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## Live and Let LIV?: The Case Against Antitrust Alarm and the Multi-Tour Future of Professional Golf

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# Live and Let LIV?: The Case Against Antitrust Alarm and the Multi-Tour Future of Professional Golf

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## I. INTRODUCTION

Since 2019, the men's professional golf world has been in turmoil, seeing the birth of the PGA Tour's first-ever legitimate rival, the commencement of legal and rhetorical warfare between the two, and the shocking announcement of a partnership between PGA and its rival's uber-powerful financier. This saga has attracted the attention of private plaintiffs; sports, law, and business commentators; policymakers; top-tier litigation teams; and national and international law enforcement groups. While even the passive sports, law, or business observer is likely familiar with the headlines, very few can claim to know at this juncture how the dust will settle. What form will the emerging entit(ies) take; what legal claims will private or public litigants make against these new structure(s), if any; and how plausible will those claims be? This paper will argue that the PGA Tour of the late 2020s may well resemble that of the late 2010s. The partnership announced between PGA and the Saudi Public Investment Fund may well fail, and, even though federal agencies would then be primed to bring antitrust actions against the newly-single PGA Tour, those claims are unlikely to hold as much weight as some have come to assume. In this light, the modern golf fan will be well advised to get used to a "multi-tour" present and future.

The paper is laid out as follows: in the remainder of Section I, it will offer a brief overview of the major entities in men's professional golf and trace the drama that has unfolded between them since 2019. This includes the emergence of the LIV Tour, a year of antitrust and other litigation between PGA and LIV-related plaintiffs, and the surprise announcement of a joint venture between PGA and the Saudi Public Investment Fund (PIF), the ultra-deep pocket behind LIV's emergence. It will then provide evidence suggesting that the much-anticipated relationship between PGA and PIF may be short-lived. The remainder of the paper will be dedicated to analyzing the viability of antitrust enforcement litigation that federal agencies may well initiate, in a post-separation world, against the PGA and its allies. The paper will suggest that PGA has legitimate defenses to most plausible antitrust claims, based on weaknesses in those claims' market definition (Section II), monopoly and monopsony power (Section III), and anticompetitive means (Section IV) elements. The paper will offer takeaways for further analysis and some predictions in its conclusion (Section V).

### *A. The Saga: The Entities, Their Battles, and Ceasefire*

By Spring 2022, men's professional golf had come to resemble a too small town in the Wild West, set for a showdown. The incumbent authority was the PGA Tour, which had, since 1968, been the dominant organizer of professional golf tours in North America. It organized and still organizes the majority of the events making up the PGA Tour Champions (senior

tour), the Korn Ferry Tour (developmental), PGA Tour Canada, PGA Tour Latinoamerica, PGA Tour China, and, most importantly, the flagship series of tournaments known as the PGA Tour (hereafter just “PGA” or “the Tour”). The Tour has always been organized as a 501(c)(6) not-for-profit business league, defined by the IRS as an “association of persons having a common business interest, whose purpose is to promote the common business interest ....”<sup>1</sup> Individual tournaments enter contracts to become Tour-sanctioned events. Player-members of the tour are independent contractors who agree to certain rules and regulations in return for Tour membership, replete with health benefits for active players<sup>2</sup> and the possibility to qualify for an “extremely generous”<sup>3</sup> player pension.<sup>4</sup>

The PGA European Tour – the PGA Tour’s “little brother” and closest ally – is the traditionally dominant organizer of professional tours in Europe. These include the European Senior Tour, the Challenge Tour (developmental), and the flagship European Tour, also known as the DP World Tour. The European Tour, like the PGA Tour, has a mission to maximize the earnings of tournament golfers and is run by a Board controlled by playing members.<sup>5</sup>

For four weeks per year, non-PGA tournaments hold the golf world’s attention. The four most prestigious tournaments in golf, the “Majors” are each run by their own organization. The Masters is put on by Augusta National Golf Club; the U.S. Open is put on by the United States Golf Association; the British Open is put on by the Royal & Ancient Golf Club; and the PGA Championship is put on by the PGA of America (which is a separate entity from the PGA Tour).

There has traditionally been extensive cooperation between the PGA Tour, the European Tour, and the four Majors. Both the PGA Tour and the

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<sup>1</sup> John Francis Reilly, Carter C. Hull & Barbara A. Braig Allen, *IRC 501(c)(6) Organizations*, Exempt Organizations-Technical Instruction Program for FY 2003, <https://www.irs.gov/pub/irs-tege/eotopick03.pdf> (last visited Feb. 22, 2023).

<sup>2</sup> “TOUR pros are . . . well looked after with perks like courtesy cars and player dining during tournaments. Plus, the TOUR provides great health benefits . . . as well as great extras like childcare.” Ben Everill, *Fighting For Your Job On Tour*, PGA TOUR, <https://www.pgatour.com/tour-insider/2016/08/17/fighting-for-your-job-on-tour.html> (last visited Feb. 22, 2023).

<sup>3</sup> Jared Doerfler, *The PGA Tour’s Retirement Plan*, PERFECT PUTT (Apr. 24, 2023), <https://perfectputt.substack.com/p/the-pga-tours-retirement-plan>.

<sup>4</sup> *2019-2020 Player Handbook & Tournament Regulations*, PGA TOUR HQ (last visited Feb. 22, 2023). “Under the PGA Tour’s cuts-made plan, a player must make 75 cuts to be 50-percent vested and is fully vested at 150 cuts, according to multiple players. According to the PGA Tour, in 2014-’15, players received \$4,500 for each of the first 15 cuts made—\$67,500—and \$9,000 for each cut made above 15, in addition to prize money.” Ron Sirak, *Golden Retirements: PGA Tour Pros Get a Gift that Keeps Giving*, GOLF DIGEST (Sept. 27, 2016), <https://www.golfdigest.com/story/golden-retirements-pga-tour-pros-get-a-gift-that-keeps-giving>.

<sup>5</sup> *PGA European Tour*, Gov.UK, <https://find-and-update.company-information.service.gov.uk/company/01867610> (last visited Sept. 2, 2023).

European Tour count performance in the Majors toward their respective overall season performance rankings. And while the PGA Tour, European Tour, and Majors each have their own rules for player eligibility, each relies extensively on players' position in the Official World Golf Ranking (OWGR). OWGR is updated weekly and recognizes players' performance in any of twenty-three international tours.<sup>6</sup>

Funded by the sovereign wealth fund of Saudi Arabia, the LIV Golf Tour (hereafter "LIV") has attempted to impose itself on this ecosystem and force PGA and its allies to make room. LIV had recruited 19 of the top 100 players in the world by May, 2022,<sup>7</sup> and it hosted its first ever tournament a month later.<sup>8</sup> Weeks before that, on June 1, 2022, PGA Tour leadership announced that it would sanction players who participated in LIV events, citing a number of its player regulations.<sup>9</sup>

With the stage set for an epic showdown, the first shots exchanged were via the media. Phil Mickelson, an early LIV defector, publicly ridiculed the PGA Tour's "obnoxious greed,"<sup>10</sup> and LIV CEO Greg Norman accused PGA of having an "illegal monopoly."<sup>11</sup> Augusta National Chairman Fred Ridley alluded that the exodus to LIV had "diminish[ed] the virtues of the game and the meaningful legacies of those who built it."<sup>12</sup> PGA Tour Commissioner Jay Monahan implied that PGA occupied a moral high ground when, referring to Saudi Arabia's role in the September 11 attacks, he said that his "heart [went] out to" the "families of 9/11" and rhetorically asked whether "any player that has left or ... would ever consider leaving" PGA has "ever had to apologize for being a member of the PGA Tour."<sup>13</sup>

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<sup>6</sup> *How The Ranking System Works*, OFFICIAL WORLD GOLF RANKING, <https://www.owgr.com/how-the-ranking-works> (last visited Feb. 22, 2023). See also *Just How Far Have LIV Golf Players Fallen in the Official World Golf Ranking*, GOLFWEEK, <https://golfweek.usatoday.com/2023/03/14/liv-golf-news-owgr-ranking-points/> (last visited Sep. 2, 2023). See also Adam Woodard, *Just How Far Have LIV Golf Players Fallen in the Official World Golf Ranking*, GOLFWEEK (Mar. 14, 2023, 1:00 PM) <https://golfweek.usatoday.com/2023/03/14/liv-golf-news-owgr-ranking-points/>.

<sup>7</sup> Sean Zak & Jack Hirsh, *PGA Tour-LIV Golf Merger Timeline: How Did We Get Here*, GOLF (June 6, 2023), <https://golf.com/news/liv-golf-pga-tour-merger-timeline/>.

<sup>8</sup> Riley Hamel, *A Complete Timeline of LIV Golf*, Leading Up to PGA Tour Merger, GOLFWEEK (June 6, 2023), <https://golfweek.usatoday.com/lists/liv-golf-history-pga-tour-merger/>.

<sup>9</sup> *LIV Golf Invitational: PGA Tour says it will sanction players who compete in London event*, BBC SPORT (June 1, 2022), <https://www.bbc.com/sport/golf/61662624>.

<sup>10</sup> Sean Zak & Jack Hirsh, *PGA Tour-LIV Golf Merger Timeline: How Did We Get Here*, GOLF (June 6, 2023), <https://golf.com/news/liv-golf-pga-tour-merger-timeline/>.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> Ryan Young, *PGA Tour Commissioner Defends Suspending LIV Defectors: 'It's Been an Unfortunate Week'*, YAHOO! SPORTS (June 12, 2022), <https://sports.yahoo.com/pga-tour-commissioner-jay-monahan-defends-suspensions-for-liv-golf-series-players-202554151.html>.

