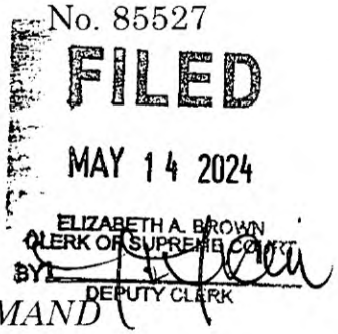
IN THE SUPREME COURT OF THE STATE OF NEVADA

THE NATIONAL FOOTBALL LEAGUE; AND ROGER GOODELL,
Appellants,
vs.
JON GRUDEN,
Respondent.

No. 85527



ORDER OF REVERSAL AND REMAND

This is an appeal from a district court order denying a motion to compel arbitration. Eighth Judicial District Court, Clark County; Nancy L. Allf, Judge.

The Las Vegas Raiders are a member of the National Football League, an unincorporated association of 32 professional football teams overseen by Commissioner Roger Goodell. The teams are governed by the NFL Constitution. At issue is the arbitration clause in Article VIII § 8.3 of the NFL Constitution, which states:

> The Commissioner shall have full, complete, and final jurisdiction and authority to arbitrate:
>
> . . .
>
> (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.

In 2018, the Raiders entered a ten-year coaching contract ("employment agreement") with Jon Gruden. Pertinent here, the parties agreed to be governed by the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, and California law. The employment agreement contained an

arbitration provision and incorporated the NFL Constitution and its arbitration provisions by reference.

In October 2021, the Wall Street Journal and New York Times published articles detailing controversial emails Gruden reportedly sent between 2011 and 2018 while working for ESPN. Shortly thereafter, Gruden resigned from the Raiders and lost his other endorsements and sponsorships. Gruden and the Raiders subsequently entered a confidential settlement agreement. Gruden then sued Goodell and the NFL ("the NFL Parties"), alleging they purposely leaked his emails to the media and forced his resignation. The NFL Parties moved to compel arbitration, and the district court denied the motion.

The NFL Parties appeal. Principally at issue is whether the arbitration clause contained in the NFL Constitution is binding under the facts of this case and California law. We review de novo the district court's denial of the motion to compel arbitration, *Uber Techs., Inc. v. Royz*, 138 Nev., Adv. Op. 66, 517 P.3d 905, 908 (2022), but defer to the district court's findings of fact unless they are clearly erroneous or not based on substantial evidence, *May v. Anderson*, 121 Nev. 668, 672-73, 119 P.3d 1254, 1257 (2005). For the reasons below, we hold that the district court erred by denying the NFL Parties' motion to compel arbitration.

Gruden did not show the settlement terminated the arbitration clauses

Relying on counsel's statements, the district court found that the settlement agreement between Gruden and the Raiders terminated the employment agreement and, by extension, the incorporated-by-reference NFL Constitution and related arbitration clauses. In the context of a motion to compel arbitration, factual assertions must be supported by citations to the record, including documents, affidavits or declarations, admissions, or other materials. NRCP 56(c)(1)(A); Cal. Civ. Proc. Code §

437c(c); *see also Hansen v. LMB Mortg. Servs., Inc.*, 1 F.4th 667, 670 (9th Cir. 2021) (motions to compel arbitration are treated similarly to motions for summary judgment). Arguments of counsel are not evidence and, unless stipulated to, do not establish facts. *Jain v. McFarland*, 109 Nev. 465, 475-76, 851 P.2d 450, 457 (1993). The settlement agreement is not in the record, and the district court improperly relied on counsel's statements about it over the NFL Parties' objection. Because Gruden did not disclose the settlement agreement or offer any evidence as to its contents, he failed to establish that it rescinded the employment agreement and its arbitration obligations, and the district court's finding to the contrary was not based on substantial evidence.

