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Nicole Antolino

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LOVE DON'T LIV HERE ANYMORE: LEGAL BATTLES ONSET
BETWEEN THE PGA TOUR, PROFESSIONAL
GOLFERS, AND THE LIV GOLF TOUR

I. THROWING DOWN THE CLUBS: AN INTRODUCTION TO THE
HEATED CONTROVERSY IN MEN'S PROFESSIONAL GOLF

The peaceful ambiance of whispered voices, freshly cut grass, and perfectly groomed hedges takes on a new meaning at the Medinah Country Club in suburban Illinois where golf members and honored guests exclusively enjoy golfing in serenity.¹ Every few years, a group of qualifying professional golfers and 45,000 fans are welcomed to immerse themselves in the scenery and legacy of the storied sport while licensed media companies broadcast the event to millions of fans.² In 1999, sports journalists and media companies reported on the building intensity at Medinah while walking alongside Sergio Garcia and Tiger Woods as they competed for the Professional Golfers' Association Championship title.³ However, away from the cameras, the mid-August heat and a winless season for Phil Mickelson prompted a passionate confrontation between

1. See *Major Championships*, MEDINAH COUNTRY CLUB, <https://www.medinahcc.org/club/scripts/section/section.asp?NS=MC> [https://perma.cc/J67U-4DSF] (last visited May 4, 2023) (providing historical backdrop of country club founders, involvement in major tournaments, golf legends, and club life).

2. See *id.* (reporting most recent events at club included 2012 Ryder Cup, 2006 and 1999 PGA Championship); see *Ratings Roar Again With Repeat Of Tiger Victory as CBS Sports' Coverage of 2007 PGA Championship Ranks As Fifth Highest-Rated Final Round Since 1986*, CBS SPORTS (Aug. 13, 2007), <https://www.paramountpressexpress.com/cbs-sports/releases/view?id=16552> [https://perma.cc/5CCM-EJVQ] (reporting 7.7 overnight household rating in United States for 1999 PGA Championship at Medinah); see also Billy Shea, *PGA Drama Didn't Prevent a Viewership Bogy; Preakness Ratings Stumble: Sports on TV*, THE ATHLETIC (May 25, 2022), <https://theathletic.com/3332014/2022/05/25/pga-drama-didnt-prevent-a-viewership-bogy-preakness-ratings-stumble-sports-on-tv/> [https://perma.cc/V2BH-3AVM] (reporting 4.9 million viewership for 2012 PGA Championship at Medinah).

3. See Alan Shipnuck, *A New Twist in a Thrilling Duel at the PGA, Tiger Woods Had to Fight Off a Younger, Equally Crowd-Pleasing Rival to Win His Second Major Title*, SPORTS ILLUSTRATED (Aug. 23, 1999), <https://vault.si.com/vault/1999/08/23/a-new-twist-in-a-thrilling-duel-at-the-pga-tiger-woods-had-to-fight-off-a-younger-equally-crowd-pleasing-rival-to-win-his-second-major-title> [https://perma.cc/C6L6-2QRW] (reporting on top two players Wood and Garcia in 1999 PGA Championship where Woods won title).

the professional golfer and a disparaging sports reporter.⁴ “Just throw the first punch,” Mickelson provoked the reporter in a tunnel under the grandstand of fans.⁵ Mickelson’s combative, unpredictable nature is juxtaposed with a gleaming reputation of professionalism and respect for the sport – making him an ideal adversary to spearhead the hottest legal controversy facing professional golf.⁶

The Professional Golfers’ Association Tour (“PGA Tour”) has been the premier golf league across the globe for decades.⁷ From mid-September through late August, the Tour sanctions tournaments for its member players to compete for global ranking points and pooled purse winnings.⁸ Additionally, by maintaining professional allegiances with lower-tiered organizations and golf associations, the PGA Tour allows its members to participate in a limited number of selected major tournaments, such as the DP World Championship, the Masters, and the Open.⁹ As such, it is no surprise that in 2021, the emergence of LIV Golf Inc. (“LIV”), a new

4. See ALAN SHIPNUCK, PHIL: THE RIP-ROARING (AND UNAUTHORIZED!) BIOGRAPHY OF GOLF’S MOST COLORFUL SUPERSTAR 1–2 (2022) (detailing personal altercation with Mickelson).

5. See *id.* (describing Mickelson’s intimidating body language and powerful presence).

6. See generally Mickelson et al. v. PGA Tour Inc., No. 5:22-cv-04486 (N.D. Cal. filed Aug. 3, 2022) [hereinafter *Mickelson v. PGA Tour, Inc.*] (initiating legal action against PGA Tour). Since the original filing, Phil Mickelson has removed himself as a plaintiff in the matter, publicly announcing his faith in LIV, co-plaintiff in the matter, to pursue their unified accusations against the Tour, while defendant PGA Tour Inc. has filed counterclaims against LIV for encouraging members breach their contracts with the Tour. See Hailey Konnath, *Phil Mickelson, Other Golfers Exit LIV Suit Against PGA Tour*, LAW360 (Sept. 27, 2022, 8:14 PM), <https://www.law360.com/articles/1534376> [<https://perma.cc/SE2Y-CBCE>] (reporting Mickelson voluntarily dismissed allegations without prejudice); see also SHIPNUCK, *supra* note 4, at 3 (describing multiple sides of Phil Mickelson according to golf community).

7. See Monte Burke, *The PGA Tour: A Not-For-Profit Money Machine*, FORBES (May 8, 2013, 10:00 AM), <https://www.forbes.com/sites/monteburke/2013/05/08/the-pga-tour-a-not-for-profit-money-machine/?sh=5535557c5733> [<https://perma.cc/PL5G-HA34>] (providing PGA Tour is nonprofit organization); see also Pls.’ Compl. & Demand for Jury Trial, Mickelson et al. v. PGA Tour, Inc., 3:22-cv-04486, at 18 (N.D.Cal. filed Aug. 3, 2022) [hereinafter *Plaintiffs’ Original Complaint*] (explaining prominence remains strong by providing highest point-grabbing, and prize earning opportunities for professional golfers).

8. See *Plaintiffs’ Original Complaint*, *supra* note 7 (arguing that beyond pooled prize earnings, Tour offers considerably lower levels of competition, income opportunities, or broadcast exposure throughout most of world).

9. See *id.* (highlighting PGA Tour history of success in men’s professional golf market); see also Dan Wetzel, *PGA Tour vs. LIV: Why the Masters Holds the Key to Golf’s Future*, YAHOO! SPORTS (June 9, 2022), <https://sports.yahoo.com/pga-tour-vs-liv-how-the-masters-holds-the-key-to-future-of-golf-192021259.html> [<https://perma.cc/P5HL-BPBQ>] (explaining Masters championship run by Augusta Na-

touring organization that offered guaranteed prizes for participating members, generated curiosity for golfers and put the PGA Tour on high alert.¹⁰ In its initial reaction to LIV, the PGA Tour reminded its members that players were limited to three releases per season for tournaments outside Tour events.¹¹ When that failed to curb interests in LIV, the Tour threatened to enforce bylaw disciplinary measures for players who chose to compete in televised, non-PGA Tour events under the Tour's media rights authority powers.¹² As a result, the 2022 golf season was plagued with scandal as numerous title holders voluntarily resigned or were barred and suspended from the Tour for engaging with LIV.¹³ In fiery Mickelson fashion, multiple PGA Tour members and LIV Golf officials propelled the tension into a full-blown battle by initiating legal action against the Tour for anticompetitive behavior over men's professional golf in violation of federal antitrust law.¹⁴

tional Golf Club, thus separate from PGA Tour and not bound by its ban on LIV players).

10. See LIV Golf, Inc., *About*, <https://www.livgolf.com/about> [<https://www.livgolf.com/about>] (last visited May 4, 2023) [hereinafter *LIV – About*] (publicizing potential earnings for LIV); see also Philip Murdock, *The Big Differences Between the LIV and PGA Tours*, FHC SPORTS REPORT (Nov. 27, 2022), <https://fhcsportsreport.com/17646/columns/the-big-differences-between-the-liv-and-pga-tours/> [<https://perma.cc/AH62-Y82D>] (noting LIV offers guaranteed money as opposed to traditional PGA Tour structure which requires qualifying rounds prior to entering tournament pooled prize earnings apportioned to performance in order from highest to lowest).

11. See Matthew Impelli, *Golfers Leaving PGA Tour for Controversial Rival Sparks Fan Curiosity* (June 7, 2022, 2:00 PM), <https://www.newsweek.com/golfers-leaving-pga-tour-liv-golf-saudi-arabia-dustin-johnson-1713606> [<https://perma.cc/J3EN-9GKR>] (referencing PGA Tour internal memorandum sent by Monahan warning members of potential suspensions and membership forfeitures for playing in LIV tournaments without Tour permission).

12. See PGA Staff, *PGA Tour Declines Players' Requests to Play Opening LIV Event*, PGA TOUR, <https://www.pgatour.com/news/2022/05/10/pga-tour-declines-players-request-to-play-opening-liv-event.html> [<https://perma.cc/6M86-A3LA>] (last visited May 4, 2023) (discussing belief that restriction is in best interest of all parties).

13. See, e.g., Impelli, *supra* note 11 (reporting Dustin Johnson's announcement moving to LIV and his expectation to be invited to non-PGA Tour-controlled Masters tournament following his "obvious" exemption, meaning automatic entry to tournament following his 2020 Masters win); Kieran Francis, *Cameron Smith Walks Out of Press Conference Amid Questions of LIV Golf Tour Defection*, THE SPORTING NEWS (Aug. 9, 2022), <https://www.sportingnews.com/us/golf/news/cameron-smith-liv-golf-tour-defection-pga/nxd5z9rclcpykazmzkmc8bsr> [<https://perma.cc/XZ53-UBHX>] (reporting Cameron Smith following FedEx Cup press conference until ultimately walking out after being repeatedly asked about his reported defection to Saudi-backed LIV Golf tour).

14. See generally *Mickelson v. PGA Tour, Inc.*, *supra* note 6 (accusing PGA Tour for anticompetitive behavior violating federal law).

This Comment highlights central aspects of *Mickelson v. PGA Tour, Inc.*¹⁵ In Part II, this Comment offers an overview of the current composition of men's professional golf.¹⁶ In Part III, this Comment delves into the Plaintiffs' allegations of anticompetitive behavior, the requirements to bring a federal antitrust lawsuit, and the application of antitrust law in a sports context.¹⁷ Part IV of this Comment highlights the significance of publicly coordinated conduct between the PGA Tour and its lower-tiered affiliates and examines potential defenses available to the Tour.¹⁸ Finally, this Comment argues that although the Plaintiffs are unlikely to prevail in this lawsuit, the road to trial will illustrate how men's professional golf is particularly vulnerable to monopoly and monopsony market control by the Tour due to its unique business structure.¹⁹

II. READING THE GREEN: A BACKGROUND ON THE LANDSCAPE OF MEN'S PROFESSIONAL GOLF AND PGA COMMISSIONER GOVERNANCE

The traditional landscape of men's professional golf consists of five recognized bodies: 1) the PGA Tour, which runs roughly fifty official events each season; 2) four "Major" annual tournaments; 3) two annual team events; 4) the quadrennial World Olympic competitions; and 5) individual standalone events.²⁰ Each competition

15. For further discussion of *Mickelson v. PGA Tour*, see *infra* notes 79–83, 95–117 and accompanying text. Initial antitrust case *Phil Mickelson, et al. v. PGA Tour, Inc.*, 3:22-cv-04486. Current court filings can be found under *Jones. et al. v. PGA Tour Inc.*, case number 5:22-cv-04486, to reflect plaintiff changes in the suit. See e.g., PGA Tour, Inc.'s Notice of Motion and Motion for Leave to Amend Counterclaim to Add Counter-Defendants at 1, *Jones et al. v. PGA Tour Inc.*, No. 5:22-CV-04486-BLF (N.D. Cal. filed Aug. 3, 2023) [hereinafter *PGA Tour Motion to Add Counter-Defendant PIF*], available at <https://www.law360.com/articles/1569207/pga-tour-seeks-to-add-saudi-wealth-fund-to-liv-golf-suit> [<https://perma.cc/MU69-SVE7>] (requesting leave to add Public Investment Fund of Kingdom of Saudi Arabia and Yasir Othman Al-Rumayyan as counter-defendants in light of produced documents).

16. For further discussion of PGA Tour's dominance, see *infra* notes 20–70.

17. For further discussion of antitrust requirements and defenses, see *infra* notes 71–117.

18. For further discussion of PGA Tour's current behaviors with DP Tour and history of anti-competitive challenges, see *infra* notes 120–164.

19. For further discussion of obstacles in lawsuit for these particular plaintiffs consisting of players and LIV, see *infra* notes 165–226.

20. See generally *Mickelson v. PGA Tour, Inc.*, *supra* note 6 (explaining structure of men's professional golf); see *2022-2023 Schedule*, PGA TOUR, <https://www.pgatour.com/company/aboutus.html> [<https://perma.cc/D2U2-VCD5>] (last visited Feb. 11, 2023) [hereinafter *About PGA Tour*] (reporting 2022-2023 season features forty-seven official events, forty-four FedEx Cup (i.e., point-earning) Regular Season events, three co-sanctioned events with DP World Tour therefore counting toward tours, four major tournaments consisting of Masters (run by Augusta

awards various ranking points to players based on their finishing score in the tournament, which then count towards the Official World Golf Ranking (“OWGR”).²¹ The OWGR is a rating institution that assigns players a number value that is used as the basis for golfing professionals’ careers.²² Since professional golfers are considered independent contractors, their OWGR ranking determines their qualifications for income-earning opportunities, such as eligibility for Major tournaments and negotiating corporate sponsorships and brand endorsement deals.²³

A. LIV’s Disruption and the PGA Tour’s Response

LIV’s arrival upended the traditional landscape with Hall-of-Famer, Greg Norman campaigning for a new tour offering characteristics unprecedented to the sport, such as team and individual competitions, refusal to cut members from event participation, and massive guaranteed paydays.²⁴ The new league received attention for its huge purses and its cash source – Saudi Arabia’s national wealth, also known as the sovereigns’ Public Investment Fund

National Golf Club), U.S. Open (run by United States Golf Association), British Open (run by R&A as collectively known), and PGA Championship (run by PGA of America), and two annual team events consisting of Ryder Cup and President’s Cup); accord Adam Schupak, *PGA Tour Releases 2021-2022 Schedule: WGC Sliced, Euro Partnership Strengthens*, GOLF WEEK (Aug. 3, 2021, 9:28 AM), <https://golfweek.usatoday.com/2021/08/03/pga-tour-2021-2022-schedule-european-tour/> [<https://perma.cc/H4BU-UGNA>] (discussing co-sanctioned event and prize changes to 2021-2022 PGA Tour season).

21. See Pls.’ Am. Compl. & Demand for Jury Trial, Mickelson et al. v. PGA Tour, Inc., 5:22-cv-04486-BLF, at 105 (N.D.Cal. filed Aug. 26, 2022) [hereinafter *Plaintiff Amended Complaint*] (providing overview of golf landscape).

22. See M.L. Rose, *How Do the World Golf Rankings Work?*, SPORTS REC (Jan. 31, 2023), <https://golftips.golfweek.usatoday.com/world-golf-rankings-work-20650.html> [<https://perma.cc/T65F-A46Z>] (describing formula of rankings earned by golfers receiving points on performance and quality of competition over two-year span with forty tournament participation minimum).

23. See *id.* (explaining scoring well in rankings allows golfers entry to world’s most prestigious tournaments, including Masters, British Open, and Players Championship, which accept all top fifty ranked players).

24. See Edward Sutelan, *LIV Golf Rules, Explained: The Biggest Differences vs. PGA Tour Include Shorter Rounds, Teams & Shotgun Starts*, SPORTING NEWS (Sept. 2, 2022), <https://www.sportingnews.com/us/golf/news/liv-golf-rules-pga-tour/iywjdfqirerdejlhzcg0vd6c> [<https://perma.cc/QMB2-GGBF>] (discussing LIV features teams, three rounds, drafts versus cuts, and guaranteed player payout opposed to PGA Tour which offers four rounds, mid-tournament cuts, and prizes for winning players only).

