No. 85527

IN THE SUPREME COURT OF THE STATE OF NEVADA

NATIONAL FOOTBALL LEAGUE; ROGER GOODELL, APPELLANTS

v.

JON GRUDEN, RESPONDENT

ON APPEAL FROM THE EIGHTH JUDICIAL DISTRICT COURT (NO. A-21-844043-B) (THE HONORABLE NANCY L. ALLF, J.)

APPELLANTS' REPLY BRIEF

MITCHELL J. LANGBERG
(Nevada Bar No. 10118)
MAXIMILIEN D. FETAZ
(Nevada Bar No. 12737)
BROWNSTEIN HYATT
FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106
(702) 382-2101

KANNON K. SHANMUGAM
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
2001 K Street, N.W.
Washington, DC 20006
(202) 223-7300
kshanmugam@paulweiss.com

BRAD S. KARP
LYNN B. BAYARD
TIANA VOEGELIN
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019

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Nothing in respondent's brief refutes appellants' showing that respondent—a longtime and sophisticated NFL coach—is required to arbitrate his claims attempting to hold the NFL responsible for the contractual consequences of the publication of his own racist, misogynistic, and homophobic e-mails.

As appellants have demonstrated, respondent agreed to arbitrate this dispute under two separate arbitration agreements in his record-setting, $100 million contract with the Raiders. *First*, respondent's employment agreement expressly incorporated the NFL Constitution and its arbitration provisions, and respondent represented that he had read and understood the Constitution's terms and agreed to be bound by them. *Second*, respondent's employment agreement contained a separate, broad arbitration provision that extends to appellants given their indisputably close relationship with the Raiders (a member club of the NFL) and respondent's reliance on the contract in asserting his claims. Far from some unwitting acquiescence to those arbitration provisions, respondent agreed to them with the benefit of decades of NFL coaching experience and with the guidance of a sports agent who respondent agrees is "accurately" described as "legendary." *See* Br. 50.

Respondent offers no valid basis for avoiding arbitration under either provision. His brief instead repeats the district court's reasoning while ignoring why that reasoning is erroneous.

With respect to the NFL Constitution: California law does not support respondent's extreme position that he was somehow entirely exempt from the provisions of the NFL Constitution—including those governing football-related conduct—simply because he purportedly never received a copy of the document. Respondent expressly represented that he had read and understood the NFL Constitution—a document he should have been and no doubt was well familiar with, given his decades of experience in the NFL. Respondent's argument that his claims fall outside the scope of the NFL Constitution's relevant arbitration provision fares no better. The provision contains no requirement, as respondent wrongly contends, that the Commissioner issue a formal opinion concluding that the dispute is arbitrable before the arbitration provision can be invoked. And respondent's interpretation of the provision as limited to current club employees flouts the federal presumption in favor of arbitrability.

With respect to respondent's employment agreement: the arbitration provision in that agreement covers this dispute, despite the agreement's

termination, because respondent bases his claims on his contractual relationship with the Raiders. Respondent cannot rely on his confidential settlement agreement with the Raiders to argue otherwise, given that he failed to submit that agreement into the record in support of his affirmative defense of novation. Nor can respondent deny that the doctrine of equitable estoppel applies here. His claims expressly rely on and invoke his contract with the Raiders; the NFL and the Raiders have a close relationship given that the latter is a member club of the former; and the Commissioner signed respondent's contract.

In a final effort to avoid arbitration, respondent attempts to paint the arbitration provisions here as "a case study in unconscionability and unfairness." Br. 57. But respondent cites no case finding unconscionability under even remotely similar circumstances. It is both farfetched and unconvincing for respondent to argue that he, a veteran head coach negotiating a $100 million contract under the advice of a preeminent sports agent, was the victim of procedural unconscionability.

Nor can respondent show that the arbitration provisions were substantively unconscionable in any way. Respondent has no answer to the numerous cases upholding arbitration by the NFL Commissioner under the same or

similar arbitration provisions. Indeed, in *Flores* v. *NFL*, Civ. No. 22-871, 2023 WL 2301575 (S.D.N.Y. Mar. 1, 2023)—a decision respondent highlights in his brief—the Court compelled arbitration of claims against the NFL before the NFL Commissioner. And contrary to respondent's repeated suggestion, the NFL Constitution defines the scope of the Commissioner's authority to arbitrate disputes; the arbitration itself will proceed under defined procedures; and federal law presumes that the Commissioner will discharge his duties appropriately.

Both of respondent's arbitration provisions are valid and enforceable, and both cover the claims at issue here. Declining to enforce those arbitration provisions would be irreconcilable with the clear language agreed to by respondent for a record-setting sum and with the federal and state policy in favor of arbitration. The order of the district court denying the motion to compel arbitration should be reversed.

I. RESPONDENT AGREED TO ARBITRATE THIS DISPUTE UNDER THE NFL CONSTITUTION

Article 8.3(E) of the NFL Constitution provides the NFL Commissioner with exclusive jurisdiction to arbitrate "[a]ny dispute involving . . . [any] employees of the members of the League . . . that in the opinion of the Commissioner constitutes conduct detrimental to the best interests of the

[NFL] or professional football." 1 A.A. 85. That arbitration provision clearly covers this dispute, which involves e-mails sent by respondent containing a racist stereotype and misogynistic and homophobic slurs directed at NFL players, owners, officials, and public figures. *See* 1 A.A. 2 n.1, 12, 24, 27. The Federal Arbitration Act thus required the district court "rigorously to enforce [the] arbitration agreement[] according to [its] terms." *Epic Systems Corp.* v. *Lewis*, 138 S. Ct. 1612, 1621 (2018). The district court erred by declining to do so, and respondent's contrary arguments lack merit.