The employment agreement incorporated the NFL Constitution by reference

The district court found that the NFL Constitution was not incorporated by reference into Gruden's employment agreement with the Raiders because Gruden was not given a copy of the NFL Constitution when he signed the agreement. When a document is incorporated into a contract by reference, it is as though its terms are set forth in the contract and both are interpreted as a single document. 11 *Williston on Contracts* § 30:25 (4th ed. 2012); *see Poublon v. C.H. Robinson Co.*, 846 F.3d 1251, 1269 (9th Cir. 2017). Under California law, an external document is incorporated into a contract where "the reference is clear and unequivocal," "the reference is called to the attention of the other party and he consents thereto," and "the terms of the incorporated document are known or easily available to the contracting parties." *B.D. v. Blizzard Ent., Inc.*, 292 Cal. Rptr. 3d 47, 65 (Ct. App. 2022). Gruden's employment agreement with the Raiders meets these criteria. In it, Gruden agrees to "abide by and be legally bound by the Constitution, Bylaws, and rules and regulations of the NFL in their present form and as amended from time to time hereafter . . . which are hereby

made a part of this [a]greement." Gruden also "acknowledges that he has read the NFL Constitution and By-Laws and applicable NFL rules and regulations, and understands their meaning." Having assented to the employment agreement, Gruden cannot now disavow that assent. *See Brookwood v. Bank of Am.*, 53 Cal. Rptr. 2d 515, 520 (Ct. App. 1996).

The NFL Constitution entered in evidence was sufficiently shown to be the version at the time of signing

The district court found that the NFL Parties did not show that the version of the NFL Constitution they provided to it was the version in effect when Gruden signed the employment agreement. The burden is on the party seeking to compel arbitration to present a valid arbitration agreement. *Engalla v. Permanente Med. Grp., Inc.*, 938 P.2d 903, 915 (Cal. 1997). At a summary proceeding, parties may present evidence in the form of a declaration from a knowledgeable person. NRCP 56(c)(4); Cal. Civ. Proc. Code § 437c(d). The NFL Parties submitted a declaration under penalty of perjury from the NFL General Counsel, a knowledgeable person, attesting that the attached version of the NFL Constitution is a "true and correct copy." That version was dated September 14, 2016, and Gruden does not allege that the NFL Constitution has since been amended. The district court relied on Gruden's declaration stating he was not provided with a copy of that version of the NFL Constitution. But Gruden averred he did not see the NFL Constitution at all. At best, Gruden could only disclaim knowledge of what version was in effect at the time he signed the employment agreement. The district court committed clear error when it considered only Gruden's declaration but did not consider the NFL Parties' declaration, which is sufficient to satisfy their burden.

The NFL Constitution contains a valid arbitration clause covering disputes involving Gruden that arise in the course of his employment with the Raiders

The district court found that the arbitration provision in Article VIII § 8.3(E) of the NFL Constitution did not apply to this dispute because (1) Goodell did not make a formal determination that the conduct at issue is detrimental to the NFL; (2) Gruden is no longer an employee; and (3) that clause's scope does not extend to this dispute. Article VIII § 8.3(E) requires arbitration where there is a "dispute involving a member . . . or any players or employees of the members . . . that in the opinion of the Commissioner constitutes conduct detrimental" to the NFL's or professional football's best interests.

Arbitration is a matter of contract. *GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC*, 140 S. Ct. 1637, 1643-44 (2020); *Knutson v. Sirius XM Radio Inc.*, 771 F.3d 559, 564-65 (9th Cir. 2014). A court cannot force parties to arbitrate a dispute where they have not agreed to do so. *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960). If a valid arbitration agreement exists, the FAA presumes that disputes between the parties are within its scope "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 314 (2010) (quoting *AT & T Techs., Inc. v. Commc'n Workers*, 475 U.S. 643, 650 (1986)). Nevertheless, the policy in favor of arbitrability does not override the principle that the parties' agreement is paramount. *Id.* at 302. The public policy of federal law, California, and Nevada all favor enforcement of a valid arbitration clause. *Id.* at 314; *OTO, L.L.C. v. Kho*, 447 P.3d 680, 689 (Cal. 2019); *Tallman v. Eighth Jud. Dist. Ct.*, 131 Nev. 713, 720, 359 P.3d 113, 118-19 (2015).

As to the conduct-detrimental requirement, while it is true that Goodell made no formal finding that Gruden's conduct (or the NFL Parties' conduct) was detrimental to the League's best interests, the NFL Constitution's broad language does not require a formal finding. Goodell is a party and his motion to compel arbitration and his other district court filings sufficiently show his opinion that some conduct here—whether it be Gruden's emails, his accusations against the NFL, or the actions by the NFL Parties described in the complaint—is detrimental within the meaning of the NFL Constitution. We conclude that under these facts, the lack of a formal opinion is not a barrier to arbitration.