It did not take long for the battle to reach the courtroom. On August 3, 2022, eleven PGA members who had committed to play in LIV events filed an antitrust, tortious interference, and breach of contract lawsuit against the PGA Tour in the Northern District of California,<sup>14</sup> as well as a motion for a temporary restraining order (TRO) to force PGA to allow the players to play in the Tour's FedEx Cup Playoffs, which were scheduled to begin eight days later.<sup>15</sup> On August 8, the PGA Tour filed its opposition to the TRO request<sup>16</sup> and included a list of alleged "mischaracterizations" made by the LIV players in their initial filing.<sup>17</sup> On August 10, Judge Beth Freeman issued an order denying the LIV players' TRO request.<sup>18</sup> On August 26, various LIV players dropped out of the suit as the LIV Tour itself joined as a plaintiff, filing an amended complaint.<sup>19</sup> The PGA Tour then added a countersuit in September, seeking damages for brand and reputation damage caused by LIV's interference (inducing PGA players to break their contracts by offering such lucrative deals) and claiming that the Saudi sovereign wealth fund was using LIV and LIV players to "sportswash" its history of human rights abuses.<sup>20</sup> PIF eventually claimed "sovereign immunity" and objected to the PGA Tour's request that its governor testify in the case and turn over the fund's finances.<sup>21</sup>

The antitrust claims in LIV's amended complaint included: unlawful monopsonization of the market for elite golf event services in violation of Sherman Act § 2 (Count I);<sup>22</sup> unlawful monopolization of the market for the promotion of elite professional golf events in violation of Sherman Act § 2

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<sup>14</sup> Complaint & Demand for Jury Trial, Mickelson, et al v. PGA Tour, Inc. (N.D. Cal. 2022) (Case No. 3:22-cv-04486).

<sup>15</sup> Notice of Motion & Motion for Temporary Restraining Order at 9, Mickelson, et al v. PGA Tour, Inc. (N.D. Cal. 2022) (Case No. 3:22-cv-04486).

<sup>16</sup> Defendant PGA Tour, Inc's Opposition to TRO Plaintiff's Motion for a Temporary Restraining Order, Mickelson, et al v. PGA Tour, Inc. (N.D. Cal. 2022) (Case No. 5:22-cv-04486-BLF).

<sup>17</sup> Exemplary Summary of TRO Plaintiffs' Mischaracterizations, Mickelson, et al v. PGA Tour, Inc. (N.D. Cal. 2022) (Case No. 5:22-cv-04486-BLF).

<sup>18</sup> Order Denying Plaintiffs Talor Gooch, Hudson Swafford, and Matt Jones's Motion for Temporary Restraining Order, Mickelson, et al., v. PGA Tour, Inc. (N.D. Cal. 2022) (Case No. 5:22-cv-04486-BLF).

<sup>19</sup> Amended Complaint & Demand for Jury Trial, Mickelson, et al., v. PGA Tour, Inc. (N.D. Cal. 2022) (Case No. 5:22-cv-04486-BLF).

<sup>20</sup> Rick Maese, *PGA Tour files countersuit against LIV Golf, escalating legal conflict*, WASHINGTON POST (Sept. 29, 2022, 2:17 PM), <https://www.washingtonpost.com/sports/2022/09/29/pga-tour-liv-golf-countersuit/>.

<sup>21</sup> Ava Benny-Morrison, *Saudi Wealth Fund Claims Immunity in PGA-LIV Golf US Court Fight*, BLOOMBERG (Nov. 23, 2022, 11:05 AM), <https://www.bloomberg.com/news/articles/2022-11-23/saudi-wealth-fund-claims-immunity-in-pga-liv-golf-us-court-fight?leadSource=verify%20wall>.

<sup>22</sup> Monopsony power is monopoly power but "on the buy side of the market." As a matter of antitrust law, monopsony is treated as a mirror image of monopoly. *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 320-21 (2007).

(Count II); unlawful attempted monopolization in violation of Sherman Act § 2 (Count III); unlawful restraint of trade in violation of Sherman Act § 1 (group boycott) (Count IV); and unlawful agreement to restrain trade in violation of the Cartwright Act (Count V).<sup>23</sup> Professional golf, unlike professional baseball, has no exemption from federal antitrust law.<sup>24</sup>

On June 6, 2023, PGA leaders shocked the world by announcing a ceasefire: an immediate end to the litigation and plans for a PGA-LIV merger.<sup>25</sup> While details remain to be determined, it is understood that the agreement will entail the formation of a new, for-profit LLC housing the PGA Tour, the European Tour, and LIV, with significant financial investment from PIF.<sup>26</sup> Monahan and PIF governor Yasir Al-Rumayyan appeared together on CNBC to discuss the agreement with David Faber, and Monahan hailed the agreement as a “transformational partnership” whose announcement made it a “historic day for the game we all know and love.”<sup>27</sup>

### *B. The Possibility of a Parting of Ways*

Despite the business leaders’ optimistic intentions, there are many reasons why the PGA-PIF partnership may fall apart. First, business negotiations could fail on their own. Parties seem unclear on the future role of LIV and its CEO Greg Norman.<sup>28</sup> Additionally, important PGA players have expressed frustration about the negotiations,<sup>29</sup> and PGA player directors’ approval is required for any agreement resulting therefrom.<sup>30</sup> So is the approval of the PGA Tour Policy Board.<sup>31</sup> From a regulatory standpoint, antitrust probes by U.S. DOJ,<sup>32</sup> U.S. FTC,<sup>33</sup> the European

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<sup>23</sup> Amended Complaint & Demand for Jury Trial at 107, Mickelson, et al., v. PGA Tour, Inc. (N.D. Cal. 2022) (Case No. 5:22-cv-04486-BLF).

<sup>24</sup> *Flood v. Kuhn*, 407 U.S. 258, 282-83 (1972) (footnotes omitted).

<sup>25</sup> Sean Zak & Jack Hirsh, *PGA Tour-LIV Golf Merger Timeline: How Did We Get Here*, GOLF (June 6, 2023), <https://golf.com/news/liv-golf-pga-tour-merger-timeline/>.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> Mark Schlabach & Tisha Thompson, *PGA Tour-PIF talks eyed Greg Norman’s ouster, Tiger Woods-owned LIV team*, ESPN (Jul. 11, 2023, 10:08 AM), [https://www.espn.com/golf/story/\\_/id/37994194/pga-tour-pif-talks-eyed-greg-norman-ouster-tiger-woods-owned-liv-team](https://www.espn.com/golf/story/_/id/37994194/pga-tour-pif-talks-eyed-greg-norman-ouster-tiger-woods-owned-liv-team).

<sup>29</sup> Associated Press, *PGA-LIV entering ‘new phase’ of merger negotiations after player meeting*, NEW YORK POST (Jun. 28, 2023, 3:43 PM), <https://nypost.com/2023/06/28/pga-liv-entering-new-phase-of-merger-negotiations/>.

<sup>30</sup> Joel Beall, *Leaked PGA Tour-Saudi framework agreement presents cloudy outlook for LIV Golf*, GOLF DIGEST (Jun. 27, 2023), <https://www.golfdigest.com/story/pga-tour-saudi-framework-leaked-agreement-2023>.

<sup>31</sup> Sean Zak, *PGA Tour, LIV Golf announce plan to merge in stunning reversal*, GOLF (Jun. 6, 2023), <https://golf.com/news/pga-tour-liv-golf-merger-stunning-reversal/>.

<sup>32</sup> Kevin Breuninger & Jessica Golden, *Justice Department to probe PGA Tour deal with Saudi-funded LIV Golf*, CNBC (Jun. 16, 2023, 1:05 PM), <https://www.cnbc.com/2023/>



Union,<sup>34</sup> or the U.K. Competition and Markets Authority<sup>35</sup> could force abandonment of the merger. Fear of such scrutiny has already led PGA and PIF to drop an important provision of the framework agreement.<sup>36</sup> A review by the Committee on Foreign Investment in the United States (CFIUS), a Treasury-led committee, could block the merger out of concerns related to national security.<sup>37</sup> Finally, at least two investigations into the negotiations have arisen out of the U.S. Senate. The Permanent Subcommittee on Investigations, chaired by Senator Richard Blumenthal, has begun investigating the merger and has expressed concerns about “the Saudi government’s role in influencing this effort and the risks posed by a foreign government entity assuming control over a cherished American institution.”<sup>38</sup> Senate Finance Committee Chair Ron Wyden has opened an investigation into the data privacy, national security, conflict of interest, and tax implications of a merger.<sup>39</sup> Suffice it to say that the LIV litigation settlement did not rid PGA of its legal and public-relations obstacles.

If the merger derails for any of these reasons, PGA and LIV will presumably try to resume operating as they did before 2022, and PGA may again find itself a defendant in antitrust litigation. This time, however, the litigation would be likely to arise from a new group of plaintiffs. Since LIV and PGA agreed to dismissal of their pending litigation *with prejudice*, LIV is permanently barred from bringing an action alleging similar

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06/15/pga-tour-liv-golf-merger-justice-department-to-investigate.html.

<sup>33</sup> A.J. Perez, *PGA Tour-LIV Golf Merger Likely to Face Regulator Scrutiny*, FRONT OFFICE SPORTS (Jun. 6, 2023, 1:56 PM), <https://frontofficesports.com/pga-tour-liv-golf-merger-likely-to-face-regulator-scrutiny/>.

<sup>34</sup> Based on Insights From Mark McCareins, Aimee Levitt, *Will the PGA-LIV Golf Merger Pass the Antitrust Test?*, KELLOGGINSIGHT (Jul. 1, 2023), <https://insight.kellogg.northwestern.edu/article/pga-liv-golf-merger-antitrust>.

<sup>35</sup> Michael McCann, *PGA Tour-LIV Golf Merger Gets U.S. Antitrust Review*, YAHOO! SPORTS (Jun. 15, 2023), [https://sports.yahoo.com/pga-tour-liv-golf-merger-195552180.html?guccounter=1&guce\\_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce\\_referrer\\_sig=AQAAAB47r5hEt6-bdc9BpQYLIqdcYBH62Meji3l2h5ldILCSfKQbbpqIvbZ00mKpM0ehKeVKCIxQDA6r6m6\\_JpOJPhPztqR6otNRgnRuxnFTrISn5Qpd0Kv3-hRYAjSvlcGJzHD2AxIStwAwWMOMKZn2INUeQG-aG7\\_1S9y5nflBqVqh](https://sports.yahoo.com/pga-tour-liv-golf-merger-195552180.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAAB47r5hEt6-bdc9BpQYLIqdcYBH62Meji3l2h5ldILCSfKQbbpqIvbZ00mKpM0ehKeVKCIxQDA6r6m6_JpOJPhPztqR6otNRgnRuxnFTrISn5Qpd0Kv3-hRYAjSvlcGJzHD2AxIStwAwWMOMKZn2INUeQG-aG7_1S9y5nflBqVqh).