A. Respondent Agreed To Comply With The NFL Constitution

As respondent acknowledges (Br. 26-27), a contract validly incorporates an external document under California law where the reference is "clear and unequivocal" and "the terms of the incorporated document are known or easily available to the contracting parties." *B.D.* v. *Blizzard Entertainment, Inc.*, 292 Cal. Rptr. 3d 47, 65 (Ct. App. 2022).[1] Respondent's employment agreement expressly incorporated the NFL Constitution, which respondent represented that he had "read" and "under[stood]." 1 A.A. 48-49. Respondent cannot credibly deny that the NFL Constitution was "easily accessible" to him,

[1] Where not preempted by federal law, California law governs the arbitration agreements at issue here. *See* Br. of Appellants 24; Br. of Respondent 17.

Br. 55, when either he or his agent could have asked for a copy. And it strains credulity to believe that a person with decades of NFL coaching experience was unfamiliar with the document that governed his conduct as a coach.

Respondent nevertheless argues (Br. 26-29) that he is not bound by Article 8.3(E) because the record lacks evidence that he received a copy of the operative version of the NFL Constitution before he executed his employment agreement. But there is no such requirement under California law, and respondent should not benefit from his apparent misrepresentation that he had read and understood the NFL Constitution. By making this argument, moreover, respondent is effectively contending that he was not required to comply with *any* of the NFL Constitution's provisions while he was the Raiders' head coach. That would have come as a shock to both appellants and respondent alike. *See*, *e.g.*, 1 A.A. 91, 97 (prohibiting betting on games and tampering with other clubs' players).

Respondent also suggests that California law usually requires an arbitration provision to be "specifically called out in the incorporation by reference." Br. 27 (citation omitted). California courts have squarely rejected that argument as inconsistent with the Federal Arbitration Act. *See* Br. of Appellants 32-33.

Respondent further argues that appellants "conceded that they failed to meet their burden" to show the existence of a valid arbitration agreement because "they did not present evidence" that the copy of the NFL Constitution in the record was the operative version when respondent entered his employment agreement in 2018. Br. 28. Respondent misstates appellants' argument. Appellants' submission of the current, authenticated version of the NFL Constitution, the arbitration provision in which has not been amended since before respondent entered his employment agreement, was itself sufficient to establish that the same version of the NFL Constitution was in effect when respondent became the Raiders head coach. No additional testimony or evidence is necessary to establish that respondent agreed to comply with the current version of Article 8.3(E).

B. Respondent's Claims Fall Within The Scope Of Article 8.3(E) Of The NFL Constitution

As appellants' opening brief also established (Br. 33-35), this dispute over respondent's offensive e-mails involves quintessential "conduct detrimental" to the NFL subject to arbitration under Article 8.3(E). Both of respondent's contrary arguments are incorrect.

First, respondent contends (Br. 42-45) that this dispute is not arbitrable because the Commissioner has not issued an express opinion that the dispute

involves "conduct detrimental." But nothing in the NFL Constitution imposes such a requirement as a condition to arbitration. *See* Br. of Appellants 33. And even if there were such a condition, the NFL Constitution delegates any such "condition precedent" determination to the Commissioner. *See id.* at 33-34. The proper procedure would thus have been for the court to compel arbitration so that the Commissioner could make that threshold determination before further proceedings occur. Although respondent contends (Br. 35, 43) that appellants failed to raise that argument below, appellants specifically argued that, if a finding of "conduct detrimental" is a precondition to arbitration, respondent "would have to raise that threshold issue with the arbitrator." 3 A.A. 617.

Respondent worries that, "[i]f the Commissioner is not required to issue an opinion on whether a claim involves 'conduct detrimental' prior to the initiation of the formal dispute," then the Commissioner can "refer *any* civil dispute" to arbitration. Br. 43-44. This case presents no such concern. If a party to an arbitration were to contest the Commissioner's jurisdiction under Article 8.3(E), the Commissioner would of course need to determine whether the dispute involves "conduct detrimental." But that does not mean the issuance of a

formal opinion at the outset is a prerequisite to enforcing the arbitration agreement in court.

Second, respondent argues that Article 8.3(E) "applies only when the *dispute itself* constitutes conduct detrimental in the opinion of the Commissioner." Br. 45 (citation omitted; emphasis added). But as even respondent recognizes, the *conduct underlying* the dispute is relevant to making that determination. *See id.* Respondent cannot seriously dispute that his conduct, which underlies this dispute, was detrimental to the NFL.

C. Respondent's Resignation Does Not Affect His Obligation To Arbitrate This Dispute

Respondent next argues (Br. 21-24) that the termination of his employment contract ended his obligation to arbitrate under Article 8.3(E), despite also conceding that, "in most cases, a dispute resolution clause will survive termination of the contract." Br. 19. While respondent contends that "[t]his presumption . . . should only apply to disputes that are *over* the contract itself," *id.* (emphasis added), precedent establishes that an arbitration provision presumptively survives termination of a contract where the "postexpiration grievance can be said to *arise under* the contract," *Litton Business Systems, Inc.* v. *NLRB*, 501 U.S. 190, 192 (1991) (emphasis added), or where the claims at issue "have their roots in the relationship between the parties [that] was

created by the contract," *Bos Material Handling, Inc.* v. *Crown Controls Corp.*, 186 Cal. Rptr. 740, 742-743 (Ct. App. 1982) (citations omitted).

