines covering dispute between player and club, which guidelines were therefore unenforceable). Given these procedural circumstances of oppression and surprise, and the substantive unconscionability of installing Goodell as final arbiter of claims asserted against him and the NFL, the arbitration provisions are unconscionable and unenforceable.[13]

2. The Arbitration Agreements Do Not Provide Adequate Procedure.

Gruden was never provided with a copy of the NFL's Dispute Resolution Procedural Guidelines and Defendants do not introduce this document either. Ex. 2; *see also Rothman v. Snyder*, No. 20-3290 PJM, 2020 WL 7395488, at *5 (D. Md. Dec. 17, 2020) (unsealing in its entirety "ECF No. 9-16, Exhibit 13 to Beskin Declaration (NFL Dispute Resolution Guidelines)"). It does not appear that these guidelines are applicable, but to the extent that the NFL has issued written procedures, it is obvious that regardless of whether the procedures are ad hoc as determined solely by Goodell or formalized through similar writing, the procedures are inadequate. First, under

[13] Defendants cannot ask the Court to appoint a substitute arbitrator in order to salvage the arbitration clause. As, according to Defendants, the arbitration process here specifically and exclusively designates the Commissioner as the arbitrator, any inability of the Commissioner to arbitrate, such as bias or lack of neutrality, invalidates the arbitration clause. *Reddam v. KPMG LLP*, 457 F.3d 1054, 1060 (9th Cir. 2006). If the selection of an arbitrator is integral to an arbitration clause, then courts decline to appoint a substitute arbitrator and invalidate the arbitration clause as a whole. *Carideo v. Dell, Inc.*, No. C06-1772JLR, 2009 WL 3485933, at *6 (W.D. Wash. Oct. 26, 2009) (identifying "compounding problems that threaten to eviscerate the core of the parties' agreement" as a result of any attempt to rewrite the parties' agreement by substituting a new arbitrator).

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the NFL Constitution, Goodell would have unlimited authority to determine the scope and procedure of the arbitration. There is simply no guarantee that most of the safeguards in California law would be followed. *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 682 (Cal. 2000) (holding that an employee arbitration agreement is lawful if it "(1) provides for neutral arbitrators, (2) provides for more than minimal discovery, (3) requires a written award, (4) provides for all of the types of relief that would otherwise be available in court, and (5) does not require employees to pay either unreasonable costs or any arbitrators' fees or expenses as a condition of access to the arbitration forum."). None of these requirements is satisfied by the NFL Constitution and only one is satisfied by the Dispute Resolution Procedural Guidelines. Under the Guidelines, Goodell (1) is not a neutral arbitrator; (2) can "permit, limit, or disallow discovery . . . as he considers necessary"; (3) does have to issue a written award; (4) may but does not have to "take or require such interim measures as he deems necessary"; and (5) "may apportion the costs of arbitration, including reasonable attorney's fees and expenses, between or among the parties in such manner as he deems reasonable." Ex. 2.

Even if the Guidelines are in place they establish that if Gruden's claims are referred to arbitration, he has no right to discovery or any of the other mandatory procedural requirements. Thus, the arbitration clause is invalid for this reason alone.

3. The Arbitration Agreements Are Not Mutual.

"Where an arbitration agreement is concerned, the agreement is unconscionable unless the arbitration remedy contains a modicum of bilaterality." *Ting v. AT&T*, 319 F.3d 1126, 1149 (9th Cir. 2003) (quotations omitted). Paragraph 10 of the Agreement states that "Gruden shall abide by and be legally bound by the Constitution, Bylaws, and rules and regulations of the NFL," but it does not similarly bind the Raiders. Mot. Ex. 2. While the Raiders may be bound in some respect to the same documents, they are not bound to them by the Agreement and not in a way that would provide Gruden with adequate contractual rights. *Stanfield v. Tawkify, Inc.*, 517 F. Supp. 3d 1002, 1008 (N.D. Cal. 2021) (invalidating arbitration agreement where the employer placed "no reasonable parameters on its exemption from a mutual obligation to arbitrate").

In a case involving the NFL, a court invalidated a similar arbitration provision. The court

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noted that only the employee "promised to comply and be bound by the NFL's constitution and bylaws" and that the Kansas City Chiefs did not make a reciprocal promise. *Sniezek v. Kansas City Chiefs Football Club*, 402 S.W.3d 580, 584–85 (Mo. Ct. App. 2013). The court rejected arguments that the Kansas City Chiefs had promised to arbitrate by virtue of the NFL's constitution and bylaws because a "mere mention of the NFL's constitution and bylaws in the Agreement" did not result in the incorporation of the terms of those documents into the agreement. Specifically, while the "Chiefs' relationship with the NFL may have required them to comply with the NFL's constitution and bylaws, nowhere in the Agreement did the Chiefs promise Sniezek that, in the context of their employment relationship with her, they would comply with the arbitration provision or any other provision in the NFL's constitution and bylaws." *Id.*

Here, the Raiders and Gruden agreed to arbitrate disputes between themselves, but while Gruden agreed to be bound to arbitration under Section 8.3(E), there is not a similar agreement from the Raiders in the Agreement, and so the arbitration clause is unconscionable for lack of mutuality. !

