UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Secretary

April 21, 2023

The Honorable Jim Jordan
Chairman
Committee on the Judiciary
U.S House of Representatives
Washington, D.C. 20515

Dear Chairman Jordan,

Please find enclosed the Commission's third production in response to your February 14, 2023, letter requesting documents and information related to the Federal Trade Commission's Non-Complete Clause Notice of Proposed Rulemaking (NPRM). The Commission sent a first response on February 28, 2023. In addition, a second response was sent on March 7, 2023. The Commission continues to devote significant time and resources to respond to your request. As previously discussed, the Commission is submitting productions on a rolling basis as it collects and reviews responsive documents and information. This third production includes documents Bates stamped FTC-000001440 – FTC-000002435.

The documents and information we are providing today contain materials that have been withheld from public disclosure. In this instance, the Commission has decided to provide them to you without redactions as an accommodation and as a demonstration of the Commission's commitment to working with you and your staff. Notwithstanding this production, the Commission reserves the right to protect deliberative materials in future productions.

These documents are, in the unredacted form in which you are receiving them, confidential Commission documents. Because of their confidential nature, the Commission requests that the Committee maintain the confidentiality of this production. We further request that you consult with the Commission before you share any part of this production with outside parties and that you redact any personal information if you share information or documents with outside parties.

Thank you for that consideration and for your understanding as we continue to be responsive to this and other Committee information and document requests.

Sincerely,

April J. Tabor
Secretary

From: Schmidt, David R. [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=de89550c06a049e9bebc18a87721e26d-dschmidt]
Sent: 6/7/2022 11:43:33 AM
To: Cady, Benjamin [bcady@ftc.gov]

Subject: Declined: Non-Compete NPRM Team Meeting
Location: https://ftc.zoomgov.com/ (b)(6)

Start: 6/7/2022 1:00:00 PM
End: 6/7/2022 2:00:00 PM
Show Time As: Busy

From: Tuttle, Bryce [btuttle@ftc.gov]
Sent: 11/3/2022 8:00:00 PM
To: Tuttle, Bryce [btuttle@ftc.gov]; Rieke, Aaron [arieke@ftc.gov]; Sanchez, Catherine [csanchez@ftc.gov]; Miller, Max [mmiller6@ftc.gov]; Bedoya, Alvaro [abedoya@ftc.gov]; Wilkins, Elizabeth [ewilkins1@ftc.gov]; Wendling, Brett [bwendling@ftc.gov]
CC: Cady, Benjamin [bcady@ftc.gov]; Signs, Kelly [ksigns@ftc.gov]; Lipsitz, Michael [mlipsitz@ftc.gov]

Subject: Noncompete NPRM Briefing

Start: 11/4/2022 11:00:00 AM
End: 11/4/2022 12:00:00 PM
Show Time As: Tentative

Recurrence: (none)

Required Attendees: Rieke, Aaron; Sanchez, Catherine; Miller, Max; Bedoya, Alvaro; Wilkins, Elizabeth; Wendling, Brett
Optional Attendees: Cady, Benjamin; Signs, Kelly; Lipsitz, Michael

Microsoft Teams meeting

Join on your computer, mobile app or room device
Click here to join the meeting

Meeting ID: (b)(6)
Passcode: (b)(6)
Download Teams | Join on the web

Or call in (audio only)
(b)(6) United States, Washington DC
Phone Conference ID: (b)(6)
Find a local number | Reset PIN

Learn More | Meeting options

From: Cady, Benjamin [bcady@ftc.gov]
Sent: 10/11/2022 1:35:21 PM
To: Cady, Benjamin [bcady@ftc.gov]; Wilkins, Elizabeth [ewilkins1@ftc.gov]; Waller, Spencer [swaller@ftc.gov]

Subject: Discuss NPRM
Location: https://ftc.zoomgov.com (b)(6)

Start: 10/12/2022 1:00:00 PM
End: 10/12/2022 1:30:00 PM
Show Time As: Tentative

Required Attendees: Wilkins, Elizabeth; Waller, Spencer

Elizabeth – Spencer and I are both coming in tomorrow, so if you are coming in as well, we could meet in-person in your office (or somewhere else in the building)!

Hi there,

Benjamin Cady is inviting you to a scheduled ZoomGov meeting.

Join Zoom Meeting

One tap mobile US: (b)(6)

Meeting URL: https://ftc.zoomgov.co (b)(6)

Meeting ID: (b)(6)

Passcode (b)(6)

Join by Telephone

For higher quality, dial a number based on your current location.

Dial:

US: + (b)(6)

Meeting ID: (b)(6)

international numbers

From: Cady, Benjamin [bcady@ftc.gov]
Sent: 10/24/2022 9:42:00 AM
To: Cady, Benjamin [bcady@ftc.gov]; Wilkins, Elizabeth [ewilkins1@ftc.gov]; Farrar, Douglas [dfarrar@ftc.gov]; Edelman, Gilad [gedelman@ftc.gov]; Carter, Paige [pcarter@ftc.gov]; Lipsitz, Michael [mlipsitz@ftc.gov]; Khan, Zehra [zkhan1@ftc.gov]; Howard, Jennifer [jhoward1@ftc.gov]

Subject: Non-compete NPRM rollout
Location: https://ftc.zoomgov.com/ (b)(6)

Start: 10/31/2022 11:30:00 AM
End: 10/31/2022 12:00:00 PM
Show Time As: Tentative

Required Attendees: Wilkins, Elizabeth; Farrar, Douglas; Edelman, Gilad; Carter, Paige; Lipsitz, Michael; Khan, Zehra; Howard, Jennifer

Adding Jen

* * *

Hi Elizabeth – let's meet to discuss the rollout. We're all talking this week, and we'll send you an outline on Thursday or Friday.

Hi there,

Benjamin Cady is inviting you to a scheduled ZoomGov meeting.

Join Zoom Meeting

One tap mobile: US: (b)(6)

Meeting URL: https://ftc.zoomgov. (b)(6)

Meeting ID: (b)(6)

Passcode (b)(6)

Join by Telephone

For higher quality, dial a number based on your current location.

Dial:

US: + (b)(6)

Meeting ID: (b)(6)

International numbers

From: Cady, Benjamin [bcady@ftc.gov]
Sent: 11/26/2022 10:44:23 PM
To: Cady, Benjamin [bcady@ftc.gov]; Wilkins, Elizabeth [ewilkins1@ftc.gov]; Mackey, Sarah D. [smackey@ftc.gov]; Lipsitz, Michael [mlipsitz@ftc.gov]; Signs, Kelly [ksigns@ftc.gov]; Vita, Michael G. [MVITA@ftc.gov]

Subject: Discuss NPRM
Location: https://ftc.zoomgov.com/ (b)(6)

Start: 11/28/2022 3:00:00 PM
End: 11/28/2022 3:30:00 PM
Show Time As: Tentative

Required Attendees: Wilkins, Elizabeth; Mackey, Sarah D.; Lipsitz, Michael; Signs, Kelly; Vita, Michael G.

Hi there.

Benjamin Cady is inviting you to a scheduled ZoomGov meeting

Join Zoom Meeting

One tap mobile: US: (b)(6)

Meeting URL: https://ftc.zoomgov.com (b)(6)

Meeting ID: (b)(6)

Passcode: (b)(6)

Join by Telephone

For higher quality, dial a number based on your current location.

Dial:

US: (b)(6)

Meeting ID: (b)(6)

International numbers

From: Cady, Benjamin [bcady@ftc.gov]
Sent: 2/16/2022 10:20:13 AM
To: Cady, Benjamin [bcady@ftc.gov]; Wilkins, Elizabeth [ewilkins1@ftc.gov]

Subject: Elizabeth/Ben - discuss non-compete NPRM
Location: Microsoft Teams Meeting

Start: 2/16/2022 3:00:00 PM
End: 2/16/2022 4:00:00 PM
Show Time As: Busy

Required Attendees: Wilkins, Elizabeth

Microsoft Teams meeting

Join on your computer or mobile app
Click here to join the meeting

Learn More | Meeting options

From: Cady, Benjamin [bcady@ftc.gov]
Sent: 2/16/2022 4:20:51 PM
To: Cady, Benjamin [bcady@ftc.gov]; Mackey, Sarah D. [smackey@ftc.gov]; Lipsitz, Michael [mlipsitz@ftc.gov]
CC: Wilkins, Elizabeth [ewilkins1@ftc.gov]; Waller, Spencer [swaller@ftc.gov]; Vita, Michael G. [MVITA@ftc.gov]

Subject: Canceled: Non-Compete NPRM Team Meeting
Attachments: Untitled Attachment; Untitled Attachment; Untitled Attachment; Untitled Attachment; Untitled Attachment; Untitled Attachment; Untitled Attachment; Untitled Attachment; Untitled Attachment; Untitled Attachment; Untitled Attachment; Untitled Attachment; Untitled Attachment; Untitled Attachment; Untitled Attachment; Untitled Attachment; Untitled Attachment; Canceled: Non-Compete NPRM Team Meeting
Location: https://ftc.zoomgov.com/j/1602265909?pwd=WHp3NXFUbDNtbStxRXZyeHhTSG16UT09

Start: 12/14/2021 1:00:00 PM
End: 12/14/2021 2:00:00 PM
Show Time As: Free

Importance: High

Recurrence: Weekly
every Tuesday from 1:00 PM to 2:00 PM
Required Attendees: Mackey, Sarah D.; Lipsitz, Michael
Optional Attendees: Wilkins, Elizabeth; Waller, Spencer; Vita, Michael G.

Hi all – I think the time has come to cancel our recurring Tuesday meeting, since we have now cancelled this meeting several times in a row. I'll schedule meetings on an ad hoc basis when something comes up.

No major updates from my end this week. OGC is in the process of preparing a legal memo, which will be part of the NPRM package when we send it to the Commission. We sent OGC the draft NPRM on Friday so they can reference it as they prepare the memo. In the meantime, I'm doing a second proof of the NPRM.

And we're starting to plan for the rollout. Mike and I are currently working on a contact list and a fact sheet; Paige Carter is helping with the overall rollout planning; and we have convened an intra-agency group that is moving forward with several different projects related to the rollout.

Hope everyone is having a great week.

Ben

Hi there,

Melody Martinez is inviting you to a scheduled ZoomGov meeting.

Join Zoom Meeting

One tap mobile: US: (b)(6)

Meeting URL: (b)(6)

Meeting ID: (b)(6)

Passcode: (b)(6)

Join by Telephone

For higher quality, dial a number based on your current location.

Dial:

US: (b)(6)

(b)(6)

Meeting ID: (b)(6)

International numbers

Join from an H.323/SIP room system

H.323: (b)(6)

Meeting ID: (b)(6)

Passcode: (b)(6)

SIP: (b)(6)

Passcode (b)(6)

Appointment

To: Cady, Benjamin [bcady@ftc.gov]; Mackey, Sarah D. [smackey@ftc.gov]; Lipsitz, Michael [mlipsitz@ftc.gov]
CC: Wilkins, Elizabeth [ewilkins1@ftc.gov]; Merber, Kenneth [kmerber@ftc.gov]; Signs, Kelly [ksigns@ftc.gov]; Gilman, Daniel [dgilman@ftc.gov]; Schmidt, David R. [DSCHMIDT@ftc.gov]

Start: 3/1/2022 1:00:00 PM
End: 3/1/2022 2:00:00 PM

Recurrence: (none)

Optional Attendees: Gilman, Daniel; Merber, Kenneth; Signs, Kelly; Schmidt, David R.; Wilkins, Elizabeth

Appointment

To: Cady, Benjamin [bcady@ftc.gov]; Mackey, Sarah D. [smackey@ftc.gov]; Lipsitz, Michael [mlipsitz@ftc.gov]
CC: Wilkins, Elizabeth [ewilkins1@ftc.gov]; Merber, Kenneth [kmerber@ftc.gov]; Signs, Kelly [ksigns@ftc.gov]; Gilman, Daniel [dgilman@ftc.gov]; Schmidt, David R. [DSCHMIDT@ftc.gov]

Start: 2/22/2022 1:00:00 PM
End: 2/22/2022 2:00:00 PM

Recurrence: (none)

Optional Attendees: Gilman, Daniel; Merber, Kenneth; Signs, Kelly; Schmidt, David R.; Wilkins, Elizabeth

Appointment

To: Cady, Benjamin [bcady@ftc.gov]; Mackey, Sarah D. [smackey@ftc.gov]; Lipsitz, Michael [mlipsitz@ftc.gov]
CC: Merber, Kenneth [kmerber@ftc.gov]; Schmidt, David R. [DSCHMIDT@ftc.gov]; Wilkins, Elizabeth [ewilkins1@ftc.gov]; Gilman, Daniel [dgilman@ftc.gov]; Signs, Kelly [ksigns@ftc.gov]

Start: 2/22/2022 1:00:00 PM
End: 2/22/2022 1:30:00 PM

Recurrence: (none)

To: Mackey, Sarah D. [smackey@ftc.gov]; Lipsitz, Michael [mlipsitz@ftc.gov]; Cady, Benjamin [bcady@ftc.gov]; Mackey, Sarah D. [smackey@ftc.gov]; Lipsitz, Michael [mlipsitz@ftc.gov]

CC: Merber, Kenneth [kmerber@ftc.gov]; Signs, Kelly [ksigns@ftc.gov]; Schmidt, David R. [DSCHMIDT@ftc.gov]; Gilman, Daniel [dgilman@ftc.gov]; Merber, Kenneth [kmerber@ftc.gov]; Schmidt, David R. [DSCHMIDT@ftc.gov]; Wilkins, Elizabeth [ewilkins1@ftc.gov]; Gilman, Daniel [dgilman@ftc.gov]; Signs, Kelly [ksigns@ftc.gov]

Start: 3/1/2022 1:00:00 PM
End: 3/1/2022 1:30:00 PM

Recurrence: (none)

Appointment

To: Cady, Benjamin [bcady@ftc.gov]; Mackey, Sarah D. [smackey@ftc.gov]; Lipsitz, Michael [mlipsitz@ftc.gov]
CC: Merber, Kenneth [kmerber@ftc.gov]; Signs, Kelly [ksigns@ftc.gov]; Schmidt, David R. [DSCHMIDT@ftc.gov]; Wilkins, Elizabeth [ewilkins1@ftc.gov]; Gilman, Daniel [dgilman@ftc.gov]

Start: 3/15/2022 1:00:00 PM
End: 3/15/2022 2:00:00 PM

Recurrence: (none)

Appointment

To: Cady, Benjamin [bcady@ftc.gov]; Mackey, Sarah D. [smackey@ftc.gov]; Lipsitz, Michael [mlipsitz@ftc.gov]
CC: Merber, Kenneth [kmerber@ftc.gov]; Signs, Kelly [ksigns@ftc.gov]; Schmidt, David R. [DSCHMIDT@ftc.gov]; Wilkins, Elizabeth [ewilkins1@ftc.gov]; Gilman, Daniel [dgilman@ftc.gov]

Start: 3/22/2022 1:00:00 PM
End: 3/22/2022 2:00:00 PM

Recurrence: (none)

Appointment

To: Cady, Benjamin [bcady@ftc.gov]; Mackey, Sarah D. [smackey@ftc.gov]; Lipsitz, Michael [mlipsitz@ftc.gov]
CC: Schmidt, David R. [DSCHMIDT@ftc.gov]; Merber, Kenneth [kmerber@ftc.gov]; Signs, Kelly [ksigns@ftc.gov]; Gilman, Daniel [dgilman@ftc.gov]; Wilkins, Elizabeth [ewilkins1@ftc.gov]; Schmidt, David R. [DSCHMIDT@ftc.gov]

Start: 3/29/2022 1:00:00 PM
End: 3/29/2022 2:00:00 PM

Recurrence: (none)

To: Cady, Benjamin [bcady@ftc.gov]; Mackey, Sarah D. [smackey@ftc.gov]; Lipsitz, Michael [mlipsitz@ftc.gov]
CC: Merber, Kenneth [kmerber@ftc.gov]; Signs, Kelly [ksigns@ftc.gov]; Schmidt, David R. [DSCHMIDT@ftc.gov]; Wilkins, Elizabeth [ewilkins1@ftc.gov]; Gilman, Daniel [dgilman@ftc.gov]; Waller, Spencer [swaller@ftc.gov]

Start: 4/19/2022 1:00:00 PM
End: 4/19/2022 2:00:00 PM

Recurrence: (none)

Optional Attendees: Gilman, Daniel; Merber, Kenneth; Signs, Kelly; Schmidt, David R.; Wilkins, Elizabeth; Waller, Spencer

Appointment

To: Cady, Benjamin [bcady@ftc.gov]; Mackey, Sarah D. [smackey@ftc.gov]; Lipsitz, Michael [mlipsitz@ftc.gov]
CC: Merber, Kenneth [kmerber@ftc.gov]; Signs, Kelly [ksigns@ftc.gov]; Schmidt, David R. [DSCHMIDT@ftc.gov]; Wilkins, Elizabeth [ewilkins1@ftc.gov]; Waller, Spencer [swaller@ftc.gov]; Gilman, Daniel [dgilman@ftc.gov]

Start: 4/5/2022 1:00:00 PM
End: 4/5/2022 2:00:00 PM

Recurrence: (none)

Appointment

To: Cady, Benjamin [bcady@ftc.gov]; Mackey, Sarah D. [smackey@ftc.gov]; Lipsitz, Michael [mlipsitz@ftc.gov]
CC: Merber, Kenneth [kmerber@ftc.gov]; Signs, Kelly [ksigns@ftc.gov]; Schmidt, David R. [DSCHMIDT@ftc.gov]; Wilkins, Elizabeth [ewilkins1@ftc.gov]; Waller, Spencer [swaller@ftc.gov]; Gilman, Daniel [dgilman@ftc.gov]

Start: 4/26/2022 1:00:00 PM
End: 4/26/2022 2:00:00 PM

Recurrence: (none)

To: Cady, Benjamin [bcady@ftc.gov]; Mackey, Sarah D. [smackey@ftc.gov]; Lipsitz, Michael [mlipsitz@ftc.gov]
CC: Merber, Kenneth [kmerber@ftc.gov]; Signs, Kelly [ksigns@ftc.gov]; Gilman, Daniel [dgilman@ftc.gov]; Schmidt, David R. [DSCHMIDT@ftc.gov]; Wilkins, Elizabeth [ewilkins1@ftc.gov]; Waller, Spencer [swaller@ftc.gov]; Vita, Michael G. [MVITA@ftc.gov]

Start: 5/4/2022 1:00:00 PM
End: 5/4/2022 2:00:00 PM
Show Time As: Tentative

Recurrence: (none)

Moving next week's team meeting to Wednesday so we can discuss the comments from intra-agency review, which are due at 5 pm Tuesday.

Hi there,

Melody Martinez is inviting you to a scheduled ZoomGov meeting.

Join Zoom Meeting

One tap mobile: US (b)(6)

Meeting URL: https://ftc.zoomgov (b)(6)

Meeting ID: (b)(6)

Passcode: (b)(6)

Join by Telephone

For higher quality, dial a number based on your current location.

Dial:

US: + (b)(6)

(b)(6)

Meeting ID: (b)(6)

International numbers

Join from an H.323/SIP room system

H.323: (b)(6)

Meeting ID: (b)(6)

Passcode: (b)(6)

SIP: (b)(6)

Passcode: (b)(6)

To: Cady, Benjamin [bcady@ftc.gov]; Mackey, Sarah D. [smackey@ftc.gov]; Lipsitz, Michael [mlipsitz@ftc.gov]
CC: Merber, Kenneth [kmerber@ftc.gov]; Signs, Kelly [ksigns@ftc.gov]; Schmidt, David R. [DSCHMIDT@ftc.gov]; Wilkins, Elizabeth [ewilkins1@ftc.gov]; Waller, Spencer [swaller@ftc.gov]; Vita, Michael G. [MVITA@ftc.gov]; Gilman, Daniel [dgilman@ftc.gov]

Start: 5/17/2022 1:00:00 PM
End: 5/17/2022 2:00:00 PM

Recurrence: (none)

To: Cady, Benjamin [bcady@ftc.gov]; Mackey, Sarah D. [smackey@ftc.gov]; Lipsitz, Michael [mlipsitz@ftc.gov]
CC: Signs, Kelly [ksigns@ftc.gov]; Gilman, Daniel [dgilman@ftc.gov]; Schmidt, David R. [DSCHMIDT@ftc.gov]; Wilkins, Elizabeth [ewilkins1@ftc.gov]; Waller, Spencer [swaller@ftc.gov]; Vita, Michael G. [MVITA@ftc.gov]

Start: 5/31/2022 1:00:00 PM
End: 5/31/2022 1:30:00 PM
Show Time As: Tentative

Recurrence: (none)

Hi all – I don't have anything major for the agenda today, so we probably won't need more than 30 minutes. I'll just give a drafting update and then open the floor in case there's anything else anyone wants to discuss.

Hope everyone had a good weekend.

Thanks,
Ben

Hi there,

Melody Martinez is inviting you to a scheduled ZoomGov meeting.

Join Zoom Meeting

One tap mobile: US: (b)(6)

Meeting URL: https://ftc.zoomgov.co (b)(6)

Meeting ID: (b)(6)

Passcode: (b)(6)

Join by Telephone

For higher quality, dial a number based on your current location.

Dial:

US: + (b)(6)

(b)(6)

Meeting ID: (b)(6)

International numbers

Join from an H.323/SIP room system

H.323

Meeting ID: (b)(6)

Passcode: (b)(6)

SIP: (b)(6)

Passcod (b)(6)

To: Cady, Benjamin [bcady@ftc.gov]; Mackey, Sarah D. [smackey@ftc.gov]; Lipsitz, Michael [mlipsitz@ftc.gov]
CC: Signs, Kelly [ksigns@ftc.gov]; Gilman, Daniel [dgilman@ftc.gov]; Schmidt, David R. [DSCHMIDT@ftc.gov]; Wilkins, Elizabeth [ewilkins1@ftc.gov]; Waller, Spencer [swaller@ftc.gov]; Vita, Michael G. [MVITA@ftc.gov]

Start: 6/7/2022 1:00:00 PM
End: 6/7/2022 2:00:00 PM
Show Time As: Tentative

Recurrence: (none)

Optional Attendees: Signs, Kelly; Gilman, Daniel; Schmidt, David R.; Wilkins, Elizabeth; Waller, Spencer; Vita, Michael G.

Changing this back to an hour since we may need the full hour. (Sorry -- I realize I just changed this to a half-hour last night.)

Hi there

Melody Martinez is inviting you to a scheduled ZoomGov meeting.

Join Zoom Meeting

One tap mobile: US: +(b)(6)

Meeting URL: https://ftc.zoomgov.com/(b)(6)

Meeting ID: 1(b)(6)

Passcode (b)(6)

Join by Telephone

For higher quality, dial a number based on your current location.

Dial:

US: +(b)(6)

(b)(6)

Meeting ID: (b)(6)

Join from an H.323/SIP room system

H.323

(b)(6)

Meeting ID:

Passcode (b)(6)

SIP: (b)(6)

Passcode: (b)(6)

Appointment

To: Cady, Benjamin [bcady@ftc.gov]; Mackey, Sarah D. [smackey@ftc.gov]; Lipsitz, Michael [mlipsitz@ftc.gov]
CC: Signs, Kelly [ksigns@ftc.gov]; Gilman, Daniel [dgilman@ftc.gov]; Schmidt, David R. [DSCHMIDT@ftc.gov]; Wilkins, Elizabeth [ewilkins1@ftc.gov]; Waller, Spencer [swaller@ftc.gov]; Vita, Michael G. [MVITA@ftc.gov]

Start: 6/14/2022 1:00:00 PM
End: 6/14/2022 2:00:00 PM

Recurrence: (none)

To: Cady, Benjamin [bcady@ftc.gov]; Mackey, Sarah D. [smackey@ftc.gov]; Lipsitz, Michael [mlipsitz@ftc.gov]
CC: Signs, Kelly [ksigns@ftc.gov]; Gilman, Daniel [dgilman@ftc.gov]; Schmidt, David R. [DSCHMIDT@ftc.gov]; Wilkins, Elizabeth [ewilkins1@ftc.gov]; Waller, Spencer [swaller@ftc.gov]; Vita, Michael G. [MVITA@ftc.gov]; Kalil, Ian [ikalil@ftc.gov]

Start: 6/22/2022 11:00:00 AM
End: 6/22/2022 12:00:00 PM
Show Time As: Tentative

Recurrence: (none)

Optional Attendees: Signs, Kelly; Gilman, Daniel; Schmidt, David R.; Wilkins, Elizabeth; Waller, Spencer; Vita, Michael G.; Kalil, Ian

Appointment

To: Cady, Benjamin [bcady@ftc.gov]; Mackey, Sarah D. [smackey@ftc.gov]; Lipsitz, Michael [mlipsitz@ftc.gov]
CC: Signs, Kelly [ksigns@ftc.gov]; Gilman, Daniel [dgilman@ftc.gov]; Wilkins, Elizabeth [ewilkins1@ftc.gov]; Waller, Spencer [swaller@ftc.gov]; Vita, Michael G. [MVITA@ftc.gov]; Kalil, Ian [ikalil@ftc.gov]

Start: 7/12/2022 1:00:00 PM
End: 7/12/2022 2:00:00 PM

Recurrence: (none)

Optional Attendees: Signs, Kelly; Gilman, Daniel; Wilkins, Elizabeth; Waller, Spencer; Vita, Michael G.; Ian Kalil

To: Cady, Benjamin [bcady@ftc.gov]; Mackey, Sarah D. [smackey@ftc.gov]; Lipsitz, Michael [mlipsitz@ftc.gov]
CC: Signs, Kelly [ksigns@ftc.gov]; Gilman, Daniel [dgilman@ftc.gov]; Wilkins, Elizabeth [ewilkins1@ftc.gov]; Waller, Spencer [swaller@ftc.gov]; Vita, Michael G. [MVITA@ftc.gov]

Subject: Canceled: Non-Compete NPRM Team Meeting

Start: 8/30/2022 1:00:00 PM
End: 8/30/2022 2:00:00 PM
Show Time As: Free

Importance: High

Recurrence: (none)

Hi all – we are still in somewhat of a holding pattern while we wait for comments from the Chair and further clarity on the substance of the Policy Statement. So I don't think we need to meet tomorrow. But please look out for a draft of the Commission memo, which I should be circulating to you all tomorrow.

Thanks,
Ben

Hi there,

Melody Martinez is inviting you to a scheduled ZoomGov meeting.

Join Zoom Meeting

One tap mobile: (b)(6)

Meeting URL: https://ftc.zoomgov.com (b)(6)

Meeting ID: (b)(6)

Passcode: (b)(6)

Join by Telephone

For higher quality, dial a number based on your current location.

Dial: (b)(6)

Meeting ID: (b)(6)

International numbers

Join from an H.323/SIP room system

H.323: (b)(6)

Meeting ID:

Passcode:

SIP: (b)(6)

Passcode:

From: Cady, Benjamin [bcady@ftc.gov]
Sent: 2/16/2022 4:20:23 PM
To: Cady, Benjamin [bcady@ftc.gov]; Lipsitz, Michael [mlipsitz@ftc.gov]; Mackey, Sarah D. [smackey@ftc.gov]; Merber, Kenneth [kmerber@ftc.gov]; Signs, Kelly [ksigns@ftc.gov]
CC: Wilkins, Elizabeth [ewilkins1@ftc.gov]

Subject: HOLD for non-compete team meeting
Location: Microsoft Teams Meeting

Start: 2/17/2022 12:30:00 PM
End: 2/17/2022 1:00:00 PM
Show Time As: Tentative

Required Attendees: Lipsitz, Michael; Mackey, Sarah D.; Merber, Kenneth; Signs, Kelly
Optional Attendees: Wilkins, Elizabeth

Let's meet to discuss the next steps on the Phase 2 memo. I'm hoping we'll have ACP's comments by this time.

(And sorry for the lunchtime meeting – it was the only time that was open. Please feel free to bring food.)

Microsoft Teams meeting

Join on your computer or mobile app
Click here to join the meeting

Learn More | Meeting options

Appointment

From: Wilkins, Elizabeth [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=283b3b96fe4b4a94b139cab290f92bea-ewilkins1]
Sent: 5/4/2022 1:21:07 PM
To: Wilkins, Elizabeth [ewilkins1@ftc.gov]

Subject: NOTE: Save time for NPRM Review

Start: 5/30/2022 8:30:00 AM
End: 5/30/2022 9:00:00 AM
Show Time As: Free

From: Cady, Benjamin [bcady@ftc.gov]
Sent: 6/21/2022 12:13:08 PM
To: Cady, Benjamin [bcady@ftc.gov]; Arnow-Richman, Rachel [(b)(6)@law.ufl.edu]; Wilkins, Elizabeth [ewilkins1@ftc.gov]; Lipsitz, Michael [mlipsitz@ftc.gov]
CC: Dan Gilman [dgilman@ftc.gov]; Mackey, Sarah D. [smackey@ftc.gov]; Vita, Michael G. [MVITA@ftc.gov]; Waller, Spencer [swaller@ftc.gov]; Kalil, Ian [ikalil@ftc.gov]; Arnow-Richman, Rachel

Subject: Non-compete discussion with FTC
Location: https://ftc.zoomgov.com (b)(6)

Start: 6/27/2022 11:30:00 AM
End: 6/27/2022 12:00:00 PM
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Required Attendees: Cady, Benjamin; Arnow-Richman, Rachel; Wilkins, Elizabeth; Lipsitz, Michael
Optional Attendees: Dan Gilman; Mackey, Sarah D.; Mike Vita (MVITA@ftc.gov); Spencer Weber Waller (swaller@ftc.gov); Kalil, Ian; Arnow-Richman, Rachel

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To: Wilkins, Elizabeth [ewilkins1@ftc.gov]; Holland, Caroline [choiland@ftc.gov]; Woolery, Ricardo [rwoolery@ftc.gov]; Slaughter, Rebecca [rslaughter@ftc.gov]; Cady, Benjamin [bcady@ftc.gov]; Lipsitz, Michael [mlipsitz@ftc.gov]; Mackey, Sarah D. [smackey@ftc.gov]
CC: Greer, Kristin [kgreer@ftc.gov]; Mohamad Batal (mbatal@ftc.gov) [mbatal@ftc.gov]; Doak, Allison [adoak@ftc.gov]; Raman, Achutha [araman@ftc.gov]

Subject: Briefing on the non-compete rule
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End: 6/27/2022 3:00:00 PM
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Required Attendees: Wilkins, Elizabeth; Holland, Caroline; Woolery, Ricardo; Slaughter, Rebecca; Cady, Benjamin; Lipsitz, Michael; Mackey, Sarah D.
Optional Attendees: Greer, Kristin; Mohamad Batal (mbatal@ftc.gov); Doak, Allison; Raman, Achutha

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CC: Dan Gilman [dgilman@ftc.gov]; Mackey, Sarah D. [smackey@ftc.gov]; Vita, Michael G. [MVITA@ftc.gov]; Waller, Spencer [swaller@ftc.gov]; Kalil, Ian [ikalil@ftc.gov]

Subject: Non-compete discussion with FTC
Location: https://ftc.zoomgov.com (b)(6)

Start: 6/23/2022 11:00:00 AM
End: 6/23/2022 11:30:00 AM
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Required Attendees: Heidi Shierholz; Elizabeth Wilkins; Mike Lipsitz
Optional Attendees: Dan Gilman; Sarah Mackey; Mike Vita (MVITA@ftc.gov); Spencer Weber Waller (swaller@ftc.gov); Kalil, Ian

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Sent: 6/22/2022 3:26:26 PM
To: Cady, Benjamin [bcady@ftc.gov]; (b)(6) @gmail.com; Wilkins, Elizabeth [ewilkins1@ftc.gov]; Lipsitz, Michael [mlipsitz@ftc.gov]
CC: Dan Gilman [dgilman@ftc.gov]; Mackey, Sarah D. [smackey@ftc.gov]; Vita, Michael G. [MVITA@ftc.gov]; Waller, Spencer [swaller@ftc.gov]; Kalil, Ian [ikalil@ftc.gov]

Subject: Non-compete discussion with FTC
Location: https://ftc.zoomgov.com/ (b)(6)

Start: 7/6/2022 2:00:00 PM
End: 7/6/2022 2:30:00 PM
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Required Attendees: (b)(6) gmail.com; Elizabeth Wilkins; Mike Lipsitz
Optional Attendees: Dan Gilman; Mackey, Sarah D.; Mike Vita (MVITA@ftc.gov); Spencer Weber Waller (swaller@ftc.gov); Kalil, Ian

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To: Walker, Schonette [swalker@oag.state.md.us]; Wilkins, Elizabeth [ewilkins1@ftc.gov]; Alacoque Nevitt [Alacoque.Nevitt@dc.gov]; Amanda Lee [Amanda.Lee@atg.in.gov]; Berger, Thomas J [thomas.j.berger@hawaii.gov]; Black, Christina (ATG [christina.black@atg.wa.gov]; Bloom, Bryan [Bryan.Bloom@ag.ny.gov]; Bradshaw, Grace (AGO [grace.bradshaw@state.ma.us]; Bryan Sanchez [Bryan.Sanchez@law.njoag.gov]; CalebSmith-contact [caleb.smith@oag.ok.gov]; Canaday, James [james.canaday@ag.state.mn.us]; Christopher Hallock [challock@attorneygeneral.gov]; David Sonnenreich [dsonnenreich@agutah.gov]; Demers, Nicole [Nicole.Demers@ct.gov]; Dunlap, Jeffrey [jdunlap@oag.state.md.us]; Durst, Arthur (OAG [arthur.durst@dc.gov]; Elizabeth Mxeiner [Elizabeth.maxeiner@ilag.gov]; Emily Myers (b)(6) @NAAG.ORG]; Etie-Lee Schaub [ESchaub@riag.ri.gov]; Hoffmann, Elinor [Elinor.Hoffmann@ag.ny.gov]; Honick, Gary [ghonick@oag.state.md.us]; Hubbard, Robert [Robert.Hubbard@ag.ny.gov]; Isabella Pitt [Isabella.Pitt@law.njoag.gov]; Jackson, Catherine [catherine.jackson@dc.gov]; Jacob.murray@atg.in.gov; Jamison T. Ball [Tate.Ball@AG.TN.GOV]; Thomson, Jennifer [jthomson@attorneygeneral.gov]; Jessica Agarwal [jessica.agarwal@ag.ny.gov]; jkirk [jkirk@attorneygeneral.gov]; Joseph 'Chervin [JChervin@atg.state.il.us]; joseph.meyer [joseph.meyer@ag.state.mn.us]; Kemerer, Hannibal [hkemerer@oag.state.md.us]; Khan, Meryum (AGO [meryum.khan@state.ma.us]; Laura Namba [Laura.Namba@doj.ca.gov]; LynetteBakker-Contact [Lynette.Bakker@AG.KS.GOV]; Marie W. Martin [MWMartin@ag.nv.gov]; Marisa Hernandez-Stern [Marisa.Hernandez-Stern@doj.ca.gov]; Mark, Cynthia (AGO [cynthia.mark@state.ma.us]; Mary Martin [MMartin@ag.nv.gov]; Matelis Christy [cmatelis@agutah.gov]; Matlack, William (AGO [William.Matlack@state.ma.us]; Max.Miller [Max.Miller@iowa.gov]; McFarlane, Amy [Amy.McFarlane@ag.ny.gov]; Michaloski, Matthew [Matthew.Michaloski@atg.in.gov]; Moler, Jonathan [Jonathan.Moler@ag.state.mn.us]; Morejon, Amanda (AGO [amanda.morejon@state.ma.us]; Nicholas Niemiec [Nicholas.Niemiec@myfloridalegal.com]; Nodit, Luminita (ATG [LuminitaN@ATG.WA.GOV]; Olson, John [john.olson@ag.idaho.gov]; Pamela Pham [Pamela.Pham@doj.ca.gov]; Paul Harper [Paul.Harper@ilag.gov]; philip.rizzo@atg.in.gov; Queyn Toland [Quyen.Toland@doj.ca.gov]; Rao, Rahul (ATG [RahulR@ATG.WA.GOV]; Robert J Yaptangco [Robert.Yaptangco@ohioattorneygeneral.gov]; Robert Yaptangco [Robert.Yaptangco@OhioAGO.gov]; Satoshi Yanai [satoshi.yanai@doj.ca.gov]; Sharp, Margaret [Margaret.Sharp@oag.texas.gov]; Shencopp, Erin [EShencopp@atg.state.il.us]; steve provazza [sprovazza@riag.ri.gov]; Tara Pincock [tpincock@agutah.gov]; Timothy Fraser [timothy.fraser@myfloridalegal.com]; Tucker, Lucas [ltucker@ag.nv.gov]; Tulin, Leah [ltulin@oag.state.md.us]; Walker, Nancy A. [nwalker@attorneygeneral.gov]; William Rogers [RogersW@ag.louisiana.gov]; Yale Leber [Yale.Leber@law.njoag.gov]; Zach Biesanz [Zach.Biesanz@ag.state.mn.us]; Alexander James Colvin (b)(6) cornell.edu]; Amezcua, Carrie G (b)(6) bipc.com]; (b)(6) ec.europa.eu; Anne Schneider (b)(6) statecenterinc.org]; avery gardiner [avery_gardiner@judiciary-dem.senate.gov]; Batal, Mohamad [mbatal@ftc.gov]; belga (b)(6) sticecatalyst.org]; Bond, Slade [slade.bond@mail.house.gov]; Braun, Christi (b)(6) @vumc.org]; (b)(6) hoganlovells.com (b)(6) @ucsd.edu; dave balan (b)(6) gmail.com]; DAVID DESARIO (b)(6) empworkerjustice.org] (b)(6) brandeis.edu; (b)(6) (b)(6) @ec.europa.eu]; Doha.Mekki [Doha.Mekki@usdoj.gov]; Eric Posner (b)(6) uchicago.edu]; Eric.posner@usdoj.gov; Funk, Stephanie [sfunk@ftc.gov]; Gerstein, Terri Ellen (b)(6) law.harvard.edu]; Greer, Kristin [kgreer@ftc.gov]; Harsch, Ryan F. [rharsch@ftc.gov]; Harvey, Dean (b)(6) @lchb.com]; Holland, Caroline [cholland@ftc.gov]; Ioana Marinescu (b)(6) @upenn.edu]; Jane Flanagan (b)(6) gmail.com]; Johnson, Heather [hjohnson@ftc.gov]; Jon Leibowitz (b)(6) gmail.com]; (b)(6) @omm.com; Berg, Karen E. [KBERG@ftc.gov]; (b)(6) c.europa.eu; Levine, Gail (b)(6) hayerbrown.com]; Marc Edelman (b)(6) @aol.com]; Mark, Synda [smark@ftc.gov]; Mast, Andrew (ATR [Andrew.Mast@usdoj.gov] (b)(6) duke.edu; megan jones (b)(6) ausfeld.com]; Myriam E Gilles (b)(6) yu.edu] (b)(6) economicliberties.us; Robinson, Tabatha (b)(6) law.harvard.edu]; Salahi, Yama (b)(6) @lchb.com]; (b)(6) (b)(6) ec.europa.eu]; Tanuja Gupta (b)(6) @gmail.com]; Terri Gerstein (b)(6) @gmail.com]; vaheesan (b)(6) openmarketsinstitute.org]; Van Wye, Joseph [Joseph.VanWye@mail.house.gov]; William Wu (b)(6) @mcmillan.ca]; Woolery, Ricardo [rwoolery@ftc.gov]; (b)(6) @edelson.com
CC: Warren, Byron [bwarren@oag.state.md.us]; Dill, Megan [mdill@oag.state.md.us]; LaPonzina, Dean [dlaponzina@oag.state.md.us]; David Balar (b)(6) conone.com]

Subject: FW: NAAG Antitrust and Labor Issues Working Group Call--OPEN call

Attachments: Balan Noncompetes Writeup Sketch.pdf; CPI-Balan_2020.pdf; Non-Competes_Antitrust Bulletin_Published Online.pdf; 06 13 2022 ALIWG Agenda Open Call..pdf
Location: zoom

Start: 6/13/2022 2:00:00 PM
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Recurrence: (none)

-----Original Appointment-----
From: Walker, Schonette
Sent: Friday, February 11, 2022 4:05 PM
To: Walker, Schonette; Alacoque Nevitt; Amanda Lee; Berger, Thomas J; Black, Christina (ATG; Bloom, Bryan; Bradshaw, Grace (AGO; Bryan Sanchez; Caleb Smith; Canaday, James; Christopher Hallock; David Sonnenreich; Demers, Nicole; Dunlap, Jeffrey; Durst, Arthur (OAG; Elizabeth Mxeiner; Emily Myers; Etie-Lee Schaub; Hoffmann, Elinor; Honick, Gary; Hubbard, Robert; Isabella Pitt; Jackson, Catherine; Jacob.murray@atg.in.gov; Jamison T. Ball; Jennifer Thomson; Jessica Agarwal; jkirk; Joseph 'Chervin; joseph.meyer; Kemerer, Hannibal; Khan, Meryum (AGO; Laura Namba; Lynette Bakker; Marie W. Martin; Marisa Hernandez-Stern; Mark, Cynthia (AGO; Mary Martin; Matelis Christy; Matlack, William (AGO; Max.Miller; McFarlane, Amy; Michaloski, Matthew; Moler, Jonathan; Morejon, Amanda (AGO; Nicholas Niemiec; Nodit, Luminita (ATG; Olson, John; Pamela Pham; Paul Harper; philip.rizzo@atg.in.gov; Queyn Toland; Rao, Rahul (ATG; Robert J Yaptangco; Robert Yaptangco; Satoshi Yanai; Sharp, Margaret; Shencopp, Erin; steve provazza; Tara Pincock; Timothy Fraser; Tucker, Lucas; Tulin, Leah; Walker, Nancy A.; William Rogers; Yale Leber; Zach Biesanz; Alexander James Colvin; Amezcua, Carrie G.; (b)(6) @ec.europa.eu; Anne Schneider; avery gardiner; Batal, Mohamad; belga; Bond, Slade; Braun, Christi; (b)(6) @hoganlovells.com (b)(6) @ucsd.edu; dave balan; DAVID DESARIO; (b)(6) brandeis.edu; DEMIROGLOU Aristeidis; Doha.Mekki; Eric Posner; Eric.posner@usdoj.gov; Funk, Stephanie; Gerstein, Terri Ellen; Greer, Kristin; Harsch, Ryan F.; Harvey, Dean; Holland, Caroline; Ioana Marinescu; Jane Flanagan; Johnson, Heather; Jon Leibowitz; (b)(6) @omm.com; KBERG@ftc.gov; (b)(6) @ec.europa.eu; Levine, Gail; Marc Edelman; Mark, Synda; Mast, Andrew (ATR; (b)(6) @duke.edu; megan jones; Myriam E Gilles; (b)(6) @economicliberties.us; Robinson, Tabatha; Salahi, Yaman; STROUVALI Konstantina; Tanuja Gupta; Terri Gerstein; vaheesan; Van Wye, Joseph; Wilkins, Elizabeth; William Wu; Woolery, Ricardo; (b)(6) @edelson.com; Jeffrey Dunlap (jdunlap@oag.state.md.us); Leah Tulin (ltulin@oag.state.md.us)
Cc: Byron Warren (bwarren@oag.state.md.us); Dill, Megan; LaPonzina, Dean; David Balan
Subject: NAAG Antitrust and Labor Issues Working Group Call--OPEN call
When: Monday, June 13, 2022 2:00 PM-3:00 PM (UTC-05:00) Eastern Time (US & Canada).
Where: zoom

These open WG calls will be held on the 2nd Monday in February, April, June, August, October and December at 2PM EST. Calendar invites will be updated with agendas shortly before the calls. Thank you. ~Schonette

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June 9, 2022

Introduction:

- This note is about the effects of non-competes on the workers who are party to them. It is not about the effects of non-competes on third parties.

- Recent research strongly suggests that non-competes are harmful to workers.[1] More specifically, and contrary to an argument that is commonly offered in support of non-competes, they are often imposed on workers involuntarily, rather than being the product of negotiation in which the worker receives something that they value at least as much as they dislike the non-compete.

- This harm to workers is not necessarily a competitive harm.[2] The purpose of this note is to argue that it can in fact reasonably be considered a competitive harm, and to briefly sketch an approach for bringing antitrust cases challenging non-competes.

Monopsony Power as a Basis for Antitrust Action Against Non-competes:

- A commonly-held view is that for non-competes to be an antitrust problem, they must be caused by monopsony power in the labor market.

- It may therefore seem natural for a central element of an investigation to be about identifying monopsony power among the firms that impose non-competes on workers.

- In my view, in many or even most cases this is likely to be a mistake, for two reasons.

- First, monopsony power may genuinely not be present. And even if it is present, it may be very difficult or impossible to prove.[3]

- Second, even if monopsony power could be proven, it is not clear that it can work as a basis for an enforcement action. The reason is as follows. Unless the claim against the non-competes is accompanied by a conventional Section 2 or Section 7 claim, the FTC/DOJ or the state AG will in effect be conceding that the monopsony power possessed by the firms was

[1] See the empirical work by Evan Starr and his many co-authors (including BE economist Michael Lipsitz), and also Balan (2021).

[2] This note is about non-competes that cause harm to the workers who are party to them. For cases where the competitive harm is to third parties (such as business that cannot find qualified workers, and their customers and workers), the problem is quite obviously a competition problem.

[3] There is some new research suggesting that monopsony power is more prevalent than had previously been believed, even for low-wage workers. This may somewhat lower the burden for showing that monopsony power exists. But to my knowledge this new research has not been tested in court, and even under this lower burden monopsony power may still be absent or at least difficult to prove.

acquired legally. And as a general matter, exercising legally-acquired market power is legal. So if the firm decides to exercise its market power by imposing a non-compete, how is that more illegal than another avenue of exercising it, such as lowering the wage? This strikes me as basically a fatal objection to the idea of basing non-competes enforcement on monopsony power possessed by the firm.

An Alternative Approach for Antitrust Enforcement Against Non-Competes (Main Idea):

- I suggest a different approach.[4] To see how different it is from a monopsony-based approach, begin by assuming that the labor market is extremely competitive, in the sense that on the day the worker accepted their job that worker had essentially an unlimited number of observationally equivalent job offers.[5] Obviously this is an extreme assumption, but it serves to emphasize the point.

- The basis for the alternative approach lies in the following facts: (i) dissolving job matches is costly for both the worker (who must engage in a costly search for another job) and the firm (that must engage in a costly search for another worker); and (ii) labor agreements are incomplete (meaning that not every term is specified up front before the match is formed) and costly to enforce (meaning that even terms that are specified up front may be performed only partially or not at all).

- Another way of saying that dissolving the match is costly to the worker and the firm is that preserving the match generates match-specific economic surplus to be divided between the worker and the firm. This surplus can be very substantial. And the fact that labor agreements are incomplete and imperfectly enforceable means that the division of this surplus cannot be fully determined up front. Instead, the division will be determined largely by informal bilateral bargaining between the worker and the firm. The worker will try to grab more of the surplus in the form of (say) demanding longer breaks, and the firm will try to grab more of the surplus in the form of (say) insisting on shorter breaks.

- In this informal bargaining, as in any other bargaining, the division of the surplus depends on how much each side "needs" an agreement. This in turn depends on how good or bad is each party's next-best alternative to reaching an agreement (often called the "outside option"). The worse the worker's outside option (i.e., the more costly it is for the worker to be fired), the lower their bargaining leverage relative to the firm, and the worse the terms they will receive. Similarly, the worse the firm's outside option (i.e., the more costly it is

[4] What follows is largely based on Balan (2020), but has been refined and expanded since that article was published.
[5] That is, the jobs need not all be identical; the assumption is only that any differences could not be discerned by the worker at the time the job was accepted.

for the firm to have the worker quit), the lower its bargaining leverage relative to the worker, and the worse the terms it will receive.

- Non-competes make the worker's outside option worse. Without the non-compete, the worker's outside option is the best job they can get. With the non-compete, the worker's outside option is the best job they can get that does not violate the non-compete. If the non-compete is binding to any significant degree, then the latter outside option will be substantially worse than the former.

- **This brings us to the central claim of this note. Non-competes are a competition problem NOT because they are the product of monopsony power possessed by firms, but rather because they make it more difficult for the worker to access the benefits of the competitive labor market. Put another way, the problem is not that the labor market is bad because it is monopsonized; the problem is that the labor market is competitive and good but the worker cannot participate in it.**

Discussion:

- There are two points related to this approach that merit discussion.

- First and perhaps most important, this approach **DOES** require that non-competes are imposed on workers against their will, rather than being something that workers freely agree to in exchange for something that they value at least as much. The empirical evidence plus the discussion in Balan (2021) strongly suggest that this is true (especially but **NOT** exclusively for low-wage workers), but it is still a necessary condition and it would need to be demonstrated in court. In other words, this approach is about showing that the harmfulness to workers of non-competes, **once demonstrated**, is specifically an antitrust problem. But it does not eliminate the need to perform the prior step and demonstrate that non-competes are harmful to workers.

- Second, the fact that this approach is not rooted in monopsony power does not mean that competition in the labor market is irrelevant. It is still necessary to show that the restraint imposed on the worker by the non-compete is meaningful. If there were 1000 equivalent jobs, and the non-compete denied the worker access to 100 of them, there would still be 900 equivalent jobs remaining and the non-compete would not have caused any harm. So there would still be a need to show that the jobs that the non-competes prevent the workers from taking are meaningfully preferable, to a sufficient number of workers, to other

available jobs. In many cases this will likely not be very difficult (jobs really are quite differentiated, even low-wage jobs), but it will still be necessary to prove it.[6]

An Alternative Approach for Antitrust Enforcement Against Non-Competes (Additional Idea):

- The main idea for this new approach was described above. There is an additional idea that is both less important and more difficult to understand. But it does identify an additional source of harm from non-competes, so I describe it here briefly.

- As discussed above, the outcome of the informal bargaining between the worker and the firm over the match-specific surplus depends on each side's outside option. This is commonly modeled in antitrust economics using the Nash Bargaining model. In that model, reducing the value of **either** side's outside option increases the total match-specific surplus. This means that the match-specific surplus is greater with a non-compete than without: when one side's outside option gets worse, that side needs a deal more, and when **either** side needs a deal more, the total surplus from the match is higher.

- There might appear to be a contradiction, or at least a tension, between the claim that the non-compete makes the worker worse off by degrading their bargaining leverage and the claim that the non-compete increases the match-specific surplus. But there is no contradiction: the non-compete does increase the surplus, because the worker's weaker relative bargaining position makes them value the match more. It also harms the worker, because it was precisely that weakening of the worker's bargaining leverage that caused the increase in the surplus.

- A numerical example will help clarify the point. Suppose that the non-compete degrades the worker's outside option by $100. That is, if the negotiation fails and the match is dissolved the worker will be worse off by $100 relative to what it would be absent the non-compete. The total surplus is the sum of how much the worker values the match plus how much the firm values the match, so the non-compete has increased total surplus by $100.

- That additional surplus has to be divided somehow. In the Nash Bargaining model, the division of the surplus is determined by the "split parameter." So for example if the split parameter was 0.5, that would mean that each side captures half of the surplus. So if the non-compete increased the surplus by $100, the worker would capture $50 of that surplus. So the degradation of the worker's outside option made them worse off by $100, but they

[6] This idea is related to market definition. Whether it should be treated literally as market definition (i.e., defined according to the Hypothetical Monopolist Test as laid out in the Horizontal Merger Guidelines), or if some alternative approach should be used instead, is an important question that is beyond the scope of this note.

recaptured $50, leaving them worse off by $50 on net. The firm would capture the other $50, making it $50 better off on net.

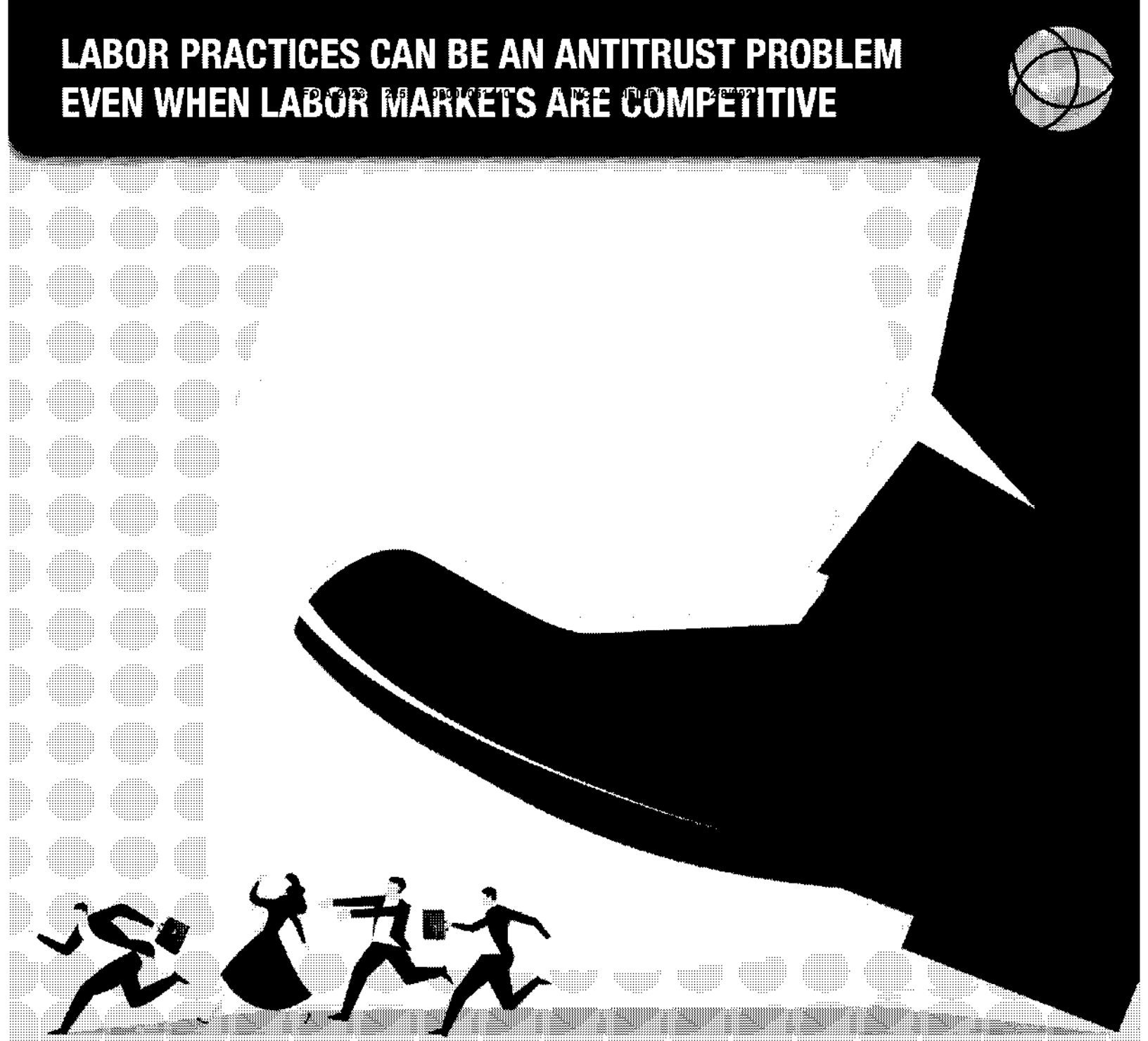
- But now suppose (realistically) that the split parameter is not 0.5, but something much more lopsided, say 0.9, meaning that the firm captures 90% of the surplus and the worker captures 10%. Now the worker would only recapture $10, being $90 worse off on net, and the firm would capture $90, being $90 better off on net.

- The fact that the firm likely captures most of the surplus is not an antitrust problem in itself. But it does have two important implications for the antitrust analysis. First, as shown in the above example, the harm caused to the worker by the non-compete is larger than it would be if the split was more equal. Second, the benefit to the firm is larger than it would be if the split was more equal. This gives the firm a stronger incentive to impose the non-compete in the first place. For both of these reasons, a highly unequal split parameter makes the antitrust harm from non-competes worse.

Conclusion:

- There is strong reason to believe that non-competes harm workers. For this to be a problem that the FTC/DOJ or state AGs can address, that harm needs to be competitive harm of some sort. A natural source of such harm is monopsony power wielded by the firm imposing the non-compete. But I believe this to be a weak basis for an enforcement action against non-competes, for both practical and conceptual reasons. My proposed alternative approach is to argue that non-competes are a competition problem because they prevent workers from accessing and enjoying the benefits of the competitive labor market, thereby weakening their bargaining leverage in informal negotiations with the firm over match-specific job surplus. In addition, the fact that the firm is likely to appropriate most of that match-specific surplus both increases the harm to the worker from the non-compete and increases the incentive of the firm to impose it.

LABOR PRACTICES CAN BE AN ANTITRUST PROBLEM EVEN WHEN LABOR MARKETS ARE COMPETITIVE



BY DAVID J. BOLAN

[1] David Bolan is an employee of the Federal Trade Commission. The views expressed in this paper are solely those of the author.

[2] I thank Keith Brand, Wally Mullin, and Jeremy Sandford for helpful comments.

CPI ANTITRUST CHRONICLE
MAY 2020

I. INTRODUCTION

In conventional antitrust analysis, there are certain conditions that must be met for a matter to be an antitrust problem. A merger is only likely to be a problem if the merging firms are close competitors to each other and there are not very many other close competitors. Coordination is only likely to be a problem if the coordinating firms collectively represent a large fraction of the sellers of the product. And conduct, including a variety of contractual restraints, is only likely to be a problem if the restraining firm has significant market power as that term is conventionally understood.[1]

Assuming, at least for the sake of argument, that this is true of output markets, it may appear that it must be true of input markets as well, including labor markets. Indeed, the textbook analysis of monopsony and oligopsony is very similar to that of monopoly and oligopoly,[2] and this similarity is explicitly recognized in the DOJ/FTC Horizontal Merger Guidelines.[3] It may therefore appear, and it is often argued, that labor market practices engaged in by firms can only be an antitrust problem in the presence of conventional labor market power, defined (roughly) as there being only one or a small number of possible employers for the type of labor in question.

The purpose of this article is to argue to the contrary. Specifically, I argue that firms can impose harmful conditions on workers even when workers have many (roughly) equivalent job offers to choose from.[4] **I further argue that this harm can reasonably be thought of as antitrust harm.**[5]

The basic argument is as follows. Even if the labor market is very competitive *ex ante* (i.e. the time of hiring), once the job match is formed, dissolving it is costly to both the worker and the firm, which means that **preserving** the match generates surplus, and this surplus must be divided between the worker and the firm. The more valuable the match (i.e. the more the worker prefers preserving the match to looking for another job, and the more the firm prefers preserving the match to looking for another worker), the more surplus there is to be divided.

This division will be determined via bilateral bargaining. This bargaining can be modeled using standard methods familiar from conventional antitrust analysis, specifically a model known as the Nash Bargaining model. In that model, the division of the surplus depends on the relative bargaining **leverage** between the worker and the firm, which loosely means that the less a party has to gain from reaching a deal, the more favorable the terms that party will receive; and on the relative bargaining **power** between the worker and the firm, which means that the stronger a party's capabilities for capturing surplus, the larger the share of the surplus that party will receive. Having more bargaining leverage and more bargaining power are both beneficial to a party, but an important and under-emphasized result from the theory of Nash Bargaining is that a party that has all of the bargaining power captures all of the surplus, regardless of relative bargaining leverage. Specifically, if one party has all of the bargaining power, they can make a take-it-or-leave-it offer to the other party that leaves that party no better off than they would be if the match was dissolved.

Whether a worker or a firm has more bargaining leverage is difficult to say, and there is no strong empirical evidence on the subject that I am aware of. However, there is some reason to suspect that workers often "need" a deal more than firms do, giving firms more relative bargaining leverage. With regard to bargaining power, matters are much clearer. Bargaining power is very likely to be held mostly by the firm, not the worker. Firms have myriad advantages in size, resources, and sophistication, and they can unilaterally set non-negotiable firm policies. An ordinary worker has little prospect of matching these advantages, and so will be at a major disadvantage in capturing the match-specific surplus.

Bargaining power as it appears in the Nash Bargaining model corresponds to power in the ordinary English sense of the word. While not without bound (the worker can still quit), the firm is able to use its advantages to acquire bargaining power, and to use that bargaining power to benefit itself at the expense of the worker. This can take the form of chiseling on wages and hours, or poor working conditions, or even abusive or degrading treatment.

The question is whether this power is **market** power in the antitrust sense. I argue that it is. As discussed above, the division of the match-specific surplus takes place outside the context of the competitive labor market, so the competitive labor market does not protect the worker from efforts by the firm to capture it.[3] Practices that allow the firm to capture most or all of that surplus can be thought of as efforts to become a monopolist over that surplus with respect to that worker, which makes it an antitrust problem.[4]

The fact that harm from these practices might reasonably be thought of as antitrust harms does not necessarily mean that they should always be dealt with in the context of antitrust. In many cases, regulation by the Department of Labor or by OSHA may be more appropriate. Nor is it obvious which practices by a firm should or should not be regarded as antitrust violations. The purpose of this article is not to resolve these questions. The purpose is only to establish that there is a reasonable basis for considering these harms to be antitrust harms, and therefore to consider antitrust action as one possible avenue for addressing them.

There is one labor market practice that is particularly likely to be an antitrust problem, namely labor non-compete agreements. Unlike other labor practices, whose purpose is to affect the division of **existing** match specific surplus, non compete agreements have the effect of **increasing** the match-specific surplus. They do this by making it more difficult for the worker to re-access the competitive labor market, thereby degrading the worker's prospects outside the match. When the worker's outside option is worse, they value the match by more, increasing the amount of match-specific surplus available to be captured by the firm. Practices that distance workers from the opportunity to participate in competitive markets are quite clearly an antitrust problem.

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This view of non-competes is at odds with the familiar argument that their voluntary nature is strong grounds for believing them to be both mutually beneficial and efficient.[16] But this is only true if non-competes are truly voluntary, and if the agreed-upon compensation offered to the worker in exchange for accepting a non-compete is actually delivered. In a separate article (Balan, 2019), I argue that these conditions are often not satisfied.[17] This argument is bolstered by a wealth of recent empirical evidence that, while somewhat mixed, largely finds non-competes to be harmful to workers.[18] And if these conditions are not satisfied, then non-competes are not to be presumed beneficial to the worker, but are rather to be understood as a restraint imposed on workers **without** compensation, to the benefit of the firm and to the detriment of the worker.

II. *EX POST* BARGAINING OVER MATCH-SPECIFIC SURPLUS

Suppose that a worker entering the labor market can choose between many jobs that *ex ante* appear to be identical. Once the worker chooses a job and a match is formed, that match is costly to dissolve, for both the worker and the firm. For the worker, the costs include the direct financial costs of a new job search, the lost income during the search (the damage from which is exacerbated by the fact that many workers have no financial cushion), and the fact that being fired is an emotionally traumatic experience for workers. In addition, the worker might need a recommendation from the firm to find another job, which they may not get if the match ends in acrimony. Finally, the worker may have signed a non-compete agreement or be subject to other restrictive covenants, which further increases the cost of leaving their job. For the firm, the costs include the direct recruiting and hiring costs to replace the worker, the indirect costs of being temporarily understaffed until a replacement is hired, and possible morale problems among remaining workers. These costs can be substantial.

Another way of saying that dissolving the match is costly is to say that **preserving** the match generates surplus arising from avoiding those costs. This surplus must somehow be divided between the worker and the firm. If labor contracts were complete and also fully and costlessly enforceable, then the division of this surplus would be determined within the context of the competitive labor market, and workers would receive competitive overall terms.

In reality, however, contracts are neither complete nor fully enforceable. This means that much of what happens between the worker and the firm is determined **after** the match has formed. There are things that the firm can do to benefit itself at the expense of the worker (chisel on wages and hours, poor working conditions, or even abusive or degrading treatment), and there are things that the worker can do to benefit themselves at the expense of the firm (shirking, theft, even sabotage). Which of these things will happen will be determined via bilateral bargaining between the worker and the firm, and not within the context of the competitive labor market.

This does not mean that the competitive labor market is irrelevant. A key concept in bargaining is that neither side can be forced to do worse than they would do if the match was dissolved (this is often referred to as their "outside option" or "disagreement payoff"). The worker will not agree to terms that are worse than being fired and having to look for another job, nor will the firm agree to terms that are worse than letting the worker quit and having to look for another worker. The more competitive the labor market, the better the worker's outside option, and the better the terms the worker will receive. That is, a labor market characterized by conventional market power makes things worse for workers, for the conventional reasons. But even in a competitive labor market, a substantial amount of surplus will be divided via bilateral bargaining outside the context of the competitive labor market.

This kind of bilateral bargaining is standard in economics, including antitrust economics. The standard framework for studying it is a well-known model called the Nash Bargaining model. In the remainder of this section, I summarize and present key results from this model.

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A. Bargaining Leverage

As discussed above, the worker's surplus from the match is the difference between what they receives if a deal is reached and what they receive if a deal is not reached, and similarly for the firm. The total surplus from the match is the sum of the worker's surplus and the firm's surplus.

Somewhat counter-intuitively, the party that contributes **less** to the total surplus has **greater** bargaining leverage. To see why, note that the surplus must be divided somehow. Suppose, for example, that the surplus is to be divided equally (though this is not necessary). A party that contributes little surplus shares little surplus with the other party (half of very little is also very little), but that party still receives half of the surplus contributed by the other party. An analogy would be a guest who brings a small side dish to a potluck dinner, but then eats the full meal like everybody else. Put another way, the party that contributes less to the total surplus has less to gain from a deal. That party "needs" a deal less, and so is able to bargain for better terms.

Whether workers or firms have greater relative bargaining leverage is difficult to say, and it may differ across employment matches and perhaps even over time within a match. While there is no direct empirical evidence that I am aware of, for the above reasons it appears that firms may often have greater relative bargaining leverage (i.e. having the match end is worse for the worker than it is for the firm).[12]

B. Bargaining Power

In Section II.A I assumed that the total surplus from reaching an agreement is divided equally between the parties. But this need not be the case. A given amount of surplus can be divided so that it goes entirely to one party, entirely to the other party, or anywhere in between. What share of the surplus a party can command is referred to as their bargaining **power**, which is distinct from the bargaining leverage described above. If one party has all of the bargaining power, then it will capture all of the surplus, and the other party will only receive value equal to their outside option, making them no better off than they would be if the match were dissolved. Any intermediate amount of bargaining power is also possible.

Bargaining power is an economic term of art, but it corresponds quite closely to the ordinary English usage of the word "power." When there is a pool of surplus to be divided between a single worker and a large firm, who has the power to capture it? Is that division likely to be 50/50 (the worker and the firm share the surplus equally)? Or is it more likely to heavily favor the firm, say 90/10 or 95/5? The massive size, sophistication, and resources of the firm strongly suggest the latter, as does the fact that the firm unilaterally sets non-negotiable rules, policies, and employment practices that can be used to apply pressure to the worker. It simply strains credulity that ordinary individual workers can outperform large, heavily resourced firms in a competition to capture a pool of surplus. That is power, and it is the firms, not the workers, that have it.[13]

There is an additional point that is a standard result of Nash Bargaining, but that is not widely appreciated. If one party has (almost) all of the bargaining power, then it matters little who has more bargaining leverage. Recall that bargaining leverage is about the relative contributions of the two parties to the total pool of surplus. But if one party has **all** of the bargaining power, then this is moot, because that party receives **all** of the surplus, regardless of who contributed it. This will be made clearer in the next sub-section.

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Define W^{D} as the value that the worker receives if a deal is reached (the job match continues) and W^{ND} as the value that the worker receives if a deal is not reached (the job match is dissolved and the worker receives their outside option).[14] The difference between these two ($W^{D} - W^{ND}$) is the gain to the worker from reaching a deal. Note that ($W^{D} - W^{ND}$) can be large because W^{D} is large (getting a deal is very good), or because W^{ND} is small (not getting a deal is very bad), or some combination of the two. Similarly, define F^{D} as the value that the firm receives if a deal is reached, F^{ND} as the value that the firm receives if a deal is not reached, and ($F^{D} - F^{ND}$) as the gain to the firm from reaching a deal.

The total surplus TS from continuing the job match is

$$TS = (W^{D} - W^{ND}) + (F^{D} - F^{ND}),$$

where TS is the sum of the amount by which the worker is better off with a deal than without, plus the amount by which the firm is better off with a deal than without.

Each party will receive their outside option (W^{ND} for the worker and F^{ND} for the firm) plus some share of the match-specific surplus. For simplicity I assume that this surplus will be divided via a lump-sum payment P from the worker to the firm (this payment can be negative, which would mean a payment from the firm to the worker). It is important to note that this does not literally mean that the worker will hand money over to the firm, or vice-versa. Rather, the "payment" will take the form of one side or the other getting away with under-performing the terms of the original agreement, or with interpreting ambiguities in that agreement in a manner favorable to themselves. Workers may get away with a certain amount of shirking, and firms may get away with a certain amount of mistreatment of one kind or another.[15]

In our examples we will assume, as is common in antitrust economics, that P will be determined as predicted by the Nash Bargaining model. There are five inputs into this model: W^{D}, W^{ND}, F^{D}, F^{ND}, and a "bargaining power" parameter α that governs the share of the surplus that is kept by the worker. According to the model, the equilibrium P will be the one that maximizes the following expression:

$$(W^{D} - P) - W^{ND})^{\alpha} \times ((F^{D} - P) - F^{ND})^{(1-\alpha)}.$$

Less technically, the P that comes out of the Nash Bargaining Model is the one that causes the worker to receive their outside option plus surplus equal to αTS, and the firm to receive its outside option plus surplus equal to $(1 - \alpha)TS$.

Now consider the following examples. In each example, $TS = 200$.

Example 1: $(W^{D} - W^{ND}) = 100$, $(F^{D} - F^{ND}) = 100$, and $\alpha = ½$.

The two parties are identically positioned, so we would expect $P = 0$ to be the answer. This is indeed the case. The worker and the firm have equal bargaining leverage; they each prefer a deal to no deal by 100, so they each contribute 100 to the $TS = 200$. They also have equal bargaining power, because $\alpha = ½$ and $(1 - \alpha) = ½$, so they each are to receive their outside option plus 100 (half of the TS) net of P. $P = 0$ is the P that accomplishes this, as this is what they each already receive gross of P.

Example 2: $(W^{D} - W^{ND}) = 150$, $(F^{D} - F^{ND}) = 50$, and $\alpha = ½$.

Now the firm has more relative bargaining leverage than in Example #1, because the worker prefers a deal to no deal by 150, and the firm prefers a deal to no deal by only 50, meaning that the worker contributes more than half of TS. But as in Example #1, the bargaining power is equal ($\alpha = ½$), so the worker and the firm will each receive their outside option plus half of TS (i.e. their outside option plus 100) net of P. Since the worker

[14] In the real world, the worker's outside option is rarely unemployment. Usually it is another job. Thus, W^{ND} is usually the value that the worker receives from their next best job opportunity. Similarly, F^{ND} is usually the value that the firm receives from its next best worker. Thus, the gain to the worker from reaching a deal ($W^{D} - W^{ND}$) is usually the difference between the worker's value at their current job and their value at their next best job opportunity. Similarly, the gain to the firm from reaching a deal ($F^{D} - F^{ND}$) is usually the difference between the value that the firm receives from its current worker and the value that it receives from its next best worker. Thus, the gain from trade is usually the difference between the worker's current job and next best job, plus the difference between the firm's current worker and next best worker.

[15] Of course, real-world bargaining is more complicated than this. Parties may not know exactly what the gain from trade is, and may have to engage in costly negotiations to determine it. Parties may also have to engage in costly negotiations to determine how to divide the gain from trade. Thus, the outcome may not be a lump-sum payment that causes each party to receive their outside option plus exactly half of the gain from trade. But, as long as the outcome of bargaining is that each party receives their outside option plus some share of the gain from trade, the lump-sum payment model is a reasonable approximation.

receives their outside option plus 150 gross of P, and the firm receives its outside option plus 50 gross of P, a payment of $P = 50$ is required. If the 150 and the 50 were reversed, then P would be −50, and the firm would be paying the worker.

$$\text{Example 3: } (W^D - W^{ND}) = 100,\ (F^D - F^{ND}) = 100, \text{ and } \alpha = 0.$$

Now the two parties have the same bargaining leverage (as in Example #1), with each preferring a deal to no deal by 100, and so each contributing 100 to TS. But now the firm has **all** of the bargaining power, which means that the worker will receive no surplus net of P, only receiving their outside option. The firm will receive its outside option plus 200 (all of TS) net of P. Since they each receive their outside option plus 100 gross of P, a payment of $P = 100$ is required. If we replaced $\alpha = 0$ with $\alpha = 1$, P would be −100, the firm would receive its outside option, and the worker would receive their outside option plus 200.

$$\text{Example 4: } (W^D - W^{ND}) = 0,\ (F^D - F^{ND}) = 200, \text{ and } \alpha = 0.$$

Now the worker has all of the bargaining leverage (they are indifferent between a deal and no deal, but the firm prefers a deal to no deal by 200 and so contributes all of the TS). But as in Example #3, the firm has all of the bargaining power. In this case, the worker **still** receives no surplus net of P, only receiving their outside option, and the firm still receives its outside option plus 200 (all of TS) net of P. Since the worker receives no surplus beyond its outside option gross of P, the payment will be $P = 0$. If we replaced $\alpha = 0$ with $\alpha = 1$, P would be −200, the firm would receive its outside option, and the worker would receive their outside option plus 200.

This last example is somewhat subtle but very important. If the firm has most or all of the bargaining power, then it will receive most or all of the bargaining surplus, regardless of bargaining leverage. When one side can capture all of the surplus from a deal, it does not matter who contributed how much to that surplus.

These examples are highly stylized, and they omit many important factors. However, they capture an essential point, namely that when the firm has a lot of bargaining leverage, and (more importantly) when the firm has almost all of the bargaining power, it is possible for workers to be harmed by firms *ex post* even when they participate in a highly competitive labor market *ex ante*.

III. IS THIS AN ANTITRUST PROBLEM?

The existence of costs to dissolving a job match creates match-specific surplus, and that surplus must be divided somehow between the worker and the firm. Labor market practices that firms engage in to the detriment of workers can be understood as efforts to capture that surplus. There are many such practices, including chiseling on wages and hours, poor working conditions, or even abusive or degrading treatment.[17]

Some of these practices may be actionable under labor law, but the question for this article is whether they can be considered **antitrust** violations, even if the labor market is highly competitive *ex ante*.[18] I argue that they can. The key fact is that the surplus that these practices are intended to capture are specific to the job match, and so by definition the harm suffered by the worker from these practices cannot be ameliorated by labor market competition. These are practices of **a single firm** against the worker. When the firm has disproportionate bargaining leverage or (more importantly) most or all of the bargaining power, it can reasonably be regarded as a monopolist with respect to that worker over the match-specific surplus.

It might be argued that these practices represent a permissible exercise of existing market power, and not an impermissible acquisition of market power. Setting aside the question of whether exercising existing market power is in fact always permissible, I believe that the practices represent the acquisition of market power, and not the exercise of it. It is true that the practices do not create the surplus, which exists exogenously by virtue of the value of the match. But that surplus does not start out belonging to the firm. The surplus exists and it must be divided somehow, and the labor practices are the means by which that division comes out to the benefit of the firm at the expense of the worker. **The exercise of bargaining power is the exercise of market power**.

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The above is not a worked-out apparatus for treating labor practices as antitrust violations. There are many questions that are beyond the scope of this article, including which practices are harmful at all, and of those which are best dealt with through labor law rather than antitrust. There is also the conceptual question of how much of the match specific surplus firms should be allowed to try to capture. Should they be allowed to try to capture half of it? Would an antitrust case hinge on what fraction of the surplus the firm refrained from trying to capture?

These are difficult questions, and it is unclear whether it is possible to build a workable regime for challenging harmful labor market practices as antitrust violations. It may be or it may not be. But the fundamental point remains. These practices represent firms trying to become monopolies with respect to their workers regarding the match specific surplus. This is the exercise of market power.

IV. LABOR NON-COMPETE AGREEMENTS

Another labor practice that firms sometimes engage in is to impose non-compete agreements on their workers. Non-competes are fundamentally different from the labor practices discussed in Section III above. Those practices represent attempts by the firm to capture a fixed quantity of match-specific surplus. In contrast, non-compete agreements **increase** the amount of surplus available to be captured. A non-compete agreement denies the worker access to the full benefits of the competitive labor market, thereby degrading that worker's outside option. The worker now has more to gain from the match, increasing the total surplus arising from the match, and the firm can use its superior bargaining power to capture most or all of that additional surplus as well.[14]

For this reason, the argument for treating non-compete agreements as an antitrust problem is even stronger than the argument discussed above for treating other labor practices as antitrust problems. A practice that denies the worker the ability to re-access the full benefits of the competitive labor market appears to fall quite squarely within the domain of antitrust, especially when combined with the firm's ability to use its bargaining power to capture the resulting increased surplus.

As discussed above, if contracts were complete and fully and costlessly enforceable, all terms of the labor contract would be determined in the context of the competitive labor market, and hence restraints such as non-competes would not be an antitrust problem (assuming that they also did not harm third parties). This is closely related to a standard defense of non-competes, namely that workers would not agree to them unless they receive compensation that they value at least as much as they dislike the restraint. In a separate article (Balan, 2019), I argue that this is often not the case, and that in fact non-competes are a means of extracting value from workers without having to compensate them for it.[15]

V. CONCLUSION

There is reasonable consensus that conventional labor market power can exist when there are only one or a few employers that hire a particular type of worker, and that antitrust is applicable to those situations. Some hold the view that the existence of such market power is a necessary condition for antitrust to apply to labor markets, meaning that when there are many employers who hire a particular type of worker, any problems that may arise from the conduct of an individual firm cannot be antitrust problems.

The purpose of this article is to argue against this view. Even with an *ex ante* competitive labor market, once a job match is formed, dissolving it is costly to one or both parties, meaning that there is often substantial economic surplus associated with continuing it. The division of this surplus will be determined via bilateral bargaining between the two parties, and not within the context of the competitive labor market.

Firms often have major advantages over workers in capturing that surplus. They often have more relative bargaining leverage, as workers may "need" the match more than they do. More importantly, firms almost certainly have much more bargaining power. Given the massive

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asymmetry of resources, sophistication, and agenda-setting power between an individual worker and a large firm, it strains credulity that the firm would not have a massive advantage allowing it to out-compete the worker in any contest to capture it. This gives the firm power over the worker, in the ordinary English meaning of the word, in the formal meaning of the word in the context of the Nash Bargaining model, **and in the antitrust sense**: certain labor market practices represent an attempt to become a monopolist with respect to the worker over that match-specific surplus.

The case for treating non-compete agreements as an antitrust problem is even stronger. Firms imposing non-competes on workers is not only a means of capturing an existing quantity of surplus, it is a way of increasing that surplus by denying the worker the ability to fully access the competitive labor market (degrading the worker's outside option), and then using its power to capture that additional surplus as well.

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Labor Noncompete Agreements: Tool for Economic Efficiency or Means to Extract Value from Workers?

David J. Balan*

Abstract

A number of theoretical arguments have been offered in favor of noncompete provisions in labor agreements. While there has been considerable empirical research on the effects of those provisions, there has been little direct evaluation of the arguments themselves. In this article, I lay out and evaluate three commonly heard arguments, namely, (1) the voluntary nature of labor agreements justifies a strong inference that the terms of those agreements, including noncompete provisions, are beneficial for both workers and firms and that they are economically efficient, 2(*A*) noncompetes facilitate efficient knowledge transfer from firms to workers, and 2(*B*) noncompetes encourage efficient firm-sponsored investment in worker training. These arguments, though not entirely without merit, mostly do not survive close scrutiny, and in fact such scrutiny reveals strong arguments that point in the opposite direction. In addition, noncompetes may cause important additional harms that are not measured in conventional economic research.

Keywords

noncompetes, labor noncompetes, postemployment restrictive covenants, PERCs

I. Introduction

Noncompete provisions in labor agreements have become widespread in the United States.[1] In recent years, empirical researchers have studied the effects of noncompetes on worker mobility, hiring, entrepreneurship, investment, innovation, wages, and other economic outcomes. This research agenda is quite new, and determining the true, causative effect of noncompetes on those outcomes is

1. *See* Evan P. Starr et al., *Noncompete Agreements in the US Labor Force*, 64 J.L. & ECON. 53–84 (2021); ALEXANDER J. S. COLVIN & HEIDI SHIERHOLZ, NONCOMPETE AGREEMENTS (Econ. Policy Inst. 2019).

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challenging. But recognizing these limitations, the evidence as it exists today, while somewhat mixed, generally shows noncompetes to be economically harmful and not beneficial.

This empirical evidence must be interpreted in light of the strength of the theoretical arguments for or against noncompetes. If there were strong theoretical arguments in their favor, the empirical evidence accumulated to date may not be sufficient to convincingly demonstrate that noncompetes are harmful on balance. But if the theoretical arguments in favor of noncompetes are weak, or if there are strong theoretical arguments against them, then the theory and the empirical evidence would both point in the same direction, strongly indicating that noncompetes are likely to be harmful and even more strongly indicating that they are unlikely to be highly beneficial.[2]

The purpose of this article is to provide a critical evaluation of those theoretical arguments. There are three major arguments that are commonly offered in favor of noncompetes, namely, (1) the voluntary nature of labor agreements justifies a strong inference that the terms of those agreements, including noncompete provisions, are mutually beneficial to workers and firms and that they are economically efficient in the sense of increasing total economic surplus, 2(A) noncompetes facilitate efficient knowledge transfer from firms to workers, and 2(B) noncompetes encourage efficient firm-sponsored investment in worker training.

There is a substantial body of literature that makes or develops these theoretical arguments.[3] The structure of this article is to enumerate, explain, and respond to these arguments one by one.[4]

To summarize my conclusions, these arguments sound plausible and have some limited merit, but all three largely fail upon close scrutiny, and in fact such scrutiny reveals strong arguments to the contrary. This theoretical conclusion, combined with the empirical evidence (discussed below) that mostly finds noncompetes to be harmful, together constitute strong reason to believe that noncompetes are in fact harmful, and even stronger reason to believe that they are not highly beneficial such that restricting or banning them would risk major economic damage.[5]

Moreover, noncompetes may cause harms that are not generally within the purview of economics and that are not normally studied in economic research. A worker who is bound by a noncompete has a large barrier to leaving a firm (on top of other barriers that likely exist), rendering them less able to avoid or resist mistreatment at their firm, including true exploitation or abuse by a predatory employer

2. In Bayesian terms, if the theoretical arguments in favor of noncompetes are strong, then the priors would be strong that noncompetes are highly beneficial, and it would take a large amount of contrary evidence to overturn those priors. But if those arguments are weak, and/or if there are strong arguments that noncompetes are harmful, then the priors would be that noncompetes are harmful (or at least not highly beneficial), and it would take a large amount of contrary evidence to overturn *those* priors.
3. Perhaps the clearest exposition of Argument #1 is at David D. Friedman, *Non-Competition Agreements: Some Alternative Explanations*, daviddfriedman.com, April 2, 1991, http://www.daviddfriedman.com/Academic/non-comp/Non-Competition.html. *See also* Maureen B. Callahan, *Post-Employment Restraint Agreements: A Reassessment*, 52 U. CHI. L. REV. 703–28 (1985). Articles that advance Argument #2(*A*) include Jonathan M. Barnett & Ted Sichelman, *The Case for Noncompetes*, 87 U. CHI. L. REV. 953–1049 (2020); and Brandon S. Long, *Protecting Employer Investment in Training: Noncompetes vs. Repayment Agreements*, 54 DUKE L.J. 1295–320 (2005). Articles that advance Argument #2(*B*) include Paul H. Rubin & Peter Shedd, *Human Capital and Covenants Not to Compete*, 10 J. LEGAL STUD. 93–110 (1981); and Long, *supra* note 3.
4. Points similar to some of those made in this article can be found in Eric A. Posner, *The Antitrust Challenge to Covenants Not to Compete in Employment Contracts*, 83 ANTITRUST L.J. 165–200 (2020) and in the survey articles referenced in note 6. *See also* NON-COMPETE CONTRACTS: ECONOMIC EFFECTS AND POLICY IMPLICATIONS (U.S. DEPT OF THE TREASURY, OFFICE OF ECON. POLICY 2016); NON-COMPETE AGREEMENTS: ANALYSIS OF THE USAGE, POTENTIAL ISSUES, AND STATE RESPONSES (The White House 2016).
5. Returning to the Bayesian framing from note 2, the conclusion of this article is that the correct priors are that noncompetes are likely to be harmful and are very unlikely to be highly beneficial. Given these priors, the existing empirical evidence provides little grounds for updating. In other words, there is a consonance rather than a tension between the empirical evidence and the theory.

or manager. In addition, a person bound by a noncompete is simply less free, and the personal freedom to use one's body and one's labor as one wishes is a value in itself. Policy makers should have a high threshold for interfering with this fundamental freedom.

II. Summary of the Empirical Literature

There is now a substantial empirical research literature on noncompetes, dealing with their effects on several important outcomes, including worker mobility, hiring, and entrepreneurship; investment and innovation; and wages. A brief summary follows.[6]

A. Worker Mobility, Hiring, and Entrepreneurship

The evidence shows that workers bound by noncompetes stay in their jobs longer (are less mobile). In one study, being bound by a noncompete is associated with an 11% increase in job tenure. According to another study, the 2015 Hawaii ban on noncompetes for tech workers increased employee mobility in the sector by 11%. Similar results are found for executives, patent holders, and the universe of individuals with LinkedIn records. An analysis of Oregon's 2008 ban on noncompetes for hourly workers finds similar results.

Four studies find evidence consistent with the notion that firms have trouble hiring workers in higher enforceability regimes, with young firms hit particularly hard. Two studies suggest that individuals bound by noncompetes are redirected to other industries, including 11% of those who have ever signed one. Other studies find that tech workers and patent holders are more likely to leave states that enforce noncompetes.

Seven recent studies examined the relationship between noncompete enforceability and entrepreneurship, finding generally that the enforceability of noncompetes dampens new firm creation. One study found that greater enforceability reduced new firm entry by 18%.

B. Investment and Innovation

The evidence regarding investment and innovation is mixed. The enforceability of noncompetes is associated with more firm-sponsored training of workers, increases in net capital investment rates, the exploration of new fields, and the creation of riskier patents. However, the mobility-inhibiting effects of noncompete enforceability also dampen knowledge flows and make venture capital less effective in spurring the creation of new patents and employment.

C. Wages

A number of studies attempt to estimate the effect of noncompetes on wages by exploiting variation in state policies on the enforceability of noncompetes. Most of these studies use some version of a "difference-in-differences" study design, in which the change in wages (for some category of workers) in a state that changed its enforceability policy is compared to the change in wages in "control" states that did not. These studies consistently show that the enforceability of noncompetes is associated with

6. This summary draws heavily, with permission, from EVAN STARR, THE USE, ABUSE, AND ENFORCEABILITY OF NON-COMPETE AND NO-POACH AGREEMENTS: A BRIEF REVIEW OF THE THEORY, EVIDENCE, AND RECENT REFORM EFFORTS (Econ. Innovation Grp. Issue Brief 2019); and from Evan Starr, *Are Noncompetes Holding Down Wages?*, *in* INEQUALITY AND THE LABOR MARKET: THE CASE FOR GREATER COMPETITION 127–49, Sharon Block and Benjamin H. Harris, editors, (Brookings Institution Press, 2021). It also relies on John M. McAdams, *Non-Compete Agreements: A Review of the Literature* (2019) (unpublished manuscript). To save space, many citations are suppressed. They can be found in those articles.

lower wages.[7] Perhaps the most notable of these studies is Starr and Lipsitz (2020),[8] which finds that banning noncompetes for hourly workers increased hourly wages by 2%–3% on average. Since only a subset of workers sign noncompetes, scaling this estimate by the prevalence of noncompete use in the hourly paid population suggests that the effect on employees actually bound by noncompetes may be as great as 14%–21%, though the true effect on bound workers is likely lower than that due to labor market spillovers which may cause part of the wage reduction to be borne by unbound workers.

The above studies attempt to measure the effects of noncompetes indirectly by comparing wages across states with different enforceability policies. Three other studies attempt to measure these effects more directly by comparing wages of workers who are bound by noncompetes to those of workers who are not. One of these studies finds that workers with noncompetes have 9.7% higher wages than similar workers without, but only if they were informed of the noncompete before accepting the job; workers who were informed of the noncompete after they accepted had no such benefit.[9] The second of these studies finds that noncompetes increase wages for CEOs, and the third finds that they increase wages for primary care physicians.[10]

The former group of studies associates noncompetes with lower wages, and the latter group associates them with higher wages. There are several possible ways to reconcile this discrepancy. First and perhaps most likely, the study design of the latter group may not be suitable for measuring the *causative* effect of noncompetes on wages; the fact that workers bound by noncompetes have higher wages does not mean that the noncompetes caused the higher wages. In contrast, the difference-in-differences study design used in the former group (and commonly used across many areas of empirical economics) exists precisely because it is often a valid way to measure causative effects; if wage trends in states that changed their policy are different from trends in otherwise similar control states, a reasonable interpretation is that the policy change caused the change in trend. For this reason, the former group of studies may be more reliable.

A second possible reason for the discrepancy is that noncompetes may be beneficial for the workers who are bound by them, but harmful overall, because of external effects on workers who are not bound by them. A third possibility has to do with the type of workers being studied. As noted above, one of the studies in the latter group is about corporate CEOs, who represent a tiny slice of workers and for whom the notion that noncompetes are beneficial is much more plausible than it is for almost all other workers. Another study in that group is about primary care physicians. Importantly, that study does not disentangle the effect of noncompetes from the effect of nonsolicitation provisions (where the physician is free to leave but is not free to take their patients with them). Nonsolicitation provisions have a much stronger claim to being beneficial than do noncompetes, and it is possible that this benefit, rather than a benefit from the noncompete itself, is what is causing the higher wages found in that study.[11]

D. Summary

In sum, though somewhat mixed, the empirical literature is largely negative regarding the effects of noncompetes, and it certainly does not support the conclusion that they are highly beneficial. This is

7. There are a number of such studies, cited and discussed in Starr, *supra* note 6.
8. Michael Lipsitz & Evan Starr, *Low-Wage Workers and the Enforceability of Noncompete Agreements*, MGMT. SCI. (forthcoming, 2021).
9. *See* Starr et al, *supra* note 1.
10. Omesh Kini et al, *CEO Noncompete Agreements, Job Risk, and Compensation*, 34 REV. FINANC. STUD. (forthcoming, 2021); Kurt J. Lavetti et al, *The Impacts of Restricting Mobility of Skilled Service Workers: Evidence from Physicians*, 55 J. HUM. RESOUR. 1025–67 (2020), respectively.
11. *See* Nataraja Balasubramanian, et al, *Bundling Postemployment Restrictive Covenants: When, Why, and How It Matters* (2021) (unpublished manuscript) for a discussion of the fact that noncompetes are often bundled together with other postemployment restrictive covenants such as nonsolicitation agreements, and the resulting difficulty in empirically identifying the effect of any individual restriction in isolation.

expressed clearly by Evan Starr, a leading empirical researcher in the field who, in recent Congressional testimony, summarized the empirical research as follows: "Taken together, these results are hard to square with theories that suggest workers should benefit from non-competes."[12]

III. Three Commonly Offered Arguments in Favor of Noncompetes

I now turn to the three major arguments that are commonly offered in favor of noncompetes.

A. Argument #1: If Both Parties Agreed to the Noncompete, It Must Be Efficient

Argument #1 begins with the simple and intuitive premise that people can generally be assumed to act in their own best interest, so if both a worker and a firm voluntarily agree to a noncompete then doing so must make them both better off, otherwise at least one would not have agreed. And if the noncompete makes both parties better off, then it follows that banning or restricting noncompetes would make them both worse off. By this argument, the mere existence of noncompetes is strong evidence that they are mutually beneficial.

Spelled out in more detail, the argument goes as follows. Suppose that a worker and a firm negotiate over employment terms before the job match is formed. In that negotiation, each side exploits their bargaining position as best they can,[13] so the terms that arise from that negotiation will be the very best ones that the worker can get and also the very best ones that the firm can get. Now suppose that the firm wishes to add a noncompete provision to the previously negotiated terms. All else equal, this restriction on the worker's outside opportunities makes the worker worse off: The reduced ability to leave is harmful in itself, and the reduced ability to threaten to leave weakens the worker's bargaining position relative to the firm with respect to any employment terms that could become the subject of disagreement (i.e., all terms except those that were fixed and not subject to any revision, neither legally nor practically, *ex ante* before the job match was formed). For the same reasons and others, the noncompete makes the firm better off.[14]

Knowing that the noncompete harms the worker and makes the firm better off, what should we expect to happen? It might appear that the firm, if it has a sufficiently strong bargaining position, could simply compel the worker to accept the noncompete. But Argument #1 says that this is incorrect,

12. Antitrust and Economic Opportunity: Competition in Labor Markets: Hearings before the Subcomm. on Antitrust, Commercial, and Administrative Law, of the House Judiciary Comm., 117 Cong. (October 29, 2019) (Statement of Evan Starr).

13. The economic theory of bargaining distinguishes between bargaining "leverage" (the less one side "needs" a deal, relative to the needs of the other side, the better the terms it will receive) and bargaining "power" (the deal creates some surplus to be divided between the two sides, and the more effective one side is at capturing that surplus, relative to effectiveness of the other side, the better the terms it will receive). Here, I informally use the term bargaining "position" to capture both of these; the more favorable the combination of leverage and power that a side has, the better the terms it will receive in the negotiation. For a discussion of the distinction between bargaining leverage and bargaining power and its relevance for evaluating noncompetes, *see* David J. Balan, *Labor Practices Can Be an Antitrust Problem Even When Labor Markets Are Competitive*, CPI ANTITRUST CHRON. (2020).

14. Once the match is formed, it is costly to dissolve, for both the worker and the firm. These costs can be substantial. Another way of saying that dissolving the match is costly is to say that *preserving* the match generates surplus arising from avoiding those costs. This match-specific surplus must somehow be divided between the worker and the firm. If labor contracts were complete and also fully and costlessly enforceable, then the division of this surplus would be determined ex-ante, before the match was formed. But in reality, this surplus is largely divided via (informal) ex-post bargaining after the match has formed. A noncompete weakens the bargaining position of the worker in this ex-post negotiation, to the worker's detriment and the firm's advantage. *See* Balan, *supra* note 13 for a discussion of this issue and its implications for the question of whether noncompetes should be treated as an antitrust problem.

because all else is not equal. The reasoning is as follows. Recall that in the initial negotiation, each side got the very best terms that they could. But that must mean that each side *fully* exploited their bargaining position; to do otherwise would be to voluntarily leave money on the table. In other words, the negotiated terms reflect the result when each side has shot every arrow in their quiver, which means that neither side has any *remaining* arrows that can be used to extract *additional* concessions from the other, and which in turn means that the firm has no ability to compel the worker to accept a noncompete involuntarily.[15]

If the firm cannot compel the worker to accept a noncompete, then its only alternative is to *compensate* the worker (above and beyond the compensation agreed to in the initial agreement) by an amount sufficient to induce them to agree. The minimum compensation that the worker would accept is the amount by which they are harmed by the noncompete, and the maximum compensation that the firm would pay is the amount by which it makes the firm better off. If the former is greater than the latter, then mutually beneficial agreement to add a noncompete is not possible, and so the noncompete will not exist. If the latter is greater than the former, then an agreement under which the worker agrees to the noncompete, and the firm pays the worker compensation that lies somewhere between those two amounts, is mutually beneficial.[16] and for that reason, there is strong reason to believe that such an agreement will occur. By the same token, if a noncompete is observed, goes Argument #1, the correct inference is that *this compensation has occurred*. and both parties must be better off. Otherwise, the noncompete would simply not exist.[17]

A striking and perhaps counterintuitive feature of this argument is that it does not depend at all on the relative bargaining positions of the worker versus the firm. The idea is as follows. If the worker's relative bargaining position is strong, they will command favorable terms. If it is weak, they will command unfavorable terms. But even if it is weak, it remains true that the unfavorable terms are the result of both sides *fully exploiting* their bargaining position. Even if the worker starts with few arrows in their quiver and the firm starts with many, at the end of the negotiation both quivers are empty, and so the firm has no way to compel the worker to accept any *additional* unfavorable terms, including a noncompete. So once again, the only way for the firm to induce the worker to accept a noncompete is in exchange for sufficient compensation, which will only occur if the firm values having the noncompete by more than the worker values avoiding it.

15. *See* Friedman, *supra* note 3, and Callahan, *supra* note 3.
16. The exact amount of the compensation will depend on the relative bargaining position as discussed in note 13, *supra*. But the argument does not depend on these specifics.
17. In the highly stylized scenario in the main text, I assume that the worker and the firm first decide that they are going to form a match and negotiate the terms that would pertain without a noncompete, and then negotiate over how those terms would change if a noncompete was added. But this is merely for clarity, it is not necessary for the logic of the argument. That logic would work essentially the same way if the worker and the firm negotiated the terms that would pertain *with* a noncompete, and then negotiated over how those terms would change if the noncompete was *removed*. If the noncompete makes the firm better off by more than it harms the worker, then it is mutually beneficial and so it will remain in place. But if the reverse is true, then the worker and the firm would negotiate its removal in exchange for other terms of the agreement (likely the wage) being adjusted in favor of the firm (i.e., the worker will compensate the firm for the removal of the noncompete). In this scenario, as in the one in the main text, one should infer from the existence of the noncompete that it is mutually beneficial. The above logic also works essentially the same way in other scenarios, including (i) where the alternative to a noncompete is working for a different firm, rather than working for the original firm but without a noncompete or (ii) where employment terms are unilaterally set by the firm rather than being negotiated (this scenario is discussed further below). Finally, this logic is not specific to noncompetes: It applies to any negative attribute of a job, such as noisy or dangerous working conditions. Such conditions will only exist if they harm the worker by less than they make the firm better off, otherwise both parties would prefer an alternative that eliminates the negative attribute and also pays a lower wage. In sum, Argument #1 says that job attributes that are not mutually beneficial will not exist, and job attributes that do exist must be mutually beneficial.

The final step in Argument #1 is the claim that mutually beneficial noncompetes are also economically efficient, both in the sense of Pareto Efficient (there is no way to make one party better off without making the other worse off), and in the sense of increasing total economic surplus (sometimes known as Kaldor-Hicks Efficiency). But it is important to note that even if noncompetes are mutually beneficial, they may not be economically efficient if they negatively affect third parties who did not agree.[18] There are good reasons to believe that noncompetes do harm third parties,[19] and this constitutes an independent reason to believe that they are harmful on net.[20] Since this is not the main subject of the present article, in what follows the effect of noncompetes on third parties is assumed away except in the discussion about Argument #2(*A*) below. That is, in what follows the question of the economic efficiency of a noncompete (in the sense of increasing total economic surplus) reduces to whether or not the noncompete makes the firm better off by more than it harms the worker.

Responses to Argument #1. The logic behind Argument #1 is sound: Given the premises, the argument is correct. The problem is that the premises are faulty. To see why, begin by supposing that, contrary to Argument #1, the firm *does* have some way, unspecified for now (but discussed below), to impose a noncompete on the worker (i.e., to induce the worker to accept it *without* compensation).[21] If the firm could do that, it would be in its interest to do so; as noted above, the firm is made better off by restricting the worker's outside opportunities. And of course this is harmful to the worker. So a firm that has the ability to impose a noncompete on a worker without compensation has a means by which to *extract value* from that worker.

If in fact a noncompete can be used as a means of extracting value from the worker (i.e., making the firm better off *at the worker's expense*), then it is clear that its mere existence no longer guarantees that it must mutually beneficial. If the firm's ability to use a noncompete to extract value from the worker is sufficiently high, then the worker will be made worse off than if the noncompete never existed.

Even if the noncompete makes the worker worse off, that does not necessarily mean that it is inefficient in the sense of reducing total economic surplus.[22] It is still possible that the noncompete makes the firm better off by more than it harms the worker, but the firm's ability to use the noncompete to extract value from the worker enables it to capture more than 100% of that efficiency. But it is also possible that the noncompete is inefficient: It may hurt the worker by more than it makes the firm better off, but it exists nevertheless because of its usefulness to the firm as a means of extracting value. (It is also possible that the noncompete is both efficient and mutually beneficial, but with the worker receiving less than they would have received if the noncompete could not also be used as a means of extracting value.)

For this reason, Argument #1 depends crucially on the premise that imposing a noncompete on a worker without compensation is impossible or nearly so. That is, the argument requires that the

18. This is closely related to the economics of exclusive dealing contracts, where exclusives that are beneficial to all of the parties that agreed to them can be harmful to parties that did not agree, and can therefore be economically inefficient. *See* MICHAEL D. WHINSTON, LECTURES ON ANTITRUST ECONOMICS, Chapter 4 (2006).

19. *See* Liyan Shi, *The Macro Impact of Non-Compete Contracts* (2020) (unpublished manuscript). That paper, using a methodology that is very different from those described above, concludes that "the optimal restriction on noncompete duration is close to a ban."

20. Possible harmed third parties include owners, workers, and customers of firms that would have been started or made more productive by the unimpeded flow of workers. This possibility is sometimes acknowledged even by supporters of noncompetes, though it is often skipped over lightly.

21. The discussion in the main text assumes that the firm can impose a noncompete on the worker without any compensation at all. The same points would apply, in an attenuated form, if the firm needed to pay some compensation, but less than the amount that would have been agreed to in a free negotiation without imposed terms.

22. As discussed above, here I assume away the effect of the noncompete on third parties. But in fact it is likely that those effects are negative, which makes it more likely that the noncompete is not efficient.

worker's formal agreement to the noncompete can never be obtained unless it truly makes the worker better off. This premise is rather obviously incorrect. The remainder of this section describes five ways in which firms can obtain formal agreement to a noncompete even when it is harmful to the worker. They are:

- The firm can mislead the worker about the very existence of the noncompete. If the noncompete is buried in the fine print of a complicated employment contract, the worker may "agree" to it without ever knowing that it was there. Similarly, the worker could see the noncompete language but not understand what it means, either in the literal sense of not having a factually accurate understanding of what they are agreeing to or in the psychological sense of not regarding as salient an abstract restraint that might be relevant only in the distant future.[23]
- In some cases, the worker is not told that the noncompete is part of the employment contract until they have already started the job. But by that time, it is more difficult to refuse. The worker is likely eager to start the new job and would not want to quit. In addition, the worker may have already turned down other job offers, so that quitting would mean starting a new job search with the attendant costs, delays, distress, and lost income. Therefore, the worker might agree to a noncompete ex post that they would not have agreed to ex ante on the day that they accepted the job.[24]
- If there is any ambiguity in the terms of the noncompete, the firm can exploit that ambiguity, along with its large advantage in the ability to bear the costs, financial and otherwise, of fighting in court, to bind the worker to an interpretation of the noncompete that is more restrictive than what the worker agreed to and was (possibly) compensated for.[25]
- Suppose the worker agrees to a noncompete in exchange for compensation in the form of a promise of better employment terms (such as a higher wage) in the future. Now suppose that the firm does not deliver on that promise. What recourse does the worker have? One natural recourse is to quit. *but that is the very thing that the noncompete deters the worker from doing.*[26] That is, the firm may be able to renege on delivering the compensation promised to the worker in exchange for agreeing to the noncompete precisely because the noncompete itself decreases the cost of doing so. This is a key point: The compensation is what makes the noncompete mutually beneficial, but then the noncompete can cause the worker not to receive the compensation.[27]
- The discussion of Argument #1 above was about *negotiating* over the inclusion of a noncompete provision in a labor agreement. But in many cases, no such negotiation is possible; the noncompete is unilateral firm policy, required of all workers. It might appear that if firms can

23. Note that even if the noncompete is not understood by or salient to the worker, that is not true for the *firm*. The firm fully understands what it has to gain from the noncompete. This asymmetry in sophistication between the worker and the firm is one reason why both sides might "agree" to a noncompete that is not mutually beneficial.
24. The possibility that a firm might exploit the reluctance of the worker to quit once they have accepted the job is not limited to noncompetes. The firm might do this with any employment term, including wages. However, the comprehension/salience point described above is relevant here as well. A worker who is told on Day 1 that they will not receive the promised wage may be more likely to quit than a worker who is told of the existence of a noncompete, and even if they do not quit they are more likely to be a disgruntled employee. So the asymmetry in sophistication between the worker and the firm gives the firm the incentive to extract value from workers ex-post by modifying opaque terms instead of salient ones.
25. Perhaps a rational worker would anticipate this possibility and so would require compensation for the stronger noncompete that the firm might try to impose ex-post, rather than the weaker one that was agreed to ex-ante. But this requires a level of foresight and "meta rationality" that is unrealistic even for relatively sophisticated workers.
26. There are other factors that give firms an incentive to deliver on their promises, including formal contracts and reputation effects. But the ability of the worker to quit is a very important one.
27. Perhaps a rational worker would anticipate this possibility and refuse to sign the noncompete in the first place. But as in note 25, this requires a level of foresight and "meta rationality" that is unrealistic even for relatively sophisticated workers.

literally impose noncompetes on workers, then there need be no compensation and noncompetes can be used as a means to extract value from workers.

However, a proponent of Argument #1 would say, correctly, that this does not follow from standard economic theory. Many standard economic models include firms that post nonnegotiable terms (e.g., the price of cereal at the supermarket). This does not mean that firms can impose whatever terms they want. Firms are still constrained by competition, which requires them to offer terms favorable enough to make workers want to work for the firm. Moreover, competition tends to work to eliminate provisions that are inefficient (i.e., that harm workers by more than they make the firm better off), for reasons similar to those discussed in note 17 above; if the provision is inefficient then there would exist a mutually beneficial agreement to eliminate it in exchange for a change in some other provision of the employment agreement. And if most firms persisted in requiring an inefficient noncompete, one or a few firms could outcompete those firms by not requiring it, either displacing them or forcing them to follow suit.

The argument in the preceding paragraph is correct as far as it goes. But if the assumptions are made a bit more realistic, it becomes clear that requiring noncompetes as a nonnegotiable provision of the job can be an effective means of imposing them on workers without compensation. Specifically, if nonnegotiable (and uncompensated) noncompetes are widespread in an industry it is unlikely that competition will dislodge them.[28] The reason is as follows. In order for competition to dislodge harmful noncompetes, firms that do not require a noncompete, and that hope to attract workers on that basis, would have to make that fact a large and salient part of their worker recruitment message, otherwise prospective workers will not even know about it. But firms can capture only a limited amount of the attention of prospective workers, and it is likely that other recruiting messages would be a better use of that limited attention, particularly if the noncompete is not highly salient for workers. In addition, if one or a few firms did recruit based on a "no noncompetes" message, the workers that they would attract would not be a random sample of workers. Rather, they would be the workers who care the most about avoiding noncompetes, and those workers may be undesirable in other ways, such as being more likely to quit.[29] In sum, once harmful noncompetes have become widespread in an industry, they are likely to persist because the competitive pressure to eliminate them, while present, may not be sufficiently strong.

In the above arguments, no distinction was made between low- and high-wage workers. It is sometimes suggested that noncompetes are a problem for the former but not for the latter, who are more sophisticated and for whom the efficiency justifications (discussed below) are more likely to apply. There may be some truth to this; to cite a recent well-known case, requiring sandwich makers at Jimmy Johns to sign a broad noncompete provision likely exploits some disadvantages that are specific to low-wage workers, and it certainly lacks any plausible efficiency justification.[30] However, the reasons to doubt Argument #1 are not confined to low-wage workers. All five of the above points apply at least to some extent to higher wage workers, particularly the last two.

28. This point is different from the others in that it depends on the assumption that noncompetes are already widespread in the industry (though a weaker version of the point applies even if they are not widespread). The other points do not depend on this assumption.

29. For a similar mechanism in a different context, *see* David J. Balan & Dan Hanner, *Job Insecurity Isn't Always Efficient* (2014) (unpublished manuscript).

30. Illinois Attorney General, *Madigan Announces Settlement with Jimmy John's for Imposing Unlawful Non-Compete Agreements*, December 7, 2016, https://illinoisattorneygeneral.gov/pressroom/2016_12/20161207.html. *See also* Illinois Attorney General, *Attorney General Madigan Reaches Settlement with National Payday Lender for Imposing Unlawful Non-Compete Agreements*, January 7, 2019, https://illinoisattorneygeneral.gov/pressroom/2019_01/20190107b.html.

B. Argument #2: Noncompetes Facilitate Beneficial Economic Activity

By the logic of Argument #1, in order for a noncompete to be economically efficient, it must have some positive benefit. If it did not, then it could not make the firm better off by more than it harms the worker. And if it is not efficient, then it cannot be mutually beneficial, and if it was not mutually beneficial then it would not be observed. But since noncompetes are observed, goes Argument #1, these positive benefits *must* exist, and they must be sufficiently large to render the noncompete efficient, otherwise one party or the other would not have agreed to it.[31]

The conviction that positive benefits must exist, and must be sufficiently large to render the noncompete efficient, does not guarantee that any particular claimed source of such benefits must be valid. However, that conviction does influence the evaluation of individual claims of positive benefits from noncompetes: If it is certain that substantial benefits must exist, and if there are a relatively small number of candidate sources of those benefits, then the evaluation of one or more individual proposed sources *must* begin with the premise that the benefit is likely to be real and substantial. That is, believing Argument #1 necessarily requires being less skeptical about claimed sources of benefits than one would be absent that belief.

But as discussed above, Argument #1 is not correct: Noncompetes can be imposed on workers by firms without compensation as a means of extracting value from them. And in that case, noncompetes can exist even if they have little or no positive benefits (and as discussed below, those "benefits" can even be negative). This does not mean that substantial positive effects do not exist; it is possible that noncompetes can be *both* a means of extracting value from workers *and* a source of meaningful positive benefits, either simultaneously for a single worker or differentially across different workers.[32] So an inquiry into claimed positive benefits is still worthwhile, but there is no a priori supposition that the claims must be valid; if the claims are found to be weak or inconsistent with evidence then the correct conclusion is that those benefits simply do not exist (or are small or even negative), and not (as Argument #1 would have it) that large benefits *must* exist and the only question is what exactly they are.

Below, I discuss the two most commonly argued claims of positive benefits from noncompetes, namely, (A) that they facilitate efficient knowledge transfer from firms to workers and (B) that they encourage efficient firm-sponsored investment in worker training. While these justifications are not completely without merit, I argue that they are both weak, and that scrutiny of them in fact reveals strong arguments in the opposite direction. These arguments, combined with the empirical evidence discussed above, support the conclusion that noncompetes are likely to be harmful on balance (being harmful to workers and likely also harmful to efficiency), and that they are very unlikely to have effects so positive that heavily restricting or banning them would risk major economic harm.

1. Argument #2(A): Noncompetes Facilitate Efficient Knowledge Transfer

Suppose a firm has some knowledge (e.g., a trade secret or a manufacturing process or a customer list) that, if shared with a worker, would make that worker more productive and more valuable to the firm. In that case, sharing the knowledge will be economically efficient. But if that knowledge is also valuable to competitors, then competitors will be willing to offer a worker in possession of that

31. Even strong supporters of noncompetes probably do not believe in a strictly literal version of Argument #1. But even in a nonliteral version of the argument, the mere existence of noncompetes, and their voluntary nature, are taken to be strong evidence that they are likely to be mutually beneficial and economically efficient. This in turn means that important positive effects are very likely to exist (in Bayesian terms, there are strong priors), whether there is clear evidence for them or not.

32. It should be noted, however, that the fact that firms impose noncompetes on low-skill workers such as sandwich makers when there are quite clearly no positive effects from doing so is grounds for additional skepticism regarding other claims of positive effects that are more facially plausible.

knowledge a wage that reflects its value. This means that the original firm will either lose the worker (and have the knowledge fall into the hands of the competitor) or it will have to match the higher wage. This may make the firm worse off than if it had never shared the knowledge in the first place. If so, the firm might design the job so that the knowledge sharing will not occur, even though sharing is efficient. The inability to protect the knowledge might even cause the firm not to develop it in the first place, or in the extreme case, it might cause the firm to eliminate the job altogether. But with a noncompete agreement in place to protect the knowledge, the firm would have the appropriate incentive to develop and share it.[33]

Responses to Argument #2(A). This argument has some plausibility. It is not difficult to imagine situations where a firm has knowledge that workers must also have in order to be fully productive, that competitors would pay a lot for, and that firms cannot otherwise protect. However, there are a number of factors that limit the strength of this argument:

- In order for the argument to hold, it must be true that the firm really will forbear from sharing the knowledge if it cannot use a noncompete. That is, there must be a more efficient way to run the business (with sharing), and another, less efficient way to run it (without sharing), and the more efficient way must be more profitable than the less efficient way if and only if the worker is bound by a noncompete.[34] If this is not true, then the sharing will occur with or without a noncompete, and so banning noncompetes, while harmful to the firm's profits, will not hurt economic efficiency (as long as it does not cause the firm to go out of business).
- Argument #2(*A*) is correct in that the possibility that knowledge might escape the firm is harmful to efficiency, because it can cause the firm not to share the knowledge within the firm, or even not to develop it in the first place. But it ignores the fact that when knowledge *does* escape a firm, and flows to other firms, that is often a *good* thing, because the receiving firms can do valuable things with the knowledge as well, including using it as an input in the creation of additional knowledge. So there is a tradeoff. Noncompetes provide an incentive to efficiently develop and share knowledge within the firm, but the absence of noncompetes causes more sharing of knowledge across firms.[35]

This tradeoff is very similar to the one that lies at the heart of the debate regarding whether intellectual property (IP) protections should be stronger or weaker: Stronger IP means stronger incentives to innovate, and weaker IP means more sharing and cross-pollination of knowledge, which among other advantages reduces the cost of subsequent innovation. It is worth noting that there is a widely held view among economists and IP experts (though not a consensus) that IP protection in the United States is too strong, not too weak.[36] That is, it probably should be *easier* to spread ideas than it currently is, even at the cost of some reduction in the ability to capture the returns to the innovation. And if this is true of IP, it may be true of noncompetes as well; if noncompetes were weaker or did not exist, the gains from spreading knowledge across firms may exceed the harm from less development and sharing of information within the firm.

The experience of California (CA) is a key piece of evidence on this point. In CA, noncompetes are legally unenforceable. And yet CA is a worldwide center of innovation. While it is possible that CA is

33. *See* Barnett & Sichelman, *supra* note 3; Long, *supra* note 3.

34. In the main text, I assume that there are two discrete ways of organizing the job. In reality, there may be a continuum of ways, but the basic point still applies.

35. This is an example of a situation where a noncompete can harm third parties that did not agree to it, even if it is mutually beneficial to the worker and the firm. *See* Shi, *supra* note 19.

36. *See* Bronwyn H. Hall & Dietmar Harhoff, *Recent Research on the Economics of Patents*, 4 ANN. REV. ECON. 541–65 (2012); and Bronwyn H. Hall, *Patents, Innovation, and Development*, INT'L L. REV. APPLIED ECON. (forthcoming, 2021).

innovative despite the restrictions on noncompetes and not because of them, at a minimum the experience of CA shows that such a policy is not severely damaging to innovation. It is also possible that the restrictions on noncompetes might be one of the *causes* of CA's success. It may cause beneficial knowledge sharing across firms similar to what might be achieved through weaker IP, and this advantage may outweigh the disadvantage of reduced incentive to develop and share knowledge within the firm.[37,38]

- While a noncompete may increase the *firm's* incentive to create new knowledge, it decreases the *worker's* incentive to do so. A worker who develops new knowledge absent a noncompete gains by being more attractive to outside firms, which allows them to either switch jobs or to bargain with their current firm from a stronger position.[39] The existence of a noncompete reduces this gain and so reduces the incentive to create knowledge.[40]
- Aside from their effects on the creation and dissemination of information within and across firms, noncompetes impede the efficient flow of *people* across firms. Not every worker/firm match is the right one. Sometimes, it was a mistake from the beginning, and other times, it was the right one once but is no longer. The normal way to improve upon a suboptimal match is for the worker to switch jobs. Noncompetes impede this switching, as it is more difficult for the worker to quit because they are barred by the noncompete from the best available alternative jobs.[41] So workers are either stuck in suboptimal matches or they are forced to take a (likely inferior) job that is not prohibited by the noncompete or even to leave the workforce entirely. Noncompetes interfering with better matches between workers and firms may be a significant source of inefficiency.[42]

Given the above points, the claim that noncompetes can lead to an increase in efficient information sharing is not entirely without merit. But close scrutiny reveals the argument to be weak and also suggests some strong arguments to the contrary.

2. *Argument #2(B):* Noncompetes *Facilitate Efficient Investment in Worker Training*

Firms sometimes engage in costly investment in worker training and skills. But they may be less likely to do so if those workers can use that training to attract better outside job offers. If training the worker means either losing that worker or having to pay a higher wage to retain that worker, the firm may not

37. For versions of this argument, *see* Orly Lobel, *Noncompetes, Human Capital Policy & Regional Competition*, 45 J. CORP. L. 931–51 (2020); and *Exit, Voice & Innovation: How Human Capital Policy Impacts Equality (& How Inequality Hurts Growth)*, 57 HOUS. L. REV. 781 (2020).
38. It is important to note, however, that many labor contracts in California contain noncompete provisions, even though they are unenforceable according to state law. It is therefore possible that some workers *believe* that they are constrained by a noncompete when in fact they are not, and this perceived constraint may have an effect similar to that of an actual constraint due to an *in terrorem* effect. For this reason, the policy regime in California is not (as a practical matter) a complete ban on noncompetes, which complicates the interpretation of California's innovation success. *See* Evan Starr, et al, *The Behavioral Effects of (Unenforceable) Contracts*, 36 J. L. ECON. & ORG. 633–87 (2020). *See also* Evan Starr & J. J. Prescott, *Subjective Beliefs about Contract Enforceability* (2021) (unpublished manuscript) for evidence that workers are often poorly informed about the enforceability of noncompete provisions in their labor agreements.
39. The reference here is not to knowledge that would be owned by the firm if it were created, such as a patent. Rather it is to knowledge that the worker can create, the creation of which would be economically efficient, but will only actually be created if the worker can use it to become more valuable to outside firms.
40. *See* Mark J. Garmaise, *Ties that Truly Bind: Non-competition Agreements, Executive Compensation and Firm Investment*, 27 J. LAW, ECON. & ORG. 376–25 (2011).
41. If the match is sufficiently bad, the firm may fire the worker. But there are many bad matches that persist.
42. If the worker is more efficient with another firm, it is possible that there could be a mutually beneficial exchange in which the worker pays the firm to release them from the noncompete. But there are many practical barriers to this happening, and so it is rare.

provide the training in the first place, even if doing so is economically efficient. But if there was a noncompete agreement in place, then the firm would have the appropriate incentives to provide the training.[43]

Responses to Argument #2(B).

- A similar point to one made above about Argument #2(*A*) applies here as well. The argument does not work if the training is inherent in the job. For example, if hospital nurses gain skills that make them more attractive to outside employers, and if those skills arise simply from the experience of being a hospital nurse, then the firm has no choice but to provide that "training," and will do so with or without a noncompete. And even if the training is formal training and not on-the-job training, it may be so necessary for the job that the firm would be willing to provide it at its own expense even if doing so will make the worker more attractive to outside employers. In order for a noncompete to lead to more training, there must be a version of the job where training is provided, another version where it is not provided, and the firm must prefer the version where it is provided if and only if the worker is bound by a noncompete.
- Labor economists distinguish between industry-specific human capital (HC) and firm-specific HC. (There is also a concept of "general" HC that is useful across industries, but for our purposes this can be folded into the concept of industry-specific HC.) Firm-specific HC is defined as HC that makes the worker more valuable at the current firm but not at other firms. Clearly, noncompetes do not cause firms to increase training that imparts firm-specific HC, because by definition firm-specific HC is not useful to any competitor; providing it to the worker does not raise the worker's outside wage, and so will not put the firm in a position where providing the HC means either losing the worker or matching a higher outside wage offer. To the contrary, firm-specific HC tends to bind workers more tightly to their firms, because it makes the existing match more valuable relative to alternative matches.

Industry-specific HC, in contrast, is valuable to other firms in the industry as well as to the original firm.[44] In the simplest labor economics models, training that imparts industry-specific HC is not paid for by the firm at all. Precisely because the HC increases the worker's value to outside firms, the benefit from that HC accrues to the worker and not to the firm, and so only the worker is willing to pay for it, either directly in the form of education or indirectly in the form of a lower wage for a period of time (or in the case of many internships, a zero wage) in exchange for on-the-job training. So even when the firm appears to be providing training for industry-specific HC at its own expense, that training is often actually indirectly financed by the worker.[45]

Given this, it might appear that firms would be willing to pay for training that imparts industry-specific HC if it could be protected by a noncompete, as then the firm would capture the benefit. But according to the simplest model of labor market competition, if the training imparts a benefit (increased industry-specific HC) that exceeds its cost, then it will occur regardless; with a noncompete, the firm will pay the cost and receive the benefit, and without a noncompete, the worker will do the same. That is, in the simplest model a noncompete removes a barrier to the firm paying

43. *See* Rubin & Shedd, *supra* note 3; Long, *supra* note 3.

44. The distinction between the types of human capital is not always so clear. For example, going to Hamburger University presumably increases the trainee's value as a manager at any fast food restaurant (industry-specific), but probably increases their value at McDonald's the most because the practices being taught are the exact ones used at McDonald's (firm-specific). Despite this, the basic point still applies.

45. *See* Gary S. Becker, *Investment in Human Capital: A Theoretical Analysis*, 70 J. POL. ECON. 9–49 (1962).

for industry-specific HC training, but it will not cause training to happen that would not have happened anyway.[46]

If we complicate slightly the model of labor market competition, there can be circumstances in which firms *do* impart industry-specific HC at their own expense and to the benefit of the worker. Minimum wage laws can limit the extent to which workers can be made to pay for their own HC in the form of lower wages. Credit constraints or behavioral factors may limit workers' willingness or ability to self-fund training by accepting a job with lower wages today in order to be able to command higher wages in the future. In these situations, it is possible that this training will be facilitated by noncompetes to the benefit of workers. And it is even possible that without the noncompetes, some jobs will be eliminated altogether.

In sum, given the above points, the claim that noncompetes lead to an increase in efficient worker training is not entirely without merit. But overall, close scrutiny reveals the argument to be weak, weaker than Argument #2(*A*), and also suggests strong arguments to the contrary.

IV. Noncompetes Versus Other Postemployment Restrictive Covenants (PERCs)

Noncompetes are only one of a number of PERCs that exist. Other PERCs include nondisclosure agreements, nonsolicitation agreements, and nonrecruitment agreements. A full evaluation of these other PERCs is beyond the scope of this article, and I offer no policy recommendations regarding them. But a few points are worth noting:

- Like noncompetes, other PERCs may be imposed on workers without compensation (or made unreasonably broad) as a means of extracting value. This is grounds for skepticism about them.[47]
- However, the argument that these other PERCs have positive benefits is stronger than is the case for noncompetes. The idea that efficient information creation and sharing requires the protection of a nondisclosure agreement (so that the worker cannot simply sell the knowledge to the highest bidder) is much more reasonable than the idea that it requires the protection of a noncompete (so that the worker's alternative sources of employment are restricted or foreclosed). Similarly, nonsolicitation agreements and nonrecruitment agreements may legitimately be necessary for certain kinds of businesses and professional practices to be willing to integrate new partners without fear that the partner will leave and take the business with them.
- By the same token the potential for harm to the worker from these other PERCs, even if they are imposed without compensation in the manner described above, is much smaller than with noncompetes. There is a fundamental difference between restricting what a worker can take with them when they leave (knowledge, customer contacts, recruitable employees) and restricting the worker in where they can go if they wish to leave.
- For these reasons, in some settings, other PERCs may be a reasonable alternative to noncompetes; they may be a less restrictive alternative means of achieving the positive benefits that are often claimed for noncompetes. The availability of this alternative further strengthens the case for greatly restricting or banning noncompetes.

46. *See* Garmaise, *supra* note 40.

47. *See* Balasubramanian, et al. *supra* note 11, for evidence that workers who are subject to one PERC are often subject to the others as well and that, for the average worker, the motivation for this appears to be what the authors term "value capture" by the firm, which is synonymous with what in this article is termed "value extraction." (For top managers, the paper finds the opposite result).

- However, it should be noted that noncompetes do have one important advantage over other PERCs, namely, that violations of noncompetes are much more easily detected. It is much easier to know and to prove that a worker has accepted a job that violates their noncompete than it is to prove that they have not shared information in violation of a nondisclosure agreement or subtly recruited customers or workers in violation of a nonsolicitation or nonrecruitment agreement.

V. Discussion

Sections II and III combine to show that noncompetes are likely to be harmful on balance and are very unlikely to be so beneficial that restricting or banning them would risk major economic damage.

The material in those sections is based on standard economic analysis, attempting to understand the effect of noncompetes on such conventional outcomes as worker mobility, hiring, and entrepreneurship, investment, innovation, and wages. It does not capture other, potentially more serious worker harms that are not typically studied by economists. A worker who is stuck in a bad job match might merely be less productive or less well-compensated than they otherwise would be. But they might also be less happy, and worse, they might be a target for genuine exploitation, degradation, or abuse. A worker who is known by a predatory employer or manager to be stuck is likely to be mistreated, because they have no choice but to accept it. There are many reasons why a worker might be stuck, but a noncompete adds an additional one: A worker trying to muster the courage to quit might be reminded of the noncompete that they signed and threatened with legal action if they violate it. It is not altogether an exaggeration to call this a human rights issue.

Even aside from these concrete harms, noncompetes represent a limitation on human freedom. The ability of a person to leave a bad situation has value in and of itself. Policy makers can choose to make a normative judgment that assigns weight to this value, for which they may be willing to sacrifice some economic efficiency. However, it would only be a sacrifice if noncompetes were economically efficient, which as discussed above is likely not the case.

Even if noncompetes are harmful, the question remains of what should be done about them.[48] One possible approach would be treat them as an antitrust problem. It is not obvious that this is the correct approach; noncompetes could be harmful without necessarily belonging within the purview of antitrust (though the very term "noncompete" should be a red flag). Or perhaps noncompetes are an antitrust problem, but only in situations where they are imposed on workers as a consequence of monopsony power in the labor market. In a companion article, I argue that noncompetes can be reasonably regarded as an antitrust problem even absent conventional monopsony power (i.e., even if the labor market was highly competitive in the sense that the worker had many job offers similar to the one that they accepted).[49]

VI. Conclusion

Defenders of labor noncompetes often claim that they were voluntarily agreed to, and so they must be both mutually beneficial and economically efficient. This claim rests on faulty premises: Firms have

48. A common argument against any policy action limiting noncompetes is that it would constitute a paternalistic violation of freedom of contract between two willing parties. But whatever one's general view on the appropriateness of paternalistic government interventions, it is important to note that of the five points listed in response to Argument #1 above, all five apply at least to some extent to higher wage workers, particularly the last two. Only the first point, and to a lesser extent the second, depends heavily on a lack of rationality or capability on the part of the worker that might be ameliorated by government paternalism. The others are ways that firms can extract value by imposing noncompetes on workers who are highly (though not infinitely) rational and capable. A ban on noncompetes therefore protects workers from being victimized by firms, not from their own poor decisions.

49. *See* Balan, *supra* note 13. *See also* Rohit Chopra & Lina M. Khan, *The Case for 'Unfair Methods of Competition' Rulemaking*, 87 U. CHI. L. REV. 357–79 (2020) for an argument for combatting noncompetes using the Federal Trade Commission's antitrust rulemaking authority.

both motive and means to induce workers to accept noncompetes that are not to their benefit, but rather are a means by which the firm extracts value from them. This is true even though the noncompetes are nominally voluntary. In addition, the most commonly made claims of positive effects from noncompetes (that they facilitate efficient knowledge transfer within firms and that they facilitate efficient worker training), while not completely without merit, do not stand up to critical scrutiny, and in fact that scrutiny reveals strong arguments to the contrary.

The weakness of the arguments in favor of noncompetes, combined with the substantial body of empirical literature that mostly finds them to be harmful, as well as the experience of California which has flourished as a center of innovation despite (or perhaps because of) not enforcing them, is sufficient to conclude that noncompetes are likely to be harmful on balance. And even if they are beneficial on balance, they are very unlikely to be so beneficial that restricting them would risk major economic harm.

In addition, noncompetes may cause harms that are not commonly measured by economists, such as increasing worker vulnerability to exploitation and abuse. Finally, the ability of a human being to take their body and their labor where they choose is a human right. Perhaps some extremely strong economic efficiency benefits would outweigh these harms, but as discussed above, such benefits do not exist.

Author's Note

David J. Balan is an employee of the Federal Trade Commission. The views expressed in this article are solely those of the author.

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Agenda

National Association of Attorneys General (NAAG)
Antitrust & Labor Issues Working Group Call (ALIWG)
Monday June 13, 2022
2:00 PM EST/1:00 PM Central/12:00 PM Mountain/11:00 AM Pacific/8:00 AM (HI)

https://naag-org.zoom.us/ (b)(6)

Meeting ID: (b)(6)
Passcode:

OPEN Call NON AAGs INCLUDED

I. Welcome

II. New to Our Call? Please Feel Free to Introduce Yourself/Your Organization

III. Topic: Antitrust Challenges to Labor Non-Competes

- Guest Speaker-
  - **David Balan,** Managing Director, Econ One
  - Q&A

IV. Open Mic

- Any Public Announcements/Updates Re Recent or Upcoming Antitrust and Labor Matters?

V. Attachments:

- Articles by D. Balan
  i. Labor Noncompete Agreements: Tools for Economic Efficiency or Means to Extract Value from Workers (Antitrust Bulletin);
  ii. Labor Practices Can Be An Antitrust Problem Even When Labor Markets are Competitive (CPI):
  iii. Article Sketch (Worker Harm as Antitrust Violation) (forthcoming)

VI. Next Call:

- July 11, 2022 AAGs Only-- Closed Call

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From: Walker, Schonette <swalker@oag.state.md.us>
Sent: Friday, June 10, 2022 4:13 PM
To: Walker, Schonette; Wilkins, Elizabeth; Alacoque Nevitt; Amanda Lee; Berger, Thomas J; Black, Christina (ATG; Bloom, Bryan; Bradshaw, Grace (AGO; Bryan Sanchez; CalebSmith-contact; Canaday, James; Christopher Hallock; David Sonnenreich; Demers, Nicole; Dunlap, Jeffrey; Durst, Arthur (OAG; Elizabeth Mxeiner; Emily Myers; Etie-Lee Schaub; Hoffmann, Elinor; Honick, Gary; Hubbard, Robert; Isabella Pitt; Jackson, Catherine; Jacob.murray@atg.in.gov; Jamison T. Ball; Thomson, Jennifer; Jessica Agarwal; jkirk; Joseph 'Chervin; joseph.meyer; Kemerer, Hannibal; Khan, Meryum (AGO; Laura Namba; LynetteBakker-Contact; Marie W. Martin; Marisa Hernandez-Stern; Mark, Cynthia (AGO; Mary Martin; Matelis Christy; Matlack, William (AGO; Max.Miller; McFarlane, Amy; Michaloski, Matthew; Moler, Jonathan; Morejon, Amanda (AGO; Nicholas Niemiec; Nodit, Luminita (ATG; Olson, John; Pamela Pham; Paul Harper; philip.rizzo@atg.in.gov; Queyn Toland; Rao, Rahul (ATG; Robert J Yaptangco; Robert Yaptangco; Satoshi Yanai; Sharp, Margaret; Shencopp, Erin; steve provazza; Tara Pincock; Timothy Fraser; Tucker, Lucas; Tulin, Leah; Walker, Nancy A.; William Rogers; Yale Leber; Zach Biesanz; Alexander James Colvin; Amezcua, Carrie G.; (b)(6) ec.europa.eu; Anne Schneider; avery gardiner; Batal, Mohamad; belga; Bond, Slade; Braun, Christi; (b)(6) @hoganlovells.com; (b)(6) ucsd.edu; dave balan; DAVID DESARIO (b)(6) brandeis.edu; DEMIROGLOU Aristeidis; Doha.Mekki; Eric Posner; Eric.posner@usdoj.gov; Funk, Stephanie; Gerstein, Terri Ellen; Greer, Kristin; Harsch, Ryan F.; Harvey, Dean; Holland, Caroline; Ioana Marinescu; Jane Flanagan; Johnson, Heather; Jon Leibowitz (b)(6) @omm.com; Berg, Karen E.; (b)(6) ec.europa.eu; Levine, Gail; Marc Edelman; Mark, Synda; Mast, Andrew (ATR; (b)(6) @duke.edu; megan jones; Myriam E Gilles (b)(6) @economicliberties.us; Robinson, Tabatha; Salahi, Yaman; STROUVALI Konstantina; Tanuja Gupta; Terri Gerstein; vaheesan; Van Wye, Joseph; William Wu; Woolery, Ricardo; (b)(6) @edelson.com
Cc: Warren, Byron; Dill, Megan; LaPonzina, Dean; David Balan
Subject: FW: NAAG Antitrust and Labor Issues Working Group Call--OPEN call
When: Monday, June 13, 2022 2:00 PM-3:00 PM (UTC-05:00) Eastern Time (US & Canada).
Where: zoom

-----Original Appointment-----
From: Walker, Schonette
Sent: Friday, February 11, 2022 4:05 PM
To: Walker, Schonette; Alacoque Nevitt; Amanda Lee; Berger, Thomas J; Black, Christina (ATG; Bloom, Bryan; Bradshaw, Grace (AGO; Bryan Sanchez; Caleb Smith; Canaday, James; Christopher Hallock; David Sonnenreich; Demers, Nicole;

Dunlap, Jeffrey; Durst, Arthur (OAG; Elizabeth Mxeiner; Emily Myers; Etie-Lee Schaub; Hoffmann, Elinor; Honick, Gary; Hubbard, Robert; Isabella Pitt; Jackson, Catherine; Jacob.murray@atg.in.gov; Jamison T. Ball; Jennifer Thomson; Jessica Agarwal; jkirk; Joseph 'Chervin; joseph.meyer; Kemerer, Hannibal; Khan, Meryum (AGO; Laura Namba; Lynette Bakker; Marie W. Martin; Marisa Hernandez-Stern; Mark, Cynthia (AGO; Mary Martin; Matelis Christy; Matlack, William (AGO; Max.Miller; McFarlane, Amy; Michaloski, Matthew; Moler, Jonathan; Morejon, Amanda (AGO; Nicholas Niemiec; Nodit, Luminita (ATG; Olson, John; Pamela Pham; Paul Harper; philip.rizzo@atg.in.gov; Queyn Toland; Rao, Rahul (ATG; Robert J Yaptangco; Robert Yaptangco; Satoshi Yanai; Sharp, Margaret; Shencopp, Erin; steve provazza; Tara Pincock; Timothy Fraser; Tucker, Lucas; Tulin, Leah; Walker, Nancy A.; William Rogers; Yale Leber; Zach Biesanz; Alexander James Colvin; Amezcua, Carrie G. (b)(6) @ec.europa.eu; Anne Schneider; avery gardiner; Batal, Mohamad; belga; Bond, Slade; Braun, Christi (b)(6) @hoganlovells.com; daarnold@ucsd.edu; dave balan; DAVID DESARIO; (b)(6) @brandeis.edu; DEMIROGLOU Aristeidis; Doha.Mekki; Eric Posner; Eric.posner@usdoj.gov; Funk, Stephanie; Gerstein, Terri Ellen; Greer, Kristin; Harsch, Ryan F.; Harvey, Dean; Holland, Caroline; Ioana Marinescu; Jane Flanagan; Johnson, Heather; Jon Leibowitz (b)(6) @omm.com; KBERG@ftc.gov; (b)(6) @ec.europa.eu; Levine, Gail; Marc Edelman; Mark, Synda; Mast, Andrew (ATR; (b)(6) @duke.edu; megan jones; Myriam E Gilles; (b)(6) @economicliberties.us; Robinson, Tabatha; Salahi, Yaman; STROUVALI Konstantina; Tanuja Gupta; Terri Gerstein; vaheesan; Van Wye, Joseph; Wilkins, Elizabeth; William Wu; Woolery, Ricardo (b)(6) @edelson.com; Jeffrey Dunlap (jdunlap@oag.state.md.us); Leah Tulin (ltulin@oag.state.md.us)
Cc: Byron Warren (bwarren@oag.state.md.us); Dill, Megan; LaPonzina, Dean; David Balan
Subject: NAAG Antitrust and Labor Issues Working Group Call--OPEN call
When: Monday, June 13, 2022 2:00 PM-3:00 PM (UTC-05:00) Eastern Time (US & Canada).
Where: zoom

These open WG calls will be held on the 2nd Monday in February, April, June, August, October and December at 2PM EST. Calendar invites will be updated with agendas shortly before the calls. Thank you. ~Schonette

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June 9, 2022

Introduction:

- This note is about the effects of non-competes on the workers who are party to them. It is not about the effects of non-competes on third parties.

- Recent research strongly suggests that non-competes are harmful to workers.[1] More specifically, and contrary to an argument that is commonly offered in support of non-competes, they are often imposed on workers involuntarily, rather than being the product of negotiation in which the worker receives something that they value at least as much as they dislike the non-compete.

- This harm to workers is not necessarily a competitive harm.[2] The purpose of this note is to argue that it can in fact reasonably be considered a competitive harm, and to briefly sketch an approach for bringing antitrust cases challenging non-competes.

Monopsony Power as a Basis for Antitrust Action Against Non-competes:

- A commonly-held view is that for non-competes to be an antitrust problem, they must be caused by monopsony power in the labor market.

- It may therefore seem natural for a central element of an investigation to be about identifying monopsony power among the firms that impose non-competes on workers.

- In my view, in many or even most cases this is likely to be a mistake, for two reasons.

- First, monopsony power may genuinely not be present. And even if it is present, it may be very difficult or impossible to prove.[3]

- Second, even if monopsony power could be proven, it is not clear that it can work as a basis for an enforcement action. The reason is as follows. Unless the claim against the non-competes is accompanied by a conventional Section 2 or Section 7 claim, the FTC/DOJ or the state AG will in effect be conceding that the monopsony power possessed by the firms was

[1] See the empirical work by Evan Starr and his many co-authors (including BE economist Michael Lipsitz), and also Balan (2021).

[2] This note is about non-competes that cause harm to the workers who are party to them. For cases where the competitive harm is to third parties (such as business that cannot find qualified workers, and their customers and workers), the problem is quite obviously a competition problem.

[3] There is some new research suggesting that monopsony power is more prevalent than had previously been believed, even for low-wage workers. This may somewhat lower the burden for showing that monopsony power exists. But to my knowledge this new research has not been tested in court, and even under this lower burden monopsony power may still be absent or at least difficult to prove.

acquired legally. And as a general matter, exercising legally-acquired market power is legal. So if the firm decides to exercise its market power by imposing a non-compete, how is that more illegal than another avenue of exercising it, such as lowering the wage? This strikes me as basically a fatal objection to the idea of basing non-competes enforcement on monopsony power possessed by the firm.

An Alternative Approach for Antitrust Enforcement Against Non-Competes (Main Idea):

- I suggest a different approach.[4] To see how different it is from a monopsony-based approach, begin by assuming that the labor market is extremely competitive, in the sense that on the day the worker accepted their job that worker had essentially an unlimited number of observationally equivalent job offers.[5] Obviously this is an extreme assumption, but it serves to emphasize the point.

- The basis for the alternative approach lies in the following facts: (i) dissolving job matches is costly for both the worker (who must engage in a costly search for another job) and the firm (that must engage in a costly search for another worker); and (ii) labor agreements are incomplete (meaning that not every term is specified up front before the match is formed) and costly to enforce (meaning that even terms that are specified up front may be performed only partially or not at all).

- Another way of saying that dissolving the match is costly to the worker and the firm is that preserving the match generates match-specific economic surplus to be divided between the worker and the firm. This surplus can be very substantial. And the fact that labor agreements are incomplete and imperfectly enforceable means that the division of this surplus cannot be fully determined up front. Instead, the division will be determined largely by informal bilateral bargaining between the worker and the firm. The worker will try to grab more of the surplus in the form of (say) demanding longer breaks, and the firm will try to grab more of the surplus in the form of (say) insisting on shorter breaks.

- In this informal bargaining, as in any other bargaining, the division of the surplus depends on how much each side "needs" an agreement. This in turn depends on how good or bad is each party's next-best alternative to reaching an agreement (often called the "outside option"). The worse the worker's outside option (i.e., the more costly it is for the worker to be fired), the lower their bargaining leverage relative to the firm, and the worse the terms they will receive. Similarly, the worse the firm's outside option (i.e., the more costly it is

[4] What follows is largely based on Balan (2020), but has been refined and expanded since that article was published.
[5] That is, the jobs need not all be identical; the assumption is only that any differences could not be discerned by the worker at the time the job was accepted.

for the firm to have the worker quit), the lower its bargaining leverage relative to the worker, and the worse the terms it will receive.

- Non-competes make the worker's outside option worse. Without the non-compete, the worker's outside option is the best job they can get. With the non-compete, the worker's outside option is the best job they can get that does not violate the non-compete. If the non-compete is binding to any significant degree, then the latter outside option will be substantially worse than the former.

- **This brings us to the central claim of this note. Non-competes are a competition problem NOT because they are the product of monopsony power possessed by firms, but rather because they make it more difficult for the worker to access the benefits of the competitive labor market. Put another way, the problem is not that the labor market is bad because it is monopsonized; the problem is that the labor market is competitive and good but the worker cannot participate in it.**

Discussion:

- There are two points related to this approach that merit discussion.

- First and perhaps most important, this approach **DOES** require that non-competes are imposed on workers against their will, rather than being something that workers freely agree to in exchange for something that they value at least as much. The empirical evidence plus the discussion in Balan (2021) strongly suggest that this is true (especially but **NOT** exclusively for low-wage workers), but it is still a necessary condition and it would need to be demonstrated in court. In other words, this approach is about showing that the harmfulness to workers of non-competes, **once demonstrated**, is specifically an antitrust problem. But it does not eliminate the need to perform the prior step and demonstrate that non-competes are harmful to workers.

- Second, the fact that this approach is not rooted in monopsony power does not mean that competition in the labor market is irrelevant. It is still necessary to show that the restraint imposed on the worker by the non-compete is meaningful. If there were 1000 equivalent jobs, and the non-compete denied the worker access to 100 of them, there would still be 900 equivalent jobs remaining and the non-compete would not have caused any harm. So there would still be a need to show that the jobs that the non-competes prevent the workers from taking are meaningfully preferable, to a sufficient number of workers, to other

available jobs. In many cases this will likely not be very difficult (jobs really are quite differentiated, even low-wage jobs), but it will still be necessary to prove it.[6]

An Alternative Approach for Antitrust Enforcement Against Non-Competes (Additional Idea):

- The main idea for this new approach was described above. There is an additional idea that is both less important and more difficult to understand. But it does identify an additional source of harm from non-competes, so I describe it here briefly.

- As discussed above, the outcome of the informal bargaining between the worker and the firm over the match-specific surplus depends on each side's outside option. This is commonly modeled in antitrust economics using the Nash Bargaining model. In that model, reducing the value of **either** side's outside option increases the total match-specific surplus. This means that the match-specific surplus is greater with a non-compete than without: when one side's outside option gets worse, that side needs a deal more, and when **either** side needs a deal more, the total surplus from the match is higher.

- There might appear to be a contradiction, or at least a tension, between the claim that the non-compete makes the worker worse off by degrading their bargaining leverage and the claim that the non-compete increases the match-specific surplus. But there is no contradiction: the non-compete does increase the surplus, because the worker's weaker relative bargaining position makes them value the match more. It also harms the worker, because it was precisely that weakening of the worker's bargaining leverage that caused the increase in the surplus.

- A numerical example will help clarify the point. Suppose that the non-compete degrades the worker's outside option by $100. That is, if the negotiation fails and the match is dissolved the worker will be worse off by $100 relative to what it would be absent the non-compete. The total surplus is the sum of how much the worker values the match plus how much the firm values the match, so the non-compete has increased total surplus by $100.

- That additional surplus has to be divided somehow. In the Nash Bargaining model, the division of the surplus is determined by the "split parameter." So for example if the split parameter was 0.5, that would mean that each side captures half of the surplus. So if the non-compete increased the surplus by $100, the worker would capture $50 of that surplus. So the degradation of the worker's outside option made them worse off by $100, but they

[6] This idea is related to market definition. Whether it should be treated literally as market definition (i.e., defined according to the Hypothetical Monopolist Test as laid out in the Horizontal Merger Guidelines), or if some alternative approach should be used instead, is an important question that is beyond the scope of this note.

recaptured $50, leaving them worse off by $50 on net. The firm would capture the other $50, making it $50 better off on net.

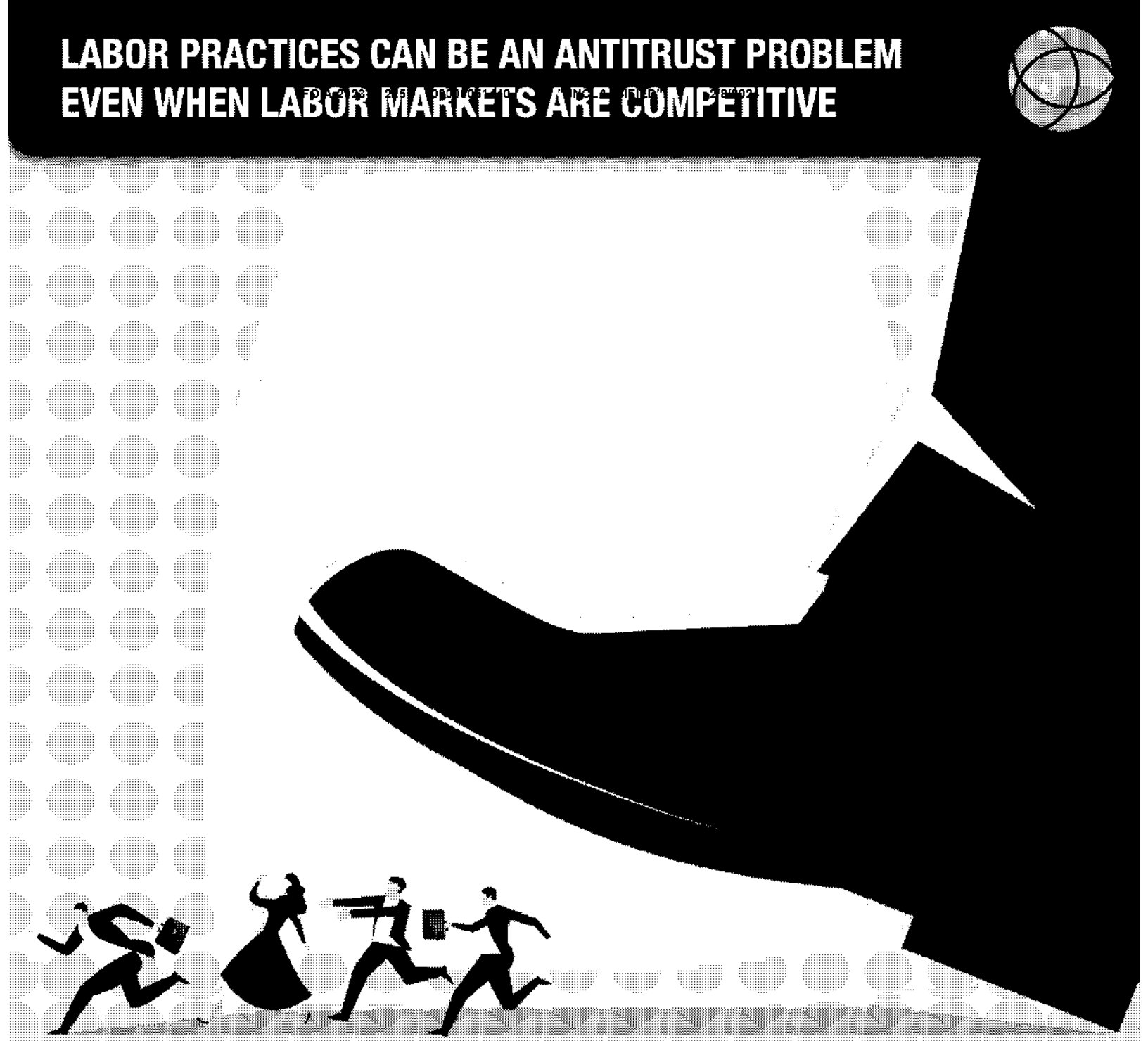
- But now suppose (realistically) that the split parameter is not 0.5, but something much more lopsided, say 0.9, meaning that the firm captures 90% of the surplus and the worker captures 10%. Now the worker would only recapture $10, being $90 worse off on net, and the firm would capture $90, being $90 better off on net.

- The fact that the firm likely captures most of the surplus is not an antitrust problem in itself. But it does have two important implications for the antitrust analysis. First, as shown in the above example, the harm caused to the worker by the non-compete is larger than it would be if the split was more equal. Second, the benefit to the firm is larger than it would be if the split was more equal. This gives the firm a stronger incentive to impose the non-compete in the first place. For both of these reasons, a highly unequal split parameter makes the antitrust harm from non-competes worse.

Conclusion:

- There is strong reason to believe that non-competes harm workers. For this to be a problem that the FTC/DOJ or state AGs can address, that harm needs to be competitive harm of some sort. A natural source of such harm is monopsony power wielded by the firm imposing the non-compete. But I believe this to be a weak basis for an enforcement action against non-competes, for both practical and conceptual reasons. My proposed alternative approach is to argue that non-competes are a competition problem because they prevent workers from accessing and enjoying the benefits of the competitive labor market, thereby weakening their bargaining leverage in informal negotiations with the firm over match-specific job surplus. In addition, the fact that the firm is likely to appropriate most of that match-specific surplus both increases the harm to the worker from the non-compete and increases the incentive of the firm to impose it.

LABOR PRACTICES CAN BE AN ANTITRUST PROBLEM EVEN WHEN LABOR MARKETS ARE COMPETITIVE



BY DAVID J. BOLAN[1]

[1] David Bolan is an employee of the Federal Trade Commission. The views expressed in this paper are solely those of the author.

[2] I thank Keith Brand, Wally Mullin, and Jeremy Sandford for helpful comments.

CPI ANTITRUST CHRONICLE
MAY 2020

I. INTRODUCTION

In conventional antitrust analysis, there are certain conditions that must be met for a matter to be an antitrust problem. A merger is only likely to be a problem if the merging firms are close competitors to each other and there are not very many other close competitors. Coordination is only likely to be a problem if the coordinating firms collectively represent a large fraction of the sellers of the product. And conduct, including a variety of contractual restraints, is only likely to be a problem if the restraining firm has significant market power as that term is conventionally understood.[1]

Assuming, at least for the sake of argument, that this is true of output markets, it may appear that it must be true of input markets as well, including labor markets. Indeed, the textbook analysis of monopsony and oligopsony is very similar to that of monopoly and oligopoly,[2] and this similarity is explicitly recognized in the DOJ/FTC Horizontal Merger Guidelines.[3] It may therefore appear, and it is often argued, that labor market practices engaged in by firms can only be an antitrust problem in the presence of conventional labor market power, defined (roughly) as there being only one or a small number of possible employers for the type of labor in question.

The purpose of this article is to argue to the contrary. Specifically, I argue that firms can impose harmful conditions on workers even when workers have many (roughly) equivalent job offers to choose from.[4] **I further argue that this harm can reasonably be thought of as antitrust harm.**[5]

The basic argument is as follows. Even if the labor market is very competitive *ex ante* (i.e. the time of hiring), once the job match is formed, dissolving it is costly to both the worker and the firm, which means that **preserving** the match generates surplus, and this surplus must be divided between the worker and the firm. The more valuable the match (i.e. the more the worker prefers preserving the match to looking for another job, and the more the firm prefers preserving the match to looking for another worker), the more surplus there is to be divided.

This division will be determined via bilateral bargaining. This bargaining can be modeled using standard methods familiar from conventional antitrust analysis, specifically a model known as the Nash Bargaining model. In that model, the division of the surplus depends on the relative bargaining **leverage** between the worker and the firm, which loosely means that the less a party has to gain from reaching a deal, the more favorable the terms that party will receive; and on the relative bargaining **power** between the worker and the firm, which means that the stronger a party's capabilities for capturing surplus, the larger the share of the surplus that party will receive. Having more bargaining leverage and more bargaining power are both beneficial to a party, but an important and under-emphasized result from the theory of Nash Bargaining is that a party that has all of the bargaining power captures all of the surplus, regardless of relative bargaining leverage. Specifically, if one party has all of the bargaining power, they can make a take-it-or-leave-it offer to the other party that leaves that party no better off than they would be if the match was dissolved.

Whether a worker or a firm has more bargaining leverage is difficult to say, and there is no strong empirical evidence on the subject that I am aware of. However, there is some reason to suspect that workers often "need" a deal more than firms do, giving firms more relative bargaining leverage. With regard to bargaining power, matters are much clearer. Bargaining power is very likely to be held mostly by the firm, not the worker. Firms have myriad advantages in size, resources, and sophistication, and they can unilaterally set non-negotiable firm policies. An ordinary worker has little prospect of matching these advantages, and so will be at a major disadvantage in capturing the match-specific surplus.

Bargaining power as it appears in the Nash Bargaining model corresponds to power in the ordinary English sense of the word. While not without bound (the worker can still quit), the firm is able to use its advantages to acquire bargaining power, and to use that bargaining power to benefit itself at the expense of the worker. This can take the form of chiseling on wages and hours, or poor working conditions, or even abusive or degrading treatment.

The question is whether this power is **market** power in the antitrust sense. I argue that it is. As discussed above, the division of the match-specific surplus takes place outside the context of the competitive labor market, so the competitive labor market does not protect the worker from efforts by the firm to capture it.[3] Practices that allow the firm to capture most or all of that surplus can be thought of as efforts to become a monopolist over that surplus with respect to that worker, which makes it an antitrust problem.[4]

The fact that harm from these practices might reasonably be thought of as antitrust harms does not necessarily mean that they should always be dealt with in the context of antitrust. In many cases, regulation by the Department of Labor or by OSHA may be more appropriate. Nor is it obvious which practices by a firm should or should not be regarded as antitrust violations. The purpose of this article is not to resolve these questions. The purpose is only to establish that there is a reasonable basis for considering these harms to be antitrust harms, and therefore to consider antitrust action as one possible avenue for addressing them.

There is one labor market practice that is particularly likely to be an antitrust problem, namely labor non-compete agreements. Unlike other labor practices, whose purpose is to affect the division of **existing** match specific surplus, non-compete agreements have the effect of **increasing** the match-specific surplus. They do this by making it more difficult for the worker to re-access the competitive labor market, thereby degrading the worker's prospects outside the match. When the worker's outside option is worse, they value the match by more, increasing the amount of match-specific surplus available to be captured by the firm. Practices that distance workers from the opportunity to participate in competitive markets are quite clearly an antitrust problem.

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[illegible]

[illegible]

This view of non-competes is at odds with the familiar argument that their voluntary nature is strong grounds for believing them to be both mutually beneficial and efficient.[16] But this is only true if non-competes are truly voluntary, and if the agreed-upon compensation offered to the worker in exchange for accepting a non-compete is actually delivered. In a separate article (Balan, 2019), I argue that these conditions are often not satisfied.[17] This argument is bolstered by a wealth of recent empirical evidence that, while somewhat mixed, largely finds non-competes to be harmful to workers.[18] And if these conditions are not satisfied, then non-competes are not to be presumed beneficial to the worker, but are rather to be understood as a restraint imposed on workers **without** compensation, to the benefit of the firm and to the detriment of the worker.

II. *EX POST* BARGAINING OVER MATCH-SPECIFIC SURPLUS

Suppose that a worker entering the labor market can choose between many jobs that *ex ante* appear to be identical. Once the worker chooses a job and a match is formed, that match is costly to dissolve, for both the worker and the firm. For the worker, the costs include the direct financial costs of a new job search, the lost income during the search (the damage from which is exacerbated by the fact that many workers have no financial cushion), and the fact that being fired is an emotionally traumatic experience for workers. In addition, the worker might need a recommendation from the firm to find another job, which they may not get if the match ends in acrimony. Finally, the worker may have signed a non-compete agreement or be subject to other restrictive covenants, which further increases the cost of leaving their job. For the firm, the costs include the direct recruiting and hiring costs to replace the worker, the indirect costs of being temporarily understaffed until a replacement is hired, and possible morale problems among remaining workers. These costs can be substantial.

Another way of saying that dissolving the match is costly is to say that **preserving** the match generates surplus arising from avoiding those costs. This surplus must somehow be divided between the worker and the firm. If labor contracts were complete and also fully and costlessly enforceable, then the division of this surplus would be determined within the context of the competitive labor market, and workers would receive competitive overall terms.