As to whether section 8.3(E) applies only to current employees, arbitration clauses are presumed to survive contract termination when the dispute involves "facts and occurrences that arose before expiration." *Litton Fin. Printing Div., a Div. of Litton Bus. Sys., Inc. v. NLRB*, 501 U.S. 190, 205-06 (1991). Though employment arbitration clauses are not binding indefinitely, courts have enforced them as to claims that are created by or arise during and from the course and scope of employment. *See, e.g., id.*; *Nolde Bros. v. Loc. No. 358, Bakery & Confectionery Workers Union, AFL-CIO*, 430 U.S. 243, 252 (1977) (compelling a former employer to arbitrate per an employment agreement); *Zolezzi v. Dean Witter Reynolds, Inc.*, 789 F.2d 1447, 1449-51 (9th Cir. 1986) (same); *Hansber v. Ulta Beauty Cosms., LLC*, 640 F. Supp. 3d 947, 955 (E.D. Cal. 2022) (same). Gruden's claims, that the NFL Parties tortiously leaked his emails and interfered with his employment agreement, arose during and out of his employment with the Raiders; the damages he seeks include the money the Raiders would have paid him had the NFL Parties not forced his resignation three years into

the ten-year contract term. Gruden's status as a former employee does not negate the presumption in favor of post-termination arbitration.

Finally, as to the scope of section 8.3(E) more generally, Gruden does not deny that the NFL Parties have rights under that clause, he does not argue that the clause does not apply to claims brought by a current employee against the Commissioner or the NFL, and at oral argument he conceded that this dispute would be "within the scope of that clause" if the predicate finding of conduct-detrimental was made. Gruden instead argues that the NFL Parties' reading gives the NFL Commissioner "unlimited scope" over disputes involving all current or past employees. Our analysis begins with the FAA presumption in favor of arbitration. Had the NFL acted under its Constitution to discipline Gruden by ousting him, section 8.3(E) would have clearly applied. But the pleaded facts also bring the dispute under the clause. By its plain terms, section 8.3(E) applies to any dispute "involving" teams or team employees so long as the dispute "constitutes" conduct detrimental to the NFL. Gruden alleges that while he was employed by the Raiders, the NFL Parties conducted a "malicious and orchestrated campaign" to destroy his career which included the leaking of offensive emails attributed to him to the national press, pressuring the Raiders to terminate him, and ultimately causing Gruden to resign. Whether judged from the perspective of Gruden's emails becoming public or the NFL Parties' alleged leaking of those emails, the conduct-detrimental to the NFL or professional football requirement appears satisfied.

Gruden agreed to the terms of the NFL Constitution arbitration clause, he concedes that the clause is a valid agreement to arbitrate disputes between him and the NFL Parties, and the presumption in favor of arbitration puts this dispute within the scope of that clause. Public policy

favors enforcement of a valid arbitration clause and we cannot say with positive assurance that the NFL Constitution arbitration clause is not susceptible to the NFL Parties' interpretation. We therefore conclude that Gruden must submit to arbitration under the NFL Constitution arbitration clause. Because the NFL Parties may compel arbitration, we need not reach whether the NFL Parties can enforce the employment agreement arbitration clause on a theory of equitable estoppel.

The district court erred in concluding the employment agreement was unenforceable due to unconscionability

The district court concluded that even if the NFL Constitution contains a valid arbitration clause, it is unenforceable because it is unconscionable. Unconscionability may invalidate an agreement to arbitrate, but an arbitration agreement will not be invalidated "by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (citing *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)). California law requires both procedural and substantive unconscionability, *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 690 (Cal. 2000); *see also* 1 Thomas H. Oehmke & Joan M. Brovins, *Commercial Arbitration* § 10:1, at 10-3 (2023), which it applies on a sliding scale, such that "[e]xcessive procedural or substantive unconscionability may compensate for lesser unconscionability in the other prong," *Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916, 926 (9th Cir. 2013); *see also* Oehmke & Brovins, *supra*, § 10:6, at 10-9. Nevertheless, no matter how significant or obvious a contract's substantive unconscionability, California courts will not find it unenforceable without at least a nominal showing of procedural unconscionability. *See, e.g.*, *Armendariz*, 6 P.3d at 690. Because Gruden's

employment agreement incorporated the NFL Constitution by reference, we read them together as a single document. *Poublon*, 846 F.3d at 1269.