<sup>36</sup> Ryan Herrington, *PGA Tour and LIV Golf drop key part of framework agreement over poaching players*, GOLF DIGEST (Jul. 13, 2023), <https://www.golfdigest.com/story/pga-tour-liv-golf-pif-abandoning-provision-prohibiting-recruiting-players-new-york-times-report>.

<sup>37</sup> Diane Bartz & Frank Pingue, *U.S. Senate panel rips into Saudi involvement in PGA Tour-LIV Golf tie-up*, REUTERS (Jul. 12, 2023, 10:48 AM), <https://www.reuters.com/sports/golf/pga-tour-official-defend-saudi-backed-liv-tie-up-before-us-senate-panel-2023-07-11/>.

<sup>38</sup> Joel Beall, *Leaked PGA Tour-Saudi framework agreement presents cloudy outlook for LIV Golf*, GOLF DIGEST (Jun. 27, 2023), <https://www.golfdigest.com/story/pga-tour-saudi-framework-leaked-agreement-2023>.

<sup>39</sup> *Wyden Launches Investigation of PGA-Saudi PIF Deal, Announces Plan to Revoke Saudi PIF’s Special Tax Treatment*, U.S. SENATE COMM. ON FINA. (Jun. 15, 2023), <https://www.finance.senate.gov/chairmans-news/wyden-launches-investigation-of-pga-saudi-pif-deal-announces-plan-to-revoke-saudi-pifs-special-tax-treatment>.

wrongdoing.<sup>40</sup> The U.S. DOJ and FTC, however, have signaled the possibility of antitrust enforcement matters.<sup>41</sup> Indeed, they would have the benefit of learning from LIV's August 2022 amended complaint, PGA's response briefing and countersuit, and Judge Freeman's responses to each. Additionally, other private plaintiffs could initiate antitrust litigation, such as LIV players other than those in the initial lawsuit, PIF itself, or LIV-affiliated vendors or broadcasters alleging harm from PGA's exclusionary practices.

These claims, however, would have to overcome a number of legitimate objections.

## II. MARKET DEFINITION

First, antitrust plaintiffs may not be able to establish their desired definitions of the relevant markets.

Plaintiffs alleging unlawful monopolization or monopsonization must establish the possession of monopoly or monopsony power in a relevantly defined market.<sup>42</sup> Therefore, market definition is a "threshold requirement" for such charges,<sup>43</sup> and how a market gets defined determines how easy or difficult it will be to prove the possession of the requisite level of control. Defining the market is an equally important task in the context of a buyer's (alleged) monopsony as it is in the context of a seller's (alleged) monopoly for this reason.<sup>44</sup>

The first way plaintiffs must define a market is as a market of particular goods or services, i.e. as a particular "product market." Plaintiffs hope to define product markets narrowly, while defendants hope to define them broadly. A defendant can claim that a certain other firm's products or services are part of the market the defendant is accused of monopolizing if the defendant can show that consumers can reasonably interchange that other firm's products or services with the defendant's own for the same purposes.<sup>45</sup> Given *Craftsmen Limousine* (see *supra* reference to fn. 20), this

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<sup>40</sup> Mark Schlabach, *PGA Tour, LIV Golf file motion to drop antitrust lawsuits*, ESPN (Jun. 16, 2023, 10:19 PM), [https://www.espn.com/golf/story/\\_/id/37866755/pga-tour-liv-golf-file-motion-drop-antitrust-lawsuits](https://www.espn.com/golf/story/_/id/37866755/pga-tour-liv-golf-file-motion-drop-antitrust-lawsuits).

<sup>41</sup> Louise Radnofsky & Andrew Beaton, *Justice Department Is Investigating PGA Tour Over Potential Antitrust Violations in LIV Golf Battle*, WALL STREET JOURNAL (Jul. 11, 2022, 4:28 PM), <https://www.wsj.com/articles/pga-tour-antitrust-liv-department-of-justice-investigation-11657557177>.

<sup>42</sup> *U.S. v. Grinnell Corp.*, 384 U.S. 563, 570 (1966); *Morris Communications Corp. v. PGA Tour, Inc.*, 235 F.Supp.2d 1269 (M.D. Fla, Jacksonville Division 2002).

<sup>43</sup> Joel Beall, *Can players be banned legally from the PGA Tour for joining the Super Golf League?*, GOLF DIGEST (Feb. 04, 2022), <https://www.golfdigest.com/story/pga-tour-sgl-ban>.

<sup>44</sup> *Craftsmen Limousine, Inc. v. Ford Motor Co.*, 491 F.3d 380, 388 (8th Cir. 2007).

<sup>45</sup> *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 482 (1992) (citing *U.S. v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956)).

means that, in the monopsony context, a relevant market will be defined (in part) as the market for a particular kind of labor, comprised of as many providers of that kind of labor as are reasonably interchangeable (from an employer's point of view).

*A. Product Market: Monopsony Context*

The first problem plaintiffs suing the PGA would face is finding a way to limit the product market given that there are myriad “lesser” tours than the PGA Tour on which professional golfers may earn a living. In Count I of their amended complaint, LIV attempted to define the relevant product market as “the market for the services of professional golfers for elite golf events.”<sup>46</sup> The validity of this definition, of course, would depend on there being a distinction, from an average tour's point of view, between the services of “elite” versus “non-elite” professional golfers (or the services necessary to run “elite” versus “non-elite” professional golf events).<sup>47</sup> Yet even in a world after a PGA-LIV dissolution, it would seem more straightforward to conceive of a market for the services of professional golfers (or the services necessary to run professional golf events) *full stop*.<sup>48</sup> In *Craftsmen Limousine*, the Eighth Circuit rejected plaintiffs' contention that 120 inches represented a meaningful cutoff between “specialty” and “non-specialty” limousines.<sup>49</sup> Similarly, here, a court would have to think seriously before finding that the services of “elite” professional golfers (however arbitrarily defined) are not reasonably interchangeable with the services of “non-elite” ones (equally arbitrarily defined). This is especially true in light of the Supreme Court's holding that “illegal monopoly does not exist merely because the product said to be monopolized differs from others,”<sup>50</sup> coupled with the fact that the margins by which modern golfers miss out on the chance to compete at the highest levels are vanishingly thin. Players trying to qualify for a year's worth of PGA Tour status, for example, are often edged out by a single stroke, over the course of hundreds of holes of competition.<sup>51</sup> The imperceptibility of differences in skill

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<sup>46</sup> Amended Complaint, Mickelson, v. PGA Tour, Inc., 83 (N.D. Cal. 2022) (Case No. 5:22-cv-04486-BLF).

<sup>47</sup> Note that LIV faces this difficulty simply by virtue of trying to argue that there are definable “echelons” or “calibers” of golfer or golf event, regardless of the specific language they use to name those echelons/calibers.

<sup>48</sup> “Professional golfers” could be defined, e.g., as those who earn a living wage or derive their primary source of income from competing in golf tournaments.

<sup>49</sup> “Under that definition, a Lincoln Town Car stretched by 85 inches competes in the same product market as one stretched by 120 inches, while a Town Car stretched by 120 inches competes in a separate market from one stretched by 121 inches.” *Craftsmen Limousine, Inc. v. Ford Motor Co.*, 491 F.3d 380, 389 (8th Cir. 2007).

<sup>50</sup> *U.S. v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 394 (1956).

<sup>51</sup> See, e.g., Zephyr Melton, ‘It just flat out sucks’: Tour rookie chokes up after losing card by single shot, *GOLF* (Aug. 8, 2022), <https://golf.com/news/justin-lower-emotional-response-losing-card/>.

between the players that populate PGA versus “lesser” tours makes the fact that such differences might exist seem hardly relevant.

As untenable as the attempt to define “elite” golf appears, even if it is allowed, it is highly questionable that the right place to make the “elite-non-elite” divide will be between those golfers who compete on the PGA Tour (or LIV) and those who compete on all other professional tours. PGA would be able to argue that simply earning one’s living playing golf makes one an “elite” golfer (or that to pay out prize money to a field at all makes an event “elite”). This, of course, would be devastating to plaintiffs, given the slew of opportunities that exist to earn a living by competing in golf tournaments.<sup>52</sup> At minimum, it seems that “elite” should include all golfers who compete on the PGA Tour (or LIV) as well as anyone who qualifies for one of the four Majors each year, these being as high-profile as any event in golf though each offering ways for certain non-PGA members to qualify.<sup>53</sup> But one could argue, just as easily, that “elite” should include those who play on the widely-known and intensely competitive European or Korn Ferry tours. While many more facts would need to be developed through discovery, it seems likely that future plaintiffs would have to settle for a broader monopsony product market definition than the one LIV sought.

#### *B. Product Market: Monopoly Context*

One might think plaintiffs would fare better by defining the product market as the “market for the promotion of elite professional golf events” and accusing PGA of possessing a monopoly as a *seller*, like LIV elected to do in its second Count. PGA Tour tournaments are arguably the foremost professional golf events in the world and thus distinguishable from a viewership and marketing standpoint, like the NBA’s games are distinguishable from the games of European, South American, and Asian basketball leagues.<sup>54</sup> On the other hand, again, other elite events such as the four Majors and the Ryder Cup, which are not run by the PGA Tour, would have to be included in such a market. Accordingly, following up a monopsonization claim with one for monopolization may yield little benefit in product market definition.

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<sup>52</sup> See *supra* note 4.

<sup>53</sup> Rob Bolton, *2023 Qualifiers for The Players and the Majors*, PGA TOUR, <https://www.pgatour.com/article/news/golfbet/major-qualifiers> (last visited Mar. 27, 2023).

<sup>54</sup> Oscar Robertson successfully sued the NBA to (among other things) block a proposed NBA-ABA merger that would have given the newly formed league a monopoly over the relevantly defined product market of the time. *Oscar Robertson Rule*, OSCAR ROBERTSON PLAYER OF THE CENTURY, <https://www.oscarrobertson.com/oscar-robertson-rule> (last visited Feb. 22, 2023). Thank you to Prof. Richard Hoskins for this idea.