In reality, however, contracts are neither complete nor fully enforceable. This means that much of what happens between the worker and the firm is determined **after** the match has formed. There are things that the firm can do to benefit itself at the expense of the worker (chisel on wages and hours, poor working conditions, or even abusive or degrading treatment), and there are things that the worker can do to benefit themselves at the expense of the firm (shirking, theft, even sabotage). Which of these things will happen will be determined via bilateral bargaining between the worker and the firm, and not within the context of the competitive labor market.

This does not mean that the competitive labor market is irrelevant. A key concept in bargaining is that neither side can be forced to do worse than they would do if the match was dissolved (this is often referred to as their "outside option" or "disagreement payoff"). The worker will not agree to terms that are worse than being fired and having to look for another job, nor will the firm agree to terms that are worse than letting the worker quit and having to look for another worker. The more competitive the labor market, the better the worker's outside option, and the better the terms the worker will receive. That is, a labor market characterized by conventional market power makes things worse for workers, for the conventional reasons. But even in a competitive labor market, a substantial amount of surplus will be divided via bilateral bargaining outside the context of the competitive labor market.

This kind of bilateral bargaining is standard in economics, including antitrust economics. The standard framework for studying it is a well-known model called the Nash Bargaining model. In the remainder of this section, I summarize and present key results from this model.

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[illegible]

[illegible]

[illegible]

[illegible]

A. Bargaining Leverage

As discussed above, the worker's surplus from the match is the difference between what they receives if a deal is reached and what they receive if a deal is not reached, and similarly for the firm. The total surplus from the match is the sum of the worker's surplus and the firm's surplus.

Somewhat counter-intuitively, the party that contributes **less** to the total surplus has **greater** bargaining leverage. To see why, note that the surplus must be divided somehow. Suppose, for example, that the surplus is to be divided equally (though this is not necessary). A party that contributes little surplus shares little surplus with the other party (half of very little is also very little), but that party still receives half of the surplus contributed by the other party. An analogy would be a guest who brings a small side dish to a potluck dinner, but then eats the full meal like everybody else. Put another way, the party that contributes less to the total surplus has less to gain from a deal. That party "needs" a deal less, and so is able to bargain for better terms.

Whether workers or firms have greater relative bargaining leverage is difficult to say, and it may differ across employment matches and perhaps even over time within a match. While there is no direct empirical evidence that I am aware of, for the above reasons it appears that firms may often have greater relative bargaining leverage (i.e. having the match end is worse for the worker than it is for the firm).[13]

B. Bargaining Power

In Section II.A I assumed that the total surplus from reaching an agreement is divided equally between the parties. But this need not be the case. A given amount of surplus can be divided so that it goes entirely to one party, entirely to the other party, or anywhere in between. What share of the surplus a party can command is referred to as their bargaining **power**, which is distinct from the bargaining leverage described above. If one party has all of the bargaining power, then it will capture all of the surplus, and the other party will only receive value equal to their outside option, making them no better off than they would be if the match were dissolved. Any intermediate amount of bargaining power is also possible.

Bargaining power is an economic term of art, but it corresponds quite closely to the ordinary English usage of the word "power." When there is a pool of surplus to be divided between a single worker and a large firm, who has the power to capture it? Is that division likely to be 50/50 (the worker and the firm share the surplus equally)? Or is it more likely to heavily favor the firm, say 90/10 or 95/5? The massive size, sophistication, and resources of the firm strongly suggest the latter, as does the fact that the firm unilaterally sets non-negotiable rules, policies, and employment practices that can be used to apply pressure to the worker. It simply strains credulity that ordinary individual workers can outperform large, heavily resourced firms in a competition to capture a pool of surplus. That is power, and it is the firms, not the workers, that have it.[14]

There is an additional point that is a standard result of Nash Bargaining, but that is not widely appreciated. If one party has (almost) all of the bargaining power, then it matters little who has more bargaining leverage. Recall that bargaining leverage is about the relative contributions of the two parties to the total pool of surplus. But if one party has **all** of the bargaining power, then this is moot, because that party receives **all** of the surplus, regardless of who contributed it. This will be made clearer in the next sub-section.

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[13] For clarity, I assume that the worker's outside option is the same as the firm's outside option. In fact, it is likely that the firm's outside option is greater than the worker's outside option. For example, [illegible] the firm can continue to operate with the vacancy, while the worker must find a new job. This would further increase the firm's bargaining leverage relative to the worker's.

[14] [illegible] Ryan Nunn, Jay Shambaugh, and Ian Hathaway, "Reconsidering Monopsony in Labor Markets: A Review of Empirical Methods," Hamilton Project, October 2019, for a comprehensive survey of the literature. [illegible] usually [illegible] [illegible]

[illegible] must [illegible]

Define W^{D} as the value that the worker receives if a deal is reached (the job match continues) and W^{ND} as the value that the worker receives if a deal is not reached (the job match is dissolved and the worker receives their outside option).[14] The difference between these two ($W^{D} - W^{ND}$) is the gain to the worker from reaching a deal. Note that ($W^{D} - W^{ND}$) can be large because W^{D} is large (getting a deal is very good), or because W^{ND} is small (not getting a deal is very bad), or some combination of the two. Similarly, define F^{D} as the value that the firm receives if a deal is reached, F^{ND} as the value that the firm receives if a deal is not reached, and ($F^{D} - F^{ND}$) as the gain to the firm from reaching a deal.

The total surplus TS from continuing the job match is

$$TS = (W^{D} - W^{ND}) + (F^{D} - F^{ND}),$$

where TS is the sum of the amount by which the worker is better off with a deal than without, plus the amount by which the firm is better off with a deal than without.

Each party will receive their outside option (W^{ND} for the worker and F^{ND} for the firm) plus some share of the match-specific surplus. For simplicity I assume that this surplus will be divided via a lump-sum payment P from the worker to the firm (this payment can be negative, which would mean a payment from the firm to the worker). It is important to note that this does not literally mean that the worker will hand money over to the firm, or vice-versa. Rather, the "payment" will take the form of one side or the other getting away with under-performing the terms of the original agreement, or with interpreting ambiguities in that agreement in a manner favorable to themselves. Workers may get away with a certain amount of shirking, and firms may get away with a certain amount of mistreatment of one kind or another.[15]

In our examples we will assume, as is common in antitrust economics, that P will be determined as predicted by the Nash Bargaining model. There are five inputs into this model: W^{D}, W^{ND}, F^{D}, F^{ND}, and a "bargaining power" parameter α that governs the share of the surplus that is kept by the worker. According to the model, the equilibrium P will be the one that maximizes the following expression:

$$((W^{D} - P) - W^{ND})^{\alpha} \times ((F^{D} - P) - F^{ND})^{(1-\alpha)}.$$

Less technically, the P that comes out of the Nash Bargaining Model is the one that causes the worker to receive their outside option plus surplus equal to αTS, and the firm to receive its outside option plus surplus equal to $(1 - \alpha)TS$.

Now consider the following examples. In each example, $TS = 200$.

Example 1: $(W^{D} - W^{ND}) = 100$, $(F^{D} - F^{ND}) = 100$, and $\alpha = ½$.

The two parties are identically positioned, so we would expect $P = 0$ to be the answer. This is indeed the case. The worker and the firm have equal bargaining leverage; they each prefer a deal to no deal by 100, so they each contribute 100 to the $TS = 200$. They also have equal bargaining power, because $\alpha = ½$ and $(1 - \alpha) = ½$, so they each are to receive their outside option plus 100 (half of the TS) net of P. $P = 0$ is the P that accomplishes this, as this is what they each already receive gross of P.

Example 2: $(W^{D} - W^{ND}) = 150$, $(F^{D} - F^{ND}) = 50$, and $\alpha = ½$.

Now the firm has more relative bargaining leverage than in Example #1, because the worker prefers a deal to no deal by 150, and the firm prefers a deal to no deal by only 50, meaning that the worker contributes more than half of TS. But as in Example #1, the bargaining power is equal ($\alpha = ½$), so the worker and the firm will each receive their outside option plus half of TS (i.e. their outside option plus 100) net of P. Since the worker

[14] In the real world, the worker's outside option may be uncertain and variable. For example, if the worker is employed at a firm that is a supplier to the merging firms, the worker's outside option may depend on the likelihood that the supplier will go out of business if the merger is blocked. For simplicity, I assume that the worker's outside option is known and fixed.

[15] Of course, the terms of the agreement may be subject to renegotiation, and the ability to get away with under-performing the terms of the agreement may be limited by the threat of termination. But renegotiation is costly, and termination is a blunt instrument. Therefore, workers may get away with a certain amount of shirking, and firms may get away with a certain amount of mistreatment of one kind or another.

receives their outside option plus 150 gross of P, and the firm receives its outside option plus 50 gross of P, a payment of $P = 50$ is required. If the 150 and the 50 were reversed, then P would be –50, and the firm would be paying the worker.

Example 3: $(W^{*} - W^{**}) = 100$, $(F^{*} - F^{**}) = 100$, and $\alpha = 0$.

Now the two parties have the same bargaining leverage (as in Example #1), with each preferring a deal to no deal by 100, and so each contributing 100 to *TS*. But now the firm has **all** of the bargaining power, which means that the worker will receive no surplus net of P, only receiving their outside option. The firm will receive its outside option plus 200 (all of *TS*) net of P. Since they each receive their outside option plus 100 gross of P, a payment of $P = 100$ is required. If we replaced $\alpha = 0$ with $\alpha = 1$, P would be –100, the firm would receive its outside option, and the worker would receive their outside option plus 200.

Example 4: $(W^{*}$ $W^{**}) = 0$, $(F^{*}$ $F^{**}) = 200$, and $\alpha = 0$.

Now the worker has all of the bargaining leverage (they are indifferent between a deal and no deal, but the firm prefers a deal to no deal by 200 and so contributes all of the *TS*). But as in Example #3, the firm has all of the bargaining power. In this case, the worker **still** receives no surplus net of P, only receiving their outside option, and the firm still receives its outside option plus 200 (all of *TS*) net of P. Since the worker receives no surplus beyond its outside option gross of P, the payment will be $P = 0$. If we replaced $\alpha = 0$ with $\alpha = 1$, P would be –200, the firm would receive its outside option, and the worker would receive their outside option plus 200.

This last example is somewhat subtle but very important. If the firm has most or all of the bargaining power, then it will receive most or all of the bargaining surplus, regardless of bargaining leverage. When one side can capture all of the surplus from a deal, it does not matter who contributed how much to that surplus.

These examples are highly stylized, and they omit many important factors. However, they capture an essential point, namely that when the firm has a lot of bargaining leverage, and (more importantly) when the firm has almost all of the bargaining power, it is possible for workers to be harmed by firms *ex post* even when they participate in a highly competitive labor market *ex ante*.

III. IS THIS AN ANTITRUST PROBLEM?

The existence of costs to dissolving a job match creates match-specific surplus, and that surplus must be divided somehow between the worker and the firm. Labor market practices that firms engage in to the detriment of workers can be understood as efforts to capture that surplus. There are many such practices, including cheating on wages and hours, poor working conditions, or even abusive or degrading treatment.[17]

Some of these practices may be actionable under labor law, but the question for this article is whether they can be considered **antitrust** violations, even if the labor market is highly competitive *ex ante*.[18] I argue that they can. The key fact is that the surplus that these practices are intended to capture are specific to the job match, and so by definition the harm suffered by the worker from these practices cannot be ameliorated by labor market competition. These are practices of **a single firm** against the worker. When the firm has disproportionate bargaining leverage or (more importantly) most or all of the bargaining power, it can reasonably be regarded as a monopolist with respect to that worker over the match-specific surplus.

It might be argued that these practices represent a permissible exercise of existing market power, and not an impermissible acquisition of market power. Setting aside the question of whether exercising existing market power is in fact always permissible, I believe that the practices represent the acquisition of market power, and not the exercise of it. It is true that the practices do not create the surplus, which exists exogenously by virtue of the value of the match. But that surplus does not start out belonging to the firm. The surplus exists and it must be divided somehow, and the labor practices are the means by which that division comes out to the benefit of the firm at the expense of the worker. **The exercise of bargaining power is the exercise of market power.**

[17] For a more detailed discussion of the practices that I have in mind, see Eric A. Posner, Antitrust in the New Economy, 68 Antitrust L.J. 925, 939–40 (2001). Posner argues that these practices are not antitrust violations because they are not "inefficient," but I argue that they are inefficient because they destroy surplus that would otherwise be created by the match. Posner's argument is a version of the Chicago School argument that I criticize in Part III.

[18] See also Antitrust Law and Labor Markets, 104 Yale L.J. 2179 (1995).

The above is not a worked-out apparatus for treating labor practices as antitrust violations. There are many questions that are beyond the scope of this article, including which practices are harmful at all, and of those which are best dealt with through labor law rather than antitrust. There is also the conceptual question of how much of the match specific surplus firms should be allowed to try to capture. Should they be allowed to try to capture half of it? Would an antitrust case hinge on what fraction of the surplus the firm refrained from trying to capture?

These are difficult questions, and it is unclear whether it is possible to build a workable regime for challenging harmful labor market practices as antitrust violations. It may be or it may not be. But the fundamental point remains. These practices represent firms trying to become monopolies with respect to their workers regarding the match specific surplus. This is the exercise of market power.

IV. LABOR NON-COMPETE AGREEMENTS

Another labor practice that firms sometimes engage in is to impose non-compete agreements on their workers. Non-competes are fundamentally different from the labor practices discussed in Section III above. Those practices represent attempts by the firm to capture a fixed quantity of match-specific surplus. In contrast, non-compete agreements **increase** the amount of surplus available to be captured. A non-compete agreement denies the worker access to the full benefits of the competitive labor market, thereby degrading that worker's outside option. The worker now has more to gain from the match, increasing the total surplus arising from the match, and the firm can use its superior bargaining power to capture most or all of that additional surplus as well.[14]

For this reason, the argument for treating non-compete agreements as an antitrust problem is even stronger than the argument discussed above for treating other labor practices as antitrust problems. A practice that denies the worker the ability to re-access the full benefits of the competitive labor market appears to fall quite squarely within the domain of antitrust, especially when combined with the firm's ability to use its bargaining power to capture the resulting increased surplus.

As discussed above, if contracts were complete and fully and costlessly enforceable, all terms of the labor contract would be determined in the context of the competitive labor market, and hence restraints such as non-competes would not be an antitrust problem (assuming that they also did not harm third parties). This is closely related to a standard defense of non-competes, namely that workers would not agree to them unless they receive compensation that they value at least as much as they dislike the restraint. In a separate article (Balan, 2019), I argue that this is often not the case, and that in fact non-competes are a means of extracting value from workers without having to compensate them for it.[15]

V. CONCLUSION

There is reasonable consensus that conventional labor market power can exist when there are only one or a few employers that hire a particular type of worker, and that antitrust is applicable to those situations. Some hold the view that the existence of such market power is a necessary condition for antitrust to apply to labor markets, meaning that when there are many employers who hire a particular type of worker, any problems that may arise from the conduct of an individual firm cannot be antitrust problems.

The purpose of this article is to argue against this view. Even with an *ex ante* competitive labor market, once a job match is formed, dissolving it is costly to one or both parties, meaning that there is often substantial economic surplus associated with continuing it. The division of this surplus will be determined via bilateral bargaining between the two parties, and not within the context of the competitive labor market.

Firms often have major advantages over workers in capturing that surplus. They often have more relative bargaining leverage, as workers may "need" the match more than they do. More importantly, firms almost certainly have much more bargaining power. Given the massive

[illegible]

[illegible]

[illegible]

[illegible]

asymmetry of resources, sophistication, and agenda-setting power between an individual worker and a large firm, it strains credulity that the firm would not have a massive advantage allowing it to out-compete the worker in any contest to capture it. This gives the firm power over the worker, in the ordinary English meaning of the word, in the formal meaning of the word in the context of the Nash Bargaining model, **and in the antitrust sense**: certain labor market practices represent an attempt to become a monopolist with respect to the worker over that match-specific surplus.

The case for treating non-compete agreements as an antitrust problem is even stronger. Firms imposing non-competes on workers is not only a means of capturing an existing quantity of surplus, it is a way of increasing that surplus by denying the worker the ability to fully access the competitive labor market (degrading the worker's outside option), and then using its power to capture that additional surplus as well.

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Labor Noncompete Agreements: Tool for Economic Efficiency or Means to Extract Value from Workers?

David J. Balan*

Abstract

A number of theoretical arguments have been offered in favor of noncompete provisions in labor agreements. While there has been considerable empirical research on the effects of those provisions, there has been little direct evaluation of the arguments themselves. In this article, I lay out and evaluate three commonly heard arguments, namely, (1) the voluntary nature of labor agreements justifies a strong inference that the terms of those agreements, including noncompete provisions, are beneficial for both workers and firms and that they are economically efficient, 2(*A*) noncompetes facilitate efficient knowledge transfer from firms to workers, and 2(*B*) noncompetes encourage efficient firm-sponsored investment in worker training. These arguments, though not entirely without merit, mostly do not survive close scrutiny, and in fact such scrutiny reveals strong arguments that point in the opposite direction. In addition, noncompetes may cause important additional harms that are not measured in conventional economic research.

Keywords

noncompetes, labor noncompetes, postemployment restrictive covenants, PERCs

I. Introduction

Noncompete provisions in labor agreements have become widespread in the United States.[1] In recent years, empirical researchers have studied the effects of noncompetes on worker mobility, hiring, entrepreneurship, investment, innovation, wages, and other economic outcomes. This research agenda is quite new, and determining the true, causative effect of noncompetes on those outcomes is

1. *See* Evan P. Starr et al., *Noncompete Agreements in the US Labor Force*, 64 J.L. & ECON. 53–84 (2021); ALEXANDER J. S. COLVIN & HEIDI SHIERHOLZ, NONCOMPETE AGREEMENTS (Econ. Policy Inst. 2019).

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challenging. But recognizing these limitations, the evidence as it exists today, while somewhat mixed, generally shows noncompetes to be economically harmful and not beneficial.

This empirical evidence must be interpreted in light of the strength of the theoretical arguments for or against noncompetes. If there were strong theoretical arguments in their favor, the empirical evidence accumulated to date may not be sufficient to convincingly demonstrate that noncompetes are harmful on balance. But if the theoretical arguments in favor of noncompetes are weak, or if there are strong theoretical arguments against them, then the theory and the empirical evidence would both point in the same direction, strongly indicating that noncompetes are likely to be harmful and even more strongly indicating that they are unlikely to be highly beneficial.[2]

The purpose of this article is to provide a critical evaluation of those theoretical arguments. There are three major arguments that are commonly offered in favor of noncompetes, namely, (1) the voluntary nature of labor agreements justifies a strong inference that the terms of those agreements, including noncompete provisions, are mutually beneficial to workers and firms and that they are economically efficient in the sense of increasing total economic surplus, 2(A) noncompetes facilitate efficient knowledge transfer from firms to workers, and 2(B) noncompetes encourage efficient firm-sponsored investment in worker training.

There is a substantial body of literature that makes or develops these theoretical arguments.[3] The structure of this article is to enumerate, explain, and respond to these arguments one by one.[4]

To summarize my conclusions, these arguments sound plausible and have some limited merit, but all three largely fail upon close scrutiny, and in fact such scrutiny reveals strong arguments to the contrary. This theoretical conclusion, combined with the empirical evidence (discussed below) that mostly finds noncompetes to be harmful, together constitute strong reason to believe that noncompetes are in fact harmful, and even stronger reason to believe that they are not highly beneficial such that restricting or banning them would risk major economic damage.[5]

Moreover, noncompetes may cause harms that are not generally within the purview of economics and that are not normally studied in economic research. A worker who is bound by a noncompete has a large barrier to leaving a firm (on top of other barriers that likely exist), rendering them less able to avoid or resist mistreatment at their firm, including true exploitation or abuse by a predatory employer

2. In Bayesian terms, if the theoretical arguments in favor of noncompetes are strong, then the priors would be strong that noncompetes are highly beneficial, and it would take a large amount of contrary evidence to overturn those priors. But if those arguments are weak, and/or if there are strong arguments that noncompetes are harmful, then the priors would be that noncompetes are harmful (or at least not highly beneficial), and it would take a large amount of contrary evidence to overturn *those* priors.
3. Perhaps the clearest exposition of Argument #1 is at David D. Friedman, *Non-Competition Agreements: Some Alternative Explanations*, daviddfriedman.com, April 2, 1991, http://www.daviddfriedman.com/Academic/non-comp/Non-Competition.html. *See also* Maureen B. Callahan, *Post-Employment Restraint Agreements: A Reassessment*, 52 U. CHI. L. REV. 703–28 (1985). Articles that advance Argument #2(*A*) include Jonathan M. Barnett & Ted Sichelman, *The Case for Noncompetes*, 87 U. CHI. L. REV. 953–1049 (2020); and Brandon S. Long, *Protecting Employer Investment in Training: Noncompetes vs. Repayment Agreements*, 54 DUKE L.J. 1295–320 (2005). Articles that advance Argument #2(*B*) include Paul H. Rubin & Peter Shedd, *Human Capital and Covenants Not to Compete*, 10 J. LEGAL STUD. 93–110 (1981); and Long, *supra* note 3.
4. Points similar to some of those made in this article can be found in Eric A. Posner, *The Antitrust Challenge to Covenants Not to Compete in Employment Contracts*, 83 ANTITRUST L.J. 165–200 (2020) and in the survey articles referenced in note 6. *See also* NON-COMPETE CONTRACTS: ECONOMIC EFFECTS AND POLICY IMPLICATIONS (U.S. DEPT OF THE TREASURY, OFFICE OF ECON. POLICY 2016); NON-COMPETE AGREEMENTS: ANALYSIS OF THE USAGE, POTENTIAL ISSUES, AND STATE RESPONSES (The White House 2016).
5. Returning to the Bayesian framing from note 2, the conclusion of this article is that the correct priors are that noncompetes are likely to be harmful and are very unlikely to be highly beneficial. Given these priors, the existing empirical evidence provides little grounds for updating. In other words, there is a consonance rather than a tension between the empirical evidence and the theory.

or manager. In addition, a person bound by a noncompete is simply less free, and the personal freedom to use one's body and one's labor as one wishes is a value in itself. Policy makers should have a high threshold for interfering with this fundamental freedom.

II. Summary of the Empirical Literature

There is now a substantial empirical research literature on noncompetes, dealing with their effects on several important outcomes, including worker mobility, hiring, and entrepreneurship; investment and innovation; and wages. A brief summary follows.[6]

A. Worker Mobility, Hiring, and Entrepreneurship

The evidence shows that workers bound by noncompetes stay in their jobs longer (are less mobile). In one study, being bound by a noncompete is associated with an 11% increase in job tenure. According to another study, the 2015 Hawaii ban on noncompetes for tech workers increased employee mobility in the sector by 11%. Similar results are found for executives, patent holders, and the universe of individuals with LinkedIn records. An analysis of Oregon's 2008 ban on noncompetes for hourly workers finds similar results.

Four studies find evidence consistent with the notion that firms have trouble hiring workers in higher enforceability regimes, with young firms hit particularly hard. Two studies suggest that individuals bound by noncompetes are redirected to other industries, including 11% of those who have ever signed one. Other studies find that tech workers and patent holders are more likely to leave states that enforce noncompetes.

Seven recent studies examined the relationship between noncompete enforceability and entrepreneurship, finding generally that the enforceability of noncompetes dampens new firm creation. One study found that greater enforceability reduced new firm entry by 18%.

B. Investment and Innovation

The evidence regarding investment and innovation is mixed. The enforceability of noncompetes is associated with more firm-sponsored training of workers, increases in net capital investment rates, the exploration of new fields, and the creation of riskier patents. However, the mobility-inhibiting effects of noncompete enforceability also dampen knowledge flows and make venture capital less effective in spurring the creation of new patents and employment.

C. Wages

A number of studies attempt to estimate the effect of noncompetes on wages by exploiting variation in state policies on the enforceability of noncompetes. Most of these studies use some version of a "difference-in-differences" study design, in which the change in wages (for some category of workers) in a state that changed its enforceability policy is compared to the change in wages in "control" states that did not. These studies consistently show that the enforceability of noncompetes is associated with

6. This summary draws heavily, with permission, from EVAN STARR, THE USE, ABUSE, AND ENFORCEABILITY OF NON-COMPETE AND NO-POACH AGREEMENTS: A BRIEF REVIEW OF THE THEORY, EVIDENCE, AND RECENT REFORM EFFORTS (Econ. Innovation Grp. Issue Brief 2019); and from Evan Starr, *Are Noncompetes Holding Down Wages?*, *in* INEQUALITY AND THE LABOR MARKET: THE CASE FOR GREATER COMPETITION 127–49, Sharon Block and Benjamin H. Harris, editors, (Brookings Institution Press, 2021). It also relies on John M. McAdams, *Non-Compete Agreements: A Review of the Literature* (2019) (unpublished manuscript). To save space, many citations are suppressed. They can be found in those articles.

lower wages.[7] Perhaps the most notable of these studies is Starr and Lipsitz (2020),[8] which finds that banning noncompetes for hourly workers increased hourly wages by 2%–3% on average. Since only a subset of workers sign noncompetes, scaling this estimate by the prevalence of noncompete use in the hourly paid population suggests that the effect on employees actually bound by noncompetes may be as great as 14%–21%, though the true effect on bound workers is likely lower than that due to labor market spillovers which may cause part of the wage reduction to be borne by unbound workers.

The above studies attempt to measure the effects of noncompetes indirectly by comparing wages across states with different enforceability policies. Three other studies attempt to measure these effects more directly by comparing wages of workers who are bound by noncompetes to those of workers who are not. One of these studies finds that workers with noncompetes have 9.7% higher wages than similar workers without, but only if they were informed of the noncompete before accepting the job; workers who were informed of the noncompete after they accepted had no such benefit.[9] The second of these studies finds that noncompetes increase wages for CEOs, and the third finds that they increase wages for primary care physicians.[10]

The former group of studies associates noncompetes with lower wages, and the latter group associates them with higher wages. There are several possible ways to reconcile this discrepancy. First and perhaps most likely, the study design of the latter group may not be suitable for measuring the *causative* effect of noncompetes on wages; the fact that workers bound by noncompetes have higher wages does not mean that the noncompetes caused the higher wages. In contrast, the difference-in-differences study design used in the former group (and commonly used across many areas of empirical economics) exists precisely because it is often a valid way to measure causative effects; if wage trends in states that changed their policy are different from trends in otherwise similar control states, a reasonable interpretation is that the policy change caused the change in trend. For this reason, the former group of studies may be more reliable.

A second possible reason for the discrepancy is that noncompetes may be beneficial for the workers who are bound by them, but harmful overall, because of external effects on workers who are not bound by them. A third possibility has to do with the type of workers being studied. As noted above, one of the studies in the latter group is about corporate CEOs, who represent a tiny slice of workers and for whom the notion that noncompetes are beneficial is much more plausible than it is for almost all other workers. Another study in that group is about primary care physicians. Importantly, that study does not disentangle the effect of noncompetes from the effect of nonsolicitation provisions (where the physician is free to leave but is not free to take their patients with them). Nonsolicitation provisions have a much stronger claim to being beneficial than do noncompetes, and it is possible that this benefit, rather than a benefit from the noncompete itself, is what is causing the higher wages found in that study.[11]

D. Summary

In sum, though somewhat mixed, the empirical literature is largely negative regarding the effects of noncompetes, and it certainly does not support the conclusion that they are highly beneficial. This is

7. There are a number of such studies, cited and discussed in Starr, *supra* note 6.
8. Michael Lipsitz & Evan Starr, *Low-Wage Workers and the Enforceability of Noncompete Agreements*, MGMT. SCI. (forthcoming, 2021).
9. *See* Starr et al, *supra* note 1.
10. Omesh Kini et al, *CEO Noncompete Agreements, Job Risk, and Compensation*, 34 REV. FINANC. STUD. (forthcoming, 2021); Kurt J. Lavetti et al, *The Impacts of Restricting Mobility of Skilled Service Workers: Evidence from Physicians*, 55 J. HUM. RESOUR. 1025–67 (2020), respectively.
11. *See* Nataraja Balasubramanian, et al, *Bundling Postemployment Restrictive Covenants: When, Why, and How It Matters* (2021) (unpublished manuscript) for a discussion of the fact that noncompetes are often bundled together with other postemployment restrictive covenants such as nonsolicitation agreements, and the resulting difficulty in empirically identifying the effect of any individual restriction in isolation.

expressed clearly by Evan Starr, a leading empirical researcher in the field who, in recent Congressional testimony, summarized the empirical research as follows: "Taken together, these results are hard to square with theories that suggest workers should benefit from non-competes."[12]

III. Three Commonly Offered Arguments in Favor of Noncompetes

I now turn to the three major arguments that are commonly offered in favor of noncompetes.

A. Argument #1: If Both Parties Agreed to the Noncompete, It Must Be Efficient

Argument #1 begins with the simple and intuitive premise that people can generally be assumed to act in their own best interest, so if both a worker and a firm voluntarily agree to a noncompete then doing so must make them both better off, otherwise at least one would not have agreed. And if the noncompete makes both parties better off, then it follows that banning or restricting noncompetes would make them both worse off. By this argument, the mere existence of noncompetes is strong evidence that they are mutually beneficial.

Spelled out in more detail, the argument goes as follows. Suppose that a worker and a firm negotiate over employment terms before the job match is formed. In that negotiation, each side exploits their bargaining position as best they can,[13] so the terms that arise from that negotiation will be the very best ones that the worker can get and also the very best ones that the firm can get. Now suppose that the firm wishes to add a noncompete provision to the previously negotiated terms. All else equal, this restriction on the worker's outside opportunities makes the worker worse off: The reduced ability to leave is harmful in itself, and the reduced ability to threaten to leave weakens the worker's bargaining position relative to the firm with respect to any employment terms that could become the subject of disagreement (i.e., all terms except those that were fixed and not subject to any revision, neither legally nor practically, *ex ante* before the job match was formed). For the same reasons and others, the noncompete makes the firm better off.[14]

Knowing that the noncompete harms the worker and makes the firm better off, what should we expect to happen? It might appear that the firm, if it has a sufficiently strong bargaining position, could simply compel the worker to accept the noncompete. But Argument #1 says that this is incorrect,

12. Antitrust and Economic Opportunity: Competition in Labor Markets: Hearings before the Subcomm. on Antitrust, Commercial, and Administrative Law, of the House Judiciary Comm., 117 Cong. (October 29, 2019) (Statement of Evan Starr).

13. The economic theory of bargaining distinguishes between bargaining "leverage" (the less one side "needs" a deal, relative to the needs of the other side, the better the terms it will receive) and bargaining "power" (the deal creates some surplus to be divided between the two sides, and the more effective one side is at capturing that surplus, relative to effectiveness of the other side, the better the terms it will receive). Here, I informally use the term bargaining "position" to capture both of these; the more favorable the combination of leverage and power that a side has, the better the terms it will receive in the negotiation. For a discussion of the distinction between bargaining leverage and bargaining power and its relevance for evaluating noncompetes, *see* David J. Balan, *Labor Practices Can Be an Antitrust Problem Even When Labor Markets Are Competitive*, CPI ANTITRUST CHRON. (2020).

14. Once the match is formed, it is costly to dissolve, for both the worker and the firm. These costs can be substantial. Another way of saying that dissolving the match is costly is to say that *preserving* the match generates surplus arising from avoiding those costs. This match-specific surplus must somehow be divided between the worker and the firm. If labor contracts were complete and also fully and costlessly enforceable, then the division of this surplus would be determined ex-ante, before the match was formed. But in reality, this surplus is largely divided via (informal) ex-post bargaining after the match has formed. A noncompete weakens the bargaining position of the worker in this ex-post negotiation, to the worker's detriment and the firm's advantage. *See* Balan, *supra* note 13 for a discussion of this issue and its implications for the question of whether noncompetes should be treated as an antitrust problem.

because all else is not equal. The reasoning is as follows. Recall that in the initial negotiation, each side got the very best terms that they could. But that must mean that each side *fully* exploited their bargaining position; to do otherwise would be to voluntarily leave money on the table. In other words, the negotiated terms reflect the result when each side has shot every arrow in their quiver, which means that neither side has any *remaining* arrows that can be used to extract *additional* concessions from the other, and which in turn means that the firm has no ability to compel the worker to accept a noncompete involuntarily.[15]

If the firm cannot compel the worker to accept a noncompete, then its only alternative is to *compensate* the worker (above and beyond the compensation agreed to in the initial agreement) by an amount sufficient to induce them to agree. The minimum compensation that the worker would accept is the amount by which they are harmed by the noncompete, and the maximum compensation that the firm would pay is the amount by which it makes the firm better off. If the former is greater than the latter, then mutually beneficial agreement to add a noncompete is not possible, and so the noncompete will not exist. If the latter is greater than the former, then an agreement under which the worker agrees to the noncompete, and the firm pays the worker compensation that lies somewhere between those two amounts, is mutually beneficial.[16] and for that reason, there is strong reason to believe that such an agreement will occur. By the same token, if a noncompete is observed, goes Argument #1, the correct inference is that *this compensation has occurred*. and both parties must be better off. Otherwise, the noncompete would simply not exist.[17]

A striking and perhaps counterintuitive feature of this argument is that it does not depend at all on the relative bargaining positions of the worker versus the firm. The idea is as follows. If the worker's relative bargaining position is strong, they will command favorable terms. If it is weak, they will command unfavorable terms. But even if it is weak, it remains true that the unfavorable terms are the result of both sides *fully exploiting* their bargaining position. Even if the worker starts with few arrows in their quiver and the firm starts with many, at the end of the negotiation both quivers are empty, and so the firm has no way to compel the worker to accept any *additional* unfavorable terms, including a noncompete. So once again, the only way for the firm to induce the worker to accept a noncompete is in exchange for sufficient compensation, which will only occur if the firm values having the noncompete by more than the worker values avoiding it.

15. *See* Friedman, *supra* note 3, and Callahan, *supra* note 3.

16. The exact amount of the compensation will depend on the relative bargaining position as discussed in note 13, *supra*. But the argument does not depend on these specifics.

17. In the highly stylized scenario in the main text, I assume that the worker and the firm first decide that they are going to form a match and negotiate the terms that would pertain without a noncompete, and then negotiate over how those terms would change if a noncompete was added. But this is merely for clarity, it is not necessary for the logic of the argument. That logic would work essentially the same way if the worker and the firm negotiated the terms that would pertain *with* a noncompete, and then negotiated over how those terms would change if the noncompete was *removed*. If the noncompete makes the firm better off by more than it harms the worker, then it is mutually beneficial and so it will remain in place. But if the reverse is true, then the worker and the firm would negotiate its removal in exchange for other terms of the agreement (likely the wage) being adjusted in favor of the firm (i.e., the worker will compensate the firm for the removal of the noncompete). In this scenario, as in the one in the main text, one should infer from the existence of the noncompete that it is mutually beneficial. The above logic also works essentially the same way in other scenarios, including (i) where the alternative to a noncompete is working for a different firm, rather than working for the original firm but without a noncompete or (ii) where employment terms are unilaterally set by the firm rather than being negotiated (this scenario is discussed further below). Finally, this logic is not specific to noncompetes: It applies to any negative attribute of a job, such as noisy or dangerous working conditions. Such conditions will only exist if they harm the worker by less than they make the firm better off, otherwise both parties would prefer an alternative that eliminates the negative attribute and also pays a lower wage. In sum, Argument #1 says that job attributes that are not mutually beneficial will not exist, and job attributes that do exist must be mutually beneficial.

The final step in Argument #1 is the claim that mutually beneficial noncompetes are also economically efficient, both in the sense of Pareto Efficient (there is no way to make one party better off without making the other worse off), and in the sense of increasing total economic surplus (sometimes known as Kaldor-Hicks Efficiency). But it is important to note that even if noncompetes are mutually beneficial, they may not be economically efficient if they negatively affect third parties who did not agree.[18] There are good reasons to believe that noncompetes do harm third parties,[19] and this constitutes an independent reason to believe that they are harmful on net.[20] Since this is not the main subject of the present article, in what follows the effect of noncompetes on third parties is assumed away except in the discussion about Argument #2(*A*) below. That is, in what follows the question of the economic efficiency of a noncompete (in the sense of increasing total economic surplus) reduces to whether or not the noncompete makes the firm better off by more than it harms the worker.

Responses to Argument #1. The logic behind Argument #1 is sound: Given the premises, the argument is correct. The problem is that the premises are faulty. To see why, begin by supposing that, contrary to Argument #1, the firm *does* have some way, unspecified for now (but discussed below), to impose a noncompete on the worker (i.e., to induce the worker to accept it *without* compensation).[21] If the firm could do that, it would be in its interest to do so; as noted above, the firm is made better off by restricting the worker's outside opportunities. And of course this is harmful to the worker. So a firm that has the ability to impose a noncompete on a worker without compensation has a means by which to *extract value* from that worker.

If in fact a noncompete can be used as a means of extracting value from the worker (i.e., making the firm better off *at the worker's expense*), then it is clear that its mere existence no longer guarantees that it must mutually beneficial. If the firm's ability to use a noncompete to extract value from the worker is sufficiently high, then the worker will be made worse off than if the noncompete never existed.

Even if the noncompete makes the worker worse off, that does not necessarily mean that it is inefficient in the sense of reducing total economic surplus.[22] It is still possible that the noncompete makes the firm better off by more than it harms the worker, but the firm's ability to use the noncompete to extract value from the worker enables it to capture more than 100% of that efficiency. But it is also possible that the noncompete is inefficient: It may hurt the worker by more than it makes the firm better off, but it exists nevertheless because of its usefulness to the firm as a means of extracting value. (It is also possible that the noncompete is both efficient and mutually beneficial, but with the worker receiving less than they would have received if the noncompete could not also be used as a means of extracting value.)

For this reason, Argument #1 depends crucially on the premise that imposing a noncompete on a worker without compensation is impossible or nearly so. That is, the argument requires that the

18. This is closely related to the economics of exclusive dealing contracts, where exclusives that are beneficial to all of the parties that agreed to them can be harmful to parties that did not agree, and can therefore be economically inefficient. *See* MICHAEL D. WHINSTON, LECTURES ON ANTITRUST ECONOMICS, Chapter 4 (2006).

19. *See* Liyan Shi, *The Macro Impact of Non-Compete Contracts* (2020) (unpublished manuscript). That paper, using a methodology that is very different from those described above, concludes that "the optimal restriction on noncompete duration is close to a ban."

20. Possible harmed third parties include owners, workers, and customers of firms that would have been started or made more productive by the unimpeded flow of workers. This possibility is sometimes acknowledged even by supporters of noncompetes, though it is often skipped over lightly.

21. The discussion in the main text assumes that the firm can impose a noncompete on the worker without any compensation at all. The same points would apply, in an attenuated form, if the firm needed to pay some compensation, but less than the amount that would have been agreed to in a free negotiation without imposed terms.

22. As discussed above, here I assume away the effect of the noncompete on third parties. But in fact it is likely that those effects are negative, which makes it more likely that the noncompete is not efficient.

worker's formal agreement to the noncompete can never be obtained unless it truly makes the worker better off. This premise is rather obviously incorrect. The remainder of this section describes five ways in which firms can obtain formal agreement to a noncompete even when it is harmful to the worker. They are:

- The firm can mislead the worker about the very existence of the noncompete. If the noncompete is buried in the fine print of a complicated employment contract, the worker may "agree" to it without ever knowing that it was there. Similarly, the worker could see the noncompete language but not understand what it means, either in the literal sense of not having a factually accurate understanding of what they are agreeing to or in the psychological sense of not regarding as salient an abstract restraint that might be relevant only in the distant future.[23]
- In some cases, the worker is not told that the noncompete is part of the employment contract until they have already started the job. But by that time, it is more difficult to refuse. The worker is likely eager to start the new job and would not want to quit. In addition, the worker may have already turned down other job offers, so that quitting would mean starting a new job search with the attendant costs, delays, distress, and lost income. Therefore, the worker might agree to a noncompete ex post that they would not have agreed to ex ante on the day that they accepted the job.[24]
- If there is any ambiguity in the terms of the noncompete, the firm can exploit that ambiguity, along with its large advantage in the ability to bear the costs, financial and otherwise, of fighting in court, to bind the worker to an interpretation of the noncompete that is more restrictive than what the worker agreed to and was (possibly) compensated for.[25]
- Suppose the worker agrees to a noncompete in exchange for compensation in the form of a promise of better employment terms (such as a higher wage) in the future. Now suppose that the firm does not deliver on that promise. What recourse does the worker have? One natural recourse is to quit. *but that is the very thing that the noncompete deters the worker from doing.*[26] That is, the firm may be able to renege on delivering the compensation promised to the worker in exchange for agreeing to the noncompete precisely because the noncompete itself decreases the cost of doing so. This is a key point: The compensation is what makes the noncompete mutually beneficial, but then the noncompete can cause the worker not to receive the compensation.[27]
- The discussion of Argument #1 above was about *negotiating* over the inclusion of a noncompete provision in a labor agreement. But in many cases, no such negotiation is possible; the noncompete is unilateral firm policy, required of all workers. It might appear that if firms can

23. Note that even if the noncompete is not understood by or salient to the worker, that is not true for the *firm*. The firm fully understands what it has to gain from the noncompete. This asymmetry in sophistication between the worker and the firm is one reason why both sides might "agree" to a noncompete that is not mutually beneficial.
24. The possibility that a firm might exploit the reluctance of the worker to quit once they have accepted the job is not limited to noncompetes. The firm might do this with any employment term, including wages. However, the comprehension/salience point described above is relevant here as well. A worker who is told on Day 1 that they will not receive the promised wage may be more likely to quit than a worker who is told of the existence of a noncompete, and even if they do not quit they are more likely to be a disgruntled employee. So the asymmetry in sophistication between the worker and the firm gives the firm the incentive to extract value from workers ex-post by modifying opaque terms instead of salient ones.
25. Perhaps a rational worker would anticipate this possibility and so would require compensation for the stronger noncompete that the firm might try to impose ex-post, rather than the weaker one that was agreed to ex-ante. But this requires a level of foresight and "meta rationality" that is unrealistic even for relatively sophisticated workers.
26. There are other factors that give firms an incentive to deliver on their promises, including formal contracts and reputation effects. But the ability of the worker to quit is a very important one.
27. Perhaps a rational worker would anticipate this possibility and refuse to sign the noncompete in the first place. But as in note 25, this requires a level of foresight and "meta rationality" that is unrealistic even for relatively sophisticated workers.

literally impose noncompetes on workers, then there need be no compensation and noncompetes can be used as a means to extract value from workers.

However, a proponent of Argument #1 would say, correctly, that this does not follow from standard economic theory. Many standard economic models include firms that post nonnegotiable terms (e.g., the price of cereal at the supermarket). This does not mean that firms can impose whatever terms they want. Firms are still constrained by competition, which requires them to offer terms favorable enough to make workers want to work for the firm. Moreover, competition tends to work to eliminate provisions that are inefficient (i.e., that harm workers by more than they make the firm better off), for reasons similar to those discussed in note 17 above; if the provision is inefficient then there would exist a mutually beneficial agreement to eliminate it in exchange for a change in some other provision of the employment agreement. And if most firms persisted in requiring an inefficient noncompete, one or a few firms could outcompete those firms by not requiring it, either displacing them or forcing them to follow suit.

The argument in the preceding paragraph is correct as far as it goes. But if the assumptions are made a bit more realistic, it becomes clear that requiring noncompetes as a nonnegotiable provision of the job can be an effective means of imposing them on workers without compensation. Specifically, if nonnegotiable (and uncompensated) noncompetes are widespread in an industry it is unlikely that competition will dislodge them.[28] The reason is as follows. In order for competition to dislodge harmful noncompetes, firms that do not require a noncompete, and that hope to attract workers on that basis, would have to make that fact a large and salient part of their worker recruitment message, otherwise prospective workers will not even know about it. But firms can capture only a limited amount of the attention of prospective workers, and it is likely that other recruiting messages would be a better use of that limited attention, particularly if the noncompete is not highly salient for workers. In addition, if one or a few firms did recruit based on a "no noncompetes" message, the workers that they would attract would not be a random sample of workers. Rather, they would be the workers who care the most about avoiding noncompetes, and those workers may be undesirable in other ways, such as being more likely to quit.[29] In sum, once harmful noncompetes have become widespread in an industry, they are likely to persist because the competitive pressure to eliminate them, while present, may not be sufficiently strong.

In the above arguments, no distinction was made between low- and high-wage workers. It is sometimes suggested that noncompetes are a problem for the former but not for the latter, who are more sophisticated and for whom the efficiency justifications (discussed below) are more likely to apply. There may be some truth to this; to cite a recent well-known case, requiring sandwich makers at Jimmy Johns to sign a broad noncompete provision likely exploits some disadvantages that are specific to low-wage workers, and it certainly lacks any plausible efficiency justification.[30] However, the reasons to doubt Argument #1 are not confined to low-wage workers. All five of the above points apply at least to some extent to higher wage workers, particularly the last two.

28. This point is different from the others in that it depends on the assumption that noncompetes are already widespread in the industry (though a weaker version of the point applies even if they are not widespread). The other points do not depend on this assumption.

29. For a similar mechanism in a different context, *see* David J. Balan & Dan Hanner, *Job Insecurity Isn't Always Efficient* (2014) (unpublished manuscript).

30. Illinois Attorney General, *Madigan Announces Settlement with Jimmy John's for Imposing Unlawful Non-Compete Agreements*, December 7, 2016, https://illinoisattorneygeneral.gov/pressroom/2016_12/20161207.html. *See also* Illinois Attorney General, *Attorney General Madigan Reaches Settlement with National Payday Lender for Imposing Unlawful Non-Compete Agreements*, January 7, 2019, https://illinoisattorneygeneral.gov/pressroom/2019_01/20190107b.html.

B. Argument #2: Noncompetes Facilitate Beneficial Economic Activity

By the logic of Argument #1, in order for a noncompete to be economically efficient, it must have some positive benefit. If it did not, then it could not make the firm better off by more than it harms the worker. And if it is not efficient, then it cannot be mutually beneficial, and if it was not mutually beneficial then it would not be observed. But since noncompetes are observed, goes Argument #1, these positive benefits *must* exist, and they must be sufficiently large to render the noncompete efficient, otherwise one party or the other would not have agreed to it.[31]

The conviction that positive benefits must exist, and must be sufficiently large to render the noncompete efficient, does not guarantee that any particular claimed source of such benefits must be valid. However, that conviction does influence the evaluation of individual claims of positive benefits from noncompetes: If it is certain that substantial benefits must exist, and if there are a relatively small number of candidate sources of those benefits, then the evaluation of one or more individual proposed sources *must* begin with the premise that the benefit is likely to be real and substantial. That is, believing Argument #1 necessarily requires being less skeptical about claimed sources of benefits than one would be absent that belief.

But as discussed above, Argument #1 is not correct: Noncompetes can be imposed on workers by firms without compensation as a means of extracting value from them. And in that case, noncompetes can exist even if they have little or no positive benefits (and as discussed below, those "benefits" can even be negative). This does not mean that substantial positive effects do not exist; it is possible that noncompetes can be *both* a means of extracting value from workers *and* a source of meaningful positive benefits, either simultaneously for a single worker or differentially across different workers.[32] So an inquiry into claimed positive benefits is still worthwhile, but there is no a priori supposition that the claims must be valid; if the claims are found to be weak or inconsistent with evidence then the correct conclusion is that those benefits simply do not exist (or are small or even negative), and not (as Argument #1 would have it) that large benefits *must* exist and the only question is what exactly they are.

Below, I discuss the two most commonly argued claims of positive benefits from noncompetes, namely, (A) that they facilitate efficient knowledge transfer from firms to workers and (B) that they encourage efficient firm-sponsored investment in worker training. While these justifications are not completely without merit, I argue that they are both weak, and that scrutiny of them in fact reveals strong arguments in the opposite direction. These arguments, combined with the empirical evidence discussed above, support the conclusion that noncompetes are likely to be harmful on balance (being harmful to workers and likely also harmful to efficiency), and that they are very unlikely to have effects so positive that heavily restricting or banning them would risk major economic harm.

1. Argument #2(A): Noncompetes Facilitate Efficient Knowledge Transfer

Suppose a firm has some knowledge (e.g., a trade secret or a manufacturing process or a customer list) that, if shared with a worker, would make that worker more productive and more valuable to the firm. In that case, sharing the knowledge will be economically efficient. But if that knowledge is also valuable to competitors, then competitors will be willing to offer a worker in possession of that

31. Even strong supporters of noncompetes probably do not believe in a strictly literal version of Argument #1. But even in a nonliteral version of the argument, the mere existence of noncompetes, and their voluntary nature, are taken to be strong evidence that they are likely to be mutually beneficial and economically efficient. This in turn means that important positive effects are very likely to exist (in Bayesian terms, there are strong priors), whether there is clear evidence for them or not.

32. It should be noted, however, that the fact that firms impose noncompetes on low-skill workers such as sandwich makers when there are quite clearly no positive effects from doing so is grounds for additional skepticism regarding other claims of positive effects that are more facially plausible.

knowledge a wage that reflects its value. This means that the original firm will either lose the worker (and have the knowledge fall into the hands of the competitor) or it will have to match the higher wage. This may make the firm worse off than if it had never shared the knowledge in the first place. If so, the firm might design the job so that the knowledge sharing will not occur, even though sharing is efficient. The inability to protect the knowledge might even cause the firm not to develop it in the first place, or in the extreme case, it might cause the firm to eliminate the job altogether. But with a noncompete agreement in place to protect the knowledge, the firm would have the appropriate incentive to develop and share it.[33]

Responses to Argument #2(A). This argument has some plausibility. It is not difficult to imagine situations where a firm has knowledge that workers must also have in order to be fully productive, that competitors would pay a lot for, and that firms cannot otherwise protect. However, there are a number of factors that limit the strength of this argument:

- In order for the argument to hold, it must be true that the firm really will forbear from sharing the knowledge if it cannot use a noncompete. That is, there must be a more efficient way to run the business (with sharing), and another, less efficient way to run it (without sharing), and the more efficient way must be more profitable than the less efficient way if and only if the worker is bound by a noncompete.[34] If this is not true, then the sharing will occur with or without a noncompete, and so banning noncompetes, while harmful to the firm's profits, will not hurt economic efficiency (as long as it does not cause the firm to go out of business).
- Argument #2(*A*) is correct in that the possibility that knowledge might escape the firm is harmful to efficiency, because it can cause the firm not to share the knowledge within the firm, or even not to develop it in the first place. But it ignores the fact that when knowledge *does* escape a firm, and flows to other firms, that is often a *good* thing, because the receiving firms can do valuable things with the knowledge as well, including using it as an input in the creation of additional knowledge. So there is a tradeoff. Noncompetes provide an incentive to efficiently develop and share knowledge within the firm, but the absence of noncompetes causes more sharing of knowledge across firms.[35]

This tradeoff is very similar to the one that lies at the heart of the debate regarding whether intellectual property (IP) protections should be stronger or weaker: Stronger IP means stronger incentives to innovate, and weaker IP means more sharing and cross-pollination of knowledge, which among other advantages reduces the cost of subsequent innovation. It is worth noting that there is a widely held view among economists and IP experts (though not a consensus) that IP protection in the United States is too strong, not too weak.[36] That is, it probably should be *easier* to spread ideas than it currently is, even at the cost of some reduction in the ability to capture the returns to the innovation. And if this is true of IP, it may be true of noncompetes as well; if noncompetes were weaker or did not exist, the gains from spreading knowledge across firms may exceed the harm from less development and sharing of information within the firm.

The experience of California (CA) is a key piece of evidence on this point. In CA, noncompetes are legally unenforceable. And yet CA is a worldwide center of innovation. While it is possible that CA is

33. *See* Barnett & Sichelman, *supra* note 3; Long, *supra* note 3.

34. In the main text, I assume that there are two discrete ways of organizing the job. In reality, there may be a continuum of ways, but the basic point still applies.

35. This is an example of a situation where a noncompete can harm third parties that did not agree to it, even if it is mutually beneficial to the worker and the firm. *See* Shi, *supra* note 19.

36. *See* Bronwyn H. Hall & Dietmar Harhoff, *Recent Research on the Economics of Patents*, 4 ANN. REV. ECON. 541–65 (2012); and Bronwyn H. Hall, *Patents, Innovation, and Development*, INT'L L REV. APPLIED ECON. (forthcoming, 2021).

innovative despite the restrictions on noncompetes and not because of them, at a minimum the experience of CA shows that such a policy is not severely damaging to innovation. It is also possible that the restrictions on noncompetes might be one of the *causes* of CA's success. It may cause beneficial knowledge sharing across firms similar to what might be achieved through weaker IP, and this advantage may outweigh the disadvantage of reduced incentive to develop and share knowledge within the firm.[37,38]

- While a noncompete may increase the *firm's* incentive to create new knowledge, it decreases the *worker's* incentive to do so. A worker who develops new knowledge absent a noncompete gains by being more attractive to outside firms, which allows them to either switch jobs or to bargain with their current firm from a stronger position.[39] The existence of a noncompete reduces this gain and so reduces the incentive to create knowledge.[40]
- Aside from their effects on the creation and dissemination of information within and across firms, noncompetes impede the efficient flow of *people* across firms. Not every worker/firm match is the right one. Sometimes, it was a mistake from the beginning, and other times, it was the right one once but is no longer. The normal way to improve upon a suboptimal match is for the worker to switch jobs. Noncompetes impede this switching, as it is more difficult for the worker to quit because they are barred by the noncompete from the best available alternative jobs.[41] So workers are either stuck in suboptimal matches or they are forced to take a (likely inferior) job that is not prohibited by the noncompete or even to leave the workforce entirely. Noncompetes interfering with better matches between workers and firms may be a significant source of inefficiency.[42]

Given the above points, the claim that noncompetes can lead to an increase in efficient information sharing is not entirely without merit. But close scrutiny reveals the argument to be weak and also suggests some strong arguments to the contrary.

2. *Argument #2(B):* Noncompetes *Facilitate Efficient Investment in Worker Training*

Firms sometimes engage in costly investment in worker training and skills. But they may be less likely to do so if those workers can use that training to attract better outside job offers. If training the worker means either losing that worker or having to pay a higher wage to retain that worker, the firm may not

37. For versions of this argument, *see* Orly Lobel, *Noncompetes, Human Capital Policy & Regional Competition*, 45 J. CORP. L. 931–51 (2020); and *Exit, Voice & Innovation: How Human Capital Policy Impacts Equality (& How Inequality Hurts Growth)*, 57 HOUS. L. REV. 781 (2020).
38. It is important to note, however, that many labor contracts in California contain noncompete provisions, even though they are unenforceable according to state law. It is therefore possible that some workers *believe* that they are constrained by a noncompete when in fact they are not, and this perceived constraint may have an effect similar to that of an actual constraint due to an *in terrorem* effect. For this reason, the policy regime in California is not (as a practical matter) a complete ban on noncompetes, which complicates the interpretation of California's innovation success. *See* Evan Starr, et al, *The Behavioral Effects of (Unenforceable) Contracts*, 36 J. L. ECON. & ORG. 633–87 (2020). *See also* Evan Starr & J. J. Prescott, *Subjective Beliefs about Contract Enforceability* (2021) (unpublished manuscript) for evidence that workers are often poorly informed about the enforceability of noncompete provisions in their labor agreements.
39. The reference here is not to knowledge that would be owned by the firm if it were created, such as a patent. Rather it is to knowledge that the worker can create, the creation of which would be economically efficient, but will only actually be created if the worker can use it to become more valuable to outside firms.
40. *See* Mark J. Garmaise, *Ties that Truly Bind: Non-competition Agreements, Executive Compensation and Firm Investment*, 27 J. LAW, ECON. & ORG. 376–25 (2011).
41. If the match is sufficiently bad, the firm may fire the worker. But there are many bad matches that persist.
42. If the worker is more efficient with another firm, it is possible that there could be a mutually beneficial exchange in which the worker pays the firm to release them from the noncompete. But there are many practical barriers to this happening, and so it is rare.

provide the training in the first place, even if doing so is economically efficient. But if there was a noncompete agreement in place, then the firm would have the appropriate incentives to provide the training.[43]

Responses to Argument #2(B).

- A similar point to one made above about Argument #2(*A*) applies here as well. The argument does not work if the training is inherent in the job. For example, if hospital nurses gain skills that make them more attractive to outside employers, and if those skills arise simply from the experience of being a hospital nurse, then the firm has no choice but to provide that "training," and will do so with or without a noncompete. And even if the training is formal training and not on-the-job training, it may be so necessary for the job that the firm would be willing to provide it at its own expense even if doing so will make the worker more attractive to outside employers. In order for a noncompete to lead to more training, there must be a version of the job where training is provided, another version where it is not provided, and the firm must prefer the version where it is provided if and only if the worker is bound by a noncompete.
- Labor economists distinguish between industry-specific human capital (HC) and firm-specific HC. (There is also a concept of "general" HC that is useful across industries, but for our purposes this can be folded into the concept of industry-specific HC.) Firm-specific HC is defined as HC that makes the worker more valuable at the current firm but not at other firms. Clearly, noncompetes do not cause firms to increase training that imparts firm-specific HC, because by definition firm-specific HC is not useful to any competitor; providing it to the worker does not raise the worker's outside wage, and so will not put the firm in a position where providing the HC means either losing the worker or matching a higher outside wage offer. To the contrary, firm-specific HC tends to bind workers more tightly to their firms, because it makes the existing match more valuable relative to alternative matches.

Industry-specific HC, in contrast, is valuable to other firms in the industry as well as to the original firm.[44] In the simplest labor economics models, training that imparts industry-specific HC is not paid for by the firm at all. Precisely because the HC increases the worker's value to outside firms, the benefit from that HC accrues to the worker and not to the firm, and so only the worker is willing to pay for it, either directly in the form of education or indirectly in the form of a lower wage for a period of time (or in the case of many internships, a zero wage) in exchange for on-the-job training. So even when the firm appears to be providing training for industry-specific HC at its own expense, that training is often actually indirectly financed by the worker.[45]

Given this, it might appear that firms would be willing to pay for training that imparts industry-specific HC if it could be protected by a noncompete, as then the firm would capture the benefit. But according to the simplest model of labor market competition, if the training imparts a benefit (increased industry-specific HC) that exceeds its cost, then it will occur regardless; with a noncompete, the firm will pay the cost and receive the benefit, and without a noncompete, the worker will do the same. That is, in the simplest model a noncompete removes a barrier to the firm paying

43. *See* Rubin & Shedd, *supra* note 3; Long, *supra* note 3.

44. The distinction between the types of human capital is not always so clear. For example, going to Hamburger University presumably increases the trainee's value as a manager at any fast food restaurant (industry-specific), but probably increases their value at McDonald's the most because the practices being taught are the exact ones used at McDonald's (firm-specific). Despite this, the basic point still applies.

45. *See* Gary S. Becker, *Investment in Human Capital: A Theoretical Analysis*, 70 J. POL. ECON. 9–49 (1962).

for industry-specific HC training, but it will not cause training to happen that would not have happened anyway.[46]

If we complicate slightly the model of labor market competition, there can be circumstances in which firms *do* impart industry-specific HC at their own expense and to the benefit of the worker. Minimum wage laws can limit the extent to which workers can be made to pay for their own HC in the form of lower wages. Credit constraints or behavioral factors may limit workers' willingness or ability to self-fund training by accepting a job with lower wages today in order to be able to command higher wages in the future. In these situations, it is possible that this training will be facilitated by noncompetes to the benefit of workers. And it is even possible that without the noncompetes, some jobs will be eliminated altogether.

In sum, given the above points, the claim that noncompetes lead to an increase in efficient worker training is not entirely without merit. But overall, close scrutiny reveals the argument to be weak, weaker than Argument #2(*A*), and also suggests strong arguments to the contrary.

IV. Noncompetes Versus Other Postemployment Restrictive Covenants (PERCs)

Noncompetes are only one of a number of PERCs that exist. Other PERCs include nondisclosure agreements, nonsolicitation agreements, and nonrecruitment agreements. A full evaluation of these other PERCs is beyond the scope of this article, and I offer no policy recommendations regarding them. But a few points are worth noting:

- Like noncompetes, other PERCs may be imposed on workers without compensation (or made unreasonably broad) as a means of extracting value. This is grounds for skepticism about them.[47]
- However, the argument that these other PERCs have positive benefits is stronger than is the case for noncompetes. The idea that efficient information creation and sharing requires the protection of a nondisclosure agreement (so that the worker cannot simply sell the knowledge to the highest bidder) is much more reasonable than the idea that it requires the protection of a noncompete (so that the worker's alternative sources of employment are restricted or foreclosed). Similarly, nonsolicitation agreements and nonrecruitment agreements may legitimately be necessary for certain kinds of businesses and professional practices to be willing to integrate new partners without fear that the partner will leave and take the business with them.
- By the same token the potential for harm to the worker from these other PERCs, even if they are imposed without compensation in the manner described above, is much smaller than with noncompetes. There is a fundamental difference between restricting what a worker can take with them when they leave (knowledge, customer contacts, recruitable employees) and restricting the worker in where they can go if they wish to leave.
- For these reasons, in some settings, other PERCs may be a reasonable alternative to noncompetes; they may be a less restrictive alternative means of achieving the positive benefits that are often claimed for noncompetes. The availability of this alternative further strengthens the case for greatly restricting or banning noncompetes.

46. *See* Garmaise, *supra* note 40.

47. *See* Balasubramanian, et al. *supra* note 11, for evidence that workers who are subject to one PERC are often subject to the others as well and that, for the average worker, the motivation for this appears to be what the authors term "value capture" by the firm, which is synonymous with what in this article is termed "value extraction." (For top managers, the paper finds the opposite result).

- However, it should be noted that noncompetes do have one important advantage over other PERCs, namely, that violations of noncompetes are much more easily detected. It is much easier to know and to prove that a worker has accepted a job that violates their noncompete than it is to prove that they have not shared information in violation of a nondisclosure agreement or subtly recruited customers or workers in violation of a nonsolicitation or nonrecruitment agreement.

V. Discussion

Sections II and III combine to show that noncompetes are likely to be harmful on balance and are very unlikely to be so beneficial that restricting or banning them would risk major economic damage.

The material in those sections is based on standard economic analysis, attempting to understand the effect of noncompetes on such conventional outcomes as worker mobility, hiring, and entrepreneurship, investment, innovation, and wages. It does not capture other, potentially more serious worker harms that are not typically studied by economists. A worker who is stuck in a bad job match might merely be less productive or less well-compensated than they otherwise would be. But they might also be less happy, and worse, they might be a target for genuine exploitation, degradation, or abuse. A worker who is known by a predatory employer or manager to be stuck is likely to be mistreated, because they have no choice but to accept it. There are many reasons why a worker might be stuck, but a noncompete adds an additional one: A worker trying to muster the courage to quit might be reminded of the noncompete that they signed and threatened with legal action if they violate it. It is not altogether an exaggeration to call this a human rights issue.

Even aside from these concrete harms, noncompetes represent a limitation on human freedom. The ability of a person to leave a bad situation has value in and of itself. Policy makers can choose to make a normative judgment that assigns weight to this value, for which they may be willing to sacrifice some economic efficiency. However, it would only be a sacrifice if noncompetes were economically efficient, which as discussed above is likely not the case.

Even if noncompetes are harmful, the question remains of what should be done about them.[48] One possible approach would be treat them as an antitrust problem. It is not obvious that this is the correct approach; noncompetes could be harmful without necessarily belonging within the purview of antitrust (though the very term "noncompete" should be a red flag). Or perhaps noncompetes are an antitrust problem, but only in situations where they are imposed on workers as a consequence of monopsony power in the labor market. In a companion article, I argue that noncompetes can be reasonably regarded as an antitrust problem even absent conventional monopsony power (i.e., even if the labor market was highly competitive in the sense that the worker had many job offers similar to the one that they accepted).[49]

VI. Conclusion

Defenders of labor noncompetes often claim that they were voluntarily agreed to, and so they must be both mutually beneficial and economically efficient. This claim rests on faulty premises: Firms have

48. A common argument against any policy action limiting noncompetes is that it would constitute a paternalistic violation of freedom of contract between two willing parties. But whatever one's general view on the appropriateness of paternalistic government interventions, it is important to note that of the five points listed in response to Argument #1 above, all five apply at least to some extent to higher wage workers, particularly the last two. Only the first point, and to a lesser extent the second, depends heavily on a lack of rationality or capability on the part of the worker that might be ameliorated by government paternalism. The others are ways that firms can extract value by imposing noncompetes on workers who are highly (though not infinitely) rational and capable. A ban on noncompetes therefore protects workers from being victimized by firms, not from their own poor decisions.

49. *See* Balan, *supra* note 13. *See also* Rohit Chopra & Lina M. Khan, *The Case for 'Unfair Methods of Competition' Rulemaking*, 87 U. CHI. L. REV. 357–79 (2020) for an argument for combatting noncompetes using the Federal Trade Commission's antitrust rulemaking authority.

both motive and means to induce workers to accept noncompetes that are not to their benefit, but rather are a means by which the firm extracts value from them. This is true even though the noncompetes are nominally voluntary. In addition, the most commonly made claims of positive effects from noncompetes (that they facilitate efficient knowledge transfer within firms and that they facilitate efficient worker training), while not completely without merit, do not stand up to critical scrutiny, and in fact that scrutiny reveals strong arguments to the contrary.

The weakness of the arguments in favor of noncompetes, combined with the substantial body of empirical literature that mostly finds them to be harmful, as well as the experience of California which has flourished as a center of innovation despite (or perhaps because of) not enforcing them, is sufficient to conclude that noncompetes are likely to be harmful on balance. And even if they are beneficial on balance, they are very unlikely to be so beneficial that restricting them would risk major economic harm.

In addition, noncompetes may cause harms that are not commonly measured by economists, such as increasing worker vulnerability to exploitation and abuse. Finally, the ability of a human being to take their body and their labor where they choose is a human right. Perhaps some extremely strong economic efficiency benefits would outweigh these harms, but as discussed above, such benefits do not exist.

Author's Note

David J. Balan is an employee of the Federal Trade Commission. The views expressed in this article are solely those of the author.

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Agenda

National Association of Attorneys General (NAAG)
Antitrust & Labor Issues Working Group Call (ALIWG)
Monday June 13, 2022
2:00 PM EST/1:00 PM Central/12:00 PM Mountain/11:00 AM Pacific/8:00 AM (HI)

https://naag-org.zoom.us (b)(6)

Meeting ID: (b)(6)
Passcode:

OPEN Call NON AAGs INCLUDED

I. Welcome

II. New to Our Call? Please Feel Free to Introduce Yourself/Your Organization

III. Topic: Antitrust Challenges to Labor Non-Competes

- Guest Speaker-
  - **David Balan,** Managing Director, Econ One
  - Q&A

IV. Open Mic

- Any Public Announcements/Updates Re Recent or Upcoming Antitrust and Labor Matters?

V. Attachments:

- Articles by D. Balan
  i. Labor Noncompete Agreements: Tools for Economic Efficiency or Means to Extract Value from Workers (Antitrust Bulletin);
  ii. Labor Practices Can Be An Antitrust Problem Even When Labor Markets are Competitive (CPI);
  iii. Article Sketch (Worker Harm as Antitrust Violation) (forthcoming)

VI. Next Call:

- July 11, 2022 AAGs Only-- Closed Call

June 9, 2022

Introduction:

- This note is about the effects of non-competes on the workers who are party to them. It is not about the effects of non-competes on third parties.

- Recent research strongly suggests that non-competes are harmful to workers.[1] More specifically, and contrary to an argument that is commonly offered in support of non-competes, they are often imposed on workers involuntarily, rather than being the product of negotiation in which the worker receives something that they value at least as much as they dislike the non-compete.

- This harm to workers is not necessarily a competitive harm.[2] The purpose of this note is to argue that it can in fact reasonably be considered a competitive harm, and to briefly sketch an approach for bringing antitrust cases challenging non-competes.

Monopsony Power as a Basis for Antitrust Action Against Non-competes:

- A commonly-held view is that for non-competes to be an antitrust problem, they must be caused by monopsony power in the labor market.

- It may therefore seem natural for a central element of an investigation to be about identifying monopsony power among the firms that impose non-competes on workers.

- In my view, in many or even most cases this is likely to be a mistake, for two reasons.

- First, monopsony power may genuinely not be present. And even if it is present, it may be very difficult or impossible to prove.[3]

- Second, even if monopsony power could be proven, it is not clear that it can work as a basis for an enforcement action. The reason is as follows. Unless the claim against the non-competes is accompanied by a conventional Section 2 or Section 7 claim, the FTC/DOJ or the state AG will in effect be conceding that the monopsony power possessed by the firms was

[1] See the empirical work by Evan Starr and his many co-authors (including BE economist Michael Lipsitz), and also Balan (2021).

[2] This note is about non-competes that cause harm to the workers who are party to them. For cases where the competitive harm is to third parties (such as business that cannot find qualified workers, and their customers and workers), the problem is quite obviously a competition problem.

[3] There is some new research suggesting that monopsony power is more prevalent than had previously been believed, even for low-wage workers. This may somewhat lower the burden for showing that monopsony power exists. But to my knowledge this new research has not been tested in court, and even under this lower burden monopsony power may still be absent or at least difficult to prove.

acquired legally. And as a general matter, exercising legally-acquired market power is legal. So if the firm decides to exercise its market power by imposing a non-compete, how is that more illegal than another avenue of exercising it, such as lowering the wage? This strikes me as basically a fatal objection to the idea of basing non-competes enforcement on monopsony power possessed by the firm.

An Alternative Approach for Antitrust Enforcement Against Non-Competes (Main Idea):

- I suggest a different approach.[4] To see how different it is from a monopsony-based approach, begin by assuming that the labor market is extremely competitive, in the sense that on the day the worker accepted their job that worker had essentially an unlimited number of observationally equivalent job offers.[5] Obviously this is an extreme assumption, but it serves to emphasize the point.

- The basis for the alternative approach lies in the following facts: (i) dissolving job matches is costly for both the worker (who must engage in a costly search for another job) and the firm (that must engage in a costly search for another worker); and (ii) labor agreements are incomplete (meaning that not every term is specified up front before the match is formed) and costly to enforce (meaning that even terms that are specified up front may be performed only partially or not at all).

- Another way of saying that dissolving the match is costly to the worker and the firm is that preserving the match generates match-specific economic surplus to be divided between the worker and the firm. This surplus can be very substantial. And the fact that labor agreements are incomplete and imperfectly enforceable means that the division of this surplus cannot be fully determined up front. Instead, the division will be determined largely by informal bilateral bargaining between the worker and the firm. The worker will try to grab more of the surplus in the form of (say) demanding longer breaks, and the firm will try to grab more of the surplus in the form of (say) insisting on shorter breaks.

- In this informal bargaining, as in any other bargaining, the division of the surplus depends on how much each side "needs" an agreement. This in turn depends on how good or bad is each party's next-best alternative to reaching an agreement (often called the "outside option"). The worse the worker's outside option (i.e., the more costly it is for the worker to be fired), the lower their bargaining leverage relative to the firm, and the worse the terms they will receive. Similarly, the worse the firm's outside option (i.e., the more costly it is

[4] What follows is largely based on Balan (2020), but has been refined and expanded since that article was published.
[5] That is, the jobs need not all be identical; the assumption is only that any differences could not be discerned by the worker at the time the job was accepted.

for the firm to have the worker quit), the lower its bargaining leverage relative to the worker, and the worse the terms it will receive.

- Non-competes make the worker's outside option worse. Without the non-compete, the worker's outside option is the best job they can get. With the non-compete, the worker's outside option is the best job they can get that does not violate the non-compete. If the non-compete is binding to any significant degree, then the latter outside option will be substantially worse than the former.

- **This brings us to the central claim of this note. Non-competes are a competition problem NOT because they are the product of monopsony power possessed by firms, but rather because they make it more difficult for the worker to access the benefits of the competitive labor market. Put another way, the problem is not that the labor market is bad because it is monopsonized; the problem is that the labor market is competitive and good but the worker cannot participate in it.**

Discussion:

- There are two points related to this approach that merit discussion.

- First and perhaps most important, this approach **DOES** require that non-competes are imposed on workers against their will, rather than being something that workers freely agree to in exchange for something that they value at least as much. The empirical evidence plus the discussion in Balan (2021) strongly suggest that this is true (especially but **NOT** exclusively for low-wage workers), but it is still a necessary condition and it would need to be demonstrated in court. In other words, this approach is about showing that the harmfulness to workers of non-competes, **once demonstrated**, is specifically an antitrust problem. But it does not eliminate the need to perform the prior step and demonstrate that non-competes are harmful to workers.

- Second, the fact that this approach is not rooted in monopsony power does not mean that competition in the labor market is irrelevant. It is still necessary to show that the restraint imposed on the worker by the non-compete is meaningful. If there were 1000 equivalent jobs, and the non-compete denied the worker access to 100 of them, there would still be 900 equivalent jobs remaining and the non-compete would not have caused any harm. So there would still be a need to show that the jobs that the non-competes prevent the workers from taking are meaningfully preferable, to a sufficient number of workers, to other

available jobs. In many cases this will likely not be very difficult (jobs really are quite differentiated, even low-wage jobs), but it will still be necessary to prove it.[6]

An Alternative Approach for Antitrust Enforcement Against Non-Competes (Additional Idea):

- The main idea for this new approach was described above. There is an additional idea that is both less important and more difficult to understand. But it does identify an additional source of harm from non-competes, so I describe it here briefly.

- As discussed above, the outcome of the informal bargaining between the worker and the firm over the match-specific surplus depends on each side's outside option. This is commonly modeled in antitrust economics using the Nash Bargaining model. In that model, reducing the value of **either** side's outside option increases the total match-specific surplus. This means that the match-specific surplus is greater with a non-compete than without: when one side's outside option gets worse, that side needs a deal more, and when **either** side needs a deal more, the total surplus from the match is higher.

- There might appear to be a contradiction, or at least a tension, between the claim that the non-compete makes the worker worse off by degrading their bargaining leverage and the claim that the non-compete increases the match-specific surplus. But there is no contradiction: the non-compete does increase the surplus, because the worker's weaker relative bargaining position makes them value the match more. It also harms the worker, because it was precisely that weakening of the worker's bargaining leverage that caused the increase in the surplus.

- A numerical example will help clarify the point. Suppose that the non-compete degrades the worker's outside option by $100. That is, if the negotiation fails and the match is dissolved the worker will be worse off by $100 relative to what it would be absent the non-compete. The total surplus is the sum of how much the worker values the match plus how much the firm values the match, so the non-compete has increased total surplus by $100.

- That additional surplus has to be divided somehow. In the Nash Bargaining model, the division of the surplus is determined by the "split parameter." So for example if the split parameter was 0.5, that would mean that each side captures half of the surplus. So if the non-compete increased the surplus by $100, the worker would capture $50 of that surplus. So the degradation of the worker's outside option made them worse off by $100, but they

[6] This idea is related to market definition. Whether it should be treated literally as market definition (i.e., defined according to the Hypothetical Monopolist Test as laid out in the Horizontal Merger Guidelines), or if some alternative approach should be used instead, is an important question that is beyond the scope of this note.

recaptured $50, leaving them worse off by $50 on net. The firm would capture the other $50, making it $50 better off on net.

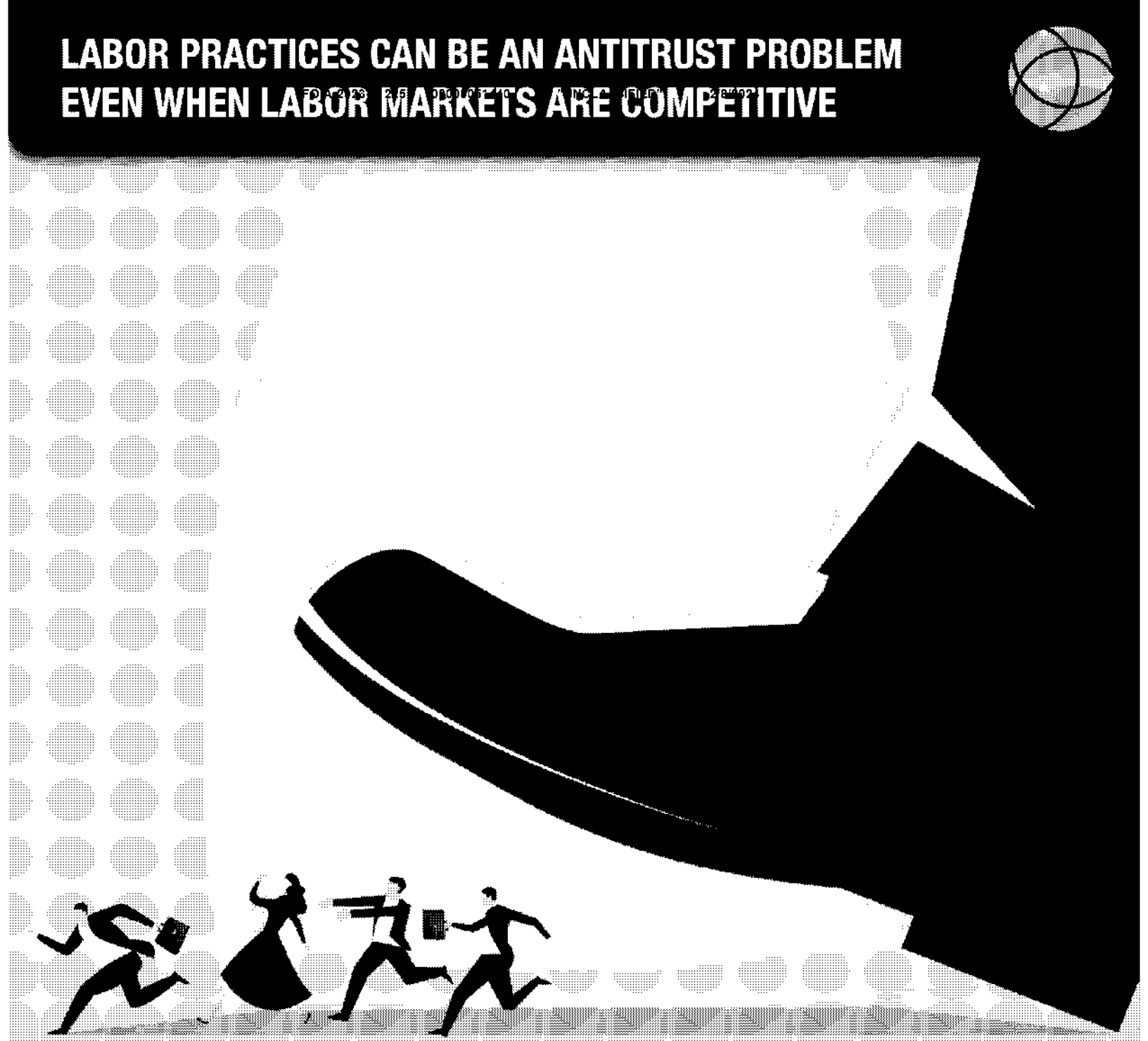
- But now suppose (realistically) that the split parameter is not 0.5, but something much more lopsided, say 0.9, meaning that the firm captures 90% of the surplus and the worker captures 10%. Now the worker would only recapture $10, being $90 worse off on net, and the firm would capture $90, being $90 better off on net.

- The fact that the firm likely captures most of the surplus is not an antitrust problem in itself. But it does have two important implications for the antitrust analysis. First, as shown in the above example, the harm caused to the worker by the non-compete is larger than it would be if the split was more equal. Second, the benefit to the firm is larger than it would be if the split was more equal. This gives the firm a stronger incentive to impose the non-compete in the first place. For both of these reasons, a highly unequal split parameter makes the antitrust harm from non-competes worse.

Conclusion:

- There is strong reason to believe that non-competes harm workers. For this to be a problem that the FTC/DOJ or state AGs can address, that harm needs to be competitive harm of some sort. A natural source of such harm is monopsony power wielded by the firm imposing the non-compete. But I believe this to be a weak basis for an enforcement action against non-competes, for both practical and conceptual reasons. My proposed alternative approach is to argue that non-competes are a competition problem because they prevent workers from accessing and enjoying the benefits of the competitive labor market, thereby weakening their bargaining leverage in informal negotiations with the firm over match-specific job surplus. In addition, the fact that the firm is likely to appropriate most of that match-specific surplus both increases the harm to the worker from the non-compete and increases the incentive of the firm to impose it.

LABOR PRACTICES CAN BE AN ANTITRUST PROBLEM EVEN WHEN LABOR MARKETS ARE COMPETITIVE



BY DAVID J. BOLAN[1]

[1] David Bolan is an attorney-advisor at the Federal Trade Commission. The views expressed in this paper are solely those of the author.

[2] I thank Keith Brand, Wally Mullin, and Jeremy Sandford for helpful comments.

CPI ANTITRUST CHRONICLE
MAY 2020

I. INTRODUCTION

In conventional antitrust analysis, there are certain conditions that must be met for a matter to be an antitrust problem. A merger is only likely to be a problem if the merging firms are close competitors to each other and there are not very many other close competitors. Coordination is only likely to be a problem if the coordinating firms collectively represent a large fraction of the sellers of the product. And conduct, including a variety of contractual restraints, is only likely to be a problem if the restraining firm has significant market power as that term is conventionally understood.[1]

Assuming, at least for the sake of argument, that this is true of output markets, it may appear that it must be true of input markets as well, including labor markets. Indeed, the textbook analysis of monopsony and oligopsony is very similar to that of monopoly and oligopoly,[2] and this similarity is explicitly recognized in the DOJ/FTC Horizontal Merger Guidelines.[3] It may therefore appear, and it is often argued, that labor market practices engaged in by firms can only be an antitrust problem in the presence of conventional labor market power, defined (roughly) as there being only one or a small number of possible employers for the type of labor in question.

The purpose of this article is to argue to the contrary. Specifically, I argue that firms can impose harmful conditions on workers even when workers have many (roughly) equivalent job offers to choose from.[4] **I further argue that this harm can reasonably be thought of as antitrust harm.**[5]

The basic argument is as follows. Even if the labor market is very competitive *ex ante* (i.e. the time of hiring), once the job match is formed, dissolving it is costly to both the worker and the firm, which means that **preserving** the match generates surplus, and this surplus must be divided between the worker and the firm. The more valuable the match (i.e. the more the worker prefers preserving the match to looking for another job, and the more the firm prefers preserving the match to looking for another worker), the more surplus there is to be divided.

This division will be determined via bilateral bargaining. This bargaining can be modeled using standard methods familiar from conventional antitrust analysis, specifically a model known as the Nash Bargaining model. In that model, the division of the surplus depends on the relative bargaining **leverage** between the worker and the firm, which loosely means that the less a party has to gain from reaching a deal, the more favorable the terms that party will receive; and on the relative bargaining **power** between the worker and the firm, which means that the stronger a party's capabilities for capturing surplus, the larger the share of the surplus that party will receive. Having more bargaining leverage and more bargaining power are both beneficial to a party, but an important and under-emphasized result from the theory of Nash Bargaining is that a party that has all of the bargaining power captures all of the surplus, regardless of relative bargaining leverage. Specifically, if one party has all of the bargaining power, they can make a take-it-or-leave-it offer to the other party that leaves that party no better off than they would be if the match was dissolved.

Whether a worker or a firm has more bargaining leverage is difficult to say, and there is no strong empirical evidence on the subject that I am aware of. However, there is some reason to suspect that workers often "need" a deal more than firms do, giving firms more relative bargaining leverage. With regard to bargaining power, matters are much clearer. Bargaining power is very likely to be held mostly by the firm, not the worker. Firms have myriad advantages in size, resources, and sophistication, and they can unilaterally set non-negotiable firm policies. An ordinary worker has little prospect of matching these advantages, and so will be at a major disadvantage in capturing the match-specific surplus.

Bargaining power as it appears in the Nash Bargaining model corresponds to power in the ordinary English sense of the word. While not without bound (the worker can still quit), the firm is able to use its advantages to acquire bargaining power, and to use that bargaining power to benefit itself at the expense of the worker. This can take the form of chiseling on wages and hours, or poor working conditions, or even abusive or degrading treatment.

The question is whether this power is **market** power in the antitrust sense. I argue that it is. As discussed above, the division of the match-specific surplus takes place outside the context of the competitive labor market, so the competitive labor market does not protect the worker from efforts by the firm to capture it.[3] Practices that allow the firm to capture most or all of that surplus can be thought of as efforts to become a monopolist over that surplus with respect to that worker, which makes it an antitrust problem.[4]

The fact that harm from these practices might reasonably be thought of as antitrust harms does not necessarily mean that they should always be dealt with in the context of antitrust. In many cases, regulation by the Department of Labor or by OSHA may be more appropriate. Nor is it obvious which practices by a firm should or should not be regarded as antitrust violations. The purpose of this article is not to resolve these questions. The purpose is only to establish that there is a reasonable basis for considering these harms to be antitrust harms, and therefore to consider antitrust action as one possible avenue for addressing them.

There is one labor market practice that is particularly likely to be an antitrust problem, namely labor non-compete agreements. Unlike other labor practices, whose purpose is to affect the division of **existing** match specific surplus, non compete agreements have the effect of **increasing** the match-specific surplus. They do this by making it more difficult for the worker to re-access the competitive labor market, thereby degrading the worker's prospects outside the match. When the worker's outside option is worse, they value the match by more, increasing the amount of match-specific surplus available to be captured by the firm. Practices that distance workers from the opportunity to participate in competitive markets are quite clearly an antitrust problem.

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This view of non-competes is at odds with the familiar argument that their voluntary nature is strong grounds for believing them to be both mutually beneficial and efficient.[10] But this is only true if non-competes are truly voluntary, and if the agreed-upon compensation offered to the worker in exchange for accepting a non-compete is actually delivered. In a separate article (Balan, 2019), I argue that these conditions are often not satisfied.[11] This argument is bolstered by a wealth of recent empirical evidence that, while somewhat mixed, largely finds non-competes to be harmful to workers.[12] And if these conditions are not satisfied, then non-competes are not to be presumed beneficial to the worker, but are rather to be understood as a restraint imposed on workers **without** compensation, to the benefit of the firm and to the detriment of the worker.

II. *EX POST* BARGAINING OVER MATCH-SPECIFIC SURPLUS

Suppose that a worker entering the labor market can choose between many jobs that *ex ante* appear to be identical. Once the worker chooses a job and a match is formed, that match is costly to dissolve, for both the worker and the firm. For the worker, the costs include the direct financial costs of a new job search, the lost income during the search (the damage from which is exacerbated by the fact that many workers have no financial cushion), and the fact that being fired is an emotionally traumatic experience for workers. In addition, the worker might need a recommendation from the firm to find another job, which they may not get if the match ends in acrimony. Finally, the worker may have signed a non-compete agreement or be subject to other restrictive covenants, which further increases the cost of leaving their job. For the firm, the costs include the direct recruiting and hiring costs to replace the worker, the indirect costs of being temporarily understaffed until a replacement is hired, and possible morale problems among remaining workers. These costs can be substantial.

Another way of saying that dissolving the match is costly is to say that **preserving** the match generates surplus arising from avoiding those costs. This surplus must somehow be divided between the worker and the firm. If labor contracts were complete and also fully and costlessly enforceable, then the division of this surplus would be determined within the context of the competitive labor market, and workers would receive competitive overall terms.

In reality, however, contracts are neither complete nor fully enforceable. This means that much of what happens between the worker and the firm is determined **after** the match has formed. There are things that the firm can do to benefit itself at the expense of the worker (chisel on wages and hours, poor working conditions, or even abusive or degrading treatment), and there are things that the worker can do to benefit themselves at the expense of the firm (shirking, theft, even sabotage). Which of these things will happen will be determined via bilateral bargaining between the worker and the firm, and not within the context of the competitive labor market.

This does not mean that the competitive labor market is irrelevant. A key concept in bargaining is that neither side can be forced to do worse than they would do if the match was dissolved (this is often referred to as their "outside option" or "disagreement payoff"). The worker will not agree to terms that are worse than being fired and having to look for another job, nor will the firm agree to terms that are worse than letting the worker quit and having to look for another worker. The more competitive the labor market, the better the worker's outside option, and the better the terms the worker will receive. That is, a labor market characterized by conventional market power makes things worse for workers, for the conventional reasons. But even in a competitive labor market, a substantial amount of surplus will be divided via bilateral bargaining outside the context of the competitive labor market.

This kind of bilateral bargaining is standard in economics, including antitrust economics. The standard framework for studying it is a well-known model called the Nash Bargaining model. In the remainder of this section, I summarize and present key results from this model.

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A. Bargaining Leverage

As discussed above, the worker's surplus from the match is the difference between what they receives if a deal is reached and what they receive if a deal is not reached, and similarly for the firm. The total surplus from the match is the sum of the worker's surplus and the firm's surplus.

Somewhat counter-intuitively, the party that contributes **less** to the total surplus has **greater** bargaining leverage. To see why, note that the surplus must be divided somehow. Suppose, for example, that the surplus is to be divided equally (though this is not necessary). A party that contributes little surplus shares little surplus with the other party (half of very little is also very little), but that party still receives half of the surplus contributed by the other party. An analogy would be a guest who brings a small side dish to a potluck dinner, but then eats the full meal like everybody else. Put another way, the party that contributes less to the total surplus has less to gain from a deal. That party "needs" a deal less, and so is able to bargain for better terms.

Whether workers or firms have greater relative bargaining leverage is difficult to say, and it may differ across employment matches and perhaps even over time within a match. While there is no direct empirical evidence that I am aware of, for the above reasons it appears that firms may often have greater relative bargaining leverage (i.e. having the match end is worse for the worker than it is for the firm).[12]

B. Bargaining Power

In Section II.A I assumed that the total surplus from reaching an agreement is divided equally between the parties. But this need not be the case. A given amount of surplus can be divided so that it goes entirely to one party, entirely to the other party, or anywhere in between. What share of the surplus a party can command is referred to as their bargaining **power**, which is distinct from the bargaining leverage described above. If one party has all of the bargaining power, then it will capture all of the surplus, and the other party will only receive value equal to their outside option, making them no better off than they would be if the match were dissolved. Any intermediate amount of bargaining power is also possible.

Bargaining power is an economic term of art, but it corresponds quite closely to the ordinary English usage of the word "power." When there is a pool of surplus to be divided between a single worker and a large firm, who has the power to capture it? Is that division likely to be 50/50 (the worker and the firm share the surplus equally)? Or is it more likely to heavily favor the firm, say 90/10 or 95/5? The massive size, sophistication, and resources of the firm strongly suggest the latter, as does the fact that the firm unilaterally sets non-negotiable rules, policies, and employment practices that can be used to apply pressure to the worker. It simply strains credulity that ordinary individual workers can outperform large, heavily resourced firms in a competition to capture a pool of surplus. That is power, and it is the firms, not the workers, that have it.[13]

There is an additional point that is a standard result of Nash Bargaining, but that is not widely appreciated. If one party has (almost) all of the bargaining power, then it matters little who has more bargaining leverage. Recall that bargaining leverage is about the relative contributions of the two parties to the total pool of surplus. But if one party has **all** of the bargaining power, then this is moot, because that party receives **all** of the surplus, regardless of who contributed it. This will be made clearer in the next sub-section.

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Define W^{D} as the value that the worker receives if a deal is reached (the job match continues) and W^{ND} as the value that the worker receives if a deal is not reached (the job match is dissolved and the worker receives their outside option).[14] The difference between these two ($W^{D} - W^{ND}$) is the gain to the worker from reaching a deal. Note that ($W^{D} - W^{ND}$) can be large because W^{D} is large (getting a deal is very good), or because W^{ND} is small (not getting a deal is very bad), or some combination of the two. Similarly, define F^{D} as the value that the firm receives if a deal is reached, F^{ND} as the value that the firm receives if a deal is not reached, and ($F^{D} - F^{ND}$) as the gain to the firm from reaching a deal.

The total surplus TS from continuing the job match is

$$TS = (W^{D} - W^{ND}) + (F^{D} - F^{ND}),$$

where TS is the sum of the amount by which the worker is better off with a deal than without, plus the amount by which the firm is better off with a deal than without.

Each party will receive their outside option (W^{ND} for the worker and F^{ND} for the firm) plus some share of the match-specific surplus. For simplicity I assume that this surplus will be divided via a lump-sum payment P from the worker to the firm (this payment can be negative, which would mean a payment from the firm to the worker). It is important to note that this does not literally mean that the worker will hand money over to the firm, or vice-versa. Rather, the "payment" will take the form of one side or the other getting away with under-performing the terms of the original agreement, or with interpreting ambiguities in that agreement in a manner favorable to themselves. Workers may get away with a certain amount of shirking, and firms may get away with a certain amount of mistreatment of one kind or another.[15]

In our examples we will assume, as is common in antitrust economics, that P will be determined as predicted by the Nash Bargaining model. There are five inputs into this model: W^{D}, W^{ND}, F^{D}, F^{ND}, and a "bargaining power" parameter α that governs the share of the surplus that is kept by the worker. According to the model, the equilibrium P will be the one that maximizes the following expression:

$$(W^{D} - P) - W^{ND})^{\alpha} \times ((F^{D} - P) - F^{ND})^{(1-\alpha)}.$$

Less technically, the P that comes out of the Nash Bargaining Model is the one that causes the worker to receive their outside option plus surplus equal to αTS, and the firm to receive its outside option plus surplus equal to $(1 - \alpha)TS$.

Now consider the following examples. In each example, $TS = 200$.

Example 1: $(W^{D} - W^{ND}) = 100$, $(F^{D} - F^{ND}) = 100$, and $\alpha = ½$.

The two parties are identically positioned, so we would expect $P = 0$ to be the answer. This is indeed the case. The worker and the firm have equal bargaining leverage; they each prefer a deal to no deal by 100, so they each contribute 100 to the $TS = 200$. They also have equal bargaining power, because $\alpha = ½$ and $(1 - \alpha) = ½$, so they each are to receive their outside option plus 100 (half of the TS) net of P. $P = 0$ is the P that accomplishes this, as this is what they each already receive gross of P.

Example 2: $(W^{D} - W^{ND}) = 150$, $(F^{D} - F^{ND}) = 50$, and $\alpha = ½$.

Now the firm has more relative bargaining leverage than in Example #1, because the worker prefers a deal to no deal by 150, and the firm prefers a deal to no deal by only 50, meaning that the worker contributes more than half of TS. But as in Example #1, the bargaining power is equal ($\alpha = ½$), so the worker and the firm will each receive their outside option plus half of TS (i.e. their outside option plus 100) net of P. Since the worker

[14] In the real world, workers may have more than two options. For example, they may receive a counteroffer from their employer, or they may receive an offer from a third employer. In this case, W^{ND} is the value of the worker's best outside option. Similarly, F^{ND} is the value that the firm receives if the worker takes the best outside option. For example, if the worker receives a counteroffer from their employer, then F^{ND} is the value that the firm receives if the worker takes the counteroffer. If the worker receives an offer from a third employer, then F^{ND} is the value that the firm receives if the worker takes the third employer's offer. In this case, F^{ND} is the value that the firm receives if the worker takes the best outside option.

[15] For example, workers may shirk by not working as hard as they are supposed to, or by not following the employer's instructions. Firms may mistreat workers by not paying them on time, or by not providing them with the benefits that they are supposed to receive. In this case, P is the amount that the worker pays to the firm to avoid the mistreatment. If P is negative, then the firm pays the worker to avoid the mistreatment.

receives their outside option plus 150 gross of P, and the firm receives its outside option plus 50 gross of P, a payment of $P = 50$ is required. If the 150 and the 50 were reversed, then P would be –50, and the firm would be paying the worker.

Example 3: $(W^{*} - W^{**}) = 100$, $(F^{*} - F^{**}) = 100$, and $\alpha = 0$.

Now the two parties have the same bargaining leverage (as in Example #1), with each preferring a deal to no deal by 100, and so each contributing 100 to *TS*. But now the firm has **all** of the bargaining power, which means that the worker will receive no surplus net of P, only receiving their outside option. The firm will receive its outside option plus 200 (all of *TS*) net of P. Since they each receive their outside option plus 100 gross of P, a payment of $P = 100$ is required. If we replaced $\alpha = 0$ with $\alpha = 1$, P would be –100, the firm would receive its outside option, and the worker would receive their outside option plus 200.

Example 4: $(W^{*} - W^{**}) = 0$, $(F^{*} - F^{**}) = 200$, and $\alpha = 0$.

Now the worker has all of the bargaining leverage (they are indifferent between a deal and no deal, but the firm prefers a deal to no deal by 200 and so contributes all of the *TS*). But as in Example #3, the firm has all of the bargaining power. In this case, the worker **still** receives no surplus net of P, only receiving their outside option, and the firm still receives its outside option plus 200 (all of *TS*) net of P. Since the worker receives no surplus beyond its outside option gross of P, the payment will be $P = 0$. If we replaced $\alpha = 0$ with $\alpha = 1$, P would be –200, the firm would receive its outside option, and the worker would receive their outside option plus 200.

This last example is somewhat subtle but very important. If the firm has most or all of the bargaining power, then it will receive most or all of the bargaining surplus, regardless of bargaining leverage. When one side can capture all of the surplus from a deal, it does not matter who contributed how much to that surplus.

These examples are highly stylized, and they omit many important factors. However, they capture an essential point, namely that when the firm has a lot of bargaining leverage, and (more importantly) when the firm has almost all of the bargaining power, it is possible for workers to be harmed by firms *ex post* even when they participate in a highly competitive labor market *ex ante*.

III. IS THIS AN ANTITRUST PROBLEM?

The existence of costs to dissolving a job match creates match-specific surplus, and that surplus must be divided somehow between the worker and the firm. Labor market practices that firms engage in to the detriment of workers can be understood as efforts to capture that surplus. There are many such practices, including cheating on wages and hours, poor working conditions, or even abusive or degrading treatment.[17]

Some of these practices may be actionable under labor law, but the question for this article is whether they can be considered **antitrust** violations, even if the labor market is highly competitive *ex ante*.[18] I argue that they can. The key fact is that the surplus that these practices are intended to capture are specific to the job match, and so by definition the harm suffered by the worker from these practices cannot be ameliorated by labor market competition. These are practices of **a single firm** against the worker. When the firm has disproportionate bargaining leverage or (more importantly) most or all of the bargaining power, it can reasonably be regarded as a monopolist with respect to that worker over the match-specific surplus.

It might be argued that these practices represent a permissible exercise of existing market power, and not an impermissible acquisition of market power. Setting aside the question of whether exercising existing market power is in fact always permissible, I believe that the practices represent the acquisition of market power, and not the exercise of it. It is true that the practices do not create the surplus, which exists exogenously by virtue of the value of the match. But that surplus does not start out belonging to the firm. The surplus exists and it must be divided somehow, and the labor practices are the means by which that division comes out to the benefit of the firm at the expense of the worker. **The exercise of bargaining power is the exercise of market power.**

[17] For a review of the evidence on labor practices that harm workers, see Eric A. Posner, E. Glen Weyl, and Alan Krueger, "Labor Market Monopsony and Its Consequences," *Stanford Law Review* (forthcoming).

[18] See also Antitrust Enforcement and Labor Markets, 170 Cong. Rec. S2,

The above is not a worked-out apparatus for treating labor practices as antitrust violations. There are many questions that are beyond the scope of this article, including which practices are harmful at all, and of those which are best dealt with through labor law rather than antitrust. There is also the conceptual question of how much of the match specific surplus firms should be allowed to try to capture. Should they be allowed to try to capture half of it? Would an antitrust case hinge on what fraction of the surplus the firm refrained from trying to capture?

These are difficult questions, and it is unclear whether it is possible to build a workable regime for challenging harmful labor market practices as antitrust violations. It may be or it may not be. But the fundamental point remains. These practices represent firms trying to become monopolies with respect to their workers regarding the match specific surplus. This is the exercise of market power.

IV. LABOR NON-COMPETE AGREEMENTS

Another labor practice that firms sometimes engage in is to impose non-compete agreements on their workers. Non-competes are fundamentally different from the labor practices discussed in Section III above. Those practices represent attempts by the firm to capture a fixed quantity of match-specific surplus. In contrast, non-compete agreements **increase** the amount of surplus available to be captured. A non-compete agreement denies the worker access to the full benefits of the competitive labor market, thereby degrading that worker's outside option. The worker now has more to gain from the match, increasing the total surplus arising from the match, and the firm can use its superior bargaining power to capture most or all of that additional surplus as well.[14]

For this reason, the argument for treating non-compete agreements as an antitrust problem is even stronger than the argument discussed above for treating other labor practices as antitrust problems. A practice that denies the worker the ability to re-access the full benefits of the competitive labor market appears to fall quite squarely within the domain of antitrust, especially when combined with the firm's ability to use its bargaining power to capture the resulting increased surplus.

As discussed above, if contracts were complete and fully and costlessly enforceable, all terms of the labor contract would be determined in the context of the competitive labor market, and hence restraints such as non-competes would not be an antitrust problem (assuming that they also did not harm third parties). This is closely related to a standard defense of non-competes, namely that workers would not agree to them unless they receive compensation that they value at least as much as they dislike the restraint. In a separate article (Balan, 2019), I argue that this is often not the case, and that in fact non-competes are a means of extracting value from workers without having to compensate them for it.[15]

V. CONCLUSION

There is reasonable consensus that conventional labor market power can exist when there are only one or a few employers that hire a particular type of worker, and that antitrust is applicable to those situations. Some hold the view that the existence of such market power is a necessary condition for antitrust to apply to labor markets, meaning that when there are many employers who hire a particular type of worker, any problems that may arise from the conduct of an individual firm cannot be antitrust problems.

The purpose of this article is to argue against this view. Even with an *ex ante* competitive labor market, once a job match is formed, dissolving it is costly to one or both parties, meaning that there is often substantial economic surplus associated with continuing it. The division of this surplus will be determined via bilateral bargaining between the two parties, and not within the context of the competitive labor market.

Firms often have major advantages over workers in capturing that surplus. They often have more relative bargaining leverage, as workers may "need" the match more than they do. More importantly, firms almost certainly have much more bargaining power. Given the massive

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asymmetry of resources, sophistication, and agenda-setting power between an individual worker and a large firm, it strains credulity that the firm would not have a massive advantage allowing it to out-compete the worker in any contest to capture it. This gives the firm power over the worker, in the ordinary English meaning of the word, in the formal meaning of the word in the context of the Nash Bargaining model, **and in the antitrust sense**: certain labor market practices represent an attempt to become a monopolist with respect to the worker over that match-specific surplus.

The case for treating non-compete agreements as an antitrust problem is even stronger. Firms imposing non-competes on workers is not only a means of capturing an existing quantity of surplus, it is a way of increasing that surplus by denying the worker the ability to fully access the competitive labor market (degrading the worker's outside option), and then using its power to capture that additional surplus as well.

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Sent: 6/9/2022 10:44:14 AM
To: Cady, Benjamin [bcady@ftc.gov]

Subject: New Time Proposed: NPRM length
Location: https://ftc.zoomgov.com/ (b)(6)

Start: 6/10/2022 1:00:00 PM
End: 6/10/2022 1:30:00 PM
Show Time As: Busy

I now have a conflict tomorrow; would this work?

From: Walker, Schonette [swalker@oag.state.md.us]
Sent: 10/26/2022 6:06:03 PM
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Subject: update--RESCHEDULED October NAAG ALIWG OPEN Call: https://naag-org.zoom.us/j/88094036435?pwd=Qk16bzJZVkY1MXY1RG9jSEVDWC9WQT09;

Attachments: 2022-08-26 - Amended Complaint (Mickelson et. al v. PGA Tour, Inc.).pdf; ANSWER.LIV Golf v. PGA Tour.pdf; TRO Motion.LIV Golf Players.pdf; TRO Opp.PGA Tour.pdf; 10 27 2022 ALIWG Agenda Open Call..pdf

Location: ZOOM

Start: 10/27/2022 12:00:00 PM
End: 10/27/2022 1:00:00 PM
Show Time As: Tentative

Recurrence: (none)

These open WG calls will be held on the 2nd Monday in February, April, June, August, October and December at 2PM EST.
Calendar invites will be updated with agendas shortly before the calls.
Thank you. ~Schonette

NAAG Antitrust and Labor Issues Working Group Call--Antitrust and Athletes

Time: Oct 27, 2022 12:00 PM Eastern Time (US and Canada)

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

PHIL MICKELSON, TALOR GOOCH, HUDSON SWAFFORD, MATT JONES, BRYSON DECHAMBEAU, IAN POULTER, PETER UIHLEIN, and LIV GOLF INC.

Plaintiffs,

v.

PGA TOUR, INC.,

Defendant.

CASE NO. 5:22-cv-04486-BLF

AMENDED COMPLAINT

JURY TRIAL DEMANDED

With knowledge as to their own conduct and on information and belief as to all other matters, Plaintiffs Phil Mickelson, Talor Gooch, Hudson Swafford, Matt Jones, Bryson DeChambeau, Ian Poulter, Peter Uihlein, and LIV Golf Inc. ("LIV Golf") (collectively, "Plaintiffs") allege:

INTRODUCTION

1. The PGA Tour, Inc. (sometimes "the Tour") began when Jack Nicklaus, Arnold Palmer, and other elite golfers in the 1960s determined the PGA of America was not compensating them their market value; they split off the Players Tournament Division and formed the Tour, a tax-exempt entity organized ostensibly to "promote the common interests of professional tournament golfers." From that seemingly laudable origin, the Tour has evolved into an entrenched monopolist with a vice-grip on professional golf. As the Tour's monopoly power has grown, it has employed its dominance to craft an arsenal of anticompetitive restraints to protect its long-standing monopoly. Now, threatened by the entry of LIV Golf, and opposed to its founding mission, the Tour has ventured to harm the careers and livelihoods of any golfers, including Plaintiffs Phil Mickelson, Talor Gooch, Hudson Swafford, Matt Jones, Bryson DeChambeau, Ian Poulter, and Peter Uihlein ("Player Plaintiffs"), who have the temerity to defy the Tour and play in tournaments sponsored by the new entrant. The Tour has done so to crush nascent competition before it threatens the Tour's monopoly.

2. Before LIV Golf's entry, golfers who sold their services in the elite professional golf services market had no meaningful option but to play on the Tour if they wanted to pursue their profession at the highest levels. This provided the Tour with enormous power over the players, including the ability to force players into restrictive terms that foreclose them from playing in competing events and the ability to suppress player compensation below competitive levels. Members of the Tour receive a lower percentage of the Tour's revenues than professional athletes in other major sports, even though the Tour is a tax-exempt non-profit corporation and other major sports leagues are for-profit enterprises. This control has also given the Tour the power to impose restrictions on players—who are independent contractors but are denied independence by the Tour—that make it risky and costly for players to affiliate with another promoter and prohibitively difficult for any would-be entrant to challenge the Tour's monopoly. And, in its response to LIV Golf's competitive challenge, the Tour has exercised this power by punishing the players to choke off the supply of elite professional

golfers—an essential input to LIV Golf's competitive challenge—and cement its dominance over the sport. The Tour's monopoly power has also allowed it to weaken golf itself, by its failure to innovate and broaden the game's appeal and bring the game into the 21st century.

3. As part of its orchestrated plan to defeat competition, the Tour has threatened lifetime bans on players who play in even a single LIV Golf event. It has backed up these threats by imposing unprecedented suspensions on players (including the Player Plaintiffs) that threaten irreparable harm to the players and their ability to pursue their profession. It has threatened sponsors, vendors, broadcasters, and agents to coerce players to abandon opportunities to play in LIV Golf events. And it has orchestrated a group boycott with the European Tour,[1] which is unlawful under either the *per se* rule or the Rule of Reason, to amplify the Tour's anticompetitive attacks and foreclose LIV Golf from having access to players. The PGA Tour also has leaned on other entities in the so-called golf "ecosystem," including certain entities that put on golf's "Majors," to do its bidding in its effort to maximize the threats and harm to any golfer who defies the Tour's monopsonistic requirements and plays in LIV Golf events.

4. The Tour's unlawful strategy has been both harmful to the players and harmful to LIV Golf in threatening its otherwise-promising launch. For example, the Tour's conduct caused LIV Golf to cancel its 2022 business plan to launch its full competing League. LIV Golf was not deterred, however, and it changed its 2022 strategy and launched a smaller version of its concept—the LIV Golf Invitational Series—with no League, no franchises, no broadcast deal, fewer elite players, and fewer tournaments. Some players (including Player Plaintiffs) were interested nonetheless. So, in response, the Tour ratcheted up its strategy and doubled-down on its efforts to punish Plaintiffs and to protect its monopoly. The Tour (1) enforced its unlawful player restrictions that deny players (including Player Plaintiffs) the ability to sell their services to others, (2) imposed lengthy suspensions on players for exercising their right as independent contractors to play in a competing promoter's events, and (3)

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[1] The European Tour recently changed its name to DP World Tour, but, because it was called European Tour for most of the time period relevant to this case and in most of the relevant documents, it is referred to herein as the European Tour for consistency and clarity.

ramped up its threats targeting Player Plaintiffs and others. The Tour has likewise threatened and blacklisted numerous other third parties with whom LIV Golf has sought to contract, in its effort to defeat LIV Golf's entry and entrench its monopoly.

5. The Tour's conduct serves no purpose other than to cause harm to players and LIV Golf, and foreclose the entry of the most meaningful competitive threat the Tour has ever faced. Banning Player Plaintiffs and other top professional golfers from its own events degrades the Tour's strength of field and diminishes the quality of the product that it offers to golf fans by depriving them from seeing many top golfers participate in Tour events. The only conceivable benefit to the Tour from degrading its own product in this manner is the destruction of competition. Indeed, the Tour has conceded its anticompetitive purpose in attacking and injuring the players. When the Tour adjusted its rules to render them more effective in defeating competitive entry, a memorandum authored by PGA Tour Commissioner Jay Monahan made clear that the rule change was expressly designed to enable the Tour to foreclose competition. And when the Tour imposed unprecedented punishments on the players for playing in LIV Golf events, the Tour explained to the players that it was doing so precisely because LIV Golf is attempting to compete with the Tour.

6. Player Plaintiffs have devoted the bulk of their professional careers to growing the PGA Tour. Yet the Tour has repaid them of late with suspensions, punishments, threats, and disparagement for merely playing professional golf for another promoter and embracing competition for their services. The Tour has denied them income-earning opportunities, attacked their goodwill and reputation, interfered with their businesses, attacked their business partners, threatened them with multiple punishments—including threats to deny them from participating in golf's marquee events, even when they have earned placement or exemptions to participate in those tournaments—and unlawfully prevented them from exercising their independent contractor rights. And, at every step, the Tour has repeatedly admitted that it has done this to destroy nascent competition.

7. The Tour long stood alone as the only tour anywhere in the world that features the best golfers in the world. The PGA Tour Commissioner Jay Monahan boasted on June 22, 2022 that the "Tour is doing everything it possibly can . . . [to] mak[e] certain that the best players in the world are competing on the best Tour in the world, the PGA Tour." The Tour has ensured that remains the case

through its anticompetitive PGA Tour Player Regulations. First, the Tour's Conflicting Events Regulation prohibits its members from participating "in any other golf tournament or event" in North America, without exception, if a Tour-sanctioned event is scheduled in the same week, regardless of whether the players would otherwise have any plans to participate in the Tour's sanctioned event. The Tour has a sanctioned event almost every week of the year, hence the Conflicting Event Regulation effectively prohibits Tour members from playing in any non-Tour golf event in North America. The effect is both a naked restraint on competition and a reduction in output, as Tour members are foreclosed from playing anywhere else when they are not playing in Tour events. For international tours or events, a player may request up to three exemptions a year, but the Tour Commissioner has complete discretion whether to grant these exemptions, something he has refused to do for each of the LIV Golf events. The Conflicting Events Regulation thus invests the leader of the incumbent monopolist with unbridled discretion to foreclose players from participating in any competing events. And while the Tour has historically granted releases to players that allow them to compete in other events throughout the world, Tour Commissioner Monahan has taken a different stance regarding LIV Golf, denying event releases even for LIV Golf events overseas. As Commissioner Monahan admitted, he has departed from past practice in prohibiting members from participating in LIV Golf events outside North America *because* LIV Golf plans to compete with the Tour. And he has enforced the Conflicting Events Regulation to deny players permission to participate in LIV Golf events in North America *because* LIV Golf's North American events compete with the Tour.

8. Second, the Tour uses its Media Rights Regulation as an additional means of foreclosing players from participating in competing events. This regulation prohibits any members from appearing in any "golf program" ("any golf contest, exhibition or play") that takes place "***anywhere in the world***" and is shown on any media of any type. It is fundamental for any organizer of elite-level professional golf tournaments to broadcast the tournament on television and other media, yet the Tour contends no PGA Tour members may participate in any such televised non-Tour golf event anywhere in the world. This broad prohibition is no accident, as the PGA Tour specifically broadened this provision to prevent competitive entry of leagues such as LIV Golf. The provision serves no procompetitive purpose nor benefits consumers, but rather restricts output and forecloses competition, as it prevents all Tour

members from playing golf, even casually, if it is recorded for distribution over any media anywhere in the world during weeks when they are not participating in PGA Tour events.

9. In short, these regulations—the Media Rights Regulation and the Conflicting Event Regulation—foreclose the players, who are independent contractors, from participating in any golf event that the PGA Tour deems to be a competitive threat. These provisions limit output by keeping golfers on the sidelines when not playing on the Tour. And these provisions, in turn, foreclose competition and entrench the PGA Tour's monopoly power. If these provisions are not enjoined, they will foreclose LIV Golf's nascent entry into the markets and prevent LIV Golf from fulfilling its competitive promise, thus harming LIV Golf, the Player Plaintiffs, golf fans, the game of golf, and competition itself.

10. It is no secret that the PGA Tour is targeting players in order to defeat the threat of competitive entry. The PGA Tour has been clear since the threat of competitive entry emerged that its most powerful weapon to defeat competition is to target its members—who comprise virtually all of the elite professional golfers in the world—to prevent them from playing on a competing tour. For example, PGA Tour Commissioner Monahan wrote in a January 2020 strategy memorandum that the best way to prevent a competitor from emerging is to prevent PGA Tour members (including Player Plaintiffs) from supporting the new promoter:

> The impact that [the new league] could have on the PGA TOUR is dependent on the level of support it may receive from these players. Without this support, [the new league's] ability to attract media and corporate partners will be significantly marginalized and its impact on the TOUR diminished.

A nascent golf league without the golfers necessary to put on elite events is no threat at all. Deprive the new league of access to virtually all of the top golfers in the world, and it will pose no challenge to the Tour's dominance.

11. Accordingly, the Tour set out to destroy competition in its infancy by doing everything in its power to lock up its members (including Player Plaintiffs) and deny them the opportunity for sustained competition for their services. The Tour's conduct has included at least seven practices, each of which is exclusionary, anticompetitive and unlawful under the Sherman Act:

a. The Tour has repeatedly threatened its members (including Player Plaintiffs) with

devasting consequences if they join LIV Golf. On multiple occasions, the Tour threatened a *lifetime ban* for any player who joins or participates in LIV Golf. Then, in June and July 2022, the Tour imposed a *career-threatening ban* on Player Plaintiffs (and others) for playing in LIV Golf events. For other golfers who resigned their Tour membership because they did not want to be subject to the Tour's punishments, the Tour responded by actually imposing a *lifetime ban*.

b. The Tour amended and expanded its Media Rights and Conflicting Events Regulations in response to the threat of competitive entry. And it then enforced these unlawful provisions to foreclose members from participating in LIV Golf events.

c. The Tour orchestrated a group boycott with the European Tour to ensure that any golfer who considers defying the Tour's threats by playing in any LIV Golf events (including Player Plaintiffs) cannot pursue his career and livelihood anywhere in the global golf "ecosystem." The Tour's agreement is established through the statements of its partners. For example, during a meeting in Malta in July 2021, representatives of the entity that sponsored LIV Golf met with the CEO and other representatives of the European Tour to seek a partnership with the European Tour in launching the new league. The minutes from that meeting prepared by the European Tour's title sponsor state that the CEO of the European Tour, Mr. Keith Pelley, "Confirmed new series appeal and fit, however, stated main issue is US PGA mighty power and need to avoid a collision course between ET [European Tour] and PGA." Under pressure from the "mighty power" of the PGA Tour, the European Tour agreed to boycott and rejected the opportunity to partner with the new entrant, and instead strengthened its strategic alliance with the PGA Tour. As part of this illegal partnership, the PGA Tour pressured the European Tour to amend its Regulations to restrict European Tour golfers from playing in LIV Golf events, and it pressured the European Tour to punish its members who played in LIV Golf events with ~$125,000 fines and suspension from any tournaments the PGA Tour and the

European Tour co-sanction. The European Tour agreed to all of the PGA Tour's demands to implement the group boycott.

d. Similarly, the PGA Tour has encouraged the PGA of America (a separate entity) to threaten to disallow LIV Golf players from playing both in the Major tournament it sponsors (the PGA Championship) and the Ryder Cup, one of golf's marquee events. And it has leaned on other golfing entities to do its bidding. The Tour leaned on Augusta National to pressure golfers against joining LIV Golf. The Tour has also leaned on the Royal & Ancient ("R&A") (sponsor of The Open) to publicly question whether LIV Golf players could play in their respective tournaments. And the Tour has leaned on the Official World Golf Ranking ("OWGR") to call into question whether LIV Golf tournaments would be eligible for OWGR ranking points. This conduct serves no beneficial purpose, but rather serves to harm the careers of the players (including Player Plaintiffs) who play in LIV Golf events, and to deter other players from joining LIV Golf to avoid career destruction at the hands of the Tour.

e. At various points, the Tour has threatened Tour members' agents and business partners with punishment if the players joined LIV Golf. In addition, the Tour has threatened numerous vendors and small companies in the golf and sports production industry that they will be blacklisted from working with the Tour if they work with LIV Golf.

f. The Tour has threatened non-member golfers with exclusion from the golf "ecosystem" if they participate in any LIV Golf events. For example, the Tour threatened college golfers (who are not PGA Tour members and have no obligation to conform to the Tour's rules for its members) that if they played in any LIV Golf events they would be banned from entry into the PGA Tour University program, which provides top college golfers entry into the Tour's developmental tour (Korn Ferry Tour).

g. The Tour has also threatened sponsors and broadcasters that they must sever their

relationships with players who join LIV Golf, or be cut off from having any opportunities with the PGA Tour. Based on these threats, several sponsors have cut ties with players who have joined LIV Golf (including the Player Plaintiffs), sometimes ending years-long relationships. The Tour has also intimidated sponsors and vendors into not doing business with LIV Golf, lest they lose the opportunity to do business with the dominant golf tour in North America, the PGA Tour.

12. These restraints have damaged competition and harmed Plaintiffs. They have harmed Player Plaintiffs by, for example, (1) diminishing competition for their services and reinforcing the Tour's monopsony power in the markets in which the Plaintiffs sell those services; (2) denying them income-earning opportunities, tournament performance opportunities (including denying them opportunities to participate in tournaments in which they have qualified), sponsorship revenue, and independent contractor rights; and (3) harming their reputations, goodwill, and brands. These restraints have likewise proved effective at harming competition in the relevant markets by preventing other players from joining LIV Golf who would have joined the new league but for these competitive restraints, thus threatening the competitive viability of LIV Golf and any other potential competitor by protecting the PGA Tour's monopoly power and monopsony power over the purchase of services from professional golfers to participate in elite golf events. The Tour's restraints have harmed LIV Golf by, for example, (i) raising to supracompetitive levels its costs to recruit players who are subject to the Tour's threats; (ii) completely preventing LIV Golf from securing the services of many players who have been subjected to the Tour's threats of severe punishments should they participate in LIV Golf events; (iii) forcing LIV Golf to scrap its launch plans for 2022, and instead launch a smaller-scale series; and (iv) preventing LIV Golf from entering into agreements with third parties and raising to supracompetitive levels its costs for contracting with those third parties who are willing to defy the Tour's threats, thus raising LIV Golf's costs and degrading its product offerings. The impacts of the Tour's continuing restraints threaten LIV Golf's competitive viability and existence.

13. Without fair process, PGA Tour Commissioner Monahan—who is necessarily partial—imposed a 21-month Tour suspension on some Player Plaintiffs, through March 31, 2024 (other Player Plaintiffs' suspensions are indefinite or 9 months as of this Complaint), for exercising their independent

contractor rights to play in the first two LIV Golf events. After imposing these suspensions, the Tour followed its procedurally and substantively unconscionable appeals process to maintain the suspension without giving Player Plaintiffs fair proceedings to be heard by neutral and independent decision-makers. Plaintiffs Gooch, Swafford and Jones (among other Player Plaintiffs) had earned the right to play in the FedEx Cup Playoffs (a series of lucrative and high-profile events scheduled at the end of the PGA Tour's 2022 season) through strong performance and dedication to the Tour, but the Tour banned them from playing in those tournaments, diminishing the strength of its own fields and harming these Plaintiffs. The injury to these players extended beyond mere foreclosure from these tournaments (itself a substantial and irreparable injury), but also crippled their chances of qualifying for both the Majors and the Tour's premier invitationals in future seasons. The punishment that accrued to these players from not being able to play in the FedEx Cup Playoffs is substantial, and involves both monetary injury (as the Tour has maintained) as well as irreparable injuries.

14. The Tour has argued that the Player Plaintiffs have already been fully compensated by LIV Golf for all suspensions the Tour might impose and all of the consequential harms that may flow from those suspensions (including exclusions from the Majors and other important professional golf tournaments and lost sponsorship opportunities). That is simply not true. While the supracompetitive payments LIV Golf was required to make in order to attract players in the face of the Tour's anticompetitive threats were in many cases above the compensation levels that would have been required in the absence of the Tour's anticompetitive conduct, it is also true that (a) many of the injuries the players will suffer are not compensable through money, (b) the monetary injuries the players have suffered and/or will suffer have exceeded and will exceed substantially the amounts they have been paid by LIV Golf, and (c) the negotiated amounts reflect a mutual understanding by the parties that at some point the PGA Tour would adjust its position and allow fair competition from LIV Golf. None of these Player Plaintiffs has agreed to a potential ban from the Majors or other important tournaments, or a long-term ban from the Tour should the Tour succeed in blocking successful long-term entry by LIV Golf.

15. Without injunctive relief prohibiting the PGA Tour's anticompetitive conduct, the Tour's antitrust violations will continue. Without injunctive relief prohibiting the PGA Tour's

anticompetitive conduct, Player Plaintiffs will be irreparably harmed, including by the Tour's unlawful suspensions that have denied and will continue to deny them income earning opportunities, tournament performance opportunities, sponsorship revenue, and independent contractor rights that they have earned, as well as by the actions of the Tour and the European Tour that deny them the opportunity to participate in events sponsored by others throughout the golf "ecosystem." LIV Golf will also be irreparably harmed if the Tour's anticompetitive conduct is not abated. While LIV Golf has been able to pursue the launch of its business in the face of supracompetitive costs and artificially reduced access to supply (i.e. players), facing headwinds of this nature is not sustainable. As a result, if the Tour's anticompetitive conduct is not enjoined, LIV Golf's entry will be thwarted and its ability to maintain a meaningful competitive presence in the markets will be destroyed, which will harm not only LIV Golf, but also competition. The Tour will continue to enforce its unlawful Regulations and take anticompetitive actions unless and until a Court enjoins the Tour's unenforceable Regulations and unlawful conduct. Moreover, the Player Plaintiffs will be irreparably harmed in that the Tour's unreasonable control over their media rights and their participation in non-Tour events will continue unless enjoined permanently. And, if LIV Golf's entry into the relevant markets is thwarted by the PGA Tour's anticompetitive conduct, Player Plaintiffs' careers will be detrimentally impacted, they will lose the most significant avenue to gain entry into the Majors, they will lose the platform to display their craft, and they will lose the opportunity to sell their advertising and sponsorship space and sell or license their name image and likeness for their branding, reputation and businesses. On the other hand, with an injunction, the anticompetitive conduct of the PGA Tour will be lifted, LIV Golf will have the opportunity to compete on the merits, and Player Plaintiffs and other professional tournament golfers will enjoy the benefits of competition for their services that the antitrust and other laws protect.

PARTIES

16. Plaintiff Phil Mickelson is a Hall of Fame American professional golfer who resides in San Diego, California. Mr. Mickelson was a three-time NCAA Champion at Arizona State University. In 1991, he won the Northern Telecom Open, which was the last time an amateur won a tournament on the PGA Tour. He is a 30-year veteran of the PGA Tour who has won 57 worldwide professional events, including six Majors—the most recent in 2021, which earned him the title of the oldest Major

winner in the game's history. He spent over 26 consecutive years in the top 50 of the Official World Golf Ranking (the only player in the history of the sport to ever do so), including over 700 weeks ranked in the top 10 in the world. Mr. Mickelson has represented the United States as a professional golfer in 24 team tournaments, which includes 12 Presidents Cups and 12 Ryder Cups, both American records. He participated as a vice captain in additional United States team tournaments, and played in the Dunhill Cup, World Amateur Team Championship and two Walker Cups for the United States as an amateur. Mr. Mickelson also has a strong commitment to giving back through the Phil and Amy Mickelson Foundation. Since its inception in 2004, the Foundation has focused primarily on supporting a variety of youth and family initiatives. He also founded Birdies for the Brave, the PGA Tour's national military outreach initiative, which raises money for a variety of charities supporting veterans and military families. Mr. Mickelson dedicated his entire professional career, 30 years, to the PGA Tour. He has hosted tournaments on the Tour and engaged in countless endeavors to advance the Tour, its purpose, and the game of golf. Mr. Mickelson has invested in himself and his investment has benefited the Tour's business tremendously over the last 30 years. As a lifetime member—a hard-earned accomplishment and honor, requiring 20 PGA Tour wins and 15 years of membership on the Tour—Mr. Mickelson desires to continue being a member of the Tour and to play in events on the Tour.

17. Plaintiff Talor Gooch is a 30-year-old professional golfer who resides in Texas. He is a member of the Tour. Mr. Gooch played golf at Oklahoma State University until 2014 when he began his professional career. He joined the PGA Tour Canada in 2015 and earned his way onto the Korn Ferry Tour in 2016. In 2017, Mr. Gooch won the News Sentinel Open (which later became the Visit Knoxville Open on the Korn Ferry Tour) and then earned his way onto the PGA Tour in 2018. In 2021, he won his first PGA Tour tournament at the RSM Classic. Mr. Gooch was on top of the PGA Tour's FedEx Cup Rankings for the 2021-22 season following the RSM Classic. Mr. Gooch has played in over one hundred PGA Tour events. As of the filing of the Complaint in this Action, he was the 20th ranked golfer on the FedEx Cup rankings. Mr. Gooch played in 21 PGA Tour events in the 2021-22 PGA Tour season and qualified for the FedEx Cup Playoffs, but was denied the opportunity to compete in the Playoffs by the Tour's anticompetitive conduct. Mr. Gooch desires to continue to be a member

of the Tour and to play in events on the Tour.

18. Plaintiff Hudson Swafford is a 34-year-old professional golfer who resides in Georgia. He is a member of the Tour. He started his professional golf career in 2011 after graduating with a B.S. in Consumer Economics from the University of Georgia. Mr. Swafford joined the Nationwide Tour in 2012. and. that same year, won the Stadion Classic at UGA, a golf tournament on the Web.com Tour (which became known as the Korn Ferry Tour in 2019). In 2013, Mr. Swafford finished 21st in the Web.Com Tour Finals to earn his PGA Tour card for 2014. Mr. Swafford won his first PGA Tour victory in 2017 at the CareerBuilder Challenge. In 2018, Mr. Swafford suffered a rib injury and then, in 2019, Mr. Swafford had to undergo a surgery to remove a small bone from the bottom of his foot, forcing him to miss four months of play. In September 2020, Mr. Swafford won his second PGA Tour victory at the Corales Puntacana Resort and Club Championship. In 2022, Mr. Swafford earned his third PGA Tour victory at the American Express. Since the start of his career, Mr. Swafford has played in over 250 Tour events. Mr. Swafford played in 21 PGA Tour events in the 2021-22 season, and as of the filing of the Complaint in this Action was 67th in the FedEx Cup rankings, and qualified for the FedEx Cup Playoffs. Mr. Swafford was denied the opportunity to compete in the Playoffs by the Tour's anticompetitive conduct. Mr. Swafford desires to continue to be a member of the Tour and to play in events on the Tour.

19. Plaintiff Matt Jones is a 42-year-old professional golfer who resides in Arizona. He is a member of the Tour. He was born in Sydney, Australia, and upon meeting fellow Australian Greg Norman at six years old became determined to become a professional golfer. Mr. Jones moved to the United States to attend Arizona State University where he was a first-team All-American golfer. Mr. Jones joined the Nationwide Tour in 2004 and earned his PGA Tour card in 2008. In 2014, Mr. Jones won the PGA Tour's Shell Houston Open. In 2015, and again in 2019, he won the Emirates Australian Open on the PGA Tour of Australasia. In 2021, Mr. Jones won the PGA Tour Honda Classic. Mr. Jones has played in over 350 Tour events. Mr. Jones played in 20 PGA Tour events in the 2021-22 season, and as of the filing of the Complaint in this Action was ranked 65th in the FedEx Cup rankings, and qualified for the FedEx Cup Playoffs. Mr. Jones was denied the opportunity to compete in the Playoffs by the Tour's anticompetitive conduct. Mr. Jones desires to continue to be a member of the

Tour and to play in events on the Tour.

20. Plaintiff Bryson DeChambeau is a 28-year-old professional golfer who resides in Texas. He is a member of the Tour. Mr. DeChambeau grew up in California and played golf at Southern Methodist University while majoring in physics. In 2015, Mr. DeChambeau became just the fifth person to win both the NCAA individual championship and the U.S. Amateur title. He made his PGA tour debut in 2015 at the FedEx St. Jude Classic. In 2015, while still an amateur, he was the runner-up in the Australian Masters. He began his professional career in 2016 at the RBC Heritage event, finishing fourth. That year, Mr. DeChambeau won the Korn Ferry DAP Championship, earning his Tour card. In 2017, Mr. DeChambeau won his first PGA Tour event at the John Deere Classic. In 2018, Mr. DeChambeau won the Memorial Tournament. He then won the first two FedEx Cup Playoff events at the Northern Trust and Dell Technologies Championship. Mr. DeChambeau was picked for the U.S. team in the 2018 Ryder Cup. In 2019, Mr. DeChambeau won the Shriners Hospitals for Children Open and the Omega Dubai Desert Classic. In 2020, Mr. DeChambeau won the Rocket Mortgage Classic and won the U.S. Open, his first Major. In 2021, he won the Arnold Palmer Invitational and played on the winning U.S. team at the 2021 Ryder Cup. In 2022, Mr. DeChambeau underwent surgery on his left wrist from a fracture. Mr. DeChambeau desires to continue to be a member of the Tour and to play in events on the Tour.

21. Plaintiff Ian Poulter is a 46-year-old professional golfer who splits his residence between Florida and England. He is a member of the Tour. He was born in England, and began playing golf at just four years old before turning professional in 1994. Mr. Poulter won the 1999 Open de Côte d'Ivoire on the Challenge Tour and was promoted to the European Tour. He was a member of the victorious 2004 European Ryder Cup team and then joined the PGA Tour in 2005. In addition to his many international victories, Mr. Poulter won the 2010 World Golf Championship-Accenture Match Play Championship, the 2012 World Golf Championships-HSBC Champions, and the 2018 Houston Open. Mr. Poulter has played in over 300 Tour events. Mr. Poulter played in 16 PGA Tour events in the 2021-22 season and, as of the filing of the Complaint in this Action, was ranked 168th in the FedEx Cup rankings. Mr. Poulter desires to continue to be a member of the Tour and to play in events on the Tour.

22. Plaintiff Peter Uihlein is a 32-year-old professional golfer. He is a member of the Korn Ferry Tour, which is owned and controlled by the Tour. Mr. Uihlein was born in New Bedford, Massachusetts, played golf at Oklahoma State, and resides in Florida. Mr. Uihlein has two professional victories on the Korn Ferry Tour—the Nationwide Children's Hospital Championship in 2017 and the MGM Resorts Championship in 2021. Mr. Uihlein has also won on the European Tour in 2013 at the Madeira Islands Open. Mr. Uihlein has represented the United States in two Walker Cups (2009 and 2011) and won the 2010 Eisenhower Trophy. Mr. Uihlein won the 2010 U.S. Amateur Championship. As of the filing of the Complaint in this Action, Mr. Uihlein ranked 59th on the Korn Ferry Tour regular season points list. Mr. Uihlein desires to be a member of the Tour and/or continue to be a member of the Korn Ferry Tour. and to play in events on the Tour and the Korn Ferry Tour.

23. LIV Golf is a Delaware corporation with its principal place of business in New York, New York. LIV Golf is the sponsor of the LIV Golf Invitational Series, an eight-event series of golf tournaments. a majority of which have been or will be set in the United States. from June to October 2022. LIV Golf also is the sponsor of a planned season-long golf tour, the League, which the PGA Tour's anticompetitive conduct thwarted and which LIV Golf was forced to delay in 2022.

24. Defendant PGA Tour is a Maryland non-profit corporation, with its principal place of business in Ponte Vedra Beach, Florida. The PGA Tour sponsors a season-long series of golf tournaments throughout the calendar year called the PGA Tour. Those events occur primarily in the United States. In the 2021-22 PGA Tour season, the Tour sponsored events in twenty states. including six events in California. The Tour is engaged in interstate commerce.

JURISDICTION AND VENUE

25. Plaintiffs' action arises under Sections 1 and 2 of the Sherman Antitrust Act. 15 U.S.C. §§ 1, 2. Plaintiffs seek injunctive relief under 15 U.S.C. § 26 and damages under 15 U.S.C. § 15(a). This Court has subject matter jurisdiction over the federal antitrust claims under 28 U.S.C. § 1331 (federal question) and 28 U.S.C. § 1337 (commerce and antitrust regulation); this Court has jurisdiction over the related state-law claims under 28 U.S.C. § 1367 (supplemental jurisdiction).

26. This Court may exercise personal jurisdiction over the PGA Tour under Section 12 of the Clayton Act, 15 U.S.C. § 22. The PGA Tour manages or operates two golf courses (TPC Harding

Park and TPC Stonebrae) in this District and employs dozens of individuals who work there. It organizes and promotes annually at least six golf tournaments throughout California (Fortinet Championship, The American Express, Farmers Insurance Open, AT&T Pebble Beach Open, The Genesis Invitational, and the Barracuda Championship), two of which are within the Northern District of California. California hosts more PGA Tour golf tournaments than any other state. The Tour issued the first of its known anticompetitive threats to Player Plaintiffs and other players that is at issue in this lawsuit in La Jolla, California in January 2020. The PGA Tour also threatened Player Plaintiffs and other players with lifetime bans in Los Angeles, California in February 2022. The Tour has unlawfully restricted Player Plaintiffs from participating in events that compete against the PGA Tour, and its conduct has already hindered—and threatens to irrevocably harm—LIV Golf's ability to compete in the market.

27. This Court also may exercise personal jurisdiction over the PGA Tour under California Code of Civil Procedure § 410.10. The Tour operated, conducted, engaged in, and carried on a business venture in this state; committed tortious acts within this state that harmed Plaintiffs; and is engaged in substantial and not isolated activity within this state.

28. Venue is proper in this district under Sections 4 and 12 of the Clayton Act (15 U.S.C. §§ 15, 22) because the Tour may be found in this District and transacts business in this District through the management or operation of two golf courses, hosting and promoting two golf tournaments, and employing individuals in this District.

BACKGROUND AND FACTS

Overview of Professional Golf

29. The business and sport of professional golf are organized around tours and tournaments that combine players of comparable skill levels. These tours and tournaments bring golf competition to fans, financially compensate players, and provide opportunities for sponsors and advertisers to market their products to golf fans of these events.

30. The elite level of men's professional golf is comprised of (1) the PGA Tour, which sponsors and co-sponsors a series of tournaments scheduled from September to September each season; (2) four annual standalone "Major" tournaments sponsored by entities other than the Tour: the Masters,

the U.S. Open, The Open (or The British Open), and the PGA Championship; (3) two bi-annual team events (Ryder Cup and the Presidents Cup); (4) quadrennial Olympic competition; and (5) a handful of standalone events in which Tour members are only permitted to compete if they are given permission by the Tour Commissioner.

31. Until LIV Golf's nascent entry, the Tour was the sole elite golf tour in the United States and the world. Other elite professional golf events are standalone events (such as the Majors) that are not part of an organized tour that extends throughout a season. Professional golfers who qualify for membership on the Tour invariably compete on it, as it offers by far the largest tournament purses, the greatest opportunities to qualify for the Majors, the greatest opportunities for exposure in the golf world and beyond, and the most expansive opportunities to secure large endorsements from sponsors. As of the filing of the Complaint in this Action, all of the top 30 golfers in the world were active members of the Tour, except those golfers whom PGA Commissioner Monahan suspended or forced to resign. No other golf tour in the world is a reasonable competitive substitute for the PGA Tour. For example, the average purse of a PGA Tour event is roughly two-and-a-half times the average purse of a European Tour event, roughly nine times the average purse of an Asian Tour event, and 13 times the average purse of a Korn Ferry Tour event. The PGA Tour is the only golf tour shown regularly on broadcast television in the United States, and it earns vastly more in sponsorship, advertising, and broadcast revenue than any other golf tour.

32. The Tour and the four Majors are complements, not competitors. The Tour schedules no events during the weeks of three of the Majors and schedules only a minor event with a lower prize pool the week of The Open. Conversely, the Majors do not compete with the Tour; rather, they encourage and incentivize players to participate on certain tours (the PGA Tour in particular) by adopting eligibility requirements that open playing spots to golfers who have performed well on those tours. Similarly, LIV Golf does not compete with the Majors, as it schedules its Series and will schedule its League around the Majors.

33. The European Tour is a purchaser of professional golfers' services and a promoter of professional golf events, but it is effectively a feeder into and only a potential competitor to the PGA Tour. In the 1980s and early 1990s, the European Tour exerted some competitive pressure on the Tour

for certain star international players, including Seve Ballesteros, Nick Faldo, and Bernhard Langer, but that has not been the case for many years. Instead, when European Tour members qualify for Tour membership, they almost invariably elect to immediately become PGA Tour members. None of the Top 30 golfers in the world are only members of the European Tour. PGA Tour superstar Rory McIlroy, originally from Northern Ireland who began his career on the European Tour, has described the European Tour as "a stepping stone," explaining "you can go to America and play for more money and more ranking points. I think as well with the world ranking points, everyone out here, all of their contracts with sponsors, it's all about world ranking points. If players are getting paid more and earning more world ranking points, why would you play over there [European Tour]?" The actions of other European players who qualify for the Tour are consistent with McIlroy's views: they join the PGA Tour when they qualify.

34. European Tour Board Member Paul McGinley told *The Independent* that "the [European] Tour has accepted it is a junior partner to the PGA Tour now and will act as a feeder tour with more and more co-sanctioned events on both sides of the pond." McGinley continued: "We are there to enhance that and enable the PGA Tour to become the premier golf tour in the world. We realise that the [European] Tour will not be that, but we want to be very much . . . a kind of international arm and create pathways for players to come into the ecosystem via the European Tour and perhaps the Korn Ferry Tour and then graduate onto the premier tour in the world which is the PGA Tour." Likewise, European Tour Commissioner Keith Pelley told *The New York Times* that the European Tour agreed not to compete with the PGA Tour for player services as of November 2020.

35. Nonetheless, the European Tour remained a potential competitor to the PGA Tour, particularly as a potential partner of a new entrant that could challenge the Tour's dominance. Recognizing this potential competition from the European Tour and the substantial threat that a new entrant partnered with the European Tour would pose, the Tour entered into an illegal agreement with the European Tour as part of its scheme to ensure that the European Tour does not partner with any entrant (including LIV Golf) that might seek to become part of the golf "ecosystem." In a January 2020 strategy memorandum describing the PGA Tour's plan to foreclose new entry, Commissioner Monahan explained that this alliance with the European Tour was aimed at removing the European

Tour as a potential partner for a new entrant: "We have continued discussions with the European Tour about the potential to work more closely together, thereby removing the European Tour as a potential partner of" a new entrant. The Tour's strategy was thus designed to ensure no new potential competitor could emerge to challenge its monopoly.

36. The Tour executed Monahan's plan in November 2020, when it announced that it had purchased a minority stake in the European Tour's media production company, and that the two tours would work in concert with one another. As detailed below, since that alliance was formed, the European Tour has joined the PGA Tour in a group boycott aimed at punishing players to foreclose LIV Golf's entry. As set forth in more detail below, that group boycott violates Section 1 of the Sherman Act, under either a *per se* analysis or a Rule of Reason analysis, because it has harmed (and will continue to harm) competition and has no redeeming procompetitive virtue.

37. There are also a number of more limited lower-level tours that operate in the U.S. and throughout the world, but none is a meaningful competitor to the Tour. In fact, the Tour owns, operates, or controls a number of these lower-level tours, ensuring that they do not become meaningful competitors to the PGA Tour and that any bans imposed by the PGA Tour (and its co-conspirator, the European Tour) have a widespread impact on any affected players. These tours include:

- PGA Tour Champions – A tour for players over the age of 50, organized and managed by the Tour;
- Korn Ferry Tour – The PGA Tour's development tour in North America, through which players (like Plaintiff Uihlein) can qualify for the PGA Tour; organized and managed by the PGA Tour and described by the Tour as "the path to the PGA Tour";
- PGA Tour Latinoamerica – A tour with events in Latin America, through which players can qualify for promotion to the Tour, organized and managed by the Tour;
- Mackenzie Tour-PGA Tour Canada – A tour with events in Canada, through which players can qualify for promotion to the Tour, organized and managed by the Tour;
- PGA Tour Series-China – A tour with events in China, organized and managed by the Tour;
- Asian Tour – A tour with events principally in Asia;

- Japan Tour – A tour with events in Japan;
- Sunshine Tour – A tour with events in Africa; and
- KPGA Korean Tour – A tour with events in South Korea.

38. These tours offer considerably lower levels of competition, far lower prize pools, far smaller sponsorship and income opportunities, and far less, if any, broadcast exposure and viewership throughout most of the world. As a result, players who qualify for the PGA Tour join the PGA Tour. Simply put, until LIV Golf's entry, the PGA Tour had no competition as the premier professional golf tour in the United States and the world. If the PGA Tour succeeds in thwarting LIV Golf's entry, it will once again face no meaningful competition in the United States or the world.

39. While the on-course competition among participants in the elite professional golf services market is intense, the Tour itself faces no meaningful competition in the relevant markets. Until LIV Golf arrived on the scene, no other tour came close to the PGA Tour in terms of the money, exposure, quality of on-course competition for players, fan interest, advertising or sponsorship opportunities.

40. In addition, players in Tour events have a significantly greater opportunity than players in the lower-tier tours to qualify for spots in the Majors, Ryder Cup, Presidents Cup, and the Olympics by winning tournaments that provide entry into the Majors and that provide greater opportunity to earn more points in the world golf ranking system. A common way for players to qualify for the Majors is by being ranked within the Top 50 of the OWGR. While players in any tournament recognized by the OWGR can qualify for points, the OWGR awards points based on a tournament's competitive strength and the player's finishing position. Thus, players on the Tour are eligible to earn far more points than players on lower-tier tours. In addition, OWGR points are often used to determine the amount of money players receive from sponsors. Qualification for the Olympics is determined solely by OWGR rankings. Again, as PGA Tour player Rory McIlroy explained "it's all about world ranking points," and players can earn the most points on the PGA Tour.

41. The OWGR's Governing Board includes PGA Tour Commissioner Monahan, as well as the top executives from a number of the other bodies: the CEO of the European Tour (Keith Pelley), the General Counsel of the European Tour (Ben Bye), the COO of the European Tour (Keith Waters),

the CEO of the PGA of America (Seth Waugh), the Executive Director of the United States Golf Association (Mike Whan), the Senior Director of the Masters Tournament of the Augusta National Golf Club (Will Jones), the CEO of the R&A (Martin Slumbers), and the former CEO of the R&A (Peter Dawson). As set forth in detail below, the PGA Tour has entered into an unlawful agreement with the European Tour to foreclose competitive entry by locking arms in a group boycott to exclude from the world golf "ecosystem" LIV Golf, any players who play in LIV Golf events (including the Plaintiffs), and any other vendor, tour promoter, or other entity that partners with LIV Golf. And the Tour has leaned on the other world golfing bodies that have representatives on the OWGR Governing Board to do its bidding to heighten threats for associating with LIV Golf.

PGA Tour Structure

42. The Tour's charter promises it will act to "promote the common interests of professional tournament golfers." The Tour certified to the Internal Revenue Service that its non-profit purpose is to promote the sport of professional golf and the common interests of touring golf professionals.

43. The professional golfers who have earned the right to compete on the Tour are the most skilled and popular professional golfers in the United States and the world. Player Plaintiffs were active members of the Tour until they were given lengthy suspensions for playing in LIV Golf events. Players from the United States who are members of the Tour include Tiger Woods, Plaintiff Mickelson (now suspended), Justin Thomas, Jordan Spieth, Plaintiff DeChambeau (now suspended), Dustin Johnson (now resigned), Scottie Scheffler, Bubba Watson, and Brooks Koepka (now suspended). The PGA Tour's Media Guide also states that its membership includes 94 international players from 29 countries and territories outside the United States, including Justin Rose, Rory McIlroy, Sergio Garcia (now resigned), Jon Rahm, Adam Scott, Henrik Stenson (now suspended), Louis Oosthuizen (now resigned), Hideki Matsuyama, and Cameron Smith. They include some of the biggest names in sports and popular culture in the United States and the world.

44. All member golfers on the Tour are independent contractors, not employees of the Tour. There is no team or other employer to cover their many and substantial expenses as a professional athlete (e.g., coaches, caddies, trainers, therapists, travel, and lodging).

45. The Tour is managed by its Commissioner, Jay Monahan, who assumed the role on

January 2, 2017. Commissioner Monahan sits on the Board of the European Tour, the Governing Board of the OWGR, and the Board of Directors and Executive Committee of the International Golf Federation. Through these various roles, Commissioner Monahan assures that the Tour controls what it terms the world golf "ecosystem." Being blacklisted by the PGA Tour means effective expulsion from the golf "ecosystem" anywhere in the world.

Elite Professional Golf Has Stagnated Under the PGA Tour's Monopoly

46. As Commissioner Monahan acknowledged in a memorandum to the PGA Tour Policy Board (the "January 2020 Monahan Memorandum"), the PGA Tour is "the world's leading professional golf tour" and "is second to none due to the strength of its members." Thus, not surprisingly, virtually every golfer of public prominence worldwide is a member of the PGA Tour.

47. While the quality of play on the PGA Tour continues to flourish, the business of professional golf has stagnated under the Tour's monopoly. In the age of social media, the accessibility and relatability of elite professional golfers should lend itself to a boom in fan interest and viewership, as it has with other sports. The opposite has happened. Without any meaningful competition (prior to LIV Golf's entry), the Tour has failed to innovate and its product has grown stale. At the same time, the Tour's fanbase has shrunk and continues to age (the ***average*** age of a PGA Tour fan is 64), a trend sharply at odds with other major sports. Likewise, the Tour's compensation to its members fell behind compensation to other professional athletes, as measured by the share of revenue the players receive, reflecting the Tour's monopsony power over players' services.

48. Despite offering a stagnant product with a shrinking and aging fanbase, the Tour has used its monopoly position to extract substantially increased revenues from broadcasters and advertisers. As a monopsonist, however, the Tour has not passed those increased revenues through to its members. For example, the Tour's revenue has increased between 2011 and 2019 by 163 percent, yet the share of revenue it provided its members fell substantially. This is because there is no competition for players' services, allowing the Tour to direct its increased revenues into its bloated bureaucracy, extravagant facilities, and multimillion-dollar compensation and lavish perks for Commissioner Monahan and the other executives who run the monopoly, rather than sharing them with players. Tour data shows that average Tour purses grew an anemic 2.5 percent per year on average

from 2014 through 2019—from $6.62 million in 2014 to $7.47 million in 2019. By comparison, the total salary pool for other major professional sports leagues grew at much stronger rates over the same period—15 percent per year for the NFL, eight percent per year for the NBA, and four percent per year for the NHL, even though the 2014 base levels for the other professional sports were substantially higher.

49. The Tour has failed to offer its members compensation on par with professional athletes in other sports. The number one player on the Tour money list in 2019 was Brooks Koepka, with $9.68 million in tournament winnings. His winnings were the equivalent to the 129th highest paid NFL player, the 121st highest paid NBA player, and the 128th highest paid MLB player.

50. It is incongruous that Tour members' share of revenue lags so significantly behind those of players in other sports over the same period, because the Tour is a nonprofit entity that does not compensate players for their travel and other expenses, while the other major professional sports are for-profit enterprises with franchise owners. Unlike those other sports, however, which have free-agency systems that establish competition among franchise owners for players' services, the PGA Tour faced no viable competition before LIV Golf's entry. If LIV Golf's entry is foreclosed, the Tour will once again face no viable competition. As a monopolist, the PGA Tour does not compete for players' services, and the Player Plaintiffs' earnings have been and are suppressed.

51. The lagging compensation the Tour pays to its members is also striking in light of the expenses and risks that the players bear. Unlike professional athletes in other sports, professional golfers have to pay out-of-pocket to play on the Tour. Tour members pay for their own travel to and lodging at Tour events, and they pay for their coaches, therapists, trainers, and caddies. In addition, the players have no guarantees from the Tour—they earn nothing if they get injured, and they get nothing if they miss the cut. As a result, Tour members can end up with *negative* earnings for the year.

52. For example, Pat Perez described a fellow Tour member that "one year ma[d]e $22,000 on the Tour. He lost, he was in the hole about 90 grand. Mind you, he didn't play well and I get it, but how can he be out money? He earned his card and he was out like $90 grand that year."

53. A Tour player agent was quoted as saying: "What I think the average fan doesn't know is how much a player spends to go to work. . . . [T]hey spend so much money or reinvest so much

money in themselves and what they pay their team and what they spend on private airfare, renting homes and [paying] chefs and trainers and physical therapists and everything that goes into it. It's a very lucrative sport, but it's also a very expensive sport for them, unlike team-sport athletes who are flown around every place and supplied all those things." But without competition, elite professional golfers have historically had no option other than the Tour.

54. The Tour's monopoly (and monopsony) hold over elite professional golf is also reflected in its failure to innovate or retain (let alone expand) its audience. The Tour's television ratings have struggled. Out of 27 PGA Tour tournaments for which data are available, 16 tournaments (almost 60 percent) had viewership in 2019 that was below the five-year average for that tournament. In 2020 (before the COVID outbreak shut down the Tour), six out of seven tournaments had viewership that was below the five-year average for that tournament. The PGA Tour's fanbase is aging faster than any other sport, because it has failed to capture the attention of younger viewers. As Rory McIlroy (a PGA Tour Member, President of the Players Advisory Council, and PGA Tour Board Member) recognized, "competition is a good thing" and "any business needs competition for things to progress and move on." But the PGA Tour has faced no competition for many years, it has had no reason to innovate and grow its fan base, and its product has grown stale.

55. LIV Golf promises to bring competition and innovation to the market for the promotion of elite professional golf, which will benefit fans, broadcasters, advertisers, players, and all other stakeholders. As the long-standing monopolist facing competition for the first time in at least decades, the Tour has responded not by competing on the merits, but rather by engaging in a course of anticompetitive conduct designed to choke off LIV Golf's nascent competition, to the detriment of LIV Golf, the players (including Player Plaintiffs), fans, broadcasters, advertisers, and others.

Anticompetitive PGA Tour Player Regulations

56. Membership on the Tour is governed by the PGA Tour Player Regulations & Tournament Regulations ("Regulations"). Exhibit 1. Several interrelated provisions of the Regulations unreasonably restrict the independent contractor-players' ability to participate in competing events.

57. **Media Rights Regulation.** The Regulations contain two provisions relevant to this case that govern players' media rights. First, Section V.B.1.a. of the Regulations purports to grant to

the PGA Tour the media rights for players when they are participating in Tour-sponsored tournaments. Plaintiffs do not challenge that provision on the understanding that the Tour interprets it to apply to golfers only when they are playing in Tour-sponsored events. However, if the Tour relies on that provision to support its position that it can control Tour members' golf media rights even when they are not participating in a Tour event, the Plaintiffs would challenge that provision as being anticompetitive.

58. A second provision in the Regulations, Section V.B.1.b. (the "Media Rights Regulation") provides that "[n]o PGA Tour member shall participate in any live or recorded golf program without the prior written approval of the Commissioner, except that this requirement shall not apply to PGA Tour cosponsored, coordinated or approved tournaments, wholly instructional programs or personal appearances on interview or guest shows." Exhibit 1. The Tour broadly defines "golf program" to cover "any golf contest, exhibition or play that is shown anywhere in the world in any form of media now known or hereinafter developed." *Id.* According to the PGA Tour, this provision prevents all Tour members from participating in any golf program anywhere in the world, during any time of the year, *even when they are not participating in a Tour event.* According to the PGA Tour, the effect is a year-round prohibition on all Tour-member independent contractors from participating in any competing golf event anywhere in the world that is broadcast on any media. For example, when the Player Plaintiffs participated in a LIV Golf event in London that was streamed on the Internet (but not shown on any television network in the United States), the PGA Tour declared that the Player Plaintiffs had violated this rule.

59. The global prohibition on playing in competing events is not needed to create or improve any product or offering by the Tour, or to improve any aspect of any product for fans. For example, other provisions purportedly grant the Tour the media rights for Tour events in which the players are participating. The global prohibition serves only to prohibit the Tour's independent contractor players from playing in any competing events during weeks when they are not playing in Tour events.

60. The Media Rights Regulation is fundamentally inconsistent with the rights of the Player Plaintiffs as independent contractors, denying them the right to sell their own media rights to other bidders for their services. As a result, the Tour has deprived and continues to deprive the Player

Plaintiffs of the opportunity to pursue their profession, thus depriving them of income-earning, marketing, branding, and charitable opportunities.

61. Furthermore, this provision has injured and foreclosed entry by LIV Golf at its planned scale and harmed LIV Golf by imposing on it a cost basis that the Tour itself describes as "irrational." In addition, and critically, the Tour has compromised LIV Golf's ability to secure a television broadcast contract, a critical component of any sustainable elite golf tour. Even though LIV Golf has been able to convince some players to defy the Tour's threatened lifetime bans and to participate in LIV Golf events, the Media Rights Regulation has precluded LIV Golf from securing agreements to broadcast its tournaments because United States platforms are disinclined to sign a broadcast contract with LIV Golf while the Tour claims to control the media rights of the players participating in LIV Golf tournaments. As the PGA Tour has maintained, the Media Rights Regulation purportedly denies any competing tour the opportunity to broadcast tournaments to fans, an essential element of the business plan of LIV Golf or any other elite professional golf promoter. Unless it is enjoined, this provision will threaten the competitive entry of LIV Golf or any other potential competitor, which would both harm LIV Golf and also the Player Plaintiffs by denying them the opportunity to sell their services in a competitive market.

62. The anticompetitive intent of the Media Rights Regulation is exposed by the Tour's amendment of the definition of "golf program" in the provision in November 2019 in response to rumors of potential competitive entry. Whereas the prohibition had previously applied to "any golf contest, exhibition or play that is shown ***in the United States***," the prohibition was expanded to cover "any golf contest, exhibition or play that is shown ***anywhere in the world***." Exhibit 1 (emphasis added). Commissioner Monahan admitted this anticompetitive purpose in his January 2020 Memorandum: "Our current Tournament Regulations provide a significant hurdle for PGA Tour members with respect to contracting with Private Equity Golf under its proposed structure. . . In particular, the Tournament Regulations governing Conflicting Events and Media Rights/Releases would be applicable. . . .[I]n November 2019 the Policy Board ratified a revised Media Rights/Release regulation to ensure that all golf events are unequivocally covered on a global basis." The Tour did not negotiate with the Player Plaintiffs or any other Tour Member over its unilateral expansion of the Media Rights Regulation and

does not compensate them for the Tour's purported exclusionary control over their year-round global media rights. The expansion ensures that players are restricted from participating with a competing golf tour anywhere in the world.

63. The anticompetitive purpose of the Media Rights Regulation is further illustrated by comparison with the European Tour. The European Tour does not prohibit its independent contractor golfers from using their media rights when they are not playing in European Tour events. Rather. the European Tour's rules make clear that the players' grant of media rights applies *only* when they participate in European Tour events. During other weeks of the year, that grant of media rights "does not otherwise affect the Member's rights as an independent contractor in respect of their own image except as set out in these Regulations, including Regulation E5(c) [Ryder Cup] below." The European Tour also "recognises the individual rights of all Members operating as independent contractors. . . and will not unreasonably seek to restrain its Members from Participating in certain golf tournaments or events which are not sanctioned by the European Tour. . . ."

64. Some Player Plaintiffs requested releases from the Media Rights Regulation to play in the LIV Golf London Invitational. The PGA Tour denied their request (as well as those of other Tour members) and instead imposed lengthy suspensions on all players who participated in the event.