4. The Arbitration Clauses Are Circular and Illusory.

This dispute is purportedly arbitrable if the Goodell opines that Gruden's conduct was detrimental to the NFL. Mot. 3. This presents a fatal circularity problem. Goodell not only makes the initial determination as to whether the conduct was detrimental to the NFL, but also makes the ultimate determination as to the entire dispute and the claims at issue. Proceeding to arbitration, Gruden cannot win without invalidating the arbitration process. As Defendants contend that the arbitration will involve Gruden's conduct, if he proves that his conduct was not detrimental to the NFL, then Goodell's initial opinion was incorrect and this dispute should not have been sent to arbitration. Accordingly, Goodell would be authorized to reach only one conclusion in the arbitration, which is fundamentally unfair and unconscionable.

Furthermore, the scope of the arbitration clause appears to be whatever Goodell says it is. "As a general matter, 'an arbitration agreement allowing one party the unfettered right to alter the arbitration agreement's existence or its scope is illusory.'" *Jean v. Bucknell Univ.*, No. 4:20-CV-01722, 2021 WL 1521724, at *13 (M.D. Pa. Apr. 16, 2021). The resulting procedural

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unconscionability is significant. Goodell can unilaterally determine the scope of Section 8.3(E) and therefore the scope is entirely illusory. Gruden had no opportunity to negotiate over the terms of the NFL Constitution or the scope of the arbitration provisions, which were effectively contracts of adhesion. As in *Sniezek*, "if the NFL had amended its constitution and bylaws to eliminate the arbitration provision, there is nothing in the plain language of the Agreement that would have required the Chiefs to arbitrate any dispute it might have had with Sniezek." 402 S.W.3d at 584–85. Defendants could alter (or even have altered) the scope of the arbitration provisions of the NFL Constitution and Gruden would have no opportunity to negotiate these provisions, opt-out of them, or anticipate which disputes would be covered. A showing of "surprise may establish a higher degree of procedural unconscionability than that inherent in a contract of adhesion." *Veitenhans v. Hikvision USA, Inc.*, No. B302552, 2021 WL 2153773, at *10 (Cal. Ct. App. May 27, 2021). And surprise may be found where "substantively unconscionable terms were "'artfully hidden' by the simple expedient of incorporating them by reference rather than including them in or attaching them to the arbitration agreement." *Id.*

5. The Arbitration Clauses Violate Public Policy.

Courts may invalidate arbitration agreements under California law when they contain provisions that are "unconscionable or contrary to public policy." *Armendariz*, 6 P.3d at 680. The practical effect of Defendants' position is that *any* dispute involving any past or current employee of the NFL or its member clubs can be kept confidential, swept under the rug, and covered-up under the Commissioner's power to declare anything to be conduct detrimental to the NFL. Given the scope of the Commissioner's claimed powers, the interpretation of Section 8.3(E) would violate public policy by sharply curtailing employees' rights and require the waiving of public rights in the arbitration context.

Accordingly, this Court should refuse to enforce the unconscionable arbitration provisions. There is at least a moderate degree of procedural unconscionability that, which if coupled with the high degree of substantive unconscionability demonstrated throughout, supports the conclusion that the arbitration agreements are unenforceable. Even if the NFL Constitution or the Agreement are somehow construed as encompassing Gruden's claims, this Court should still not compel Gruden

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to arbitrate his claims before Commissioner Goodell.

IV. CONCLUSION

For all of the above reasons, Gruden respectfully requests that the Court deny Defendants' Motion in its entirety and retain jurisdiction over the case.

Dated: March 4, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of McDonald Carano LLP and on the 4th day of March, 2022, the foregoing **GRUDEN'S OPPOSITION TO DEFENDANTS' MOTION TO COMPEL ARBITRATION** was electronically submitted to the Clerk of the Court via the Clark County District Court Electronic Filing Program which will provide copies to all counsel of record registered to receive such electronic notification.