### C. Geographic Market

Just as many hurdles await plaintiffs in the geographic realm. In addition to defining a relevant product market, antitrust plaintiffs must define a particular geographic market for purposes of calculating market share. A relevant geographic market is that geographic area in which a potential buyer may rationally look to acquire the goods or services he seeks.<sup>55</sup> In the monopsony context, then, it is the area in which an employer may rationally look for the labor that it seeks. In all cases, the geographic scope of a market is a question of fact to be determined in acknowledgement of the commercial realities of the particular industry.<sup>56</sup> In the golf context, we can assume that courts will look to the sites of tournaments of the relevant tour(s) as the primary indicator for both monopsony and monopoly allegations.<sup>57</sup>

We can expect that plaintiffs would try to define the geographic market for monopsonization and monopolization claims as the United States, listing progressively more expansive definitions in the alternative.<sup>58</sup> Like in the product market context, the more narrowly plaintiffs can define the geographic market, the easier it will be to establish that PGA possesses a monopoly (or monopsony) over it.

There are several potential problems with a geographic market definition as narrow as the U.S. First, even if plaintiffs succeed in limiting the scope of the product market to the PGA Tour, PGA could likely succeed in expanding the geographic market globally, given that the PGA's 2022-23 schedule included, in addition to 40 tournaments in the United States, tournaments in Japan, Bermuda, Mexico, the Bahamas, Puerto Rico, the Dominican Republic, Canada, and the United Kingdom.<sup>59</sup> Of course, the less success plaintiffs have at limiting the scope of the product market, the more rapidly their chances at limiting the geographic market vanish. The Open Championship is held in the United Kingdom; every other Ryder Cup

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<sup>55</sup> *Gordon v. Lewistown Hosp.*, 423 F.3d 184, 212 (3d Cir. 2005) (citing *Pennsylvania Dental Ass'n v. Medical Service Ass'n of Pa.*, 745 F.2d 248 (3d Cir. 1984)).

<sup>56</sup> *Gordon v. Lewistown Hosp.*, 423 F.3d 184, 212 (3d Cir. 2005) (citing *Borough of Lansdale v. Philadelphia Elec. Co.*, 692 F.2d 307, 311 (3d Cir. 1982)).

<sup>57</sup> Thank you to Prof. Hoskins for instruction on this point.

<sup>58</sup> Counts I-III in LIV's amended complaint listed the geographic market as "the United States, and, alternatively, the world." Amended Complaint, *Mickelson, et al., v. PGA Tour, Inc.* (N.D. Cal. 2022) (Case No. 5:22-cv-04486-BLF).

<sup>59</sup> *Schedule*, PGA TOUR, <https://www.pgatour.com/tournaments/schedule.html> (last visited Feb. 22, 2023). The PGA Tour also owns and operates the Presidents Cup, which takes place biannually and alternates location between the United States and a non-European international country. *History*, PRESIDENTS CUP, <https://www.presidentscup.com/history> (last visited May 17, 2023). Even if a court interpreted geographic market to mean the areas from which a tour sought golfer-members, PGA could still demonstrate international scope given that current PGA members hail from twenty-five countries including the United States. *PGA TOUR: International Players*, PGA TOUR, <https://www.pgatourmediaguide.com/player/international> (last visited Feb. 22, 2023).

is held in Europe; and professional golf tours exist on six of the world's seven continents.<sup>60</sup> Moreover, the fact that nearly all golf fans view the sport by television rather than in person<sup>61</sup> allows for massive international audiences.<sup>62</sup>

### III. POWER

Even if plaintiffs could secure their preferred market definitions, there are challenges to proving the requisite level of control. Plaintiffs may claim PGA possesses monopsony power over the relevant labor market and monopoly power over the relevant resale market, as LIV tried to do in its Counts I and II. Monopoly power is the power profitably to control prices or exclude competition,<sup>63</sup> and monopoly power under § 2 requires something greater than market power under § 1.<sup>64</sup> Direct evidence of monopoly power may be shown by evidence of supracompetitive prices and restricted output.<sup>65</sup> Circumstantial evidence may exist if, within a relevant market, an actor has a substantial market share and there are significant or insurmountable barriers to entry.<sup>66</sup> 87% of the relevant market has been found to be a monopoly,<sup>67</sup> as has a market share of over two-thirds.<sup>68</sup> In general, as little as 70% market share would likely be a monopoly.<sup>69</sup>

#### A. Monopsony Power

PGA almost certainly falls short of the monopsony standard now and, assuming a post-dissolution world does not entail the disappearance of LIV,

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<sup>60</sup> *What Are the Professional Golf Tours?*, GOLF BLOGGER (July 30, 2022), <https://golfblogger.com/what-are-the-professional-golf-tours/>.

<sup>61</sup> The 2022 Masters, for example, had a full-capacity attendance of 40,000 spectators per day, with 2.82 million ESPN viewers of its opening round alone. Paulsen, *Masters opens with largest Thursday audience in four years*, SPORTS MEDIA WATCH, <https://www.sportsmediawatch.com/2022/04/masters-ratings-espn-most-watched-four-years-tiger-return/> (last visited Feb. 22, 2023); *2022 Masters attendance: How many people are at Augusta National?*, GOLF NEWS NET (Apr. 7, 2022), <https://thegolfnewsnet.com/golfnews-netteam/2022/04/07/2022-masters-attendance-how-many-people-are-at-augusta-national-125833/>.

<sup>62</sup> In 2018, Discovery struck a 12-year \$2 billion deal with PGA for television and digital rights to PGA events outside the United States. Stewart Clarke, *Discovery Inks International Deal for PGA Tour Golf Rights*, VARIETY (June 4, 2018, 1:54 AM), <https://variety.com/2018/tv/news/pga-tour-golf-discovery-takes-international-rights-1202829084/>.

<sup>63</sup> *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956).

<sup>64</sup> *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 481 (1992).

<sup>65</sup> *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 307 (3rd Cir. 2007).

<sup>66</sup> *United States v. Microsoft Corp.*, 253 F.3d 34, 51 (D.C. Cir. 2001).

<sup>67</sup> *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966).

<sup>68</sup> *American Tobacco Co. v. United States*, 328 U.S. 781, 797 (1946).

<sup>69</sup> *See generally* *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 424 (2d Cir. 1945).

will likely continue to in the future. Revenue is perhaps the most direct way of measuring tours' ability to impact the price or quality of professional golf services, since revenue determines the amount of money tours have with which to pay those services' providers.<sup>70</sup> While PGA earned \$1.59 billion in revenue in 2021,<sup>71</sup> LIV received a \$2 billion investment from the Saudi sovereign wealth fund in May 2022.<sup>72</sup> PGA's market share, then, would be a mere 44.3%, even without including any other tours in the definition of the relevant market. As antitrust attorney Timothy LaComb points out, PGA would likely also fall short of monopsony as measured by the number of golfers it has been able to attract (and keep).<sup>73</sup> As PGA argued in its response to LIV's request for a temporary restraining order, "LIV, by its own admission, has succeeded in attracting numerous elite professional golfers to participate in its new league. LIV has held numerous events with full fields and has announced a full season for 2023."<sup>74</sup> As of October 2022, 68 players had joined the LIV ranks,<sup>75</sup> compared to 175 card-carrying members of the PGA Tour,<sup>76</sup> or a roughly 72% (PGA) to 28% (LIV) split.<sup>77</sup>

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<sup>70</sup> Thank you to Prof. Hoskins for guidance on this point.

<sup>71</sup> Justin Byers, *PGA Tour Reports 37% Increase in Revenue During 2021*, FRONT OFFICE SPORTS (Dec. 20, 2022, 12:50 PM), <https://frontofficesports.com/pga-tour-reports-37-increase-in-revenue-during-2021/>.

<sup>72</sup> Liam Killingstad, *LIV Golf Has Money to Blow*, FRONT OFFICE SPORTS (June 12, 2022, 8:22 AM), <https://frontofficesports.com/liv-golf-has-money-to-blow/>.

<sup>73</sup> Hannah Albarazi, *Is The PGA Tour Illegally Maintaining A Monopoly?*, LAW360 (Aug. 5, 2022), <https://plus.lexis.com/api/permalink/c2b17b34-b8f7-4f2a-b556-470c1c38b09a/?context=1530671>.

<sup>74</sup> Mark Schlabach, *PGA Tour countersuit claims LIV Golf induced golfers to breach existing contracts by offering 'astronomical sums of money,'* ESPN (Sept. 29, 2022, 8:58 AM), [https://www.espn.com/golf/story/\\_/id/34689459/pga-tour-countersuit-claims-liv-golf-induced-golfers-breach-existing-contracts-offering-astronomical-sums-money](https://www.espn.com/golf/story/_/id/34689459/pga-tour-countersuit-claims-liv-golf-induced-golfers-breach-existing-contracts-offering-astronomical-sums-money).

<sup>75</sup> Oliver Young-Myles, *LIV Golf players list: Everyone who has quit PGA Tour and DP World Tour to play in the 2023 series*, iNEWS (May 19, 2023, 12:12 PM), <https://inews.co.uk/sport/golf/liv-golf-players-list-full-quit-pga-tour-taking-part-saudi-arabia-series-1675627>.

<sup>76</sup> Nick Lomas, *How Many Golfers Are on the PGA Tour?*, GOLFSpan <https://www.golfspan.com/how-many-golfers-are-on-the-pga-tour/> (last updated Aug. 22, 2023).