65. The Tour's anticompetitive use of the Media Rights Regulation is further demonstrated through its selective enforcement of the provision against other events that it does not deem to be competitive threats. For example, the Tour did not require members to obtain releases to participate in a Pro-Am golf competition called the JP McManus held in the Republic of Ireland from July 4–5, 2022, even though the event was broadcast in the United States, Europe, and throughout the world. In contrast, days earlier the Tour enforced the provision with draconian punishments when the Player Plaintiffs and others played in the LIV Golf Portland Invitational from June 30 – July 2, 2022. The key difference between the LIV Golf event and the JP McManus event is that the Tour views only LIV Golf as a competitive threat.

66. The anticompetitive purpose and effect of the Media Rights Regulation is clear. The incumbent monopolist has granted itself the right to foreclose the best golfers in the world from playing in events that create real competition, at its own discretion. And if golfers defy the Tour's threats. the

competitor that is able to secure the players' services is nonetheless foreclosed from securing contracts to broadcast the event on television or any other media.

67. **Conflicting Events Regulation.** A second exclusionary provision in the Regulations (Section V.A.2–3, the "Conflicting Events Regulation") grants Tour Commissioner Monahan with the discretion to prohibit the Player Plaintiffs and all other Tour members from playing in any other golf tournament anywhere in the world. Exhibit 1. Commissioner Monahan has exercised his discretion to foreclose competition from LIV Golf by preventing any Tour members from participating in any LIV Golf events, under penalty of career-threatening suspensions.

68. The Conflicting Events Regulation contains two components, each of which the Tour has employed to attack the Player Plaintiffs in its effort to foreclose LIV Golf's entry. First, the provision prohibits any Tour member from playing in any other golf tournament in North America during any week when the Tour sponsors or co-sponsors an event—without exception, even when the player is not playing in the Tour event. Because the Tour typically sponsors or co-sponsors events approximately 48 weeks per year, the Conflicting Events Regulation effectively prevents independent contractor Tour members from ever playing in non-PGA Tour events in North America. Second, the Regulations also prohibit the Player Plaintiffs and all other Tour members from playing in any events *outside* North America during weeks in which the Tour is sponsoring or co-sponsoring an event, unless the Commissioner grants a release. These releases are limited to three per year, and the Commissioner has complete discretion to deny them.

69. The releases the Commissioner can choose to grant do not permit meaningful competition by other tours. No releases are permitted for any event in North America. Even as to international events, the Commissioner retains "sole discretion" to deny a release. Exhibit 1. While the Tour has historically granted releases for international events, the Tour changed its practice once the threat of potential competitive entry became evident. For the LIV Golf London Invitational, the Tour denied releases for all members. In doing so, Commissioner Monahan clarified that the Tour denied the requested relief because LIV Golf is organizing a tour that competes with the PGA Tour in North America. The Commissioner's vice president wrote, "While releases have been granted in limited circumstances for one-off events outside North America or for events outside of North America

on tours based exclusively outside of North America, the event for which you have requested a release is the first in an eight-event "2022 LIV Golf Invitational Series" season, and more than half of them will be held in the United States." Furthermore, even if the Commissioner did not exercise his discretion to attack competition, the Regulation provides that a player may obtain only three Conflicting Event releases per season, and may do so only if he also plays in a minimum of 15 Tour cosponsored or approved tournaments. Also, the PGA Tour Commissioner is only required to give a player a decision 30 days in advance of the event, which makes it difficult for those planning international events to know which players will be permitted by the Tour Commissioner to play in the field.

70. The scope of this Conflicting Events Regulation is expanded by another provision in the Regulations which provides that in any week in which a Tour, PGA Tour Champions, Korn Ferry Tour, PGA Tour *Latinoamerica*, PGA Tour Canada, or PGA Tour China cosponsored tournament is scheduled, no Tour member may participate in any golf activity (including public exhibitions, clinics, and pro-ams) in the same geographic area without the prior approval of the Commissioner.

71. The Tour has made clear that it will weaponize the Conflicting Events and the Media Rights Regulation to attack competition. In January 2020, Commissioner Monahan told a meeting of PGA Tour members that the Tour will impose "strict enforcement of the Conflicting Event and Media Rights/Release rules" on players to prevent them from playing golf on a competing tour. When Player Plaintiffs participated in the LIV Golf London Invitational, Commissioner Monahan summarily suspended them within an hour of tee-off. Then, to expand the *in terrorem* effect of the suspension on all other Tour members, Commissioner Monahan immediately notified all PGA Tour members of his action.

72. The Tour has forced members of the Korn Ferry Tour—the developmental tour—like Plaintiff Uihlein, to be bound by the same Regulations and has enforced them to punish young developing professional golfers who play in LIV Golf events.

73. Furthermore, the Tour's argument that it is merely enforcing its membership rules and its assertion that there is some legitimate justification for those rules in preventing simultaneous Tour membership and participation in LIV Golf events are betrayed as mere pretext by the Tour's attacks on

golfers who play in LIV Golf events but are not PGA Tour members. For example, The PGA Tour has even banned golfers who are members in good-standing of the European Tour from the European Tour events it co-sanctions with the PGA Tour simply because they played in a LIV Golf event, including members of the European Tour who were granted permission to play in the LIV Golf event. Those golfers were not bound by the PGA Tour's membership rules (because they were not Tour members) and did not violate any Tour rule, and yet they were punished by the Tour for playing in a LIV Golf event. Similarly, the Tour has threatened college golfers—who are not Tour members and are not bound by any Tour rule—that they will not be permitted to participate in the pathway onto the Korn Ferry Tour or the PGA Tour if they play in any LIV Golf events.

74. The Tour's attack on LIV Golf is not the first time the Tour has used the Media Rights and Conflicting Events Regulations to attack nascent competitive entry. Before LIV Golf, the last meaningful threat of competitive entry to challenge the PGA Tour was the World Golf Tour, led by Greg Norman, which attempted to launch in 1994. In response, then-Tour Commissioner Tim Finchem wrote to Mr. Norman that the Tour would not grant conflicting event releases for "events held within the United States" and that it would only grant a media rights release if the World Golf Tour would pay a prohibitive sum to the PGA Tour. And even then, the Tour's releases would only be granted for events held on a Monday, Tuesday, or Wednesday. The Commissioner also threatened Tour members that they would lose PGA Tour membership cards if they joined the competing tour. Within days, the World Golf Tour collapsed. No other meaningful competitive threat emerged for more than a quarter century.

75. The Player Plaintiffs are members of the Tour (albeit now subject to lengthy suspensions) and remain subject to the Regulations. They requested releases from the Media Rights and Conflicting Events Regulations to participate in one or more LIV Golf events. The Tour denied their requests and imposed severe punishment when they exercised their rights as independent contractors to play in the LIV Golf events (detailed further below). While the PGA Tour's charter requires that the PGA Tour's acquisition of players' media rights be used "to promote the common interests of professional golfers," the Tour uses its acquisition of players' media rights to prevent other promoters from competing for its members' services.

76. Furthermore, after dozens of Tour members (including the Player Plaintiffs) sought Conflicting Events releases to participate in a LIV Golf event in London, the Tour amended its Conflicting Events Release request form to require its members to verify the event would not be shown on any medium in the United States—an impossible verification given modern technology. As the sequence of events makes clear, the Tour added that provision (the Contractual Assurance Confirmation) in response to LIV Golf's attempted competitive entry. This amendment makes it even harder for the Player Plaintiffs to exercise their independent contractor right to play for other promoters during their off-weeks.

The PGA Tour's Anticompetitive Response to Potential Competitive Entry in 2020

77. After the PGA Tour used its Media Rights and Conflicting Events Regulations to deter entry by the World Golf Tour in 1994, there was no attempted entry into professional golf for over 25 years. Then, in late 2019 and into 2020, a number of individuals and entities, some of whom later became involved with LIV Golf, attempted to launch a competing tour known as the Premier Golf League ("PGL"). The Tour orchestrated an anticompetitive response that blocked PGL's attempted entry.

78. PGL was a venture involving the Raine Investor Group SPV, World Golf Group ("WGG"), the Public Investment Fund of Saudi Arabia, and Performance 54. PGL developed a proposal for a new golf league, and it approached various golf stakeholders as part of its effort to launch a new elite professional golf tour to compete with the Tour.

79. PGL had discussions with player representatives in the fourth quarter of 2019 and began offering contracts to players in January 2020.

80. In January 2020, the Tour obtained copies of PGL's marketing materials and the packages the PGL offered Tour players.

81. In response, Commissioner Monahan distributed his January 2020 Memorandum acknowledging that the PGL "would be competitive to the PGA TOUR," and detailed the PGA Tour's "response" to "mitigate any impact" from this potential competitive threat.

82. In his January 2020 Memorandum, Commissioner Monahan explained that the principal means to defeat the threat of competition was to prevent players from joining the new league. As

Commissioner Monahan wrote, "[t]he impact that [the new league] can have on the PGA TOUR is dependent on the level of support it may receive from these players. Without this support, [the new league's] ability to attract media and corporate partners will be significantly marginalized and its impact on the TOUR diminished."

83. Commissioner Monahan pointed out that PGA Tour members would have "a significant hurdle" to join the new league because the Regulations prohibit players from joining a competing tour. In addition, Commissioner Monahan pointed to a rule he claimed would prevent players from competing in the team format proposed by the new league (based on a rule prohibiting "players having a financial interest in another player") and prevent players from competing in "conflicting events" except under limited circumstances.

84. In the 2020 memorandum, Commissioner Monahan also informed the Tour Policy Board that in November 2019, in response to rumors about potential competitive entry of an upstart international golf tour, the Tour had amended the Regulations to expand the Media Rights Regulation "to ensure that all golf events are unequivocally covered on a global basis." He also detailed plans to "further crystallize[] these restrictions."

85. Commissioner Monahan proposed two additional revisions to the Regulations, one that would tighten restrictions on conflicting events and a second that would prohibit players from having an equity interest in another's performance, a direct response to the PGL's team concept. On information and belief, these revisions were later adopted.

86. In addition, Commissioner Monahan stated that the PGA Tour has "communicated with key members of the Tournament Advisory Council," a group of PGA Tour tournament directors who advise the PGA Tour on its business conditions, "to prepare for a possible entrance of the [new league] to the marketplace." Commissioner Monahan similarly detailed that the PGA Tour has "liaised with each [Major Championships and Governing Bodies] organization to learn of its position regarding [the new league]." And the PGA Tour communicated with the OWGR regarding the new league's eligibility for OWGR ranking points.

87. The January 2020 Monahan Memorandum described the PGA Tour's efforts to secure commitments from across the global golf ecosystem to foreclose potential competitive entry.

Recognizing that the competitive threat from the new league would be greatly strengthened through a partnership with the European Tour, Commissioner Monahan stated that the PGA Tour has "continued discussions with the European Tour about the potential to work more closely together, thereby removing the European Tour as a potential partner of [the upstart competitor]." As described, the PGA Tour did in fact partner with the European Tour to prevent competitive entry.

88. Commissioner Monahan and the PGA Tour executed this anticompetitive plan to prevent players from joining the PGL and "remov[e]" others in the ecosystem as potential partners of the PGL, ensuring that the competitive threat from the PGL was thwarted before it could launch.

The PGA Tour Threatens Players Considering Joining The PGL

89. At a Tour players' meeting in January 2020 at Torrey Pines in La Jolla, California, Commissioner Monahan read aloud a message to Tour players similarly detailing some of his messages from his January 2020 Memorandum. In that meeting, Commissioner Monahan told PGA Tour players, "[t]he schedule for the [PGL] is designed to directly compete and conflict with the PGA Tour's FedExCup schedule, and to not conflict with [and be in addition to] the Masters, PGA Championship, U.S. Open and The Open Championship." Then, Commissioner Monahan threatened the Tour members with a ban from the PGA Tour if they joined the PGL or any other new league, stating: "If the Team Golf Concept or another iteration of this structure becomes a reality in 2022 or at any time before or after, our members will have to decide whether they want to continue to be a member of the PGA Tour or play on a new series."

90. As Commissioner Monahan made clear, the Tour demanded exclusivity from its independent contractor members, under penalty of a ban from the Tour.

91. In March 2020, Monahan repeated his threats to the players, stating that the Tour would "vigilantly protect [the Tour's] business model" from the competitive entrance of a new league.

92. The Tour's threats to the players' livelihoods had their intended effect. As one player was quoted anonymously in a leading golf publication in early 2020, "the risk of getting banned by the PGA Tour has to be an obvious concern." Many other Tour Members felt the same. As of 2020, the potential harm to the Player Plaintiffs resulting from a ban from the Tour made the idea of signing on to a new start-up too risky to bear. Nonetheless, many Tour members—recognizing that they were

disadvantaged by the Tour's monopsonistic control over the market—remained very interested in new playing opportunities in addition to the Tour.

The Tour Induces The European Tour Into a Group Boycott

93. As Commissioner Monahan admitted in his January 2020 Memorandum, the PGA Tour agreed with the European Tour to remove the European Tour as a potential partner of any new entrant.

94. Throughout 2020, the PGL had been negotiating with the European Tour to develop a partnership to co-sponsor events, which would have been a key step toward enabling the PGL to launch.

95. The co-sponsorship was important because it would have assured that PGL events would qualify players to earn points under the OWGR system. OWGR rankings are used to determine qualification for the Majors. Professional golfers are reluctant to join any tour that does not provide a path to qualify for the Majors.

96. Under the rules of the OWGR (on whose board Commissioner Monahan sits), a brand new tour purportedly cannot qualify for OWGR points for at least three years and must be sponsored by one of the six full members of the International Federation of PGA Tours (PGA Tour. European Tour, Asian Tour, Japan Tour, Australasia Tour, and Sunshine Tour). This establishes a barrier to the entry of any new tour: No elite professional tour can sustain in the long-term unless it provides players with a path to earn OWGR points, but no professional tour can secure points until it has existed for at least three years (absent an OWGR waiver of that requirement) and has sponsorship from one of the established International Federation members. To navigate through this Catch-22, the PGL sought to partner with the European Tour as part of its plan to enter and obtain a sponsor for its OWGR application.

97. Recognizing the PGL's need for a partnership with the European Tour, the PGA Tour forged an alliance with the European Tour through threats and financial incentives to put a bearhug around the European Tour and cut off a potential partner of the PGL. To obtain this agreement. the Tour threatened rule changes that would have made it more difficult for top European players who participate on the PGA Tour to play in European Tour events.

98. The PGA Tour's approach proved highly effective. In November 2020, the European Tour announced that it would not partner with the PGL. but instead it would enter into an alliance with

the PGA Tour. One condition of the agreement was that the European Tour not partner with or sponsor the PGL, thereby removing a key partner for the PGL's planned entry. Additionally, through the alliance with the European Tour, PGA Tour Commissioner Monahan secured a seat on the Board of Directors of the European Tour and the PGA Tour made a massive investment in the European Tour and its subsidiaries. The Tour's illegal alliance with the European Tour enabled it to require the European Tour to work in concert with the PGA Tour to prevent competitive entry. The Tour used its strategic alliance with the European Tour throughout the next two years to carry out its anticompetitive scheme to thwart LIV Golf's entry. The Tour entered into the illegal agreement with the illegal purpose to eliminate a competitor and future potential entrants.

99. The PGA Tour's efforts to thwart the PGL's entry were successful. The PGL never got off the ground, the venture as it existed disbanded, and the PGL was left with no real prospect of viability. In 2022, the PGL offered to partner with the PGA Tour, but under the Tour's control. The Tour summarily rejected the proposal.

100. And through its campaign to destroy the PGL, the PGA Tour had secured an anticompetitive agreement with the European Tour to foreclose any future potential competitive entrants.

LIV Golf Promises Long-Needed Competition

101. After the Tour destroyed PGL's viability and the venture disbanded, LIV Golf formed in 2021. LIV Golf is a new golf company whose goal is to improve professional golf for all stakeholders: fans, players, broadcasters, sponsors, and tournament hosts. It seeks to offer more of what fans, broadcasters, and sponsors want, including an exciting new format that will ensure heightened competition among golf's star players. LIV Golf seeks to modernize the professional game by allowing the game's superstars to realize their true market potential, while enhancing the professional golf marketplace with a dynamic, team-inspired format that will complement individual competition.

102. LIV Golf developed a new golf tour (the League) that would include 48 top golfers who would compete both as individuals and on 12 teams of four. The LIV Golf League's format is inspired

by the globally successful format for Formula 1 racing.[2] Twelve headline players would be player-owners, each holding an equity interest in their team and having substantial opportunities to guide their team to on-course and commercial success. Each LIV Golf League team of four was also set to have two substitute players, thereby offering 72 total players the opportunity to play. The player-owner of each team was to select four of the six players to play in a given week. By introducing an innovative format highlighting weekly head-to-head competition among the top players in the game, LIV Golf League's format would have created a more desirable product offering than the PGA Tour format, which has not changed for decades and has the lowest youth viewership of any North American major sport. LIV Golf League was going to include 54-hole tournaments with shotgun starts[3] and no cut, offering a faster-paced format with high levels of competition in every tournament, dramatically improving the fan experience.

103. The LIV Golf League format was designed as a fan-friendly alternative to the PGA Tour. The proposed "shotgun" format would reduce the number of hours required to watch a tournament and increase the excitement of the viewer experience. The team format would provide opportunities for team allegiances among fans and lead to multiple levels of competition within any given tournament. The LIV Golf League would also benefit sponsors, advertisers, and other stakeholders, as each team was to be independently commercialized with freedom to develop and select team sponsors and a home city or region. LIV Golf had strategies for improved broadcast output and an entertainment experience with more storylines and content.

104. The LIV Golf League was also set to improve conditions for players. In contrast to the PGA Tour's stagnating tournament purses (until LIV Golf emerged), with about half the players not making the cut and earning nothing in any given tournament, LIV Golf League was set to introduce the benefits of competition to players, including offering players greater economic benefits more

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[2] Formula 1 is the world's premier international auto racing series.

[3] Shotgun starts are when all golfers in a tournament tee off of different holes at the same time so that they finish their rounds around the same time, as compared to tournaments where all golfers tee off of the first hole and proceed to the eighteenth hole in consecutive fashion.

commensurate with their ability to attract revenue, equity ownership opportunities in their own success, and guaranteed income for every tournament in which they participated. LIV Golf would not require players to sign away their name, image and likeness rights for non-LIV Golf events. LIV Golf also would not foreclose players from playing in other tournaments during weeks in which LIV Golf is not playing, which would respect players' independent contractor status and allow them to participate in other tournaments and tours (to the extent not banned by the Tour).

105. The introduction of competition from the LIV Golf League would provide new and improved options for players, fans, and other stakeholders. Innovation would replace stagnation. Players, fans, sponsors, advertisers, and broadcasters would all benefit. The introduction of the LIV Golf franchise model to the sport of golf—with city, country, and regional affiliations—would engage more fans and increase commercial opportunities.

106. The LIV Golf League also aspired to enhance player opportunities more broadly and add meaningfully to the playing opportunities for professional golfers worldwide. It planned to provide qualification opportunities for players not initially selected and to embrace other tours, providing their players with pathways into the League. This format was designed to ensure a high level of competition throughout each season, as well as a fair and inclusive platform for golfers throughout the world, including younger development golfers.

107. If not for the anticompetitive conduct of the Tour, the LIV Golf League would have launched in 2022. LIV Golf had developed a ground-breaking business plan. It secured a chief executive officer and Commissioner—Greg Norman, a giant in the world of golf and a highly successful businessman in multiple industries—hired an experienced team of executives, assembled a board, and built out a full front office with dozens of employees and numerous industry consultants and contractors. LIV Golf partnered with the Asian Tour and invested several hundred million dollars in the Asian Tour to sponsor marquee events throughout the world and develop the sport at multiple levels on a worldwide basis. LIV Golf negotiated with broadcast companies, sponsors, venues, advertisers, vendors, and several other business partners who expressed interest in LIV Golf League. All these successful stakeholders indicated, however, that they would commit only when LIV Golf League had signed up the players needed to launch LIV Golf *and*, critically, secured the players' media

rights.

108. LIV Golf also sought to cultivate relationships with other tours in the existing golf "ecosystem," in order to ensure that there were further player pathways into and out of LIV Golf events (both within and across seasons) and to ensure that LIV Golf's entry would be additive and beneficial to the sport of golf throughout the world. For example, LIV Golf made offers to the Ladies European Tour and the LPGA, which rejected those offers due to the PGA Tour's opposition to LIV Golf, and due to the PGA Tour's board seats in those organizations and its control over the golfing world. As described below, the PGA Tour has thwarted LIV Golf's efforts by spearheading a group boycott designed to exclude LIV Golf from the "ecosystem" and punish any player who plays in any LIV Golf events.

The Tour's Anticompetitive Response to the Potential Entry of LIV Golf

109. In response to the potential entry of LIV Golf, the PGA Tour has used a carrot-and-stick approach to prevent the Player Plaintiffs and other PGA Tour Members from playing with LIV Golf.

110. The carrot is a loosening of the PGA Tour's purse strings to make somewhat greater compensation available to players than the Tour historically provided. This increased compensation to players in response to competitive entry is direct proof of the PGA Tour's monopsony power and the anticompetitive effects on players (including the Player Plaintiffs) from excluding competition. When the PGA Tour faced the meaningful threat of competitive entry for the first time in a quarter-century, it suddenly and substantially increased player compensation, thus providing direct proof of the Tour's monopsony power in suppressing player compensation below competitive levels.[4] These changes in the Tour's practices made only in response to nascent competitive entry are also indicative of the anticompetitive effects that will be imposed on the markets if the Tour is successful in defeating LIV Golf's nascent entry—once the Tour is free from competitive pressures, it will have both the ability and incentive to suppress player payments, as it did for many years before LIV Golf's nascent entry.

111. The stick used by the Tour is an array of anticompetitive actions by the PGA Tour to

[4] Despite these increases in compensation in response to LIV Golf's entry, PGA Tour compensation for players remains well below competitive levels.

destroy the careers and livelihood of players who participate in any LIV Golf events (including the Player Plaintiffs), their business partners and agents, and anyone who associates with LIV Golf or its players. It is particularly notable that as LIV Golf's threat of entry grew, and as the press reported increased player interest and player signings, the Tour ramped up the intensity of its punishment and threats. As Commissioner Monahan made clear in his January 2020 Memorandum, the Tour knew that if it could deter players from joining a new league, the new league's "ability to attract media and corporate partners will be significantly marginalized" and "its impact on the [Tour] diminished." Particularly for a 501(c)(6) organization that is required to further the interests of its members, the Tour's commitment to attack and destroy the careers of its members in order to defeat competition is striking. The Tour's conduct is also blatantly anticompetitive, serves no purpose but to harm competition, and cannot be justified under the antitrust laws.

112. **The carrot.** In April 2021, in direct response to rumors of LIV Golf's potential entry into the marketplace, the PGA Tour announced the "Player Impact Program," a $40 million bonus pool for the top 10 players on the PGA Tour who drive engagement with sponsors and fans. This new bonus pool, announced by the PGA Tour in response to potential competitive entry, is a clear indicator of the benefits of competition for players. As the PGA Tour recognized, competition in the labor market from LIV Golf will force it to raise compensation to the players or it will lose its talent to the new entrant. The PGA Tour's "Player Impact Program," however, was a half-measure, and offered far less than the compensation the players would earn in a competitive labor market.

113. In August 2021, in response to reports that LIV Golf's efforts to secure player commitments were gaining momentum and that the new entrant would offer substantially greater compensation, the Tour announced it would increase the purse sizes for tournaments and bonus pools for the 2021–2022 PGA Tour season by 18 percent compared to the purse size and bonus pools for the 2020–2021 PGA Tour season. As noted above, PGA Tour purse sizes had grown at an anemic low-single-digit rate for years, but when competitive entry was rumored, the Tour responded with an 18 percent increase for the next season. This is clear and direct proof of the Tour's monopsony power, the benefits of LIV Golf's competitive entry, and the harm to competition and the Player Plaintiffs if the Tour is permitted to destroy LIV Golf's nascent entry.

114. In October 2021, the Tour announced it would increase the purse size for the Players Championship by $5 million (from $15 to $20 million) and would provide players with a $50,000 bonus if they compete in 15 PGA Tour events.

115. In December 2021, the Tour published its increased purse size for 2022 (increasing from $367 million to $427 million in aggregate) including: (1) increasing FedEx Cup bonus pool from $60 million to $75 million; (2) increasing Top 10 Comcast Business Tour bonus from $10 million to $20 million; (3) increasing the Player Impact Program prize pool from $40 million to $50 million; and (4) making official the October 2021 compensation announcements.

116. In December 2021, the Tour also disclosed initial plans to copy LIV Golf's team-golf, international, prestigious, exclusive, no-cut, high purse, tournament format. Whereas the Tour and its spokespersons had previously used LIV Golf's new format as an excuse for justifying their opposition to the new entrant, the Tour's announcement that it planned to knock off LIV Golf's format revealed that any opposition based on the new format was merely pretext. And again, the Tour's response to LIV Golf's innovations demonstrates the benefits of competition.

117. In February 2022, the Tour leaked further information about its plan to copy LIV Golf's ideas in creating a fall series of team events with high purses and no cuts. With that announcement, the Tour also discussed further plans to increase player compensation, reflecting further competitive benefits of LIV Golf's nascent entry.

118. The increased purses and bonuses that the Tour offered in response to LIV Golf's anticipated entry were, however, a half-measure. They are materially less than the compensation the players would earn in a competitive labor market. In a nutshell: before LIV Golf's anticipated entry, the Tour's market power and the barriers to entry it had created allowed the Tour to compensate its players at levels substantially below what would exist in a competitive market. In response to LIV Golf's attempted entry, the Tour increased player compensation on numerous occasions, but still at less than competitive levels. For example, LIV Golf offers tournament purses between 200 percent to 300 percent higher than PGA Tour's purses, including guaranteed income to all participants. The lowest purse on the LIV Golf tour is millions of dollars greater than the largest purse ever offered by the PGA Tour. The point at which compensation becomes competitive will be determined only when the Tour

is enjoined from using its anticompetitive threats, retaliations, and restrictive contractual provisions, and has to compete on a level playing field with LIV Golf to secure players' services.

119. Nonetheless, even the early effects of the threat of competitive entry were striking. The Tour increased player compensation several times in response to the potential competitive entry of LIV Golf, totaling *$135 million* in a matter of a few months. This is clear and direct evidence of the Tour's monopsony power and the benefits of competition from LIV Golf. It is also direct evidence of the harm to competition that will result if LIV Golf's competitive entry is thwarted. Without the threat of competition from LIV Golf, the Tour would again face neither competition nor any reasonable likelihood of competition in the future. The Tour would then have both the ability and incentive to suppress player compensation to the sub-competitive levels that existed in the decades before LIV Golf launched.

120. In response to the increased compensation from the PGA Tour, players recognized that the threat of competitive entry prompted the changes:

i. Plaintiff Mickelson: "I'm appreciative of the fact that there is competition, and that leverage has allowed for a much better environment on the PGA Tour, meaning we would not have an incentive program like the PIP [Player Impact Program] for the top players without this type of competition. We would not have the increase in the FedEx Cup money. We would not have the increase in the Players Championship to $20 million this year if it wasn't for this threat."

ii. Joel Dahmen: "The PGA Tour . . . magically come up with $40 million for PIP and then there paying us all 50 grand to play 15 events, which is another X million dollars. That's like, $50 million they just magically found laying around overnight. The money is there. There's a way to do it."

iii. Jason Kokrak: "I'm curious to see if the PGA Tour would've ever increased any of that without this competition."

121. As PGA Tour Member and then-PGA Tour Policy Board Member Jordan Spieth said, "I think as a player overall it [competition from LIV Golf] will benefit us . . . . I can only say from my point of view I think that it's been beneficial to the players to have competition." PGA Tour member

Rickie Fowler said. "I think competition is a good thing, and in business, whatever it may be. . . . if you're trying to be the best, you want to find ways that you can be better than your competitors. It goes through sport, business, tours, whatever it may be." And Mr. Fowler noted that these new tours are coming about because the PGA Tour's stale product left players frustrated: "These tours or leagues, however you want to classify or call them, they wouldn't really be coming up if they didn't see that there was more opportunity out there. I've always looked at competition being a good thing. It's the driving force of our game."

122. Then, after LIV Golf had achieved some success with its first LIV Golf Invitational Series event and contracting with some popular golfers, the Tour managed to come up with yet more money to try to deter golfers from leaving the Tour for LIV Golf. On June 21, 2022, just days after LIV Golf London Invitational, the Tour copied LIV Golf's concept of limited field, no cut, team events with high purses, and announced its version of the events to begin in 2023. In that announcement, the Tour announced another increase of approximately $54 million to existing events and, in total, over $100 million purse increases across all of its events. In its announcement to its players, the Tour admitted the increase came from its "reserves." The Tour had the money, but didn't compensate the athletes or seek to offer innovative tournament ideas until LIV Golf introduced actual—albeit fragile—competition in the relevant market. On August 1, 2022, the Tour announced the purse amounts for the entire 2022–2023 schedule, which totaled a record $415 million in prize money in official events and another $145 million in bonuses—further showing how competition from LIV Golf caused the Tour to increase compensation for players.

123. **The stick.** The Tour's increased purses were not successful in deterring player interest in LIV Golf. As noted, the Player Plaintiffs and other players recognized that competition was good for the game of golf and for them, and the promise of true competition for their services fueled player interest in LIV Golf, which offered a more desirable format, more favorable terms for the Player Plaintiffs and other players (such as owning their media rights), and far greater compensation than the Tour was offering even with the recent increases in compensation. As a result, in a desperate effort to thwart competitive entry and protect its monopoly position, the Tour launched a campaign of threats against its own members, including the Player Plaintiffs, that promised career destruction for any

players who joined LIV Golf.

124. After news broke in April 2021 that LIV Golf made formal offers to a number of the top players in the world, on May 4, 2021, Commissioner Monahan addressed a meeting of Tour players (including the Player Plaintiffs) and informed the players that any golfer who joined LIV Golf would immediately lose their status as a PGA Tour member and face *a lifetime ban from the PGA Tour*. The players, including the Player Plaintiffs, were understandably intimidated by the Tour's threat.

125. The Tour intended its threat of lifetime ban to be a serious deterrent. It was. The prospect of leaving the Tour for an upstart golf promoter that could not guarantee its long-term existence, under threat of a lifetime ban from the incumbent monopsonist, was prohibitively risky. If banned from the Tour, the player would face a serious risk of being foreclosed from pursuing his chosen profession, a harrowing prospect for any golfer, and particularly younger golfers capable of 20 or more years of elite play.

126. In the 24 hours after the Tour announced that it would impose a lifetime ban on players who join LIV Golf, and after the Tour leaned on them for support, other entities in the golf "ecosystem" issued public statements reinforcing and expanding the Tour's threat:

- Seth Waugh, the CEO of the PGA of America, which sponsors the PGA Championship, publicly indicated the PGA of America's support for the PGA Tour and the European Tour in excluding competition from the "ecosystem of the professional game." He stated: "We are in full support of the PGA Tour and the European Tour regarding the current ecosystem of the professional game."
- Augusta National, which sponsors the Masters, issued a statement that "[t]he PGA Tour and European Tour have each served the global game of golf with honor and distinction. . . . As it has for many decades, the Masters Tournament proudly supports both organizations in their pursuit to promote the game and world's best players."
- A spokesperson for the R&A, which sponsors The Open, stated, "we have deep relationships with the [PGA Tour and the European Tour] and are supportive of them."

127. When the Tour learned that LIV Golf was continuing to talk with players' representatives (including the Player Plaintiffs' representatives) despite the threat of lifetime bans, the Tour threatened certain of the players' representatives, saying that it would harm the representatives' and the players' business interests if they continued to engage in discussions with LIV Golf. These threats to players' representatives highlight the pretext in the Tour's assertions that it is merely enforcing its own rules. No Tour rule grants it the authority to threaten the business of a player's agent or representative if a player participates in a LIV Golf tournament. And there is no conceivable procompetitive justification that could support such bullying. The Tour's actions are transparently anticompetitive, as they are aimed purely at kneecapping competition from LIV Golf before it can get off the ground and threaten the Tour's monopoly.

128. Furthermore, the Tour threatened—without basis—the Player Plaintiffs, their representatives, and other players and their representatives, that the Tour would withhold players' vested retirement funds if they were to join LIV Golf. Again, this threat is not justified under any Tour rule, but rather is targeted purely at undermining LIV Golf's competitive entry.

129. Several player representatives, including those of the Plaintiffs, were threatened that the Tour would use its connections to pressure their sponsors to revoke sponsorship agreements were they to join LIV Golf. Upon information and belief, the Tour successfully pressured sponsors to revoke player sponsorships. This conduct is not justifiable as the enforcement of any Tour rule, but instead is a transparent use of the Tour's muscle to attack players in order to undermine LIV Golf's competitive entry.

130. Through all of these actions, the Tour has harmed both the Player Plaintiffs and LIV Golf. Furthermore, the Tour's continued anticompetitive bullying aimed at any players or other parties who do business with LIV Golf (including the Player Plaintiffs) presents a severe threat of thwarting LIV Golf's nascent competitive entry. If not enjoined by the Court, the Tour's ongoing anticompetitive conduct threatens to irreparably harm LIV Golf, the Player Plaintiffs (both as direct targets of the Tour's anticompetitive conduct and as sellers into the market in which the Tour aims to secure its monopsony power), and competition itself.

The Tour Uses Its Strategic Alliance with the European Tour to Exclude LIV Golf and Its Partners from the "Ecosystem"

131. Before the PGA Tour formed an illegal alliance with the European Tour, the European Tour was a willing partner for prospective innovators and entrants into the global golf ecosystem. This included Golf Saudi and the Saudi investors who ultimately sponsored LIV Golf. For example, in a panel discussion in 2019, European Tour CEO Keith Pelley asserted that Saudi Arabia "are at the forefront of helping us develop the game." In fact, the European Tour partnered with Golf Saudi in launching the Saudi International, co-sanctioning the tournament for three years from 2019 to 2021.

132. While the Tour and those it has leaned on now use the Saudi sponsorship of LIV Golf as a weapon to smear LIV Golf and the golfers (including the Player Plaintiffs) who play in LIV Golf events and justify their attacks on the golfers, Mr. Pelley's statements reveal that attacks on the Saudi sponsorship of LIV Golf are pure pretext. The Tour had no problem entering into a partnership with the European Tour at the same time that the European Tour co-sanctioned the Saudi International and while Mr. Pelley gushed about the prospect of partnering with Golf Saudi to grow the sport. And the Tour has no problem accepting its own sponsorship money from companies that do billions of dollars in business with Saudi Arabia each year. An estimated 23 PGA Tour sponsors conduct regular business with Saudi Arabia each year—an estimated $40 billion dollars of business with Saudi Arabia. That the PGA Tour eagerly does business with these companies while criticizing golfers for playing on a tour primarily sponsored by the Public Investment Fund of Saudi Arabia is simply hypocrisy. And it exposes as pretext any notion that the Tour is orchestrating an attack on the players because the Tour is somehow unable to do business with anyone who has business connections to Saudi Arabia. The Tour's campaign to destroy these players is about defeating competition even at the cost of punishing its own members.

133. The European Tour's support for Golf Saudi changed starkly once the European Tour entered into its alliance with the PGA Tour and when Golf Saudi supported a potential competitive entrant to the PGA Tour.

134. The Tour's agreement with the European Tour to form a group boycott to block competitive entry that could challenge the PGA Tour's dominance is a matter of public record. For example, on May 4, 2021, the European Tour released a statement that "we are aligned with the PGA

Tour in opposing an alternative golf league, in the strongest possible terms."

135. Just over a week later, on May 12, 2021, European Tour Commissioner Keith Pelley wrote to representatives of Golf Saudi, noting its understanding that "Golf Saudi appears to be leading the current pursuit of a new golfing enterprise, referred to widely as the Super Golf League or [LIV Golf]." Commissioner Pelley wrote that the European Tour believed Golf Saudi was "talking to our members about joining this **rebel enterprise**." In an effort to deter Golf Saudi from supporting a new entrant, Commissioner Pelley threatened that the European Tour would refuse to co-sanction the Saudi International (which the European Tour had co-sanctioned since 2019) unless Golf Saudi "publicly denounce[d] [LIV Golf]."

136. Commissioner Pelley also made clear that his threats to Golf Saudi were in furtherance of the European Tour's anticompetitive agreement with the Tour to lock arms in a global "ecosystem" to foreclose LIV Golf's entry:

> We had, and indeed still have, aspirations of working with Golf Saudi in continuing to build the Saudi International into a world class event, and indeed look for other opportunities and have shared this view with our Strategic Alliance partners at the PGA TOUR.
>
> It is, however, impossible for us to continue those discussions while Golf Saudi is championing an alternative Tour that we believe is detrimental to both the European Tour, the PGA TOUR and global professional golf. I know PGA TOUR Commissioner Jay Monahan feels the same.
>
> We would therefore encourage you in the strongest possible terms to publicly denounce SGL as soon as possible which would allow us to reopen dialogue about the Saudi International and how Golf Saudi, operating ***inside*** the ecosystem, could resume the joint vision we began in 2017.[5]

137. The Tour and the European Tour also threatened other prospective partners of LIV Golf, making clear that they will seek to punish those who support LIV Golf by excluding them from the so-called world golf "ecosystem." For example, LIV Golf sought to enter into a relationship with the Asian Tour to co-sanction LIV Golf's tournaments to ensure that players would qualify for OWGR points (which, as described above, is essential to the long-term success of an elite level tour) and to establish a broader relationship for investment in the Asian Tour to grow the sport globally. In

[5] "SGL" in Commissioner Pelley's email stands for Super Golf League and refers to the entity and potential entrant that is now known as LIV Golf.

response, the European Tour sent a list of "Consequences" to the CEO of the Asian Tour—under the logos of the European Tour and the PGA Tour—that the Asian Tour would suffer if it entered into any partnership with LIV Golf. Those consequences included (1) eliminating a "[p]athway for Asian Tour members onto European Tour," (2) taking away "[e]xisting tournaments we co-sanction, totaling in excess of US$10m of prize money and 250 playing opportunities," (3) eliminating all future "co-sanctioned tournaments between the European Tour/PGA TOUR and Asian Tour" and (4) the Asian Tour would lose its "[p]osition within existing global golf ecosystem." Notably, the European Tour and Tour threatened not only to punish the Asian Tour directly, but to punish golfers on the Asian Tour by eliminating a "pathway for Asian Tour members onto [the] European Tour" and by removing prize money that had previously been available to Asian Tour members. Despite these threats, LIV Golf was able to offer constructive collaboration and investment in the Asian Tour sufficient to convince the Asian Tour to partner with LIV Golf in the face of the threats from the European Tour and Tour.

138. Despite these threats, LIV Golf and its sponsors continued in the effort to work constructively with existing golfing bodies to grow the sport. For example, on July 5, 2021, representatives of the entities that would sponsor LIV Golf met in Malta with leaders of European Tour. They presented an offer that would have made the European Tour a partner in innovating in the sport worth up to $1 billion for the European Tour. As reflected in the meeting minutes provided by a representative of the European Tour's title sponsor (DP World), the representatives from European Tour were "[g]rateful for the detailed work and preparation" and "[c]onfirmed" the LIV Golf series had "appeal and fit." However, the European Tour representatives "**stated main issue is US PGA mighty power and need to avoid a collision course between ET and PGA.**" Simply put, partnering with LIV Golf was good for the European Tour, its members, and the sport of golf, but the European Tour feared the "mighty power" of the PGA Tour, turning down the opportunity to partner with LIV Golf because of its "need to avoid a collision course between ET and PGA."

139. When Golf Saudi did not yield to Commissioner Pelley's May 2021 demand that it "publicly denounce" LIV Golf, the European Tour followed through on its threat to refuse to continue sanctioning the Saudi International. Then, in August 2021, the Tour announced through the press that it would not grant any PGA Tour members conflict releases for the Saudi International as it had done

since 2019, because the Saudi International was no longer sanctioned by the European Tour.

140. In response to the PGA Tour's threats to deny releases to play in the Saudi International, the players expressed their concerns:

a. Sergio Garcia: "When you get banned from playing, or whatever, it hurts the game. . . . People want to see us play all around the world and enjoy us wherever we go."

b. Rory McIlroy: "My view as a professional golfer is I'm an independent contractor, I should be able to play where I want if I have the credentials and I have the eligibility to do so. . . . Just the one thing I would worry about is if guys want to go to Saudi and they are going to make ten percent of their yearly income just by going and playing and [the PGA Tour is] restricting them from doing that, punishing them. that creates resentment for the players and that creates a problem between the tours."

c. Xander Schauffele: "I feel like there just needs to be some sort of counter in the way certain things work. I'll try and do what I need to do, and they'll tell me what I can and can't do at a certain point. but I feel like they need to counter. They can't just tell me no, you can't do this and then just kick rocks, kid. That's not really how I'd want to do things."

141. Despite the Tour's threat, the demand from the Tour members to play in this non-Tour-sanctioned event was so strong that over 30 players (including Plaintiffs Mickelson and DeChambeau) sought releases to play in the Saudi International. In response to this pressure from the players, the Tour granted the release requests under the Conflicting Events and Media Rights Regulations, but imposed conditions on the players (including Plaintiffs). The Tour informed players that the Regulations fully supported the denial of the players' requests but that it would permit players to play in the Saudi International provided that: (1) players who have not played in the AT&T Pebble Beach Pro-Am (a PGA Tour event that takes place annually in this district) at least once in the last five years must commit to playing Pebble Beach at least twice in the next three years; and (2) players who have played Pebble Beach at least once in the last five years must commit to play Pebble Beach at least once in the next two years. The Tour did not impose these conditions and restrictions when it granted past releases—it did so only after Golf Saudi refused the threat to denounce and boycott LIV Golf.

142. In a message to European Tour members, Commissioner Pelley made clear that the opposition to having players participate in the Saudi International, which the European Tour had co-sanctioned from 2019 to 2021, was an attack on competition from LIV Golf, which he described as "a clear existential threat." As Commissioner Pelley stated, "we have done everything we can to encourage the Asian Tour and LIV Investments to play within our ecosystem." letting golfers play for a partner of LIV Golf would "damage" our business. Commissioner Pelley was blunt in conceding that the tours are acting to protect their own business interests, which diverge from the interests of the players whom they are supposed to support: "We want the best for our members but at the same time will vehemently do everything we can to protect your Tour."

143. Similarly, on December 16, 2021, the PGA Tour and European Tour flexed the muscle of their group boycott and made good on their threats to the Asian Tour. After the Asian Tour accepted investment and partnership with LIV Golf, Asian Tour CEO Cho Minn Thant received a call from Martin Slumbers, the CEO of the R&A, which hosts The Open. Mr. Slumbers told Mr. Thant that the R&A would end its years-long practice of giving the Asian Tour Order of Merit winner entry into The Open because the PGA Tour and European Tour, with whom the R&A was aligned, were displeased about LIV Golf's investment in the Asian Tour. Days later, the media confirmed the R&A would revoke the Asian Tour Order of Merit winner's entry into the Open, identifying punishment of LIV Golf as the basis for harming individual Asian Tour players. Once again, the Tour and those it was pressuring were attacking LIV Golf and its partners by punishing golfers who had any association with LIV Golf.

144. As LIV Golf's player recruitment efforts continued, the Tour encouraged the European Tour to tighten its grip on its members and ensure they would not leave the "ecosystem" to play with LIV Golf. In threatening and imposing punishment on European Tour members, Commissioner Pelley made clear that it was doing so (1) pursuant to its agreement with the PGA Tour, (2) in an effort to thwart competition from LIV Golf, and (3) that the punishments were aimed at coercing players to act contrary to their individual interests. For example, on April 19, 2022, Commissioner Pelley wrote to European Tour members, reminding them of the European Tour's Conflicting Events Regulation. He stated: "Conflicting events, regardless of how attractive they might appear to you personally,

potentially compromise our efforts in these areas and could significantly hurt your Tour in both the short and long term." He continued: "Please, therefore, continue to bear this bigger picture in mind, particularly considering some of these conflicting events in 2022 are scheduled directly opposite some of our most prestigious 'heritage events.'" He also stated: "We are unwavering in our belief that working together with PGA Tour . . . will make our sport less fractured and benefit global golf."

145. As part of their concerted efforts to tighten the reins, on June 24, 2022, the PGA Tour and European Tour suspended golfers who participated in the initial LIV Golf tournament from their three co-sanctioned events—the Scottish Open, Barbasol, and Barracuda Championships—and fined the suspended golfers €100,000. They further threatened to double the sanctions for future violations (which all participants in the second LIV Golf tournament in Portland, Oregon had already committed).

146. Just four days later, on June 28, 2022, the PGA Tour and the European Tour announced a further agreement to solidify their strategic alliance whereby: (1) the PGA Tour invested more in the European Tour Productions (the European Tour's media arm) to take a 40 percent share; and (2) the PGA Tour arranged for the European Tour to be a direct feeder tour into the PGA Tour, with the top 10 performing golfers on the European Tour earning PGA Tour cards. In a press conference announcing the agreement, when asked whether players who play in LIV Golf events could earn the tour cards, European Tour Commissioner Pelley and PGA Tour Commissioner Monahan both struggled to answer, until Commissioner Pelley conceded their plan to impose total bans on golfers who participate in LIV Golf events: "This won't come into place until next year and I honestly don't think we'll have that problem by then" because LIV Golf players will not be permitted to play on the European Tour to earn a PGA Tour card.

147. The PGA Tour's agreement with the European Tour to form a group boycott against LIV Golf and its players is further reflected in the punishments the European Tour imposed on its members who participated in LIV Golf events. The European Tour has historically considered playing in a competing event without a release to be a minor breach of its Regulations, with a punishment of €12,000 for a violation. In contrast, when its members participated in the first LIV Golf event, the European Tour issued punitive sanctions at the behest of the Tour, including fines of approximately €100,000 and suspensions from the three events the European Tour co-sanctions with the PGA Tour

(but not other European Tour events not co-sanctioned by the PGA Tour), and threatened that participating in further LIV Golf events would lead to double fines and suspensions. To engineer these punishments, the European Tour first amended its regulations twice—after entering into the illegal alliance with the PGA Tour—to make the relevant violation of the European Tour's Regulation a "Serious Breach," which would give the Commissioner discretion to punish players and expand the scope of the Regulation.

148. On July 1, 2022 three of the golfers suspended from the co-sanctioned events, Ian Poulter, Adrian Otaegui, and Justin Harding, sued the European Tour to stay their suspensions and allow them to participate in the Scottish Open. The players challenged the European Tour's sanction process as unfair and partial, and challenged the legality of its regulations. They also challenged the sanctions as contrary to the European Tour's interest, as it was clear the European Tour was acting in concert with the PGA Tour.

149. The matter was referred to an arbitrator (pursuant to European Tour rules and an agreement between the players and the European Tour to stay the players' suit), who granted the players' request to stay their suspension from the Scottish Open until the merits of their appeal could be heard before an independent panel. The arbitrator reasoned that European Tour CEO and Commissioner Keith Pelley undertook "no process . . . close to replicating the guidelines for a disciplinary hearing" and "was on record as having made strong adverse public statements on LIV," and, as the European Tour stated itself, he was "'necessarily partial.'"

150. On July 1, 2022, the PGA Tour demonstrated its power over the European Tour, and laid bare its anticompetitive motives in banning participants in LIV Golf events from its tournaments, by banning from the co-sanctioned events in the United States (the Barbasol and the Barracuda) all European Tour golfers in good standing who had played in the LIV Golf London Invitational. These golfers were not members of the PGA Tour, and thus could not have violated any PGA Tour rule. And even though they are members of the European Tour, they had not violated any European Tour rule

because they were permitted by the European Tour to participate in the LIV Golf event.[6] Nonetheless, the PGA Tour barred these golfers from playing in co-sanctioned events, because the PGA Tour has a policy of total foreclosure of LIV Golf players from any of its events.

151. On July 20, 2022, in furtherance of its agreement with the Tour to boycott LIV Golf and those who associate with it, the European Tour removed Henrik Stenson as the European Team's 2023 Ryder Cup Captain because he joined LIV Golf.

PGA Tour Leans on the Majors to Do Its Bidding Against LIV Golf

152. The Tour's threats to impose bans on players who join LIV Golf are vastly strengthened if the ban encompasses not only PGA Tour events, but also the four annual Major Championships—the PGA Championship, the Masters, the Open, and the U.S. Open—as well as the biannual Ryder Cup. Participating in and winning the Majors and the Ryder Cup are the ultimate goal of most top professional golfers. And, in turn, one of the goals of playing on a tour each year is to secure qualification to the Majors and the Ryder Cup. The Tour is aware that if it can foreclose LIV Golf players from having access to these events—or even create enough credible doubt about whether participation in LIV Golf will end a player's chance of playing in those events—LIV Golf will find it prohibitively difficult to sign and sustain a critical mass of players to field a competitive elite-level tour. Accordingly, the Tour has pressured and encouraged the Major organizations to join its group boycott and to prevent LIV Golf from entering the global golf ecosystem.

153. For example, PGA Tour Commissioner Jay Monahan wrote in his January 2020 Memorandum: "We have liaised with each [Major] organization to learn of its position regarding Private Equity Golf."

154. As with the Tour's ramping up of its player threats over time as the threat of LIV Golf's competitive entry has grown, the Tour's pressure on the Major organizations has grown over time as well. For example, as part of its strategy to pressure the Majors into doing its bidding, in July 2022, the Tour had its 2022 Presidents Cup Captain and Hall of Fame Golfer Davis Love III use his position

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[6] The golfers did not need a release from the European Tour to play in the LIV Golf London event because they had not qualified for the conflicting event on the European Tour. Thus, the golfers had not breached any European Tour rule and were not subject to any discipline from the European Tour.

and influence to publicly encourage Tour members to enter into a group boycott of the Majors if the Majors do not ban all players who have played in LIV Golf. As Mr. Love stated, in encouraging a *per se* unlawful group boycott among Tour members: "Well, here's the biggest lever; and it's not the nice lever. But if a group of veterans and a group of top current players align with 150 guys on the Tour, and we say, 'Guess what? We're not playing,' that solves it, right? If LIV guys play in the U.S. Open, we're not playing. If they sue in court, and they win, well, we're not playing. You know, there won't be a U.S. Open. It's just like a baseball strike." As Mr. Love's comments make clear, the Tour and its representatives view themselves as being above the law, exempt from the requirements of the Sherman Act, and free to engineer a self-help group boycott aimed at frustrating any injunction entered by this Court.

155. *The PGA Championship and the Ryder Cup.* The PGA of America is a separate entity from the PGA Tour, which organizes the PGA Championship and co-organizes the Ryder Cup along with the European Tour. The PGA of America has a representative, President Jim Richerson, on the PGA Tour Policy Board. On May 4, 2021, during a time when LIV Golf was gaining momentum in attracting players' interest and on the eve of the PGA Championship in South Carolina, the CEO of the PGA of America, Seth Waugh, stated publicly that the PGA of America was aligned with the Tour in opposing LIV Golf's competitive entry. Specifically, he said, "We [PGA of America] are in full support of the PGA Tour and the European Tour regarding the current ecosystem of the professional game." Then, two weeks later, Mr. Waugh said that the PGA of America would ban players from future PGA Championships and the Ryder Cup if they joined LIV Golf. Specifically, Mr. Waugh said, "If someone wants to play on a Ryder Cup for the U.S., they're going to need to be a member of the PGA TOUR—excuse me, a member of the PGA of America, and they get that membership through being a member of the TOUR. . . . It's a little murkier in our championship, but to play from a U.S. perspective you also have to be a member of the TOUR and the PGA of America to play in our championship, and we don't see that changing." Mr. Waugh went on to state, "I believe the Europeans feel the same way. And so I don't know that we can be more clear than that." Mr. Waugh's public threat inaccurately characterized the PGA of America's Constitution, as there are many ways to be a member of the PGA of America beyond being a member on the PGA Tour.

156. At the September 2021 Ryder Cup, PGA of America representatives privately threatened golfers and their representatives that they would be banned from future Ryder Cups and the PGA Championship if they joined LIV Golf.

157. Mr. Waugh repeated the threat a year later at the 2022 PGA Championship. He said, "As I said, we're a fan of the current ecosystem and world golf ranking system and everything else that goes into creating the best field in golf. Right now we really—I don't know what it'll look like next year. We don't think this [LIV Golf] is good for the game and we are supportive of that ecosystem. We have our own bylaws that we will follow towards those fields." He was then asked by the media, "I'm sorry do your bylaws preclude letting those players [players who played in LIV Golf] play?" Mr. Waugh responded, "Not specifically, but our bylaws do say that you have to be a recognized member of a recognized Tour in order to be a PGA member somewhere, and therefore eligible to play."

158. And then, in June 2022, the 2023 PGA of America Ryder Cup Captain Zach Johnson repeated the same unfounded threat and expanded it to suggest that Plaintiffs will not be eligible for the 2023 Ryder Cup. When he was asked by the media whether a player who plays in LIV Golf will be eligible for his 2023 Captain Picks, he responded, "The way that we're members of the PGA of America is through the PGA Tour. I'll let you connect the dots from there."

159. *The Open.* The R&A, the global golf rules organization and promoter of The Open Championship, has taken multiple actions to support the PGA Tour's efforts to exclude LIV Golf. For example, the R&A has taken away the Asian Tour's Order of Merit winner's entry into the Open Championship in order to deter the Asian Tour from partnering with LIV Golf. Similarly, the CEO of the R&A (Martin Slumbers) and the Chairman of Augusta National (Fred Ridley) called the CEO of the Asian Tour (Cho Minn Thant) to threaten consequences relating to the Asian Tour's position in the current "ecosystem" if the Asian Tour continued to support LIV Golf and its LIV Golf Invitational Series. More recently, in July 2022, the R&A demonstrated its alignment with the PGA Tour by publicly disinviting two-time Open Championship winner Greg Norman from champions events at the 150th Open Championship because he is the CEO of LIV Golf. The R&A also informed Mr. Mickelson he was not welcome. And, at the Open Championship in July 2022, R&A CEO Martin Slumbers suggested that players who play in LIV Golf may not be eligible or qualify for future Open

Championships, and that it would be harder for them to make it in the tournaments.

160. *The Masters.* Augusta National, the promoter of The Masters, has taken multiple actions to indicate its alignment with the PGA Tour, thus seeding doubt among top professional golfers whether they would be banned from future Masters Tournaments. As an initial matter, the links between the PGA Tour and Augusta National run deep. The actions by Augusta National indicate that the PGA Tour has used these channels to pressure Augusta National to do its bidding. For example, in February, 2022 Augusta National representatives threatened to disinvite players from The Masters if they joined LIV Golf. In addition, Augusta National Chairman Fred Ridley personally instructed a number of participants in the 2022 Masters not to play in the LIV Golf Invitational Series. Plainly, these threats to top players served no beneficial purpose, as they would only serve to weaken the field in the Masters.

161. In May, 2022 the PGA Tour also encouraged Augusta National representatives to attend Tour Player Advisory Council meetings to discuss ramifications for players participating in LIV Golf events, further demonstrating how the Tour has leaned on Augusta National to aid it in dissuading golfers from joining LIV Golf.

162. And, when LIV Golf CEO Greg Norman asked Mr. Ridley if he would meet with him to understand LIV Golf's business model and discuss how LIV Golf could operate in the existing professional golf world, Mr. Ridley declined the invitation—another example of LIV Golf trying to work with existing golfing entities and being turned away before even getting an opportunity to show them what LIV Golf is about.

163. In addition, the Tour and others are utilizing their positions on the Governing Board of the OWGR to create enough credible doubt about whether LIV Golf will be eligible for OWGR points and whether players who participate in OWGR will be able to earn points playing in LIV Golf tournaments.

The Tour Announces Policy to Permanently Ban Players Who Join LIV Golf

164. Between January 2020 and February 2022, the Tour increased the severity of its threats of punishment to any player who would consider joining LIV Golf, as well as threats to the players' representatives and entities involved in golf sponsorship and advertisement. These threats, both individually and in combination, were anticompetitive acts that harmed Plaintiffs and tortiously

interfered with the Plaintiffs' business relationships.

165. With multiple press reports in early 2022 describing LIV Golf's forward momentum and reporting that LIV Golf was nearing the critical mass needed to launch its tour, the Tour once again increased its threats to the players. In February 2022, the Tour gathered the agents of players (including the Player Plaintiffs' agents) who were assembled for a Tour event in Los Angeles, California and informed them that the Tour would impose a lifetime ban on any player who signed with LIV Golf. This threat was a significant deterrent for players to take the risk to join LIV Golf. At that time, LIV Golf had not held its first tournament, and there was simply too great of a risk of career destruction in the face of such unlawful and brazen threats. For example, one star player, who had been in favor of joining the LIV Golf League before the threat, stated that younger players were "s***ting in [their] pants" in response to this threat, and that he was not sure how LIV Golf could get the players it needed with the Tour's lifetime ban threat.

166. On February 22, 2022, Commissioner Monahan addressed a meeting of Tour players at the Honda Classic and reiterated that any player who joined LIV Golf would receive a lifetime ban from the Tour. According to an article quoting an anonymous player present at the meeting, Commissioner Monahan told players that if they were going to play in the league operated by LIV Golf to "walk out that door now" and "made the ban seem like it was in all capital letters."

167. The Tour's threats of punishment and career destruction greatly affected LIV Golf's ability to sign enough elite professional golfers to fill out its League. Some players (including Plaintiff DeChambeau) who had previously signed contracts with LIV Golf were forced to publicly profess loyalty to the Tour. Other players who had previously agreed in principle to all terms with LIV Golf informed LIV Golf that they now could not sign, and instead publicly professed loyalty to the Tour. Players who had been enthusiastic about joining LIV Golf informed LIV Golf that they regrettably could not join in light of these threats. Just as Commissioner Monahan had predicted in his 2020 Memorandum outlining the PGA Tour's plan to attack a new entrant, a competing tour without player support would prove unable to pose a competitive threat to the PGA Tour.

168. The Tour's lifetime ban policy had its desired effect, as LIV Golf League's 2022 launch plan died. LIV Golf was injured by having its launch plans derailed. And Player Plaintiffs were injured

by losing the opportunity for increased playing and income opportunities and sustained competition for their services.

LIV Golf Invitational Series

169. Forced to scrap its plans for a 2022 launch of the League, LIV Golf regrouped and developed a substantially scaled-down launch plan that became known as the LIV Golf Invitational Series. The Invitational Series did not include franchised teams or other planned League features, and promised two fewer events in 2022. Instead, on March 16, 2022, LIV Golf announced that the Invitational Series would feature an eight-event series showcasing a new golf format starting in June 2022. The format features both individual and team play, and offers more than $250 million in prize purses. The first seven LIV Golf Invitational Series events each carry a purse of $25 million, comprised of $20 million in individual prizes (all players in the field earn a share) and $5 million, split among the top three teams. Following the first seven LIV Golf Invitational Series events, an Individual Champion will be crowned and a $30 million bonus prize will be split among the top three individual performers throughout the series. The eighth LIV Golf Invitational Series event will be a Team Championship that will provide an additional $50 million in total prize funds. The LIV Golf Invitational 2022 schedule started with the LIV Golf London Invitational on June 9–11, 2022, the LIV Golf Portland Invitational at the Pumpkin Ridge Golf Club on June 30–July 2, 2022, and the LIV Golf New York Invitational in Bedminster, New Jersey on July 29–31, 2022. The remaining LIV Golf scheduled events are:

- Sept. 2–4: The International – Boston, Massachusetts
- Sept. 16–18: Rich Harvest Farms – Chicago, Illinois
- Oct. 7–9: Stonehill Golf Club – Bangkok, Thailand
- Oct. 14–16: Royal Greens Golf Club – Jeddah, Saudi Arabia
- Oct. 28–30: Trump Doral Golf Course – Miami, Florida

170. During weeks in which there is no LIV Golf Invitational Series tournament, LIV Golf encourages players to play wherever they choose, including Tour events, other events on other tours, or events that might be created in the future (and which are currently prevented from developing because of the Tour's restrictive rules).

171. While LIV Golf has moved forward with its scaled-down plans for the Invitational

Series, it has incurred financial losses that were far more severe than it would have incurred if its original launch plans had not been derailed by the Tour's anticompetitive conduct. These losses are partly due to the supracompetitive increases to player-acquisition costs it has incurred in light of the Tour's anticompetitive conduct, and partly due to the loss in revenue-generating opportunities as a result of the scaled-down nature of the Invitational Series in comparison to the original plans for the League.

Efforts to Prevent and Harm LIV Golf's Invitational Series

172. On March 15, 2022, LIV Golf Commissioner and CEO Greg Norman sent emails regarding the LIV Golf Invitational Series to approximately 250 top professional golfers (including Plaintiffs). The Player Plaintiffs were excited that LIV Golf was going to host tournaments despite the obstacles the Tour put in its path. On March 23, 2022, LIV Golf formally invited the same group of players to participate in the LIV Golf Invitational Series. Several players (including the Player Plaintiffs) reached out to LIV Golf to say that they were interested in playing in the Invitationals, but they were concerned about doing so in light of the Tour's threats to players. The Player Plaintiffs remained interested in LIV Golf and continued discussions, as did others.

173. The Player Plaintiffs and many other players (at least 170 golfers) filed entry applications for LIV Golf Invitational Series' first event. The Player Plaintiffs and, on information and belief, some 80 Tour members sought conflicting events and media rights releases from the PGA Tour under the Conflicting Events and Media Rights Regulations.

174. In furtherance of its monopoly and its monopsony and its illegal agreement with the European Tour, on May 10, 2022, the Tour denied *all* requests from Tour members to participate in LIV Golf Invitational Series events. The denials were striking, because the Tour has historically granted releases to players to permit them to participate in events outside the U.S., but in this case the Tour issued an across-the-board denial for an event taking place in London. In its letter to the players denying the release requests, the Tour made clear that the reason it was departing from past practice was that LIV Golf planned to compete against the PGA Tour in North America:

> While releases have been granted in limited circumstances for one off-events outside North America or for events outside of North America on tours based exclusively outside of North America, the event for which you have requested

a release is the first in an eight-event "2022 LIV Golf Invitational Series" season, and more than half of them will be held in the United States.

175. There is no possible procompetitive justification for the denial, particularly because—as the Tour acknowledged—it would have granted the release for another event or tour that was not trying to compete against the Tour. This was simply an effort to defeat competition.

176. Then, unsatisfied with prohibiting all current Tour members from participating in LIV Golf events, the Tour extended its threat college golfers, explaining that if they played in any LIV Golf events they would be banned from entry into the PGA Tour University program, which provides top college golfers entry into the Tour's developmental tour (Korn Ferry Tour). Again, this action served no procompetitive purpose, nor could it plausibly be justified as an enforcement of any Tour member regulations, because the college golfers threatened by the Tour are not Tour members and are not bound by any Tour rules or regulations. Instead, this was simply aimed at thwarting competition by preventing LIV Golf from being able to secure top golfers to participate in its tournaments.

177. On May 17, 2022, the European Tour acted in concert with the Tour and sent notices to its members denying them permission to participate in the LIV Golf Invitational Series event in London. The European Tour stated that the basis for the denial is that the LIV Golf Invitational Series event will compete with its European Tour event. Notably, however, the European Tour historically did not deny golfers' requests to participate in conflicting events.

178. In response to these threats, LIV Golf was forced to commit to substantial up-front payments to a number of top golfers to convince the players to take on the risk of punishment from the Tour, as well as the risk of lost sponsorships and other injuries orchestrated by the Tour. These substantial payments have greatly increased LIV Golf's costs of launching its Invitational Series, and, if the Tour's conduct is not enjoined, the ongoing cash outlays significantly threaten the long-term viability of LIV Golf. Notably, however, while the increased payments have harmed LIV Golf, they also have not fully compensated the Player Plaintiffs for all of the injuries they have suffered as a result of the Tour's anticompetitive conduct, including both uncompensated monetary injury and ongoing irreparable injury in the form of lost professional playing and other opportunities that cannot be compensated through monetary relief. As such, both the Player Plaintiffs and LIV Golf have been injured and continue to suffer irreparable injury as a result of the Tour's anticompetitive conduct.

179. On May 31, 2022, LIV Golf announced the field for its London Invitational. In that announcement, the field included 16 PGA Tour players, 22 European Tour players, three promising young amateurs, and a number of other top players from across the world. Players were very interested in the product. But it was not the quality of field LIV Golf set out to have and was not the field of players LIV Golf would have had but for the PGA Tour's unlawful regulations and threats.

180. Tour members who agreed to participate in the LIV Golf London Invitational publicly expressed the difficulty of doing so in light of the Tour's conduct.

a. For example, the agent for PGA Tour member Dustin Johnson released a statement that: "Dustin has been contemplating this opportunity off-and-on for the past couple of years. Ultimately, he decided it was in his and his family's best interest to pursue it. Dustin has never had any issue with the PGA Tour and is grateful for all it has given him, but in the end felt this was too compelling to pass up."

b. Plaintiff Matt Jones averred that participating in the LIV Golf Invitational Series "was a good business opportunity for me and my family. I like the concept, the idea of the three-day tournaments. [and] the team format aspect of things is great. I have thought about that [threat of punishment from the PGA Tour], which is something I had to weigh. I don't think banning players is a good look for the PGA Tour, or for golf in general."

c. PGA Tour member Graeme McDowell stated, "[t]he perceived consequences are definitely concerning. It was an exceedingly difficult decision. It is a difficult decision as a player when there's so many unknowns. We do not know what the reaction is going to be. It just boils down to the fact that I am a business and I have operated all over the world for 20 years. This is a compelling opportunity."

181. Other Tour members who agreed to compete in the LIV Golf London Invitational welcomed the innovations LIV Golf brought to the game. Player Plaintiff Swafford stated that LIV Golf's "[s]chedule is very enticing to a guy who has two small kids. I think the format, the team aspect,

is going to be incredible. Look at Zurich [the Zurich Classic of New Orleans, which is a two-man team event], putting teams together turned an event that was in a tough part of the schedule into one that gets some incredible fields. I'm really looking forward to seeing how that works."

182. After the LIV Golf field was announced, the PGA Tour Player Advisory Council held an emergency meeting with representatives from Augusta National present. They informed the golfers in attendance that the PGA Tour and Augusta National had agreed to work together to address LIV Golf. As described above, the threat of exclusion from the Masters (and the other Majors) is a powerful weapon in the Tour's arsenal to deter players from joining LIV Golf.

183. On information and belief, the Tour also ramped up its pressure on sponsors to prevent them from doing business with players who join LIV Golf, including pressuring a number of sponsors to sever longstanding relationships with players.

184. The Tour also continued its campaign of direct pressure on players to seek to convince them to withdraw from the LIV Golf event. The Tour sent letters to all Tour members listed in LIV Golf's May 31, 2022 press release, notifying them they were in violation of the PGA Tour Member Regulations and that the Tour Commissioner would take "appropriate course of action" against the players unless they withdrew from the LIV Golf Invitational Series event "in a manner reasonably satisfactory to the [PGA] Tour within forty-eight (48) hours." The European Tour sent similar notices to its members who were included in the LIV Golf Invitational Series field.

185. The PGA Tour also enforced its Regulations on players agreeing to participate in LIV Golf Invitational Series who had not even qualified for the Tour but are members of the developmental Korn Ferry Tour owned by the PGA Tour (and subject to nearly identical Regulations). For example, the PGA Tour applied its Regulations to prohibit Korn Ferry Tour members Mr. Uihlein and Turk Pettit from participating in LIV Golf Invitational Series.

186. The PGA Tour also sent a letter to Andy Ogletree, a Korn Ferry Tour Member, threatening him with punishment if he played in the LIV Golf event. In response, Mr. Ogletree reached out to Tour Vice President of Competition Administration Kristen Burgess regarding the Tour's denial of his release request. Mr. Ogletree explained that he had not qualified for the conflicting event on the Korn Ferry Tour taking place the same weekend as the London LIV Golf Invitational Series. Thus, his

participation in the London LIV Golf Invitational Series event did not keep him from otherwise participating in a Korn Ferry Tour event (or, for that matter, a PGA Tour events). Mr. Ogletree informed the Tour that he had "spent thousands and thousands of dollars" in his unsuccessful effort to play in Korn Ferry Tour and PGA Tour events. He asked the PGA Tour: "Should I just sit at home on my couch next week and not make any money? It seems like this is your stance." Mr. Ogletree also noted the inconsistency of the Tour's stance since it had given Mr. Ogletree a release to participate in the Asian Tour International Series event from June 2–5, 2022 sponsored by LIV Golf. In response, the Tour cited the fact the LIV Golf Invitational Series will host events in the United States—specifically, that the LIV Golf Invitational Series competes with the Tour—as the basis for his event release denial.

187. This episode highlights that there is no conceivable procompetitive justification for the Tour's punishment of players for participating in LIV Golf events. Mr. Ogletree was not going to play in any PGA Tour or Korn Ferry Tour event that weekend, because he was not qualified by those tours to participate in their events. The LIV Golf event thus did not pull Mr. Ogletree away from any PGA Tour event. Instead, it simply provided an opportunity for a player to pursue his trade and earn compensation, along with increasing overall output in the market. And yet the PGA Tour denied a release for Mr. Ogletree and subjected him to discipline for the offense of playing in a tournament when he otherwise would have been "just sit[ting] at home on [his] couch."

188. It also demonstrates that the PGA Tour's opposition to LIV Golf is not based on the source of capital for LIV Golf events. The Tour granted a release to Mr. Ogletree to play in the Asian Tour event that was funded by LIV Golf, because the Asian Tour is not competing with the PGA Tour. But when Mr. Ogletree sought to participate in an event that the PGA Tour deemed a competitive threat, the Tour denied the release and threatened punishment against him.

189. The Tour then went further to contact individually players who had chosen to play in the LIV Golf Invitational Series. Among them was Player Plaintiff Gooch. PGA Tour Chief Tournament & Competitions Officer Andy Pazder texted Mr. Gooch on June 2: "Just want to make sure you understand the implications of playing without an approved conflicting event release." Mr. Gooch responded, "Davis [Love III] called yesterday and said jay [Monahan, PGA Tour

Commissioner] is going to suspend, is this true?" In response, Mr. Pazder told Mr. Gooch that he would be banned from the Tour for life if he played in *one* LIV Golf Invitational Series event: "Our position has been that a player may choose to be a member of the Tour or to play in the Saudi/LIV events, but he can't do both. If the player chooses the latter, he should not expect to be welcomed back."

190. On June 3, 2022, the PGA Tour sent an additional letter to all its members who had agreed to participate in the LIV Golf London Invitational, informing them: "pursuant to Article VII, Section C, you are being placed on probation until further notice. Specifically, as reflected in the Notice of Disciplinary Inquiry to you dated June 1, 2022, the rule infraction triggering your probation is violation of Article V, Section A.2 of the PGA Tour Player Handbook & Tournament Regulations ("Regulations"). Accordingly, if you violate any other rule of the PGA Tour while on probation including, but not limited to, violating Article V, Section B.1, which prohibits your participation in a live or recorded golf program, such as the LIV Golf Invitational London, for which a media release has been denied, the Commissioner may immediately suspend your playing privileges." Article VII, Section C of the PGA Tour Regulations relates to "conduct unbecoming a professional." Thus, the Tour told its members that the act of playing in a professional golf tournament constituted "conduct unbecoming a professional golfer."

191. Simply put, the Tour's position that merely playing professional golf for another promoter constitutes "conduct unbecoming a professional" golfer is breathtaking. And it reveals the threat to competition that underlies the PGA Tour's Regulations giving the PGA Tour Commissioner absolute discretion to interpret the Regulations and punish its Members.

192. On June 4, 2022, former Tour member Kevin Na resigned his PGA Tour membership due to the PGA Tour's refusal to permit him to participate in the LIV Golf Invitational Series. Mr. Na expressed his desire as an independent contractor to "exercise[e] my right as a free agent" to have "the freedom to play wherever I want," noting that he "cannot remain a PGA Tour member" and exercise his independent contractor rights due to the Tour's Regulations and threats. He expressed his "sad[ness]" and his desire that PGA Tour Regulations change to enable him to play on the PGA Tour again.

193. In total, 10 Tour members who agreed to participate in the LIV Golf London Invitational resigned from the PGA Tour in response to these threats to avoid Tour punishment.

194. When the Tour learned that members were considering resignation to avoid the punishments it had threatened, it informed them that "should a member resign in an effort to avoid disciplinary action for future violations of the Regulations, the member would still be subject to disciplinary actions for violations prior to the date of Resignation. In addition, a player should not expect that he will be able to rejoin membership or play in any events without membership at any particular time, as such matters would be governed by the Regulations and event requirements in effect at the time, as they may be amended from time to time." Most PGA Tour tournaments are managed by other nonprofit organizations and offer sponsorship exemptions to PGA Tour and non-PGA Tour golfers. Thus, in order for the PGA Tour's written threat to play out it requires agreement from other economic actors (the sponsors and tournament hosts).

195. Minutes after the golfers teed off at the LIV Golf London Invitational on June 9, 2022, the Tour distributed letters to its current and former members immediately suspending them and promising "the same fate [would] hold" for any Tour member playing in future LIV Golf events.

196. Also on June 9, 2022, Commissioner Monahan sent a letter to all PGA Tour Members and released the letter to the public identifying the golfers the PGA Tour was punishing. Contrary to its historical practices, the Tour sought to expose and malign these golfers for pursuing their profession. In particular, the PGA Tour Commissioner wrote:

a. Tour members, including the Player Plaintiffs and former members "are suspended or otherwise no longer eligible to participate in PGA Tour tournament play, including the Presidents Cup;"

b. The suspension applies to all tours sanctioned by the PGA Tour (Korn Ferry, Champions, Canada, Latinoamerica);

c. The golfers participating in the LIV Golf London Invitational Series "did not receive the necessary conflicting events and media rights releases—or did not apply for releases at all—and their participation . . . is in violation" of the Regulations;

d. The Tour Commissioner made clear that any players "who participate in future [LIV Golf Invitational Series] events in violation of our Regulations" will suffer the "same fate" of suspension;

e. Non-PGA Tour members who participated in LIV Golf Invitational Series "will not be permitted to play in PGA Tour tournaments as a non-member via a sponsor exemption or any other eligibility category;"

f. The Commissioner tried to embarrass the Player Plaintiffs by claiming that they and others made "their own financial-based" choice and they cannot demand the same "PGA Tour membership benefits" as other golfers;

g. The Commissioner further acknowledged that "there are true consequences for every shot" taken on the PGA Tour where a golfer could earn no compensation while paying for his travel to the event, whereas LIV Golf compensates its participants; and

h. The Commissioner embraced the notion that the PGA Tour is the "preeminent organization in the world of professional golf."

197. Also on June 9, 2022, the PGA Tour Vice President of Competition Administration, Kristen Burgess, sent letters to all former PGA Tour Members who participated in the LIV Golf London Invitational Series but had resigned from the Tour, informing them they "remain subject to disciplinary action for violations prior to the date of resignation" and they "should not expect that [they] will be able to rejoin membership or play in any events without membership at any particular time."

198. The Tour expanded its punishments by threatening to revoke the agency credentials for agencies that represent golfers who join LIV Golf—thereby threatening to injure the agents' business for merely representing golfers who chose to join LIV Golf.

199. The Tour also enlisted Tiger Woods to do its bidding and publicly criticize golfers—particularly younger golfers—for joining LIV Golf by suggesting they would never play in The Masters, The Open, or other Majors and would not earn OWGR points: "Some of these players may not ever get a chance to play in major championships. That is a possibility. We don't know that for sure yet. It's up to all the major championship bodies to make that determination. But that is a

possibility, that some players will never, ever get a chance to play in a major championship, never get a chance to experience this right here, walk down the fairways at Augusta National. . . , especially if the LIV organization doesn't get world-ranking points and the major championship change their criteria for entering the events." Mr. Woods' comments echoed earlier evidence indicating that the Tour was continuing to pressure the Majors to join the Tour's unlawful group boycott to exclude LIV Golf and punish any players who played in any LIV events.

PGA Tour Disciplinary Process

200. On June 9, 2022, PGA Tour Senior Vice President of Tournament Administration Andy Levinson sent letters to all PGA Tour Members who participated in the LIV Golf London Invitational Series event, including the Player Plaintiffs. In that Letter, Mr. Levinson informed golfers that (1) the PGA Tour considered them in violation of the Media Rights Regulation (V.B.1.b), (2) the PGA Tour considered them in violation of a PGA Tour Regulation against Public Attacks (VI.E.), (3) they were suspended immediately from playing in PGA Tour events "until further notice," and (4) they had 14 days to submit written statements and/or evidence that the PGA Tour Commissioner should consider "before determining an appropriate course of action separate from your current suspension."

201. The PGA Tour's Regulations detail its Disciplinary Procedures and Appeals, which provide an unconscionable and unfair process by which the players have no legitimate chance of getting fair treatment as it relates to punishments having anything to do with LIV Golf. Exhibit 1. The Tour's Regulations provide that the Commissioner has discretion to hear the appeal in the first instance. The Commissioner can also transfer the appeal to a panel of three Tour policy board members. The procedures do not give the player a hearing as a matter of right. After the procedures conclude, the Regulations provide that a player has released any and all claims against "the PGA TOUR Policy Board, the Commissioner or the Appeals Committee, PGA TOUR, Inc., the Professional Golfers' Association of America, and each director, officer, member, employee, agent or representative of any of the foregoing." Thus, the Tour's Regulations are set up as follows: (1) the Tour sets the Regulations which bind any player member, including changing those Regulations from time to time without input or consent from the player members, (2) the Regulations give the Commissioner the sole authority to interpret the Regulations in his discretion, (3) the Regulations demand that the biased Commissioner

serve as judge, (4) the Regulations allow that same biased Commissioner to hear any appeals, (5) the Regulations provide no independent review process, as the Tour Board is put in the position of reviewing a Tour commercial policy that it approved and executed over the last few years, and (6) at the end of it all, the Regulations purportedly provide that the player has no right to challenge the punishment having released all involved. That release is unenforceable and the Regulations' Disciplinary Procedures are procedurally and substantively unconscionable.

202. Several golfers submitted letters to the Tour challenging the Tour's indefinite suspension and objecting to any further course of action punishing the golfers.

203. On June 29, 2022, and various other dates, the PGA Tour suspended the Player Plaintiffs until March 31, 2023, issued threats to extend the suspensions based on further violations of the Regulations, including (in the Tour's view) continuing to play in LIV Golf events or even to talk favorably about LIV Golf. Commissioner Monahan considered the golfers in violation of the Conflicting Events Regulation and Media Rights Regulation. Additionally, Commissioner Monahan considered the golfers in violation of the PGA Tour's Regulation Section VI.E ("Public Comments, Public Attacks") provision which provides that:

> The favorable public reputation of PGA TOUR, its players and its tournaments are valuable assets and create tangible benefits for all PGA TOUR members. Accordingly, it is an obligation of membership 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. Speech that could be reasonably viewed as hateful, abusive, obscene and/ or divisive is expressly prohibited. Responsible expressions of legitimate disagreement with PGA TOUR policies are not prohibited. However, public 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. Any violation of this section shall be considered conduct unbecoming a professional.

Commissioner Monahan deemed the golfers' reasonable statements of opinion and compliments of LIV Golf in violation of this provision merely because favorable comments regarding a competitor to the PGA Tour supposedly could cause the Tour financial harm.

204. The Tour's punishments put the players in an untenable position: They were banned for roughly nine months, which prevents them from playing in PGA Tour events (and its subsidiary tours) and they have been told that if they play in any LIV Golf events while the suspensions are in

effect. the Tour will deem that an additional violation and impose event greater punishments. In effect, the Tour's punishments amount to a lifetime ban, because the only chance for a player to be clear of the PGA Tour's suspensions is to refrain from playing in any elite professional events—and thus essentially drop out of his profession.

205. On July 6, 2022, PGA Tour Board Member and President of the PGA Player Advisory Council Rory McIlroy said that golfers who join LIV Golf are "basically leaving all [their] peers behind to go make more money, which is fine. But just go over there. Don't try and come back and play over here again." Several years ago, Mr. McIlroy left the European Tour to play predominantly on the PGA Tour, and was still permitted by the PGA Tour to remain a European Tour member through his participation in the minimum number of events required by each tour.

206. On July 13, 2022, the Player Plaintiffs appealed their nine-month suspension (and career threatening ban from the PGA Tour). The grounds for the players' appeals were:

a. Provisions of Sections V.A.2, V.A.3, and V.B.1.b are plainly unlawful restraints of trade that violate Section 2 of the Sherman Act, 15 U.S.C. § 2, and various state laws, and therefore (1) no punishment for purportedly violating those unlawful provisions may issue and (2) any purported agreement by any person to adhere to those unlawful provisions is void and unenforceable;

b. Commissioner Monahan and the PGA Tour (the "Tour") violate Section 2 of the Sherman Act by applying Sections VII.E. and VII.C to unlawfully punish golfers to thwart LIV Golf's competitive entry, and therefore no punishment for purportedly violating those provisions may issue;

c. Provisions of Sections V.A.2, V.A.3, and V.B.1.b enable Commissioner Monahan to unlawfully control what independent contractor-golfers do when they are not playing on the PGA Tour (the "Tour"), and thus no punishment for purportedly violating those provisions may issue;

d. The Tour has unlawfully agreed with other entities in the purported golf "ecosystem," including the European Tour, to establish a group boycott to prevent LIV Golf from succeeding and has targeted its Regulations to

impermissibly punish golfers to carry out its coordinated dealings with others in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1;

e. Commissioner Monahan has violated the Tour's purported nonprofit purpose and violated his fiduciary duties to the Tour and its members by punishing golfers in this way;

f. There was patent injustice and a lack of fair process because Commissioner Monahan cannot be impartial in his determination whether to sanction golfers because he has engaged in a two-year vendetta against prospective and new competitor professional golf promoter(s) and golfers are being punished for participating in a competitive promoter's events;

g. There was injustice and a lack of fair process because the Regulations' Disciplinary Process is procedurally and substantively unconscionable; and

h. In the alternative, the sanction imposed by Commissioner Monahan is grossly disproportionate to the seriousness of the alleged breaches of the Regulations that the Tour contends the players committed.

i. In their appeal letters, Player Plaintiffs indicated their belief that their suspensions would be abated pending appeal of their suspensions.

207. While some of the Player Plaintiffs' appeals of the Commissioner's disciplinary action were pending, on July 23, 2022, Mr. Levinson sent them a letter informing that: (1) the PGA Tour Commissioner believed they violated the Conflicting Events and Media Rights Regulations (Article V, Sections A.2 and B.1) by participating in the June 30 – July 2, 2022 LIV Golf Invitational Portland event; (2) the PGA Tour Commissioner imposed a Major Penalty of suspension from participation in any PGA Tour-affiliated tournaments, including PGA Tour, PGA Tour Champions, Korn Ferry Tour, PGA Tour Latinoamérica, and PGA Tour Canada, and a suspension of their privileges at Tournament Players Clubs, for a period ending no earlier than March 31, 2024 (an additional year suspension), at which time they may seek in writing to have their suspension lifted; (3) the PGA Tour Commissioner may impose further disciplinary action for any additional violation of the Regulations; and (4) they may appeal the sanctions by written notice to the PGA Tour Commissioner within 14 days of the letter.

In other words, the PGA Tour Commissioner unilaterally imposed further sanctions—a full additional year of suspension for playing in a second LIV Golf tournament—while the appeal of the first Notice of Disciplinary Action was still pending.

208. On July 25, 2022, the Tour informed the Player Advisory Council that golfers who were suspended for playing in LIV Golf would not be permitted to play in the FedEx Cup, even though some of their appeals of the suspensions were pending and should have been abated under the Tour's Regulations.

209. On July 27, 2022, Commissioner Monahan referred some of the Player Plaintiffs' appeals to the Appeals Committee and requested that any materials in support of appeal be submitted by August 10, 2022. In response, Plaintiff Gooch requested confirmation that the Tour would abate their suspensions pending appeal to the Appeals Committee. In response, Commissioner Monahan indicated he would not abate the Player Plaintiffs' suspensions pending appeal.

210. On July 29, 2022, Mr. Levinson informed some Player Plaintiffs that the Tour would no longer send them Notice of Disciplinary Inquiry letters for "ongoing violations." The Tour thus chose to abandon its disciplinary process.

211. And, then on August 2, 2022, the Tour informed Mr. Gooch that the Tour would not abate suspensions pending appeals in violation of the Tour's regulations.

212. The Tour historically abated players' suspensions pending their appeal of their suspensions, consistent with Section VII.E.2 of the Regulations.

213. The Player Plaintiffs' suspensions were a critical means employed by the Tour to achieve its anticompetitive end. Punishing the players is essential to the scheme to eliminate competition in the market. Absent participants in elite professional golf events, no nascent league can enter the market. By suspending the Player Plaintiffs and threatening to suspend other players, the Tour endeavored to eliminate competition.

Specific Player Plaintiffs' PGA Tour Disciplinary Proceedings and Harm

214. **Phil Mickelson:** The Tour's anticompetitive scheme is apparent from the disciplinary action levied against Plaintiff Mickelson. On March 22, 2022, the Commissioner suspended Plaintiff Mickelson (with the opportunity to apply for reinstatement in May of 2022) for, among other alleged

reasons, "attempting to recruit players to join [LIV Golf]." Following an appeal, the appeals committee (a three-person committee comprised of members of the Tour Policy Board) affirmed the Commissioner's two-month suspension. On June 20, 2022, Mr. Mickelson applied for reinstatement from the two-month suspension. The Tour denied his request, stating that Plaintiff Mickelson violated Tour regulations by participating in the LIV Golf London Invitational. In addition to denying his request for reinstatement, the Tour extended Plaintiff Mickelson's suspension, forbidding him from seeking reinstatement to play professional golf with the Tour until March 31, 2023. While Plaintiff Mickelson was suspended from tournament play, the Tour continued to levy suspensions. On July 23, 2022, the Tour imposed additional sanctions on him for participating in the LIV Golf Invitational in Portland. Specifically, the Tour extended Plaintiff Mickelson's suspension once again, deferring even the mere opportunity to apply for reinstatement until after March 31, 2024.

215. Mr. Mickelson's unlawful two-year suspension from the PGA Tour has caused him irreparable professional harm, as well as financial, and commercial harm. The Tour's unlawful suspensions are denying Mr. Mickelson the right he has earned to play in events on the Tour, to earn compensation playing on the Tour, and to have the opportunities that come with such play. The Tour's suspension has denied Mr. Mickelson the right to the platform and the public exposure provided by playing on the Tour. The Tour's suspension has denied Mr. Mickelson the opportunity to hone and maintain his golf game by playing professional golf in the tournaments that he would choose to play. The Tour's suspension has denied Mr. Mickelson access to play professional golf before his fans via live attendance and video broadcast of Tour events. The Tour's unlawful conduct cost Plaintiff Mickelson endorsement deals and sponsorships. Notably, the Tour is the only golf tour shown regularly on broadcast television in the United States, and it earns vastly more in sponsorship, advertising, and broadcast revenue than any other golf tour. The Tour's unlawful conduct eliminated Plaintiff Mickelson's opportunity to earn up to $10 million annually in the Player Impact Program, a program that measures player impact by, among other things, calculating the player's Nielsen score (how often a player is featured during PGA Tour tournament broadcasts). The Tour's suspension has denied Mr. Mickelson the opportunity to earn FedEx Cup rankings and OWGR rankings. The Tour's suspensions have denied Mr. Mickelson the opportunity to earn deferred compensation pursuant to the

PGA Tour Player Retirement Plan—which is his right as a member of the Tour and which he earns for each tournament cut he makes. The Tour's unlawful suspensions have damaged Mr. Mickelson's goodwill and caused him substantial reputational harm. The Tour's unlawful Conflicting Events and Media Rights Regulations have denied Mr. Mickelson competition for his services for years, have depressed his earnings, and have decreased output of professional golf earning opportunities. The Tour's unlawful Conflicting Events and Media Rights Regulations Tour's unlawful control of Mr. Mickelson and his use of his media rights are causing him irreparable. financial and commercial harm that have denied him income and playing opportunities in the past and as long as the Regulations that give the Tour such purported control remain in place, Mr. Mickelson will be financially and irreparably harmed. As a lifetime member of the Tour, Mr. Mickelson is particularly harmed by the Tour wrongfully taking away what he has rightfully earned—opportunity to play in Tour events for the remainder of his golfing career.

216. The Tour's unlawful conduct has also denied Mr. Mickelson the opportunity to play in PGL tournaments and to earn compensation he foreseeably would have received competing in PGL tournaments.

217. The Tour's unlawful conduct has harmed Mr. Mickelson by denying him access to fans, viewers and playing opportunities in Tour events.

218. **Talor Gooch.** On June 9, 2022, the Tour unlawfully suspended Mr. Gooch on an indefinite basis from playing on the Tour. On June 30, 2022, the Tour unlawfully suspended Mr. Gooch from playing on the Tour (or any affiliated tours) through at least March 31, 2023. On July 23, 2022, the Tour unlawfully extended Mr. Gooch's suspension through at least March 31, 2024. The PGA Tour has threatened to impose further disciplinary sanction on Mr. Gooch if he continues to play in LIV Golf events when he is not playing on the Tour.

219. Mr. Gooch's unlawful two-year suspension from the PGA Tour has caused him irreparable professional harm, as well as financial, and commercial harm. The Tour's unlawful suspensions are denying Mr. Gooch the right he has earned to play in events on the Tour, to earn compensation playing on the Tour, and to have the opportunities that come with such play. The Tour's suspension has denied Mr. Gooch the strong chance to qualify for the 2023 Major Championships by

placing in the Top 30 of the 2022 FedEx Cup Rankings. The Tour's suspension has denied Mr. Gooch the right to the platform and the public exposure provided by playing on the Tour. The Tour's suspension has denied Mr. Gooch the opportunity to hone and maintain his golf game by playing professional golf in the tournaments that he would choose to play. The Tour's suspension has denied Mr. Gooch access to play professional golf before his fans via live attendance and video broadcast of Tour events. The Tour's unlawful conduct cost Plaintiff Gooch endorsement deals and sponsorships. Notably, the Tour is the only golf tour shown regularly on broadcast television in the United States, and it earns vastly more in sponsorship, advertising, and broadcast revenue than any other golf tour. The Tour's unlawful conduct eliminated Plaintiff Gooch's opportunity to earn up to $10 million annually in the Player Impact Program, a program that measures player impact by, among other things, calculating the player's Nielsen score (how often a player is featured during PGA Tour tournament broadcasts). The Tour's suspension has denied Mr. Gooch the opportunity to earn FedEx Cup rankings and OWGR rankings. The Tour's suspensions have denied Mr. Gooch the opportunity to earn deferred compensation pursuant to the PGA Tour Player Retirement Plan—which is his right as a member of the Tour and which he earns for each tournament cut he makes. The Tour's unlawful suspensions have damaged Mr. Gooch's goodwill and caused him substantial reputational harm. The Tour's unlawful Conflicting Events and Media Rights Regulations have denied Mr. Gooch competition for his services for years, have depressed his earnings, and have decreased output of professional golf earning opportunities. The Tour's unlawful Conflicting Events and Media Rights Regulations Tour's unlawful control of Mr. Gooch and his use of his media rights are causing him irreparable, financial and commercial harm that have denied him income and playing opportunities in the past and as long as the Regulations that give the Tour such purported control remain in place. Mr. Gooch will be financially and irreparably harmed.

220. The Tour's unlawful conduct has also denied Mr. Gooch the opportunity to play in PGL tournaments and to earn compensation he foreseeably would have received competing in PGL tournaments.

221. The Tour's unlawful conduct has harmed Mr. Gooch by denying him access to fans, viewers and playing opportunities in Tour events.

222. **Hudson Swafford.** On June 9, 2022, the Tour unlawfully suspended Mr. Swafford on an indefinite basis from playing on the Tour. On June 29, 2022, the Tour unlawfully suspended Mr. Swafford from playing on the Tour (or any affiliated tours) through at least March 31, 2023. On July 23, 2022, the Tour unlawfully extended Mr. Swafford's suspension through at least March 31, 2024. The PGA Tour has threatened to impose further disciplinary sanction on Mr. Swafford if he continues to play in LIV Golf events when he is not playing on the Tour.

223. Mr. Swafford's unlawful two-year suspension from the PGA Tour has caused him irreparable professional harm, as well as financial, and commercial harm. The Tour's unlawful suspensions are denying Mr. Swafford the right he has earned to play in events on the Tour, to earn compensation playing on the Tour, and to have the opportunities that come with such play. The Tour's suspension has denied Mr. Swafford the chance to qualify for the 2023 Major Championships by placing in the Top 30 of the 2022 FedEx Cup Rankings. The Tour's suspension has denied Mr. Swafford the strong chance to qualify for the 2023 premier Invitationals on the Tour by placing in the Top 70 of the 2022 FedEx Cup Rankings. The Tour's suspension has denied Mr. Swafford the right to the platform and the public exposure provided by playing on the Tour. The Tour's suspension has denied Mr. Swafford the opportunity to hone and maintain his golf game by playing professional golf in the tournaments that he would choose to play. The Tour's suspension has denied Mr. Swafford access to play professional golf before his fans via live attendance and video broadcast of Tour events. The Tour's unlawful conduct cost Plaintiff Swafford endorsement deals and sponsorships. Notably, the Tour is the only golf tour shown regularly on broadcast television in the United States, and it earns vastly more in sponsorship, advertising, and broadcast revenue than any other golf tour. The Tour's unlawful conduct eliminated Plaintiff Swafford's opportunity to earn up to $10 million annually in the Player Impact Program, a program that measures player impact by, among other things, calculating the player's Nielsen score (how often a player is featured during PGA Tour tournament broadcasts). The Tour's suspension has denied Mr. Swafford the opportunity to earn FedEx Cup rankings and OWGR rankings. The Tour's suspensions have denied Mr. Swafford the opportunity to earn deferred compensation pursuant to the PGA Tour Player Retirement Plan—which is his right as a member of the Tour and which he earns for each tournament cut he makes. The Tour's unlawful suspensions have

damaged Mr. Swafford's goodwill and caused him substantial reputational harm. The Tour's unlawful Conflicting Events and Media Rights Regulations have denied Mr. Swafford competition for his services for years, have depressed his earnings, and have decreased output of professional golf earning opportunities. The Tour's unlawful Conflicting Events and Media Rights Regulations Tour's unlawful control of Mr. Swafford and his use of his media rights are causing him irreparable, financial and commercial harm that have denied him income and playing opportunities in the past and as long as the Regulations that give the Tour such purported control remain in place, Mr. Swafford will be financially and irreparably harmed.

224. The Tour's unlawful conduct has also denied Mr. Swafford the opportunity to play in PGL tournaments and to earn compensation he foreseeably would have received competing in PGL tournaments.

225. The Tour's unlawful conduct has harmed Mr. Swafford by denying him access to fans, viewers and playing opportunities in Tour events.

226. **Matt Jones.** On June 9, 2022, the Tour unlawfully suspended Mr. Jones on an indefinite basis from playing on the Tour. On June 30, 2022, the Tour unlawfully suspended Mr. Jones from playing on the Tour (or any affiliated tours) through at least March 31, 2023. On July 23, 2022, the Tour unlawfully extended Mr. Jones's suspension through at least March 31, 2024. The PGA Tour has threatened to impose further disciplinary sanction on Mr. Jones if he continues to play in LIV Golf events when he is not playing on the Tour.

227. Mr. Jones's unlawful two-year suspension from the PGA Tour has caused him irreparable professional harm, as well as financial, and commercial harm. The Tour's unlawful suspensions are denying Mr. Jones the right he has earned to play in events on the Tour, to earn compensation playing on the Tour, and to have the opportunities that come with such play. The Tour's suspension has denied Mr. Jones the chance to qualify for the 2023 Major Championships by placing in the Top 30 of the 2022 FedEx Cup Rankings. The Tour's suspension has denied Mr. Jones the strong chance to qualify for the 2023 premier Invitationals on the Tour by placing in the Top 70 of the 2022 FedEx Cup Rankings. The Tour's suspension has denied Mr. Jones the right to the platform and the public exposure provided by playing on the Tour. The Tour's suspension has denied Mr. Jones the

opportunity to hone and maintain his golf game by playing professional golf in the tournaments that he would choose to play. The Tour's suspension has denied Mr. Jones access to play professional golf before his fans via live attendance and video broadcast of Tour events. The Tour's unlawful conduct cost Plaintiff Jones endorsement deals and sponsorships. Notably, the Tour is the only golf tour shown regularly on broadcast television in the United States, and it earns vastly more in sponsorship, advertising, and broadcast revenue than any other golf tour. The Tour's unlawful conduct eliminated Plaintiff Jones's opportunity to earn up to $10 million annually in the Player Impact Program, a program that measures player impact by, among other things, calculating the player's Nielsen score (how often a player is featured during PGA Tour tournament broadcasts). The Tour's suspension has denied Mr. Jones the opportunity to earn FedEx Cup rankings and OWGR rankings. The Tour's suspensions have denied Mr. Jones the opportunity to earn deferred compensation pursuant to the PGA Tour Player Retirement Plan—which is his right as a member of the Tour and which he earns for each tournament cut he makes. The Tour's unlawful suspensions have damaged Mr. Jones's goodwill and caused him substantial reputational harm. The Tour's unlawful Conflicting Events and Media Rights Regulations have denied Mr. Jones competition for his services for years, have depressed his earnings, and have decreased output of professional golf earning opportunities. The Tour's unlawful Conflicting Events and Media Rights Regulations Tour's unlawful control of Mr. Jones and his use of his media rights are causing him irreparable, financial and commercial harm that have denied him income and playing opportunities in the past and as long as the Regulations that give the Tour such purported control remain in place, Mr. Jones will be financially and irreparably harmed.

228. The Tour's unlawful conduct has also denied Mr. Jones the opportunity to play in PGL tournaments and to earn compensation he foreseeably would have received competing in PGL tournaments.

229. The Tour's unlawful conduct has harmed Mr. Jones by denying him access to fans, viewers and playing opportunities in Tour events.

230. **Bryson DeChambeau.** On June 30, 2022, the Tour unlawfully suspended Mr. DeChambeau on an indefinite basis from playing on the Tour. On July 8, 2022, the Tour unlawfully suspended Mr. DeChambeau from playing on the Tour (or any affiliated tours) through at least March

31, 2023. The PGA Tour has threatened to impose further disciplinary sanction on Mr. DeChambeau if he continues to play in LIV Golf events when he is not playing on the Tour. On July 29, 2022, the Tour sent notice to Mr. DeChambeau that it was sanctioning him for talking to other Tour members about the positive experience he had had with LIV Golf.

231. Mr. DeChambeau's unlawful suspension from the PGA Tour has caused him irreparable professional harm, as well as financial, and commercial harm. The Tour's unlawful suspensions are denying Mr. DeChambeau the right he has earned to play in events on the Tour, to earn compensation playing on the Tour, and to have the opportunities that come with such play. The Tour's suspension has denied Mr. DeChambeau the right to the platform and the public exposure provided by playing on the Tour. The Tour's suspension has denied Mr. DeChambeau the opportunity to hone and maintain his golf game by playing professional golf in the tournaments that he would choose to play. The Tour's suspension has denied Mr. DeChambeau access to play professional golf before his fans via live attendance and video broadcast of Tour events. The Tour's unlawful conduct cost Plaintiff DeChambeau endorsement deals and sponsorships. Notably, the Tour is the only golf tour shown regularly on broadcast television in the United States, and it earns vastly more in sponsorship, advertising, and broadcast revenue than any other golf tour. The Tour's unlawful conduct eliminated Plaintiff DeChambeau's opportunity to earn up to $10 million annually in the Player Impact Program, a program that measures player impact by, among other things, calculating the player's Nielsen score (how often a player is featured during PGA Tour tournament broadcasts). The Tour's suspension has denied Mr. DeChambeau the opportunity to earn FedEx Cup rankings and OWGR rankings. The Tour's suspensions have denied Mr. DeChambeau the opportunity to earn deferred compensation pursuant to the PGA Tour Player Retirement Plan—which is his right as a member of the Tour and which he earns for each tournament cut he makes. The Tour's unlawful suspensions have damaged Mr. DeChambeau's goodwill and caused him substantial reputational harm. The Tour's unlawful Conflicting Events and Media Rights Regulations have denied Mr. DeChambeau competition for his services for years, have depressed his earnings, and have decreased output of professional golf earning opportunities. The Tour's unlawful Conflicting Events and Media Rights Regulations Tour's unlawful control of Mr. DeChambeau and his use of his media rights are causing him irreparable, financial and

commercial harm that have denied him income and playing opportunities in the past and as long as the Regulations that give the Tour such purported control remain in place, Mr. DeChambeau will be financially and irreparably harmed.

232. The Tour's unlawful conduct has also denied Mr. DeChambeau the opportunity to play in PGL tournaments and to earn compensation he foreseeably would have received competing in PGL tournaments.

233. The Tour's unlawful conduct has harmed Mr. DeChambeau by denying him access to fans, viewers and playing opportunities in Tour events.

234. **Ian Poulter**. On June 9, 2022, the Tour unlawfully suspended Mr. Poulter on an indefinite basis from playing on the Tour. On June 30, 2022, the Tour unlawfully suspended Mr. Jones from playing on the Tour (or any affiliated tours) through at least March 31, 2023. On July 23, 2022, the Tour unlawfully extended Mr. Poulter's suspension through at least March 31, 2024. The PGA Tour has threatened to impose further disciplinary sanction on Mr. Poulter if he continues to play in LIV Golf events when he is not playing on the Tour.

235. Mr. Poulter's unlawful two-year suspension from the PGA Tour has caused him irreparable professional harm, as well as financial, and commercial harm. The Tour's unlawful suspensions are denying Mr. Poulter the right he has earned to play in events on the Tour, to earn compensation playing on the Tour, and to have the opportunities that come with such play. The Tour's suspension has denied Mr. Poulter the opportunity to participate in events that would have permitted him the chance to qualify for the Tour in 2023. The Tour's suspension has denied Mr. Poulter the right to the platform and the public exposure provided by playing on the Tour. The Tour's suspension has denied Mr. Poulter the opportunity to hone and maintain his golf game by playing professional golf in the tournaments that he would choose to play. The Tour's suspension has denied Mr. Poulter access to play professional golf before his fans via live attendance and video broadcast of Tour events. The Tour's unlawful conduct cost Plaintiff Poulter endorsement deals and sponsorships. Notably, the Tour is the only golf tour shown regularly on broadcast television in the United States, and it earns vastly more in sponsorship, advertising, and broadcast revenue than any other golf tour. The Tour's unlawful conduct eliminated Plaintiff Poulter's opportunity to earn up to $10 million annually in the Player

Impact Program, a program that measures player impact by, among other things, calculating the player's Nielsen score (how often a player is featured during PGA Tour tournament broadcasts). The Tour's suspension has denied Mr. Poulter the opportunity to earn FedEx Cup rankings and OWGR rankings. The Tour's suspensions have denied Mr. Poulter the opportunity to earn deferred compensation pursuant to the PGA Tour Player Retirement Plan—which is his right as a member of the Tour and which he earns for each tournament cut he makes. The Tour's unlawful suspensions have damaged Mr. Poulter's goodwill and caused him substantial reputational harm. The Tour's unlawful Conflicting Events and Media Rights Regulations have denied Mr. Poulter competition for his services for years, have depressed his earnings, and have decreased output of professional golf earning opportunities. The Tour's unlawful Conflicting Events and Media Rights Regulations Tour's unlawful control of Mr. Poulter and his use of his media rights are causing him irreparable, financial and commercial harm that have denied him income and playing opportunities in the past and as long as the Regulations that give the Tour such purported control remain in place. Mr. Poulter will be financially and irreparably harmed.

236. The Tour's unlawful conduct has also denied Mr. Poulter the opportunity to play in PGL tournaments and to earn compensation he foreseeably would have received competing in PGL tournaments.

237. The Tour's unlawful conduct has harmed Mr. Poulter by denying him access to fans, viewers and playing opportunities in Tour events.

238. **Peter Uihlein**. On June 9, 2022, the Tour unlawfully suspended Mr. Uihlein on an indefinite basis from playing on the Tour, the Korn Ferry Tour and any affiliated tours. On June 30, 2022, the Tour unlawfully suspended Mr. Uihlein from playing on the Tour, the Korn Ferry Tour, (or any affiliated tours) through at least March 31, 2023. On July 23, 2022, the Tour unlawfully extended Mr. Uihlein's suspension through at least March 31, 2024. The PGA Tour has threatened to impose further disciplinary sanction on Mr. Uihlein if he continues to play in LIV Golf events when he is not playing on the Tour or the Korn Ferry Tour.

239. Mr. Uihlein's unlawful two-year suspension from the PGA Tour and its affiliated tours, including but not limited to the Korn Ferry Tour, has caused him irreparable professional harm, as well

as financial, and commercial harm. The Tour's unlawful suspensions are denying Mr. Uihlein the right he has earned to play in events on the Korn Ferry Tour, to earn compensation playing on the Korn Ferry Tour, and to have the opportunities that come with such play. The Tour's suspension has denied Mr. Uihlein the opportunity to hone and maintain his golf game by playing professional golf in the tournaments that he would choose to play. The Tour's unlawful suspensions are denying Mr. Uihlein to the right he has earned to participate in the Korn Ferry Tour Championship Series finals (three events) to have a chance to earn a PGA Tour card for the 2022-2023 season. If Mr. Uihlein is prohibited from playing that series then he will have no other way to qualify for the PGA Tour next season. The Tour's suspension has denied Mr. Uihlein the right to the platform and the public exposure provided by playing on the Korn Ferry Tour (and possibly the Tour). The Tour's suspension has denied Mr. Uihlein access to play professional golf before his fans via live attendance and video broadcast of Korn Ferry Tour events (and possibly the Tour events). The Tour's suspension has denied Mr. Uihlein the opportunity to earn Korn Ferry season rankings (and possibly FedEx Cup rankings next season).and OWGR rankings. The Tour's unlawful suspensions have damaged Mr. Uihlein's goodwill and caused him substantial reputational harm. The Tour's unlawful Conflicting Events and Media Rights Regulations, which apply to Korn Ferry Tour members just as they apply to Tour member, have denied Mr. Uihlein competition for his services for years, have depressed his earnings, and have decreased output of professional golf earning opportunities. The Tour's unlawful Conflicting Events and Media Rights Regulations Tour's unlawful control of Mr. Uihlein and his use of his media rights are causing him irreparable, financial and commercial harm that have denied him income and playing opportunities in the past and as long as the Regulations that give the Tour such purported control remain in place, Mr. Uihlein will be financially and irreparably harmed.

240. The Tour's unlawful conduct has also denied Mr. Uihlein the opportunity to play in PGL tournaments and to earn compensation he foreseeably would have received competing in PGL tournaments.

241. The Tour's unlawful conduct has harmed Mr. Uihlein by denying him access to fans, viewers and playing opportunities in Tour events.

Tour Threatens Small Businesses and Vendors To Boycott LIV Golf

242. As part of its efforts to foreclose competition from LIV Golf and to foreclose competition for Plaintiffs' services, the Tour has also threatened companies and individuals in the golf and sports production industry that they will be blacklisted from working with the Tour if they work with LIV Golf. As a result of these unlawful threats, LIV Golf has suffered (and will continue to suffer) financial injuries because its offerings in the marketplace have been impaired and because it has been denied the opportunity to work with the third parties of its choice on terms that could be reached in a fair and open marketplace. Furthermore, this conduct threatens ongoing and irreparable harm to LIV Golf, as the headwinds created by the Tour's anticompetitive conduct threaten LIV Golf's competitive viability.

243. In January 2022, LIV Golf was negotiating with a tent vendor, Arena Americas, about providing tents for LIV Golf events. Arena Americas indicated that it was interested in working with LIV Golf, and LIV Golf engaged Arena Americas for its LIV Golf Invitational Series. However, Arena Americas subsequently informed LIV Golf that it could not work with LIV Golf because the Tour had told Arena Americas that it would cease doing business with Arena Americas if it worked with LIV Golf.

244. LIV Golf had contracted with a technology company to provide live scoring during LIV Golf events for fans watching and following along on the Internet. On March 23, 2022, LIV Golf received an email from that technology company that it needed to rescind the contract with LIV Golf due to a business issue and needed to discuss the issue with its attorney. The company later represented to LIV Golf that representatives from the PGA Tour had threatened that the Tour would cease doing business with it if it provided LIV Golf with support. The company also told LIV Golf that the PGA Tour has a "blacklist" for any vendor that works with LIV Golf. A Tour representative called the company and threatened to blacklist the company if it worked with LIV Golf.

245. LIV Golf was in negotiation with Top Tracer to license its shot-tracing technology for use during LIV Golf broadcasts. The Chief Executive Officer of Top Tracer was engaged with LIV Golf on multiple calls, expressed major interest in providing LIV Golf with a license to Top Tracer technology and developing a broader relationship to deploy and develop innovative products. Suddenly, however, Top Tracer ceased communication with LIV Golf. After a period of radio silence,

Top Tracer informed LIV Golf that it would not be putting itself up for the potential business with LIV Golf.

246. LIV Golf was in negotiation with Levelwear athletic apparel for LIV Golf volunteer apparel for LIV Golf Invitational Series event staffing. On March 25, 2022, Levelwear informed LIV that it would not sell LIV Golf any apparel because it did not want to jeopardize its relationship with the Tour.

247. LIV Golf reached out to numerous producer candidates, many of whom are independent contractors, who have communicated to LIV Golf that NBC and Golf Channel personnel have informed all producers that they will not be hired or renewed for any work with NBC or Golf Channel moving forward if they work with LIV Golf.

248. Senior programming executives at CBS revealed to LIV Golf that they cannot touch LIV Golf even for consideration due to its relationship with the PGA Tour.

249. LIV Golf tried to retain the Endeavor Company, which includes IMG, IMG Arena, IMG Media and WME, and despite interest in working with LIV Golf, they have told LIV Golf they cannot work with it because Tour Commissioner Monahan has impressed upon Ari Emmanuel (Endeavor CEO) and Mark Shapiro (Endeavor President) that Endeavor cannot work with LIV Golf.

250. Other vendors, like Intersport (event management company) and Aggreko (Power/HVAC) engaged with LIV Golf but backed out without explanation, likely indicating that they were subjected to pressure from the PGA Tour similar to that expressed by other third-party vendors.

251. LIV Golf negotiated with Provision Events, an event management company. On February 15, 2020 Provision Events told LIV Golf, "we feel like we can provide exactly what you need and our ambition would be to become your activation partner." Provision Events and LIV Golf corresponded regarding scope and arranged for a meeting to occur in March 2022. On March 10, 2022, Provision Events emailed LIV Golf and informed LIV Golf without explanation that it could no longer work with LIV Golf.

252. To supply drug testing procedures for the competing athletes, LIV Golf contacted Drug Free Sport. A Drug Free Sport representative informed LIV Golf that it would have to take the prospect of doing business with LIV Golf to his boss because of Drug Free Sport's involvement with the Tour,

but stated that "we do business with other organizations. not sure why this would be any different." After checking with the "boss," the Drug Free Sport representative responded to LIV Golf, "I've spoken to our CEO and given current headwinds in our space, we won't be able to engage at this time."

253. LIV Golf tried to negotiate with a golf shot technology company, Hawk Eye. Chris Wary of Hawk Eye emailed LIV Golf that "[u]pon careful consideration and following internal discussions, regrettably, at this point in time, we are not in a position to proceed any further with the potential delivery of these technologies due to conflict of interest with our existing relationships." The Tour is a Hawk Eye client.

254. LIV Golf tried to schedule events at a premier golf course, Sentosa Golf Club. Bob Tan, Chairman of Sentosa Golf Club, informed LIV Golf that Dominic Wall of the R&A called him and informed him that Sentosa Golf Club would be excluded and shunned by the rest of the world of golf if it worked with LIV Golf.

255. LIV Golf tried to engage Ticketmaster for ticketing at its events. Ticketmaster was prepared to work with LIV Golf until Ticketmaster pulled out of helping LIV Golf with ticket sales in response to pressure from the PGA Tour.

256. LIV Golf tried to engage Pro Secrets, a yardage book company. Michael Etherington of Pro Secrets informed LIV Golf that the PGA Tour had asked Pro Secrets to not work with LIV Golf.

257. LIV Golf tried to engage a company known as Cueto to provide software for organizing event volunteers. Cueto was prepared to work with LIV Golf until Cueto informed LIV Golf that it cannot work with LIV Golf "because of the threat it received from the PGA Tour."

258. LIV Golf tried to order custom hats through American Needle hat company, and American needle informed LIV Golf that it does not want to do business with LIV Golf because of its relationship with the PGA Tour and Augusta National.

259. LIV Golf tried to enter into a business relationship with Dick's Sporting Goods. In response, Dick's Sporting Goods informed LIV Golf that "[g]iven our relationship with the PGA Tour and our Tournament [PGA Tour Champions tournament], [] [Dick's Sporting Goods representatives] agree it's best to pass right now."

260. The PGA Tour threatened numerous golf courses with adverse consequences if they

hosted LIV Golf events. LIV Golf secured commitments from pristine high level courses, but the PGA Tour and the R&A retaliated against the owners of the venues with which LIV Golf contracted. The R&A punished one golf course owner by adopting a policy that it would not host The Open at his course in the future because he is giving LIV Golf "a platform," and as the R&A is "firmly on the side of the traditional Tours [PGA Tour and European Tour]." The Tour informed the same golf course owner that it would never work with the Tour again because it had worked with LIV Golf.

261. In July 2022, LIV Golf's branding team, Czarnowski, terminated its relationship with LIV Golf due to pressure from the PGA Tour.

262. The Tour threatened sponsors that they would lose opportunities to partner with the Tour if they worked with LIV Golf.

Relevant Markets and the PGA Tour's Monopoly Position

263. The PGA Tour is a monopolist and/or a monopsonist in two relevant product markets: (1) the market for the services of professional golfers for elite golf events, and (2) the market for the promotion of elite professional golf events.

264. The relevant geographic market for each product market is national; in the alternative, the market for each product market is global in scope.

The Market for Services of Professional Golfers for Elite Golf Events

265. The first relevant product market is the services of professional golfers for elite golf events. A hypothetical monopsonist in this product market would have the power to suppress compensation for golfers substantially below competitive levels for a sustained period of time, because professional golfers who sell their services for elite golf events have no reasonable substitute to which they could plausibly turn in the event of a suppression of compensation below competitive levels. For example, non-elite golf events do not offer the level of purse sizes, Major qualifying opportunities, public platforms, sponsorship opportunities, OWGR ranking opportunities, or the other attributes of elite events that would make them viable options for professional golfers in the event that a hypothetical monopsonist controlled the market for the purchase of services of elite golf events. This is demonstrated in the evidence surrounding the PGA Tour, which has been able to impose sub-competitive compensation for elite golf events without losing a meaningful number of golfers to

another type of sport or event.

266. The relevant geographic market for the product market is national; in the alternative, the market for each product is global in scope. A hypothetical monopsonist in the purchase of services of professional golfers for elite events in the United States would have the power to suppress compensation for golfers substantially below competitive levels for a sustained period of time, because professional golfers would be unlikely to leave the country to pursue their profession in sufficient numbers to make sub-competitive compensation unprofitable for a hypothetical monopsonist in the United States. This is also demonstrated in the evidence surrounding the PGA Tour, which has been able to impose sub-competitive compensation for its elite golf events in the United States without losing a meaningful number of golfers to golf tours in other countries. In the alternative, the relevant geographic market is global. Under either formulation, the Tour has unquestioned monopsony power.

267. Until LIV Golf's nascent entry, the Tour was the only viable buyer of professional golfer services in the relevant market for the purchase of services of professional golfers for elite golf events because there is no reasonable substitute for playing on the Tour. The European Tour's participation in the market is limited to events it co-sanctions with the Tour and thus, while it could be a purchaser of services of professional golfers for elite events in the United States, it has entered into an agreement with the Tour to not even try to compete with it. And, in the alternative global market, the European Tour is not a viable alternative to the Tour because it cannot compete with the Tour on purse size, Major qualifying opportunities, OWGR rankings, public platforms, sponsorship opportunities and other benefits, and, regardless, it has entered into an agreement not to compete with the Tour.

268. Until LIV Golf's nascent entry, the Tour offered earnings opportunities for professional golfers that are many times greater than any other tour in the world through far greater prize pools and opportunities to secure sponsorships. The Tour offers far greater opportunities for recognition and exposure, on-course competition, and opportunity to accrue OWGR points than any other tour in the world. Until LIV Golf's nascent entry, virtually every golfer who qualifies for membership on the PGA Tour joined it. Until LIV Golf's nascent entry, all of the top 50 golfers in the world were members of the PGA Tour.

269. The Tour's monopsony control of the purchase of services of professional golfers for

elite golf events allows it to compensate players at substantially lower levels than professional golfers would earn in a competitive market, without risk of losing players to other promoters.

270. The Tour has used its monopsony power to impose anticompetitive regulations, notably the Media Rights and Conflicting Events Regulations, which it forces on all of its Members and which have the intent and effect of excluding competition.

271. Until LIV Golf's nascent entry, the Tour controlled the overwhelming share of the relevant market, as nearly all of the elite professional golfers in the United States (and the world) were members of the Tour. Even after LIV Golf's entry—which the Tour's Commissioner has characterized as "irrational"—the Tour's share of the relevant market is dominant, as measured by the Tour's share of purchases in the services market for elite professional golf events. Indeed, all of the top golfers in the world, other than those whom the Tour suspended, are locked into the PGA Tour. The Tour's monopsony power is also reflected in the bonus pool, increased purses, new marquee high-purse events that the Tour established in response to the threat of entry by LIV Golf. The bonus pool and increased purses are direct evidence of the Tour's monopsony power, as the Tour significantly raised its prices in response to LIV Golf's competitive entry. This evidence also shows that compensation for professional golfers for elite events would be significantly greater in a competitive labor market.

272. The Tour excludes competition for independent contractor players to sell their services to others and manage their own name, image, and likeness because the Tour uses its market power to prohibit them from doing so. The Tour's Media Rights and Conflicting Events Regulations prevent competitors from acquiring the services of Tour members. And even when a rival is able to get Tour members to play in its events, the Media Rights Regulation excludes competition because it prevents the competing event from securing broadcast partners for its events. That the Tour is able to require Player Plaintiffs and the Tour's other members to agree to these rules without guaranteed compensation for doing so is powerful evidence of the Tour's monopsony power.

273. The Majors are not substitutes for the PGA Tour in the market for services of elite professional golfers. The Tour schedules its tournaments around the Majors and most qualifying opportunities for the Majors are derived from the players' play in the Tour.

The Market for the Promotion of Elite Professional Golf

274. The second relevant product market is the market for the promotion of elite professional golf events. A hypothetical monopolist in this product market would have the power to raise prices substantially above competitive levels for a sustained period of time, because advertisers, sponsors, broadcasters, and fans would not be able to turn to reasonable substitutes in sufficient volumes to make it unprofitable for the hypothetical monopolist to charge prices above competitive levels. This is because the promotion of elite professional golf is uniquely attractive to fans of professional golf and it is uniquely valuable for sponsors, advertisers, broadcast partners, venues, and others who seek to market to fans of elite professional golf.

275. The Tour represents to prospective advertisers that it offers the "most valuable audience in sports." According to its Tour's marketing materials, its audience of golf fans is (a) "affluent," in that it is "55% more likely to have household net worth of $1M+"; (b) "educated," in that it is "43% more likely to have a master's degree"; and (c) comprised of "influencers," in that it is "63% more likely to be top management or C-level." The Tour is differentiated from other sports or entertainment products by the access it offers to such a valuable audience. Because elite golf events offer a unique opportunity to reach this valuable audience, TV advertisers and event sponsors would be expected to continue purchasing elite golf events even with a small but significant nontransitory monopoly premium in the cost of doing so.

276. Furthermore, because the high degree of elite-level competition draws fans to watch elite golf events, the sponsors and TV broadcasters that pay for those events will not be able to reach those fans through events that do not provide similar elite-level competition. Thus, a hypothetical monopolist supplier of elite events (of the sort provided by the Tour) would not be expected to see a material diversion of sponsor or TV network money to other types of golf events in response to a monopoly premium for elite golf events.

277. Similarly, a substantial proportion of golf fans have a particular affinity for the sport, which is often tied to their participation in the sport. As players of the sport themselves, golf fans have a particular connection with golf broadcasts, which cannot readily be replicated by broadcasts of other sports or entertainment events. For the same reason, golf enthusiasts are a particular target of many advertisers on elite golf events, who seek to sell particular products and services (such as golf apparel

and equipment) to golf enthusiasts. Accordingly, a golf broadcaster, its golf advertisers, and the event sponsors cannot simply substitute coverage of another sport and expect the same golf fans to tune in. Thus, replacement of a golf telecast with a baseball game, automobile race, or other sporting event would likely retain some golf fans, but a substantial portion of golf fans—particularly the golf enthusiasts who will be the most loyal viewers and the primary targets for advertisers seeking to advertise to golf enthusiasts—would be lost by substituting to another type of programming.

278. From a geographic perspective, the events organized by the PGA Tour occur mostly in the United States, and the fans who attend those events in person are mostly in the United States. These events and their live network broadcasts are scheduled to provide convenient time slots for fans in the United States, and therefore are focused on generating viewership in the United States. Furthermore, elite golf events taking place in the United States capture the overwhelming share of viewership in the United States, indicating that elite golf events taking place elsewhere in the world are not a substitute for events in the United States for fans, broadcasters, and advertisers. The Tour itself has recognized the national dimension of competition, as it has informed players that they would ordinarily be granted releases for playing in conflicting events taking place outside the United States, but because LIV Golf has plans to organize a tour with events taking place in the United States it has denied releases to the players. This indicates that the Tour itself has far greater concern with competing events in the United States than for events taking place in other countries, which underscores that the United States represents a separate geographic market. In the alternative, however, the only other plausible relevant geographic market would be global. In either potential geographic market, the Tour maintains monopoly power.

279. For all of these reasons, a hypothetical monopolist in the supply of elite golf events in the United States would be able to profitably raise prices above competitive levels, indicating that the promotion of elite golf events in the United States is a relevant market.

Barriers To Entry To The Relevant Markets

280. The Tour's monopsony power in the market for the services of professional golfers for elite golf events and its monopoly power in the market for the promotion of elite professional golf events are protected by high barriers to entry. To enter these markets, a competing elite professional

golf promoter needs to raise at least hundreds of millions of dollars in capital, recruit a sufficient number of elite professional golfers to comprise a credible competing tour, arrange venues and tournaments, arrange for television coverage of tournaments, recruit sponsors and advertisers, and overcome the Tour's antitrust violations. It also needs to offer OWGR ranking points.

281. As the facts giving rise to this litigation attest, the Tour's Media Rights and Conflicting Events Regulations restrict a competitor's ability to contract for the services of professional golfers for elite golf events. Despite offering far greater prize money, and guaranteed compensation for participating players, LIV Golf was only able to attract a minority of elite golf professionals and had to pay excessively higher guaranteed payments to recruit a number of marquee players than would be required in a competitive market. And LIV Golf has been able to capture only a tiny share in the market for the promotion of elite golf events, as the viewership for LIV Golf events has been dwarfed by that of the PGA Tour's events, despite the more fan-friendly format and superior fan experience LIV Golf offers.

282. The Tour's threats to the Player Plaintiffs, its members, agencies, small businesses, and others, and the threats of those acting in concert with it, erect an additional and substantial barrier to entry. Any entity looking to enter the markets relevant to this litigation now knows what it will face. As Commissioner Monahan put it, the Tour will impose costs on any potential entrant such that there will be "no possibility of a return" on the enormous investment it would take to attempt to enter the market.

283. The last prospective entrant before LIV Golf to garner any meaningful support from players was the World Golf Tour in the mid-1990s. The Tour's Media Rights and Conflicting Events Regulations precluded its entry in short order. After the World Golf Tour folded, there was no meaningful threat of competitive entry for roughly a quarter-century. If the Tour's naked exercise of its market power renders LIV Golf unable to sustain its efforts to enter the market, it would be unreasonable to expect any attempt at competitive entry for the foreseeable future.

284. LIV Golf was able and prepared to enter the markets before the anticompetitive conduct of the Tour diminished its entry to what Commissioner Monahan dismissed as "exhibition matches" that were acquired with a cost structure that offered "no possibility of a return." LIV Golf is as serious

a nascent entrant as the PGA Tour has ever encountered. And despite all of LIV Golf's attributes and efforts, the Tour's ongoing anticompetitive conduct threatens LIV Golf's competitive viability. If LIV Golf fails, there will be no alternatives for the participants in elite professional golf events, fans, and sponsors of the game. They will be left with whatever the Tour chooses to offer.

285. Absent the Tour's anticompetitive conduct, LIV Golf would be an established and healthy competitor to the Tour in the markets for the services of professional golfers for elite golf events and the promotion of elite professional golf events. The Tour recognizes that LIV Golf "would be competitive to the PGA Tour." It denied LIV Golf access to the Player Plaintiffs' and its other members' services because it viewed LIV Golf as a competitor. But because of the Tour's anticompetitive conduct, LIV Golf is faced with a risk that it will not be able to remain competitively viable. As such, LIV Golf risks irreparable harm to its business and there is a severe risk of irreparable harm to competition if the Tour's conduct is not enjoined.

286. The Player Plaintiffs, other professional golfers and Tour members are participants in the restrained markets because they sell their services to the PGA Tour and are thus subject to its monopsony power. In addition, the Player Plaintiffs, other professional golfers, and Tour members are the target of the Tour's anticompetitive scheme to destroy LIV Golf and monopolize the market.

Anticompetitive Effects of the Tour's Conduct, Antitrust Injury, and Irreparable Harm

287. The Tour's conduct, including (1) unreasonably restrictive regulations, (2) threats of and now imposition of career-threatening bans, (3) suspensions of the Player Plaintiffs and other members who played at LIV Golf events, (4) the promise it will visit the "same fate" on any member who follows their example, (5) the Tour's threats and punishments to non-members who participate in LIV events and a wide range of other businesses who do business with LIV Golf, and (6) its exclusionary group boycott with other golfing bodies in the "ecosystem," all serve no purpose other than to thwart competitive entry and preserve the Tour's entrenched monopoly power. Faced with punishments of this nature, which could cause incalculable damage to players' careers, the Player Plaintiffs have been denied their right as independent contractors to sell their services to buyers other than the PGA Tour. And they have been directly and irreparably harmed by being prevented from participating in events in which they have already qualified, including the FedEx Cup Playoffs. While

some Player Plaintiffs have received higher payments from LIV Golf as a result of the risks they took by playing in LIV Golf events, they have not been compensated in full for the financial injuries they have already suffered and will continue to suffer. Nor have the Player Plaintiffs been compensated for the substantial irreparable injuries they have suffered and will continue to suffer if the Tour's attacks on them are allowed to continue unabated. Many other players are effectively prevented from playing in LIV Golf events due to fear of punishment from the PGA Tour.

288. LIV Golf has also suffered and will continue to suffer severe financial injuries as well as irreparable harms to its business from the Tour's anticompetitive conduct. The fields LIV Golf has been able to attract are weaker than would have been the case in the absence of the punishments from the PGA Tour, because many golfers are simply unwilling to take on the risks of playing in even a single LIV Golf event. This threatens irreparable harm to all of the Plaintiffs because it threatens to thwart LIV Golf's nascent entry and permanently entrench the PGA Tour's monopsony and monopoly power.

289. The punishments from the PGA Tour and others have forced LIV Golf to concentrate funds towards increasing upfront payments, and they have caused LIV Golf to scale down its entry plans and offer fewer tournaments in 2022. This has caused LIV Golf to suffer severe financial injuries as a result of the Tour's anticompetitive conduct.

290. Furthermore, while LIV Golf has the financial resources to make initial cash outlays to launch its product, the ongoing cash outlays significantly impact long-term viability of LIV Golf. Specifically, if the Tour's anticompetitive conduct continues unabated, it will threaten the competitive viability of LIV Golf.

291. The risk that LIV Golf could be driven out of the marketplace only serves to make it more difficult for players (including the Player Plaintiffs) to overcome the threat of punishments from the PGA Tour. It has been suggested that the actions of the PGA Tour and others have simply presented Plaintiffs with a "choice"—stay within the existing "*ecosystem*" or choose to switch to the LIV Golf series. But this is a false choice for several reasons.

292. As Commissioner Monahan admitted in his 2020 Memorandum, the Tour's Media Rights and Conflicting Events Regulations are intended to restrict its member players from offering

their services to others. The Tour's amendments of its Regulations and the procedures for members being released from them underscore the obvious: the Tour uses these provisions to create a roadblock to competition. The Conflicting Events and Media Rights Regulation serve no legitimate business purpose.

293. The Tour's unlawful conduct has depressed professional golfer wages, denied the Player Plaintiffs labor mobility, blunted the effective entry of the potential entrants into the markets that could challenge the Tour's monopoly, decreased the output of elite professional golf events and tours, decreased opportunities for broadcast of elite professional golf, decreased opportunities for advertising and sponsoring surrounding professional golf, decreased output of elite professional golf entertainment for fans, and diluted LIV Golf's opportunity to compete in the elite professional golf marketplace. The Tour's unlawful conduct has likewise caused severe financial injuries to LIV Golf in the form of higher costs and lost revenue, while also threatening to impose irreparable injuries to LIV Golf.

294. The Tour's punishments have deprived the Player Plaintiffs' opportunities to continue playing on the Tour, earning deserved compensation, earning opportunities into Majors, sponsorship relationships and revenue, and future opportunities to play and earn on the Tour. The Tour's punishments have also caused irreparable harm to the Player Plaintiffs' goodwill, reputation, and brand. The Tour denied Player Plaintiff Gooch, Swafford and Jones entry into the FedEx Cup Playoffs, which they earned through their performance, which has caused and will continue to cause severe injuries to these Plaintiffs.

295. LIV Golf sought to secure commitments from players by March 2022 to establish its League for the summer 2022. The Tour's anticompetitive conduct caused top professional golfers not to sign up. The Tour's conduct thus caused severe financial injury to LIV Golf, and it denied the Player Plaintiffs and other Tour members compensation they would earned from the LIV Golf League. Its anticompetitive conduct diminished competition, reduced marketwide output, and put LIV Golf League on the shelf for 2022.

296. Moreover, the Tour's threats of possible punishment for violating its Regulations and its actual punishments have caused even further foreclosure and have caused LIV Golf to employ a cost structure that significantly impacts its long-term viability.

297. The Tour's Regulations, unilateral and coordinated threats of lifetime bans, and imposition of career-threatening punishment have scared off the large majority of elite professional golfers and other participants in elite professional golf events and have caused LIV Golf to employ a cost structure that significantly impacts its long-term viability.

298. The Tour's conduct has substantially diminished and impaired the entry of the promoters that could meaningfully threaten the PGA Tour's monopoly, which has stood unchallenged for decades. Its conduct has denied LIV Golf the opportunity to pursue its innovative business model in 2022. Its conduct decreased elite professional golf tournaments in 2022 and 2023 as LIV Golf was required to change its model and allocate further capital to try to overcome the Tour's Regulations and threats.

299. The Tour's conduct has harmed the Player Plaintiffs as they have been suspended from what the Tour calls the "preeminent" golf association in the world for exercising their right as independent contractors to pursue their livelihood, sell their services to buyers other than the incumbent monopolist, and expand their sponsorship opportunities.

300. The Tour's conduct has also harmed the Player Plaintiffs as they have lost sponsorship opportunities and other business opportunities as a result of the Tour's pressure on sponsors and other entities with which the Plaintiffs do business.

301. The Tour's conduct has harmed consumers, giving them less choice, less output, and less innovation. Fans are unable to watch Player Plaintiffs in Tour events. Fans are unable to watch LIV Golf on television or other streaming services. Fans suffer from reduced output of elite professional golf events and suffer from getting fewer opportunities to watch Player Plaintiffs, Dustin Johnson, Brooks Koepka and many others whom the Tour has excommunicated from its events.

302. If the Tour's unlawful conduct is not enjoined, the harm to Plaintiffs will be permanent and irreparable. While LIV Golf has partially entered the markets at great expense, it has done so on terms that the Tour recognizes are "irrational." If the Tour's unlawful conduct is not enjoined, LIV Golf faces a risk that it will not be competitive in the long run. For competition for the Player Plaintiffs' services, the Tour's anticompetitive Regulations and other conduct frustrating the labor mobility of its members and tying up their media rights must be enjoined.

303. If the Tour can force LIV Golf out of the relevant markets altogether and/or foreclose LIV Golf from offering a set of products and services that provides a meaningful competitive constraint on the Tour, the Tour's monopoly and monopsony power will be cemented for many years to come, and immune to even attempted entry. Injunctive relief is necessary to restore competition for Tour members' services and to innovate the game that the Tour, only in theory, promises to support. All of the equities and the public interest support such relief. Otherwise, the harm to competition will be irreversible and permanent.

The PGA Tour's Alleged Procompetitive Defenses Are Pretextual

304. To assert a procompetitive justification for its conduct under the antitrust laws, the Tour must, at a minimum, offer a nonpretextual claim that its conduct is a form of competition on the merits. As set forth in detail above, the Tour cannot make such a showing, because its conduct is aimed at foreclosing the only meaningful competitive threat it has faced in a quarter century. Rather than competing on the merits, the Tour's conduct is aimed at kneecapping LIV Golf to foreclose nascent competition.

305. The Tour's purported justifications for its conduct are pretextual. For example, the Tour asserts that it is merely enforcing its membership rules that have some benign purposes. This argument is betrayed as pretextual in multiple respects. First, as detailed in the 2020 Monahan Memorandum, the Tour expressly expanded its membership rules for the purpose of defeating competition from a new entrant such as LIV Golf. Second, the Tour only enforces its rules to deny releases to players when they are playing in *competing* events, demonstrating that these rules are aimed at defeating competition. Third, the Tour has threatened and imposed punishments on a variety of golfers who are not even Tour members (and therefore are not subject to the Tour's rules at all), including European Tour members, college golfers, and Asian Tour members. Instead of enforcing its rules on its members, the Tour threatens and imposes punishments on any golfer anywhere in the world who participates in LIV Golf events. There is nothing *pro*competitive about the Tour's actions—they are aimed at thwarting the only competition it has faced in decades.

306. Similarly, the Tour's conduct reveals as pretextual its claim that it is acting to prevent some sort of "free-riding" on investments the Tour supposedly makes in players. As noted, the Tour's

attacks are not limited to those players in whom it has supposedly made some sort of investment, but instead extend to all golfers anywhere, including college players and members of other tours who have never been members of the PGA Tour. At the other end of the spectrum, the Tour's "free-riding" claim is absurd when applied to golfers such as Plaintiff Mickelson, who has devoted 30 years of his Hall of Fame career to playing on the Tour, providing massive benefits to the Tour throughout his career. And any punishments meted out by the Tour to players like Mr. Mickelson (and others) are disproportionate to the unspecified investments the Tour claims to make in the early stages of golfers' careers.

307. The Tour's words and conduct also betray as mere pretext its assertion that it is attacking LIV Golf and any players who participate in its events because the Tour does not want to be associated with any player who participates in a league that is majority funded by the Public Investment Fund of Saudi Arabia. Commissioner Monahan's 2020 Memorandum outlining the Tour's attacks on a new entrant says nothing about Saudi Arabia. Instead, it is focused on the competitive threat that the new entrant—which Commissioner Monahan labeled "Private Equity Golf"—presented to the Tour. The Tour's pretextual arguments about Saudi funding are further betrayed by its willingness to do business with dozens of sponsors who do billions of dollars of business each year in Saudi Arabia. Furthermore, the Tour's pretext is exposed by its willingness to have the PGA Tour Fan Shop operated by Fanatics, which has received substantial funding from the Public Investment Fund of Saudi Arabia—the same fund that the Tour supposedly finds so objectionable when it sponsors LIV Golf.

308. The Tour's own actions also reveal that the Tour's various objections to LIV Golf's innovative format are pretextual. While the Tour has suggested that there is something about LIV Golf's no-cut, high purse tournaments and its team-golf format that justify its opposition to the new entrant, the Tour itself has disclosed plans to copy LIV Golf's format.

309. Furthermore, the Tour and its spokespersons have asserted that they object to LIV Golf because LIV Golf is supposedly operating outside the "ecosystem" and is not cooperating with other existing tours or sanctioning bodies. The facts, however, demonstrate the pretext in any such argument. For example, the sponsors of LIV Golf sought to work with the European Tour, but in the meeting in Malta in July 2021, the European Tour revealed that although it recognized the "appeal and fit" of the new tour, it feared the "mighty power" of the PGA Tour and therefore had to reject the proposed

partnership. LIV Golf has likewise sought to partner with others in the golf "ecosystem" and grow the game at multiple levels, including through proposed partnerships with entities ranging from the Asian Tour, to the LPGA, to the Ladies European Tour. At every turn, the PGA Tour has either directly foreclosed LIV Golf's efforts or exerted extreme pressure on other golfing bodies to exclude LIV Golf. For example, the PGA Tour and the European Tour threatened severe consequences on the Asian Tour and have punished golfers on the Asian Tour in their effort to prevent the Asian Tour from partnering with LIV Golf. The Tour prevented the LPGA and the Ladies European Tour from partnering with LIV Golf, thus harming countless women professional golfers by denying them additional playing opportunities and much-needed funding for their tours—all for the purpose of foreclosing LIV Golf from the "ecosystem." And, as detailed above, the Tour has leaned on the bodies that sponsor the Majors and the OWGR to lock arms with the Tour in excluding LIV Golf. Thus, having used every tool at its disposal to prevent LIV Golf from working with other bodies in the golf "ecosystem," and punishing those who make the choice to partner with LIV Golf, it is pure pretext for the Tour to suggest that it is somehow justified in opposing LIV Golf because LIV Golf has been left to operate largely outside the "ecosystem."

CLAIMS FOR RELIEF

COUNT I: Unlawful Monopsonization of the market for ELITE GOLF EVENT SERVICES in Violation of Sherman Act § 2 (15 U.S.C. § 2)

310. Plaintiffs incorporate by reference the allegations of all preceding paragraphs as though fully set forth in this Count I.

311. At all relevant times, the Tour has had monopsony power over the market for the services of professional golfers for elite golf events in the United States (or, alternatively, in the world).

312. The Tour has willfully maintained and abused its monopsony power through anticompetitive conduct, including, among other things, 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.

313. The anticompetitive actions of the PGA Tour do not further any procompetitive goals and are not reasonably necessary to achieve any legitimate procompetitive benefits.

314. The PGA Tour's exclusionary conduct has unreasonably restrained competition in the market for services of professional golfers for elite golf events. including by:

- Preventing vigorous competition for services of professional golfers for elite golf events;
- Suspending the Player Plaintiffs for playing professional golf;
- Preventing LIV Golf from contracting with agencies, vendors, sponsors. advertisers and players needed to offer an elite professional golf entertainment product;
- Impacting competition in contracting for the services of elite professional golfers;
- Depressing compensation for the services of professional golfers for elite golf events below competitive levels;
- Decreasing the output of opportunities for professional golfers for elite golf events;
- Denying the Player Plaintiffs the right to have free agency for their independent contractor services;
- Interfering with the Player Plaintiffs' and others' contractual negotiations with LIV Golf;
- Interfering with LIV Golf's contractual negotiations with agencies, sponsors, venues, vendors, broadcasters, and partners to work with LIV Golf; and
- Preventing LIV Golf from promoting elite professional golf to fans.

315. As a result of the PGA Tour's anticompetitive conduct, Plaintiffs have been and will continue to be harmed in their business or property; competition in the relevant market will be harmed;

the PGA Tour will unlawfully maintain its monopsony position; and players, consumers. and other stakeholders will be harmed. Each of the injuries suffered by Plaintiffs is of the type the antitrust laws were intended to prevent, and each flows from Tour's unlawful conduct. Such conduct is inherently and manifestly anticompetitive and has an injurious effect on competition.

316. Plaintiffs have been and will continue to be irreparably harmed by the PGA Tour's unlawful conduct such that Plaintiffs need injunctive relief in order to stop immediately the PGA Tour's threats and imposition of onerous punishments on professional athletes to thwart LIV Golf's entry and maintain the PGA Tour's monopsony and an order enjoining enforcement of the PGA Tour's anticompetitive Regulations.

317. The PGA Tour's anticompetitive acts violate Section 2 of the Sherman Act. Plaintiffs seek injunctive relief, monetary damages, treble damages, costs of this suit, reasonable attorney's fees, and interest pursuant to 15 U.S.C. §§ 15(a), 26 and any other relief this Court deems just and proper under Count I.

COUNT II: Unlawful Monopolization of the market for the PROMOTION OF ELITE PROFESSIONAL GOLF EVENTS in Violation of Sherman Act § 2 (15 U.S.C. § 2)

318. Plaintiffs incorporate by reference the allegations of all preceding paragraphs as though fully set forth in this Count II.

319. At all relevant times, the PGA Tour has had monopoly power over the market for the promotion of elite professional golf events in the United States (or, alternatively, in the world). The only viable competitor to the PGA Tour's dominant market position in this market is LIV Golf.

320. The PGA Tour has willfully maintained and abused its monopoly power through anticompetitive conduct, 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.

321. The anticompetitive actions of the PGA Tour do not further any procompetitive goals and are not reasonably necessary to achieve any procompetitive benefits.

322. The PGA Tour's exclusionary conduct has unreasonably constrained competition in the market for the promotion of elite professional golf events, including by:

- Preventing vigorous competition for the promotion of elite professional golf entertainment;
- Preventing LIV Golf from contracting with players regarding their own media rights needed to promote elite professional golf tournaments;
- Preventing Player Plaintiffs from contracting with LIV Golf and others regarding their own media rights;
- Decreasing the output of elite professional golf tournaments;
- Suspending Player Plaintiffs and other golfers for playing professional golf;
- Preventing LIV Golf from contracting with agencies, vendors, sponsors, advertisers and players need to offer elite professional golf entertainment product;
- Impacting competition in contracting for the play of elite professional golfers;
- Depressing compensation for the services of professional golfers in elite events below competitive levels;
- Interfering with LIV Golf's contractual negotiations with players to join LIV Golf;
- Interfering with LIV Golf's contractual negotiations with agencies, sponsors, venues, vendors, broadcasters and partners to work with LIV Golf; and
- Preventing LIV Golf from promoting elite professional golf to fans.

323. As a result of the PGA Tour's anticompetitive conduct, LIV Golf and Player Plaintiffs have been and will continue to be harmed in their business or property; competition in the relevant market will be harmed; the PGA Tour will unlawfully maintain its monopoly position; and players,

consumers, and other stakeholders will be harmed. Each of the injuries suffered by Plaintiffs is of the type the antitrust laws were intended to prevent, and each flows from Tour's unlawful conduct. Such conduct is inherently and manifestly anticompetitive and has an injurious effect on competition.

324. Plaintiffs have been and will continue to be irreparably harmed by the PGA Tour's unlawful conduct such that they need injunctive relief stopping immediately the PGA Tour's threats and imposition of onerous punishments on professional athletes designed to thwart LIV Golf's entry and maintain the PGA Tour's monopoly and enjoining enforcement of the PGA Tour's anticompetitive player Regulations.

325. The PGA Tour's anticompetitive acts violate Section 2 of the Sherman Act. Plaintiffs seek injunctive relief, monetary damages, treble damages, costs of this suit, reasonable attorney's fees, and interest pursuant to 15 U.S.C. §§ 15(a), 26 and any other relief this Court deems just and proper under Count II.

COUNT III: Unlawful Attempted Monopolization in Violation of Sherman Act § 2 (15 U.S.C. § 2)

326. Plaintiffs incorporate by reference the allegations of all preceding paragraphs as though fully set forth in this Count III.

327. In the event that the PGA Tour's position in the relevant markets does not amount to monopoly and/or monopsony power, either by virtue of LIV Golf's nascent entry or otherwise, Plaintiffs plead in the alternative that the Tour's conduct constitutes unlawful attempted monopolization and monopsonization in violation of Section 2 of the Sherman Act.

328. The Tour has unlawfully attempted to monopolize and monopsonize the relevant markets.

329. At all relevant times, the Tour has had monopoly and/or monopsony power or, at a minimum, a dangerous probability of success in acquiring (or re-acquiring) monopoly and/or monopsony power, over the relevant markets in the United States (or, alternatively, in the world).

330. 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.

331. As set forth in detail above, the Tour's conduct carries a dangerous probability of destroying the competitive viability of LIV Golf. The Tour's anticompetitive conduct forced LIV Golf to change its commercial strategy for 2022. LIV Golf was forced to announce a substantially scaled-down version of its League concept by offering 8 invitationals in 2022 (the LIV Golf Invitational Series). The Tour then attacked LIV Golf's Invitational Series events. Furthermore, because of the Tour's anticompetitive conduct, LIV Golf has been unable to broadcast its events in the United States—an encumbrance that threatens its long-term viability.

332. Furthermore, the Tour's conduct has denied and will continue to deny LIV Golf access to many top players. The Tour's Regulations and unilateral and conspiratorial threats of punishment have scared off the large majority of elite players as well as the pipeline of future elite players. And for those players whom LIV Golf has been able to sign, it has had to offer supracompetitive compensation well above the levels that would prevail in a market not polluted by the Tour's anticompetitive conduct. This has forced LIV Golf into an unsustainable business model. If the Tour's anticompetitive conduct is not enjoined, LIV Golf will be unable to sustain a competitively viable tour.

333. And, the Tour's attempted monopolization and unlawful exclusionary conduct presents a dangerous probability that the Tour will succeed, to the extent it has not already, in its attempt to monopolize the relevant markets, as shown by its willful and intentional efforts and success in:

- Preventing vigorous competition;
- Preventing the PGL from entering the markets;

- Suspending Player Plaintiffs;
- Preventing Plaintiff LIV Golf from contracting with agencies, vendors, sponsors, advertisers and players needed to offer an elite professional golf entertainment product;
- Impacting competition in contracting for the services of elite professional golfers;
- Depressing compensation for the services of elite professional golfers below competitive levels;
- Decreasing the output of elite professional golfer services opportunities;
- Denying Player Plaintiffs the right to have free agency for their independent contractor services;
- Interfering with Plaintiffs' and others' contractual negotiations;
- Preventing Plaintiff LIV Golf from promoting elite professional golf to fans;
- Encouraging other golfing entities to pressure golfers against joining LIV Golf, including by threatening to disallow LIV Golf players from playing in various tournaments; and
- Orchestrating a group boycott of LIV Golf with the European Tour in furtherance of their agreement to boycott LIV Golf and golfers who would play for a competitive tour.

334. Absent injunctive relief halting the Tour's anticompetitive conduct, LIV Golf will be unable to sustain a competitively viable business, and it will be unable to meaningfully constrain the Tour's monopoly power.

335. The Tour's conduct has substantially diminished and impaired the entry of the only entrant that could meaningfully threaten the PGA Tour's monopoly and monopsony power in the relevant markets, which has stood unchallenged for decades. And if it not enjoined, the Tour's conduct will forever destroy the competitive viability of the only potential challenger to the Tour's monopoly

and monopsony power.

336. The Tour has acted with the specific intent to monopolize and monopsonize the relevant markets. The Tour's actions are irrational but for its anticompetitive effect, including by degrading its own offerings. The Tour's specific intent to monopolize and monopsonize the relevant markets is shown through its statements and actions, including: (1) the PGA Tour Commissioner's statements in the January 2020 Monahan Memorandum, (2) the Tour's public and private statements since 2020 related to the Tour's desire to "protect this business model" and prevent a new entrant from contracting with Tour members through threats and enforcement of unlawful Regulation provisions, (3) statements of Tour officials and Members related to the Tour's desire to destroy LIV Golf, (4) the Tour's May 10, 2022 denial of Tour members' requests to participate in the LIV Golf London Invitational, (5) the Tour's coordinated efforts to get others to support its boycott of LIV Golf and those who associate with LIV Golf, (6) the Tour pressuring small businesses not to work with LIV Golf or be blacklisted by the Tour, (7) the Tour's application of its Regulations to impose irreparable punishment on Player Plaintiffs and others for playing professional golf.

337. As a result of the PGA Tour's anticompetitive conduct, LIV Golf and the Player Plaintiffs have been and will continue to be harmed in their business or property; competition in the relevant markets will be harmed; the PGA Tour will unlawfully monopolize and monopsonize the relevant markets; and players, consumers, and other stakeholders will be harmed.

338. Plaintiffs have been and will continue to be irreparably harmed by the PGA Tour's unlawful conduct such that they need injunctive relief stopping immediately the PGA Tour's threats and imposition of onerous punishments on professional athletes designed to thwart LIV Golf's entry and maintain the PGA Tour's monopoly and enjoining enforcement of the PGA Tour's anticompetitive player Regulations. Each of the injuries suffered by Plaintiffs is of the type the antitrust laws were intended to prevent, and each flows from Tour's unlawful conduct. Such conduct is inherently and manifestly anticompetitive and has an injurious effect on competition.

339. Accordingly, to the extent the Tour argues that LIV Golf's nascent entry means the Tour is not presently a monopolist, the Tour's anticompetitive conduct carriers a dangerous probability of restoring and maintaining the Tour's monopoly and monopsony power in the relevant markets, in

violation of Section 2 of the Sherman Act.

340. Plaintiffs seek injunctive relief, monetary damages, treble damages, costs of this suit, reasonable attorney's fees, and interest pursuant to 15 U.S.C. §§ 15(a), 26 and any other relief this Court deems just and proper under Count III.

Count IV: Unlawful Restraint of Trade in Violation of Sherman Act § 1 (15 U.S.C. § 1) [Group Boycott]

341. Plaintiffs incorporate by reference the allegations of all preceding paragraphs as though fully set forth in this Count IV.

342. The PGA Tour has unlawfully reached an agreement. with the purpose to eliminate competition, with the European Tour, a potential horizontal competitor, (and possibly others) to not compete for players' services and to prevent the entry and competitive viability of LIV Golf into the relevant markets. Specifically, the PGA Tour and the European Tour have agreed to engage in a group boycott of LIV Golf. other potential competitors. golfers (like Player Plaintiffs) who agree to play in LIV Golf's events. and any other person or entity who seeks to partner with LIV Golf, to harm competition for the services of professional golfers for elite golf events and for the promotion of elite golf events.

343. The actions of the Tour and the European Tour make clear that they had a conscious commitment to a common scheme: to prevent the entry of new competitors into the market. The unlawful agreement is evidenced by the actions and statements of the Tour and the European Tour, as set forth in this Complaint, including:

- The Tour admitted the existence of an unlawful agreement with the European Tour. In his January 2020 Memorandum describing the PGA Tour's plan to foreclose new entry, Commissioner Monahan explained that this alliance with the European Tour was aimed at removing the European Tour as a potential horizontal competitor through its potential to partner with a new entrant: "We have continued discussions with the European Tour about the potential to work more closely together. thereby removing the European Tour as a potential partner of" a new entrant;
- As Mr. Pelley detailed. in November 2020 the European Tour and the PGA Tour

ceased competing with each other for players' services, and instead formed an illegal alliance to eliminate new competition for players' services;

- Following the agreement, in November 2020, the European Tour announced it would not partner with PGL;
- Pursuant to its illegal alliance, the European Tour agreed not to partner with LIV Golf despite recognizing the "fit and appeal" of partnering with LIV Golf because the European Tour had contracted with the Tour and could not upset the "US PGA mighty power;"
- The Tour and the European Tour then took steps in furtherance of their scheme, including threatening all players with lifetime bans if they competed in the PGL and, later, LIV Golf tournaments; and
- In addition, the Tour and European Tour agreed to suspend players who competed in LIV Golf tournaments.

344. The Tour used its Regulations to implement the unlawful agreement and achieve the anticompetitive purpose of the agreement, harming Plaintiffs and competition.

345. After the agreement was reached, the Tour enforced its unlawful Regulations and proceeded to suspend the Player Plaintiffs for violating the Regulations. Further evidencing the agreement that was in fact reached, the Tour enforced the Regulations in a way that they had not been enforced previously. Historically, the Tour permitted members to associate with multiple tours simultaneously and routinely granted releases for golfers to compete in non-Tour affiliated tournaments. In contrast, the Tour denied all releases for LIV Golf events and imposed effective career-ending suspensions on Plaintiffs. The Tour made clear its enforcement of these Regulations is intended to destroy the entry of LIV Golf, harming the Plaintiffs and competition as a whole in the process. Likewise, as detailed in this Complaint, the European Tour has departed from its longstanding practices regarding conflicting events to align with the Tour in furtherance of their agreement to act jointly to exclude LIV Golf and punish the Player Plaintiffs and other golfers who play in LIV Golf events.

346. Professional golfers (including the Player Plaintiffs) are essential to the Tour's scheme to eliminate competition in the market. As Commissioner Monahan admitted: "The impact that [the

new league] could have on the PGA TOUR is dependent on the level of support it may receive from these players. Without this support, [the new league's] ability to attract media and corporate partners will be significantly marginalized and its impact on the TOUR diminished."

347. The Player Plaintiffs are the pawns (and targets) used to effectuate the group boycott and eliminate competition in the markets; the Player Plaintiffs' suspensions are a necessary means to accomplish the Tour's anticompetitive scheme.

348. ***Per se* violation:** The agreements constitute unreasonable restraints of trade that are *per se* illegal under Section 1 of the Sherman Act, 15 U.S.C. § 1. The agreement constitutes a group boycott orchestrated by a monopolist and joined by a potential competitor 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.

349. **Rule of Reason violation:** The agreements are also unreasonable restraints of trade that are unlawful under Section 1 of the Sherman Act, 15 U.S.C. § 1, under the rule of reason analytical framework. The principal tendency of the agreement is to restrain competition, reinforce the market power of the PGA Tour, defeat the nascent entry of LIV Golf, and eliminate competition in the relevant markets. This harmed the Player Plaintiffs and other professional golfers by eliminating competition in the market for their services and also restricted competition in the market generally. It has also harmed LIV Golf and competition in the relevant markets by hindering LIV Golf's entry and threatening to destroy its competitive viability. The agreement between the Tour and the European Tour to lock arms in a joint effort to foreclose competitive entry lacks any legitimate procompetitive justifications.

350. As a result of the PGA Tour's anticompetitive conduct, Plaintiffs have been and will continue to be harmed in their business or property; competition in the relevant markets will be harmed; the PGA Tour will unlawfully maintain its monopoly position; and Plaintiffs, consumers, and other stakeholders will be harmed. Each of the injuries suffered by Plaintiffs is of the type the antitrust laws were intended to prevent, and each flows from Tour's unlawful conduct. Such conduct is inherently and manifestly anticompetitive and has an injurious effect on competition.

351. Plaintiffs have been and will continue to be irreparably harmed by the PGA Tour's

unlawful conduct such that Plaintiffs need injunctive relief in order to stop the PGA Tour's unlawful conduct.

352. The PGA Tour's anticompetitive acts violate Section 1 of the Sherman Act.

353. Plaintiffs seek injunctive relief, monetary damages, treble damages, costs of this suit, reasonable attorney's fees, and interest pursuant to 15 U.S.C. §§ 15(a) and 26, and any other relief this Court deems just and proper under Count IV.

Count V: Unlawful Agreement to Restrain Trade in Violation of the Cartwright Act (Cal. Bus. & Prof. Code §§ 16720(a), 16726) [Group Boycott]

354. Plaintiffs incorporate by reference the allegations of all preceding paragraphs as though fully set forth in this Count V.

355. The PGA Tour has unlawfully agreed with the European Tour (and potentially others) "[t]o create or carry out restrictions in trade or commerce." Cal. Bus. & Prof. Code §§ 16720(a), 16726. Moreover, the Tour's violation of Section 1 of the Sherman Act necessarily constitutes a violation of the Cartwright Act.

356. The Tour operates six annual tournaments in the state of California, owns golf courses in California, committed multiple acts in furtherance of its unlawful group boycott in California, co-hosted a tournament with the European Tour in California from which it banned any golfers who participated in a LIV Golf event, harmed California resident golfers (including Plaintiff Mickelson), and harmed competition for professional golfers' services for elite events in California. Moreover, the law and public policy of other affected states is materially similar to the law of California.

357. The Tour has unlawfully agreed with the European Tour to not compete for players' services and to act jointly to prevent the entry of LIV Golf into the relevant markets. Specifically, the PGA Tour and the European Tour agreed to boycott LIV Golf, players who work with LIV Golf, and any other person or entity that seeks to partner with LIV Golf. The Tour entered an agreement with the European Tour so as to—as Commissioner Monahan vowed—"remov[e] the European Tour as a potential partner" of a new entrant like LIV Golf.

358. The PGA Tour and the European Tour have taken acts in furtherance of their unlawful boycott. For instance, the European Tour has agreed to suspend and punish golfers for playing in LIV

Golf, to no longer compete with the PGA Tour for players' services, and to not partner with LIV Golf or other potential entrants. The two tours have unlawfully agreed to deny (and taken steps to deny) golfers who play in LIV Golf events the opportunity to play in the tours' co-sanctioned events (including the event they co-sanctioned in California), and to unfairly punish independent contractors for playing with a competitor promoter.