A contract is procedurally unconscionable when surprise or oppression at formation requires added scrutiny of its fairness. *OTO*, 447 P.3d at 690. A contract is oppressive if one of adhesion, imposed on a "take it or leave it" basis by the party with superior bargaining power. *Lim v. TForce Logistics, LLC*, 8 F.4th 992, 1000 (9th Cir. 2021); *see Armendariz*, 6 P.3d at 689-90. But the inclusion of "take it or leave it" provisions in a mutually negotiated contract does not make the contract one of adhesion. *Grand Prospect Partners, L.P. v. Ross Dress for Less, Inc.*, 182 Cal. Rptr. 3d 235, 250-51 (Ct. App. 2015), *as modified on denial of reh'g* (Feb. 9, 2015). The test for adhesion is not whether parts of a contract are non-negotiable, but whether the whole contract at issue is a "take it or leave it" proposition, offered by a party with superior bargaining power. *Id.*

As discussed above, Gruden expressly acknowledged in the employment agreement that he had read the NFL Constitution and understood its terms. He therefore cannot now claim surprise at its contents. As a former Super Bowl Champion coach and long-time media personality signing the most lucrative NFL coaching contract in history, while being represented by an elite agent, Gruden was the very definition of a sophisticated party. Though Gruden could not negotiate with the Raiders as to the terms of the NFL Constitution, he had the ability to negotiate the employment contract as a whole—such as for more pay, a longer contract, added control over team decisions, or its other terms. Because we cannot say Gruden and the Raiders had unequal bargaining power or that the employment agreement as a whole was a "take it or leave it" offer, we conclude oppression is not present here. The district court

therefore erred in finding Gruden's employment agreement was procedurally unconscionable.

Gruden makes strong arguments as to substantive unconscionability. In particular, he points to section 8.3 of the NFL Constitution, which gives the Commissioner the "jurisdiction" and "authority" to act as arbitrator in disputes covered by section 8.3(E). Citing *Graham v. Scissor-Tail, Inc.*, 623 P.2d 165, 177 (Cal. 1981), Gruden argues that for Goodell, who is a defendant, to act as arbitrator is substantively unconscionable. *See id.* at 177 (finding substantively unconscionable a provision designating a party to the contract as arbitrator); *see also State ex rel. Hewitt v. Kerr*, 461 S.W.3d 798, 813 (Mo. 2015) (severing a substantively unconscionable provision designating the NFL Commissioner as arbitrator in a dispute between a former employee against the team that employed him, but noting that, in Missouri, procedural unconscionability is not required), *discussed in* Oehmke & Brovins, *supra*, § 70:8. But *Graham* is distinguishable in that the court found *both* procedural *and* substantive unconscionability, 623 P.2d at 171-72, both of which California law requires to invalidate a contract for unconscionability. Because Gruden did not establish procedural unconscionability, his unconscionability challenge fails, even though he has arguably shown substantive unconscionability under *Graham*.

Of note, it is not clear that Goodell will act as arbitrator. The NFL parties point to cases in which the Commissioner has designated third-party arbitrators to hear disputes falling within the Commissioner's jurisdiction, *e.g.*, *NFL Players Ass'n ex rel. Peterson v. NFL*, 831 F.3d 985, 998 (8th Cir. 2016); they say Goodell may do so here. And, if Goodell recuses and a third-party is not named, authority exists for the parties to agree on

a replacement or for the court to order one. *See* 9 U.S.C. § 5; Cal. Civ. Proc. Code § 1281.6 ("if the agreed method [of appointing an arbitrator] fails or for any reason cannot be followed . . . the court, on petition of a party to the arbitration agreement, shall appoint the arbitrator"); NRS 38.226(1) (Nevada Uniform Arbitration Act (UAA) provision analogous to Missouri UAA provision M.S. 435.360, relied on in *Hewitt*, 461 S.W.3d at 813, in appointing third-party arbitrator in NFL dispute). Finally, issues of arbitrator bias are reviewable post-arbitration, as a basis for invalidating the arbitrator's award. *See* NRS 38.241(1)(b)(1) (the court "shall vacate" an arbitration award if there was "[e]vident partiality by an arbitrator appointed as a neutral arbitrator"); 9 U.S.C. § 10(a)(3) (the court may vacate an award "where there was evident partiality or corruption in the arbitrators"). For these reasons, and based on Gruden's failure to establish procedural unconscionability under California law, we reject his unconscionability defense to the NFL parties' motion to compel arbitration under section 8.3(E).