<sup>77</sup> Measuring market share by dollars paid to labor results in similarly unconvincing findings. In 2022, while PGA gave away \$445.9 million in tournament prize money over 49 events, i.e. an average of \$9.1 million per event, LIV gave away \$225 million over eight events, i.e. an average of \$28.1 million. PGA would have 66.5% of the tournament prize money market, then, compared to LIV's 33.5%, or roughly a two-thirds-one-third split. Factoring in bonuses the tours pay out for multi-event or overall season performance, the split is \$540.9 million (PGA) to \$255 million (LIV), or roughly 68% (PGA) to 32% (LIV). Brett Knight, *When It Comes To Prize Money, LIV Golf's Debut In London Blows Away the PGA Tour*, FORBES (Jun. 9, 2022, 6:00 AM EDT) <https://www.forbes.com/sites/brettknight/2022/06/09/when-it-comes-to-prize-money-liv-golfs-debut-in-london-blows-away-the-pga-tour/?sh=4fc5ebbc6e7>. However, these figures do not include the massive signing bonuses PGA-defectors have secured just for agreeing to play in LIV events. For example, Dustin

Also weighing in PGA's favor is the potential difficulty of establishing that PGA has the power to force golfers to accept sub-competitive wages, given that PGA players are and will remain free to defect and accept LIV's (or other tours') higher payouts.<sup>78</sup> As of 2022, LIV's fields of 48 players, which do not face cuts,<sup>79</sup> enjoy \$25 million purses, averaging to nearly \$521,000 per player. In comparison, the 65 or so players lucky enough to survive the cut in the 120-player fields of PGA events split \$9.1 million, averaging to \$130,000 per cut-surviving player.<sup>80</sup>

PGA might also point out that there are other exclusive golf organizations, such as the United States Golf Association or Western Golf Association, that compete either directly or indirectly with PGA, as well as other golf tours outside the U.S., such as the European Tour, Japan Golf Tour, and Nordic Golf League.<sup>81</sup> As LaComb argues, the "players have options when it comes to where they play."<sup>82</sup> University of Florida sports law professor Darren Heitner agrees.<sup>83</sup>

Finally, PGA may emphasize the significant adjustments it made in response to the emergence of LIV, exemplifying the competitiveness of the market for attracting players. The 2022 average PGA tournament purses represented a 14% boost from 2021.<sup>84</sup> The bonus pool for finishing in the

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Johnson reportedly received a \$150 million signing bonus; Phil Mickelson's reportedly reached \$200 million. Oliver Young-Myles, *LIV Golf players list*, iNEWS (May 19, 2023, 12:12 PM), <https://inews.co.uk/sport/golf/liv-golf-players-list-full-quit-pga-tour-taking-part-saudi-arabia-series-1675627>. In any case, LIV's payment of signing bonuses likely brings PGA's market share demonstrably below the 70% threshold typically necessary for monopoly.

<sup>78</sup> Hannah Albarazi, *Is The PGA Tour Illegally Maintaining A Monopoly?*, LAW360 (Aug. 5, 2022)(quoting Timothy LaComb), <https://plus.lexis.com/api/permalink/c2b17b34-b8f7-4f2a-b556-470c1c38b09a/?context=1530671>.

<sup>79</sup> "Cuts" happen at the halfway point of PGA tournaments, when (typically) the best 65 scores and ties get to continue on to the second half of the tournament and the bottom (roughly) half of the field is eliminated, receiving no payout.

<sup>80</sup> Oliver Young-Myles, *LIV Golf players list: Everyone who has quit the PGA Tour and DP World Tour to play in 2023 series*, iNEWS (May 19, 2023, 12:12 PM) , <https://inews.co.uk/sport/golf/liv-golf-players-list-full-quit-pga-tour-taking-part-saudi-arabia-series-1675627>.

<sup>81</sup> Hannah Albarazi, *Is The PGA Tour Illegally Maintaining A Monopoly?*, LAW360 (Aug. 5, 2022)(quoting R. Mark McCareins, a clinical professor of business law at the Kellogg School of Management at Northwestern University), <https://plus.lexis.com/api/permalink/c2b17b34-b8f7-4f2a-b556-470c1c38b09a/?context=1530671>

<sup>82</sup> Hannah Albarazi, *Is The PGA Tour Illegally Maintaining A Monopoly?*, LAW360 (Aug. 5, 2022), <https://plus.lexis.com/api/permalink/c2b17b34-b8f7-4f2a-b556-470c1c38b09a/?context=1530671>

<sup>83</sup> "I do not believe [the tour is violating antitrust laws], since the player has other options to compete, which is the basis for the ban itself," Heitner explains. Joel Beall, *Can players be banned legally from the PGA Tour for joining the Super Golf League?*, GOLF DIGEST (Feb. 4, 2022), <https://www.golfdigest.com/story/pga-tour-sgl-ban>.

<sup>84</sup> Brett Knight, *When It Comes to Prize Money, LIV Golf's Debut in London Blows Away the PGA Tour*, FORBES (Jun. 9, 2022, 6:00 AM EDT), <https://www.forbes.com/sites/>



season's top ten was doubled from 2021, and the pool for FedEx Cup Playoff earnings is up 25%.<sup>85</sup> Finally, PGA last year introduced a Player Impact Program that paid golfers a total of \$40 million for the "interest they stirred in the sport."<sup>86</sup>

### *B. Monopoly Power*

Nor does there seem to be a straightforward way for plaintiffs to prove a monopoly over the market for the promotion of golf events, as LIV alleged it could do in its second Count.<sup>87</sup> As shown above, PGA sanctioned 49 events in 2022 compared to LIV's 8 (i.e., in a product market containing only these two providers, PGA represented 86% of elite golf events compared to LIV's 14%). However, when one (a) considers the *size* of these tournaments, rather than just the number of them, and (b) uses operating budget, which is largely driven by purse size, to approximate this, the picture will become quite different (see *supra* Section III.A).

Moreover, the PGA Tour is not actually the organizing body behind the four most prominent events in the professional golf world – the Majors. Plaintiffs would inevitably point out that PGA recognizes the Majors as official events on its calendar and categorically allows its players to play in them. This may spark a debate over whether PGA is responsible for the Majors' "promotion" and ultimate success. It is at least fair to say, at this stage, that plaintiffs' attempt to establish monopoly power will be linked to their attempt to establish that PGA has successfully "leaned on" the Majors,<sup>88</sup> each requiring plaintiffs to show that PGA exerts substantial influence on the decision-making of otherwise independent organizations.

## IV. OBTAINING POWER VIA ANTICOMPETITIVE MEANS

Plaintiffs trying to establish *attempted* monopolization or monopsonization would face just as many hurdles. To succeed on a claim of unlawful attempted monopolization in violation of Sherman Act § 2,<sup>89</sup> plaintiffs would need to prove that (1) PGA specifically intended to achieve monopoly or monopsony power through predatory or exclusionary conduct, (2) PGA engaged in such conduct, and (3) there exists or existed a "dangerous probability" that PGA would succeed.<sup>90</sup> Predatory or

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brettknight/2022/06/09/when-it-comes-to-prize-money-liv-golfs-debut-in-london-blows-away-the-pga-tour/?sh=4fc5ebbc6e7.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> Amended Complaint & Demand for Jury Trial at 97, Mickelson, et al., v. PGA Tour, Inc., (N.D. Cal. 2022) (Case No. 5:22-cv-04486-BLF).

<sup>88</sup> *See, e.g.*, Amended Complaint & Demand for Jury Trial at 7, Mickelson, et al., v. PGA Tour, Inc., (N.D. Cal. 2022) (Case No. 5:22-cv-04486-BLF).

<sup>89</sup> Such as LIV made in its Count III. Amended Complaint & Demand for Jury Trial at 99, Mickelson, et al., v. PGA Tour, Inc., (N.D. Cal. 2022) (Case No. 5:22-cv-04486-BLF).

<sup>90</sup> Sherman Antitrust Act, § 2, as amended, 15 U.S.C.A. § 2. *Morris Commc'ns Corp. v.*

exclusionary conduct (hereafter, “anticompetitive means”) means willful, purposeful acquisition of monopoly power (thus, this requirement blends closely with the requirement of specific intent), as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.<sup>91</sup> These same elements are required in the case of attempted monopsonization.<sup>92</sup>

Plaintiffs may also seek to establish unlawful restraint of trade in violation of Sherman Act § 1 (group boycott)<sup>93</sup> – both as an independent charge and as a legally cognizable way of proving anticompetitive means – but such efforts again face significant challenges. Defendants may be found to have violated Sherman Act § 1 directly (and § 2 indirectly) through either *per se* violations or “rule of reason” violations.<sup>94</sup> We will evaluate each of these possibilities, in PGA’s case, in turn (IV.A). After that, we will examine additional conduct plaintiffs would likely point to as being violative of § 2 (IV.B), a list of defenses PGA would have at its disposal (IV.C), and possible rebuttals plaintiffs may make to those defenses (IV.D).

#### A. Sherman Act § 1

LIV claimed in its complaint (Count IV) that for years PGA and the European Tour exhibited a “conscious commitment to a common scheme: to prevent the entry of new competitors into the market.”<sup>95</sup> LIV detailed attempts by PGA to “pressure the DP World Tour” to amend its regulations to restrict players from playing LIV events and to punish violators with fines and suspension from any co-sanctioned events.<sup>96</sup> If future plaintiffs could prove behavior like this, with PGA acting in concert with DP World Tour, they could plausibly win a finding of a *per se* violation of § 1, and thus a cognizable example of anticompetitive means, supporting a violation of § 2. However, as Judge Freeman pointed out in her TRO denial, the desire to cast PGA and DP World Tour as non-competitors (in order to minimize the size of the market over which plaintiffs are trying to demonstrate PGA’s monopoly power) comes at the cost of plaintiffs’ ability

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PGA Tour, Inc., 235 F.Supp.2d 1269 (M.D. Fla. 2002).

<sup>91</sup> Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 481 (1992) (citing United States v. Grinnell Corp., 384 U.S. 563, at 570–571 (1966)). In other words, “that the PGA Tour is trying to maintain that power through means other than having a superior product or business savvy.” Joel Beall, *Can players be banned legally from the PGA Tour for joining the Super Golf League?*, GOLF DIGEST (Feb. 4, 2022), <https://www.golfdigest.com/story/pga-tour-sgl-ban>.

<sup>92</sup> U.S. v. Grinnell Corp., 384 U.S. 563 (1966).

<sup>93</sup> LIV’s Count IV charge. Amended Complaint & Demand for Jury Trial at 103, Mickelson, et al., v. PGA Tour, Inc., (N.D. Cal. 2022)(Case No. 5:22-cv-04486-BLF).

<sup>94</sup> Nat’l Soc. of Pro. Engineers v. United States, 435 U.S. 679 (1978).

<sup>95</sup> Amended Complaint & Demand for Jury Trial, Mickelson, et al., v. PGA Tour, Inc., 103 (N.D. Cal. 2022) (Case No. 5:22-cv-04486-BLF).

<sup>96</sup> Amended Complaint & Demand for Jury Trial, Mickelson, et al., v. PGA Tour, Inc., 6 (N.D. Cal. 2022) (Case No. 5:22-cv-04486-BLF).

to demonstrate a horizontal group boycott, since “horizontality” requires showing concerted action between *competitors*.<sup>97</sup> LIV established in its own complaint that PGA and the European Tour are *not* competitors, which precluded a finding of horizontal group boycott in violation of Sherman Act § 1. LIV responded to Judge Freeman’s ruling by adapting its complaint so as to characterize the European Tour as a “potential” PGA competitor. However, the *per se* rule in the boycott context is limited to cases involving horizontal agreements among actual competitors, not potential ones.<sup>98</sup> Thus, future plaintiffs likely will not be able to demonstrate a *per se* violation of § 1, either for its own sake or for the sake of proving anticompetitive means under § 2.