359. The Tour's agreement with the European Tour has the illegal purpose to eliminate a competitor and future potential entrants. In particular, the Tour seeks to deny LIV Golf access to the services of professional golfers for elite golf events along with the other partners and inputs necessary to compete for the services of professional golfers for elite golf events. The two tours have also unlawfully agreed to not compete for players' services in order to suppress wages and decrease output of opportunities.

360. The tours' agreement constitutes an unreasonable restraint of trade that is *per se* illegal under California Business and Professions Code §§ 16720(a), 16726. 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 markets. No elaborate analysis is required to demonstrate the anticompetitive character of this group boycott.

361. The agreement also constitutes an unreasonable restraint of trade that is unlawful under California Business and Professions Code §§ 16720(a), 16726, under a rule-of-reason analysis. The principal tendency of the agreements is to restrain competition, reinforce the market power of the PGA Tour, and seriously hamper (or outright defeat) the competitive effectiveness and prospective entry of LIV Golf—by harming professional golfers like the Player Plaintiffs and thus eliminating competition for their services—the only viable alternative in the relevant market, and thereby harm competition in the relevant markets. This harmed the Player Plaintiffs and other professional golfers by eliminating competition in the market for their services and also restricted competition in the markets generally. It has also harmed LIV Golf and competition in the market for the promotion of elite events by hindering LIV Golf's entry and threatening to destroy its competitive viability. The agreement lacks any legitimate procompetitive justifications, because, among other things, the group boycott deprives Plaintiff Mickelson and other Player Plaintiffs of means to practice their profession that are so essential

that they are necessary to compete effectively in the sport of professional golf.

362. As a result of the PGA Tour's anticompetitive conduct, Plaintiffs have been and will continue to be harmed in their business or property; competition in the relevant markets will be harmed; the PGA Tour will unlawfully maintain its monopoly position and unlawful boycott; and Plaintiffs, LIV Golf, consumers, and other stakeholders will be harmed. Each of the injuries suffered by Plaintiffs is of the type the antitrust laws were intended to prevent, and each flows from Tour's unlawful conduct. Such conduct is inherently and manifestly anticompetitive and has an injurious effect on competition.

363. As a result of the PGA Tour's anticompetitive conduct, Plaintiffs have been and will continue to be irreparably harmed such that they need injunctive relief in order to stop immediately the PGA Tour's unlawful conduct.

364. The PGA Tour's anticompetitive acts violate the Cartwright Act. Cal. Bus. & Prof. Code §§ 16720(a), 16726.

365. Plaintiffs seek injunctive relief, monetary damages, treble damages, costs of this suit, reasonable attorney's fees, and interest pursuant to Cal. Bus. & Prof. Code § 16750(a), and any other relief this Court deems just and proper under Count V.

Count VI: Breach of Contract (Player Plaintiffs)

366. Player Plaintiffs incorporate by reference the allegations of all preceding paragraphs as though fully set forth in this Count VI.

367. On various dates, Player Plaintiffs and the Tour entered into a contract when the Plaintiffs submitted their respective membership applications and membership renewal applications and agreed to be bound by the Tour's Regulations. The Regulations (other than those described in this Complaint that violate the antitrust laws and therefore are unenforceable) are a legally binding agreement by and between Player Plaintiffs, respectively and individually, and the Tour. Player Plaintiffs maintain that provisions within the Regulations are not enforceable, but the provision the Tour has breached is not one of those provisions.

368. Player Plaintiffs performed all enforceable provisions in the Tour's Regulations and have complied with all obligations under the Tour's Disciplinary Process detailed in the Tour's Regulations.

369. The Tour breached Section VII.E.2 of the Regulations because it failed to abate Plaintiffs' suspensions pending their appeals of the Tour's Disciplinary Actions. Section VII.E.2 provides that "[a]n appeal shall operate to stay the effective date of any penalty, except suspension from a tournament then in progress or scheduled for the calendar week in which the alleged violation occurred, until after the final decision on the appeal." Exhibit 1. The Tour was thus required to honor some Player Plaintiffs' requests to participate in Tour events, including the FedEx Cup Playoff events, occurring while Player Plaintiffs' appeals to the Tour's Appeals Committees remained pending.

370. The Tour's breach caused Player Plaintiffs to incur substantial damages in the form of irreparable harm (in the form of loss of FedEx Cup ranking points, loss of OWGR ranking points, loss of career opportunities, loss of goodwill, and reputational harm), loss of income-earning opportunities, loss of retirement-plan payments, consequential damages, expenses, and costs.

Count VII: Tortious Interference with LIV Golf's Contractual Relationships (LIV Golf)

371. LIV Golf incorporates by reference the allegations of all preceding paragraphs as though fully set forth in this Count VII.

372. LIV Golf has entered into contractual relationships with professional golfers and other third parties, such as vendors, sponsors, and broadcasters.

373. The PGA Tour knew that LIV Golf had entered into contractual relationships with professional golfers and other third parties.

374. The PGA Tour's unlawful actions detailed herein were intended to prevent professional golfers and other third parties from performing their contracts with LIV Golf.

375. The professional golfers and other third parties have been unable to perform under their contracts with LIV Golf as a result of the PGA Tour's actions described herein.

376. There was no legal justification for the PGA Tour's anticompetitive conduct.

377. As a result of the PGA Tour's anticompetitive and wrongful conduct, LIV Golf has suffered significant and irreparable harm to its business.

378. LIV Golf has been and will continue to be irreparably harmed by the PGA Tour's unlawful conduct such that LIV Golf needs expedited injunctive relief stopping immediately the PGA Tour's unlawful conduct.

379. LIV Golf seeks injunctive relief, economic damages, including compensatory damages, special damages, and consequential damages, costs of this suit, and interest and any other relief this Court deems just and proper under Count VII. LIV Golf also seeks punitive damages against the PGA Tour for its tortious interference with LIV Golf's business relationships.

Count VIII: Tortious Interference with LIV Golf's Prospective Business Relationships (LIV Golf)

380. LIV Golf incorporates by reference the allegations of all preceding paragraphs as though fully set forth in this Count VIII.

381. LIV Golf has been on the verge of entering business relationships with professional golfers and other third parties, such as vendors, sponsors, and broadcasters.

382. The PGA Tour knew that LIV Golf was contacting players and other third parties about entering into a business relationship.

383. The PGA Tour's actions detailed herein were independently tortious as detailed herein and were intended to prevent professional golfers and other third parties from entering into a business relationship with LIV Golf.

384. Several professional golfers and other third parties have not entered into such business relationships with LIV Golf to-date as a result of the PGA's Tours anticompetitive actions and restrictions.

385. There was no legal justification for the PGA Tour's anticompetitive conduct.

386. As a result of the PGA Tour's anticompetitive and wrongful conduct, LIV Golf has suffered significant and irreparable harm to its business.

387. LIV Golf has been and will continue to be irreparably harmed by the PGA Tour's unlawful conduct such that LIV Golf needs expedited injunctive relief stopping immediately the PGA Tour's unlawful conduct.

388. LIV Golf seeks injunctive relief, economic damages, including compensatory damages, special damages, and consequential damages, costs of this suit, and interest and any other relief this Court deems just and proper under Count VIII. LIV Golf also seeks punitive damages against the PGA Tour for its tortious interference with LIV Golf's prospective business relationships..

JURY DEMAND

389. Plaintiffs demand a trial by jury of all issues so triable.

RELIEF REQUESTED

WHEREFORE, Plaintiffs hereby request that the Honorable Court award the following preliminary injunctive relief against the PGA TOUR:

a. Stay and enjoin the PGA Tour's suspension and sanctions imposed on the Player Plaintiffs;

b. Prevent the PGA Tour from banning or threatening to ban from the PGA Tour (and its affiliated Tour) players who talk to, contract with, play in, or associate with LIV Golf;

c. Prevent the PGA Tour from expelling players from the PGA Tour (and its affiliated Tours) or PGA Tour tournaments who talk to, contract with, play in, or associate with LIV Golf;

d. Prevent the PGA Tour from threatening or imposing any other punishments or otherwise harming or threatening to harm anyone who talks to, contracts with, or associates with LIV Golf;

e. Prevent the PGA Tour from conspiring or unlawfully agreeing with the European Tour to ban or threaten to ban players from participating in European Tour events or participating in the Ryder Cup for talking to, contracting with, playing in, or associating with LIV Golf;

f. Prevent the PGA Tour from pressuring or coordinating with the R&A, Masters, and/or PGA of America (or others), to punish, exclude or threaten to exclude players otherwise eligible under current eligibility rules from participating in golf events (including the Majors);

g. Prevent the PGA Tour from amending its rules to prevent players otherwise eligible from playing in PGA Tour events or co-sponsored events, such as the FedEx Cup, the WGC tournaments, the Tournament of Champions, the Players,

the Memorial, the Arnold Palmer Invitational, the Genesis Invitational, AT&T Pebble Beach Open, and the Presidents Cup;

h. Prevent the PGA Tour from enforcing its unlawful restrictions on independent-contractor golfers, including the Media Rights Regulation and the Conflicting Events Regulation;

i. Prevent the PGA Tour from amending its rules to prevent players otherwise eligible from playing in PGA Tour events or co-sponsored events;

j. Prevent the PGA Tour from applying rules beyond their meaning to punish players who associate with LIV Golf, or otherwise to thwart competition; and

k. Prevent the PGA Tour from taking any other actions intended to undermine competition on the merits from LIV Golf.

WHEREFORE, Plaintiffs hereby request that the Honorable Court award the following permanent injunctive relief against the PGA TOUR:

a. Stay and enjoin the PGA Tour's suspension and sanctions imposed on the Player Plaintiffs;

b. Enjoin the PGA Tour from banning or threatening to ban from the PGA Tour (and its affiliated Tour) players who talk to, contract with, play in, or associate with LIV Golf;

c. Enjoin the PGA Tour from expelling players from the PGA Tour (and its affiliated Tour) or PGA Tour tournaments who talk to, contract with, play in, or associate with LIV Golf;

d. Enjoin the PGA Tour from threatening or imposing any other punishments or otherwise harming or threatening to harm anyone who talks to, contracts with, or associates with LIV Golf;

e. Enjoin the PGA Tour from conspiring or unlawfully agreeing with the European Tour to ban or threaten to ban players from participating in European Tour events or participating in the Ryder Cup for talking to, contracting with, playing in, or associating with LIV Golf;

f. Enjoin the PGA Tour from agreeing, contracting or threatening the R&A, Masters, and/or PGA of America (or others), to punish, exclude or threaten to exclude players otherwise eligible under current eligibility rules from participating in golf events (including the Majors);

g. Enjoin the PGA Tour from amending its rules to prevent players otherwise eligible from playing in PGA Tour events or co-sponsored events, such as the FedEx Cup, the WGC tournaments, the Tournament of Champions, the Players, the Memorial, the Arnold Palmer Invitational, the Genesis Invitational, AT&T Pebble Beach Open, and the Presidents Cup;

h. Enjoin the PGA Tour from enforcing its unlawful restrictions on independent-contractor golfers, including the Media Rights Regulation and the Conflicting Events Regulation;

i. Enjoin the PGA Tour from amending its rules to prevent players otherwise eligible from playing in PGA Tour events or co-sponsored events;

j. Enjoin the PGA Tour from applying rules beyond their meaning to punish players who associate with LIV Golf, or otherwise to thwart competition; and

k. Enjoin the PGA Tour from taking any other actions intended to undermine competition on the merits from LIV Golf.

WHEREFORE, Plaintiffs request that this Honorable Court:

a. Adjudge and decree that the PGA Tour is unlawfully maintaining its monopoly over the market for the services of professional golfers for elite golf events in violation of Section 2 of the Sherman Act;

b. Adjudge and decree that the PGA Tour is unlawfully maintaining its monopoly over the market for the promotion of elite golf events in violation of Section 2 of the Sherman Act;

c. In the alternative, adjudge and decree that the PGA Tour is attempting to monopolize the market for the services of professional golfers for elite golf

events and the market for the promotion of elite golf events in violation of Section 2 of the Sherman Act;

d. Adjudge and decree that the PGA Tour unreasonably restrained trade in violation of Section 1 of the Sherman Act when it entered agreement with the European Tour to boycott LIV Golf and potential competitors and those who associate with LIV Golf to try to foreclose competition from LIV Golf in the relevant markets;

e. Adjudge and decree that the PGA Tour breached its Regulations when it refused to abate Player Plaintiffs' suspensions pending their respective appeals;

f. Adjudge and decree that the PGA Tour unlawfully and tortiously interfered with LIV Golf's contractual and prospective business relationships;

g. Award Plaintiffs monetary damages, treble damages, and economic damages;

h. Award LIV Golf punitive damages for the PGA Tour's bad faith and egregious interference with LIV Golf's contractual and prospective business relationships;

i. Award Plaintiffs their costs in this action, including attorneys' fees; and

j. Award Plaintiffs any further relief as may be just and proper.

DATED: August 26. 2022

Respectfully submitted,

By: */s/ Rachel S. Brass*

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DATED: August 26, 2022

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ATTESTATION PURSUANT TO CIVIL LOCAL RULE 5-1

Pursuant to Civil Local Rule 5-1(h)(3) of the Northern District of California, I attest that concurrence in the filing of the document has been obtained from each of the other signatories to this document.

DATED: August 26, 2022

GIBSON, DUNN & CRUTCHER LLP

By: */s/ Rachel S. Brass*
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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

MATT JONES; BRYSON DECHAMBEAU; PETER UIHLEIN; and LIV GOLF, INC.,

Plaintiffs,

v.

PGA TOUR, INC.,

Defendant.

PGA TOUR, INC.,

Counterclaimant,

v.

LIV GOLF, INC.,

Counterdefendant.

Case No. 5:22-cv-04486-BLF

DEFENDANT PGA TOUR, INC.'S ANSWER TO PLAINTIFFS' AMENDED COMPLAINT & COUNTERCLAIM

JURY TRIAL DEMANDED

Judge: Hon. Beth Labson Freeman

Date Filed: August 3, 2022

Trial Date: January 8, 2024

ANSWER TO AMENDED COMPLAINT

Defendant PGA TOUR, INC. ("the TOUR"), by and through its counsel of record, answers Plaintiffs MATT JONES, BRYSON DECHAMBEAU, PETER UIHLEIN (the "Player Plaintiffs"), and LIV GOLF INC.'s ("LIV") (collectively, "Plaintiffs") Amended Complaint as follows:

LIV, a new golf league paid for by Saudi Arabia's sovereign wealth fund, seeks to wield the antitrust laws as a cudgel instead of engaging in an honest effort to compete in the market for professional golf, while at the same time free riding on the TOUR's decades-long investment in tournament promotion for the various tours it operates, and in particular the PGA TOUR. Both LIV and the Player Plaintiffs knew that participating in LIV events while they remained members of the PGA TOUR, without a release from the TOUR's Commissioner, would breach the Player Plaintiffs' contractual obligations and would result in their suspensions.

The PGA TOUR's Player Handbook & Tournament Regulations (the "Regulations") contribute to the success of scheduled TOUR events, help the TOUR fulfill its own contractual obligations (including its obligation to sponsors and media partners to ensure representative fields), and provide substantial benefits to tournament sponsors, title sponsors, broadcasters, local host organizers, and ultimately, the players. The Regulations make the TOUR's media rights more valuable to sponsors and content distributors, leading to higher sponsorship and broadcast revenues, which in turn are distributed to members in the form of prize money and additional benefits.

Through this lawsuit, LIV asks the Court to invalidate these wholly legitimate provisions with the stroke of a pen *after* inducing the remaining Player Plaintiffs to violate those same regulations with hundreds of millions of dollars in Saudi money. The Player Plaintiffs that have remained in the case — eight of the original eleven players have withdrawn their names from this lawsuit already — want only to enrich themselves in complete disregard of the promises they made to the TOUR and its members when they joined the TOUR.

But there is no actual injury to Plaintiffs here, and no violation of the law. LIV, by its own admission, has succeeded in attracting numerous elite professional golfers to participate in its new

league. LIV has held numerous events with full fields and has announced a full season for 2023. Both LIV and the Player Plaintiffs baked the financial cost of their suspensions into LIV's exorbitant signing bonuses, making the Player Plaintiffs whole. Moreover, while LIV and the Player Plaintiffs challenge the TOUR's media rights and conflicting events policies as anticompetitive, LIV imposes similar—indeed far more restrictive—conditions on its players, and the Player Plaintiffs have agreed to them.

This case is not about unfair competition—if anyone is competing unfairly, it is LIV, not the TOUR. Instead, it is a cynical effort to avoid competition and to freeride off of the TOUR's investment in the development of professional golf. Plaintiffs' allegations are baseless and entirely without legal merit. The TOUR responds herein to each allegation, and at the same time, files a counterclaim against LIV for tortious interference with the TOUR's contracts with its members.

1. The TOUR admits that it was created in the 1960s in part by the world's best golfers at the time. The TOUR states that it is organized as a tax-exempt organization under Internal Revenue Code Section 501(c)(6). The TOUR otherwise denies the allegations in Paragraph 1 of the Amended Complaint.[1]

2. The TOUR admits that PGA TOUR members are independent contractors. The TOUR further admits that it is organized as a tax-exempt organization under Internal Revenue Code Section 501(c)(6). The TOUR otherwise denies the allegations in Paragraph 2 of the Amended Complaint.

3. To the extent Paragraph 3 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR admits that it has suspended some players in accordance with the Regulations' disciplinary provisions—including the remaining Player Plaintiffs—for their violations of the Regulations regarding conflicting events, media and

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[1] The TOUR denies each and every allegation of Plaintiffs' Amended Complaint—including the headings, footnotes, and captions—not specifically admitted or to which the TOUR has not otherwise responded in this Answer.

marketing rights, and player conduct. The TOUR otherwise denies the allegations in Paragraph 3 of the Amended Complaint.

4. To the extent Paragraph 4 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR is without sufficient information to admit or deny Plaintiffs' allegation that LIV canceled its 2022 business plan to launch a full league, and on that basis denies it. The TOUR admits that LIV launched its "Invitational Series" in 2022. The Tour further admits that it has suspended some players in accordance with the Regulations' disciplinary provisions for their violations of the regulations regarding conflicting events, media and marketing rights, and player conduct. The TOUR otherwise denies the allegations in Paragraph 4 of the Amended Complaint.

5. The TOUR admits that it has amended its Regulations from time to time. The TOUR otherwise denies the allegations in Paragraph 5 of the Amended Complaint.

6. To the extent Paragraph 6 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR admits that it has suspended some players in accordance with the Regulations' disciplinary provisions—including the remaining Player Plaintiffs—for their violations of the Regulations regarding conflicting events, media and marketing rights, and player conduct. The TOUR otherwise denies the allegations in Paragraph 6 of the Amended Complaint.

7. The TOUR admits that many of the best golfers in the world are PGA TOUR members. The TOUR further admits that PGA TOUR members agree each season to adhere to the Regulations, and that pursuant to the Regulations PGA TOUR members generally may not participate in any other golf tournament on a date when a PGA TOUR tournament is scheduled, absent permission from the TOUR. The TOUR further admits that, in certain circumstances, players may seek and receive releases to play in non-TOUR tournaments (and participate in non-TOUR media programs) that are held on the same dates as PGA TOUR events. The TOUR further admits that each player is generally eligible for up to three conflicting event releases per season, assuming he participates in fifteen PGA TOUR tournaments that season, and one additional release for each additional five PGA TOUR tournaments in which he participates. The

TOUR further admits that a release can be denied if the Commissioner determines that it would cause the TOUR to be in violation of a contractual commitment to a tournament sponsor, or would otherwise significantly and unreasonably harm the TOUR and its sponsors. The TOUR further admits that the Regulations preclude conflicting events releases for events held in North America. The TOUR further admits that the TOUR has granted releases for players when the releases do not violate one of these provisions or the TOUR's obligations to its members. The TOUR further admits that the Commissioner did not grant releases to players seeking to play in conflicting LIV events and noted LIV's intention to launch a series of events in North America as one reason for the denial of a release. The TOUR otherwise denies the allegations in Paragraph 7 of the Amended Complaint.

8. The TOUR admits that the Regulations also contain provisions related to member media rights, to which all PGA TOUR members agree on a season-to-season basis. The TOUR further admits that the quoted words appear in the Regulations, but otherwise denies the second sentence of Paragraph 8. The TOUR further admits that a portion of the media rights regulations provides that "[n]o PGA TOUR member shall participate in any live or recorded golf program without the prior written consent of the Commissioner, except that this requirement shall not apply to PGA TOUR cosponsored, coordinated or approved tournaments, wholly instructional programs or personal appearances on interview or guest shows." The TOUR further admits that the media rights regulations provide that "'[g]olf program' for purposes of [the media rights] section means any golf contest, exhibition or play that is shown anywhere in the world[.]" The TOUR otherwise denies the allegations in Paragraph 8 of the Amended Complaint.

9. The TOUR admits that PGA TOUR members are independent contractors. The TOUR otherwise denies the allegations in Paragraph 9 of the Amended Complaint.

10. The TOUR admits that certain of the block quoted words in Paragraph 10 appear in a January 24, 2020 memorandum from Commissioner Monahan to the PGA TOUR Policy Board, but denies the misleading alterations to the text of the memorandum. The TOUR otherwise denies the allegations in Paragraph 10 of the Amended Complaint.

11. To the extent Paragraph 11 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in the introductory portion of Paragraph 11 of the Amended Complaint.

a. The TOUR admits that it has suspended some players in accordance with the Regulations' disciplinary provisions—including the Player Plaintiffs—for their violations of the Regulations regarding conflicting events, media and marketing rights, and player conduct. The TOUR otherwise denies the allegations in Paragraph 11.a of the Amended Complaint.

b. The TOUR admits that it has amended its Regulations from time to time. The TOUR otherwise denies the allegations in Paragraph 11.b of the Amended Complaint.

c. The TOUR is without sufficient information to admit or deny the accuracy of the quotations in Paragraph 11.c, and on that basis denies them. The TOUR otherwise denies the allegations in Paragraph 11.c of the Amended Complaint.

d. The TOUR denies the allegations in Paragraph 11.d of the Amended Complaint.

e. The TOUR denies the allegations in Paragraph 11.e of the Amended Complaint.

f. The TOUR admits that it administers a program called PGA TOUR University designed to identify the best college golfers in the United States and provide them with playing opportunities, including on the Korn Ferry Tour. The TOUR further admits that college players must meet the eligibility requirements in the PGA TOUR University rules and regulations. The TOUR otherwise denies the allegations in Paragraph 11.f of the Amended Complaint.

g. The TOUR is without sufficient information to admit or deny whether or why sponsors have cut ties with players who have joined LIV. The TOUR otherwise denies the allegations in Paragraph 11.g of the Amended Complaint.

12. To the extent Paragraph 12 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 12 of the Amended Complaint.

13. The TOUR admits that PGA TOUR members are independent contractors. The TOUR further admits that Commissioner Monahan. consistent with the Regulations, imposed discipline on players for breaching their membership agreements with the TOUR, including imposing certain suspensions in accordance with the Regulations' disciplinary provisions for violations of the Regulations regarding conflicting events. media and marketing rights, and player conduct. The TOUR further admits that Talor Gooch, Hudson Swafford. and Matt Jones earned sufficient points to finish the 2021-2022 TOUR season in the top 125 of the 2021-2022 FedExCup Points list and, but for their suspensions for violations of the Regulations, they would have qualified for the first tournament of the 2022 FedExCup Playoffs. The TOUR otherwise denies the allegations in Paragraph 13 of the Amended Complaint.

14. The TOUR admits that Player Plaintiffs have already been fully compensated by LIV for all suspensions the TOUR might impose and all of the other consequences that may flow from their decision to violate the Regulations. The TOUR otherwise denies the allegations in Paragraph 14 of the Amended Complaint.

15. To the extent Paragraph 15 sets forth a conclusion of law. no response is required. To the extent a response is required, the TOUR admits that LIV has launched its business. The TOUR otherwise denies the allegations in Paragraph 15 of the Amended Complaint and denies that Plaintiffs are entitled to any relief.

16. Paragraph 16 sets forth allegations related to an individual who is no longer a plaintiff in this action, and no response is required. Further, to the extent Paragraph 16 sets forth a conclusion of law, no response is required.

17. Paragraph 17 sets forth allegations related to an individual who is no longer a plaintiff in this action. and no response is required. Further, to the extent Paragraph 17 sets forth a conclusion of law, no response is required.

18. Paragraph 18 sets forth allegations related to an individual who is no longer a plaintiff in this action, and no response is required. Further, to the extent Paragraph 18 sets forth a conclusion of law, no response is required. member of the PGA TOUR; has been suspended by the TOUR; attended the University of Georgia; that he joined the Nationwide Tour in 2012; won.

19. To the extent Paragraph 19 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR admits that Mr. Jones: is currently forty-two years old; was a member of the PGA TOUR; has been suspended by the PGA TOUR; attended Arizona State University; was a first-team All-American golfer; joined the Nationwide Tour in 2004; joined the PGA TOUR in 2008; won the 2014 Shell Houston Open; won the Emirates Australian Open in both 2015 and 2019 on the PGA Tour of Australasia; won the Honda Classic in 2021; played in over 350 PGA TOUR events; played in 20 events during the 2021-2022 PGA TOUR season; was within the top 50 of the FedExCup standings at the time of his suspension from the TOUR; and would have qualified to play in the first tournament of the 2022 FedExCup Playoffs if he had not been suspended for violations of the Regulations. The TOUR is without sufficient information to admit or deny Plaintiffs' remaining allegations in Paragraph 19 of the Amended Complaint, and on that basis denies them.

20. To the extent Paragraph 20 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR admits that Mr. DeChambeau: was twenty-eight years old at the time the Amended Complaint was filed; was a member of the PGA TOUR; has been suspended by the TOUR; attended Southern Methodist University; won the 2015 NCAA individual and U.S. Amateur titles; made his PGA TOUR debut in the 2015 FedEx St. Jude Classic as an amateur; finished second in the 2015 UNIQLO Masters as a professional; finished tied for fourth in the 2016 RBC Heritage on the PGA TOUR; won the 2016 Korn Ferry DAP Championship; won the 2017 John Deere Classic; won the 2018 Memorial Tournament, Northern Trust, and Dell Technologies Championships; played for the United States in the 2018 Ryder Cup; won the 2019 Shriners Hospitals for Children Open and the Omega Dubai Desert Classic on the European Tour (now the DP World Tour); won the 2020 Rocket Mortgage Classic and the U.S. Open; won the 2021 Arnold Palmer Invitational; and played for the United States in the 2021 Ryder Cup. The TOUR is without sufficient information to admit or deny Plaintiffs' remaining allegations in Paragraph 20 of the Amended Complaint, and on that basis denies them.

21. Paragraph 21 sets forth allegations related to an individual who is no longer a plaintiff in this action, and no response is required. Further, to the extent Paragraph 21 sets forth a conclusion of law, no response is required.

22. To the extent Paragraph 22 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR admits that Mr. Uihlein: was thirty-two years old at the time the Amended Complaint was filed; was a member of the Korn Ferry Tour and PGA TOUR; has been suspended by the TOUR; attended Oklahoma State University; won the 2017 Nationwide Children's Hospital Championship in 2017 on the Web.com Tour (now the Korn Ferry Tour); won the MGM Resorts Championship in 2021 on the Korn Ferry Tour; won the 2013 Madeira Islands Open on the European Tour (now the DP World Tour); represented the United States in the 2009 and 2011 Walker Cups as an amateur; won the 2010 Eisenhower Trophy; won the 2010 United States Amateur Championship; and ranked within the top 50 of the Korn Ferry Tour's regular season points list at the time of his suspension. The TOUR is without sufficient information to admit or deny Plaintiffs' remaining allegations in Paragraph 22 of the Amended Complaint, and on that basis denies them.

23. To the extent Paragraph 23 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR admits that LIV is the sponsor of the LIV Golf Invitational Series, which will host the majority of its 2022 tournaments in the United States. The TOUR is without sufficient information to admit or deny Plaintiffs' remaining allegations in Paragraph 23 of the Amended Complaint, and on that basis denies them.

24. To the extent Paragraph 24 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR admits the allegations in Paragraph 24 of the Amended Complaint.

25. To the extent Paragraph 25 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR admits for purposes of this action only that the Court has subject matter jurisdiction. The TOUR otherwise denies the allegations in Paragraph 25 of the Amended Complaint.

26. To the extent Paragraph 26 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR admits for purposes of this action only that the Court may exercise personal jurisdiction over the TOUR. The TOUR further admits that it manages or operates TPC Harding Park within the Northern District of California. The TOUR further admits that, in 2022, it cosponsored the Fortinet Championship, the American Express, the Farmers Insurance Open, the AT&T Pebble Beach Pro-Am, the Genesis Invitational, and the Barracuda Championship in California, and that California hosted more PGA TOUR events than any other state in 2022. The TOUR otherwise denies the allegations in Paragraph 26 of the Amended Complaint.

27. To the extent Paragraph 27 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR, for purposes of this action only, does not contest that this Court may exercise personal jurisdiction over the TOUR. The TOUR otherwise denies the remaining allegations in Paragraph 27 of the Amended Complaint.

28. To the extent Paragraph 28 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR does not contest, for purposes of this action only, that venue is proper in this District.

29. The TOUR is without sufficient information to admit or deny the allegations in Paragraph 29 of the Amended Complaint, and on that basis denies them.

30. The TOUR admits that it cosponsors a series of tournaments each year and that there are four "major" tournaments each golf season: the Masters, the U.S. Open, the Open Championship, and the PGA Championship. The TOUR further admits that the Ryder Cup and the Presidents Cup take place on a bi-annual basis and that the Olympics take place every four years. The TOUR further admits that PGA TOUR members may compete in other tournaments outside North America that conflict with TOUR cosponsored events if they obtain a conflicting event release and/or a media rights release from the Commissioner under the Regulations. The TOUR otherwise denies the allegations in Paragraph 30 of the Amended Complaint.

31. The TOUR admits that many of the world's top golfers seek to compete on the PGA TOUR. The TOUR further admits that the TOUR's investments in building its platform

have allowed the TOUR to offer some of the largest purses in professional golf. The TOUR admits that purses are generally larger on the PGA TOUR than on the DP World Tour, the Asian Tour, and the Korn Ferry Tour, but denies Plaintiffs' allegations regarding purse sizes to the extent that they assert PGA TOUR purses are always larger than those on other tours. The TOUR admits that one way members can qualify for competition in the major tournaments is through success in PGA TOUR events. The TOUR otherwise denies the allegations in Paragraph 31 of the Amended Complaint.

32. The TOUR admits that, historically, it has not held additional cosponsored events the weeks that the majors hosted in North America—the Masters, U.S. Open, and PGA Championship—are played. The TOUR further admits that it has cosponsored an event during the week of the major hosted outside of North America, the Open Championship. The TOUR further admits that one way, among many, that members can qualify for competition in some of the major tournaments is through success in PGA TOUR events. The TOUR is without sufficient information to admit or deny Plaintiffs' allegation that LIV schedules its series and will schedule its league around the Majors, and on that basis denies it. The TOUR otherwise denies the allegations in Paragraph 32 of the Amended Complaint.

33. The TOUR admits that the DP World Tour (formerly known as the European Tour) is another men's professional golf players' membership organization. The TOUR further admits that Seve Ballesteros, Nick Faldo, and Bernhard Langer played numerous events throughout their careers on the European Tour. The TOUR is without sufficient information to admit or deny the accuracy of the quotations in Paragraph 33 or Plaintiffs' allegation that when DP World Tour members qualify for PGA TOUR membership, they almost invariably elect to immediately become PGA TOUR members, and on that basis denies them. The TOUR otherwise denies the allegations in Paragraph 33 of the Amended Complaint.

34. The TOUR is without sufficient information to admit or deny the accuracy of the quotation or the allegations in Paragraph 34 of the Amended Complaint, and on that basis denies them.

35. The TOUR admits that the quoted language in Paragraph 35 appears in Commissioner Monahan's January 2020 memorandum. The TOUR otherwise denies the allegations in Paragraph 35 of the Amended Complaint.

36. To the extent Paragraph 36 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR admits that it purchased a minority stake in European Tour Productions in 2020. The TOUR otherwise denies the allegations in Paragraph 36 of the Amended Complaint.

37. The TOUR admits that it organizes and manages the PGA TOUR Champions, the Korn Ferry Tour, and the developmental tours PGA TOUR Latinoamerica and PGA TOUR Canada. The TOUR further admits that the PGA TOUR Latinoamerica holds events in Latin America and that PGA TOUR Canada holds events in Canada. The TOUR further admits that it describes the Korn Ferry Tour as the path to the PGA TOUR. The TOUR further admits that the Asian Tour hosts events principally in Asia, that the Japan Tour hosts events in Japan, that the Sunshine Tour hosts events in South Africa, and that the KPGA Korean Tour holds events in South Korea. The TOUR otherwise denies the allegations in Paragraph 37 of the Amended Complaint.

38. The TOUR denies the allegations in Paragraph 38 of the Amended Complaint.

39. The TOUR denies the allegations in Paragraph 39 of the Amended Complaint.

40. The TOUR admits that one way PGA TOUR members may gain spots in some of the majors, the Ryder and Presidents Cup teams, and the Olympics is through success in PGA TOUR events. The TOUR further admits that holding a ranking within the top 50 of the Official World Golf Rankings is one means through which players may qualify for some major tournaments. The TOUR further admits that the number of World Golf Ranking points earned in any particular tournament is, in part, determined by the Total Field Rating as determined by the Official World Golf Rankings. The TOUR further admits that Olympic Golf Rankings—which are used to determine eligibility for the Olympic golf field—are currently derived from World Golf Rankings. The TOUR is without sufficient information to admit or deny the accuracy of the

quotation in Paragraph 40, and on that basis denies it. The TOUR otherwise denies the allegations in Paragraph 40 of the Amended Complaint.

41. To the extent Paragraph 41 sets for a conclusion of law, no response is required. To the extent a response is required, the TOUR admits Jay Monahan, Keith Pelley, Keith Waters, Seth Waugh, Mike Whan, Will Jones, Martin Slumbers, and Peter Dawson are members of the Official World Golf Rankings' Governing Board. The TOUR otherwise denies the allegations in Paragraph 41 of the Amended Complaint.

42. The TOUR admits its Articles of Incorporation, which were included in the TOUR's application to the Internal Revenue Service for tax-exempt status under Section 501(c)(6), state that one of the TOUR's purposes is to promote the common interests of professional tournament golfers. The TOUR otherwise denies the allegations in Paragraph 42 of the Amended Complaint.

43. The TOUR admits that the professional golfers who have earned the right to compete on the PGA TOUR are among the most skilled and popular professional golfers in the United States and the world, and that they include some of the biggest names in sports and popular culture in the United States and the world. The TOUR denies that Phil Mickelson, Bryson DeChambeau, Brooks Koepka, Henrik Stenson, Cameron Smith, Dustin Johnson, Louis Oosthuizen, Sergio Garcia, or Bubba Watson are currently members of the PGA TOUR. The TOUR otherwise denies the allegations in Paragraph 43 of the Amended Complaint.

44. The TOUR admits that PGA TOUR members are independent contractors. The TOUR further admits that there are no teams to cover expenses for players on the TOUR. The TOUR otherwise denies the allegations in Paragraph 44 of the Amended Complaint.

45. The TOUR admits that Jay Monahan is the Commissioner of the PGA TOUR and assumed that role on January 1, 2017. The TOUR further admits that Commissioner Monahan sits on the Board of the DP World Tour (formerly known as the European Tour), the Governing Board of the Official World Golf Rankings, and the Board of Directors and Executive Committee of the International Golf Federation. The TOUR otherwise denies the allegations in Paragraph 45 of the Amended Complaint.

46. The TOUR admits that the quoted language appears in Commissioner Monahan's January 2020 Memorandum to the TOUR Policy Board. The TOUR otherwise denies the allegations in Paragraph 46 of the Amended Complaint.

47. The TOUR admits that the quality of play on the PGA TOUR continues to flourish. The TOUR otherwise denies the allegations in Paragraph 47 of the Amended Complaint.

48. The TOUR admits that its revenue has increased between 2011 and 2019. The TOUR otherwise denies the allegations in Paragraph 48 of the Amended Complaint.

49. The TOUR admits that Brooks Koepka earned $9.68 million in official money during the 2018-2019 PGA TOUR season and that he was first on the PGA TOUR's official money list for that season. The TOUR is otherwise without sufficient information to admit or deny the allegations in Paragraph 49 of the Amended Complaint, and on that basis denies them.

50. The TOUR admits that it is organized as a tax-exempt organization under Internal Revenue Code Section 501(c)(6). The TOUR further admits that it does not provide players with direct reimbursement for travel. The TOUR otherwise denies the allegations in Paragraph 50 of the Amended Complaint.

51. The TOUR admits that it does not provide players with direct reimbursement for travel to and lodging at PGA TOUR events, or for coaches, therapists, trainers, or caddies. The TOUR otherwise denies the allegations in Paragraph 51 of the Amended Complaint.

52. The TOUR is without sufficient information to admit or deny the accuracy of the quotation or the allegations in Paragraph 52 of the Amended Complaint, and on that basis denies them.

53. The TOUR is without sufficient information to admit or deny the accuracy of the quotation in Paragraph 53, and on that basis denies it. The TOUR otherwise denies the allegations in Paragraph 53 of the Amended Complaint.

54. The TOUR is without sufficient information to admit or deny the accuracy of the quotation in Paragraph 54, and on that basis denies it. The TOUR otherwise denies the allegations in Paragraph 54 of the Amended Complaint.

55. The TOUR denies the allegations in Paragraph 55 of the Amended Complaint.

56. The TOUR admits that the Regulations govern, in large part, membership on the TOUR. The TOUR otherwise denies the allegations in Paragraph 56 of the Amended Complaint.

57. The TOUR admits that Section V.B.1.a of the Regulations relates to player media rights. The TOUR otherwise denies the allegations in Paragraph 57 of the Amended Complaint.

58. The TOUR admits that the quoted words appear in the Regulations. To the extent the remaining allegations in Paragraph 58 constitute a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the remaining allegations in Paragraph 58 of the Amended Complaint.

59. The TOUR admits that PGA TOUR members are independent contractors. The TOUR further admits that other provisions of the Regulations also relate to player media rights. The TOUR otherwise denies the allegations in Paragraph 59 of the Amended Complaint.

60. The TOUR admits that PGA TOUR members are independent contractors. The TOUR otherwise denies the allegations in Paragraph 60 of the Amended Complaint.

61. The TOUR is without sufficient information to admit or deny Plaintiffs' allegation that LIV has not reached a broadcast agreement for its tournaments in the United States, and on that basis denies it. The TOUR otherwise denies the allegations in Paragraph 61 of the Amended Complaint.

62. The TOUR admits that it amended the Regulations in November 2019, and that the quoted language reflects the amendment. Except for the omissions and alterations, the TOUR further admits that quoted language appears in Commissioner Monahan's January 2020 memorandum. The TOUR otherwise denies the allegations in Paragraph 62 of the Amended Complaint.

63. The TOUR is without sufficient information to admit or deny the accuracy of the quotation or the allegations in Paragraph 63 of the Amended Complaint, and on that basis denies them.

64. The TOUR admits that some players requested releases to play in the LIV Golf London Invitational. The TOUR further admits that it denied those players' requests and in accordance with the Regulations' disciplinary provisions for violations of the Regulations

regarding conflicting events, media and marketing rights, and player conduct, suspended those who violated the Regulations by still playing in the event. The TOUR otherwise denies the allegations in Paragraph 64 of the Amended Complaint.

65. The TOUR denies that it did not require PGA TOUR members to obtain releases to participate in the JP McManus in July 2022. The TOUR admits that in accordance with the Regulations' disciplinary provisions for violations of the Regulations regarding conflicting events, media and marketing rights, and player conduct, it imposed discipline on players who violated the Regulations through their participation in the LIV Golf Portland Invitational. The TOUR otherwise denies the allegations in Paragraph 65 of the Amended Complaint.

66. The TOUR denies the allegations in Paragraph 66 of the Amended Complaint.

67. The TOUR admits that Sections V.A.2-3 of the Regulations provide that "no PGA TOUR member shall participate in any other golf tournament or event on a date when a PGA TOUR . . . cosponsored tournament . . . is scheduled," that members may participate in a conflicting event "for which a member obtains an advance written release for his participation from the Commissioner," and that "[e]ach Regular Member of PGA TOUR ordinarily shall be eligible for three releases per season based on participation in 15 PGA TOUR cosponsored or approved tournaments and, in addition, shall be eligible for one release for every five cosponsored or approved tournaments . . . in which he participates above 15 tournaments." The TOUR otherwise denies the allegations in Paragraph 67 of the Amended Complaint.

68. The TOUR admits that the Regulations prohibit PGA TOUR members from participating in golf tournaments on a date when a PGA TOUR cosponsored event is scheduled and for which the PGA TOUR member is eligible, unless the member has obtained a release from the Commissioner. The TOUR further admits that the decision to grant releases is in the discretion of the Commissioner. The TOUR further admits that the Regulations do not permit releases for conflicting events in North America. The TOUR otherwise denies the allegations in Paragraph 68 of the Amended Complaint.

69. The TOUR admits that the Regulations do not permit releases for conflicting events in North America. The TOUR further admits that the decision to grant releases is in the

discretion of the Commissioner. The TOUR further admits that it has historically granted releases for international events on tours that are part of a series of events based outside North America. The TOUR further admits that it did not grant releases to any player to participate in the LIV Golf London Invitational. The TOUR further admits that the quoted language appears in the TOUR's letters denying the requested releases. The TOUR further admits that the Commissioner shall make decisions on release requests not later than 30 days in advance of the tournament for which the release is requested. The TOUR otherwise denies the allegations in Paragraph 69 of the Amended Complaint.

70. The TOUR admits the allegations in Paragraph 70 of the Amended Complaint.

71. The TOUR admits that it has informed players that it will enforce the Regulations. The TOUR further admits that, in accordance with the Regulations' disciplinary provisions for violations of the Regulations regarding conflicting events, media and marketing rights, and player conduct, it suspended Player Plaintiffs who participated in the LIV Golf London Invitational. The TOUR further admits that it notified other PGA TOUR members of Plaintiffs' suspensions. The TOUR otherwise denies the allegations in Paragraph 71 of the Amended Complaint.

72. The TOUR admits that Korn Ferry Tour Members must abide by the Korn Ferry Tour Player Handbook and Regulations. The TOUR otherwise denies the allegations in Paragraph 72 of the Amended Complaint.

73. The TOUR admits that non-members who played in LIV events during the 2021-2022 PGA TOUR season were ineligible for participation in tournaments on any tour operated by the TOUR including PGA TOUR tournaments also sanctioned by another governing body or league. The TOUR otherwise denies the allegations in Paragraph 73 of the Amended Complaint.

74. The TOUR admits that Greg Norman was involved in the launch of the World Golf Tour in 1994. The TOUR is without sufficient information to admit or deny Plaintiffs' allegations that it informed players by letter nearly three decades ago that it would not grant conflicting events releases for World Golf Tour events held within the United States, and that it would only grant other releases for events taking place on Monday, Tuesday, or Wednesday, and

on that basis denies them. The TOUR otherwise denies the allegations in Paragraph 74 of the Amended Complaint.

75. The TOUR admits that the Player Plaintiffs requested releases to participate in LIV events and that the TOUR denied their requests. The TOUR further admits that, in accordance with the Regulations' disciplinary provisions for violations of the Regulations regarding conflicting events, media and marketing rights, and player conduct, it imposed discipline on the Player Plaintiffs for violating the Regulations. The TOUR otherwise denies the allegations in Paragraph 75 of the Amended Complaint.

76. The TOUR admits that the Player Plaintiffs requested releases to participate in a LIV Golf event in London. The TOUR otherwise denies the allegations in Paragraph 76 of the Amended Complaint.

77. The TOUR denies that it orchestrated an anticompetitive response to the Premier Golf League ("PGL"). The TOUR is otherwise without sufficient information to admit or deny the accuracy of the allegations in Paragraph 77 of the Amended Complaint, and on that basis denies them.

78. The TOUR is without sufficient information to admit or deny the accuracy of the allegations in Paragraph 78 of the Amended Complaint, and on that basis denies them.

79. The TOUR is without sufficient information to admit or deny the accuracy the allegations in Paragraph 79 of the Amended Complaint, and on that basis denies them.

80. The TOUR denies the allegations in Paragraph 80 of the Amended Complaint.

81. The TOUR admits that the quoted words appear in Commissioner Monahan's January 2020 memorandum. The TOUR otherwise denies the allegations in Paragraph 81 of the Amended Complaint.

82. Except for the alterations, the TOUR admits that the quoted words appear in Commissioner Monahan's January 2020 memorandum. The TOUR otherwise denies the allegations in Paragraph 82 of the Amended Complaint.

83. The TOUR admits that the quoted words appear in Commissioner Monahan's January 2020 memorandum. The TOUR otherwise denies the allegations in Paragraph 83 of the Amended Complaint.

84. Except for the alterations, the TOUR admits that the quoted words appear in Commissioner Monahan's January 2020 memorandum. The TOUR otherwise denies the allegations in Paragraph 84 of the Amended Complaint.

85. The TOUR admits that Commissioner Monahan's January 2020 memorandum refers to "two proposed changes to our Regulations[.]" The TOUR otherwise denies the allegations in Paragraph 85 of the Amended Complaint.

86. Except for the alterations, the TOUR admits that the quoted words appear in Commissioner Monahan's January 2020 memorandum. The TOUR otherwise denies the allegations in Paragraph 86 of the Amended Complaint.

87. Except for the alterations, the TOUR admits that the quoted words appear in Commissioner Monahan's January 2020 memorandum. The TOUR otherwise denies the allegations in Paragraph 87 of the Amended Complaint.

88. Except for the alterations, the TOUR admits that the quoted words appear in Commissioner Monahan's January 2020 memorandum. The TOUR otherwise denies the allegations in Paragraph 88 of the Amended Complaint.

89. The TOUR is without sufficient information to admit or deny the accuracy of the quoted language in Paragraph 89, and on that basis denies it. The TOUR otherwise denies the allegations in Paragraph 89 of the Amended Complaint.

90. The TOUR admits that PGA TOUR members are independent contractors. The TOUR otherwise denies the allegations in Paragraph 90 of the Amended Complaint.

91. The TOUR is without sufficient information to admit or deny the accuracy of the quoted language in Paragraph 91, and on that basis denies it. The TOUR otherwise denies the allegations in Paragraph 91 of the Amended Complaint.

92. The TOUR is without sufficient information to admit or deny the accuracy of the quotation in Paragraph 92, and on that basis denies it. The TOUR otherwise denies the allegations in Paragraph 92 of the Amended Complaint.

93. The TOUR admits that Commissioner Monahan's January 2020 memo states that "[w]e have continued discussions with the European Tour about the potential to work more closely together, thereby removing the European Tour as a potential partner of Private Equity Golf." The TOUR otherwise denies the allegations in Paragraph 93 of the Amended Complaint.

94. The TOUR is without sufficient information to admit or deny the accuracy of the allegations in Paragraph 94 of the Amended Complaint, and on that basis denies them.

95. The TOUR admits that OWGR rankings are one means of qualifying for the Majors. The TOUR otherwise denies the allegations in Paragraph 95 of the Amended Complaint.

96. The TOUR admits that Commissioner Monahan sits on the board of the OWGR. The TOUR is without sufficient information to admit or deny Plaintiffs' allegation that the PGL sought to partner with the European Tour as part of its plan to enter and obtain a sponsor for its OWGR application, and on that basis denies it. The TOUR otherwise denies the allegations in Paragraph 96 of the Amended Complaint.

97. The TOUR denies the allegations in Paragraph 97 of the Amended Complaint.

98. To the extent Paragraph 98 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR admits that it entered into a strategic alliance with the European Tour in November 2020. The TOUR further admits that Commissioner Monahan was granted a seat on the European Tour's Board of Directors and that the TOUR made further investments in the European Tour Productions. The TOUR otherwise denies the allegations in Paragraph 98 of the Amended Complaint.

99. The TOUR is without sufficient information to admit or deny the accuracy of the allegation in Paragraph 99 that the PGL was left with no real prospect of viability, and on that basis denies it. The TOUR otherwise denies the allegations in Paragraph 99 of the Amended Complaint.

100. The TOUR denies the allegations in Paragraph 100 of the Amended Complaint.

101. The TOUR denies the allegations in Paragraph 101 of the Amended Complaint.

102. The TOUR is without sufficient information to admit or deny the accuracy of the allegations in Paragraph 102 of the Amended Complaint, and on that basis denies them.

103. The TOUR is without sufficient information to admit or deny the accuracy of the allegations in Paragraph 103 of the Amended Complaint, and on that basis denies them.

104. The TOUR admits that a typical TOUR cosponsored tournament includes a cut. The TOUR otherwise denies the allegations in Paragraph 104 of the Amended Complaint.

105. The TOUR denies the allegations in Paragraph 105 of the Amended Complaint.

106. The TOUR is without sufficient information to admit or deny the accuracy of the allegations in Paragraph 106 of the Amended Complaint, and on that basis denies them.

107. To the extent Paragraph 107 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR is without sufficient information to admit or deny Plaintiffs' allegation that LIV partnered with the Asian Tour, and on that basis denies it. The TOUR is otherwise without sufficient information to admit or deny the accuracy of the allegations in Paragraph 107 of the Amended Complaint, and on that basis denies them.

108. The TOUR is without sufficient information to admit or deny the accuracy of the allegations regarding the relationships LIV sought to cultivate, and on that basis denies them. The TOUR otherwise denies the allegations in Paragraph 108 of the Amended Complaint.

109. The TOUR denies the allegations in Paragraph 109 of the Amended Complaint.

110. The TOUR admits that purse sizes have grown in recent years. The TOUR otherwise denies the allegations in Paragraph 110 of the Amended Complaint.

111. To the extent Paragraph 111 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR admits that the quoted words appear in Commissioner Monahan's January 2020 memorandum. The TOUR otherwise denies the allegations in Paragraph 111 of the Amended Complaint.

112. The TOUR admits that the Player Impact Program ("PIP") went into effect in 2021. The TOUR further admits that PIP is a bonus program designed to recognize those players that have the most impact on the TOUR's business success. The TOUR further admits that the

initial PIP pool totaled $40 million in 2021. The TOUR otherwise denies the allegations in Paragraph 112 of the Amended Complaint.

113. The TOUR admits that player compensation has increased substantially. The TOUR otherwise denies the allegations in Paragraph 113 of the Amended Complaint.

114. The TOUR admits the allegations in Paragraph 114 of the Amended Complaint.

115. The TOUR denies that the publication of increased purse sizes occurred in December 2021. The TOUR otherwise admits the allegations in Paragraph 115 of the Amended Complaint.

116. The TOUR denies the allegations in Paragraph 116 of the Amended Complaint.

117. The TOUR denies the allegations in Paragraph 117 of the Amended Complaint.

118. The TOUR denies the allegations in Paragraph 118 of the Amended Complaint.

119. The TOUR denies the allegations in Paragraph 119 of the Amended Complaint.

120. The TOUR is without sufficient information to admit or deny the accuracy of the quotations in Paragraph 120 of the Amended Complaint, and on that basis denies it.

121. The TOUR is without sufficient information to admit or deny the accuracy of the quotations in Paragraph 121 of the Amended Complaint, and on that basis denies it.

122. The TOUR admits that it announced purse increases on June 21, 2022. The TOUR further admits that it informed players a portion of the increased purses would be paid from the TOUR's reserves. The TOUR further admits that it announced the 2022-2023 season on August 1, 2022, that the total prize money from official events exceeds $400 million, and that the total bonus money for the season would be $145 million. The TOUR otherwise denies the allegations in Paragraph 122 of the Amended Complaint.

123. The TOUR denies the allegations in Paragraph 123 of the Amended Complaint.

124. The TOUR admits that Commissioner Monahan spoke to players prior to the Wells Fargo Championship in Charlotte, North Carolina on May 4, 2021. The TOUR otherwise denies the allegations in Paragraph 124 of the Amended Complaint.

125. The TOUR is without sufficient information to admit or deny the accuracy of the allegations in Paragraph 125 of the Amended Complaint, and on that basis denies them.

126. The TOUR is without sufficient information to admit or deny the accuracy of the quotations in Paragraph 126, and on that basis denies it. The TOUR otherwise denies the remaining allegations in Paragraph 126 of the Amended Complaint.

127. The TOUR denies the allegations in Paragraph 127 of the Amended Complaint.

128. The TOUR denies the allegations in Paragraph 128 of the Amended Complaint.

129. The TOUR denies the allegations in Paragraph 129 of the Amended Complaint.

130. The TOUR denies the allegations in Paragraph 130 of the Amended Complaint.

131. The TOUR admits that the DP World Tour co-sanctioned the Saudi International with Golf Saudi between 2019 and 2021. The TOUR is without sufficient information to admit or deny the accuracy of the quotation in Paragraph 131, and on that basis denies it. The TOUR otherwise denies the allegations in Paragraph 131 of the Amended Complaint.

132. The TOUR denies the allegations in Paragraph 132 of the Amended Complaint.

133. The TOUR denies the allegations in Paragraph 133 of the Amended Complaint.

134. The TOUR is without sufficient information to admit or deny the accuracy of the quotation in Paragraph 134, and on that basis denies it. The TOUR otherwise denies the allegations in Paragraph 134 of the Amended Complaint.

135. The TOUR is without sufficient information to admit or deny the accuracy of the quotation in Paragraph 135, and on that basis denies it. The TOUR otherwise denies the allegations in Paragraph 135 of the Amended Complaint.

136. TOUR is without sufficient information to admit or deny the accuracy of the quotation in Paragraph 136, and on that basis denies it. The TOUR otherwise denies the allegations in Paragraph 136 of the Amended Complaint.

137. TOUR is without sufficient information to admit or deny the accuracy of the quotations or allegations in Paragraph 137 of the Amended Complaint, and on that basis denies them.

138. TOUR is without sufficient information to admit or deny the accuracy of the quotations or allegations in Paragraph 138 of the Amended Complaint, and on that basis denies them.

139. The TOUR admits that it stated it would not grant conflicting events releases for the 2022 Saudi International. The TOUR otherwise denies the allegations in Paragraph 139 of the Amended Complaint.

140. The TOUR is without sufficient information to admit or deny the accuracy of the quotations in Paragraph 140 of the Amended Complaint, and on that basis denies it.

141. The TOUR admits that approximately twenty-eight players requested conflicting event releases for the 2022 Saudi International. The TOUR further admits that it granted conditional conflicting events releases, to the extent permitted by the Regulations. The TOUR further admits that it conditioned the releases that were granted as follows: those players who had played in the AT&T Pebble Beach Pro-Am (the conflicting TOUR event) at least once in the preceding five years were required to commit to play the event at least once in 2023 or 2024, and those who had not played in the Pro-Am in the past five years were required to commit to play the event twice between 2023 and 2025. The TOUR otherwise denies the allegations in Paragraph 141 of the Amended Complaint.

142. The TOUR is without sufficient information to admit or deny the accuracy of the quotations or allegations in Paragraph 142 of the Amended Complaint, and on that basis denies them.

143. The TOUR is without sufficient information to admit or deny the accuracy of the allegations in Paragraph 143 of the Amended Complaint, and on that basis denies them.

144. The TOUR is without sufficient information to admit or deny the accuracy of the quotations or allegations in Paragraph 144 of the Amended Complaint, and on that basis denies them.

145. The TOUR denies the allegations in Paragraph 145 of the Amended Complaint.

146. The TOUR admits that it announced an agreement with the DP World Tour on June 28, 2022. The TOUR further admits that it announced it was increasing its existing stake in European Tour Productions to 40%. The TOUR further admits that it announced that the top ten players in the end of season DP World Tour Rankings would earn PGA TOUR cards for the

following season. The TOUR otherwise denies the allegations in Paragraph 146 of the Amended Complaint.

147. The TOUR denies that the DP World Tour issued sanctions at the TOUR's behest. The TOUR is otherwise without sufficient information to admit or deny the accuracy of the quotations or allegations in Paragraph 144 of the Amended Complaint, and on that basis denies them.

148. The TOUR is without sufficient information to admit or deny the accuracy of the allegations in Paragraph 148 of the Amended Complaint, and on that basis denies them.

149. The TOUR is without sufficient information to admit or deny the accuracy of the quotations or allegations in Paragraph 149 of the Amended Complaint, and on that basis denies them.

150. The TOUR admits that non-members who played in LIV events during the 2021-2022 PGA TOUR season were ineligible for participation in tournaments on any tour operated by the TOUR including PGA TOUR tournaments also sanctioned by another governing body or league. The TOUR otherwise denies the allegations in Paragraph 150 of the Amended Complaint.

151. The TOUR denies the allegations in Paragraph 151 of the Amended Complaint.

152. The TOUR is without sufficient information to admit or deny the accuracy of Plaintiffs' allegations that participating in and winning the Majors and the Ryder Cup are the ultimate goal of most top professional golfers and that one of the goals of playing on a tour each year is to secure qualification to the Majors and the Ryder Cup, and on that basis denies them. The TOUR otherwise denies the allegations in Paragraph 152 of the Amended Complaint.

153. The TOUR admits that the quoted words appear in Commissioner Monahan's January 2020 memorandum. The TOUR otherwise denies the allegations in Paragraph 153 of the Amended Complaint.

154. The TOUR is without sufficient information to admit or deny the accuracy of the quotation in Paragraph 154, and on that basis denies it. The TOUR otherwise denies the allegations in Paragraph 154 of the Amended Complaint.

155. The TOUR admits that the PGA of America is a separate entity from the PGA TOUR, and that the PGA of America organizes the PGA Championship and co-organizes the Ryder Cup along with the European Tour. The TOUR further admits that the PGA of America has a representative, President Jim Richerson, on the PGA TOUR Policy Board. The TOUR is without sufficient information to admit or deny the accuracy of the quotations or remaining allegations in Paragraph 155 of the Amended Complaint, and on that basis denies them.

156. The TOUR is without sufficient information to admit or deny the accuracy of the allegations in Paragraph 156 of the Amended Complaint, and on that basis denies them.

157. The TOUR is without sufficient information to admit or deny the accuracy of the quotations or allegations in Paragraph 157 of the Amended Complaint, and on that basis denies them.

158. The TOUR is without sufficient information to admit or deny the accuracy of the quotations or allegations in Paragraph 158 of the Amended Complaint, and on that basis denies them.

159. The TOUR admits that the R&A is the promoter of the Open Championship. The TOUR is otherwise without sufficient information to admit or deny the accuracy of the allegations in Paragraph 159 of the Amended Complaint, and on that basis denies them.

160. The TOUR admits that Augusta National is the promoter of the Masters Tournament. The TOUR denies that it has pressured August National to do its bidding. The TOUR is without sufficient information to admit or deny the accuracy of the remaining allegations in Paragraph 160 of the Amended Complaint, and on that basis denies them.

161. The TOUR denies the allegations in Paragraph 161 of the Amended Complaint.

162. The TOUR is without sufficient information to admit or deny the accuracy of the allegations in Paragraph 162 of the Amended Complaint, and on that basis denies them.

163. The TOUR denies the allegations in Paragraph 163 of the Amended Complaint.

164. The TOUR denies the allegations in Paragraph 164 of the Amended Complaint.

165. The TOUR is without sufficient information to admit or deny the accuracy of the quotation in Paragraph 165, and on that basis denies it. The TOUR otherwise denies the remaining allegations in Paragraph 165 of the Amended Complaint.

166. The TOUR admits that Commissioner Monahan spoke with players prior to the Honda Classic in February 2022 and that he told players that the TOUR would enforce its Regulations. The TOUR otherwise denies the allegations in Paragraph 166 of the Amended Complaint.

167. The TOUR is without sufficient information to admit or deny the accuracy of the allegations in Paragraph 167 of the Amended Complaint, and on that basis denies them.

168. The TOUR denies the allegations in Paragraph 168 of the Amended Complaint.

169. The TOUR is without sufficient information to admit or deny the accuracy of the allegations in Paragraph 169 of the Amended Complaint, and on that basis denies them.

170. The TOUR is without sufficient information to admit or deny the accuracy of the allegations in Paragraph 170 of the Amended Complaint, and on that basis denies them.

171. The TOUR denies the allegations in Paragraph 171 of the Amended Complaint.

172. The TOUR is without sufficient information to admit or deny the accuracy of the allegations in Paragraph 172 of the Amended Complaint, and on that basis denies them.

173. The TOUR is without sufficient information to admit or deny Plaintiffs' allegation that the Player Plaintiffs and many other players (at least 170 golfers) filed entry applications for LIV Golf Invitational Series' first event, and on that basis denies it. The TOUR admits that the Player Plaintiffs and other PGA TOUR members requested conflicting events releases and media rights releases for the LIV Golf Invitational in London. The TOUR otherwise denies the allegations in Paragraph 173 of the Amended Complaint.

174. The TOUR admits that it denied all requests for conflicting event and media releases for the LIV Golf Invitational in London. The TOUR further admits that the quoted language appears in the letters the TOUR sent denying the releases. The TOUR further admits that, in certain circumstances, it has granted releases for conflicting events scheduled to take

place outside North America on tours based outside North America. The TOUR otherwise denies the allegations in Paragraph 174 of the Amended Complaint.

175. The TOUR denies the allegations in Paragraph 175 of the Amended Complaint.

176. The TOUR admits that it administers a program called PGA TOUR University designed to identify the best college golfers in the United States and provide them with playing opportunities, including on the Korn Ferry Tour. The TOUR further admits that college players must meet the eligibility requirements in the PGA TOUR University rules and regulations. The TOUR otherwise denies the allegations in Paragraph 176 of the Amended Complaint.

177. The TOUR denies that the DP World Tour acted in concert with the TOUR to deny releases for the LIV Golf Invitational in London. The TOUR is otherwise without sufficient information to admit or deny the accuracy of the allegations in Paragraph 177 of the Amended Complaint, and on that basis denies them.

178. The TOUR is without sufficient information to admit or deny Plaintiffs' allegations with respect to LIV's compensation to players. The TOUR otherwise denies the allegations in Paragraph 178 of the Amended Complaint.

179. To the extent Paragraph 179 sets forth a conclusion of law, no response is required. To extent a response is required, the TOUR admits that LIV announced the field for its London Invitational on May 31, 2022. The TOUR is without sufficient information to admit or deny Plaintiffs' allegations that players were very interested in its product or that the London Invitational lacked the quality of field LIV set out to have, and on that basis denies them. The TOUR otherwise denies the allegations in Paragraph 179 of the Amended Complaint.

180. The TOUR is without sufficient information to admit or deny the accuracy of the quotations in Paragraph 180 of the Amended Complaint, and on that basis denies it.

181. The TOUR is without sufficient information to admit or deny the accuracy of the quotations and allegations in Paragraph 181 of the Amended Complaint, and on that basis denies them.

182. The TOUR denies the allegations in Paragraph 182 of the Amended Complaint.

183. The TOUR denies the allegations in Paragraph 183 of the Amended Complaint.

184. The TOUR admits that quoted language appears in letters sent to TOUR players identified as part of the field for the LIV Golf London Invitational. The TOUR is without sufficient information to admit or deny Plaintiffs' allegation that the DP World Tour sent similar notices to its members who were included in the LIV Golf Invitational Series field. The TOUR otherwise denies the allegations in Paragraph 184 of the Amended Complaint.

185. The TOUR denies the allegations in Paragraph 185 of the Amended Complaint.

186. The TOUR admits that TOUR representatives communicated with Mr. Ogletree and explained why his requested release was denied. The TOUR admits that the quotation in Paragraph 186 of the Amended Complaint appeared in those communications. The TOUR otherwise denies the allegations in Paragraph 186 of the Amended Complaint.

187. The TOUR denies the allegations in Paragraph 187 of the Amended Complaint.

188. To the extent Paragraph 188 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR admits that it granted Mr. Ogletree a release to compete in an Asian Tour event. The TOUR otherwise denies the allegations in Paragraph 188 of the Amended Complaint.

189. The TOUR admits that a TOUR representative communicated with Mr. Gooch regarding his participation in LIV events. The TOUR further admits that, except for the alterations, the quotation in Paragraph 189 appeared in those communications. The TOUR otherwise denies the allegations in Paragraph 189 of the Amended Complaint.

190. The TOUR admits that it sent letters on June 3, 2022 to TOUR members who indicated they intended to participate in the LIV Golf London Invitational. The TOUR further admits that the quoted language appears in the June 3, 2022 letters. The TOUR further admits that Article VII, Section C of the Regulations relates to conduct unbecoming a professional. The TOUR otherwise denies the allegations in Paragraph 190 of the Amended Complaint.

191. The TOUR denies the allegations in Paragraph 191 of the Amended Complaint.

192. The TOUR admits that PGA TOUR members are independent contractors. The TOUR further admits that Kevin Na resigned his membership on June 3, 2022. The TOUR further

admits that, except for the alterations, the quotation in Paragraph 192 appears in Mr. Na's letter. The TOUR otherwise denies the allegations in Paragraph 192 of the Amended Complaint.

193. The TOUR admits that several players who participated in the LIV Golf London Invitational resigned from the TOUR. The TOUR otherwise denies the allegations in Paragraph 193 of the Amended Complaint.

194. The TOUR admits that the quoted language appears in a letter sent by the TOUR's Vice President of Competition Administration, Kristen Burgess. The TOUR otherwise denies the allegations in Paragraph 194 of the Amended Complaint.

195. The TOUR admits that it sent letters to TOUR members who elected to play in the LIV Golf London Invitational on June 9, 2022, and that the letters informed the recipients of their immediate suspension. The TOUR denies the remaining allegations in Paragraph 195 of the Amended Complaint.

196. The TOUR admits that Commissioner Monahan sent a letter to TOUR members on June 9, 2022 identifying suspended players. The TOUR further admits that, except for the alterations and quotations, the quoted words appear in the Commissioner's June 9, 2022 letter. The TOUR otherwise denies the remaining allegations in Paragraph 196 of the Amended Complaint.

197. The TOUR admits that on June 9, 2022, the PGA TOUR Vice President of Competition Administration, Kristen Burgess, sent letters to all former PGA TOUR Members who participated in the LIV Golf London Invitational Series but had resigned from the PGA TOUR. The TOUR further admits that the quoted words appear in the letter. The TOUR otherwise denies the allegations in Paragraph 197 of the Amended Complaint.

198. The TOUR denies the allegations in Paragraph 198 of the Amended Complaint.

199. The TOUR is without sufficient information to admit or deny the accuracy of the quotations and allegations in Paragraph 199, and on that basis denies them. The TOUR otherwise denies the allegations in Paragraph 199 of the Amended Complaint.

200. The TOUR admits the allegations in Paragraph 200 of the Amended Complaint.

201. To the extent Paragraph 201 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR admits that its Regulations set out the appeals process. The TOUR further admits that the quoted language appears in the Regulations. The TOUR otherwise denies the remaining allegations in Paragraph 201 of the Amended Complaint.

202. The TOUR admits it received letters from suspended members. The TOUR otherwise denies the allegations in Paragraph 202 of the Amended Complaint.

203. The TOUR admits that the quoted words appear in the Regulations at Section VI.E. The TOUR further admits that the Player Plaintiffs are currently suspended. The TOUR otherwise denies the allegation in Paragraph 203 of the Amended Complaint.

204. The TOUR denies the allegations in Paragraph 204 of the Amended Complaint.

205. The TOUR is without sufficient information to admit or deny the accuracy of the quotation in Paragraph 205, and on that basis denies it. The TOUR admits that Rory McIlroy is a PGA TOUR Board member. The TOUR further admits that Rory McIlroy is a member of the PGA TOUR and the DP World Tour. The TOUR otherwise denies the allegations in Paragraph 205 of the Amended Complaint.

206. To the extent Paragraph 206 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR admits that the Player Plaintiffs have appealed the penalties imposed for their violations of the Regulations. The TOUR otherwise denies the allegations in Paragraph 206 of the Amended Complaint.

207. The TOUR admits that it sent a letter to the Player Plaintiffs regarding their violations of the Regulations and the resulting consequences. The TOUR otherwise denies the allegations in Paragraph 207 of the Amended Complaint.

208. The TOUR admits that it informed PGA TOUR members on July 25, 2022 of the FedExCup Playoffs and Eligibility Point List that would determine eligibility for the FedExCup playoffs. The TOUR otherwise denies the allegations in Paragraph 208 of the Amended Complaint.

209. The TOUR admits that some of the Player Plaintiffs' appeals were transferred to the Appeals Committee on July 27, 2022. The TOUR further admits that it confirmed that the Player Plaintiffs' suspensions under VII.C. of the Regulations remained in effect. The TOUR otherwise denies the allegations in Paragraph 209 of the Amended Complaint.

210. The TOUR admits that Andrew Levinson sent some Player Plaintiffs a letter to the effect that the Tour would no longer send them Notice of Disciplinary Inquiry letters for "ongoing violations." The TOUR otherwise denies the allegations in Paragraph 210 of the Amended Complaint.

211. The TOUR admits that it sent a letter to Mr. Gooch on August 2, 2022 informing him that his "eligibility to participate in PGA TOUR events has been suspended based on serious violations of the Regulations by your playing in and contributing your media rights to LIV Golf events, contrary to the terms you expressly agreed to as a condition of PGA TOUR membership," and that his "continuing participation in and promotion of LIV Golf is inflicting ongoing harm to the reputation and financial best interest of the TOUR," that his "suspension under Article VII, Section C remains in effect and, under Article VII, Section E, your July 13 appeal does not effectuate a stay of your suspension from tournaments in which your violations continue to occur," and that "[a]ccordingly, you remain ineligible for competition in the FedExCup Playoffs or otherwise." The TOUR otherwise denies the allegations in Paragraph 211 of the Amended Complaint.

212. The TOUR denies the allegations in Paragraph 212 of the Amended Complaint.

213. The TOUR denies the allegations in Paragraph 213 of the Amended Complaint.

214. Paragraph 214 sets forth allegations related to an individual who is no longer a plaintiff in this action, and no response is required. To the extent a response is required, the TOUR denies that it engaged in any anticompetitive conduct. The TOUR otherwise admits the allegations in Paragraph 214 of the Amended Complaint.

215. Paragraph 215 sets forth allegations related to an individual who is no longer a plaintiff in this action, and no response is required. Further, to the extent Paragraph 215 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 215 of the Amended Complaint.

216. Paragraph 216 sets forth allegations related to an individual who is no longer a plaintiff in this action, and no response is required. Further, to the extent Paragraph 216 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 216 of the Amended Complaint.

217. Paragraph 217 sets forth allegations related to an individual who is no longer a plaintiff in this action, and no response is required. Further, To the extent Paragraph 217 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 217 of the Amended Complaint.

218. Paragraph 218 sets forth allegations related to an individual who is no longer a plaintiff in this action, and no response is required. Further, to the extent Paragraph 218 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR admits that, in accordance with the Regulations' disciplinary provisions for violations of TOUR Regulations regarding conflicting events, media and marketing rights, and player conduct, it suspended Talor Gooch. The TOUR otherwise denies the allegations in Paragraph 218 of the Amended Complaint.

219. Paragraph 219 sets forth allegations related to an individual who is no longer a plaintiff in this action, and no response is required. Further, to the extent Paragraph 219 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 219 of the Amended Complaint.

220. Paragraph 220 sets forth allegations related to an individual who is no longer a plaintiff in this action, and no response is required. Further, to the extent Paragraph 220 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 220 of the Amended Complaint.

221. Paragraph 221 sets forth allegations related to an individual who is no longer a plaintiff in this action, and no response is required. Further, to the extent Paragraph 221 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 221 of the Amended Complaint.

222. Paragraph 222 sets forth allegations related to an individual who is no longer a plaintiff in this action, and no response is required. Further, to the extent Paragraph 222 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR admits that, in accordance with the Regulations' disciplinary provisions for violations of TOUR Regulations regarding conflicting events, media and marketing rights, and player conduct, it suspended Hudson Swafford. The TOUR otherwise denies the allegations in Paragraph 222 of the Amended Complaint.

223. Paragraph 223 sets forth allegations related to an individual who is no longer a plaintiff in this action, and no response is required. Further, to the extent Paragraph 223 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 223 of the Amended Complaint.

224. Paragraph 224 sets forth allegations related to an individual who is no longer a plaintiff in this action, and no response is required. Further, to the extent Paragraph 224 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 224 of the Amended Complaint.

225. Paragraph 224 sets forth allegations related to an individual who is no longer a plaintiff in this action, and no response is required. Further, to the extent Paragraph 225 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 225 of the Amended Complaint.

226. To the extent Paragraph 226 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR admits that, in accordance with the Regulations' disciplinary provisions for violations of TOUR Regulations regarding conflicting events, media and marketing rights, and player conduct, it suspended Matt Jones. The TOUR otherwise denies the allegations in Paragraph 226 of the Amended Complaint.

227. To the extent Paragraph 227 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 227 of the Amended Complaint.

228. To the extent Paragraph 228 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 228 of the Amended Complaint.

229. To the extent Paragraph 229 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 229 of the Amended Complaint.

230. To the extent Paragraph 230 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR admits that, in accordance with the Regulations' disciplinary provisions for violations of TOUR Regulations regarding conflicting events, media and marketing rights, and player conduct, it suspended Bryson DeChambeau. The TOUR otherwise denies the allegations in Paragraph 230 of the Amended Complaint.

231. To the extent Paragraph 231 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 231 of the Amended Complaint.

232. To the extent Paragraph 232 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 232 of the Amended Complaint.

233. To the extent Paragraph 233 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 233 of the Amended Complaint.

234. Paragraph 234 sets forth allegations related to an individual who is no longer a plaintiff in this action, and no response is required. Further, to the extent Paragraph 234 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR admits that, in accordance with the Regulations' disciplinary provisions for violations of TOUR Regulations regarding conflicting events, media and marketing rights, and player conduct, it suspended Ian Poulter. The TOUR otherwise denies the allegations in Paragraph 234 of the Amended Complaint.

235. Paragraph 235 sets forth allegations related to an individual who is no longer a plaintiff in this action, and no response is required. Further, to the extent Paragraph 235 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 235 of the Amended Complaint.

236. Paragraph 236 sets forth allegations related to an individual who is no longer a plaintiff in this action, and no response is required. Further, To the extent Paragraph 236 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 236 of the Amended Complaint.

237. Paragraph 237 sets forth allegations related to an individual who is no longer a plaintiff in this action, and no response is required. Further, to the extent Paragraph 237 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 237 of the Amended Complaint.

238. To the extent Paragraph 238 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR admits that, in accordance with the Regulations' disciplinary provisions for violations of TOUR Regulations regarding conflicting events, media and marketing rights, and player conduct, it suspended Peter Uihlein. The TOUR otherwise denies the allegations in Paragraph 238 of the Amended Complaint.

239. To the extent Paragraph 239 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 239 of the Amended Complaint.

240. To the extent Paragraph 240 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 240 of the Amended Complaint.

241. To the extent Paragraph 241 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 241 of the Amended Complaint.

242. The TOUR denies the allegations in Paragraph 242 of the Amended Complaint.

243. The TOUR denies that it told Arena Americas that it would cease doing business with Arena Americas if it worked with LIV Golf. The TOUR is otherwise without sufficient information to admit or deny the remaining allegations in Paragraph 243 of the Amended Complaint, and on that basis denies them.

244. The TOUR denies that it has a "blacklist" for any vendor that works with LIV Golf. The TOUR is without sufficient information to admit or deny the remaining allegations in Paragraph 244 of the Amended Complaint, and on that basis denies them.

245. The TOUR is without sufficient information to admit or deny the allegations in Paragraph 245 of the Amended Complaint, and on that basis denies them.

246. The TOUR is without sufficient information to admit or deny the allegations in Paragraph 246 of the Amended Complaint, and on that basis denies them.

247. The TOUR is without sufficient information to admit or deny the allegations in Paragraph 247 of the Amended Complaint, and on that basis denies them.

248. The TOUR is without sufficient information to admit or deny the allegations in Paragraph 248 of the Amended Complaint, and on that basis denies them.

249. The TOUR denies that Commissioner Monahan has impressed upon Ari Emmanuel and Mark Shapiro that the Endeavor Company cannot work with LIV. The TOUR is otherwise without sufficient information to admit or deny the remaining allegations in Paragraph 243 of the Amended Complaint, and on that basis denies them.

250. The TOUR is without sufficient information to admit or deny the allegations in Paragraph 250 of the Amended Complaint, and on that basis denies them.

251. The TOUR is without sufficient information to admit or deny the allegations in Paragraph 251 of the Amended Complaint, and on that basis denies them.

252. The TOUR is without sufficient information to admit or deny the allegations in Paragraph 252 of the Amended Complaint, and on that basis denies them.

253. The TOUR is without sufficient information to admit or deny the allegations in Paragraph 253 of the Amended Complaint, and on that basis denies them.

254. The TOUR is without sufficient information to admit or deny the allegations in Paragraph 254 of the Amended Complaint, and on that basis denies them.

255. The TOUR denies that it applied pressure to Ticketmaster. The TOUR is otherwise without sufficient information to admit or deny the remaining allegations in Paragraph 255 of the Amended Complaint, and on that basis denies them.

256. The TOUR denies that it asked Pro Secrets not to work with LIV. The TOUR is otherwise without sufficient information to admit or deny the remaining allegations in Paragraph 256 of the Amended Complaint, and on that basis denies them.

257. The TOUR denies that it threatened Cueto. The TOUR is otherwise without sufficient information to admit or deny the remaining allegations in Paragraph 257 of the Amended Complaint, and on that basis denies them.

258. The TOUR is without sufficient information to admit or deny the allegations in Paragraph 258 of the Amended Complaint, and on that basis denies them.

259. The TOUR is without sufficient information to admit or deny the allegations in Paragraph 259 of the Amended Complaint, and on that basis denies them.

260. The TOUR denies that it threatened golf courses with adverse consequences if they hosted LIV events. The TOUR is otherwise without sufficient information to admit or deny the remaining allegations in Paragraph 260 of the Amended Complaint, and on that basis denies them.

261. The TOUR denies the allegations in Paragraph 261 of the Amended Complaint.

262. The TOUR denies the allegations in Paragraph 262 of the Amended Complaint.

263. To the extent Paragraph 263 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 263 of the Amended Complaint.

264. To the extent Paragraph 264 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 264 of the Amended Complaint.

265. To the extent Paragraph 265 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 265 of the Amended Complaint.

266. To the extent Paragraph 266 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 266 of the Amended Complaint.

267. To the extent Paragraph 267 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 267 of the Amended Complaint.

268. The TOUR denies the allegations in Paragraph 268 of the Amended Complaint.

269. To the extent Paragraph 269 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 269 of the Amended Complaint.

270. To the extent Paragraph 270 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 270 of the Amended Complaint.

271. To the extent Paragraph 271 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 271 of the Amended Complaint.

272. To the extent Paragraph 272 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 272 of the Amended Complaint.

273. To the extent Paragraph 273 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR admits that success in PGA TOUR events may lead to opportunities to compete in the Majors. The TOUR otherwise denies the allegations in Paragraph 273 of the Amended Complaint.

274. To the extent Paragraph 274 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 274 of the Amended Complaint.

275. The TOUR admits that it describes PGA TOUR viewers as the "most valuable audience in sports." The TOUR further admits that it describes PGA TOUR viewers as "affluent, educated, and influential." To the extent the remaining allegations in Paragraph 275 set forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the remaining allegations in Paragraph 275 of the Amended Complaint.

276. To the extent Paragraph 276 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 276 of the Amended Complaint.

277. The TOUR is without sufficient information to admit or deny Plaintiffs' allegations that (1) a substantial proportion of golf fans have a particular affinity for the sport, which is often tied to their participation; (2) that as players of the sport themselves, golf fans have a particular connection with golf broadcasts, which cannot readily be replicated by broadcasts of other sports or entertainment events; and (3) that golf enthusiasts are a particular target of many advertisers on elite golf events, who seek to sell particular products and services (such as golf apparel and equipment) to golf enthusiasts, and on that basis denies them. To the extent the remaining allegations in Paragraph 277 set forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the remaining allegations in Paragraph 277 of the Amended Complaint.

278. The TOUR admits that events organized by the TOUR occur mostly in the United States, and the fans who attend those events in person are mostly in the United States. The TOUR further admits that TOUR events and their live network broadcasts are scheduled to provide convenient time slots for fans in the United States. The TOUR further admits that LIV has announced plans to organize a tour with events taking place in the United States and that the TOUR has denied releases to members seeking to participate in conflicting events. The TOUR otherwise denies the allegations in Paragraph 278 of the Amended Complaint.

279. To the extent Paragraph 279 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 279 of the Amended Complaint.

280. To the extent Paragraph 280 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 280 of the Amended Complaint.

281. The TOUR denies the allegations in Paragraph 281 of the Amended Complaint.

282. The TOUR denies the allegations in Paragraph 282 of the Amended Complaint.

283. The TOUR denies the allegations in Paragraph 283 of the Amended Complaint.

284. The TOUR denies the allegations in Paragraph 284 of the Amended Complaint.

285. The TOUR denies the allegations in Paragraph 285 of the Amended Complaint.

286. To the extent Paragraph 286 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 286 of the Amended Complaint.

287. To the extent Paragraph 287 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 287 of the Amended Complaint.

288. To the extent Paragraph 288 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 288 of the Amended Complaint.

289. The TOUR is without sufficient information to admit or deny the allegations in Paragraph 289 of the Amended Complaint, and on that basis denies them.

290. The TOUR is without sufficient information to admit or deny the allegations in Paragraph 290 of the Amended Complaint, and on that basis denies them.

291. The TOUR denies the allegations in Paragraph 291 of the Amended Complaint.

292. The TOUR denies the allegations in Paragraph 292 of the Amended Complaint.

293. To the extent Paragraph 293 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 293 of the Amended Complaint.

294. To the extent Paragraph 294 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 294 of the Amended Complaint.

295. The TOUR is without sufficient information to admit or deny Plaintiffs' allegation that LIV sought to secure commitments from players by March 2022 to establish its League for the summer 2022, and on that basis denies it. The TOUR otherwise denies the remaining allegations in Paragraph 295 of the Amended Complaint.

296. The TOUR denies the allegations in Paragraph 296 of the Amended Complaint.

297. The TOUR denies the allegations in Paragraph 297 of the Amended Complaint.

298. The TOUR denies the allegations in Paragraph 298 of the Amended Complaint.

299. The TOUR denies the allegations in Paragraph 299 of the Amended Complaint.

300. The TOUR denies the allegations in Paragraph 300 of the Amended Complaint.

301. The TOUR admits that fans cannot watch Player Plaintiffs in TOUR events due to their suspensions for violations of the Regulations. The TOUR otherwise denies the remaining allegations in Paragraph 301 of the Amended Complaint.

302. To the extent Paragraph 302 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 302 of the Amended Complaint.

303. To the extent Paragraph 303 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 303 of the Amended Complaint.

304. To the extent Paragraph 304 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 304 of the Amended Complaint.

305. To the extent Paragraph 305 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR admits that it is enforcing membership rules that have benign purposes. The TOUR otherwise denies the remaining allegations in Paragraph 305 of the Amended Complaint.

306. To the extent Paragraph 306 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR admits that it is acting to prevent free-riding. The TOUR otherwise denies the remaining allegations in Paragraph 306 of the Amended Complaint.

307. To the extent Paragraph 307 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR admits that the website "PGA TOUR Fan Shop" is operated by Fanatics. The TOUR is without sufficient information to admit or deny Plaintiffs' allegation that it does business with dozens of sponsors who do billions of dollars of business each year in Saudi Arabia, and on that basis denies it. The TOUR otherwise denies the remaining allegations in Paragraph 307 of the Amended Complaint.

308. The TOUR denies the allegations in Paragraph 308 of the Amended Complaint.

309. To the extent Paragraph 309 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 309 of the Amended Complaint.

310. The TOUR repeats, alleges, and incorporates by reference as if fully set forth herein each and every response to Paragraphs 1-309 above.

311. To the extent Paragraph 311 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 311 of the Amended Complaint.

312. To the extent Paragraph 312 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 312 of the Amended Complaint.

313. To the extent Paragraph 313 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 313 of the Amended Complaint.

314. To the extent Paragraph 314 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 314 of the Amended Complaint.

315. To the extent Paragraph 315 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 315 of the Amended Complaint.

316. To the extent Paragraph 316 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 316 of the Amended Complaint.

317. To the extent Paragraph 317 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 317 of the Amended Complaint.

318. The TOUR repeats, alleges, and incorporates by reference as if fully set forth herein each and every response to Paragraphs 1-317 above.

319. To the extent Paragraph 319 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 319 of the Amended Complaint.

320. To the extent Paragraph 320 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 320 of the Amended Complaint.

321. To the extent Paragraph 321 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 321 of the Amended Complaint.

322. To the extent Paragraph 322 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 322 of the Amended Complaint.

323. To the extent Paragraph 323 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 323 of the Amended Complaint.

324. To the extent Paragraph 324 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 324 of the Amended Complaint.

325. To the extent Paragraph 325 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 325 of the Amended Complaint.

326. The TOUR repeats, alleges, and incorporates by reference as if fully set forth herein each and every response to Paragraphs 1-325 above.

327. To the extent Paragraph 327 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 327 of the Amended Complaint.

328. To the extent Paragraph 328 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 328 of the Amended Complaint.

329. To the extent Paragraph 329 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 329 of the Amended Complaint.

330. To the extent Paragraph 330 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 330 of the Amended Complaint.

331. To the extent Paragraph 331 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 331 of the Amended Complaint.

332. To the extent Paragraph 332 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 332 of the Amended Complaint.

333. To the extent Paragraph 333 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 333 of the Amended Complaint.

334. To the extent Paragraph 334 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 334 of the Amended Complaint.

335. To the extent Paragraph 335 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 335 of the Amended Complaint.

336. To the extent Paragraph 336 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 336 of the Amended Complaint.

337. To the extent Paragraph 337 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 337 of the Amended Complaint.

338. To the extent Paragraph 338 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 338 of the Amended Complaint.

339. To the extent Paragraph 339 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 339 of the Amended Complaint.

340. To the extent Paragraph 340 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 340 of the Amended Complaint.

341. The TOUR repeats, alleges, and incorporates by reference as if fully set forth herein each and every response to Paragraphs 1-340 above.

342. To the extent Paragraph 342 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 342 of the Amended Complaint.

343. To the extent Paragraph 343 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 343 of the Amended Complaint.

344. To the extent Paragraph 344 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 344 of the Amended Complaint.

345. To the extent Paragraph 345 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 345 of the Amended Complaint.

346. To the extent Paragraph 346 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 346 of the Amended Complaint.

347. To the extent Paragraph 347 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 347 of the Amended Complaint.

348. To the extent Paragraph 348 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 348 of the Amended Complaint.

349. To the extent Paragraph 349 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 349 of the Amended Complaint.

350. To the extent Paragraph 350 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 350 of the Amended Complaint.

351. To the extent Paragraph 351 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 351 of the Amended Complaint.

352. To the extent Paragraph 352 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 352 of the Amended Complaint.

353. To the extent Paragraph 353 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 353 of the Amended Complaint.

354. The TOUR repeats, alleges, and incorporates by reference as if fully set forth herein each and every response to Paragraphs 1-353 above.

355. To the extent Paragraph 355 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 355 of the Amended Complaint.

356. The TOUR admits that it cosponsored six tournaments in the State of California during the 2021-2022 season and that a subsidiary entity owns and operates one golf course in the State of California. The TOUR otherwise denies the allegations in Paragraph 356 of the Amended Complaint.

357. To the extent Paragraph 357 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 357 of the Amended Complaint.

358. To the extent Paragraph 358 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 358 of the Amended Complaint.

359. To the extent Paragraph 359 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 359 of the Amended Complaint.

360. To the extent Paragraph 360 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 360 of the Amended Complaint.

361. To the extent Paragraph 361 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 361 of the Amended Complaint.

362. To the extent Paragraph 362 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 362 of the Amended Complaint.

363. To the extent Paragraph 363 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 363 of the Amended Complaint.

364. To the extent Paragraph 364 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 364 of the Amended Complaint.

365. To the extent Paragraph 365 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 365 of the Amended Complaint.

366. The TOUR repeats, alleges, and incorporates by reference as if fully set forth herein each and every response to Paragraphs 1-365 above.

367. To the extent Paragraph 367 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR admits that the TOUR and Player

Plaintiffs entered contracts. The TOUR otherwise denies the allegations in Paragraph 367 of the Amended Complaint.

368. To the extent Paragraph 368 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 368 of the Amended Complaint.

369. To the extent Paragraph 369 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 369 of the Amended Complaint.

370. To the extent Paragraph 370 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 370 of the Amended Complaint.

371. The TOUR repeats, alleges, and incorporates by reference as if fully set forth herein each and every response to Paragraphs 1-370 above.

372. To the extent Paragraph 372 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR is without sufficient information to admit or deny the allegations in Paragraph 372 of the Amended Complaint, and on that basis denies them.

373. To the extent Paragraph 373 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR is without sufficient information to admit or deny the allegations in Paragraph 373 of the Amended Complaint, and on that basis denies them.

374. To the extent Paragraph 374 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 374 of the Amended Complaint.

375. To the extent Paragraph 375 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 375 of the Amended Complaint.

376. To the extent Paragraph 376 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 376 of the Amended Complaint.

377. To the extent Paragraph 377 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 377 of the Amended Complaint.

378. To the extent Paragraph 378 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 378 of the Amended Complaint.

379. To the extent Paragraph 379 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 379 of the Amended Complaint.

380. The TOUR repeats, alleges, and incorporates by reference as if fully set forth herein each and every response to Paragraphs 1-379 above.

381. The TOUR is without sufficient information to admit or deny the allegations in Paragraph 381 of the Amended Complaint, and on that basis denies them.

382. The TOUR denies the allegations in Paragraph 382 of the Amended Complaint.

383. To the extent Paragraph 383 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 383 of the Amended Complaint.

384. To the extent Paragraph 384 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 384 of the Amended Complaint.

385. To the extent Paragraph 385 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 385 of the Amended Complaint.

386. To the extent Paragraph 386 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 386 of the Amended Complaint.

387. To the extent Paragraph 387 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 387 of the Amended Complaint.

388. To the extent Paragraph 388 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 388 of the Amended Complaint.

389. Plaintiffs' demand for a trial by jury does not state an allegation and does not require a response.

The paragraphs that set forth Plaintiffs' prayer for relief state no allegations and a response is not required. The TOUR denies any allegations contained in Plaintiffs' Prayer for Relief to which a response is required.

THE TOUR'S DEFENSES

The TOUR asserts the following defenses at law and in equity. The TOUR further reserves all additional defenses under Federal Rule of Civil Procedure 8(c) and any other defense that may now exist or that may in the future be available based on further discovery or factual investigation in this action. The TOUR denies that Plaintiffs are entitled to any relief whatsoever. By setting forth the defenses asserted below, the TOUR does not concede that it bears the burden of proof on any of the issues raised in these defenses. Furthermore, all such defenses are pled in the alternative, and do not constitute an admission of liability or an admission that Plaintiffs are entitled to any relief whatsoever.

First Defense

The Amended Complaint and each and every cause of action are barred for failure to state a claim upon which relief may be granted.

Second Defense

Plaintiffs' claims are barred, in whole or in part, because they lack antitrust standing to

pursue them, lack a cognizable antitrust injury, and are not proper or efficient enforcers of the antitrust laws.

Third Defense

Plaintiffs' claims are barred, in whole or in part, because they have not suffered an injury to their business or property due to any of the TOUR's actions alleged in the Amended Complaint.

Fourth Defense

Plaintiffs' claims are barred, in whole or in part, because the TOUR's actions alleged in the Amended Complaint were lawful, justified, and procompetitive.

Fifth Defense

Plaintiffs' claims are barred, in whole or in part, because the TOUR does not possess monopoly power, does not have the specific intent to obtain monopoly power, has not engaged in the willful acquisition or maintenance of monopoly power by engaging in anticompetitive conduct, and has no probability of achieving monopoly power in the relevant market.

Sixth Defense

Plaintiffs' claims are barred, in whole or in part, because they have failed to properly define the product and geographic markets.

Seventh Defense

Plaintiffs' claims are barred, in whole or in part, because the TOUR has not formed an agreement with a direct competitor to refuse to deal with Plaintiffs.

Eighth Defense

Plaintiffs' claims are barred, in whole or in part, because none of the TOUR's actions alleged in the Amended Complaint have caused harm to competition within a relevant market.

Ninth Defense

Player Plaintiffs' claims are barred, in whole or in part, because they failed to perform under the terms of their contracts.

Tenth Defense

Player Plaintiffs' claims are barred, in whole or in part, because the TOUR substantially performed all the material terms of its contracts with Player Plaintiffs.

Eleventh Defense

LIV's claims are barred, in whole or in part, because the TOUR lacked knowledge of LIV's contractual relationships with LIV players.

Twelfth Defense

LIV's claims are barred, in whole or in part, because the TOUR lacked knowledge of an economic relationship between LIV and third-parties that probably would have resulted in an economic benefit to LIV, or that the TOUR's actions alleged in the Amended Complaint were certain or substantially certain to disrupt any economic relationship between LIV and third-parties.

Thirteenth Defense

Plaintiffs' claims for equitable and injunctive relief are barred by the doctrine of unclean hands.

Fourteenth Defense

Plaintiffs' claims for equitable and injunctive relief are barred by the doctrine of laches.

Fifteenth Defense

Plaintiffs' claims for equitable and injunctive relief are barred because the balance of the equities does not favor granting the requested relief.

Sixteenth Defense

Plaintiffs' claims for equitable and injunctive relief are barred because the requested relief is not in the public interest.

Seventeenth Defense

Plaintiffs' claims are barred in whole or in part by the statute of limitations applicable to their respective claims.

Eighteenth Defense

Plaintiffs' claims are barred, in whole or in part, because of the Player Plaintiffs'

ratification, agreement, acquiescence, authorization, or consent to the TOUR's alleged conduct, including by agreeing to the Regulations.

PGA TOUR'S COUNTERCLAIM

PGA TOUR, Inc. ("PGA TOUR" or "TOUR"), by its undersigned counsel, brings this counterclaim against LIV Golf, Inc. ("LIV") and alleges as follows:

INTRODUCTION

1. The TOUR's counterclaim against LIV arises out of LIV's tortious inducement of numerous, repeated breaches of contract by former TOUR members, including: Phil Mickelson, Talor Gooch, Hudson Swafford, Matt Jones, Bryson DeChambeau, Ian Poulter, and Peter Uihlein (together, "LIV Players"). LIV has executed a campaign to pay the LIV Players astronomical sums of money to induce them to breach their contracts with the TOUR in an effort to use the LIV Players and the game of golf to sportswash the recent history of Saudi atrocities and to further the Saudi Public Investment Fund's Vision 2030 initiatives.

2. Simultaneously, LIV has encouraged and funded the pursuit by the LIV Players of meritless antitrust claims against the TOUR to challenge the lawfulness of the TOUR's contracts with its members. Indeed, to encourage that lawsuit, LIV has falsely communicated to the LIV Players and to other players that their agreements with the TOUR are unenforceable and thus LIV Players may breach them. In the same breath, however, LIV has entered into its own agreements with the LIV Players, which impose contractual restrictions on the LIV Players more onerous in scope and duration than any of the TOUR regulations they challenge. These restrictions, many of which required LIV Players to breach their contracts with the TOUR, include, but are not limited to, (i) multi-year commitments, (ii) a mandate that LIV Players play in every single LIV event, including all those played in the same week as a TOUR event, (iii) numerous full-day appearance obligations each year, (iv) requirements to wear LIV-branded apparel at non-LIV events, (v) providing LIV with significant control over LIV Players' social media activity and their ability to speak with the media, and (vi) a broad and exclusive media rights assignment to LIV. Moreover, at least some LIV contracts, such as that signed by Talor Gooch, require LIV members to "assist

[LIV] in seeking to persuade players to enter into multiyear player participation agreements with [LIV]."[2]

3. LIV has tortiously interfered with the TOUR's contracts with full knowledge of the terms of those agreements and with intent to induce LIV Players to breach their contracts with the TOUR. LIV Players have responded to LIV's inducements exactly as LIV hoped—by repeatedly breaching their contracts with the TOUR.

4. Indeed, a key component of LIV's strategy has been to intentionally induce TOUR members to breach their TOUR agreements and play in LIV events while seeking to maintain their TOUR memberships and play in marquee TOUR events like The Players Championship and the FedEx Cup Playoffs, so LIV can free ride off the TOUR and its platform. LIV's 2022 schedule noticeably and purposefully took a break during the weeks of the TOUR's FedExCup playoffs, which LIV has described as the "Super Bowl" of golf, and LIV has announced it will do the same in upcoming seasons.

5. LIV has falsely informed LIV Players that they may openly breach their contractual obligations to the TOUR, for the benefit of LIV and to the detriment of all TOUR members. LIV's interference with the TOUR's contracts is unlawful.

PARTIES

6. Defendant LIV is a professional golf tour financed and overseen by the Public Investment Fund ("PIF"), the Saudi sovereign wealth fund, which holds more than $500 billion in

[2] Andrew Beaton, *LIV Golf's Player Contracts Include Restrictions to Go With the Big Money*, Wall Street Journal (Aug. 17, 2022), https://www.wsj.com/articles/liv-golf-pga-tour-contract-11660744567. Indeed, once LIV induced players like Phil Mickelson and Bryson DeChambeau to breach their contracts with the TOUR, they started recruiting members on their own. *See* Abdul Bari Khan, *Report Makes an Amazing Revelation about LIV Team Captains Brooks Koepka and Bryson DeChambeau*, Essentially Sports (July 27, 2022), https://www.essentiallysports.com/golf-news-report-makes-an-amazing-revelation-about-liv-team-captains-brooks-koepka-and-bryson-dechambeau/.

assets. LIV is organized under the laws of the state of Delaware and has identified as its principal place of business New York City, New York. LIV's headquarters and primary offices are in West Palm Beach, Florida. To date, PIF has committed at least $2 billion in funding to LIV.

7. Plaintiff TOUR is a Maryland non-profit corporation, with its principal place of business in Ponte Vedra Beach, Florida. The TOUR operates as a membership organization, the sole members of which are the professional golfers themselves.

JURISDICTION AND VENUE

8. Pursuant to 28 U.S.C. § 1367(a), this Court has supplemental jurisdiction over the TOUR's counterclaim against LIV for state-law tortious interference with contract. LIV's action against the TOUR arises under Sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1, 2. This Court has subject matter jurisdiction over those federal claims under 28 U.S.C. § 1331, § 1337. The TOUR's state-law tortious interference counterclaim arises out of facts that are directly related to LIV's claims such that they form part of the same case or controversy within this Court's original jurisdiction.

9. This Court has personal jurisdiction over LIV and venue is proper in the Northern District of California pursuant to 28 U.S.C. § 1391(b) and (c) because LIV has appeared in this action and filed claims against the TOUR in this District.

GENERAL ALLEGATIONS

I. The TOUR's History and Business Model

10. The TOUR was founded in 1968 as a membership organization by a group of professional golfers. The TOUR was designed for the collective benefit of its members—all of whom are professional golfers—to secure prize money by soliciting corporate sponsorships and securing television exposure for golf tournaments through the aggregation of all players' rights.

11. The TOUR's founding members wanted the freedom, among other things, to plan their own travel and playing schedules, to practice as and when they saw fit, and otherwise to operate their respective "golf businesses" independently while, at the same time, associating as a "membership" in order to negotiate efficiently and effectively with sponsors, tournament organizers, media partners, and others to increase the value of their collective rights.

12. This ability to bundle player rights was then, and is now, dependent upon members assigning their media rights exclusively to the TOUR. In turn, the TOUR is able to provide prospective sponsors/media outlets with the assurances necessary to ensure that the rights "sold" to sponsors/partners are exclusive. That exclusivity influences the fees received by the TOUR on behalf of its members and, in turn, the prize money and other benefits that go to TOUR players.

13. The TOUR remains a membership organization to this day and is organized under Internal Revenue Code Section 501(c)(6). The TOUR has taken a leading role in charitable initiatives and efforts to develop, promote and expand the game of golf and increase the diversity of participants. As a membership organization, the TOUR takes on certain responsibilities towards its membership. In return, and to receive the benefits of membership, when golfers voluntarily agree to join the TOUR as members, they also must agree to certain obligations.

14. The obligations and conditions of membership to which each PGA TOUR member agrees are set forth in the PGA TOUR's Player Handbook & Tournament Regulations (the "Regulations"). The Regulations are issued annually and set forth the TOUR's operations, policies, and procedures. Each year, PGA TOUR members renew their agreements with the TOUR by agreeing to be bound by the Regulations as updated at the beginning of each season.

15. The PGA TOUR season includes a regular season of more than forty golf tournaments operated by the TOUR along with the four independently-operated Majors,[5] culminating in the FedEx Cup Playoffs. Forty-eight official tournaments were scheduled for the 2021-2022 season—forty-five regular season events and three FedEx Cup playoff events. TOUR-operated tournaments are played primarily in North America and principally in the United States.

II. LIV's Business Model and Financial Backing by the Saudi Government

16. LIV was founded in 2021 for the purpose of creating and scheduling a series of golf events. Unlike the TOUR and the other golf entities around the world that depend upon

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[5] The four "Majors" are the Masters, the PGA Championship, the US Open, and the Open Championship. The Majors are operated by independent organizations and not the TOUR, but they are approved events that are part of the TOUR's official schedule.

media fees and sponsorship for their revenues, LIV is "wholly owned" by and relies solely on financial backing from PIF, the Saudi sovereign wealth fund, which holds more than $500 billion in assets.[4]

17. LIV's funding through PIF grants it access to nearly unlimited resources from the Saudi government and allows it to operate without consideration of profitability. To date, PIF has committed at least $2 billion of funding to LIV, which, spurred by competition with the TOUR and other golf tours worldwide, LIV is using to pay nine-figure advances to some PGA TOUR members, provide free and/or significantly reduced tournament tickets to spectators, and fully fund all its operational costs, including hundreds of millions of dollars in tournament purses. With the backing of PIF, LIV has the luxury of operating at a loss for as long as it needs to accomplish its goals.

18. The limitless nature of LIV's funding is illustrated by the guaranteed contracts LIV has entered into with golfers. LIV has reportedly contracted to pay well-known golfers between $100-200 million to join LIV, with other golfers receiving large upfront payments as well. These payments are not conditioned on the quality of a golfer's performance in LIV's events, and every player is guaranteed at least an additional $120.000 in prize money per LIV event. LIV CEO Greg Norman claimed that LIV offered Tiger Woods between $700-$800 million to join the LIV Tour, a sum that would have nearly equaled the entirety of the TOUR's net revenue in 2021.

19. While LIV's publicly claimed goal is to "grow the game of golf," unlike all of the other major golf tours in the world, it has no system (nor plans for a system) to develop golfers to reach elite status. Instead, its actual objective is to further the interests of the Saudi Arabian government and PIF.

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[4] *See* Bob Harig, *Golf Legend Greg Norman Set to Run Competing Tour That Hopes to Begin Play in 2022*, ESPN (Oct. 29, 2021), https://www.espn.com/golf/story/_/id/32500931/golf-legend-greg-norman-set-run-competing-tour-hopes-begin-play-2022.

20. LIV's inaugural season includes eight events, five of which will have been held in North America. By its second season in 2023, LIV plans to expand to fourteen events (ten of which will be held in North America).[5] LIV events are invitationals, meaning that only those golfers with whom LIV has contracted or whom it has invited to compete may participate.

21. All LIV Players were recruited by LIV and were PGA TOUR members during the 2021-2022 season. LIV claims its players are "independent contractors" or "free agents," but LIV's own business plan and player agreements demonstrate this is a fiction. Golfers who join LIV must sign long-term exclusive contracts that require them to participate in ***all*** LIV events and prohibit them from playing in ***any*** TOUR events occurring in the same week as any LIV event (or any conflicting event whatsoever).[6] LIV's statements regarding golfer freedom are a thinly veiled public relations ploy concocted to disparage the TOUR and deflect criticism from LIV's own restrictive business model.

22. Indeed, LIV Players' contracts with LIV are rife with severe restrictions. For example, the TOUR is aware that at least certain LIV Player contracts contain the following requirements:

- Players must play in ***every*** LIV event "as a fundamental condition of [their] Agreement." LIV projects this will involve 10-14 events (along with qualification events) in the 2023 and 2024 season (and not including any of the four Major

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[5] *See* Dan Rapaport, *LIV Golf to Transition to 'League' Schedule in 2023, with 14 Events and 48 Contracted Players*, Golf Digest (June 30, 2022), https://www.golfdigest.com/story/liv-golf-league-schedule-2023.

[6] LIV has already prohibited players from playing in other golf tournaments. For example, Graeme McDowell was prohibited from playing in the Irish Open—his native country's open championship—even though he has played in that tournament for a majority of the past twenty years. *See* Bob Harig, *While Admitting a "Tainted" Legacy, Graeme McDowell Takes Issue with LIV Backlash*, Sports Illustrated (July 5, 2022), https://www.si.com/golf/news/while-admitting-a-tainted-legacy-graeme-mcdowell-takes-issue-with-liv-backlash.

championships). ***However***, LIV retains "sole discretion" to schedule these events, and LIV is not restricted in the number, location or dates it schedules those events. LIV already has used its discretion to increase the obligations of players who signed with LIV in May. Those contracts indicate players should expect to participate in 10 events in 2023, but by late June, LIV was publicly stating it would hold 14 events in 2023.

- For the duration of their multi-year contracts with LIV, players must grant LIV "an exclusive, perpetual, royalty-free, worldwide, transferable, fully paid-up irrevocable right and license (with the right to grant sublicenses) to exhibit, exploit, copy, reproduce and otherwise use the Player Identification" in connection with any promotional activities, team apparel, and all content created, recorded or otherwise generated by or on behalf of LIV, LIV Team, or any League Rights Holder (League Rights are defined to include, among other things, any content, advertising and film rights).
- Players must wear LIV Team Apparel in LIV events, other non-LIV tournaments, and other events in which they must participate (effectively granting LIV sponsorship rights that could otherwise be used by the player).
- Players agree they will not enter into any "Conflicting Contract," defined in a manner that would preclude LIV Players from renewing their membership agreements with the TOUR.
- Players are required to use their social media platforms to promote LIV.
- Players are obligated to make numerous required appearances including multiple sponsorship activations, receptions, meet and greets, and appearances at each team's "draft event."
- Players must lend their likenesses to content creation, including photoshoots/video content, participate in a mini-series/documentary series and agree to their inclusion in LIV marketing materials.

- Players are prohibited from providing exclusive interviews or commentaries or entering into any agreements involving exclusive interviews with or appearances in or on any media or social media in relation to any league activities without obtaining LIV or Team operator approval.
- Players are required to participate in and assist LIV with meetings, negotiations and/or other activities with corporate sponsors or other business partners, including team promotional activities and league activities (i.e., activities organized by or on behalf of LIV in relation to the league and/or any event including ancillary tournament or promotional activities).
- At LIV's request, players must introduce LIV representatives to the player's existing or prior sponsors to facilitate sponsorship discussions for LIV and other LIV Players.
- Players must not make any statement or commit any act (or fail to act), nor make, post, publish or communicate to any Person or in any public forum any false, defamatory, libelous, or slanderous remarks, comments or statements which could reasonably be expected to, or actually do, adversely affect (i) the Player's ability to participate in connection with any Tournament or Event, or (ii) the reputation or public image of any relevant person. Relevant person is defined in such a way to specifically cover shareholders of LIV—i.e., the Saudi government.

23. These membership conditions are far more restrictive than the TOUR's own Regulations on player participation in PGA TOUR events, which LIV Players disingenuously have alleged violate the antitrust laws. They also make it impossible for LIV Players to meet their contractual obligations to the TOUR. For example, LIV Players have admitted that they could not realistically participate in their required LIV events (8 in 2022 and 14 in 2023) and the minimum number of PGA TOUR events (15) needed to maintain membership on the PGA TOUR. At least some of the LIV agreements also directly prohibit players from agreeing to the Regulations.

III. The TOUR's Contract with TOUR Members, Including LIV Players

24. LIV Players admit they had a contractual, business relationship with the TOUR until the end of the 2021-22 season that required them to comply with the Regulations. Dkt. 83 ¶¶ 16-22, 367. The Regulations and any amendment to them are approved not only by a majority of the TOUR's Policy Board, but generally by at least three of the player directors who sit on the Policy Board.

25. As consideration and in exchange for fulfilling these obligations, LIV Players (and other PGA TOUR members) gained the right to participate in and earn from PGA TOUR events, taking advantage of the TOUR's reputation, media and sponsorship platform and pool of prize money. They also receive other reputational and membership benefits (e.g., healthcare and retirement plans). Dkt. No. 50-5 (Levinson Decl.) ¶ 5.

26. If PGA TOUR members refuse to live up to the terms of their agreements, and instead treat their own promises as optional, the entire mutually beneficial arrangement amongst PGA TOUR members is harmed. The TOUR continues to depend on all members to honor their contractual membership commitments and has no legal obligation to hold in good standing and/or provide playing opportunities to any member who willfully violates those terms. Golfers have no right to claim for themselves whichever of the privileges of PGA TOUR membership they choose while at the same time rejecting any obligations that they deem inconvenient.

27. Among the most critical obligations in the Regulations are the requirements that PGA TOUR members: (i) grant their exclusive media rights to the TOUR; (ii) avoid participating in events that conflict with PGA TOUR events absent a waiver from the TOUR; and (iii) refrain from conduct unbecoming of PGA TOUR members, including by commenting or behaving in a way that will reflect unfavorably on the TOUR or harm the TOUR.

A. Media Rights and Conflicting Events Obligations

28. Article V of the Regulations sets forth PGA TOUR members' contractual requirements regarding the exclusive grant of their media rights to the TOUR. At the beginning of every season, all PGA TOUR members grant the TOUR the exclusive right to use their media rights in any golf program. (Regulations at Art. V.B.1.a.). Moreover, Article V provides that

"[n]o PGA TOUR member shall participate in any live or recorded golf program without the prior written approval of the Commissioner, except that this requirement shall not apply to PGA TOUR cosponsored, coordinated or approved tournaments, wholly instructional programs or personal appearances on interviews or guest shows."

29. Under the TOUR's media rights Regulations, each PGA TOUR member agrees to consolidate his individual media rights with his fellow members' respective rights and contractually assigns such rights to the TOUR on an exclusive basis so that the TOUR can license the pooled rights to media outlets, thereby creating a new product—the pooled media rights—that would not otherwise exist. This new product allows the TOUR to sell the aggregated rights to media outlets in the same manner as other professional sports leagues.

30. As with all obligations under the Regulations, the grant of media rights covers only a single PGA TOUR season. This season-long exclusive grant of media rights by PGA TOUR members is an essential contractual provision because the TOUR must rely on that grant of rights to license those rights to media partners and sponsors.

31. Article V of the Regulations also sets forth PGA TOUR members' contractual requirements regarding conflicting events. These rules contribute to the success of scheduled PGA TOUR tournaments. Consistent with these contractual obligations, the TOUR has long-standing player rules that limit participation in conflicting events.

32. Article V.A.2 of the Regulations provides that PGA TOUR members generally may not participate in any other golf tournament on a date when a PGA TOUR tournament is scheduled. In certain circumstances, players may seek and receive releases to play in non-TOUR tournaments that are held outside of North America on the same dates as TOUR tournaments.

33. Taken together, the media rights grant and conflicting events rules make the TOUR's product more valuable to sponsors, local host organizers, and content distributors, leading to higher sponsorship and broadcast revenues for the TOUR, which in turn are distributed to members in the form of higher purses, bonuses, pensions and other ancillary membership benefits. They also help preserve the TOUR's reputation, including from being tarnished by LIV.

B. Prohibition on Conduct Unbecoming

34. Article VI of the Regulations prohibits certain forms of conduct unbecoming professional golfers who are members of the PGA TOUR. Players agree that "Players participating in PGA TOUR cosponsored, approved or coordinated tournaments . . . at all times shall conduct themselves in a manner becoming professional golfers that will not reflect unfavorably on PGA TOUR, its members, officers or representatives, tournaments or sponsors." (Regulations at Art. VI.) They also agree "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." Regulations at Art. VI.E. Violations of this section constitute conduct unbecoming a professional. *Id.*

IV. LIV Players Have Materially Breached Their Contracts with the TOUR

35. Several PGA TOUR members, including LIV Players Talor Gooch, Matt Jones, Ian Poulter, and Peter Uihlein, requested and were denied media rights and conflicting events releases to participate in LIV's inaugural London tournament, which was scheduled to be held on the same weekend as the TOUR's RBC Canadian Open. Other LIV Players didn't even bother requesting releases despite the obligations to obtain them set forth in the Regulations to which they agreed. By that time, it was clear that LIV planned an eight-tournament schedule for 2022—to be held principally in North America—with a far more substantial schedule in North America in 2023 and beyond. As LIV Players knew, their LIV contracts guaranteed LIV de facto exclusivity for multiple years, and compelled LIV Players to continually violate their existing agreements and any future agreements with the TOUR because, by agreeing to these LIV contract terms, LIV Players were promising to repeatedly breach the TOUR's conflicting events and

media rights provisions in Article V.A.2 and V.B.1 of the Regulations and to recruit other PGA TOUR members to do the same.

36. Similarly, several additional players, including LIV Player Bryson DeChambeau, elected to play in LIV's next two events held in Portland, Oregon, and/or Bedminster, New Jersey, both of which were held on the same days as PGA TOUR events, without conflicting events and media rights releases. Those players also breached their contracts with the TOUR in the same fashion and were sent disciplinary notices by the TOUR.

37. Further, numerous LIV Players breached Article VI of the Regulations that prohibits PGA TOUR members from engaging in conduct unbecoming, which, as detailed above, is defined to include conduct that will harm the financial interest of the TOUR. For example, in connection with the LIV event, Jones and Swafford participated in a series of interviews that promoted the LIV series. In addition, Poulter promoted the LIV event through the posting of multiple social media posts. Mickelson and DeChambeau also promoted the LIV event and actively recruited other TOUR members to join LIV and breach their agreements with the TOUR. These LIV Players' active promotion of LIV and other conduct that they knew or should have reasonably known was not in the best financial or reputational interests of the TOUR, violated Article VI, and was in furtherance of contractual obligations to LIV intended to specifically induce others to breach their agreements with the TOUR. Based on these blatant violations of the Regulations, the TOUR notified LIV Players that they were in breach of their obligations.

38. LIV Players responded to the disciplinary notices from the TOUR with nearly identical messages authored by attorneys acting on LIV's behalf (the "Responses"). None of the Responses denied that LIV Players were violating the Regulations. Instead, again prompted by LIV, LIV Players (wrongly) asserted the TOUR's rules violated the antitrust laws. Indeed, the Responses, if anything, reaffirmed LIV Players' commitments to continue violating the Regulations by continuing to play in conflicting events and granting their media rights to LIV.

39. Several TOUR members elected to resign their PGA TOUR memberships and participate exclusively on the LIV tour. However, despite signing lucrative contracts with LIV, numerous other PGA TOUR members, including LIV Players Mickelson, Gooch, Swafford,

Jones, Poulter, and Uihlein, did not resign their PGA TOUR memberships and instead knowingly and blatantly breached their obligations to the TOUR and their fellow members.

V. LIV's Engineering of LIV Players' Breach of the TOUR's Regulations

40. LIV has conducted a coordinated campaign of ongoing interference with contracts between the TOUR and its members in the hope LIV can convince a court to alter the TOUR's membership structure to benefit itself at expense of the TOUR and for the benefit of LIV.

41. LIV has made its strategy clear: fully aware the Regulations do not permit members to remain on the PGA TOUR while participating in all events on the LIV tour as required by LIV, LIV denigrates the TOUR, encourages players to breach their contracts with the TOUR on the baseless promise that LIV can help those golfers force their way into PGA TOUR events, and then uses LIV Players as a vehicle to challenge the Regulations, directing and funding a campaign to undermine the TOUR's membership structure. From the outset, LIV has intentionally and systematically engineered each step of LIV Players' breach.

42. LIV recruited LIV Players and entered into contracts with them with full knowledge that doing so would interfere with their contractual obligations to the TOUR and place players in continuing violation of the Regulations, including the provisions on media rights, conflicting events, and conduct unbecoming a PGA TOUR member. LIV has openly sought to damage the TOUR's business relationships with its members by inducing them to breach their contractual requirements, even going so far as to pay members' legal fees to make breaching their contracts with TOUR more enticing.

43. LIV issued a communication to all PGA TOUR members through their agents demonstrating clear knowledge of the Regulations. LIV expressed understanding that the Regulations "authorize the commissioner to impose punishments on golfers who engage in 'conduct unbecoming a professional golfer,'" including discipline and suspension.

44. Aware of these provisions, LIV falsely alleged that the TOUR's adherence to its own Regulations constituted anticompetitive behavior and/or that the TOUR had violated its own rules. LIV proceeded to encourage PGA TOUR members to join LIV based on the promise that the TOUR either would not and/or could not enforce its contractual rights to suspend golfers.

including LIV Players who openly decided to breach their contracts with the TOUR. The TOUR understands that these types of representations were made informally in conversations between TOUR members and representatives from LIV, including Greg Norman, and other TOUR members who had already planned to join LIV, like Phil Mickelson. The LIV Players have sued the TOUR based upon their suspensions for violation of the Regulations, in part based upon these false assertions by LIV.

45. In text messages between Sergio Garcia and LIV CEO Greg Norman, Norman wrongly told Garcia: "They cannot ban you for one day let alone life. It is a shallow threat. Ask them to put in writing to you or any player. I bet they don't. Happy for anyone to speak with our legal team to better understand they have no chance of enforcing." Dkt. 2-3 at 128–132. Norman's reassurances to Garcia and potentially other members of the TOUR were intended to mislead players who were concerned about the consequences of breaching their agreements with the TOUR and to encourage them to breach those agreements.

46. For instance, Talor Gooch, Hudson Swafford and Matthew Jones elected to remain in the LIV London Invitational Series event despite the TOUR's denial because they claimed they "did not believe the [TOUR] had a lawful right to prevent [them] from playing in the event and because it was important [they] stand up for the lawful rights of professional golfers to achieve their market value as independent contractors." Dkt. 2-9 (Declaration of Hudson Swafford) ¶ 21; Dkt. 2-10 (Declaration of Matt Jones) ¶ 21; Dkt. 2-11 (Declaration of Talor Gooch) ¶ 21. This "belief" is based on misrepresentations made by LIV and Norman.

47. LIV's actions make clear that it knew that the TOUR's behavior was neither anticompetitive nor in violation of the Regulations. Indeed, despite asserting that the TOUR's Regulations infringe on the supposed rights of independent contractors and violate the antitrust laws, LIV has signed golfers to multi-year contracts containing obligations that are ***far more restrictive than anything in the Regulations***, including a prohibition on participation in conflicting events that, unlike the TOUR's conflicting event rules, does not allow for any request for release. Yet LIV told players that the TOUR's behavior was anticompetitive and in violation of the Regulations in a calculated effort to convince LIV Players it would benefit them to breach

their agreements with the TOUR, move forward with LIV, and give LIV the opportunity to free ride off TOUR's investments by encouraging the LIV Players to play in PGA TOUR events despite their clear violation of the Regulations.

48. In anticipation that some PGA TOUR members would hesitate to openly breach their contracts with the TOUR while at the same time insisting upon all the benefits of PGA TOUR membership, on May 11, 2022, Greg Norman promised that LIV would offer financial protections to any player who could nevertheless be induced to violate the Regulations: "All the players I've told: we've got your back. We'll defend, we'll reimburse and we'll represent–simple as that." In effect, LIV has agreed not only to induce, but also to fund, any LIV Player's ongoing breach of the TOUR Regulations. LIV also specifically provided what it described as "greater payments and extensive indemnification" and "hundreds of millions of dollars . . . to compensate [LIV Players] for the risks they incur in punishments to facilitate these breaches." Dkt. No. 2-12 ¶¶ 23-24.

49. The TOUR remains committed to fostering legitimate competition in professional golf, which LIV's inducement scheme is not. LIV's orchestrated efforts to induce TOUR members to breach their contracts and prevent them from entering into any future contract with the TOUR are part of a deliberate effort to harm the TOUR.

50. LIV has encouraged LIV Players to breach their contracts by providing them with assurances that because they are "independent contractors," they have the right to blatantly breach their contractual relationship with the TOUR. Indeed, LIV's true purpose appears to be to induce LIV Players to breach their agreements with the TOUR and then participate in PGA TOUR events in order to free ride off of the TOUR's platforms, while simultaneously committing LIV Players to multi-year exclusive, contracts with far more restrictive provisions.

51. Once LIV successfully induced players to breach their contracts with the TOUR, those players, in turn, became integral to further LIV's recruitment efforts. Indeed, certain LIV

Player contracts appear to require LIV members to "assist [LIV] in seeking to persuade [TOUR members] to enter into multiyear player participation agreements with [LIV]."[7]

52. Through its tortious interference with the TOUR's agreements and membership structure, LIV has damaged the TOUR and has forced the TOUR to spend considerable resources defending its structure and reputation, including by forcing the TOUR to defend itself from LIV Players' claims based on false representations.

53. LIV's tortious interference has sought to harm the TOUR by jeopardizing the TOUR's reputation and trying to insert instability and uncertainty into the TOUR's existing and planned future business relationships with PGA TOUR members.

54. Ultimately, LIV has sought not only to induce PGA TOUR members, including LIV Players, to breach their contracts and interfere with the TOUR's business relationships with its members, but also to force the TOUR to change its Regulations to suit LIV's business purposes at the expense of the TOUR. Those business purposes include free riding on the TOUR's player development investments by skimming off the top and pilfering elite players developed under the TOUR's system, while continuing to demand a right to take advantage of the TOUR's platform for LIV Players. LIV seeks to allow itself and its members to exploit the TOUR's reputation, goodwill, and platform to benefit them at the TOUR's expense.

COUNT I
TORTIOUS INTERFERENCE WITH CONTRACT

55. The TOUR reasserts the allegations set forth in the foregoing Paragraphs above as though set forth herein.

56. A contractual relationship existed between the TOUR and each LIV Player—Phil Mickelson, Talor Gooch, Hudson Swafford, Matt Jones, Bryson DeChambeau, Ian Poulter, and

[7] Andrew Beaton, *LIV Golf's Player Contracts Include Restrictions to Go With the Big Money*, Wall Street Journal (Aug. 17, 2022), https://www.wsj.com/articles/liv-golf-pga-tour-contract-11660744567

Peter Uihlein—through the contracts between the TOUR and each LIV Player that is embodied in the Regulations.

57. LIV had full knowledge of the contracts between the TOUR and each LIV Player, including the specific terms of LIV Players' contracts and the impact LIV's conduct would have on the business and contractual relationships between the TOUR and each of the LIV Players.

58. LIV paid significant sums of upfront cash and made false representations to the LIV Players to induce their breach of the agreements with the TOUR.

59. LIV has intentionally, willfully, and unjustifiably interfered with, and has knowingly facilitated a conspiracy to interfere with, the contractual and business relationship between the TOUR and each LIV Player.

60. By requiring LIV Players to recruit TOUR members on LIV's behalf, LIV has intentionally, willfully, and unjustifiably interfered with, and has knowingly facilitated a conspiracy to interfere with, the current business relationship between the TOUR and other TOUR members.

61. Among other things, LIV interfered with these relationships by engaging in a campaign to direct and fund LIV Players' legal action against the TOUR. Through this campaign, LIV has directed LIV Players to try to force the TOUR to amend its contractual provisions in order to harm the TOUR and to exploit each LIV Player's contract to claim for LIV's own benefit the TOUR's platform and reputation.

62. LIV's intentional interference was committed through improper means, well beyond the bounds of legitimate competition, to LIV's direct benefit and to the detriment of the TOUR. As a result, LIV is intentionally interfering with the TOUR's business relationships through improper means and in violation of the law.

63. LIV engaged in the acts of interference set forth herein with a conscious desire to prevent the contracts from continuing. LIV also knew or should have known its conduct would interfere with the contract between the TOUR and each of the LIV Players, and indeed, LIV structured its contracts to ensure each of the LIV Players would necessarily be in breach of his contract with the TOUR.

64. LIV's acts have caused damage to the TOUR including, but not limited to, forcing the TOUR to spend its resources through this lawsuit and otherwise on discipline of the LIV Players, forcing the TOUR to defend its reputation, and in such other manners in an amount to be determined at trial. LIV's acts will continue to harm the TOUR in an amount to be determined at trial.

RELIEF REQUESTED

WHEREFORE, Plaintiffs hereby request that the Honorable Court award the following relief:

a. Awarding the TOUR damages suffered as a result of LIV's tortious interference with the TOUR's contracts with LIV Players including any lost profits, damages to reputational and brand harm, costs, punitive damages, reasonable attorneys' fees and pre-suit costs.

b. Granting such further and additional relief this Court deems just and proper.

JURY DEMAND

The TOUR demands a trial by jury on all issues so triable.

Dated: September 28, 2022

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

PHIL MICKELSON, TALOR GOOCH, HUDSON SWAFFORD, MATT JONES, BRYSON DECHAMBEAU, ABRAHAM ANCER, CARLOS ORTIZ, IAN POULTER, PAT PEREZ, JASON KOKRAK and PETER UIHLEIN,

Plaintiffs,

v.

PGA TOUR, INC.,

Defendant.

CASE NO. 3:22-cv-04486

NOTICE OF MOTION AND MOTION FOR TEMPORARY RESTRAINING ORDER

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on a date and time to be determined, or as soon as the matter may be heard, before the judge to be assigned of the United States District Court for the Northern District of California in the 450 Golden Gate Avenue, in the courtroom of the assigned judge, Plaintiffs Talor Gooch, Hudson Swafford, and Matt Jones ("TRO Plaintiffs") will and do move this Court for a temporary restraining order prohibiting Defendant from preventing Talor Gooch, Hudson Swafford, and Matt Jones from playing in the FedEx Cup Playoffs during the term of the Temporary Restraining Order. Defendant is prohibited from enforcing its Media Rights and Conflicting Events Regulations to punish Talor Gooch, Hudson Swafford, and Matt Jones for playing with a competing promoter or other activities related to LIV Golf during the term of the Temporary Restraining Order. Defendant is prohibited from enforcing its disciplinary procedures in connection with their play with a competing promoter or other activities related to LIV Golf on Talor Gooch, Hudson Swafford, and Matt Jones during the term of the Temporary Restraining Order. This motion is brought on the grounds that Defendant's restrictions are illegal under the antitrust laws, Defendant has breached its Regulations by refusing to abate TRO Plaintiffs' suspensions as it is required to under its Regulations, and Defendant's disciplinary procedures are unfair under state law. Plaintiff is likely to succeed on the merits, it will imminently suffer irreparable harm absent injunctive relief, and the balance of equities favors immediate injunctive relief.

DATED: August 3, 2022

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TABLE OF CONTENTS

CASES

STATUTES

Defendant PGA Tour, Inc. (sometimes the "Tour") is a monopsonist. It controls the market for the services of professional golfers for elite golf events in the United States. The purpose of this action is to strike down the PGA Tour's anticompetitive rules and practices that prevent these independent-contractor golfers from playing when and where they choose.

Three of the Plaintiffs in this case, Talor Gooch, Hudson Swafford, and Matt Jones ("TRO Plaintiffs"), seek a temporary restraining order. Each of the three TRO Plaintiffs has qualified to play in the highly prestigious and lucrative FedEx Cup Playoffs, which begin in eight days. The Tour has unlawfully suspended the TRO plaintiffs from the Tour ***for almost two years*** and, as of yesterday, refused to stay these suspensions, as the Tour's own rules require. As we describe below, the Tour has imposed these suspensions solely because the TRO Plaintiffs chose to play in events sponsored by LIV Golf, a newly created golf promoter, as the Tour views LIV Golf as a threat to its long-standing domination of elite professional golf. Unless restrained, the Tour's impermissible suspensions will prevent the TRO Plaintiffs from playing in the FedEx Cup Playoffs, which will deny them a crucial opportunity to qualify for next year's premier professional golf events. The Tour thinks it is above the law. Yesterday, a Tour representative said, "**We hold all the cards . . . . We don't want those guys playing. We don't care what the courts say.**" Declaration of Rachel Brass ("Brass Decl.") Ex. 62 (emphasis added). Accordingly, the TRO Plaintiffs request that the Court prevent irreparable injury by restraining the Tour from enforcing its impermissible suspension of these players.

I. SUMMARY OF THE ARGUMENT

The Tour has suspended Mr. Gooch, Mr. Swafford, and Mr. Jones for violating Tour restrictions that are illegal and unenforceable under the antitrust laws. TRO Plaintiffs appealed their suspensions to the Tour's Appeals Committee, and should, under the Tour's own regulations, be permitted to play in Tour events while their appeals are pending. But, only yesterday, the Tour informed Mr. Gooch that it would bar TRO Plaintiffs from the FedEx Cup Playoffs. The Tour's actions are aimed at harming these players' careers as part of its larger ambition to protect its monopsony against the nascent entry of LIV Golf. The Tour's violation of its own regulations underscores that it is employing its so-called disciplinary process to boycott players, LIV Golf, and all who would support them in introducing competition to elite professional golf. The TRO Plaintiffs respectfully request that the Court enjoin the

Tour's suspensions and allow them to play in the FedEx Cup Playoffs, a high honor each earned through his superior play on the PGA Tour this year.

The Tour's abdication of its own disciplinary rules is but its latest act in its unceasing efforts to protect its unlawful monopsony. The Tour's ostensible 501(c)(6) tax-exempt purpose is to "promote the common interests of professional tournament golfers," yet it denies TRO Plaintiffs the opportunity to play in the potentially career-altering FedEx Cup merely because they play during their off-weeks for a competing golf promoter.

TRO Plaintiffs have dedicated years of their lives to the Tour, playing in over one hundred Tour events each, and well over this season's minimum number of Tour-required events. Through superb play, each qualified for the FedEx Cup Playoffs, an event critical to the TRO Plaintiffs' careers. Indeed, the Tour itself describes the FedEx Cup Playoffs as the "pinnacle"—"if not the No. 1 goal, it's certainly a top goal for every single player" each golf season. Brass Decl. Ex. 1. Entry into next year's Majors (Masters, PGA Championship, U.S. Open, and The Open), as well as into the Tour's premier invitationals, is earned in the FedEx Cup. Large bonuses, big purses, substantial retirement plan payments, sponsorship, branding, and important business opportunities are at stake.

The Tour is denying TRO Plaintiffs entry into the Playoffs by imposing career-threatening suspensions until March 31, 2024, as punishment for playing in two events sponsored by LIV Golf with a threat of increased exclusion if they ever again play for LIV Golf. The Tour's suspensions are unlawful acts in furtherance of the its efforts to prevent competition for professional golfers' services for elite events. *See, e.g., Int'l Boxing Club of N.Y. v. U.S.*, 358 U.S. 242, 254 (1959) (boxing club violated antitrust law through its "control of contending [championship] boxers through exclusive agreements"); *Volvo N. Am. Corp. v. Men's Int'l Prof'l Tennis Council*, 857 F.2d 55, 69 (2d Cir. 1988) (tennis council's agreements that "discourage players from participating" in any non-council events were unlawful group boycott).

The Tour has enforced its Regulations to ensure that golfers—whom the Tour freely acknowledges are independent contractors—are not permitted to play for any other promoter that the Tour deems a threat to its monopoly. Through a two-year campaign to intimidate golfers, the Tour has threatened unlawful lifetime suspensions for any golfer who plays for a new entrant. The Tour has also

unlawfully agreed with the European Tour to ensure that any player who plays for LIV Golf would be cut off from access to the golf "ecosystem." The Tour has even leaned on those who operate the Majors to call into question whether golfers who play in LIV Golf will qualify for future Majors. And the Tour has threatened agents, vendors, and sponsors with dire consequences if they do business with LIV Golf.

The Tour has historically embraced its members' playing on other tours—so long as those tours respect the Tour's monopsony by staying out of the United States. But because the Tour views LIV Golf as threatening its monopsony, the Tour responded by imposing career-threatening suspensions when the TRO Plaintiffs sold their services to this competing buyer. The Tour's actions are obviously anticompetitive, as they serve no purpose but to thwart competition and maintain its monopsony. Even setting aside antitrust issues, the proceedings by which the Tour imposed the suspensions have proven biased, predetermined, and contrary to the Tour's own requirements. TRO Plaintiffs therefore request that the Court enjoin their suspensions so they can avoid irreparable harm they would otherwise suffer.

II. FACTUAL BACKGROUND

A. PGA Tour

The PGA Tour is a 501(c)(6) tax-exempt member association that describes itself as "the world's leading professional golf tour" and "second to none due to the strength of its members." Brass Decl. Ex. 2. Until LIV Golf's recent entry, top golfers had no alternative to pursue their careers except through the Tour. Declaration of Talor Gooch ("Gooch Decl.") ¶ 3; Declaration of Hudson Swafford ("Swafford Decl.") ¶ 3; Declaration of Matt Jones ("Jones Decl.") ¶ 3; Expert Declaration of Dr. Jeffrey Leitzinger, Ph.D. ("Leitzinger Decl.") ¶¶ 18, 50.[1] Professional golfers who qualify for Tour membership invariably compete on the Tour, as it offers by far the largest tournament purses, the greatest opportunities to qualify for the Majors, the greatest exposure in the golf world and beyond, and the most expansive opportunities to secure endorsements and sponsors. Leitzinger Decl. ¶ 18. ***All*** of the top golfers in the world are Tour members—except those the Tour recently suspended or effectively forced to resign for playing with LIV Golf. *Id.* ¶ 17. The Tour's dominance in the United States and globally is absolute. *Id.* ¶ 31. Before LIV Golf's entry, all global tours fed directly or indirectly into the Tour. *Id.* ¶¶ 43–46. The Tour concedes that it is "irrational" to try to compete with it. Brass Decl.

[1] Dr. Leitzinger is an experienced economist who testifies frequently in antitrust cases.

Ex. 1a (Jay Monahan in June 2022: "LIV Golf . . . is an irrational threat"), and has used its monopsonistic control over elite professional golf to exclude competition. *Id.* Exs. 4–10.

Most of the Tour's members are professional golfers, whom the Tour acknowledges are independent contractors. Brass Decl. Exs. 11, 61. These independent contractors receive no salary from the Tour. Gooch Decl. ¶ 40; Swafford Decl. ¶ 38; Jones Decl. ¶ 38. They pay for their own coaches, caddies, trainers, travel, and lodging—even though about half the players in each Tour event do not make the cut and earn nothing. Gooch Decl. ¶ 40; Swafford Decl. ¶ 38; Jones Decl. ¶ 38. When member golfers are injured, they earn nothing. Gooch Decl. ¶ 40; Swafford Decl. ¶ 38; Jones Decl. ¶ 38. For example, Mr. Swafford was injured for two years, and the Tour gave him no support. Swafford Decl. ¶ 38. The people who control the Tour and its Policy Board are not professional golfers, but are full-time administrators. Brass Decl. Exs. 11–13. The Tour has taken in billions in revenue on the backs of golfers who have had no choice but to play for it, and it has used this revenue to fund a bloated bureaucracy and pay its executives multimillion-dollar salaries. *Id.* Ex. 3; Leitzinger Decl. ¶ 61. The Tour's members, by contrast, earn far less than their peers in other professional sports and a far lower share of league revenues than other athletes. *Id.* ¶ 54. And because they pay their own way and have no guaranteed earnings, Tour members can—and often do—play an entire season and have net negative earnings. Gooch Decl. ¶ 40; Swafford Decl. ¶ 38; Jones Decl. ¶ 38; Brass Decl. Exs. 14, 59.

B. LIV Golf

LIV Golf is a start-up golf tournament promoter. Declaration of Atul Khosla ("Khosla Decl.") ¶ 5.[2] LIV Golf aspires to host an elite League of 48-player golf tournaments where players compete both as individuals and as franchised teams. *Id.* ¶ 8. Because the Tour thwarted LIV Golf's plans to launch its full League in 2022, Brass Decl. Exs. 6, 7, 8, 15, 16, LIV Golf launched a back-up plan: an eight-event series known as the LIV Golf Invitational Series with an innovative new golf format (54 holes, shotgun start, team and individual components, limited field, and more attractive purses) and featuring individuals and teams playing for more than $250 million in prize purses. Khosla Decl. ¶¶ 8, 14–17. In June and July 2022, the LIV Golf Invitational Series has visited London, England, Portland, Oregon, and Bedminster, New Jersey. *Id.* ¶ 17.

[2] Mr. Khosla is the President and Chief Commercial Officer of LIV Golf. Khosla Decl. ¶ 2.

LIV Golf's entry introduced new competition for the services of professional golfers for elite golf events. Khosla Decl. ¶¶ 19, 31; *e.g.*, Jones Decl. ¶ 8, Ex. J; Leitzinger Decl. ¶¶ 62–64; Brass Decl. Ex. 17. For the first time in decades, professional golfers have a viable alternative to the Tour; golf fans, broadcasters, and advertisers alike will benefit from this newly introduced competition and innovation. Leitzinger Decl. ¶ 64. Already, competition from LIV Golf compelled the Tour to increase player compensation by millions of dollars and introduce new elite-player-only events mirroring LIV Golf's offerings. *Id.* ¶¶ 54–61. The Tour, however, is intent on destroying LIV Golf and on enforcing unlawful restraints preventing players from exercising their rights as independent contractors to pursue their profession. Brass Decl. Exs. 4, 12, 18–21.

LIV Golf tried to partner with existing golf entities in 2021 to facilitate its entry, but the Tour pressured those entities not to work with LIV Golf. Brass Decl. Ex. 5. For example, in July 2021, when LIV Golf representatives offered the European Tour a partnership worth up to $1 billion dollars, the European Tour, in its own words, confirmed that LIV Golf had "fit and appeal" for the European Tour, but it rejected the partnership offer, stating the "main issue is ***US PGA mighty power*** and the need to avoid a collision course between ET and PGA." *Id.* (emphasis added).

C. Anticompetitive Actions

With the intent and effect of foreclosing competition, Brass Decl. Ex. 4, the Tour has engaged in a campaign to destroy the careers of anyone who plays with LIV Golf, *e.g.*, Gooch Decl. Ex. G. The Tour has threatened ***lifetime bans*** for players who participate in LIV Golf events, Brass Decl. Exs. 6–8, 21, and it has recruited the European Tour to join it in punishing players for participating in LIV Golf events. *Id.* Ex. 22. As part of its intimidation campaign, the Tour has (1) told golfers they will be banned from the Tour for life if they play with LIV Golf, Gooch Decl. Ex. C; (2) amended its Regulations to make it harder for members to play with LIV Golf, Brass Decl. Exs. 4, 12, 23; (3) pressured sponsors to drop players for playing with LIV Golf, *Id.* Exs. 4, 18, 30; (4) threatened to blacklist player agencies whose golfers played with LIV Golf, Khosla Decl. ¶ 29, Compl. ¶ 195; (5) amended rules to discourage college athletes from playing with LIV Golf, Brass Decl. Ex. 24; (6) enlisted famous players to publicly intimidate young golfers against playing with LIV Golf, Brass Decl. Exs. 25, 26, 33, 62; (7) threatened small business vendors and others with blacklisting if they work with LIV Golf, Khosla

Decl. ¶¶ 8, 28, 29; Brass Decl. Exs. 27, 60; Compl. ¶¶ 243–63; (8) leaned on the PGA of America, Royal & Ancient, and others to intimidate players from playing with LIV Golf, Brass Decl. Ex. 28; and (9) coordinated with the European Tour to oppose LIV Golf and any players who play on its Tour, *Id.* Ex. 22. And, just days ago, the Tour sanctioned players for speaking positively about LIV Golf, Brass Decl. Ex. 58, and had the Presidents Cup Captain (a Tour position), Davis Love III, propose that 150 Tour members boycott the Majors if those events don't bar those who play with LIV Golf. *Id.* Ex. 33.

The Tour also is acting in concert with the European Tour as part of its effort to thwart competitor tours from emerging. In Commissioner Monahan's Monopoly Manifesto, defined below, describing the Tour's plan to foreclose entry, he explained: "We have continued discussions with the European Tour about the potential to work more closely together, thereby removing the European Tour as a potential partner of" a new entrant. Brass Decl. Ex. 4. The Tour and the European Tour formalized their alliance in November 2020. *Id.* Ex. 10. As the alliance evolved, they coordinated to prevent their respective members from participating in LIV Golf events, including by amending European Tour rules to restrict LIV Golf's access to European Tour members, and by jointly punishing golfers for playing with LIV Golf to maximize the exclusionary effect of their bans. *Id.* Ex. 22. Earlier this year, the Tour compelled the European Tour to suspend its members from co-sanctioned events for playing in LIV Golf events. *Id.* Three golfers challenged those suspensions from the European Tour on similar procedural grounds and under European competition laws. *Id.* On July 4, 2022, a Sports Resolution (UK) judge stayed the suspensions, concluding the suspended players were denied fair proceedings because the European Tour CEO was "necessarily partial" and could not render impartial judgment. *Id.*

D. Regulations

The Tour's exclusionary Regulations purport to provide the Tour Commissioner with unfettered discretion to impose punishments—including lifetime bans—on any member who participates in a competing event. Brass. Decl. Ex. 4. First, the "Conflicting Events Regulation" prohibits Tour members, without exception, from playing in any tournament in the United States that takes place in the same week as a Tour event. *Id.* Ex. 12 (V.A.2.a.). And it prohibits Tour members from playing in international events unless the Tour Commissioner grants a release, and only then three times a season. *Id.* (V.A.2–3). Because the Tour holds events 47 to 49 weeks of the year, this Regulation ensures that

Tour members cannot sell their services to a competing tour. *Id.* Second, the Media Rights Regulation prohibits Tour members from participating in any live or recorded golf program anywhere in the world at any time without prior approval of the Tour Commissioner—***even when they are not playing in a PGA Tour event***. *Id.* (V.B.1.b). Notably, the Tour beefed up this Regulation in 2020 to make it an even more powerful tool for excluding entry. *Id.* Ex. 4. The Tour Commissioner has the power to permanently ban a player who violates either Regulation. *Id.* Ex. 12 (at 87, VII). These rules make the Tour the gatekeeper to any potential competitor, as no golf event anywhere in the world has access to the top players "without the prior written approval of the [Tour] Commissioner." *Id.* (V.B.1.b). The Tour has used these Regulations to exclude competitors. *Id.* Exs. 4–10. The Tour admits these Regulations give it the power to prevent its members from playing for competitors. *Id.* Exs. 4, 19.

E. The Tour's Star Chamber Disciplinary Process

The Tour requires its members to agree to its Regulations, Brass Decl. Exs. 31, 32, which expressly give the Commissioner the power to interpret and apply the Regulations as he sees fit. *Id.* Ex. 12 (at 87, VII). The Regulations also give the Commissioner discretionary authority over player discipline. *Id.* (VII). As he did here, the Commissioner has the discretion to place a Tour member "on probation for an infraction of any rule of the" Tour, and if the member violates any other rule then the Commissioner "may immediately suspend the member's playing privileges" indefinitely. *Id.* (VII.C). As he did here, the Commissioner has the discretion to interpret playing in even a single competing event as constituting multiple violations and thus impose an indefinite or lifetime ban. *Id.* And players lack any ability to negotiate the terms or amend the Regulations. *Id.*; *see also id.* Ex. 11.

The Tour's disciplinary process for "major" penalties (at issue here) takes the following steps: (1) notice of disciplinary inquiry; (2) member's response; (3) notice of disciplinary action; and (4) member's appeal of the disciplinary action. Brass Decl. Ex. 12 (VII). Importantly, the member's appeal automatically stays any suspension during the pendency of the appeal. *Id.* (VII.E.2). On receipt of the appeal, the Commissioner may choose in his discretion: (1) an expedited appeal where he transfers the appeal to the Appeals Committee, or (2) a long-appeal. *Id.* According to the Tour's Regulations, failure to appeal purportedly constitutes admission of the violation, and the Tour requires an

advance release of decisionmakers from liability. *Id.* The Appeals Committee, "three non-Player Directors designated by the Board," "shall prescribe its own rules of procedure." *Id.* This Disciplinary Process does not provide members rights to a hearing or an impartial tribunal. *Id.* Rather, the Regulations give the Commissioner the discretion to proceed as he sees fit, other than providing that any suspension is stayed pending player appeals. *Id.*

F. Application of the Tour's Unfair Disciplinary Process to Harm Plaintiffs

Almost three years ago, Tour Commissioner Monahan wrote a memorandum (his "Monopoly Manifesto") to the PGA Tour Policy Board detailing his plan to thwart competitive entry by applying the Tour's Regulations to prevent a new entrant from accessing Tour members such as TRO Plaintiffs. Brass Decl. Ex. 4. The Monopoly Manifesto explains: "The impact that [the new league] could have on the PGA TOUR is dependent on the level of support it may receive from these players. Without this support, [the new league's] ability to attract media and corporate partners will be significantly marginalized and its impact on the TOUR diminished." *Id.* Consistent with the Monopoly Manifesto, the Commissioner has vocally and consistently punished golfers who play with LIV Golf. *Id.* Ex. 19.

In 2020, Monahan promised to "vigilantly protect [the Tour's] business model"—not its players. Brass Decl. Ex. 19b. The Tour has in the past routinely permitted golfers to play with other promoters; however, in 2021, Monahan threatened to impose career bans simply for playing professional golf with LIV Golf, because LIV Golf would offer players more compensation and rights than would the Tour. *Id.* Then, in 2022, Monahan publicly maligned TRO Plaintiffs for choosing to play professional golf with another promoter and took every step in his power to punish them because they played with a promoter that the Tour views as a threat to its monopsony. *Id.*

Despite these threats, a number of players saw the benefits that new competition from LIV Golf would bring to players, fans, and the sport as a whole. After much consideration, the TRO Plaintiffs ultimately decided to participate in LIV Golf events. Gooch Decl. ¶ 17; Swafford Decl. ¶ 17; Jones Decl. ¶ 17. On May 10, 2022, Commissioner Monahan denied all requests for permission to participate in LIV Golf's June 9–11 London Invitational. *E.g.*, Jones Decl. Ex. A. The Tour's stated rationale was: (1) the London Invitational would compete with the Tour-sponsored RBC Canadian Open; and

(2) LIV Golf intends to compete with the Tour in the United States. *Id.* The same day, the Tour pressured other golfers not to ask for permission to participate in LIV Golf events. Brass Decl. Ex. 24.

On May 31, 2022, LIV Golf announced the player field for its London Invitational. Brass Decl. Ex. 35. The field included the TRO Plaintiffs. *Id.* TRO Plaintiffs elected to play in LIV Golf's London Invitational because they believed the Tour could not lawfully punish them for exercising their independent contractor rights to play where they choose when not playing on the Tour. Gooch Decl. ¶ 21; Swafford Decl. ¶ 21; Jones Decl. ¶ 21. In response, on June 1, 2022, the Tour sent disciplinary notices for violating the Conflicting Events Regulation. *E.g.*, Jones Decl. Ex. B. The Tour did not send a notice to Mr. Swafford. Swafford Decl. ¶ 25. The Tour also enforced that same Regulation on developmental tour players who had not even qualified for events that week, and thus had no possible "conflict." Brass Decl. Ex. 36. As one such player, Andy Ogletree, responded to the Tour, "Should I just sit at home on my couch next week and not make any money? It seems like this is your stance." *Id.*

On June 2, 2022, Tour Chief Tournament & Competitions Officer Andy Pazder texted Mr. Gooch: "Just want to make sure you understand the implications of playing without an approved conflicting event release." Gooch Decl. Ex. C. Mr. Gooch responded, "Davis [Love III] called yesterday and said jay [Tour Commissioner] is going to suspend, is this true?" *Id.* Mr. Pazder then told Mr. Gooch that he would be banned from the Tour ***for life*** if he played in one LIV Golf event: "Our position has been that a player may choose to be a member of the Tour or to play in the Saudi/LIV events, but he can't do both. If the player chooses the latter, he should not expect to be welcomed back." *Id.*

On June 3 and 5, 2022, the PGA Tour sent TRO Plaintiffs a letter placing them on probation "pursuant to Article VII, Section C." *E.g.*, Swafford Decl. Ex. A. This Regulation relates to "conduct unbecoming a professional." *Id.* In other words, the Tour's position is that playing professional golf is "conduct unbecoming a professional" golfer—when it is played with a competing promoter. *Id.* In response, approximately ten Tour members who had played with LIV Golf decided to resign from the Tour. *E.g.*, Brass Decl. Ex. 37. The Tour responded by informing resigning members not to "expect that [they] will be able to rejoin membership or play in any events without membership." *Id.* Ex. 38.

The Tour has plainly targeted the TRO Plaintiffs as part of its effort to exclude competition from LIV Golf. For example, on June 9, 2022, Commissioner Monahan sent a public letter to all Tour

members identifying the suspended golfers and stating that "the same fate [would] hold" for any member playing in any LIV Golf event. Brass Decl. Ex. 18. Then, shortly after TRO Plaintiffs teed off in the London Invitational, the Tour notified them that (i) it considered them in violation of the Media Rights Regulation (V.B.1.b); (ii) it considered Messrs. Swafford and Jones in violation of the Regulation against Public Attacks (VI.E)—a rule that prohibits "hateful, abusive, obscene and/or divisive speech" but permits "reasonable expressions" of opinion—for favorably describing LIV Golf; and (iii) they were all suspended from Tour events "until further notice." *E.g.*, Swafford Decl. Ex. B. TRO Plaintiffs submitted their responses challenging the suspensions. *E.g.*, *id.*; Jones Decl. Ex. E.

Thereafter, the Tour suspended TRO Plaintiffs until March 31, 2023 from participation "in any PGA Tour-affiliated tournaments including PGA Tour [and other affiliated tours]," with threats to extend the suspensions based on further violations of Tour Regulations (*i.e.*, playing in LIV Golf events). *E.g.*, Swafford Decl. Ex. D. Commissioner Monahan also banned Messrs. Swafford and Jones from entering any Tour-owned or managed courses, including TPC Harding Park in San Francisco. *Id.*

On July 13, 2022, TRO Plaintiffs appealed their suspensions. *E.g.*, Swafford Decl. Ex. H. In their appeals, TRO Plaintiffs asked the Commissioner to transfer the appeal to an independent tribunal. *Id.* On July 27, 2022, the Commissioner rejected that request, referred their appeals to the Tour Board, and requested that any materials in support of their appeals be submitted by August 10, 2022. *E.g.*, *id.* Ex. I. In response, Mr. Gooch requested confirmation that the Tour would abate suspensions pending appeal. Gooch Decl. Ex. L. Yesterday, the Commissioner refused to do so. *Id.* Exs. M–N.

While TRO Plaintiffs' appeals of the suspensions through March 31, 2023 were pending, the Tour extended the suspensions through March 31, 2024 for TRO Plaintiffs' participation in a second LIV Golf event, even though at that time they already were suspended from the Tour. *E.g.*, *id.* Ex. B. The Tour's rolling suspension scheme thus operates as an effective career ban from the Tour.

G. FedEx Cup Playoffs and TRO Plaintiffs

The FedEx Cup is a season-long competition in which players accumulate points for placing in Tour tournaments and in the Majors. Brass Decl. Ex. 39. At the conclusion of the season, the top 125 players in points are eligible to play in a three-tournament event known as the FedEx Cup Playoffs. *Id.* The FedEx Cup Playoffs feature a progressive cut through the first two events to determine the final

30 players who qualify for the Tour Championship and all four Major Championships the following year (2023). *Id.* The Top 70 players qualify for the marquee PGA Tour Invitationals. *Id.* Players such as the TRO Plaintiffs receive higher bonuses and deferred compensation retirement plan payments the higher they place in the FedEx Cup Playoffs. *Id.* In addition, placing high in the FedEx Cup Playoffs can dramatically boost a golfer's world ranking. *Id.*

TRO Plaintiffs are currently ranked 20th (Gooch), 62nd (Jones), and 63rd (Swafford) in the FedEx Cup. Brass Decl. Ex. 40. Each earned the right to play in the FedEx Cup Playoffs under the Tour's rules. *Id.* None has qualified for the Majors or premier Tour Invitationals in 2023. Gooch Decl. ¶ 42; Swafford Decl. ¶ 41; Jones Decl. ¶ 41. But they will hit those critical milestones, and the associated increased career benefits, if they place in the Top 30 or Top 70 of the Playoffs. Swafford Decl. ¶ 42; Jones Decl. ¶ 42. Qualifying for the Top 30 would bring qualification into the 2023 Majors, even greater benefits in revenue, event eligibility, and a major career accomplishment. Gooch Decl. ¶ 42. The importance of playing in the FedEx Cup Playoffs is undisputed. Brass Decl. Ex. 1. Not playing in the FedEx Cup will all-but guarantee they will not qualify.

III. LEGAL STANDARD

A party moving for a temporary restraining order "must establish that: (1) it is likely to succeed on the merits; (2) it is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in its favor; and (4) an injunction is in the public interest." *Idaho v. Coeur D'Alene Tribe*, 794 F.3d 1039, 1046 (9th Cir. 2015). The Court may apply a "sliding scale" approach that considers how "serious questions going to the merits" compare to the balance of hardships. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131–32 (9th Cir. 2011).

IV. ARGUMENT

A. TRO PLAINTIFFS ARE HIGHLY LIKELY TO SUCCEED ON THE MERITS

1. The Tour Breached Its Regulations by Refusing to Abate TRO Plaintiffs' Suspensions Pending Appeal

TRO Plaintiffs entered into individual agreements with the Tour to mutually abide by the terms of the Regulations. Brass Decl. Ex. 32. Commissioner Monahan suspended TRO Plaintiffs under the Regulations, and TRO Plaintiffs appealed those suspensions. The Regulations provide that TRO Plaintiffs' appeals "***shall operate to stay*** the effective date of any penalty . . . until after the final decision

on the appeal." *Id.* Ex. 12 (VII.E.2) (emphasis added). This Regulation operates to stay "suspension[s]" unless the tournament is "then in progress or scheduled for the calendar week in which the alleged violation occurred." *Id.* On August 2, 2022, the Tour indicated it would not honor Section VII.E.2 and TRO Plaintiffs could not play in Tour events, including the Playoffs, pending their appeals. Gooch Decl. Ex. L. If not enjoined, the Tour's breach of this unambiguous provision will irreparably harm TRO Plaintiffs by denying them their earned right to play in the Playoffs. *E.g.*, Gooch Decl. 42–46. TRO Plaintiffs are highly likely to succeed on the merits of their breach of contract claim.[3]

2. The Tour Unlawfully Maintains a Monopoly Under Section 2 of the Sherman Act

Section 2 of the Sherman Act makes it illegal to acquire or maintain a monopoly through anti-competitive conduct. 15 U.S.C. § 2. To establish a Section 2 violation, a plaintiff must show "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *U.S. v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966).

a) The Tour Possesses Monopoly Power in the Relevant Market

Monopoly power "is the power to control market prices or exclude competition." *U.S. v. E.I. duPont de Nemours & Co.*, 351 U.S. 377, 391 (1956); *see also Weyerhaeuser Co. v. Ross Simmons Hardwood Lumber Co.*, 549 U.S. 312, 320–22 (2007) ("a monopsony is to the buy side of the market what a monopoly is to the sell side" and "similar legal standards should apply"). A defendant's "predominant share of the market" ordinarily demonstrates market power. *Grinnell*, 384 U.S. at 571. An antitrust market "is composed of products that have reasonable interchangeability for the purposes for which they are produced." *Paladin Assocs., Inc. v. Mont. Power Co.*, 328 F.3d 1145, 1163 (9th Cir. 2003) (citation omitted). The Tour unquestionably dominates the national (and indeed, world) market for the services of professional golfers for elite golf events.

[3] The Regulations include no choice of law provision. The Tour's clear breach of its unambiguous Regulations requires no choice of law analysis, though California law would apply here. *See Paracor Fin., Inc. v. Gen. Elec. Capital Corp.*, 96 F.3d 1151, 1164 (9th Cir. 1996) (federal court applies the choice-of-law rules of the forum state where court is exercising supplemental jurisdiction); *Axis Reinsurance Co. v. Telekenex, Inc.*, 913 F. Supp. 2d 793, 800 (N.D. Cal. 2012) ("[C]ourts need not engage in a . . . choice-of-law analysis where there is no material conflict between the laws of the states.").