/s/ Brian Grubb
An employee of McDonald Carano LLP

4873-8856-2700, v. 11

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Exhibit 1

DECL

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Attorneys for Plaintiff Jon Gruden

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-20-844043-b
DEPT. NO.: XXVII

DECLARATION OF JON GRUDEN

I, Jon Gruden, hereby declare as follows:

1. I am an individual residing in the State of Nevada. I am the former head coach of the Las Vegas Raiders and the plaintiff in the above-captioned action.

2. Prior to signing my employment agreement with the Raiders, I was never provided a copy of the version of the NFL Constitution and Bylaws that was attached to Defendants' Motion to Compel Arbitration as Exhibit 3.

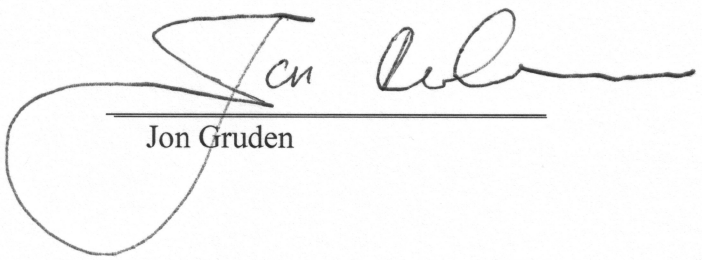
3. I have never received a communication from the National Football League or Commissioner Goodell in which any allegation in my Complaint or any aspect of the above-

captioned dispute was deemed to be conduct detrimental to the best interests of the League or professional football.

4. I have never received notice of any disciplinary action by the National Football League or Commissioner Goodell regarding my emails, the leaking of my emails, or any related aspect of the above-captioned dispute.

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

Dated: March 1, 2022



Jon Gruden

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Exhibit 2

Exhibit 13

NATIONAL FOOTBALL LEAGUE
DISPUTE RESOLUTION
PROCEDURAL GUIDELINES

1. *Certification of Dispute for Arbitration.*

   1.1 A party wishing to certify a dispute for arbitration (the "Claimant") shall send the Commissioner a written request asking him to hear and decide the matter, with a copy of the request to all other directly affected persons (the "Respondents").

   1.2 The request for arbitration shall contain a description of the claim, the facts supporting it, and the relief or remedy sought, including any amounts claimed.

   1.3 Within 20 days after receipt of the request for arbitration, any Respondent shall deliver to the Commissioner, with a copy to all directly affected persons, a written statement of the general nature of the defense, and may also include a description of additional facts relevant to the dispute.

   1.4 The Respondent may include in its statement any setoffs, counterclaims or third party claims related to the request for arbitration, along with the information required in Section 1.2 above. If a counterclaim or third party claim is asserted, the Claimant or third party claim Respondent shall reply within 20 days after receipt of the counterclaim or third party claim in accordance with Section 1.3.

2. *Representation.* The parties may represent themselves or be represented or assisted by persons, including attorneys, of their choice.

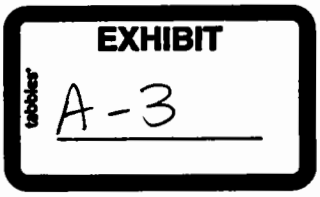
3. *General Procedures.*

   3.1 The Commissioner will conduct the arbitration in a manner designed to reach a fair and prompt outcome, consistent with the circumstances of the particular dispute.

   3.2 The Commissioner may be assisted by persons from his staff in conducting arbitration proceedings, including serving as hearing officer.

   3.3 The Commissioner may impose time limits he considers reasonable on each phase of the proceeding.

   3.4 All documents or information supplied to the Commissioner by one party shall at the same time be communicated by that party to all other parties. *Ex parte* communications with the Commissioner relating to the material facts of the dispute are not permitted unless the parties and the Commissioner agree otherwise or a party is in default, as defined in Section 11 below.



3.5 The parties may jointly propose alternative methods of proceeding or variations from these Guidelines in a particular arbitration, which the Commissioner may permit in his discretion.

4. *Location and Choice of Law.*

4.1 The Commissioner may conduct hearings and other proceedings at the NFL office in New York or at any other location he deems appropriate or fair after consultation with the parties. He may conduct management conferences by telephone. Hearings may be conducted by telephone if the parties consent.

4.2 The Commissioner will apply the substantive law, including burdens of proof, that would be applied by a court in the venue of the arbitration, unless otherwise agreed to by the parties.

5. *Management Conferences.*

5.1 Promptly after certification of the dispute, the parties shall confer in person or by telephone for the purpose of organizing, scheduling and agreeing to procedures to expedite subsequent proceedings. The parties shall submit a joint scheduling proposal with respect to subsequent proceedings, including discovery, dispositive motions, pre-hearing memoranda, and the conduct of a hearing if necessary.