That is plainly the case here. Respondent alleges that appellants released his offensive e-mails before his resignation and then pressured the Raiders to terminate his employment. *See* 1 A.A. 10-13. And as respondent admits, the employment agreement itself "stands as a source of damages in this case." Br. 32. Respondent's claims thus arise out of the contract; the fact that those claims technically sound in tort is of no significance. *See*, *e.g.*, *Shivkov* v. *Artex Risk Solutions, Inc.*, 974 F.3d 1051, 1059 (9th Cir. 2020); *Zolezzi* v. *Dean Witter Reynolds, Inc.*, 789 F.2d 1447, 1450 (9th Cir. 1986).

Respondent attempts to avoid the foregoing conclusion by arguing (Br. 21-22) that the language of Article 8.3(E) covers only *current* NFL players or employees. Under federal law, however, a motion to compel should be granted "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. *Teamsters*, 561 U.S. 287, 314 (2010). Article 8.3(E) does not use the word "current" when describing the employees bound to arbitrate disputes. *See* 1 A.A. 85. And the provision lacks any clear evidence that the parties intended to displace the normal federal rule that an arbitration provision

applies to former employees. Article 8.3(E) thus covers this dispute. *See* Br. of Appellants 36 (collecting cases enforcing arbitration agreements between employees and their former employers).[2]

Respondent's expressed concern (Br. 22-24) about the prospect of being bound by the NFL Constitution in perpetuity is a red herring. The question here is not whether respondent is bound by *all* of the NFL Constitution's provisions; it is whether he is bound by its arbitration provisions. And federal law states that *those* provisions apply to post-termination disputes under circumstances such as those present here. *See Shivkov*, 974 F.3d at 1061. Respondent's fanciful hypothetical (Br. 23-24) about an assault by the current Commissioner on a long-retired NFL player equally misses the mark: such conduct, occurring decades after the player's employment ended, would not "have its roots" in the parties' contractual relationship.

[2] Respondent notes that the presumption in favor of arbitrability does not apply to questions concerning the "existence of an arbitration agreement." Br. 18 (citation omitted). But respondent concedes that he *formed* an agreement to arbitrate claims under the NFL Constitution; he is seeking to avoid that agreement by arguing that it *does not cover his claims* and is *unenforceable*.

II. RESPONDENT AGREED TO ARBITRATE HIS CLAIMS UNDER HIS EMPLOYMENT AGREEMENT WITH THE RAIDERS

Aside from his agreement to abide by the NFL Constitution, respondent's employment agreement provided that "all matters in dispute between [him] 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." 1 A.A. 49. The district court erred by declining to compel arbitration under that provision as well. *See* Br. of Appellants 39-45. Respondent's efforts to defend the district court's decision fall short.

A. The Arbitration Provision In Respondent's Employment Agreement Survived The Termination Of That Agreement

As he does with respect to the NFL Constitution, respondent first argues (Br. 19) that his resignation from the Raiders terminated his obligation to arbitrate this dispute under his employment agreement. But that argument fails for the same reasons: the dispute at issue arises out of respondent's employment agreement and has its roots in his contractual relationship with the Raiders. *See* pp. 9-11, *supra*.

Respondent next argues (Br. 20-21) that the dispute-resolution procedures in his settlement agreement with the Raiders superseded the arbitration provision in his employment agreement. But respondent did not brief that

issue below and cannot now rely on the settlement agreement that he failed to enter into the record. *See* Br. of Appellants 48-49.

Respondent nevertheless asserts (Br. 20) that he preserved this argument below in his opposition to appellants' motion to compel arbitration. But there, respondent stated only that "[a]ll of [his] contractual claims under the [employment] [a]greement have been resolved via settlement with the Raiders." 3 A.A. 554-555; *see id.* at 546, 550. That is hardly the novation argument that respondent raised for the first time at oral argument below and now asserts on appeal. Nor is respondent correct that it is "proper" for "arguments [to be] raised in the first instance at oral argument," Br. 20; a party forfeits an entirely new argument not raised in his brief. *See*, *e.g.*, *Martel* v. *HG Staffing, LLC*, 138 Nev., Adv. Op. 56, 519 P.3d 25, 30 n.2 (2022); *State ex rel. Department of Highways* v. *Pinson*, 65 Nev. 510, 530, 199 P.2d 631, 641 (1948).

In any event, the district court was not permitted to deny appellants' motion to compel arbitration based on a settlement agreement that is absent from the record. *See* Br. of Appellants 48-49. Respondent suggests (Br. 20) that *appellants* had the burden to enter the settlement agreement into evidence, but respondent is wrong. While the party seeking to compel arbitration "bears the burden of proving the existence of an agreement to arbitrate,"

Johnson v. *Walmart Inc.*, 57 F.4th 677, 681 (9th Cir. 2023), "[t]he party opposing arbitration bears the burden of proving any defense," *Lim* v. *TForce Logistics, LLC*, 8 F.4th 992, 999 (9th Cir. 2021). After appellants entered an authenticated version of respondent's employment agreement into the record, *see* 1 A.A. 44-52, it was respondent's burden to prove novation, which is an affirmative defense. *See Mountain Air Enterprises, LLC* v. *Sundowner Towers, LLC*, 398 P.3d 556, 558 (Cal. 2017). Respondent was thus required to submit the settlement agreement as evidence in support of his defense, which he did not do.[3]

What is more, even if the Raiders and respondent agreed in the settlement agreement not to arbitrate future employment-related disputes, they had no ability to waive *appellants'* right to rely on the law permitting the enforcement of arbitration agreements after contract termination. Regardless of the contents of the settlement agreement, respondent cannot invoke his

[3] Respondent's demand that appellants make "specific[] represent[ations] to the Court" about their prior awareness of the provisions of the settlement agreement is entirely off-base. Br. 21. Appellants' awareness is irrelevant because they had no duty to anticipate and counter respondent's novation defense. Nor is a remand warranted. *See id.* Respondent has offered no reason why he failed to raise the novation defense below or to submit the settlement agreement into evidence. Respondent simply wants a second bite at the apple.

employment agreement as the basis for his claims while simultaneously seeking to avoid its arbitration provision.