For golfers who qualify for elite events, the Tour has no substitutes (absent successful entry by LIV Golf). All other tours merely feed into the PGA Tour, *see* Leitzinger Decl. ¶¶ 34–52. The CEO of the European Tour conceded that his organization no longer competes with the PGA Tour for players' services. Brass Decl. Ex. 22. There are no reasonably interchangeable alternatives to the Tour because no other golf promoter offers the Tour's combination of large tournament purses, opportunities to earn Official World Golf Ranking ("OWGR") points, public exposure, and endorsement deal prospects. Leitzinger Decl. ¶¶ 17–18. The Tour provides the principal avenue for professional golfers to qualify for the Majors. *Id.* ¶ 51. Courts routinely find that similar facts establish a market for elite sports. *See O'Bannon v. NCAA*, 802 F.3d 1049, 1056 (9th Cir. 2015) (a market "for FBS football and Division I basketball scholarships is cognizable under the antitrust laws because there are no professional or college football or basketball leagues capable of supplying a substitute for the bundle of goods and services [they] provide") (cleaned up); *Phila. World Hockey Club, Inc. v. Phila. Hockey Club, Inc.*, 351 F. Supp. 462, 501 (E.D. Pa. 1972) (recognizing separate markets for major / minor league hockey due to the former's "higher ticket prices, increased television revenues, and greater players' *skill* and *salaries*"); *Int'l Boxing Club*, 358 U.S. at 250–51 (championship boxing contests are a separate market from non-championship ones); *NCAA v. Alston*, 141 S. Ct. 2141, 2151, 2154 (2021) ("NCAA's Division I essentially *is* the relevant market for elite college football and basketball") (citation omitted).

By restricting the output of player services through its Regulations, the Tour artificially depresses player wages—*i.e.*, it controls market prices. Leitzinger Decl. ¶¶ 8, 10, 65, 79, 82. Notably, in response to entry by LIV Golf, the Tour announced increases in player pay totaling over $235 million. *Id.* ¶¶ 54–61. These increases are direct proof of monopsony power, as they show that the Tour's compensation to players before LIV Golf's prospective entry was sub-competitive and substantially lower than the levels of compensation that would prevail in a competitive market. *See Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995) (reduced output and sub-competitive pricing can be "direct proof" of "the actual exercise of market power").

The first three LIV Golf Invitationals provide further direct evidence of the Tour's exercise of monopsony power over the services of professional golfers for elite golf events causing "genuine adverse effects on competition." *FTC v. Ind. Fed. of Dentists*, 476 U.S. 447, 460–61 (1986). The question

in a monopsony case is whether the monopsony buyer "has enough market power to pay suppliers less than it would pay in a truly competitive market." *Boardman v. Pac. Seafood Grp.*, 2015 WL 13358335, at *1 n.1 (D. Or. June 8, 2015) (citing *Weyerhaeuser*, 549 U.S. at 320). During the same time period as the first three LIV Golf events, the Tour paid half of the golfers in its tournaments (those who made the cut) essentially one-third of LIV Golf's purses, and paid nothing to those who didn't make the cut—while LIV Golf paid every player (and paid them significantly more in purses, bonuses, and appearance fees). Brass Decl. Exs. 41–44. Nonetheless, despite these differences, a very small percentage of Tour members played in even one LIV Golf event. Leitzinger Decl. ¶ 86. This is direct evidence of monopsony power. Leitzinger Decl. ¶¶ 54–61. The Tour's dominance is also shown through its exclusion of potential competitors, Brass Decl. Exs. 4–10. *E.I. duPont*, 351 U.S. at 391.

b) The Tour Is Unlawfully Maintaining Its Monopoly By Willfully Excluding Competition

The Tour has violated Section 2 of the Sherman Act because it uses its monopoly power "to foreclose competition, to gain a competitive advantage, or to destroy a [prospective] competitor" *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 482-83 (1992) (citation omitted).

The antitrust laws "certainly forbid all restraints of trade which were unlawful at common-law, and one of the oldest and best established of these is a contract which unreasonably forbids any one to practice his calling." *Gardella v. Chandler*, 172 F.2d 402, 408 (2d Cir. 1949) (Hand, J., dissenting where restrictions upheld due to baseball's unique antitrust exemption). These principles have been confirmed when dominant sports leagues have blacklisted players in an attempt to force players to boycott an upstart competitor. *See, e.g., Radovich v. NFL*, 352 U.S. 445, 448, 453-54 (1957).

Here, the PGA Tour's Media Rights and its Conflicting Events Regulations are nakedly anti-competitive, as they invest the Tour with control to prevent PGA Tour members from selling their services to any buyer without Tour permission. The Tour expressly designed its rules to deny would-be competitors access to independent contractors to "mitigate" the impact of competitive entry and to deny those independent contractors their right to sell their services to other promoters it might deem a threat. Brass Decl. Exs. 4, 12, 45–50. Such rules in furtherance of a monopoly are unlawful. *See, e.g., Int'l Boxing*, 358 U.S. at 254; *Wash. State Bowling Proprietors Ass'n v. Pac. Lanes, Inc.*, 356 F.2d

371, 374-77 (9th Cir. 1966) (affirming antitrust judgment against bowling alley proprietors that black-listed bowlers who bowled in competitors' establishments).[4]

The Tour prohibits releases for events in North America, caps international releases for any player at three per season, and gives the Tour Commissioner unfettered discretion to reject a player's release request. Brass Decl. Ex. 12 (V.A). Thus, the Tour's Regulations create for golfers "precisely the dilemma the Sherman Act is designed to prevent," wherein "the dominant firm[] force[s] [its] suppliers or customers to choose between assisting the dominant firm[] in injuring [its] competitors or working exclusively with those competitors, knowing that because of the dominant firm['s] market power very few suppliers or customers will be able to rely exclusively on the competitors." *PLS.com, LLC v. Nat'l Ass'n of Realtors*, 32 F.4th 824, 836 (9th Cir. 2022). The effect is to suppress player compensation, deny competition for their services, and reduce the number of elite professional golf events. Leitzinger Decl. ¶¶ 8, 10, 65, 79, 82.; *e.g.* Gooch Decl. ¶¶ 11, 14.

The purely anticompetitive, unlawful nature of these Regulations is further evidenced by the Tour's selective enforcement of the Regulations to respond to LIV Golf's competitive threat. Never before has the Tour imposed lengthy or lifetime bans for playing in competing events. To the contrary, the Tour routinely permitted its members to play with the tours that feed into it (*e.g.*, European Tour) and it has routinely granted releases for golfers to play with promoters that the Tour does not view as a competitive threat. *E.g.*, Jones Decl. ¶ 20. For example, just last month, the Tour did not require its members to seek a media release to participate in the JP McManus event in Ireland. Brass Decl. Ex. 52. But when LIV Golf entered the market, presenting a threat to the Tour's dominance, the Tour denied all release requests and imposed potentially career-ending suspensions on any member that dared to play in even one LIV Golf event. *E.g.*, Jones Decl. Exs. A, F; Brass Decl. Exs. 18, 34. The Tour has made clear that it enforces these Regulations to destroy LIV Golf, regardless of how much it may harm itself and its own members in the process. *Id.* Exs. 17, 19. The Tour's actions directly harm the TRO Plaintiffs because they are the targets of the Tour's anticompetitive campaign and the Tour is

[4] *See also, e.g.*, *Le v. Zuffa, LLC*, 216 F. Supp. 3d 1154, 1169 (D. Nev. 2016) (independent contractor fighters sufficiently alleged that UFC's exclusivity agreements constituted exclusionary conduct under § 2); *U.S. v. Richfield Oil Corp.*, 99 F. Supp. 280, 294 (S.D. Cal. 1951) (policy requiring independent contractors to work with only one company violated antitrust laws where it could create a monopoly).

eliminating their ability to offer their services in a competitive market, *e.g.*, Gooch Decl. ¶¶ 11, 14, Ex. J. Courts regularly find such bans violate the antitrust laws by excluding athletes from their profession.[5]

The Tour's Regulations also severely limit the overall output of professional golf services for elite events, by foreclosing professional golfers from playing elsewhere even when they are not playing in a Tour event and threatening the viability of LIV Golf. Leitzinger Decl. ¶¶ 8, 10, 65; *e.g.*, Gooch Decl. ¶¶ 11, 14, Ex. J; Brass Decl. Ex. 36; Khosla Decl. ¶¶ 26, 31, 33. Output restrictions are a "paradigmatic example" of the adverse effects a monopolist can have on competition. *See NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 104-08 (1984) ("Restrictions on price and output are the paradigmatic examples of restraints of trade that the Sherman Act was intended to prohibit."); *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018). That rule is no different in the sports context than any other. *See, e.g.*, *NCAA*, 468 U.S. at 104–08; *U.S. Football League v. NFL*, 842 F.2d 1335, 1341-42 (2d Cir. 1988) (affirming that the NFL unlawfully maintained its monopoly over professional football through predatory tactics intended to destroy a nascent competitor league).

Aside from the direct harm caused to the TRO Plaintiffs, the Tour's suspensions have harmed competition in the market as a whole. Leitzinger Decl. ¶¶ 83–88; Khosla Decl. ¶¶ 14, 18–33. The suspensions serve as a warning shot to other professional golfers, distorting the market and compelling other golfers to act contrary to their best interests, thereby foreclosing LIV Golf's access to a substantial portion of the market. *E.g.*, Gooch Decl. ¶¶ 11, 14, Ex. J. In so doing, the Tour's suspension of TRO Plaintiffs has the effect—and the intent—of threatening LIV Golf's nascent entry and depriving golf fans of the opportunity to enjoy the new and innovative product that LIV Golf is attempting to offer. Brass Decl. Ex. 19; Leitzinger Decl. ¶¶ 83–88; Khosla Decl. ¶¶ 14, 18–33; *e.g.*, Gooch Decl. Ex. J.

Moreover, in addition to its unlawful Regulations and its associated unlawful punishments, the Tour has acted to foreclose competition for the services of professional golfers for elite golf events in a variety of equally illegal ways, including: (a) threatening to revoke player agents' credentials for representing clients who played with LIV Golf; (b) threatening to blacklist small businesses if they

[5] *See, e.g.*, *Mackey v. NFL*, 543 F.2d 606, 617–18, 622 (8th Cir. 1976), *overruled on other grounds by Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996) ("courts have not hesitated to apply the Sherman Act to club owner imposed restraints on competition for players' services") (compiling cases).

work with LIV Golf; (c) leaning on the Majors to do its bidding by calling into question whether players who participate in LIV Golf will be eligible for their respective future tournaments; (d) threatening LIV Golf's partners with exclusion from the professional golf "ecosystem" if they continue to support LIV Golf; (e) threatening sponsors and advertisers with loss of future opportunities with the Tour if they associate with LIV Golf or players who've played with LIV Golf; and (g) pressuring the European Tour to enter into an alliance to foreclose LIV Golf. *See supra* at 5–6. All of these actions were aimed at thwarting LIV Golf's entry, foreclosing competition for the services of professional golfers for elite golf events, and harming TRO Plaintiffs and competition in the market. *See Lorain Journal Co. v. U.S.*, 342 U.S. 143, 149–50, 186 (1951) (monopolist's "attempt to regain its monopoly . . . by forcing [customers] to boycott a competit[or] violated [Section] 2").

c) No Procompetitive Justification Redeems the PGA Tour's Conduct

Finally, the Tour's actions serve no legitimate business purpose. Leitzinger Decl. ¶¶ 109–22. Forcing Plaintiffs to sit on the sidelines when they are not playing in PGA Tour events does not improve any product or expand output. Threatening star players with destruction of their careers by imposing lifetime bans for playing with a competitor serves no purpose other than thwarting competition. Indeed, it only serves to degrade—not improve—the product of the Tour. *Id.* __; *e.g.*, Gooch Decl. Ex. J.

In an August 2, 2022 letter to Mr. Gooch, the Tour asserted that its Regulations benefit the Tour by "enabling members to pool media rights," which drives revenue for the Tour. Gooch Decl. Ex. M. But that misses the point. Plaintiffs are not challenging the Tour's rules that assign media rights to the Tour *when golfers are playing in Tour events*. They are challenging the Tour's rules that prevent players from having and assigning their media rights *during weeks they are not playing in Tour events*. Those rules serve no beneficial purpose, and serve only to reduce output and foreclose competition.

Similarly, to the extent the Tour argues its restrictions benefit the Tour by guaranteeing fields comprised of the best players in the sport, that would only serve to underscore the anticompetitive purpose and effect of those Regulations. As with any business that relies on the input of talented professionals, if the Tour wants to secure the services of top-tier golfers it must ***compete*** for those services—not bind the players to rules that foreclose competition. The antitrust laws do not permit

arguments that competition would somehow be harmful—and certainly not where an incumbent monopolist is seeking shelter from competition. *Nat'l Soc. of Pro. Eng'rs v. U.S.*, 435 U.S. 679, 695 (1978). The Supreme Court rejected the NCAA's attempted justifications for similar output restriction on televised football games. *NCAA*, 468 U.S. at 113-17 (rejecting argument that televised games must be limited to preserve live ticket sales, because it would be antithetical to the antitrust laws to "insulate live ticket sales from the full spectrum of competition"). Proffered justifications that "do[] not legitimately promote competition" are irrelevant. *Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1212 (9th Cir. 1997). The Tour has other regulations (such as a minimum participation requirement) that are sufficient to ensure that golfers play in enough events to support the Tour. Brass Decl. Ex. 12 (IX.B.1–2). In fact, TRO Plaintiffs have all played in over 20 Tour events this season—five more than the minimum. *Id.* Ex. 40. The Conflicting Events and Media Rights Regulations serve only to construct a competitive moat around the PGA Tour. Khosla Decl. ¶¶ 17–19, 24, 27–28, 33; Brass Decl. Ex. 4. Restrictive professional sports rules that exceed what is necessary to create a product are unlawful, and as applied here, require immediate injunctive relief.[6]

Moreover, the Tour's stated reasons for prohibiting players from associating with LIV Golf undermine any claim that the rules are necessary to support its business model. Brass Decl. Exs. 19, 51; Gooch Decl. Ex. A. The Tour regularly grants exceptions for players to participate in international events hosted by other promoters, e.g., Jones Decl. ¶ 20, but it rejected requests to participate in LIV Golf's London Invitational for the stated reason that it is "the first in an eight-event '2022 LIV Golf Invitational Series' season, and more than half of them will be held in the United States." Ex. Gooch Decl. Ex. A. In other words, the Tour prevented players from participating ***because*** LIV Golf posed a potential competitive threat, making any other claims of a valid business justification plainly pretextual. *See, e.g., U.S. v. Dentsply Int'l, Inc.*, 399 F.3d 181, 196–97 (3d Cir. 2005) (conduct inconsistent with

[6] *See, e.g., O.M. by & through Moultrie v. Nat'l Women's Soccer League, LLC*, 544 F. Supp. 3d 1063, 1077 (D. Or. 2021), *appeal dismissed*, No. 21-35469, 2021 WL 4268938 (9th Cir. Aug. 20, 2021) (enjoining eligibility rule as an unreasonable restraint of trade); *Haywood v. NBA*, 401 U.S. 1204, 1205–07 (1971) (reinstating injunction restraining four-year eligibility rule); *Kapp v. NFL*, 390 F. Supp. 73, 81 (N.D. Cal. 1974) (enjoining enforcement of rule capping players' earning potential), *vacated in not relevant part*, No. C 72 537 WTS, 1975 WL 959 (N.D. Cal. Apr. 11, 1975), *aff'd*, 586 F.2d 644 (9th Cir. 1978), and *aff'd*, 586 F.2d 644 (9th Cir. 1978).

purported justifications for exclusionary policies is pretextual); *U.S. v. Visa U.S.A., Inc.*, 344 F.3d 229, 243 (2d Cir. 2003) (defendants' purported justification for exclusionary rules was pretextual where they did not enforce such rules overseas).

3. The Tour Has Unlawfully Agreed With Others To Boycott Players Under Section 1 of the Sherman Act.

Courts have "long held that certain concerted refusals to deal or group boycotts are so likely to restrict competition without any offsetting efficiency gains that they should be condemned as per se violations of § 1 of the Sherman Act." *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 290 (1985). Here, the Tour coerced and coordinated with the European Tour (an inferior buyer of professional golfers' services and potential competitor) to boycott any players that work with LIV Golf. Brass Decl. Ex. 22. And agreements "either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive struggle" are per se unlawful. *Nw. Wholesale*, 472 U.S. at 294 (citation omitted).[7] A group boycott claim requires (1) an agreement (2) to deprive a would-be competitor of a trade relationship they need to enter or participate in the market. *Smith v. Pro-Football, Inc.*, 593 F.2d 1173, 1178 (D.C. Cir. 1978).

Here, the Tour has openly acted in concert with the European Tour (and potentially others) to thwart competition. Commissioner Monahan detailed his unlawful agreement in his Monopoly Manifesto, describing how the Tour would "remov[e] the European Tour as a potential partner" of a new entrant like LIV Golf. Brass Decl. Ex. 4. The timeline in Brass Declaration, Ex. 22 illustrates just how the Tour's strategic alliance with the European Tour evolved to thwart competitive entry. That agreement effectuated the removal of an important potential LIV Golf partner, and bolstered the exclusionary

[7] The actions of the Tour and the European Tour are also unlawful under the rule of reason. *FTC*, 476 U.S. at 460-61. Here, where there is an agreement to punish players to foreclose competitive entry, it is inconceivable that there is a colorable procompetitive justification that could outweigh the obvious competitive harm from excluding a once-in-a-generation potential entrant. As described *infra*, at 12–14, the Tour has monopoly power in the relevant market, and the anticompetitive effects of starving potential entrants of skilled players are clear. Leitzinger Decl. ¶¶ 17–61, 83–88. Just because "*some* restraints are necessary to create or maintain a league sport does not mean *all* aspects of elaborate interleague cooperation are." *Alston*, 141 S.Ct. at 2156 (cleaned up). Any purported "procompetitive benefits" of the challenged Regulations can be achieved through "substantially less restrictive restraints;" and there can be no doubt that absent anticompetitive rules like the Media Rights and Conflicting Events Prohibitions, the Tour's golf tournaments would still "go on." *Id.* at 2157, 2162.

consequences of its punishments and threats. Such an agreement to boycott a would-be entrant is a clear antitrust violation, under either the per se rule or the rule of reason. *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 135 (1998); *Volvo N. Am. Corp.*, 857 F.2d at 73; *see also Fashion Originators' Guild of Am. v. FTC*, 312 U.S. 457, 467–68 (1941) (scheme to boycott any customer that used textile of a competitor to achieve the "intentional destruction" of that competitor violated Section 1).

In addition, the Tour's suspensions of TRO Plaintiffs necessarily constitute an unlawful group boycott because they effectively foreclose the suspended players from the market. *See Blalock v. LPGA*, 359 F. Supp. 1260, 1265-66 (N.D. Ga. 1973) (one-year suspension of golfer constituted an illegal group boycott as it is "tantamount to total exclusion from the market of professional golf"). Because this conduct is per se unlawful, and serves no procompetitive purpose even if the rule of reason applies, TRO Plaintiffs are highly likely to succeed in a Section 1 violation.

4. The Tour's Appeal Process Does Not Justify The Suspensions, Both Because The Suspensions Were An Illegal Exercise of Monopoly Power, And Because They Were Unfair.

The Tour is wrong if it attempts to rely on its procedures or its internal appeals process to argue that the suspensions should be upheld. The arguments would fail at the outset because fair process (even assuming it was provided) does not justify an illegal exercise of monopoly power. But the Tour's processes were not fair. And because TRO Plaintiffs were unlawfully denied fair proceedings and an impartial arbiter during the Tour's imposition of their career-threatening suspensions, that provides a separate and independent basis for them to succeed on the merits.

The Tour must provide its members with fair process in disciplining them. Since the Tour is a private membership organization "tinged with public . . . purpose" it must provide fair process in disciplining members. *McCune v. Wilson*, 237 So. 2d 169, 173 (Fla. 1970). Further, where, as here, the organization "exercis[es] virtually monopolistic control" over a profession, expulsion would harm the professional's career, and thus "the power (of exclusion) should not be unbridled" and should be "exercised in a reasonable and lawful manner." *Pinsker v. Pac. Coast Soc. of Orthodontists*, 460 P.2d 495, 498 (Cal. 1969); *see also Rewolinski v. Fisher*, 444 So. 2d 54, 58 (Fla. Dist. Ct. App. 1984) (requiring

fair process where "the association's action adversely affects substantial . . . economic rights").[8]

Fair process must include impartial review. *McCune*, 237 So. 2d at 173; *see also Ernst v. Cincinnati Bengals, Inc.*, 1976 WL 189949, at *2 (Ohio Ct. App. Aug. 30, 1976) (concluding NFL Commissioner had to be "impartial and unbiased" in disciplinary process). However, Commissioner Monahan demonstrated his bias and tainted the Appeals Committee in multiple ways. As early as 2020, he wrote his Monopoly Manifesto to the Appeals Committee, notifying them of his plan to punish golfers to thwart competition. Brass Decl. Ex. 19. Over the two years since receiving the Monopoly Manifesto, not one member of the Appeals Committee has disavowed it. Commissioner Monahan has since then engaged in a long-running and public vendetta against everything LIV Golf-related. *Id.* Consequently, once the Tour's internal disciplinary process started (a process Monahan initiates and oversees), its outcome was foretold. *Id.* Exs. 4, 18, and it doesn't care what the court says. *Id.* Ex. 62.

Further, the Tour's disciplinary process provided TRO Plaintiffs was entirely unfair considering the magnitude of the penalties imposed. The players had no ability to negotiate the Regulations, and no alternative but to accept them. *E.g.*, Gooch Decl. ¶ 3. The Regulations purport to provide the Commissioner with unlimited discretion to interpret the Regulations and to punish players, and, as in this case, impose what effectively amounts to career bans from the Tour. Brass Decl. Ex. 12 at 87. Furthermore, while the players' appeals of Commissioner Monahan's suspensions—challenging them as unlawful anticompetitive conduct—were pending, Commissioner Monahan more than doubled their suspensions—demonstrating that he is not giving players and their appeals any serious consideration. *E.g.*, Gooch Decl. Ex. M. Meanwhile, the Commissioner has also (1) failed to timely notify Plaintiff Gooch of his appeal decision, *id.* ¶ 35; (2) failed to send disciplinary inquiry letters to TRO Plaintiffs despite sending those letters to other similarly situated golfers, e.g., Swafford Decl. ¶¶ 25–26; (3) claimed TRO Plaintiffs failed to respond when they had in fact responded, *id.* Ex. J; and (4) failed to honor the provision of the Regulations that abates suspensions pending appeal, Gooch Decl. Exs. M–N—leaving TRO Plaintiffs with no choice but to come to the Court to seek immediate interim relief.[9]

[8] There is no conflict between California and Florida law regarding Plaintiffs' right of fair procedure, and thus California law applies and does not change the result. *See Telekenex*, 913 F. Supp. 2d at 800.

[9] The Regulations also include an unenforceable release of claims against the Tour and others in the disciplinary process, and unfairly deem failure to participate in the process as an admission of the charges. Courts have recognized that parties cannot contractually evade antitrust liability. *See, e.g.,*

The Tour's one-sided and harsh disciplinary proceedings only further compel a finding of unfairness and an abatement of the Tour's suspensions. *See McCune*, 237 So.2d at 173.

B. TRO PLAINTIFFS WILL SUFFER IRREPARABLE HARM

A party seeking a temporary restraining order must demonstrate that "irreparable injury is likely in the absence of an injunction." *Disney Enter., Inc. v. VidAngel, Inc.*, 869 F.3d 848, 865 (9th Cir. 2017) (emphasis omitted). To establish irreparable harm, a movant must generally show that the injury cannot be adequately compensated by monetary damages. 15 U.S.C. § 26. A threat of irreparable harm is "sufficiently immediate to warrant preliminary injunctive relief if the plaintiff is likely to suffer irreparable harm before a decision on the merits can be rendered." *Boardman v. Pac. Seafood Grp.*, 822 F.3d 1011, 1023 (9th Cir. 2016) (citation and quotation marks omitted).

TRO Plaintiffs have experienced—and continue to experience—irreparable harm, because the Tour's unlawful suspensions deny them the ability to participate in the FedEx Cup Playoffs, which each has earned the right to play. Gooch Decl. ¶¶ 42–46; Swafford Decl. ¶¶ 41–46; Jones Decl. ¶¶ 41–46. The Tour concedes the Playoffs are special and that playing in them is meaningful to the TRO Plaintiffs. Brass Decl. Ex. 1. If the Tour's suspensions of the TRO Plaintiffs are not immediately enjoined, TRO Plaintiffs will (1) lose the opportunity to qualify for the 2023 Majors, (2) lose opportunities to accumulate points, (3) lose chances to qualify for other premier tournaments, (4) lose income earning opportunities, and (5) suffer irreparable losses to goodwill, reputation, and brand. Gooch Decl. ¶¶ 42–46; Swafford Decl. ¶¶ 41–46; Jones Decl. ¶¶ 41–46. These injuries will be complete upon the inception of the FedEx Cup Playoffs; and no monetary relief could compensate TRO Plaintiffs for these injuries. The only reason TRO Plaintiffs are being denied this opportunity is because they are the targets of the Tour's unlawful scheme to defeat its new competitor—LIV Golf.

Because of the "undisputed brevity and precariousness of the players' careers in professional sports," courts recognize that even a short-term player suspension causes irreparable injury. *Jackson v. NFL*, 802 F. Supp. 226, 231–35 (D. Minn. 1992) (enjoining NFL from preventing football players' participation in league); *see also O.M.*, 544 F. Supp. 3d at 1077 (soccer player irreparably harmed if

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Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc., 473 U.S. 614, 637 n.19 (1985) (if contractual term operated "as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy").

prevented from competing because "the career of a professional soccer player is short, and . . . there are no substitutes to actual professional competition to help her realize her full potential"). Professional golf is no exception. The Ninth Circuit has recognized that restricting professional golfers' ability to play golf causes "immeasurable injuries" and irreparable harm. *Gilder v. PGA Tour, Inc.*, 936 F.2d 417, 423 (9th Cir. 1991) (forcing golfers not to use the club of their choice would cause irreparable harm because it would "have an immediately discernible but unquantifiable adverse impact on their earnings, their ability to maintain their eligibility for the tour, and for endorsement contracts"). Here, the harm is more acute, as the Tour's ban prevents Plaintiffs from ***all play***.[10]

If the Tour is allowed to proceed with its anticompetitive behavior, it risks severely harming TRO Plaintiffs' careers. The Tour has already indefinitely suspended any player who participates in LIV Golf events. Gooch Decl. ¶ 36; Swafford Decl. ¶ 34; Jones Decl. ¶ 34. The Tour is trying to prevent TRO Plaintiffs, whom it views as defecting from its monopoly, from performing at an elite level ***anywhere***. *E.g.* Gooch Decl. Ex. A. The only elite golf leagues in existence today are the Tour and LIV Golf, and the Tour wants to exclude the players from participating in ***both*** at a pivotal juncture—the FedEx Cup Playoffs. The Tour itself describes the FedEx Cup as the "pinnacle." Brass Decl. Ex. 1. The Playoffs are critical to the TRO Plaintiffs' careers, and their attempts try to qualify for the Majors and other key 2023 events. Gooch Decl. ¶ 42; Swafford Decl. ¶ 41; Jones Decl. ¶¶ 41–42. Moreover, the irreparable harm to the TRO Plaintiffs is imminent, as the FedEx Cup begins in 8 days.[11]

C. THE BALANCE OF THE EQUITIES WEIGHS IN TRO PLAINTIFFS' FAVOR

The balance of harms here clearly weighs in TRO Plaintiffs' favor. *See Boardman*, 822 F.3d

[10] *See, e.g., Denver Rockets v. All-Pro Mgmt., Inc.*, 325 F. Supp. 1049, 1057 (C.D. Cal. 1971) (player would "suffer irreparable injury in that a substantial part of his playing career will have been dissipated, his physical condition, skills and coordination will deteriorate from lack of high-level competition, [and] his public acceptance as a super star will diminish to the detriment of his career"), *reinstated by Haywood*, 401 U.S. 1204, 1207 (1971); *Linseman v. World Hockey Ass'n*, 439 F. Supp. 1315, 1319–20 (D. Conn. 1977) (similar).

[11] The Tour's suspensions further deprive TRO Plaintiffs and other players access to the LIV Golf Invitational matches, and if not enjoined, those efforts will negatively impact LIV Golf's business and deprive the players of sustained competition for their services. Plaintiffs plan to seek a preliminary injunction to ensure they are not unlawfully punished for further participation in LIV Golf and their suspensions for doing the same are stayed pending the outcome of this litigation.

at 1020 (the balance of equities weighs heavily in plaintiffs' favor where there is a reasonable probability of "substantially lessen[ed] competition" injuring plaintiffs and no evidence that "maintaining the status quo . . . will injure [defendants]"). As TRO Plaintiffs have demonstrated, the Tour's suspensions deprive them of their ability to play in the FedEx Cup, or perhaps even play on the Tour ever again, and denying them the professional and financial benefits of participating in these events. *Prop Sols., LLC v. GOPD, LLC*, 2016 WL 8902589, *5 (N.D. Ga. Dec. 8, 2016) (recognizing as decisive, in weighing the relative harms, the inability of "at least some" of 300 businesses to continue operating).

Against these injuries, the Tour cannot demonstrate any discernible injury that would result from a temporary restraining order. The TRO Plaintiffs have qualified for the FedEx Cup Playoffs under the Tour's own point system. To exclude them from these tournaments would actually *weaken* the fields for those events by removing players who earned their right to play and replacing them with lower-ranked players. Gooch Decl. Ex. J. And, the Tour violates its own Regulations which require the result TRO Plaintiffs seek—abatement of their suspensions. Brass Decl. Ex. 12 (VII.E.2). In any event, because the Tour's conduct is without any legitimate justification, its cessation will do the Tour no harm. The Tour cannot possibly claim any harm as a result.

The Tour might contend that staying the three TRO Plaintiffs' suspensions risks upending the Tour's business model as the enforceability of its Regulations are called into question. But the Ninth Circuit has already rejected that same argument from the Tour. *See Gilder*, 936 F.2d at 424. Moreover, it would obviously be hyperbolic to assert that the participation by these three golfers in a three-tournament event risks any serious consequences to the Tour (in contrast to the severe harm the ban would do to the TRO Plaintiffs). Indeed, the Tour's own Regulations provide precisely what the TRO Plaintiffs are seeking here—a stay of punishments pending appeal. Brass Decl. Ex. 12 (VII.E.2). The Tour breached the plain terms of its Regulations by expressly refusing to abate the TRO Plaintiffs' suspensions pending appeal, Gooch Decl. Ex. L, meaning any harm to the Tour from a suspended player playing in a Tour tournament is self-inflicted. Brass Decl. Ex. 51. In addition, as a matter of law, the Tour does not suffer any cognizable harm if it is prevented from enforcing unlawful Regulations. *See AECOM Energy & Constr., Inc. v. Morrison Knudsen Corp.*, 748 F. App'x 115, 120 (9th Cir. 2018)

(affirming preliminary injunction where defendant "will merely be required to cease [its] illegal activities"); *see also Deckers Outdoor Corp. v. Ozwear Connection Pty Ltd.*, 2014 WL 4679001, *13 (C.D. Cal. Sept. 18, 2014) ("There is no hardship to a defendant when a [temporary restraining order] would merely require the defendant to comply with law.").

Finally, the relief requested here would impart no harm to other golfers or affiliates; they will be able to carry on with their normal course of business. Golfers can continue to participate in the Tour's tournaments. That the Tour promised to add lower-ranking golfers to replace TRO Plaintiffs is of no import. Brass Decl. Ex. 51. The Tour could easily add a tee time to accommodate the three golfers, as was done during the Scottish Open. *Id.* Ex. 22. The equities therefore favor entry of the proposed order. A Sports Resolution (UK) judge has already concluded the same: the equitable result is to avoid irreparably harming the professional golfers' careers by letting them play in critical tournaments by staying their sanction until an impartial court can rule on the legality of the suspension. *Id.*

D. THE PUBLIC INTEREST SUPPORTS A TEMPORARY RESTRAINING ORDER

The public interest factor is concerned with the rights of non-parties. *See Boardman*, 822 F.3d at 1023–24. There is a strong public interest in enforcing the antitrust laws and preserving free and fair competition. *See id.* at 1024 ("state and federal" antitrust laws "preserve competition" which is "vital to the public interest" (quoting *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 988 (9th Cir. 2000)). Enjoining an antitrust violation that harms consumers (golf fans) is in the public interest.

A temporary restraining order would also serve the public interest by promoting competition for the services of professional golfers for elite golf events. Leitzinger Decl. ¶¶ 83–88. By allowing TRO Plaintiffs to participate in the FedEx Cup, the competition would improve. Moreover, LIV Golf offers the first meaningful competition in elite professional golf in decades. *Id.* ¶ 64. Denying the Motion would only serve to further entrench the Tour's monopoly by imposing career threatening punishment on independent contractors for simply playing with a competitor. This would have a chilling effect on competition for players' services and deny the public fans more, better elite professional golf. *See DNA Genotek Inc. v. Spectrum Sols. L.L.C.*, 2016 WL 8738225, at *5 (S.D. Cal. Oct. 6, 2016) ("the public interest would be better served by increased competition between two competitors").

V. CONCLUSION

For all of these reasons, TRO Plaintiffs respectfully request that the Court grant their motion for temporary restraining order, and enter the accompanying proposed order.

DATED: August 3, 2022

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ATTESTATION PURSUANT TO CIVIL LOCAL RULE 5-1

Pursuant to Civil Local Rule 5-1(h)(3) of the Northern District of California, I attest that concurrence in the filing of the document has been obtained from each of the other signatories to this document.

DATED: August 3, 2022

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

PHIL MICKELSON; TALOR GOOCH; HUDSON SWAFFORD; MATT JONES; BRYSON DECHAMBEAU; ABRAHAM ANCER; CARLOS ORTIZ; IAN POULTER; PAT PEREZ; JASON KOKRAK; and PETER UIHLEIN,

Plaintiffs,

v.

PGA TOUR, INC.,

Defendant.

Case No. 5:22-cv-04486-BLF

DEFENDANT PGA TOUR, INC.'S OPPOSITION TO TRO PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER

Judge: Hon. Beth Labson Freeman
Date: August 9, 2022
Time: 1:00 p.m.
Dept.: Courtroom 1, 5th Floor

Date Filed: August 3, 2022

Trial Date: None Set

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Federal Cases

State Cases

I. INTRODUCTION

Throughout their careers, TRO Plaintiffs Talor Gooch, Hudson Swafford, and Matt Jones have enjoyed the benefits of the PGA TOUR's ("PGA TOUR" or "TOUR") unique structure and role in the sport of golf. By enabling professional golfers to pool their media rights, the TOUR has driven media and sponsorship money into the sport for the benefit of all TOUR members. But the TOUR could not function in this mutually beneficial way without TOUR members' annual agreement to abide by the terms of the PGA TOUR Handbook & Tournament Regulations (the "Regulations"). Under these Regulations, members agree not to play in, and thereby contribute their media rights to, non-TOUR golf events held in North America that conflict with PGA TOUR events. These Regulations thus maintain the value of the TOUR's pooled media rights.

Despite knowing full well that they would breach TOUR Regulations and be suspended for doing so, Plaintiffs have joined competing golf league LIV Golf, which has paid them tens and hundreds of millions of dollars in guaranteed money supplied by Saudi Arabia's sovereign wealth fund to procure their breaches. TRO Plaintiffs now run into Court seeking a mandatory injunction to force their way into the TOUR's season-ending FedExCup Playoffs, an action that would harm all TOUR members that follow the rules. The antitrust laws do not allow Plaintiffs to have their cake and eat it too. The TOUR is "free to choose the parties with whom [it] will deal," *Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 555 U.S. 438, 448 (2009), and it has no duty to provide Plaintiffs and LIV a platform to freeride off the TOUR's investments. As one TOUR member aptly put it, "I don't have an issue with anyone going to LIV. I have an issue with them wanting to comeback and play [on the TOUR]. If the grass is so green, why do you want to come back?" As another said about Plaintiffs' gambit: "They're suing the 200 card-carrying members of the PGA Tour. They chose to go this route and play less and now they want to play more."

The injunction TRO Plaintiffs seek is legally baseless. TRO Plaintiffs bear the burden of showing (1) a substantial likelihood of success on the merits; (2) that they will be irreparably injured without relief; (3) that the threatened injury outweighs the harm a TRO would inflict on the TOUR; and (4) that the TRO would serve the public interest. TRO Plaintiffs cannot satisfy ***any***, let alone ***all***, of the well-established requirements for the Court to enter such a drastic

order—particularly under the Ninth Circuit's heightened standard for mandatory injunctions.

TRO Plaintiffs have waited nearly ***two months*** to seek relief from the Court, fabricating an "emergency" they now maintain requires immediate action. It doesn't. Their ineligibility for TOUR events was foreseeable when they accepted millions from LIV to breach their agreements with the TOUR, and they knew for a fact that they were suspended on June 9. The harm they now allege from their suspensions is 100% economic and capable of redress with money damages. Indeed, several other LIV players, including four other Plaintiffs ***in this case***, recognize there is no emergency or irreparable harm; they too have qualified to play in the FedExCup but have not asked the Court for the extraordinary relief sought through this motion. The Court should use its equitable powers to redress real emergencies, not engineered ones by parties who knowingly accepted multi-million-dollar payouts to place themselves in the situation they are in.

Moreover, neither the equities nor the public interest tip in favor of TRO Plaintiffs, who willfully breached their contracts with the TOUR for a pile of cash supplied by LIV. LIV is not a rational economic actor, competing fairly to start a golf tour. It is prepared to lose billions of dollars to leverage Plaintiffs and the sport of golf to "sportswash" the Saudi government's deplorable reputation for human rights abuses. If Plaintiffs are allowed to breach their TOUR contracts without consequence, the entire mutually beneficial structure of the TOUR, an arrangement that has grown the sport and promoted the interests of golfers going back to Arnold Palmer and Jack Nicklaus, would collapse.

Finally, TRO Plaintiffs have not proved that the facts and law clearly favor them on any of their claims. TRO Plaintiffs cannot establish that they are likely to win their antitrust claims—they lack antitrust standing, cannot show that the TOUR has monopoly power given LIV's successful entrance, fail to demonstrate any restriction of competition, and challenge Regulations that are procompetitive. Nor can TRO Plaintiffs prevail on their argument that their suspensions should be "abated" during their appeals. The TOUR's Regulations empower the Commissioner to immediately suspend serial offenders like TRO Plaintiffs, and to maintain those suspensions for their ongoing violations during their appeals. TRO Plaintiffs' attempt to upend the TOUR's disciplinary process on procedural grounds is also meritless. The motion should be denied.

II. FACTUAL BACKGROUND

A. The PGA TOUR

1. The PGA TOUR promotes all members' interests

The PGA TOUR began in 1968 when a small group of professional golfers left the PGA of America and formed the Association of Professional Golfers, a member organization that eventually became the TOUR. Declaration of Andrew Levinson ("Levinson Decl.") ¶ 3. The founding members elected to pool their media rights and negotiate jointly for television exposure and corporate sponsorship. *Id.* ¶ 4. They wanted to increase prize money and improve playing conditions by aggregating their rights—thereby increasing their collective value—while preserving the freedom to plan their own travel and playing schedules, practice as and when they saw fit, and otherwise operate their respective "golf businesses" independently. *Id.*

The PGA TOUR has remained a membership organization ever since. *Id.* ¶¶ 5, 8. Unlike other sports organizations such as the NFL or NBA, there are no "owners" on the TOUR that control or contract with individual golfers or teams of golfers. *Id.* ¶ 8. The TOUR is a 501(c)(6) non-profit membership organization. *Id.* ¶¶ 2, 8. Its revenues come principally from the sale of its members' bundled media rights and sponsorships, and are used to fund its operations, tournament purses, membership benefits (e.g., healthcare and retirement plans), investments in growing the game of golf, and significant charitable initiatives. *Id.* ¶ 5. These revenue streams depend on assurances to sponsors and media outlets that the TOUR has been assigned and is authorized to sell its members' rights. *Id.* As one recent article noted, "if the [PGA TOUR's] media rights were fragmented—say, if CBS Sports didn't have the exclusive rights to air this weekend's Genesis Invitational and players could individually sell their live and archived broadcast rights—the TV deals would be worthless." Declaration of Nicholas Goldberg ("Goldberg Decl.") Ex. 45.

These increased sponsorship, broadcast, and other revenues are distributed to members in the form of tournament purses, bonuses, retirement plan contributions, and other benefits. Levinson Decl. ¶ 6. In 2021, $916 million—approximately ***98%*** of the TOUR's net revenue—was allocated to players, tournaments (i.e., a portion of the sponsorship revenue related to a specific tournament is paid to the tournament), and charities. *Id.* Of that amount, $770 million

was allocated to players, including $443 million to player prize money and benefits, $110 million to player bonus programs, $17 million to Player Retirement Plan contributions, and $200 million to Player Retirement Plan earnings. *Id.* The TOUR's structure and marketing creates the opportunity for aspiring golfers—as TRO Plaintiffs once were—to hone their skill, establish their reputation, and leverage the collective efforts of their predecessors and peers to raise their profile and obtain sponsorships. *Id.* ¶¶ 2–25.

TOUR members are also directly involved in TOUR governance. *Id.* ¶¶ 7, 14. The TOUR is governed by its Policy Board, which includes four player directors, and a fifth player director is slated to join in January 2023. *Id.* The TOUR also includes a sixteen-member Player Advisory Council, elected by TOUR members, which advises and consults with the Policy Board, including membership-elected player directors, and Commissioner on major TOUR decisions. *Id.*

2. The Regulations serve TOUR members' interests by driving up media and sponsorship revenues that are distributed to players

Like all membership organizations, the TOUR has Regulations that provide certain obligations flowing both from the TOUR to its members and from the members to the TOUR. Levinson Decl. ¶¶ 14–35 & Ex. 6. Among the TOUR's long-standing player Regulations are ones that limit participation in events that conflict with scheduled TOUR events and in non-TOUR golf programs live or recorded on media. *Id.* ¶¶ 17–25 & Ex. 6 at Art. V.A–B. These Regulations contribute to the success of scheduled TOUR events by ensuring representative fields and provide substantial benefits to sponsors and media partners. *Id.* ¶ 17. As a result, the Regulations make the TOUR's media rights more valuable, leading to higher sponsorship and broadcast revenues, which in turn are distributed to members. *Id.*

Players are eligible in certain circumstances for three or more conflicting event releases per season to play in non-TOUR tournaments outside North America. *Id.* ¶ 18. Conflicting event releases are not permitted for non-TOUR tournaments held in North America because those tournaments directly conflict with TOUR events for which the TOUR's domestic television partners have paid substantial fees. *Id.* ¶ 20. Conflicting event releases for tournaments outside North America may be denied if the Commissioner determines that it would cause the TOUR to violate a contractual commitment to a tournament sponsor or would otherwise significantly and

unreasonably harm the TOUR and its sponsors. *Id.* ¶ 19. The TOUR has regularly granted conflicting event releases for players where appropriate. *Id.*

Nothing in the Regulations prevents members from resigning their TOUR membership at any time to play on a competing tour, including LIV, or to start their own competing tour or events. Levinson Decl. ¶¶ 21, 25, 101–103. The Regulations do not have any non-compete provision. *Id.* ***Plaintiffs themselves*** joined LIV. Numerous other golfers have joined LIV as well, reportedly in exchange for massive contracts, including Dustin Johnson, Sergio Garcia, and Graeme McDowell, who resigned their TOUR memberships upon joining LIV, recognizing that they cannot participate in TOUR events and work for LIV at the same time. Goldberg Decl. Exs. 52, 54.

As discussed in the accompanying declaration of economist Dr. Mark Israel, the eligibility and media provisions of the TOUR's Regulations do not thwart competition but rather promote it. Declaration of Mark Israel ("Israel Decl.") ¶¶ 10–13, 40–63, 85–107. The eligibility and media provisions reduce inefficiencies by limiting competitors' ability to freeride on the PGA TOUR's substantial investments in developing and promoting its players and the TOUR. *Id.* ¶¶ 85–95. They enhance incentives for the TOUR's media partners to invest in promoting the TOUR's events and players, thereby increasing the value of the media rights and the revenues the TOUR uses to compensate players. *Id.* ¶ 94. And the Regulations protect the TOUR's investment in and preservation of its reputation, by seeking to limit its association with LIV and LIV players' Saudi Arabian backers. *Id.* ¶¶ 101–104. Allowing Plaintiffs to vitiate the TOUR's eligibility and media rights Regulations would force the TOUR to cooperate with its competitor LIV, by providing a platform for Plaintiffs and other LIV golfers. *Id.* ¶¶ 92–93. And it would impose severe harm on the TOUR and its rule-abiding members by devaluing their media rights and upending the TOUR's substantial investments in media partnerships and sponsorships. *Id.* ¶¶ 88–93.

B. Saudi-Backed LIV Golf

LIV Golf was founded in 2021 with financial backing from the Public Investment Fund ("PIF"), the sovereign wealth fund of Saudi Arabia, which holds more than $500 billion in assets. Goldberg Decl. Ex. 43. LIV is the most recent example of "sportswashing," a strategy by the

Saudi government to use sports in an effort to improve its reputation for human rights abuses and other atrocities. *Id.* Exs. 44, 57, 61, 81. With access to nearly unlimited funding through the PIF, LIV has been able to compete for elite players quickly and successfully and operate without consideration of profitability. *Id.* Exs. 65, 80. To date, PIF has committed at least $2 billion of funding to LIV, which LIV is using to pay eight- and nine-figure advances to some TOUR members, provide free tournament tickets to spectators, and fully fund all of its operational costs, including hundreds of millions of dollars in tournament purses. *Id.* Exs. 48, 65, 82. There is no discernible plan for how the PIF will recoup its $2 billion investment in LIV. *Id.*

During its short existence, LIV has established itself as a competing golf tour, having already successfully recruited more than twenty PGA TOUR members, including TRO Plaintiffs. *Id.* Ex. 85. Far from struggling to recruit golfers, LIV's CEO stated in a televised interview with Tucker Carlson just two days before Plaintiffs filed this lawsuit that LIV is oversubscribed for golfers and that "the list gets longer, longer, longer for the players that want to" join LIV. *Id.* Ex. 84. It has also been reported that players joining LIV have received tens-of-millions of dollars, and in some cases hundreds-of-millions of dollars, in guaranteed payments to play for LIV. *Id.* Exs. 80, 83. Plaintiff Phil Mickelson reportedly received $200 million to join LIV, and other prominent TOUR members such as Plaintiff Bryson DeChambeau and Dustin Johnson have reportedly received more than $100 million each. *Id.* Ex. 80.

LIV represents a stark departure from golf's long-earned reputation as a meritocracy in which players are paid based on their skill and performance. Unlike the PGA TOUR, LIV's golf tournaments feature guaranteed money to every participant. Khosla Decl. ¶¶ 9, 15–17. LIV has also adopted a team format that provides additional opportunities for its golfers to play for exorbitant prize money financed by the Saudi PIF. *Id.* ¶¶ 8, 12, 15–17; Goldberg Decl. Ex. 47. LIV's inaugural season includes eight events, five of which are in North America. Khosla Decl. ¶ 16. By its second season in 2023, LIV has announced plans to expand to fourteen events, including ten in North America, with prize money totaling $405 million. Goldberg Decl. Ex. 78.

LIV's direct ties to the Saudi government have cast a black cloud over its events and its players. Goldberg Decl. Ex. 63. Even before LIV officially launched, Plaintiff Phil Mickelson

admitted to a golf writer that LIV was nothing more than "sportswashing" by the Saudi's brutally repressive regime. *Id.* Ex. 46. "They're scary mother****ers to get involved with," he said. *Id.* "We know they killed [*Washington Post* reporter and U.S. resident Jamal] Khashoggi and have a horrible record on human rights. They execute people over there for being gay." *Id.* While Mickelson and the other Plaintiffs nevertheless accepted the enormous paychecks that LIV offered them, many golfers refused to do so, presumably due to concerns over LIV's ties to the Saudi government or their preference for the TOUR's competitive offering, or both. *Id.* Exs. 59, 60, 62, 74. Tiger Woods, for example, rejected an offer from LIV of $700–$800 million. *Id.* Ex. 84. Fans and community members have also protested LIV's events, including, organizations seeking justice for the victims and families affected by the 9/11 attacks. *Id.* Exs. 68, 70, 73, 77.

C. TRO Plaintiffs' Contracts with LIV That Breach Their Agreements with the TOUR

TRO Plaintiffs Gooch, Swafford, and Jones have collectively earned $37 million in official prize money on the PGA TOUR, including over $7 million to date this season. Levinson Decl. ¶ 36. [redacted]

[redacted]

TRO Plaintiffs chose to breach their agreements with the TOUR in exchange for [redacted]

D. The PGA TOUR's Right to Suspend Players Who Violate TOUR Regulations

Under the rules approved by the Policy Board, the TOUR has the authority to impose discipline on members who violate the Regulations or otherwise threaten the TOUR's well-being or integrity. Levinson Decl. ¶¶ 26–35 & Ex. 6 at Art. VII. The Regulations establish a probation procedure to deal with players who serially violate the rules in a manner that the Commissioner determines requires that they be suspended from play while the disciplinary process against them runs its course. *Id.* ¶¶ 33–35 & Ex. 6 at Art. VII.C. If a member breaks the rules, he may be notified that he is being placed on probation. *Id.* If he then commits another infraction, the Commissioner, in his discretion, may immediately suspend the member's playing privileges, preventing him from playing in TOUR events until his disciplinary process concludes. *Id.* This probation procedure prevents a serial offender from disrupting TOUR events while his disciplinary process unfolds, which goes to the heart of the Commissioner's duty to protect the TOUR, its members, its partners, its sponsors, and their reputations. *Id.* ¶ 35.

The Regulations establish a separate disciplinary procedure for the Commissioner to impose minor, intermediate, or major penalties for violations of TOUR Regulations. *Id.* ¶¶ 30–32 & Ex. 6 at Art. VII.D. Members receive notice of violations and proposed penalties, are provided an opportunity to respond, and may appeal the imposition of an intermediate or major penalty to the Appeals Committee, which is comprised of independent (non-player) members of the TOUR

Policy Board. *Id.* ¶¶ 30–31 & Ex. 6 at Art. VII.A and VII.E. In some cases, the effective date of a penalty may be stayed while a member pursues an appeal. *Id.* ¶ 32 & Ex. 6 at Art. VII.E.2.

Both the probation and penalty procedures were invoked against TRO Plaintiffs here. First, under the probation procedure, the TOUR notified all three TRO Plaintiffs in the first week of June that they were being placed on probation under Article VII.C. *Id.* ¶¶ 39–40, 61–62, 80–81. The probation notices, which were sent to Swafford and Jones on June 3, and to Gooch on June 5, warned them that under the probation procedure they could be immediately suspended from playing in TOUR events if they committed further violations. *Id.* Exs. 8, 21, 32. After they violated the rules again—and made clear that they intended to continue doing so—the TOUR notified each of them on June 9 that the Commissioner was exercising his authority under Article VII.C to suspend them from play immediately. *Id.* ¶¶ 41, 43, 63, 65, 82, 84 & Exs. 9, 22, 33. Those suspensions have not been revoked and remain in effect through the completion of TRO Plaintiffs' disciplinary proceedings. *Id.* ¶¶ 51, 57, 73, 92.

Separately, under the penalty procedure in Article VII.D, TRO Plaintiffs, who repeatedly played in conflicting LIV Golf events without releases, each received four notices of disciplinary inquiries: Gooch on June 3, June 9, June 25, and June 30; and Swafford and Jones on June 1, June 9, June 25, June 29, and June 30. *Id.* ¶¶ 38, 42, 45, 47, 60, 64, 68, 71, 80, 84, 88, 90 & Exs. 7, 9, 10, 12, 20, 22, 24, 26, 31, 33, 35, 36, 37. After considering the information they submitted in response, the TOUR imposed major penalties on each of them. *Id.* ¶¶ 46, 48–57, 66, 69–76, 86–96 & Exs. 13, 15, 25, 28, 36, 39. They have appealed those penalties, and the appeal process is currently underway. *Id.* ¶¶ 50, 54, 72, 92. However, because the TOUR suspended them under the separate probation procedure in Article VII.C, and due to their ongoing violations, their appeals of their major penalties do not stay their suspensions. *Id.* ¶¶ 51, 57, 73, 93 & Ex. 6 at Art. VII.C.

E. TRO Plaintiffs Delay Filing This Action

TRO Plaintiffs have known since June 9—and indeed, earlier—that they would violate the TOUR's Regulations and forfeit their ability to play in the FedExCup Playoffs in exchange for accepting massive payments from LIV Golf. *Id.* Exs. 9, 22, 33. For example, a week before his suspension, Plaintiff Matt Jones stated publicly "[y]ou've got to expect" that he would be banned

for committing to play in LIV events without a release. Goldberg Decl. Ex. 51. When asked following his suspension about the possibility of never playing again on the PGA TOUR, Jones stated, "I did come to this [LIV] series and this tournament with the understanding that [] could be the case." *Id.* Ex. 55. Unsurprisingly, TRO Plaintiffs have not played in any of the TOUR's last seven events and did not seek any mandatory injunction to do so. Levinson Decl. ¶ 98. To the extent this motion presents any "emergency," it is one that TRO Plaintiffs chose to create. Notwithstanding the knowledge that he would be suspended and ineligible to participate in the FedExCup, Jones stated that he was "very happy with the decision [he] made," and that he was "more than happy to play in this LIV Golf series for the rest of the year." Goldberg Decl. Ex 55.

F. TRO Plaintiffs Mischaracterize the Facts

Unable to establish their claims based on any fair interpretation of admissible evidence, TRO Plaintiffs have resorted to mischaracterizing the record. The TOUR does not have the space to correct all of TRO Plaintiffs' half-truths and falsehoods in this brief, and instead has created a separate chart identifying an exemplary set of them. *See* Goldberg Decl. Ex. 42. To cite a few examples: TRO Plaintiffs begin their motion on page 1 with an egregious mischaracterization of a comment they attribute to a "Tour representative," presented in bold text. Mot. at 1. The comment was actually from Davis Love III, a hall-of-fame golfer. Love is ***not*** a TOUR official and did ***not*** say that the TOUR "hold[s] all the cards" or "[doesn't] care what the courts say"; that would be absurd. He said that ***golfers*** hold all the cards, and that if a court ordered the TOUR to permit LIV golfers to play in TOUR events despite breaking the TOUR's rules, other golfers might simply boycott those events, because they "respect the rules," are "fed up," and "don't want those guys . . . coming and cherry-picking our tournaments." Dkt. 2-8 at 276–77. His comments do not reveal some purported arrogance by the TOUR; rather, they demonstrate the disruption and damage to all rule-abiding PGA TOUR members that would ensue if TRO Plaintiffs get their way. Likewise, TRO Plaintiffs mischaracterize TOUR Commissioner Jay Monahan's comment that LIV Golf is "an irrational threat." Mot. at 3–4. He did ***not*** say that it is irrational to compete with the PGA TOUR. He said that LIV is an ***irrational market actor***, "one not concerned with the return on investment or true growth of the game." Dkt. 2-3 at 4. TRO Plaintiffs' moving papers

are littered with similar mischaracterizations and half-truths. Goldberg Decl. Ex. 42.

III. ARGUMENT

A TRO is an "extraordinary remedy never awarded as of right." *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (en banc). TRO Plaintiffs bear "the heavy burden" of demonstrating: (1) they are likely to succeed on the merits, (2) they are likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tip in their favor, and (4) an injunction is in the public interest. *Blankenship v. Newsom*, 477 F. Supp. 3d 1098, 1103 (N.D. Cal. 2020). A TRO is typically a procedure "for preserving the status quo." *Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1422 (9th Cir. 1984). Mandatory injunctions, by contrast, go "well beyond" preserving the status quo and are "particularly disfavored." *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1320 (9th Cir. 1994) (quoting *Anderson v. United States*, 612 F.2d 1112, 1114 (9th Cir. 1979)). The Court must deny a mandatory injunction "unless the facts and law clearly favor the moving party." *Anderson*, 612 F.2d at 1114. The status quo is the state of affairs at "the time the complaint was filed." *Animal Legal Def. Fund v. U.S.D.A.*, 2017 WL 2352009, at *3 (N.D. Cal. May 31, 2017). TRO Plaintiffs seek a mandatory injunction to compel the PGA TOUR to take affirmative action to allow them to play in the FedExCup, while continuing to breach the TOUR's Regulations. They fail to meet the standard for issuing any TRO, let alone the "doubly demanding" standard required for mandatory injunctive relief. *Garcia*, 786 F.3d at 740.

A. TRO Plaintiffs Have Failed to Show They Are Likely to Suffer Irreparable Harm

"Irreparable harm is 'harm for which there is no adequate legal remedy, such as an award for damages.' For this reason, economic harm is not generally considered irreparable." *E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 677 (9th Cir. 2021) (quoting *Arizona Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1068 (9th Cir. 2014)). "[T]he temporary loss of income, ultimately to be recovered, does not usually constitute irreparable injury. . . . Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough." *Sampson v. Murray*, 415 U.S. 61, 90 (1974). Additionally, irreparable harm must be "likely," not just possible. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008).

1. TRO Plaintiffs delayed seeking relief

TRO Plaintiffs' motion should be denied because "delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm." *Oakland Trib., Inc. v. Chron. Pub. Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985); *see also Garcia v. Google, Inc.*, 786 F.3d at 746 ("months" delay in seeking injunction undercut claim of irreparable harm); *Collins v. Nat'l Football League*, 566 F. Supp. 3d 586, 603–04 (E.D. Tex. 2021) (two-week delay weighed against finding of irreparable harm). TRO Plaintiffs knew about their suspensions but sat on their purported claims for months. They were informed that their violations of the Regulations resulted in their suspensions on June 9. Levinson Decl. Exs. 9, 22, 33. Even before being notified, they expected to be suspended. Goldberg Decl. Ex. 51. And the citations in their hefty filings demonstrate that they have spent months preparing this legal challenge. Dkt. 2-13 at p.15 n.31 (declaration stating that cited source was "accessed 6/9/2022"). Yet TRO Plaintiffs waited nearly two months before seeking the "emergency" relief to which they now claim they are entitled. TRO Plaintiffs' delay weighs heavily against a finding of irreparable harm. *See* Rutter Group Prac. Guide Fed. Civ. Proc. Before Trial (Nat Ed.) Ch. 13-D at ¶ 13:95 ("Delay in seeking relief may be evidence of laches or negate the alleged threat of 'immediate' irreparable injury. The court has discretion to deny the application on either ground." (citations omitted)).

2. TRO Plaintiffs' claimed harm can be redressed through monetary remedies

TRO Plaintiffs' motion also should be denied because the only arguably concrete injuries they claim are compensable by damages. They provide a list of five purported harms, but the first three—lost opportunities (1) "to qualify for the 2023 Majors," (2) "to accumulate points," and (3) "to qualify for other premier tournaments"—ultimately collapse into the final two—(4) lost "income earning opportunities" and (5) "losses to goodwill, reputation, and brand." Mot. at 22. The tournaments and points are merely means to earn financial and reputational rewards. Even if TRO Plaintiffs were actually suffering those purported harms, neither would justify extraordinary relief they seek. Loss of income that could have been earned in future tournaments is entirely compensable by monetary damages. And TRO Plaintiffs' conclusory, tag-along allegations regarding reputational harm are too remote and speculative to qualify as irreparable injury.

First, "monetary injury is not normally considered irreparable." *hiQ Labs, Inc. v. LinkedIn Corp.*, 31 F.4th 1180, 1188 (9th Cir. 2022). "The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm." *Sampson*, 415 U.S. at 90. "An injury is not irreparable if it can be compensated by the court when, and if, the plaintiff prevails on the merits. Stated differently, only harm that the district court cannot remedy following a final determination on the merits may constitute irreparable harm." *Qualcomm Inc. v. Compal Elecs., Inc.*, 283 F. Supp. 3d 905, 915 (S.D. Cal. 2017) (internal quotation marks and citation omitted).

Here, TRO Plaintiffs expressly seek "monetary damages, treble damages, and economic damages." Compl. at 103. Although the TOUR has committed to pay TRO Plaintiffs for their achievements through the dates of their suspensions, they now seek redress for their inability to play for money in TOUR events postdating their breaches of contract and suspensions. TRO Plaintiffs' claims are fundamentally economic and may be redressed through monetary relief. In *Heldman v. United States Lawn Tennis Ass'n*, 354 F. Supp. 1241, 1251 (S.D.N.Y. 1973), the court denied injunctive relief for similar claims by an athlete, Billie Jean King, barred from events in one league because of unauthorized participation in another. There, the athlete "saw a valuable opportunity in plaintiff's contract and opted for it; she has available to her the chance to win large sums of prize money and with that the subsequent opportunities of endorsements that accrue to athletic stars. That other tournament opportunities may be lost to her … does not, on this record, support a preliminary injunction." *Id.* So too here, where TRO Plaintiffs claim that LIV offered them ***superior*** compensation for foregoing TOUR opportunities, and LIV has indemnified them for losses associated with their breaches of TOUR Regulations. Gooch Decl. ¶ 16 ("LIV Golf offered to compensate me in amounts in addition to its already strong compensation offering—including the highest purses in golf history and guaranteed compensation."); Jones Decl. ¶ 16 (same); Swafford Decl. ¶ 16 (same); Khosla Decl. ¶ 23 (LIV has offered players "extensive indemnification" "to take on the risk" of players' TOUR punishments).

The fact that TRO Plaintiffs' purported lost earnings would occur in the future and may be "difficult to predict" because they are "based on performance" does not justify extraordinary

relief. Gooch Decl. ¶ 45; Jones Decl. ¶ 45; Swafford Decl. ¶ 45. Courts routinely award compensation for lost income, including projected future income. *United States v. Cienfuegos*, 462 F.3d 1160, 1169 (9th Cir. 2006) ("concepts and analysis involved" in calculating future lost income "are well-developed in federal law"); *Mir v. Little Co. of Mary Hosp.*, 844 F.2d 646, 650 (9th Cir. 1988) ("The mere fact that the extent of the injury may be uncertain would not have prevented recovery" because plaintiff "could have easily presented evidence of his projected lost income"). In fact, TRO Plaintiffs' own economist concludes that golfers have calculated the costs associated with "the loss of expected lifetime playing revenues on the TOUR," "the loss of opportunities to earn ranking points," and the loss of opportunities "to earn entry into the Majors" when determining what "large upfront payments" would be "required" for them to join LIV. Leitzinger Decl. ¶ 9. TRO Plaintiffs' assertion that lost earnings would be "difficult to quantify" ignores the fact that their own economist admits that these projected lost earnings have already been quantified and paid. *See Braintree Lab'ys, Inc. v. Citigroup Glob. Mkts. Inc.*, 622 F.3d 36, 42 (1st Cir. 2010) (finding no irreparable injury where plaintiff claimed "it might be difficult to determine retrospectively how much these missed opportunities were actually worth.").

TRO Plaintiffs' irreparable injury claims are easily distinguishable from cases where athletes were barred entirely from participation at the elite level of their sport. *See* Mot. at 22–23 & n.10. TRO Plaintiffs are not barred from professional golf entirely by age restrictions, rights of first refusal, or some other improper mechanism.[1] *See Elite Rodeo Ass'n v. Prof. Rodeo Cowboys Ass'n, Inc.*, 159 F. Supp. 3d 738, 745 (N.D. Tex. 2016) ("In cases recognizing lost playing time alone as constituting irreparable harm, athletes were entirely locked out of their sports."). TRO Plaintiffs themselves argue that they may still compete at an elite level at LIV Golf tournaments.

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[1] TRO Plaintiffs' reliance on *Gilder v. PGA Tour, Inc.*, 936 F.2d 417, 423 (9th Cir.1991), also is misplaced. *Gilder* concerned the requirement that members use certain clubs while playing on the TOUR, not suspension from the TOUR itself. The court held that the marginal effect of using different clubs was an injury that could defy calculation. *Id.* The purported injury here is not so subtle, and damages could be calculated using established methodologies, as described above.

Mot. at 23 ("The only elite golf leagues in existence today are the Tour and LIV Golf."). Their choice to breach their agreements with the TOUR and join another "elite" golf league—one that they claim has offered them superior compensation—is not an irreparable injury.

Second, to the extent TRO Plaintiffs purport to allege non-monetary harm, their allegations are fatally speculative and conclusory. "Speculative injury does not constitute irreparable injury sufficient to warrant granting a preliminary injunction." *Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988). "[A] plaintiff who attempts to establish irreparable harm via loss of business reputation and goodwill must proffer evidence of that loss—a district court may not base a finding of reputational harm on platitudes rather than evidence." *Amazing Ins., Inc. v. Dimanno*, 2019 WL 3406941, at *3 (E.D. Cal. July 26, 2019).

Here, TRO Plaintiffs' boilerplate claims that they will suffer harms to their "goodwill, reputation, and brand" do not even rise to the level of platitudes. *See* Gooch Decl. ¶ 44 ("Participating in the FedEx Cup would provide me opportunities to enhance my sponsor relationships and compensation.") & ¶ 46 ("To retaliate against me and to disparage me for living out the purpose of the organization the PGA TOUR has harmed my reputation and goodwill."); Jones Decl. ¶¶ 44 & 46 (same); Swafford Decl. ¶¶ 44 & 46 (same). Moreover, those claimed harms—to the extent they are even identifiable—are too remote and speculative to warrant injunctive relief. *See Jessup v. Am. Kennel Club, Inc.*, 862 F. Supp. 1122, 1128 (S.D.N.Y. 1994) (finding conclusory affidavits failed to establish irreparable injury to reputation). Any reputational harms TRO Plaintiffs may suffer are far more likely to arise from their alignment with LIV and its efforts to paper over Saudi Arabia's long and well-documented history of human rights abuses than their suspension from the TOUR for violating its rules.

Third, the true lack of exigency here is revealed by the actions of other Plaintiffs. Four other Plaintiffs are similarly situated to the TRO Plaintiffs—they have qualified to play in the FedExCup Playoffs but are suspended from TOUR events—but those four have not sought emergency relief from the Court. Levinson Decl. ¶ 97. If suspension from the TOUR and the consequences that flow from it were truly irreparable, one would expect uniform action by the affected Plaintiffs. The fact that other Plaintiffs face the same purportedly dire consequences and

have not sought immediate relief underscores that their purported injuries are not irreparable.

B. The Balance of Equities Tips Sharply in the PGA TOUR's Favor

Though TRO Plaintiffs have not shown that they are threatened with irreparable harm, the TOUR and its members will be immediately and irreparably injured if this Court orders that TRO Plaintiffs must play in the FedExCup despite their repeated violations of the Regulations.

The TOUR and its members will suffer irreparable harm if the TOUR cannot enforce its Regulations and, by doing so, ensure the exclusive media rights those Regulations protect. *See Heldman*, 354 F. Supp. at 1252 ("It would unduly damage the prestige and the operation of the [incumbent tennis association] to enjoin its rules before an adverse determination on the merits."). If Plaintiffs are permitted to play for both the TOUR and LIV, the TOUR will be forced to provide a platform for golfers who have denigrated the TOUR and devalued its product for all TOUR members. Levinson Decl. ¶¶ 106–116; Israel Decl. ¶¶ 88–95, 101–104. [redacted] Peters Decl. Exs. 2–4. In other words, the requested relief will allow LIV and its players to use the TOUR's platform to attempt to draw viewers, sponsors, and other golfers away from the TOUR, while simultaneously allowing TRO Plaintiffs to flout their promise to adhere to the TOUR's rules.

Moreover, the TOUR will suffer irreparable reputational damage if it is forced to give a stage to players engaged with LIV and to associate the PGA TOUR brand with the Saudi government's efforts to "sportswash" its deplorable reputation. Goldberg Decl. Ex. 44. This fear is well-founded, as LIV has already been a constant distraction at recent TOUR events. During a June 8 press conference for the TOUR's RBC Canadian Open, questions about LIV dominated; half of the questions to reigning champion Rory McIlroy were about LIV rather than the tournament. *Id.* Ex. 53. Similarly, at the recent 150th Open Championship, one of professional golf's most historic tournaments, prominent TOUR members expressed frustration with the unwanted media focus on LIV rather than the tournament. As Justin Thomas explained, "I think it's very obvious why we're sick of talking about it because . . . it's taking away from a lot of –

whether it's great storylines or just great things happening in the game of golf." *Id.* Ex. 75.

The public outrage and political backlash aimed at golfers who have joined LIV reinforces the TOUR's concerns. After Pumpkin Ridge Golf Club (outside Portland, Oregon) announced that it would host a LIV tournament on July 1–3, eleven mayors in Washington County (where Pumpkin Ridge is located) signed an open letter opposing the tournament, numerous members of the club protested the decision, and an estimated forty club members resigned. *Id.* Ex. 64. U.S. Senator Ron Wyden, spoke out against the Oregon LIV event, citing a hit-and-run accident that killed an Oregon teen and how the Saudi-national defendant was shuttled out of the U.S. by the Saudi government before he could stand trial. *Id.* Ex. 66. In addition, several protesters, including members of 9/11 survivor families, gathered outside Pumpkin Ridge and again at the Trump resort in Bedminster, New Jersey, to protest LIV events. *Id.* Exs. 71, 81. The irreparable harm to the TOUR that would necessarily flow from forcing the TOUR to provide LIV golfers and their Saudi backers a greater platform weighs heavily against granting the requested relief.

C. An Injunction Would Harm the Public Interest

The Court also must "pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Disney Enters., Inc. v. VidAngel, Inc.*, 869 F.3d 848, 867 (9th Cir. 2017). A temporary restraining order would permit LIV and TRO Plaintiffs to unfairly reap the benefits of the TOUR's media and sponsorship rights, which are exclusive to TOUR members, and force the TOUR's partners and sponsors to be associated with LIV and its backers. Many of the TOUR's partners and sponsors have made independent decisions to have no relationship with LIV but would be forced into an affiliation with them. A preliminary injunction also will engender consumer confusion because players with dual, conflicting loyalties may promote LIV over the PGA TOUR while participating in TOUR events. Finally, as explained below, the TOUR's enforcement of its Regulations is not anticompetitive. Those Regulations are key to protect rule-abiding TOUR members and are procompetitive.

D. The Law and Facts Do Not Clearly Favor TRO Plaintiffs on the Merits

1. TRO Plaintiffs lack antitrust standing

Plaintiffs' antitrust claims under Section 1 and 2 fail at square one because Plaintiffs lack

antitrust standing. "A plaintiff may only pursue an antitrust action if it can show 'antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.'" *Am. Ad. Mgmt., Inc. v. Gen. Tel. Co. of Cal.*, 190 F.3d 1051, 1055 (9th Cir. 1999) (quoting *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990)). Plaintiffs allege that the TOUR's Regulations are anticompetitive, but the injury they claim is exclusion from the benefits of a contract they knowingly breached, not the exclusion of themselves or LIV from any relevant market. Compl. ¶¶ 7, 9, 11, 58–77. Having breached their agreements with the TOUR and thrown their lot in with LIV, Plaintiffs have no "right to the [TOUR] platform and the public exposure provided by playing on the Tour." *Id.* ¶¶ 212, 215, 218. Their purported "injury"—being denied the benefits of a contract they breached—is not the type of injury "the antitrust laws were intended to prevent." *Atl. Richfield*, 495 U.S. at 334. Moreover, Plaintiffs' antitrust claims are merely a stalking horse for claimed injury to LIV. Compl. ¶¶ 283–286, 290 293, 297; Dkt. 3 (disclosure of LIV as interested entity). Plaintiffs (falsely) allege that the TOUR is engaged in an "effort to exclude competition from LIV Golf," Mot. at 9, but Plaintiffs are not the "efficient enforcer" of any such claim and "therefore lack[] antitrust standing on that basis as well," *Gatt Commc'ns, Inc. v. PMC Assocs., L.L.C.*, 711 F.3d 68, 78–80 (2d Cir. 2013) (plaintiff that agreed to and then was excluded from alleged anticompetitive contract lacked standing because it was not "efficient enforcer" of alleged antitrust violation).

2. The law and facts do not clearly favor TRO Plaintiffs on their Section 2 claim

a. The TOUR lacks monopoly power

Plaintiffs' Section 2 claim fails because Plaintiffs cannot clearly show that the TOUR has "the power to exclude competition or control prices." *United States v. Syufy Enters.*, 903 F.2d 659, 664 (9th Cir. 1990). The "successful entry by LIV Golf" demonstrates that the TOUR lacks the power to exclude competition. Mot. at 13. In just its first year, LIV has established a tour that competes directly with the PGA TOUR, has more financial resources than the TOUR, and offers more guaranteed money to players than the TOUR. Plaintiffs' own economist states that LIV is on track to go from 0% of the market in 2021 to 20% of the market in 2023, while filling its fields with a greater percentage of elite golfers on average (24%) than the TOUR averages (16%).

Letizinger Decl. ¶¶ 33. 62–64; Goldberg Decl ¶ 49. LIV's recruitment of Plaintiffs as part of a full complement of 48 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." *Tops Mkts., Inc. v. Quality Mkts., Inc.*, 142 F.3d 90. 99 (2d Cir. 1998); *see also Syufy Enters.*, 903 F.2d at 665 (evidence that new competitor entered market and began taking market share from defendant was "conclusive" proof of defendant's lack of monopoly power); *Elite Rodeo*, 159 F. Supp. 3d at 745 (denying injunctive relief where competitor's "initial success" entering market demonstrated that defendant "does not have the ability to exclude competitors from the market"). Likewise, the fact that the TOUR responded to LIV's entrance into the market by increasing player pay refutes any argument that the TOUR has the power to "control prices." *Syufy Enters.*, 903 F.2d at 664.

b. The TOUR's Regulations do not restrict competition

TRO Plaintiffs' monopolization claim also falls short because the TOUR's Regulations do not "prevent PGA TOUR members from selling their services" to TOUR competitors like LIV. Mot. at 14. Unlike "non-compete" clauses, the TOUR's Regulations do ***not*** prohibit members from playing on a competing tour. Levinson Decl. ¶¶ 101–103; Israel Decl. ¶ 51. Any TOUR member is free to "sell[] their services" to LIV or any other TOUR competitor. Mot. at 14. Indeed, players including Dustin Johnson, Sergio Garcia, and Graeme McDowell have resigned from the TOUR in favor of doing so. Plaintiffs themselves have also already sold their services to join LIV, only without resigning. What Plaintiffs cannot do, however, is enter into annual agreements with the TOUR that grant the TOUR their media rights, breach those agreements by granting conflicting media rights to LIV, and then force the TOUR to allow LIV to freeride off the TOUR's investment and goodwill by compelling the TOUR to allow Plaintiffs to play in both TOUR and LIV events. The TOUR's eligibility and media rights provisions are analogous to an exclusive services contract. Israel Decl. ¶¶ 11, 50. Such agreements are common, including for independent contractors. *Id.*; *see also Cogan v. Harford Mem'l Hosp.*, 843 F. Supp. 1013, 1018, 1020 (D. Md. 1994) (rejecting antitrust claims where defendant hospital terminated contract with plaintiff independent contractor physician who operated a competing clinic because plaintiff "has

not been eliminated as a competitor in the market"). As Dr. Israel notes, Compass-Lexecon has exclusive relationships with independent contractor academics that prevent those academics from providing consulting services to different firms simultaneously. Israel Decl. ¶ 50. Such provisions are commonplace and procompetitive. *Id.*

Moreover, suspending Plaintiffs from the TOUR based on their breaches of the Regulations is perfectly legal: "businesses are free to choose the parties with whom they will deal, as well as the prices, terms, and conditions of that dealing." *linkLine Commc'ns*, 555 U.S. at 448. Plaintiffs' theory of exclusionary conduct boils down to their claim that the TOUR has an antitrust duty to allow Plaintiffs to play in TOUR events, even while Plaintiffs are breaching their contracts and competing against the TOUR as agents and "equity owner[s]" of LIV. Mot. at 14–15; Khosla Decl. ¶ 8. But the antitrust laws do not require the TOUR "to aid competitors." *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 410–11 (2004); *see also FTC v. Qualcomm Inc.*, 969 F.3d 974, 994 (9th Cir. 2020).

c. Any alleged harm to competition does not outweigh the procompetitive benefits of the TOUR's eligibility and media rights Regulations

TRO Plaintiffs also cannot show that any alleged anticompetitive harm outweighs the TOUR's procompetitive justifications. *See Qualcomm*, 969 F.3d at 991. The TOUR's Regulations are justified by several "legitimate business purpose[s]." *Universal Analytics, Inc. v. MacNeal-Schwendler Corp.*, 914 F.2d 1256, 1258 (9th Cir. 1990).

First, the TOUR's eligibility and media rights Regulations promote competition between tours—including not only LIV, but tours based outside North America as well—because they are an exclusive dealing agreement between the TOUR and its members during the applicable season. In exchange for TOUR membership benefits, members agree not to play in competing events in North America. Courts routinely acknowledge the "well-recognized economic benefits to exclusive dealing arrangements, including the enhancement of interbrand competition." *Omega Env't, Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1162 (9th Cir. 1997). "Exclusive dealing agreements are often entered into for entirely procompetitive reasons, and generally pose little threat to competition." *PNY Techs., Inc. v. SanDisk Corp.*, 2014 WL 2987322, at *4 (N.D. Cal. July 2, 2014) (citation omitted); *see Brown v. Hansen Publ'ns, Inc.*, 556 F.2d 969, 971 (9th Cir. 1977).

Here, as Dr. Israel explains, Plaintiffs' limited exclusivity commitment to the TOUR increases competition by requiring the TOUR and LIV to compete vigorously against one another to attract and retain the top players, which is already occurring. Israel Decl. ¶¶ 53–63.

Second, the Regulations are procompetitive because they encourage TOUR members to use their best efforts to support and promote the TOUR rather than competing tours. Without those obligations, players with conflicting interests would be incentivized to promote LIV at the expense of the TOUR, including by recruiting players for LIV while participating in TOUR events and forgoing conflicting TOUR tournaments in favor of LIV events. Israel Decl. ¶¶ 13, 88–95; Peters Decl. Exs. 2–4. Courts frequently recognize as procompetitive exclusive contracts that, like the Regulations here, are designed to encourage the best efforts and undivided commitment of a venture's participants. *See, e.g.*, *E. Food Servs., Inc. v. Pontifical Cath. Univ. Servs. Ass'n, Inc.*, 357 F.3d 1, 8 (1st Cir. 2004); *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 395 (7th Cir. 1984); *Sulmeyer v. Coca Cola Co.*, 515 F.2d 835, 840 n.2 (5th Cir. 1975).

Third, Plaintiffs' agreement to play exclusively in TOUR events in North America and to grant the TOUR their exclusive media rights prevents LIV from freeriding on the TOUR's platform and reputation. "Eliminating free riders" is a well-recognized "procompetitive advantage of alleged restraints on competition." *N. Am. Soccer League, LLC v. U.S. Soccer Fed'n, Inc.*, 883 F.3d 32, 43 (2d Cir. 2018); *see, e.g.*, *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 222–23 (D.C. Cir. 1986); *SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958, 969–70 (10th Cir. 1994). The TOUR has invested heavily to grow the game of golf and generate interest in its product. Levinson Decl. ¶¶ 2 –25. If Plaintiffs, in breach of their agreements with the TOUR, were permitted to play in TOUR and LIV events in North America, the TOUR would effectively be subsidizing its competitor by allowing LIV and its players to freeride off the TOUR's efforts in the United States. Israel Decl. ¶¶ 88–107. LIV would be using the TOUR's platform and hard-earned reputation to promote LIV and its players at TOUR events. *Id.* The TOUR's freeriding concerns explain why it grants releases to players for certain events on tours based outside of North America but withholds releases from players seeking to play in LIV events regardless of location. Because the majority of LIV's events are held in North America, they pose greater risk

to the TOUR's investment in its platform and reputation. *Id.* ¶¶ 96–98. Such freeriding harms players and fans because it disincentivizes the TOUR from continuing to invest in its product, players, and platform and disincentivizes LIV from doing the same. *Id.*

3. The law and facts do not clearly favor TRO Plaintiffs on their Section 1 claim

TRO Plaintiffs' jumble of conspiracy allegations fare no better than their Section 2 claim. TRO Plaintiffs assert the TOUR conspired with the DP World Tour either to boycott players who work with LIV or to boycott LIV itself. *See* Mot. at 19. Whatever claim they are making, neither is supported by anything other than counsel's mischaracterization of selective news reports, third-party statements, and LIV press releases. *Compare* Brass Decl. Ex. 22 *with* Goldberg Decl. Ex. 42. Even if Plaintiffs' hearsay upon hearsay upon hearsay were sufficient, their Section 1 theory bears no relationship to the relief TRO Plaintiffs seek here. Nor could it. As a matter of law, Plaintiffs cannot allege a Section 1 claim based on the TOUR's enforcement of its ***own*** eligibility and media rights Regulations. *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 769 (1984) ("[I]t is perfectly plain that an internal 'agreement' to implement a single, unitary firm's policies does not raise the antitrust dangers that § 1 was designed to police.").

Plaintiffs' conspiracy allegations fail for two other reasons. ***First***, their boycott theory is "limited to cases involving horizontal agreements among *direct competitors*." *Nova Designs, Inc. v. Scuba Retailers Ass'n*, 202 F.3d 1088, 1092 (9th Cir. 2000) (emphasis added). But Plaintiffs' own economist contends that the DP World Tour does ***not*** compete with the TOUR. Leitzinger Decl. ¶¶ 42–46. ***Second***, to establish a Section 1 boycott claim, TRO Plaintiffs must show that the TOUR "possesses a dominant market position." *Adaptive Power Sols., LLC v. Hughes Missile Sys. Co.*, 141 F.3d 947, 950 (9th Cir. 1998) (citation omitted). But LIV's successful entry into the market is "conclusive" proof that that the TOUR does ***not*** have such power. *Syufy Enters.*, 903 F.2d at 665; *Tops Mkts.*, 142 F.3d at 99. TRO Plaintiffs have not established that the law or the facts clearly favor them on their Section 1 claim.

4. TRO Plaintiffs are not entitled to play in TOUR events pending their appeals

Nor can TRO Plaintiffs prevail on their misguided argument that their suspensions must be "abated" while they appeal their intentional and ongoing violations of TOUR Regulations.

Mot. at 11–12. Nothing in the Regulations entitles TRO Plaintiffs to violate the rules repeatedly and deliberately but continue to play in TOUR events to the detriment of all other rule-abiding members, merely because they have lodged an appeal. On the contrary, Article VII.C of the Regulations empowers the Commissioner to immediately suspend serial offenders like Plaintiffs, and to maintain their suspensions until any appeal of an ensuing disciplinary action is concluded. The Commissioner exercised that authority here with respect to all three TRO Plaintiffs—a fact that they conveniently ignore in their pleadings. The Commissioner's power to suspend serial offenders goes to the heart of his duty to protect and promote the interests and reputations of the TOUR and its members. And it would be rendered all but meaningless if players with nefarious intent could override his decision by merely lodging appeals.

When private organizations establish regulations and disciplinary procedures for their members, courts must defer to their judgment on how those procedures should operate and avoid interfering with them. *See Scheire v. Int'l Show Car Ass'n (ISCA)*, 717 F.2d 464, 465 (9th Cir. 1983) (articulating "[t]he principle of judicial noninterference in internal disputes of voluntary associations"); *Oakland Raiders v. Nat'l Football League*, 131 Cal. App. 4th 621, 645–46 (2005) (warning that "judicial intervention in such disputes will have the undesired and unintended effect of interfering with the [organization]'s autonomy in matters where the [organization] and its commissioner have much greater competence and understanding than the courts"); Levinson Decl. Ex. 6 at 95 (Commissioner has power to "interpret and apply" the Regulations).

TRO Plaintiffs invite the Court to ignore the deference that should be afforded to the TOUR's interpretation of its own rules, and to do so with no basis in either the rules or common sense. Under Article VII.E, PGA TOUR members may stay enforcement of an Intermediate or Major ***penalty*** while it is being appealed. But there is ***no*** corresponding stay pending appeal for suspensions under Article VII.C resulting from a ***probation*** violation, as the plain language of the Regulations makes clear. The ***penalty*** procedures described in Section A include a 14-day period for notice and a 14-day period for member response, and expressly include a stay pending appeals under Section E. By contrast, the ***probation*** procedures described in Section C contain no reference to an appeal. Nor would such a procedure make any sense because the probation rule

exists to fill the gap while the disciplinary process runs its course, which may span several months. TRO Plaintiffs' interpretation—that repeat, willful, and ongoing violators of the rules can override the Commissioner's decision to immediately suspend them—would only invite abuse and would eviscerate the Commissioner's power to protect the TOUR and its members from parties who are actively trying to harm them.

Moreover, the continuous and ongoing nature of TRO Plaintiffs' violations presents a second, independent reason why they are not entitled to play in TOUR events during their appeals. Even for appeals of penalties under Section E, no stay applies to suspensions "from a tournament then in progress or scheduled for the calendar week in which the alleged violation occurred." Levinson Decl. Ex. 6 at Art. VII.E.2. By these means, the Regulations afford a stay to players who in good faith wish to contest a Penalty imposed for a discrete incident that occurred in the past, but ***not*** to players who continue actively violating the Regulations during their appeals. For this additional reason, TRO Plaintiffs are not entitled to stay their suspensions.

5. TRO Plaintiffs' "fair process" claim is meritless

Finally, TRO Plaintiffs' challenge to the TOUR's disciplinary process gains no traction. As TRO Plaintiffs concede, "fair process" claims apply only to organizations that are "tinged with public purpose." Mot. at 20 (quoting *McCune v. Wilson*, 237 So. 2d 169, 173 (Fla. 1970) (internal ellipses omitted)). But "the right to fair procedure is a limited one that applies to an organization that operates in the public interest—and not one that engages in activity of some interest to the public." *Flaa v. Hollywood Foreign Press Ass'n*, 2020 WL 8256191, at *4 (C.D. Cal. Nov. 20, 2020). Fair process claims have "not been applied in the field of entertainment." *See id.* (press association); *Yari v. Producers Guild of Am., Inc.*, 161 Cal. App. 4th 172, 180 (2008) (film producers' association). TRO Plaintiffs' lone case on this point, *McCune v. Wilson*, 237 So. 2d 169, 173 (Fla. 1970), is easily distinguishable because it involved a "quasi-public organization." Nor can TRO Plaintiffs establish that the TOUR has "monopolistic control" in any relevant market, as demonstrated by the emergence of LIV and the existence of other competitors. Section III.D.2, *supra*. Thus, Plaintiffs' fair process claim fails as a matter of law.

Even if TRO Plaintiffs' fair process claim applied to the TOUR's private disciplinary

procedures, it would not support any request for extraordinary injunctive relief. There is no "rigid procedure that must invariably be observed" to provide "fair procedure." *Ezekial v. Winkley*, 20 Cal. 3d 267, 278 (1977). All that is required is "adequate notice of the 'charges'" and a "reasonable opportunity to respond." *Id.* (citing *Pinsker v. Pac. Coast Soc'y of Orthodontists*, 12 Cal. 3d 541, 555 (1974)). The TOUR's disciplinary process easily meets this test. It is undisputed that the TRO Plaintiffs received adequate notice of the charges and have had a reasonable opportunity to respond. Levinson Decl. ¶¶ 26–99. Nothing more is required.

TRO Plaintiffs complain that the TOUR's Appeals Committee fails to provide "impartial review." Mot. at 21. But the Appeals Committee, which has not yet made any determinations, is comprised of independent non-player members of the TOUR Policy Board and "may affirm, modify (increase or decrease), or reverse the decision of the Commissioner." Levinson Decl. Ex. 17. TRO Plaintiffs have not and cannot explain how they would suffer irreparable injury by allowing their appeals to play out. TRO Plaintiffs also suggest that the Commissioner is supposedly "bias[ed]" against them. Mot. at 21. That's false. But regardless, the Commissioner has referred their appeals to the Appeals Committee, a separate body, for review. Levinson Decl. ¶¶ 55, 75, 94 & Exs. 17, 29, 40. Finally, TRO Plaintiffs' allegations about other supposed minor flaws in TOUR processes, Mot. at 21, are belied by the facts. Mr. Gooch ***was*** timely provided notice; the TOUR ***did*** send disciplinary notice letters to each TRO Plaintiff; and, as discussed above, the TOUR was under no obligation to "abate" TRO Plaintiffs' suspensions for their ongoing violations. Levinson Decl. ¶¶ 36–99. Regardless, none of these complaints change the ultimate fact that the TOUR's Regulations provide a "fair procedure," which TRO Plaintiffs continue to avail themselves of to this day. *Pinsker*, 12 Cal. 3d at 555.

IV. CONCLUSION

For the foregoing reasons, the PGA TOUR respectfully requests that the Court deny TRO Plaintiffs' motion for a temporary restraining order.

Dated: August 8, 2022

KEKER, VAN NEST & PETERS LLP

By: */s/ Elliot R. Peters*
ELLIOT R. PETERS
DAVID SILBERT
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PGA Tour, Inc.

Agenda

National Association of Attorneys General (NAAG)
Antitrust & Labor Issues Working Group Call (ALIWG)
Thursday June 27, 2022
12:00 PM EST/11:00 AM Central/10:00 AM Mountain/9:00 AM Pacific/6:00 AM (HI)

Join Zoom Meeting

https://naag-org.zoom.[redacted] (b)(6)

Meeting ID: (b)(6)
Passcode: (b)(6)

OPEN Call NON AAGs INCLUDED

I. Welcome

II. New to Our Call? Please Feel Free to Introduce Yourself/Your Organization

III. Topic: Antitrust & Athletes

- Guest Speaker Presentation-
  - **Gabe Feldman**, Sher Garner Professor Sports Law and Paul and Abram B. Barron Professor of Law --Tulane Law School
    - To what extent can professional sports leagues require the exclusive participation of member athletes?
      - The PGA Tour has allegedly responded to competition from a new league, LIV Golf, by suspending any tour member that also participates in LIV events.
    - What are the antitrust implications of the PGA's policy and what are the prospects for the litigation that was filed by LIV and the professional golfers?
  - Q&A

IV. Open Mic

- Any Public Announcements/Updates Re Recent or Upcoming Antitrust and Labor Matters?

V. Attachments:

- Amended Complaint—Mickelson et al v. PGA Tour, Inc.
- Answer- Liv Golf v. PGA Tour

- TRO Motion Liv Golf Players
- Opposition to TRO Motion

VI. Next Call:

- November 14, 2022 @ 2:00 EST--AAGs Only-- Closed Call

From: Cady, Benjamin [bcady@ftc.gov]
Sent: 2/17/2022 12:32:35 PM
To: Lipsitz, Michael [mlipsitz@ftc.gov]; Mackey, Sarah D. [smackey@ftc.gov]; Merber, Kenneth [kmerber@ftc.gov]; Signs, Kelly [ksigns@ftc.gov]; Wilkins, Elizabeth [ewilkins1@ftc.gov]

Subject: Non-compete team meeting
Location: https://ftc.zoomgov.com/ (b)(6)
Start: 2/17/2022 12:30:00 PM
End: 2/17/2022 1:00:00 PM
Show Time As: Tentative

Required Attendees: Lipsitz, Michael; Mackey, Sarah D.; Merber, Kenneth; Signs, Kelly; Wilkins, Elizabeth

Let's use this one.

Hi there.

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International numbers

From: Cady, Benjamin [bcady@ftc.gov]
Sent: 2/16/2022 10:20:11 AM
To: Wilkins, Elizabeth [ewilkins1@ftc.gov]

Subject: Elizabeth/Ben - discuss non-compete NPRM
Location: Microsoft Teams Meeting

Start: 2/16/2022 3:00:00 PM
End: 2/16/2022 4:00:00 PM
Show Time As: Tentative

Required Attendees: Wilkins, Elizabeth

Microsoft Teams meeting

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From: Cady, Benjamin [bcady@ftc.gov]
Sent: 2/16/2022 4:20:20 PM
CC: Wilkins, Elizabeth [ewilkins1@ftc.gov]

Subject: HOLD for non-compete team meeting
Location: Microsoft Teams Meeting

Start: 2/17/2022 12:30:00 PM
End: 2/17/2022 1:00:00 PM
Show Time As: Tentative

Required Attendees: Lipsitz, Michael; Mackey, Sarah D.; Merber, Kenneth; Signs, Kelly
Optional Attendees: Wilkins, Elizabeth

Let's meet to discuss the next steps on the Phase 2 memo. I'm hoping we'll have ACP's comments by this time.

(And sorry for the lunchtime meeting – it was the only time that was open. Please feel free to bring food.)

Microsoft Teams meeting

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From: Greer, Kristin [kgreer@ftc.gov]
Sent: 6/14/2022 5:46:25 PM
To: Wilkins, Elizabeth [ewilkins1@ftc.gov]

Subject: Accepted: Briefing on the non-compete
Location: Microsoft Teams Meeting

Start: 6/27/2022 2:00:00 PM
End: 6/27/2022 3:00:00 PM
Show Time As: Busy

From: Cady, Benjamin [bcady@ftc.gov]
Sent: 5/31/2022 10:24:38 AM
To: Mackey, Sarah D. [smackey@ftc.gov]; Lipsitz, Michael [mlipsitz@ftc.gov]
CC: Signs, Kelly [ksigns@ftc.gov]; Gilman, Daniel [dgilman@ftc.gov]; Schmidt, David R. [DSCHMIDT@ftc.gov]; Wilkins, Elizabeth [ewilkins1@ftc.gov]; Waller, Spencer [swaller@ftc.gov]; Vita, Michael G. [MVITA@ftc.gov]

Subject: Non-Compete NPRM Team Meeting
Location: https://ftc.zoomgov.com/ (b)(6)

Start: 5/31/2022 1:00:00 PM
End: 5/31/2022 1:30:00 PM
Show Time As: Tentative

Recurrence: Weekly
every Tuesday from 1:00 PM to 2:00 PM
Required Attendees: Mackey, Sarah D.; Lipsitz, Michael
Optional Attendees: Signs, Kelly; Gilman, Daniel; Schmidt, David R.; Wilkins, Elizabeth; Waller, Spencer; Vita, Michael G.

Hi all – I don't have anything major for the agenda today, so we probably won't need more than 30 minutes. I'll just give a drafting update and then open the floor in case there's anything else anyone wants to discuss.

Hope everyone had a good weekend.

Thanks,
Ben

Hi there,

Melody Martinez is inviting you to a scheduled ZoomGov meeting.

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International numbers

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H.323

Meeting ID: (b)(6)

Passcode:

SIP: (b)(6)

Passcode:

Appointment

From: Cady, Benjamin [bcady@ftc.gov]
Sent: 6/15/2022 9:19:20 AM
To: Wilkins, Elizabeth [ewilkins1@ftc.gov]

Subject: Accepted: Briefing on the non-compete rule
Location: Microsoft Teams Meeting

Start: 6/27/2022 2:00:00 PM
End: 6/27/2022 3:00:00 PM
Show Time As: Busy

From: Lipsitz, Michael [mlipsitz@ftc.gov]
Sent: 6/14/2022 7:59:17 PM
To: Wilkins, Elizabeth [ewilkins1@ftc.gov]

Subject: Accepted: Briefing on the non-compete
Location: Microsoft Teams Meeting

Start: 6/27/2022 2:00:00 PM
End: 6/27/2022 3:00:00 PM
Show Time As: Busy

From: Cady, Benjamin [bcady@ftc.gov]
Sent: 6/15/2022 10:53:28 AM
To: Gilman, Daniel [dgilman@ftc.gov]; Schmidt, David R. [DSCHMIDT@ftc.gov]; Wilkins, Elizabeth [ewilkins1@ftc.gov]; Signs, Kelly [ksigns@ftc.gov]; Lipsitz, Michael [mlipsitz@ftc.gov]; Vita, Michael G. [MVITA@ftc.gov]; Mackey, Sarah D. [smackey@ftc.gov]; Waller, Spencer [swaller@ftc.gov]

Subject: Canceled: HOLD for non-compete NPRM team meeting
Location: https://ftc.zoomgov.com/ (b)(6)

Start: 6/16/2022 1:00:00 PM
End: 6/16/2022 2:00:00 PM
Show Time As: Free

Importance: High

Required Attendees: Dan Gilman; Dave Schmidt; Elizabeth Wilkins; Kelly Signs; Mike Lipsitz; Mike Vita (MVITA@ftc.gov); Sarah Mackey; Spencer Weber Waller (swaller@ftc.gov)

Canceling this meeting because it doesn't seem like we have a lot to discuss, right now, on the second batch of sections. Mike and I will discuss any questions we have based on your comments on those sections at our next team meeting (on Tuesday 6/21).

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Melody Martinez is inviting you to a scheduled ZoomGov meeting.

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Meeting ID:

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H.323: (b)(6)

Meeting ID:

Passcode

SIP: (b)(6)

Passcode

Appointment

From: Mackey, Sarah D. [smackey@ftc.gov]
Sent: 6/14/2022 6:02:45 PM
To: Wilkins, Elizabeth [ewilkins1@ftc.gov]

Subject: Accepted: Briefing on the non-compete
Location: Microsoft Teams Meeting

Start: 6/27/2022 2:00:00 PM
End: 6/27/2022 3:00:00 PM
Show Time As: Busy

From: Cady, Benjamin [bcady@ftc.gov]
Sent: 6/22/2022 3:26:22 PM
To: (b)(6) gmail.com; Wilkins, Elizabeth [ewilkins1@ftc.gov]; Lipsitz, Michael [mlipsitz@ftc.gov]
CC: Gilman, Daniel [dgilman@ftc.gov]; Mackey, Sarah D. [smackey@ftc.gov]; Vita, Michael G. [MVITA@ftc.gov]; Waller, Spencer [swaller@ftc.gov]; Kalil, Ian [ikalil@ftc.gov]

Subject: Non-compete discussion with FTC
Location: https://ftc.zoomgov.com (b)(6)

Start: 7/6/2022 2:00:00 PM
End: 7/6/2022 2:30:00 PM
Show Time As: Tentative

Required Attendees: (b)(6) @gmail.com; Elizabeth Wilkins; Mike Lipsitz
Optional Attendees: Dan Gilman; Mackey, Sarah D.; Mike Vita (MVITA@ftc.gov); Spencer Weber Waller (swaller@ftc.gov); Kalil, Ian

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Hi there.

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Meeting ID: (b)(6) FOIA-2023-01225 00000051440 "UNCLASSIFIED" 2/8/2024

International numbers

From: Cady, Benjamin [bcady@ftc.gov]
Sent: 6/16/2022 3:16:15 PM
To: Heidi Shierholz (b)(6) @epi.org]; Wilkins, Elizabeth [ewilkins1@ftc.gov]; Lipsitz, Michael [mlipsitz@ftc.gov]
CC: Gilman, Daniel [dgilman@ftc.gov]; Mackey, Sarah D. [smackey@ftc.gov]; Vita, Michael G. [MVITA@ftc.gov]; Waller, Spencer [swaller@ftc.gov]; Kalil, Ian [ikalil@ftc.gov]

Subject: Non-compete discussion with FTC
Location: https://ftc.zoomgov.com (b)(6)

Start: 6/23/2022 11:00:00 AM
End: 6/23/2022 11:30:00 AM
Show Time As: Tentative

Required Attendees: Heidi Shierholz; Elizabeth Wilkins; Mike Lipsitz
Optional Attendees: Dan Gilman; Sarah Mackey; Mike Vita (MVITA@ftc.gov); Spencer Weber Waller (swaller@ftc.gov); Kalil, Ian

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International numbers

From: Greer, Kristin [kgreer@ftc.gov]
Sent: 6/14/2022 5:46:28 PM
To: Wilkins, Elizabeth [ewilkins1@ftc.gov]

Subject: Accepted: Briefing on the non-compete
Location: Microsoft Teams Meeting

Start: 6/27/2022 2:00:00 PM
End: 6/27/2022 3:00:00 PM
Show Time As: Busy

From: Walker, Schonette [swalker@oag.state.md.us]
Sent: 6/10/2022 4:36:21 PM
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Subject: FW: NAAG Antitrust and Labor Issues Working Group Call--OPEN call

Attachments: Balan Noncompetes Writeup Sketch.pdf; CPI-Balan_2020.pdf; Non-Competes_Antitrust Bulletin_Published Online.pdf; 06 13 2022 ALIWG Agenda Open Call..pdf
Location: zoom

Start: 6/13/2022 2:00:00 PM
End: 6/13/2022 3:00:00 PM
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Recurrence: (none)

-----Original Appointment-----
From: Walker, Schonette
Sent: Friday, February 11, 2022 4:05 PM
To: Walker, Schonette; Alacoque Nevitt; Amanda Lee; Berger, Thomas J; Black, Christina (ATG; Bloom, Bryan; Bradshaw, Grace (AGO; Bryan Sanchez; Caleb Smith; Canaday, James; Christopher Hallock; David Sonnenreich; Demers, Nicole; Dunlap, Jeffrey; Durst, Arthur (OAG; Elizabeth Mxeiner; Emily Myers; Etie-Lee Schaub; Hoffmann, Elinor; Honick, Gary; Hubbard, Robert; Isabella Pitt; Jackson, Catherine; Jacob.murray@atg.in.gov; Jamison T. Ball; Jennifer Thomson; Jessica Agarwal; jkirk; Joseph 'Chervin; joseph.meyer; Kemerer, Hannibal; Khan, Meryum (AGO; Laura Namba; Lynette Bakker; Marie W. Martin; Marisa Hernandez-Stern; Mark, Cynthia (AGO; Mary Martin; Matelis Christy; Matlack, William (AGO; Max.Miller; McFarlane, Amy; Michaloski, Matthew; Moler, Jonathan; Morejon, Amanda (AGO; Nicholas Niemiec; Nodit, Luminita (ATG; Olson, John; Pamela Pham; Paul Harper; philip.rizzo@atg.in.gov; Queyn Toland; Rao, Rahul (ATG; Robert J Yaptangco; Robert Yaptangco; Satoshi Yanai; Sharp, Margaret; Shencopp, Erin; steve provazza; Tara Pincock; Timothy Fraser; Tucker, Lucas; Tulin, Leah; Walker, Nancy A.; William Rogers; Yale Leber; Zach Biesanz; Alexander James Colvin; Amezcua, Carrie G.; (b)(6) @ec.europa.eu; Anne Schneider; avery gardiner; Batal, Mohamad; belga; Bond, Slade; Braun, Christi; (b)(6) @hoganlovells.com; (b)(6) @ucsd.edu; dave balan; DAVID DESARIO; (b)(6) @brandeis.edu; DEMIROGLOU Aristeidis; Doha.Mekki; Eric Posner; Eric.posner@usdoj.gov; Funk, Stephanie; Gerstein, Terri Ellen; Greer, Kristin; Harsch, Ryan F.; Harvey, Dean; Holland, Caroline; Ioana Marinescu; Jane Flanagan; Johnson, Heather; Jon Leibowitz (b)(6) @omm.com; KBERG@ftc.gov; (b)(6) @ec.europa.eu; Levine, Gail; Marc Edelman; Mark, Synda; Mast, Andrew (ATR; (b)(6) @duke.edu; megan jones; Myriam E Gilles; (b)(6) @economicliberties.us; Robinson, Tabatha; Salahi, Yaman; STROUVALI Konstantina; Tanuja Gupta; Terri Gerstein; vaheesan; Van Wye, Joseph; Wilkins, Elizabeth; William Wu; Woolery, Ricardo (b)(6) @edelson.com; Jeffrey Dunlap (jdunlap@oag.state.md.us); Leah Tulin (ltulin@oag.state.md.us)
Cc: Byron Warren (bwarren@oag.state.md.us); Dill, Megan; LaPonzina, Dean; David Balan
Subject: NAAG Antitrust and Labor Issues Working Group Call--OPEN call
When: Monday, June 13, 2022 2:00 PM-3:00 PM (UTC-05:00) Eastern Time (US & Canada).
Where: zoom

These open WG calls will be held on the 2nd Monday in February, April, June, August, October and December at 2PM EST. Calendar invites will be updated with agendas shortly before the calls. Thank you. ~Schonette

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June 9, 2022

Introduction:

- This note is about the effects of non-competes on the workers who are party to them. It is not about the effects of non-competes on third parties.

- Recent research strongly suggests that non-competes are harmful to workers.[1] More specifically, and contrary to an argument that is commonly offered in support of non-competes, they are often imposed on workers involuntarily, rather than being the product of negotiation in which the worker receives something that they value at least as much as they dislike the non-compete.

- This harm to workers is not necessarily a competitive harm.[2] The purpose of this note is to argue that it can in fact reasonably be considered a competitive harm, and to briefly sketch an approach for bringing antitrust cases challenging non-competes.

Monopsony Power as a Basis for Antitrust Action Against Non-competes:

- A commonly-held view is that for non-competes to be an antitrust problem, they must be caused by monopsony power in the labor market.

- It may therefore seem natural for a central element of an investigation to be about identifying monopsony power among the firms that impose non-competes on workers.

- In my view, in many or even most cases this is likely to be a mistake, for two reasons.

- First, monopsony power may genuinely not be present. And even if it is present, it may be very difficult or impossible to prove.[3]

- Second, even if monopsony power could be proven, it is not clear that it can work as a basis for an enforcement action. The reason is as follows. Unless the claim against the non-competes is accompanied by a conventional Section 2 or Section 7 claim, the FTC/DOJ or the state AG will in effect be conceding that the monopsony power possessed by the firms was

[1] See the empirical work by Evan Starr and his many co-authors (including BE economist Michael Lipsitz), and also Balan (2021).

[2] This note is about non-competes that cause harm to the workers who are party to them. For cases where the competitive harm is to third parties (such as business that cannot find qualified workers, and their customers and workers), the problem is quite obviously a competition problem.

[3] There is some new research suggesting that monopsony power is more prevalent than had previously been believed, even for low-wage workers. This may somewhat lower the burden for showing that monopsony power exists. But to my knowledge this new research has not been tested in court, and even under this lower burden monopsony power may still be absent or at least difficult to prove.

acquired legally. And as a general matter, exercising legally-acquired market power is legal. So if the firm decides to exercise its market power by imposing a non-compete, how is that more illegal than another avenue of exercising it, such as lowering the wage? This strikes me as basically a fatal objection to the idea of basing non-competes enforcement on monopsony power possessed by the firm.

An Alternative Approach for Antitrust Enforcement Against Non-Competes (Main Idea):

- I suggest a different approach.[4] To see how different it is from a monopsony-based approach, begin by assuming that the labor market is extremely competitive, in the sense that on the day the worker accepted their job that worker had essentially an unlimited number of observationally equivalent job offers.[5] Obviously this is an extreme assumption, but it serves to emphasize the point.

- The basis for the alternative approach lies in the following facts: (i) dissolving job matches is costly for both the worker (who must engage in a costly search for another job) and the firm (that must engage in a costly search for another worker); and (ii) labor agreements are incomplete (meaning that not every term is specified up front before the match is formed) and costly to enforce (meaning that even terms that are specified up front may be performed only partially or not at all).

- Another way of saying that dissolving the match is costly to the worker and the firm is that preserving the match generates match-specific economic surplus to be divided between the worker and the firm. This surplus can be very substantial. And the fact that labor agreements are incomplete and imperfectly enforceable means that the division of this surplus cannot be fully determined up front. Instead, the division will be determined largely by informal bilateral bargaining between the worker and the firm. The worker will try to grab more of the surplus in the form of (say) demanding longer breaks, and the firm will try to grab more of the surplus in the form of (say) insisting on shorter breaks.

- In this informal bargaining, as in any other bargaining, the division of the surplus depends on how much each side "needs" an agreement. This in turn depends on how good or bad is each party's next-best alternative to reaching an agreement (often called the "outside option"). The worse the worker's outside option (i.e., the more costly it is for the worker to be fired), the lower their bargaining leverage relative to the firm, and the worse the terms they will receive. Similarly, the worse the firm's outside option (i.e., the more costly it is

[4] What follows is largely based on Balan (2020), but has been refined and expanded since that article was published.
[5] That is, the jobs need not all be identical; the assumption is only that any differences could not be discerned by the worker at the time the job was accepted.

for the firm to have the worker quit), the lower its bargaining leverage relative to the worker, and the worse the terms it will receive.

- Non-competes make the worker's outside option worse. Without the non-compete, the worker's outside option is the best job they can get. With the non-compete, the worker's outside option is the best job they can get that does not violate the non-compete. If the non-compete is binding to any significant degree, then the latter outside option will be substantially worse than the former.

- **This brings us to the central claim of this note. Non-competes are a competition problem NOT because they are the product of monopsony power possessed by firms, but rather because they make it more difficult for the worker to access the benefits of the competitive labor market. Put another way, the problem is not that the labor market is bad because it is monopsonized; the problem is that the labor market is competitive and good but the worker cannot participate in it.**

Discussion:

- There are two points related to this approach that merit discussion.

- First and perhaps most important, this approach **DOES** require that non-competes are imposed on workers against their will, rather than being something that workers freely agree to in exchange for something that they value at least as much. The empirical evidence plus the discussion in Balan (2021) strongly suggest that this is true (especially but **NOT** exclusively for low-wage workers), but it is still a necessary condition and it would need to be demonstrated in court. In other words, this approach is about showing that the harmfulness to workers of non-competes, **once demonstrated**, is specifically an antitrust problem. But it does not eliminate the need to perform the prior step and demonstrate that non-competes are harmful to workers.

- Second, the fact that this approach is not rooted in monopsony power does not mean that competition in the labor market is irrelevant. It is still necessary to show that the restraint imposed on the worker by the non-compete is meaningful. If there were 1000 equivalent jobs, and the non-compete denied the worker access to 100 of them, there would still be 900 equivalent jobs remaining and the non-compete would not have caused any harm. So there would still be a need to show that the jobs that the non-competes prevent the workers from taking are meaningfully preferable, to a sufficient number of workers, to other

available jobs. In many cases this will likely not be very difficult (jobs really are quite differentiated, even low-wage jobs), but it will still be necessary to prove it.[6]

An Alternative Approach for Antitrust Enforcement Against Non-Competes (Additional Idea):

- The main idea for this new approach was described above. There is an additional idea that is both less important and more difficult to understand. But it does identify an additional source of harm from non-competes, so I describe it here briefly.

- As discussed above, the outcome of the informal bargaining between the worker and the firm over the match-specific surplus depends on each side's outside option. This is commonly modeled in antitrust economics using the Nash Bargaining model. In that model, reducing the value of **either** side's outside option increases the total match-specific surplus. This means that the match-specific surplus is greater with a non-compete than without: when one side's outside option gets worse, that side needs a deal more, and when **either** side needs a deal more, the total surplus from the match is higher.

- There might appear to be a contradiction, or at least a tension, between the claim that the non-compete makes the worker worse off by degrading their bargaining leverage and the claim that the non-compete increases the match-specific surplus. But there is no contradiction: the non-compete does increase the surplus, because the worker's weaker relative bargaining position makes them value the match more. It also harms the worker, because it was precisely that weakening of the worker's bargaining leverage that caused the increase in the surplus.

- A numerical example will help clarify the point. Suppose that the non-compete degrades the worker's outside option by $100. That is, if the negotiation fails and the match is dissolved the worker will be worse off by $100 relative to what it would be absent the non-compete. The total surplus is the sum of how much the worker values the match plus how much the firm values the match, so the non-compete has increased total surplus by $100.

- That additional surplus has to be divided somehow. In the Nash Bargaining model, the division of the surplus is determined by the "split parameter." So for example if the split parameter was 0.5, that would mean that each side captures half of the surplus. So if the non-compete increased the surplus by $100, the worker would capture $50 of that surplus. So the degradation of the worker's outside option made them worse off by $100, but they

[6] This idea is related to market definition. Whether it should be treated literally as market definition (i.e., defined according to the Hypothetical Monopolist Test as laid out in the Horizontal Merger Guidelines), or if some alternative approach should be used instead, is an important question that is beyond the scope of this note.

recaptured $50, leaving them worse off by $50 on net. The firm would capture the other $50, making it $50 better off on net.

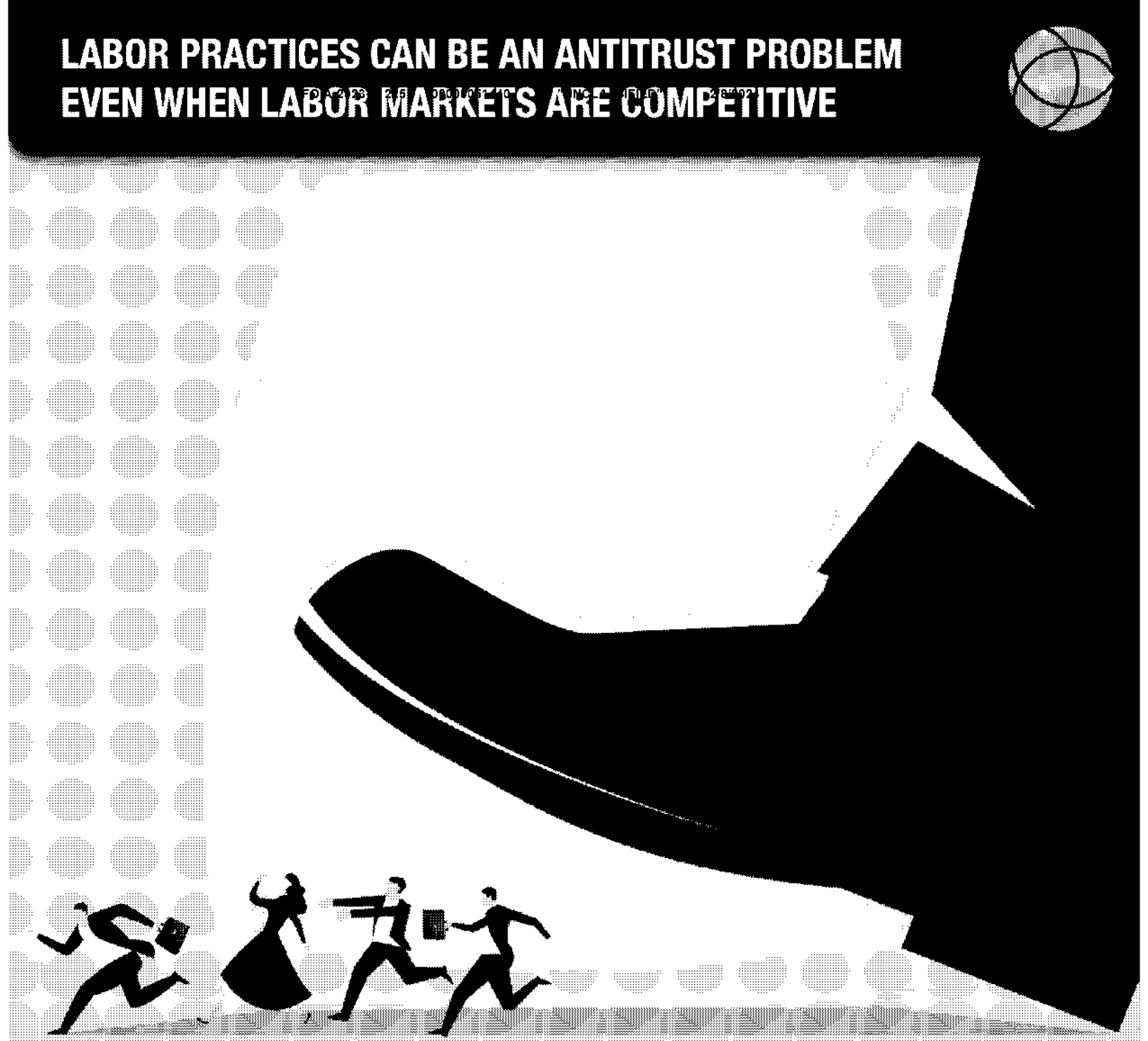
- But now suppose (realistically) that the split parameter is not 0.5, but something much more lopsided, say 0.9, meaning that the firm captures 90% of the surplus and the worker captures 10%. Now the worker would only recapture $10, being $90 worse off on net, and the firm would capture $90, being $90 better off on net.

- The fact that the firm likely captures most of the surplus is not an antitrust problem in itself. But it does have two important implications for the antitrust analysis. First, as shown in the above example, the harm caused to the worker by the non-compete is larger than it would be if the split was more equal. Second, the benefit to the firm is larger than it would be if the split was more equal. This gives the firm a stronger incentive to impose the non-compete in the first place. For both of these reasons, a highly unequal split parameter makes the antitrust harm from non-competes worse.

Conclusion:

- There is strong reason to believe that non-competes harm workers. For this to be a problem that the FTC/DOJ or state AGs can address, that harm needs to be competitive harm of some sort. A natural source of such harm is monopsony power wielded by the firm imposing the non-compete. But I believe this to be a weak basis for an enforcement action against non-competes, for both practical and conceptual reasons. My proposed alternative approach is to argue that non-competes are a competition problem because they prevent workers from accessing and enjoying the benefits of the competitive labor market, thereby weakening their bargaining leverage in informal negotiations with the firm over match-specific job surplus. In addition, the fact that the firm is likely to appropriate most of that match-specific surplus both increases the harm to the worker from the non-compete and increases the incentive of the firm to impose it.

LABOR PRACTICES CAN BE AN ANTITRUST PROBLEM EVEN WHEN LABOR MARKETS ARE COMPETITIVE



BY DAVID J. BOLAN[1]

[1] David Bolan is an employee of the Federal Trade Commission. The views expressed in this paper are solely those of the author.

[2] I thank Keith Brand, Wally Mullin, and Jeremy Sandford for helpful comments.

CPI ANTITRUST CHRONICLE
MAY 2020

I. INTRODUCTION

In conventional antitrust analysis, there are certain conditions that must be met for a matter to be an antitrust problem. A merger is only likely to be a problem if the merging firms are close competitors to each other and there are not very many other close competitors. Coordination is only likely to be a problem if the coordinating firms collectively represent a large fraction of the sellers of the product. And conduct, including a variety of contractual restraints, is only likely to be a problem if the restraining firm has significant market power as that term is conventionally understood.[1]

Assuming, at least for the sake of argument, that this is true of output markets, it may appear that it must be true of input markets as well, including labor markets. Indeed, the textbook analysis of monopsony and oligopsony is very similar to that of monopoly and oligopoly,[2] and this similarity is explicitly recognized in the DOJ/FTC Horizontal Merger Guidelines.[3] It may therefore appear, and it is often argued, that labor market practices engaged in by firms can only be an antitrust problem in the presence of conventional labor market power, defined (roughly) as there being only one or a small number of possible employers for the type of labor in question.

The purpose of this article is to argue to the contrary. Specifically, I argue that firms can impose harmful conditions on workers even when workers have many (roughly) equivalent job offers to choose from.[4] **I further argue that this harm can reasonably be thought of as antitrust harm.**[5]

The basic argument is as follows. Even if the labor market is very competitive *ex ante* (i.e. the time of hiring), once the job match is formed, dissolving it is costly to both the worker and the firm, which means that **preserving** the match generates surplus, and this surplus must be divided between the worker and the firm. The more valuable the match (i.e. the more the worker prefers preserving the match to looking for another job, and the more the firm prefers preserving the match to looking for another worker), the more surplus there is to be divided.

This division will be determined via bilateral bargaining. This bargaining can be modeled using standard methods familiar from conventional antitrust analysis, specifically a model known as the Nash Bargaining model. In that model, the division of the surplus depends on the relative bargaining **leverage** between the worker and the firm, which loosely means that the less a party has to gain from reaching a deal, the more favorable the terms that party will receive; and on the relative bargaining **power** between the worker and the firm, which means that the stronger a party's capabilities for capturing surplus, the larger the share of the surplus that party will receive. Having more bargaining leverage and more bargaining power are both beneficial to a party, but an important and under-emphasized result from the theory of Nash Bargaining is that a party that has all of the bargaining power captures all of the surplus, regardless of relative bargaining leverage. Specifically, if one party has all of the bargaining power, they can make a take-it-or-leave-it offer to the other party that leaves that party no better off than they would be if the match was dissolved.

Whether a worker or a firm has more bargaining leverage is difficult to say, and there is no strong empirical evidence on the subject that I am aware of. However, there is some reason to suspect that workers often "need" a deal more than firms do, giving firms more relative bargaining leverage. With regard to bargaining power, matters are much clearer. Bargaining power is very likely to be held mostly by the firm, not the worker. Firms have myriad advantages in size, resources, and sophistication, and they can unilaterally set non-negotiable firm policies. An ordinary worker has little prospect of matching these advantages, and so will be at a major disadvantage in capturing the match-specific surplus.

Bargaining power as it appears in the Nash Bargaining model corresponds to power in the ordinary English sense of the word. While not without bound (the worker can still quit), the firm is able to use its advantages to acquire bargaining power, and to use that bargaining power to benefit itself at the expense of the worker. This can take the form of chiseling on wages and hours, or poor working conditions, or even abusive or degrading treatment.

The question is whether this power is **market** power in the antitrust sense. I argue that it is. As discussed above, the division of the match-specific surplus takes place outside the context of the competitive labor market, so the competitive labor market does not protect the worker from efforts by the firm to capture it.[3] Practices that allow the firm to capture most or all of that surplus can be thought of as efforts to become a monopolist over that surplus with respect to that worker, which makes it an antitrust problem.[4]

The fact that harm from these practices might reasonably be thought of as antitrust harms does not necessarily mean that they should always be dealt with in the context of antitrust. In many cases, regulation by the Department of Labor or by OSHA may be more appropriate. Nor is it obvious which practices by a firm should or should not be regarded as antitrust violations. The purpose of this article is not to resolve these questions. The purpose is only to establish that there is a reasonable basis for considering these harms to be antitrust harms, and therefore to consider antitrust action as one possible avenue for addressing them.

There is one labor market practice that is particularly likely to be an antitrust problem, namely labor non-compete agreements. Unlike other labor practices, whose purpose is to affect the division of **existing** match specific surplus, non-compete agreements have the effect of **increasing** the match-specific surplus. They do this by making it more difficult for the worker to re-access the competitive labor market, thereby degrading the worker's prospects outside the match. When the worker's outside option is worse, they value the match by more, increasing the amount of match-specific surplus available to be captured by the firm. Practices that distance workers from the opportunity to participate in competitive markets are quite clearly an antitrust problem.

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[illegible]

[illegible]

This view of non-competes is at odds with the familiar argument that their voluntary nature is strong grounds for believing them to be both mutually beneficial and efficient.[16] But this is only true if non-competes are truly voluntary, and if the agreed-upon compensation offered to the worker in exchange for accepting a non-compete is actually delivered. In a separate article (Balan, 2019), I argue that these conditions are often not satisfied.[17] This argument is bolstered by a wealth of recent empirical evidence that, while somewhat mixed, largely finds non-competes to be harmful to workers.[18] And if these conditions are not satisfied, then non-competes are not to be presumed beneficial to the worker, but are rather to be understood as a restraint imposed on workers **without** compensation, to the benefit of the firm and to the detriment of the worker.

II. *EX POST* BARGAINING OVER MATCH-SPECIFIC SURPLUS

Suppose that a worker entering the labor market can choose between many jobs that *ex ante* appear to be identical. Once the worker chooses a job and a match is formed, that match is costly to dissolve, for both the worker and the firm. For the worker, the costs include the direct financial costs of a new job search, the lost income during the search (the damage from which is exacerbated by the fact that many workers have no financial cushion), and the fact that being fired is an emotionally traumatic experience for workers. In addition, the worker might need a recommendation from the firm to find another job, which they may not get if the match ends in acrimony. Finally, the worker may have signed a non-compete agreement or be subject to other restrictive covenants, which further increases the cost of leaving their job. For the firm, the costs include the direct recruiting and hiring costs to replace the worker, the indirect costs of being temporarily understaffed until a replacement is hired, and possible morale problems among remaining workers. These costs can be substantial.

Another way of saying that dissolving the match is costly is to say that **preserving** the match generates surplus arising from avoiding those costs. This surplus must somehow be divided between the worker and the firm. If labor contracts were complete and also fully and costlessly enforceable, then the division of this surplus would be determined within the context of the competitive labor market, and workers would receive competitive overall terms.

In reality, however, contracts are neither complete nor fully enforceable. This means that much of what happens between the worker and the firm is determined **after** the match has formed. There are things that the firm can do to benefit itself at the expense of the worker (chisel on wages and hours, poor working conditions, or even abusive or degrading treatment), and there are things that the worker can do to benefit themselves at the expense of the firm (shirking, theft, even sabotage). Which of these things will happen will be determined via bilateral bargaining between the worker and the firm, and not within the context of the competitive labor market.

This does not mean that the competitive labor market is irrelevant. A key concept in bargaining is that neither side can be forced to do worse than they would do if the match was dissolved (this is often referred to as their "outside option" or "disagreement payoff"). The worker will not agree to terms that are worse than being fired and having to look for another job, nor will the firm agree to terms that are worse than letting the worker quit and having to look for another worker. The more competitive the labor market, the better the worker's outside option, and the better the terms the worker will receive. That is, a labor market characterized by conventional market power makes things worse for workers, for the conventional reasons. But even in a competitive labor market, a substantial amount of surplus will be divided via bilateral bargaining outside the context of the competitive labor market.

This kind of bilateral bargaining is standard in economics, including antitrust economics. The standard framework for studying it is a well-known model called the Nash Bargaining model. In the remainder of this section, I summarize and present key results from this model.

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

As discussed above, the worker's surplus from the match is the difference between what they receives if a deal is reached and what they receive if a deal is not reached, and similarly for the firm. The total surplus from the match is the sum of the worker's surplus and the firm's surplus.

Somewhat counter-intuitively, the party that contributes **less** to the total surplus has **greater** bargaining leverage. To see why, note that the surplus must be divided somehow. Suppose, for example, that the surplus is to be divided equally (though this is not necessary). A party that contributes little surplus shares little surplus with the other party (half of very little is also very little), but that party still receives half of the surplus contributed by the other party. An analogy would be a guest who brings a small side dish to a potluck dinner, but then eats the full meal like everybody else. Put another way, the party that contributes less to the total surplus has less to gain from a deal. That party "needs" a deal less, and so is able to bargain for better terms.

Whether workers or firms have greater relative bargaining leverage is difficult to say, and it may differ across employment matches and perhaps even over time within a match. While there is no direct empirical evidence that I am aware of, for the above reasons it appears that firms may often have greater relative bargaining leverage (i.e. having the match end is worse for the worker than it is for the firm).[13]

B. Bargaining Power

In Section II.A I assumed that the total surplus from reaching an agreement is divided equally between the parties. But this need not be the case. A given amount of surplus can be divided so that it goes entirely to one party, entirely to the other party, or anywhere in between. What share of the surplus a party can command is referred to as their bargaining **power**, which is distinct from the bargaining leverage described above. If one party has all of the bargaining power, then it will capture all of the surplus, and the other party will only receive value equal to their outside option, making them no better off than they would be if the match were dissolved. Any intermediate amount of bargaining power is also possible.

Bargaining power is an economic term of art, but it corresponds quite closely to the ordinary English usage of the word "power." When there is a pool of surplus to be divided between a single worker and a large firm, who has the power to capture it? Is that division likely to be 50/50 (the worker and the firm share the surplus equally)? Or is it more likely to heavily favor the firm, say 90/10 or 95/5? The massive size, sophistication, and resources of the firm strongly suggest the latter, as does the fact that the firm unilaterally sets non-negotiable rules, policies, and employment practices that can be used to apply pressure to the worker. It simply strains credulity that ordinary individual workers can outperform large, heavily resourced firms in a competition to capture a pool of surplus. That is power, and it is the firms, not the workers, that have it.[14]

There is an additional point that is a standard result of Nash Bargaining, but that is not widely appreciated. If one party has (almost) all of the bargaining power, then it matters little who has more bargaining leverage. Recall that bargaining leverage is about the relative contributions of the two parties to the total pool of surplus. But if one party has **all** of the bargaining power, then this is moot, because that party receives **all** of the surplus, regardless of who contributed it. This will be made clearer in the next sub-section.

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[13] For clarity, I assume that the worker's outside option is the same as the firm's outside option. In fact, it is likely that the firm's outside option is better than the worker's outside option. For example, if the worker and firm are in a bilateral monopoly, then the firm's outside option is to hire another worker, while the worker's outside option is to remain unemployed. Thus, the firm's relative bargaining leverage is even greater than it would be if the outside options were equal.

[14] This is not to say that workers never have any bargaining power. Workers can sometimes exercise bargaining power through collective action, such as unionization or strikes. Workers can also sometimes exercise bargaining power through individual action, such as quitting to take a better job offer. But in general, workers have much less bargaining power than firms.

[15] This must be made more precise.

Define W^D as the value that the worker receives if a deal is reached (the job match continues) and W^{ND} as the value that the worker receives if a deal is not reached (the job match is dissolved and the worker receives their outside option).[14] The difference between these two ($W^D - W^{ND}$) is the gain to the worker from reaching a deal. Note that ($W^D - W^{ND}$) can be large because W^D is large (getting a deal is very good), or because W^{ND} is small (not getting a deal is very bad), or some combination of the two. Similarly, define F^D as the value that the firm receives if a deal is reached, F^{ND} as the value that the firm receives if a deal is not reached, and ($F^D - F^{ND}$) as the gain to the firm from reaching a deal.

The total surplus TS from continuing the job match is

$$TS = (W^D - W^{ND}) + (F^D - F^{ND}),$$

where TS is the sum of the amount by which the worker is better off with a deal than without, plus the amount by which the firm is better off with a deal than without.

Each party will receive their outside option (W^{ND} for the worker and F^{ND} for the firm) plus some share of the match-specific surplus. For simplicity I assume that this surplus will be divided via a lump-sum payment P from the worker to the firm (this payment can be negative, which would mean a payment from the firm to the worker). It is important to note that this does not literally mean that the worker will hand money over to the firm, or vice-versa. Rather, the "payment" will take the form of one side or the other getting away with under-performing the terms of the original agreement, or with interpreting ambiguities in that agreement in a manner favorable to themselves. Workers may get away with a certain amount of shirking, and firms may get away with a certain amount of mistreatment of one kind or another.[15]

In our examples we will assume, as is common in antitrust economics, that P will be determined as predicted by the Nash Bargaining model. There are five inputs into this model: W^D, W^{ND}, F^D, F^{ND}, and a "bargaining power" parameter α that governs the share of the surplus that is kept by the worker. According to the model, the equilibrium P will be the one that maximizes the following expression:

$$((W^D - P) - W^{ND})^{\alpha} \times ((F^D - P) - F^{ND})^{(1-\alpha)}.$$

Less technically, the P that comes out of the Nash Bargaining Model is the one that causes the worker to receive their outside option plus surplus equal to αTS, and the firm to receive its outside option plus surplus equal to $(1 - \alpha)TS$.

Now consider the following examples. In each example, $TS = 200$.

Example 1: $(W^D - W^{ND}) = 100$, $(F^D - F^{ND}) = 100$, and $\alpha = ½$.

The two parties are identically positioned, so we would expect $P = 0$ to be the answer. This is indeed the case. The worker and the firm have equal bargaining leverage; they each prefer a deal to no deal by 100, so they each contribute 100 to the $TS = 200$. They also have equal bargaining power, because $\alpha = ½$ and $(1 - \alpha) = ½$, so they each are to receive their outside option plus 100 (half of the TS) net of P. $P = 0$ is the P that accomplishes this, as this is what they each already receive gross of P.

Example 2: $(W^D - W^{ND}) = 150$, $(F^D - F^{ND}) = 50$, and $\alpha = ½$.

Now the firm has more relative bargaining leverage than in Example #1, because the worker prefers a deal to no deal by 150, and the firm prefers a deal to no deal by only 50, meaning that the worker contributes more than half of TS. But as in Example #1, the bargaining power is equal ($\alpha = ½$), so the worker and the firm will each receive their outside option plus half of TS (i.e. their outside option plus 100) net of P. Since the worker

[14] In the real world, the worker may receive some benefit from the job match continuing even if a deal is not reached, for example because they enjoy working with their colleagues, or because they are hoping that a deal will be reached in the future. Similarly, the firm may receive some benefit from the job match continuing even if a deal is not reached, for example because they are hoping that a deal will be reached in the future. For simplicity, I assume that W^{ND} and F^{ND} are the values that the worker and the firm receive if a deal is not reached, regardless of whether the job match continues or is dissolved.

[15] Of course, the worker might also engage in shirking, and the firm might also engage in mistreatment, in the event that a deal is reached. Therefore, the gain to the worker from reaching a deal, ($W^D - W^{ND}$), should be understood as net of any shirking that the worker engages in if a deal is reached, and the gain to the firm from reaching a deal, ($F^D - F^{ND}$), should be understood as net of any mistreatment that the firm engages in if a deal is reached.

receives their outside option plus 150 gross of P, and the firm receives its outside option plus 50 gross of P, a payment of $P = 50$ is required. If the 150 and the 50 were reversed, then P would be –50, and the firm would be paying the worker.

Example 3: $(W^{in} - W^{out}) = 100$, $(F^{in} - F^{out}) = 100$, and $\alpha = 0$.

Now the two parties have the same bargaining leverage (as in Example #1), with each preferring a deal to no deal by 100, and so each contributing 100 to *TS*. But now the firm has **all** of the bargaining power, which means that the worker will receive no surplus net of P, only receiving their outside option. The firm will receive its outside option plus 200 (all of *TS*) net of P. Since they each receive their outside option plus 100 gross of P, a payment of $P = 100$ is required. If we replaced $\alpha = 0$ with $\alpha = 1$, P would be –100, the firm would receive its outside option, and the worker would receive their outside option plus 200.

Example 4: $(W^{in} - W^{out}) = 0$, $(F^{in} - F^{out}) = 200$, and $\alpha = 0$.

Now the worker has all of the bargaining leverage (they are indifferent between a deal and no deal, but the firm prefers a deal to no deal by 200 and so contributes all of the *TS*). But as in Example #3, the firm has all of the bargaining power. In this case, the worker **still** receives no surplus net of P, only receiving their outside option, and the firm still receives its outside option plus 200 (all of *TS*) net of P. Since the worker receives no surplus beyond its outside option gross of P, the payment will be $P = 0$. If we replaced $\alpha = 0$ with $\alpha = 1$, P would be –200, the firm would receive its outside option, and the worker would receive their outside option plus 200.

This last example is somewhat subtle but very important. If the firm has most or all of the bargaining power, then it will receive most or all of the bargaining surplus, regardless of bargaining leverage. When one side can capture all of the surplus from a deal, it does not matter who contributed how much to that surplus.

These examples are highly stylized, and they omit many important factors. However, they capture an essential point, namely that when the firm has a lot of bargaining leverage, and (more importantly) when the firm has almost all of the bargaining power, it is possible for workers to be harmed by firms *ex post* even when they participate in a highly competitive labor market *ex ante*.

III. IS THIS AN ANTITRUST PROBLEM?

The existence of costs to dissolving a job match creates match-specific surplus, and that surplus must be divided somehow between the worker and the firm. Labor market practices that firms engage in to the detriment of workers can be understood as efforts to capture that surplus. There are many such practices, including chiseling on wages and hours, poor working conditions, or even abusive or degrading treatment.[17]

Some of these practices may be actionable under labor law, but the question for this article is whether they can be considered **antitrust** violations, even if the labor market is highly competitive *ex ante*.[18] I argue that they can. The key fact is that the surplus that these practices are intended to capture are specific to the job match, and so by definition the harm suffered by the worker from these practices cannot be ameliorated by labor market competition. These are practices of **a single firm** against the worker. When the firm has disproportionate bargaining leverage or (more importantly) most or all of the bargaining power, it can reasonably be regarded as a monopolist with respect to that worker over the match-specific surplus.

It might be argued that these practices represent a permissible exercise of existing market power, and not an impermissible acquisition of market power. Setting aside the question of whether exercising existing market power is in fact always permissible, I believe that the practices represent the acquisition of market power, and not the exercise of it. It is true that the practices do not create the surplus, which exists exogenously by virtue of the value of the match. But that surplus does not start out belonging to the firm. The surplus exists and it must be divided somehow, and the labor practices are the means by which that division comes out to the benefit of the firm at the expense of the worker. **The exercise of bargaining power is the exercise of market power.**

[17] For a more detailed discussion of the practices that I have in mind, see Eric A. Posner, Antitrust in the New Economy, 68 Antitrust L.J. 925, 939–40 (2001). Posner argues that these practices are not antitrust violations because they are not "exclusionary" in the sense that they do not exclude competitors from the market. This is a misunderstanding of the concept of exclusionary practices. The practices are exclusionary because they exclude the worker from the surplus that would otherwise be available to them.

[18] The distinction between *ex ante* and *ex post* competition is discussed in Alan J. Meese, Price Theory and Competition, 81 Cal. L. Rev. 1157, 1207–08 (1993).

[19] Ohio v. Am. Express Co., 138 S. Ct. 2274 (2018).

The above is not a worked-out apparatus for treating labor practices as antitrust violations. There are many questions that are beyond the scope of this article, including which practices are harmful at all, and of those which are best dealt with through labor law rather than antitrust. There is also the conceptual question of how much of the match specific surplus firms should be allowed to try to capture. Should they be allowed to try to capture half of it? Would an antitrust case hinge on what fraction of the surplus the firm refrained from trying to capture?

These are difficult questions, and it is unclear whether it is possible to build a workable regime for challenging harmful labor market practices as antitrust violations. It may be or it may not be. But the fundamental point remains. These practices represent firms trying to become monopolies with respect to their workers regarding the match specific surplus. This is the exercise of market power.

IV. LABOR NON-COMPETE AGREEMENTS

Another labor practice that firms sometimes engage in is to impose non-compete agreements on their workers. Non-competes are fundamentally different from the labor practices discussed in Section III above. Those practices represent attempts by the firm to capture a fixed quantity of match-specific surplus. In contrast, non-compete agreements **increase** the amount of surplus available to be captured. A non-compete agreement denies the worker access to the full benefits of the competitive labor market, thereby degrading that worker's outside option. The worker now has more to gain from the match, increasing the total surplus arising from the match, and the firm can use its superior bargaining power to capture most or all of that additional surplus as well.[14]

For this reason, the argument for treating non-compete agreements as an antitrust problem is even stronger than the argument discussed above for treating other labor practices as antitrust problems. A practice that denies the worker the ability to re-access the full benefits of the competitive labor market appears to fall quite squarely within the domain of antitrust, especially when combined with the firm's ability to use its bargaining power to capture the resulting increased surplus.

As discussed above, if contracts were complete and fully and costlessly enforceable, all terms of the labor contract would be determined in the context of the competitive labor market, and hence restraints such as non-competes would not be an antitrust problem (assuming that they also did not harm third parties). This is closely related to a standard defense of non-competes, namely that workers would not agree to them unless they receive compensation that they value at least as much as they dislike the restraint. In a separate article (Balan, 2019), I argue that this is often not the case, and that in fact non-competes are a means of extracting value from workers without having to compensate them for it.[15]

V. CONCLUSION

There is reasonable consensus that conventional labor market power can exist when there are only one or a few employers that hire a particular type of worker, and that antitrust is applicable to those situations. Some hold the view that the existence of such market power is a necessary condition for antitrust to apply to labor markets, meaning that when there are many employers who hire a particular type of worker, any problems that may arise from the conduct of an individual firm cannot be antitrust problems.

The purpose of this article is to argue against this view. Even with an *ex ante* competitive labor market, once a job match is formed, dissolving it is costly to one or both parties, meaning that there is often substantial economic surplus associated with continuing it. The division of this surplus will be determined via bilateral bargaining between the two parties, and not within the context of the competitive labor market.

Firms often have major advantages over workers in capturing that surplus. They often have more relative bargaining leverage, as workers may "need" the match more than they do. More importantly, firms almost certainly have much more bargaining power. Given the massive

[illegible]

[illegible]

[illegible]

[illegible]

asymmetry of resources, sophistication, and agenda-setting power between an individual worker and a large firm, it strains credulity that the firm would not have a massive advantage allowing it to out-compete the worker in any contest to capture it. This gives the firm power over the worker, in the ordinary English meaning of the word, in the formal meaning of the word in the context of the Nash Bargaining model, **and in the antitrust sense**: certain labor market practices represent an attempt to become a monopolist with respect to the worker over that match-specific surplus.

The case for treating non-compete agreements as an antitrust problem is even stronger. Firms imposing non-competes on workers is not only a means of capturing an existing quantity of surplus, it is a way of increasing that surplus by denying the worker the ability to fully access the competitive labor market (degrading the worker's outside option), and then using its power to capture that additional surplus as well.

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Labor Noncompete Agreements: Tool for Economic Efficiency or Means to Extract Value from Workers?

David J. Balan*

Abstract

A number of theoretical arguments have been offered in favor of noncompete provisions in labor agreements. While there has been considerable empirical research on the effects of those provisions, there has been little direct evaluation of the arguments themselves. In this article, I lay out and evaluate three commonly heard arguments, namely, (1) the voluntary nature of labor agreements justifies a strong inference that the terms of those agreements, including noncompete provisions, are beneficial for both workers and firms and that they are economically efficient, 2(*A*) noncompetes facilitate efficient knowledge transfer from firms to workers, and 2(*B*) noncompetes encourage efficient firm-sponsored investment in worker training. These arguments, though not entirely without merit, mostly do not survive close scrutiny, and in fact such scrutiny reveals strong arguments that point in the opposite direction. In addition, noncompetes may cause important additional harms that are not measured in conventional economic research.

Keywords

noncompetes, labor noncompetes, postemployment restrictive covenants, PERCs

I. Introduction

Noncompete provisions in labor agreements have become widespread in the United States.[1] In recent years, empirical researchers have studied the effects of noncompetes on worker mobility, hiring, entrepreneurship, investment, innovation, wages, and other economic outcomes. This research agenda is quite new, and determining the true, causative effect of noncompetes on those outcomes is

1. *See* Evan P. Starr et al., *Noncompete Agreements in the US Labor Force*, 64 J.L. & ECON. 53–84 (2021); ALEXANDER J. S. COLVIN & HEIDI SHIERHOLZ, NONCOMPETE AGREEMENTS (Econ. Policy Inst. 2019).

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challenging. But recognizing these limitations, the evidence as it exists today, while somewhat mixed, generally shows noncompetes to be economically harmful and not beneficial.

This empirical evidence must be interpreted in light of the strength of the theoretical arguments for or against noncompetes. If there were strong theoretical arguments in their favor, the empirical evidence accumulated to date may not be sufficient to convincingly demonstrate that noncompetes are harmful on balance. But if the theoretical arguments in favor of noncompetes are weak, or if there are strong theoretical arguments against them, then the theory and the empirical evidence would both point in the same direction, strongly indicating that noncompetes are likely to be harmful and even more strongly indicating that they are unlikely to be highly beneficial.[2]

The purpose of this article is to provide a critical evaluation of those theoretical arguments. There are three major arguments that are commonly offered in favor of noncompetes, namely, (1) the voluntary nature of labor agreements justifies a strong inference that the terms of those agreements, including noncompete provisions, are mutually beneficial to workers and firms and that they are economically efficient in the sense of increasing total economic surplus, 2(A) noncompetes facilitate efficient knowledge transfer from firms to workers, and 2(B) noncompetes encourage efficient firm-sponsored investment in worker training.

There is a substantial body of literature that makes or develops these theoretical arguments.[3] The structure of this article is to enumerate, explain, and respond to these arguments one by one.[4]

To summarize my conclusions, these arguments sound plausible and have some limited merit, but all three largely fail upon close scrutiny, and in fact such scrutiny reveals strong arguments to the contrary. This theoretical conclusion, combined with the empirical evidence (discussed below) that mostly finds noncompetes to be harmful, together constitute strong reason to believe that noncompetes are in fact harmful, and even stronger reason to believe that they are not highly beneficial such that restricting or banning them would risk major economic damage.[5]

Moreover, noncompetes may cause harms that are not generally within the purview of economics and that are not normally studied in economic research. A worker who is bound by a noncompete has a large barrier to leaving a firm (on top of other barriers that likely exist), rendering them less able to avoid or resist mistreatment at their firm, including true exploitation or abuse by a predatory employer

2. In Bayesian terms, if the theoretical arguments in favor of noncompetes are strong, then the priors would be strong that noncompetes are highly beneficial, and it would take a large amount of contrary evidence to overturn those priors. But if those arguments are weak, and/or if there are strong arguments that noncompetes are harmful, then the priors would be that noncompetes are harmful (or at least not highly beneficial), and it would take a large amount of contrary evidence to overturn *those* priors.
3. Perhaps the clearest exposition of Argument #1 is at David D. Friedman, *Non-Competition Agreements: Some Alternative Explanations*, daviddfriedman.com, April 2, 1991, http://www.daviddfriedman.com/Academic/non-comp/Non-Competition.html. *See also* Maureen B. Callahan, *Post-Employment Restraint Agreements: A Reassessment*, 52 U. CHI. L. REV. 703–28 (1985). Articles that advance Argument #2(*A*) include Jonathan M. Barnett & Ted Sichelman, *The Case for Noncompetes*, 87 U. CHI. L. REV. 953–1049 (2020); and Brandon S. Long, *Protecting Employer Investment in Training: Noncompetes vs. Repayment Agreements*, 54 DUKE L.J. 1295–320 (2005). Articles that advance Argument #2(*B*) include Paul H. Rubin & Peter Shedd, *Human Capital and Covenants Not to Compete*, 10 J. LEGAL STUD. 93–110 (1981); and Long, *supra* note 3.
4. Points similar to some of those made in this article can be found in Eric A. Posner, *The Antitrust Challenge to Covenants Not to Compete in Employment Contracts*, 83 ANTITRUST L.J. 165–200 (2020) and in the survey articles referenced in note 6. *See also* NON-COMPETE CONTRACTS: ECONOMIC EFFECTS AND POLICY IMPLICATIONS (U.S. DEPT OF THE TREASURY, OFFICE OF ECON. POLICY 2016); NON-COMPETE AGREEMENTS: ANALYSIS OF THE USAGE, POTENTIAL ISSUES, AND STATE RESPONSES (The White House 2016).
5. Returning to the Bayesian framing from note 2, the conclusion of this article is that the correct priors are that noncompetes are likely to be harmful and are very unlikely to be highly beneficial. Given these priors, the existing empirical evidence provides little grounds for updating. In other words, there is a consonance rather than a tension between the empirical evidence and the theory.

or manager. In addition, a person bound by a noncompete is simply less free, and the personal freedom to use one's body and one's labor as one wishes is a value in itself. Policy makers should have a high threshold for interfering with this fundamental freedom.

II. Summary of the Empirical Literature

There is now a substantial empirical research literature on noncompetes, dealing with their effects on several important outcomes, including worker mobility, hiring, and entrepreneurship; investment and innovation; and wages. A brief summary follows.[6]

A. Worker Mobility, Hiring, and Entrepreneurship

The evidence shows that workers bound by noncompetes stay in their jobs longer (are less mobile). In one study, being bound by a noncompete is associated with an 11% increase in job tenure. According to another study, the 2015 Hawaii ban on noncompetes for tech workers increased employee mobility in the sector by 11%. Similar results are found for executives, patent holders, and the universe of individuals with LinkedIn records. An analysis of Oregon's 2008 ban on noncompetes for hourly workers finds similar results.

Four studies find evidence consistent with the notion that firms have trouble hiring workers in higher enforceability regimes, with young firms hit particularly hard. Two studies suggest that individuals bound by noncompetes are redirected to other industries, including 11% of those who have ever signed one. Other studies find that tech workers and patent holders are more likely to leave states that enforce noncompetes.

Seven recent studies examined the relationship between noncompete enforceability and entrepreneurship, finding generally that the enforceability of noncompetes dampens new firm creation. One study found that greater enforceability reduced new firm entry by 18%.

B. Investment and Innovation

The evidence regarding investment and innovation is mixed. The enforceability of noncompetes is associated with more firm-sponsored training of workers, increases in net capital investment rates, the exploration of new fields, and the creation of riskier patents. However, the mobility-inhibiting effects of noncompete enforceability also dampen knowledge flows and make venture capital less effective in spurring the creation of new patents and employment.

C. Wages

A number of studies attempt to estimate the effect of noncompetes on wages by exploiting variation in state policies on the enforceability of noncompetes. Most of these studies use some version of a "difference-in-differences" study design, in which the change in wages (for some category of workers) in a state that changed its enforceability policy is compared to the change in wages in "control" states that did not. These studies consistently show that the enforceability of noncompetes is associated with

6. This summary draws heavily, with permission, from EVAN STARR, THE USE, ABUSE, AND ENFORCEABILITY OF NON-COMPETE AND NO-POACH AGREEMENTS: A BRIEF REVIEW OF THE THEORY, EVIDENCE, AND RECENT REFORM EFFORTS (Econ. Innovation Grp. Issue Brief 2019); and from Evan Starr, *Are Noncompetes Holding Down Wages?*, *in* INEQUALITY AND THE LABOR MARKET: THE CASE FOR GREATER COMPETITION 127–49, Sharon Block and Benjamin H. Harris, editors, (Brookings Institution Press, 2021). It also relies on John M. McAdams, *Non-Compete Agreements: A Review of the Literature* (2019) (unpublished manuscript). To save space, many citations are suppressed. They can be found in those articles.

lower wages.[7] Perhaps the most notable of these studies is Starr and Lipsitz (2020),[8] which finds that banning noncompetes for hourly workers increased hourly wages by 2%–3% on average. Since only a subset of workers sign noncompetes, scaling this estimate by the prevalence of noncompete use in the hourly paid population suggests that the effect on employees actually bound by noncompetes may be as great as 14%–21%, though the true effect on bound workers is likely lower than that due to labor market spillovers which may cause part of the wage reduction to be borne by unbound workers.

The above studies attempt to measure the effects of noncompetes indirectly by comparing wages across states with different enforceability policies. Three other studies attempt to measure these effects more directly by comparing wages of workers who are bound by noncompetes to those of workers who are not. One of these studies finds that workers with noncompetes have 9.7% higher wages than similar workers without, but only if they were informed of the noncompete before accepting the job; workers who were informed of the noncompete after they accepted had no such benefit.[9] The second of these studies finds that noncompetes increase wages for CEOs, and the third finds that they increase wages for primary care physicians.[10]

The former group of studies associates noncompetes with lower wages, and the latter group associates them with higher wages. There are several possible ways to reconcile this discrepancy. First and perhaps most likely, the study design of the latter group may not be suitable for measuring the *causative* effect of noncompetes on wages; the fact that workers bound by noncompetes have higher wages does not mean that the noncompetes caused the higher wages. In contrast, the difference-in-differences study design used in the former group (and commonly used across many areas of empirical economics) exists precisely because it is often a valid way to measure causative effects; if wage trends in states that changed their policy are different from trends in otherwise similar control states, a reasonable interpretation is that the policy change caused the change in trend. For this reason, the former group of studies may be more reliable.

A second possible reason for the discrepancy is that noncompetes may be beneficial for the workers who are bound by them, but harmful overall, because of external effects on workers who are not bound by them. A third possibility has to do with the type of workers being studied. As noted above, one of the studies in the latter group is about corporate CEOs, who represent a tiny slice of workers and for whom the notion that noncompetes are beneficial is much more plausible than it is for almost all other workers. Another study in that group is about primary care physicians. Importantly, that study does not disentangle the effect of noncompetes from the effect of nonsolicitation provisions (where the physician is free to leave but is not free to take their patients with them). Nonsolicitation provisions have a much stronger claim to being beneficial than do noncompetes, and it is possible that this benefit, rather than a benefit from the noncompete itself, is what is causing the higher wages found in that study.[11]

D. Summary

In sum, though somewhat mixed, the empirical literature is largely negative regarding the effects of noncompetes, and it certainly does not support the conclusion that they are highly beneficial. This is

7. There are a number of such studies, cited and discussed in Starr, *supra* note 6.
8. Michael Lipsitz & Evan Starr, *Low-Wage Workers and the Enforceability of Noncompete Agreements*, MGMT. SCI. (forthcoming, 2021).
9. *See* Starr et al, *supra* note 1.
10. Omesh Kini et al, *CEO Noncompete Agreements, Job Risk, and Compensation*, 34 REV. FINANC. STUD. (forthcoming, 2021); Kurt J. Lavetti et al, *The Impacts of Restricting Mobility of Skilled Service Workers: Evidence from Physicians*, 55 J. HUM. RESOUR. 1025–67 (2020), respectively.
11. *See* Nataraja Balasubramanian, et al, *Bundling Postemployment Restrictive Covenants: When, Why, and How It Matters* (2021) (unpublished manuscript) for a discussion of the fact that noncompetes are often bundled together with other postemployment restrictive covenants such as nonsolicitation agreements, and the resulting difficulty in empirically identifying the effect of any individual restriction in isolation.

expressed clearly by Evan Starr, a leading empirical researcher in the field who, in recent Congressional testimony, summarized the empirical research as follows: "Taken together, these results are hard to square with theories that suggest workers should benefit from non-competes."[12]

III. Three Commonly Offered Arguments in Favor of Noncompetes

I now turn to the three major arguments that are commonly offered in favor of noncompetes.

A. Argument #1: If Both Parties Agreed to the Noncompete, It Must Be Efficient

Argument #1 begins with the simple and intuitive premise that people can generally be assumed to act in their own best interest, so if both a worker and a firm voluntarily agree to a noncompete then doing so must make them both better off, otherwise at least one would not have agreed. And if the noncompete makes both parties better off, then it follows that banning or restricting noncompetes would make them both worse off. By this argument, the mere existence of noncompetes is strong evidence that they are mutually beneficial.

Spelled out in more detail, the argument goes as follows. Suppose that a worker and a firm negotiate over employment terms before the job match is formed. In that negotiation, each side exploits their bargaining position as best they can,[13] so the terms that arise from that negotiation will be the very best ones that the worker can get and also the very best ones that the firm can get. Now suppose that the firm wishes to add a noncompete provision to the previously negotiated terms. All else equal, this restriction on the worker's outside opportunities makes the worker worse off: The reduced ability to leave is harmful in itself, and the reduced ability to threaten to leave weakens the worker's bargaining position relative to the firm with respect to any employment terms that could become the subject of disagreement (i.e., all terms except those that were fixed and not subject to any revision, neither legally nor practically, *ex ante* before the job match was formed). For the same reasons and others, the noncompete makes the firm better off.[14]

Knowing that the noncompete harms the worker and makes the firm better off, what should we expect to happen? It might appear that the firm, if it has a sufficiently strong bargaining position, could simply compel the worker to accept the noncompete. But Argument #1 says that this is incorrect,

12. Antitrust and Economic Opportunity: Competition in Labor Markets: Hearings before the Subcomm. on Antitrust, Commercial, and Administrative Law, of the House Judiciary Comm., 117 Cong. (October 29, 2019) (Statement of Evan Starr).

13. The economic theory of bargaining distinguishes between bargaining "leverage" (the less one side "needs" a deal, relative to the needs of the other side, the better the terms it will receive) and bargaining "power" (the deal creates some surplus to be divided between the two sides, and the more effective one side is at capturing that surplus, relative to effectiveness of the other side, the better the terms it will receive). Here, I informally use the term bargaining "position" to capture both of these; the more favorable the combination of leverage and power that a side has, the better the terms it will receive in the negotiation. For a discussion of the distinction between bargaining leverage and bargaining power and its relevance for evaluating noncompetes, *see* David J. Balan, *Labor Practices Can Be an Antitrust Problem Even When Labor Markets Are Competitive*, CPI ANTITRUST CHRON. (2020).

14. Once the match is formed, it is costly to dissolve, for both the worker and the firm. These costs can be substantial. Another way of saying that dissolving the match is costly is to say that *preserving* the match generates surplus arising from avoiding those costs. This match-specific surplus must somehow be divided between the worker and the firm. If labor contracts were complete and also fully and costlessly enforceable, then the division of this surplus would be determined ex-ante, before the match was formed. But in reality, this surplus is largely divided via (informal) ex-post bargaining after the match has formed. A noncompete weakens the bargaining position of the worker in this ex-post negotiation, to the worker's detriment and the firm's advantage. *See* Balan, *supra* note 13 for a discussion of this issue and its implications for the question of whether noncompetes should be treated as an antitrust problem.

because all else is not equal. The reasoning is as follows. Recall that in the initial negotiation, each side got the very best terms that they could. But that must mean that each side *fully* exploited their bargaining position; to do otherwise would be to voluntarily leave money on the table. In other words, the negotiated terms reflect the result when each side has shot every arrow in their quiver, which means that neither side has any *remaining* arrows that can be used to extract *additional* concessions from the other, and which in turn means that the firm has no ability to compel the worker to accept a noncompete involuntarily.[15]

If the firm cannot compel the worker to accept a noncompete, then its only alternative is to *compensate* the worker (above and beyond the compensation agreed to in the initial agreement) by an amount sufficient to induce them to agree. The minimum compensation that the worker would accept is the amount by which they are harmed by the noncompete, and the maximum compensation that the firm would pay is the amount by which it makes the firm better off. If the former is greater than the latter, then mutually beneficial agreement to add a noncompete is not possible, and so the noncompete will not exist. If the latter is greater than the former, then an agreement under which the worker agrees to the noncompete, and the firm pays the worker compensation that lies somewhere between those two amounts, is mutually beneficial.[16] and for that reason, there is strong reason to believe that such an agreement will occur. By the same token, if a noncompete is observed, goes Argument #1, the correct inference is that *this compensation has occurred*. and both parties must be better off. Otherwise, the noncompete would simply not exist.[17]

A striking and perhaps counterintuitive feature of this argument is that it does not depend at all on the relative bargaining positions of the worker versus the firm. The idea is as follows. If the worker's relative bargaining position is strong, they will command favorable terms. If it is weak, they will command unfavorable terms. But even if it is weak, it remains true that the unfavorable terms are the result of both sides *fully exploiting* their bargaining position. Even if the worker starts with few arrows in their quiver and the firm starts with many, at the end of the negotiation both quivers are empty, and so the firm has no way to compel the worker to accept any *additional* unfavorable terms, including a noncompete. So once again, the only way for the firm to induce the worker to accept a noncompete is in exchange for sufficient compensation, which will only occur if the firm values having the noncompete by more than the worker values avoiding it.