(“PIF”).²⁵ After decades of consistency, the entrance of LIV propelled the golf world into disarray.²⁶

The Tour quickly alerted members and sponsors that participating in the innovative opportunity would terminate good standing with the Tour and asserted its decision to enforce disciplinary rules was rooted in the integrity and best interest of its membership.²⁷ The PGA Tour relied on the “conflicting events” and “media rights” provisions embedded in each member’s contract.²⁸ The “conflicting events” rule prohibits a player who qualifies to play in a Tour event from entering a non-Tour tournament scheduled on the same date unless he first obtains a written release from the Tour Commissioner.²⁹ The “media rights” regulation requires Tour members to seek the Commissioner’s approval before participating in any televised tournament that is not cosponsored or approved by the Tour.³⁰ These contractual provisions prevent PGA Tour mem-

25. See Sporting News, *LIV Golf Prize Money: How the Saudi-Backed Upstart Golf Tournament Compares to Majors and the PGA Tour*, SPORTING NEWS (July 15, 2022), <https://www.sportingnews.com/us/golf/news/liv-golf-prize-money-saudi-golf-tournament/xyzqdhvum39jfz4qdnatd8cb> [<https://perma.cc/R4HP-53B4>] (describing structure of LIV).

26. Tyler Lauletta, *LIV Golf Has Brought ‘sportswashing’ Into Everyday Conversation. But What is The Saudi Government Really Doing And Why Should People Care?*, INSIDER (Aug. 2, 2022, 1:46 PM), <https://www.insider.com/what-is-sportswashing-liv-golf-saudi-government-2022-7> [<https://perma.cc/DWB6-FSYA>] (reporting big name players shifting from PGA Tour to LIV shines light on how breakaway project is decried as act of sports washing and in conflict with U.S. national interests such as 2021 released by President Biden’s administration that directly implicated Saudi Arabia’s Crown Prince Muhammad bin Salman in killing of Washington Post journalist Khashoggi). The article reported Mickelson’s statements in an earlier interview with Alan Shipnuck where Mickelson conceded to the known human rights violations related to Saudi Arabia and PIF stating, “Knowing all of this, why would I even consider it? Because this is a once-in-a-lifetime opportunity to reshape how the PGA Tour operates.” See *id.* (referring to Mickelson’s belief that Saudi Arabia was scary to get involved with).

27. See Adam Woodard, *What Could the PGA Tour Have Done Differently? LIV Golf Competitors Dish on What Could Have Been*, GOLFWEEK (June 30, 2022, 3:00 PM), <https://golfwheel.usatoday.com/lists/what-could-the-pga-tour-have-done-differently-liv-golf-competitors-dish-on-what-could-have-been/> [<https://perma.cc/2EGC-U3GQ>] (explaining players perspective of Tour’s reaction to LIV).

28. See *Plaintiff Amended Complaint*, *supra* note 21 at 5 (accusing Tour of using its contract to foreclose players from participating in competing events and protect its entrenched monopoly power).

29. See *id.* (alleging Tour uses conflicting events provision as means of foreclosing players from participating in competing golf events in North America).

30. See *id.* (alleging Tour uses media rights provision as way of foreclosing players from participation in other golf opportunities globally); see Adam Staten, *PGA Tour, LIV Golf Rift Intensifies in Dueling Statements Over Suspensions*, NEWSWEEK (June 9, 2022, 12:21 PM), <https://www.newsweek.com/pga-tour-liv-golf-rift-intensifies-dueling-statements-over-suspensions-1714310> [<https://perma.cc/BN6Y-UHUY>] (quoting LIV as criticizing regulations as “vindictive,” restrictive, and overly broad for leaving players filmed during casual play at risk for violation and

bers from participating in LIV and any outside golf opportunities without permission from Commissioner Jay Monahan.³¹

Despite express notice from the Commissioner, some players nonetheless requested releases to play in the inaugural LIV Invitational Series hosted in London in June 2022, to which Monahan formally refused and issued suspensions from upcoming Tour events.³² This made it abundantly clear that professional golfers across the globe had a choice: back the Tour, or abandon their prestigious membership for a chance with LIV.³³ Some of the most noteworthy players that are no longer with the Tour include Phil Mickelson, Sergio Garcia, Bryson DeChambeau, Dustin Johnson (“DJ”), Brooks Koepka, and Cameron Smith.³⁴ Consequences for players who jumped ship to LIV intensified as suspended members lost endorsement deals from corporate sponsors who refused to condone, let alone support, LIV.³⁵ Tensions even rippled down to

disciplinary action). *But see Def.’s TRO Br.*, *infra* note 47, at 3 (asserting media rights broadly bundled with sponsorships and used to fund its operations thus, cannot be fragmented for each player).

31. *See* Staten, *supra* note 30 (summarizing players’ frustrations with Tour’s limits).

32. *See* Kyle Porter, *PGA Tour denies golfers’ waiver requests to play Saudi-backed LIV Golf league event in London*, CBS SPORTS (May 11, 2022, 10:56 AM), <https://www.cbssports.com/golf/news/pga-tour-denies-golfers-waiver-requests-to-play-saudi-backed-liv-golf-league-event-in-london/> [<https://perma.cc/3F62-6WQT>] (reporting Monahan’s refusal of players’ LIV participation while describing LIV as “Saudi Golf League,” and warning of permanent bans from Tour for any other players who participate in LIV events in violation of PGA Tour Regulations).

33. *See* Dan Rapaport, *PGA Tour Draws Hard Line With Rival Tour, Won’t Grant Players Releases to Compete Elsewhere*, GOLF DIGEST (May 10, 2022), <https://www.golfdigest.com/story/pga-tour-releases-first-liv-golf-invitational-event> [<https://perma.cc/C3MV-NYXP>] (citing PGA Tour memorandum warning players who still opted to play in LIV event at Centurion Golf Club outside London were put on notice, consequently deemed in violation of tour’s regulations and subject to disciplinary action, which could include suspension or revocation of membership).

34. *See id.* (announcing players banned from certain tournaments due to LIV involvement); *see also* Matt Bonesteel & Des Bieler, *Brooks Koepka The Latest to Leave PGA Tour For LIV Golf*, WASH. POST (June 21, 2022, 8:42 AM), <https://www.washingtonpost.com/sports/2022/06/21/brooks-koepka-liv-golf/> [<https://perma.cc/8V9H-LVND>] (reporting list of resigned players growing to include other prominent players such as Bubba Watson, Brenden Grace, Graene McDowell, Kevin Na, Louis Oosthizen, Turk Petit, Charl Schwartzel, Lee Westwood, etc.); *see also* Kieran Francis, *Why Cameron Smith Defected to LIV Golf From The PGA Tour*, SPORTING NEWS (Aug. 30, 2022), <https://www.sportingnews.com/us/golf/news/why-cameron-smith-defected-liv-golf-pga-tour/hhna80fqu1ejcwhnn8j64p05> [<https://perma.cc/K23C-73JT>] (reporting No.2 ranked golfer Cameron Smith’s motivation to join LIV was larger purses and greater flexibility to travel to his home country of Australia).

35. *See e.g.*, *Sponsors Desert Phil Mickelson in Wake of Saudi Comments*, GOLF BUSINESS NEWS (Feb. 28, 2022, 8:14 AM), <https://golfbusinessnews.com/news/sponsorship-and-events/sponsors-desert-phil-mickelson-in-wake-of-saudi-comments/> [<https://perma.cc/8ZS9-2SU2>] (providing Phil Mickelson dropped by Workday

the collegiate level as the PGA Tour-University amended its qualifications to prohibit student-athletes who considered LIV for name, image, and likeness income opportunities.³⁶ While initially vague in its rejection of LIV, the Tour now publicly condemns the Saudi-backed organization for its political funding and alleged unethical luring of Tour members.³⁷

and KPMG); David Suggs, *Dustin Johnson, Phil Mickelson and Other Prominent LIV Golf Defectors to Lose Major Sponsorships After Leaving PGA Tour*, SPORTING NEWS (June 11, 2022), <https://www.sportingnews.com/us/golf/news/liv-golf-lost-sponsorships-dustin-johnson-phil-mickelson/tnzyc3nnag9fztjdlbrty> [<https://perma.cc/ZK94-K82F>] (providing Bryson DeChambeau Dropped by Rocket Mortgage); see e.g., Roy Strom, *Law Firm With 9/11 History Dumps Golfer After Move to Saudi Tour*, BLOOMBERG LAW (July 21, 2022, 1:45 PM), <https://news.bloomberglaw.com/business-and-practice/law-firm-with-9-11-history-dumps-golfer-after-move-to-saudi-tour> [<https://perma.cc/LS9J-HZNE>] (“In light of Mr. Kokrak’s affiliation with new LIV Tour, we have mutually agreed he will no longer be an ambassador for Cozen O’Connor.”).

36. See e.g., Joel Beall, *In Response to LIV Golf Threat PGA Tour U Changes Eligibility for College Stars*, GOLF DIGEST (May 11, 2022), <https://www.golfdigest.com/story/pga-tour-u-liv-golf> [<https://perma.cc/T2S3-B8CN>] (analyzing Tour’s amendments “PGA Tour U” ranking program by deeming players who compete in non-OWGR tournament are ineligible to receive PGA Tour U’s benefits). PGA Tour University is a program designed to identify and rank collegiate players and allows the top college senior golfers direct access to the Korn Ferry and other tour-related developmental leagues and categorizes the LIV Golf series events as such “non-ranking” tournaments. See *id.* (explaining players in PGA Tour U must participate in eligible tournaments to qualify for OWGR ranking and path to PGA Tour). This amendment mitigates LIV Golf CEO Greg Norman’s efforts to invite golf amateurs to his competitions, believing he can secure these amateurs’ services through NIL deals that are now legal under NCAA and USGA guidelines. See *id.* (describing implications of PGA Tour’s denouncement of LIV on NCAA and NIL contracts).

37. See *PGA Tour Motion to Add Counter-Defendant PIF*, *supra* note 15 (alleging recently produced documents confirm PIF and Mr. Al-Rumayyan played active and central role in providing extensive indemnification and hundreds of millions of dollars to compensate players to breaches Tour contracts for their own benefit and are equally liable for the harm caused to Tour); see Def.’s Answer to Pls.’ Am. Compl. & Countercl., *Mickelson v. PGA Tour Inc.*, No. 5:22-cv-04486-BLF (N.D. Cal. filed Sept. 28, 2022), at 54, available at <https://www.law360.com/articles/1535281> [<https://perma.cc/C2LN-8AJN>] (accusing LIV of sports washing); see also ABC News, *Saudi-Backed LIV Golf Tournament Accused of ‘Sportswashing’*, 101 ESPN (June 14, 2022), <https://www.101espn.com/news/saudi-backed-liv-golf-tournament-accused-of-sportswashing/> [<https://perma.cc/TEW9-EE4P>] (reporting Tour’s prior statements asserted its decision to suspend had no connection to the Saudi funding, but rather intended to uphold Tournament Regulations for best interest of Tour entirely); see Bryan Koenig, *PGA Tour Says LIV Lured Golfers With False Antitrust Claims*, LAW360 (Sept. 29, 2022, 6:12 PM), <https://www.law360.com/articles/1535281/pga-tour-says-liv-lured-golfers-with-false-antitrust-claims> [<https://perma.cc/88NK-HSNF>] (reporting Tour’s counterclaim against LIV for tortious interference with contract argues LIV knew Tour members required permission before participating in unsanctioned tournaments and is similarly restricting players through its own multiyear contracts which impose absolute ban on participating in conflicting events with no possibility of getting exemption).

B. Financial Structure of the Competing Leagues

One meaningful distinction between LIV Golf and the PGA Tour is golfer compensation – a source of player hesitation and public scrutiny for both tours.³⁸ The reported \$255 million LIV Series is financed by Saudi Arabia's PIF, a feature many American individuals and corporations take issue with as part of America's unhealed trauma from 9/11 and more recent criticisms of the Saudi Arabia's human rights violations.³⁹ Norman, the CEO and leading face of LIV, has met with Congress regarding the league's ties to Saudi Arabia and its impact on foreign relations and federal agency law.⁴⁰ Faced with such scrutiny, LIV purports its strategic

38. See Joseph Hanna & Jason Kaner, *The Looming Legal Showdown Set to Change Golf's Course*, LAW360 (July 6, 2022, 4:56 PM), <https://www.law360.com/articles/1507361/the-looming-legal-showdown-set-to-change-golf-s-course> [<https://perma.cc/39F8-QYPY>] (summarizing criticism toward PGA Tour's § 501 non-profit, tax-exempt status in relation to considerably low prizes awarded to winning golfers compared to projected revenues exceeding \$1.5 billion for 2022).

39. See Impelli, *supra* note 11 (reporting PIF as autonomous wealth fund administered by government of Saudi Arabia and is main shareholder of LIV Golf); see also Zaeem Shaikh, 'Shame on Them': Family Members of 9/11 Victims Denounce LIV Golf Tournament at Pumpkin Ridge, OREGONIAN (June 30, 2022, 3:47 PM), <https://www.oregonlive.com/portland/2022/06/shame-on-them-family-members-of-911-victims-denounce-liv-golf-tournament-at-pumpkin-ridge.html> [<https://perma.cc/KH97-L5KH>] (reporting on 9/11 families protesting outside Pumpkin Ridge, Oregon); see Storm, *supra* note 35 (announcing Cozen O'Connor ended sponsorship with LIV-aligned Kokrak due to its leading role in lawsuit against Saudi Arabia filed by 9/11 victims and families in 2003); see also Julian E. Barnes and David E. Sanger, *Saudi Crown Prince is Held Responsible For Khashoggi Killing in U.S. Report*, N.Y. TIMES (July 17, 2021), <https://www.nytimes.com/2021/02/26/us/politics/jamal-khashoggi-killing-cia-report.html> [<https://perma.cc/7J8R-V2GH>] (announcing U.S. intelligence report determined Crown Prince Mohammed bin Salman of Saudi Arabia approved assassination of Washington Post journalist Jamal Khashoggi in 2018).

40. See Stephanie Kirchgaessner, *US Congressman Accuses LIV CEO Greg Norman of Pushing Saudi 'Propaganda'*, THE GUARDIAN (Sept. 22, 2022, 8:42 AM), <https://www.theguardian.com/sport/2022/sep/22/greg-norman-liv-golf-series-saudi-arabia-us-congress-visit> [<https://perma.cc/7WC4-HNVY>] (summarizing concerns of U.S. congress representatives of LIV's entrance to golf atmosphere); see Brian Schwartz, *Inside the PGA Tour's Washington Lobbying Effort Against the Saudi-Funded LIV Golf League*, CNBC (Jul. 22, 2022, 9:11?AM), <https://www.cnbc.com/2022/07/21/inside-the-pga-tours-lobbying-effort-against-saudi-funded-liv-golf.html> [<https://perma.cc/AN8P-BXBP>] (reporting Sen. Lindsey Graham wrote to Monahan imploring he inform players of complications that would come from golf league sponsored by Saudi government); see Rick Maese, *Greg Norman Finds Friendly Faces, Harsh Criticism on Capitol Hill Trip*, WASH. POST (Sept. 21, 2022, 6:53 PM), <https://www.washingtonpost.com/sports/2022/09/21/greg-norman-chip-roy-timburchett-congress/> [<https://perma.cc/4GW5-STN8>] (reporting Rep. Chip Roy, R-Tex. sent letter to Justice Department concerned that Saudi Arabia could be violating federal law by failing to abide by Foreign Agents Registration Act).

investments in golf are to “modernize and supercharge the wonderful sport of golf.”⁴¹

Interestingly, the PGA Tour also faces skepticism for its financial structure.⁴² Instead of criticisms for its funding, the PGA Tour has a long-standing quarrel with the public regarding its balance sheet.⁴³ Since 1977, the PGA Tour has been registered with the Internal Revenue Service (“IRS”) as a business league under 26 U.S.C. § 501(c)(6), allowing it to classify as a nonprofit organization and effectively claim millions of dollars in exemptions from federal and state taxes each year.⁴⁴ In order to register as a nonprofit, the Tour files IRS-990 forms stating its organization’s mission: “by showcasing golf’s greatest players, we engage, inspire and positively impact our fans, partners and communities worldwide.”⁴⁵ The Tour purports to achieve its mission of promoting professional golf through the management and sponsorship of tournaments for professional golfers to compete and earn prize money while growing the game by corporate sponsorship and television exposure to the general public.⁴⁶ To illustrate the critiqued hypocrisy here, Tour revenues come largely from the sale of its members’ bundled

41. See *LIV – About*, *supra* note 10 (providing desire to build on and complement existing format of professional golf and take it to new levels of excitement and engagement with generations of fans).