The NFL Constitution arbitration clause is neither circular nor illusory

The district court declined to enforce the NFL Constitution arbitration clause on the additional grounds that it was circular and illusory. Gruden argues that the NFL can unilaterally modify the arbitration clause without notice and that this renders that clause illusory and unenforceable. We note that the district court only considered the illusory argument within the scope of unconscionability, and this is unavailing because there is no showing of procedural unconscionability. Nevertheless, we address the construction Gruden presents here because it was raised broadly and sufficiently at district court.

An illusory promise amounts to a failure of consideration. 17A Am. Jur. 2d *Contracts* § 125 (2024 update). A promise is illusory when a

contracting party's obligation is purely optional. *See* 3 *Williston on Contracts* § 7:14 (4th ed. 2012). Under California law, "[a] contract is unenforceable as illusory when one of the parties has the unfettered or arbitrary right to modify or terminate the agreement or assumes no obligations thereunder." *Harris v. TAP Worldwide, LLC*, 203 Cal. Rptr. 3d 522, 531 (Ct. App. 2016); *see also* 14 Cal. Jur. 3d *Contracts* § 148 (2024 update) ("For a contract to be valid, the parties must exchange promises that represent legal obligations. An agreement is illusory and there is no valid contract when one of the parties assumes no obligation, such as a contract in which performance is conditional on some fact or event that is wholly under the promisor's control and bringing it about is left wholly to the promisor's own will and discretion.") (footnotes omitted). Nevertheless, California courts will uphold unilateral modification clauses if the implied covenant of good faith and fair dealing implicit in every contract prevents the party with the authority to modify the contract from doing so in a manner that will frustrate the contract's purpose or it deprives the other party of fairness and reasonable notice. *Eiess v. USAA Fed. Sav. Bank*, 404 F. Supp. 3d 1240, 1250-51 (N.D. Cal. 2019).

Gruden argues that the NFL Parties' obligation to arbitrate is "illusory" because the NFL, through the votes of its member teams, can amend the NFL Constitution at will. This argument misses the mark. The NFL and Goodell are not parties to Gruden's employment agreement with the Raiders. The consideration supporting the employment agreement was the exchange of promises between Gruden and the Raiders. The NFL's power to amend its constitution without notice to Gruden does not affect the promises providing the consideration that supports the employment agreement, including Gruden's and the Raiders' promises to adhere to the

NFL Constitution. Importantly, the Raiders did not have the power to unilaterally modify any part of the employment agreement. But even if the Raiders did, the arbitration clause would be saved by the duty of good faith and fair dealing the employment agreement imposes on Gruden and the Raiders. Under California law and in view of these facts, we conclude the section 8.3(E) arbitration clause is not illusory.

We acknowledge that the United States District Court for the Southern District of New York recently found a similar NFL Constitution arbitration clause illusory and unenforceable under Florida and Massachusetts law because the NFL could unilaterally amend the terms without notice. *Flores v. Nat'l Football League*, 658 F. Supp. 3d 198, 208 n.10, 215 (S.D.N.Y. 2023). But the Florida and Massachusetts cases cited in *Flores* do not consider non-parties or whether the duty of good faith and fair dealing would save those clauses, and we find this reasoning unpersuasive to our analysis. *Id.* (citing *Fawcett v. Citizens Bank, N.A.*, 297 F. Supp. 3d 213, 221 (D. Mass. 2018); *Diverse Elements, Inc. v. Ecommerce, Inc.*, 5 F. Supp. 3d 1378, 1382 (S.D. Fla. 2014)).

The district court further concluded that the section 8.3(E) arbitration clause is circular because the Commissioner's threshold determination of conduct detrimental would require him to later rule against Gruden on the merits. Although section 8.3(E) requires that, in the opinion of the Commissioner, the dispute must "constitute[ ] conduct detrimental" to the NFL or professional football, nothing in the NFL Constitution binds the Commissioner's later determination of the merits to the earlier threshold opinion. Accordingly, we conclude the district court erred by concluding the arbitration provision was unenforceable on these grounds.