15. *See* Friedman, *supra* note 3, and Callahan, *supra* note 3.
16. The exact amount of the compensation will depend on the relative bargaining position as discussed in note 13, *supra*. But the argument does not depend on these specifics.
17. In the highly stylized scenario in the main text, I assume that the worker and the firm first decide that they are going to form a match and negotiate the terms that would pertain without a noncompete, and then negotiate over how those terms would change if a noncompete was added. But this is merely for clarity, it is not necessary for the logic of the argument. That logic would work essentially the same way if the worker and the firm negotiated the terms that would pertain *with* a noncompete, and then negotiated over how those terms would change if the noncompete was *removed*. If the noncompete makes the firm better off by more than it harms the worker, then it is mutually beneficial and so it will remain in place. But if the reverse is true, then the worker and the firm would negotiate its removal in exchange for other terms of the agreement (likely the wage) being adjusted in favor of the firm (i.e., the worker will compensate the firm for the removal of the noncompete). In this scenario, as in the one in the main text, one should infer from the existence of the noncompete that it is mutually beneficial. The above logic also works essentially the same way in other scenarios, including (i) where the alternative to a noncompete is working for a different firm, rather than working for the original firm but without a noncompete or (ii) where employment terms are unilaterally set by the firm rather than being negotiated (this scenario is discussed further below). Finally, this logic is not specific to noncompetes: It applies to any negative attribute of a job, such as noisy or dangerous working conditions. Such conditions will only exist if they harm the worker by less than they make the firm better off, otherwise both parties would prefer an alternative that eliminates the negative attribute and also pays a lower wage. In sum, Argument #1 says that job attributes that are not mutually beneficial will not exist, and job attributes that do exist must be mutually beneficial.

The final step in Argument #1 is the claim that mutually beneficial noncompetes are also economically efficient, both in the sense of Pareto Efficient (there is no way to make one party better off without making the other worse off), and in the sense of increasing total economic surplus (sometimes known as Kaldor-Hicks Efficiency). But it is important to note that even if noncompetes are mutually beneficial, they may not be economically efficient if they negatively affect third parties who did not agree.[18] There are good reasons to believe that noncompetes do harm third parties,[19] and this constitutes an independent reason to believe that they are harmful on net.[20] Since this is not the main subject of the present article, in what follows the effect of noncompetes on third parties is assumed away except in the discussion about Argument #2(*A*) below. That is, in what follows the question of the economic efficiency of a noncompete (in the sense of increasing total economic surplus) reduces to whether or not the noncompete makes the firm better off by more than it harms the worker.

Responses to Argument #1. The logic behind Argument #1 is sound: Given the premises, the argument is correct. The problem is that the premises are faulty. To see why, begin by supposing that, contrary to Argument #1, the firm *does* have some way, unspecified for now (but discussed below), to impose a noncompete on the worker (i.e., to induce the worker to accept it *without* compensation).[21] If the firm could do that, it would be in its interest to do so; as noted above, the firm is made better off by restricting the worker's outside opportunities. And of course this is harmful to the worker. So a firm that has the ability to impose a noncompete on a worker without compensation has a means by which to *extract value* from that worker.

If in fact a noncompete can be used as a means of extracting value from the worker (i.e., making the firm better off *at the worker's expense*), then it is clear that its mere existence no longer guarantees that it must mutually beneficial. If the firm's ability to use a noncompete to extract value from the worker is sufficiently high, then the worker will be made worse off than if the noncompete never existed.

Even if the noncompete makes the worker worse off, that does not necessarily mean that it is inefficient in the sense of reducing total economic surplus.[22] It is still possible that the noncompete makes the firm better off by more than it harms the worker, but the firm's ability to use the noncompete to extract value from the worker enables it to capture more than 100% of that efficiency. But it is also possible that the noncompete is inefficient: It may hurt the worker by more than it makes the firm better off, but it exists nevertheless because of its usefulness to the firm as a means of extracting value. (It is also possible that the noncompete is both efficient and mutually beneficial, but with the worker receiving less than they would have received if the noncompete could not also be used as a means of extracting value.)

For this reason, Argument #1 depends crucially on the premise that imposing a noncompete on a worker without compensation is impossible or nearly so. That is, the argument requires that the

18. This is closely related to the economics of exclusive dealing contracts, where exclusives that are beneficial to all of the parties that agreed to them can be harmful to parties that did not agree, and can therefore be economically inefficient. *See* MICHAEL D. WHINSTON, LECTURES ON ANTITRUST ECONOMICS, Chapter 4 (2006).

19. *See* Liyan Shi, *The Macro Impact of Non-Compete Contracts* (2020) (unpublished manuscript). That paper, using a methodology that is very different from those described above, concludes that "the optimal restriction on noncompete duration is close to a ban."

20. Possible harmed third parties include owners, workers, and customers of firms that would have been started or made more productive by the unimpeded flow of workers. This possibility is sometimes acknowledged even by supporters of noncompetes, though it is often skipped over lightly.

21. The discussion in the main text assumes that the firm can impose a noncompete on the worker without any compensation at all. The same points would apply, in an attenuated form, if the firm needed to pay some compensation, but less than the amount that would have been agreed to in a free negotiation without imposed terms.

22. As discussed above, here I assume away the effect of the noncompete on third parties. But in fact it is likely that those effects are negative, which makes it more likely that the noncompete is not efficient.

worker's formal agreement to the noncompete can never be obtained unless it truly makes the worker better off. This premise is rather obviously incorrect. The remainder of this section describes five ways in which firms can obtain formal agreement to a noncompete even when it is harmful to the worker. They are:

- The firm can mislead the worker about the very existence of the noncompete. If the noncompete is buried in the fine print of a complicated employment contract, the worker may "agree" to it without ever knowing that it was there. Similarly, the worker could see the noncompete language but not understand what it means, either in the literal sense of not having a factually accurate understanding of what they are agreeing to or in the psychological sense of not regarding as salient an abstract restraint that might be relevant only in the distant future.[23]
- In some cases, the worker is not told that the noncompete is part of the employment contract until they have already started the job. But by that time, it is more difficult to refuse. The worker is likely eager to start the new job and would not want to quit. In addition, the worker may have already turned down other job offers, so that quitting would mean starting a new job search with the attendant costs, delays, distress, and lost income. Therefore, the worker might agree to a noncompete ex post that they would not have agreed to ex ante on the day that they accepted the job.[24]
- If there is any ambiguity in the terms of the noncompete, the firm can exploit that ambiguity, along with its large advantage in the ability to bear the costs, financial and otherwise, of fighting in court, to bind the worker to an interpretation of the noncompete that is more restrictive than what the worker agreed to and was (possibly) compensated for.[25]
- Suppose the worker agrees to a noncompete in exchange for compensation in the form of a promise of better employment terms (such as a higher wage) in the future. Now suppose that the firm does not deliver on that promise. What recourse does the worker have? One natural recourse is to quit. *but that is the very thing that the noncompete deters the worker from doing.*[26] That is, the firm may be able to renege on delivering the compensation promised to the worker in exchange for agreeing to the noncompete precisely because the noncompete itself decreases the cost of doing so. This is a key point: The compensation is what makes the noncompete mutually beneficial, but then the noncompete can cause the worker not to receive the compensation.[27]
- The discussion of Argument #1 above was about *negotiating* over the inclusion of a noncompete provision in a labor agreement. But in many cases, no such negotiation is possible; the noncompete is unilateral firm policy, required of all workers. It might appear that if firms can

23. Note that even if the noncompete is not understood by or salient to the worker, that is not true for the *firm*. The firm fully understands what it has to gain from the noncompete. This asymmetry in sophistication between the worker and the firm is one reason why both sides might "agree" to a noncompete that is not mutually beneficial.
24. The possibility that a firm might exploit the reluctance of the worker to quit once they have accepted the job is not limited to noncompetes. The firm might do this with any employment term, including wages. However, the comprehension/salience point described above is relevant here as well. A worker who is told on Day 1 that they will not receive the promised wage may be more likely to quit than a worker who is told of the existence of a noncompete, and even if they do not quit they are more likely to be a disgruntled employee. So the asymmetry in sophistication between the worker and the firm gives the firm the incentive to extract value from workers ex-post by modifying opaque terms instead of salient ones.
25. Perhaps a rational worker would anticipate this possibility and so would require compensation for the stronger noncompete that the firm might try to impose ex-post, rather than the weaker one that was agreed to ex-ante. But this requires a level of foresight and "meta rationality" that is unrealistic even for relatively sophisticated workers.
26. There are other factors that give firms an incentive to deliver on their promises, including formal contracts and reputation effects. But the ability of the worker to quit is a very important one.
27. Perhaps a rational worker would anticipate this possibility and refuse to sign the noncompete in the first place. But as in note 25, this requires a level of foresight and "meta rationality" that is unrealistic even for relatively sophisticated workers.

literally impose noncompetes on workers, then there need be no compensation and noncompetes can be used as a means to extract value from workers.

However, a proponent of Argument #1 would say, correctly, that this does not follow from standard economic theory. Many standard economic models include firms that post nonnegotiable terms (e.g., the price of cereal at the supermarket). This does not mean that firms can impose whatever terms they want. Firms are still constrained by competition, which requires them to offer terms favorable enough to make workers want to work for the firm. Moreover, competition tends to work to eliminate provisions that are inefficient (i.e., that harm workers by more than they make the firm better off), for reasons similar to those discussed in note 17 above; if the provision is inefficient then there would exist a mutually beneficial agreement to eliminate it in exchange for a change in some other provision of the employment agreement. And if most firms persisted in requiring an inefficient noncompete, one or a few firms could outcompete those firms by not requiring it, either displacing them or forcing them to follow suit.

The argument in the preceding paragraph is correct as far as it goes. But if the assumptions are made a bit more realistic, it becomes clear that requiring noncompetes as a nonnegotiable provision of the job can be an effective means of imposing them on workers without compensation. Specifically, if nonnegotiable (and uncompensated) noncompetes are widespread in an industry it is unlikely that competition will dislodge them.[28] The reason is as follows. In order for competition to dislodge harmful noncompetes, firms that do not require a noncompete, and that hope to attract workers on that basis, would have to make that fact a large and salient part of their worker recruitment message, otherwise prospective workers will not even know about it. But firms can capture only a limited amount of the attention of prospective workers, and it is likely that other recruiting messages would be a better use of that limited attention, particularly if the noncompete is not highly salient for workers. In addition, if one or a few firms did recruit based on a "no noncompetes" message, the workers that they would attract would not be a random sample of workers. Rather, they would be the workers who care the most about avoiding noncompetes, and those workers may be undesirable in other ways, such as being more likely to quit.[29] In sum, once harmful noncompetes have become widespread in an industry, they are likely to persist because the competitive pressure to eliminate them, while present, may not be sufficiently strong.

In the above arguments, no distinction was made between low- and high-wage workers. It is sometimes suggested that noncompetes are a problem for the former but not for the latter, who are more sophisticated and for whom the efficiency justifications (discussed below) are more likely to apply. There may be some truth to this; to cite a recent well-known case, requiring sandwich makers at Jimmy Johns to sign a broad noncompete provision likely exploits some disadvantages that are specific to low-wage workers, and it certainly lacks any plausible efficiency justification.[30] However, the reasons to doubt Argument #1 are not confined to low-wage workers. All five of the above points apply at least to some extent to higher wage workers, particularly the last two.

28. This point is different from the others in that it depends on the assumption that noncompetes are already widespread in the industry (though a weaker version of the point applies even if they are not widespread). The other points do not depend on this assumption.

29. For a similar mechanism in a different context, *see* David J. Balan & Dan Hanner, *Job Insecurity Isn't Always Efficient* (2014) (unpublished manuscript).

30. Illinois Attorney General, *Madigan Announces Settlement with Jimmy John's for Imposing Unlawful Non-Compete Agreements*, December 7, 2016, https://illinoisattorneygeneral.gov/pressroom/2016_12/20161207.html. *See also* Illinois Attorney General, *Attorney General Madigan Reaches Settlement with National Payday Lender for Imposing Unlawful Non-Compete Agreements*, January 7, 2019, https://illinoisattorneygeneral.gov/pressroom/2019_01/20190107b.html.

B. Argument #2: Noncompetes Facilitate Beneficial Economic Activity

By the logic of Argument #1, in order for a noncompete to be economically efficient, it must have some positive benefit. If it did not, then it could not make the firm better off by more than it harms the worker. And if it is not efficient, then it cannot be mutually beneficial, and if it was not mutually beneficial then it would not be observed. But since noncompetes are observed, goes Argument #1, these positive benefits *must* exist, and they must be sufficiently large to render the noncompete efficient, otherwise one party or the other would not have agreed to it.[31]

The conviction that positive benefits must exist, and must be sufficiently large to render the noncompete efficient, does not guarantee that any particular claimed source of such benefits must be valid. However, that conviction does influence the evaluation of individual claims of positive benefits from noncompetes: If it is certain that substantial benefits must exist, and if there are a relatively small number of candidate sources of those benefits, then the evaluation of one or more individual proposed sources *must* begin with the premise that the benefit is likely to be real and substantial. That is, believing Argument #1 necessarily requires being less skeptical about claimed sources of benefits than one would be absent that belief.

But as discussed above, Argument #1 is not correct: Noncompetes can be imposed on workers by firms without compensation as a means of extracting value from them. And in that case, noncompetes can exist even if they have little or no positive benefits (and as discussed below, those "benefits" can even be negative). This does not mean that substantial positive effects do not exist; it is possible that noncompetes can be *both* a means of extracting value from workers *and* a source of meaningful positive benefits, either simultaneously for a single worker or differentially across different workers.[32] So an inquiry into claimed positive benefits is still worthwhile, but there is no a priori supposition that the claims must be valid; if the claims are found to be weak or inconsistent with evidence then the correct conclusion is that those benefits simply do not exist (or are small or even negative), and not (as Argument #1 would have it) that large benefits *must* exist and the only question is what exactly they are.

Below, I discuss the two most commonly argued claims of positive benefits from noncompetes, namely, (A) that they facilitate efficient knowledge transfer from firms to workers and (B) that they encourage efficient firm-sponsored investment in worker training. While these justifications are not completely without merit, I argue that they are both weak, and that scrutiny of them in fact reveals strong arguments in the opposite direction. These arguments, combined with the empirical evidence discussed above, support the conclusion that noncompetes are likely to be harmful on balance (being harmful to workers and likely also harmful to efficiency), and that they are very unlikely to have effects so positive that heavily restricting or banning them would risk major economic harm.

1. Argument #2(A): Noncompetes Facilitate Efficient Knowledge Transfer

Suppose a firm has some knowledge (e.g., a trade secret or a manufacturing process or a customer list) that, if shared with a worker, would make that worker more productive and more valuable to the firm. In that case, sharing the knowledge will be economically efficient. But if that knowledge is also valuable to competitors, then competitors will be willing to offer a worker in possession of that

31. Even strong supporters of noncompetes probably do not believe in a strictly literal version of Argument #1. But even in a nonliteral version of the argument, the mere existence of noncompetes, and their voluntary nature, are taken to be strong evidence that they are likely to be mutually beneficial and economically efficient. This in turn means that important positive effects are very likely to exist (in Bayesian terms, there are strong priors), whether there is clear evidence for them or not.

32. It should be noted, however, that the fact that firms impose noncompetes on low-skill workers such as sandwich makers when there are quite clearly no positive effects from doing so is grounds for additional skepticism regarding other claims of positive effects that are more facially plausible.

knowledge a wage that reflects its value. This means that the original firm will either lose the worker (and have the knowledge fall into the hands of the competitor) or it will have to match the higher wage. This may make the firm worse off than if it had never shared the knowledge in the first place. If so, the firm might design the job so that the knowledge sharing will not occur, even though sharing is efficient. The inability to protect the knowledge might even cause the firm not to develop it in the first place, or in the extreme case, it might cause the firm to eliminate the job altogether. But with a noncompete agreement in place to protect the knowledge, the firm would have the appropriate incentive to develop and share it.[33]

Responses to Argument #2(A). This argument has some plausibility. It is not difficult to imagine situations where a firm has knowledge that workers must also have in order to be fully productive, that competitors would pay a lot for, and that firms cannot otherwise protect. However, there are a number of factors that limit the strength of this argument:

- In order for the argument to hold, it must be true that the firm really will forbear from sharing the knowledge if it cannot use a noncompete. That is, there must be a more efficient way to run the business (with sharing), and another, less efficient way to run it (without sharing), and the more efficient way must be more profitable than the less efficient way if and only if the worker is bound by a noncompete.[34] If this is not true, then the sharing will occur with or without a noncompete, and so banning noncompetes, while harmful to the firm's profits, will not hurt economic efficiency (as long as it does not cause the firm to go out of business).
- Argument #2(*A*) is correct in that the possibility that knowledge might escape the firm is harmful to efficiency, because it can cause the firm not to share the knowledge within the firm, or even not to develop it in the first place. But it ignores the fact that when knowledge *does* escape a firm, and flows to other firms, that is often a *good* thing, because the receiving firms can do valuable things with the knowledge as well, including using it as an input in the creation of additional knowledge. So there is a tradeoff. Noncompetes provide an incentive to efficiently develop and share knowledge within the firm, but the absence of noncompetes causes more sharing of knowledge across firms.[35]

This tradeoff is very similar to the one that lies at the heart of the debate regarding whether intellectual property (IP) protections should be stronger or weaker: Stronger IP means stronger incentives to innovate, and weaker IP means more sharing and cross-pollination of knowledge, which among other advantages reduces the cost of subsequent innovation. It is worth noting that there is a widely held view among economists and IP experts (though not a consensus) that IP protection in the United States is too strong, not too weak.[36] That is, it probably should be *easier* to spread ideas than it currently is, even at the cost of some reduction in the ability to capture the returns to the innovation. And if this is true of IP, it may be true of noncompetes as well; if noncompetes were weaker or did not exist, the gains from spreading knowledge across firms may exceed the harm from less development and sharing of information within the firm.

The experience of California (CA) is a key piece of evidence on this point. In CA, noncompetes are legally unenforceable. And yet CA is a worldwide center of innovation. While it is possible that CA is

33. *See* Barnett & Sichelman, *supra* note 3; Long, *supra* note 3.

34. In the main text, I assume that there are two discrete ways of organizing the job. In reality, there may be a continuum of ways, but the basic point still applies.

35. This is an example of a situation where a noncompete can harm third parties that did not agree to it, even if it is mutually beneficial to the worker and the firm. *See* Shi, *supra* note 19.

36. *See* Bronwyn H. Hall & Dietmar Harhoff, *Recent Research on the Economics of Patents*, 4 ANN. REV. ECON. 541–65 (2012); and Bronwyn H. Hall, *Patents, Innovation, and Development*, INT'L L REV. APPLIED ECON. (forthcoming, 2021).

innovative despite the restrictions on noncompetes and not because of them, at a minimum the experience of CA shows that such a policy is not severely damaging to innovation. It is also possible that the restrictions on noncompetes might be one of the *causes* of CA's success. It may cause beneficial knowledge sharing across firms similar to what might be achieved through weaker IP, and this advantage may outweigh the disadvantage of reduced incentive to develop and share knowledge within the firm.[37,38]

- While a noncompete may increase the *firm's* incentive to create new knowledge, it decreases the *worker's* incentive to do so. A worker who develops new knowledge absent a noncompete gains by being more attractive to outside firms, which allows them to either switch jobs or to bargain with their current firm from a stronger position.[39] The existence of a noncompete reduces this gain and so reduces the incentive to create knowledge.[40]
- Aside from their effects on the creation and dissemination of information within and across firms, noncompetes impede the efficient flow of *people* across firms. Not every worker/firm match is the right one. Sometimes, it was a mistake from the beginning, and other times, it was the right one once but is no longer. The normal way to improve upon a suboptimal match is for the worker to switch jobs. Noncompetes impede this switching, as it is more difficult for the worker to quit because they are barred by the noncompete from the best available alternative jobs.[41] So workers are either stuck in suboptimal matches or they are forced to take a (likely inferior) job that is not prohibited by the noncompete or even to leave the workforce entirely. Noncompetes interfering with better matches between workers and firms may be a significant source of inefficiency.[42]

Given the above points, the claim that noncompetes can lead to an increase in efficient information sharing is not entirely without merit. But close scrutiny reveals the argument to be weak and also suggests some strong arguments to the contrary.

2. *Argument #2(B)*: Noncompetes *Facilitate Efficient Investment in Worker Training*

Firms sometimes engage in costly investment in worker training and skills. But they may be less likely to do so if those workers can use that training to attract better outside job offers. If training the worker means either losing that worker or having to pay a higher wage to retain that worker, the firm may not

37. For versions of this argument, *see* Orly Lobel, *Noncompetes, Human Capital Policy & Regional Competition*, 45 J. CORP. L. 931–51 (2020); and *Exit, Voice & Innovation: How Human Capital Policy Impacts Equality (& How Inequality Hurts Growth)*, 57 HOUS. L. REV. 781 (2020).
38. It is important to note, however, that many labor contracts in California contain noncompete provisions, even though they are unenforceable according to state law. It is therefore possible that some workers *believe* that they are constrained by a noncompete when in fact they are not, and this perceived constraint may have an effect similar to that of an actual constraint due to an *in terrorem* effect. For this reason, the policy regime in California is not (as a practical matter) a complete ban on noncompetes, which complicates the interpretation of California's innovation success. *See* Evan Starr, et al, *The Behavioral Effects of (Unenforceable) Contracts*, 36 J. L. ECON. & ORG. 633–87 (2020). *See also* Evan Starr & J. J. Prescott, *Subjective Beliefs about Contract Enforceability* (2021) (unpublished manuscript) for evidence that workers are often poorly informed about the enforceability of noncompete provisions in their labor agreements.
39. The reference here is not to knowledge that would be owned by the firm if it were created, such as a patent. Rather it is to knowledge that the worker can create, the creation of which would be economically efficient, but will only actually be created if the worker can use it to become more valuable to outside firms.
40. *See* Mark J. Garmaise, *Ties that Truly Bind: Non-competition Agreements, Executive Compensation and Firm Investment*, 27 J. LAW, ECON. & ORG. 376–25 (2011).
41. If the match is sufficiently bad, the firm may fire the worker. But there are many bad matches that persist.
42. If the worker is more efficient with another firm, it is possible that there could be a mutually beneficial exchange in which the worker pays the firm to release them from the noncompete. But there are many practical barriers to this happening, and so it is rare.

provide the training in the first place, even if doing so is economically efficient. But if there was a noncompete agreement in place, then the firm would have the appropriate incentives to provide the training.[43]

Responses to Argument #2(B).

- A similar point to one made above about Argument #2(*A*) applies here as well. The argument does not work if the training is inherent in the job. For example, if hospital nurses gain skills that make them more attractive to outside employers, and if those skills arise simply from the experience of being a hospital nurse, then the firm has no choice but to provide that "training," and will do so with or without a noncompete. And even if the training is formal training and not on-the-job training, it may be so necessary for the job that the firm would be willing to provide it at its own expense even if doing so will make the worker more attractive to outside employers. In order for a noncompete to lead to more training, there must be a version of the job where training is provided, another version where it is not provided, and the firm must prefer the version where it is provided if and only if the worker is bound by a noncompete.
- Labor economists distinguish between industry-specific human capital (HC) and firm-specific HC. (There is also a concept of "general" HC that is useful across industries, but for our purposes this can be folded into the concept of industry-specific HC.) Firm-specific HC is defined as HC that makes the worker more valuable at the current firm but not at other firms. Clearly, noncompetes do not cause firms to increase training that imparts firm-specific HC, because by definition firm-specific HC is not useful to any competitor; providing it to the worker does not raise the worker's outside wage, and so will not put the firm in a position where providing the HC means either losing the worker or matching a higher outside wage offer. To the contrary, firm-specific HC tends to bind workers more tightly to their firms, because it makes the existing match more valuable relative to alternative matches.

Industry-specific HC, in contrast, is valuable to other firms in the industry as well as to the original firm.[44] In the simplest labor economics models, training that imparts industry-specific HC is not paid for by the firm at all. Precisely because the HC increases the worker's value to outside firms, the benefit from that HC accrues to the worker and not to the firm, and so only the worker is willing to pay for it, either directly in the form of education or indirectly in the form of a lower wage for a period of time (or in the case of many internships, a zero wage) in exchange for on-the-job training. So even when the firm appears to be providing training for industry-specific HC at its own expense, that training is often actually indirectly financed by the worker.[45]

Given this, it might appear that firms would be willing to pay for training that imparts industry-specific HC if it could be protected by a noncompete, as then the firm would capture the benefit. But according to the simplest model of labor market competition, if the training imparts a benefit (increased industry-specific HC) that exceeds its cost, then it will occur regardless; with a noncompete, the firm will pay the cost and receive the benefit, and without a noncompete, the worker will do the same. That is, in the simplest model a noncompete removes a barrier to the firm paying

43. *See* Rubin & Shedd, *supra* note 3; Long, *supra* note 3.

44. The distinction between the types of human capital is not always so clear. For example, going to Hamburger University presumably increases the trainee's value as a manager at any fast food restaurant (industry-specific), but probably increases their value at McDonald's the most because the practices being taught are the exact ones used at McDonald's (firm-specific). Despite this, the basic point still applies.

45. *See* Gary S. Becker, *Investment in Human Capital: A Theoretical Analysis*, 70 J. POL. ECON. 9–49 (1962).

for industry-specific HC training, but it will not cause training to happen that would not have happened anyway.[46]

If we complicate slightly the model of labor market competition, there can be circumstances in which firms *do* impart industry-specific HC at their own expense and to the benefit of the worker. Minimum wage laws can limit the extent to which workers can be made to pay for their own HC in the form of lower wages. Credit constraints or behavioral factors may limit workers' willingness or ability to self-fund training by accepting a job with lower wages today in order to be able to command higher wages in the future. In these situations, it is possible that this training will be facilitated by noncompetes to the benefit of workers. And it is even possible that without the noncompetes, some jobs will be eliminated altogether.

In sum, given the above points, the claim that noncompetes lead to an increase in efficient worker training is not entirely without merit. But overall, close scrutiny reveals the argument to be weak, weaker than Argument #2(*A*), and also suggests strong arguments to the contrary.

IV. Noncompetes Versus Other Postemployment Restrictive Covenants (PERCs)

Noncompetes are only one of a number of PERCs that exist. Other PERCs include nondisclosure agreements, nonsolicitation agreements, and nonrecruitment agreements. A full evaluation of these other PERCs is beyond the scope of this article, and I offer no policy recommendations regarding them. But a few points are worth noting:

- Like noncompetes, other PERCs may be imposed on workers without compensation (or made unreasonably broad) as a means of extracting value. This is grounds for skepticism about them.[47]
- However, the argument that these other PERCs have positive benefits is stronger than is the case for noncompetes. The idea that efficient information creation and sharing requires the protection of a nondisclosure agreement (so that the worker cannot simply sell the knowledge to the highest bidder) is much more reasonable than the idea that it requires the protection of a noncompete (so that the worker's alternative sources of employment are restricted or foreclosed). Similarly, nonsolicitation agreements and nonrecruitment agreements may legitimately be necessary for certain kinds of businesses and professional practices to be willing to integrate new partners without fear that the partner will leave and take the business with them.
- By the same token the potential for harm to the worker from these other PERCs, even if they are imposed without compensation in the manner described above, is much smaller than with noncompetes. There is a fundamental difference between restricting what a worker can take with them when they leave (knowledge, customer contacts, recruitable employees) and restricting the worker in where they can go if they wish to leave.
- For these reasons, in some settings, other PERCs may be a reasonable alternative to noncompetes; they may be a less restrictive alternative means of achieving the positive benefits that are often claimed for noncompetes. The availability of this alternative further strengthens the case for greatly restricting or banning noncompetes.

46. *See* Garmaise, *supra* note 40.

47. *See* Balasubramanian, et al. *supra* note 11, for evidence that workers who are subject to one PERC are often subject to the others as well and that, for the average worker, the motivation for this appears to be what the authors term "value capture" by the firm, which is synonymous with what in this article is termed "value extraction." (For top managers, the paper finds the opposite result).

- However, it should be noted that noncompetes do have one important advantage over other PERCs, namely, that violations of noncompetes are much more easily detected. It is much easier to know and to prove that a worker has accepted a job that violates their noncompete than it is to prove that they have not shared information in violation of a nondisclosure agreement or subtly recruited customers or workers in violation of a nonsolicitation or nonrecruitment agreement.

V. Discussion

Sections II and III combine to show that noncompetes are likely to be harmful on balance and are very unlikely to be so beneficial that restricting or banning them would risk major economic damage.

The material in those sections is based on standard economic analysis, attempting to understand the effect of noncompetes on such conventional outcomes as worker mobility, hiring, and entrepreneurship, investment, innovation, and wages. It does not capture other, potentially more serious worker harms that are not typically studied by economists. A worker who is stuck in a bad job match might merely be less productive or less well-compensated than they otherwise would be. But they might also be less happy, and worse, they might be a target for genuine exploitation, degradation, or abuse. A worker who is known by a predatory employer or manager to be stuck is likely to be mistreated, because they have no choice but to accept it. There are many reasons why a worker might be stuck, but a noncompete adds an additional one: A worker trying to muster the courage to quit might be reminded of the noncompete that they signed and threatened with legal action if they violate it. It is not altogether an exaggeration to call this a human rights issue.

Even aside from these concrete harms, noncompetes represent a limitation on human freedom. The ability of a person to leave a bad situation has value in and of itself. Policy makers can choose to make a normative judgment that assigns weight to this value, for which they may be willing to sacrifice some economic efficiency. However, it would only be a sacrifice if noncompetes were economically efficient, which as discussed above is likely not the case.

Even if noncompetes are harmful, the question remains of what should be done about them.[48] One possible approach would be treat them as an antitrust problem. It is not obvious that this is the correct approach; noncompetes could be harmful without necessarily belonging within the purview of antitrust (though the very term "noncompete" should be a red flag). Or perhaps noncompetes are an antitrust problem, but only in situations where they are imposed on workers as a consequence of monopsony power in the labor market. In a companion article, I argue that noncompetes can be reasonably regarded as an antitrust problem even absent conventional monopsony power (i.e., even if the labor market was highly competitive in the sense that the worker had many job offers similar to the one that they accepted).[49]

VI. Conclusion

Defenders of labor noncompetes often claim that they were voluntarily agreed to, and so they must be both mutually beneficial and economically efficient. This claim rests on faulty premises: Firms have

48. A common argument against any policy action limiting noncompetes is that it would constitute a paternalistic violation of freedom of contract between two willing parties. But whatever one's general view on the appropriateness of paternalistic government interventions, it is important to note that of the five points listed in response to Argument #1 above, all five apply at least to some extent to higher wage workers, particularly the last two. Only the first point, and to a lesser extent the second, depends heavily on a lack of rationality or capability on the part of the worker that might be ameliorated by government paternalism. The others are ways that firms can extract value by imposing noncompetes on workers who are highly (though not infinitely) rational and capable. A ban on noncompetes therefore protects workers from being victimized by firms, not from their own poor decisions.

49. *See* Balan, *supra* note 13. *See also* Rohit Chopra & Lina M. Khan, *The Case for 'Unfair Methods of Competition' Rulemaking*, 87 U. CHI. L. REV. 357–79 (2020) for an argument for combatting noncompetes using the Federal Trade Commission's antitrust rulemaking authority.

both motive and means to induce workers to accept noncompetes that are not to their benefit, but rather are a means by which the firm extracts value from them. This is true even though the noncompetes are nominally voluntary. In addition, the most commonly made claims of positive effects from noncompetes (that they facilitate efficient knowledge transfer within firms and that they facilitate efficient worker training), while not completely without merit, do not stand up to critical scrutiny, and in fact that scrutiny reveals strong arguments to the contrary.

The weakness of the arguments in favor of noncompetes, combined with the substantial body of empirical literature that mostly finds them to be harmful, as well as the experience of California which has flourished as a center of innovation despite (or perhaps because of) not enforcing them, is sufficient to conclude that noncompetes are likely to be harmful on balance. And even if they are beneficial on balance, they are very unlikely to be so beneficial that restricting them would risk major economic harm.

In addition, noncompetes may cause harms that are not commonly measured by economists, such as increasing worker vulnerability to exploitation and abuse. Finally, the ability of a human being to take their body and their labor where they choose is a human right. Perhaps some extremely strong economic efficiency benefits would outweigh these harms, but as discussed above, such benefits do not exist.

Author's Note

David J. Balan is an employee of the Federal Trade Commission. The views expressed in this article are solely those of the author.

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Agenda

National Association of Attorneys General (NAAG)
Antitrust & Labor Issues Working Group Call (ALIWG)
Monday June 13, 2022
2:00 PM EST/1:00 PM Central/12:00 PM Mountain/11:00 AM Pacific/8:00 AM (HI)

https://naag-org.zoom.us/j/8 (b)(6)

Meeting ID: (b)(6)
Passcode:

OPEN Call NON AAGs INCLUDED

I. Welcome

II. New to Our Call? Please Feel Free to Introduce Yourself/Your Organization

III. Topic: Antitrust Challenges to Labor Non-Competes

- Guest Speaker-
  - **David Balan,** Managing Director, Econ One
  - Q&A

IV. Open Mic

- Any Public Announcements/Updates Re Recent or Upcoming Antitrust and Labor Matters?

V. Attachments:

- Articles by D. Balan
  i. Labor Noncompete Agreements: Tools for Economic Efficiency or Means to Extract Value from Workers (Antitrust Bulletin);
  ii. Labor Practices Can Be An Antitrust Problem Even When Labor Markets are Competitive (CPI);
  iii. Article Sketch (Worker Harm as Antitrust Violation) (forthcoming)

VI. Next Call:

- July 11, 2022 AAGs Only-- Closed Call

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Sent: 10/26/2022 6:06:35 PM
To: Walker, Schonette [swalker@oag.state.md.us]; Alexander James Colvin (b)(6) @cornell.edu]; Amezcua, Carrie G. [(b)(6) bipc.com]; (b)(6) @ec.europa.eu; Anne Schneider (b)(6) @statecenterinc.org]; Arends, Wendy (b)(6) @huschblackwell.com]; avery gardiner [avery_gardiner@judiciary-dem.senate.gov]; Batal, Mohamad [mbatal@ftc.gov]; belga (b)(6) @justicecatalyst.org]; Bond, Slade [slade.bond@mail.house.gov]; (b)(6) @hoganlovells.com; (b)(6) @ucsd.edu; dave balan (b)(6) @gmail.com]; DAVID DESARIO (b)(6) @tempworkerjustice.org]; (b)(6) @brandeis.edu; DEMIROGLOU Aristeidis (b)(6) @ec.europa.eu]; Doha.Mekki [Doha.Mekki@usdoj.gov]; Eric Posner (b)(6) @uchicago.edu]; Eric.posner@usdoj.gov; Funk, Stephanie [sfunk@ftc.gov]; Gerstein, Terri Ellen (b)(6) @law.harvard.edu]; Greer, Kristin [kgreer@ftc.gov]; Harsch, Ryan F. 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Subject: update--RESCHEDULED October NAAG ALIWG OPEN Call: https://naag-org.zoom.us/(b)(6)

Attachments: 2022-08-26 - Amended Complaint (Mickelson et. al v. PGA Tour, Inc.).pdf; ANSWER.LIV Golf v. PGA Tour.pdf; TRO Motion.LIV Golf Players.pdf; TRO Opp.PGA Tour.pdf; 10 27 2022 ALIWG Agenda Open Call..pdf

Location: ZOOM

Start: 10/27/2022 12:00:00 PM
End: 10/27/2022 1:00:00 PM
Show Time As: Tentative

Recurrence: (none)

These open WG calls will be held on the 2nd Monday in February, April, June, August, October and December at 2PM EST.
Calendar invites will be updated with agendas shortly before the calls.
Thank you. ~Schonette

NAAG Antitrust and Labor Issues Working Group Call--Antitrust and Athletes

Time: Oct 27, 2022 12:00 PM Eastern Time (US and Canada)

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

PHIL MICKELSON, TALOR GOOCH, HUDSON SWAFFORD, MATT JONES, BRYSON DECHAMBEAU, IAN POULTER, PETER UIHLEIN, and LIV GOLF INC.

Plaintiffs,

v.

PGA TOUR, INC.,

Defendant.

CASE NO. 5:22-cv-04486-BLF

AMENDED COMPLAINT

JURY TRIAL DEMANDED

With knowledge as to their own conduct and on information and belief as to all other matters, Plaintiffs Phil Mickelson, Talor Gooch, Hudson Swafford, Matt Jones, Bryson DeChambeau, Ian Poulter, Peter Uihlein, and LIV Golf Inc. ("LIV Golf") (collectively, "Plaintiffs") allege:

INTRODUCTION

1. The PGA Tour, Inc. (sometimes "the Tour") began when Jack Nicklaus, Arnold Palmer, and other elite golfers in the 1960s determined the PGA of America was not compensating them their market value; they split off the Players Tournament Division and formed the Tour, a tax-exempt entity organized ostensibly to "promote the common interests of professional tournament golfers." From that seemingly laudable origin, the Tour has evolved into an entrenched monopolist with a vice-grip on professional golf. As the Tour's monopoly power has grown, it has employed its dominance to craft an arsenal of anticompetitive restraints to protect its long-standing monopoly. Now, threatened by the entry of LIV Golf, and opposed to its founding mission, the Tour has ventured to harm the careers and livelihoods of any golfers, including Plaintiffs Phil Mickelson, Talor Gooch, Hudson Swafford, Matt Jones, Bryson DeChambeau, Ian Poulter, and Peter Uihlein ("Player Plaintiffs"), who have the temerity to defy the Tour and play in tournaments sponsored by the new entrant. The Tour has done so to crush nascent competition before it threatens the Tour's monopoly.

2. Before LIV Golf's entry, golfers who sold their services in the elite professional golf services market had no meaningful option but to play on the Tour if they wanted to pursue their profession at the highest levels. This provided the Tour with enormous power over the players, including the ability to force players into restrictive terms that foreclose them from playing in competing events and the ability to suppress player compensation below competitive levels. Members of the Tour receive a lower percentage of the Tour's revenues than professional athletes in other major sports, even though the Tour is a tax-exempt non-profit corporation and other major sports leagues are for-profit enterprises. This control has also given the Tour the power to impose restrictions on players—who are independent contractors but are denied independence by the Tour—that make it risky and costly for players to affiliate with another promoter and prohibitively difficult for any would-be entrant to challenge the Tour's monopoly. And, in its response to LIV Golf's competitive challenge, the Tour has exercised this power by punishing the players to choke off the supply of elite professional

golfers—an essential input to LIV Golf's competitive challenge—and cement its dominance over the sport. The Tour's monopoly power has also allowed it to weaken golf itself, by its failure to innovate and broaden the game's appeal and bring the game into the 21st century.

3. As part of its orchestrated plan to defeat competition, the Tour has threatened lifetime bans on players who play in even a single LIV Golf event. It has backed up these threats by imposing unprecedented suspensions on players (including the Player Plaintiffs) that threaten irreparable harm to the players and their ability to pursue their profession. It has threatened sponsors, vendors, broadcasters, and agents to coerce players to abandon opportunities to play in LIV Golf events. And it has orchestrated a group boycott with the European Tour,[1] which is unlawful under either the *per se* rule or the Rule of Reason, to amplify the Tour's anticompetitive attacks and foreclose LIV Golf from having access to players. The PGA Tour also has leaned on other entities in the so-called golf "ecosystem," including certain entities that put on golf's "Majors," to do its bidding in its effort to maximize the threats and harm to any golfer who defies the Tour's monopsonistic requirements and plays in LIV Golf events.

4. The Tour's unlawful strategy has been both harmful to the players and harmful to LIV Golf in threatening its otherwise-promising launch. For example, the Tour's conduct caused LIV Golf to cancel its 2022 business plan to launch its full competing League. LIV Golf was not deterred, however, and it changed its 2022 strategy and launched a smaller version of its concept—the LIV Golf Invitational Series—with no League, no franchises, no broadcast deal, fewer elite players, and fewer tournaments. Some players (including Player Plaintiffs) were interested nonetheless. So, in response, the Tour ratcheted up its strategy and doubled-down on its efforts to punish Plaintiffs and to protect its monopoly. The Tour (1) enforced its unlawful player restrictions that deny players (including Player Plaintiffs) the ability to sell their services to others, (2) imposed lengthy suspensions on players for exercising their right as independent contractors to play in a competing promoter's events, and (3)

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[1] The European Tour recently changed its name to DP World Tour, but, because it was called European Tour for most of the time period relevant to this case and in most of the relevant documents, it is referred to herein as the European Tour for consistency and clarity.

ramped up its threats targeting Player Plaintiffs and others. The Tour has likewise threatened and blacklisted numerous other third parties with whom LIV Golf has sought to contract, in its effort to defeat LIV Golf's entry and entrench its monopoly.

5. The Tour's conduct serves no purpose other than to cause harm to players and LIV Golf, and foreclose the entry of the most meaningful competitive threat the Tour has ever faced. Banning Player Plaintiffs and other top professional golfers from its own events degrades the Tour's strength of field and diminishes the quality of the product that it offers to golf fans by depriving them from seeing many top golfers participate in Tour events. The only conceivable benefit to the Tour from degrading its own product in this manner is the destruction of competition. Indeed, the Tour has conceded its anticompetitive purpose in attacking and injuring the players. When the Tour adjusted its rules to render them more effective in defeating competitive entry, a memorandum authored by PGA Tour Commissioner Jay Monahan made clear that the rule change was expressly designed to enable the Tour to foreclose competition. And when the Tour imposed unprecedented punishments on the players for playing in LIV Golf events. the Tour explained to the players that it was doing so precisely because LIV Golf is attempting to compete with the Tour.

6. Player Plaintiffs have devoted the bulk of their professional careers to growing the PGA Tour. Yet the Tour has repaid them of late with suspensions, punishments, threats, and disparagement for merely playing professional golf for another promoter and embracing competition for their services. The Tour has denied them income-earning opportunities, attacked their goodwill and reputation, interfered with their businesses, attacked their business partners, threatened them with multiple punishments—including threats to deny them from participating in golf's marquee events, even when they have earned placement or exemptions to participate in those tournaments—and unlawfully prevented them from exercising their independent contractor rights. And, at every step, the Tour has repeatedly admitted that it has done this to destroy nascent competition.

7. The Tour long stood alone as the only tour anywhere in the world that features the best golfers in the world. The PGA Tour Commissioner Jay Monahan boasted on June 22, 2022 that the "Tour is doing everything it possibly can . . . [to] mak[e] certain that the best players in the world are competing on the best Tour in the world, the PGA Tour." The Tour has ensured that remains the case

through its anticompetitive PGA Tour Player Regulations. First, the Tour's Conflicting Events Regulation prohibits its members from participating "in any other golf tournament or event" in North America, without exception, if a Tour-sanctioned event is scheduled in the same week, regardless of whether the players would otherwise have any plans to participate in the Tour's sanctioned event. The Tour has a sanctioned event almost every week of the year, hence the Conflicting Event Regulation effectively prohibits Tour members from playing in any non-Tour golf event in North America. The effect is both a naked restraint on competition and a reduction in output, as Tour members are foreclosed from playing anywhere else when they are not playing in Tour events. For international tours or events, a player may request up to three exemptions a year, but the Tour Commissioner has complete discretion whether to grant these exemptions, something he has refused to do for each of the LIV Golf events. The Conflicting Events Regulation thus invests the leader of the incumbent monopolist with unbridled discretion to foreclose players from participating in any competing events. And while the Tour has historically granted releases to players that allow them to compete in other events throughout the world, Tour Commissioner Monahan has taken a different stance regarding LIV Golf, denying event releases even for LIV Golf events overseas. As Commissioner Monahan admitted, he has departed from past practice in prohibiting members from participating in LIV Golf events outside North America *because* LIV Golf plans to compete with the Tour. And he has enforced the Conflicting Events Regulation to deny players permission to participate in LIV Golf events in North America *because* LIV Golf's North American events compete with the Tour.

8. Second, the Tour uses its Media Rights Regulation as an additional means of foreclosing players from participating in competing events. This regulation prohibits any members from appearing in any "golf program" ("any golf contest, exhibition or play") that takes place "***anywhere in the world***" and is shown on any media of any type. It is fundamental for any organizer of elite-level professional golf tournaments to broadcast the tournament on television and other media, yet the Tour contends no PGA Tour members may participate in any such televised non-Tour golf event anywhere in the world. This broad prohibition is no accident, as the PGA Tour specifically broadened this provision to prevent competitive entry of leagues such as LIV Golf. The provision serves no procompetitive purpose nor benefits consumers, but rather restricts output and forecloses competition, as it prevents all Tour

members from playing golf, even casually, if it is recorded for distribution over any media anywhere in the world during weeks when they are not participating in PGA Tour events.

9. In short, these regulations—the Media Rights Regulation and the Conflicting Event Regulation—foreclose the players, who are independent contractors, from participating in any golf event that the PGA Tour deems to be a competitive threat. These provisions limit output by keeping golfers on the sidelines when not playing on the Tour. And these provisions, in turn, foreclose competition and entrench the PGA Tour's monopoly power. If these provisions are not enjoined, they will foreclose LIV Golf's nascent entry into the markets and prevent LIV Golf from fulfilling its competitive promise, thus harming LIV Golf, the Player Plaintiffs, golf fans, the game of golf, and competition itself.

10. It is no secret that the PGA Tour is targeting players in order to defeat the threat of competitive entry. The PGA Tour has been clear since the threat of competitive entry emerged that its most powerful weapon to defeat competition is to target its members—who comprise virtually all of the elite professional golfers in the world—to prevent them from playing on a competing tour. For example, PGA Tour Commissioner Monahan wrote in a January 2020 strategy memorandum that the best way to prevent a competitor from emerging is to prevent PGA Tour members (including Player Plaintiffs) from supporting the new promoter:

> The impact that [the new league] could have on the PGA TOUR is dependent on the level of support it may receive from these players. Without this support, [the new league's] ability to attract media and corporate partners will be significantly marginalized and its impact on the TOUR diminished.

A nascent golf league without the golfers necessary to put on elite events is no threat at all. Deprive the new league of access to virtually all of the top golfers in the world, and it will pose no challenge to the Tour's dominance.

11. Accordingly, the Tour set out to destroy competition in its infancy by doing everything in its power to lock up its members (including Player Plaintiffs) and deny them the opportunity for sustained competition for their services. The Tour's conduct has included at least seven practices, each of which is exclusionary, anticompetitive and unlawful under the Sherman Act:

a. The Tour has repeatedly threatened its members (including Player Plaintiffs) with

devasting consequences if they join LIV Golf. On multiple occasions, the Tour threatened a *lifetime ban* for any player who joins or participates in LIV Golf. Then, in June and July 2022, the Tour imposed a *career-threatening ban* on Player Plaintiffs (and others) for playing in LIV Golf events. For other golfers who resigned their Tour membership because they did not want to be subject to the Tour's punishments, the Tour responded by actually imposing a *lifetime ban*.

b. The Tour amended and expanded its Media Rights and Conflicting Events Regulations in response to the threat of competitive entry. And it then enforced these unlawful provisions to foreclose members from participating in LIV Golf events.

c. The Tour orchestrated a group boycott with the European Tour to ensure that any golfer who considers defying the Tour's threats by playing in any LIV Golf events (including Player Plaintiffs) cannot pursue his career and livelihood anywhere in the global golf "ecosystem." The Tour's agreement is established through the statements of its partners. For example, during a meeting in Malta in July 2021, representatives of the entity that sponsored LIV Golf met with the CEO and other representatives of the European Tour to seek a partnership with the European Tour in launching the new league. The minutes from that meeting prepared by the European Tour's title sponsor state that the CEO of the European Tour, Mr. Keith Pelley, "Confirmed new series appeal and fit, however, stated main issue is US PGA mighty power and need to avoid a collision course between ET [European Tour] and PGA." Under pressure from the "mighty power" of the PGA Tour, the European Tour agreed to boycott and rejected the opportunity to partner with the new entrant, and instead strengthened its strategic alliance with the PGA Tour. As part of this illegal partnership, the PGA Tour pressured the European Tour to amend its Regulations to restrict European Tour golfers from playing in LIV Golf events, and it pressured the European Tour to punish its members who played in LIV Golf events with ~$125,000 fines and suspension from any tournaments the PGA Tour and the

European Tour co-sanction. The European Tour agreed to all of the PGA Tour's demands to implement the group boycott.

d. Similarly, the PGA Tour has encouraged the PGA of America (a separate entity) to threaten to disallow LIV Golf players from playing both in the Major tournament it sponsors (the PGA Championship) and the Ryder Cup, one of golf's marquee events. And it has leaned on other golfing entities to do its bidding. The Tour leaned on Augusta National to pressure golfers against joining LIV Golf. The Tour has also leaned on the Royal & Ancient ("R&A") (sponsor of The Open) to publicly question whether LIV Golf players could play in their respective tournaments. And the Tour has leaned on the Official World Golf Ranking ("OWGR") to call into question whether LIV Golf tournaments would be eligible for OWGR ranking points. This conduct serves no beneficial purpose, but rather serves to harm the careers of the players (including Player Plaintiffs) who play in LIV Golf events, and to deter other players from joining LIV Golf to avoid career destruction at the hands of the Tour.

e. At various points, the Tour has threatened Tour members' agents and business partners with punishment if the players joined LIV Golf. In addition, the Tour has threatened numerous vendors and small companies in the golf and sports production industry that they will be blacklisted from working with the Tour if they work with LIV Golf.

f. The Tour has threatened non-member golfers with exclusion from the golf "ecosystem" if they participate in any LIV Golf events. For example, the Tour threatened college golfers (who are not PGA Tour members and have no obligation to conform to the Tour's rules for its members) that if they played in any LIV Golf events they would be banned from entry into the PGA Tour University program, which provides top college golfers entry into the Tour's developmental tour (Korn Ferry Tour).

g. The Tour has also threatened sponsors and broadcasters that they must sever their

relationships with players who join LIV Golf, or be cut off from having any opportunities with the PGA Tour. Based on these threats, several sponsors have cut ties with players who have joined LIV Golf (including the Player Plaintiffs), sometimes ending years-long relationships. The Tour has also intimidated sponsors and vendors into not doing business with LIV Golf, lest they lose the opportunity to do business with the dominant golf tour in North America, the PGA Tour.

12. These restraints have damaged competition and harmed Plaintiffs. They have harmed Player Plaintiffs by, for example, (1) diminishing competition for their services and reinforcing the Tour's monopsony power in the markets in which the Plaintiffs sell those services; (2) denying them income-earning opportunities, tournament performance opportunities (including denying them opportunities to participate in tournaments in which they have qualified), sponsorship revenue, and independent contractor rights; and (3) harming their reputations, goodwill, and brands. These restraints have likewise proved effective at harming competition in the relevant markets by preventing other players from joining LIV Golf who would have joined the new league but for these competitive restraints, thus threatening the competitive viability of LIV Golf and any other potential competitor by protecting the PGA Tour's monopoly power and monopsony power over the purchase of services from professional golfers to participate in elite golf events. The Tour's restraints have harmed LIV Golf by, for example, (i) raising to supracompetitive levels its costs to recruit players who are subject to the Tour's threats; (ii) completely preventing LIV Golf from securing the services of many players who have been subjected to the Tour's threats of severe punishments should they participate in LIV Golf events; (iii) forcing LIV Golf to scrap its launch plans for 2022, and instead launch a smaller-scale series; and (iv) preventing LIV Golf from entering into agreements with third parties and raising to supracompetitive levels its costs for contracting with those third parties who are willing to defy the Tour's threats, thus raising LIV Golf's costs and degrading its product offerings. The impacts of the Tour's continuing restraints threaten LIV Golf's competitive viability and existence.

13. Without fair process, PGA Tour Commissioner Monahan—who is necessarily partial—imposed a 21-month Tour suspension on some Player Plaintiffs, through March 31, 2024 (other Player Plaintiffs' suspensions are indefinite or 9 months as of this Complaint), for exercising their independent

contractor rights to play in the first two LIV Golf events. After imposing these suspensions, the Tour followed its procedurally and substantively unconscionable appeals process to maintain the suspension without giving Player Plaintiffs fair proceedings to be heard by neutral and independent decision-makers. Plaintiffs Gooch, Swafford and Jones (among other Player Plaintiffs) had earned the right to play in the FedEx Cup Playoffs (a series of lucrative and high-profile events scheduled at the end of the PGA Tour's 2022 season) through strong performance and dedication to the Tour, but the Tour banned them from playing in those tournaments, diminishing the strength of its own fields and harming these Plaintiffs. The injury to these players extended beyond mere foreclosure from these tournaments (itself a substantial and irreparable injury), but also crippled their chances of qualifying for both the Majors and the Tour's premier invitationals in future seasons. The punishment that accrued to these players from not being able to play in the FedEx Cup Playoffs is substantial, and involves both monetary injury (as the Tour has maintained) as well as irreparable injuries.

14. The Tour has argued that the Player Plaintiffs have already been fully compensated by LIV Golf for all suspensions the Tour might impose and all of the consequential harms that may flow from those suspensions (including exclusions from the Majors and other important professional golf tournaments and lost sponsorship opportunities). That is simply not true. While the supracompetitive payments LIV Golf was required to make in order to attract players in the face of the Tour's anticompetitive threats were in many cases above the compensation levels that would have been required in the absence of the Tour's anticompetitive conduct, it is also true that (a) many of the injuries the players will suffer are not compensable through money, (b) the monetary injuries the players have suffered and/or will suffer have exceeded and will exceed substantially the amounts they have been paid by LIV Golf, and (c) the negotiated amounts reflect a mutual understanding by the parties that at some point the PGA Tour would adjust its position and allow fair competition from LIV Golf. None of these Player Plaintiffs has agreed to a potential ban from the Majors or other important tournaments, or a long-term ban from the Tour should the Tour succeed in blocking successful long-term entry by LIV Golf.

15. Without injunctive relief prohibiting the PGA Tour's anticompetitive conduct, the Tour's antitrust violations will continue. Without injunctive relief prohibiting the PGA Tour's

anticompetitive conduct, Player Plaintiffs will be irreparably harmed, including by the Tour's unlawful suspensions that have denied and will continue to deny them income earning opportunities, tournament performance opportunities, sponsorship revenue, and independent contractor rights that they have earned, as well as by the actions of the Tour and the European Tour that deny them the opportunity to participate in events sponsored by others throughout the golf "ecosystem." LIV Golf will also be irreparably harmed if the Tour's anticompetitive conduct is not abated. While LIV Golf has been able to pursue the launch of its business in the face of supracompetitive costs and artificially reduced access to supply (i.e. players), facing headwinds of this nature is not sustainable. As a result, if the Tour's anticompetitive conduct is not enjoined, LIV Golf's entry will be thwarted and its ability to maintain a meaningful competitive presence in the markets will be destroyed, which will harm not only LIV Golf, but also competition. The Tour will continue to enforce its unlawful Regulations and take anticompetitive actions unless and until a Court enjoins the Tour's unenforceable Regulations and unlawful conduct. Moreover, the Player Plaintiffs will be irreparably harmed in that the Tour's unreasonable control over their media rights and their participation in non-Tour events will continue unless enjoined permanently. And, if LIV Golf's entry into the relevant markets is thwarted by the PGA Tour's anticompetitive conduct, Player Plaintiffs' careers will be detrimentally impacted, they will lose the most significant avenue to gain entry into the Majors, they will lose the platform to display their craft, and they will lose the opportunity to sell their advertising and sponsorship space and sell or license their name image and likeness for their branding, reputation and businesses. On the other hand, with an injunction, the anticompetitive conduct of the PGA Tour will be lifted, LIV Golf will have the opportunity to compete on the merits, and Player Plaintiffs and other professional tournament golfers will enjoy the benefits of competition for their services that the antitrust and other laws protect.

PARTIES

16. Plaintiff Phil Mickelson is a Hall of Fame American professional golfer who resides in San Diego, California. Mr. Mickelson was a three-time NCAA Champion at Arizona State University. In 1991, he won the Northern Telecom Open, which was the last time an amateur won a tournament on the PGA Tour. He is a 30-year veteran of the PGA Tour who has won 57 worldwide professional events, including six Majors—the most recent in 2021, which earned him the title of the oldest Major

winner in the game's history. He spent over 26 consecutive years in the top 50 of the Official World Golf Ranking (the only player in the history of the sport to ever do so), including over 700 weeks ranked in the top 10 in the world. Mr. Mickelson has represented the United States as a professional golfer in 24 team tournaments, which includes 12 Presidents Cups and 12 Ryder Cups, both American records. He participated as a vice captain in additional United States team tournaments, and played in the Dunhill Cup, World Amateur Team Championship and two Walker Cups for the United States as an amateur. Mr. Mickelson also has a strong commitment to giving back through the Phil and Amy Mickelson Foundation. Since its inception in 2004, the Foundation has focused primarily on supporting a variety of youth and family initiatives. He also founded Birdies for the Brave, the PGA Tour's national military outreach initiative, which raises money for a variety of charities supporting veterans and military families. Mr. Mickelson dedicated his entire professional career, 30 years, to the PGA Tour. He has hosted tournaments on the Tour and engaged in countless endeavors to advance the Tour, its purpose, and the game of golf. Mr. Mickelson has invested in himself and his investment has benefited the Tour's business tremendously over the last 30 years. As a lifetime member—a hard-earned accomplishment and honor, requiring 20 PGA Tour wins and 15 years of membership on the Tour—Mr. Mickelson desires to continue being a member of the Tour and to play in events on the Tour.

17. Plaintiff Talor Gooch is a 30-year-old professional golfer who resides in Texas. He is a member of the Tour. Mr. Gooch played golf at Oklahoma State University until 2014 when he began his professional career. He joined the PGA Tour Canada in 2015 and earned his way onto the Korn Ferry Tour in 2016. In 2017, Mr. Gooch won the News Sentinel Open (which later became the Visit Knoxville Open on the Korn Ferry Tour) and then earned his way onto the PGA Tour in 2018. In 2021, he won his first PGA Tour tournament at the RSM Classic. Mr. Gooch was on top of the PGA Tour's FedEx Cup Rankings for the 2021-22 season following the RSM Classic. Mr. Gooch has played in over one hundred PGA Tour events. As of the filing of the Complaint in this Action, he was the 20th ranked golfer on the FedEx Cup rankings. Mr. Gooch played in 21 PGA Tour events in the 2021-22 PGA Tour season and qualified for the FedEx Cup Playoffs, but was denied the opportunity to compete in the Playoffs by the Tour's anticompetitive conduct. Mr. Gooch desires to continue to be a member

of the Tour and to play in events on the Tour.

18. Plaintiff Hudson Swafford is a 34-year-old professional golfer who resides in Georgia. He is a member of the Tour. He started his professional golf career in 2011 after graduating with a B.S. in Consumer Economics from the University of Georgia. Mr. Swafford joined the Nationwide Tour in 2012. and. that same year, won the Stadion Classic at UGA, a golf tournament on the Web.com Tour (which became known as the Korn Ferry Tour in 2019). In 2013, Mr. Swafford finished 21st in the Web.Com Tour Finals to earn his PGA Tour card for 2014. Mr. Swafford won his first PGA Tour victory in 2017 at the CareerBuilder Challenge. In 2018, Mr. Swafford suffered a rib injury and then, in 2019, Mr. Swafford had to undergo a surgery to remove a small bone from the bottom of his foot, forcing him to miss four months of play. In September 2020, Mr. Swafford won his second PGA Tour victory at the Corales Puntacana Resort and Club Championship. In 2022, Mr. Swafford earned his third PGA Tour victory at the American Express. Since the start of his career, Mr. Swafford has played in over 250 Tour events. Mr. Swafford played in 21 PGA Tour events in the 2021-22 season, and as of the filing of the Complaint in this Action was 67th in the FedEx Cup rankings, and qualified for the FedEx Cup Playoffs. Mr. Swafford was denied the opportunity to compete in the Playoffs by the Tour's anticompetitive conduct. Mr. Swafford desires to continue to be a member of the Tour and to play in events on the Tour.

19. Plaintiff Matt Jones is a 42-year-old professional golfer who resides in Arizona. He is a member of the Tour. He was born in Sydney, Australia, and upon meeting fellow Australian Greg Norman at six years old became determined to become a professional golfer. Mr. Jones moved to the United States to attend Arizona State University where he was a first-team All-American golfer. Mr. Jones joined the Nationwide Tour in 2004 and earned his PGA Tour card in 2008. In 2014, Mr. Jones won the PGA Tour's Shell Houston Open. In 2015, and again in 2019, he won the Emirates Australian Open on the PGA Tour of Australasia. In 2021, Mr. Jones won the PGA Tour Honda Classic. Mr. Jones has played in over 350 Tour events. Mr. Jones played in 20 PGA Tour events in the 2021-22 season, and as of the filing of the Complaint in this Action was ranked 65th in the FedEx Cup rankings, and qualified for the FedEx Cup Playoffs. Mr. Jones was denied the opportunity to compete in the Playoffs by the Tour's anticompetitive conduct. Mr. Jones desires to continue to be a member of the

Tour and to play in events on the Tour.

20. Plaintiff Bryson DeChambeau is a 28-year-old professional golfer who resides in Texas. He is a member of the Tour. Mr. DeChambeau grew up in California and played golf at Southern Methodist University while majoring in physics. In 2015, Mr. DeChambeau became just the fifth person to win both the NCAA individual championship and the U.S. Amateur title. He made his PGA tour debut in 2015 at the FedEx St. Jude Classic. In 2015, while still an amateur, he was the runner-up in the Australian Masters. He began his professional career in 2016 at the RBC Heritage event, finishing fourth. That year, Mr. DeChambeau won the Korn Ferry DAP Championship, earning his Tour card. In 2017, Mr. DeChambeau won his first PGA Tour event at the John Deere Classic. In 2018, Mr. DeChambeau won the Memorial Tournament. He then won the first two FedEx Cup Playoff events at the Northern Trust and Dell Technologies Championship. Mr. DeChambeau was picked for the U.S. team in the 2018 Ryder Cup. In 2019, Mr. DeChambeau won the Shriners Hospitals for Children Open and the Omega Dubai Desert Classic. In 2020, Mr. DeChambeau won the Rocket Mortgage Classic and won the U.S. Open, his first Major. In 2021, he won the Arnold Palmer Invitational and played on the winning U.S. team at the 2021 Ryder Cup. In 2022, Mr. DeChambeau underwent surgery on his left wrist from a fracture. Mr. DeChambeau desires to continue to be a member of the Tour and to play in events on the Tour.

21. Plaintiff Ian Poulter is a 46-year-old professional golfer who splits his residence between Florida and England. He is a member of the Tour. He was born in England, and began playing golf at just four years old before turning professional in 1994. Mr. Poulter won the 1999 Open de Côte d'Ivoire on the Challenge Tour and was promoted to the European Tour. He was a member of the victorious 2004 European Ryder Cup team and then joined the PGA Tour in 2005. In addition to his many international victories, Mr. Poulter won the 2010 World Golf Championship-Accenture Match Play Championship, the 2012 World Golf Championships-HSBC Champions, and the 2018 Houston Open. Mr. Poulter has played in over 300 Tour events. Mr. Poulter played in 16 PGA Tour events in the 2021-22 season and, as of the filing of the Complaint in this Action, was ranked 168th in the FedEx Cup rankings. Mr. Poulter desires to continue to be a member of the Tour and to play in events on the Tour.

22. Plaintiff Peter Uihlein is a 32-year-old professional golfer. He is a member of the Korn Ferry Tour, which is owned and controlled by the Tour. Mr. Uihlein was born in New Bedford, Massachusetts, played golf at Oklahoma State, and resides in Florida. Mr. Uihlein has two professional victories on the Korn Ferry Tour—the Nationwide Children's Hospital Championship in 2017 and the MGM Resorts Championship in 2021. Mr. Uihlein has also won on the European Tour in 2013 at the Madeira Islands Open. Mr. Uihlein has represented the United States in two Walker Cups (2009 and 2011) and won the 2010 Eisenhower Trophy. Mr. Uihlein won the 2010 U.S. Amateur Championship. As of the filing of the Complaint in this Action, Mr. Uihlein ranked 59th on the Korn Ferry Tour regular season points list. Mr. Uihlein desires to be a member of the Tour and/or continue to be a member of the Korn Ferry Tour. and to play in events on the Tour and the Korn Ferry Tour.

23. LIV Golf is a Delaware corporation with its principal place of business in New York, New York. LIV Golf is the sponsor of the LIV Golf Invitational Series, an eight-event series of golf tournaments. a majority of which have been or will be set in the United States. from June to October 2022. LIV Golf also is the sponsor of a planned season-long golf tour, the League, which the PGA Tour's anticompetitive conduct thwarted and which LIV Golf was forced to delay in 2022.

24. Defendant PGA Tour is a Maryland non-profit corporation, with its principal place of business in Ponte Vedra Beach, Florida. The PGA Tour sponsors a season-long series of golf tournaments throughout the calendar year called the PGA Tour. Those events occur primarily in the United States. In the 2021-22 PGA Tour season, the Tour sponsored events in twenty states. including six events in California. The Tour is engaged in interstate commerce.

JURISDICTION AND VENUE

25. Plaintiffs' action arises under Sections 1 and 2 of the Sherman Antitrust Act. 15 U.S.C. §§ 1, 2. Plaintiffs seek injunctive relief under 15 U.S.C. § 26 and damages under 15 U.S.C. § 15(a). This Court has subject matter jurisdiction over the federal antitrust claims under 28 U.S.C. § 1331 (federal question) and 28 U.S.C. § 1337 (commerce and antitrust regulation); this Court has jurisdiction over the related state-law claims under 28 U.S.C. § 1367 (supplemental jurisdiction).

26. This Court may exercise personal jurisdiction over the PGA Tour under Section 12 of the Clayton Act, 15 U.S.C. § 22. The PGA Tour manages or operates two golf courses (TPC Harding

Park and TPC Stonebrae) in this District and employs dozens of individuals who work there. It organizes and promotes annually at least six golf tournaments throughout California (Fortinet Championship, The American Express, Farmers Insurance Open, AT&T Pebble Beach Open, The Genesis Invitational, and the Barracuda Championship), two of which are within the Northern District of California. California hosts more PGA Tour golf tournaments than any other state. The Tour issued the first of its known anticompetitive threats to Player Plaintiffs and other players that is at issue in this lawsuit in La Jolla, California in January 2020. The PGA Tour also threatened Player Plaintiffs and other players with lifetime bans in Los Angeles, California in February 2022. The Tour has unlawfully restricted Player Plaintiffs from participating in events that compete against the PGA Tour, and its conduct has already hindered—and threatens to irrevocably harm—LIV Golf's ability to compete in the market.

27. This Court also may exercise personal jurisdiction over the PGA Tour under California Code of Civil Procedure § 410.10. The Tour operated, conducted, engaged in, and carried on a business venture in this state; committed tortious acts within this state that harmed Plaintiffs; and is engaged in substantial and not isolated activity within this state.

28. Venue is proper in this district under Sections 4 and 12 of the Clayton Act (15 U.S.C. §§ 15, 22) because the Tour may be found in this District and transacts business in this District through the management or operation of two golf courses, hosting and promoting two golf tournaments, and employing individuals in this District.

BACKGROUND AND FACTS

Overview of Professional Golf

29. The business and sport of professional golf are organized around tours and tournaments that combine players of comparable skill levels. These tours and tournaments bring golf competition to fans, financially compensate players, and provide opportunities for sponsors and advertisers to market their products to golf fans of these events.

30. The elite level of men's professional golf is comprised of (1) the PGA Tour, which sponsors and co-sponsors a series of tournaments scheduled from September to September each season; (2) four annual standalone "Major" tournaments sponsored by entities other than the Tour: the Masters,

the U.S. Open, The Open (or The British Open), and the PGA Championship; (3) two bi-annual team events (Ryder Cup and the Presidents Cup); (4) quadrennial Olympic competition; and (5) a handful of standalone events in which Tour members are only permitted to compete if they are given permission by the Tour Commissioner.

31. Until LIV Golf's nascent entry, the Tour was the sole elite golf tour in the United States and the world. Other elite professional golf events are standalone events (such as the Majors) that are not part of an organized tour that extends throughout a season. Professional golfers who qualify for membership on the Tour invariably compete on it, as it offers by far the largest tournament purses, the greatest opportunities to qualify for the Majors, the greatest opportunities for exposure in the golf world and beyond, and the most expansive opportunities to secure large endorsements from sponsors. As of the filing of the Complaint in this Action, all of the top 30 golfers in the world were active members of the Tour, except those golfers whom PGA Commissioner Monahan suspended or forced to resign. No other golf tour in the world is a reasonable competitive substitute for the PGA Tour. For example, the average purse of a PGA Tour event is roughly two-and-a-half times the average purse of a European Tour event, roughly nine times the average purse of an Asian Tour event, and 13 times the average purse of a Korn Ferry Tour event. The PGA Tour is the only golf tour shown regularly on broadcast television in the United States, and it earns vastly more in sponsorship, advertising, and broadcast revenue than any other golf tour.

32. The Tour and the four Majors are complements, not competitors. The Tour schedules no events during the weeks of three of the Majors and schedules only a minor event with a lower prize pool the week of The Open. Conversely, the Majors do not compete with the Tour; rather, they encourage and incentivize players to participate on certain tours (the PGA Tour in particular) by adopting eligibility requirements that open playing spots to golfers who have performed well on those tours. Similarly, LIV Golf does not compete with the Majors, as it schedules its Series and will schedule its League around the Majors.

33. The European Tour is a purchaser of professional golfers' services and a promoter of professional golf events, but it is effectively a feeder into and only a potential competitor to the PGA Tour. In the 1980s and early 1990s, the European Tour exerted some competitive pressure on the Tour

for certain star international players, including Seve Ballesteros, Nick Faldo, and Bernhard Langer, but that has not been the case for many years. Instead, when European Tour members qualify for Tour membership, they almost invariably elect to immediately become PGA Tour members. None of the Top 30 golfers in the world are only members of the European Tour. PGA Tour superstar Rory McIlroy, originally from Northern Ireland who began his career on the European Tour, has described the European Tour as "a stepping stone," explaining "you can go to America and play for more money and more ranking points. I think as well with the world ranking points, everyone out here, all of their contracts with sponsors, it's all about world ranking points. If players are getting paid more and earning more world ranking points, why would you play over there [European Tour]?" The actions of other European players who qualify for the Tour are consistent with McIlroy's views: they join the PGA Tour when they qualify.

34. European Tour Board Member Paul McGinley told *The Independent* that "the [European] Tour has accepted it is a junior partner to the PGA Tour now and will act as a feeder tour with more and more co-sanctioned events on both sides of the pond." McGinley continued: "We are there to enhance that and enable the PGA Tour to become the premier golf tour in the world. We realise that the [European] Tour will not be that, but we want to be very much . . . a kind of international arm and create pathways for players to come into the ecosystem via the European Tour and perhaps the Korn Ferry Tour and then graduate onto the premier tour in the world which is the PGA Tour." Likewise, European Tour Commissioner Keith Pelley told *The New York Times* that the European Tour agreed not to compete with the PGA Tour for player services as of November 2020.

35. Nonetheless, the European Tour remained a potential competitor to the PGA Tour, particularly as a potential partner of a new entrant that could challenge the Tour's dominance. Recognizing this potential competition from the European Tour and the substantial threat that a new entrant partnered with the European Tour would pose, the Tour entered into an illegal agreement with the European Tour as part of its scheme to ensure that the European Tour does not partner with any entrant (including LIV Golf) that might seek to become part of the golf "ecosystem." In a January 2020 strategy memorandum describing the PGA Tour's plan to foreclose new entry, Commissioner Monahan explained that this alliance with the European Tour was aimed at removing the European

Tour as a potential partner for a new entrant: "We have continued discussions with the European Tour about the potential to work more closely together, thereby removing the European Tour as a potential partner of" a new entrant. The Tour's strategy was thus designed to ensure no new potential competitor could emerge to challenge its monopoly.

36. The Tour executed Monahan's plan in November 2020, when it announced that it had purchased a minority stake in the European Tour's media production company, and that the two tours would work in concert with one another. As detailed below, since that alliance was formed, the European Tour has joined the PGA Tour in a group boycott aimed at punishing players to foreclose LIV Golf's entry. As set forth in more detail below, that group boycott violates Section 1 of the Sherman Act, under either a *per se* analysis or a Rule of Reason analysis, because it has harmed (and will continue to harm) competition and has no redeeming procompetitive virtue.

37. There are also a number of more limited lower-level tours that operate in the U.S. and throughout the world, but none is a meaningful competitor to the Tour. In fact, the Tour owns, operates, or controls a number of these lower-level tours, ensuring that they do not become meaningful competitors to the PGA Tour and that any bans imposed by the PGA Tour (and its co-conspirator, the European Tour) have a widespread impact on any affected players. These tours include:

- PGA Tour Champions – A tour for players over the age of 50, organized and managed by the Tour;
- Korn Ferry Tour – The PGA Tour's development tour in North America, through which players (like Plaintiff Uihlein) can qualify for the PGA Tour; organized and managed by the PGA Tour and described by the Tour as "the path to the PGA Tour";
- PGA Tour Latinoamerica – A tour with events in Latin America, through which players can qualify for promotion to the Tour, organized and managed by the Tour;
- Mackenzie Tour-PGA Tour Canada – A tour with events in Canada, through which players can qualify for promotion to the Tour, organized and managed by the Tour;
- PGA Tour Series-China – A tour with events in China, organized and managed by the Tour;
- Asian Tour – A tour with events principally in Asia;

- Japan Tour – A tour with events in Japan;
- Sunshine Tour – A tour with events in Africa; and
- KPGA Korean Tour – A tour with events in South Korea.

38. These tours offer considerably lower levels of competition, far lower prize pools, far smaller sponsorship and income opportunities, and far less, if any, broadcast exposure and viewership throughout most of the world. As a result, players who qualify for the PGA Tour join the PGA Tour. Simply put, until LIV Golf's entry, the PGA Tour had no competition as the premier professional golf tour in the United States and the world. If the PGA Tour succeeds in thwarting LIV Golf's entry, it will once again face no meaningful competition in the United States or the world.

39. While the on-course competition among participants in the elite professional golf services market is intense, the Tour itself faces no meaningful competition in the relevant markets. Until LIV Golf arrived on the scene, no other tour came close to the PGA Tour in terms of the money, exposure, quality of on-course competition for players, fan interest, advertising or sponsorship opportunities.

40. In addition, players in Tour events have a significantly greater opportunity than players in the lower-tier tours to qualify for spots in the Majors, Ryder Cup, Presidents Cup, and the Olympics by winning tournaments that provide entry into the Majors and that provide greater opportunity to earn more points in the world golf ranking system. A common way for players to qualify for the Majors is by being ranked within the Top 50 of the OWGR. While players in any tournament recognized by the OWGR can qualify for points, the OWGR awards points based on a tournament's competitive strength and the player's finishing position. Thus, players on the Tour are eligible to earn far more points than players on lower-tier tours. In addition, OWGR points are often used to determine the amount of money players receive from sponsors. Qualification for the Olympics is determined solely by OWGR rankings. Again, as PGA Tour player Rory McIlroy explained "it's all about world ranking points," and players can earn the most points on the PGA Tour.

41. The OWGR's Governing Board includes PGA Tour Commissioner Monahan, as well as the top executives from a number of the other bodies: the CEO of the European Tour (Keith Pelley), the General Counsel of the European Tour (Ben Bye), the COO of the European Tour (Keith Waters),

the CEO of the PGA of America (Seth Waugh), the Executive Director of the United States Golf Association (Mike Whan), the Senior Director of the Masters Tournament of the Augusta National Golf Club (Will Jones), the CEO of the R&A (Martin Slumbers), and the former CEO of the R&A (Peter Dawson). As set forth in detail below, the PGA Tour has entered into an unlawful agreement with the European Tour to foreclose competitive entry by locking arms in a group boycott to exclude from the world golf "ecosystem" LIV Golf, any players who play in LIV Golf events (including the Plaintiffs), and any other vendor, tour promoter, or other entity that partners with LIV Golf. And the Tour has leaned on the other world golfing bodies that have representatives on the OWGR Governing Board to do its bidding to heighten threats for associating with LIV Golf.

PGA Tour Structure

42. The Tour's charter promises it will act to "promote the common interests of professional tournament golfers." The Tour certified to the Internal Revenue Service that its non-profit purpose is to promote the sport of professional golf and the common interests of touring golf professionals.

43. The professional golfers who have earned the right to compete on the Tour are the most skilled and popular professional golfers in the United States and the world. Player Plaintiffs were active members of the Tour until they were given lengthy suspensions for playing in LIV Golf events. Players from the United States who are members of the Tour include Tiger Woods, Plaintiff Mickelson (now suspended), Justin Thomas, Jordan Spieth, Plaintiff DeChambeau (now suspended), Dustin Johnson (now resigned), Scottie Scheffler, Bubba Watson, and Brooks Koepka (now suspended). The PGA Tour's Media Guide also states that its membership includes 94 international players from 29 countries and territories outside the United States, including Justin Rose, Rory McIlroy, Sergio Garcia (now resigned), Jon Rahm, Adam Scott, Henrik Stenson (now suspended), Louis Oosthuizen (now resigned), Hideki Matsuyama, and Cameron Smith. They include some of the biggest names in sports and popular culture in the United States and the world.

44. All member golfers on the Tour are independent contractors, not employees of the Tour. There is no team or other employer to cover their many and substantial expenses as a professional athlete (e.g., coaches, caddies, trainers, therapists, travel, and lodging).

45. The Tour is managed by its Commissioner, Jay Monahan, who assumed the role on

January 2, 2017. Commissioner Monahan sits on the Board of the European Tour, the Governing Board of the OWGR, and the Board of Directors and Executive Committee of the International Golf Federation. Through these various roles, Commissioner Monahan assures that the Tour controls what it terms the world golf "ecosystem." Being blacklisted by the PGA Tour means effective expulsion from the golf "ecosystem" anywhere in the world.

Elite Professional Golf Has Stagnated Under the PGA Tour's Monopoly

46. As Commissioner Monahan acknowledged in a memorandum to the PGA Tour Policy Board (the "January 2020 Monahan Memorandum"), the PGA Tour is "the world's leading professional golf tour" and "is second to none due to the strength of its members." Thus, not surprisingly, virtually every golfer of public prominence worldwide is a member of the PGA Tour.

47. While the quality of play on the PGA Tour continues to flourish, the business of professional golf has stagnated under the Tour's monopoly. In the age of social media, the accessibility and relatability of elite professional golfers should lend itself to a boom in fan interest and viewership, as it has with other sports. The opposite has happened. Without any meaningful competition (prior to LIV Golf's entry), the Tour has failed to innovate and its product has grown stale. At the same time, the Tour's fanbase has shrunk and continues to age (the ***average*** age of a PGA Tour fan is 64), a trend sharply at odds with other major sports. Likewise, the Tour's compensation to its members fell behind compensation to other professional athletes, as measured by the share of revenue the players receive, reflecting the Tour's monopsony power over players' services.

48. Despite offering a stagnant product with a shrinking and aging fanbase, the Tour has used its monopoly position to extract substantially increased revenues from broadcasters and advertisers. As a monopsonist, however, the Tour has not passed those increased revenues through to its members. For example, the Tour's revenue has increased between 2011 and 2019 by 163 percent, yet the share of revenue it provided its members fell substantially. This is because there is no competition for players' services, allowing the Tour to direct its increased revenues into its bloated bureaucracy, extravagant facilities, and multimillion-dollar compensation and lavish perks for Commissioner Monahan and the other executives who run the monopoly, rather than sharing them with players. Tour data shows that average Tour purses grew an anemic 2.5 percent per year on average

from 2014 through 2019—from $6.62 million in 2014 to $7.47 million in 2019. By comparison, the total salary pool for other major professional sports leagues grew at much stronger rates over the same period—15 percent per year for the NFL, eight percent per year for the NBA, and four percent per year for the NHL, even though the 2014 base levels for the other professional sports were substantially higher.

49. The Tour has failed to offer its members compensation on par with professional athletes in other sports. The number one player on the Tour money list in 2019 was Brooks Koepka, with $9.68 million in tournament winnings. His winnings were the equivalent to the 129th highest paid NFL player, the 121st highest paid NBA player, and the 128th highest paid MLB player.

50. It is incongruous that Tour members' share of revenue lags so significantly behind those of players in other sports over the same period, because the Tour is a nonprofit entity that does not compensate players for their travel and other expenses, while the other major professional sports are for-profit enterprises with franchise owners. Unlike those other sports, however, which have free-agency systems that establish competition among franchise owners for players' services, the PGA Tour faced no viable competition before LIV Golf's entry. If LIV Golf's entry is foreclosed, the Tour will once again face no viable competition. As a monopolist, the PGA Tour does not compete for players' services, and the Player Plaintiffs' earnings have been and are suppressed.

51. The lagging compensation the Tour pays to its members is also striking in light of the expenses and risks that the players bear. Unlike professional athletes in other sports, professional golfers have to pay out-of-pocket to play on the Tour. Tour members pay for their own travel to and lodging at Tour events, and they pay for their coaches, therapists, trainers, and caddies. In addition, the players have no guarantees from the Tour—they earn nothing if they get injured, and they get nothing if they miss the cut. As a result, Tour members can end up with *negative* earnings for the year.

52. For example, Pat Perez described a fellow Tour member that "one year ma[d]e $22,000 on the Tour. He lost, he was in the hole about 90 grand. Mind you, he didn't play well and I get it, but how can he be out money? He earned his card and he was out like $90 grand that year."

53. A Tour player agent was quoted as saying: "What I think the average fan doesn't know is how much a player spends to go to work. . . . [T]hey spend so much money or reinvest so much

money in themselves and what they pay their team and what they spend on private airfare, renting homes and [paying] chefs and trainers and physical therapists and everything that goes into it. It's a very lucrative sport, but it's also a very expensive sport for them, unlike team-sport athletes who are flown around every place and supplied all those things." But without competition, elite professional golfers have historically had no option other than the Tour.

54. The Tour's monopoly (and monopsony) hold over elite professional golf is also reflected in its failure to innovate or retain (let alone expand) its audience. The Tour's television ratings have struggled. Out of 27 PGA Tour tournaments for which data are available, 16 tournaments (almost 60 percent) had viewership in 2019 that was below the five-year average for that tournament. In 2020 (before the COVID outbreak shut down the Tour), six out of seven tournaments had viewership that was below the five-year average for that tournament. The PGA Tour's fanbase is aging faster than any other sport, because it has failed to capture the attention of younger viewers. As Rory McIlroy (a PGA Tour Member, President of the Players Advisory Council, and PGA Tour Board Member) recognized, "competition is a good thing" and "any business needs competition for things to progress and move on." But the PGA Tour has faced no competition for many years, it has had no reason to innovate and grow its fan base, and its product has grown stale.

55. LIV Golf promises to bring competition and innovation to the market for the promotion of elite professional golf, which will benefit fans, broadcasters, advertisers, players, and all other stakeholders. As the long-standing monopolist facing competition for the first time in at least decades, the Tour has responded not by competing on the merits, but rather by engaging in a course of anticompetitive conduct designed to choke off LIV Golf's nascent competition, to the detriment of LIV Golf, the players (including Player Plaintiffs), fans, broadcasters, advertisers, and others.

Anticompetitive PGA Tour Player Regulations

56. Membership on the Tour is governed by the PGA Tour Player Regulations & Tournament Regulations ("Regulations"). Exhibit 1. Several interrelated provisions of the Regulations unreasonably restrict the independent contractor-players' ability to participate in competing events.

57. **Media Rights Regulation.** The Regulations contain two provisions relevant to this case that govern players' media rights. First, Section V.B.1.a. of the Regulations purports to grant to

the PGA Tour the media rights for players when they are participating in Tour-sponsored tournaments. Plaintiffs do not challenge that provision on the understanding that the Tour interprets it to apply to golfers only when they are playing in Tour-sponsored events. However, if the Tour relies on that provision to support its position that it can control Tour members' golf media rights even when they are not participating in a Tour event, the Plaintiffs would challenge that provision as being anticompetitive.

58. A second provision in the Regulations, Section V.B.1.b. (the "Media Rights Regulation") provides that "[n]o PGA Tour member shall participate in any live or recorded golf program without the prior written approval of the Commissioner, except that this requirement shall not apply to PGA Tour cosponsored, coordinated or approved tournaments, wholly instructional programs or personal appearances on interview or guest shows." Exhibit 1. The Tour broadly defines "golf program" to cover "any golf contest, exhibition or play that is shown anywhere in the world in any form of media now known or hereinafter developed." *Id.* According to the PGA Tour, this provision prevents all Tour members from participating in any golf program anywhere in the world, during any time of the year, *even when they are not participating in a Tour event.* According to the PGA Tour, the effect is a year-round prohibition on all Tour-member independent contractors from participating in any competing golf event anywhere in the world that is broadcast on any media. For example, when the Player Plaintiffs participated in a LIV Golf event in London that was streamed on the Internet (but not shown on any television network in the United States), the PGA Tour declared that the Player Plaintiffs had violated this rule.

59. The global prohibition on playing in competing events is not needed to create or improve any product or offering by the Tour, or to improve any aspect of any product for fans. For example, other provisions purportedly grant the Tour the media rights for Tour events in which the players are participating. The global prohibition serves only to prohibit the Tour's independent contractor players from playing in any competing events during weeks when they are not playing in Tour events.

60. The Media Rights Regulation is fundamentally inconsistent with the rights of the Player Plaintiffs as independent contractors, denying them the right to sell their own media rights to other bidders for their services. As a result, the Tour has deprived and continues to deprive the Player

Plaintiffs of the opportunity to pursue their profession, thus depriving them of income-earning, marketing, branding, and charitable opportunities.

61. Furthermore, this provision has injured and foreclosed entry by LIV Golf at its planned scale and harmed LIV Golf by imposing on it a cost basis that the Tour itself describes as "irrational." In addition, and critically, the Tour has compromised LIV Golf's ability to secure a television broadcast contract, a critical component of any sustainable elite golf tour. Even though LIV Golf has been able to convince some players to defy the Tour's threatened lifetime bans and to participate in LIV Golf events, the Media Rights Regulation has precluded LIV Golf from securing agreements to broadcast its tournaments because United States platforms are disinclined to sign a broadcast contract with LIV Golf while the Tour claims to control the media rights of the players participating in LIV Golf tournaments. As the PGA Tour has maintained, the Media Rights Regulation purportedly denies any competing tour the opportunity to broadcast tournaments to fans, an essential element of the business plan of LIV Golf or any other elite professional golf promoter. Unless it is enjoined, this provision will threaten the competitive entry of LIV Golf or any other potential competitor, which would both harm LIV Golf and also the Player Plaintiffs by denying them the opportunity to sell their services in a competitive market.

62. The anticompetitive intent of the Media Rights Regulation is exposed by the Tour's amendment of the definition of "golf program" in the provision in November 2019 in response to rumors of potential competitive entry. Whereas the prohibition had previously applied to "any golf contest, exhibition or play that is shown ***in the United States***," the prohibition was expanded to cover "any golf contest, exhibition or play that is shown ***anywhere in the world***." Exhibit 1 (emphasis added). Commissioner Monahan admitted this anticompetitive purpose in his January 2020 Memorandum: "Our current Tournament Regulations provide a significant hurdle for PGA Tour members with respect to contracting with Private Equity Golf under its proposed structure. . . In particular, the Tournament Regulations governing Conflicting Events and Media Rights/Releases would be applicable. . . .[I]n November 2019 the Policy Board ratified a revised Media Rights/Release regulation to ensure that all golf events are unequivocally covered on a global basis." The Tour did not negotiate with the Player Plaintiffs or any other Tour Member over its unilateral expansion of the Media Rights Regulation and

does not compensate them for the Tour's purported exclusionary control over their year-round global media rights. The expansion ensures that players are restricted from participating with a competing golf tour anywhere in the world.

63. The anticompetitive purpose of the Media Rights Regulation is further illustrated by comparison with the European Tour. The European Tour does not prohibit its independent contractor golfers from using their media rights when they are not playing in European Tour events. Rather. the European Tour's rules make clear that the players' grant of media rights applies *only* when they participate in European Tour events. During other weeks of the year, that grant of media rights "does not otherwise affect the Member's rights as an independent contractor in respect of their own image except as set out in these Regulations, including Regulation E5(c) [Ryder Cup] below." The European Tour also "recognises the individual rights of all Members operating as independent contractors. . . and will not unreasonably seek to restrain its Members from Participating in certain golf tournaments or events which are not sanctioned by the European Tour. . . ."

64. Some Player Plaintiffs requested releases from the Media Rights Regulation to play in the LIV Golf London Invitational. The PGA Tour denied their request (as well as those of other Tour members) and instead imposed lengthy suspensions on all players who participated in the event.

65. The Tour's anticompetitive use of the Media Rights Regulation is further demonstrated through its selective enforcement of the provision against other events that it does not deem to be competitive threats. For example, the Tour did not require members to obtain releases to participate in a Pro-Am golf competition called the JP McManus held in the Republic of Ireland from July 4–5, 2022, even though the event was broadcast in the United States, Europe, and throughout the world. In contrast, days earlier the Tour enforced the provision with draconian punishments when the Player Plaintiffs and others played in the LIV Golf Portland Invitational from June 30 – July 2, 2022. The key difference between the LIV Golf event and the JP McManus event is that the Tour views only LIV Golf as a competitive threat.

66. The anticompetitive purpose and effect of the Media Rights Regulation is clear. The incumbent monopolist has granted itself the right to foreclose the best golfers in the world from playing in events that create real competition, at its own discretion. And if golfers defy the Tour's threats. the

competitor that is able to secure the players' services is nonetheless foreclosed from securing contracts to broadcast the event on television or any other media.

67. **Conflicting Events Regulation.** A second exclusionary provision in the Regulations (Section V.A.2–3, the "Conflicting Events Regulation") grants Tour Commissioner Monahan with the discretion to prohibit the Player Plaintiffs and all other Tour members from playing in any other golf tournament anywhere in the world. Exhibit 1. Commissioner Monahan has exercised his discretion to foreclose competition from LIV Golf by preventing any Tour members from participating in any LIV Golf events, under penalty of career-threatening suspensions.

68. The Conflicting Events Regulation contains two components, each of which the Tour has employed to attack the Player Plaintiffs in its effort to foreclose LIV Golf's entry. First, the provision prohibits any Tour member from playing in any other golf tournament in North America during any week when the Tour sponsors or co-sponsors an event—without exception, even when the player is not playing in the Tour event. Because the Tour typically sponsors or co-sponsors events approximately 48 weeks per year, the Conflicting Events Regulation effectively prevents independent contractor Tour members from ever playing in non-PGA Tour events in North America. Second, the Regulations also prohibit the Player Plaintiffs and all other Tour members from playing in any events *outside* North America during weeks in which the Tour is sponsoring or co-sponsoring an event, unless the Commissioner grants a release. These releases are limited to three per year, and the Commissioner has complete discretion to deny them.

69. The releases the Commissioner can choose to grant do not permit meaningful competition by other tours. No releases are permitted for any event in North America. Even as to international events, the Commissioner retains "sole discretion" to deny a release. Exhibit 1. While the Tour has historically granted releases for international events, the Tour changed its practice once the threat of potential competitive entry became evident. For the LIV Golf London Invitational, the Tour denied releases for all members. In doing so, Commissioner Monahan clarified that the Tour denied the requested relief because LIV Golf is organizing a tour that competes with the PGA Tour in North America. The Commissioner's vice president wrote, "While releases have been granted in limited circumstances for one-off events outside North America or for events outside of North America

on tours based exclusively outside of North America, the event for which you have requested a release is the first in an eight-event "2022 LIV Golf Invitational Series" season, and more than half of them will be held in the United States." Furthermore, even if the Commissioner did not exercise his discretion to attack competition, the Regulation provides that a player may obtain only three Conflicting Event releases per season, and may do so only if he also plays in a minimum of 15 Tour cosponsored or approved tournaments. Also, the PGA Tour Commissioner is only required to give a player a decision 30 days in advance of the event, which makes it difficult for those planning international events to know which players will be permitted by the Tour Commissioner to play in the field.

70. The scope of this Conflicting Events Regulation is expanded by another provision in the Regulations which provides that in any week in which a Tour, PGA Tour Champions, Korn Ferry Tour, PGA Tour *Latinoamerica*, PGA Tour Canada, or PGA Tour China cosponsored tournament is scheduled, no Tour member may participate in any golf activity (including public exhibitions, clinics, and pro-ams) in the same geographic area without the prior approval of the Commissioner.

71. The Tour has made clear that it will weaponize the Conflicting Events and the Media Rights Regulation to attack competition. In January 2020, Commissioner Monahan told a meeting of PGA Tour members that the Tour will impose "strict enforcement of the Conflicting Event and Media Rights/Release rules" on players to prevent them from playing golf on a competing tour. When Player Plaintiffs participated in the LIV Golf London Invitational, Commissioner Monahan summarily suspended them within an hour of tee-off. Then, to expand the *in terrorem* effect of the suspension on all other Tour members, Commissioner Monahan immediately notified all PGA Tour members of his action.

72. The Tour has forced members of the Korn Ferry Tour—the developmental tour—like Plaintiff Uihlein, to be bound by the same Regulations and has enforced them to punish young developing professional golfers who play in LIV Golf events.

73. Furthermore, the Tour's argument that it is merely enforcing its membership rules and its assertion that there is some legitimate justification for those rules in preventing simultaneous Tour membership and participation in LIV Golf events are betrayed as mere pretext by the Tour's attacks on

golfers who play in LIV Golf events but are not PGA Tour members. For example, The PGA Tour has even banned golfers who are members in good-standing of the European Tour from the European Tour events it co-sanctions with the PGA Tour simply because they played in a LIV Golf event, including members of the European Tour who were granted permission to play in the LIV Golf event. Those golfers were not bound by the PGA Tour's membership rules (because they were not Tour members) and did not violate any Tour rule, and yet they were punished by the Tour for playing in a LIV Golf event. Similarly, the Tour has threatened college golfers—who are not Tour members and are not bound by any Tour rule—that they will not be permitted to participate in the pathway onto the Korn Ferry Tour or the PGA Tour if they play in any LIV Golf events.

74. The Tour's attack on LIV Golf is not the first time the Tour has used the Media Rights and Conflicting Events Regulations to attack nascent competitive entry. Before LIV Golf, the last meaningful threat of competitive entry to challenge the PGA Tour was the World Golf Tour, led by Greg Norman, which attempted to launch in 1994. In response, then-Tour Commissioner Tim Finchem wrote to Mr. Norman that the Tour would not grant conflicting event releases for "events held within the United States" and that it would only grant a media rights release if the World Golf Tour would pay a prohibitive sum to the PGA Tour. And even then, the Tour's releases would only be granted for events held on a Monday, Tuesday, or Wednesday. The Commissioner also threatened Tour members that they would lose PGA Tour membership cards if they joined the competing tour. Within days, the World Golf Tour collapsed. No other meaningful competitive threat emerged for more than a quarter century.

75. The Player Plaintiffs are members of the Tour (albeit now subject to lengthy suspensions) and remain subject to the Regulations. They requested releases from the Media Rights and Conflicting Events Regulations to participate in one or more LIV Golf events. The Tour denied their requests and imposed severe punishment when they exercised their rights as independent contractors to play in the LIV Golf events (detailed further below). While the PGA Tour's charter requires that the PGA Tour's acquisition of players' media rights be used "to promote the common interests of professional golfers," the Tour uses its acquisition of players' media rights to prevent other promoters from competing for its members' services.

76. Furthermore, after dozens of Tour members (including the Player Plaintiffs) sought Conflicting Events releases to participate in a LIV Golf event in London, the Tour amended its Conflicting Events Release request form to require its members to verify the event would not be shown on any medium in the United States—an impossible verification given modern technology. As the sequence of events makes clear, the Tour added that provision (the Contractual Assurance Confirmation) in response to LIV Golf's attempted competitive entry. This amendment makes it even harder for the Player Plaintiffs to exercise their independent contractor right to play for other promoters during their off-weeks.

The PGA Tour's Anticompetitive Response to Potential Competitive Entry in 2020

77. After the PGA Tour used its Media Rights and Conflicting Events Regulations to deter entry by the World Golf Tour in 1994, there was no attempted entry into professional golf for over 25 years. Then, in late 2019 and into 2020, a number of individuals and entities, some of whom later became involved with LIV Golf, attempted to launch a competing tour known as the Premier Golf League ("PGL"). The Tour orchestrated an anticompetitive response that blocked PGL's attempted entry.

78. PGL was a venture involving the Raine Investor Group SPV, World Golf Group ("WGG"), the Public Investment Fund of Saudi Arabia, and Performance 54. PGL developed a proposal for a new golf league, and it approached various golf stakeholders as part of its effort to launch a new elite professional golf tour to compete with the Tour.

79. PGL had discussions with player representatives in the fourth quarter of 2019 and began offering contracts to players in January 2020.

80. In January 2020, the Tour obtained copies of PGL's marketing materials and the packages the PGL offered Tour players.

81. In response, Commissioner Monahan distributed his January 2020 Memorandum acknowledging that the PGL "would be competitive to the PGA TOUR," and detailed the PGA Tour's "response" to "mitigate any impact" from this potential competitive threat.

82. In his January 2020 Memorandum, Commissioner Monahan explained that the principal means to defeat the threat of competition was to prevent players from joining the new league. As

Commissioner Monahan wrote, "[t]he impact that [the new league] can have on the PGA TOUR is dependent on the level of support it may receive from these players. Without this support, [the new league's] ability to attract media and corporate partners will be significantly marginalized and its impact on the TOUR diminished."

83. Commissioner Monahan pointed out that PGA Tour members would have "a significant hurdle" to join the new league because the Regulations prohibit players from joining a competing tour. In addition, Commissioner Monahan pointed to a rule he claimed would prevent players from competing in the team format proposed by the new league (based on a rule prohibiting "players having a financial interest in another player") and prevent players from competing in "conflicting events" except under limited circumstances.

84. In the 2020 memorandum, Commissioner Monahan also informed the Tour Policy Board that in November 2019, in response to rumors about potential competitive entry of an upstart international golf tour, the Tour had amended the Regulations to expand the Media Rights Regulation "to ensure that all golf events are unequivocally covered on a global basis." He also detailed plans to "further crystallize[] these restrictions."

85. Commissioner Monahan proposed two additional revisions to the Regulations, one that would tighten restrictions on conflicting events and a second that would prohibit players from having an equity interest in another's performance, a direct response to the PGL's team concept. On information and belief, these revisions were later adopted.

86. In addition, Commissioner Monahan stated that the PGA Tour has "communicated with key members of the Tournament Advisory Council," a group of PGA Tour tournament directors who advise the PGA Tour on its business conditions, "to prepare for a possible entrance of the [new league] to the marketplace." Commissioner Monahan similarly detailed that the PGA Tour has "liaised with each [Major Championships and Governing Bodies] organization to learn of its position regarding [the new league]." And the PGA Tour communicated with the OWGR regarding the new league's eligibility for OWGR ranking points.

87. The January 2020 Monahan Memorandum described the PGA Tour's efforts to secure commitments from across the global golf ecosystem to foreclose potential competitive entry.

Recognizing that the competitive threat from the new league would be greatly strengthened through a partnership with the European Tour, Commissioner Monahan stated that the PGA Tour has "continued discussions with the European Tour about the potential to work more closely together, thereby removing the European Tour as a potential partner of [the upstart competitor]." As described, the PGA Tour did in fact partner with the European Tour to prevent competitive entry.

88. Commissioner Monahan and the PGA Tour executed this anticompetitive plan to prevent players from joining the PGL and "remov[e]" others in the ecosystem as potential partners of the PGL, ensuring that the competitive threat from the PGL was thwarted before it could launch.

The PGA Tour Threatens Players Considering Joining The PGL

89. At a Tour players' meeting in January 2020 at Torrey Pines in La Jolla, California, Commissioner Monahan read aloud a message to Tour players similarly detailing some of his messages from his January 2020 Memorandum. In that meeting, Commissioner Monahan told PGA Tour players, "[t]he schedule for the [PGL] is designed to directly compete and conflict with the PGA Tour's FedExCup schedule, and to not conflict with [and be in addition to] the Masters, PGA Championship, U.S. Open and The Open Championship." Then, Commissioner Monahan threatened the Tour members with a ban from the PGA Tour if they joined the PGL or any other new league, stating: "If the Team Golf Concept or another iteration of this structure becomes a reality in 2022 or at any time before or after, our members will have to decide whether they want to continue to be a member of the PGA Tour or play on a new series."

90. As Commissioner Monahan made clear, the Tour demanded exclusivity from its independent contractor members, under penalty of a ban from the Tour.

91. In March 2020, Monahan repeated his threats to the players, stating that the Tour would "vigilantly protect [the Tour's] business model" from the competitive entrance of a new league.

92. The Tour's threats to the players' livelihoods had their intended effect. As one player was quoted anonymously in a leading golf publication in early 2020, "the risk of getting banned by the PGA Tour has to be an obvious concern." Many other Tour Members felt the same. As of 2020, the potential harm to the Player Plaintiffs resulting from a ban from the Tour made the idea of signing on to a new start-up too risky to bear. Nonetheless, many Tour members—recognizing that they were

disadvantaged by the Tour's monopsonistic control over the market—remained very interested in new playing opportunities in addition to the Tour.

The Tour Induces The European Tour Into a Group Boycott

93. As Commissioner Monahan admitted in his January 2020 Memorandum, the PGA Tour agreed with the European Tour to remove the European Tour as a potential partner of any new entrant.

94. Throughout 2020, the PGL had been negotiating with the European Tour to develop a partnership to co-sponsor events, which would have been a key step toward enabling the PGL to launch.

95. The co-sponsorship was important because it would have assured that PGL events would qualify players to earn points under the OWGR system. OWGR rankings are used to determine qualification for the Majors. Professional golfers are reluctant to join any tour that does not provide a path to qualify for the Majors.

96. Under the rules of the OWGR (on whose board Commissioner Monahan sits), a brand new tour purportedly cannot qualify for OWGR points for at least three years and must be sponsored by one of the six full members of the International Federation of PGA Tours (PGA Tour. European Tour, Asian Tour, Japan Tour, Australasia Tour, and Sunshine Tour). This establishes a barrier to the entry of any new tour: No elite professional tour can sustain in the long-term unless it provides players with a path to earn OWGR points, but no professional tour can secure points until it has existed for at least three years (absent an OWGR waiver of that requirement) and has sponsorship from one of the established International Federation members. To navigate through this Catch-22, the PGL sought to partner with the European Tour as part of its plan to enter and obtain a sponsor for its OWGR application.

97. Recognizing the PGL's need for a partnership with the European Tour, the PGA Tour forged an alliance with the European Tour through threats and financial incentives to put a bearhug around the European Tour and cut off a potential partner of the PGL. To obtain this agreement. the Tour threatened rule changes that would have made it more difficult for top European players who participate on the PGA Tour to play in European Tour events.

98. The PGA Tour's approach proved highly effective. In November 2020, the European Tour announced that it would not partner with the PGL. but instead it would enter into an alliance with

the PGA Tour. One condition of the agreement was that the European Tour not partner with or sponsor the PGL, thereby removing a key partner for the PGL's planned entry. Additionally, through the alliance with the European Tour, PGA Tour Commissioner Monahan secured a seat on the Board of Directors of the European Tour and the PGA Tour made a massive investment in the European Tour and its subsidiaries. The Tour's illegal alliance with the European Tour enabled it to require the European Tour to work in concert with the PGA Tour to prevent competitive entry. The Tour used its strategic alliance with the European Tour throughout the next two years to carry out its anticompetitive scheme to thwart LIV Golf's entry. The Tour entered into the illegal agreement with the illegal purpose to eliminate a competitor and future potential entrants.

99. The PGA Tour's efforts to thwart the PGL's entry were successful. The PGL never got off the ground, the venture as it existed disbanded, and the PGL was left with no real prospect of viability. In 2022, the PGL offered to partner with the PGA Tour, but under the Tour's control. The Tour summarily rejected the proposal.

100. And through its campaign to destroy the PGL, the PGA Tour had secured an anticompetitive agreement with the European Tour to foreclose any future potential competitive entrants.

LIV Golf Promises Long-Needed Competition

101. After the Tour destroyed PGL's viability and the venture disbanded, LIV Golf formed in 2021. LIV Golf is a new golf company whose goal is to improve professional golf for all stakeholders: fans, players, broadcasters, sponsors, and tournament hosts. It seeks to offer more of what fans, broadcasters, and sponsors want, including an exciting new format that will ensure heightened competition among golf's star players. LIV Golf seeks to modernize the professional game by allowing the game's superstars to realize their true market potential, while enhancing the professional golf marketplace with a dynamic, team-inspired format that will complement individual competition.

102. LIV Golf developed a new golf tour (the League) that would include 48 top golfers who would compete both as individuals and on 12 teams of four. The LIV Golf League's format is inspired

by the globally successful format for Formula 1 racing.[2] Twelve headline players would be player-owners, each holding an equity interest in their team and having substantial opportunities to guide their team to on-course and commercial success. Each LIV Golf League team of four was also set to have two substitute players, thereby offering 72 total players the opportunity to play. The player-owner of each team was to select four of the six players to play in a given week. By introducing an innovative format highlighting weekly head-to-head competition among the top players in the game, LIV Golf League's format would have created a more desirable product offering than the PGA Tour format, which has not changed for decades and has the lowest youth viewership of any North American major sport. LIV Golf League was going to include 54-hole tournaments with shotgun starts[3] and no cut, offering a faster-paced format with high levels of competition in every tournament, dramatically improving the fan experience.

103. The LIV Golf League format was designed as a fan-friendly alternative to the PGA Tour. The proposed "shotgun" format would reduce the number of hours required to watch a tournament and increase the excitement of the viewer experience. The team format would provide opportunities for team allegiances among fans and lead to multiple levels of competition within any given tournament. The LIV Golf League would also benefit sponsors, advertisers, and other stakeholders, as each team was to be independently commercialized with freedom to develop and select team sponsors and a home city or region. LIV Golf had strategies for improved broadcast output and an entertainment experience with more storylines and content.

104. The LIV Golf League was also set to improve conditions for players. In contrast to the PGA Tour's stagnating tournament purses (until LIV Golf emerged), with about half the players not making the cut and earning nothing in any given tournament, LIV Golf League was set to introduce the benefits of competition to players, including offering players greater economic benefits more

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[2] Formula 1 is the world's premier international auto racing series.

[3] Shotgun starts are when all golfers in a tournament tee off of different holes at the same time so that they finish their rounds around the same time, as compared to tournaments where all golfers tee off of the first hole and proceed to the eighteenth hole in consecutive fashion.

commensurate with their ability to attract revenue, equity ownership opportunities in their own success, and guaranteed income for every tournament in which they participated. LIV Golf would not require players to sign away their name, image and likeness rights for non-LIV Golf events. LIV Golf also would not foreclose players from playing in other tournaments during weeks in which LIV Golf is not playing, which would respect players' independent contractor status and allow them to participate in other tournaments and tours (to the extent not banned by the Tour).

105. The introduction of competition from the LIV Golf League would provide new and improved options for players, fans, and other stakeholders. Innovation would replace stagnation. Players, fans, sponsors, advertisers, and broadcasters would all benefit. The introduction of the LIV Golf franchise model to the sport of golf—with city, country, and regional affiliations—would engage more fans and increase commercial opportunities.

106. The LIV Golf League also aspired to enhance player opportunities more broadly and add meaningfully to the playing opportunities for professional golfers worldwide. It planned to provide qualification opportunities for players not initially selected and to embrace other tours, providing their players with pathways into the League. This format was designed to ensure a high level of competition throughout each season, as well as a fair and inclusive platform for golfers throughout the world, including younger development golfers.

107. If not for the anticompetitive conduct of the Tour, the LIV Golf League would have launched in 2022. LIV Golf had developed a ground-breaking business plan. It secured a chief executive officer and Commissioner—Greg Norman, a giant in the world of golf and a highly successful businessman in multiple industries—hired an experienced team of executives, assembled a board, and built out a full front office with dozens of employees and numerous industry consultants and contractors. LIV Golf partnered with the Asian Tour and invested several hundred million dollars in the Asian Tour to sponsor marquee events throughout the world and develop the sport at multiple levels on a worldwide basis. LIV Golf negotiated with broadcast companies, sponsors, venues, advertisers, vendors, and several other business partners who expressed interest in LIV Golf League. All these successful stakeholders indicated, however, that they would commit only when LIV Golf League had signed up the players needed to launch LIV Golf *and*, critically, secured the players' media

rights.

108. LIV Golf also sought to cultivate relationships with other tours in the existing golf "ecosystem," in order to ensure that there were further player pathways into and out of LIV Golf events (both within and across seasons) and to ensure that LIV Golf's entry would be additive and beneficial to the sport of golf throughout the world. For example, LIV Golf made offers to the Ladies European Tour and the LPGA, which rejected those offers due to the PGA Tour's opposition to LIV Golf, and due to the PGA Tour's board seats in those organizations and its control over the golfing world. As described below, the PGA Tour has thwarted LIV Golf's efforts by spearheading a group boycott designed to exclude LIV Golf from the "ecosystem" and punish any player who plays in any LIV Golf events.

The Tour's Anticompetitive Response to the Potential Entry of LIV Golf

109. In response to the potential entry of LIV Golf, the PGA Tour has used a carrot-and-stick approach to prevent the Player Plaintiffs and other PGA Tour Members from playing with LIV Golf.

110. The carrot is a loosening of the PGA Tour's purse strings to make somewhat greater compensation available to players than the Tour historically provided. This increased compensation to players in response to competitive entry is direct proof of the PGA Tour's monopsony power and the anticompetitive effects on players (including the Player Plaintiffs) from excluding competition. When the PGA Tour faced the meaningful threat of competitive entry for the first time in a quarter-century, it suddenly and substantially increased player compensation, thus providing direct proof of the Tour's monopsony power in suppressing player compensation below competitive levels.[4] These changes in the Tour's practices made only in response to nascent competitive entry are also indicative of the anticompetitive effects that will be imposed on the markets if the Tour is successful in defeating LIV Golf's nascent entry—once the Tour is free from competitive pressures, it will have both the ability and incentive to suppress player payments, as it did for many years before LIV Golf's nascent entry.

111. The stick used by the Tour is an array of anticompetitive actions by the PGA Tour to

[4] Despite these increases in compensation in response to LIV Golf's entry, PGA Tour compensation for players remains well below competitive levels.

destroy the careers and livelihood of players who participate in any LIV Golf events (including the Player Plaintiffs), their business partners and agents, and anyone who associates with LIV Golf or its players. It is particularly notable that as LIV Golf's threat of entry grew, and as the press reported increased player interest and player signings, the Tour ramped up the intensity of its punishment and threats. As Commissioner Monahan made clear in his January 2020 Memorandum, the Tour knew that if it could deter players from joining a new league, the new league's "ability to attract media and corporate partners will be significantly marginalized" and "its impact on the [Tour] diminished." Particularly for a 501(c)(6) organization that is required to further the interests of its members, the Tour's commitment to attack and destroy the careers of its members in order to defeat competition is striking. The Tour's conduct is also blatantly anticompetitive, serves no purpose but to harm competition, and cannot be justified under the antitrust laws.

112. **The carrot.** In April 2021, in direct response to rumors of LIV Golf's potential entry into the marketplace, the PGA Tour announced the "Player Impact Program," a $40 million bonus pool for the top 10 players on the PGA Tour who drive engagement with sponsors and fans. This new bonus pool, announced by the PGA Tour in response to potential competitive entry, is a clear indicator of the benefits of competition for players. As the PGA Tour recognized, competition in the labor market from LIV Golf will force it to raise compensation to the players or it will lose its talent to the new entrant. The PGA Tour's "Player Impact Program," however, was a half-measure, and offered far less than the compensation the players would earn in a competitive labor market.

113. In August 2021, in response to reports that LIV Golf's efforts to secure player commitments were gaining momentum and that the new entrant would offer substantially greater compensation, the Tour announced it would increase the purse sizes for tournaments and bonus pools for the 2021–2022 PGA Tour season by 18 percent compared to the purse size and bonus pools for the 2020–2021 PGA Tour season. As noted above, PGA Tour purse sizes had grown at an anemic low-single-digit rate for years, but when competitive entry was rumored, the Tour responded with an 18 percent increase for the next season. This is clear and direct proof of the Tour's monopsony power, the benefits of LIV Golf's competitive entry, and the harm to competition and the Player Plaintiffs if the Tour is permitted to destroy LIV Golf's nascent entry.

114. In October 2021, the Tour announced it would increase the purse size for the Players Championship by $5 million (from $15 to $20 million) and would provide players with a $50,000 bonus if they compete in 15 PGA Tour events.

115. In December 2021, the Tour published its increased purse size for 2022 (increasing from $367 million to $427 million in aggregate) including: (1) increasing FedEx Cup bonus pool from $60 million to $75 million; (2) increasing Top 10 Comcast Business Tour bonus from $10 million to $20 million; (3) increasing the Player Impact Program prize pool from $40 million to $50 million; and (4) making official the October 2021 compensation announcements.

116. In December 2021, the Tour also disclosed initial plans to copy LIV Golf's team-golf, international, prestigious, exclusive, no-cut, high purse, tournament format. Whereas the Tour and its spokespersons had previously used LIV Golf's new format as an excuse for justifying their opposition to the new entrant, the Tour's announcement that it planned to knock off LIV Golf's format revealed that any opposition based on the new format was merely pretext. And again, the Tour's response to LIV Golf's innovations demonstrates the benefits of competition.

117. In February 2022, the Tour leaked further information about its plan to copy LIV Golf's ideas in creating a fall series of team events with high purses and no cuts. With that announcement, the Tour also discussed further plans to increase player compensation, reflecting further competitive benefits of LIV Golf's nascent entry.

118. The increased purses and bonuses that the Tour offered in response to LIV Golf's anticipated entry were, however, a half-measure. They are materially less than the compensation the players would earn in a competitive labor market. In a nutshell: before LIV Golf's anticipated entry, the Tour's market power and the barriers to entry it had created allowed the Tour to compensate its players at levels substantially below what would exist in a competitive market. In response to LIV Golf's attempted entry, the Tour increased player compensation on numerous occasions, but still at less than competitive levels. For example, LIV Golf offers tournament purses between 200 percent to 300 percent higher than PGA Tour's purses, including guaranteed income to all participants. The lowest purse on the LIV Golf tour is millions of dollars greater than the largest purse ever offered by the PGA Tour. The point at which compensation becomes competitive will be determined only when the Tour

is enjoined from using its anticompetitive threats, retaliations, and restrictive contractual provisions, and has to compete on a level playing field with LIV Golf to secure players' services.

119. Nonetheless, even the early effects of the threat of competitive entry were striking. The Tour increased player compensation several times in response to the potential competitive entry of LIV Golf, totaling *$135 million* in a matter of a few months. This is clear and direct evidence of the Tour's monopsony power and the benefits of competition from LIV Golf. It is also direct evidence of the harm to competition that will result if LIV Golf's competitive entry is thwarted. Without the threat of competition from LIV Golf, the Tour would again face neither competition nor any reasonable likelihood of competition in the future. The Tour would then have both the ability and incentive to suppress player compensation to the sub-competitive levels that existed in the decades before LIV Golf launched.

120. In response to the increased compensation from the PGA Tour, players recognized that the threat of competitive entry prompted the changes:

i. Plaintiff Mickelson: "I'm appreciative of the fact that there is competition, and that leverage has allowed for a much better environment on the PGA Tour, meaning we would not have an incentive program like the PIP [Player Impact Program] for the top players without this type of competition. We would not have the increase in the FedEx Cup money. We would not have the increase in the Players Championship to $20 million this year if it wasn't for this threat."

ii. Joel Dahmen: "The PGA Tour . . . magically come up with $40 million for PIP and then there paying us all 50 grand to play 15 events, which is another X million dollars. That's like, $50 million they just magically found laying around overnight. The money is there. There's a way to do it."

iii. Jason Kokrak: "I'm curious to see if the PGA Tour would've ever increased any of that without this competition."

121. As PGA Tour Member and then-PGA Tour Policy Board Member Jordan Spieth said, "I think as a player overall it [competition from LIV Golf] will benefit us . . . . I can only say from my point of view I think that it's been beneficial to the players to have competition." PGA Tour member

Rickie Fowler said. "I think competition is a good thing, and in business, whatever it may be. . . . if you're trying to be the best, you want to find ways that you can be better than your competitors. It goes through sport, business, tours, whatever it may be." And Mr. Fowler noted that these new tours are coming about because the PGA Tour's stale product left players frustrated: "These tours or leagues, however you want to classify or call them, they wouldn't really be coming up if they didn't see that there was more opportunity out there. I've always looked at competition being a good thing. It's the driving force of our game."

122. Then, after LIV Golf had achieved some success with its first LIV Golf Invitational Series event and contracting with some popular golfers, the Tour managed to come up with yet more money to try to deter golfers from leaving the Tour for LIV Golf. On June 21, 2022, just days after LIV Golf London Invitational, the Tour copied LIV Golf's concept of limited field, no cut, team events with high purses, and announced its version of the events to begin in 2023. In that announcement, the Tour announced another increase of approximately $54 million to existing events and, in total, over $100 million purse increases across all of its events. In its announcement to its players, the Tour admitted the increase came from its "reserves." The Tour had the money, but didn't compensate the athletes or seek to offer innovative tournament ideas until LIV Golf introduced actual—albeit fragile—competition in the relevant market. On August 1, 2022, the Tour announced the purse amounts for the entire 2022–2023 schedule, which totaled a record $415 million in prize money in official events and another $145 million in bonuses—further showing how competition from LIV Golf caused the Tour to increase compensation for players.

123. **The stick.** The Tour's increased purses were not successful in deterring player interest in LIV Golf. As noted, the Player Plaintiffs and other players recognized that competition was good for the game of golf and for them, and the promise of true competition for their services fueled player interest in LIV Golf, which offered a more desirable format, more favorable terms for the Player Plaintiffs and other players (such as owning their media rights), and far greater compensation than the Tour was offering even with the recent increases in compensation. As a result, in a desperate effort to thwart competitive entry and protect its monopoly position, the Tour launched a campaign of threats against its own members, including the Player Plaintiffs, that promised career destruction for any

players who joined LIV Golf.

124. After news broke in April 2021 that LIV Golf made formal offers to a number of the top players in the world, on May 4, 2021, Commissioner Monahan addressed a meeting of Tour players (including the Player Plaintiffs) and informed the players that any golfer who joined LIV Golf would immediately lose their status as a PGA Tour member and face *a lifetime ban from the PGA Tour*. The players, including the Player Plaintiffs, were understandably intimidated by the Tour's threat.

125. The Tour intended its threat of lifetime ban to be a serious deterrent. It was. The prospect of leaving the Tour for an upstart golf promoter that could not guarantee its long-term existence, under threat of a lifetime ban from the incumbent monopsonist, was prohibitively risky. If banned from the Tour, the player would face a serious risk of being foreclosed from pursuing his chosen profession, a harrowing prospect for any golfer, and particularly younger golfers capable of 20 or more years of elite play.

126. In the 24 hours after the Tour announced that it would impose a lifetime ban on players who join LIV Golf, and after the Tour leaned on them for support, other entities in the golf "ecosystem" issued public statements reinforcing and expanding the Tour's threat:

- Seth Waugh, the CEO of the PGA of America, which sponsors the PGA Championship, publicly indicated the PGA of America's support for the PGA Tour and the European Tour in excluding competition from the "ecosystem of the professional game." He stated: "We are in full support of the PGA Tour and the European Tour regarding the current ecosystem of the professional game."
- Augusta National, which sponsors the Masters, issued a statement that "[t]he PGA Tour and European Tour have each served the global game of golf with honor and distinction. . . . As it has for many decades, the Masters Tournament proudly supports both organizations in their pursuit to promote the game and world's best players."
- A spokesperson for the R&A, which sponsors The Open, stated, "we have deep relationships with the [PGA Tour and the European Tour] and are supportive of them."

127. When the Tour learned that LIV Golf was continuing to talk with players' representatives (including the Player Plaintiffs' representatives) despite the threat of lifetime bans, the Tour threatened certain of the players' representatives, saying that it would harm the representatives' and the players' business interests if they continued to engage in discussions with LIV Golf. These threats to players' representatives highlight the pretext in the Tour's assertions that it is merely enforcing its own rules. No Tour rule grants it the authority to threaten the business of a player's agent or representative if a player participates in a LIV Golf tournament. And there is no conceivable procompetitive justification that could support such bullying. The Tour's actions are transparently anticompetitive, as they are aimed purely at kneecapping competition from LIV Golf before it can get off the ground and threaten the Tour's monopoly.

128. Furthermore, the Tour threatened—without basis—the Player Plaintiffs, their representatives, and other players and their representatives, that the Tour would withhold players' vested retirement funds if they were to join LIV Golf. Again, this threat is not justified under any Tour rule, but rather is targeted purely at undermining LIV Golf's competitive entry.

129. Several player representatives, including those of the Plaintiffs, were threatened that the Tour would use its connections to pressure their sponsors to revoke sponsorship agreements were they to join LIV Golf. Upon information and belief, the Tour successfully pressured sponsors to revoke player sponsorships. This conduct is not justifiable as the enforcement of any Tour rule, but instead is a transparent use of the Tour's muscle to attack players in order to undermine LIV Golf's competitive entry.

130. Through all of these actions, the Tour has harmed both the Player Plaintiffs and LIV Golf. Furthermore, the Tour's continued anticompetitive bullying aimed at any players or other parties who do business with LIV Golf (including the Player Plaintiffs) presents a severe threat of thwarting LIV Golf's nascent competitive entry. If not enjoined by the Court, the Tour's ongoing anticompetitive conduct threatens to irreparably harm LIV Golf, the Player Plaintiffs (both as direct targets of the Tour's anticompetitive conduct and as sellers into the market in which the Tour aims to secure its monopsony power), and competition itself.

The Tour Uses Its Strategic Alliance with the European Tour to Exclude LIV Golf and Its Partners from the "Ecosystem"

131. Before the PGA Tour formed an illegal alliance with the European Tour, the European Tour was a willing partner for prospective innovators and entrants into the global golf ecosystem. This included Golf Saudi and the Saudi investors who ultimately sponsored LIV Golf. For example, in a panel discussion in 2019, European Tour CEO Keith Pelley asserted that Saudi Arabia "are at the forefront of helping us develop the game." In fact, the European Tour partnered with Golf Saudi in launching the Saudi International, co-sanctioning the tournament for three years from 2019 to 2021.

132. While the Tour and those it has leaned on now use the Saudi sponsorship of LIV Golf as a weapon to smear LIV Golf and the golfers (including the Player Plaintiffs) who play in LIV Golf events and justify their attacks on the golfers, Mr. Pelley's statements reveal that attacks on the Saudi sponsorship of LIV Golf are pure pretext. The Tour had no problem entering into a partnership with the European Tour at the same time that the European Tour co-sanctioned the Saudi International and while Mr. Pelley gushed about the prospect of partnering with Golf Saudi to grow the sport. And the Tour has no problem accepting its own sponsorship money from companies that do billions of dollars in business with Saudi Arabia each year. An estimated 23 PGA Tour sponsors conduct regular business with Saudi Arabia each year—an estimated $40 billion dollars of business with Saudi Arabia. That the PGA Tour eagerly does business with these companies while criticizing golfers for playing on a tour primarily sponsored by the Public Investment Fund of Saudi Arabia is simply hypocrisy. And it exposes as pretext any notion that the Tour is orchestrating an attack on the players because the Tour is somehow unable to do business with anyone who has business connections to Saudi Arabia. The Tour's campaign to destroy these players is about defeating competition even at the cost of punishing its own members.

133. The European Tour's support for Golf Saudi changed starkly once the European Tour entered into its alliance with the PGA Tour and when Golf Saudi supported a potential competitive entrant to the PGA Tour.

134. The Tour's agreement with the European Tour to form a group boycott to block competitive entry that could challenge the PGA Tour's dominance is a matter of public record. For example, on May 4, 2021, the European Tour released a statement that "we are aligned with the PGA

Tour in opposing an alternative golf league, in the strongest possible terms."

135. Just over a week later, on May 12, 2021, European Tour Commissioner Keith Pelley wrote to representatives of Golf Saudi, noting its understanding that "Golf Saudi appears to be leading the current pursuit of a new golfing enterprise, referred to widely as the Super Golf League or [LIV Golf]." Commissioner Pelley wrote that the European Tour believed Golf Saudi was "talking to our members about joining this **rebel enterprise**." In an effort to deter Golf Saudi from supporting a new entrant, Commissioner Pelley threatened that the European Tour would refuse to co-sanction the Saudi International (which the European Tour had co-sanctioned since 2019) unless Golf Saudi "publicly denounce[d] [LIV Golf]."

136. Commissioner Pelley also made clear that his threats to Golf Saudi were in furtherance of the European Tour's anticompetitive agreement with the Tour to lock arms in a global "ecosystem" to foreclose LIV Golf's entry:

> We had, and indeed still have, aspirations of working with Golf Saudi in continuing to build the Saudi International into a world class event, and indeed look for other opportunities and have shared this view with our Strategic Alliance partners at the PGA TOUR.
>
> It is, however, impossible for us to continue those discussions while Golf Saudi is championing an alternative Tour that we believe is detrimental to both the European Tour, the PGA TOUR and global professional golf. I know PGA TOUR Commissioner Jay Monahan feels the same.
>
> We would therefore encourage you in the strongest possible terms to publicly denounce SGL as soon as possible which would allow us to reopen dialogue about the Saudi International and how Golf Saudi, operating ***inside*** the ecosystem, could resume the joint vision we began in 2017.[5]

137. The Tour and the European Tour also threatened other prospective partners of LIV Golf, making clear that they will seek to punish those who support LIV Golf by excluding them from the so-called world golf "ecosystem." For example, LIV Golf sought to enter into a relationship with the Asian Tour to co-sanction LIV Golf's tournaments to ensure that players would qualify for OWGR points (which, as described above, is essential to the long-term success of an elite level tour) and to establish a broader relationship for investment in the Asian Tour to grow the sport globally. In

[5] "SGL" in Commissioner Pelley's email stands for Super Golf League and refers to the entity and potential entrant that is now known as LIV Golf.

response, the European Tour sent a list of "Consequences" to the CEO of the Asian Tour—under the logos of the European Tour and the PGA Tour—that the Asian Tour would suffer if it entered into any partnership with LIV Golf. Those consequences included (1) eliminating a "[p]athway for Asian Tour members onto European Tour," (2) taking away "[e]xisting tournaments we co-sanction, totaling in excess of US$10m of prize money and 250 playing opportunities," (3) eliminating all future "co-sanctioned tournaments between the European Tour/PGA TOUR and Asian Tour" and (4) the Asian Tour would lose its "[p]osition within existing global golf ecosystem." Notably, the European Tour and Tour threatened not only to punish the Asian Tour directly, but to punish golfers on the Asian Tour by eliminating a "pathway for Asian Tour members onto [the] European Tour" and by removing prize money that had previously been available to Asian Tour members. Despite these threats, LIV Golf was able to offer constructive collaboration and investment in the Asian Tour sufficient to convince the Asian Tour to partner with LIV Golf in the face of the threats from the European Tour and Tour.

138. Despite these threats, LIV Golf and its sponsors continued in the effort to work constructively with existing golfing bodies to grow the sport. For example, on July 5, 2021, representatives of the entities that would sponsor LIV Golf met in Malta with leaders of European Tour. They presented an offer that would have made the European Tour a partner in innovating in the sport worth up to $1 billion for the European Tour. As reflected in the meeting minutes provided by a representative of the European Tour's title sponsor (DP World), the representatives from European Tour were "[g]rateful for the detailed work and preparation" and "[c]onfirmed" the LIV Golf series had "appeal and fit." However, the European Tour representatives "**stated main issue is US PGA mighty power and need to avoid a collision course between ET and PGA.**" Simply put, partnering with LIV Golf was good for the European Tour, its members, and the sport of golf, but the European Tour feared the "mighty power" of the PGA Tour, turning down the opportunity to partner with LIV Golf because of its "need to avoid a collision course between ET and PGA."

139. When Golf Saudi did not yield to Commissioner Pelley's May 2021 demand that it "publicly denounce" LIV Golf, the European Tour followed through on its threat to refuse to continue sanctioning the Saudi International. Then, in August 2021, the Tour announced through the press that it would not grant any PGA Tour members conflict releases for the Saudi International as it had done

since 2019, because the Saudi International was no longer sanctioned by the European Tour.

140. In response to the PGA Tour's threats to deny releases to play in the Saudi International, the players expressed their concerns:

a. Sergio Garcia: "When you get banned from playing, or whatever, it hurts the game. . . . People want to see us play all around the world and enjoy us wherever we go."

b. Rory McIlroy: "My view as a professional golfer is I'm an independent contractor, I should be able to play where I want if I have the credentials and I have the eligibility to do so. . . . Just the one thing I would worry about is if guys want to go to Saudi and they are going to make ten percent of their yearly income just by going and playing and [the PGA Tour is] restricting them from doing that, punishing them. that creates resentment for the players and that creates a problem between the tours."

c. Xander Schauffele: "I feel like there just needs to be some sort of counter in the way certain things work. I'll try and do what I need to do, and they'll tell me what I can and can't do at a certain point. but I feel like they need to counter. They can't just tell me no, you can't do this and then just kick rocks, kid. That's not really how I'd want to do things."

141. Despite the Tour's threat, the demand from the Tour members to play in this non-Tour-sanctioned event was so strong that over 30 players (including Plaintiffs Mickelson and DeChambeau) sought releases to play in the Saudi International. In response to this pressure from the players, the Tour granted the release requests under the Conflicting Events and Media Rights Regulations, but imposed conditions on the players (including Plaintiffs). The Tour informed players that the Regulations fully supported the denial of the players' requests but that it would permit players to play in the Saudi International provided that: (1) players who have not played in the AT&T Pebble Beach Pro-Am (a PGA Tour event that takes place annually in this district) at least once in the last five years must commit to playing Pebble Beach at least twice in the next three years; and (2) players who have played Pebble Beach at least once in the last five years must commit to play Pebble Beach at least once in the next two years. The Tour did not impose these conditions and restrictions when it granted past releases—it did so only after Golf Saudi refused the threat to denounce and boycott LIV Golf.

142. In a message to European Tour members, Commissioner Pelley made clear that the opposition to having players participate in the Saudi International, which the European Tour had co-sanctioned from 2019 to 2021, was an attack on competition from LIV Golf, which he described as "a clear existential threat." As Commissioner Pelley stated, "we have done everything we can to encourage the Asian Tour and LIV Investments to play within our ecosystem." letting golfers play for a partner of LIV Golf would "damage" our business. Commissioner Pelley was blunt in conceding that the tours are acting to protect their own business interests, which diverge from the interests of the players whom they are supposed to support: "We want the best for our members but at the same time will vehemently do everything we can to protect your Tour."

143. Similarly, on December 16, 2021, the PGA Tour and European Tour flexed the muscle of their group boycott and made good on their threats to the Asian Tour. After the Asian Tour accepted investment and partnership with LIV Golf, Asian Tour CEO Cho Minn Thant received a call from Martin Slumbers, the CEO of the R&A, which hosts The Open. Mr. Slumbers told Mr. Thant that the R&A would end its years-long practice of giving the Asian Tour Order of Merit winner entry into The Open because the PGA Tour and European Tour, with whom the R&A was aligned, were displeased about LIV Golf's investment in the Asian Tour. Days later, the media confirmed the R&A would revoke the Asian Tour Order of Merit winner's entry into the Open, identifying punishment of LIV Golf as the basis for harming individual Asian Tour players. Once again, the Tour and those it was pressuring were attacking LIV Golf and its partners by punishing golfers who had any association with LIV Golf.

144. As LIV Golf's player recruitment efforts continued, the Tour encouraged the European Tour to tighten its grip on its members and ensure they would not leave the "ecosystem" to play with LIV Golf. In threatening and imposing punishment on European Tour members, Commissioner Pelley made clear that it was doing so (1) pursuant to its agreement with the PGA Tour, (2) in an effort to thwart competition from LIV Golf, and (3) that the punishments were aimed at coercing players to act contrary to their individual interests. For example, on April 19, 2022, Commissioner Pelley wrote to European Tour members, reminding them of the European Tour's Conflicting Events Regulation. He stated: "Conflicting events, regardless of how attractive they might appear to you personally,

potentially compromise our efforts in these areas and could significantly hurt your Tour in both the short and long term." He continued: "Please, therefore, continue to bear this bigger picture in mind, particularly considering some of these conflicting events in 2022 are scheduled directly opposite some of our most prestigious 'heritage events.'" He also stated: "We are unwavering in our belief that working together with PGA Tour . . . will make our sport less fractured and benefit global golf."

145. As part of their concerted efforts to tighten the reins, on June 24, 2022, the PGA Tour and European Tour suspended golfers who participated in the initial LIV Golf tournament from their three co-sanctioned events—the Scottish Open, Barbasol, and Barracuda Championships—and fined the suspended golfers €100,000. They further threatened to double the sanctions for future violations (which all participants in the second LIV Golf tournament in Portland, Oregon had already committed).

146. Just four days later, on June 28, 2022, the PGA Tour and the European Tour announced a further agreement to solidify their strategic alliance whereby: (1) the PGA Tour invested more in the European Tour Productions (the European Tour's media arm) to take a 40 percent share; and (2) the PGA Tour arranged for the European Tour to be a direct feeder tour into the PGA Tour, with the top 10 performing golfers on the European Tour earning PGA Tour cards. In a press conference announcing the agreement, when asked whether players who play in LIV Golf events could earn the tour cards, European Tour Commissioner Pelley and PGA Tour Commissioner Monahan both struggled to answer, until Commissioner Pelley conceded their plan to impose total bans on golfers who participate in LIV Golf events: "This won't come into place until next year and I honestly don't think we'll have that problem by then" because LIV Golf players will not be permitted to play on the European Tour to earn a PGA Tour card.

147. The PGA Tour's agreement with the European Tour to form a group boycott against LIV Golf and its players is further reflected in the punishments the European Tour imposed on its members who participated in LIV Golf events. The European Tour has historically considered playing in a competing event without a release to be a minor breach of its Regulations, with a punishment of €12,000 for a violation. In contrast, when its members participated in the first LIV Golf event, the European Tour issued punitive sanctions at the behest of the Tour, including fines of approximately €100,000 and suspensions from the three events the European Tour co-sanctions with the PGA Tour

(but not other European Tour events not co-sanctioned by the PGA Tour), and threatened that participating in further LIV Golf events would lead to double fines and suspensions. To engineer these punishments, the European Tour first amended its regulations twice—after entering into the illegal alliance with the PGA Tour—to make the relevant violation of the European Tour's Regulation a "Serious Breach," which would give the Commissioner discretion to punish players and expand the scope of the Regulation.

148. On July 1, 2022 three of the golfers suspended from the co-sanctioned events, Ian Poulter, Adrian Otaegui, and Justin Harding, sued the European Tour to stay their suspensions and allow them to participate in the Scottish Open. The players challenged the European Tour's sanction process as unfair and partial, and challenged the legality of its regulations. They also challenged the sanctions as contrary to the European Tour's interest, as it was clear the European Tour was acting in concert with the PGA Tour.

149. The matter was referred to an arbitrator (pursuant to European Tour rules and an agreement between the players and the European Tour to stay the players' suit), who granted the players' request to stay their suspension from the Scottish Open until the merits of their appeal could be heard before an independent panel. The arbitrator reasoned that European Tour CEO and Commissioner Keith Pelley undertook "no process . . . close to replicating the guidelines for a disciplinary hearing" and "was on record as having made strong adverse public statements on LIV," and, as the European Tour stated itself, he was "'necessarily partial.'"

150. On July 1, 2022, the PGA Tour demonstrated its power over the European Tour, and laid bare its anticompetitive motives in banning participants in LIV Golf events from its tournaments, by banning from the co-sanctioned events in the United States (the Barbasol and the Barracuda) all European Tour golfers in good standing who had played in the LIV Golf London Invitational. These golfers were not members of the PGA Tour, and thus could not have violated any PGA Tour rule. And even though they are members of the European Tour, they had not violated any European Tour rule

because they were permitted by the European Tour to participate in the LIV Golf event.[6] Nonetheless, the PGA Tour barred these golfers from playing in co-sanctioned events, because the PGA Tour has a policy of total foreclosure of LIV Golf players from any of its events.

151. On July 20, 2022, in furtherance of its agreement with the Tour to boycott LIV Golf and those who associate with it, the European Tour removed Henrik Stenson as the European Team's 2023 Ryder Cup Captain because he joined LIV Golf.

PGA Tour Leans on the Majors to Do Its Bidding Against LIV Golf

152. The Tour's threats to impose bans on players who join LIV Golf are vastly strengthened if the ban encompasses not only PGA Tour events, but also the four annual Major Championships—the PGA Championship, the Masters, the Open, and the U.S. Open—as well as the biannual Ryder Cup. Participating in and winning the Majors and the Ryder Cup are the ultimate goal of most top professional golfers. And, in turn, one of the goals of playing on a tour each year is to secure qualification to the Majors and the Ryder Cup. The Tour is aware that if it can foreclose LIV Golf players from having access to these events—or even create enough credible doubt about whether participation in LIV Golf will end a player's chance of playing in those events—LIV Golf will find it prohibitively difficult to sign and sustain a critical mass of players to field a competitive elite-level tour. Accordingly, the Tour has pressured and encouraged the Major organizations to join its group boycott and to prevent LIV Golf from entering the global golf ecosystem.

153. For example, PGA Tour Commissioner Jay Monahan wrote in his January 2020 Memorandum: "We have liaised with each [Major] organization to learn of its position regarding Private Equity Golf."

154. As with the Tour's ramping up of its player threats over time as the threat of LIV Golf's competitive entry has grown, the Tour's pressure on the Major organizations has grown over time as well. For example, as part of its strategy to pressure the Majors into doing its bidding, in July 2022, the Tour had its 2022 Presidents Cup Captain and Hall of Fame Golfer Davis Love III use his position

[6] The golfers did not need a release from the European Tour to play in the LIV Golf London event because they had not qualified for the conflicting event on the European Tour. Thus, the golfers had not breached any European Tour rule and were not subject to any discipline from the European Tour.

and influence to publicly encourage Tour members to enter into a group boycott of the Majors if the Majors do not ban all players who have played in LIV Golf. As Mr. Love stated, in encouraging a *per se* unlawful group boycott among Tour members: "Well, here's the biggest lever; and it's not the nice lever. But if a group of veterans and a group of top current players align with 150 guys on the Tour, and we say, 'Guess what? We're not playing,' that solves it, right? If LIV guys play in the U.S. Open, we're not playing. If they sue in court, and they win, well, we're not playing. You know, there won't be a U.S. Open. It's just like a baseball strike." As Mr. Love's comments make clear, the Tour and its representatives view themselves as being above the law, exempt from the requirements of the Sherman Act, and free to engineer a self-help group boycott aimed at frustrating any injunction entered by this Court.

155. *The PGA Championship and the Ryder Cup.* The PGA of America is a separate entity from the PGA Tour, which organizes the PGA Championship and co-organizes the Ryder Cup along with the European Tour. The PGA of America has a representative, President Jim Richerson, on the PGA Tour Policy Board. On May 4, 2021, during a time when LIV Golf was gaining momentum in attracting players' interest and on the eve of the PGA Championship in South Carolina, the CEO of the PGA of America, Seth Waugh, stated publicly that the PGA of America was aligned with the Tour in opposing LIV Golf's competitive entry. Specifically, he said, "We [PGA of America] are in full support of the PGA Tour and the European Tour regarding the current ecosystem of the professional game." Then, two weeks later, Mr. Waugh said that the PGA of America would ban players from future PGA Championships and the Ryder Cup if they joined LIV Golf. Specifically, Mr. Waugh said, "If someone wants to play on a Ryder Cup for the U.S., they're going to need to be a member of the PGA TOUR—excuse me, a member of the PGA of America, and they get that membership through being a member of the TOUR. . . . It's a little murkier in our championship, but to play from a U.S. perspective you also have to be a member of the TOUR and the PGA of America to play in our championship, and we don't see that changing." Mr. Waugh went on to state, "I believe the Europeans feel the same way. And so I don't know that we can be more clear than that." Mr. Waugh's public threat inaccurately characterized the PGA of America's Constitution, as there are many ways to be a member of the PGA of America beyond being a member on the PGA Tour.

156. At the September 2021 Ryder Cup, PGA of America representatives privately threatened golfers and their representatives that they would be banned from future Ryder Cups and the PGA Championship if they joined LIV Golf.

157. Mr. Waugh repeated the threat a year later at the 2022 PGA Championship. He said, "As I said, we're a fan of the current ecosystem and world golf ranking system and everything else that goes into creating the best field in golf. Right now we really—I don't know what it'll look like next year. We don't think this [LIV Golf] is good for the game and we are supportive of that ecosystem. We have our own bylaws that we will follow towards those fields." He was then asked by the media, "I'm sorry do your bylaws preclude letting those players [players who played in LIV Golf] play?" Mr. Waugh responded, "Not specifically, but our bylaws do say that you have to be a recognized member of a recognized Tour in order to be a PGA member somewhere, and therefore eligible to play."

158. And then, in June 2022, the 2023 PGA of America Ryder Cup Captain Zach Johnson repeated the same unfounded threat and expanded it to suggest that Plaintiffs will not be eligible for the 2023 Ryder Cup. When he was asked by the media whether a player who plays in LIV Golf will be eligible for his 2023 Captain Picks, he responded, "The way that we're members of the PGA of America is through the PGA Tour. I'll let you connect the dots from there."

159. *The Open.* The R&A, the global golf rules organization and promoter of The Open Championship, has taken multiple actions to support the PGA Tour's efforts to exclude LIV Golf. For example, the R&A has taken away the Asian Tour's Order of Merit winner's entry into the Open Championship in order to deter the Asian Tour from partnering with LIV Golf. Similarly, the CEO of the R&A (Martin Slumbers) and the Chairman of Augusta National (Fred Ridley) called the CEO of the Asian Tour (Cho Minn Thant) to threaten consequences relating to the Asian Tour's position in the current "ecosystem" if the Asian Tour continued to support LIV Golf and its LIV Golf Invitational Series. More recently, in July 2022, the R&A demonstrated its alignment with the PGA Tour by publicly disinviting two-time Open Championship winner Greg Norman from champions events at the 150th Open Championship because he is the CEO of LIV Golf. The R&A also informed Mr. Mickelson he was not welcome. And, at the Open Championship in July 2022, R&A CEO Martin Slumbers suggested that players who play in LIV Golf may not be eligible or qualify for future Open

Championships, and that it would be harder for them to make it in the tournaments.

160. *The Masters.* Augusta National, the promoter of The Masters, has taken multiple actions to indicate its alignment with the PGA Tour, thus seeding doubt among top professional golfers whether they would be banned from future Masters Tournaments. As an initial matter, the links between the PGA Tour and Augusta National run deep. The actions by Augusta National indicate that the PGA Tour has used these channels to pressure Augusta National to do its bidding. For example, in February, 2022 Augusta National representatives threatened to disinvite players from The Masters if they joined LIV Golf. In addition, Augusta National Chairman Fred Ridley personally instructed a number of participants in the 2022 Masters not to play in the LIV Golf Invitational Series. Plainly, these threats to top players served no beneficial purpose, as they would only serve to weaken the field in the Masters.

161. In May, 2022 the PGA Tour also encouraged Augusta National representatives to attend Tour Player Advisory Council meetings to discuss ramifications for players participating in LIV Golf events, further demonstrating how the Tour has leaned on Augusta National to aid it in dissuading golfers from joining LIV Golf.

162. And, when LIV Golf CEO Greg Norman asked Mr. Ridley if he would meet with him to understand LIV Golf's business model and discuss how LIV Golf could operate in the existing professional golf world, Mr. Ridley declined the invitation—another example of LIV Golf trying to work with existing golfing entities and being turned away before even getting an opportunity to show them what LIV Golf is about.

163. In addition, the Tour and others are utilizing their positions on the Governing Board of the OWGR to create enough credible doubt about whether LIV Golf will be eligible for OWGR points and whether players who participate in OWGR will be able to earn points playing in LIV Golf tournaments.

The Tour Announces Policy to Permanently Ban Players Who Join LIV Golf

164. Between January 2020 and February 2022, the Tour increased the severity of its threats of punishment to any player who would consider joining LIV Golf, as well as threats to the players' representatives and entities involved in golf sponsorship and advertisement. These threats, both individually and in combination, were anticompetitive acts that harmed Plaintiffs and tortiously

interfered with the Plaintiffs' business relationships.

165. With multiple press reports in early 2022 describing LIV Golf's forward momentum and reporting that LIV Golf was nearing the critical mass needed to launch its tour, the Tour once again increased its threats to the players. In February 2022, the Tour gathered the agents of players (including the Player Plaintiffs' agents) who were assembled for a Tour event in Los Angeles, California and informed them that the Tour would impose a lifetime ban on any player who signed with LIV Golf. This threat was a significant deterrent for players to take the risk to join LIV Golf. At that time, LIV Golf had not held its first tournament, and there was simply too great of a risk of career destruction in the face of such unlawful and brazen threats. For example, one star player, who had been in favor of joining the LIV Golf League before the threat, stated that younger players were "s***ting in [their] pants" in response to this threat, and that he was not sure how LIV Golf could get the players it needed with the Tour's lifetime ban threat.

166. On February 22, 2022, Commissioner Monahan addressed a meeting of Tour players at the Honda Classic and reiterated that any player who joined LIV Golf would receive a lifetime ban from the Tour. According to an article quoting an anonymous player present at the meeting, Commissioner Monahan told players that if they were going to play in the league operated by LIV Golf to "walk out that door now" and "made the ban seem like it was in all capital letters."

167. The Tour's threats of punishment and career destruction greatly affected LIV Golf's ability to sign enough elite professional golfers to fill out its League. Some players (including Plaintiff DeChambeau) who had previously signed contracts with LIV Golf were forced to publicly profess loyalty to the Tour. Other players who had previously agreed in principle to all terms with LIV Golf informed LIV Golf that they now could not sign, and instead publicly professed loyalty to the Tour. Players who had been enthusiastic about joining LIV Golf informed LIV Golf that they regrettably could not join in light of these threats. Just as Commissioner Monahan had predicted in his 2020 Memorandum outlining the PGA Tour's plan to attack a new entrant, a competing tour without player support would prove unable to pose a competitive threat to the PGA Tour.

168. The Tour's lifetime ban policy had its desired effect, as LIV Golf League's 2022 launch plan died. LIV Golf was injured by having its launch plans derailed. And Player Plaintiffs were injured

by losing the opportunity for increased playing and income opportunities and sustained competition for their services.

LIV Golf Invitational Series

169. Forced to scrap its plans for a 2022 launch of the League, LIV Golf regrouped and developed a substantially scaled-down launch plan that became known as the LIV Golf Invitational Series. The Invitational Series did not include franchised teams or other planned League features, and promised two fewer events in 2022. Instead, on March 16, 2022, LIV Golf announced that the Invitational Series would feature an eight-event series showcasing a new golf format starting in June 2022. The format features both individual and team play, and offers more than $250 million in prize purses. The first seven LIV Golf Invitational Series events each carry a purse of $25 million, comprised of $20 million in individual prizes (all players in the field earn a share) and $5 million, split among the top three teams. Following the first seven LIV Golf Invitational Series events, an Individual Champion will be crowned and a $30 million bonus prize will be split among the top three individual performers throughout the series. The eighth LIV Golf Invitational Series event will be a Team Championship that will provide an additional $50 million in total prize funds. The LIV Golf Invitational 2022 schedule started with the LIV Golf London Invitational on June 9–11, 2022, the LIV Golf Portland Invitational at the Pumpkin Ridge Golf Club on June 30–July 2, 2022, and the LIV Golf New York Invitational in Bedminster, New Jersey on July 29–31, 2022. The remaining LIV Golf scheduled events are:

- Sept. 2–4: The International – Boston, Massachusetts
- Sept. 16–18: Rich Harvest Farms – Chicago, Illinois
- Oct. 7–9: Stonehill Golf Club – Bangkok, Thailand
- Oct. 14–16: Royal Greens Golf Club – Jeddah, Saudi Arabia
- Oct. 28–30: Trump Doral Golf Course – Miami, Florida

170. During weeks in which there is no LIV Golf Invitational Series tournament, LIV Golf encourages players to play wherever they choose, including Tour events, other events on other tours, or events that might be created in the future (and which are currently prevented from developing because of the Tour's restrictive rules).

171. While LIV Golf has moved forward with its scaled-down plans for the Invitational

Series, it has incurred financial losses that were far more severe than it would have incurred if its original launch plans had not been derailed by the Tour's anticompetitive conduct. These losses are partly due to the supracompetitive increases to player-acquisition costs it has incurred in light of the Tour's anticompetitive conduct, and partly due to the loss in revenue-generating opportunities as a result of the scaled-down nature of the Invitational Series in comparison to the original plans for the League.

Efforts to Prevent and Harm LIV Golf's Invitational Series

172. On March 15, 2022, LIV Golf Commissioner and CEO Greg Norman sent emails regarding the LIV Golf Invitational Series to approximately 250 top professional golfers (including Plaintiffs). The Player Plaintiffs were excited that LIV Golf was going to host tournaments despite the obstacles the Tour put in its path. On March 23, 2022, LIV Golf formally invited the same group of players to participate in the LIV Golf Invitational Series. Several players (including the Player Plaintiffs) reached out to LIV Golf to say that they were interested in playing in the Invitationals, but they were concerned about doing so in light of the Tour's threats to players. The Player Plaintiffs remained interested in LIV Golf and continued discussions, as did others.

173. The Player Plaintiffs and many other players (at least 170 golfers) filed entry applications for LIV Golf Invitational Series' first event. The Player Plaintiffs and, on information and belief, some 80 Tour members sought conflicting events and media rights releases from the PGA Tour under the Conflicting Events and Media Rights Regulations.

174. In furtherance of its monopoly and its monopsony and its illegal agreement with the European Tour, on May 10, 2022, the Tour denied *all* requests from Tour members to participate in LIV Golf Invitational Series events. The denials were striking, because the Tour has historically granted releases to players to permit them to participate in events outside the U.S., but in this case the Tour issued an across-the-board denial for an event taking place in London. In its letter to the players denying the release requests, the Tour made clear that the reason it was departing from past practice was that LIV Golf planned to compete against the PGA Tour in North America:

> While releases have been granted in limited circumstances for one off-events outside North America or for events outside of North America on tours based exclusively outside of North America, the event for which you have requested

a release is the first in an eight-event "2022 LIV Golf Invitational Series" season, and more than half of them will be held in the United States.

175. There is no possible procompetitive justification for the denial, particularly because—as the Tour acknowledged—it would have granted the release for another event or tour that was not trying to compete against the Tour. This was simply an effort to defeat competition.

176. Then, unsatisfied with prohibiting all current Tour members from participating in LIV Golf events, the Tour extended its threat college golfers, explaining that if they played in any LIV Golf events they would be banned from entry into the PGA Tour University program, which provides top college golfers entry into the Tour's developmental tour (Korn Ferry Tour). Again, this action served no procompetitive purpose, nor could it plausibly be justified as an enforcement of any Tour member regulations, because the college golfers threatened by the Tour are not Tour members and are not bound by any Tour rules or regulations. Instead, this was simply aimed at thwarting competition by preventing LIV Golf from being able to secure top golfers to participate in its tournaments.

177. On May 17, 2022, the European Tour acted in concert with the Tour and sent notices to its members denying them permission to participate in the LIV Golf Invitational Series event in London. The European Tour stated that the basis for the denial is that the LIV Golf Invitational Series event will compete with its European Tour event. Notably, however, the European Tour historically did not deny golfers' requests to participate in conflicting events.

178. In response to these threats, LIV Golf was forced to commit to substantial up-front payments to a number of top golfers to convince the players to take on the risk of punishment from the Tour, as well as the risk of lost sponsorships and other injuries orchestrated by the Tour. These substantial payments have greatly increased LIV Golf's costs of launching its Invitational Series, and, if the Tour's conduct is not enjoined, the ongoing cash outlays significantly threaten the long-term viability of LIV Golf. Notably, however, while the increased payments have harmed LIV Golf, they also have not fully compensated the Player Plaintiffs for all of the injuries they have suffered as a result of the Tour's anticompetitive conduct, including both uncompensated monetary injury and ongoing irreparable injury in the form of lost professional playing and other opportunities that cannot be compensated through monetary relief. As such, both the Player Plaintiffs and LIV Golf have been injured and continue to suffer irreparable injury as a result of the Tour's anticompetitive conduct.

179. On May 31, 2022, LIV Golf announced the field for its London Invitational. In that announcement, the field included 16 PGA Tour players, 22 European Tour players, three promising young amateurs, and a number of other top players from across the world. Players were very interested in the product. But it was not the quality of field LIV Golf set out to have and was not the field of players LIV Golf would have had but for the PGA Tour's unlawful regulations and threats.

180. Tour members who agreed to participate in the LIV Golf London Invitational publicly expressed the difficulty of doing so in light of the Tour's conduct.

a. For example, the agent for PGA Tour member Dustin Johnson released a statement that: "Dustin has been contemplating this opportunity off-and-on for the past couple of years. Ultimately, he decided it was in his and his family's best interest to pursue it. Dustin has never had any issue with the PGA Tour and is grateful for all it has given him, but in the end felt this was too compelling to pass up."

b. Plaintiff Matt Jones averred that participating in the LIV Golf Invitational Series "was a good business opportunity for me and my family. I like the concept, the idea of the three-day tournaments. [and] the team format aspect of things is great. I have thought about that [threat of punishment from the PGA Tour], which is something I had to weigh. I don't think banning players is a good look for the PGA Tour, or for golf in general."

c. PGA Tour member Graeme McDowell stated, "[t]he perceived consequences are definitely concerning. It was an exceedingly difficult decision. It is a difficult decision as a player when there's so many unknowns. We do not know what the reaction is going to be. It just boils down to the fact that I am a business and I have operated all over the world for 20 years. This is a compelling opportunity."

181. Other Tour members who agreed to compete in the LIV Golf London Invitational welcomed the innovations LIV Golf brought to the game. Player Plaintiff Swafford stated that LIV Golf's "[s]chedule is very enticing to a guy who has two small kids. I think the format, the team aspect,

is going to be incredible. Look at Zurich [the Zurich Classic of New Orleans, which is a two-man team event], putting teams together turned an event that was in a tough part of the schedule into one that gets some incredible fields. I'm really looking forward to seeing how that works."

182. After the LIV Golf field was announced, the PGA Tour Player Advisory Council held an emergency meeting with representatives from Augusta National present. They informed the golfers in attendance that the PGA Tour and Augusta National had agreed to work together to address LIV Golf. As described above, the threat of exclusion from the Masters (and the other Majors) is a powerful weapon in the Tour's arsenal to deter players from joining LIV Golf.

183. On information and belief, the Tour also ramped up its pressure on sponsors to prevent them from doing business with players who join LIV Golf, including pressuring a number of sponsors to sever longstanding relationships with players.

184. The Tour also continued its campaign of direct pressure on players to seek to convince them to withdraw from the LIV Golf event. The Tour sent letters to all Tour members listed in LIV Golf's May 31, 2022 press release, notifying them they were in violation of the PGA Tour Member Regulations and that the Tour Commissioner would take "appropriate course of action" against the players unless they withdrew from the LIV Golf Invitational Series event "in a manner reasonably satisfactory to the [PGA] Tour within forty-eight (48) hours." The European Tour sent similar notices to its members who were included in the LIV Golf Invitational Series field.

185. The PGA Tour also enforced its Regulations on players agreeing to participate in LIV Golf Invitational Series who had not even qualified for the Tour but are members of the developmental Korn Ferry Tour owned by the PGA Tour (and subject to nearly identical Regulations). For example, the PGA Tour applied its Regulations to prohibit Korn Ferry Tour members Mr. Uihlein and Turk Pettit from participating in LIV Golf Invitational Series.

186. The PGA Tour also sent a letter to Andy Ogletree, a Korn Ferry Tour Member, threatening him with punishment if he played in the LIV Golf event. In response, Mr. Ogletree reached out to Tour Vice President of Competition Administration Kristen Burgess regarding the Tour's denial of his release request. Mr. Ogletree explained that he had not qualified for the conflicting event on the Korn Ferry Tour taking place the same weekend as the London LIV Golf Invitational Series. Thus, his

participation in the London LIV Golf Invitational Series event did not keep him from otherwise participating in a Korn Ferry Tour event (or, for that matter, a PGA Tour events). Mr. Ogletree informed the Tour that he had "spent thousands and thousands of dollars" in his unsuccessful effort to play in Korn Ferry Tour and PGA Tour events. He asked the PGA Tour: "Should I just sit at home on my couch next week and not make any money? It seems like this is your stance." Mr. Ogletree also noted the inconsistency of the Tour's stance since it had given Mr. Ogletree a release to participate in the Asian Tour International Series event from June 2–5, 2022 sponsored by LIV Golf. In response, the Tour cited the fact the LIV Golf Invitational Series will host events in the United States—specifically, that the LIV Golf Invitational Series competes with the Tour—as the basis for his event release denial.