42. See generally Laurel C. Montag, *It’s (Not) All Par For The Course: An In-Depth Analysis of The PGA’s Controversial Nonprofit Status*, 32 MARQ. SPORTS L. REV. 569, 579 (2022) (arguing that criticism of PGA’s nonprofit status is not unwarranted but also insufficient to cause revocation of 990 status).

43. See *id.* at 580 (highlighting PGA Tour’s employee expenses included perfectly legal million-dollar salaries to executives, including Commissioner Monahan under 26 U.S.C. §501(c)(6)).

44. 26 U.S.C. § 501(c)(6) (1954) (listing tax exemptions for specified organizations including business leagues); see also *Exemption requirements: Business League*, INTERNAL REVENUE SERVICE, <https://www.irs.gov/charities-non-profits/other-non-profits/requirements-for-exemption-business-league> [<https://perma.cc/WN7J-QVFL>] (last visited Mar. 1, 2023) (requiring exempt business league activities must be devoted to improving business conditions of one or more lines of business and must show that conditions of particular trade or interests of community will be advanced).

45. See Montag, *supra* note 42, at 574 (quoting *About PGA Tour*, *supra* note 20) (analyzing PGA’s financial structure under I.R.C. § 501(c)); see also *Business Leagues*, INTERNAL REVENUE SERV., <https://www.irs.gov/charities-non-profits/other-non-profits/business-leagues> [<https://perma.cc/8DEW-2HSY>] (last visited May 4, 2023) (“[M]ust be devoted to improving business conditions of one or more lines of business as distinguished from performing particular services for individual persons.”).

46. See *About PGA Tour Inc.*, *supra* note 20 (explaining comprising divisions PGA Tour, PGA Tour Champions, Korn Ferry Tour, PGA Tour Latinoamerica, Mackenzie Tour-PGA Tour Canada, PGA Tour-U and LPGA Tour).

media rights and sponsorships.⁴⁷ The revenue generated by these sales is then used to fund its operations, tournament purses, membership benefits, investments in growing the game of golf, digital media representations, charitable initiatives, and executive employee compensation.⁴⁸

For example, for the fiscal year ending in 2019, the Tour reported roughly \$1.5 billion in total revenue, \$1.4 billion in total functional expenses, and a net income of \$72 million.⁴⁹ However, the PGA Tour reports nothing for employee compensation to *member players* because it classifies participating golfers as independent contractors who are only rewarded with prize earnings after they win or place in Tour events, instead of wages or salaries.⁵⁰ As such, the member players are responsible for their expenses including caddies, staff and travel costs, and even locker room access fees, regardless of whether they make the cut to play in participating tournaments.⁵¹ This means that PGA Tour members who do not score high enough during a qualifying event walk away without getting paid by the Tour at all, but are still on the hook for their costs to compete.⁵²

This structure opens the PGA Tour to criticism for failing to adequately compensate competing players and unethically maintaining a tax-exempt financial status.⁵³ Policy arguments against the Tour's status hold that the structure allows avoidance of mil-

47. See Def.'s Opp'n to Pls' Mot. for TRO, Mickelson et al. v. PGA Tour Inc., No. 5:22-cv-04486-BLF (N.D. Cal. filed Aug. 3, 2022) [hereinafter *Def.'s TRO Br.*] at 3, (Aug. 3, 2022) (explaining revenue structure of PGA Tour and impact on "media rights" restrictions over players).

48. See *id.* (explaining how revenue is allocated to promote member interests).

49. See *PGA Tour Inc.*, PROPUBLICA, <https://projects.propublica.org/nonprofits/organizations/520999206/202023219349309777/full> [<https://perma.cc/78A4-8DJL>] (last visited Feb. 25, 2023) [hereinafter *PGA Tour's 2019 990-Form*] (reporting \$27,500,490 in executive compensation for fiscal year 2019).

50. See *id.* (reporting salaries only for member players with executive roles within PGA Tour, such as Jordan Spieth, who served as Player Director, earning roughly \$1.8 million in 2019, further listing prize rewards as "Player Earnings" under Part VII Section B).

51. See Ike Brannon, *How Long Will The PGA Handicap Its Golfers?*, FORBES (Feb. 2, 2022, 10:59 AM), <https://www.forbes.com/sites/ikebrannon/2022/02/02/how-long-will-the-pga-handicap-its-golfers/?sh=6e331740784c> [<https://perma.cc/22QM-MUSL>] (reporting PGA Tour members, as independent contractors are responsible for every expense from training to tournament participation including fifty-dollar locker room charge).

52. See Sutelan, *supra* note 24 (explaining payout differences on Tour and LIV).

53. See e.g., Greg Steube, *End Special Tax Breaks for Pro Leagues*, HERALD-TRIBUNE (Feb. 18, 2022, 7:37 AM), <https://www.heraldtribune.com/story/opinion/columns/guest/2022/02/18/lets-close-loophole-gives-pro-sports-leagues-huge-tax->

lions in taxes, despite historically spending reportedly less than twenty percent of its revenue on a charitable business mission.⁵⁴ Furthermore, by avoiding significant taxes, the Tour can build up a massive reserve of wealth, which critics assert gives way to the organization's financial strength to squash potential competitors in the market, that is, until LIV.⁵⁵

The financial elements of both the PGA Tour and LIV highlight the crux of their legal arguments in the current lawsuit.⁵⁶ The PGA Tour uses its tax-exempt status to defend its antitrust behavior by proclaiming its not-for-profit mission of investing in golf permits the Tour's expansive authority over the sport's professionals and their individual conduct.⁵⁷ In contrast, LIV proclaims it has been financially harmed by the PGA Tour's restrictive rules, which prevent players from participating in LIV Tour events as it simultaneously dropping millions of dollars into broadcast deals and contracts with Mickelson and DJ.⁵⁸

breaks/6839810001/ [https://perma.cc/T3FB-62Z9] (arguing tax-exempt status unfair manipulation of U.S. tax system).

54. See Gregory Bresiger, *As PGA Execs Collect Millions, Critics Question Its Non-profit Status*, INSIDE SOURCES (June 1, 2022), <https://insidesources.com/as-pga-execs-collect-millions-critics-question-its-non-profit-status/> [https://perma.cc/674H-C545] (questioning why enterprise allegedly in business of generating charitable contributions cares about competition introduced by LIV).

55. See Drew Johnson, *PGA Tour Rakes in Cash by Exploiting Tax Loophole*, NEWSMAX (June 14, 2022, 8:04 AM), <https://www.newsmax.com/drewjohnson/pga-tour-golf-tax-loophole/2022/06/14/id/1074297/> [http://web.archive.org/web/20220617115907/https://www.newsmax.com/drewjohnson/pga-tour-golf-tax-loophole/2022/06/14/id/1074297/] (arguing PGA Tour grossly utilizes its tax-exempt status to benefit in other ways).

56. See *id.* (highlighting PGA Tour relies on its tax-exempt mission to promote golf and enforce integrity bylaws, while LIV seeks to offer additional tournament opportunities funded by LIV Golf Investments).

57. See *id.* (arguing PGA Tour's tax-exempt mission would be better furthered by permitting member participation in additional golf events instead of fewer).

58. See Konnath, *supra* note 6 (summarizing players and LIV argue that PGA Tour's unlawful imposition of participation restrictions on independent contractors violates antitrust laws); see Adam Woodard, *Forbes List of 2022 Highest-Paid Golfers in the World Features Seven LIV Golf Players*, GOLFWEEK (July 30, 2022, 3:59 PM), <https://golfweek.usatoday.com/lists/forbes-money-list-liv-golf-tiger-woods-phil-mickelson/> [https://perma.cc/T63T-Q5U6] (reporting Mickelson received \$200 million, and DJ received \$62 million in signing bonuses from LIV).

C. Historical Deference to Commissioner Discretion Concerning Contracts and Conduct within Professional Sports Leagues

The catalyst for the legal dispute began with Commissioner Monahan's refusal to permit players to compete in LIV events.⁵⁹ Although the players agreed to this discretionary provision in their respective contracts, it is curious how the Commissioner has gained such expansive authority over independent contractors to the extent that they are unable to protect their interests like other professional athletes who have negotiated collective bargaining agreements with their sports leagues.⁶⁰ The explanation lies within an entrenched history of Commissioner authority bolstered by federal courts.⁶¹ American sports leagues, fans, and courts have experienced a love-hate relationship with the "Commissioner" role since its origin in Major League Baseball ("MLB") in the 1920s.⁶² However, when Commissioner power has been in dispute across the major sports leagues for baseball, soccer, and football, courts have awarded Commissioner discretion over their respective leagues even when their conduct violated basic antitrust doctrine, contract principles, and labor laws.⁶³ For example, a federal court set the

59. See Hanna & Kaner, *supra* note 38 (quoting LIV response to sanctions as, "[t]his is certainly is not the last word on the topic. The era of free agency is beginning.").

60. For further discussion on the impacts of collective bargaining and power disparity in contract negotiations for independent contractors, see *infra* notes 161–193.

61. See Charles O. Finley & Co. v. Kuhn, 569 F.2d 527, 544 (7th Cir. 1978) (finding Commissioner authority extends to being sole decision maker of what is in "best interest" of sport and may act preventatively and disciplinarily to conduct contrary to such interest); see e.g., Rose v. Giamatti, 721 F. Supp. 906, 920 (S.D. Ohio 1989) (holding Commissioner of Major League Baseball was authorized by Major League Agreement voluntarily signed by teams and players to govern internal investigation and actions in "best interests of baseball").

62. See *Finley*, 569 F.2d at 544 (explaining original MLB Agreement granted Commissioner sole discretionary power but removed such authority in 1940s and reinstated said powers in 1960s for more effective power to determine remedial punitive action).

63. See *id.* (finding disparity of power which would otherwise violate contract enforcement on public policy insufficient to invalidate waiver of right to recourse and enforced arbitration provision in favor of MLB); see e.g., Soar v. Nat'l Football League Players Ass'n, 438 F. Supp. 337, 342 (D.R.I. 1975) (holding Commissioner of National Football League would have authority to bind League to contracts where such agreements were voted on and approved by member clubs), *aff'd sub nom.*, 550 F.2d 1287, 1291 (1st Cir. 1977); see e.g., Claret v. NFL, 369 F.3d 124, 127–28 (2d. Cir. 2004) (holding NFL draft eligibility rules requiring players to have graduated high school for at least three years were not unreasonable restraint on labor because draft is voluntarily agreed upon provision in NFL bylaws under players collective bargaining agreement with league); see Stephen F. Ross, *Monopoly Sports Leagues*, 73 MINN. L. REV. 643, 734 (1989) (summarizing NFL's success in

precedent that the Commissioner of the MLB was authorized to block valid contracts between member teams attempting to trade rights to players that resulted in million dollar breaches between the teams.⁶⁴ The court reasoned that the Commissioner's conduct fell within his contractual authority under the league's bylaws, which permitted him to maintain the competitive balance in the "best interest of baseball."⁶⁵ Later cases involving the MLB and the National Football League ("NFL") established favorable case law for commissioners to grant themselves broad discretionary power in member contracts so that they could have the final say on common conflicts such as the scope of a commissioner's oversight, preventative measures over member conduct, and disciplinary authority to protect the best interests of their respective sport.⁶⁶

Regarding men's professional golf, in June 2022, Commissioner Monahan sent an internal memorandum to members where he preemptively refused permission to players seeking participation in LIV and issued suspensions for players who already committed to play in LIV's inaugural London tournament.⁶⁷ The Commissioner justified his decision on grounds that the players' conduct was "un-

persuading Congress to grant antitrust exemptions to leagues under passage of Sports Broadcasting Act, codified under 28 U.S. § 1291-95 (1961) amended 1986, which allowed NFL to sell lucrative exclusive packages of broadcast rights to network television).

64. *See Finley*, 569 F.2d at 544 (discussing Commissioner's sizeable discretion to block trades).

65. *See id.* (determining that contracts between leagues and members were freely negotiated and "the principles of construction that the specific controls the general, or that the expression of some kinds of authority operates to exclude unexpressed kinds, do not apply since the Commissioner is empowered to determine what preventive, remedial or punitive action is appropriate in a particular case and the listed sanctions are punitive only").

66. *See id.* (finding Commissioner authority extends to solely deciding what is in "best interest" of sport and may act preventatively and disciplinarily to conduct contrary to such interest).

67. *See* Letter from Commissioner Jay Monahan, Memorandum from PGA Tour Inc., to PGA Tour Members (June 9, 2022), [hereinafter Monahan Memo] accessible via https://fm.cnbc.com/applications/cnbc.com/resources/editorialfiles/2022/06/09/PGA_TOUR_members_-_060922_memo.pdf [<https://perma.cc/NSY6-ND92>] (addressing two provisions via internal memorandums sent to members throughout 2022 season, reminding members that failure to obtain permission to participate in events outside Tour would result in disciplinary action). In addressing LIV players who abandoned the Tour following the apparent ultimatum, Monahan wrote, "[t]heir participation in the Saudi Golf League/LIV Golf event is in violation of our Tournament Regulations . . . the same fate holds true for any other players who participate in future Saudi Golf League events in violation of our Regulations." *See id.* (including additional commitment that Tour's current membership will not be negatively impacted by former players seeking to maintain same membership benefits, considerations, opportunities, and platform as loyal PGA Tour members).

becoming” of the Tour’s professional reputation and financial interest.⁶⁸ Simply put, the relevant case law does not require sports league commissioners to explain in detail why they have chosen a particular course of action so long as they can point to a discretionary authority provision in some sort of governing document.⁶⁹ Here, Monahan claims that pulling the strings on the “media rights” and “conflicting events” regulations is within the scope of his discretionary authority over “unbecoming conduct” to protect the leagues’ best interest.⁷⁰

D. Antitrust Injury & Standing

Congress enacted the antitrust laws under 15 U.S.C. §§ 1-7, (the “Sherman Act”), to promote market efficiency and competition by preventing monopolies and cartels.⁷¹ Section 1 of the Sherman Act prevents a single corporation or business from dominating

68. See Def.’s Answer to Pls.’ Am. Compl. & Countercl., *supra* note 37, at 64 (asserting Tour’s decision to refuse conflicting events releases and enforce media rights violations were rooted in conduct ‘unbecoming’ of professional which included commenting or behaving in way that reflected unfavorably or harmed Tour).

69. See *Finley*, 569 F.2d at 544 (holding Commissioner authorized to enforce arbitration where waiver of right to recourse provision agreed upon by informed parties, freely contracting).

70. See *id.* at 545–46 (holding in Illinois, courts will generally not rule review decisions of governing body of private association absent sparse circumstances which warranted extremely narrow review and shared dicta that plaintiffs might be able to overturn enforcement of governing rules if can prove Commissioner was biased or motivated by malice); see Def.’s Answer to Pls.’ Am. Compl. & Countercl., *supra* note 37, at 64 (citing to Article VI of PGA Tour Regulations whereby players agreed “to refrain from making comments that unreasonably attack or disparage others, including, but not limited to, tournaments, sponsors, fellow members/players and/or PGA TOUR . . . [P]ublic comments that a member knows, or should reasonably know, will harm the reputation or financial best interest of PGA TOUR, a fellow member/player, a tournament sponsor or a charity are expressly covered by this section.”).

71. See 15 U.S.C. §§1-7 (2004) (prohibiting conspiracies or agreements between horizontal competitors to force particular players out of market). The Sherman Act controls much antitrust litigation in sports law issues. See Jackson Field, *Punt and Pass: Why Congress Should Punt on an Antitrust Exemption and Pass on Express Preemption When Regulating Student-Athlete Name, Image, and Likeness*, 53 TEX. TECH L. REV. 743, 755 (2021). There is additional legislation that seeks to control competition in the market at both the federal and state level § 15 (Clayton Act), § 45 (Federal Trade Commission Act), and several state antitrust laws. See *id.* at 751 (explaining synergy between state and federal antitrust laws and NCAA pressure on Congress to exempt NIL deals from antitrust violations). While not discussed directly in this Comment, Plaintiffs in *Mickelson v. PGA Tour, Inc.* accuse the Tour of simultaneously violating California antitrust laws (Cal. Bus. & Prof. Code §§ 16720(a), 16726) through the restricted trade and commerce of harmed California resident golfers. See *Mickelson v. PGA Tour, Inc.*, *supra* note 6, at 95 (alleging PGA Tour of violating state antitrust laws under Count III).

a single market by prohibiting agreements, conspiracies, or activities that restrain trade.⁷² To prevail in a Section 1 claim, a plaintiff must show an agreement that directly created an unreasonable and anticompetitive effect on interstate commerce.⁷³

Section 2 of the Sherman Act prohibits attempts or conspiracies to monopolize aspects involving interstate trade.⁷⁴ To prevail in a Section 2 claim, a plaintiff must prove a specific intent to monopolize a relevant market, a party's predatory anticompetitive acts, and a dangerous probability of successful monopolization.⁷⁵ To raise either claim, federal courts generally require a plaintiff to show that the defendant possessed monopoly power in a relevant market, willful acquisition or maintenance of that power in an exclusionary manner, and causal antitrust injury.⁷⁶ The court in *Tos-*

72. See 15 U.S.C. § 1 (2004) (prohibiting conspiracies that unreasonably restrain trade). Section 1 provides:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

Id. (prohibiting coordinated anticompetitive behavior).