B. Appellants Are Entitled To Enforce The Arbitration Provision In Respondent's Employment Agreement

The doctrine of equitable estoppel entitles appellants to enforce the arbitration provision in respondent's employment agreement. Respondent's claims are "intimately founded in and intertwined with" his agreement, *Boucher* v. *Alliance Title Co.*, 25 Cal. Rptr. 3d 440 (Ct. App. 2005); the Raiders and the NFL are expressly and closely associated with one another; and the Commissioner signed respondent's agreement. *See* Br. of Appellants 41-45. Respondent's efforts to resist the application of equitable estoppel are unavailing.

1. As a threshold matter, respondent argues (Br. 37-41) that his claims are beyond the scope of the arbitration provision in his employment agreement because the provision covers only "matters in dispute between [respondent] and [the Raiders]." 1 A.A. 49. But California courts have applied equitable estoppel to require a plaintiff to arbitrate claims against a third party in the context of arbitration agreements with party-based language. *See*, *e.g.*, *Felisilda* v. *FCA US LLC*, 266 Cal. Rptr. 3d 640, 643 (Ct. App. 2020); *Garcia* v. *Pexco, LLC*, 217 Cal. Rptr. 3d 793, 797 (Ct. App. 2017) (language of agreement reproduced at Br. of Respondent at 3, 2016 WL 11811364);

Franklin v. *Community Regional Medical Center*, 998 F.3d 867 (9th Cir. 2021) (language of agreement reproduced at Br. of Appellants at 8-9, 2020 WL 957221); *In re Apple & AT&TM Antitrust Litigation*, 826 F. Supp. 2d 1168, 1176-1179 (N.D. Cal. 2011) (language of agreement reproduced at 596 F. Supp. 2d 1288, 1298 (N.D. Cal. 2008)). In *Flores*, *supra*, the court compelled arbitration of claims against the NFL under an arbitration provision with party-based language materially identical to the arbitration provision here. *See* 2023 WL 2301575, at *6 (language of agreement reproduced at 2022 WL 3142483). Party-based language is thus no bar to the application of equitable estoppel.

The authorities cited by respondent confirm as much. In both *Kramer* v. *Toyota Motor Corp.*, 705 F.3d 1122 (9th Cir. 2013), and *Mundi* v. *Union Security Life Insurance Co.*, 555 F.3d 1042 (9th Cir. 2009), the relevant arbitration provision contained party-based language, which led the court initially to conclude that a claim asserted by a signatory against a nonsignatory fell outside the scope of the arbitration provision. *See Kramer*, 705 F.3d at 1126-1128; *Mundi*, 555 F.3d at 1045. But the court did not stop there in either case; it proceeded to analyze whether the doctrine of equitable estoppel would nevertheless allow the nonsignatory to enforce the arbitration agreement. *See Kramer*, 705 F.3d at 1128-1133; *Mundi*, 555 F.3d at 1045-1047.

The decision in *Donovan* v. *Coinbase Global, Inc.*, Civ. No. 22-2826, 2023 WL 2124776 (N.D. Cal. Jan. 6, 2023), relied on by respondent (Br. 39-40), is not to the contrary. There, the court was considering whether the arbitration agreement required the plaintiff to arbitrate a gateway *question of arbitrability* raised by claims asserted against a nonsignatory to the agreement. *See* 2023 WL 2124776, at *2. Because the question was whether the parties had changed the default rule that courts (and not arbitrators) must resolve such gateway questions, federal law required "clear and unmistakable" evidence that the plaintiff agreed to arbitrate such questions with a nonsignatory. *Id.* at *6. The heightened "clear and unmistakable" standard does not apply here, however, because appellants are not arguing that the arbitration provision in the employment agreement changed the default rule that courts resolve gateway questions of arbitrability. *Donovan* is thus irrelevant.

2. As respondent acknowledges, California law permits nonsignatories to invoke arbitration agreements under the doctrine of equitable estoppel where (1) "a signatory must rely on the terms of the written agreement in asserting its claims against the nonsignatory or the claims are intimately founded in and intertwined with the underlying contract," or (2) "the signatory alleges substantially interdependent and concerted misconduct by the

nonsignatory and another signatory and the allegations of interdependent misconduct are founded in or intimately connected with the obligations of the underlying agreement." Br. 30 (citation omitted). Equitable estoppel only requires that one be true; both circumstances are present here. *See* Br. of Appellants 41-45.

Respondent admits that his employment agreement "stands as a source of [his] damages," but he contends that the agreement must actually "provide the basis for the causes of action" before a sufficient connection between the claims and the agreement can exist. Br. 32. Even if that were an accurate statement of the law, the contract clearly provides the basis for his causes of action. For example, respondent's first cause of action is for intentional interference with contractual relations, the elements of which are "(1) a valid and existing contract; (2) the defendant's knowledge of the contract; (3) intentional acts intended or designed to disrupt the contractual relationship; (4) actual disruption of the contract; and (5) resulting damage." *J.J. Industrial, LLC* v. *Bennett*, 119 Nev. 269, 274, 71 P.3d 1264, 1267 (2003); *see* 1 A.A. 14-15. Without his employment agreement, that claim does not exist.