5.2 The Commissioner may, in his discretion or at the request of a party, convene a conference, in person or by telephone, to resolve any disagreements as to the matters specified in Section 5.1, and to consider any matters that would expedite the proceedings including, for example:

(a) the issues to be arbitrated;

(b) the need for an oral hearing or whether the dispute can be resolved by written submissions;

(c) the date, time and estimated duration of the hearing;

(d) the resolution of outstanding discovery issues and establishment of discovery parameters;

(e) the law, standards, rules of evidence and burdens of proof that are to apply to the proceeding;

(f) whether the parties will submit pre-hearing and/or post-hearing memoranda;

(g) the form of any award or relief to be granted;

(h) the allocation of attorney's fees, costs, and the expenses of the arbitration.

6. *Discovery.*

6.1 Consistent with the expedited nature of arbitration and the needs of the parties, the Commissioner may in his discretion or at the request of a party, permit, limit or disallow discovery, or compel a party to provide such discovery as he considers necessary to an appropriate exploration of the issues in dispute. Such discovery may include depositions, written discovery requests, as well as any other discovery adequate to arbitrate both statutory and non-statutory claims. The Commissioner is not required to apply the rules of discovery used in judicial proceeding, provided, however, that the Commissioner shall apply the attorney-client privilege and the attorney-work product doctrine.

6.2 The Commissioner may issue orders to protect the confidentiality of proprietary information, trade secrets and other sensitive information.

7. *Resolution on Motion or Written Submissions.* The parties are encouraged to narrow the issues in dispute prior to any hearing, to stipulate to facts, and to identify those issues which may be susceptible to resolution on motion or written submissions without an oral hearing.

8. *Settlement and Mediation.* The Commissioner may suggest that the parties explore settlement or mediation, and may give such assistance in settlement negotiations or mediation as the parties may request or as he deems appropriate.

9. *Hearing.*

9.1 The Commissioner shall determine the manner in which the parties shall present their cases. Unless otherwise determined by the Commissioner, the Claimant shall present evidence to support its claim, then the Respondent shall present evidence supporting its defense and counterclaims, if any, and then there may be opportunity for further rebuttal as appropriate. Exhibits, when offered by either party, may be received in evidence by the Commissioner.

9.2 The Commissioner is not required to apply the rules of evidence used in judicial proceedings; provided, however, that the Commissioner shall apply the attorney-client privilege and the attorney work product doctrine.

9.3 Witnesses may be questioned by each party and by the Commissioner. The Commissioner may receive and consider the evidence of witnesses by affidavit

or deposition, but shall give such evidence only such weight as he deems it warrants after consideration of any objection made to its admission.

9.4 The Commissioner may exclude witnesses from hearings during the testimony of other witnesses or at other times if he deems it appropriate.

9.5 The hearing shall be maintained as confidential and the Commissioner may, in his discretion, issue appropriate orders to safeguard that confidentiality.

9.6 When the Commissioner is satisfied that the parties have had a reasonable opportunity to present their cases, he shall close the hearing.

10. *Post-Hearing Memoranda.* If requested or authorized by the Commissioner, the parties shall submit post-hearing memoranda summarizing the evidence and proposing findings of fact and conclusions of law.

11. *Default.* If any of the parties refuses or fails to take part in the arbitration or any stage thereof, without showing sufficient cause for such failure as determined by the Commissioner, the Commissioner may proceed with the arbitration and may resolve the dispute on the evidence before him.

12. *Interim Measures of Protection.* The Commissioner may take or require such interim measures as he deems necessary in respect of the subject matter of the dispute. If requested by a party, the Commissioner may require security for the costs of such measures. An order for interim relief is without prejudice to the rights of the parties or to the final determination of the dispute.

13. *Decision.*

13.1 The award or decision resolving the dispute shall be in writing and shall set forth the factual and legal basis for the decision. The Commissioner may grant final, interim, interlocutory and partial relief, and may grant any remedy or relief that would have been available to the parties had the matter been litigated in court.

13.2 The decision of the Commissioner shall be final and binding on the parties, and shall be effective as of the date it is delivered to the parties to the fullest extent permitted by law. The decision may be enforced by any court of competent jurisdiction.

13.3 The arbitrator shall issue a written decision within 90 days of the conclusion of the hearing or the submission of post-hearing briefs, whichever occurs later. The failure of the Arbitrator to meet this or any other deadline shall not affect the validity of the arbitration award.

14. *Fees and Costs.* Subject to any agreement between the parties to the contrary, each party shall pay its own costs and attorneys' fees to the fullest extent permitted by law; provided that the Commissioner will have authority to award reimbursement of attorney's fees to the prevailing party in accordance with applicable law.