Conclusion

Gruden's employment agreement incorporated the NFL Constitution by reference, and he agreed to arbitrate this claim under the arbitration clause in Article VIII § 8.3(E) of the NFL Constitution. Gruden has presented no contract defenses that make that clause unenforceable. The district court erred in its denial of the NFL Parties' motion to compel arbitration under the NFL Constitution. Accordingly, we

REVERSE the district court's order denying the motion to compel arbitration and REMAND for the district court to grant that motion consistent with this order.

Cadish, C.J.

Pickering, J.

BELL, J., dissenting:

I write separately because I disagree with the majority's interpretation of the NFL Constitution arbitration clause, and I would hold that the clause does not apply to former employees. I would also find the NFL Constitution arbitration clause unenforceable due to unconscionability. Although I agree the district court erred in certain findings, I would affirm because the outcome is correct.

Article VIII § 8.3(E) of the NFL Constitution does not apply to former employees

The majority reasons that Gruden's status as a former employee does not exempt him from arbitration because arbitration clauses

may survive contract termination. I disagree with their conclusion because the facts of this case do not support survival of the clause past the end of Gruden's employment.

The party seeking to compel arbitration bears the burden of proving the parties have an agreement to arbitrate by a preponderance of the evidence. *Johnson v. Walmart Inc.*, 57 F.4th 677, 681 (9th Cir. 2023); 4 Am. Jur. 2d *Alternative Dispute Resolution* § 100 (Supp. 2024). The common law principles of contract interpretation, such as construing ambiguity against the drafter, apply to arbitration clauses. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 63 (1995) ("[r]espondents drafted an ambiguous document, and they cannot now claim the benefit of the doubt"). Agreeing to an arbitration clause does not mean that a party is necessarily bound to arbitrate with any party and in any capacity. *See, e.g., McCarthy v. Azure*, 22 F.3d 351, 355-56 (1st Cir. 1994) (finding that a company could not compel a former executive to arbitrate claims brought by him as an individual). If parties have formed a valid agreement to arbitrate, the FAA provides a presumption in favor of arbitration when analyzing the scope of that agreement. *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 476 (1989). But the policy in favor of arbitrability does not override the principle that the terms of the agreement are paramount. *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 302 (2010). Whether former employees are bound by an arbitration clause is a question of formation, and the presumption in favor of arbitration does not override the plain terms of the parties' agreement. *See* Thomas H. Oehmke & Joan M. Brovins, 1 *Commercial Arbitration* § 5:12 (Dec. 2023 Update).

Article VIII § 8.3 of the NFL Constitution empowers the Commissioner to arbitrate disputes "involving a member or members in the League or any players or employees of the members of the League," when that dispute "in the opinion of the Commissioner constitutes conduct detrimental to the best interests of the [NFL]." The Constitution defines "members" as "the thirty-two (32) member clubs." By its unambiguous language, the arbitration clause here is an agreement to arbitrate disputes involving teams and team employees when the Commissioner finds conduct detrimental to the NFL.

Gruden is not a team employee; he is a former employee. No action by Gruden at issue in this case occurred during his employment with the Raiders. Gruden sent the offensive emails prior to his employment and filed a complaint after his employment ended. Likewise, the NFL Parties moved to compel arbitration when Gruden was no longer a team employee. The majority points out that the NFL Parties allegedly leaked the emails and interfered with Gruden's contract while the Raiders employed Gruden, but the "facts and occurrences" the majority points to were caused by the NFL Parties, not Gruden. Regarding Goodell's opinion, the conduct at issue in this dispute is *his own*, and a finding that his own conduct is detrimental does not empower Goodell to arbitrate a claim brought by a non-employee.

Furthermore, Article VIII § 8.6 of the NFL Constitution clearly anticipates "detrimental conduct" by a non-employee and provides a procedure detailing the Commissioner's authority to hire outside counsel and take legal action. And Article VIII § 8.13 describes the Commissioner's disciplinary procedure for making a finding of "conduct detrimental" by a coach. When read as a whole, the NFL Constitution provides detailed

procedures for confronting conduct detrimental by both employees and non-employees. Any conduct by Gruden clearly falls within the latter.