73. See Heike K. Sullivan, *Fraser v. Major League Soccer: The MLS's Single-Entity Structure is a Sham*, 73 TEMP. L. REV. 865, 870–71 (2000) (breaking down Section 1 claim into three elements, which when met, still require judicial scrutiny of degree of reasonableness within in challenged agreement).

74. See 15 U.S.C. § 2 (2004) (prohibiting attempts to monopolize). Section 2 provides:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court."

Id. (prohibiting attempted Section 1 violations).

75. See Sullivan, *supra* note 73, at 874 (citing *Advanced Health-Care Servs., Inc. v. Radford Cmty. Hosp.*, 910 F.2d 139, 147 (4th Cir. 1990)) (explaining two subsidiaries of same parent corporation are legally incapable of conspiring with one another for purposes of Section 1 of Sherman Act but may be governed by Section 2 if actual monopolization).

76. See *Buccaneer Energy (USA) Inc. v. Gunnison Energy Corp.*, 846 F.3d 1297, 1312 (10th Cir. 2017) (finding burden falls on plaintiff to identify relevant market because "provides the framework against which economic power can be measured, defining the product and geographic markets is a threshold requirement"); *Catlin v. Washington Energy Co.*, 791 F.2d 1343, 1347 (9th Cir. 1986) (finding plaintiff need not rule out all possible alternative sources of injury but must show alleged violation was material cause); *United States v. Grinnell Corp.*,

cano v. PGA Tour Inc.,⁷⁷ provided helpful guidance to determine if a plaintiff demonstrates sufficient antitrust standing, such as: “(1) the nature of the plaintiff’s alleged injury; that is, whether it was the type the antitrust laws were intended to prevent; (2) the directness of the injury; (3) the speculative measure of the harm; (4) the risk of duplicative recovery; and (5) the complexity in apportioning damages.”⁷⁸

In the current case, Plaintiffs argue that the harmful restrictions embedded in their contracts were enforced for the purpose of keeping the PGA Tour’s control over the sport because LIV Golf plans to compete with the Tour.⁷⁹ These harmful restrictions include the Tour’s “conflicting events” and “media rights” rules.⁸⁰ Players argue that these rules prevent players from offering their professional services significantly outside the Tour’s approval.⁸¹

384 U.S. 563, 570–71 (1966) (finding willful acquisition or maintenance of monopoly power is essential element of Section 2 monopolization claim).

77. *Toscano v. PGA Tour, Inc.*, 201 F. Supp. 2d 1106, 1119 (E.D. Cal. 2002).

78. *See id.* at 1119 (holding doctrine of antitrust standing serves to ensure only parties most injured by anticompetitive conduct are permitted to sue and collect treble damages); *see also* Daniel W. Morton-Bentley, Annotation, *Causation in Fact at Summary Judgment Stage in Antitrust Litigation*, 21 A.L.R. FED. 3D ART. 5 (2017) (defining antitrust injury as type antitrust laws were intended to prevent and flows from that which makes defendants’ acts unlawful).

79. *See* Hannah Albarazi, *Pro Golfers Take Legal Swing at PGA Tour’s Alleged Monopoly*, LAW360 (Aug. 3, 2022, 8:17 PM), <https://www.law360.com/articles/1518020/pro-golfers-take-legal-swing-at-pga-tour-s-alleged-monopoly> [<https://perma.cc/88SA-NHAW>] (summarizing original complaint filed by professional golfers). For further discussion on voluntary removal of Plaintiffs, *see supra* note 6 (reporting Plaintiffs voluntarily removed from suit include Mickelson, Gooch, Swafford, and Poulter). It is also worth noting that Plaintiffs take issue with the internal disciplinary action procedures and accuse the PGA Tour Commissioner, Jay Monahan, of unilaterally imposing further sanctions while the player’s appeals were pending (one full additional year of suspension for playing in second LIV Golf tournament). *See* Dorothy Atkins, *PGA Tour Beats LIV Golfers’ Bid for TRO to Play in FedEx Cup*, LAW360 (Aug. 9, 2022, 10:39 PM), <https://www.law360.com/articles/1519539/pga-tour-beats-liv-golfers-bid-for-tro-to-play-fedex-cup> [<https://perma.cc/2BUW-GQ75>] (summarizing players’ requests for temporary restraining order to play in 2022 FedEx Cup were dismissed by U.S. District Judge Beth Labson Freeman because monetary loss alone is not enough to prove irreparable harm).

80. *See Plaintiffs’ Original Complaint, supra* note 7, at 5–7 (alleging these provisions limit output by keeping golfers on sidelines when not playing on Tour, which simultaneously forecloses competition and entrenches PGA Tour’s monopoly power by doing everything in its power to lock up its members).

81. *See* Pls.’ Am. Compl. & Demand for Jury Trial, *supra* note 21, at 4–5 (alleging PGA Tour forecloses independent contractors from participating in events Tour deems to be competitive threat which hinders competition and entrenches PGA Tour’s monopoly power); *see* Monahan’s Memo, *supra* note 67 (providing Tour member shall not participate in any live or recorded golf program without prior written approval of Commissioner, except Tour events cosponsored, coordi-

LIV argues the PGA Tour's power in its contractual agreements prevents any outside entity from entering the golf market.⁸²

1. *Per Se Violation*

If a court determines a plaintiff has adequate antitrust standing, meaning that either Section 1 or 2 has been sufficiently alleged, it might inquire whether the conduct or agreement at issue has slightly restrained trade or competition.⁸³ Conversely, the court may question whether the negative impact on competition is so significant that regardless of the facts and circumstances of the agreement, there has been a "per se" violation of antitrust law.⁸⁴ A per se violation occurs when a court determines that an agreement or contract is inherently anticompetitive and possesses no redeeming qualities.⁸⁵ If so, the court will deem the agreement per se illegal, and the injured party will prevail.⁸⁶ Here, Plaintiffs allege that the Tour's enforcement of its bylaws and public allegiance with its affiliates to boycott LIV players proves a per se violation.⁸⁷

2. *Rule of Reason Violation*

Alternatively, if the anticompetitive agreement has some beneficial effect, or if there is not a per se violation present, the court will inquire into the reasonableness of the restraint at issue to deter-

nated or other approved tournaments, wholly instructional programs or personal appearances on interviews or guest shows).

82. See Pls.' Am. Compl. & Demand for Jury Trial, *supra* note 21, at 6 (alleging PGA Tour pressured players and other entities to similarly enforce disciplinary boycott of LIV and reject opportunities to partner with new entrant and instead strengthened its strategic alliance with PGA Tour).

83. See Sullivan, *supra* note 73, at 871 (citing case law precedent which makes clear that Supreme Court applies "per se" rule only in clear cut cases due to its demanding standard).

84. See *id.* at 871 (quoting *Mid-South Grizzlies v. Nat'l Football League*, 550 F. Supp. 558, 565 (E.D. Pa. 1982)) ("Per se violations should be found only where the involved agreements are so clearly anticompetitive and lacking in any redeeming quality that they can be conclusively presumed illegal without any further inquiry.").

85. See *id.* (supporting limited use of this analysis by courts to instances where practice facially appears to be one that would always effectively restrict competition).

86. See Scott J. Champagne, *Hicks v. PGA Tour: An Examination of Caddies' Rights and Human Billboards in Sports*, 23 SPORTS L. J. 185, 191 (2016) (explaining outcome of per se analysis).

87. See Pls.' Am. Compl. & Demand for Jury Trial, *supra* note 21, at 95 ("The agreement constitutes a group boycott orchestrated by a monopolist that is expressly aimed at foreclosing the entry of the only viable alternative to the Tour into the relevant market. No elaborate analysis is required to demonstrate the anticompetitive character of this group boycott.")

mine if a violation has occurred by a “rule of reason.”⁸⁸ In these instances, a court will consider the facts and circumstances presented by both parties and evaluate the anticompetitive effects with the procompetitive benefits of an agreement to find the net competitive effect on the market.⁸⁹ Another way to apply the rule of reason test is to ask whether the conduct or agreement at issue promotes or stifles competition.⁹⁰ If the agreement is overall “net procompetitive,” then the agreement will be legal.⁹¹

The distinction between a “per se” violation and “rule of reason” analysis is important because per se violations do not require proof of anticompetitive effects, whereas the rule of reason will require such proof.⁹² As a result, if plaintiffs cannot convince the court that there was a per se violation, the court will apply a rule of reason analysis and look beyond any agreements made to restrain player activity from inquiring about the “purpose sought to be obtained” by the Tour’s conduct.⁹³ The Tour argues the proper test is a rule of reason analysis and while it does not assert its behavior was *not anticompetitive*, it believes it was *justified* based on its business mission.⁹⁴

3. *Plaintiffs’ Analysis of Sherman Act*

Here, the Complaint alleges that the Tour has unlawfully agreed with other entities in the golf ecosystem to impermissibly

88. See *NCAA v. Alston*, 141 S. Ct. 2141, 2141 (2021) (holding court hearing case brought under Sherman Act should conduct full rule-of-reason analysis of challenged business practice unless practice is per se illegal or so obviously decidable that quick-look analysis is warranted); see also Sullivan, *supra* note 73, at 871-873 (explaining judicial approach to antitrust claims).

89. See *Champagne*, *supra* note 86, at 191 (describing net effects of anticompetitive behavior in judicial balancing test).

90. See Leah Farzin, *On the Antitrust Exemption for Professional Sports in the United States and Europe*, 22 JEFFREY S. MOORAD SPORTS L.J. 75, 91 (2015) (arguing that rule of reason analysis is favorable to sports leagues and commonly applied by courts because of joint-venture-like structure required to operate coordinated events within leagues).

91. See *id.* (explaining even anticompetitive behavior that has some competitive effect will not be violate antitrust law under Rule of Reason balancing test).

92. See Henry Hauser, Shylah Alfonso, & Shari Brandt, *Assessing LIV Golf’s Role in PGA Tour Antitrust Suit*, LAW360 (Sept. 9, 2022, 3:46 PM), <https://www.law360.com/articles/1528971> [<https://perma.cc/RN9G-VUXZ>] (analyzing LIV as plaintiff to lawsuit and unlikely success of plaintiffs amid court skepticism of antitrust violations as matter of law).

93. See *id.* (reporting Plaintiffs’ plan to combat such defense by alleging boycott against banned LIV players was nothing more than effort to block LIV from entering market which, “lacks any legitimate procompetitive justifications”).

94. For further discussion, see *infra* notes 135–187 (discussing PGA Tour’s defense and response in current litigation against LIV Golf).

punish LIV and its aligned golfers by establishing a group boycott to carry out its coordinated efforts in violation of Section 1.⁹⁵ Plaintiffs suggest that the PGA Tour has threatened sponsors, vendors, and agents in order to coerce players to reject offers from LIV.⁹⁶ In particular, Plaintiffs point to the PGA Tour’s publicized “strategic alliance” with the DP Tour (sometimes, as formerly known, “European Tour”).⁹⁷ In preparation for the 2021-2022 season, the two tours announced their “landmark agreement” to revise and connect the global scheduling of events to maximize member point-earning potential, increase prize funds, enhance playing opportuni-

95. See Pls.’ Am. Compl. & Demand for Jury Trial, *supra* note 21, at 67–68 (accusing PGA Tour of unlawfully agreeing with other golf entities to prevent LIV from successfully entering market).

96. See *id.* at 98–100 (alleging PGA Tour punishments were aimed at coercing players, vendors, and sponsors to act contrary to their individual interests).

The PGA Tour has engaged in anticompetitive conduct to try to monopolize the relevant markets, including by: (1) threatening to expel and impose a lifetime ban on all players who contract with LIV Golf—including both members and non-members of the Tour; (2) imposing unreasonable and anticompetitive restrictions on players’ ability to sell their independent contractor services, including the Media Rights Regulation and Conflicting Events Regulation in the Regulations, which have the effect of foreclosing competition; (3) threatening to enforce the terms of the regulations beyond their meaning to deny players the freedom to play in competing tours; (4) enforcing the terms of the Regulations to deny Plaintiffs’ competitive opportunities; (5) threatening to harm other agencies, businesses or individuals who would otherwise work with Plaintiffs and/or LIV Golf; and (6) suspending and punishing the Player Plaintiffs for playing in LIV Golf and supporting it, all in order to punish and harm Plaintiffs, to prevent competition for the players’ services, and to prevent LIV Golf from launching a competitive elite professional golf tour.

Id. (alleging interference with LIV Golf’s contractual negotiations with players, agencies, sponsors, and media broadcasters).

97. See Adam Schupak, *European Tour Sells Naming Rights for the Circuit, to be Called DP World Tour in 2022 Season*, GOLFWEK (Nov. 9, 2021, 9:45 AM), <https://golfweek.usatoday.com/2021/11/09/european-tour-naming-rights-dp-world-tour/> [<https://perma.cc/4UMN-TU7W>] (explaining European Tour now known as DP World Tour commencing 2022 golf season); see *PGA Tour and European Tour Announce Details of Historic Strategic Alliance*, DP World Tour (Aug. 3, 2021), <https://www.europeantour.com/dpworld-tour/news/articles/detail/pga-tour-and-european-tour-announce-details-of-historic-strategic-alliance/> [<https://perma.cc/MLZ5-H6U4>] [hereinafter *DP World Tour & PGA Tour’s Alliance Announcement*] (announcing details of coordinated and co-sanctioned scheduled events for upcoming tour seasons in order to maximize member player attendance, point opportunities, and rewards).

ties for member players.⁹⁸ Both leagues also chose to ban LIV players from their separate and co-sanctioned events.⁹⁹

In the absence of a per se violation, Plaintiffs additionally argue the special alliance with the DP Tour is a rule of reason violation because the purpose of the agreement is to restrain competition and reinforce the Tour's market power to defeat LIV Golf's entrance to the market.¹⁰⁰ Here, the biggest obstacle for the Plaintiffs is obtaining evidence that the group boycott intended to eliminate competition and weaken LIV's competitive viability.¹⁰¹ As anticipated, the discovery requests have expanded to the DP Tour and the PGA Tour's public relations agency as Plaintiffs seek documentation of collusion.¹⁰² Accordingly, the PGA Tour has sought discovery requests from financial sources of LIV, including PIF and its governing officers, to justify the Tour's conduct was to combat

98. See *DP World Tour & PGA Tour's Alliance Announcement*, *supra* note 97 (listing structural changes following alliance); see also James Hibbitt, *Horizon Irish Open Purse, Prize Money and Field*, GOLF MONTHLY (June 28, 2022), <https://www.golfmonthly.com/news/horizon-irish-open-purse-prize-money-and-field> [<https://perma.cc/X4GF-AUUV>] (reporting 2022 prize money increased by nearly double from 2020-2021 season totaling \$6 million); see also Matt Bonesteel, *PGA Tour Strengthens Ties with European Golf to Blunt LIV Threat*, WASH. POST (June 28, 2022, 4:02 PM), <https://www.washingtonpost.com/sports/2022/06/28/pga-tour-dp-liv/> [<https://perma.cc/SV9C-T3WK>] (reporting PGA Tour acquired additional fifteen percent stake in DP Tour Productions, and Scottish Open, Barbasol Championship and Barracuda Championship became co-sanctioned events meaning golfers can earn points towards both PGA Tour FedEx Cup points and DP World Tour rankings at once).

99. See ESPN, *UK panel rules in favour of DP World Tour in battle with LIV players*, ESPN (Apr. 6, 2023), https://www.espn.com/golf/story/_/id/36088879/dp-world-tour-wins-legal-battle-fine-suspend-liv-golfers [<https://perma.cc/UGB7-TQ4N>] (reporting DP World Tour won legal battle to suspend and fine LIV players who featured in conflicting events without permission by independent UK-based panel of Sports Resolutions who dismissed players' appeals and ordered fines of £100,000 [\$124,540]).