The decision in *Boucher*, *supra*, confirms that equitable estoppel applies here. *See* Br. of Appellants 43-45. Remarkably, respondent attempts to

distinguish *Boucher* on the ground that all of the claims there "relied on or made reference to the employment agreement" and "depended upon the legal rights and obligations created in" the agreement. Br. 33. But the claims there were for some of the same causes of action that respondent asserts here: namely, "interference with contractual and prospective economic relations." 25 Cal. Rptr. 3d at 442; *see* 1 A.A. 14-16. *Boucher* is thus squarely on point.

Gruden also argues that his claims do not involve "interdependent and concerted misconduct" by appellants and the Raiders. Br. 33 (citation omitted). Of course, respondent must have taken the opposite position when he settled "[a]ll of [his] contractual claims" against the Raiders. 3 A.A. 554-555. In any event, a claim that a contractual party allegedly succumbed to pressure from a third party to breach a contract qualifies as interdependent and concerted misconduct. *See Grigson* v. *Creative Artists Agency, L.L.C.*, 210 F.3d 524, 529 (5th Cir. 2000). Here, respondent's claims are based on the allegation that appellants successfully pressured the Raiders to terminate his employment contract. *See* Br. of Respondent ix-x. While appellants categorically deny those allegations, respondent cannot advance those allegations and simultaneously avoid the arbitration provision in his employment contract.

Finally on this score, respondent contends that appellants and the Raiders do not have an "integral relationship." Br. 32. That contention strains credulity. The NFL is a membership association, and the Raiders are one of its 32 member clubs. 1 A.A. 3; Br. of Appellants 5-6. The Raiders, as well as their coaches and staff, are bound by the NFL Constitution. *See* 1 A.A. 67. The NFL oversees a number of operational issues for the Raiders. *See*, *e.g.*, 1 A.A. 104, 116 (division of television income between clubs, game scheduling). And of course, the NFL Commissioner signed respondent's employment agreement. 1 A.A. 51-52; *see Flores*, 2023 WL 2301575, at *9 n.17. That relationship is far more integral than "the relationships between manufacturers and distributors or franchisor and franchisee[s]" in the cases respondent cites. Br. 32.

The doctrine of equitable estoppel is designed to "prevent[] a plaintiff from having it both ways by seeking to hold a non-signatory liable for obligations imposed by [an] agreement, while at the same time repudiating the arbitration clause of that very agreement." *Ngo* v. *BMW of North America, LLC*, 23 F.4th 942, 949 (9th Cir. 2022) (internal quotation marks and citation omitted). That is precisely what respondent is attempting to do here—hold appellants liable for obligations imposed under his employment agreement while

repudiating his core commitment to arbitrate disputes arising under that same agreement. The doctrine of equitable estoppel, and the fundamental principles of fairness on which it is based, preclude him from so doing.[4]

III. THE ARBITRATION AGREEMENTS IN THE NFL CONSTITUTION AND RESPONDENT'S EMPLOYMENT AGREEMENT ARE NOT UNCONSCIONABLE

The district court erred by holding that the arbitration provisions in the NFL Constitution and respondent's employment agreement are unconscionable. *See* Br. of Appellants 52-68. Notably, respondent does not argue that the arbitration provision in his employment agreement is procedurally unconscionable, limiting his arguments on that score to the agreement's incorporation of the NFL Constitution. *See* Br. 50-56. Respondent's apparent acknowledgement that the separate arbitration provision in his employment agreement is procedurally reasonable renders his unconscionability challenge to that provision meritless. *See OTO, L.L.C.* v. *Kho*, 447 P.3d 680, 689, 690 (Cal.

[4] Respondent suggests in passing that appellants must rely on the doctrine of equitable estoppel to enforce Article 8.3(E) of the NFL Constitution, stating that "the NFL Constitution was incorporated into the [e]mployment [a]greement only via a promise to the Raiders . . . to comply with the terms of the NFL Constitution." Br. 29-30. Respondent did not raise that argument below, *see* 3 A.A. 555-565, and it would fail in any event for the reasons just explained.

2019). And each of his arguments directed to the NFL Constitution wilts under scrutiny.

A. The Employment Agreement's Incorporation Of The NFL Constitution Was Procedurally Reasonable

Despite his decades of professional coaching experience, his representation by a prominent and highly skilled sports agent, and his record-setting contract, respondent argues that the incorporation of the NFL Constitution into his employment agreement was somehow procedurally unconscionable. But he can show no unfairness during the negotiation process or "oppression or surprise to undue bargaining power." *Sanchez* v. *Valencia Holding Co.*, 353 P.3d 741, 748 (Cal. 2015).

Respondent first contends that the NFL Constitution is a contract of adhesion "in [s]ubstance" because he "had no choice but to accept [its] terms" as a condition of employment with the Raiders. Br. 50, 51. Under California law, however, "[a]n adhesive contract is standardized, generally on a preprinted form, and offered by the party with superior bargaining power on a take-it-or-leave-it basis." *OTO*, 447 P.3d at 690 (internal quotation marks and citation omitted); *accord Baltazar* v. *Forever 21, Inc.*, 367 P.3d 6, 12 (Cal. 2016). Such a contract qualifies as adhesive because it "relegates to the subscribing party only the opportunity to adhere to the contract or reject it." *Armendariz*

v. *Foundation Health Psychcare Services, Inc.*, 6 P.3d 669, 689 (Cal. 2000). The weaker party usually "lacks not only the opportunity to bargain but also any realistic opportunity to look elsewhere for a more favorable contract." *Madden* v. *Kaiser Foundation Hospitals*, 552 P.2d 1178, 1185-1186 (Cal. 1976); *see USS-Posco Industries* v. *Case*, 197 Cal. Rptr. 3d 791, 805 (Ct. App. 2016).