Even if the clause here were ambiguous, the principles of contract construction instruct this court to construe this ambiguity against the NFL Parties because they are both the drafter of the clause and the party seeking to compel arbitration. The majority inverts traditional contract formation principles by concluding that because an arbitration clause may survive contract termination and because courts have enforced employment agreement arbitration clauses post-employment, we must construe the clause here against the former employee. I would affirm the district court because the NFL Constitution arbitration clause does not bind former employees like Gruden.

The arbitration clause is unenforceable due to unconscionability

The majority finds no procedural unconscionability in the formation of Gruden's employment agreement with the Raiders because he was a sophisticated party, and he could negotiate some terms. I would find at least a minimal amount of procedural unconscionability because Gruden was powerless to negotiate the terms of the NFL Constitution and its inclusion made his employment agreement take-it-or-leave-it.

A contract is procedurally unconscionable when the "circumstances of the contract's formation created such oppression or surprise that closer scrutiny of its overall fairness is required." *OTO, L.L.C. v. Kho*, 447 P.3d 680, 690 (Cal. 2019). Unequal bargaining power and a take-it-or-leave-it type offer constitute oppression. *Lim v. TForce Logistics, LLC*, 8 F.4th 992, 1000 01 (9th Cir. 2021). Even sophisticated parties such as a famous rock musician or a highly paid corporate executive may be subject to unequal bargaining power when they lack a realistic opportunity

to negotiate the terms of a contract. *Stirlen v. Supercuts, Inc.*, 60 Cal. Rptr. 2d 138, 146 (Ct. App. 1997), *as modified* (Feb. 10, 1997) (citing *Graham v. Scissor-Tail, Inc.*, 623 P.2d 165, 172 (Cal. 1981)). Furthermore, "[t]he availability of alternative business opportunities does not preclude a finding of procedural unconscionability under California law." *Pokorny v. Quixtar, Inc.*, 601 F.3d 987, 997 (9th Cir. 2010). Adhesion is sufficient to establish at least "a low degree of procedural unconscionability." *Davis v. Kozak*, 267 Cal. Rptr. 3d 927, 936 (Ct. App. 2020) (citing *Serpa v. Cal. Sur. Investigations, Inc.*, 155 Cal. Rptr. 3d 506, 512 (Ct. App. 2013), *as modified* (Apr. 19, 2013 and Apr. 26, 2013).

Gruden had no bargaining power whatsoever regarding the take-it-or-leave-it inclusion of the NFL Constitution in his employment agreement. Gruden's contract is a seven-page employment agreement that incorporates by reference the 447-page NFL Constitution. That means that the employment agreement is effectively 454 pages, over 98 per cent of which Gruden had no power to negotiate in any way. Like every employee of every NFL team, Gruden would be subject to the adhesive terms no matter the NFL team for which he might coach because Article III § 3.11(D) of the NFL Constitution mandates that all teams must incorporate the NFL Constitution into every employment contract. Gruden's sophistication is meaningless because, though he could negotiate some terms, he had a total absence of meaningful choice. Because Gruden had unequal bargaining power and because his employment agreement was take-it-or-leave-it, at least a nominal amount of procedural unconscionability was present at formation.

The majority indicates, and I agree, that the employment agreement is substantively unconscionable because Goodell acting as

arbitrator is outrageous. Furthermore, the NFL is empowered to unilaterally amend the NFL Constitution—including the arbitration clause at issue—at any time without notice. These factors alone show an extreme level of substantive unconscionability. Applying California's sliding scale test as cited in the majority, with a nominal amount of procedural unconscionability and an extreme amount of substantive unconscionability, I would affirm the district court's conclusion that this arbitration clause is unenforceable.

For the foregoing reasons the district court correctly denied the NFL Parties' motion to compel arbitration, and I would affirm.

Bell, J.

cc: Hon. Jerry A. Wiese II, Chief Judge
Hon. Joe Hardy, District Judge
Lansford W. Levitt, Settlement Judge
Paul, Weiss, Rifkind, Wharton & Garrison, LLP/Wash DC
Brownstein Hyatt Farber Schreck, LLP/Las Vegas
McDonald Carano LLP/Reno
McDonald Carano LLP/Las Vegas
Eighth District Court Clerk