Unable to prove a *per se* violation, plaintiffs may attempt to demonstrate a violation of § 1 (and thus, indirectly, § 2) using the rule of reason. They might try to cast the relationship between PGA and the European Tour as a group boycott between non-competitors (or potential competitors) that has a substantial anticompetitive effect on the properly defined market.<sup>99</sup> In such a case, the rule of reason tells us to assess both the positive and negative effects of any agreement on competition.<sup>100</sup> Plaintiffs will try, as LIV did, to present evidence suggesting that the PGA-ET relationship’s “principal tendency . . . is to restrain competition, reinforce market power . . . defeat nascent entry . . . [and] eliminate competition.”<sup>101</sup>

Again, however, PGA likely has compelling defenses. It may well be able to show that the European Tour has “acted independently and [has] had independent reservations about forming any relationship with LIV.”<sup>102</sup> The plaintiff in *Toscano* failed to overcome the presumption that local sponsors acted independently of the PGA when they refrained from offering appearance fees to players, even though refraining from doing so was in

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<sup>97</sup> Order Denying Plaintiffs Talor Gooch, Hudson Swafford, and Matt Jones’s Motion for Temporary Restraining Order at 13, *Mickelson, et al., v. PGA Tour, Inc.*, (N.D. Cal. 2022) (Case No. 5:22-cv-04486-BLF). Of course, PGA should not celebrate a finding that PGA and DP World are not competitors too happily, since the flip side would be that PGA and DP World operate in different markets. This would imply that all global tours less prestigious than DP World Tour also operate outside the relevant market, leaving virtually only PGA, LIV, the Majors, and perhaps the Ryder Cup in the definition.

<sup>98</sup> *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 128 (1998).

<sup>99</sup> Or it could claim that, even if there is no horizontal relationship with the European Tour, PGA is so powerful that the European Tour will go along with anything it suggests, meaning it should be *regarded* as an illegal relationship. Thank you to Prof. Hoskins for this suggestion.

<sup>100</sup> Sherman Antitrust Act § 1, as amended, 15 U.S.C.A. § 1. *Toscano v. PGA Tour, Inc.*, 201 F.Supp.2d 1106 (E.D. Cal. 2002).

<sup>101</sup> Amended Complaint & Demand for Jury Trial at 107, *Mickelson, et al., v. PGA Tour, Inc.*, 107 (N.D. Cal. 2022) (Case No. 5:22-cv-04486-BLF).

<sup>102</sup> Exemplary Summary of TRO Plaintiffs’ Mischaracterizations at 5, *Mickelson et al v. PGA Tour, Inc.*, (N.D. Cal. 2022) (Case No. 5:22-cv-04486-BLF).

accordance with the PGA's wishes.<sup>103</sup> Similarly, future antitrust plaintiffs may have a difficult time proving that the European Tour refused to contract with LIV – a tour backed by a sovereign wealth fund the government of which has committed high-profile human rights abuses in recent memory – *only* at the behest of the PGA.

### *B. Sherman Act § 2: LIV's Claims*

Besides proving a violation of Sherman Act § 1, there may be other ways of proving a violation of § 2, though the roadmap for doing so is less clear. In general, we can presume a court will apply the “predatory or exclusionary conduct” and “dangerous probability” elements by evaluating the likely effects of PGA's demonstrated actions on the competitiveness of the market for professional golfers and golf events, the welfare of professional golfers, and the welfare of consumers, including the price and quality of the product consumed.

There are two types of actions that future plaintiffs (following LIV) would likely focus on as violative of § 2. The first includes threatening to impose, imposing, and enforcing regulations prohibiting PGA members from participating in LIV events.<sup>104</sup> One such regulation is PGA's Conflicting Events Regulation, which has historically prohibited members from participating in any other tournament happening in North America at the same time as a PGA event. Given that there were forty-six PGA-hosted or -sanctioned events in the 2022-23 schedule,<sup>105</sup> e.g., this means that the restriction is essentially in effect year-round.<sup>106</sup> LIV's amended complaint described this regulation as both “a naked restraint on competition and a reduction in output.”<sup>107</sup> Another is PGA's Media Rights Regulation, which has historically prohibited players from appearing, without permission, in “any golf contest, exhibition or play” not cosponsored, coordinated, or approved by PGA, which is shown on any form of media anywhere in the world.<sup>108</sup> LIV similarly described this as a regulation that “restricts output and forecloses competition.”<sup>109</sup>

The second type of action plaintiffs may take issue with is the making of threats against agencies, businesses, or individuals who would otherwise work with LIV players and/or LIV itself.<sup>110</sup> LIV argued in its amended

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<sup>103</sup> *Toscano vs. Professional Golfers Association*, 258 F.3d 978, 984 (9th Cir. 2001).

<sup>104</sup> *See, e.g.*, Amended Complaint & Demand for Jury Trial at 99-100, *Mickelson, et al., v. PGA Tour, Inc.*, (N.D. Cal. 2022) (Case No. 5:22-cv-04486-BLF).

<sup>105</sup> PGA Tour Schedule, ESPN, <https://www.espn.com/golf/schedule> (last visited Feb. 24, 2023).

<sup>106</sup> Amended Complaint & Demand for Jury Trial at 27 *Mickelson, et al., v. PGA Tour, Inc.*, (N.D. Cal. 2022) (Case No. 5:22-cv-04486-BLF).

<sup>107</sup> *Id.* at 5.

<sup>108</sup> *Id.* at 27.

<sup>109</sup> *Id.* at 4.

<sup>110</sup> *Id.* at 7-8.

complaint, for instance, that PGA had “threatened Tour members’ agents and business partners with punishment if the [members] joined LIV Golf.”<sup>111</sup> They went on to allege that PGA had “threatened numerous vendors and small companies in the golf and sports production industry that they [would] be blacklisted from working with the Tour if they work[ed] with LIV Golf”;<sup>112</sup> that PGA had threatened non-PGA-member golfers with exclusion, e.g. from the PGA Tour University program or from competing in PGA events via sponsor’s exemption,<sup>113</sup> if they participated in LIV,<sup>114</sup> and that PGA had threatened sponsors and broadcasters that they must sever relationships with LIV players or be cut off from having opportunities with PGA Tour.<sup>115</sup> The implication was that PGA had harmed certain interested third parties, including some closely related to golfers and some closely related to consumers.

Plaintiffs may be able to show that, even if actions like these have not yet secured PGA monopsony or monopoly power, PGA enjoys a “dangerous probability” of achieving as much at some point in the near future. They would first argue that, although LIV has had success attracting players via astronomical payouts, “the PGA Tour could still be found to have illegally hampered LIV’s efforts to get off the ground.”<sup>116</sup> Moreover, that such a business model is sure to prove unsustainable if something is not done to enjoin PGA’s anticompetitive practices which necessitate the exorbitance.<sup>117</sup> This of course would re-call into question the depth of the Saudi sovereign wealth fund, whose governor had previously resisted requests to turn over the fund’s financials, claiming “sovereign immunity.”<sup>118</sup>

### C. *Sherman Act § 2: PGA’s Defenses*

Although juries tend to be sympathetic to accusations of this nature,<sup>119</sup>

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<sup>111</sup> Amended Complaint & Demand for Jury Trial at 8, Mickelson, et al., v. PGA Tour, Inc., (N.D. Cal. 2022) (Case No. 5:22-cv-04486-BLF).

<sup>112</sup> Id.

<sup>113</sup> Id. at 59.

<sup>114</sup> Id. at 8.

<sup>115</sup> Id. at 8-9.

<sup>116</sup> Rick Maese, *LIV Golf Joins its Players in Lawsuit, Intensifying Feud with PGA Tour*, WASHINGTON POST (Aug. 28, 2022), <https://www.washingtonpost.com/sports/2022/08/28/liv-golf-antitrust-lawsuit/>.

<sup>117</sup> Rick Maese, *LIV Golf Joins its players in Lawsuit, Intensifying Feud with PGA Tour*, WASHINGTON POST (Aug. 28, 2022), <https://www.washingtonpost.com/sports/2022/08/28/liv-golf-antitrust-lawsuit/>.

<sup>118</sup> Ava Benny-Morrison, *Saudi Wealth Fund Claims Immunity in PGA-LIV Golf US Court Fight*, BLOOMBERG (Nov. 23, 2022), <https://www.bloomberg.com/news/articles/2022-11-23/saudi-wealth-fund-claims-immunity-in-pga-liv-golf-us-court-fight#:~:text=Saudi%20Arabia's%20%24676%20billion%20sovereign,by%20the%20oil%20rich%20kingdom.>

<sup>119</sup> Thank you to Prof. Hoskins for this perspective.

PGA, as before, would have a plethora of defenses at its disposal. These can be broken into four categories: arguments that PGA's restrictions are (1) not actually very harmful to LIV golfers, (2) beneficial to PGA's members, (3) beneficial to consumers, and (4) arguments that no "dangerous probability" of PGA achieving monopsony or monopoly power exists.

First, particularly with the advent of LIV, a golfer's being barred from the PGA Tour may not be a massive detriment to their (or their associated third parties') careers. *See supra*. Section III.A for some of the compelling alternatives that golfers have to continued participation on the PGA. Indeed, PGA argued that LIV had "baked the financial cost of [PGA] suspensions into LIV's exorbitant signing bonuses," concluding that "there [was] no actual injury to Plaintiffs here."<sup>120</sup> Additionally, if plaintiffs contend that PGA's suspensions effectively prevent them from competing in golf's four Majors, the PGA can counter with the fact that points earned in the FedEx Cup (a PGA event) are "only one of myriad ways a player may qualify for the Majors, which each determine their own fields according to their own invitation regulations."<sup>121</sup> Finally, in response to the charge that it has threatened third parties against affiliating with LIV, PGA may be able to marshal testimony to the effect that agents, vendors, non-member players, sponsors and broadcasters have chosen to avoid associating with LIV of their own volition.<sup>122</sup> It seems the Saudi government's history of human rights abuses could again be a helpful fact to PGA here.