That does not remotely describe respondent's contract with the Raiders. At the outset, there is no dispute that respondent had the opportunity to negotiate the terms of his employment agreement. *See* Br. of Appellants 56. Respondent thus attempts to shift his focus to the specific provision of the employment agreement incorporating the NFL Constitution. But even "the inclusion of a take-it-or-leave-it clause in a negotiated agreement" does not "turn[] the entire agreement into a contract of adhesion." *Grand Prospect Partners, L.P.* v. *Ross Dress for Less, Inc.*, 182 Cal. Rptr. 3d 235, 251 (Ct. App. 2015). Not surprisingly, respondent cites no authority for the proposition that California courts analyze the adhesive nature of a contract on a provision-by-provision basis. And there is significant authority to the contrary. *See*, *e.g.*, *OTO*, 447 P.3d at 691; *Baltazar*, 367 P.3d at 12; *Betancourt* v. *Transportation Brokerage Specialists, Inc.*, 276 Cal. Rptr. 3d 785, 792 (Ct. App. 2021); *Cabatit*

v. *Sunnova Energy Corp.*, 274 Cal. Rptr. 3d 720, 725 (Ct. App. 2020); *Ali* v. *Daylight Transport, LLC*, 59 Cal. App. 5th 462, 474 (Ct. App. 2020).

Respondent separately contends that arbitration under the NFL Constitution would be procedurally unconscionable because he was "not provided with the NFL Constitution when signing" the agreement. Br. 52. That is impossible to square with respondent's representation in the agreement that he had read and understood the NFL Constitution before signing. *See* 1 A.A. 49. But even setting that aside, the California Supreme Court rejected respondent's argument in *Baltazar*, *supra*—a decision issued after the cases respondent cites. *See* Br. 52. As the Ninth Circuit has subsequently explained, under *Baltazar*, a court "may 'more closely scrutinize the *substantive* unconscionability' of terms appearing only in" the incorporated arbitral rules, but "incorporation by reference, without more, does not affect the finding of *procedural* unconscionability." *Poublon* v. *C.H. Robinson Co.*, 846 F.3d 1251, 1262 (9th Cir. 2017) (emphasis added) (quoting *Baltazar*, 367 P.3d at 15).

The Federal Arbitration Act compels that reading of California law. In particular, that reading creates "consisten[cy] with California's general rule that parties may validly incorporate by reference into their contract the terms of another document provided certain conditions are met." *Poublon*, 846 F.3d

at 1262. Respondent's claim that California law specifically disfavors the incorporation of arbitral rules into a contract would violate the Federal Arbitration Act's "equal-treatment principle," which prohibits courts from imposing more stringent requirements on arbitration agreements than other contracts. *Kindred Nursing Centers Limited Partnership* v. *Clark*, 137 S. Ct. 1421, 1423 (2017).

Respondent separately suggests (Br. 53-56) that procedural unconscionability is present because his employment agreement did not validly incorporate the NFL Constitution by reference. But as already shown, the incorporation was valid. *See* pp. 5-7.

B. Article 8.3(E) Of The NFL Constitution Is Substantively Reasonable

As noted above, *see* p. 21, the Court need not address the substantive reasonableness of the arbitration provision in respondent's employment contract, because he does not contest that the provision is procedurally reasonable. *See Sanchez*, 353 P.3d at 748. And because Article 8.3(E) is also procedurally reasonable, the Court need not address substantive unconscionability with regard to the NFL Constitution either. In any event, neither arbitration agreement comes close to being "unduly oppressive" or "so one-sided as to

shock the conscience." *Baltazar*, 367 P.3d at 11-12 (internal quotation marks and citation omitted).

1. The Commissioner's Potential Role As The Arbitrator Is Permissible

Respondent first argues (Br. 57-60) that it would be substantively unconscionable for the NFL Commissioner to serve as the arbitrator of this dispute. But respondent offers no response to the numerous cases approving of the Commissioner's serving in such a role, including precedent permitting the Commissioner to arbitrate a challenge to a disciplinary determination rendered by the Commissioner himself. *See* Br. of Appellants 57-59; *Flores*, 2023 WL 2301575, at *11-*14.

The cases cited by respondent (Br. 58) are inapposite. In *Pokorny* v. *Quixtar*, 601 F.3d 987 (9th Cir. 2010), one of the parties had trained the relevant arbitrators through presentations "designed to produce a very favorable view of the defendant," and the other party was unaware of the nature of the training. *Id.* at 1003. Here, by contrast, respondent entered his record-setting employment agreement with full knowledge of the Commissioner's role in the NFL and express approval that he may oversee any future arbitration. *See* Br. of Appellants 61. And in *Graham* v. *Scissor-Tail, Inc.*, 623 P.2d 165 (Cal. 1981), the court was "scrutinizing [the agreement] with particular care"

because it was a contract of adhesion. *Id.* at 176. Here, however, respondent's employment agreement was not adhesive. *See* pp. 22-24, *supra*.