187. This episode highlights that there is no conceivable procompetitive justification for the Tour's punishment of players for participating in LIV Golf events. Mr. Ogletree was not going to play in any PGA Tour or Korn Ferry Tour event that weekend, because he was not qualified by those tours to participate in their events. The LIV Golf event thus did not pull Mr. Ogletree away from any PGA Tour event. Instead, it simply provided an opportunity for a player to pursue his trade and earn compensation, along with increasing overall output in the market. And yet the PGA Tour denied a release for Mr. Ogletree and subjected him to discipline for the offense of playing in a tournament when he otherwise would have been "just sit[ting] at home on [his] couch."

188. It also demonstrates that the PGA Tour's opposition to LIV Golf is not based on the source of capital for LIV Golf events. The Tour granted a release to Mr. Ogletree to play in the Asian Tour event that was funded by LIV Golf, because the Asian Tour is not competing with the PGA Tour. But when Mr. Ogletree sought to participate in an event that the PGA Tour deemed a competitive threat, the Tour denied the release and threatened punishment against him.

189. The Tour then went further to contact individually players who had chosen to play in the LIV Golf Invitational Series. Among them was Player Plaintiff Gooch. PGA Tour Chief Tournament & Competitions Officer Andy Pazder texted Mr. Gooch on June 2: "Just want to make sure you understand the implications of playing without an approved conflicting event release." Mr. Gooch responded, "Davis [Love III] called yesterday and said jay [Monahan, PGA Tour

Commissioner] is going to suspend, is this true?" In response, Mr. Pazder told Mr. Gooch that he would be banned from the Tour for life if he played in *one* LIV Golf Invitational Series event: "Our position has been that a player may choose to be a member of the Tour or to play in the Saudi/LIV events, but he can't do both. If the player chooses the latter, he should not expect to be welcomed back."

190. On June 3, 2022, the PGA Tour sent an additional letter to all its members who had agreed to participate in the LIV Golf London Invitational, informing them: "pursuant to Article VII, Section C, you are being placed on probation until further notice. Specifically, as reflected in the Notice of Disciplinary Inquiry to you dated June 1, 2022, the rule infraction triggering your probation is violation of Article V, Section A.2 of the PGA Tour Player Handbook & Tournament Regulations ("Regulations"). Accordingly, if you violate any other rule of the PGA Tour while on probation including, but not limited to, violating Article V, Section B.1, which prohibits your participation in a live or recorded golf program, such as the LIV Golf Invitational London, for which a media release has been denied, the Commissioner may immediately suspend your playing privileges." Article VII, Section C of the PGA Tour Regulations relates to "conduct unbecoming a professional." Thus, the Tour told its members that the act of playing in a professional golf tournament constituted "conduct unbecoming a professional golfer."

191. Simply put, the Tour's position that merely playing professional golf for another promoter constitutes "conduct unbecoming a professional" golfer is breathtaking. And it reveals the threat to competition that underlies the PGA Tour's Regulations giving the PGA Tour Commissioner absolute discretion to interpret the Regulations and punish its Members.

192. On June 4, 2022, former Tour member Kevin Na resigned his PGA Tour membership due to the PGA Tour's refusal to permit him to participate in the LIV Golf Invitational Series. Mr. Na expressed his desire as an independent contractor to "exercise[e] my right as a free agent" to have "the freedom to play wherever I want," noting that he "cannot remain a PGA Tour member" and exercise his independent contractor rights due to the Tour's Regulations and threats. He expressed his "sad[ness]" and his desire that PGA Tour Regulations change to enable him to play on the PGA Tour again.

193. In total, 10 Tour members who agreed to participate in the LIV Golf London Invitational resigned from the PGA Tour in response to these threats to avoid Tour punishment.

194. When the Tour learned that members were considering resignation to avoid the punishments it had threatened, it informed them that "should a member resign in an effort to avoid disciplinary action for future violations of the Regulations, the member would still be subject to disciplinary actions for violations prior to the date of Resignation. In addition, a player should not expect that he will be able to rejoin membership or play in any events without membership at any particular time, as such matters would be governed by the Regulations and event requirements in effect at the time, as they may be amended from time to time." Most PGA Tour tournaments are managed by other nonprofit organizations and offer sponsorship exemptions to PGA Tour and non-PGA Tour golfers. Thus, in order for the PGA Tour's written threat to play out it requires agreement from other economic actors (the sponsors and tournament hosts).

195. Minutes after the golfers teed off at the LIV Golf London Invitational on June 9, 2022, the Tour distributed letters to its current and former members immediately suspending them and promising "the same fate [would] hold" for any Tour member playing in future LIV Golf events.

196. Also on June 9, 2022, Commissioner Monahan sent a letter to all PGA Tour Members and released the letter to the public identifying the golfers the PGA Tour was punishing. Contrary to its historical practices, the Tour sought to expose and malign these golfers for pursuing their profession. In particular, the PGA Tour Commissioner wrote:

a. Tour members, including the Player Plaintiffs and former members "are suspended or otherwise no longer eligible to participate in PGA Tour tournament play, including the Presidents Cup;"

b. The suspension applies to all tours sanctioned by the PGA Tour (Korn Ferry, Champions, Canada, Latinoamerica);

c. The golfers participating in the LIV Golf London Invitational Series "did not receive the necessary conflicting events and media rights releases—or did not apply for releases at all—and their participation . . . is in violation" of the Regulations;

d. The Tour Commissioner made clear that any players "who participate in future [LIV Golf Invitational Series] events in violation of our Regulations" will suffer the "same fate" of suspension;

e. Non-PGA Tour members who participated in LIV Golf Invitational Series "will not be permitted to play in PGA Tour tournaments as a non-member via a sponsor exemption or any other eligibility category;"

f. The Commissioner tried to embarrass the Player Plaintiffs by claiming that they and others made "their own financial-based" choice and they cannot demand the same "PGA Tour membership benefits" as other golfers;

g. The Commissioner further acknowledged that "there are true consequences for every shot" taken on the PGA Tour where a golfer could earn no compensation while paying for his travel to the event, whereas LIV Golf compensates its participants; and

h. The Commissioner embraced the notion that the PGA Tour is the "preeminent organization in the world of professional golf."

197. Also on June 9, 2022, the PGA Tour Vice President of Competition Administration, Kristen Burgess, sent letters to all former PGA Tour Members who participated in the LIV Golf London Invitational Series but had resigned from the Tour, informing them they "remain subject to disciplinary action for violations prior to the date of resignation" and they "should not expect that [they] will be able to rejoin membership or play in any events without membership at any particular time."

198. The Tour expanded its punishments by threatening to revoke the agency credentials for agencies that represent golfers who join LIV Golf—thereby threatening to injure the agents' business for merely representing golfers who chose to join LIV Golf.

199. The Tour also enlisted Tiger Woods to do its bidding and publicly criticize golfers—particularly younger golfers—for joining LIV Golf by suggesting they would never play in The Masters, The Open, or other Majors and would not earn OWGR points: "Some of these players may not ever get a chance to play in major championships. That is a possibility. We don't know that for sure yet. It's up to all the major championship bodies to make that determination. But that is a

possibility, that some players will never, ever get a chance to play in a major championship, never get a chance to experience this right here, walk down the fairways at Augusta National. . . , especially if the LIV organization doesn't get world-ranking points and the major championship change their criteria for entering the events." Mr. Woods' comments echoed earlier evidence indicating that the Tour was continuing to pressure the Majors to join the Tour's unlawful group boycott to exclude LIV Golf and punish any players who played in any LIV events.

PGA Tour Disciplinary Process

200. On June 9, 2022, PGA Tour Senior Vice President of Tournament Administration Andy Levinson sent letters to all PGA Tour Members who participated in the LIV Golf London Invitational Series event, including the Player Plaintiffs. In that Letter, Mr. Levinson informed golfers that (1) the PGA Tour considered them in violation of the Media Rights Regulation (V.B.1.b), (2) the PGA Tour considered them in violation of a PGA Tour Regulation against Public Attacks (VI.E.), (3) they were suspended immediately from playing in PGA Tour events "until further notice," and (4) they had 14 days to submit written statements and/or evidence that the PGA Tour Commissioner should consider "before determining an appropriate course of action separate from your current suspension."

201. The PGA Tour's Regulations detail its Disciplinary Procedures and Appeals, which provide an unconscionable and unfair process by which the players have no legitimate chance of getting fair treatment as it relates to punishments having anything to do with LIV Golf. Exhibit 1. The Tour's Regulations provide that the Commissioner has discretion to hear the appeal in the first instance. The Commissioner can also transfer the appeal to a panel of three Tour policy board members. The procedures do not give the player a hearing as a matter of right. After the procedures conclude, the Regulations provide that a player has released any and all claims against "the PGA TOUR Policy Board, the Commissioner or the Appeals Committee, PGA TOUR, Inc., the Professional Golfers' Association of America, and each director, officer, member, employee, agent or representative of any of the foregoing." Thus, the Tour's Regulations are set up as follows: (1) the Tour sets the Regulations which bind any player member, including changing those Regulations from time to time without input or consent from the player members, (2) the Regulations give the Commissioner the sole authority to interpret the Regulations in his discretion, (3) the Regulations demand that the biased Commissioner

serve as judge, (4) the Regulations allow that same biased Commissioner to hear any appeals, (5) the Regulations provide no independent review process, as the Tour Board is put in the position of reviewing a Tour commercial policy that it approved and executed over the last few years, and (6) at the end of it all, the Regulations purportedly provide that the player has no right to challenge the punishment having released all involved. That release is unenforceable and the Regulations' Disciplinary Procedures are procedurally and substantively unconscionable.

202. Several golfers submitted letters to the Tour challenging the Tour's indefinite suspension and objecting to any further course of action punishing the golfers.

203. On June 29, 2022, and various other dates, the PGA Tour suspended the Player Plaintiffs until March 31, 2023, issued threats to extend the suspensions based on further violations of the Regulations, including (in the Tour's view) continuing to play in LIV Golf events or even to talk favorably about LIV Golf. Commissioner Monahan considered the golfers in violation of the Conflicting Events Regulation and Media Rights Regulation. Additionally, Commissioner Monahan considered the golfers in violation of the PGA Tour's Regulation Section VI.E ("Public Comments, Public Attacks") provision which provides that:

> The favorable public reputation of PGA TOUR, its players and its tournaments are valuable assets and create tangible benefits for all PGA TOUR members. Accordingly, it is an obligation of membership 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. Speech that could be reasonably viewed as hateful, abusive, obscene and/ or divisive is expressly prohibited. Responsible expressions of legitimate disagreement with PGA TOUR policies are not prohibited. However, public 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. Any violation of this section shall be considered conduct unbecoming a professional.

Commissioner Monahan deemed the golfers' reasonable statements of opinion and compliments of LIV Golf in violation of this provision merely because favorable comments regarding a competitor to the PGA Tour supposedly could cause the Tour financial harm.

204. The Tour's punishments put the players in an untenable position: They were banned for roughly nine months, which prevents them from playing in PGA Tour events (and its subsidiary tours) and they have been told that if they play in any LIV Golf events while the suspensions are in

effect. the Tour will deem that an additional violation and impose event greater punishments. In effect, the Tour's punishments amount to a lifetime ban, because the only chance for a player to be clear of the PGA Tour's suspensions is to refrain from playing in any elite professional events—and thus essentially drop out of his profession.

205. On July 6, 2022, PGA Tour Board Member and President of the PGA Player Advisory Council Rory McIlroy said that golfers who join LIV Golf are "basically leaving all [their] peers behind to go make more money, which is fine. But just go over there. Don't try and come back and play over here again." Several years ago, Mr. McIlroy left the European Tour to play predominantly on the PGA Tour, and was still permitted by the PGA Tour to remain a European Tour member through his participation in the minimum number of events required by each tour.

206. On July 13, 2022, the Player Plaintiffs appealed their nine-month suspension (and career threatening ban from the PGA Tour). The grounds for the players' appeals were:

a. Provisions of Sections V.A.2, V.A.3, and V.B.1.b are plainly unlawful restraints of trade that violate Section 2 of the Sherman Act, 15 U.S.C. § 2, and various state laws, and therefore (1) no punishment for purportedly violating those unlawful provisions may issue and (2) any purported agreement by any person to adhere to those unlawful provisions is void and unenforceable;

b. Commissioner Monahan and the PGA Tour (the "Tour") violate Section 2 of the Sherman Act by applying Sections VII.E. and VII.C to unlawfully punish golfers to thwart LIV Golf's competitive entry, and therefore no punishment for purportedly violating those provisions may issue;

c. Provisions of Sections V.A.2, V.A.3, and V.B.1.b enable Commissioner Monahan to unlawfully control what independent contractor-golfers do when they are not playing on the PGA Tour (the "Tour"), and thus no punishment for purportedly violating those provisions may issue;

d. The Tour has unlawfully agreed with other entities in the purported golf "ecosystem," including the European Tour, to establish a group boycott to prevent LIV Golf from succeeding and has targeted its Regulations to

impermissibly punish golfers to carry out its coordinated dealings with others in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1;

e. Commissioner Monahan has violated the Tour's purported nonprofit purpose and violated his fiduciary duties to the Tour and its members by punishing golfers in this way;

f. There was patent injustice and a lack of fair process because Commissioner Monahan cannot be impartial in his determination whether to sanction golfers because he has engaged in a two-year vendetta against prospective and new competitor professional golf promoter(s) and golfers are being punished for participating in a competitive promoter's events;

g. There was injustice and a lack of fair process because the Regulations' Disciplinary Process is procedurally and substantively unconscionable; and

h. In the alternative, the sanction imposed by Commissioner Monahan is grossly disproportionate to the seriousness of the alleged breaches of the Regulations that the Tour contends the players committed.

i. In their appeal letters, Player Plaintiffs indicated their belief that their suspensions would be abated pending appeal of their suspensions.

207. While some of the Player Plaintiffs' appeals of the Commissioner's disciplinary action were pending, on July 23, 2022, Mr. Levinson sent them a letter informing that: (1) the PGA Tour Commissioner believed they violated the Conflicting Events and Media Rights Regulations (Article V, Sections A.2 and B.1) by participating in the June 30 – July 2, 2022 LIV Golf Invitational Portland event; (2) the PGA Tour Commissioner imposed a Major Penalty of suspension from participation in any PGA Tour-affiliated tournaments, including PGA Tour, PGA Tour Champions, Korn Ferry Tour, PGA Tour Latinoamérica, and PGA Tour Canada, and a suspension of their privileges at Tournament Players Clubs, for a period ending no earlier than March 31, 2024 (an additional year suspension), at which time they may seek in writing to have their suspension lifted; (3) the PGA Tour Commissioner may impose further disciplinary action for any additional violation of the Regulations; and (4) they may appeal the sanctions by written notice to the PGA Tour Commissioner within 14 days of the letter.

In other words, the PGA Tour Commissioner unilaterally imposed further sanctions—a full additional year of suspension for playing in a second LIV Golf tournament—while the appeal of the first Notice of Disciplinary Action was still pending.

208. On July 25, 2022, the Tour informed the Player Advisory Council that golfers who were suspended for playing in LIV Golf would not be permitted to play in the FedEx Cup, even though some of their appeals of the suspensions were pending and should have been abated under the Tour's Regulations.

209. On July 27, 2022, Commissioner Monahan referred some of the Player Plaintiffs' appeals to the Appeals Committee and requested that any materials in support of appeal be submitted by August 10, 2022. In response, Plaintiff Gooch requested confirmation that the Tour would abate their suspensions pending appeal to the Appeals Committee. In response, Commissioner Monahan indicated he would not abate the Player Plaintiffs' suspensions pending appeal.

210. On July 29, 2022, Mr. Levinson informed some Player Plaintiffs that the Tour would no longer send them Notice of Disciplinary Inquiry letters for "ongoing violations." The Tour thus chose to abandon its disciplinary process.

211. And, then on August 2, 2022, the Tour informed Mr. Gooch that the Tour would not abate suspensions pending appeals in violation of the Tour's regulations.

212. The Tour historically abated players' suspensions pending their appeal of their suspensions, consistent with Section VII.E.2 of the Regulations.

213. The Player Plaintiffs' suspensions were a critical means employed by the Tour to achieve its anticompetitive end. Punishing the players is essential to the scheme to eliminate competition in the market. Absent participants in elite professional golf events, no nascent league can enter the market. By suspending the Player Plaintiffs and threatening to suspend other players, the Tour endeavored to eliminate competition.

Specific Player Plaintiffs' PGA Tour Disciplinary Proceedings and Harm

214. **Phil Mickelson:** The Tour's anticompetitive scheme is apparent from the disciplinary action levied against Plaintiff Mickelson. On March 22, 2022, the Commissioner suspended Plaintiff Mickelson (with the opportunity to apply for reinstatement in May of 2022) for, among other alleged

reasons, "attempting to recruit players to join [LIV Golf]." Following an appeal, the appeals committee (a three-person committee comprised of members of the Tour Policy Board) affirmed the Commissioner's two-month suspension. On June 20, 2022, Mr. Mickelson applied for reinstatement from the two-month suspension. The Tour denied his request, stating that Plaintiff Mickelson violated Tour regulations by participating in the LIV Golf London Invitational. In addition to denying his request for reinstatement, the Tour extended Plaintiff Mickelson's suspension, forbidding him from seeking reinstatement to play professional golf with the Tour until March 31, 2023. While Plaintiff Mickelson was suspended from tournament play, the Tour continued to levy suspensions. On July 23, 2022, the Tour imposed additional sanctions on him for participating in the LIV Golf Invitational in Portland. Specifically, the Tour extended Plaintiff Mickelson's suspension once again, deferring even the mere opportunity to apply for reinstatement until after March 31, 2024.

215. Mr. Mickelson's unlawful two-year suspension from the PGA Tour has caused him irreparable professional harm, as well as financial, and commercial harm. The Tour's unlawful suspensions are denying Mr. Mickelson the right he has earned to play in events on the Tour, to earn compensation playing on the Tour, and to have the opportunities that come with such play. The Tour's suspension has denied Mr. Mickelson the right to the platform and the public exposure provided by playing on the Tour. The Tour's suspension has denied Mr. Mickelson the opportunity to hone and maintain his golf game by playing professional golf in the tournaments that he would choose to play. The Tour's suspension has denied Mr. Mickelson access to play professional golf before his fans via live attendance and video broadcast of Tour events. The Tour's unlawful conduct cost Plaintiff Mickelson endorsement deals and sponsorships. Notably, the Tour is the only golf tour shown regularly on broadcast television in the United States, and it earns vastly more in sponsorship, advertising, and broadcast revenue than any other golf tour. The Tour's unlawful conduct eliminated Plaintiff Mickelson's opportunity to earn up to $10 million annually in the Player Impact Program, a program that measures player impact by, among other things, calculating the player's Nielsen score (how often a player is featured during PGA Tour tournament broadcasts). The Tour's suspension has denied Mr. Mickelson the opportunity to earn FedEx Cup rankings and OWGR rankings. The Tour's suspensions have denied Mr. Mickelson the opportunity to earn deferred compensation pursuant to the

PGA Tour Player Retirement Plan—which is his right as a member of the Tour and which he earns for each tournament cut he makes. The Tour's unlawful suspensions have damaged Mr. Mickelson's goodwill and caused him substantial reputational harm. The Tour's unlawful Conflicting Events and Media Rights Regulations have denied Mr. Mickelson competition for his services for years, have depressed his earnings, and have decreased output of professional golf earning opportunities. The Tour's unlawful Conflicting Events and Media Rights Regulations Tour's unlawful control of Mr. Mickelson and his use of his media rights are causing him irreparable. financial and commercial harm that have denied him income and playing opportunities in the past and as long as the Regulations that give the Tour such purported control remain in place, Mr. Mickelson will be financially and irreparably harmed. As a lifetime member of the Tour, Mr. Mickelson is particularly harmed by the Tour wrongfully taking away what he has rightfully earned—opportunity to play in Tour events for the remainder of his golfing career.

216. The Tour's unlawful conduct has also denied Mr. Mickelson the opportunity to play in PGL tournaments and to earn compensation he foreseeably would have received competing in PGL tournaments.

217. The Tour's unlawful conduct has harmed Mr. Mickelson by denying him access to fans, viewers and playing opportunities in Tour events.

218. **Talor Gooch.** On June 9, 2022, the Tour unlawfully suspended Mr. Gooch on an indefinite basis from playing on the Tour. On June 30, 2022, the Tour unlawfully suspended Mr. Gooch from playing on the Tour (or any affiliated tours) through at least March 31, 2023. On July 23, 2022, the Tour unlawfully extended Mr. Gooch's suspension through at least March 31, 2024. The PGA Tour has threatened to impose further disciplinary sanction on Mr. Gooch if he continues to play in LIV Golf events when he is not playing on the Tour.

219. Mr. Gooch's unlawful two-year suspension from the PGA Tour has caused him irreparable professional harm, as well as financial, and commercial harm. The Tour's unlawful suspensions are denying Mr. Gooch the right he has earned to play in events on the Tour, to earn compensation playing on the Tour, and to have the opportunities that come with such play. The Tour's suspension has denied Mr. Gooch the strong chance to qualify for the 2023 Major Championships by

placing in the Top 30 of the 2022 FedEx Cup Rankings. The Tour's suspension has denied Mr. Gooch the right to the platform and the public exposure provided by playing on the Tour. The Tour's suspension has denied Mr. Gooch the opportunity to hone and maintain his golf game by playing professional golf in the tournaments that he would choose to play. The Tour's suspension has denied Mr. Gooch access to play professional golf before his fans via live attendance and video broadcast of Tour events. The Tour's unlawful conduct cost Plaintiff Gooch endorsement deals and sponsorships. Notably, the Tour is the only golf tour shown regularly on broadcast television in the United States, and it earns vastly more in sponsorship, advertising, and broadcast revenue than any other golf tour. The Tour's unlawful conduct eliminated Plaintiff Gooch's opportunity to earn up to $10 million annually in the Player Impact Program, a program that measures player impact by, among other things, calculating the player's Nielsen score (how often a player is featured during PGA Tour tournament broadcasts). The Tour's suspension has denied Mr. Gooch the opportunity to earn FedEx Cup rankings and OWGR rankings. The Tour's suspensions have denied Mr. Gooch the opportunity to earn deferred compensation pursuant to the PGA Tour Player Retirement Plan—which is his right as a member of the Tour and which he earns for each tournament cut he makes. The Tour's unlawful suspensions have damaged Mr. Gooch's goodwill and caused him substantial reputational harm. The Tour's unlawful Conflicting Events and Media Rights Regulations have denied Mr. Gooch competition for his services for years, have depressed his earnings, and have decreased output of professional golf earning opportunities. The Tour's unlawful Conflicting Events and Media Rights Regulations Tour's unlawful control of Mr. Gooch and his use of his media rights are causing him irreparable, financial and commercial harm that have denied him income and playing opportunities in the past and as long as the Regulations that give the Tour such purported control remain in place. Mr. Gooch will be financially and irreparably harmed.

220. The Tour's unlawful conduct has also denied Mr. Gooch the opportunity to play in PGL tournaments and to earn compensation he foreseeably would have received competing in PGL tournaments.

221. The Tour's unlawful conduct has harmed Mr. Gooch by denying him access to fans, viewers and playing opportunities in Tour events.

222. **Hudson Swafford.** On June 9, 2022, the Tour unlawfully suspended Mr. Swafford on an indefinite basis from playing on the Tour. On June 29, 2022, the Tour unlawfully suspended Mr. Swafford from playing on the Tour (or any affiliated tours) through at least March 31, 2023. On July 23, 2022, the Tour unlawfully extended Mr. Swafford's suspension through at least March 31, 2024. The PGA Tour has threatened to impose further disciplinary sanction on Mr. Swafford if he continues to play in LIV Golf events when he is not playing on the Tour.

223. Mr. Swafford's unlawful two-year suspension from the PGA Tour has caused him irreparable professional harm, as well as financial, and commercial harm. The Tour's unlawful suspensions are denying Mr. Swafford the right he has earned to play in events on the Tour, to earn compensation playing on the Tour, and to have the opportunities that come with such play. The Tour's suspension has denied Mr. Swafford the chance to qualify for the 2023 Major Championships by placing in the Top 30 of the 2022 FedEx Cup Rankings. The Tour's suspension has denied Mr. Swafford the strong chance to qualify for the 2023 premier Invitationals on the Tour by placing in the Top 70 of the 2022 FedEx Cup Rankings. The Tour's suspension has denied Mr. Swafford the right to the platform and the public exposure provided by playing on the Tour. The Tour's suspension has denied Mr. Swafford the opportunity to hone and maintain his golf game by playing professional golf in the tournaments that he would choose to play. The Tour's suspension has denied Mr. Swafford access to play professional golf before his fans via live attendance and video broadcast of Tour events. The Tour's unlawful conduct cost Plaintiff Swafford endorsement deals and sponsorships. Notably, the Tour is the only golf tour shown regularly on broadcast television in the United States, and it earns vastly more in sponsorship, advertising, and broadcast revenue than any other golf tour. The Tour's unlawful conduct eliminated Plaintiff Swafford's opportunity to earn up to $10 million annually in the Player Impact Program, a program that measures player impact by, among other things, calculating the player's Nielsen score (how often a player is featured during PGA Tour tournament broadcasts). The Tour's suspension has denied Mr. Swafford the opportunity to earn FedEx Cup rankings and OWGR rankings. The Tour's suspensions have denied Mr. Swafford the opportunity to earn deferred compensation pursuant to the PGA Tour Player Retirement Plan—which is his right as a member of the Tour and which he earns for each tournament cut he makes. The Tour's unlawful suspensions have

damaged Mr. Swafford's goodwill and caused him substantial reputational harm. The Tour's unlawful Conflicting Events and Media Rights Regulations have denied Mr. Swafford competition for his services for years, have depressed his earnings, and have decreased output of professional golf earning opportunities. The Tour's unlawful Conflicting Events and Media Rights Regulations Tour's unlawful control of Mr. Swafford and his use of his media rights are causing him irreparable, financial and commercial harm that have denied him income and playing opportunities in the past and as long as the Regulations that give the Tour such purported control remain in place, Mr. Swafford will be financially and irreparably harmed.

224. The Tour's unlawful conduct has also denied Mr. Swafford the opportunity to play in PGL tournaments and to earn compensation he foreseeably would have received competing in PGL tournaments.

225. The Tour's unlawful conduct has harmed Mr. Swafford by denying him access to fans, viewers and playing opportunities in Tour events.

226. **Matt Jones.** On June 9, 2022, the Tour unlawfully suspended Mr. Jones on an indefinite basis from playing on the Tour. On June 30, 2022, the Tour unlawfully suspended Mr. Jones from playing on the Tour (or any affiliated tours) through at least March 31, 2023. On July 23, 2022, the Tour unlawfully extended Mr. Jones's suspension through at least March 31, 2024. The PGA Tour has threatened to impose further disciplinary sanction on Mr. Jones if he continues to play in LIV Golf events when he is not playing on the Tour.

227. Mr. Jones's unlawful two-year suspension from the PGA Tour has caused him irreparable professional harm, as well as financial, and commercial harm. The Tour's unlawful suspensions are denying Mr. Jones the right he has earned to play in events on the Tour, to earn compensation playing on the Tour, and to have the opportunities that come with such play. The Tour's suspension has denied Mr. Jones the chance to qualify for the 2023 Major Championships by placing in the Top 30 of the 2022 FedEx Cup Rankings. The Tour's suspension has denied Mr. Jones the strong chance to qualify for the 2023 premier Invitationals on the Tour by placing in the Top 70 of the 2022 FedEx Cup Rankings. The Tour's suspension has denied Mr. Jones the right to the platform and the public exposure provided by playing on the Tour. The Tour's suspension has denied Mr. Jones the

opportunity to hone and maintain his golf game by playing professional golf in the tournaments that he would choose to play. The Tour's suspension has denied Mr. Jones access to play professional golf before his fans via live attendance and video broadcast of Tour events. The Tour's unlawful conduct cost Plaintiff Jones endorsement deals and sponsorships. Notably, the Tour is the only golf tour shown regularly on broadcast television in the United States, and it earns vastly more in sponsorship, advertising, and broadcast revenue than any other golf tour. The Tour's unlawful conduct eliminated Plaintiff Jones's opportunity to earn up to $10 million annually in the Player Impact Program, a program that measures player impact by, among other things, calculating the player's Nielsen score (how often a player is featured during PGA Tour tournament broadcasts). The Tour's suspension has denied Mr. Jones the opportunity to earn FedEx Cup rankings and OWGR rankings. The Tour's suspensions have denied Mr. Jones the opportunity to earn deferred compensation pursuant to the PGA Tour Player Retirement Plan—which is his right as a member of the Tour and which he earns for each tournament cut he makes. The Tour's unlawful suspensions have damaged Mr. Jones's goodwill and caused him substantial reputational harm. The Tour's unlawful Conflicting Events and Media Rights Regulations have denied Mr. Jones competition for his services for years, have depressed his earnings, and have decreased output of professional golf earning opportunities. The Tour's unlawful Conflicting Events and Media Rights Regulations Tour's unlawful control of Mr. Jones and his use of his media rights are causing him irreparable, financial and commercial harm that have denied him income and playing opportunities in the past and as long as the Regulations that give the Tour such purported control remain in place, Mr. Jones will be financially and irreparably harmed.

228. The Tour's unlawful conduct has also denied Mr. Jones the opportunity to play in PGL tournaments and to earn compensation he foreseeably would have received competing in PGL tournaments.

229. The Tour's unlawful conduct has harmed Mr. Jones by denying him access to fans, viewers and playing opportunities in Tour events.

230. **Bryson DeChambeau.** On June 30, 2022, the Tour unlawfully suspended Mr. DeChambeau on an indefinite basis from playing on the Tour. On July 8, 2022, the Tour unlawfully suspended Mr. DeChambeau from playing on the Tour (or any affiliated tours) through at least March

31, 2023. The PGA Tour has threatened to impose further disciplinary sanction on Mr. DeChambeau if he continues to play in LIV Golf events when he is not playing on the Tour. On July 29, 2022, the Tour sent notice to Mr. DeChambeau that it was sanctioning him for talking to other Tour members about the positive experience he had had with LIV Golf.

231. Mr. DeChambeau's unlawful suspension from the PGA Tour has caused him irreparable professional harm, as well as financial, and commercial harm. The Tour's unlawful suspensions are denying Mr. DeChambeau the right he has earned to play in events on the Tour, to earn compensation playing on the Tour, and to have the opportunities that come with such play. The Tour's suspension has denied Mr. DeChambeau the right to the platform and the public exposure provided by playing on the Tour. The Tour's suspension has denied Mr. DeChambeau the opportunity to hone and maintain his golf game by playing professional golf in the tournaments that he would choose to play. The Tour's suspension has denied Mr. DeChambeau access to play professional golf before his fans via live attendance and video broadcast of Tour events. The Tour's unlawful conduct cost Plaintiff DeChambeau endorsement deals and sponsorships. Notably, the Tour is the only golf tour shown regularly on broadcast television in the United States, and it earns vastly more in sponsorship, advertising, and broadcast revenue than any other golf tour. The Tour's unlawful conduct eliminated Plaintiff DeChambeau's opportunity to earn up to $10 million annually in the Player Impact Program, a program that measures player impact by, among other things, calculating the player's Nielsen score (how often a player is featured during PGA Tour tournament broadcasts). The Tour's suspension has denied Mr. DeChambeau the opportunity to earn FedEx Cup rankings and OWGR rankings. The Tour's suspensions have denied Mr. DeChambeau the opportunity to earn deferred compensation pursuant to the PGA Tour Player Retirement Plan—which is his right as a member of the Tour and which he earns for each tournament cut he makes. The Tour's unlawful suspensions have damaged Mr. DeChambeau's goodwill and caused him substantial reputational harm. The Tour's unlawful Conflicting Events and Media Rights Regulations have denied Mr. DeChambeau competition for his services for years, have depressed his earnings, and have decreased output of professional golf earning opportunities. The Tour's unlawful Conflicting Events and Media Rights Regulations Tour's unlawful control of Mr. DeChambeau and his use of his media rights are causing him irreparable, financial and

commercial harm that have denied him income and playing opportunities in the past and as long as the Regulations that give the Tour such purported control remain in place, Mr. DeChambeau will be financially and irreparably harmed.

232. The Tour's unlawful conduct has also denied Mr. DeChambeau the opportunity to play in PGL tournaments and to earn compensation he foreseeably would have received competing in PGL tournaments.

233. The Tour's unlawful conduct has harmed Mr. DeChambeau by denying him access to fans, viewers and playing opportunities in Tour events.

234. **Ian Poulter**. On June 9, 2022, the Tour unlawfully suspended Mr. Poulter on an indefinite basis from playing on the Tour. On June 30, 2022, the Tour unlawfully suspended Mr. Jones from playing on the Tour (or any affiliated tours) through at least March 31, 2023. On July 23, 2022, the Tour unlawfully extended Mr. Poulter's suspension through at least March 31, 2024. The PGA Tour has threatened to impose further disciplinary sanction on Mr. Poulter if he continues to play in LIV Golf events when he is not playing on the Tour.

235. Mr. Poulter's unlawful two-year suspension from the PGA Tour has caused him irreparable professional harm, as well as financial, and commercial harm. The Tour's unlawful suspensions are denying Mr. Poulter the right he has earned to play in events on the Tour, to earn compensation playing on the Tour, and to have the opportunities that come with such play. The Tour's suspension has denied Mr. Poulter the opportunity to participate in events that would have permitted him the chance to qualify for the Tour in 2023. The Tour's suspension has denied Mr. Poulter the right to the platform and the public exposure provided by playing on the Tour. The Tour's suspension has denied Mr. Poulter the opportunity to hone and maintain his golf game by playing professional golf in the tournaments that he would choose to play. The Tour's suspension has denied Mr. Poulter access to play professional golf before his fans via live attendance and video broadcast of Tour events. The Tour's unlawful conduct cost Plaintiff Poulter endorsement deals and sponsorships. Notably, the Tour is the only golf tour shown regularly on broadcast television in the United States, and it earns vastly more in sponsorship, advertising, and broadcast revenue than any other golf tour. The Tour's unlawful conduct eliminated Plaintiff Poulter's opportunity to earn up to $10 million annually in the Player

Impact Program, a program that measures player impact by, among other things, calculating the player's Nielsen score (how often a player is featured during PGA Tour tournament broadcasts). The Tour's suspension has denied Mr. Poulter the opportunity to earn FedEx Cup rankings and OWGR rankings. The Tour's suspensions have denied Mr. Poulter the opportunity to earn deferred compensation pursuant to the PGA Tour Player Retirement Plan—which is his right as a member of the Tour and which he earns for each tournament cut he makes. The Tour's unlawful suspensions have damaged Mr. Poulter's goodwill and caused him substantial reputational harm. The Tour's unlawful Conflicting Events and Media Rights Regulations have denied Mr. Poulter competition for his services for years, have depressed his earnings, and have decreased output of professional golf earning opportunities. The Tour's unlawful Conflicting Events and Media Rights Regulations Tour's unlawful control of Mr. Poulter and his use of his media rights are causing him irreparable, financial and commercial harm that have denied him income and playing opportunities in the past and as long as the Regulations that give the Tour such purported control remain in place. Mr. Poulter will be financially and irreparably harmed.

236. The Tour's unlawful conduct has also denied Mr. Poulter the opportunity to play in PGL tournaments and to earn compensation he foreseeably would have received competing in PGL tournaments.

237. The Tour's unlawful conduct has harmed Mr. Poulter by denying him access to fans, viewers and playing opportunities in Tour events.

238. **Peter Uihlein**. On June 9, 2022, the Tour unlawfully suspended Mr. Uihlein on an indefinite basis from playing on the Tour, the Korn Ferry Tour and any affiliated tours. On June 30, 2022, the Tour unlawfully suspended Mr. Uihlein from playing on the Tour, the Korn Ferry Tour, (or any affiliated tours) through at least March 31, 2023. On July 23, 2022, the Tour unlawfully extended Mr. Uihlein's suspension through at least March 31, 2024. The PGA Tour has threatened to impose further disciplinary sanction on Mr. Uihlein if he continues to play in LIV Golf events when he is not playing on the Tour or the Korn Ferry Tour.

239. Mr. Uihlein's unlawful two-year suspension from the PGA Tour and its affiliated tours, including but not limited to the Korn Ferry Tour, has caused him irreparable professional harm, as well

as financial, and commercial harm. The Tour's unlawful suspensions are denying Mr. Uihlein the right he has earned to play in events on the Korn Ferry Tour, to earn compensation playing on the Korn Ferry Tour, and to have the opportunities that come with such play. The Tour's suspension has denied Mr. Uihlein the opportunity to hone and maintain his golf game by playing professional golf in the tournaments that he would choose to play. The Tour's unlawful suspensions are denying Mr. Uihlein to the right he has earned to participate in the Korn Ferry Tour Championship Series finals (three events) to have a chance to earn a PGA Tour card for the 2022-2023 season. If Mr. Uihlein is prohibited from playing that series then he will have no other way to qualify for the PGA Tour next season. The Tour's suspension has denied Mr. Uihlein the right to the platform and the public exposure provided by playing on the Korn Ferry Tour (and possibly the Tour). The Tour's suspension has denied Mr. Uihlein access to play professional golf before his fans via live attendance and video broadcast of Korn Ferry Tour events (and possibly the Tour events). The Tour's suspension has denied Mr. Uihlein the opportunity to earn Korn Ferry season rankings (and possibly FedEx Cup rankings next season).and OWGR rankings. The Tour's unlawful suspensions have damaged Mr. Uihlein's goodwill and caused him substantial reputational harm. The Tour's unlawful Conflicting Events and Media Rights Regulations, which apply to Korn Ferry Tour members just as they apply to Tour member, have denied Mr. Uihlein competition for his services for years, have depressed his earnings, and have decreased output of professional golf earning opportunities. The Tour's unlawful Conflicting Events and Media Rights Regulations Tour's unlawful control of Mr. Uihlein and his use of his media rights are causing him irreparable, financial and commercial harm that have denied him income and playing opportunities in the past and as long as the Regulations that give the Tour such purported control remain in place, Mr. Uihlein will be financially and irreparably harmed.

240. The Tour's unlawful conduct has also denied Mr. Uihlein the opportunity to play in PGL tournaments and to earn compensation he foreseeably would have received competing in PGL tournaments.

241. The Tour's unlawful conduct has harmed Mr. Uihlein by denying him access to fans, viewers and playing opportunities in Tour events.

Tour Threatens Small Businesses and Vendors To Boycott LIV Golf

242. As part of its efforts to foreclose competition from LIV Golf and to foreclose competition for Plaintiffs' services, the Tour has also threatened companies and individuals in the golf and sports production industry that they will be blacklisted from working with the Tour if they work with LIV Golf. As a result of these unlawful threats, LIV Golf has suffered (and will continue to suffer) financial injuries because its offerings in the marketplace have been impaired and because it has been denied the opportunity to work with the third parties of its choice on terms that could be reached in a fair and open marketplace. Furthermore, this conduct threatens ongoing and irreparable harm to LIV Golf, as the headwinds created by the Tour's anticompetitive conduct threaten LIV Golf's competitive viability.

243. In January 2022, LIV Golf was negotiating with a tent vendor, Arena Americas, about providing tents for LIV Golf events. Arena Americas indicated that it was interested in working with LIV Golf, and LIV Golf engaged Arena Americas for its LIV Golf Invitational Series. However, Arena Americas subsequently informed LIV Golf that it could not work with LIV Golf because the Tour had told Arena Americas that it would cease doing business with Arena Americas if it worked with LIV Golf.

244. LIV Golf had contracted with a technology company to provide live scoring during LIV Golf events for fans watching and following along on the Internet. On March 23, 2022, LIV Golf received an email from that technology company that it needed to rescind the contract with LIV Golf due to a business issue and needed to discuss the issue with its attorney. The company later represented to LIV Golf that representatives from the PGA Tour had threatened that the Tour would cease doing business with it if it provided LIV Golf with support. The company also told LIV Golf that the PGA Tour has a "blacklist" for any vendor that works with LIV Golf. A Tour representative called the company and threatened to blacklist the company if it worked with LIV Golf.

245. LIV Golf was in negotiation with Top Tracer to license its shot-tracing technology for use during LIV Golf broadcasts. The Chief Executive Officer of Top Tracer was engaged with LIV Golf on multiple calls, expressed major interest in providing LIV Golf with a license to Top Tracer technology and developing a broader relationship to deploy and develop innovative products. Suddenly, however, Top Tracer ceased communication with LIV Golf. After a period of radio silence,

Top Tracer informed LIV Golf that it would not be putting itself up for the potential business with LIV Golf.

246. LIV Golf was in negotiation with Levelwear athletic apparel for LIV Golf volunteer apparel for LIV Golf Invitational Series event staffing. On March 25, 2022, Levelwear informed LIV that it would not sell LIV Golf any apparel because it did not want to jeopardize its relationship with the Tour.

247. LIV Golf reached out to numerous producer candidates, many of whom are independent contractors, who have communicated to LIV Golf that NBC and Golf Channel personnel have informed all producers that they will not be hired or renewed for any work with NBC or Golf Channel moving forward if they work with LIV Golf.

248. Senior programming executives at CBS revealed to LIV Golf that they cannot touch LIV Golf even for consideration due to its relationship with the PGA Tour.

249. LIV Golf tried to retain the Endeavor Company, which includes IMG, IMG Arena, IMG Media and WME, and despite interest in working with LIV Golf, they have told LIV Golf they cannot work with it because Tour Commissioner Monahan has impressed upon Ari Emmanuel (Endeavor CEO) and Mark Shapiro (Endeavor President) that Endeavor cannot work with LIV Golf.

250. Other vendors, like Intersport (event management company) and Aggreko (Power/HVAC) engaged with LIV Golf but backed out without explanation, likely indicating that they were subjected to pressure from the PGA Tour similar to that expressed by other third-party vendors.

251. LIV Golf negotiated with Provision Events, an event management company. On February 15, 2020 Provision Events told LIV Golf, "we feel like we can provide exactly what you need and our ambition would be to become your activation partner." Provision Events and LIV Golf corresponded regarding scope and arranged for a meeting to occur in March 2022. On March 10, 2022, Provision Events emailed LIV Golf and informed LIV Golf without explanation that it could no longer work with LIV Golf.

252. To supply drug testing procedures for the competing athletes, LIV Golf contacted Drug Free Sport. A Drug Free Sport representative informed LIV Golf that it would have to take the prospect of doing business with LIV Golf to his boss because of Drug Free Sport's involvement with the Tour,

but stated that "we do business with other organizations. not sure why this would be any different." After checking with the "boss," the Drug Free Sport representative responded to LIV Golf, "I've spoken to our CEO and given current headwinds in our space, we won't be able to engage at this time."

253. LIV Golf tried to negotiate with a golf shot technology company, Hawk Eye. Chris Wary of Hawk Eye emailed LIV Golf that "[u]pon careful consideration and following internal discussions, regrettably, at this point in time, we are not in a position to proceed any further with the potential delivery of these technologies due to conflict of interest with our existing relationships." The Tour is a Hawk Eye client.

254. LIV Golf tried to schedule events at a premier golf course, Sentosa Golf Club. Bob Tan, Chairman of Sentosa Golf Club, informed LIV Golf that Dominic Wall of the R&A called him and informed him that Sentosa Golf Club would be excluded and shunned by the rest of the world of golf if it worked with LIV Golf.

255. LIV Golf tried to engage Ticketmaster for ticketing at its events. Ticketmaster was prepared to work with LIV Golf until Ticketmaster pulled out of helping LIV Golf with ticket sales in response to pressure from the PGA Tour.

256. LIV Golf tried to engage Pro Secrets, a yardage book company. Michael Etherington of Pro Secrets informed LIV Golf that the PGA Tour had asked Pro Secrets to not work with LIV Golf.

257. LIV Golf tried to engage a company known as Cueto to provide software for organizing event volunteers. Cueto was prepared to work with LIV Golf until Cueto informed LIV Golf that it cannot work with LIV Golf "because of the threat it received from the PGA Tour."

258. LIV Golf tried to order custom hats through American Needle hat company, and American needle informed LIV Golf that it does not want to do business with LIV Golf because of its relationship with the PGA Tour and Augusta National.

259. LIV Golf tried to enter into a business relationship with Dick's Sporting Goods. In response, Dick's Sporting Goods informed LIV Golf that "[g]iven our relationship with the PGA Tour and our Tournament [PGA Tour Champions tournament], [] [Dick's Sporting Goods representatives] agree it's best to pass right now."

260. The PGA Tour threatened numerous golf courses with adverse consequences if they

hosted LIV Golf events. LIV Golf secured commitments from pristine high level courses, but the PGA Tour and the R&A retaliated against the owners of the venues with which LIV Golf contracted. The R&A punished one golf course owner by adopting a policy that it would not host The Open at his course in the future because he is giving LIV Golf "a platform," and as the R&A is "firmly on the side of the traditional Tours [PGA Tour and European Tour]." The Tour informed the same golf course owner that it would never work with the Tour again because it had worked with LIV Golf.

261. In July 2022, LIV Golf's branding team, Czarnowski, terminated its relationship with LIV Golf due to pressure from the PGA Tour.

262. The Tour threatened sponsors that they would lose opportunities to partner with the Tour if they worked with LIV Golf.

Relevant Markets and the PGA Tour's Monopoly Position

263. The PGA Tour is a monopolist and/or a monopsonist in two relevant product markets: (1) the market for the services of professional golfers for elite golf events, and (2) the market for the promotion of elite professional golf events.

264. The relevant geographic market for each product market is national; in the alternative, the market for each product market is global in scope.

The Market for Services of Professional Golfers for Elite Golf Events

265. The first relevant product market is the services of professional golfers for elite golf events. A hypothetical monopsonist in this product market would have the power to suppress compensation for golfers substantially below competitive levels for a sustained period of time, because professional golfers who sell their services for elite golf events have no reasonable substitute to which they could plausibly turn in the event of a suppression of compensation below competitive levels. For example, non-elite golf events do not offer the level of purse sizes, Major qualifying opportunities, public platforms, sponsorship opportunities, OWGR ranking opportunities, or the other attributes of elite events that would make them viable options for professional golfers in the event that a hypothetical monopsonist controlled the market for the purchase of services of elite golf events. This is demonstrated in the evidence surrounding the PGA Tour, which has been able to impose sub-competitive compensation for elite golf events without losing a meaningful number of golfers to

another type of sport or event.

266. The relevant geographic market for the product market is national; in the alternative, the market for each product is global in scope. A hypothetical monopsonist in the purchase of services of professional golfers for elite events in the United States would have the power to suppress compensation for golfers substantially below competitive levels for a sustained period of time, because professional golfers would be unlikely to leave the country to pursue their profession in sufficient numbers to make sub-competitive compensation unprofitable for a hypothetical monopsonist in the United States. This is also demonstrated in the evidence surrounding the PGA Tour, which has been able to impose sub-competitive compensation for its elite golf events in the United States without losing a meaningful number of golfers to golf tours in other countries. In the alternative, the relevant geographic market is global. Under either formulation, the Tour has unquestioned monopsony power.

267. Until LIV Golf's nascent entry, the Tour was the only viable buyer of professional golfer services in the relevant market for the purchase of services of professional golfers for elite golf events because there is no reasonable substitute for playing on the Tour. The European Tour's participation in the market is limited to events it co-sanctions with the Tour and thus, while it could be a purchaser of services of professional golfers for elite events in the United States, it has entered into an agreement with the Tour to not even try to compete with it. And, in the alternative global market, the European Tour is not a viable alternative to the Tour because it cannot compete with the Tour on purse size, Major qualifying opportunities, OWGR rankings, public platforms, sponsorship opportunities and other benefits, and, regardless, it has entered into an agreement not to compete with the Tour.

268. Until LIV Golf's nascent entry, the Tour offered earnings opportunities for professional golfers that are many times greater than any other tour in the world through far greater prize pools and opportunities to secure sponsorships. The Tour offers far greater opportunities for recognition and exposure, on-course competition, and opportunity to accrue OWGR points than any other tour in the world. Until LIV Golf's nascent entry, virtually every golfer who qualifies for membership on the PGA Tour joined it. Until LIV Golf's nascent entry, all of the top 50 golfers in the world were members of the PGA Tour.

269. The Tour's monopsony control of the purchase of services of professional golfers for

elite golf events allows it to compensate players at substantially lower levels than professional golfers would earn in a competitive market, without risk of losing players to other promoters.

270. The Tour has used its monopsony power to impose anticompetitive regulations, notably the Media Rights and Conflicting Events Regulations, which it forces on all of its Members and which have the intent and effect of excluding competition.

271. Until LIV Golf's nascent entry, the Tour controlled the overwhelming share of the relevant market, as nearly all of the elite professional golfers in the United States (and the world) were members of the Tour. Even after LIV Golf's entry—which the Tour's Commissioner has characterized as "irrational"—the Tour's share of the relevant market is dominant, as measured by the Tour's share of purchases in the services market for elite professional golf events. Indeed, all of the top golfers in the world, other than those whom the Tour suspended, are locked into the PGA Tour. The Tour's monopsony power is also reflected in the bonus pool, increased purses, new marquee high-purse events that the Tour established in response to the threat of entry by LIV Golf. The bonus pool and increased purses are direct evidence of the Tour's monopsony power, as the Tour significantly raised its prices in response to LIV Golf's competitive entry. This evidence also shows that compensation for professional golfers for elite events would be significantly greater in a competitive labor market.

272. The Tour excludes competition for independent contractor players to sell their services to others and manage their own name, image, and likeness because the Tour uses its market power to prohibit them from doing so. The Tour's Media Rights and Conflicting Events Regulations prevent competitors from acquiring the services of Tour members. And even when a rival is able to get Tour members to play in its events, the Media Rights Regulation excludes competition because it prevents the competing event from securing broadcast partners for its events. That the Tour is able to require Player Plaintiffs and the Tour's other members to agree to these rules without guaranteed compensation for doing so is powerful evidence of the Tour's monopsony power.

273. The Majors are not substitutes for the PGA Tour in the market for services of elite professional golfers. The Tour schedules its tournaments around the Majors and most qualifying opportunities for the Majors are derived from the players' play in the Tour.

The Market for the Promotion of Elite Professional Golf

274. The second relevant product market is the market for the promotion of elite professional golf events. A hypothetical monopolist in this product market would have the power to raise prices substantially above competitive levels for a sustained period of time, because advertisers, sponsors, broadcasters, and fans would not be able to turn to reasonable substitutes in sufficient volumes to make it unprofitable for the hypothetical monopolist to charge prices above competitive levels. This is because the promotion of elite professional golf is uniquely attractive to fans of professional golf and it is uniquely valuable for sponsors, advertisers, broadcast partners, venues, and others who seek to market to fans of elite professional golf.

275. The Tour represents to prospective advertisers that it offers the "most valuable audience in sports." According to its Tour's marketing materials, its audience of golf fans is (a) "affluent," in that it is "55% more likely to have household net worth of $1M+"; (b) "educated," in that it is "43% more likely to have a master's degree"; and (c) comprised of "influencers," in that it is "63% more likely to be top management or C-level." The Tour is differentiated from other sports or entertainment products by the access it offers to such a valuable audience. Because elite golf events offer a unique opportunity to reach this valuable audience, TV advertisers and event sponsors would be expected to continue purchasing elite golf events even with a small but significant nontransitory monopoly premium in the cost of doing so.

276. Furthermore, because the high degree of elite-level competition draws fans to watch elite golf events, the sponsors and TV broadcasters that pay for those events will not be able to reach those fans through events that do not provide similar elite-level competition. Thus, a hypothetical monopolist supplier of elite events (of the sort provided by the Tour) would not be expected to see a material diversion of sponsor or TV network money to other types of golf events in response to a monopoly premium for elite golf events.

277. Similarly, a substantial proportion of golf fans have a particular affinity for the sport, which is often tied to their participation in the sport. As players of the sport themselves, golf fans have a particular connection with golf broadcasts, which cannot readily be replicated by broadcasts of other sports or entertainment events. For the same reason, golf enthusiasts are a particular target of many advertisers on elite golf events, who seek to sell particular products and services (such as golf apparel

and equipment) to golf enthusiasts. Accordingly, a golf broadcaster, its golf advertisers, and the event sponsors cannot simply substitute coverage of another sport and expect the same golf fans to tune in. Thus, replacement of a golf telecast with a baseball game, automobile race, or other sporting event would likely retain some golf fans, but a substantial portion of golf fans—particularly the golf enthusiasts who will be the most loyal viewers and the primary targets for advertisers seeking to advertise to golf enthusiasts—would be lost by substituting to another type of programming.

278. From a geographic perspective, the events organized by the PGA Tour occur mostly in the United States, and the fans who attend those events in person are mostly in the United States. These events and their live network broadcasts are scheduled to provide convenient time slots for fans in the United States, and therefore are focused on generating viewership in the United States. Furthermore, elite golf events taking place in the United States capture the overwhelming share of viewership in the United States, indicating that elite golf events taking place elsewhere in the world are not a substitute for events in the United States for fans, broadcasters, and advertisers. The Tour itself has recognized the national dimension of competition, as it has informed players that they would ordinarily be granted releases for playing in conflicting events taking place outside the United States, but because LIV Golf has plans to organize a tour with events taking place in the United States it has denied releases to the players. This indicates that the Tour itself has far greater concern with competing events in the United States than for events taking place in other countries, which underscores that the United States represents a separate geographic market. In the alternative, however, the only other plausible relevant geographic market would be global. In either potential geographic market, the Tour maintains monopoly power.

279. For all of these reasons, a hypothetical monopolist in the supply of elite golf events in the United States would be able to profitably raise prices above competitive levels, indicating that the promotion of elite golf events in the United States is a relevant market.

Barriers To Entry To The Relevant Markets

280. The Tour's monopsony power in the market for the services of professional golfers for elite golf events and its monopoly power in the market for the promotion of elite professional golf events are protected by high barriers to entry. To enter these markets, a competing elite professional

golf promoter needs to raise at least hundreds of millions of dollars in capital, recruit a sufficient number of elite professional golfers to comprise a credible competing tour, arrange venues and tournaments, arrange for television coverage of tournaments, recruit sponsors and advertisers, and overcome the Tour's antitrust violations. It also needs to offer OWGR ranking points.

281. As the facts giving rise to this litigation attest, the Tour's Media Rights and Conflicting Events Regulations restrict a competitor's ability to contract for the services of professional golfers for elite golf events. Despite offering far greater prize money, and guaranteed compensation for participating players, LIV Golf was only able to attract a minority of elite golf professionals and had to pay excessively higher guaranteed payments to recruit a number of marquee players than would be required in a competitive market. And LIV Golf has been able to capture only a tiny share in the market for the promotion of elite golf events, as the viewership for LIV Golf events has been dwarfed by that of the PGA Tour's events, despite the more fan-friendly format and superior fan experience LIV Golf offers.

282. The Tour's threats to the Player Plaintiffs, its members, agencies, small businesses, and others, and the threats of those acting in concert with it, erect an additional and substantial barrier to entry. Any entity looking to enter the markets relevant to this litigation now knows what it will face. As Commissioner Monahan put it, the Tour will impose costs on any potential entrant such that there will be "no possibility of a return" on the enormous investment it would take to attempt to enter the market.

283. The last prospective entrant before LIV Golf to garner any meaningful support from players was the World Golf Tour in the mid-1990s. The Tour's Media Rights and Conflicting Events Regulations precluded its entry in short order. After the World Golf Tour folded, there was no meaningful threat of competitive entry for roughly a quarter-century. If the Tour's naked exercise of its market power renders LIV Golf unable to sustain its efforts to enter the market, it would be unreasonable to expect any attempt at competitive entry for the foreseeable future.

284. LIV Golf was able and prepared to enter the markets before the anticompetitive conduct of the Tour diminished its entry to what Commissioner Monahan dismissed as "exhibition matches" that were acquired with a cost structure that offered "no possibility of a return." LIV Golf is as serious

a nascent entrant as the PGA Tour has ever encountered. And despite all of LIV Golf's attributes and efforts, the Tour's ongoing anticompetitive conduct threatens LIV Golf's competitive viability. If LIV Golf fails, there will be no alternatives for the participants in elite professional golf events, fans, and sponsors of the game. They will be left with whatever the Tour chooses to offer.

285. Absent the Tour's anticompetitive conduct, LIV Golf would be an established and healthy competitor to the Tour in the markets for the services of professional golfers for elite golf events and the promotion of elite professional golf events. The Tour recognizes that LIV Golf "would be competitive to the PGA Tour." It denied LIV Golf access to the Player Plaintiffs' and its other members' services because it viewed LIV Golf as a competitor. But because of the Tour's anticompetitive conduct, LIV Golf is faced with a risk that it will not be able to remain competitively viable. As such, LIV Golf risks irreparable harm to its business and there is a severe risk of irreparable harm to competition if the Tour's conduct is not enjoined.

286. The Player Plaintiffs, other professional golfers and Tour members are participants in the restrained markets because they sell their services to the PGA Tour and are thus subject to its monopsony power. In addition, the Player Plaintiffs, other professional golfers, and Tour members are the target of the Tour's anticompetitive scheme to destroy LIV Golf and monopolize the market.

Anticompetitive Effects of the Tour's Conduct, Antitrust Injury, and Irreparable Harm

287. The Tour's conduct, including (1) unreasonably restrictive regulations, (2) threats of and now imposition of career-threatening bans, (3) suspensions of the Player Plaintiffs and other members who played at LIV Golf events, (4) the promise it will visit the "same fate" on any member who follows their example, (5) the Tour's threats and punishments to non-members who participate in LIV events and a wide range of other businesses who do business with LIV Golf, and (6) its exclusionary group boycott with other golfing bodies in the "ecosystem," all serve no purpose other than to thwart competitive entry and preserve the Tour's entrenched monopoly power. Faced with punishments of this nature, which could cause incalculable damage to players' careers, the Player Plaintiffs have been denied their right as independent contractors to sell their services to buyers other than the PGA Tour. And they have been directly and irreparably harmed by being prevented from participating in events in which they have already qualified, including the FedEx Cup Playoffs. While

some Player Plaintiffs have received higher payments from LIV Golf as a result of the risks they took by playing in LIV Golf events, they have not been compensated in full for the financial injuries they have already suffered and will continue to suffer. Nor have the Player Plaintiffs been compensated for the substantial irreparable injuries they have suffered and will continue to suffer if the Tour's attacks on them are allowed to continue unabated. Many other players are effectively prevented from playing in LIV Golf events due to fear of punishment from the PGA Tour.

288. LIV Golf has also suffered and will continue to suffer severe financial injuries as well as irreparable harms to its business from the Tour's anticompetitive conduct. The fields LIV Golf has been able to attract are weaker than would have been the case in the absence of the punishments from the PGA Tour, because many golfers are simply unwilling to take on the risks of playing in even a single LIV Golf event. This threatens irreparable harm to all of the Plaintiffs because it threatens to thwart LIV Golf's nascent entry and permanently entrench the PGA Tour's monopsony and monopoly power.

289. The punishments from the PGA Tour and others have forced LIV Golf to concentrate funds towards increasing upfront payments, and they have caused LIV Golf to scale down its entry plans and offer fewer tournaments in 2022. This has caused LIV Golf to suffer severe financial injuries as a result of the Tour's anticompetitive conduct.

290. Furthermore, while LIV Golf has the financial resources to make initial cash outlays to launch its product, the ongoing cash outlays significantly impact long-term viability of LIV Golf. Specifically, if the Tour's anticompetitive conduct continues unabated, it will threaten the competitive viability of LIV Golf.

291. The risk that LIV Golf could be driven out of the marketplace only serves to make it more difficult for players (including the Player Plaintiffs) to overcome the threat of punishments from the PGA Tour. It has been suggested that the actions of the PGA Tour and others have simply presented Plaintiffs with a "choice"—stay within the existing "*ecosystem*" or choose to switch to the LIV Golf series. But this is a false choice for several reasons.

292. As Commissioner Monahan admitted in his 2020 Memorandum, the Tour's Media Rights and Conflicting Events Regulations are intended to restrict its member players from offering

their services to others. The Tour's amendments of its Regulations and the procedures for members being released from them underscore the obvious: the Tour uses these provisions to create a roadblock to competition. The Conflicting Events and Media Rights Regulation serve no legitimate business purpose.

293. The Tour's unlawful conduct has depressed professional golfer wages, denied the Player Plaintiffs labor mobility, blunted the effective entry of the potential entrants into the markets that could challenge the Tour's monopoly, decreased the output of elite professional golf events and tours, decreased opportunities for broadcast of elite professional golf, decreased opportunities for advertising and sponsoring surrounding professional golf, decreased output of elite professional golf entertainment for fans, and diluted LIV Golf's opportunity to compete in the elite professional golf marketplace. The Tour's unlawful conduct has likewise caused severe financial injuries to LIV Golf in the form of higher costs and lost revenue, while also threatening to impose irreparable injuries to LIV Golf.

294. The Tour's punishments have deprived the Player Plaintiffs' opportunities to continue playing on the Tour, earning deserved compensation, earning opportunities into Majors, sponsorship relationships and revenue, and future opportunities to play and earn on the Tour. The Tour's punishments have also caused irreparable harm to the Player Plaintiffs' goodwill, reputation, and brand. The Tour denied Player Plaintiff Gooch, Swafford and Jones entry into the FedEx Cup Playoffs, which they earned through their performance, which has caused and will continue to cause severe injuries to these Plaintiffs.

295. LIV Golf sought to secure commitments from players by March 2022 to establish its League for the summer 2022. The Tour's anticompetitive conduct caused top professional golfers not to sign up. The Tour's conduct thus caused severe financial injury to LIV Golf, and it denied the Player Plaintiffs and other Tour members compensation they would earned from the LIV Golf League. Its anticompetitive conduct diminished competition, reduced marketwide output, and put LIV Golf League on the shelf for 2022.

296. Moreover, the Tour's threats of possible punishment for violating its Regulations and its actual punishments have caused even further foreclosure and have caused LIV Golf to employ a cost structure that significantly impacts its long-term viability.

297. The Tour's Regulations, unilateral and coordinated threats of lifetime bans, and imposition of career-threatening punishment have scared off the large majority of elite professional golfers and other participants in elite professional golf events and have caused LIV Golf to employ a cost structure that significantly impacts its long-term viability.

298. The Tour's conduct has substantially diminished and impaired the entry of the promoters that could meaningfully threaten the PGA Tour's monopoly, which has stood unchallenged for decades. Its conduct has denied LIV Golf the opportunity to pursue its innovative business model in 2022. Its conduct decreased elite professional golf tournaments in 2022 and 2023 as LIV Golf was required to change its model and allocate further capital to try to overcome the Tour's Regulations and threats.

299. The Tour's conduct has harmed the Player Plaintiffs as they have been suspended from what the Tour calls the "preeminent" golf association in the world for exercising their right as independent contractors to pursue their livelihood, sell their services to buyers other than the incumbent monopolist, and expand their sponsorship opportunities.

300. The Tour's conduct has also harmed the Player Plaintiffs as they have lost sponsorship opportunities and other business opportunities as a result of the Tour's pressure on sponsors and other entities with which the Plaintiffs do business.

301. The Tour's conduct has harmed consumers, giving them less choice, less output, and less innovation. Fans are unable to watch Player Plaintiffs in Tour events. Fans are unable to watch LIV Golf on television or other streaming services. Fans suffer from reduced output of elite professional golf events and suffer from getting fewer opportunities to watch Player Plaintiffs, Dustin Johnson, Brooks Koepka and many others whom the Tour has excommunicated from its events.

302. If the Tour's unlawful conduct is not enjoined, the harm to Plaintiffs will be permanent and irreparable. While LIV Golf has partially entered the markets at great expense, it has done so on terms that the Tour recognizes are "irrational." If the Tour's unlawful conduct is not enjoined, LIV Golf faces a risk that it will not be competitive in the long run. For competition for the Player Plaintiffs' services, the Tour's anticompetitive Regulations and other conduct frustrating the labor mobility of its members and tying up their media rights must be enjoined.

303. If the Tour can force LIV Golf out of the relevant markets altogether and/or foreclose LIV Golf from offering a set of products and services that provides a meaningful competitive constraint on the Tour, the Tour's monopoly and monopsony power will be cemented for many years to come, and immune to even attempted entry. Injunctive relief is necessary to restore competition for Tour members' services and to innovate the game that the Tour, only in theory, promises to support. All of the equities and the public interest support such relief. Otherwise, the harm to competition will be irreversible and permanent.

The PGA Tour's Alleged Procompetitive Defenses Are Pretextual

304. To assert a procompetitive justification for its conduct under the antitrust laws, the Tour must, at a minimum, offer a nonpretextual claim that its conduct is a form of competition on the merits. As set forth in detail above, the Tour cannot make such a showing, because its conduct is aimed at foreclosing the only meaningful competitive threat it has faced in a quarter century. Rather than competing on the merits, the Tour's conduct is aimed at kneecapping LIV Golf to foreclose nascent competition.

305. The Tour's purported justifications for its conduct are pretextual. For example, the Tour asserts that it is merely enforcing its membership rules that have some benign purposes. This argument is betrayed as pretextual in multiple respects. First, as detailed in the 2020 Monahan Memorandum, the Tour expressly expanded its membership rules for the purpose of defeating competition from a new entrant such as LIV Golf. Second, the Tour only enforces its rules to deny releases to players when they are playing in *competing* events, demonstrating that these rules are aimed at defeating competition. Third, the Tour has threatened and imposed punishments on a variety of golfers who are not even Tour members (and therefore are not subject to the Tour's rules at all), including European Tour members, college golfers, and Asian Tour members. Instead of enforcing its rules on its members, the Tour threatens and imposes punishments on any golfer anywhere in the world who participates in LIV Golf events. There is nothing *pro*competitive about the Tour's actions—they are aimed at thwarting the only competition it has faced in decades.

306. Similarly, the Tour's conduct reveals as pretextual its claim that it is acting to prevent some sort of "free-riding" on investments the Tour supposedly makes in players. As noted, the Tour's

attacks are not limited to those players in whom it has supposedly made some sort of investment, but instead extend to all golfers anywhere, including college players and members of other tours who have never been members of the PGA Tour. At the other end of the spectrum, the Tour's "free-riding" claim is absurd when applied to golfers such as Plaintiff Mickelson, who has devoted 30 years of his Hall of Fame career to playing on the Tour, providing massive benefits to the Tour throughout his career. And any punishments meted out by the Tour to players like Mr. Mickelson (and others) are disproportionate to the unspecified investments the Tour claims to make in the early stages of golfers' careers.

307. The Tour's words and conduct also betray as mere pretext its assertion that it is attacking LIV Golf and any players who participate in its events because the Tour does not want to be associated with any player who participates in a league that is majority funded by the Public Investment Fund of Saudi Arabia. Commissioner Monahan's 2020 Memorandum outlining the Tour's attacks on a new entrant says nothing about Saudi Arabia. Instead, it is focused on the competitive threat that the new entrant—which Commissioner Monahan labeled "Private Equity Golf"—presented to the Tour. The Tour's pretextual arguments about Saudi funding are further betrayed by its willingness to do business with dozens of sponsors who do billions of dollars of business each year in Saudi Arabia. Furthermore, the Tour's pretext is exposed by its willingness to have the PGA Tour Fan Shop operated by Fanatics, which has received substantial funding from the Public Investment Fund of Saudi Arabia—the same fund that the Tour supposedly finds so objectionable when it sponsors LIV Golf.

308. The Tour's own actions also reveal that the Tour's various objections to LIV Golf's innovative format are pretextual. While the Tour has suggested that there is something about LIV Golf's no-cut, high purse tournaments and its team-golf format that justify its opposition to the new entrant, the Tour itself has disclosed plans to copy LIV Golf's format.

309. Furthermore, the Tour and its spokespersons have asserted that they object to LIV Golf because LIV Golf is supposedly operating outside the "ecosystem" and is not cooperating with other existing tours or sanctioning bodies. The facts, however, demonstrate the pretext in any such argument. For example, the sponsors of LIV Golf sought to work with the European Tour, but in the meeting in Malta in July 2021, the European Tour revealed that although it recognized the "appeal and fit" of the new tour, it feared the "mighty power" of the PGA Tour and therefore had to reject the proposed

partnership. LIV Golf has likewise sought to partner with others in the golf "ecosystem" and grow the game at multiple levels, including through proposed partnerships with entities ranging from the Asian Tour, to the LPGA, to the Ladies European Tour. At every turn, the PGA Tour has either directly foreclosed LIV Golf's efforts or exerted extreme pressure on other golfing bodies to exclude LIV Golf. For example, the PGA Tour and the European Tour threatened severe consequences on the Asian Tour and have punished golfers on the Asian Tour in their effort to prevent the Asian Tour from partnering with LIV Golf. The Tour prevented the LPGA and the Ladies European Tour from partnering with LIV Golf, thus harming countless women professional golfers by denying them additional playing opportunities and much-needed funding for their tours—all for the purpose of foreclosing LIV Golf from the "ecosystem." And, as detailed above, the Tour has leaned on the bodies that sponsor the Majors and the OWGR to lock arms with the Tour in excluding LIV Golf. Thus, having used every tool at its disposal to prevent LIV Golf from working with other bodies in the golf "ecosystem," and punishing those who make the choice to partner with LIV Golf, it is pure pretext for the Tour to suggest that it is somehow justified in opposing LIV Golf because LIV Golf has been left to operate largely outside the "ecosystem."

CLAIMS FOR RELIEF

COUNT I: Unlawful Monopsonization of the market for ELITE GOLF EVENT SERVICES in Violation of Sherman Act § 2 (15 U.S.C. § 2)

310. Plaintiffs incorporate by reference the allegations of all preceding paragraphs as though fully set forth in this Count I.

311. At all relevant times, the Tour has had monopsony power over the market for the services of professional golfers for elite golf events in the United States (or, alternatively, in the world).

312. The Tour has willfully maintained and abused its monopsony power through anticompetitive conduct, including, among other things, 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.

313. The anticompetitive actions of the PGA Tour do not further any procompetitive goals and are not reasonably necessary to achieve any legitimate procompetitive benefits.

314. The PGA Tour's exclusionary conduct has unreasonably restrained competition in the market for services of professional golfers for elite golf events. including by:

- Preventing vigorous competition for services of professional golfers for elite golf events;
- Suspending the Player Plaintiffs for playing professional golf;
- Preventing LIV Golf from contracting with agencies, vendors, sponsors. advertisers and players needed to offer an elite professional golf entertainment product;
- Impacting competition in contracting for the services of elite professional golfers;
- Depressing compensation for the services of professional golfers for elite golf events below competitive levels;
- Decreasing the output of opportunities for professional golfers for elite golf events;
- Denying the Player Plaintiffs the right to have free agency for their independent contractor services;
- Interfering with the Player Plaintiffs' and others' contractual negotiations with LIV Golf;
- Interfering with LIV Golf's contractual negotiations with agencies, sponsors, venues, vendors, broadcasters, and partners to work with LIV Golf; and
- Preventing LIV Golf from promoting elite professional golf to fans.

315. As a result of the PGA Tour's anticompetitive conduct, Plaintiffs have been and will continue to be harmed in their business or property; competition in the relevant market will be harmed;

the PGA Tour will unlawfully maintain its monopsony position; and players, consumers. and other stakeholders will be harmed. Each of the injuries suffered by Plaintiffs is of the type the antitrust laws were intended to prevent, and each flows from Tour's unlawful conduct. Such conduct is inherently and manifestly anticompetitive and has an injurious effect on competition.

316. Plaintiffs have been and will continue to be irreparably harmed by the PGA Tour's unlawful conduct such that Plaintiffs need injunctive relief in order to stop immediately the PGA Tour's threats and imposition of onerous punishments on professional athletes to thwart LIV Golf's entry and maintain the PGA Tour's monopsony and an order enjoining enforcement of the PGA Tour's anticompetitive Regulations.

317. The PGA Tour's anticompetitive acts violate Section 2 of the Sherman Act. Plaintiffs seek injunctive relief, monetary damages, treble damages, costs of this suit, reasonable attorney's fees, and interest pursuant to 15 U.S.C. §§ 15(a), 26 and any other relief this Court deems just and proper under Count I.

COUNT II: Unlawful Monopolization of the market for the PROMOTION OF ELITE PROFESSIONAL GOLF EVENTS in Violation of Sherman Act § 2 (15 U.S.C. § 2)

318. Plaintiffs incorporate by reference the allegations of all preceding paragraphs as though fully set forth in this Count II.

319. At all relevant times, the PGA Tour has had monopoly power over the market for the promotion of elite professional golf events in the United States (or, alternatively, in the world). The only viable competitor to the PGA Tour's dominant market position in this market is LIV Golf.

320. The PGA Tour has willfully maintained and abused its monopoly power through anticompetitive conduct, 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.

321. The anticompetitive actions of the PGA Tour do not further any procompetitive goals and are not reasonably necessary to achieve any procompetitive benefits.

322. The PGA Tour's exclusionary conduct has unreasonably constrained competition in the market for the promotion of elite professional golf events, including by:

- Preventing vigorous competition for the promotion of elite professional golf entertainment;
- Preventing LIV Golf from contracting with players regarding their own media rights needed to promote elite professional golf tournaments;
- Preventing Player Plaintiffs from contracting with LIV Golf and others regarding their own media rights;
- Decreasing the output of elite professional golf tournaments;
- Suspending Player Plaintiffs and other golfers for playing professional golf;
- Preventing LIV Golf from contracting with agencies, vendors, sponsors, advertisers and players need to offer elite professional golf entertainment product;
- Impacting competition in contracting for the play of elite professional golfers;
- Depressing compensation for the services of professional golfers in elite events below competitive levels;
- Interfering with LIV Golf's contractual negotiations with players to join LIV Golf;
- Interfering with LIV Golf's contractual negotiations with agencies, sponsors, venues, vendors, broadcasters and partners to work with LIV Golf; and
- Preventing LIV Golf from promoting elite professional golf to fans.

323. As a result of the PGA Tour's anticompetitive conduct, LIV Golf and Player Plaintiffs have been and will continue to be harmed in their business or property; competition in the relevant market will be harmed; the PGA Tour will unlawfully maintain its monopoly position; and players,

consumers, and other stakeholders will be harmed. Each of the injuries suffered by Plaintiffs is of the type the antitrust laws were intended to prevent, and each flows from Tour's unlawful conduct. Such conduct is inherently and manifestly anticompetitive and has an injurious effect on competition.

324. Plaintiffs have been and will continue to be irreparably harmed by the PGA Tour's unlawful conduct such that they need injunctive relief stopping immediately the PGA Tour's threats and imposition of onerous punishments on professional athletes designed to thwart LIV Golf's entry and maintain the PGA Tour's monopoly and enjoining enforcement of the PGA Tour's anticompetitive player Regulations.

325. The PGA Tour's anticompetitive acts violate Section 2 of the Sherman Act. Plaintiffs seek injunctive relief, monetary damages, treble damages, costs of this suit, reasonable attorney's fees, and interest pursuant to 15 U.S.C. §§ 15(a), 26 and any other relief this Court deems just and proper under Count II.

COUNT III: Unlawful Attempted Monopolization in Violation of Sherman Act § 2 (15 U.S.C. § 2)

326. Plaintiffs incorporate by reference the allegations of all preceding paragraphs as though fully set forth in this Count III.

327. In the event that the PGA Tour's position in the relevant markets does not amount to monopoly and/or monopsony power, either by virtue of LIV Golf's nascent entry or otherwise, Plaintiffs plead in the alternative that the Tour's conduct constitutes unlawful attempted monopolization and monopsonization in violation of Section 2 of the Sherman Act.

328. The Tour has unlawfully attempted to monopolize and monopsonize the relevant markets.

329. At all relevant times, the Tour has had monopoly and/or monopsony power or, at a minimum, a dangerous probability of success in acquiring (or re-acquiring) monopoly and/or monopsony power, over the relevant markets in the United States (or, alternatively, in the world).

330. 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.

331. As set forth in detail above, the Tour's conduct carries a dangerous probability of destroying the competitive viability of LIV Golf. The Tour's anticompetitive conduct forced LIV Golf to change its commercial strategy for 2022. LIV Golf was forced to announce a substantially scaled-down version of its League concept by offering 8 invitationals in 2022 (the LIV Golf Invitational Series). The Tour then attacked LIV Golf's Invitational Series events. Furthermore, because of the Tour's anticompetitive conduct, LIV Golf has been unable to broadcast its events in the United States—an encumbrance that threatens its long-term viability.

332. Furthermore, the Tour's conduct has denied and will continue to deny LIV Golf access to many top players. The Tour's Regulations and unilateral and conspiratorial threats of punishment have scared off the large majority of elite players as well as the pipeline of future elite players. And for those players whom LIV Golf has been able to sign, it has had to offer supracompetitive compensation well above the levels that would prevail in a market not polluted by the Tour's anticompetitive conduct. This has forced LIV Golf into an unsustainable business model. If the Tour's anticompetitive conduct is not enjoined, LIV Golf will be unable to sustain a competitively viable tour.

333. And, the Tour's attempted monopolization and unlawful exclusionary conduct presents a dangerous probability that the Tour will succeed, to the extent it has not already, in its attempt to monopolize the relevant markets, as shown by its willful and intentional efforts and success in:

- Preventing vigorous competition;
- Preventing the PGL from entering the markets;

- Suspending Player Plaintiffs;
- Preventing Plaintiff LIV Golf from contracting with agencies, vendors, sponsors, advertisers and players needed to offer an elite professional golf entertainment product;
- Impacting competition in contracting for the services of elite professional golfers;
- Depressing compensation for the services of elite professional golfers below competitive levels;
- Decreasing the output of elite professional golfer services opportunities;
- Denying Player Plaintiffs the right to have free agency for their independent contractor services;
- Interfering with Plaintiffs' and others' contractual negotiations;
- Preventing Plaintiff LIV Golf from promoting elite professional golf to fans;
- Encouraging other golfing entities to pressure golfers against joining LIV Golf, including by threatening to disallow LIV Golf players from playing in various tournaments; and
- Orchestrating a group boycott of LIV Golf with the European Tour in furtherance of their agreement to boycott LIV Golf and golfers who would play for a competitive tour.

334. Absent injunctive relief halting the Tour's anticompetitive conduct, LIV Golf will be unable to sustain a competitively viable business, and it will be unable to meaningfully constrain the Tour's monopoly power.

335. The Tour's conduct has substantially diminished and impaired the entry of the only entrant that could meaningfully threaten the PGA Tour's monopoly and monopsony power in the relevant markets, which has stood unchallenged for decades. And if it not enjoined, the Tour's conduct will forever destroy the competitive viability of the only potential challenger to the Tour's monopoly

and monopsony power.

336. The Tour has acted with the specific intent to monopolize and monopsonize the relevant markets. The Tour's actions are irrational but for its anticompetitive effect, including by degrading its own offerings. The Tour's specific intent to monopolize and monopsonize the relevant markets is shown through its statements and actions, including: (1) the PGA Tour Commissioner's statements in the January 2020 Monahan Memorandum, (2) the Tour's public and private statements since 2020 related to the Tour's desire to "protect this business model" and prevent a new entrant from contracting with Tour members through threats and enforcement of unlawful Regulation provisions, (3) statements of Tour officials and Members related to the Tour's desire to destroy LIV Golf, (4) the Tour's May 10, 2022 denial of Tour members' requests to participate in the LIV Golf London Invitational, (5) the Tour's coordinated efforts to get others to support its boycott of LIV Golf and those who associate with LIV Golf, (6) the Tour pressuring small businesses not to work with LIV Golf or be blacklisted by the Tour, (7) the Tour's application of its Regulations to impose irreparable punishment on Player Plaintiffs and others for playing professional golf.

337. As a result of the PGA Tour's anticompetitive conduct, LIV Golf and the Player Plaintiffs have been and will continue to be harmed in their business or property; competition in the relevant markets will be harmed; the PGA Tour will unlawfully monopolize and monopsonize the relevant markets; and players, consumers, and other stakeholders will be harmed.

338. Plaintiffs have been and will continue to be irreparably harmed by the PGA Tour's unlawful conduct such that they need injunctive relief stopping immediately the PGA Tour's threats and imposition of onerous punishments on professional athletes designed to thwart LIV Golf's entry and maintain the PGA Tour's monopoly and enjoining enforcement of the PGA Tour's anticompetitive player Regulations. Each of the injuries suffered by Plaintiffs is of the type the antitrust laws were intended to prevent, and each flows from Tour's unlawful conduct. Such conduct is inherently and manifestly anticompetitive and has an injurious effect on competition.

339. Accordingly, to the extent the Tour argues that LIV Golf's nascent entry means the Tour is not presently a monopolist, the Tour's anticompetitive conduct carriers a dangerous probability of restoring and maintaining the Tour's monopoly and monopsony power in the relevant markets, in

violation of Section 2 of the Sherman Act.

340. Plaintiffs seek injunctive relief, monetary damages, treble damages, costs of this suit, reasonable attorney's fees, and interest pursuant to 15 U.S.C. §§ 15(a), 26 and any other relief this Court deems just and proper under Count III.

Count IV: Unlawful Restraint of Trade in Violation of Sherman Act § 1 (15 U.S.C. § 1) [Group Boycott]

341. Plaintiffs incorporate by reference the allegations of all preceding paragraphs as though fully set forth in this Count IV.

342. The PGA Tour has unlawfully reached an agreement. with the purpose to eliminate competition, with the European Tour, a potential horizontal competitor, (and possibly others) to not compete for players' services and to prevent the entry and competitive viability of LIV Golf into the relevant markets. Specifically, the PGA Tour and the European Tour have agreed to engage in a group boycott of LIV Golf. other potential competitors. golfers (like Player Plaintiffs) who agree to play in LIV Golf's events. and any other person or entity who seeks to partner with LIV Golf, to harm competition for the services of professional golfers for elite golf events and for the promotion of elite golf events.

343. The actions of the Tour and the European Tour make clear that they had a conscious commitment to a common scheme: to prevent the entry of new competitors into the market. The unlawful agreement is evidenced by the actions and statements of the Tour and the European Tour, as set forth in this Complaint, including:

- The Tour admitted the existence of an unlawful agreement with the European Tour. In his January 2020 Memorandum describing the PGA Tour's plan to foreclose new entry, Commissioner Monahan explained that this alliance with the European Tour was aimed at removing the European Tour as a potential horizontal competitor through its potential to partner with a new entrant: "We have continued discussions with the European Tour about the potential to work more closely together. thereby removing the European Tour as a potential partner of" a new entrant;
- As Mr. Pelley detailed. in November 2020 the European Tour and the PGA Tour

ceased competing with each other for players' services, and instead formed an illegal alliance to eliminate new competition for players' services;

- Following the agreement, in November 2020, the European Tour announced it would not partner with PGL;
- Pursuant to its illegal alliance, the European Tour agreed not to partner with LIV Golf despite recognizing the "fit and appeal" of partnering with LIV Golf because the European Tour had contracted with the Tour and could not upset the "US PGA mighty power;"
- The Tour and the European Tour then took steps in furtherance of their scheme, including threatening all players with lifetime bans if they competed in the PGL and, later, LIV Golf tournaments; and
- In addition, the Tour and European Tour agreed to suspend players who competed in LIV Golf tournaments.

344. The Tour used its Regulations to implement the unlawful agreement and achieve the anticompetitive purpose of the agreement, harming Plaintiffs and competition.

345. After the agreement was reached, the Tour enforced its unlawful Regulations and proceeded to suspend the Player Plaintiffs for violating the Regulations. Further evidencing the agreement that was in fact reached, the Tour enforced the Regulations in a way that they had not been enforced previously. Historically, the Tour permitted members to associate with multiple tours simultaneously and routinely granted releases for golfers to compete in non-Tour affiliated tournaments. In contrast, the Tour denied all releases for LIV Golf events and imposed effective career-ending suspensions on Plaintiffs. The Tour made clear its enforcement of these Regulations is intended to destroy the entry of LIV Golf, harming the Plaintiffs and competition as a whole in the process. Likewise, as detailed in this Complaint, the European Tour has departed from its longstanding practices regarding conflicting events to align with the Tour in furtherance of their agreement to act jointly to exclude LIV Golf and punish the Player Plaintiffs and other golfers who play in LIV Golf events.

346. Professional golfers (including the Player Plaintiffs) are essential to the Tour's scheme to eliminate competition in the market. As Commissioner Monahan admitted: "The impact that [the

new league] could have on the PGA TOUR is dependent on the level of support it may receive from these players. Without this support, [the new league's] ability to attract media and corporate partners will be significantly marginalized and its impact on the TOUR diminished."

347. The Player Plaintiffs are the pawns (and targets) used to effectuate the group boycott and eliminate competition in the markets; the Player Plaintiffs' suspensions are a necessary means to accomplish the Tour's anticompetitive scheme.

348. ***Per se* violation:** The agreements constitute unreasonable restraints of trade that are *per se* illegal under Section 1 of the Sherman Act, 15 U.S.C. § 1. The agreement constitutes a group boycott orchestrated by a monopolist and joined by a potential competitor 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.

349. **Rule of Reason violation:** The agreements are also unreasonable restraints of trade that are unlawful under Section 1 of the Sherman Act, 15 U.S.C. § 1, under the rule of reason analytical framework. The principal tendency of the agreement is to restrain competition, reinforce the market power of the PGA Tour, defeat the nascent entry of LIV Golf, and eliminate competition in the relevant markets. This harmed the Player Plaintiffs and other professional golfers by eliminating competition in the market for their services and also restricted competition in the market generally. It has also harmed LIV Golf and competition in the relevant markets by hindering LIV Golf's entry and threatening to destroy its competitive viability. The agreement between the Tour and the European Tour to lock arms in a joint effort to foreclose competitive entry lacks any legitimate procompetitive justifications.

350. As a result of the PGA Tour's anticompetitive conduct, Plaintiffs have been and will continue to be harmed in their business or property; competition in the relevant markets will be harmed; the PGA Tour will unlawfully maintain its monopoly position; and Plaintiffs, consumers, and other stakeholders will be harmed. Each of the injuries suffered by Plaintiffs is of the type the antitrust laws were intended to prevent, and each flows from Tour's unlawful conduct. Such conduct is inherently and manifestly anticompetitive and has an injurious effect on competition.

351. Plaintiffs have been and will continue to be irreparably harmed by the PGA Tour's

unlawful conduct such that Plaintiffs need injunctive relief in order to stop the PGA Tour's unlawful conduct.

352. The PGA Tour's anticompetitive acts violate Section 1 of the Sherman Act.

353. Plaintiffs seek injunctive relief, monetary damages, treble damages, costs of this suit, reasonable attorney's fees, and interest pursuant to 15 U.S.C. §§ 15(a) and 26, and any other relief this Court deems just and proper under Count IV.

Count V: Unlawful Agreement to Restrain Trade in Violation of the Cartwright Act (Cal. Bus. & Prof. Code §§ 16720(a), 16726) [Group Boycott]

354. Plaintiffs incorporate by reference the allegations of all preceding paragraphs as though fully set forth in this Count V.

355. The PGA Tour has unlawfully agreed with the European Tour (and potentially others) "[t]o create or carry out restrictions in trade or commerce." Cal. Bus. & Prof. Code §§ 16720(a), 16726. Moreover, the Tour's violation of Section 1 of the Sherman Act necessarily constitutes a violation of the Cartwright Act.

356. The Tour operates six annual tournaments in the state of California, owns golf courses in California, committed multiple acts in furtherance of its unlawful group boycott in California, co-hosted a tournament with the European Tour in California from which it banned any golfers who participated in a LIV Golf event, harmed California resident golfers (including Plaintiff Mickelson), and harmed competition for professional golfers' services for elite events in California. Moreover, the law and public policy of other affected states is materially similar to the law of California.

357. The Tour has unlawfully agreed with the European Tour to not compete for players' services and to act jointly to prevent the entry of LIV Golf into the relevant markets. Specifically, the PGA Tour and the European Tour agreed to boycott LIV Golf, players who work with LIV Golf, and any other person or entity that seeks to partner with LIV Golf. The Tour entered an agreement with the European Tour so as to—as Commissioner Monahan vowed—"remov[e] the European Tour as a potential partner" of a new entrant like LIV Golf.

358. The PGA Tour and the European Tour have taken acts in furtherance of their unlawful boycott. For instance, the European Tour has agreed to suspend and punish golfers for playing in LIV

Golf, to no longer compete with the PGA Tour for players' services, and to not partner with LIV Golf or other potential entrants. The two tours have unlawfully agreed to deny (and taken steps to deny) golfers who play in LIV Golf events the opportunity to play in the tours' co-sanctioned events (including the event they co-sanctioned in California), and to unfairly punish independent contractors for playing with a competitor promoter.

359. The Tour's agreement with the European Tour has the illegal purpose to eliminate a competitor and future potential entrants. In particular, the Tour seeks to deny LIV Golf access to the services of professional golfers for elite golf events along with the other partners and inputs necessary to compete for the services of professional golfers for elite golf events. The two tours have also unlawfully agreed to not compete for players' services in order to suppress wages and decrease output of opportunities.

360. The tours' agreement constitutes an unreasonable restraint of trade that is *per se* illegal under California Business and Professions Code §§ 16720(a), 16726. 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 markets. No elaborate analysis is required to demonstrate the anticompetitive character of this group boycott.

361. The agreement also constitutes an unreasonable restraint of trade that is unlawful under California Business and Professions Code §§ 16720(a), 16726, under a rule-of-reason analysis. The principal tendency of the agreements is to restrain competition, reinforce the market power of the PGA Tour, and seriously hamper (or outright defeat) the competitive effectiveness and prospective entry of LIV Golf—by harming professional golfers like the Player Plaintiffs and thus eliminating competition for their services—the only viable alternative in the relevant market, and thereby harm competition in the relevant markets. This harmed the Player Plaintiffs and other professional golfers by eliminating competition in the market for their services and also restricted competition in the markets generally. It has also harmed LIV Golf and competition in the market for the promotion of elite events by hindering LIV Golf's entry and threatening to destroy its competitive viability. The agreement lacks any legitimate procompetitive justifications, because, among other things, the group boycott deprives Plaintiff Mickelson and other Player Plaintiffs of means to practice their profession that are so essential

that they are necessary to compete effectively in the sport of professional golf.

362. As a result of the PGA Tour's anticompetitive conduct, Plaintiffs have been and will continue to be harmed in their business or property; competition in the relevant markets will be harmed; the PGA Tour will unlawfully maintain its monopoly position and unlawful boycott; and Plaintiffs, LIV Golf, consumers, and other stakeholders will be harmed. Each of the injuries suffered by Plaintiffs is of the type the antitrust laws were intended to prevent, and each flows from Tour's unlawful conduct. Such conduct is inherently and manifestly anticompetitive and has an injurious effect on competition.

363. As a result of the PGA Tour's anticompetitive conduct, Plaintiffs have been and will continue to be irreparably harmed such that they need injunctive relief in order to stop immediately the PGA Tour's unlawful conduct.

364. The PGA Tour's anticompetitive acts violate the Cartwright Act. Cal. Bus. & Prof. Code §§ 16720(a), 16726.

365. Plaintiffs seek injunctive relief, monetary damages, treble damages, costs of this suit, reasonable attorney's fees, and interest pursuant to Cal. Bus. & Prof. Code § 16750(a), and any other relief this Court deems just and proper under Count V.

Count VI: Breach of Contract (Player Plaintiffs)

366. Player Plaintiffs incorporate by reference the allegations of all preceding paragraphs as though fully set forth in this Count VI.

367. On various dates, Player Plaintiffs and the Tour entered into a contract when the Plaintiffs submitted their respective membership applications and membership renewal applications and agreed to be bound by the Tour's Regulations. The Regulations (other than those described in this Complaint that violate the antitrust laws and therefore are unenforceable) are a legally binding agreement by and between Player Plaintiffs, respectively and individually, and the Tour. Player Plaintiffs maintain that provisions within the Regulations are not enforceable, but the provision the Tour has breached is not one of those provisions.

368. Player Plaintiffs performed all enforceable provisions in the Tour's Regulations and have complied with all obligations under the Tour's Disciplinary Process detailed in the Tour's Regulations.

369. The Tour breached Section VII.E.2 of the Regulations because it failed to abate Plaintiffs' suspensions pending their appeals of the Tour's Disciplinary Actions. Section VII.E.2 provides that "[a]n appeal shall operate to stay the effective date of any penalty, except suspension from a tournament then in progress or scheduled for the calendar week in which the alleged violation occurred, until after the final decision on the appeal." Exhibit 1. The Tour was thus required to honor some Player Plaintiffs' requests to participate in Tour events, including the FedEx Cup Playoff events, occurring while Player Plaintiffs' appeals to the Tour's Appeals Committees remained pending.

370. The Tour's breach caused Player Plaintiffs to incur substantial damages in the form of irreparable harm (in the form of loss of FedEx Cup ranking points, loss of OWGR ranking points, loss of career opportunities, loss of goodwill, and reputational harm), loss of income-earning opportunities, loss of retirement-plan payments, consequential damages, expenses, and costs.

Count VII: Tortious Interference with LIV Golf's Contractual Relationships (LIV Golf)

371. LIV Golf incorporates by reference the allegations of all preceding paragraphs as though fully set forth in this Count VII.

372. LIV Golf has entered into contractual relationships with professional golfers and other third parties, such as vendors, sponsors, and broadcasters.

373. The PGA Tour knew that LIV Golf had entered into contractual relationships with professional golfers and other third parties.

374. The PGA Tour's unlawful actions detailed herein were intended to prevent professional golfers and other third parties from performing their contracts with LIV Golf.

375. The professional golfers and other third parties have been unable to perform under their contracts with LIV Golf as a result of the PGA Tour's actions described herein.

376. There was no legal justification for the PGA Tour's anticompetitive conduct.

377. As a result of the PGA Tour's anticompetitive and wrongful conduct, LIV Golf has suffered significant and irreparable harm to its business.

378. LIV Golf has been and will continue to be irreparably harmed by the PGA Tour's unlawful conduct such that LIV Golf needs expedited injunctive relief stopping immediately the PGA Tour's unlawful conduct.

379. LIV Golf seeks injunctive relief, economic damages, including compensatory damages, special damages, and consequential damages, costs of this suit, and interest and any other relief this Court deems just and proper under Count VII. LIV Golf also seeks punitive damages against the PGA Tour for its tortious interference with LIV Golf's business relationships.

Count VIII: Tortious Interference with LIV Golf's Prospective Business Relationships (LIV Golf)

380. LIV Golf incorporates by reference the allegations of all preceding paragraphs as though fully set forth in this Count VIII.

381. LIV Golf has been on the verge of entering business relationships with professional golfers and other third parties, such as vendors, sponsors, and broadcasters.

382. The PGA Tour knew that LIV Golf was contacting players and other third parties about entering into a business relationship.

383. The PGA Tour's actions detailed herein were independently tortious as detailed herein and were intended to prevent professional golfers and other third parties from entering into a business relationship with LIV Golf.

384. Several professional golfers and other third parties have not entered into such business relationships with LIV Golf to-date as a result of the PGA's Tours anticompetitive actions and restrictions.

385. There was no legal justification for the PGA Tour's anticompetitive conduct.

386. As a result of the PGA Tour's anticompetitive and wrongful conduct, LIV Golf has suffered significant and irreparable harm to its business.

387. LIV Golf has been and will continue to be irreparably harmed by the PGA Tour's unlawful conduct such that LIV Golf needs expedited injunctive relief stopping immediately the PGA Tour's unlawful conduct.

388. LIV Golf seeks injunctive relief, economic damages, including compensatory damages, special damages, and consequential damages, costs of this suit, and interest and any other relief this Court deems just and proper under Count VIII. LIV Golf also seeks punitive damages against the PGA Tour for its tortious interference with LIV Golf's prospective business relationships..

JURY DEMAND

389. Plaintiffs demand a trial by jury of all issues so triable.

RELIEF REQUESTED

WHEREFORE, Plaintiffs hereby request that the Honorable Court award the following preliminary injunctive relief against the PGA TOUR:

a. Stay and enjoin the PGA Tour's suspension and sanctions imposed on the Player Plaintiffs;

b. Prevent the PGA Tour from banning or threatening to ban from the PGA Tour (and its affiliated Tour) players who talk to, contract with, play in, or associate with LIV Golf;

c. Prevent the PGA Tour from expelling players from the PGA Tour (and its affiliated Tours) or PGA Tour tournaments who talk to, contract with, play in, or associate with LIV Golf;

d. Prevent the PGA Tour from threatening or imposing any other punishments or otherwise harming or threatening to harm anyone who talks to, contracts with, or associates with LIV Golf;

e. Prevent the PGA Tour from conspiring or unlawfully agreeing with the European Tour to ban or threaten to ban players from participating in European Tour events or participating in the Ryder Cup for talking to, contracting with, playing in, or associating with LIV Golf;

f. Prevent the PGA Tour from pressuring or coordinating with the R&A, Masters, and/or PGA of America (or others), to punish, exclude or threaten to exclude players otherwise eligible under current eligibility rules from participating in golf events (including the Majors);

g. Prevent the PGA Tour from amending its rules to prevent players otherwise eligible from playing in PGA Tour events or co-sponsored events, such as the FedEx Cup, the WGC tournaments, the Tournament of Champions, the Players,

the Memorial, the Arnold Palmer Invitational, the Genesis Invitational, AT&T Pebble Beach Open, and the Presidents Cup;

h. Prevent the PGA Tour from enforcing its unlawful restrictions on independent-contractor golfers, including the Media Rights Regulation and the Conflicting Events Regulation;

i. Prevent the PGA Tour from amending its rules to prevent players otherwise eligible from playing in PGA Tour events or co-sponsored events;

j. Prevent the PGA Tour from applying rules beyond their meaning to punish players who associate with LIV Golf, or otherwise to thwart competition; and

k. Prevent the PGA Tour from taking any other actions intended to undermine competition on the merits from LIV Golf.

WHEREFORE, Plaintiffs hereby request that the Honorable Court award the following permanent injunctive relief against the PGA TOUR:

a. Stay and enjoin the PGA Tour's suspension and sanctions imposed on the Player Plaintiffs;

b. Enjoin the PGA Tour from banning or threatening to ban from the PGA Tour (and its affiliated Tour) players who talk to, contract with, play in, or associate with LIV Golf;

c. Enjoin the PGA Tour from expelling players from the PGA Tour (and its affiliated Tour) or PGA Tour tournaments who talk to, contract with, play in, or associate with LIV Golf;

d. Enjoin the PGA Tour from threatening or imposing any other punishments or otherwise harming or threatening to harm anyone who talks to, contracts with, or associates with LIV Golf;

e. Enjoin the PGA Tour from conspiring or unlawfully agreeing with the European Tour to ban or threaten to ban players from participating in European Tour events or participating in the Ryder Cup for talking to, contracting with, playing in, or associating with LIV Golf;

f. Enjoin the PGA Tour from agreeing, contracting or threatening the R&A, Masters, and/or PGA of America (or others), to punish, exclude or threaten to exclude players otherwise eligible under current eligibility rules from participating in golf events (including the Majors);

g. Enjoin the PGA Tour from amending its rules to prevent players otherwise eligible from playing in PGA Tour events or co-sponsored events, such as the FedEx Cup, the WGC tournaments, the Tournament of Champions, the Players, the Memorial, the Arnold Palmer Invitational, the Genesis Invitational, AT&T Pebble Beach Open, and the Presidents Cup;

h. Enjoin the PGA Tour from enforcing its unlawful restrictions on independent-contractor golfers, including the Media Rights Regulation and the Conflicting Events Regulation;

i. Enjoin the PGA Tour from amending its rules to prevent players otherwise eligible from playing in PGA Tour events or co-sponsored events;

j. Enjoin the PGA Tour from applying rules beyond their meaning to punish players who associate with LIV Golf, or otherwise to thwart competition; and

k. Enjoin the PGA Tour from taking any other actions intended to undermine competition on the merits from LIV Golf.

WHEREFORE, Plaintiffs request that this Honorable Court:

a. Adjudge and decree that the PGA Tour is unlawfully maintaining its monopoly over the market for the services of professional golfers for elite golf events in violation of Section 2 of the Sherman Act;

b. Adjudge and decree that the PGA Tour is unlawfully maintaining its monopoly over the market for the promotion of elite golf events in violation of Section 2 of the Sherman Act;

c. In the alternative, adjudge and decree that the PGA Tour is attempting to monopolize the market for the services of professional golfers for elite golf

events and the market for the promotion of elite golf events in violation of Section 2 of the Sherman Act;

d. Adjudge and decree that the PGA Tour unreasonably restrained trade in violation of Section 1 of the Sherman Act when it entered agreement with the European Tour to boycott LIV Golf and potential competitors and those who associate with LIV Golf to try to foreclose competition from LIV Golf in the relevant markets;

e. Adjudge and decree that the PGA Tour breached its Regulations when it refused to abate Player Plaintiffs' suspensions pending their respective appeals;

f. Adjudge and decree that the PGA Tour unlawfully and tortiously interfered with LIV Golf's contractual and prospective business relationships;

g. Award Plaintiffs monetary damages, treble damages, and economic damages;

h. Award LIV Golf punitive damages for the PGA Tour's bad faith and egregious interference with LIV Golf's contractual and prospective business relationships;

i. Award Plaintiffs their costs in this action, including attorneys' fees; and

j. Award Plaintiffs any further relief as may be just and proper.

DATED: August 26. 2022

Respectfully submitted,

By: */s/ Rachel S. Brass*

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ATTESTATION PURSUANT TO CIVIL LOCAL RULE 5-1

Pursuant to Civil Local Rule 5-1(h)(3) of the Northern District of California, I attest that concurrence in the filing of the document has been obtained from each of the other signatories to this document.

DATED: August 26, 2022

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

MATT JONES; BRYSON DECHAMBEAU; PETER UIHLEIN; and LIV GOLF, INC.,

Plaintiffs,

v.

PGA TOUR, INC.,

Defendant.

PGA TOUR, INC.,

Counterclaimant,

v.

LIV GOLF, INC.,

Counterdefendant.

Case No. 5:22-cv-04486-BLF

DEFENDANT PGA TOUR, INC.'S ANSWER TO PLAINTIFFS' AMENDED COMPLAINT & COUNTERCLAIM

JURY TRIAL DEMANDED

Judge: Hon. Beth Labson Freeman

Date Filed: August 3, 2022

Trial Date: January 8, 2024

ANSWER TO AMENDED COMPLAINT

Defendant PGA TOUR, INC. ("the TOUR"), by and through its counsel of record, answers Plaintiffs MATT JONES, BRYSON DECHAMBEAU, PETER UIHLEIN (the "Player Plaintiffs"), and LIV GOLF INC.'s ("LIV") (collectively, "Plaintiffs") Amended Complaint as follows:

LIV, a new golf league paid for by Saudi Arabia's sovereign wealth fund, seeks to wield the antitrust laws as a cudgel instead of engaging in an honest effort to compete in the market for professional golf, while at the same time free riding on the TOUR's decades-long investment in tournament promotion for the various tours it operates, and in particular the PGA TOUR. Both LIV and the Player Plaintiffs knew that participating in LIV events while they remained members of the PGA TOUR, without a release from the TOUR's Commissioner, would breach the Player Plaintiffs' contractual obligations and would result in their suspensions.

The PGA TOUR's Player Handbook & Tournament Regulations (the "Regulations") contribute to the success of scheduled TOUR events, help the TOUR fulfill its own contractual obligations (including its obligation to sponsors and media partners to ensure representative fields), and provide substantial benefits to tournament sponsors, title sponsors, broadcasters, local host organizers, and ultimately, the players. The Regulations make the TOUR's media rights more valuable to sponsors and content distributors, leading to higher sponsorship and broadcast revenues, which in turn are distributed to members in the form of prize money and additional benefits.

Through this lawsuit, LIV asks the Court to invalidate these wholly legitimate provisions with the stroke of a pen *after* inducing the remaining Player Plaintiffs to violate those same regulations with hundreds of millions of dollars in Saudi money. The Player Plaintiffs that have remained in the case — eight of the original eleven players have withdrawn their names from this lawsuit already — want only to enrich themselves in complete disregard of the promises they made to the TOUR and its members when they joined the TOUR.

But there is no actual injury to Plaintiffs here, and no violation of the law. LIV, by its own admission, has succeeded in attracting numerous elite professional golfers to participate in its new

league. LIV has held numerous events with full fields and has announced a full season for 2023. Both LIV and the Player Plaintiffs baked the financial cost of their suspensions into LIV's exorbitant signing bonuses, making the Player Plaintiffs whole. Moreover, while LIV and the Player Plaintiffs challenge the TOUR's media rights and conflicting events policies as anticompetitive, LIV imposes similar—indeed far more restrictive—conditions on its players, and the Player Plaintiffs have agreed to them.

This case is not about unfair competition—if anyone is competing unfairly, it is LIV, not the TOUR. Instead, it is a cynical effort to avoid competition and to freeride off of the TOUR's investment in the development of professional golf. Plaintiffs' allegations are baseless and entirely without legal merit. The TOUR responds herein to each allegation, and at the same time, files a counterclaim against LIV for tortious interference with the TOUR's contracts with its members.

1. The TOUR admits that it was created in the 1960s in part by the world's best golfers at the time. The TOUR states that it is organized as a tax-exempt organization under Internal Revenue Code Section 501(c)(6). The TOUR otherwise denies the allegations in Paragraph 1 of the Amended Complaint.[1]

2. The TOUR admits that PGA TOUR members are independent contractors. The TOUR further admits that it is organized as a tax-exempt organization under Internal Revenue Code Section 501(c)(6). The TOUR otherwise denies the allegations in Paragraph 2 of the Amended Complaint.

3. To the extent Paragraph 3 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR admits that it has suspended some players in accordance with the Regulations' disciplinary provisions—including the remaining Player Plaintiffs—for their violations of the Regulations regarding conflicting events, media and

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[1] The TOUR denies each and every allegation of Plaintiffs' Amended Complaint—including the headings, footnotes, and captions—not specifically admitted or to which the TOUR has not otherwise responded in this Answer.

marketing rights, and player conduct. The TOUR otherwise denies the allegations in Paragraph 3 of the Amended Complaint.

4. To the extent Paragraph 4 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR is without sufficient information to admit or deny Plaintiffs' allegation that LIV canceled its 2022 business plan to launch a full league, and on that basis denies it. The TOUR admits that LIV launched its "Invitational Series" in 2022. The Tour further admits that it has suspended some players in accordance with the Regulations' disciplinary provisions for their violations of the regulations regarding conflicting events, media and marketing rights, and player conduct. The TOUR otherwise denies the allegations in Paragraph 4 of the Amended Complaint.

5. The TOUR admits that it has amended its Regulations from time to time. The TOUR otherwise denies the allegations in Paragraph 5 of the Amended Complaint.

6. To the extent Paragraph 6 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR admits that it has suspended some players in accordance with the Regulations' disciplinary provisions—including the remaining Player Plaintiffs—for their violations of the Regulations regarding conflicting events, media and marketing rights, and player conduct. The TOUR otherwise denies the allegations in Paragraph 6 of the Amended Complaint.

7. The TOUR admits that many of the best golfers in the world are PGA TOUR members. The TOUR further admits that PGA TOUR members agree each season to adhere to the Regulations, and that pursuant to the Regulations PGA TOUR members generally may not participate in any other golf tournament on a date when a PGA TOUR tournament is scheduled, absent permission from the TOUR. The TOUR further admits that, in certain circumstances, players may seek and receive releases to play in non-TOUR tournaments (and participate in non-TOUR media programs) that are held on the same dates as PGA TOUR events. The TOUR further admits that each player is generally eligible for up to three conflicting event releases per season, assuming he participates in fifteen PGA TOUR tournaments that season, and one additional release for each additional five PGA TOUR tournaments in which he participates. The

TOUR further admits that a release can be denied if the Commissioner determines that it would cause the TOUR to be in violation of a contractual commitment to a tournament sponsor, or would otherwise significantly and unreasonably harm the TOUR and its sponsors. The TOUR further admits that the Regulations preclude conflicting events releases for events held in North America. The TOUR further admits that the TOUR has granted releases for players when the releases do not violate one of these provisions or the TOUR's obligations to its members. The TOUR further admits that the Commissioner did not grant releases to players seeking to play in conflicting LIV events and noted LIV's intention to launch a series of events in North America as one reason for the denial of a release. The TOUR otherwise denies the allegations in Paragraph 7 of the Amended Complaint.

8. The TOUR admits that the Regulations also contain provisions related to member media rights, to which all PGA TOUR members agree on a season-to-season basis. The TOUR further admits that the quoted words appear in the Regulations, but otherwise denies the second sentence of Paragraph 8. The TOUR further admits that a portion of the media rights regulations provides that "[n]o PGA TOUR member shall participate in any live or recorded golf program without the prior written consent of the Commissioner, except that this requirement shall not apply to PGA TOUR cosponsored, coordinated or approved tournaments, wholly instructional programs or personal appearances on interview or guest shows." The TOUR further admits that the media rights regulations provide that "'[g]olf program' for purposes of [the media rights] section means any golf contest, exhibition or play that is shown anywhere in the world[.]" The TOUR otherwise denies the allegations in Paragraph 8 of the Amended Complaint.

9. The TOUR admits that PGA TOUR members are independent contractors. The TOUR otherwise denies the allegations in Paragraph 9 of the Amended Complaint.

10. The TOUR admits that certain of the block quoted words in Paragraph 10 appear in a January 24, 2020 memorandum from Commissioner Monahan to the PGA TOUR Policy Board, but denies the misleading alterations to the text of the memorandum. The TOUR otherwise denies the allegations in Paragraph 10 of the Amended Complaint.

11. To the extent Paragraph 11 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in the introductory portion of Paragraph 11 of the Amended Complaint.

a. The TOUR admits that it has suspended some players in accordance with the Regulations' disciplinary provisions—including the Player Plaintiffs—for their violations of the Regulations regarding conflicting events, media and marketing rights, and player conduct. The TOUR otherwise denies the allegations in Paragraph 11.a of the Amended Complaint.

b. The TOUR admits that it has amended its Regulations from time to time. The TOUR otherwise denies the allegations in Paragraph 11.b of the Amended Complaint.

c. The TOUR is without sufficient information to admit or deny the accuracy of the quotations in Paragraph 11.c, and on that basis denies them. The TOUR otherwise denies the allegations in Paragraph 11.c of the Amended Complaint.

d. The TOUR denies the allegations in Paragraph 11.d of the Amended Complaint.

e. The TOUR denies the allegations in Paragraph 11.e of the Amended Complaint.

f. The TOUR admits that it administers a program called PGA TOUR University designed to identify the best college golfers in the United States and provide them with playing opportunities, including on the Korn Ferry Tour. The TOUR further admits that college players must meet the eligibility requirements in the PGA TOUR University rules and regulations. The TOUR otherwise denies the allegations in Paragraph 11.f of the Amended Complaint.

g. The TOUR is without sufficient information to admit or deny whether or why sponsors have cut ties with players who have joined LIV. The TOUR otherwise denies the allegations in Paragraph 11.g of the Amended Complaint.

12. To the extent Paragraph 12 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 12 of the Amended Complaint.

13. The TOUR admits that PGA TOUR members are independent contractors. The TOUR further admits that Commissioner Monahan, consistent with the Regulations, imposed discipline on players for breaching their membership agreements with the TOUR, including imposing certain suspensions in accordance with the Regulations' disciplinary provisions for violations of the Regulations regarding conflicting events, media and marketing rights, and player conduct. The TOUR further admits that Talor Gooch, Hudson Swafford, and Matt Jones earned sufficient points to finish the 2021-2022 TOUR season in the top 125 of the 2021-2022 FedExCup Points list and, but for their suspensions for violations of the Regulations, they would have qualified for the first tournament of the 2022 FedExCup Playoffs. The TOUR otherwise denies the allegations in Paragraph 13 of the Amended Complaint.

14. The TOUR admits that Player Plaintiffs have already been fully compensated by LIV for all suspensions the TOUR might impose and all of the other consequences that may flow from their decision to violate the Regulations. The TOUR otherwise denies the allegations in Paragraph 14 of the Amended Complaint.

15. To the extent Paragraph 15 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR admits that LIV has launched its business. The TOUR otherwise denies the allegations in Paragraph 15 of the Amended Complaint and denies that Plaintiffs are entitled to any relief.

16. Paragraph 16 sets forth allegations related to an individual who is no longer a plaintiff in this action, and no response is required. Further, to the extent Paragraph 16 sets forth a conclusion of law, no response is required.

17. Paragraph 17 sets forth allegations related to an individual who is no longer a plaintiff in this action, and no response is required. Further, to the extent Paragraph 17 sets forth a conclusion of law, no response is required.

18. Paragraph 18 sets forth allegations related to an individual who is no longer a plaintiff in this action, and no response is required. Further, to the extent Paragraph 18 sets forth a conclusion of law, no response is required. member of the PGA TOUR; has been suspended by the TOUR; attended the University of Georgia; that he joined the Nationwide Tour in 2012; won.

19. To the extent Paragraph 19 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR admits that Mr. Jones: is currently forty-two years old; was a member of the PGA TOUR; has been suspended by the PGA TOUR; attended Arizona State University; was a first-team All-American golfer; joined the Nationwide Tour in 2004; joined the PGA TOUR in 2008; won the 2014 Shell Houston Open; won the Emirates Australian Open in both 2015 and 2019 on the PGA Tour of Australasia; won the Honda Classic in 2021; played in over 350 PGA TOUR events; played in 20 events during the 2021-2022 PGA TOUR season; was within the top 50 of the FedExCup standings at the time of his suspension from the TOUR; and would have qualified to play in the first tournament of the 2022 FedExCup Playoffs if he had not been suspended for violations of the Regulations. The TOUR is without sufficient information to admit or deny Plaintiffs' remaining allegations in Paragraph 19 of the Amended Complaint, and on that basis denies them.

20. To the extent Paragraph 20 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR admits that Mr. DeChambeau: was twenty-eight years old at the time the Amended Complaint was filed; was a member of the PGA TOUR; has been suspended by the TOUR; attended Southern Methodist University; won the 2015 NCAA individual and U.S. Amateur titles; made his PGA TOUR debut in the 2015 FedEx St. Jude Classic as an amateur; finished second in the 2015 UNIQLO Masters as a professional; finished tied for fourth in the 2016 RBC Heritage on the PGA TOUR; won the 2016 Korn Ferry DAP Championship; won the 2017 John Deere Classic; won the 2018 Memorial Tournament, Northern Trust, and Dell Technologies Championships; played for the United States in the 2018 Ryder Cup; won the 2019 Shriners Hospitals for Children Open and the Omega Dubai Desert Classic on the European Tour (now the DP World Tour); won the 2020 Rocket Mortgage Classic and the U.S. Open; won the 2021 Arnold Palmer Invitational; and played for the United States in the 2021 Ryder Cup. The TOUR is without sufficient information to admit or deny Plaintiffs' remaining allegations in Paragraph 20 of the Amended Complaint, and on that basis denies them.

21. Paragraph 21 sets forth allegations related to an individual who is no longer a plaintiff in this action, and no response is required. Further, to the extent Paragraph 21 sets forth a conclusion of law, no response is required.

22. To the extent Paragraph 22 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR admits that Mr. Uihlein: was thirty-two years old at the time the Amended Complaint was filed; was a member of the Korn Ferry Tour and PGA TOUR; has been suspended by the TOUR; attended Oklahoma State University; won the 2017 Nationwide Children's Hospital Championship in 2017 on the Web.com Tour (now the Korn Ferry Tour); won the MGM Resorts Championship in 2021 on the Korn Ferry Tour; won the 2013 Madeira Islands Open on the European Tour (now the DP World Tour); represented the United States in the 2009 and 2011 Walker Cups as an amateur; won the 2010 Eisenhower Trophy; won the 2010 United States Amateur Championship; and ranked within the top 50 of the Korn Ferry Tour's regular season points list at the time of his suspension. The TOUR is without sufficient information to admit or deny Plaintiffs' remaining allegations in Paragraph 22 of the Amended Complaint, and on that basis denies them.

23. To the extent Paragraph 23 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR admits that LIV is the sponsor of the LIV Golf Invitational Series, which will host the majority of its 2022 tournaments in the United States. The TOUR is without sufficient information to admit or deny Plaintiffs' remaining allegations in Paragraph 23 of the Amended Complaint, and on that basis denies them.

24. To the extent Paragraph 24 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR admits the allegations in Paragraph 24 of the Amended Complaint.

25. To the extent Paragraph 25 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR admits for purposes of this action only that the Court has subject matter jurisdiction. The TOUR otherwise denies the allegations in Paragraph 25 of the Amended Complaint.

26. To the extent Paragraph 26 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR admits for purposes of this action only that the Court may exercise personal jurisdiction over the TOUR. The TOUR further admits that it manages or operates TPC Harding Park within the Northern District of California. The TOUR further admits that, in 2022, it cosponsored the Fortinet Championship, the American Express, the Farmers Insurance Open, the AT&T Pebble Beach Pro-Am, the Genesis Invitational, and the Barracuda Championship in California, and that California hosted more PGA TOUR events than any other state in 2022. The TOUR otherwise denies the allegations in Paragraph 26 of the Amended Complaint.

27. To the extent Paragraph 27 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR, for purposes of this action only, does not contest that this Court may exercise personal jurisdiction over the TOUR. The TOUR otherwise denies the remaining allegations in Paragraph 27 of the Amended Complaint.

28. To the extent Paragraph 28 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR does not contest, for purposes of this action only, that venue is proper in this District.

29. The TOUR is without sufficient information to admit or deny the allegations in Paragraph 29 of the Amended Complaint, and on that basis denies them.

30. The TOUR admits that it cosponsors a series of tournaments each year and that there are four "major" tournaments each golf season: the Masters, the U.S. Open, the Open Championship, and the PGA Championship. The TOUR further admits that the Ryder Cup and the Presidents Cup take place on a bi-annual basis and that the Olympics take place every four years. The TOUR further admits that PGA TOUR members may compete in other tournaments outside North America that conflict with TOUR cosponsored events if they obtain a conflicting event release and/or a media rights release from the Commissioner under the Regulations. The TOUR otherwise denies the allegations in Paragraph 30 of the Amended Complaint.

31. The TOUR admits that many of the world's top golfers seek to compete on the PGA TOUR. The TOUR further admits that the TOUR's investments in building its platform

have allowed the TOUR to offer some of the largest purses in professional golf. The TOUR admits that purses are generally larger on the PGA TOUR than on the DP World Tour, the Asian Tour, and the Korn Ferry Tour, but denies Plaintiffs' allegations regarding purse sizes to the extent that they assert PGA TOUR purses are always larger than those on other tours. The TOUR admits that one way members can qualify for competition in the major tournaments is through success in PGA TOUR events. The TOUR otherwise denies the allegations in Paragraph 31 of the Amended Complaint.

32. The TOUR admits that, historically, it has not held additional cosponsored events the weeks that the majors hosted in North America—the Masters, U.S. Open, and PGA Championship—are played. The TOUR further admits that it has cosponsored an event during the week of the major hosted outside of North America, the Open Championship. The TOUR further admits that one way, among many, that members can qualify for competition in some of the major tournaments is through success in PGA TOUR events. The TOUR is without sufficient information to admit or deny Plaintiffs' allegation that LIV schedules its series and will schedule its league around the Majors, and on that basis denies it. The TOUR otherwise denies the allegations in Paragraph 32 of the Amended Complaint.

33. The TOUR admits that the DP World Tour (formerly known as the European Tour) is another men's professional golf players' membership organization. The TOUR further admits that Seve Ballesteros, Nick Faldo, and Bernhard Langer played numerous events throughout their careers on the European Tour. The TOUR is without sufficient information to admit or deny the accuracy of the quotations in Paragraph 33 or Plaintiffs' allegation that when DP World Tour members qualify for PGA TOUR membership, they almost invariably elect to immediately become PGA TOUR members, and on that basis denies them. The TOUR otherwise denies the allegations in Paragraph 33 of the Amended Complaint.

34. The TOUR is without sufficient information to admit or deny the accuracy of the quotation or the allegations in Paragraph 34 of the Amended Complaint, and on that basis denies them.

35. The TOUR admits that the quoted language in Paragraph 35 appears in Commissioner Monahan's January 2020 memorandum. The TOUR otherwise denies the allegations in Paragraph 35 of the Amended Complaint.

36. To the extent Paragraph 36 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR admits that it purchased a minority stake in European Tour Productions in 2020. The TOUR otherwise denies the allegations in Paragraph 36 of the Amended Complaint.

37. The TOUR admits that it organizes and manages the PGA TOUR Champions, the Korn Ferry Tour, and the developmental tours PGA TOUR Latinoamerica and PGA TOUR Canada. The TOUR further admits that the PGA TOUR Latinoamerica holds events in Latin America and that PGA TOUR Canada holds events in Canada. The TOUR further admits that it describes the Korn Ferry Tour as the path to the PGA TOUR. The TOUR further admits that the Asian Tour hosts events principally in Asia, that the Japan Tour hosts events in Japan, that the Sunshine Tour hosts events in South Africa, and that the KPGA Korean Tour holds events in South Korea. The TOUR otherwise denies the allegations in Paragraph 37 of the Amended Complaint.

38. The TOUR denies the allegations in Paragraph 38 of the Amended Complaint.

39. The TOUR denies the allegations in Paragraph 39 of the Amended Complaint.

40. The TOUR admits that one way PGA TOUR members may gain spots in some of the majors, the Ryder and Presidents Cup teams, and the Olympics is through success in PGA TOUR events. The TOUR further admits that holding a ranking within the top 50 of the Official World Golf Rankings is one means through which players may qualify for some major tournaments. The TOUR further admits that the number of World Golf Ranking points earned in any particular tournament is, in part, determined by the Total Field Rating as determined by the Official World Golf Rankings. The TOUR further admits that Olympic Golf Rankings—which are used to determine eligibility for the Olympic golf field—are currently derived from World Golf Rankings. The TOUR is without sufficient information to admit or deny the accuracy of the

quotation in Paragraph 40, and on that basis denies it. The TOUR otherwise denies the allegations in Paragraph 40 of the Amended Complaint.

41. To the extent Paragraph 41 sets for a conclusion of law, no response is required. To the extent a response is required, the TOUR admits Jay Monahan, Keith Pelley, Keith Waters, Seth Waugh, Mike Whan, Will Jones, Martin Slumbers, and Peter Dawson are members of the Official World Golf Rankings' Governing Board. The TOUR otherwise denies the allegations in Paragraph 41 of the Amended Complaint.

42. The TOUR admits its Articles of Incorporation, which were included in the TOUR's application to the Internal Revenue Service for tax-exempt status under Section 501(c)(6), state that one of the TOUR's purposes is to promote the common interests of professional tournament golfers. The TOUR otherwise denies the allegations in Paragraph 42 of the Amended Complaint.

43. The TOUR admits that the professional golfers who have earned the right to compete on the PGA TOUR are among the most skilled and popular professional golfers in the United States and the world, and that they include some of the biggest names in sports and popular culture in the United States and the world. The TOUR denies that Phil Mickelson, Bryson DeChambeau, Brooks Koepka, Henrik Stenson, Cameron Smith, Dustin Johnson, Louis Oosthuizen, Sergio Garcia, or Bubba Watson are currently members of the PGA TOUR. The TOUR otherwise denies the allegations in Paragraph 43 of the Amended Complaint.

44. The TOUR admits that PGA TOUR members are independent contractors. The TOUR further admits that there are no teams to cover expenses for players on the TOUR. The TOUR otherwise denies the allegations in Paragraph 44 of the Amended Complaint.

45. The TOUR admits that Jay Monahan is the Commissioner of the PGA TOUR and assumed that role on January 1, 2017. The TOUR further admits that Commissioner Monahan sits on the Board of the DP World Tour (formerly known as the European Tour), the Governing Board of the Official World Golf Rankings, and the Board of Directors and Executive Committee of the International Golf Federation. The TOUR otherwise denies the allegations in Paragraph 45 of the Amended Complaint.

46. The TOUR admits that the quoted language appears in Commissioner Monahan's January 2020 Memorandum to the TOUR Policy Board. The TOUR otherwise denies the allegations in Paragraph 46 of the Amended Complaint.

47. The TOUR admits that the quality of play on the PGA TOUR continues to flourish. The TOUR otherwise denies the allegations in Paragraph 47 of the Amended Complaint.

48. The TOUR admits that its revenue has increased between 2011 and 2019. The TOUR otherwise denies the allegations in Paragraph 48 of the Amended Complaint.

49. The TOUR admits that Brooks Koepka earned $9.68 million in official money during the 2018-2019 PGA TOUR season and that he was first on the PGA TOUR's official money list for that season. The TOUR is otherwise without sufficient information to admit or deny the allegations in Paragraph 49 of the Amended Complaint, and on that basis denies them.

50. The TOUR admits that it is organized as a tax-exempt organization under Internal Revenue Code Section 501(c)(6). The TOUR further admits that it does not provide players with direct reimbursement for travel. The TOUR otherwise denies the allegations in Paragraph 50 of the Amended Complaint.

51. The TOUR admits that it does not provide players with direct reimbursement for travel to and lodging at PGA TOUR events, or for coaches, therapists, trainers, or caddies. The TOUR otherwise denies the allegations in Paragraph 51 of the Amended Complaint.

52. The TOUR is without sufficient information to admit or deny the accuracy of the quotation or the allegations in Paragraph 52 of the Amended Complaint, and on that basis denies them.

53. The TOUR is without sufficient information to admit or deny the accuracy of the quotation in Paragraph 53, and on that basis denies it. The TOUR otherwise denies the allegations in Paragraph 53 of the Amended Complaint.

54. The TOUR is without sufficient information to admit or deny the accuracy of the quotation in Paragraph 54, and on that basis denies it. The TOUR otherwise denies the allegations in Paragraph 54 of the Amended Complaint.

55. The TOUR denies the allegations in Paragraph 55 of the Amended Complaint.

56. The TOUR admits that the Regulations govern, in large part, membership on the TOUR. The TOUR otherwise denies the allegations in Paragraph 56 of the Amended Complaint.

57. The TOUR admits that Section V.B.1.a of the Regulations relates to player media rights. The TOUR otherwise denies the allegations in Paragraph 57 of the Amended Complaint.

58. The TOUR admits that the quoted words appear in the Regulations. To the extent the remaining allegations in Paragraph 58 constitute a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the remaining allegations in Paragraph 58 of the Amended Complaint.

59. The TOUR admits that PGA TOUR members are independent contractors. The TOUR further admits that other provisions of the Regulations also relate to player media rights. The TOUR otherwise denies the allegations in Paragraph 59 of the Amended Complaint.

60. The TOUR admits that PGA TOUR members are independent contractors. The TOUR otherwise denies the allegations in Paragraph 60 of the Amended Complaint.

61. The TOUR is without sufficient information to admit or deny Plaintiffs' allegation that LIV has not reached a broadcast agreement for its tournaments in the United States, and on that basis denies it. The TOUR otherwise denies the allegations in Paragraph 61 of the Amended Complaint.

62. The TOUR admits that it amended the Regulations in November 2019, and that the quoted language reflects the amendment. Except for the omissions and alterations, the TOUR further admits that quoted language appears in Commissioner Monahan's January 2020 memorandum. The TOUR otherwise denies the allegations in Paragraph 62 of the Amended Complaint.

63. The TOUR is without sufficient information to admit or deny the accuracy of the quotation or the allegations in Paragraph 63 of the Amended Complaint, and on that basis denies them.

64. The TOUR admits that some players requested releases to play in the LIV Golf London Invitational. The TOUR further admits that it denied those players' requests and in accordance with the Regulations' disciplinary provisions for violations of the Regulations

regarding conflicting events, media and marketing rights, and player conduct, suspended those who violated the Regulations by still playing in the event. The TOUR otherwise denies the allegations in Paragraph 64 of the Amended Complaint.

65. The TOUR denies that it did not require PGA TOUR members to obtain releases to participate in the JP McManus in July 2022. The TOUR admits that in accordance with the Regulations' disciplinary provisions for violations of the Regulations regarding conflicting events, media and marketing rights, and player conduct, it imposed discipline on players who violated the Regulations through their participation in the LIV Golf Portland Invitational. The TOUR otherwise denies the allegations in Paragraph 65 of the Amended Complaint.

66. The TOUR denies the allegations in Paragraph 66 of the Amended Complaint.

67. The TOUR admits that Sections V.A.2-3 of the Regulations provide that "no PGA TOUR member shall participate in any other golf tournament or event on a date when a PGA TOUR . . . cosponsored tournament . . . is scheduled," that members may participate in a conflicting event "for which a member obtains an advance written release for his participation from the Commissioner," and that "[e]ach Regular Member of PGA TOUR ordinarily shall be eligible for three releases per season based on participation in 15 PGA TOUR cosponsored or approved tournaments and, in addition, shall be eligible for one release for every five cosponsored or approved tournaments . . . in which he participates above 15 tournaments." The TOUR otherwise denies the allegations in Paragraph 67 of the Amended Complaint.

68. The TOUR admits that the Regulations prohibit PGA TOUR members from participating in golf tournaments on a date when a PGA TOUR cosponsored event is scheduled and for which the PGA TOUR member is eligible, unless the member has obtained a release from the Commissioner. The TOUR further admits that the decision to grant releases is in the discretion of the Commissioner. The TOUR further admits that the Regulations do not permit releases for conflicting events in North America. The TOUR otherwise denies the allegations in Paragraph 68 of the Amended Complaint.

69. The TOUR admits that the Regulations do not permit releases for conflicting events in North America. The TOUR further admits that the decision to grant releases is in the

discretion of the Commissioner. The TOUR further admits that it has historically granted releases for international events on tours that are part of a series of events based outside North America. The TOUR further admits that it did not grant releases to any player to participate in the LIV Golf London Invitational. The TOUR further admits that the quoted language appears in the TOUR's letters denying the requested releases. The TOUR further admits that the Commissioner shall make decisions on release requests not later than 30 days in advance of the tournament for which the release is requested. The TOUR otherwise denies the allegations in Paragraph 69 of the Amended Complaint.

70. The TOUR admits the allegations in Paragraph 70 of the Amended Complaint.

71. The TOUR admits that it has informed players that it will enforce the Regulations. The TOUR further admits that, in accordance with the Regulations' disciplinary provisions for violations of the Regulations regarding conflicting events, media and marketing rights, and player conduct, it suspended Player Plaintiffs who participated in the LIV Golf London Invitational. The TOUR further admits that it notified other PGA TOUR members of Plaintiffs' suspensions. The TOUR otherwise denies the allegations in Paragraph 71 of the Amended Complaint.

72. The TOUR admits that Korn Ferry Tour Members must abide by the Korn Ferry Tour Player Handbook and Regulations. The TOUR otherwise denies the allegations in Paragraph 72 of the Amended Complaint.

73. The TOUR admits that non-members who played in LIV events during the 2021-2022 PGA TOUR season were ineligible for participation in tournaments on any tour operated by the TOUR including PGA TOUR tournaments also sanctioned by another governing body or league. The TOUR otherwise denies the allegations in Paragraph 73 of the Amended Complaint.

74. The TOUR admits that Greg Norman was involved in the launch of the World Golf Tour in 1994. The TOUR is without sufficient information to admit or deny Plaintiffs' allegations that it informed players by letter nearly three decades ago that it would not grant conflicting events releases for World Golf Tour events held within the United States, and that it would only grant other releases for events taking place on Monday, Tuesday, or Wednesday, and

on that basis denies them. The TOUR otherwise denies the allegations in Paragraph 74 of the Amended Complaint.

75. The TOUR admits that the Player Plaintiffs requested releases to participate in LIV events and that the TOUR denied their requests. The TOUR further admits that, in accordance with the Regulations' disciplinary provisions for violations of the Regulations regarding conflicting events, media and marketing rights, and player conduct, it imposed discipline on the Player Plaintiffs for violating the Regulations. The TOUR otherwise denies the allegations in Paragraph 75 of the Amended Complaint.

76. The TOUR admits that the Player Plaintiffs requested releases to participate in a LIV Golf event in London. The TOUR otherwise denies the allegations in Paragraph 76 of the Amended Complaint.

77. The TOUR denies that it orchestrated an anticompetitive response to the Premier Golf League ("PGL"). The TOUR is otherwise without sufficient information to admit or deny the accuracy of the allegations in Paragraph 77 of the Amended Complaint, and on that basis denies them.

78. The TOUR is without sufficient information to admit or deny the accuracy of the allegations in Paragraph 78 of the Amended Complaint, and on that basis denies them.

79. The TOUR is without sufficient information to admit or deny the accuracy the allegations in Paragraph 79 of the Amended Complaint, and on that basis denies them.

80. The TOUR denies the allegations in Paragraph 80 of the Amended Complaint.

81. The TOUR admits that the quoted words appear in Commissioner Monahan's January 2020 memorandum. The TOUR otherwise denies the allegations in Paragraph 81 of the Amended Complaint.

82. Except for the alterations, the TOUR admits that the quoted words appear in Commissioner Monahan's January 2020 memorandum. The TOUR otherwise denies the allegations in Paragraph 82 of the Amended Complaint.

83. The TOUR admits that the quoted words appear in Commissioner Monahan's January 2020 memorandum. The TOUR otherwise denies the allegations in Paragraph 83 of the Amended Complaint.

84. Except for the alterations, the TOUR admits that the quoted words appear in Commissioner Monahan's January 2020 memorandum. The TOUR otherwise denies the allegations in Paragraph 84 of the Amended Complaint.

85. The TOUR admits that Commissioner Monahan's January 2020 memorandum refers to "two proposed changes to our Regulations[.]" The TOUR otherwise denies the allegations in Paragraph 85 of the Amended Complaint.

86. Except for the alterations, the TOUR admits that the quoted words appear in Commissioner Monahan's January 2020 memorandum. The TOUR otherwise denies the allegations in Paragraph 86 of the Amended Complaint.

87. Except for the alterations, the TOUR admits that the quoted words appear in Commissioner Monahan's January 2020 memorandum. The TOUR otherwise denies the allegations in Paragraph 87 of the Amended Complaint.

88. Except for the alterations, the TOUR admits that the quoted words appear in Commissioner Monahan's January 2020 memorandum. The TOUR otherwise denies the allegations in Paragraph 88 of the Amended Complaint.

89. The TOUR is without sufficient information to admit or deny the accuracy of the quoted language in Paragraph 89, and on that basis denies it. The TOUR otherwise denies the allegations in Paragraph 89 of the Amended Complaint.

90. The TOUR admits that PGA TOUR members are independent contractors. The TOUR otherwise denies the allegations in Paragraph 90 of the Amended Complaint.

91. The TOUR is without sufficient information to admit or deny the accuracy of the quoted language in Paragraph 91, and on that basis denies it. The TOUR otherwise denies the allegations in Paragraph 91 of the Amended Complaint.

92. The TOUR is without sufficient information to admit or deny the accuracy of the quotation in Paragraph 92, and on that basis denies it. The TOUR otherwise denies the allegations in Paragraph 92 of the Amended Complaint.

93. The TOUR admits that Commissioner Monahan's January 2020 memo states that "[w]e have continued discussions with the European Tour about the potential to work more closely together, thereby removing the European Tour as a potential partner of Private Equity Golf." The TOUR otherwise denies the allegations in Paragraph 93 of the Amended Complaint.

94. The TOUR is without sufficient information to admit or deny the accuracy of the allegations in Paragraph 94 of the Amended Complaint, and on that basis denies them.

95. The TOUR admits that OWGR rankings are one means of qualifying for the Majors. The TOUR otherwise denies the allegations in Paragraph 95 of the Amended Complaint.

96. The TOUR admits that Commissioner Monahan sits on the board of the OWGR. The TOUR is without sufficient information to admit or deny Plaintiffs' allegation that the PGL sought to partner with the European Tour as part of its plan to enter and obtain a sponsor for its OWGR application, and on that basis denies it. The TOUR otherwise denies the allegations in Paragraph 96 of the Amended Complaint.

97. The TOUR denies the allegations in Paragraph 97 of the Amended Complaint.

98. To the extent Paragraph 98 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR admits that it entered into a strategic alliance with the European Tour in November 2020. The TOUR further admits that Commissioner Monahan was granted a seat on the European Tour's Board of Directors and that the TOUR made further investments in the European Tour Productions. The TOUR otherwise denies the allegations in Paragraph 98 of the Amended Complaint.

99. The TOUR is without sufficient information to admit or deny the accuracy of the allegation in Paragraph 99 that the PGL was left with no real prospect of viability, and on that basis denies it. The TOUR otherwise denies the allegations in Paragraph 99 of the Amended Complaint.

100. The TOUR denies the allegations in Paragraph 100 of the Amended Complaint.

101. The TOUR denies the allegations in Paragraph 101 of the Amended Complaint.

102. The TOUR is without sufficient information to admit or deny the accuracy of the allegations in Paragraph 102 of the Amended Complaint, and on that basis denies them.

103. The TOUR is without sufficient information to admit or deny the accuracy of the allegations in Paragraph 103 of the Amended Complaint, and on that basis denies them.

104. The TOUR admits that a typical TOUR cosponsored tournament includes a cut. The TOUR otherwise denies the allegations in Paragraph 104 of the Amended Complaint.

105. The TOUR denies the allegations in Paragraph 105 of the Amended Complaint.

106. The TOUR is without sufficient information to admit or deny the accuracy of the allegations in Paragraph 106 of the Amended Complaint, and on that basis denies them.

107. To the extent Paragraph 107 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR is without sufficient information to admit or deny Plaintiffs' allegation that LIV partnered with the Asian Tour, and on that basis denies it. The TOUR is otherwise without sufficient information to admit or deny the accuracy of the allegations in Paragraph 107 of the Amended Complaint, and on that basis denies them.

108. The TOUR is without sufficient information to admit or deny the accuracy of the allegations regarding the relationships LIV sought to cultivate, and on that basis denies them. The TOUR otherwise denies the allegations in Paragraph 108 of the Amended Complaint.

109. The TOUR denies the allegations in Paragraph 109 of the Amended Complaint.

110. The TOUR admits that purse sizes have grown in recent years. The TOUR otherwise denies the allegations in Paragraph 110 of the Amended Complaint.

111. To the extent Paragraph 111 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR admits that the quoted words appear in Commissioner Monahan's January 2020 memorandum. The TOUR otherwise denies the allegations in Paragraph 111 of the Amended Complaint.

112. The TOUR admits that the Player Impact Program ("PIP") went into effect in 2021. The TOUR further admits that PIP is a bonus program designed to recognize those players that have the most impact on the TOUR's business success. The TOUR further admits that the

initial PIP pool totaled $40 million in 2021. The TOUR otherwise denies the allegations in Paragraph 112 of the Amended Complaint.

113. The TOUR admits that player compensation has increased substantially. The TOUR otherwise denies the allegations in Paragraph 113 of the Amended Complaint.

114. The TOUR admits the allegations in Paragraph 114 of the Amended Complaint.

115. The TOUR denies that the publication of increased purse sizes occurred in December 2021. The TOUR otherwise admits the allegations in Paragraph 115 of the Amended Complaint.

116. The TOUR denies the allegations in Paragraph 116 of the Amended Complaint.

117. The TOUR denies the allegations in Paragraph 117 of the Amended Complaint.

118. The TOUR denies the allegations in Paragraph 118 of the Amended Complaint.

119. The TOUR denies the allegations in Paragraph 119 of the Amended Complaint.

120. The TOUR is without sufficient information to admit or deny the accuracy of the quotations in Paragraph 120 of the Amended Complaint, and on that basis denies it.

121. The TOUR is without sufficient information to admit or deny the accuracy of the quotations in Paragraph 121 of the Amended Complaint, and on that basis denies it.

122. The TOUR admits that it announced purse increases on June 21, 2022. The TOUR further admits that it informed players a portion of the increased purses would be paid from the TOUR's reserves. The TOUR further admits that it announced the 2022-2023 season on August 1, 2022, that the total prize money from official events exceeds $400 million, and that the total bonus money for the season would be $145 million. The TOUR otherwise denies the allegations in Paragraph 122 of the Amended Complaint.

123. The TOUR denies the allegations in Paragraph 123 of the Amended Complaint.

124. The TOUR admits that Commissioner Monahan spoke to players prior to the Wells Fargo Championship in Charlotte, North Carolina on May 4, 2021. The TOUR otherwise denies the allegations in Paragraph 124 of the Amended Complaint.

125. The TOUR is without sufficient information to admit or deny the accuracy of the allegations in Paragraph 125 of the Amended Complaint, and on that basis denies them.

126. The TOUR is without sufficient information to admit or deny the accuracy of the quotations in Paragraph 126, and on that basis denies it. The TOUR otherwise denies the remaining allegations in Paragraph 126 of the Amended Complaint.

127. The TOUR denies the allegations in Paragraph 127 of the Amended Complaint.

128. The TOUR denies the allegations in Paragraph 128 of the Amended Complaint.

129. The TOUR denies the allegations in Paragraph 129 of the Amended Complaint.

130. The TOUR denies the allegations in Paragraph 130 of the Amended Complaint.

131. The TOUR admits that the DP World Tour co-sanctioned the Saudi International with Golf Saudi between 2019 and 2021. The TOUR is without sufficient information to admit or deny the accuracy of the quotation in Paragraph 131, and on that basis denies it. The TOUR otherwise denies the allegations in Paragraph 131 of the Amended Complaint.

132. The TOUR denies the allegations in Paragraph 132 of the Amended Complaint.

133. The TOUR denies the allegations in Paragraph 133 of the Amended Complaint.

134. The TOUR is without sufficient information to admit or deny the accuracy of the quotation in Paragraph 134, and on that basis denies it. The TOUR otherwise denies the allegations in Paragraph 134 of the Amended Complaint.

135. The TOUR is without sufficient information to admit or deny the accuracy of the quotation in Paragraph 135, and on that basis denies it. The TOUR otherwise denies the allegations in Paragraph 135 of the Amended Complaint.

136. TOUR is without sufficient information to admit or deny the accuracy of the quotation in Paragraph 136, and on that basis denies it. The TOUR otherwise denies the allegations in Paragraph 136 of the Amended Complaint.

137. TOUR is without sufficient information to admit or deny the accuracy of the quotations or allegations in Paragraph 137 of the Amended Complaint, and on that basis denies them.

138. TOUR is without sufficient information to admit or deny the accuracy of the quotations or allegations in Paragraph 138 of the Amended Complaint, and on that basis denies them.

139. The TOUR admits that it stated it would not grant conflicting events releases for the 2022 Saudi International. The TOUR otherwise denies the allegations in Paragraph 139 of the Amended Complaint.

140. The TOUR is without sufficient information to admit or deny the accuracy of the quotations in Paragraph 140 of the Amended Complaint, and on that basis denies it.

141. The TOUR admits that approximately twenty-eight players requested conflicting event releases for the 2022 Saudi International. The TOUR further admits that it granted conditional conflicting events releases, to the extent permitted by the Regulations. The TOUR further admits that it conditioned the releases that were granted as follows: those players who had played in the AT&T Pebble Beach Pro-Am (the conflicting TOUR event) at least once in the preceding five years were required to commit to play the event at least once in 2023 or 2024, and those who had not played in the Pro-Am in the past five years were required to commit to play the event twice between 2023 and 2025. The TOUR otherwise denies the allegations in Paragraph 141 of the Amended Complaint.

142. The TOUR is without sufficient information to admit or deny the accuracy of the quotations or allegations in Paragraph 142 of the Amended Complaint, and on that basis denies them.

143. The TOUR is without sufficient information to admit or deny the accuracy of the allegations in Paragraph 143 of the Amended Complaint, and on that basis denies them.

144. The TOUR is without sufficient information to admit or deny the accuracy of the quotations or allegations in Paragraph 144 of the Amended Complaint, and on that basis denies them.

145. The TOUR denies the allegations in Paragraph 145 of the Amended Complaint.

146. The TOUR admits that it announced an agreement with the DP World Tour on June 28, 2022. The TOUR further admits that it announced it was increasing its existing stake in European Tour Productions to 40%. The TOUR further admits that it announced that the top ten players in the end of season DP World Tour Rankings would earn PGA TOUR cards for the

following season. The TOUR otherwise denies the allegations in Paragraph 146 of the Amended Complaint.

147. The TOUR denies that the DP World Tour issued sanctions at the TOUR's behest. The TOUR is otherwise without sufficient information to admit or deny the accuracy of the quotations or allegations in Paragraph 144 of the Amended Complaint, and on that basis denies them.

148. The TOUR is without sufficient information to admit or deny the accuracy of the allegations in Paragraph 148 of the Amended Complaint, and on that basis denies them.

149. The TOUR is without sufficient information to admit or deny the accuracy of the quotations or allegations in Paragraph 149 of the Amended Complaint, and on that basis denies them.

150. The TOUR admits that non-members who played in LIV events during the 2021-2022 PGA TOUR season were ineligible for participation in tournaments on any tour operated by the TOUR including PGA TOUR tournaments also sanctioned by another governing body or league. The TOUR otherwise denies the allegations in Paragraph 150 of the Amended Complaint.

151. The TOUR denies the allegations in Paragraph 151 of the Amended Complaint.

152. The TOUR is without sufficient information to admit or deny the accuracy of Plaintiffs' allegations that participating in and winning the Majors and the Ryder Cup are the ultimate goal of most top professional golfers and that one of the goals of playing on a tour each year is to secure qualification to the Majors and the Ryder Cup, and on that basis denies them. The TOUR otherwise denies the allegations in Paragraph 152 of the Amended Complaint.

153. The TOUR admits that the quoted words appear in Commissioner Monahan's January 2020 memorandum. The TOUR otherwise denies the allegations in Paragraph 153 of the Amended Complaint.

154. The TOUR is without sufficient information to admit or deny the accuracy of the quotation in Paragraph 154, and on that basis denies it. The TOUR otherwise denies the allegations in Paragraph 154 of the Amended Complaint.

155. The TOUR admits that the PGA of America is a separate entity from the PGA TOUR, and that the PGA of America organizes the PGA Championship and co-organizes the Ryder Cup along with the European Tour. The TOUR further admits that the PGA of America has a representative, President Jim Richerson, on the PGA TOUR Policy Board. The TOUR is without sufficient information to admit or deny the accuracy of the quotations or remaining allegations in Paragraph 155 of the Amended Complaint, and on that basis denies them.

156. The TOUR is without sufficient information to admit or deny the accuracy of the allegations in Paragraph 156 of the Amended Complaint, and on that basis denies them.

157. The TOUR is without sufficient information to admit or deny the accuracy of the quotations or allegations in Paragraph 157 of the Amended Complaint, and on that basis denies them.

158. The TOUR is without sufficient information to admit or deny the accuracy of the quotations or allegations in Paragraph 158 of the Amended Complaint, and on that basis denies them.

159. The TOUR admits that the R&A is the promoter of the Open Championship. The TOUR is otherwise without sufficient information to admit or deny the accuracy of the allegations in Paragraph 159 of the Amended Complaint, and on that basis denies them.

160. The TOUR admits that Augusta National is the promoter of the Masters Tournament. The TOUR denies that it has pressured August National to do its bidding. The TOUR is without sufficient information to admit or deny the accuracy of the remaining allegations in Paragraph 160 of the Amended Complaint, and on that basis denies them.

161. The TOUR denies the allegations in Paragraph 161 of the Amended Complaint.

162. The TOUR is without sufficient information to admit or deny the accuracy of the allegations in Paragraph 162 of the Amended Complaint, and on that basis denies them.

163. The TOUR denies the allegations in Paragraph 163 of the Amended Complaint.

164. The TOUR denies the allegations in Paragraph 164 of the Amended Complaint.

165. The TOUR is without sufficient information to admit or deny the accuracy of the quotation in Paragraph 165, and on that basis denies it. The TOUR otherwise denies the remaining allegations in Paragraph 165 of the Amended Complaint.

166. The TOUR admits that Commissioner Monahan spoke with players prior to the Honda Classic in February 2022 and that he told players that the TOUR would enforce its Regulations. The TOUR otherwise denies the allegations in Paragraph 166 of the Amended Complaint.

167. The TOUR is without sufficient information to admit or deny the accuracy of the allegations in Paragraph 167 of the Amended Complaint, and on that basis denies them.

168. The TOUR denies the allegations in Paragraph 168 of the Amended Complaint.

169. The TOUR is without sufficient information to admit or deny the accuracy of the allegations in Paragraph 169 of the Amended Complaint, and on that basis denies them.

170. The TOUR is without sufficient information to admit or deny the accuracy of the allegations in Paragraph 170 of the Amended Complaint, and on that basis denies them.

171. The TOUR denies the allegations in Paragraph 171 of the Amended Complaint.

172. The TOUR is without sufficient information to admit or deny the accuracy of the allegations in Paragraph 172 of the Amended Complaint, and on that basis denies them.

173. The TOUR is without sufficient information to admit or deny Plaintiffs' allegation that the Player Plaintiffs and many other players (at least 170 golfers) filed entry applications for LIV Golf Invitational Series' first event, and on that basis denies it. The TOUR admits that the Player Plaintiffs and other PGA TOUR members requested conflicting events releases and media rights releases for the LIV Golf Invitational in London. The TOUR otherwise denies the allegations in Paragraph 173 of the Amended Complaint.

174. The TOUR admits that it denied all requests for conflicting event and media releases for the LIV Golf Invitational in London. The TOUR further admits that the quoted language appears in the letters the TOUR sent denying the releases. The TOUR further admits that, in certain circumstances, it has granted releases for conflicting events scheduled to take

place outside North America on tours based outside North America. The TOUR otherwise denies the allegations in Paragraph 174 of the Amended Complaint.

175. The TOUR denies the allegations in Paragraph 175 of the Amended Complaint.

176. The TOUR admits that it administers a program called PGA TOUR University designed to identify the best college golfers in the United States and provide them with playing opportunities, including on the Korn Ferry Tour. The TOUR further admits that college players must meet the eligibility requirements in the PGA TOUR University rules and regulations. The TOUR otherwise denies the allegations in Paragraph 176 of the Amended Complaint.

177. The TOUR denies that the DP World Tour acted in concert with the TOUR to deny releases for the LIV Golf Invitational in London. The TOUR is otherwise without sufficient information to admit or deny the accuracy of the allegations in Paragraph 177 of the Amended Complaint, and on that basis denies them.

178. The TOUR is without sufficient information to admit or deny Plaintiffs' allegations with respect to LIV's compensation to players. The TOUR otherwise denies the allegations in Paragraph 178 of the Amended Complaint.

179. To the extent Paragraph 179 sets forth a conclusion of law, no response is required. To extent a response is required, the TOUR admits that LIV announced the field for its London Invitational on May 31, 2022. The TOUR is without sufficient information to admit or deny Plaintiffs' allegations that players were very interested in its product or that the London Invitational lacked the quality of field LIV set out to have, and on that basis denies them. The TOUR otherwise denies the allegations in Paragraph 179 of the Amended Complaint.

180. The TOUR is without sufficient information to admit or deny the accuracy of the quotations in Paragraph 180 of the Amended Complaint, and on that basis denies it.

181. The TOUR is without sufficient information to admit or deny the accuracy of the quotations and allegations in Paragraph 181 of the Amended Complaint, and on that basis denies them.

182. The TOUR denies the allegations in Paragraph 182 of the Amended Complaint.

183. The TOUR denies the allegations in Paragraph 183 of the Amended Complaint.

184. The TOUR admits that quoted language appears in letters sent to TOUR players identified as part of the field for the LIV Golf London Invitational. The TOUR is without sufficient information to admit or deny Plaintiffs' allegation that the DP World Tour sent similar notices to its members who were included in the LIV Golf Invitational Series field. The TOUR otherwise denies the allegations in Paragraph 184 of the Amended Complaint.

185. The TOUR denies the allegations in Paragraph 185 of the Amended Complaint.

186. The TOUR admits that TOUR representatives communicated with Mr. Ogletree and explained why his requested release was denied. The TOUR admits that the quotation in Paragraph 186 of the Amended Complaint appeared in those communications. The TOUR otherwise denies the allegations in Paragraph 186 of the Amended Complaint.

187. The TOUR denies the allegations in Paragraph 187 of the Amended Complaint.

188. To the extent Paragraph 188 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR admits that it granted Mr. Ogletree a release to compete in an Asian Tour event. The TOUR otherwise denies the allegations in Paragraph 188 of the Amended Complaint.

189. The TOUR admits that a TOUR representative communicated with Mr. Gooch regarding his participation in LIV events. The TOUR further admits that, except for the alterations, the quotation in Paragraph 189 appeared in those communications. The TOUR otherwise denies the allegations in Paragraph 189 of the Amended Complaint.

190. The TOUR admits that it sent letters on June 3, 2022 to TOUR members who indicated they intended to participate in the LIV Golf London Invitational. The TOUR further admits that the quoted language appears in the June 3, 2022 letters. The TOUR further admits that Article VII, Section C of the Regulations relates to conduct unbecoming a professional. The TOUR otherwise denies the allegations in Paragraph 190 of the Amended Complaint.

191. The TOUR denies the allegations in Paragraph 191 of the Amended Complaint.

192. The TOUR admits that PGA TOUR members are independent contractors. The TOUR further admits that Kevin Na resigned his membership on June 3, 2022. The TOUR further

admits that, except for the alterations, the quotation in Paragraph 192 appears in Mr. Na's letter. The TOUR otherwise denies the allegations in Paragraph 192 of the Amended Complaint.

193. The TOUR admits that several players who participated in the LIV Golf London Invitational resigned from the TOUR. The TOUR otherwise denies the allegations in Paragraph 193 of the Amended Complaint.

194. The TOUR admits that the quoted language appears in a letter sent by the TOUR's Vice President of Competition Administration, Kristen Burgess. The TOUR otherwise denies the allegations in Paragraph 194 of the Amended Complaint.

195. The TOUR admits that it sent letters to TOUR members who elected to play in the LIV Golf London Invitational on June 9, 2022, and that the letters informed the recipients of their immediate suspension. The TOUR denies the remaining allegations in Paragraph 195 of the Amended Complaint.

196. The TOUR admits that Commissioner Monahan sent a letter to TOUR members on June 9, 2022 identifying suspended players. The TOUR further admits that, except for the alterations and quotations, the quoted words appear in the Commissioner's June 9, 2022 letter. The TOUR otherwise denies the remaining allegations in Paragraph 196 of the Amended Complaint.

197. The TOUR admits that on June 9, 2022, the PGA TOUR Vice President of Competition Administration, Kristen Burgess, sent letters to all former PGA TOUR Members who participated in the LIV Golf London Invitational Series but had resigned from the PGA TOUR. The TOUR further admits that the quoted words appear in the letter. The TOUR otherwise denies the allegations in Paragraph 197 of the Amended Complaint.

198. The TOUR denies the allegations in Paragraph 198 of the Amended Complaint.

199. The TOUR is without sufficient information to admit or deny the accuracy of the quotations and allegations in Paragraph 199, and on that basis denies them. The TOUR otherwise denies the allegations in Paragraph 199 of the Amended Complaint.

200. The TOUR admits the allegations in Paragraph 200 of the Amended Complaint.

201. To the extent Paragraph 201 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR admits that its Regulations set out the appeals process. The TOUR further admits that the quoted language appears in the Regulations. The TOUR otherwise denies the remaining allegations in Paragraph 201 of the Amended Complaint.

202. The TOUR admits it received letters from suspended members. The TOUR otherwise denies the allegations in Paragraph 202 of the Amended Complaint.

203. The TOUR admits that the quoted words appear in the Regulations at Section VI.E. The TOUR further admits that the Player Plaintiffs are currently suspended. The TOUR otherwise denies the allegation in Paragraph 203 of the Amended Complaint.

204. The TOUR denies the allegations in Paragraph 204 of the Amended Complaint.

205. The TOUR is without sufficient information to admit or deny the accuracy of the quotation in Paragraph 205, and on that basis denies it. The TOUR admits that Rory McIlroy is a PGA TOUR Board member. The TOUR further admits that Rory McIlroy is a member of the PGA TOUR and the DP World Tour. The TOUR otherwise denies the allegations in Paragraph 205 of the Amended Complaint.

206. To the extent Paragraph 206 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR admits that the Player Plaintiffs have appealed the penalties imposed for their violations of the Regulations. The TOUR otherwise denies the allegations in Paragraph 206 of the Amended Complaint.

207. The TOUR admits that it sent a letter to the Player Plaintiffs regarding their violations of the Regulations and the resulting consequences. The TOUR otherwise denies the allegations in Paragraph 207 of the Amended Complaint.

208. The TOUR admits that it informed PGA TOUR members on July 25, 2022 of the FedExCup Playoffs and Eligibility Point List that would determine eligibility for the FedExCup playoffs. The TOUR otherwise denies the allegations in Paragraph 208 of the Amended Complaint.