100. See Pls.' Am. Compl. & Demand for Jury Trial, *supra* note 21, at 99 (alleging Section 2 violation for attempted conspiracy to violate federal antitrust law by threatening to expel players and impose lifetime ban who contract with LIV).

101. See *id.* at 100 (accusing Tour's conduct as carrying dangerous probability to eliminating LIV from maintaining long-term viability by being unable to broadcast US events and maintaining access to many top professionals who possess PGA Tour membership).

102. See Alex Lawson, *LIV Golf Seeks Docs to Show PGA, European Tour Collusion*, LAW360 (Nov. 8, 2022, 5:12 PM), <https://www.law360.com/articles/1547623/liv-golf-seeks-docs-to-show-pga-european-tour-collusion> [<https://perma.cc/S9RH-7RRV>] (issuing its discovery request through letters rogatory which are used when seeking information from foreign entity like DP Tour).

LIV's manipulation of Tour members as pawns in a larger political and social chess game.¹⁰³

E. Antitrust Defenses

As a general rule, to violate federal antitrust law, an agreement or conspiracy requires conduct by a minimum of two parties.¹⁰⁴ Thus, agreements within a single business cannot be construed as conspiring or engaging in anticompetitive behavior.¹⁰⁵ Accordingly, single entities are exempt from antitrust violations.¹⁰⁶ This chain of legal principles formed what is known as the "single-entity defense."¹⁰⁷

Antitrust behavior and monopolist accusations are not entirely new to the sports industry, nor the PGA Tour.¹⁰⁸ As major professional sports leagues and commissioners faced challenges under the Sherman Act throughout the last hundred years, federal courts had to establish whether sports leagues acted as a single entity, or were engaged in monopolist behavior when enforcing expansive rules upon its constituent teams, affiliated vendors, and participating players.¹⁰⁹ Defendants in sports and business settings have historically relied on the single-entity defense following the Supreme Court decision in *Copperweld Corp. v. Independence Tube Corp.*¹¹⁰ In

103. See *PGA Tour Motion to Add Counter-Defendant PI*, *supra* note 15 at 5–6 (requesting leave to amend counterclaim adding PIF as counter-defendant after discovery revealed role in allegedly luring Tour-members to breach contracts).

104. See Claudia Catalano, Annotation, *Application of Federal Antitrust Laws to Professional Sports*, 79 A.L.R. Fed. 2d Art. 1, at 24 (2013) (explaining antitrust allegations require two-party conduct because unilateral conduct is not unlawful under Section 1).

105. See Sullivan, *supra* note 73 at 868 (explaining single entity defense leaves qualifying parties exempt from otherwise antitrust violations).

106. See *id.* at 877 (explaining leagues such as NFL for years have attempted to fall within single entity defense to be exempt from antitrust challenges).

107. See *id.* (defining single entity defense).

108. See *e.g.*, *Fed. Baseball Club, Inc. v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200, 207–09 (1922) (holding antitrust laws do not apply to professional baseball); see also Sullivan, *supra* note 73 (exploring application of antitrust laws in professional soccer, noting that *Fed. Baseball Club of Baltimore, Inc. v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200, 207–09 (1922) allowed sports leagues to presume their conduct would escape antitrust scrutiny for decades); see generally David Willman, *PGA Outclubs FTC in Antitrust Fight*, L.A. TIMES (Oct. 22, 1995, 12 AM), <https://www.latimes.com/archives/la-xpm-1995-10-22-fi-59876-story.html> [<https://perma.cc/F2RE-JG2F>] (reporting on potential federal investigation in 1994 into PGA Tour antitrust violations).

109. See Farzin, *supra* note 90, at 82–83 (suggesting question is still yet to be resolved as advocates of single entity defense argued legitimate economic interest prevails over any anticompetitive effects, while those opposed argue that single entity defense is limited to very narrow circumstances of parent-subsidiary relationship, not leagues).

110. 467 U.S. 752 (1984).

Copperweld, the Court held that a corporation is legally incapable of conspiring with its wholly-owned subsidiaries, its unincorporated divisions, and its officers and employees for purposes of violating the Sherman Act.¹¹¹

When applied to sports, the question was whether leagues were considered a single entity or a collection of independent firms under federal antitrust laws.¹¹² The difficulty courts face in answering this question is due to the unique characteristic of professional sports, which partly requires some agreement across teams, leagues, members, and other entities to produce the product of a professional sport.¹¹³ Moreover, federal courts have opined that an entity's enforcement of its policies is a generally defensible action that does not raise antitrust violations of Section 1.¹¹⁴ Particular to the Tour, in *Toscano v. PGA Tour Inc.*, a federal district court rejected an antitrust challenge under Section 1 of the Sherman Act to the PGA Tour's per-event limit of seventy-eight golfers, and its eligibility rules limiting the ability of new players to compete in its events.¹¹⁵ The golfer in *Toscano* similarly contested the conflicting events and media rights regulations, alleging harm as a direct result of the inability to participate in competing tournaments where he could have won prize money and additional income due to media exposure arising from such participation.¹¹⁶ Not only did the court find that the Tour's eligibility standards were permissible, but it also held the plaintiff lacked appropriate standing in the absence of direct causation of harm.¹¹⁷ Federal courts continue to struggle with a uniform approach to coordinated conduct within sports leagues

111. *See id.* at 775 (concluding Congress intended different treatment for unilateral and concerted conduct).

112. *See Sullivan, supra* note 73, at 883 (considering that because single entity defense does not apply to some major leagues, such as NFL, it should similarly be unavailable to NHL and NBA).

113. *See id.* (concluding, however, that despite special characteristics, leagues are not single entities because would mean virtually any joint venture in sports context would be able to hide behind single entity defense).

114. *See Copperweld*, 467 U.S. at 769 (interpreting plain meaning of Section 1 as inapplicable to unitary firm's implementation of company policies).

115. *See Toscano v. PGA Tour, Inc.*, 201 F. Supp. 2d 1106, 1113 (E.D. Cal. 2002) (ruling in favor of PGA Tour).

116. *See id.* (arguing if PGA Tour rules ever applied to plaintiff, they would potentially inflict antitrust harm and similarly situated parties).

117. *See id.* at 1116–17 (holding plaintiff who complains of injury that is too remote from alleged restraint or that is derivative of injury suffered by third party absent from suit is generally unable to establish antitrust standing, and finding here that injuries were remote because contingent upon series of intervening, speculative events); *see Morton-Bentley, supra* note 78 (elaborating that *Toscano* court found injuries were remote because they were contingent upon series of intervening, speculative events, and injuries were derivative of those).

due to the various legal structures of each organization.¹¹⁸ Thus, an antitrust violation in this context may not turn on whether or not the concerted action was between two separate legal entities, but rather on whether the entities involved in a league's coordination were capable of independent decision-making.¹¹⁹

III. IN THE ROUGH: PGA TOUR POTENTIAL DEFENSES FACE UNCERTAINTY AND PLAINTIFFS' STRUGGLE TO PROVE INJURY

A. Single Entity Defense Likely Unavailable

The PGA Tour's unitary enforcement of its bylaws could make available a single entity exemption under *Copperweld*.¹²⁰ However, its special alliance with the DP Tour will face harsher scrutiny considering a Section 1 agreement may be found when "the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement."¹²¹ If the court determines the PGA Tour and DP Tour acted in concert by banning players from all events, it will want to shift course and convince the court that the two tours acted together as part of a single entity.¹²²

118. See *Fraser v. Major League Soccer*, 284 F.3d 47, 57–58 (1st Cir. 2002), *cert. denied*, 537 U.S. 885 (2002) (holding sports leagues are "hybrid arrangement" where franchises have entrepreneurial interests but also promote common interest of league); see *Am. Needle, Inc. v. NFL*, 560 U.S. 183, 204 (2010) (refusing to expand antitrust injury doctrine to treat sports league as immune from Section 1 in marketing of intellectual property); see *Chicago Pro. Sports Ltd. P'ship v. NBA*, 95 F.3d 593, 597 (7th Cir. 1996) (citing *Charles O. Finley & Co. v. Kuhn*, 569 F.2d 527 (7th Cir. 1978)) (providing courts must respect league's disposition of profit and coordination issues in similar manner to which they respect contracts and decisions by corporation's board of directors).

119. See *Catalano*, *supra* note 104 at 95 (citing *American Needle, Inc. v. National Football League*, 560 U.S. 183 (2010)) (providing agreements to join together independent centers of decision making or separate economic actors pursuing separate economic interests, might warrant flexible Rule of Reason analysis due to legitimate and important interest in maintaining competitive balance among athletic teams might save agreements amongst teams).

120. See *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 771–72 (1984) (establishing that when a parent and a wholly owned subsidiary "agree" to a course of action, there is no Section 1 scrutiny because there has not been a sudden joining of economic resources that had previously served different interests).

121. See *id.* (finding officers of single firm are not separate economic actors bringing together economic powers previously pursuing divergent goals).

122. See *id.* (finding coordination with employees or officers of same firm may be necessary if business enterprise is to compete effectively).

Currently, the DP Tour is not a “wholly-owned” subsidiary of the PGA Tour.¹²³ However, as part of the joint venture, the PGA Tour has agreed to admit the DP Tour’s top 10 qualifying players into its membership.¹²⁴ Additionally, the PGA Tour has largely increased its share in European Tour Productions from 15% to 40%.¹²⁵ This alliance is significant because the PGA Tour and DP Tour are two of the most dominant golf leagues across the globe, and while their union is meaningful in other antitrust aspects, it is unlikely that it goes so far as to warrant the Tour’s use of the single entity defense.¹²⁶ For instance, in *In re Se. Milk Antitrust Litig.*,¹²⁷ a U.S. District Court dismissed a Section 2 claim because the Defendant’s market share ownership of around 40% did not meet “the threshold of what it takes to establish monopoly or monopsony power.”¹²⁸ Similarly, the Court in *Copperweld* chose not to consider the circumstances under which an organization may be liable for conspiring with an affiliated corporation it does not completely own.¹²⁹

123. See Associated Press, *New Alliance Gives PGA Tour Cards to 10 European Tour Players*, ESPN (June 28, 2022), https://www.espn.com/golf/story/_/id/34162403/new-alliance-gives-pga-tour-cards-10-european-tour-players [<https://perma.cc/Y8KS-UBC7>] [hereinafter *PGA Tour Cards to DP Players*] (explaining PGA Tour and DP Tour agreement consequences).

124. See Adam Schupak, *PGA Tour Ramps up ‘joint venture’ With DP World Tour*, GOLFWEEK (June 28, 2022, 2:00 PM), <https://golfweek.usatoday.com/2022/06/28/pga-tour-joint-venture-dp-world-tour-adding-bigger-purses-tour-cards/> [<https://perma.cc/8ZNP-ATNX>] (reporting alliance adds bigger purses, Tour cards, and formal pathway from DP World Tour to PGA Tour and beginning in 2023, leading ten players at end of season DP World Tour Rankings, in addition to those already exempt, will earn PGA Tour cards).

125. See *id.* (providing ownership statistics following PGA Tour and DP Tour allegiance).

126. See Maurice E. Stucke, *Looking at The Monopsony in The Mirror*, 62 EMORY L.J. 1509, 1510 (2013) (describing monopsony power as market power on buyer’s side of market).

127. 801 F. Supp. 2d 705 (E.D. Tenn. 2011).

128. See Stucke, *supra* note 126 at 1515 (quoting *In re Se. Milk Antitrust Litig.*, 801 F. Supp. 2d 705, 727) (arguing courts and agencies cannot solely rely on market-share thresholds because firms can exercise monopsony power at relatively lower market shares).

129. See *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 767 (1984) (limiting its holding to issue of whether parent company and its wholly owned subsidiary are capable of conspiracy under Section 1). In *American Needle, Inc. v. National Football League*, 560 U.S. 183 (2010), the Supreme Court decided to narrow the holding of *Copperweld* in the context of sports by holding that the National Football League did not constitute a single entity for purposes of licensing agreements contracted by its subsidiaries. See Cyntrice Thomas, Thomas A. Baker III, & Kevin Byon, *The Treatment of Non-Team Sports Under Section One of The Sherman Act*, 12 VA. SPORTS & ENT. L.J. 296, 297 (2013) (arguing courts avoid making absolute judgments on non-team sports and antitrust violations).

While the alliance is probably too weak to quantify as a vertical agreement to invoke a single-entity defense, the shared structure of the tours helps the PGA Tour against a per se attack by negating the likelihood that the two leagues should be considered equal, horizontal competitors.¹³⁰ This benefits the Tour because group boycotts are only per se violations of antitrust law when they involve agreements between horizontal competitors.¹³¹ Here, the public statements of the DP Tour acknowledging their structure as a “pathway” for players to later compete in the PGA Tour supports the notion that the two leagues mutually coexist in the golf ecosystem and operate in their separate roles cohesively.¹³² Therefore, in the absence of horizontal competition between the PGA Tour and DP Tour, the Plaintiffs may struggle to prove the agreement is a per se violation and should focus on proving their harmful anticompetitive effects under a rule of reason theory.¹³³

B. PGA Tour Leans Into Its Nonprofit Status to Defend Its Monopsonist Behavior

The Tour relies on its tax-exempt status and role in charitable initiatives to justify its otherwise anticompetitive conduct by proclaiming it aligns with its nonprofit mission statement.¹³⁴ The Tour’s 501(c)(6) tax status is particularly beneficial because it allows the league to lobby and engage in political activity as opposed to other tax-exempt, wholly-charitable entities.¹³⁵ Even so, the Tour consistently ties its business league mission to a charitable contribution – each PGA Tournament donates its proceeds to support local organizations near the event.¹³⁶ The Tour’s reported

130. See Hauser et al., *supra* note 92 (analyzing LIV as plaintiff to lawsuit and unlikely success of plaintiffs amid court skepticism of antitrust violations as matter of law).

131. See *id.* (reporting overseeing Judge Freeman highlighted this rule when commenting on plaintiffs’ Section 1 claim).

132. See *id.* (reporting plaintiffs’ expert testimony of case admits two tours are not competitors).

133. See Ross, *supra* note 63, at 734 (predicting courts will generally evaluate league bylaws under rule of reason test because horizontal agreements are oftentimes essential).

134. See Def.’s Answer to Pls.’ Am. Compl. & Countercl., *supra* note 37 at 57 (asserting its charitable initiatives and efforts to develop, promote, and expand game of golf requires Tour to take on certain obligations and in return, binds its members to these same obligations in exchange for benefits of membership).

135. See Montag, *supra* note 42, at 574 (comparing Tour’s § 501(c)(6) business status with PGA Foundation, wholly charitable registration as § 501(c)(3) and benefits or disadvantages of both system).

136. See *Impact*, PGA TOUR, <https://www.pgatour.com/impact.html> (last visited Jan. 14, 2023) (promoting Tour’s commitment to inclusivity, sustainability,

charitable contributions to date are significant, totaling roughly \$3.37 billion as of 2023.¹³⁷

The PGA Tour's intentional intersection of business, charity, and lobbying was highlighted in a 1994 investigation by the Federal Trade Commission ("FTC") following the Tour's successful deterrence of players from entering a competing tournament series at the time, the World Tour.¹³⁸ Through its legally permissible lobbying power, the PGA Tour convinced multiple Congressional representatives that the growth and charitable arm of the Tour justified its contractual restrictions over players.¹³⁹ As a result, the Tour de-railed any thorough investigation or official legal action by the FTC.¹⁴⁰ The irony that the Tour can use the charitable arm as the crutch for its conduct is illustrated by the fact that its ability to lobby and persuade Congress is afforded by *not* being wholly charitable.¹⁴¹ By persuading Congress to do its bidding and receiving tax breaks on its balance sheet, the PGA Tour gets the best of both worlds.¹⁴² Moreover, the Tour continues to lean into this dynamic

and supporting local communities and organizations where tournaments take place).

137. *See id.* (reporting not-for-profit tournaments under PGA Tour umbrella total dollar amounts).

138. *See* Willman, *supra* note 108 (reporting on World Tour's attempt to enter professional golf market also headed by, now LIV spokesperson, Greg Norman).

139. *See id.* (promoting its disputed policies may control players, but restraints are necessary to assure TV networks and sponsors reliable supply of quality golfers).

140. *See id.* (reporting FTC announced to kill investigation and keep findings confidential in September 1995).

141. *See id.* (considering whether risky move by PGA Tour general counsel to seek congressional support actively was successful due to legal merits or public opinion that government agencies were overextending power and taxpayer resources); *see* PGA Tour's 2019 990 Form, *supra* note 49 (reporting \$1.3 million in lobbying expenses for 2019 taxable year).