In addition, it is not a foregone conclusion that the Commissioner will serve as the arbitrator for respondent's claims, because NFL policies and procedures allow him to select a third-party arbitrator to hear claims within his jurisdiction. *See* Br. of Appellants 59. Until the arbitrator is selected, respondent should not "speculate[]" about who will arbitrate this dispute. *See Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30 (1991); *Carboni* v. *Lake*, 562 F. Supp. 2d 585, 588 (S.D.N.Y. 2008). And even if the Court were to conclude that the arbitration agreements are unconscionable because they designate the Commissioner as the arbitrator, the proper remedy would be to sever that designation and enforce the remainder of the arbitration provision. *See* Br. of Appellants 61-63.

Respondent argues that severance is not an available option here for three reasons. Each is unavailing.

First, respondent questions the applicability of California's severability statute in Nevada courts. *See* Br. 59; Cal. Civ. Code § 1670.5(a). But federal courts routinely apply that statute to arbitration agreements, treating it as a substantive rule of California contract law. *See*, *e.g.*, *Poublon*, 846 F.3d at

1272-1274; *Beltran* v. *AuPairCare, Inc.*, 907 F.3d 1240, 1262-1263 (10th Cir. 2018); *Bridge Fund Capital Corp.* v. *Fastbucks Franchise Corp.*, 622 F.3d 996, 1005 (9th Cir. 2010).

Second, respondent argues (Br. 59) that his contract's selection of the Commissioner as the arbitrator is "integral" to the arbitration agreement and thus not severable. But the mere fact of designation alone does not make his service as the arbitrator "integral" to the agreement. To the contrary, some courts have appointed an alternative arbitrator in cases where the arbitral forum selected by the arbitration agreement is unavailable to adjudicate the dispute. *See*, *e.g.*, *Green* v. *U.S. Cash Advance Illinois, LLC*, 724 F.3d 787, 790-793 (7th Cir. 2013); *Khan* v. *Dell Inc.*, 669 F.3d 350, 354-357 (3d Cir. 2012); *Brown* v. *ITT Consumer Financial Corp.*, 211 F.3d 1217, 1222 (11th Cir. 2000). The Commissioner's personal service as the arbitrator also cannot be "integral" to the agreement, given that the NFL's policies affirmatively authorize the Commissioner to appoint a third-party arbitrator to hear claims within his jurisdiction, *see* 3 A.A. 579, and any number of circumstances could make the Commissioner unavailable to serve.

Third, respondent argues that severance is not permissible under California law where an arbitration agreement is "permeated by

unconscionability." Br. 59 (citation omitted). As appellants have shown (Br. 52-68), the arbitration agreements here are procedurally and substantively reasonable. If the designation of the Commissioner as the arbitrator is the only unconscionable aspect of the agreement, it is plainly severable.[5]

2. Article 8.3(E) Does Not Lack Mutuality

The district court held that the arbitration provisions in both respondent's employment agreement and the NFL Constitution were nonmutual because respondent could not have requested arbitration under them. *See* 6 A.A. 793-794. On appeal, respondent does not defend the district court's decision with respect to his employment agreement. *See* Br. 61-63. And with respect to the NFL Constitution, it expressly provides that the Raiders must arbitrate

[5] Citing *Armendariz*, *supra*, respondent briefly asserts that arbitration under the NFL Constitution would be substantively unconscionable because the Commissioner "would have unlimited authority to determine . . . the procedure of the arbitration." Br. 60. Respondent fails to mention (Br. 60-61) that the NFL has an established set of procedures for governing arbitrations before the Commissioner. *See* 3 A.A. 579-583. And in *Armendariz*, the California Supreme Court was establishing the minimum procedures required to arbitrate an employment claim under a state statute not at issue here. *See* 6 P.3d at 680-689. In setting forth those minimum requirements, the court concluded that the employer had "impliedly consented" to provide those procedures by agreeing to arbitrate such statutory claims. *See id.* at 684. Respondent offers no other authority for the proposition that "this is not a defect that can or should be raised after the conclusion of the arbitration." Br. 60; *see* 9 U.S.C. § 10(a).

"[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." 1 A.A. 85. That plainly provides the "modicum of bilaterality" necessary to render an arbitration agreement valid under California law. *Ting* v. *AT&T*, 319 F.3d 1126, 1149 (9th Cir. 2003).

Respondent acknowledges that "the Raiders may be bound in some respect" to the NFL Constitution but contends that the club is "not bound to [it] by" the employment agreement and thus "not in a way that would provide Gruden with adequate contractual rights." Br. 61. To the contrary, because the employment contract validly incorporates the NFL Constitution, *see* pp. 5-7, *supra*, it does impose a contractual obligation vis-à-vis the Raiders to comply with the Constitution's arbitration provisions. Respondent's citation (Br. 62) of *Sniezek* v. *Kansas City Chiefs Football Club*, 402 S.W.3d 580 (Mo. Ct. App. 2013) is also unpersuasive, for reasons appellants have already identified. *See* Br. of Appellants 65.

3. Article 8.3(E) Is Neither Circular Nor Illusory

Respondent next repeats (Br. 63-64) the district court's conclusion that Article 8.3(E) is circular because it limits the Commissioner's jurisdiction to disputes that, in his opinion, involve "conduct detrimental" to the NFL. But

contrary to respondent's unexplained assertion, a decision on the question whether the dispute involves "conduct detrimental" is merely a threshold determination; it is not a resolution of the merits of the claims. *See* Br. of Appellants 67-68. To the extent both appellants' and respondent's interpretations of the "conduct detrimental" determination under Article 8.3(E) are reasonable, California law requires the Court to select the interpretation that renders Article 8.3(E) enforceable—here, appellants' interpretation. *See* Cal. Civ. Code § 1643.