Second, it might be that, without its restrictive policies, PGA could not provide certain benefits and opportunities to its members and others,<sup>123</sup> not least because such policies may be vital to the existence of the PGA Tour itself.<sup>124</sup> Recall that, in golf, tours "buy" players' services and earn revenue by marketing access to them to tournament organizers, sponsors, and television networks. These stakeholders wish to contract with tours

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<sup>120</sup> Rick Maese, *PGA Tour Files Countersuit Against LIV Golf, Escalating Legal Conflict*, WASHINGTON POST (Sept. 29, 2022), <https://www.washingtonpost.com/sports/2022/09/29/pga-tour-liv-golf-countersuit/>. It is perhaps this rationale that leads Heitner to conclude that players (and, we might think, third parties) have the "choice" of complying with PGA's regulations or not. Joel Beall, *Can players be Banned Legally From the PGA Tour for Joining the Super Golf League?*, GOLF Digest (Feb. 4, 2022), <https://www.golfdigest.com/story/pga-tour-sgl-ban>. Thank you to Prof. Hoskins for a conversation that helped me see this point.

<sup>121</sup> Brandon Quinn, *PGA Tour Responds to LIV Suit, Says Golfers are 'Fabricating and Emergency' to Play in FedEx Cup*, THE ATHLETIC (Aug. 8, 2022), <https://theathletic.com/3487625/2022/08/08/pga-tour-responds-liv-golf-lawsuit-fedex-cup-playoffs/>.

<sup>122</sup> Thank you to Prof. Hoskins for a conversation that helped me see this possibility.

<sup>123</sup> Mark Schlabach, *PGA Tour Countersuit Claims LIV Golf Induced Golfers to Breach Existing Contracts by Offering 'Astronomical Sums of Money'*, ESPN (Sept. 29, 2022), [https://www.espn.com/golf/story/\\_/id/34689459/pga-tour-countersuit-claims-liv-golf-induced-golfers-breach-existing-contracts-offering-astronomical-sums-money](https://www.espn.com/golf/story/_/id/34689459/pga-tour-countersuit-claims-liv-golf-induced-golfers-breach-existing-contracts-offering-astronomical-sums-money).

<sup>124</sup> For an argument that there is a legal basis for taking this into account, *see, e.g.*, Robert H. Heidt, "Don't Talk of Fairness": *The Chicago School's Approach Toward Disciplining Professional Athletes*, 61 INDIANA L.J. 53, 56 (1985).

presumably because they are attracted to the quality of competition that takes place among the tours' player-members.<sup>125</sup> One can see, then, how a tour's inability to require its members to compete in a certain amount of its events might cripple its ability to attract and contract with its most important customers, since such inability would introduce a risk that the tour's high-caliber players would be absent during the week of the contracting tournament and thus that the quality of competition at that event would be below average.<sup>126</sup> In other words, even if PGA's use of the word "collapse" in its response to LIV's restraining order request<sup>127</sup> was an exaggeration prompted by the rhetoric of litigation, it seems clear that PGA could demonstrate at least some serious potential detriment were it to lose its ability to enforce a certain amount of member loyalty.

It might be the case that, with no PGA Tour, there would be no "product" for PGA players to offer up at all, since tours serve as the mouthpieces that enable players to market their services to tournament organizers, sponsors and broadcasters and negotiate the terms of such exchanges.<sup>128</sup> In *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, defendants were not-for-profit membership associations, like the PGA,<sup>129</sup> owned by their members who were songwriters, composers, and music publishers.<sup>130</sup> Defendants would set and collect royalty fees from radio stations in return for granting the stations "blanket licenses" to play any of a catalog of their members' songs. The basic question in the case was "whether the issuance by ASCAP and BMI to CBS of blanket licenses

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<sup>125</sup> Recall that most golf tournaments pit players each-against-the-others, i.e. each against the "field," rather than in individual matchups.

<sup>126</sup> It may be these reasons that lead R. Mark McCareins, a clinical professor of business law at the Kellogg School of Management at Northwestern University, to assess that "the PGA is certainly entitled to set and enforce unilaterally member-based rules like any governing professional association." Hannah Albarazi, *Is The PGA Tour Illegally Maintaining A Monopoly?*, LAW360 (Aug. 5, 2022), <https://plus.lexis.com/api/permalink/c2b17b34-b8f7-4f2a-b556-470c1c38b09a/?context=1530671>

<sup>127</sup> PGA argued that forcing it to allow the players who breached their contract by competing at LIV to nonetheless continue to compete at PGA would cause the "collapse" of "the entire mutually beneficial structure of the tour." Brendan Quinn, *PGA Tour Responds to LIV Suit, Says Golfers are 'Fabricating an Emergency' to Play in FedEx Cup*, THE ATHLETIC (Aug. 8, 2022), <https://theathletic.com/3487625/2022/08/08/pgatour-responds-liv-golf-lawsuit-fedex-cup-playoffs/>.

<sup>128</sup> In PGA's words, golfers enter into membership agreements with the Tour "to negotiate efficiently and effectively with sponsors, tournament organizers, media partners, and others . . ." Rick Maese, *PGA Tour Files Countersuit Against LIV Golf, Escalating Legal Conflict*, WASHINGTON POST (Sept. 29, 2022, 2:17 PM), <https://www.washingtonpost.com/sports/2022/09/29/pgatour-liv-golf-countersuit/>.

<sup>129</sup> The PGA Tour is a member-controlled association of the players themselves. Eight out of fourteen positions on its Board of Directors are held by players. About Us, PGA TOUR, <https://www.pgatour.com/company/board-of-directors.html> (last visited Feb. 22, 2023).

<sup>130</sup> 441 U.S. 1 (1979). *Music in the Marketplace*, ASCAP, <https://www.ascap.com/~media/BCF785E6949646D7899FC54B7C39F20D.pdf> (last visited Feb. 22, 2023).

to copyrighted musical compositions at fees negotiated by them [was] price fixing *per se* unlawful under the antitrust laws.”<sup>131</sup> The Supreme Court held that, instead of being *per se* illegal price fixing, BMI had created a *new* product in light of which the legality of the companies’ practices was to be assessed under the rule of reason.<sup>132</sup> Without the associations known as BMI and ASCAP, this “new product” would never have been created, and artist-members would have been without this additional vehicle for marketing their services. The PGA may be able to similarly argue that, without a strong, centralized entity, the “package deal” of inter-player competition (the equivalent of the “blanket license”) could not exist.<sup>133</sup> And if PGA can show that the “product” of professional golf is dependent on the existence of loyalty-enforcing tours in this way, it may be able to convince a court that the marketability of professional golfers’ services at all is contingent on the same.

PGA may even be able to persuade a court that its restrictive policies are a selling point to its third-party stakeholders, and thus that they serve to enhance the professional opportunities of its members. Purse sizes are primarily driven by the prices stakeholders are willing to pay tours for access to their product. This price is, again, presumably a function of the quality of the competition those tours can guarantee, which is in turn a function of the caliber of the individual players that are committed to them. Therefore, once the best players in the world are identified, one can see how rules that enforce loyalty to the tour among those players might be mutually beneficial. As PGA has argued, when players grant a tour the exclusive right to negotiate for them, “[t]hat exclusivity influences the fees received by the Tour on behalf of its members and, in turn, the prize money and other benefits that go to . . . players.”<sup>134</sup>

Beyond helping secure higher payouts, PGA may be able to show that its restrictions have allowed it to make substantial (indirect) *investments* in

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<sup>131</sup> *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 4 (1979).

<sup>132</sup> *Id.* at 24.

<sup>133</sup> “A middleman with a blanket license was an obvious necessity if the thousands of individual negotiations, a virtual impossibility, were to be avoided.” *Id.* at 20.

<sup>134</sup> Rick Maese, *PGA Tour Files Countersuit Against LIV Golf, Escalating Legal Conflict*, WASHINGTON POST (Sept. 29, 2022, 2:17 PM), <https://www.washingtonpost.com/sports/2022/09/29/pga-tour-liv-golf-countersuit/>.

“In the motion, the PGA Tour claims that its Player Handbook & Tournament Regulations, which allowed it to suspend more than two dozen members for competing in LIV Golf events, contributes to its success and to generating higher sponsorship and broadcast revenues, which result in increased prize money and benefits for its players. ‘Through this lawsuit, LIV asks the Court to invalidate these wholly legitimate provisions with the stroke of a pen . . .’” Mark Schlabach, *PGA Tour Countersuit Claims LIV Golf Induced Golfers to Breach Existing Contracts by Offering ‘Astronomical Sums of Money,’* ESPN (Sept. 29, 2022, 8:58 AM), [https://www.espn.com/golf/story/\\_/id/34689459/pga-tour-countersuit-claims-liv-golf-induced-golfers-breach-existing-contracts-offering-astronomical-sums-money](https://www.espn.com/golf/story/_/id/34689459/pga-tour-countersuit-claims-liv-golf-induced-golfers-breach-existing-contracts-offering-astronomical-sums-money).



its players over the years, which may help PGA enforce what amounts to an otherwise unenforceable noncompete.<sup>135</sup> Granted, the PGA Tour does not train or pay for the training of players directly. However, by organizing tournaments and enforcing regulations in such a way that ensures the level of competition at the PGA stays high, the PGA reliably provides its players with competitive access to the most elite talent in the world, which, coupled with players' own private work and investment, is a vital part of any training regimen. Players would be nowhere near as "battle-tested" and formidable as they are without the competition to which PGA exposes them, which is in part due to its restrictive membership policies. In this light, it is not at all obvious that players' agreements not to play in competing events should be regarded as unenforceable and meritless for § 2 purposes.