142. *See* Brently Romine, *Report: Department of Justice Investigating PGA Tour for 'Anti-Competitive Behavior' Against LIV Golf*, GOLF CHANNEL (July 11, 2022, 4:16 PM), <https://www.golfchannel.com/news/report-department-justice-investigating-pga-tour-anti-competitive-behavior-against-liv-golf> [<https://perma.cc/DUU4-4L3T>] (reporting Tour spokesperson stated, "[w]e went through this in 1994, and we are confident in a similar outcome" in response to LIV litigations and rumored reports of contact from the DOJ's anti-trust division)." In the original complaint, Plaintiffs alleged that in 2019, amid rumors of a new league called the Premier Golf League ("PGL"), Commissioner Monahan distributed an internal memorandum detailing the PGA Tour's response to, "mitigate any impact," which included targeting the level of player support by enforcing and expanding the Media Rights and Conflicting Events regulations, "to ensure that all golf events [be] unequivocally covered on a global basis." *See* Pls.' Compl. & Demand for Jury Trial, *supra* note 7, at 29 (conceding that some members of PGL later became affiliated with LIV to break into golf market). Following these events, the players allege Monahan demanded exclusivity from the independent contractors, reemphasizing the potential for discipline and membership ban, which successfully deterred players from exploring

by using the same charitable reputation and mission driven approach when lobbying in its interest to the federal government almost thirty years later.¹⁴³

The PGA Tour's swift and harsh reaction to LIV is purported to preserve the interest and integrity of golf through healthy competition and protect it from "sportswashing."¹⁴⁴ Sportswashing occurs when a nation, state, or political organization hides behind the comradery of sports to improve its reputation for human rights abuses and other atrocities.¹⁴⁵ Sportswashing is a growing concern for global viewers of the Olympics and other international sporting events in countries known for human rights violations, such as China, Qatar, and Bahrain.¹⁴⁶ Saudi Arabia and PIF are becoming

PGL opportunities and demonstrated the Tour's intentional, monopsonist control over the market. See Pls.' Compl. & Demand for Jury Trial, *supra* note 7, at 29 at 30–31 (crediting PGA Tour with being highly effective at threatening interest and movement of players to PGL during member's meeting at Torrey Pines in La Jolla, California, further demonstrated by European Tour's denouncement of PGL, and simultaneous creation of Special Alliance); see also James Hibbitt, *What is The Premier Golf League?*, GOLF MONTHLY (Mar. 16, 2022), <https://www.golfmonthly.com/news/what-is-the-premier-golf-league> [<https://perma.cc/J84R-N6TT>] (providing background for PGL, byproduct of London based company, World Golf Group, has not received media, or player, attention as that of LIV). Moreover, as an alternative to LIV, the PGL now advertises itself to players, including former world number one in the Official World Golf Ranking Rory McIlroy. See *id.* (noting PGL advertises its wealth is "funded through private equity and high net worth individuals in the United States and not Saudi Arabia or other sovereign wealth funds").

143. See Brian Schwartz, *Inside the PGA Tour's Washington lobbying effort against the Saudi-funded LIV golf league*, CNBC (Jul. 21, 2022, 12:49 PM), <https://www.cnbc.com/2022/07/21/inside-the-pga-tours-lobbying-effort-against-saudi-funded-liv-golf.html> [<https://perma.cc/LN53-5QY2>] (reporting PGA Tour quietly reached out to White House and lawmakers from both sides of aisle in second quarter of 2021 through firm DLA Piper to lobby on their behalf according to lobbying disclosure reports).

144. See *id.* (reporting Monahan's statement about tensions with LIV noting, "We welcome good, healthy competition. The LIV Saudi Golf League is not that. It's an irrational threat, one not concerned with the return on investment or true growth of the game"); see *Def.'s TRO Br.*, *supra* note 47, at 31 (admitting to sending letter to member Talor Gooch regarding his suspension was due to series of bylaw violations and participation in LIV, which as organization was "inflicting ongoing harm to the reputation and financial best interest" of Tour).

145. See Ryan Gauthier & Gigi Alford, *Will Human Rights Ever Be Olympic Values?: Evaluating The Responses to Human Rights Violations at The Olympic Games*, 35 CONN. J. INT'L L. 21, 32 (2019) (arguing Global Olympic Games need to be careful not to exercise sportswashing in face of human rights violations of participating and host cities).

146. See Fatima Yazbek, *Bahrain's Athletes Rewarded with Prison Sentences*, 29 HUM. RTS. DEFENDER 16, 16 (2020) (addressing concern for Bahrain's potential use of sportswashing to repair its reputation after prisoners released post Covid-19 restrictions); see also Michael Rosenberg, *Sportswashing is Everywhere, But It's Not New*, SPORTS ILLUSTRATED (Dec. 29, 2022), <https://www.si.com/olympics/2022/04/11/sportswashing-olympics-world-cup-daily-cover> [<https://perma.cc/67ZB-8A4D>] (considering China's "appalling" human rights record in conjunction with hosting

more relevant in the sportswashing news cycle with recent rumors involving potential participation in Formula 1 and WWE.¹⁴⁷

If derailing PIF and LIV from sportswashing is the sole basis for the PGA Tour's behavior, it is an honorable and significant step toward a unified global community that promotes shared experiences through sports culture.¹⁴⁸ However, whether such motivations are genuine will be an issue for the fact finder to determine when the case goes to trial in 2024.¹⁴⁹ Either way, by taking a counterattack against LIV for sportswashing, the Tour attempts to strike a nerve with the public and form a protective shield over its anticompetitive conduct.¹⁵⁰ As such, the Tour argues that it is "free to choose the parties with whom [it] will deal," and it has no duty to

2022 Winter Olympics, and additionally remarking on Bubba Watson's support of LIV expanding to women's professional golf despite Saudi Arabia's discriminatory laws against women); Eddie Pells, *Qatar's World Cup Denounced For 'Washing' Country's Image*, ASSOCIATED PRESS (Nov. 16, 2022), <https://apnews.com/article/eileen-gu-roman-abramovich-sports-soccer-business-cc0594f123b85bc5d4cc404cba6fb37e> [<https://perma.cc/S2C8-63TP>] (reporting skeptics of Qatar's decision to host 2022 World Cup was tactic to use sports as forum to cast country in different light would not succeed because "no World Cup takes place in a vacuum").

147. See Giles Turner, Dinesh Nair, and Matthew Martin, *Saudi Arabia Explored Bid to Buy F1 for Over \$20 Billion*, BLOOMBERG (Jan. 20, 2023, 6:08 AM), <https://www.bloomberg.com/news/articles/2023-01-20/saudi-arabia-wealth-fund-explored-bid-to-buy-f1-motor-racing> [<https://perma.cc/Y597-97PL>] (reporting bid by Saudi Arabia sovereign wealth fund to add Formula 1 motor racing to its growing portfolio of sports investments); see also Mike Chiari, *Report: WWE Doesn't Have Deal to Sell to Saudi Arabia's Public Investment Fund*, BLEACHER REPORT (Jan. 11, 2023), <https://bleacherreport.com/articles/10061294-report-wwe-doesnt-have-deal-to-sell-to-saudi-arabias-public-investment-fund> [<https://perma.cc/R46X-HVND>] (reporting sale rumors of World Wrestling Entertainment ("WWE") following CEO Vince McMahon scandal originating from 2018 business arrangement with Saudi Arabia where WWE agreed to hold two major events there every year through 2027).

148. See Yazbek, *supra* note 146 (noting importance that initiatives addressing impact of sports on human rights do not become exercise in sports washing).

149. See Pls.' Am. Compl. & Demand for Jury Trial, *supra* note 21, at 68 (suggesting Commissioner Monahan violated Tour's purported nonprofit purpose to promote golf globally and his fiduciary duties to Tour and its members by punishing golfers with suspensions and bans); see also Dorothy Atkins, *PGA Tour And LIV's Trial Date Nixed Amid 9th Circ. Appeal*, LAW360 (Apr. 10, 2023), <https://www.law360.com/articles/1594786/pga-tour-and-liv-s-trial-date-nixed-amid-9th-circ-appeal> [<https://perma.cc/8YX8-N9T2>] (reporting California federal judge vacated January 2024 trial date in LIV Golf and PGA Tour's antitrust fight after LIV Golf's Saudi financier indicated he'll appeal orders requiring him to be deposed, with judge saying appeal and discovery dispute have "essentially blown up my docket," and now aims for June 2024 trial date).

150. See *Def's TRO Br.*, *supra* note 47, at 2 (accusing suspended members for willfully breaching contracts with PGA Tour for "pile of cash supplied by LIV").

provide Plaintiffs and LIV a platform to freeride off the Tour's media and broadcasting investments.¹⁵¹

Typically, the Tour's behavior is balanced with its contributions to charity.¹⁵² However, it is unclear if the charitable kickback will be enough to protect its attempt to exclude LIV from the golf ecosystem.¹⁵³ The Tour argues that the human rights concerns of its charitable grantees made player-members affiliated with LIV liable for "unbecoming" conduct under its bylaws, justifying the Tour's disciplinary action.¹⁵⁴ According to the Tour, engaging in unbecoming conduct includes that which players should have reasonably known would harm the financial and reputational interest of the Tour.¹⁵⁵ However, this argument weakens the Tour's position by highlighting the expansive scope of the unbecoming discretionary provision which would make any player acting contrary to the financial interest of the PGA Tour in violation of its bylaws.¹⁵⁶ Thus, any income-earning opportunities that involve playing golf without the PGA Tour's approval would appear to constitute unbecoming behavior.¹⁵⁷ Such a provision begs the question of whether a OWGR ranked-PGA Tour member who fails to meet tournament eligibility, now being out hundreds of dollars for expenses to qualify, can earn a living by offering his golf expertise outside the PGA Tour and avoid "unbecoming" conduct in breach of his contract without Commissioner approval.¹⁵⁸ Rather than find ways to justify its monopsonist behavior, the Tour should rec-

151. See *id.* at 1 (quoting *Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 555 U.S. 438, 448 (2009)) (supporting its position that exercising free choice of business partners is not anticompetitive).

152. See Burke, *supra* note 7 (arguing PGA Tour "carries a halo" because of money it creates for charity).

153. See Willman, *supra* note 108 (observing PGA Tour got through 1994 FTC investigation on margins).

154. See Def.'s Answer to Pls.' Am. Compl. & Countercl., *supra* note 37, at 64 (stating Article VI of PGA Tour's Regulations governs certain forms of conduct unbecoming over member-players).

155. See *id.* (arguing players agreed to refrain from commenting unreasonably attacking or disparaging PGA Tour, sponsors, or other members).

156. See Ike Bannon, *PGA Golfers Aren't Allowed to Play When And Where They Want, But There's a Solution*, FORBES (May 11, 2022, 3:23 PM), <https://www.forbes.com/sites/ikebrannon/2022/03/11/pg-golfers-arent-allowed-to-play-when-and-where-they-want-but-theres-a-solution/?sh=E07a6ab6004b> [<https://perma.cc/MJB6-EUGL>] (speculating Commissioner Monahan can destroy livelihoods for player comments and suggesting golfers attempt to form players association despite categorical assignment as independent contractors).

157. See *id.* (arguing players should take back control of rules and change them to serve, rather than exploit them).

158. See Bannon, *supra* note 156 (quoting Rory McIlroy, "We should be able to play where we want to play").

ognize its obligations to the common interest of its members the way other tax-exempt businesses do and allow golfers to offer their services elsewhere and compete in other events.¹⁵⁹ Competition, as Congress intended when drafting the Sherman Act, will benefit the market by bringing more fans to the sport and improving professional golfers' welfare.¹⁶⁰

Furthermore, the Tour's contractual arrangements with players in lieu of employment status could create additional legal hurdles in light of federal interpretations defining independent contractors by their nature of being "generally free to seek out business opportunities," under the Fair Labor Standard Act.¹⁶¹ The players in their lawsuit shine light on the public criticism that the Tour unfairly treats its members as employees while categorically identifying them as independent contractors.¹⁶² The difference between this categorization is significant because employees receive greater workplace protections than independent contractors.¹⁶³ Furthermore, while the PGA Tour has the right to organize its business under its goal of "promoting the sport of professional golf," and "providing competitive earnings opportunities," restricting independently contracted players from seeking outside business opportunities seems contrary to their mission and federal labor and antitrust law.¹⁶⁴

C. Plaintiffs' Antitrust Standing Dependent on Proving Harm

Ultimately, although warranted, Plaintiffs are unlikely to prevail in their lawsuit because absent civil rights violations, courts generally refrain from interpreting and interfering with voluntary contracts between players and sports leagues.¹⁶⁵ Federal courts

159. Johnson, *supra* note 55 (criticizing PGA Tour's failure to concede its tax-exempt status in addition to exercising such extensive restraint over players).

160. *See id.* (arguing players deserve competition to improve sport); *see also* Bannon, *supra* note 156 (reinforcing idea that current PGA Tour restrictions on professional players face serious financial repercussions upon few consecutive bad tournaments due to their upfront expense demands and qualifying requirements).

161. *See* Hanna & Kaner, *supra* note 38 (reporting as of effective date March 8, 2021, U.S. Department of Labor and U.S. District Court for Eastern District of Texas expressly removed independent contractor rule).

162. *See id.* (explaining prior independent contractor rule was in tension with FLSA purpose of protecting persons in workplace).

163. *See id.* (noting that because PGA Tour golfers are not employees, they do not have union, nor is there bargaining agreement between Tour golfers and PGA Tour).

164. *See* Johnson, *supra* note 55 (quoting PGA Tour's 990 form filed with Internal Revenue Service taxable year 2018).

165. *See e.g.*, PGA Tour, Inc. v. Martin, 532 U.S. 661, 694 (2001) (holding PGA Tour violated Americans with Disabilities Act by enforcing walking requirement

have provided little guidance on a bright line antitrust test to apply to non-team sports litigation by generally opining the facts of each case will determine the court's analysis.¹⁶⁶ Even when parties feel disadvantaged by league practices, judicial restraint limits the use of a "per se" analysis over collective league action, and the "rule of reason" threshold is often difficult to satisfy.¹⁶⁷ Here, the district court could dismiss the suit before trial and find the PGA Tour's dominance over the professional golf market is balanced with its anticompetitive conduct rather than divulging into a full analysis of commissioner authority within a league's bylaws.¹⁶⁸ Instead, the court could thoroughly analyze Plaintiffs' standing to determine whether their complaints establish the kind of antitrust harm the Sherman Act was designed to prevent.¹⁶⁹ Since antitrust harm is a weak spot in Plaintiffs' argument, a stronger approach would be for them to focus on the PGA Tour's anticompetitive conduct instead of Plaintiffs' financial harm.¹⁷⁰

1. *Antitrust Injury and Harm*

Plaintiffs and critics of the Tour argue that by restraining competition and threatening permanent bans, the Tour can keep its purses low and "its workforce in line," causing unreasonable harm to its members and other competitive organizations seeking to enter the market.¹⁷¹ In light of prior case law, it is not surprising that players initiating the suit alleged injury at a different angle by arguing that the irreparable harm suffered stems from the impacts

for professional golfer suffering from circulatory disorder because golf cart modification did not fundamentally alter nature of event).

166. See Sullivan, *supra* note 73 (explaining courts tend to hold narrow findings specific to facts of each case).

167. See Anthony Dreyer, Karen Lent & Matthew M. Martino, *Common Antitrust Issues in The Sports Context*, 2021 A.B.A. SEC. LITIG. 16 BUS. & COM. LITIG. FED. CTS. § 171:19, 1 (5TH ED.) (explaining litigation sometimes arises when unilateral conduct of party is questionable, but there is not always legal remedy or argument that wrongdoer was monopolist).

168. See Sullivan, *supra* note 73, at 873 (explaining courts have also utilized "quick look" test where regulation is not illegal as per se violation, and in-depth examination is unnecessary if regulation is inherently suspect).

169. See Hauser et al., *supra* note 92 (analyzing LIV as plaintiff to lawsuit and unlikely success of Plaintiffs amid court skepticism of antitrust violations as matter of law).

170. See Sullivan, *supra* note 73, at 871 (explaining importance of antitrust harm in lawsuit because unreasonable restraint is insufficient to prevail); see Atkins, *infra* note 204 and accompanying text for overseeing Judge Freeman's initial comments to LIV contracts.