Nor is Article 8.3(E) illusory because its scope is "whatever [the Commissioner] says it is." Br. of Respondent 64. The language in the provision requiring the arbitration of disputes that "in the opinion of the Commissioner" involve "conduct detrimental" merely delegates the "conduct detrimental" determination to the Commissioner. *See* Br. of Appellants 66. As the United States Supreme Court has recognized, such delegation provisions are valid and enforceable under the Federal Arbitration Act. *See Henry Schein, Inc.* v. *Archer & White Sales, Inc.*, 139 S. Ct. 524, 530 (2019).

Respondent argues that Article 8.3(E) is illusory for the additional reason that appellants have authority "unilaterally [to] modify the NFL Constitution." Br. 25. Respondent did not raise that argument below, and the

district court did not address it. The point is forfeited. *See Elk Point Country Club Homeowners' Association, Inc.* v. *K.J. Brown, LLC*, 138 Nev., Adv. Op. 60, 515 P.3d 837, 841 (2022); *Greystone Nevada, LLC* v. *McCoy*, No. 68769, 134 Nev. 945, 416 P.3d 198, 2018 WL 1863336, at *2 n.1 (Apr. 12, 2018) (unpublished).

In any event, respondent's argument lacks merit. For starters, neither appellants nor the Raiders (respondent's contractual counterparty) have unilateral authority to modify the NFL Constitution. Amendments require the agreement of 24 of the 32 NFL member clubs—which itself is a significant safeguard against unfairness. *See* 1 A.A. 178. In addition, under California law, a "unilateral modification clause does not make [an] arbitration provision itself unconscionable," because "California courts have held that the implied covenant of good faith and fair dealing prevents a party from exercising its rights under a unilateral modification clause in a way that would make it unconscionable." *Tompkins* v. *23andMe, Inc.*, 840 F.3d 1016, 1033 (9th Cir. 2016); *see Fuentes* v. *Empire Nissan, Inc.*, 307 Cal. Rptr. 3d 512, 523 (Ct. App. 2023) (compiling cases). Whether or not appellants owed respondent an implied duty of good faith and fair dealing, *see* Br. of Respondent 26, the Raiders

had such a duty, which limited their ability to seek to modify the NFL Constitution.

Finally, the Court could easily remedy any unconscionability here by severing the language in respondent's employment agreement that binds him to the NFL Constitution "as amended from time to time" after his employment began. 1 A.A. 48. That result would have no effect on respondent's obligation to arbitrate this dispute, because it is indisputable that the NFL Constitution's arbitration provisions have not been amended since he became the Raiders' head coach.

Respondent's reliance on the portion of *Flores* addressing unilateral modification is misplaced. On that question, the court was not applying California law and did not address the question of severability. *See* 2023 WL 2301575 at *11. A motion for reconsideration of that ruling is also pending.

4. Article 8.3(E) Does Not Violate Public Policy

Respondent does not dispute that federal, California, and Nevada law and public policy all favor the arbitration of disputes and direct courts to uphold arbitration agreements unless it is clear that the dispute falls outside the scope of the agreement. *See* Br. of Appellants 68. Respondent nevertheless contends that arbitration under Article 8.3(E) would violate public policy,

reasoning that the Commissioner's purported "power to declare anything to be conduct detrimental" means that "*any* dispute involving any past or current employee of the NFL or its member clubs" is subject to arbitration. Br. 65. That argument is entirely derivative of respondent's other arguments on appeal, and appellants have already explained why they are incorrect. *See* pp. 8-9, 11. Nothing about respondent's arbitration agreements violates public policy or is otherwise unconscionable; to the contrary, public policy strongly supports enforcing those agreements as written and requiring arbitration of the dispute at issue here.

* * * * *

The order of the district court denying the motion to compel arbitration should be reversed.

Respectfully submitted,

/s/ Maximilien D. Fetaz

MITCHELL J. LANGBERG
(Nevada Bar No. 10118)
MAXIMILIEN D. FETAZ
(Nevada Bar No. 12737)
BROWNSTEIN HYATT
FARBER SCHRECK, LLP
100 North City Parkway,
Suite 1600
Las Vegas, NV 89106
(702) 382-2101

KANNON K. SHANMUGAM
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
2001 K Street, N.W.
Washington, DC 20006

BRAD S. KARP
LYNN B. BAYARD
TIANA VOEGELIN
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019

MAY 30, 2023

ATTORNEY CERTIFICATION

1. I hereby certify that Appellants' Reply Brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type-style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point font in Microsoft Office 365.

2. I further certify that Appellants' Reply Brief complies with the page- or type-volume limitations of NRAP 21(d) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 6,987 words.

3. Finally, I hereby certify that I have read Appellants' Reply Brief, and, to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying

brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

/s/ Maximilien D. Fetaz
MAXIMILIEN D. FETAZ
(Nevada Bar No. 12737)
BROWNSTEIN HYATT
FARBER SCHRECK, LLP
100 North City Parkway,
Suite 1600
Las Vegas, NV 89106

MAY 30, 2023

CERTIFICATE OF SERVICE

Pursuant to Nevada Rule of Appellate Procedure 25(b), I certify that I am an employee of Brownstein Hyatt Farber Schreck, LLP, and that, on May 30, 2023, I served Appellants' Reply Brief by submitting it for electronic filing and service though the Supreme Court of Nevada's EFlex Filing system and serving all parties with an e-mail address on record, as indicated below, pursuant to Rule 8 of the N.E.F.C.R.

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