Third, PGA may be able to argue that there are ways in which its dominance is beneficial from a product-quality perspective. As PGA argued in its TRO response, LIV's entry to the marketplace "cleav[ed] the game's best players into two groups and potentially weaken[ed] the playing fields in tournaments big and small."<sup>136</sup> It is true that competition among tours to attract talent likely puts upward pressure on wages (payouts), which likely attracts more individuals to the profession of golf than before, which leads to more talented fields, fiercer competition, and a higher quality product. However, a court would be irresponsible not to acknowledge additional ways in which the quality of LIV's current product is *itself* significantly lower than that of the PGA's. First, LIV players are given (often massive) appearance fees merely for showing up at LIV events, regardless of how they play, whereas this is still yet to happen on the PGA Tour. Second,

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<sup>135</sup> "One of the provisions in the PGA Tour Player Handbook . . . is that each PGA Tour member acknowledges the commissioner, the tour's policy board and the appeals committee have . . . authority to permanently ban a member from playing in a tour co-sponsored, approved or coordinated tournaments if the member violates its regulations." Joel Beall, *Can Players be Banned Legally From the PGA Tour for Joining the Super Golf League?*, GOLF DIGEST (Feb. 4, 2022), <https://www.golfdigest.com/story/pga-tour-sgl-ban>. Darren Heitner argues that this provision "has the feel of a 'non-compete.'" *Id.* Attorneys John Lauro and Jonathan Pollard assert that the noncompete would be unenforceable because it is not asserted for reasons of "confidential information or trade secrets, protectable customer relationships or an extraordinary investment in the employee's education or training." Mark Cannizzaro, *Lawyers Suggest PGA Tour Bans for Saudi League Defectors Won't Stand*, NEW YORK POST (July 14, 2022, 4:33 PM), <https://nypost.com/2022/06/11/lawyers-suggest-pga-tour-bans-for-saudi-defectors-wont-stand/>.

<sup>136</sup> Rick Maese, *LIV Golf Joins its Players in Lawsuit, Intensifying Feud with PGA Tour*, WASHINGTON POST (Aug. 28, 2022, 1:01 PM), <https://www.washingtonpost.com/sports/2022/08/28/liv-golf-antitrust-lawsuit/>. "The tour's lawyers could argue that trying to maintain a dominant, unified tour is good for the game and consumers — 'that there is a really good reason for all the best golfers in the world to be playing at the same tournament,' said Henry Hauser, a former attorney for the Federal Trade Commission who now specializes in antitrust matters for Perkins Coie, 'and that makes a more appealing product.'" *Id.*

there are no cuts in LIV events, meaning everyone who competes in a given week is guaranteed a certain (high) amount of earnings. Meanwhile, roughly half of the entire 120 person field in PGA events gets eliminated at the halfway point and is paid nothing. From a player perspective, these are extraordinary perks. From the perspective of a viewer, sponsor or vendor interested in the quality and intensity of golf competition, they are undeniable drawbacks which must be weighed against any perceived benefits generated by inter-tour optionality.

Fourth and finally, PGA would likely try to show that no “dangerous probability” of it acquiring monopsony or monopoly power exists. It is ironically possible that the existence and success of LIV would actually *hurt* future plaintiffs’ challenge to PGA, since LIV constitutes a viable and lucrative alternative for professional golfers and has been successful at attracting players away from the dominant tour thus far. PGA would almost certainly claim that the stars LIV has been able to attract constitute a solid foundation for long-term success with fans, even if Saudi funds eventually dry out.<sup>137</sup> We can tentatively conclude, therefore, that a golf landscape void of nascent tours and including the PGA’s restrictive membership policies would have been a more fertile one for an attempted monopsonization attack than the landscape that currently exists.

#### *D. Sherman Act § 2: LIV’s Rebuttals*

Plaintiffs would likely have three important rebuttals to defenses like these. First, plaintiffs could point out that, even though players can request exemptions to play in up to three international events per year, PGA Commissioner Monahan had refused all such requests to play in LIV events. LIV’s amended complaint, e.g., included an assertion that PGA had granted players waivers to play in other tours’ events in the past, and that the only reason it was treating LIV as a special case was because LIV was the only legitimate threat to PGA’s monopsony that had arisen in recent memory.<sup>138</sup> The stronger the evidence plaintiffs can marshal of discriminatory treatment, the greater their chances may be of proving PGA acted with anticompetitive motive.

Second, even granting that PGA should be able to promulgate and enforce certain rules for the continued viability of its enterprise, plaintiffs may be able to argue that PGA’s regulations go farther than necessary, revealing viability and mutual benefit to be pretext for, again, an anticompetitive motive. LIV’s complaint is again instructive:

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<sup>137</sup> Ewan Murray, *Cameron Smith Confirmed as Latest Star to Sign for Saudi-backed LIV Golf Series*, THE GUARDIAN (Aug. 31, 2022, 12:11 AM), <https://www.theguardian.com/sport/2022/aug/30/cameron-smith-saudi-backed-liv-golf-series>. Thank you to Prof. Hoskins for a conversation that helped me see this point.

<sup>138</sup> Amended Complaint, *Mickelson, v. PGA Tour, Inc.*, at 4 (N.D. Cal. 2022) (Case No. 5:22-cv-04486-BLF).

The Tour's conduct reveals as pretextual its claim that it is acting to prevent some sort of "free-riding" on investments the Tour supposedly makes in players. As noted, the Tour's attacks are not limited to those players in whom it has supposedly made some sort of investment, but instead extend to all golfers anywhere, including college players and members of other tours who have never been members of the PGA Tour. . . . [T]he Tour's actions . . . are aimed at thwarting the only competition it has faced in decades.

Plaintiffs may try to show that PGA's policies have been more restrictive than necessary by contrasting them with a more permissive set of hypothetical policies that would still accomplish the valid goals of tour viability and product marketability but allow players and third parties more freedom to associate with tours of their choice. The most important thing from the standpoint of product marketability, as argued above, is being able to enforce a certain amount of loyalty to the tour producing the product among members. PGA could accomplish this, plaintiffs might claim, by requiring its members to participate in a certain number of PGA events each year, without restricting which tours they can associate with in the weeks they are not participating on PGA. PGA's decision to exceed this more moderate alternative seems unnecessary and suggests exclusionary underlying motivations.

Third, even if LIV's emergence is bad for overall product quality (see *supra* Section IV.C), the criteria for a Sherman Act § 2 violation is specific intent to achieve – and dangerous probability of achieving – monopoly power through exclusionary conduct; there is no requirement that the monopoly harm consumers or that its dissolution benefit them. PGA's assertions about product quality and consumer welfare, plaintiffs could argue, are at best equitable factors that courts are free to ignore if they wish.

## VII. CONCLUSION

If the PGA-PIF merger goes through, it is likely that both the PGA Tour and LIV Golf will continue existing, as separate tours, in some form.

If PGA-PIF negotiations break down, however, a "multi-tour" future is still nearly certain. If LIV continues operating independently, we should expect to see the 2022 DOJ antitrust investigations against PGA continue, or new antitrust claims get filed by LIV-affiliated litigants. Ultimately, if LIV's rebuttals convince the court that PGA's motives are anticompetitive and that consumer-benefitting effects are not legally relevant, then (assuming LIV cannot show that PGA currently possesses monopoly or monopsony power) the case will likely come down to whether there is a dangerous probability of PGA monopolizing or monopsonizing, which in turn depends heavily on both market definition and the amount and duration of support LIV can expect from its investors, whoever they may be at the time. The PGA's relationship with the European Tour will also come under

scrutiny: are the two tours competitors and thus part of the same product market, or non-competitors and thus immune from horizontal group boycott charges?

Interestingly, even if the court finds PGA in violation of Sherman Act § 1 or 2 and enjoins it to dispense with its Competing Event and Media Right regulations, PGA could still fall back on the following minimum event participation requirement that it already has in place:

Under PGA Tour rules, a member must compete in a minimum of 15 PGA Tour events each season as a condition of their membership voting rights. It can be any 15 events co-sanctioned by the PGA Tour, including the four majors and four World Golf Championships, as well any of the FedEx Cup playoff events. So long as a player competes in 15 events.<sup>139</sup>

There is no evident risk that PGA would be forced to do away with this regulation, given that (1) it does not seem to run afoul of the Sherman Act § 2 criteria (see *supra* Section IV), and (2) LIV has its own requirement that its members play in 100% of its tournaments (set to increase to fourteen in 2023).<sup>140</sup>

In fact, given these two points, PGA may be able to ratchet up its 15-event requirement to, say, a 25-, 30-, or 35-event requirement, which would start to have effects very similar to the no-competing-events regulations, since there are limited weeks in the year and players' opportunities to compete on alternative tours would shrink further and further. Despite Norman's stated intention to move golf toward a model of "free agency,"<sup>141</sup> one could imagine an arms race unfolding between the tours, each requiring more and more participatory loyalty from their respective members. We could foresee an eventual settling point, where PGA and LIV are each offering 20-30 events, each nominally open to non-members, but where each enforces member-loyalty requirements somewhere in the range of 40-50% of their respective schedules.

The flip side of this analysis is that, if LIV *ceases* to exist following a merger collapse, many of its earlier antitrust arguments against PGA likely become significantly stronger (e.g., the collapse of LIV could help antitrust plaintiffs hoping to prove that the market for elite golf is small and PGA's control of it is large). If these claims ultimately carried the day, the PGA's

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<sup>139</sup> *What is the Minimum Number of PGA Tour Events a Golfer Must Play Each Season?*, GOLF NEWS NET (Sept. 9, 2018), <https://thegolfnewsnet.com/golfnewsnetteam/2018/09/09/what-minimum-number-pga-tour-events-golfer-play-season-110741/>.

<sup>140</sup> Mark Harris, *The Interesting Requirements Reportedly Included in LIV Golf Player Contracts*, OUTKICK (Aug. 18, 2022, 10:01 PM), <https://www.outkick.com/liv-golf-player-contracts-requirements/>.

<sup>141</sup> Mark Schlabach, *Greg Norman on LIV Golf's First Season, Free Agency and His Relationship with the PGA Tour*, ESPN (Nov. 2, 2022, 7:24 PM), [https://www.espn.com/golf/story/\\_/id/34934885/greg-norman-liv-golf-inaugural-season](https://www.espn.com/golf/story/_/id/34934885/greg-norman-liv-golf-inaugural-season).

competing event and media right regulations could face permanent injunction, but so too could its minimum event participation requirements. This would mean that rival tours could lure PGA players away with offers significantly lower than they are having to extend today. This would make it much easier for new tours to arise, whether under the name of LIV and backed by the Saudi PIF or not.

Thus, in all of golf's three most imaginable futures — a successful PGA-PIF merger, a failed merger accompanied by LIV survival, and a failed merger accompanied by LIV death — the ecosystem is very likely to remain “multi-tour.”