171. See *e.g.*, Johnson, *supra* note 55 (arguing PGA Tour engages in anticompetitive behavior over independent contract member players).

of world rankings and financial endorsements that follow the boycott.¹⁷² The players' alleged harm is that the PGA Tour's monopsony power has barred them from entering point-earning events, which substantially affects their world-ranking positions and jeopardizes their endorsement capabilities and financial well-being.¹⁷³ As it stands, the OWGR continues to deny LIV tournaments any recognized ranking points for its players, which will likely play into the case due to Commissioner Monahan's position on the OWGR executive board.¹⁷⁴ Consequently, without participating in PGA Tour events, the world ranking for most LIV players has already fallen.¹⁷⁵ For example, in the early 2000's, Phil Mickelson spent 270 weeks as

172. See Matthew J. Mitten & Timothy Davis, *Athlete Eligibility Requirements and Legal Protection of Sports Participation Opportunities*, 8 VA. SPORTS & ENT. L.J. 71, 110 (2008) (considering Toscano's standing as player alleging antitrust litigation was insufficient compared to antitrust cause of action brought by parties excluded from participating in market).

173. See Pls.' Compl. & Demand for Jury Trial at, *supra* note 7, at 16 (describing PGA Tour's dominance over players stating, "it's all about world ranking points"); see also Stucke, *supra* note 126, at 1510 (describing monopsony power as market power on buyer's side of market); Dave Shedloski, *Here is Why The World Ranking System is so Critical to LIV Golf's Longterm Viability*, GOLF DIGEST (June 24, 2022), <https://www.golfdigest.com/story/liv-golf-applying-to-official-world-golf-ranking-pga-tour-greg-norman-jay-monahan> [<https://perma.cc/G7C5-ZZ64>] (quoting IMG golf management company co-CEO Alastair Johnston stating "[t]he rankings had become incredibly important with the respect to the landscape of golf").

174. See Tim Daniels, *World Golf Rankings Won't Give LIV Points for 1st 2 Tournaments Despite Partnership*, BLEACHER REPORT (Oct. 6, 2022), <https://bleacherreport.com/articles/10051444-world-golf-rankings-wont-give-liv-points-for-1st-2-tournaments-despite-partnership> [<https://perma.cc/QQ9R-35UZ>] (analyzing reality long-term for LIV-aligned players unable to earn ranking points leading to ineligibility for future major tournaments); see Mark Schlabach, *LIV Golf's Application to be Included in Rankings Mullied by OWGR*, ESPN (July 13, 2022), https://www.espn.com/golf/story/_/id/34235229/liv-application-ranking-mulled-official-board-governors [<https://perma.cc/F7KL-4ZXX>] (listing OWGR board members including: PGA Tour commissioner Jay Monahan, DP World Tour CEO Keith Pelley, USGA CEO Mike Whan, R&A CEO Martin Slumbers, PGA of America executive director Seth Waugh, Augusta National Golf Club executive director Will Jones and International Federation of PGA Tours representative Keith Waters). Interestingly, Sports Illustrated noticed a need and interest in keeping up with LIV players and debuted a new world golf ranking system ("SI World Golf Ranking") that puts more weight on a player's recent performance over a shorter amount of time, factors in the number of holes played, and a stat (e.g., distance per shot) that can be used for all tours and recognizes LIV Golf results. See Stuart Hall, *SI debuts world golf ranking system that factors in LIV Golf*, THE FIRST CALL (Feb. 26, 2023), <https://www.firstcallgolf.com/features/feature/2023-02-26/si-debuts-world-golf-ranking-system-that-includes-liv-golf> [<https://perma.cc/V6L5-CFUH>] (reporting SI collaboration with Golf Intelligence arose from opportunity to build better model without bias toward or against any professional tour).

175. See Schlabach, *supra* note 174 (reporting that LIV player's world ranking has already dropped).

world number 2.¹⁷⁶ Just before leaving the Tour Mickelson's world number remained around 30, but as he started to miss PGA Tour events between 2019-2020, his ranking slipped between 60-70.¹⁷⁷ After committing to LIV in 2021, he was consistently blocked from point-earning events and his ranking took a steep decline to number 254, dropping as low as 425 in 2023.¹⁷⁸ However, in April 2023, Mickelson was welcomed at the point-earning Masters Championship where he remarkably finished in second place, catapulting his world ranking number back to 74.¹⁷⁹ However, other LIV players have not been as successful as Mickelson in earning back their ranking positions, such as Dustin Johnson who sat at number 3 in 2021 but dropped to 41, despite three top-25 finishes in majors and numerous victories in LIV tournaments, and Bryson DeChambeau who fell from number 28 to 194 since leaving the Tour.¹⁸⁰

LIV also offers *guaranteed* earnings for players who participate in its tournaments.¹⁸¹ LIV's alleged harm is that the PGA Tour's ultimatum placed on players effectively forced LIV to upfront much of the payments to players through signing bonuses and scale down the number of tournaments to balance the cash outlays.¹⁸² While failing to invoke pity from public opinion, this element of guaran-

176. See *World Ranking*, Official World Golf Ranking, <https://www.owgr.com/current-world-ranking> [<https://perma.cc/8SKL-7X65>] (last visited May 5, 2023) (providing statistics of players' points earned per event, including non "counting-events").

177. See *id.* (tracking Mickelson ranking per event from career start in 1990).

178. See *id.* (dropping Mickelson to number 101 in March 2021, making it his first time out of top 100 since 1993); see also Evin Priest, *Phil Mickelson has reached this unwanted milestone in the World Ranking for the first time in 30 years*, GOLF DIGEST (Dec. 25, 2022), <https://www.golfdigest.com/story/phil-mickelson-drops-out-of-top-200-in-official-world-golf-ranking> [<https://perma.cc/L6KX-G954>] (reporting Mickelson falling out of top 200 was due to four-month hiatus after comments he made in 2021 regarding PIF's LIV Golf League and his belief he could "reshape" the PGA Tour using "leverage" from the upcoming rival league).

179. See *World Ranking*, *supra* note 176 (reporting statistics of other LIV players such as Brooks Koepka who similarly jumped from ranking number 118 to 39 after tying with Mickelson for second place at Masters in April 2023).

180. See Abdul Bari Khan, *Does LIV Golf Have OWGR Points in 2023?*, ESSENTIALLY SPORTS (Feb. 16, 2023 at 6:30 PM) <https://www.essentiallysports.com/golf-news-does-liv-golf-have-owgr-points-in-2023/> [<https://perma.cc/4ZG9-7KTR>] (arguing LIV players have been the biggest victims of OWGR policies including Dustin Johnson, who won inaugural LIV Golf season but has fallen out of top 50 rankings for first time since 2010 and 2020 US Open winner, Bryson DeChambeau, is out of top 100).

181. See *Pls.' Am. Compl. & Demand for Jury Trial*, *supra* note 21, at 90 (contesting that though LIV Golf has financial resources to pay upfront costs and minimize tournaments, ongoing cash will have significant long-term implications on viability of LIV if PGA Tour controls golf ecosystem).

182. See *id.* (arguing that impacts of continued outlays will force LIV out of marketplace).

teed compensation strongly supports the element of direct causation of harm inflicted by the PGA Tour's prohibiting restrictions.¹⁸³

However, the Tour will likely benefit from poking holes in the Plaintiffs' antitrust standing under the *Toscano* framework by highlighting the lack of antitrust harm, such as failure to enter the relevant market, a speculative measure of harm, and the risk of duplicative recovery.¹⁸⁴ Even in the presence of the Tour's anticompetitive behavior, Plaintiffs' million-dollar pockets are unlikely to convince the court they experienced substantial harm as the direct result of the PGA Tour's preventative measure to keep LIV out of the market.¹⁸⁵ For example, Phil Mickelson reportedly agreed to a deal worth \$200 million to opt out of his PGA Tour commitment and sign on to LIV's forty-eight-player tournament series.¹⁸⁶ According to the PGA Tour, not only do the excessive prize amounts negate a showing of financial harm, but it furthers no injury occurred because LIV successfully lured players to efficiently breach their PGA Tour obligations with a season planned for 2023, "and the costs of PGA Tour suspensions baked into LIV's' exorbi-

183. See e.g., *Toscano v. PGA Tour, Inc.*, 201 F. Supp. 2d 1106, 1116 (E.D. Cal. 2002) (holding that to prevail in proving directness of injury, plaintiff must be close in chain of causation to alleged market restraint); see also Morton-Bentley, *supra* note 78 (emphasizing importance of direct causation of harm to establish standing in antitrust lawsuit).

184. See e.g., *Toscano v. PGA Tour Inc.*, 201 F. Supp. 2d at 1113 (finding plaintiff-senior PGA Tour member's complaint satisfied antitrust injury requirements but held he did not have standing to bring claims because injuries were indirect, speculative, and complex). While beyond the scope of this article, it is more likely that the PGA Tour could ultimately be liable for its conduct following an investigation by the U.S. Department of Justice rather than plaintiffs in the suit because, unlike the players and LIV, the DOJ does not have to prove the PGA Tour *directly* injured, only that the PGA Tour directly affected interstate trade by its anticompetitive behavior. See David Steele, *DOJ's Golf Probe Into Possible Collusion Parallels LIV Suit*, LAW360 (Nov. 1, 2022, 5:52 PM), <https://www.law360.com/articles/1544523/doj-s-golf-probe-into-possible-collusion-parallels-liv-suit> [<https://perma.cc/57PW-T2DL>] (exploring DOJ investigation beginning in June 2022 probing not only PGA Tour, but also affiliated entities within U.S.-based men's professional golf for group boycotting independent contractors against emergence of LIV). The U.S. Department of Justice's antitrust investigation into professional golf reportedly parallels the suit brought against the PGA Tour LIV and will similarly hinge on whether the PGA Tour colluded with the U.S. men's golf majors to try to exclude players in hopes of shutting down LIV. See *id.* (reporting expansion of suit to investigating three major tournaments in addition to DP Tour according to Wall Street Journal).

185. See Adam Woodard, *supra* note 27 (explaining high net worth creates obstacle for complaining players).

186. See Sporting News, *LIV Golf Prize Money: How the Saudi-Backed Upstart Golf Tournament Compares to Majors And The PGA Tour*, SPORTING NEWS (July 15, 2022), <https://www.sportingnews.com/us/golf/news/liv-golf-prize-money-saudi-golf-tournament/xyzqdhvum39jfz4qdnatd8cb> [<https://perma.cc/K6N8-YR5G>] (describing high financial rewards as main motivator for joining LIV).

tant signing bonuses, making the Player Plaintiffs whole.”¹⁸⁷ Moreover, a ruling in favor of the Plaintiffs could duplicate their recovery.¹⁸⁸ Additionally, the Tour argues that the recent broadcasting deal between LIV and U.S. network, the CW, which will disseminate televised LIV events, mitigates any direct injury or caused an inability to enter the market.¹⁸⁹

While the lawsuit might make the high net-worth players appear litigious, it is likely their only course of action considering their employment classification as independent contractors, which leaves them without an employee base to unionize and collectively bargain.¹⁹⁰ Participants of individual professional sports, such as golf and swimming, are typically independent contractors, meaning each player must satisfy a governing body’s eligibility criteria and performance standards to participate in a competition.¹⁹¹ As demonstrated in *Toscana*, courts are generally favorable to professional standards and internal competition and eligibility requirements as set by business leagues and voluntarily agreed upon by its constituent members.¹⁹² As such, some courts tasked with analyzing antitrust harm in the sports industry have noted that injury generally requires plaintiffs to show unlawful conduct which causes an

187. See Bryan Koenig, *PGA Tour Says LIV Lured Golfers With False Antitrust Claims*, LAW360 (Sept. 29, 2022, 6:12 PM), <https://www.law360.com/articles/1535281/pg-a-tour-says-liv-lured-golfers-with-false-antitrust-claims> [<https://perma.cc/MM6A-J7PM>] (reporting PGA Tour argues that LIV knowingly enticed member golfers to breach their contractual obligations to Tour).

188. See *PGA Tour Motion to Add Counter-Defendant PIF*, *supra* note 15, at 71 (defending its conduct by asserting none of Tour’s actions alleged in Amended Complaint have caused harm to competition within relevant market).

189. Alan Blinder, *LIV Golf Reaches TV Deal, Putting Saudi-Backed Tour on The Air*, N.Y. TIMES (Jan. 19, 2023), <https://www.nytimes.com/2023/01/19/sports/golf/liv-television-cw.html> [<https://perma.cc/7X2M-ZYWH>] (reporting in 2023 that Tour signed deal with CW network to broadcast its events in U.S.).

190. See Mitten & Timothy Davis, *supra* note 172 (discussing that in non-team sports, athletes’ ability to challenge league rules is limited to challenges against either labor or antitrust laws because the players lack union representation to allow for any collective bargaining).

191. See *id.* (arguing independent sports governing bodies have economic incentive to maximize individual members’ commercial appeal to fans).

192. See *Toscana v. PGA Tour Inc.*, 201 F. Supp. 2d 1106, 1123 (E.D. Cal. 2002) (ruling plaintiff failed to prove harm caused by PGA Tour eligibility requirements excluding plaintiff from competing); *but see* *PGA Tour Inc. v. Martin*, 532 U.S. 661, 662 (2001) (holding Americans with Disabilities Act requires PGA Tour to permit physically impaired professional golfer to use cart against tournament policy to enable accessibility accommodation). In *Martin*, the Court considered whether allowing the disabled golfer to use a golf cart, despite the walking requirement that applied to the Tour’s association protocol, was not a modification that would fundamentally alter the nature of those events and was required by Title III of the ADA. See Mitten & Davis, *supra* note 190 (explaining power of collective bargaining in sports).

injury to the plaintiff flowing from said conduct that is of the type the antitrust laws were intended to prevent.¹⁹³ Although a plaintiff does not need to prevail on each factor to establish standing, and no single factor is dispositive, “the absence of antitrust injury is fatal.”¹⁹⁴ Thus, while the PGA Tour may be directly causing harm, it is unlikely that the court will find that an injury was suffered by players while signing hundred million dollar deals in exchange for temporary or permanent suspension from PGA Tour events.¹⁹⁵ This is because the district judge overseeing the case previously signaled the significance of non-competing players’ ability to earn money by signing with LIV in a prior order filed with the court.¹⁹⁶ However, as an entity attempting to enter the market, LIV may have a stronger case in demonstrating antitrust harm than the players alone.¹⁹⁷ On the other hand, LIV has been a powerful force in shaking up the Tour’s roster and impacting the market.¹⁹⁸ For instance, of the twenty-six major tournaments between 2016 and 2022, twelve were won by now-LIV golfers.¹⁹⁹ As such, the success-

193. *Chicago Pro. Sports Ltd. P’ship v. Nat’l Basketball Ass’n*, 961 F.2d 667, 670 (7th Cir. 1992) (explaining antitrust injury doctrine is to promote competition in best interest of consumers); see *City of Oakland v. Oakland Raiders*, 20 F.4th 441, 456 (9th Cir. 2021), *cert. denied sub nom. City of Oakland, California v. Oakland Raiders*, 214 L. Ed. 2d 13, 143 S. Ct. 84 (2022) (providing injuries that result from increased competition or lower (but non-predatory) prices are not encompassed by antitrust laws).

194. See *Toscano*, 201 F. Supp. 2d at 1116 (finding plaintiff need not be competitor or consumer to have standing and only needs to be market participant to satisfy antitrust injury requirement); see *City of Oakland*, 20 F.4th at 456 (antitrust injury is mandatory for standing under Article III).

195. See *Atkins*, *supra* note 79 (suggesting California federal judge hesitant to find injury established).

196. See *id.* (reporting judge found no irreparable harm insofar as plaintiffs’ request to compete in FedEx Cup Playoff tournament during PGA Tour suspension during ensuing litigation because players earned “elite pay” from Saudi-backed LIV Golf).

197. See *Toscano*, 201 F. Supp. 2d at 1119 (suggesting that damages may be awarded to more immediate victims, including PGA Tour rivals and sponsors, if able to prove other mandatory antitrust elements).

198. See *The First Cut, Cameron Smith Officially Off to LIV Golf + PGA Tour Season Superlatives*, CBS SPORTS (Aug. 30, 2022) (downloaded using Apple podcasts) (recounting scant history of PGA Tour having such significant competition).

199. See *id.* (reporting as of August 2022); see David Dusek, *Why is The Official World Golf Ranking so Important to LIV Golf? And How do Pros Qualify For Majors?*, GOLFWEEK (Nov. 16, 2022, 12:00 PM), <https://golfweek.usatoday.com/lists/official-world-golf-ranking-liv-golfers-how-pros-qualify-for-majors/> [https://perma.cc/F7AR-RS22] (listing former Masters champions included Sergio Garcia (2017), Dustin Johnson (2020), Patrick Reed (2018)); last five PGA Championship winners included Brooks Koepka (2018, 2019), Phil Mickelson (2021), last five U.S. Open winners included Brooks Koepka (2018), Bryson DeChambeau (2020); last five British Open winners included Cameron Smith (2022); last three Players Championship winners included Cameron Smith (2022)).

ful inducement of highly-achieved golfers could diminish LIV's argument that the Tour has kept it from fully entering and competing within the relevant market.²⁰⁰

Courts generally discourage expanding federal antitrust standing.²⁰¹ Even in the presence of the PGA Tour's anticompetitive behavior, courts have held that only the parties most injured by anticompetitive conduct are permitted to sue.²⁰² Interestingly, the PGA Tour asserts the inverse, that *the Tour* will face irreparable harm if a court finds it liable for antitrust violations and requires it to reinstate LIV players following public outrage over its financial backing.²⁰³

2. *Highlighting Monopsonist Danger for Independent Contractors in Sports*

There is an additional concern that antitrust lawsuits will continue from the golf community if *Mickelson v. PGA Tour, Inc.*, is litigated.²⁰⁴ However, the importance of exposing the harms of monopolies in a free market provides a strong incentive for the

200. See *The First Cut*, *supra* note 198 (opining rumors of major tournament winners leaving Tour benefits LIV in significant way, even when rumors prove to be untrue such as in case of Cameron Young, because said reporting bolsters credibility of LIV to compete with PGA Tour and makes LIV attractive to potential buyers of leagues in future).

201. See *Tosciano*, 201 F. Supp. 2d at 1119 (explaining doctrine of antitrust standing serves important interest and is not simply technical ruling).

202. See *id.* (narrowing its holding to standing in context of PGA Tour's exclusivity over media rights and conflict events rules).

203. See *Def.'s TRO Br.*, *supra* note 47, at 17 (arguing this type of conduct is not what Congress intended to protect market from in enacting Sherman Act); see e.g., Zaeem Shaikh, 'Shame on Them': Family Members of 9/11 Victims Denounce LIV Golf Tournament at Pumpkin Ridge, *THE OREGONIAN* (June 30, 2022, 3:47 PM), <https://www.oregonlive.com/portland/2022/06/shame-on-them-family-members-of-911-victims-denounce-liv-golf-tournament-at-pumpkin-ridge.html> [<https://perma.cc/3B3A-AWXW>] (reporting on protesting outside LIV participating Golf Course, Pumpkin Ridge, Oregon); Camille Furst, *It's 'Death Golf,' 9/11 Families Say as LIV Event Tees Off at Trump National*, (July 31, 2022, 7:14 AM), *NJ.COM*, <https://www.nj.com/news/2022/07/its-death-golf-911-families-say-as-liv-event-tees-off-at-trump-national.html> [<https://perma.cc/32RG-XFDQ>] (reporting on protestors outside Trump National Golf Club, Bedminster, NJ during LIV Golf outing event).

204. See *Atkins*, *supra* note 79 (reporting Judge Freeman in U.S. District Court for Northern District of California, who, as of August 2022, presiding over *Mickelson v. PGA Tour, Inc.*, denied motion filed by three plaintiffs seeking temporary restraining order on PGA's sanctions which would permit them to play in FedEx Cup). Judge Freeman determined the evidence showed the players calculated the money they would lose from missing the FedEx Cup when they negotiated their contracts with LIV Golf as significant. See *id.* (quoting Judge Freeman saying, "[I]t seems almost without a doubt that they would be able to make more [with LIV]," noting that LIV projections showing a twenty-percent increase in market share (from 0%) next year led her to predict, "I can just see the follow-on suit that LIV is a monopoly").

Plaintiffs to continue the suit.²⁰⁵ Monopoly and monopsony power are significant sources of market failure that have both economic and non-economic effects.²⁰⁶ Plaintiffs here, whatever their motives, present an opportunity to highlight the dangers of such conduct in a capitalistic economy.²⁰⁷

The labor and service market has been described as a spectrum ranging from perfect competition, consisting of multiple and alternative buyers, to monopsony, consisting of only a single buyer.²⁰⁸ According to one state supreme court, antitrust laws are equally concerned about abuses of monopsony power (to pay prices below a competitive level) and abuses of monopoly power (to charge prices above a competitive level).²⁰⁹ Therefore, the seller to a monopsony has been harmed, in the eyes of economists, as much as the buyer of the monopoly.²¹⁰ The public policies for correcting the shortcomings of such a market failure are to replace the faulting party with competition where possible, which is most commonly achieved by governments enacting antitrust laws.²¹¹

The PGA Tour justifies its conduct by pointing to the contract and bylaws agreed upon by the Plaintiffs.²¹² The economic argument embedded in that justification assumes that “take-it-or-leave-

205. See David R. Kamerschen, *The Economic Effects of Monopoly: A Lawyer's Guide to Antitrust Economics*, 27 MERCER L. REV. 1061, 1061 (1976) (arguing harm of monopoly in market from economical analysis of law perspective).

206. See Bernadette Berger, *Shut Up and Pitch: Major League Baseball's Power Struggle with Minor League Players in *Sevne v. Kansas City Royals Baseball Corp.**, 28 JEFFREY S. MOORAD SPORTS L.J. 53, 73, 83-86 (2021). (highlighting residual consequences of major sports leagues exercising dominance over vulnerable players and communities that rely on consistent employment, fair wages, and economic development).

207. See Robert D. Cooter & Thomas Ulen, *Law and Economics* at 38 (Sally Yagan et al. eds., 6th ed. 2012) (describing monopolies in their various forms are limited in ways public policies may attempt to correct).

208. See Eric Posner, *The Economic Basis of the Independent Contractor/Employee Distinction*, COASE-SANDOR WORKING PAPER SERIES IN L. AND ECON., NO. 909, 3-4 (2020), https://chicagounbound.uchicago.edu/law_and_economics_wp/39/ [<https://perma.cc/4FDL-FY9L>] (highlighting legal protections of employees compared to independent contractors).

209. See *Mueller v. Wellmark, Inc.*, 818 N.W.2d 244, 265 (Iowa 2012) (holding monopsony laws equally important source for market failure).

210. See Stucke, *supra* note 126, at 1510 (describing monopsony power as market power on buy side of market).

211. See *id.* at 1518 (explaining economics behind public policies regarding monopolies also consider that sometimes it is not possible or even desirable to replace monopolistic behavior, such as in case of natural monopolies (e.g., public utilities), which policymakers might allow continuing in, but government regulates their prices).

212. See *Def.'s TRO Br.*, *supra* note 47, at 24 (asserting plaintiffs cannot allege harm under Section 2 by PGA Tour's enforcement of agreed-upon bylaws).

it” contracts indicate perfect competition rather than a monopoly.²¹³ However, economists suggest that contracts of adhesion are generally more prevalent in a monopolistic market than a competitive one.²¹⁴ The economic theory suggests that the disadvantaged party in a contract of adhesion will typically argue that the contract is invalid for lack of bargaining, which many judges accept to prove a lack of consideration and mutual assent.²¹⁵

However, this is not always the case, especially when both parties are informed, which can result in a determination unfavorable to the Plaintiffs: that the standardized terms in form contracts are economically efficient and not biased against one party without any bargaining.²¹⁶ Economists believe that the real problem with these kinds of contracts is the party’s ignorance, not the absence of bargaining.²¹⁷ Thus, rather than solely relying on its prior defense of bylaw enforcement and deflecting to rumors that LIV is sportswashing, the Tour would be better off taking an economist’s perspective by arguing that their bylaws and vendor agreements are not “contracts of adhesion,” as proven by use of player’s highly-educated sports agents and corporate-sponsor lawyers, and that everyone in the men’s professional golf ecosystem is far from ignorant or void of bargaining power in their individual contracts with the Tour.²¹⁸

IV. ROUNDUP: FINAL THOUGHTS ON *MICKELSON V. PGA TOUR*

Commentators ranging from critics to commissioners agree that sports leagues require a certain level of authority to produce a professional sport, manage a competitive balance, and further the

213. See Cooter & Ulen, *supra* note 207, at 365 (describing economic analysis of law approach to monopolistic contracts).

214. See *id.* (explaining economists believe monopolies can cause inefficient standardization of contracts to become “contract of adhesion,” i.e., when seller takes advantage of buyer’s ignorance). Indicia for potential contracts of adhesion might include a stipulated process for resolving future disputes that favor sellers, such as compulsory arbitration before a board organized by the association of sellers. See *id.* (linking contracts of adhesion to unfair bargaining power).

215. See *id.* at 364 (suggesting “contract of adhesion” should be reserved for monopoly contracts and not “take-it-or-leave-it” contracts).

216. See *id.* at 366 (explaining how courts often use “contract of adhesion” to undermine enforceability).

217. See *id.* at 365 (suggesting in some cases standard forms, similar to PGA Tours bylaws, are used to reduce number of terms requiring drafting and agreement rather than intention to restrict competition and efficiency).

218. See *id.* (predicting evening bargaining power in creating agreement will oftentimes be sufficient for courts to refrain from interpreting standard contract terms).

success of its underlying business.²¹⁹ Courts have also recognized, through dicta if not through formal holdings, that these actions have limitations.²²⁰ Particular to the Tour's conduct, a single-entity defense will likely be unavailable because its public coordination with other prominent organizations, including the DP Tour, affects interstate trade and falls within the scope of federal antitrust law.²²¹ However, evidence that a new competitor, LIV, has successfully entered a market and begun taking market share from a major player could be "conclusive" to show the PGA Tour lacks the dominant monopoly power that LIV alleges.²²² Therefore, the more players and vendors that leave the PGA Tour for LIV will strengthen LIV's presence in the market, but weaken its legal claims against the Tour.²²³ If Saudi Arabia and PIF are using LIV as a pawn for sportswashing, then the strength of their legal claims and success in the suit is meaningless.²²⁴ Either way, it will be difficult for LIV to convince the court that it has not achieved initial success entering the market while securing players like Cameron Smith, and Phil Mickelson.²²⁵ Additionally, while "harm" takes its legal meaning in the lawsuit between millionaires, the economic principles of monopolist danger on workers and service providers in the context of

219. See Ross, *supra* note 63 at 670–71 (summarizing shared goals across professional sports leagues derived in enhancing fan enjoyment via close competition).

220. See *id.* at 671 (citing *Mackey v. NFL*, 407 F.Supp. 1000, 1006–07 (D. Minn. 1975)) (demonstrating leagues have "strong and unique" interest in competitive balance).

221. See *PGA Tour Cards to DP Players*, *supra* note 123 (highlighting agreement between PGA Tour and DP Tour for anticompetitive purposes).

222. See *United States v. Syufy Enters.*, 903 F.2d 659, 665 (9th Cir. 1990) (providing evidence that new competitor entered market and began taking market share from defendant was "conclusive" proof of defendant's lack of monopoly power).

223. See *Def.'s TRO Br.*, *supra* note 42, at 19 (quoting *Tops Mkts., Inc. v. Quality Mkts., Inc.*, 142 F.3d 90, 99 (2d Cir. 1998)) (asserting LIV's recruitment of Plaintiffs as part of full complement of forty-eight professional golfers and its "successful entry [into the market] itself refutes any inference of the existence of monopoly power that might be drawn from [the TOUR's] market share").

224. See *Yazbek*, *supra* note 146 (arguing international public responses and organization punishments are not always strong enough to pressure sportswashing nations from correcting their human rights violations).

225. See *Def.'s TRO Br.*, at 20 (quoting *Elite Rodeo Ass'n v. Prof. Rodeo Cowboys Ass'n Inc.*, 159 F.Supp. 3d 738, 745 (N.D. Tex. 2016)) (denying injunctive relief where competitor's "initial success" entering market demonstrated that defendant "does not have the ability to exclude competitors from the market"); see also Dom Farrell, *LIV Golf Tour Schedule 2022: Dates, Locations for All Eight Events in The Controversial Saudi-Backed PGA Tour Rival*, SPORTING NEWS (Aug. 1, 2022), <https://www.sportingnews.com/us/golf/news/liv-golf-tour-schedule-2022-dates-locations-prize-money/k8y0uoimtfj96lj6nd0xadhn> [<https://perma.cc/DUP8-T3ET>] (reporting LIV event schedule 2022).

sports highlight a key demographic courts have recently sought to support: athletes who lack a credible threat to quit if their compensation, wages, or working conditions worsen to unreasonable margins.²²⁶

On a final note, unbeknownst to a majority of PGA Tour or LIV golfers and board executives, just days after the PGA Tour filed a counter claim to add financial backer of LIV, Saudi Public Investment Fund governor Yasir Othman Al-Rumayyan, and hours after a heated discovery motion was ruled on by the Ninth Circuit, the PGA Commissioner and Mr. Al-Rumayyan announced a preliminary, unprecedented agreement to merge the two tours, along with the DP World tour.²²⁷ While the terms and validity of the merger, which would form a new corporation to dominate professional golf, are currently unknown to the tours or the general public, the drastic change from adversary to ally would involve dropping the current lawsuit, changing the landscape even further and leaving many antitrust questions unsolved.²²⁸ Because the implications of such a

226. See *e.g.*, *NCAA v. Alston*, 141 S. Ct. 2141, 2163–66 (2021) (finding Sherman Act prohibited NCAA from limiting education benefits for students, which spiraled into student athlete’s ability to earn income from their name, image and likeness); see Posner, *supra* note 208, at 5 (indicating legal literature argues employment and labor law should extend to contractors who may not be low-income but are nonetheless vulnerable).

227. See Shane Ryan, *15 lingering questions you might have about the PGA Tour-LIV Golf merger, with one-sentence answers*, GOLF DIGEST (June 6, 2023), <https://www.golfdigest.com/story/pga-tour-liv-golf-merger-early-lingering-questions-one-sentence-answers> [<https://perma.cc/9VD9-QLJB>] (reporting framework of surprise merger announced June 6, 2023 would create new for-profit tour between PGA Tour, DP Tour, and LIV Golf whereby many details remain to be determined); see *e.g.*, @MacHughesGolf, Twitter (June 6, 2023, 10:47 AM), <https://twitter.com/MacHughesGolf/status/16666094467903012866?ctx=HHwWhIDSmeuFJ8uAAAA> [<https://perma.cc/YC6F-FZZB>] (“Nothing like finding out through Twitter that we’re merging with a tour that we said we’d never do that with.”); see Joel Beall, *PGA Tour, LIV Golf announce surprise merger, will form new ‘commercial entity to unify golf’*, GOLF DIGEST (June 6, 2023), <https://www.golfdigest.com/story/pga-tour-liv-golf-peace-merger-2023> [<https://perma.cc/D2WK-RGUQ>] (reporting Al-Rumayyan revealed Norman did not find out about peace treaty until moments before PIF governor and PGA Tour Commissioner’s CNBC TV appearance announcing merger deal).

228. See *Squawk on the Street* (CNBC television broadcast June 6, 2023), available at <https://www.cnbc.com/video/2023/06/06/pgas-jay-monahan-and-pifs-yasir-al-rumayyan-break-down-surprise-deal-to-merge-pga-and-liv.html> [<https://perma.cc/5DL5-32WC>] (interviewing PGA Tour Commissioner Jay Monahan and Yasir Al Rumayyan, governor of Saudi Public Investment Fund (PIF), to discuss surprise agreement amidst heated legal battle). When asked to address how two parties started conversation of agreement after unfavorable public statements of the competing tours, Jay Monahan stated, “there’s been a lot of tension in our sport over the last couple of years, but what we’re talking about today is coming together to unify the game of golf and to do so under one umbrella.” See *id.* (responding to inquiry of how agreement came to be after years of hostility).

merger would contemplate various policies of federal and international law, corporate and employment considerations, and tax consequences, they are beyond the scope of this Comment at this time.²²⁹

*Nicole Antolino**

229. See e.g., Alex Lawson, *PGA-LIV Deal Leaves Sovereign Immunity Questions*, LAW360 (June 8, 2023, 6:49 PM), <https://www.law360.com/articles/1686250/pga-liv-deal-leaves-sovereign-immunity-questions-adrift> [<https://perma.cc/N9P5-8L6N>] (considering questions such as foreign sovereign immunity raised by litigation will remain unaddressed for foreseeable future).

* To my husband, my parents, and my sister. Thank you for your endless love and support.