209. The TOUR admits that some of the Player Plaintiffs' appeals were transferred to the Appeals Committee on July 27, 2022. The TOUR further admits that it confirmed that the Player Plaintiffs' suspensions under VII.C. of the Regulations remained in effect. The TOUR otherwise denies the allegations in Paragraph 209 of the Amended Complaint.

210. The TOUR admits that Andrew Levinson sent some Player Plaintiffs a letter to the effect that the Tour would no longer send them Notice of Disciplinary Inquiry letters for "ongoing violations." The TOUR otherwise denies the allegations in Paragraph 210 of the Amended Complaint.

211. The TOUR admits that it sent a letter to Mr. Gooch on August 2, 2022 informing him that his "eligibility to participate in PGA TOUR events has been suspended based on serious violations of the Regulations by your playing in and contributing your media rights to LIV Golf events, contrary to the terms you expressly agreed to as a condition of PGA TOUR membership," and that his "continuing participation in and promotion of LIV Golf is inflicting ongoing harm to the reputation and financial best interest of the TOUR," that his "suspension under Article VII, Section C remains in effect and, under Article VII, Section E, your July 13 appeal does not effectuate a stay of your suspension from tournaments in which your violations continue to occur," and that "[a]ccordingly, you remain ineligible for competition in the FedExCup Playoffs or otherwise." The TOUR otherwise denies the allegations in Paragraph 211 of the Amended Complaint.

212. The TOUR denies the allegations in Paragraph 212 of the Amended Complaint.

213. The TOUR denies the allegations in Paragraph 213 of the Amended Complaint.

214. Paragraph 214 sets forth allegations related to an individual who is no longer a plaintiff in this action, and no response is required. To the extent a response is required, the TOUR denies that it engaged in any anticompetitive conduct. The TOUR otherwise admits the allegations in Paragraph 214 of the Amended Complaint.

215. Paragraph 215 sets forth allegations related to an individual who is no longer a plaintiff in this action, and no response is required. Further, to the extent Paragraph 215 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 215 of the Amended Complaint.

216. Paragraph 216 sets forth allegations related to an individual who is no longer a plaintiff in this action, and no response is required. Further, to the extent Paragraph 216 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 216 of the Amended Complaint.

217. Paragraph 217 sets forth allegations related to an individual who is no longer a plaintiff in this action, and no response is required. Further, To the extent Paragraph 217 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 217 of the Amended Complaint.

218. Paragraph 218 sets forth allegations related to an individual who is no longer a plaintiff in this action, and no response is required. Further, to the extent Paragraph 218 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR admits that, in accordance with the Regulations' disciplinary provisions for violations of TOUR Regulations regarding conflicting events, media and marketing rights, and player conduct, it suspended Talor Gooch. The TOUR otherwise denies the allegations in Paragraph 218 of the Amended Complaint.

219. Paragraph 219 sets forth allegations related to an individual who is no longer a plaintiff in this action, and no response is required. Further, to the extent Paragraph 219 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 219 of the Amended Complaint.

220. Paragraph 220 sets forth allegations related to an individual who is no longer a plaintiff in this action, and no response is required. Further, to the extent Paragraph 220 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 220 of the Amended Complaint.

221. Paragraph 221 sets forth allegations related to an individual who is no longer a plaintiff in this action, and no response is required. Further, to the extent Paragraph 221 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 221 of the Amended Complaint.

222. Paragraph 222 sets forth allegations related to an individual who is no longer a plaintiff in this action, and no response is required. Further, to the extent Paragraph 222 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR admits that, in accordance with the Regulations' disciplinary provisions for violations of TOUR Regulations regarding conflicting events, media and marketing rights, and player conduct, it suspended Hudson Swafford. The TOUR otherwise denies the allegations in Paragraph 222 of the Amended Complaint.

223. Paragraph 223 sets forth allegations related to an individual who is no longer a plaintiff in this action, and no response is required. Further, to the extent Paragraph 223 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 223 of the Amended Complaint.

224. Paragraph 224 sets forth allegations related to an individual who is no longer a plaintiff in this action, and no response is required. Further, to the extent Paragraph 224 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 224 of the Amended Complaint.

225. Paragraph 224 sets forth allegations related to an individual who is no longer a plaintiff in this action, and no response is required. Further, to the extent Paragraph 225 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 225 of the Amended Complaint.

226. To the extent Paragraph 226 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR admits that, in accordance with the Regulations' disciplinary provisions for violations of TOUR Regulations regarding conflicting events, media and marketing rights, and player conduct, it suspended Matt Jones. The TOUR otherwise denies the allegations in Paragraph 226 of the Amended Complaint.

227. To the extent Paragraph 227 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 227 of the Amended Complaint.

228. To the extent Paragraph 228 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 228 of the Amended Complaint.

229. To the extent Paragraph 229 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 229 of the Amended Complaint.

230. To the extent Paragraph 230 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR admits that, in accordance with the Regulations' disciplinary provisions for violations of TOUR Regulations regarding conflicting events, media and marketing rights, and player conduct, it suspended Bryson DeChambeau. The TOUR otherwise denies the allegations in Paragraph 230 of the Amended Complaint.

231. To the extent Paragraph 231 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 231 of the Amended Complaint.

232. To the extent Paragraph 232 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 232 of the Amended Complaint.

233. To the extent Paragraph 233 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 233 of the Amended Complaint.

234. Paragraph 234 sets forth allegations related to an individual who is no longer a plaintiff in this action, and no response is required. Further, to the extent Paragraph 234 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR admits that, in accordance with the Regulations' disciplinary provisions for violations of TOUR Regulations regarding conflicting events, media and marketing rights, and player conduct, it suspended Ian Poulter. The TOUR otherwise denies the allegations in Paragraph 234 of the Amended Complaint.

235. Paragraph 235 sets forth allegations related to an individual who is no longer a plaintiff in this action, and no response is required. Further, to the extent Paragraph 235 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 235 of the Amended Complaint.

236. Paragraph 236 sets forth allegations related to an individual who is no longer a plaintiff in this action, and no response is required. Further, To the extent Paragraph 236 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 236 of the Amended Complaint.

237. Paragraph 237 sets forth allegations related to an individual who is no longer a plaintiff in this action, and no response is required. Further, to the extent Paragraph 237 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 237 of the Amended Complaint.

238. To the extent Paragraph 238 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR admits that, in accordance with the Regulations' disciplinary provisions for violations of TOUR Regulations regarding conflicting events, media and marketing rights, and player conduct, it suspended Peter Uihlein. The TOUR otherwise denies the allegations in Paragraph 238 of the Amended Complaint.

239. To the extent Paragraph 239 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 239 of the Amended Complaint.

240. To the extent Paragraph 240 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 240 of the Amended Complaint.

241. To the extent Paragraph 241 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 241 of the Amended Complaint.

242. The TOUR denies the allegations in Paragraph 242 of the Amended Complaint.

243. The TOUR denies that it told Arena Americas that it would cease doing business with Arena Americas if it worked with LIV Golf. The TOUR is otherwise without sufficient information to admit or deny the remaining allegations in Paragraph 243 of the Amended Complaint, and on that basis denies them.

244. The TOUR denies that it has a "blacklist" for any vendor that works with LIV Golf. The TOUR is without sufficient information to admit or deny the remaining allegations in Paragraph 244 of the Amended Complaint, and on that basis denies them.

245. The TOUR is without sufficient information to admit or deny the allegations in Paragraph 245 of the Amended Complaint, and on that basis denies them.

246. The TOUR is without sufficient information to admit or deny the allegations in Paragraph 246 of the Amended Complaint, and on that basis denies them.

247. The TOUR is without sufficient information to admit or deny the allegations in Paragraph 247 of the Amended Complaint, and on that basis denies them.

248. The TOUR is without sufficient information to admit or deny the allegations in Paragraph 248 of the Amended Complaint, and on that basis denies them.

249. The TOUR denies that Commissioner Monahan has impressed upon Ari Emmanuel and Mark Shapiro that the Endeavor Company cannot work with LIV. The TOUR is otherwise without sufficient information to admit or deny the remaining allegations in Paragraph 243 of the Amended Complaint, and on that basis denies them.

250. The TOUR is without sufficient information to admit or deny the allegations in Paragraph 250 of the Amended Complaint, and on that basis denies them.

251. The TOUR is without sufficient information to admit or deny the allegations in Paragraph 251 of the Amended Complaint, and on that basis denies them.

252. The TOUR is without sufficient information to admit or deny the allegations in Paragraph 252 of the Amended Complaint, and on that basis denies them.

253. The TOUR is without sufficient information to admit or deny the allegations in Paragraph 253 of the Amended Complaint, and on that basis denies them.

254. The TOUR is without sufficient information to admit or deny the allegations in Paragraph 254 of the Amended Complaint, and on that basis denies them.

255. The TOUR denies that it applied pressure to Ticketmaster. The TOUR is otherwise without sufficient information to admit or deny the remaining allegations in Paragraph 255 of the Amended Complaint, and on that basis denies them.

256. The TOUR denies that it asked Pro Secrets not to work with LIV. The TOUR is otherwise without sufficient information to admit or deny the remaining allegations in Paragraph 256 of the Amended Complaint, and on that basis denies them.

257. The TOUR denies that it threatened Cueto. The TOUR is otherwise without sufficient information to admit or deny the remaining allegations in Paragraph 257 of the Amended Complaint, and on that basis denies them.

258. The TOUR is without sufficient information to admit or deny the allegations in Paragraph 258 of the Amended Complaint, and on that basis denies them.

259. The TOUR is without sufficient information to admit or deny the allegations in Paragraph 259 of the Amended Complaint, and on that basis denies them.

260. The TOUR denies that it threatened golf courses with adverse consequences if they hosted LIV events. The TOUR is otherwise without sufficient information to admit or deny the remaining allegations in Paragraph 260 of the Amended Complaint, and on that basis denies them.

261. The TOUR denies the allegations in Paragraph 261 of the Amended Complaint.

262. The TOUR denies the allegations in Paragraph 262 of the Amended Complaint.

263. To the extent Paragraph 263 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 263 of the Amended Complaint.

264. To the extent Paragraph 264 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 264 of the Amended Complaint.

265. To the extent Paragraph 265 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 265 of the Amended Complaint.

266. To the extent Paragraph 266 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 266 of the Amended Complaint.

267. To the extent Paragraph 267 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 267 of the Amended Complaint.

268. The TOUR denies the allegations in Paragraph 268 of the Amended Complaint.

269. To the extent Paragraph 269 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 269 of the Amended Complaint.

270. To the extent Paragraph 270 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 270 of the Amended Complaint.

271. To the extent Paragraph 271 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 271 of the Amended Complaint.

272. To the extent Paragraph 272 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 272 of the Amended Complaint.

273. To the extent Paragraph 273 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR admits that success in PGA TOUR events may lead to opportunities to compete in the Majors. The TOUR otherwise denies the allegations in Paragraph 273 of the Amended Complaint.

274. To the extent Paragraph 274 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 274 of the Amended Complaint.

275. The TOUR admits that it describes PGA TOUR viewers as the "most valuable audience in sports." The TOUR further admits that it describes PGA TOUR viewers as "affluent, educated, and influential." To the extent the remaining allegations in Paragraph 275 set forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the remaining allegations in Paragraph 275 of the Amended Complaint.

276. To the extent Paragraph 276 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 276 of the Amended Complaint.

277. The TOUR is without sufficient information to admit or deny Plaintiffs' allegations that (1) a substantial proportion of golf fans have a particular affinity for the sport, which is often tied to their participation; (2) that as players of the sport themselves, golf fans have a particular connection with golf broadcasts, which cannot readily be replicated by broadcasts of other sports or entertainment events; and (3) that golf enthusiasts are a particular target of many advertisers on elite golf events, who seek to sell particular products and services (such as golf apparel and equipment) to golf enthusiasts, and on that basis denies them. To the extent the remaining allegations in Paragraph 277 set forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the remaining allegations in Paragraph 277 of the Amended Complaint.

278. The TOUR admits that events organized by the TOUR occur mostly in the United States, and the fans who attend those events in person are mostly in the United States. The TOUR further admits that TOUR events and their live network broadcasts are scheduled to provide convenient time slots for fans in the United States. The TOUR further admits that LIV has announced plans to organize a tour with events taking place in the United States and that the TOUR has denied releases to members seeking to participate in conflicting events. The TOUR otherwise denies the allegations in Paragraph 278 of the Amended Complaint.

279. To the extent Paragraph 279 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 279 of the Amended Complaint.

280. To the extent Paragraph 280 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 280 of the Amended Complaint.

281. The TOUR denies the allegations in Paragraph 281 of the Amended Complaint.

282. The TOUR denies the allegations in Paragraph 282 of the Amended Complaint.

283. The TOUR denies the allegations in Paragraph 283 of the Amended Complaint.

284. The TOUR denies the allegations in Paragraph 284 of the Amended Complaint.

285. The TOUR denies the allegations in Paragraph 285 of the Amended Complaint.

286. To the extent Paragraph 286 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 286 of the Amended Complaint.

287. To the extent Paragraph 287 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 287 of the Amended Complaint.

288. To the extent Paragraph 288 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 288 of the Amended Complaint.

289. The TOUR is without sufficient information to admit or deny the allegations in Paragraph 289 of the Amended Complaint, and on that basis denies them.

290. The TOUR is without sufficient information to admit or deny the allegations in Paragraph 290 of the Amended Complaint, and on that basis denies them.

291. The TOUR denies the allegations in Paragraph 291 of the Amended Complaint.

292. The TOUR denies the allegations in Paragraph 292 of the Amended Complaint.

293. To the extent Paragraph 293 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 293 of the Amended Complaint.

294. To the extent Paragraph 294 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 294 of the Amended Complaint.

295. The TOUR is without sufficient information to admit or deny Plaintiffs' allegation that LIV sought to secure commitments from players by March 2022 to establish its League for the summer 2022, and on that basis denies it. The TOUR otherwise denies the remaining allegations in Paragraph 295 of the Amended Complaint.

296. The TOUR denies the allegations in Paragraph 296 of the Amended Complaint.

297. The TOUR denies the allegations in Paragraph 297 of the Amended Complaint.

298. The TOUR denies the allegations in Paragraph 298 of the Amended Complaint.

299. The TOUR denies the allegations in Paragraph 299 of the Amended Complaint.

300. The TOUR denies the allegations in Paragraph 300 of the Amended Complaint.

301. The TOUR admits that fans cannot watch Player Plaintiffs in TOUR events due to their suspensions for violations of the Regulations. The TOUR otherwise denies the remaining allegations in Paragraph 301 of the Amended Complaint.

302. To the extent Paragraph 302 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 302 of the Amended Complaint.

303. To the extent Paragraph 303 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 303 of the Amended Complaint.

304. To the extent Paragraph 304 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 304 of the Amended Complaint.

305. To the extent Paragraph 305 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR admits that it is enforcing membership rules that have benign purposes. The TOUR otherwise denies the remaining allegations in Paragraph 305 of the Amended Complaint.

306. To the extent Paragraph 306 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR admits that it is acting to prevent free-riding. The TOUR otherwise denies the remaining allegations in Paragraph 306 of the Amended Complaint.

307. To the extent Paragraph 307 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR admits that the website "PGA TOUR Fan Shop" is operated by Fanatics. The TOUR is without sufficient information to admit or deny Plaintiffs' allegation that it does business with dozens of sponsors who do billions of dollars of business each year in Saudi Arabia, and on that basis denies it. The TOUR otherwise denies the remaining allegations in Paragraph 307 of the Amended Complaint.

308. The TOUR denies the allegations in Paragraph 308 of the Amended Complaint.

309. To the extent Paragraph 309 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 309 of the Amended Complaint.

310. The TOUR repeats, alleges, and incorporates by reference as if fully set forth herein each and every response to Paragraphs 1-309 above.

311. To the extent Paragraph 311 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 311 of the Amended Complaint.

312. To the extent Paragraph 312 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 312 of the Amended Complaint.

313. To the extent Paragraph 313 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 313 of the Amended Complaint.

314. To the extent Paragraph 314 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 314 of the Amended Complaint.

315. To the extent Paragraph 315 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 315 of the Amended Complaint.

316. To the extent Paragraph 316 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 316 of the Amended Complaint.

317. To the extent Paragraph 317 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 317 of the Amended Complaint.

318. The TOUR repeats, alleges, and incorporates by reference as if fully set forth herein each and every response to Paragraphs 1-317 above.

319. To the extent Paragraph 319 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 319 of the Amended Complaint.

320. To the extent Paragraph 320 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 320 of the Amended Complaint.

321. To the extent Paragraph 321 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 321 of the Amended Complaint.

322. To the extent Paragraph 322 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 322 of the Amended Complaint.

323. To the extent Paragraph 323 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 323 of the Amended Complaint.

324. To the extent Paragraph 324 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 324 of the Amended Complaint.

325. To the extent Paragraph 325 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 325 of the Amended Complaint.

326. The TOUR repeats, alleges, and incorporates by reference as if fully set forth herein each and every response to Paragraphs 1-325 above.

327. To the extent Paragraph 327 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 327 of the Amended Complaint.

328. To the extent Paragraph 328 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 328 of the Amended Complaint.

329. To the extent Paragraph 329 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 329 of the Amended Complaint.

330. To the extent Paragraph 330 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 330 of the Amended Complaint.

331. To the extent Paragraph 331 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 331 of the Amended Complaint.

332. To the extent Paragraph 332 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 332 of the Amended Complaint.

333. To the extent Paragraph 333 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 333 of the Amended Complaint.

334. To the extent Paragraph 334 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 334 of the Amended Complaint.

335. To the extent Paragraph 335 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 335 of the Amended Complaint.

336. To the extent Paragraph 336 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 336 of the Amended Complaint.

337. To the extent Paragraph 337 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 337 of the Amended Complaint.

338. To the extent Paragraph 338 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 338 of the Amended Complaint.

339. To the extent Paragraph 339 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 339 of the Amended Complaint.

340. To the extent Paragraph 340 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 340 of the Amended Complaint.

341. The TOUR repeats, alleges, and incorporates by reference as if fully set forth herein each and every response to Paragraphs 1-340 above.

342. To the extent Paragraph 342 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 342 of the Amended Complaint.

343. To the extent Paragraph 343 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 343 of the Amended Complaint.

344. To the extent Paragraph 344 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 344 of the Amended Complaint.

345. To the extent Paragraph 345 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 345 of the Amended Complaint.

346. To the extent Paragraph 346 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 346 of the Amended Complaint.

347. To the extent Paragraph 347 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 347 of the Amended Complaint.

348. To the extent Paragraph 348 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 348 of the Amended Complaint.

349. To the extent Paragraph 349 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 349 of the Amended Complaint.

350. To the extent Paragraph 350 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 350 of the Amended Complaint.

351. To the extent Paragraph 351 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 351 of the Amended Complaint.

352. To the extent Paragraph 352 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 352 of the Amended Complaint.

353. To the extent Paragraph 353 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 353 of the Amended Complaint.

354. The TOUR repeats, alleges, and incorporates by reference as if fully set forth herein each and every response to Paragraphs 1-353 above.

355. To the extent Paragraph 355 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 355 of the Amended Complaint.

356. The TOUR admits that it cosponsored six tournaments in the State of California during the 2021-2022 season and that a subsidiary entity owns and operates one golf course in the State of California. The TOUR otherwise denies the allegations in Paragraph 356 of the Amended Complaint.

357. To the extent Paragraph 357 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 357 of the Amended Complaint.

358. To the extent Paragraph 358 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 358 of the Amended Complaint.

359. To the extent Paragraph 359 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 359 of the Amended Complaint.

360. To the extent Paragraph 360 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 360 of the Amended Complaint.

361. To the extent Paragraph 361 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 361 of the Amended Complaint.

362. To the extent Paragraph 362 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 362 of the Amended Complaint.

363. To the extent Paragraph 363 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 363 of the Amended Complaint.

364. To the extent Paragraph 364 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 364 of the Amended Complaint.

365. To the extent Paragraph 365 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 365 of the Amended Complaint.

366. The TOUR repeats, alleges, and incorporates by reference as if fully set forth herein each and every response to Paragraphs 1-365 above.

367. To the extent Paragraph 367 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR admits that the TOUR and Player

Plaintiffs entered contracts. The TOUR otherwise denies the allegations in Paragraph 367 of the Amended Complaint.

368. To the extent Paragraph 368 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 368 of the Amended Complaint.

369. To the extent Paragraph 369 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 369 of the Amended Complaint.

370. To the extent Paragraph 370 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 370 of the Amended Complaint.

371. The TOUR repeats, alleges, and incorporates by reference as if fully set forth herein each and every response to Paragraphs 1-370 above.

372. To the extent Paragraph 372 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR is without sufficient information to admit or deny the allegations in Paragraph 372 of the Amended Complaint, and on that basis denies them.

373. To the extent Paragraph 373 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR is without sufficient information to admit or deny the allegations in Paragraph 373 of the Amended Complaint, and on that basis denies them.

374. To the extent Paragraph 374 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 374 of the Amended Complaint.

375. To the extent Paragraph 375 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 375 of the Amended Complaint.

376. To the extent Paragraph 376 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 376 of the Amended Complaint.

377. To the extent Paragraph 377 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 377 of the Amended Complaint.

378. To the extent Paragraph 378 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 378 of the Amended Complaint.

379. To the extent Paragraph 379 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 379 of the Amended Complaint.

380. The TOUR repeats, alleges, and incorporates by reference as if fully set forth herein each and every response to Paragraphs 1-379 above.

381. The TOUR is without sufficient information to admit or deny the allegations in Paragraph 381 of the Amended Complaint, and on that basis denies them.

382. The TOUR denies the allegations in Paragraph 382 of the Amended Complaint.

383. To the extent Paragraph 383 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 383 of the Amended Complaint.

384. To the extent Paragraph 384 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 384 of the Amended Complaint.

385. To the extent Paragraph 385 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 385 of the Amended Complaint.

386. To the extent Paragraph 386 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 386 of the Amended Complaint.

387. To the extent Paragraph 387 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 387 of the Amended Complaint.

388. To the extent Paragraph 388 sets forth a conclusion of law, no response is required. To the extent a response is required, the TOUR denies the allegations in Paragraph 388 of the Amended Complaint.

389. Plaintiffs' demand for a trial by jury does not state an allegation and does not require a response.

The paragraphs that set forth Plaintiffs' prayer for relief state no allegations and a response is not required. The TOUR denies any allegations contained in Plaintiffs' Prayer for Relief to which a response is required.

THE TOUR'S DEFENSES

The TOUR asserts the following defenses at law and in equity. The TOUR further reserves all additional defenses under Federal Rule of Civil Procedure 8(c) and any other defense that may now exist or that may in the future be available based on further discovery or factual investigation in this action. The TOUR denies that Plaintiffs are entitled to any relief whatsoever. By setting forth the defenses asserted below, the TOUR does not concede that it bears the burden of proof on any of the issues raised in these defenses. Furthermore, all such defenses are pled in the alternative, and do not constitute an admission of liability or an admission that Plaintiffs are entitled to any relief whatsoever.

First Defense

The Amended Complaint and each and every cause of action are barred for failure to state a claim upon which relief may be granted.

Second Defense

Plaintiffs' claims are barred, in whole or in part, because they lack antitrust standing to

pursue them, lack a cognizable antitrust injury, and are not proper or efficient enforcers of the antitrust laws.

Third Defense

Plaintiffs' claims are barred, in whole or in part, because they have not suffered an injury to their business or property due to any of the TOUR's actions alleged in the Amended Complaint.

Fourth Defense

Plaintiffs' claims are barred, in whole or in part, because the TOUR's actions alleged in the Amended Complaint were lawful, justified, and procompetitive.

Fifth Defense

Plaintiffs' claims are barred, in whole or in part, because the TOUR does not possess monopoly power, does not have the specific intent to obtain monopoly power, has not engaged in the willful acquisition or maintenance of monopoly power by engaging in anticompetitive conduct, and has no probability of achieving monopoly power in the relevant market.

Sixth Defense

Plaintiffs' claims are barred, in whole or in part, because they have failed to properly define the product and geographic markets.

Seventh Defense

Plaintiffs' claims are barred, in whole or in part, because the TOUR has not formed an agreement with a direct competitor to refuse to deal with Plaintiffs.

Eighth Defense

Plaintiffs' claims are barred, in whole or in part, because none of the TOUR's actions alleged in the Amended Complaint have caused harm to competition within a relevant market.

Ninth Defense

Player Plaintiffs' claims are barred, in whole or in part, because they failed to perform under the terms of their contracts.

Tenth Defense

Player Plaintiffs' claims are barred, in whole or in part, because the TOUR substantially performed all the material terms of its contracts with Player Plaintiffs.

Eleventh Defense

LIV's claims are barred, in whole or in part, because the TOUR lacked knowledge of LIV's contractual relationships with LIV players.

Twelfth Defense

LIV's claims are barred, in whole or in part, because the TOUR lacked knowledge of an economic relationship between LIV and third-parties that probably would have resulted in an economic benefit to LIV, or that the TOUR's actions alleged in the Amended Complaint were certain or substantially certain to disrupt any economic relationship between LIV and third-parties.

Thirteenth Defense

Plaintiffs' claims for equitable and injunctive relief are barred by the doctrine of unclean hands.

Fourteenth Defense

Plaintiffs' claims for equitable and injunctive relief are barred by the doctrine of laches.

Fifteenth Defense

Plaintiffs' claims for equitable and injunctive relief are barred because the balance of the equities does not favor granting the requested relief.

Sixteenth Defense

Plaintiffs' claims for equitable and injunctive relief are barred because the requested relief is not in the public interest.

Seventeenth Defense

Plaintiffs' claims are barred in whole or in part by the statute of limitations applicable to their respective claims.

Eighteenth Defense

Plaintiffs' claims are barred, in whole or in part, because of the Player Plaintiffs'

ratification, agreement, acquiescence, authorization, or consent to the TOUR's alleged conduct, including by agreeing to the Regulations.

PGA TOUR'S COUNTERCLAIM

PGA TOUR, Inc. ("PGA TOUR" or "TOUR"), by its undersigned counsel, brings this counterclaim against LIV Golf, Inc. ("LIV") and alleges as follows:

INTRODUCTION

1. The TOUR's counterclaim against LIV arises out of LIV's tortious inducement of numerous, repeated breaches of contract by former TOUR members, including: Phil Mickelson, Talor Gooch, Hudson Swafford, Matt Jones, Bryson DeChambeau, Ian Poulter, and Peter Uihlein (together, "LIV Players"). LIV has executed a campaign to pay the LIV Players astronomical sums of money to induce them to breach their contracts with the TOUR in an effort to use the LIV Players and the game of golf to sportswash the recent history of Saudi atrocities and to further the Saudi Public Investment Fund's Vision 2030 initiatives.

2. Simultaneously, LIV has encouraged and funded the pursuit by the LIV Players of meritless antitrust claims against the TOUR to challenge the lawfulness of the TOUR's contracts with its members. Indeed, to encourage that lawsuit, LIV has falsely communicated to the LIV Players and to other players that their agreements with the TOUR are unenforceable and thus LIV Players may breach them. In the same breath, however, LIV has entered into its own agreements with the LIV Players, which impose contractual restrictions on the LIV Players more onerous in scope and duration than any of the TOUR regulations they challenge. These restrictions, many of which required LIV Players to breach their contracts with the TOUR, include, but are not limited to, (i) multi-year commitments, (ii) a mandate that LIV Players play in every single LIV event, including all those played in the same week as a TOUR event, (iii) numerous full-day appearance obligations each year, (iv) requirements to wear LIV-branded apparel at non-LIV events, (v) providing LIV with significant control over LIV Players' social media activity and their ability to speak with the media, and (vi) a broad and exclusive media rights assignment to LIV. Moreover, at least some LIV contracts, such as that signed by Talor Gooch, require LIV members to "assist

[LIV] in seeking to persuade players to enter into multiyear player participation agreements with [LIV]."[2]

3. LIV has tortiously interfered with the TOUR's contracts with full knowledge of the terms of those agreements and with intent to induce LIV Players to breach their contracts with the TOUR. LIV Players have responded to LIV's inducements exactly as LIV hoped—by repeatedly breaching their contracts with the TOUR.

4. Indeed, a key component of LIV's strategy has been to intentionally induce TOUR members to breach their TOUR agreements and play in LIV events while seeking to maintain their TOUR memberships and play in marquee TOUR events like The Players Championship and the FedEx Cup Playoffs, so LIV can free ride off the TOUR and its platform. LIV's 2022 schedule noticeably and purposefully took a break during the weeks of the TOUR's FedExCup playoffs, which LIV has described as the "Super Bowl" of golf, and LIV has announced it will do the same in upcoming seasons.

5. LIV has falsely informed LIV Players that they may openly breach their contractual obligations to the TOUR, for the benefit of LIV and to the detriment of all TOUR members. LIV's interference with the TOUR's contracts is unlawful.

PARTIES

6. Defendant LIV is a professional golf tour financed and overseen by the Public Investment Fund ("PIF"), the Saudi sovereign wealth fund, which holds more than $500 billion in

[2] Andrew Beaton, *LIV Golf's Player Contracts Include Restrictions to Go With the Big Money*, Wall Street Journal (Aug. 17, 2022), https://www.wsj.com/articles/liv-golf-pga-tour-contract-11660744567. Indeed, once LIV induced players like Phil Mickelson and Bryson DeChambeau to breach their contracts with the TOUR, they started recruiting members on their own. *See* Abdul Bari Khan, *Report Makes an Amazing Revelation about LIV Team Captains Brooks Koepka and Bryson DeChambeau*, Essentially Sports (July 27, 2022), https://www.essentiallysports.com/golf-news-report-makes-an-amazing-revelation-about-liv-team-captains-brooks-koepka-and-bryson-dechambeau/.

assets. LIV is organized under the laws of the state of Delaware and has identified as its principal place of business New York City, New York. LIV's headquarters and primary offices are in West Palm Beach, Florida. To date, PIF has committed at least $2 billion in funding to LIV.

7. Plaintiff TOUR is a Maryland non-profit corporation, with its principal place of business in Ponte Vedra Beach, Florida. The TOUR operates as a membership organization, the sole members of which are the professional golfers themselves.

JURISDICTION AND VENUE

8. Pursuant to 28 U.S.C. § 1367(a), this Court has supplemental jurisdiction over the TOUR's counterclaim against LIV for state-law tortious interference with contract. LIV's action against the TOUR arises under Sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1, 2. This Court has subject matter jurisdiction over those federal claims under 28 U.S.C. § 1331, § 1337. The TOUR's state-law tortious interference counterclaim arises out of facts that are directly related to LIV's claims such that they form part of the same case or controversy within this Court's original jurisdiction.

9. This Court has personal jurisdiction over LIV and venue is proper in the Northern District of California pursuant to 28 U.S.C. § 1391(b) and (c) because LIV has appeared in this action and filed claims against the TOUR in this District.

GENERAL ALLEGATIONS

I. The TOUR's History and Business Model

10. The TOUR was founded in 1968 as a membership organization by a group of professional golfers. The TOUR was designed for the collective benefit of its members—all of whom are professional golfers—to secure prize money by soliciting corporate sponsorships and securing television exposure for golf tournaments through the aggregation of all players' rights.

11. The TOUR's founding members wanted the freedom, among other things, to plan their own travel and playing schedules, to practice as and when they saw fit, and otherwise to operate their respective "golf businesses" independently while, at the same time, associating as a "membership" in order to negotiate efficiently and effectively with sponsors, tournament organizers, media partners, and others to increase the value of their collective rights.

12. This ability to bundle player rights was then, and is now, dependent upon members assigning their media rights exclusively to the TOUR. In turn, the TOUR is able to provide prospective sponsors/media outlets with the assurances necessary to ensure that the rights "sold" to sponsors/partners are exclusive. That exclusivity influences the fees received by the TOUR on behalf of its members and, in turn, the prize money and other benefits that go to TOUR players.

13. The TOUR remains a membership organization to this day and is organized under Internal Revenue Code Section 501(c)(6). The TOUR has taken a leading role in charitable initiatives and efforts to develop, promote and expand the game of golf and increase the diversity of participants. As a membership organization, the TOUR takes on certain responsibilities towards its membership. In return, and to receive the benefits of membership, when golfers voluntarily agree to join the TOUR as members, they also must agree to certain obligations.

14. The obligations and conditions of membership to which each PGA TOUR member agrees are set forth in the PGA TOUR's Player Handbook & Tournament Regulations (the "Regulations"). The Regulations are issued annually and set forth the TOUR's operations, policies, and procedures. Each year, PGA TOUR members renew their agreements with the TOUR by agreeing to be bound by the Regulations as updated at the beginning of each season.

15. The PGA TOUR season includes a regular season of more than forty golf tournaments operated by the TOUR along with the four independently-operated Majors,[5] culminating in the FedEx Cup Playoffs. Forty-eight official tournaments were scheduled for the 2021-2022 season—forty-five regular season events and three FedEx Cup playoff events. TOUR-operated tournaments are played primarily in North America and principally in the United States.

II. LIV's Business Model and Financial Backing by the Saudi Government

16. LIV was founded in 2021 for the purpose of creating and scheduling a series of golf events. Unlike the TOUR and the other golf entities around the world that depend upon

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[5] The four "Majors" are the Masters, the PGA Championship, the US Open, and the Open Championship. The Majors are operated by independent organizations and not the TOUR, but they are approved events that are part of the TOUR's official schedule.

media fees and sponsorship for their revenues, LIV is "wholly owned" by and relies solely on financial backing from PIF, the Saudi sovereign wealth fund, which holds more than $500 billion in assets.[4]

17. LIV's funding through PIF grants it access to nearly unlimited resources from the Saudi government and allows it to operate without consideration of profitability. To date, PIF has committed at least $2 billion of funding to LIV, which, spurred by competition with the TOUR and other golf tours worldwide, LIV is using to pay nine-figure advances to some PGA TOUR members, provide free and/or significantly reduced tournament tickets to spectators, and fully fund all its operational costs, including hundreds of millions of dollars in tournament purses. With the backing of PIF, LIV has the luxury of operating at a loss for as long as it needs to accomplish its goals.

18. The limitless nature of LIV's funding is illustrated by the guaranteed contracts LIV has entered into with golfers. LIV has reportedly contracted to pay well-known golfers between $100-200 million to join LIV, with other golfers receiving large upfront payments as well. These payments are not conditioned on the quality of a golfer's performance in LIV's events, and every player is guaranteed at least an additional $120.000 in prize money per LIV event. LIV CEO Greg Norman claimed that LIV offered Tiger Woods between $700-$800 million to join the LIV Tour, a sum that would have nearly equaled the entirety of the TOUR's net revenue in 2021.

19. While LIV's publicly claimed goal is to "grow the game of golf," unlike all of the other major golf tours in the world, it has no system (nor plans for a system) to develop golfers to reach elite status. Instead, its actual objective is to further the interests of the Saudi Arabian government and PIF.

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[4] *See* Bob Harig, *Golf Legend Greg Norman Set to Run Competing Tour That Hopes to Begin Play in 2022*, ESPN (Oct. 29, 2021), https://www.espn.com/golf/story/_/id/32500931/golf-legend-greg-norman-set-run-competing-tour-hopes-begin-play-2022.

20. LIV's inaugural season includes eight events, five of which will have been held in North America. By its second season in 2023, LIV plans to expand to fourteen events (ten of which will be held in North America).[5] LIV events are invitationals, meaning that only those golfers with whom LIV has contracted or whom it has invited to compete may participate.

21. All LIV Players were recruited by LIV and were PGA TOUR members during the 2021-2022 season. LIV claims its players are "independent contractors" or "free agents," but LIV's own business plan and player agreements demonstrate this is a fiction. Golfers who join LIV must sign long-term exclusive contracts that require them to participate in ***all*** LIV events and prohibit them from playing in ***any*** TOUR events occurring in the same week as any LIV event (or any conflicting event whatsoever).[6] LIV's statements regarding golfer freedom are a thinly veiled public relations ploy concocted to disparage the TOUR and deflect criticism from LIV's own restrictive business model.

22. Indeed, LIV Players' contracts with LIV are rife with severe restrictions. For example, the TOUR is aware that at least certain LIV Player contracts contain the following requirements:

- Players must play in ***every*** LIV event "as a fundamental condition of [their] Agreement." LIV projects this will involve 10-14 events (along with qualification events) in the 2023 and 2024 season (and not including any of the four Major

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[5] *See* Dan Rapaport, *LIV Golf to Transition to 'League' Schedule in 2023, with 14 Events and 48 Contracted Players*, Golf Digest (June 30, 2022), https://www.golfdigest.com/story/liv-golf-league-schedule-2023.

[6] LIV has already prohibited players from playing in other golf tournaments. For example, Graeme McDowell was prohibited from playing in the Irish Open—his native country's open championship—even though he has played in that tournament for a majority of the past twenty years. *See* Bob Harig, *While Admitting a "Tainted" Legacy, Graeme McDowell Takes Issue with LIV Backlash*, Sports Illustrated (July 5, 2022), https://www.si.com/golf/news/while-admitting-a-tainted-legacy-graeme-mcdowell-takes-issue-with-liv-backlash.

championships). ***However***, LIV retains "sole discretion" to schedule these events, and LIV is not restricted in the number, location or dates it schedules those events. LIV already has used its discretion to increase the obligations of players who signed with LIV in May. Those contracts indicate players should expect to participate in 10 events in 2023, but by late June, LIV was publicly stating it would hold 14 events in 2023.

- For the duration of their multi-year contracts with LIV, players must grant LIV "an exclusive, perpetual, royalty-free, worldwide, transferable, fully paid-up irrevocable right and license (with the right to grant sublicenses) to exhibit, exploit, copy, reproduce and otherwise use the Player Identification" in connection with any promotional activities, team apparel, and all content created, recorded or otherwise generated by or on behalf of LIV, LIV Team, or any League Rights Holder (League Rights are defined to include, among other things, any content, advertising and film rights).
- Players must wear LIV Team Apparel in LIV events, other non-LIV tournaments, and other events in which they must participate (effectively granting LIV sponsorship rights that could otherwise be used by the player).
- Players agree they will not enter into any "Conflicting Contract," defined in a manner that would preclude LIV Players from renewing their membership agreements with the TOUR.
- Players are required to use their social media platforms to promote LIV.
- Players are obligated to make numerous required appearances including multiple sponsorship activations, receptions, meet and greets, and appearances at each team's "draft event."
- Players must lend their likenesses to content creation, including photoshoots/video content, participate in a mini-series/documentary series and agree to their inclusion in LIV marketing materials.

- Players are prohibited from providing exclusive interviews or commentaries or entering into any agreements involving exclusive interviews with or appearances in or on any media or social media in relation to any league activities without obtaining LIV or Team operator approval.
- Players are required to participate in and assist LIV with meetings, negotiations and/or other activities with corporate sponsors or other business partners, including team promotional activities and league activities (i.e., activities organized by or on behalf of LIV in relation to the league and/or any event including ancillary tournament or promotional activities).
- At LIV's request, players must introduce LIV representatives to the player's existing or prior sponsors to facilitate sponsorship discussions for LIV and other LIV Players.
- Players must not make any statement or commit any act (or fail to act), nor make, post, publish or communicate to any Person or in any public forum any false, defamatory, libelous, or slanderous remarks, comments or statements which could reasonably be expected to, or actually do, adversely affect (i) the Player's ability to participate in connection with any Tournament or Event, or (ii) the reputation or public image of any relevant person. Relevant person is defined in such a way to specifically cover shareholders of LIV—i.e., the Saudi government.

23. These membership conditions are far more restrictive than the TOUR's own Regulations on player participation in PGA TOUR events, which LIV Players disingenuously have alleged violate the antitrust laws. They also make it impossible for LIV Players to meet their contractual obligations to the TOUR. For example, LIV Players have admitted that they could not realistically participate in their required LIV events (8 in 2022 and 14 in 2023) and the minimum number of PGA TOUR events (15) needed to maintain membership on the PGA TOUR. At least some of the LIV agreements also directly prohibit players from agreeing to the Regulations.

III. The TOUR's Contract with TOUR Members, Including LIV Players

24. LIV Players admit they had a contractual, business relationship with the TOUR until the end of the 2021-22 season that required them to comply with the Regulations. Dkt. 83 ¶¶ 16-22, 367. The Regulations and any amendment to them are approved not only by a majority of the TOUR's Policy Board, but generally by at least three of the player directors who sit on the Policy Board.

25. As consideration and in exchange for fulfilling these obligations, LIV Players (and other PGA TOUR members) gained the right to participate in and earn from PGA TOUR events, taking advantage of the TOUR's reputation, media and sponsorship platform and pool of prize money. They also receive other reputational and membership benefits (e.g., healthcare and retirement plans). Dkt. No. 50-5 (Levinson Decl.) ¶ 5.

26. If PGA TOUR members refuse to live up to the terms of their agreements, and instead treat their own promises as optional, the entire mutually beneficial arrangement amongst PGA TOUR members is harmed. The TOUR continues to depend on all members to honor their contractual membership commitments and has no legal obligation to hold in good standing and/or provide playing opportunities to any member who willfully violates those terms. Golfers have no right to claim for themselves whichever of the privileges of PGA TOUR membership they choose while at the same time rejecting any obligations that they deem inconvenient.

27. Among the most critical obligations in the Regulations are the requirements that PGA TOUR members: (i) grant their exclusive media rights to the TOUR; (ii) avoid participating in events that conflict with PGA TOUR events absent a waiver from the TOUR; and (iii) refrain from conduct unbecoming of PGA TOUR members, including by commenting or behaving in a way that will reflect unfavorably on the TOUR or harm the TOUR.

A. Media Rights and Conflicting Events Obligations

28. Article V of the Regulations sets forth PGA TOUR members' contractual requirements regarding the exclusive grant of their media rights to the TOUR. At the beginning of every season, all PGA TOUR members grant the TOUR the exclusive right to use their media rights in any golf program. (Regulations at Art. V.B.1.a.). Moreover, Article V provides that

"[n]o PGA TOUR member shall participate in any live or recorded golf program without the prior written approval of the Commissioner, except that this requirement shall not apply to PGA TOUR cosponsored, coordinated or approved tournaments, wholly instructional programs or personal appearances on interviews or guest shows."

29. Under the TOUR's media rights Regulations, each PGA TOUR member agrees to consolidate his individual media rights with his fellow members' respective rights and contractually assigns such rights to the TOUR on an exclusive basis so that the TOUR can license the pooled rights to media outlets, thereby creating a new product—the pooled media rights—that would not otherwise exist. This new product allows the TOUR to sell the aggregated rights to media outlets in the same manner as other professional sports leagues.

30. As with all obligations under the Regulations, the grant of media rights covers only a single PGA TOUR season. This season-long exclusive grant of media rights by PGA TOUR members is an essential contractual provision because the TOUR must rely on that grant of rights to license those rights to media partners and sponsors.

31. Article V of the Regulations also sets forth PGA TOUR members' contractual requirements regarding conflicting events. These rules contribute to the success of scheduled PGA TOUR tournaments. Consistent with these contractual obligations, the TOUR has long-standing player rules that limit participation in conflicting events.

32. Article V.A.2 of the Regulations provides that PGA TOUR members generally may not participate in any other golf tournament on a date when a PGA TOUR tournament is scheduled. In certain circumstances, players may seek and receive releases to play in non-TOUR tournaments that are held outside of North America on the same dates as TOUR tournaments.

33. Taken together, the media rights grant and conflicting events rules make the TOUR's product more valuable to sponsors, local host organizers, and content distributors, leading to higher sponsorship and broadcast revenues for the TOUR, which in turn are distributed to members in the form of higher purses, bonuses, pensions and other ancillary membership benefits. They also help preserve the TOUR's reputation, including from being tarnished by LIV.

B. Prohibition on Conduct Unbecoming

34. Article VI of the Regulations prohibits certain forms of conduct unbecoming professional golfers who are members of the PGA TOUR. Players agree that "Players participating in PGA TOUR cosponsored, approved or coordinated tournaments . . . at all times shall conduct themselves in a manner becoming professional golfers that will not reflect unfavorably on PGA TOUR, its members, officers or representatives, tournaments or sponsors." (Regulations at Art. VI.) They also agree "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." Regulations at Art. VI.E. Violations of this section constitute conduct unbecoming a professional. *Id.*

IV. LIV Players Have Materially Breached Their Contracts with the TOUR

35. Several PGA TOUR members, including LIV Players Talor Gooch, Matt Jones, Ian Poulter, and Peter Uihlein, requested and were denied media rights and conflicting events releases to participate in LIV's inaugural London tournament, which was scheduled to be held on the same weekend as the TOUR's RBC Canadian Open. Other LIV Players didn't even bother requesting releases despite the obligations to obtain them set forth in the Regulations to which they agreed. By that time, it was clear that LIV planned an eight-tournament schedule for 2022—to be held principally in North America—with a far more substantial schedule in North America in 2023 and beyond. As LIV Players knew, their LIV contracts guaranteed LIV de facto exclusivity for multiple years, and compelled LIV Players to continually violate their existing agreements and any future agreements with the TOUR because, by agreeing to these LIV contract terms, LIV Players were promising to repeatedly breach the TOUR's conflicting events and

media rights provisions in Article V.A.2 and V.B.1 of the Regulations and to recruit other PGA TOUR members to do the same.

36. Similarly, several additional players, including LIV Player Bryson DeChambeau, elected to play in LIV's next two events held in Portland, Oregon, and/or Bedminster, New Jersey, both of which were held on the same days as PGA TOUR events, without conflicting events and media rights releases. Those players also breached their contracts with the TOUR in the same fashion and were sent disciplinary notices by the TOUR.

37. Further, numerous LIV Players breached Article VI of the Regulations that prohibits PGA TOUR members from engaging in conduct unbecoming, which, as detailed above, is defined to include conduct that will harm the financial interest of the TOUR. For example, in connection with the LIV event, Jones and Swafford participated in a series of interviews that promoted the LIV series. In addition, Poulter promoted the LIV event through the posting of multiple social media posts. Mickelson and DeChambeau also promoted the LIV event and actively recruited other TOUR members to join LIV and breach their agreements with the TOUR. These LIV Players' active promotion of LIV and other conduct that they knew or should have reasonably known was not in the best financial or reputational interests of the TOUR, violated Article VI, and was in furtherance of contractual obligations to LIV intended to specifically induce others to breach their agreements with the TOUR. Based on these blatant violations of the Regulations, the TOUR notified LIV Players that they were in breach of their obligations.

38. LIV Players responded to the disciplinary notices from the TOUR with nearly identical messages authored by attorneys acting on LIV's behalf (the "Responses"). None of the Responses denied that LIV Players were violating the Regulations. Instead, again prompted by LIV, LIV Players (wrongly) asserted the TOUR's rules violated the antitrust laws. Indeed, the Responses, if anything, reaffirmed LIV Players' commitments to continue violating the Regulations by continuing to play in conflicting events and granting their media rights to LIV.

39. Several TOUR members elected to resign their PGA TOUR memberships and participate exclusively on the LIV tour. However, despite signing lucrative contracts with LIV, numerous other PGA TOUR members, including LIV Players Mickelson, Gooch, Swafford,

Jones, Poulter, and Uihlein, did not resign their PGA TOUR memberships and instead knowingly and blatantly breached their obligations to the TOUR and their fellow members.

V. LIV's Engineering of LIV Players' Breach of the TOUR's Regulations

40. LIV has conducted a coordinated campaign of ongoing interference with contracts between the TOUR and its members in the hope LIV can convince a court to alter the TOUR's membership structure to benefit itself at expense of the TOUR and for the benefit of LIV.

41. LIV has made its strategy clear: fully aware the Regulations do not permit members to remain on the PGA TOUR while participating in all events on the LIV tour as required by LIV, LIV denigrates the TOUR, encourages players to breach their contracts with the TOUR on the baseless promise that LIV can help those golfers force their way into PGA TOUR events, and then uses LIV Players as a vehicle to challenge the Regulations, directing and funding a campaign to undermine the TOUR's membership structure. From the outset, LIV has intentionally and systematically engineered each step of LIV Players' breach.

42. LIV recruited LIV Players and entered into contracts with them with full knowledge that doing so would interfere with their contractual obligations to the TOUR and place players in continuing violation of the Regulations, including the provisions on media rights, conflicting events, and conduct unbecoming a PGA TOUR member. LIV has openly sought to damage the TOUR's business relationships with its members by inducing them to breach their contractual requirements, even going so far as to pay members' legal fees to make breaching their contracts with TOUR more enticing.

43. LIV issued a communication to all PGA TOUR members through their agents demonstrating clear knowledge of the Regulations. LIV expressed understanding that the Regulations "authorize the commissioner to impose punishments on golfers who engage in 'conduct unbecoming a professional golfer,'" including discipline and suspension.

44. Aware of these provisions, LIV falsely alleged that the TOUR's adherence to its own Regulations constituted anticompetitive behavior and/or that the TOUR had violated its own rules. LIV proceeded to encourage PGA TOUR members to join LIV based on the promise that the TOUR either would not and/or could not enforce its contractual rights to suspend golfers.

including LIV Players who openly decided to breach their contracts with the TOUR. The TOUR understands that these types of representations were made informally in conversations between TOUR members and representatives from LIV, including Greg Norman, and other TOUR members who had already planned to join LIV, like Phil Mickelson. The LIV Players have sued the TOUR based upon their suspensions for violation of the Regulations, in part based upon these false assertions by LIV.

45. In text messages between Sergio Garcia and LIV CEO Greg Norman, Norman wrongly told Garcia: "They cannot ban you for one day let alone life. It is a shallow threat. Ask them to put in writing to you or any player. I bet they don't. Happy for anyone to speak with our legal team to better understand they have no chance of enforcing." Dkt. 2-3 at 128–132. Norman's reassurances to Garcia and potentially other members of the TOUR were intended to mislead players who were concerned about the consequences of breaching their agreements with the TOUR and to encourage them to breach those agreements.

46. For instance, Talor Gooch, Hudson Swafford and Matthew Jones elected to remain in the LIV London Invitational Series event despite the TOUR's denial because they claimed they "did not believe the [TOUR] had a lawful right to prevent [them] from playing in the event and because it was important [they] stand up for the lawful rights of professional golfers to achieve their market value as independent contractors." Dkt. 2-9 (Declaration of Hudson Swafford) ¶ 21; Dkt. 2-10 (Declaration of Matt Jones) ¶ 21; Dkt. 2-11 (Declaration of Talor Gooch) ¶ 21. This "belief" is based on misrepresentations made by LIV and Norman.

47. LIV's actions make clear that it knew that the TOUR's behavior was neither anticompetitive nor in violation of the Regulations. Indeed, despite asserting that the TOUR's Regulations infringe on the supposed rights of independent contractors and violate the antitrust laws, LIV has signed golfers to multi-year contracts containing obligations that are ***far more restrictive than anything in the Regulations***, including a prohibition on participation in conflicting events that, unlike the TOUR's conflicting event rules, does not allow for any request for release. Yet LIV told players that the TOUR's behavior was anticompetitive and in violation of the Regulations in a calculated effort to convince LIV Players it would benefit them to breach

their agreements with the TOUR, move forward with LIV, and give LIV the opportunity to free ride off TOUR's investments by encouraging the LIV Players to play in PGA TOUR events despite their clear violation of the Regulations.

48. In anticipation that some PGA TOUR members would hesitate to openly breach their contracts with the TOUR while at the same time insisting upon all the benefits of PGA TOUR membership, on May 11, 2022, Greg Norman promised that LIV would offer financial protections to any player who could nevertheless be induced to violate the Regulations: "All the players I've told: we've got your back. We'll defend, we'll reimburse and we'll represent–simple as that." In effect, LIV has agreed not only to induce, but also to fund, any LIV Player's ongoing breach of the TOUR Regulations. LIV also specifically provided what it described as "greater payments and extensive indemnification" and "hundreds of millions of dollars . . . to compensate [LIV Players] for the risks they incur in punishments to facilitate these breaches." Dkt. No. 2-12 ¶¶ 23-24.

49. The TOUR remains committed to fostering legitimate competition in professional golf, which LIV's inducement scheme is not. LIV's orchestrated efforts to induce TOUR members to breach their contracts and prevent them from entering into any future contract with the TOUR are part of a deliberate effort to harm the TOUR.

50. LIV has encouraged LIV Players to breach their contracts by providing them with assurances that because they are "independent contractors," they have the right to blatantly breach their contractual relationship with the TOUR. Indeed, LIV's true purpose appears to be to induce LIV Players to breach their agreements with the TOUR and then participate in PGA TOUR events in order to free ride off of the TOUR's platforms, while simultaneously committing LIV Players to multi-year exclusive, contracts with far more restrictive provisions.

51. Once LIV successfully induced players to breach their contracts with the TOUR, those players, in turn, became integral to further LIV's recruitment efforts. Indeed, certain LIV

Player contracts appear to require LIV members to "assist [LIV] in seeking to persuade [TOUR members] to enter into multiyear player participation agreements with [LIV]."[7]

52. Through its tortious interference with the TOUR's agreements and membership structure, LIV has damaged the TOUR and has forced the TOUR to spend considerable resources defending its structure and reputation, including by forcing the TOUR to defend itself from LIV Players' claims based on false representations.

53. LIV's tortious interference has sought to harm the TOUR by jeopardizing the TOUR's reputation and trying to insert instability and uncertainty into the TOUR's existing and planned future business relationships with PGA TOUR members.

54. Ultimately, LIV has sought not only to induce PGA TOUR members, including LIV Players, to breach their contracts and interfere with the TOUR's business relationships with its members, but also to force the TOUR to change its Regulations to suit LIV's business purposes at the expense of the TOUR. Those business purposes include free riding on the TOUR's player development investments by skimming off the top and pilfering elite players developed under the TOUR's system, while continuing to demand a right to take advantage of the TOUR's platform for LIV Players. LIV seeks to allow itself and its members to exploit the TOUR's reputation, goodwill, and platform to benefit them at the TOUR's expense.

COUNT I
TORTIOUS INTERFERENCE WITH CONTRACT

55. The TOUR reasserts the allegations set forth in the foregoing Paragraphs above as though set forth herein.

56. A contractual relationship existed between the TOUR and each LIV Player—Phil Mickelson, Talor Gooch, Hudson Swafford, Matt Jones, Bryson DeChambeau, Ian Poulter, and

[7] Andrew Beaton, *LIV Golf's Player Contracts Include Restrictions to Go With the Big Money*, Wall Street Journal (Aug. 17, 2022), https://www.wsj.com/articles/liv-golf-pga-tour-contract-11660744567

Peter Uihlein—through the contracts between the TOUR and each LIV Player that is embodied in the Regulations.

57. LIV had full knowledge of the contracts between the TOUR and each LIV Player, including the specific terms of LIV Players' contracts and the impact LIV's conduct would have on the business and contractual relationships between the TOUR and each of the LIV Players.

58. LIV paid significant sums of upfront cash and made false representations to the LIV Players to induce their breach of the agreements with the TOUR.

59. LIV has intentionally, willfully, and unjustifiably interfered with, and has knowingly facilitated a conspiracy to interfere with, the contractual and business relationship between the TOUR and each LIV Player.

60. By requiring LIV Players to recruit TOUR members on LIV's behalf, LIV has intentionally, willfully, and unjustifiably interfered with, and has knowingly facilitated a conspiracy to interfere with, the current business relationship between the TOUR and other TOUR members.

61. Among other things, LIV interfered with these relationships by engaging in a campaign to direct and fund LIV Players' legal action against the TOUR. Through this campaign, LIV has directed LIV Players to try to force the TOUR to amend its contractual provisions in order to harm the TOUR and to exploit each LIV Player's contract to claim for LIV's own benefit the TOUR's platform and reputation.

62. LIV's intentional interference was committed through improper means, well beyond the bounds of legitimate competition, to LIV's direct benefit and to the detriment of the TOUR. As a result, LIV is intentionally interfering with the TOUR's business relationships through improper means and in violation of the law.

63. LIV engaged in the acts of interference set forth herein with a conscious desire to prevent the contracts from continuing. LIV also knew or should have known its conduct would interfere with the contract between the TOUR and each of the LIV Players, and indeed, LIV structured its contracts to ensure each of the LIV Players would necessarily be in breach of his contract with the TOUR.

64. LIV's acts have caused damage to the TOUR including, but not limited to, forcing the TOUR to spend its resources through this lawsuit and otherwise on discipline of the LIV Players, forcing the TOUR to defend its reputation, and in such other manners in an amount to be determined at trial. LIV's acts will continue to harm the TOUR in an amount to be determined at trial.

RELIEF REQUESTED

WHEREFORE, Plaintiffs hereby request that the Honorable Court award the following relief:

a. Awarding the TOUR damages suffered as a result of LIV's tortious interference with the TOUR's contracts with LIV Players including any lost profits, damages to reputational and brand harm, costs, punitive damages, reasonable attorneys' fees and pre-suit costs.

b. Granting such further and additional relief this Court deems just and proper.

JURY DEMAND

The TOUR demands a trial by jury on all issues so triable.

Dated: September 28, 2022

KEKER, VAN NEST & PETERS LLP

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

PHIL MICKELSON, TALOR GOOCH, HUDSON SWAFFORD, MATT JONES, BRYSON DECHAMBEAU, ABRAHAM ANCER, CARLOS ORTIZ, IAN POULTER, PAT PEREZ, JASON KOKRAK and PETER UIHLEIN,

Plaintiffs,

v.

PGA TOUR, INC.,

Defendant.

CASE NO. 3:22-cv-04486

NOTICE OF MOTION AND MOTION FOR TEMPORARY RESTRAINING ORDER

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on a date and time to be determined, or as soon as the matter may be heard, before the judge to be assigned of the United States District Court for the Northern District of California in the 450 Golden Gate Avenue, in the courtroom of the assigned judge, Plaintiffs Talor Gooch, Hudson Swafford, and Matt Jones ("TRO Plaintiffs") will and do move this Court for a temporary restraining order prohibiting Defendant from preventing Talor Gooch, Hudson Swafford, and Matt Jones from playing in the FedEx Cup Playoffs during the term of the Temporary Restraining Order. Defendant is prohibited from enforcing its Media Rights and Conflicting Events Regulations to punish Talor Gooch, Hudson Swafford, and Matt Jones for playing with a competing promoter or other activities related to LIV Golf during the term of the Temporary Restraining Order. Defendant is prohibited from enforcing its disciplinary procedures in connection with their play with a competing promoter or other activities related to LIV Golf on Talor Gooch, Hudson Swafford, and Matt Jones during the term of the Temporary Restraining Order. This motion is brought on the grounds that Defendant's restrictions are illegal under the antitrust laws, Defendant has breached its Regulations by refusing to abate TRO Plaintiffs' suspensions as it is required to under its Regulations, and Defendant's disciplinary procedures are unfair under state law. Plaintiff is likely to succeed on the merits, it will imminently suffer irreparable harm absent injunctive relief, and the balance of equities favors immediate injunctive relief.

DATED: August 3, 2022

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By: */s/ Rachel S. Brass*
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TABLE OF CONTENTS

CASES

STATUTES

Defendant PGA Tour, Inc. (sometimes the "Tour") is a monopsonist. It controls the market for the services of professional golfers for elite golf events in the United States. The purpose of this action is to strike down the PGA Tour's anticompetitive rules and practices that prevent these independent-contractor golfers from playing when and where they choose.

Three of the Plaintiffs in this case, Talor Gooch, Hudson Swafford, and Matt Jones ("TRO Plaintiffs"), seek a temporary restraining order. Each of the three TRO Plaintiffs has qualified to play in the highly prestigious and lucrative FedEx Cup Playoffs, which begin in eight days. The Tour has unlawfully suspended the TRO plaintiffs from the Tour ***for almost two years*** and, as of yesterday, refused to stay these suspensions, as the Tour's own rules require. As we describe below, the Tour has imposed these suspensions solely because the TRO Plaintiffs chose to play in events sponsored by LIV Golf, a newly created golf promoter, as the Tour views LIV Golf as a threat to its long-standing domination of elite professional golf. Unless restrained, the Tour's impermissible suspensions will prevent the TRO Plaintiffs from playing in the FedEx Cup Playoffs, which will deny them a crucial opportunity to qualify for next year's premier professional golf events. The Tour thinks it is above the law. Yesterday, a Tour representative said, "**We hold all the cards . . . . We don't want those guys playing. We don't care what the courts say.**" Declaration of Rachel Brass ("Brass Decl.") Ex. 62 (emphasis added). Accordingly, the TRO Plaintiffs request that the Court prevent irreparable injury by restraining the Tour from enforcing its impermissible suspension of these players.

I. SUMMARY OF THE ARGUMENT

The Tour has suspended Mr. Gooch, Mr. Swafford, and Mr. Jones for violating Tour restrictions that are illegal and unenforceable under the antitrust laws. TRO Plaintiffs appealed their suspensions to the Tour's Appeals Committee, and should, under the Tour's own regulations, be permitted to play in Tour events while their appeals are pending. But, only yesterday, the Tour informed Mr. Gooch that it would bar TRO Plaintiffs from the FedEx Cup Playoffs. The Tour's actions are aimed at harming these players' careers as part of its larger ambition to protect its monopsony against the nascent entry of LIV Golf. The Tour's violation of its own regulations underscores that it is employing its so-called disciplinary process to boycott players, LIV Golf, and all who would support them in introducing competition to elite professional golf. The TRO Plaintiffs respectfully request that the Court enjoin the

Tour's suspensions and allow them to play in the FedEx Cup Playoffs, a high honor each earned through his superior play on the PGA Tour this year.

The Tour's abdication of its own disciplinary rules is but its latest act in its unceasing efforts to protect its unlawful monopsony. The Tour's ostensible 501(c)(6) tax-exempt purpose is to "promote the common interests of professional tournament golfers," yet it denies TRO Plaintiffs the opportunity to play in the potentially career-altering FedEx Cup merely because they play during their off-weeks for a competing golf promoter.

TRO Plaintiffs have dedicated years of their lives to the Tour, playing in over one hundred Tour events each, and well over this season's minimum number of Tour-required events. Through superb play, each qualified for the FedEx Cup Playoffs, an event critical to the TRO Plaintiffs' careers. Indeed, the Tour itself describes the FedEx Cup Playoffs as the "pinnacle"—"if not the No. 1 goal, it's certainly a top goal for every single player" each golf season. Brass Decl. Ex. 1. Entry into next year's Majors (Masters, PGA Championship, U.S. Open, and The Open), as well as into the Tour's premier invitationals, is earned in the FedEx Cup. Large bonuses, big purses, substantial retirement plan payments, sponsorship, branding, and important business opportunities are at stake.

The Tour is denying TRO Plaintiffs entry into the Playoffs by imposing career-threatening suspensions until March 31, 2024, as punishment for playing in two events sponsored by LIV Golf with a threat of increased exclusion if they ever again play for LIV Golf. The Tour's suspensions are unlawful acts in furtherance of the its efforts to prevent competition for professional golfers' services for elite events. *See, e.g., Int'l Boxing Club of N.Y. v. U.S.*, 358 U.S. 242, 254 (1959) (boxing club violated antitrust law through its "control of contending [championship] boxers through exclusive agreements"); *Volvo N. Am. Corp. v. Men's Int'l Prof'l Tennis Council*, 857 F.2d 55, 69 (2d Cir. 1988) (tennis council's agreements that "discourage players from participating" in any non-council events were unlawful group boycott).

The Tour has enforced its Regulations to ensure that golfers—whom the Tour freely acknowledges are independent contractors—are not permitted to play for any other promoter that the Tour deems a threat to its monopoly. Through a two-year campaign to intimidate golfers, the Tour has threatened unlawful lifetime suspensions for any golfer who plays for a new entrant. The Tour has also

unlawfully agreed with the European Tour to ensure that any player who plays for LIV Golf would be cut off from access to the golf "ecosystem." The Tour has even leaned on those who operate the Majors to call into question whether golfers who play in LIV Golf will qualify for future Majors. And the Tour has threatened agents, vendors, and sponsors with dire consequences if they do business with LIV Golf.

The Tour has historically embraced its members' playing on other tours—so long as those tours respect the Tour's monopsony by staying out of the United States. But because the Tour views LIV Golf as threatening its monopsony, the Tour responded by imposing career-threatening suspensions when the TRO Plaintiffs sold their services to this competing buyer. The Tour's actions are obviously anticompetitive, as they serve no purpose but to thwart competition and maintain its monopsony. Even setting aside antitrust issues, the proceedings by which the Tour imposed the suspensions have proven biased, predetermined, and contrary to the Tour's own requirements. TRO Plaintiffs therefore request that the Court enjoin their suspensions so they can avoid irreparable harm they would otherwise suffer.

II. FACTUAL BACKGROUND

A. PGA Tour

The PGA Tour is a 501(c)(6) tax-exempt member association that describes itself as "the world's leading professional golf tour" and "second to none due to the strength of its members." Brass Decl. Ex. 2. Until LIV Golf's recent entry, top golfers had no alternative to pursue their careers except through the Tour. Declaration of Talor Gooch ("Gooch Decl.") ¶ 3; Declaration of Hudson Swafford ("Swafford Decl.") ¶ 3; Declaration of Matt Jones ("Jones Decl.") ¶ 3; Expert Declaration of Dr. Jeffrey Leitzinger, Ph.D. ("Leitzinger Decl.") ¶¶ 18, 50.[1] Professional golfers who qualify for Tour membership invariably compete on the Tour, as it offers by far the largest tournament purses, the greatest opportunities to qualify for the Majors, the greatest exposure in the golf world and beyond, and the most expansive opportunities to secure endorsements and sponsors. Leitzinger Decl. ¶ 18. ***All*** of the top golfers in the world are Tour members—except those the Tour recently suspended or effectively forced to resign for playing with LIV Golf. *Id.* ¶ 17. The Tour's dominance in the United States and globally is absolute. *Id.* ¶ 31. Before LIV Golf's entry, all global tours fed directly or indirectly into the Tour. *Id.* ¶¶ 43–46. The Tour concedes that it is "irrational" to try to compete with it. Brass Decl.

[1] Dr. Leitzinger is an experienced economist who testifies frequently in antitrust cases.

Ex. 1a (Jay Monahan in June 2022: "LIV Golf . . . is an irrational threat"), and has used its monopsonistic control over elite professional golf to exclude competition. *Id.* Exs. 4–10.

Most of the Tour's members are professional golfers, whom the Tour acknowledges are independent contractors. Brass Decl. Exs. 11, 61. These independent contractors receive no salary from the Tour. Gooch Decl. ¶ 40; Swafford Decl. ¶ 38; Jones Decl. ¶ 38. They pay for their own coaches, caddies, trainers, travel, and lodging—even though about half the players in each Tour event do not make the cut and earn nothing. Gooch Decl. ¶ 40; Swafford Decl. ¶ 38; Jones Decl. ¶ 38. When member golfers are injured, they earn nothing. Gooch Decl. ¶ 40; Swafford Decl. ¶ 38; Jones Decl. ¶ 38. For example, Mr. Swafford was injured for two years, and the Tour gave him no support. Swafford Decl. ¶ 38. The people who control the Tour and its Policy Board are not professional golfers, but are full-time administrators. Brass Decl. Exs. 11–13. The Tour has taken in billions in revenue on the backs of golfers who have had no choice but to play for it, and it has used this revenue to fund a bloated bureaucracy and pay its executives multimillion-dollar salaries. *Id.* Ex. 3; Leitzinger Decl. ¶ 61. The Tour's members, by contrast, earn far less than their peers in other professional sports and a far lower share of league revenues than other athletes. *Id.* ¶ 54. And because they pay their own way and have no guaranteed earnings, Tour members can—and often do—play an entire season and have net negative earnings. Gooch Decl. ¶ 40; Swafford Decl. ¶ 38; Jones Decl. ¶ 38; Brass Decl. Exs. 14, 59.

B. LIV Golf

LIV Golf is a start-up golf tournament promoter. Declaration of Atul Khosla ("Khosla Decl.") ¶ 5.[2] LIV Golf aspires to host an elite League of 48-player golf tournaments where players compete both as individuals and as franchised teams. *Id.* ¶ 8. Because the Tour thwarted LIV Golf's plans to launch its full League in 2022, Brass Decl. Exs. 6, 7, 8, 15, 16, LIV Golf launched a back-up plan: an eight-event series known as the LIV Golf Invitational Series with an innovative new golf format (54 holes, shotgun start, team and individual components, limited field, and more attractive purses) and featuring individuals and teams playing for more than $250 million in prize purses. Khosla Decl. ¶¶ 8, 14–17. In June and July 2022, the LIV Golf Invitational Series has visited London, England, Portland, Oregon, and Bedminster, New Jersey. *Id.* ¶ 17.

[2] Mr. Khosla is the President and Chief Commercial Officer of LIV Golf. Khosla Decl. ¶ 2.

LIV Golf's entry introduced new competition for the services of professional golfers for elite golf events. Khosla Decl. ¶¶ 19, 31; *e.g.*, Jones Decl. ¶ 8, Ex. J; Leitzinger Decl. ¶¶ 62–64; Brass Decl. Ex. 17. For the first time in decades, professional golfers have a viable alternative to the Tour; golf fans, broadcasters, and advertisers alike will benefit from this newly introduced competition and innovation. Leitzinger Decl. ¶ 64. Already, competition from LIV Golf compelled the Tour to increase player compensation by millions of dollars and introduce new elite-player-only events mirroring LIV Golf's offerings. *Id.* ¶¶ 54–61. The Tour, however, is intent on destroying LIV Golf and on enforcing unlawful restraints preventing players from exercising their rights as independent contractors to pursue their profession. Brass Decl. Exs. 4, 12, 18–21.

LIV Golf tried to partner with existing golf entities in 2021 to facilitate its entry, but the Tour pressured those entities not to work with LIV Golf. Brass Decl. Ex. 5. For example, in July 2021, when LIV Golf representatives offered the European Tour a partnership worth up to $1 billion dollars, the European Tour, in its own words, confirmed that LIV Golf had "fit and appeal" for the European Tour, but it rejected the partnership offer, stating the "main issue is ***US PGA mighty power*** and the need to avoid a collision course between ET and PGA." *Id.* (emphasis added).

C. Anticompetitive Actions

With the intent and effect of foreclosing competition, Brass Decl. Ex. 4, the Tour has engaged in a campaign to destroy the careers of anyone who plays with LIV Golf, *e.g.*, Gooch Decl. Ex. G. The Tour has threatened ***lifetime bans*** for players who participate in LIV Golf events, Brass Decl. Exs. 6–8, 21, and it has recruited the European Tour to join it in punishing players for participating in LIV Golf events. *Id.* Ex. 22. As part of its intimidation campaign, the Tour has (1) told golfers they will be banned from the Tour for life if they play with LIV Golf, Gooch Decl. Ex. C; (2) amended its Regulations to make it harder for members to play with LIV Golf, Brass Decl. Exs. 4, 12, 23; (3) pressured sponsors to drop players for playing with LIV Golf, *Id.* Exs. 4, 18, 30; (4) threatened to blacklist player agencies whose golfers played with LIV Golf, Khosla Decl. ¶ 29, Compl. ¶ 195; (5) amended rules to discourage college athletes from playing with LIV Golf, Brass Decl. Ex. 24; (6) enlisted famous players to publicly intimidate young golfers against playing with LIV Golf, Brass Decl. Exs. 25, 26, 33, 62; (7) threatened small business vendors and others with blacklisting if they work with LIV Golf, Khosla

Decl. ¶¶ 8, 28, 29; Brass Decl. Exs. 27, 60; Compl. ¶¶ 243–63; (8) leaned on the PGA of America, Royal & Ancient, and others to intimidate players from playing with LIV Golf, Brass Decl. Ex. 28; and (9) coordinated with the European Tour to oppose LIV Golf and any players who play on its Tour, *Id.* Ex. 22. And, just days ago, the Tour sanctioned players for speaking positively about LIV Golf, Brass Decl. Ex. 58, and had the Presidents Cup Captain (a Tour position), Davis Love III, propose that 150 Tour members boycott the Majors if those events don't bar those who play with LIV Golf. *Id.* Ex. 33.

The Tour also is acting in concert with the European Tour as part of its effort to thwart competitor tours from emerging. In Commissioner Monahan's Monopoly Manifesto, defined below, describing the Tour's plan to foreclose entry, he explained: "We have continued discussions with the European Tour about the potential to work more closely together, thereby removing the European Tour as a potential partner of" a new entrant. Brass Decl. Ex. 4. The Tour and the European Tour formalized their alliance in November 2020. *Id.* Ex. 10. As the alliance evolved, they coordinated to prevent their respective members from participating in LIV Golf events, including by amending European Tour rules to restrict LIV Golf's access to European Tour members, and by jointly punishing golfers for playing with LIV Golf to maximize the exclusionary effect of their bans. *Id.* Ex. 22. Earlier this year, the Tour compelled the European Tour to suspend its members from co-sanctioned events for playing in LIV Golf events. *Id.* Three golfers challenged those suspensions from the European Tour on similar procedural grounds and under European competition laws. *Id.* On July 4, 2022, a Sports Resolution (UK) judge stayed the suspensions, concluding the suspended players were denied fair proceedings because the European Tour CEO was "necessarily partial" and could not render impartial judgment. *Id.*

D. Regulations

The Tour's exclusionary Regulations purport to provide the Tour Commissioner with unfettered discretion to impose punishments—including lifetime bans—on any member who participates in a competing event. Brass. Decl. Ex. 4. First, the "Conflicting Events Regulation" prohibits Tour members, without exception, from playing in any tournament in the United States that takes place in the same week as a Tour event. *Id.* Ex. 12 (V.A.2.a.). And it prohibits Tour members from playing in international events unless the Tour Commissioner grants a release, and only then three times a season. *Id.* (V.A.2–3). Because the Tour holds events 47 to 49 weeks of the year, this Regulation ensures that

Tour members cannot sell their services to a competing tour. *Id.* Second, the Media Rights Regulation prohibits Tour members from participating in any live or recorded golf program anywhere in the world at any time without prior approval of the Tour Commissioner—***even when they are not playing in a PGA Tour event***. *Id.* (V.B.1.b). Notably, the Tour beefed up this Regulation in 2020 to make it an even more powerful tool for excluding entry. *Id.* Ex. 4. The Tour Commissioner has the power to permanently ban a player who violates either Regulation. *Id.* Ex. 12 (at 87, VII). These rules make the Tour the gatekeeper to any potential competitor, as no golf event anywhere in the world has access to the top players "without the prior written approval of the [Tour] Commissioner." *Id.* (V.B.1.b). The Tour has used these Regulations to exclude competitors. *Id.* Exs. 4–10. The Tour admits these Regulations give it the power to prevent its members from playing for competitors. *Id.* Exs. 4, 19.

E. The Tour's Star Chamber Disciplinary Process

The Tour requires its members to agree to its Regulations, Brass Decl. Exs. 31, 32, which expressly give the Commissioner the power to interpret and apply the Regulations as he sees fit. *Id.* Ex. 12 (at 87, VII). The Regulations also give the Commissioner discretionary authority over player discipline. *Id.* (VII). As he did here, the Commissioner has the discretion to place a Tour member "on probation for an infraction of any rule of the" Tour, and if the member violates any other rule then the Commissioner "may immediately suspend the member's playing privileges" indefinitely. *Id.* (VII.C). As he did here, the Commissioner has the discretion to interpret playing in even a single competing event as constituting multiple violations and thus impose an indefinite or lifetime ban. *Id.* And players lack any ability to negotiate the terms or amend the Regulations. *Id.*; *see also id.* Ex. 11.

The Tour's disciplinary process for "major" penalties (at issue here) takes the following steps: (1) notice of disciplinary inquiry; (2) member's response; (3) notice of disciplinary action; and (4) member's appeal of the disciplinary action. Brass Decl. Ex. 12 (VII). Importantly, the member's appeal automatically stays any suspension during the pendency of the appeal. *Id.* (VII.E.2). On receipt of the appeal, the Commissioner may choose in his discretion: (1) an expedited appeal where he transfers the appeal to the Appeals Committee, or (2) a long-appeal. *Id.* According to the Tour's Regulations, failure to appeal purportedly constitutes admission of the violation, and the Tour requires an

advance release of decisionmakers from liability. *Id.* The Appeals Committee, "three non-Player Directors designated by the Board," "shall prescribe its own rules of procedure." *Id.* This Disciplinary Process does not provide members rights to a hearing or an impartial tribunal. *Id.* Rather, the Regulations give the Commissioner the discretion to proceed as he sees fit, other than providing that any suspension is stayed pending player appeals. *Id.*

F. Application of the Tour's Unfair Disciplinary Process to Harm Plaintiffs

Almost three years ago, Tour Commissioner Monahan wrote a memorandum (his "Monopoly Manifesto") to the PGA Tour Policy Board detailing his plan to thwart competitive entry by applying the Tour's Regulations to prevent a new entrant from accessing Tour members such as TRO Plaintiffs. Brass Decl. Ex. 4. The Monopoly Manifesto explains: "The impact that [the new league] could have on the PGA TOUR is dependent on the level of support it may receive from these players. Without this support, [the new league's] ability to attract media and corporate partners will be significantly marginalized and its impact on the TOUR diminished." *Id.* Consistent with the Monopoly Manifesto, the Commissioner has vocally and consistently punished golfers who play with LIV Golf. *Id.* Ex. 19.

In 2020, Monahan promised to "vigilantly protect [the Tour's] business model"—not its players. Brass Decl. Ex. 19b. The Tour has in the past routinely permitted golfers to play with other promoters; however, in 2021, Monahan threatened to impose career bans simply for playing professional golf with LIV Golf, because LIV Golf would offer players more compensation and rights than would the Tour. *Id.* Then, in 2022, Monahan publicly maligned TRO Plaintiffs for choosing to play professional golf with another promoter and took every step in his power to punish them because they played with a promoter that the Tour views as a threat to its monopsony. *Id.*

Despite these threats, a number of players saw the benefits that new competition from LIV Golf would bring to players, fans, and the sport as a whole. After much consideration, the TRO Plaintiffs ultimately decided to participate in LIV Golf events. Gooch Decl. ¶ 17; Swafford Decl. ¶ 17; Jones Decl. ¶ 17. On May 10, 2022, Commissioner Monahan denied all requests for permission to participate in LIV Golf's June 9–11 London Invitational. *E.g.*, Jones Decl. Ex. A. The Tour's stated rationale was: (1) the London Invitational would compete with the Tour-sponsored RBC Canadian Open; and

(2) LIV Golf intends to compete with the Tour in the United States. *Id.* The same day, the Tour pressured other golfers not to ask for permission to participate in LIV Golf events. Brass Decl. Ex. 24.

On May 31, 2022, LIV Golf announced the player field for its London Invitational. Brass Decl. Ex. 35. The field included the TRO Plaintiffs. *Id.* TRO Plaintiffs elected to play in LIV Golf's London Invitational because they believed the Tour could not lawfully punish them for exercising their independent contractor rights to play where they choose when not playing on the Tour. Gooch Decl. ¶ 21; Swafford Decl. ¶ 21; Jones Decl. ¶ 21. In response, on June 1, 2022, the Tour sent disciplinary notices for violating the Conflicting Events Regulation. *E.g.*, Jones Decl. Ex. B. The Tour did not send a notice to Mr. Swafford. Swafford Decl. ¶ 25. The Tour also enforced that same Regulation on developmental tour players who had not even qualified for events that week, and thus had no possible "conflict." Brass Decl. Ex. 36. As one such player, Andy Ogletree, responded to the Tour, "Should I just sit at home on my couch next week and not make any money? It seems like this is your stance." *Id.*

On June 2, 2022, Tour Chief Tournament & Competitions Officer Andy Pazder texted Mr. Gooch: "Just want to make sure you understand the implications of playing without an approved conflicting event release." Gooch Decl. Ex. C. Mr. Gooch responded, "Davis [Love III] called yesterday and said jay [Tour Commissioner] is going to suspend, is this true?" *Id.* Mr. Pazder then told Mr. Gooch that he would be banned from the Tour ***for life*** if he played in one LIV Golf event: "Our position has been that a player may choose to be a member of the Tour or to play in the Saudi/LIV events, but he can't do both. If the player chooses the latter, he should not expect to be welcomed back." *Id.*

On June 3 and 5, 2022, the PGA Tour sent TRO Plaintiffs a letter placing them on probation "pursuant to Article VII, Section C." *E.g.*, Swafford Decl. Ex. A. This Regulation relates to "conduct unbecoming a professional." *Id.* In other words, the Tour's position is that playing professional golf is "conduct unbecoming a professional" golfer—when it is played with a competing promoter. *Id.* In response, approximately ten Tour members who had played with LIV Golf decided to resign from the Tour. *E.g.*, Brass Decl. Ex. 37. The Tour responded by informing resigning members not to "expect that [they] will be able to rejoin membership or play in any events without membership." *Id.* Ex. 38.

The Tour has plainly targeted the TRO Plaintiffs as part of its effort to exclude competition from LIV Golf. For example, on June 9, 2022, Commissioner Monahan sent a public letter to all Tour

members identifying the suspended golfers and stating that "the same fate [would] hold" for any member playing in any LIV Golf event. Brass Decl. Ex. 18. Then, shortly after TRO Plaintiffs teed off in the London Invitational, the Tour notified them that (i) it considered them in violation of the Media Rights Regulation (V.B.1.b); (ii) it considered Messrs. Swafford and Jones in violation of the Regulation against Public Attacks (VI.E)—a rule that prohibits "hateful, abusive, obscene and/or divisive speech" but permits "reasonable expressions" of opinion—for favorably describing LIV Golf; and (iii) they were all suspended from Tour events "until further notice." *E.g.*, Swafford Decl. Ex. B. TRO Plaintiffs submitted their responses challenging the suspensions. *E.g.*, *id.*; Jones Decl. Ex. E.

Thereafter, the Tour suspended TRO Plaintiffs until March 31, 2023 from participation "in any PGA Tour-affiliated tournaments including PGA Tour [and other affiliated tours]," with threats to extend the suspensions based on further violations of Tour Regulations (*i.e.*, playing in LIV Golf events). *E.g.*, Swafford Decl. Ex. D. Commissioner Monahan also banned Messrs. Swafford and Jones from entering any Tour-owned or managed courses, including TPC Harding Park in San Francisco. *Id.*

On July 13, 2022, TRO Plaintiffs appealed their suspensions. *E.g.*, Swafford Decl. Ex. H. In their appeals, TRO Plaintiffs asked the Commissioner to transfer the appeal to an independent tribunal. *Id.* On July 27, 2022, the Commissioner rejected that request, referred their appeals to the Tour Board, and requested that any materials in support of their appeals be submitted by August 10, 2022. *E.g.*, *id.* Ex. I. In response, Mr. Gooch requested confirmation that the Tour would abate suspensions pending appeal. Gooch Decl. Ex. L. Yesterday, the Commissioner refused to do so. *Id.* Exs. M–N.

While TRO Plaintiffs' appeals of the suspensions through March 31, 2023 were pending, the Tour extended the suspensions through March 31, 2024 for TRO Plaintiffs' participation in a second LIV Golf event, even though at that time they already were suspended from the Tour. *E.g.*, *id.* Ex. B. The Tour's rolling suspension scheme thus operates as an effective career ban from the Tour.

G. FedEx Cup Playoffs and TRO Plaintiffs

The FedEx Cup is a season-long competition in which players accumulate points for placing in Tour tournaments and in the Majors. Brass Decl. Ex. 39. At the conclusion of the season, the top 125 players in points are eligible to play in a three-tournament event known as the FedEx Cup Playoffs. *Id.* The FedEx Cup Playoffs feature a progressive cut through the first two events to determine the final

30 players who qualify for the Tour Championship and all four Major Championships the following year (2023). *Id.* The Top 70 players qualify for the marquee PGA Tour Invitationals. *Id.* Players such as the TRO Plaintiffs receive higher bonuses and deferred compensation retirement plan payments the higher they place in the FedEx Cup Playoffs. *Id.* In addition, placing high in the FedEx Cup Playoffs can dramatically boost a golfer's world ranking. *Id.*

TRO Plaintiffs are currently ranked 20th (Gooch), 62nd (Jones), and 63rd (Swafford) in the FedEx Cup. Brass Decl. Ex. 40. Each earned the right to play in the FedEx Cup Playoffs under the Tour's rules. *Id.* None has qualified for the Majors or premier Tour Invitationals in 2023. Gooch Decl. ¶ 42; Swafford Decl. ¶ 41; Jones Decl. ¶ 41. But they will hit those critical milestones, and the associated increased career benefits, if they place in the Top 30 or Top 70 of the Playoffs. Swafford Decl. ¶ 42; Jones Decl. ¶ 42. Qualifying for the Top 30 would bring qualification into the 2023 Majors, even greater benefits in revenue, event eligibility, and a major career accomplishment. Gooch Decl. ¶ 42. The importance of playing in the FedEx Cup Playoffs is undisputed. Brass Decl. Ex. 1. Not playing in the FedEx Cup will all-but guarantee they will not qualify.

III. LEGAL STANDARD

A party moving for a temporary restraining order "must establish that: (1) it is likely to succeed on the merits; (2) it is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in its favor; and (4) an injunction is in the public interest." *Idaho v. Coeur D'Alene Tribe*, 794 F.3d 1039, 1046 (9th Cir. 2015). The Court may apply a "sliding scale" approach that considers how "serious questions going to the merits" compare to the balance of hardships. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131–32 (9th Cir. 2011).

IV. ARGUMENT

A. TRO PLAINTIFFS ARE HIGHLY LIKELY TO SUCCEED ON THE MERITS

1. The Tour Breached Its Regulations by Refusing to Abate TRO Plaintiffs' Suspensions Pending Appeal

TRO Plaintiffs entered into individual agreements with the Tour to mutually abide by the terms of the Regulations. Brass Decl. Ex. 32. Commissioner Monahan suspended TRO Plaintiffs under the Regulations, and TRO Plaintiffs appealed those suspensions. The Regulations provide that TRO Plaintiffs' appeals "***shall operate to stay*** the effective date of any penalty . . . until after the final decision

on the appeal." *Id.* Ex. 12 (VII.E.2) (emphasis added). This Regulation operates to stay "suspension[s]" unless the tournament is "then in progress or scheduled for the calendar week in which the alleged violation occurred." *Id.* On August 2, 2022, the Tour indicated it would not honor Section VII.E.2 and TRO Plaintiffs could not play in Tour events, including the Playoffs, pending their appeals. Gooch Decl. Ex. L. If not enjoined, the Tour's breach of this unambiguous provision will irreparably harm TRO Plaintiffs by denying them their earned right to play in the Playoffs. *E.g.*, Gooch Decl. 42–46. TRO Plaintiffs are highly likely to succeed on the merits of their breach of contract claim.[3]

2. The Tour Unlawfully Maintains a Monopoly Under Section 2 of the Sherman Act

Section 2 of the Sherman Act makes it illegal to acquire or maintain a monopoly through anti-competitive conduct. 15 U.S.C. § 2. To establish a Section 2 violation, a plaintiff must show "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *U.S. v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966).

a) The Tour Possesses Monopoly Power in the Relevant Market

Monopoly power "is the power to control market prices or exclude competition." *U.S. v. E.I. duPont de Nemours & Co.*, 351 U.S. 377, 391 (1956); *see also Weyerhaeuser Co. v. Ross Simmons Hardwood Lumber Co.*, 549 U.S. 312, 320–22 (2007) ("a monopsony is to the buy side of the market what a monopoly is to the sell side" and "similar legal standards should apply"). A defendant's "predominant share of the market" ordinarily demonstrates market power. *Grinnell*, 384 U.S. at 571. An antitrust market "is composed of products that have reasonable interchangeability for the purposes for which they are produced." *Paladin Assocs., Inc. v. Mont. Power Co.*, 328 F.3d 1145, 1163 (9th Cir. 2003) (citation omitted). The Tour unquestionably dominates the national (and indeed, world) market for the services of professional golfers for elite golf events.

[3] The Regulations include no choice of law provision. The Tour's clear breach of its unambiguous Regulations requires no choice of law analysis, though California law would apply here. *See Paracor Fin., Inc. v. Gen. Elec. Capital Corp.*, 96 F.3d 1151, 1164 (9th Cir. 1996) (federal court applies the choice-of-law rules of the forum state where court is exercising supplemental jurisdiction); *Axis Reinsurance Co. v. Telekenex, Inc.*, 913 F. Supp. 2d 793, 800 (N.D. Cal. 2012) ("[C]ourts need not engage in a . . . choice-of-law analysis where there is no material conflict between the laws of the states.").

For golfers who qualify for elite events, the Tour has no substitutes (absent successful entry by LIV Golf). All other tours merely feed into the PGA Tour, *see* Leitzinger Decl. ¶¶ 34–52. The CEO of the European Tour conceded that his organization no longer competes with the PGA Tour for players' services. Brass Decl. Ex. 22. There are no reasonably interchangeable alternatives to the Tour because no other golf promoter offers the Tour's combination of large tournament purses, opportunities to earn Official World Golf Ranking ("OWGR") points, public exposure, and endorsement deal prospects. Leitzinger Decl. ¶¶ 17–18. The Tour provides the principal avenue for professional golfers to qualify for the Majors. *Id.* ¶ 51. Courts routinely find that similar facts establish a market for elite sports. *See O'Bannon v. NCAA*, 802 F.3d 1049, 1056 (9th Cir. 2015) (a market "for FBS football and Division I basketball scholarships is cognizable under the antitrust laws because there are no professional or college football or basketball leagues capable of supplying a substitute for the bundle of goods and services [they] provide") (cleaned up); *Phila. World Hockey Club, Inc. v. Phila. Hockey Club, Inc.*, 351 F. Supp. 462, 501 (E.D. Pa. 1972) (recognizing separate markets for major / minor league hockey due to the former's "higher ticket prices, increased television revenues, and greater players' *skill* and *salaries*"); *Int'l Boxing Club*, 358 U.S. at 250–51 (championship boxing contests are a separate market from non-championship ones); *NCAA v. Alston*, 141 S. Ct. 2141, 2151, 2154 (2021) ("NCAA's Division I essentially *is* the relevant market for elite college football and basketball") (citation omitted).

By restricting the output of player services through its Regulations, the Tour artificially depresses player wages—*i.e.*, it controls market prices. Leitzinger Decl. ¶¶ 8, 10, 65, 79, 82. Notably, in response to entry by LIV Golf, the Tour announced increases in player pay totaling over $235 million. *Id.* ¶¶ 54–61. These increases are direct proof of monopsony power, as they show that the Tour's compensation to players before LIV Golf's prospective entry was sub-competitive and substantially lower than the levels of compensation that would prevail in a competitive market. *See Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995) (reduced output and sub-competitive pricing can be "direct proof" of "the actual exercise of market power").

The first three LIV Golf Invitationals provide further direct evidence of the Tour's exercise of monopsony power over the services of professional golfers for elite golf events causing "genuine adverse effects on competition." *FTC v. Ind. Fed. of Dentists*, 476 U.S. 447, 460–61 (1986). The question

in a monopsony case is whether the monopsony buyer "has enough market power to pay suppliers less than it would pay in a truly competitive market." *Boardman v. Pac. Seafood Grp.*, 2015 WL 13358335, at *1 n.1 (D. Or. June 8, 2015) (citing *Weyerhaeuser*, 549 U.S. at 320). During the same time period as the first three LIV Golf events, the Tour paid half of the golfers in its tournaments (those who made the cut) essentially one-third of LIV Golf's purses, and paid nothing to those who didn't make the cut—while LIV Golf paid every player (and paid them significantly more in purses, bonuses, and appearance fees). Brass Decl. Exs. 41–44. Nonetheless, despite these differences, a very small percentage of Tour members played in even one LIV Golf event. Leitzinger Decl. ¶ 86. This is direct evidence of monopsony power. Leitzinger Decl. ¶¶ 54–61. The Tour's dominance is also shown through its exclusion of potential competitors, Brass Decl. Exs. 4–10. *E.I. duPont*, 351 U.S. at 391.

b) The Tour Is Unlawfully Maintaining Its Monopoly By Willfully Excluding Competition

The Tour has violated Section 2 of the Sherman Act because it uses its monopoly power "to foreclose competition, to gain a competitive advantage, or to destroy a [prospective] competitor" *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 482-83 (1992) (citation omitted).

The antitrust laws "certainly forbid all restraints of trade which were unlawful at common-law, and one of the oldest and best established of these is a contract which unreasonably forbids any one to practice his calling." *Gardella v. Chandler*, 172 F.2d 402, 408 (2d Cir. 1949) (Hand, J., dissenting where restrictions upheld due to baseball's unique antitrust exemption). These principles have been confirmed when dominant sports leagues have blacklisted players in an attempt to force players to boycott an upstart competitor. *See, e.g., Radovich v. NFL*, 352 U.S. 445, 448, 453-54 (1957).

Here, the PGA Tour's Media Rights and its Conflicting Events Regulations are nakedly anti-competitive, as they invest the Tour with control to prevent PGA Tour members from selling their services to any buyer without Tour permission. The Tour expressly designed its rules to deny would-be competitors access to independent contractors to "mitigate" the impact of competitive entry and to deny those independent contractors their right to sell their services to other promoters it might deem a threat. Brass Decl. Exs. 4, 12, 45–50. Such rules in furtherance of a monopoly are unlawful. *See, e.g., Int'l Boxing*, 358 U.S. at 254; *Wash. State Bowling Proprietors Ass'n v. Pac. Lanes, Inc.*, 356 F.2d

371, 374-77 (9th Cir. 1966) (affirming antitrust judgment against bowling alley proprietors that black-listed bowlers who bowled in competitors' establishments).[4]

The Tour prohibits releases for events in North America, caps international releases for any player at three per season, and gives the Tour Commissioner unfettered discretion to reject a player's release request. Brass Decl. Ex. 12 (V.A). Thus, the Tour's Regulations create for golfers "precisely the dilemma the Sherman Act is designed to prevent," wherein "the dominant firm[] force[s] [its] suppliers or customers to choose between assisting the dominant firm[] in injuring [its] competitors or working exclusively with those competitors, knowing that because of the dominant firm['s] market power very few suppliers or customers will be able to rely exclusively on the competitors." *PLS.com, LLC v. Nat'l Ass'n of Realtors*, 32 F.4th 824, 836 (9th Cir. 2022). The effect is to suppress player compensation, deny competition for their services, and reduce the number of elite professional golf events. Leitzinger Decl. ¶¶ 8, 10, 65, 79, 82.; *e.g.* Gooch Decl. ¶¶ 11, 14.

The purely anticompetitive, unlawful nature of these Regulations is further evidenced by the Tour's selective enforcement of the Regulations to respond to LIV Golf's competitive threat. Never before has the Tour imposed lengthy or lifetime bans for playing in competing events. To the contrary, the Tour routinely permitted its members to play with the tours that feed into it (*e.g.*, European Tour) and it has routinely granted releases for golfers to play with promoters that the Tour does not view as a competitive threat. *E.g.*, Jones Decl. ¶ 20. For example, just last month, the Tour did not require its members to seek a media release to participate in the JP McManus event in Ireland. Brass Decl. Ex. 52. But when LIV Golf entered the market, presenting a threat to the Tour's dominance, the Tour denied all release requests and imposed potentially career-ending suspensions on any member that dared to play in even one LIV Golf event. *E.g.*, Jones Decl. Exs. A, F; Brass Decl. Exs. 18, 34. The Tour has made clear that it enforces these Regulations to destroy LIV Golf, regardless of how much it may harm itself and its own members in the process. *Id.* Exs. 17, 19. The Tour's actions directly harm the TRO Plaintiffs because they are the targets of the Tour's anticompetitive campaign and the Tour is

[4] *See also, e.g.*, *Le v. Zuffa, LLC*, 216 F. Supp. 3d 1154, 1169 (D. Nev. 2016) (independent contractor fighters sufficiently alleged that UFC's exclusivity agreements constituted exclusionary conduct under § 2); *U.S. v. Richfield Oil Corp.*, 99 F. Supp. 280, 294 (S.D. Cal. 1951) (policy requiring independent contractors to work with only one company violated antitrust laws where it could create a monopoly).

eliminating their ability to offer their services in a competitive market, *e.g.*, Gooch Decl. ¶¶ 11, 14, Ex. J. Courts regularly find such bans violate the antitrust laws by excluding athletes from their profession.[5]

The Tour's Regulations also severely limit the overall output of professional golf services for elite events, by foreclosing professional golfers from playing elsewhere even when they are not playing in a Tour event and threatening the viability of LIV Golf. Leitzinger Decl. ¶¶ 8, 10, 65; *e.g.*, Gooch Decl. ¶¶ 11, 14, Ex. J; Brass Decl. Ex. 36; Khosla Decl. ¶¶ 26, 31, 33. Output restrictions are a "paradigmatic example" of the adverse effects a monopolist can have on competition. *See NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 104-08 (1984) ("Restrictions on price and output are the paradigmatic examples of restraints of trade that the Sherman Act was intended to prohibit."); *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018). That rule is no different in the sports context than any other. *See, e.g.*, *NCAA*, 468 U.S. at 104–08; *U.S. Football League v. NFL*, 842 F.2d 1335, 1341-42 (2d Cir. 1988) (affirming that the NFL unlawfully maintained its monopoly over professional football through predatory tactics intended to destroy a nascent competitor league).

Aside from the direct harm caused to the TRO Plaintiffs, the Tour's suspensions have harmed competition in the market as a whole. Leitzinger Decl. ¶¶ 83–88; Khosla Decl. ¶¶ 14, 18–33. The suspensions serve as a warning shot to other professional golfers, distorting the market and compelling other golfers to act contrary to their best interests, thereby foreclosing LIV Golf's access to a substantial portion of the market. *E.g.*, Gooch Decl. ¶¶ 11, 14, Ex. J. In so doing, the Tour's suspension of TRO Plaintiffs has the effect—and the intent—of threatening LIV Golf's nascent entry and depriving golf fans of the opportunity to enjoy the new and innovative product that LIV Golf is attempting to offer. Brass Decl. Ex. 19; Leitzinger Decl. ¶¶ 83–88; Khosla Decl. ¶¶ 14, 18–33; *e.g.*, Gooch Decl. Ex. J.

Moreover, in addition to its unlawful Regulations and its associated unlawful punishments, the Tour has acted to foreclose competition for the services of professional golfers for elite golf events in a variety of equally illegal ways, including: (a) threatening to revoke player agents' credentials for representing clients who played with LIV Golf; (b) threatening to blacklist small businesses if they

[5] *See, e.g.*, *Mackey v. NFL*, 543 F.2d 606, 617–18, 622 (8th Cir. 1976), *overruled on other grounds by Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996) ("courts have not hesitated to apply the Sherman Act to club owner imposed restraints on competition for players' services") (compiling cases).

work with LIV Golf; (c) leaning on the Majors to do its bidding by calling into question whether players who participate in LIV Golf will be eligible for their respective future tournaments; (d) threatening LIV Golf's partners with exclusion from the professional golf "ecosystem" if they continue to support LIV Golf; (e) threatening sponsors and advertisers with loss of future opportunities with the Tour if they associate with LIV Golf or players who've played with LIV Golf; and (g) pressuring the European Tour to enter into an alliance to foreclose LIV Golf. *See supra* at 5–6. All of these actions were aimed at thwarting LIV Golf's entry, foreclosing competition for the services of professional golfers for elite golf events, and harming TRO Plaintiffs and competition in the market. *See Lorain Journal Co. v. U.S.*, 342 U.S. 143, 149–50, 186 (1951) (monopolist's "attempt to regain its monopoly . . . by forcing [customers] to boycott a competit[or] violated [Section] 2").

c) No Procompetitive Justification Redeems the PGA Tour's Conduct

Finally, the Tour's actions serve no legitimate business purpose. Leitzinger Decl. ¶¶ 109–22. Forcing Plaintiffs to sit on the sidelines when they are not playing in PGA Tour events does not improve any product or expand output. Threatening star players with destruction of their careers by imposing lifetime bans for playing with a competitor serves no purpose other than thwarting competition. Indeed, it only serves to degrade—not improve—the product of the Tour. *Id.* __; *e.g.*, Gooch Decl. Ex. J.

In an August 2, 2022 letter to Mr. Gooch, the Tour asserted that its Regulations benefit the Tour by "enabling members to pool media rights," which drives revenue for the Tour. Gooch Decl. Ex. M. But that misses the point. Plaintiffs are not challenging the Tour's rules that assign media rights to the Tour *when golfers are playing in Tour events*. They are challenging the Tour's rules that prevent players from having and assigning their media rights *during weeks they are not playing in Tour events*. Those rules serve no beneficial purpose, and serve only to reduce output and foreclose competition.

Similarly, to the extent the Tour argues its restrictions benefit the Tour by guaranteeing fields comprised of the best players in the sport, that would only serve to underscore the anticompetitive purpose and effect of those Regulations. As with any business that relies on the input of talented professionals, if the Tour wants to secure the services of top-tier golfers it must ***compete*** for those services—not bind the players to rules that foreclose competition. The antitrust laws do not permit

arguments that competition would somehow be harmful—and certainly not where an incumbent monopolist is seeking shelter from competition. *Nat'l Soc. of Pro. Eng'rs v. U.S.*, 435 U.S. 679, 695 (1978). The Supreme Court rejected the NCAA's attempted justifications for similar output restriction on televised football games. *NCAA*, 468 U.S. at 113-17 (rejecting argument that televised games must be limited to preserve live ticket sales, because it would be antithetical to the antitrust laws to "insulate live ticket sales from the full spectrum of competition"). Proffered justifications that "do[] not legitimately promote competition" are irrelevant. *Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1212 (9th Cir. 1997). The Tour has other regulations (such as a minimum participation requirement) that are sufficient to ensure that golfers play in enough events to support the Tour. Brass Decl. Ex. 12 (IX.B.1–2). In fact, TRO Plaintiffs have all played in over 20 Tour events this season—five more than the minimum. *Id.* Ex. 40. The Conflicting Events and Media Rights Regulations serve only to construct a competitive moat around the PGA Tour. Khosla Decl. ¶¶ 17–19, 24, 27–28, 33; Brass Decl. Ex. 4. Restrictive professional sports rules that exceed what is necessary to create a product are unlawful, and as applied here, require immediate injunctive relief.[6]

Moreover, the Tour's stated reasons for prohibiting players from associating with LIV Golf undermine any claim that the rules are necessary to support its business model. Brass Decl. Exs. 19, 51; Gooch Decl. Ex. A. The Tour regularly grants exceptions for players to participate in international events hosted by other promoters, e.g., Jones Decl. ¶ 20, but it rejected requests to participate in LIV Golf's London Invitational for the stated reason that it is "the first in an eight-event '2022 LIV Golf Invitational Series' season, and more than half of them will be held in the United States." Ex. Gooch Decl. Ex. A. In other words, the Tour prevented players from participating ***because*** LIV Golf posed a potential competitive threat, making any other claims of a valid business justification plainly pretextual. *See, e.g., U.S. v. Dentsply Int'l, Inc.*, 399 F.3d 181, 196–97 (3d Cir. 2005) (conduct inconsistent with

[6] *See, e.g., O.M. by & through Moultrie v. Nat'l Women's Soccer League, LLC*, 544 F. Supp. 3d 1063, 1077 (D. Or. 2021), *appeal dismissed*, No. 21-35469, 2021 WL 4268938 (9th Cir. Aug. 20, 2021) (enjoining eligibility rule as an unreasonable restraint of trade); *Haywood v. NBA*, 401 U.S. 1204, 1205–07 (1971) (reinstating injunction restraining four-year eligibility rule); *Kapp v. NFL*, 390 F. Supp. 73, 81 (N.D. Cal. 1974) (enjoining enforcement of rule capping players' earning potential), *vacated in not relevant part*, No. C 72 537 WTS, 1975 WL 959 (N.D. Cal. Apr. 11, 1975), *aff'd*, 586 F.2d 644 (9th Cir. 1978), and *aff'd*, 586 F.2d 644 (9th Cir. 1978).

purported justifications for exclusionary policies is pretextual); *U.S. v. Visa U.S.A., Inc.*, 344 F.3d 229, 243 (2d Cir. 2003) (defendants' purported justification for exclusionary rules was pretextual where they did not enforce such rules overseas).

3. The Tour Has Unlawfully Agreed With Others To Boycott Players Under Section 1 of the Sherman Act.

Courts have "long held that certain concerted refusals to deal or group boycotts are so likely to restrict competition without any offsetting efficiency gains that they should be condemned as per se violations of § 1 of the Sherman Act." *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 290 (1985). Here, the Tour coerced and coordinated with the European Tour (an inferior buyer of professional golfers' services and potential competitor) to boycott any players that work with LIV Golf. Brass Decl. Ex. 22. And agreements "either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive struggle" are per se unlawful. *Nw. Wholesale*, 472 U.S. at 294 (citation omitted).[7] A group boycott claim requires (1) an agreement (2) to deprive a would-be competitor of a trade relationship they need to enter or participate in the market. *Smith v. Pro-Football, Inc.*, 593 F.2d 1173, 1178 (D.C. Cir. 1978).

Here, the Tour has openly acted in concert with the European Tour (and potentially others) to thwart competition. Commissioner Monahan detailed his unlawful agreement in his Monopoly Manifesto, describing how the Tour would "remov[e] the European Tour as a potential partner" of a new entrant like LIV Golf. Brass Decl. Ex. 4. The timeline in Brass Declaration, Ex. 22 illustrates just how the Tour's strategic alliance with the European Tour evolved to thwart competitive entry. That agreement effectuated the removal of an important potential LIV Golf partner, and bolstered the exclusionary

[7] The actions of the Tour and the European Tour are also unlawful under the rule of reason. *FTC*, 476 U.S. at 460-61. Here, where there is an agreement to punish players to foreclose competitive entry, it is inconceivable that there is a colorable procompetitive justification that could outweigh the obvious competitive harm from excluding a once-in-a-generation potential entrant. As described *infra*, at 12–14, the Tour has monopoly power in the relevant market, and the anticompetitive effects of starving potential entrants of skilled players are clear. Leitzinger Decl. ¶¶ 17–61, 83–88. Just because "*some* restraints are necessary to create or maintain a league sport does not mean *all* aspects of elaborate interleague cooperation are." *Alston*, 141 S.Ct. at 2156 (cleaned up). Any purported "procompetitive benefits" of the challenged Regulations can be achieved through "substantially less restrictive restraints;" and there can be no doubt that absent anticompetitive rules like the Media Rights and Conflicting Events Prohibitions, the Tour's golf tournaments would still "go on." *Id.* at 2157, 2162.

consequences of its punishments and threats. Such an agreement to boycott a would-be entrant is a clear antitrust violation, under either the per se rule or the rule of reason. *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 135 (1998); *Volvo N. Am. Corp.*, 857 F.2d at 73; *see also Fashion Originators' Guild of Am. v. FTC*, 312 U.S. 457, 467–68 (1941) (scheme to boycott any customer that used textile of a competitor to achieve the "intentional destruction" of that competitor violated Section 1).

In addition, the Tour's suspensions of TRO Plaintiffs necessarily constitute an unlawful group boycott because they effectively foreclose the suspended players from the market. *See Blalock v. LPGA*, 359 F. Supp. 1260, 1265-66 (N.D. Ga. 1973) (one-year suspension of golfer constituted an illegal group boycott as it is "tantamount to total exclusion from the market of professional golf"). Because this conduct is per se unlawful, and serves no procompetitive purpose even if the rule of reason applies, TRO Plaintiffs are highly likely to succeed in a Section 1 violation.

4. The Tour's Appeal Process Does Not Justify The Suspensions, Both Because The Suspensions Were An Illegal Exercise of Monopoly Power, And Because They Were Unfair.

The Tour is wrong if it attempts to rely on its procedures or its internal appeals process to argue that the suspensions should be upheld. The arguments would fail at the outset because fair process (even assuming it was provided) does not justify an illegal exercise of monopoly power. But the Tour's processes were not fair. And because TRO Plaintiffs were unlawfully denied fair proceedings and an impartial arbiter during the Tour's imposition of their career-threatening suspensions, that provides a separate and independent basis for them to succeed on the merits.

The Tour must provide its members with fair process in disciplining them. Since the Tour is a private membership organization "tinged with public . . . purpose" it must provide fair process in disciplining members. *McCune v. Wilson*, 237 So. 2d 169, 173 (Fla. 1970). Further, where, as here, the organization "exercis[es] virtually monopolistic control" over a profession, expulsion would harm the professional's career, and thus "the power (of exclusion) should not be unbridled" and should be "exercised in a reasonable and lawful manner." *Pinsker v. Pac. Coast Soc. of Orthodontists*, 460 P.2d 495, 498 (Cal. 1969); *see also Rewolinski v. Fisher*, 444 So. 2d 54, 58 (Fla. Dist. Ct. App. 1984) (requiring

fair process where "the association's action adversely affects substantial . . . economic rights").[8]

Fair process must include impartial review. *McCune*, 237 So. 2d at 173; *see also Ernst v. Cincinnati Bengals, Inc.*, 1976 WL 189949, at *2 (Ohio Ct. App. Aug. 30, 1976) (concluding NFL Commissioner had to be "impartial and unbiased" in disciplinary process). However, Commissioner Monahan demonstrated his bias and tainted the Appeals Committee in multiple ways. As early as 2020, he wrote his Monopoly Manifesto to the Appeals Committee, notifying them of his plan to punish golfers to thwart competition. Brass Decl. Ex. 19. Over the two years since receiving the Monopoly Manifesto, not one member of the Appeals Committee has disavowed it. Commissioner Monahan has since then engaged in a long-running and public vendetta against everything LIV Golf-related. *Id.* Consequently, once the Tour's internal disciplinary process started (a process Monahan initiates and oversees), its outcome was foretold. *Id.* Exs. 4, 18, and it doesn't care what the court says. *Id.* Ex. 62.

Further, the Tour's disciplinary process provided TRO Plaintiffs was entirely unfair considering the magnitude of the penalties imposed. The players had no ability to negotiate the Regulations, and no alternative but to accept them. *E.g.*, Gooch Decl. ¶ 3. The Regulations purport to provide the Commissioner with unlimited discretion to interpret the Regulations and to punish players, and, as in this case, impose what effectively amounts to career bans from the Tour. Brass Decl. Ex. 12 at 87. Furthermore, while the players' appeals of Commissioner Monahan's suspensions—challenging them as unlawful anticompetitive conduct—were pending, Commissioner Monahan more than doubled their suspensions—demonstrating that he is not giving players and their appeals any serious consideration. *E.g.*, Gooch Decl. Ex. M. Meanwhile, the Commissioner has also (1) failed to timely notify Plaintiff Gooch of his appeal decision, *id.* ¶ 35; (2) failed to send disciplinary inquiry letters to TRO Plaintiffs despite sending those letters to other similarly situated golfers, e.g., Swafford Decl. ¶¶ 25–26; (3) claimed TRO Plaintiffs failed to respond when they had in fact responded, *id.* Ex. J; and (4) failed to honor the provision of the Regulations that abates suspensions pending appeal, Gooch Decl. Exs. M–N—leaving TRO Plaintiffs with no choice but to come to the Court to seek immediate interim relief.[9]

[8] There is no conflict between California and Florida law regarding Plaintiffs' right of fair procedure, and thus California law applies and does not change the result. *See Telekenex*, 913 F. Supp. 2d at 800.

[9] The Regulations also include an unenforceable release of claims against the Tour and others in the disciplinary process, and unfairly deem failure to participate in the process as an admission of the charges. Courts have recognized that parties cannot contractually evade antitrust liability. *See, e.g.,*

The Tour's one-sided and harsh disciplinary proceedings only further compel a finding of unfairness and an abatement of the Tour's suspensions. *See McCune*, 237 So.2d at 173.

B. TRO PLAINTIFFS WILL SUFFER IRREPARABLE HARM

A party seeking a temporary restraining order must demonstrate that "irreparable injury is likely in the absence of an injunction." *Disney Enter., Inc. v. VidAngel, Inc.*, 869 F.3d 848, 865 (9th Cir. 2017) (emphasis omitted). To establish irreparable harm, a movant must generally show that the injury cannot be adequately compensated by monetary damages. 15 U.S.C. § 26. A threat of irreparable harm is "sufficiently immediate to warrant preliminary injunctive relief if the plaintiff is likely to suffer irreparable harm before a decision on the merits can be rendered." *Boardman v. Pac. Seafood Grp.*, 822 F.3d 1011, 1023 (9th Cir. 2016) (citation and quotation marks omitted).

TRO Plaintiffs have experienced—and continue to experience—irreparable harm, because the Tour's unlawful suspensions deny them the ability to participate in the FedEx Cup Playoffs, which each has earned the right to play. Gooch Decl. ¶¶ 42–46; Swafford Decl. ¶¶ 41–46; Jones Decl. ¶¶ 41–46. The Tour concedes the Playoffs are special and that playing in them is meaningful to the TRO Plaintiffs. Brass Decl. Ex. 1. If the Tour's suspensions of the TRO Plaintiffs are not immediately enjoined, TRO Plaintiffs will (1) lose the opportunity to qualify for the 2023 Majors, (2) lose opportunities to accumulate points, (3) lose chances to qualify for other premier tournaments, (4) lose income earning opportunities, and (5) suffer irreparable losses to goodwill, reputation, and brand. Gooch Decl. ¶¶ 42–46; Swafford Decl. ¶¶ 41–46; Jones Decl. ¶¶ 41–46. These injuries will be complete upon the inception of the FedEx Cup Playoffs; and no monetary relief could compensate TRO Plaintiffs for these injuries. The only reason TRO Plaintiffs are being denied this opportunity is because they are the targets of the Tour's unlawful scheme to defeat its new competitor—LIV Golf.

Because of the "undisputed brevity and precariousness of the players' careers in professional sports," courts recognize that even a short-term player suspension causes irreparable injury. *Jackson v. NFL*, 802 F. Supp. 226, 231–35 (D. Minn. 1992) (enjoining NFL from preventing football players' participation in league); *see also O.M.*, 544 F. Supp. 3d at 1077 (soccer player irreparably harmed if

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Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc., 473 U.S. 614, 637 n.19 (1985) (if contractual term operated "as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy").

prevented from competing because "the career of a professional soccer player is short, and . . . there are no substitutes to actual professional competition to help her realize her full potential"). Professional golf is no exception. The Ninth Circuit has recognized that restricting professional golfers' ability to play golf causes "immeasurable injuries" and irreparable harm. *Gilder v. PGA Tour, Inc.*, 936 F.2d 417, 423 (9th Cir. 1991) (forcing golfers not to use the club of their choice would cause irreparable harm because it would "have an immediately discernible but unquantifiable adverse impact on their earnings, their ability to maintain their eligibility for the tour, and for endorsement contracts"). Here, the harm is more acute, as the Tour's ban prevents Plaintiffs from ***all play***.[10]

If the Tour is allowed to proceed with its anticompetitive behavior, it risks severely harming TRO Plaintiffs' careers. The Tour has already indefinitely suspended any player who participates in LIV Golf events. Gooch Decl. ¶ 36; Swafford Decl. ¶ 34; Jones Decl. ¶ 34. The Tour is trying to prevent TRO Plaintiffs, whom it views as defecting from its monopoly, from performing at an elite level ***anywhere***. *E.g.* Gooch Decl. Ex. A. The only elite golf leagues in existence today are the Tour and LIV Golf, and the Tour wants to exclude the players from participating in ***both*** at a pivotal juncture—the FedEx Cup Playoffs. The Tour itself describes the FedEx Cup as the "pinnacle." Brass Decl. Ex. 1. The Playoffs are critical to the TRO Plaintiffs' careers, and their attempts try to qualify for the Majors and other key 2023 events. Gooch Decl. ¶ 42; Swafford Decl. ¶ 41; Jones Decl. ¶¶ 41–42. Moreover, the irreparable harm to the TRO Plaintiffs is imminent, as the FedEx Cup begins in 8 days.[11]

C. THE BALANCE OF THE EQUITIES WEIGHS IN TRO PLAINTIFFS' FAVOR

The balance of harms here clearly weighs in TRO Plaintiffs' favor. *See Boardman*, 822 F.3d

[10] *See, e.g., Denver Rockets v. All-Pro Mgmt., Inc.*, 325 F. Supp. 1049, 1057 (C.D. Cal. 1971) (player would "suffer irreparable injury in that a substantial part of his playing career will have been dissipated, his physical condition, skills and coordination will deteriorate from lack of high-level competition, [and] his public acceptance as a super star will diminish to the detriment of his career"), *reinstated by Haywood*, 401 U.S. 1204, 1207 (1971); *Linseman v. World Hockey Ass'n*, 439 F. Supp. 1315, 1319–20 (D. Conn. 1977) (similar).

[11] The Tour's suspensions further deprive TRO Plaintiffs and other players access to the LIV Golf Invitational matches, and if not enjoined, those efforts will negatively impact LIV Golf's business and deprive the players of sustained competition for their services. Plaintiffs plan to seek a preliminary injunction to ensure they are not unlawfully punished for further participation in LIV Golf and their suspensions for doing the same are stayed pending the outcome of this litigation.

at 1020 (the balance of equities weighs heavily in plaintiffs' favor where there is a reasonable probability of "substantially lessen[ed] competition" injuring plaintiffs and no evidence that "maintaining the status quo . . . will injure [defendants]"). As TRO Plaintiffs have demonstrated, the Tour's suspensions deprive them of their ability to play in the FedEx Cup, or perhaps even play on the Tour ever again, and denying them the professional and financial benefits of participating in these events. *Prop Sols., LLC v. GOPD, LLC*, 2016 WL 8902589, *5 (N.D. Ga. Dec. 8, 2016) (recognizing as decisive, in weighing the relative harms, the inability of "at least some" of 300 businesses to continue operating).

Against these injuries, the Tour cannot demonstrate any discernible injury that would result from a temporary restraining order. The TRO Plaintiffs have qualified for the FedEx Cup Playoffs under the Tour's own point system. To exclude them from these tournaments would actually *weaken* the fields for those events by removing players who earned their right to play and replacing them with lower-ranked players. Gooch Decl. Ex. J. And, the Tour violates its own Regulations which require the result TRO Plaintiffs seek—abatement of their suspensions. Brass Decl. Ex. 12 (VII.E.2). In any event, because the Tour's conduct is without any legitimate justification, its cessation will do the Tour no harm. The Tour cannot possibly claim any harm as a result.

The Tour might contend that staying the three TRO Plaintiffs' suspensions risks upending the Tour's business model as the enforceability of its Regulations are called into question. But the Ninth Circuit has already rejected that same argument from the Tour. *See Gilder*, 936 F.2d at 424. Moreover, it would obviously be hyperbolic to assert that the participation by these three golfers in a three-tournament event risks any serious consequences to the Tour (in contrast to the severe harm the ban would do to the TRO Plaintiffs). Indeed, the Tour's own Regulations provide precisely what the TRO Plaintiffs are seeking here—a stay of punishments pending appeal. Brass Decl. Ex. 12 (VII.E.2). The Tour breached the plain terms of its Regulations by expressly refusing to abate the TRO Plaintiffs' suspensions pending appeal, Gooch Decl. Ex. L, meaning any harm to the Tour from a suspended player playing in a Tour tournament is self-inflicted. Brass Decl. Ex. 51. In addition, as a matter of law, the Tour does not suffer any cognizable harm if it is prevented from enforcing unlawful Regulations. *See AECOM Energy & Constr., Inc. v. Morrison Knudsen Corp.*, 748 F. App'x 115, 120 (9th Cir. 2018)

(affirming preliminary injunction where defendant "will merely be required to cease [its] illegal activities"); *see also Deckers Outdoor Corp. v. Ozwear Connection Pty Ltd.*, 2014 WL 4679001, *13 (C.D. Cal. Sept. 18, 2014) ("There is no hardship to a defendant when a [temporary restraining order] would merely require the defendant to comply with law.").

Finally, the relief requested here would impart no harm to other golfers or affiliates; they will be able to carry on with their normal course of business. Golfers can continue to participate in the Tour's tournaments. That the Tour promised to add lower-ranking golfers to replace TRO Plaintiffs is of no import. Brass Decl. Ex. 51. The Tour could easily add a tee time to accommodate the three golfers, as was done during the Scottish Open. *Id.* Ex. 22. The equities therefore favor entry of the proposed order. A Sports Resolution (UK) judge has already concluded the same: the equitable result is to avoid irreparably harming the professional golfers' careers by letting them play in critical tournaments by staying their sanction until an impartial court can rule on the legality of the suspension. *Id.*

D. THE PUBLIC INTEREST SUPPORTS A TEMPORARY RESTRAINING ORDER

The public interest factor is concerned with the rights of non-parties. *See Boardman*, 822 F.3d at 1023–24. There is a strong public interest in enforcing the antitrust laws and preserving free and fair competition. *See id.* at 1024 ("state and federal" antitrust laws "preserve competition" which is "vital to the public interest" (quoting *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 988 (9th Cir. 2000)). Enjoining an antitrust violation that harms consumers (golf fans) is in the public interest.

A temporary restraining order would also serve the public interest by promoting competition for the services of professional golfers for elite golf events. Leitzinger Decl. ¶¶ 83–88. By allowing TRO Plaintiffs to participate in the FedEx Cup, the competition would improve. Moreover, LIV Golf offers the first meaningful competition in elite professional golf in decades. *Id.* ¶ 64. Denying the Motion would only serve to further entrench the Tour's monopoly by imposing career threatening punishment on independent contractors for simply playing with a competitor. This would have a chilling effect on competition for players' services and deny the public fans more, better elite professional golf. *See DNA Genotek Inc. v. Spectrum Sols. L.L.C.*, 2016 WL 8738225, at *5 (S.D. Cal. Oct. 6, 2016) ("the public interest would be better served by increased competition between two competitors").

V. CONCLUSION

For all of these reasons, TRO Plaintiffs respectfully request that the Court grant their motion for temporary restraining order, and enter the accompanying proposed order.

DATED: August 3, 2022

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* * * * * * *

ATTESTATION PURSUANT TO CIVIL LOCAL RULE 5-1

Pursuant to Civil Local Rule 5-1(h)(3) of the Northern District of California, I attest that concurrence in the filing of the document has been obtained from each of the other signatories to this document.

DATED: August 3, 2022

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

PHIL MICKELSON; TALOR GOOCH; HUDSON SWAFFORD; MATT JONES; BRYSON DECHAMBEAU; ABRAHAM ANCER; CARLOS ORTIZ; IAN POULTER; PAT PEREZ; JASON KOKRAK; and PETER UIHLEIN,

Plaintiffs,

v.

PGA TOUR, INC.,

Defendant.

Case No. 5:22-cv-04486-BLF

DEFENDANT PGA TOUR, INC.'S OPPOSITION TO TRO PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER

Judge: Hon. Beth Labson Freeman
Date: August 9, 2022
Time: 1:00 p.m.
Dept.: Courtroom 1, 5th Floor

Date Filed: August 3, 2022

Trial Date: None Set

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Federal Cases

State Cases

I. INTRODUCTION

Throughout their careers, TRO Plaintiffs Talor Gooch, Hudson Swafford, and Matt Jones have enjoyed the benefits of the PGA TOUR's ("PGA TOUR" or "TOUR") unique structure and role in the sport of golf. By enabling professional golfers to pool their media rights, the TOUR has driven media and sponsorship money into the sport for the benefit of all TOUR members. But the TOUR could not function in this mutually beneficial way without TOUR members' annual agreement to abide by the terms of the PGA TOUR Handbook & Tournament Regulations (the "Regulations"). Under these Regulations, members agree not to play in, and thereby contribute their media rights to, non-TOUR golf events held in North America that conflict with PGA TOUR events. These Regulations thus maintain the value of the TOUR's pooled media rights.

Despite knowing full well that they would breach TOUR Regulations and be suspended for doing so, Plaintiffs have joined competing golf league LIV Golf, which has paid them tens and hundreds of millions of dollars in guaranteed money supplied by Saudi Arabia's sovereign wealth fund to procure their breaches. TRO Plaintiffs now run into Court seeking a mandatory injunction to force their way into the TOUR's season-ending FedExCup Playoffs, an action that would harm all TOUR members that follow the rules. The antitrust laws do not allow Plaintiffs to have their cake and eat it too. The TOUR is "free to choose the parties with whom [it] will deal," *Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 555 U.S. 438, 448 (2009), and it has no duty to provide Plaintiffs and LIV a platform to freeride off the TOUR's investments. As one TOUR member aptly put it, "I don't have an issue with anyone going to LIV. I have an issue with them wanting to comeback and play [on the TOUR]. If the grass is so green, why do you want to come back?" As another said about Plaintiffs' gambit: "They're suing the 200 card-carrying members of the PGA Tour. They chose to go this route and play less and now they want to play more."

The injunction TRO Plaintiffs seek is legally baseless. TRO Plaintiffs bear the burden of showing (1) a substantial likelihood of success on the merits; (2) that they will be irreparably injured without relief; (3) that the threatened injury outweighs the harm a TRO would inflict on the TOUR; and (4) that the TRO would serve the public interest. TRO Plaintiffs cannot satisfy ***any***, let alone ***all***, of the well-established requirements for the Court to enter such a drastic

order—particularly under the Ninth Circuit's heightened standard for mandatory injunctions.

TRO Plaintiffs have waited nearly ***two months*** to seek relief from the Court, fabricating an "emergency" they now maintain requires immediate action. It doesn't. Their ineligibility for TOUR events was foreseeable when they accepted millions from LIV to breach their agreements with the TOUR, and they knew for a fact that they were suspended on June 9. The harm they now allege from their suspensions is 100% economic and capable of redress with money damages. Indeed, several other LIV players, including four other Plaintiffs ***in this case***, recognize there is no emergency or irreparable harm; they too have qualified to play in the FedExCup but have not asked the Court for the extraordinary relief sought through this motion. The Court should use its equitable powers to redress real emergencies, not engineered ones by parties who knowingly accepted multi-million-dollar payouts to place themselves in the situation they are in.

Moreover, neither the equities nor the public interest tip in favor of TRO Plaintiffs, who willfully breached their contracts with the TOUR for a pile of cash supplied by LIV. LIV is not a rational economic actor, competing fairly to start a golf tour. It is prepared to lose billions of dollars to leverage Plaintiffs and the sport of golf to "sportswash" the Saudi government's deplorable reputation for human rights abuses. If Plaintiffs are allowed to breach their TOUR contracts without consequence, the entire mutually beneficial structure of the TOUR, an arrangement that has grown the sport and promoted the interests of golfers going back to Arnold Palmer and Jack Nicklaus, would collapse.

Finally, TRO Plaintiffs have not proved that the facts and law clearly favor them on any of their claims. TRO Plaintiffs cannot establish that they are likely to win their antitrust claims—they lack antitrust standing, cannot show that the TOUR has monopoly power given LIV's successful entrance, fail to demonstrate any restriction of competition, and challenge Regulations that are procompetitive. Nor can TRO Plaintiffs prevail on their argument that their suspensions should be "abated" during their appeals. The TOUR's Regulations empower the Commissioner to immediately suspend serial offenders like TRO Plaintiffs, and to maintain those suspensions for their ongoing violations during their appeals. TRO Plaintiffs' attempt to upend the TOUR's disciplinary process on procedural grounds is also meritless. The motion should be denied.

II. FACTUAL BACKGROUND

A. The PGA TOUR

1. The PGA TOUR promotes all members' interests

The PGA TOUR began in 1968 when a small group of professional golfers left the PGA of America and formed the Association of Professional Golfers, a member organization that eventually became the TOUR. Declaration of Andrew Levinson ("Levinson Decl.") ¶ 3. The founding members elected to pool their media rights and negotiate jointly for television exposure and corporate sponsorship. *Id.* ¶ 4. They wanted to increase prize money and improve playing conditions by aggregating their rights—thereby increasing their collective value—while preserving the freedom to plan their own travel and playing schedules, practice as and when they saw fit, and otherwise operate their respective "golf businesses" independently. *Id.*

The PGA TOUR has remained a membership organization ever since. *Id.* ¶¶ 5, 8. Unlike other sports organizations such as the NFL or NBA, there are no "owners" on the TOUR that control or contract with individual golfers or teams of golfers. *Id.* ¶ 8. The TOUR is a 501(c)(6) non-profit membership organization. *Id.* ¶¶ 2, 8. Its revenues come principally from the sale of its members' bundled media rights and sponsorships, and are used to fund its operations, tournament purses, membership benefits (e.g., healthcare and retirement plans), investments in growing the game of golf, and significant charitable initiatives. *Id.* ¶ 5. These revenue streams depend on assurances to sponsors and media outlets that the TOUR has been assigned and is authorized to sell its members' rights. *Id.* As one recent article noted, "if the [PGA TOUR's] media rights were fragmented—say, if CBS Sports didn't have the exclusive rights to air this weekend's Genesis Invitational and players could individually sell their live and archived broadcast rights—the TV deals would be worthless." Declaration of Nicholas Goldberg ("Goldberg Decl.") Ex. 45.

These increased sponsorship, broadcast, and other revenues are distributed to members in the form of tournament purses, bonuses, retirement plan contributions, and other benefits. Levinson Decl. ¶ 6. In 2021, $916 million—approximately ***98%*** of the TOUR's net revenue—was allocated to players, tournaments (i.e., a portion of the sponsorship revenue related to a specific tournament is paid to the tournament), and charities. *Id.* Of that amount, $770 million

was allocated to players, including $443 million to player prize money and benefits, $110 million to player bonus programs, $17 million to Player Retirement Plan contributions, and $200 million to Player Retirement Plan earnings. *Id.* The TOUR's structure and marketing creates the opportunity for aspiring golfers—as TRO Plaintiffs once were—to hone their skill, establish their reputation, and leverage the collective efforts of their predecessors and peers to raise their profile and obtain sponsorships. *Id.* ¶¶ 2–25.

TOUR members are also directly involved in TOUR governance. *Id.* ¶¶ 7, 14. The TOUR is governed by its Policy Board, which includes four player directors, and a fifth player director is slated to join in January 2023. *Id.* The TOUR also includes a sixteen-member Player Advisory Council, elected by TOUR members, which advises and consults with the Policy Board, including membership-elected player directors, and Commissioner on major TOUR decisions. *Id.*

2. The Regulations serve TOUR members' interests by driving up media and sponsorship revenues that are distributed to players

Like all membership organizations, the TOUR has Regulations that provide certain obligations flowing both from the TOUR to its members and from the members to the TOUR. Levinson Decl. ¶¶ 14–35 & Ex. 6. Among the TOUR's long-standing player Regulations are ones that limit participation in events that conflict with scheduled TOUR events and in non-TOUR golf programs live or recorded on media. *Id.* ¶¶ 17–25 & Ex. 6 at Art. V.A–B. These Regulations contribute to the success of scheduled TOUR events by ensuring representative fields and provide substantial benefits to sponsors and media partners. *Id.* ¶ 17. As a result, the Regulations make the TOUR's media rights more valuable, leading to higher sponsorship and broadcast revenues, which in turn are distributed to members. *Id.*

Players are eligible in certain circumstances for three or more conflicting event releases per season to play in non-TOUR tournaments outside North America. *Id.* ¶ 18. Conflicting event releases are not permitted for non-TOUR tournaments held in North America because those tournaments directly conflict with TOUR events for which the TOUR's domestic television partners have paid substantial fees. *Id.* ¶ 20. Conflicting event releases for tournaments outside North America may be denied if the Commissioner determines that it would cause the TOUR to violate a contractual commitment to a tournament sponsor or would otherwise significantly and

unreasonably harm the TOUR and its sponsors. *Id.* ¶ 19. The TOUR has regularly granted conflicting event releases for players where appropriate. *Id.*

Nothing in the Regulations prevents members from resigning their TOUR membership at any time to play on a competing tour, including LIV, or to start their own competing tour or events. Levinson Decl. ¶¶ 21, 25, 101–103. The Regulations do not have any non-compete provision. *Id.* ***Plaintiffs themselves*** joined LIV. Numerous other golfers have joined LIV as well, reportedly in exchange for massive contracts, including Dustin Johnson, Sergio Garcia, and Graeme McDowell, who resigned their TOUR memberships upon joining LIV, recognizing that they cannot participate in TOUR events and work for LIV at the same time. Goldberg Decl. Exs. 52, 54.

As discussed in the accompanying declaration of economist Dr. Mark Israel, the eligibility and media provisions of the TOUR's Regulations do not thwart competition but rather promote it. Declaration of Mark Israel ("Israel Decl.") ¶¶ 10–13, 40–63, 85–107. The eligibility and media provisions reduce inefficiencies by limiting competitors' ability to freeride on the PGA TOUR's substantial investments in developing and promoting its players and the TOUR. *Id.* ¶¶ 85–95. They enhance incentives for the TOUR's media partners to invest in promoting the TOUR's events and players, thereby increasing the value of the media rights and the revenues the TOUR uses to compensate players. *Id.* ¶ 94. And the Regulations protect the TOUR's investment in and preservation of its reputation, by seeking to limit its association with LIV and LIV players' Saudi Arabian backers. *Id.* ¶¶ 101–104. Allowing Plaintiffs to vitiate the TOUR's eligibility and media rights Regulations would force the TOUR to cooperate with its competitor LIV, by providing a platform for Plaintiffs and other LIV golfers. *Id.* ¶¶ 92–93. And it would impose severe harm on the TOUR and its rule-abiding members by devaluing their media rights and upending the TOUR's substantial investments in media partnerships and sponsorships. *Id.* ¶¶ 88–93.

B. Saudi-Backed LIV Golf

LIV Golf was founded in 2021 with financial backing from the Public Investment Fund ("PIF"), the sovereign wealth fund of Saudi Arabia, which holds more than $500 billion in assets. Goldberg Decl. Ex. 43. LIV is the most recent example of "sportswashing," a strategy by the

Saudi government to use sports in an effort to improve its reputation for human rights abuses and other atrocities. *Id.* Exs. 44, 57, 61, 81. With access to nearly unlimited funding through the PIF, LIV has been able to compete for elite players quickly and successfully and operate without consideration of profitability. *Id.* Exs. 65, 80. To date, PIF has committed at least $2 billion of funding to LIV, which LIV is using to pay eight- and nine-figure advances to some TOUR members, provide free tournament tickets to spectators, and fully fund all of its operational costs, including hundreds of millions of dollars in tournament purses. *Id.* Exs. 48, 65, 82. There is no discernible plan for how the PIF will recoup its $2 billion investment in LIV. *Id.*

During its short existence, LIV has established itself as a competing golf tour, having already successfully recruited more than twenty PGA TOUR members, including TRO Plaintiffs. *Id.* Ex. 85. Far from struggling to recruit golfers, LIV's CEO stated in a televised interview with Tucker Carlson just two days before Plaintiffs filed this lawsuit that LIV is oversubscribed for golfers and that "the list gets longer, longer, longer for the players that want to" join LIV. *Id.* Ex. 84. It has also been reported that players joining LIV have received tens-of-millions of dollars, and in some cases hundreds-of-millions of dollars, in guaranteed payments to play for LIV. *Id.* Exs. 80, 83. Plaintiff Phil Mickelson reportedly received $200 million to join LIV, and other prominent TOUR members such as Plaintiff Bryson DeChambeau and Dustin Johnson have reportedly received more than $100 million each. *Id.* Ex. 80.

LIV represents a stark departure from golf's long-earned reputation as a meritocracy in which players are paid based on their skill and performance. Unlike the PGA TOUR, LIV's golf tournaments feature guaranteed money to every participant. Khosla Decl. ¶¶ 9, 15–17. LIV has also adopted a team format that provides additional opportunities for its golfers to play for exorbitant prize money financed by the Saudi PIF. *Id.* ¶¶ 8, 12, 15–17; Goldberg Decl. Ex. 47. LIV's inaugural season includes eight events, five of which are in North America. Khosla Decl. ¶ 16. By its second season in 2023, LIV has announced plans to expand to fourteen events, including ten in North America, with prize money totaling $405 million. Goldberg Decl. Ex. 78.

LIV's direct ties to the Saudi government have cast a black cloud over its events and its players. Goldberg Decl. Ex. 63. Even before LIV officially launched, Plaintiff Phil Mickelson

admitted to a golf writer that LIV was nothing more than "sportswashing" by the Saudi's brutally repressive regime. *Id.* Ex. 46. "They're scary mother****ers to get involved with," he said. *Id.* "We know they killed [*Washington Post* reporter and U.S. resident Jamal] Khashoggi and have a horrible record on human rights. They execute people over there for being gay." *Id.* While Mickelson and the other Plaintiffs nevertheless accepted the enormous paychecks that LIV offered them, many golfers refused to do so, presumably due to concerns over LIV's ties to the Saudi government or their preference for the TOUR's competitive offering, or both. *Id.* Exs. 59, 60, 62, 74. Tiger Woods, for example, rejected an offer from LIV of $700–$800 million. *Id.* Ex. 84. Fans and community members have also protested LIV's events, including, organizations seeking justice for the victims and families affected by the 9/11 attacks. *Id.* Exs. 68, 70, 73, 77.

C. TRO Plaintiffs' Contracts with LIV That Breach Their Agreements with the TOUR

TRO Plaintiffs Gooch, Swafford, and Jones have collectively earned $37 million in official prize money on the PGA TOUR, including over $7 million to date this season. Levinson Decl. ¶ 36. [redacted]

[redacted]

TRO Plaintiffs chose to breach their agreements with the TOUR in exchange for [redacted]

D. The PGA TOUR's Right to Suspend Players Who Violate TOUR Regulations

Under the rules approved by the Policy Board, the TOUR has the authority to impose discipline on members who violate the Regulations or otherwise threaten the TOUR's well-being or integrity. Levinson Decl. ¶¶ 26–35 & Ex. 6 at Art. VII. The Regulations establish a probation procedure to deal with players who serially violate the rules in a manner that the Commissioner determines requires that they be suspended from play while the disciplinary process against them runs its course. *Id.* ¶¶ 33–35 & Ex. 6 at Art. VII.C. If a member breaks the rules, he may be notified that he is being placed on probation. *Id.* If he then commits another infraction, the Commissioner, in his discretion, may immediately suspend the member's playing privileges, preventing him from playing in TOUR events until his disciplinary process concludes. *Id.* This probation procedure prevents a serial offender from disrupting TOUR events while his disciplinary process unfolds, which goes to the heart of the Commissioner's duty to protect the TOUR, its members, its partners, its sponsors, and their reputations. *Id.* ¶ 35.

The Regulations establish a separate disciplinary procedure for the Commissioner to impose minor, intermediate, or major penalties for violations of TOUR Regulations. *Id.* ¶¶ 30–32 & Ex. 6 at Art. VII.D. Members receive notice of violations and proposed penalties, are provided an opportunity to respond, and may appeal the imposition of an intermediate or major penalty to the Appeals Committee, which is comprised of independent (non-player) members of the TOUR

Policy Board. *Id.* ¶¶ 30–31 & Ex. 6 at Art. VII.A and VII.E. In some cases, the effective date of a penalty may be stayed while a member pursues an appeal. *Id.* ¶ 32 & Ex. 6 at Art. VII.E.2.

Both the probation and penalty procedures were invoked against TRO Plaintiffs here. First, under the probation procedure, the TOUR notified all three TRO Plaintiffs in the first week of June that they were being placed on probation under Article VII.C. *Id.* ¶¶ 39–40, 61–62, 80–81. The probation notices, which were sent to Swafford and Jones on June 3, and to Gooch on June 5, warned them that under the probation procedure they could be immediately suspended from playing in TOUR events if they committed further violations. *Id.* Exs. 8, 21, 32. After they violated the rules again—and made clear that they intended to continue doing so—the TOUR notified each of them on June 9 that the Commissioner was exercising his authority under Article VII.C to suspend them from play immediately. *Id.* ¶¶ 41, 43, 63, 65, 82, 84 & Exs. 9, 22, 33. Those suspensions have not been revoked and remain in effect through the completion of TRO Plaintiffs' disciplinary proceedings. *Id.* ¶¶ 51, 57, 73, 92.

Separately, under the penalty procedure in Article VII.D, TRO Plaintiffs, who repeatedly played in conflicting LIV Golf events without releases, each received four notices of disciplinary inquiries: Gooch on June 3, June 9, June 25, and June 30; and Swafford and Jones on June 1, June 9, June 25, June 29, and June 30. *Id.* ¶¶ 38, 42, 45, 47, 60, 64, 68, 71, 80, 84, 88, 90 & Exs. 7, 9, 10, 12, 20, 22, 24, 26, 31, 33, 35, 36, 37. After considering the information they submitted in response, the TOUR imposed major penalties on each of them. *Id.* ¶¶ 46, 48–57, 66, 69–76, 86–96 & Exs. 13, 15, 25, 28, 36, 39. They have appealed those penalties, and the appeal process is currently underway. *Id.* ¶¶ 50, 54, 72, 92. However, because the TOUR suspended them under the separate probation procedure in Article VII.C, and due to their ongoing violations, their appeals of their major penalties do not stay their suspensions. *Id.* ¶¶ 51, 57, 73, 93 & Ex. 6 at Art. VII.C.

E. TRO Plaintiffs Delay Filing This Action

TRO Plaintiffs have known since June 9—and indeed, earlier—that they would violate the TOUR's Regulations and forfeit their ability to play in the FedExCup Playoffs in exchange for accepting massive payments from LIV Golf. *Id.* Exs. 9, 22, 33. For example, a week before his suspension, Plaintiff Matt Jones stated publicly "[y]ou've got to expect" that he would be banned

for committing to play in LIV events without a release. Goldberg Decl. Ex. 51. When asked following his suspension about the possibility of never playing again on the PGA TOUR, Jones stated, "I did come to this [LIV] series and this tournament with the understanding that [] could be the case." *Id.* Ex. 55. Unsurprisingly, TRO Plaintiffs have not played in any of the TOUR's last seven events and did not seek any mandatory injunction to do so. Levinson Decl. ¶ 98. To the extent this motion presents any "emergency," it is one that TRO Plaintiffs chose to create. Notwithstanding the knowledge that he would be suspended and ineligible to participate in the FedExCup, Jones stated that he was "very happy with the decision [he] made," and that he was "more than happy to play in this LIV Golf series for the rest of the year." Goldberg Decl. Ex 55.

F. TRO Plaintiffs Mischaracterize the Facts

Unable to establish their claims based on any fair interpretation of admissible evidence, TRO Plaintiffs have resorted to mischaracterizing the record. The TOUR does not have the space to correct all of TRO Plaintiffs' half-truths and falsehoods in this brief, and instead has created a separate chart identifying an exemplary set of them. *See* Goldberg Decl. Ex. 42. To cite a few examples: TRO Plaintiffs begin their motion on page 1 with an egregious mischaracterization of a comment they attribute to a "Tour representative," presented in bold text. Mot. at 1. The comment was actually from Davis Love III, a hall-of-fame golfer. Love is ***not*** a TOUR official and did ***not*** say that the TOUR "hold[s] all the cards" or "[doesn't] care what the courts say"; that would be absurd. He said that ***golfers*** hold all the cards, and that if a court ordered the TOUR to permit LIV golfers to play in TOUR events despite breaking the TOUR's rules, other golfers might simply boycott those events, because they "respect the rules," are "fed up," and "don't want those guys . . . coming and cherry-picking our tournaments." Dkt. 2-8 at 276–77. His comments do not reveal some purported arrogance by the TOUR; rather, they demonstrate the disruption and damage to all rule-abiding PGA TOUR members that would ensue if TRO Plaintiffs get their way. Likewise, TRO Plaintiffs mischaracterize TOUR Commissioner Jay Monahan's comment that LIV Golf is "an irrational threat." Mot. at 3–4. He did ***not*** say that it is irrational to compete with the PGA TOUR. He said that LIV is an ***irrational market actor***, "one not concerned with the return on investment or true growth of the game." Dkt. 2-3 at 4. TRO Plaintiffs' moving papers

are littered with similar mischaracterizations and half-truths. Goldberg Decl. Ex. 42.

III. ARGUMENT

A TRO is an "extraordinary remedy never awarded as of right." *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (en banc). TRO Plaintiffs bear "the heavy burden" of demonstrating: (1) they are likely to succeed on the merits, (2) they are likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tip in their favor, and (4) an injunction is in the public interest. *Blankenship v. Newsom*, 477 F. Supp. 3d 1098, 1103 (N.D. Cal. 2020). A TRO is typically a procedure "for preserving the status quo." *Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1422 (9th Cir. 1984). Mandatory injunctions, by contrast, go "well beyond" preserving the status quo and are "particularly disfavored." *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1320 (9th Cir. 1994) (quoting *Anderson v. United States*, 612 F.2d 1112, 1114 (9th Cir. 1979)). The Court must deny a mandatory injunction "unless the facts and law clearly favor the moving party." *Anderson*, 612 F.2d at 1114. The status quo is the state of affairs at "the time the complaint was filed." *Animal Legal Def. Fund v. U.S.D.A.*, 2017 WL 2352009, at *3 (N.D. Cal. May 31, 2017). TRO Plaintiffs seek a mandatory injunction to compel the PGA TOUR to take affirmative action to allow them to play in the FedExCup, while continuing to breach the TOUR's Regulations. They fail to meet the standard for issuing any TRO, let alone the "doubly demanding" standard required for mandatory injunctive relief. *Garcia*, 786 F.3d at 740.

A. TRO Plaintiffs Have Failed to Show They Are Likely to Suffer Irreparable Harm

"Irreparable harm is 'harm for which there is no adequate legal remedy, such as an award for damages.' For this reason, economic harm is not generally considered irreparable." *E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 677 (9th Cir. 2021) (quoting *Arizona Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1068 (9th Cir. 2014)). "[T]he temporary loss of income, ultimately to be recovered, does not usually constitute irreparable injury. . . . Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough." *Sampson v. Murray*, 415 U.S. 61, 90 (1974). Additionally, irreparable harm must be "likely," not just possible. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008).

1. TRO Plaintiffs delayed seeking relief

TRO Plaintiffs' motion should be denied because "delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm." *Oakland Trib., Inc. v. Chron. Pub. Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985); *see also Garcia v. Google, Inc.*, 786 F.3d at 746 ("months" delay in seeking injunction undercut claim of irreparable harm); *Collins v. Nat'l Football League*, 566 F. Supp. 3d 586, 603–04 (E.D. Tex. 2021) (two-week delay weighed against finding of irreparable harm). TRO Plaintiffs knew about their suspensions but sat on their purported claims for months. They were informed that their violations of the Regulations resulted in their suspensions on June 9. Levinson Decl. Exs. 9, 22, 33. Even before being notified, they expected to be suspended. Goldberg Decl. Ex. 51. And the citations in their hefty filings demonstrate that they have spent months preparing this legal challenge. Dkt. 2-13 at p.15 n.31 (declaration stating that cited source was "accessed 6/9/2022"). Yet TRO Plaintiffs waited nearly two months before seeking the "emergency" relief to which they now claim they are entitled. TRO Plaintiffs' delay weighs heavily against a finding of irreparable harm. *See* Rutter Group Prac. Guide Fed. Civ. Proc. Before Trial (Nat Ed.) Ch. 13-D at ¶ 13:95 ("Delay in seeking relief may be evidence of laches or negate the alleged threat of 'immediate' irreparable injury. The court has discretion to deny the application on either ground." (citations omitted)).

2. TRO Plaintiffs' claimed harm can be redressed through monetary remedies

TRO Plaintiffs' motion also should be denied because the only arguably concrete injuries they claim are compensable by damages. They provide a list of five purported harms, but the first three—lost opportunities (1) "to qualify for the 2023 Majors," (2) "to accumulate points," and (3) "to qualify for other premier tournaments"—ultimately collapse into the final two—(4) lost "income earning opportunities" and (5) "losses to goodwill, reputation, and brand." Mot. at 22. The tournaments and points are merely means to earn financial and reputational rewards. Even if TRO Plaintiffs were actually suffering those purported harms, neither would justify extraordinary relief they seek. Loss of income that could have been earned in future tournaments is entirely compensable by monetary damages. And TRO Plaintiffs' conclusory, tag-along allegations regarding reputational harm are too remote and speculative to qualify as irreparable injury.

First, "monetary injury is not normally considered irreparable." *hiQ Labs, Inc. v. LinkedIn Corp.*, 31 F.4th 1180, 1188 (9th Cir. 2022). "The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm." *Sampson*, 415 U.S. at 90. "An injury is not irreparable if it can be compensated by the court when, and if, the plaintiff prevails on the merits. Stated differently, only harm that the district court cannot remedy following a final determination on the merits may constitute irreparable harm." *Qualcomm Inc. v. Compal Elecs., Inc.*, 283 F. Supp. 3d 905, 915 (S.D. Cal. 2017) (internal quotation marks and citation omitted).

Here, TRO Plaintiffs expressly seek "monetary damages, treble damages, and economic damages." Compl. at 103. Although the TOUR has committed to pay TRO Plaintiffs for their achievements through the dates of their suspensions, they now seek redress for their inability to play for money in TOUR events postdating their breaches of contract and suspensions. TRO Plaintiffs' claims are fundamentally economic and may be redressed through monetary relief. In *Heldman v. United States Lawn Tennis Ass'n*, 354 F. Supp. 1241, 1251 (S.D.N.Y. 1973), the court denied injunctive relief for similar claims by an athlete, Billie Jean King, barred from events in one league because of unauthorized participation in another. There, the athlete "saw a valuable opportunity in plaintiff's contract and opted for it; she has available to her the chance to win large sums of prize money and with that the subsequent opportunities of endorsements that accrue to athletic stars. That other tournament opportunities may be lost to her … does not, on this record, support a preliminary injunction." *Id.* So too here, where TRO Plaintiffs claim that LIV offered them ***superior*** compensation for foregoing TOUR opportunities, and LIV has indemnified them for losses associated with their breaches of TOUR Regulations. Gooch Decl. ¶ 16 ("LIV Golf offered to compensate me in amounts in addition to its already strong compensation offering—including the highest purses in golf history and guaranteed compensation."); Jones Decl. ¶ 16 (same); Swafford Decl. ¶ 16 (same); Khosla Decl. ¶ 23 (LIV has offered players "extensive indemnification" "to take on the risk" of players' TOUR punishments).

The fact that TRO Plaintiffs' purported lost earnings would occur in the future and may be "difficult to predict" because they are "based on performance" does not justify extraordinary

relief. Gooch Decl. ¶ 45; Jones Decl. ¶ 45; Swafford Decl. ¶ 45. Courts routinely award compensation for lost income, including projected future income. *United States v. Cienfuegos*, 462 F.3d 1160, 1169 (9th Cir. 2006) ("concepts and analysis involved" in calculating future lost income "are well-developed in federal law"); *Mir v. Little Co. of Mary Hosp.*, 844 F.2d 646, 650 (9th Cir. 1988) ("The mere fact that the extent of the injury may be uncertain would not have prevented recovery" because plaintiff "could have easily presented evidence of his projected lost income"). In fact, TRO Plaintiffs' own economist concludes that golfers have calculated the costs associated with "the loss of expected lifetime playing revenues on the TOUR," "the loss of opportunities to earn ranking points," and the loss of opportunities "to earn entry into the Majors" when determining what "large upfront payments" would be "required" for them to join LIV. Leitzinger Decl. ¶ 9. TRO Plaintiffs' assertion that lost earnings would be "difficult to quantify" ignores the fact that their own economist admits that these projected lost earnings have already been quantified and paid. *See Braintree Lab'ys, Inc. v. Citigroup Glob. Mkts. Inc.*, 622 F.3d 36, 42 (1st Cir. 2010) (finding no irreparable injury where plaintiff claimed "it might be difficult to determine retrospectively how much these missed opportunities were actually worth.").

TRO Plaintiffs' irreparable injury claims are easily distinguishable from cases where athletes were barred entirely from participation at the elite level of their sport. *See* Mot. at 22–23 & n.10. TRO Plaintiffs are not barred from professional golf entirely by age restrictions, rights of first refusal, or some other improper mechanism.[1] *See Elite Rodeo Ass'n v. Prof. Rodeo Cowboys Ass'n, Inc.*, 159 F. Supp. 3d 738, 745 (N.D. Tex. 2016) ("In cases recognizing lost playing time alone as constituting irreparable harm, athletes were entirely locked out of their sports."). TRO Plaintiffs themselves argue that they may still compete at an elite level at LIV Golf tournaments.

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[1] TRO Plaintiffs' reliance on *Gilder v. PGA Tour, Inc.*, 936 F.2d 417, 423 (9th Cir.1991), also is misplaced. *Gilder* concerned the requirement that members use certain clubs while playing on the TOUR, not suspension from the TOUR itself. The court held that the marginal effect of using different clubs was an injury that could defy calculation. *Id.* The purported injury here is not so subtle, and damages could be calculated using established methodologies, as described above.

Mot. at 23 ("The only elite golf leagues in existence today are the Tour and LIV Golf."). Their choice to breach their agreements with the TOUR and join another "elite" golf league—one that they claim has offered them superior compensation—is not an irreparable injury.

Second, to the extent TRO Plaintiffs purport to allege non-monetary harm, their allegations are fatally speculative and conclusory. "Speculative injury does not constitute irreparable injury sufficient to warrant granting a preliminary injunction." *Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988). "[A] plaintiff who attempts to establish irreparable harm via loss of business reputation and goodwill must proffer evidence of that loss—a district court may not base a finding of reputational harm on platitudes rather than evidence." *Amazing Ins., Inc. v. Dimanno*, 2019 WL 3406941, at *3 (E.D. Cal. July 26, 2019).

Here, TRO Plaintiffs' boilerplate claims that they will suffer harms to their "goodwill, reputation, and brand" do not even rise to the level of platitudes. *See* Gooch Decl. ¶ 44 ("Participating in the FedEx Cup would provide me opportunities to enhance my sponsor relationships and compensation.") & ¶ 46 ("To retaliate against me and to disparage me for living out the purpose of the organization the PGA TOUR has harmed my reputation and goodwill."); Jones Decl. ¶¶ 44 & 46 (same); Swafford Decl. ¶¶ 44 & 46 (same). Moreover, those claimed harms—to the extent they are even identifiable—are too remote and speculative to warrant injunctive relief. *See Jessup v. Am. Kennel Club, Inc.*, 862 F. Supp. 1122, 1128 (S.D.N.Y. 1994) (finding conclusory affidavits failed to establish irreparable injury to reputation). Any reputational harms TRO Plaintiffs may suffer are far more likely to arise from their alignment with LIV and its efforts to paper over Saudi Arabia's long and well-documented history of human rights abuses than their suspension from the TOUR for violating its rules.

Third, the true lack of exigency here is revealed by the actions of other Plaintiffs. Four other Plaintiffs are similarly situated to the TRO Plaintiffs—they have qualified to play in the FedExCup Playoffs but are suspended from TOUR events—but those four have not sought emergency relief from the Court. Levinson Decl. ¶ 97. If suspension from the TOUR and the consequences that flow from it were truly irreparable, one would expect uniform action by the affected Plaintiffs. The fact that other Plaintiffs face the same purportedly dire consequences and

have not sought immediate relief underscores that their purported injuries are not irreparable.

B. The Balance of Equities Tips Sharply in the PGA TOUR's Favor

Though TRO Plaintiffs have not shown that they are threatened with irreparable harm, the TOUR and its members will be immediately and irreparably injured if this Court orders that TRO Plaintiffs must play in the FedExCup despite their repeated violations of the Regulations.

The TOUR and its members will suffer irreparable harm if the TOUR cannot enforce its Regulations and, by doing so, ensure the exclusive media rights those Regulations protect. *See Heldman*, 354 F. Supp. at 1252 ("It would unduly damage the prestige and the operation of the [incumbent tennis association] to enjoin its rules before an adverse determination on the merits."). If Plaintiffs are permitted to play for both the TOUR and LIV, the TOUR will be forced to provide a platform for golfers who have denigrated the TOUR and devalued its product for all TOUR members. Levinson Decl. ¶¶ 106–116; Israel Decl. ¶¶ 88–95, 101–104. [redacted] Peters Decl. Exs. 2–4. In other words, the requested relief will allow LIV and its players to use the TOUR's platform to attempt to draw viewers, sponsors, and other golfers away from the TOUR, while simultaneously allowing TRO Plaintiffs to flout their promise to adhere to the TOUR's rules.

Moreover, the TOUR will suffer irreparable reputational damage if it is forced to give a stage to players engaged with LIV and to associate the PGA TOUR brand with the Saudi government's efforts to "sportswash" its deplorable reputation. Goldberg Decl. Ex. 44. This fear is well-founded, as LIV has already been a constant distraction at recent TOUR events. During a June 8 press conference for the TOUR's RBC Canadian Open, questions about LIV dominated; half of the questions to reigning champion Rory McIlroy were about LIV rather than the tournament. *Id.* Ex. 53. Similarly, at the recent 150th Open Championship, one of professional golf's most historic tournaments, prominent TOUR members expressed frustration with the unwanted media focus on LIV rather than the tournament. As Justin Thomas explained, "I think it's very obvious why we're sick of talking about it because . . . it's taking away from a lot of –

whether it's great storylines or just great things happening in the game of golf." *Id.* Ex. 75.

The public outrage and political backlash aimed at golfers who have joined LIV reinforces the TOUR's concerns. After Pumpkin Ridge Golf Club (outside Portland, Oregon) announced that it would host a LIV tournament on July 1–3, eleven mayors in Washington County (where Pumpkin Ridge is located) signed an open letter opposing the tournament, numerous members of the club protested the decision, and an estimated forty club members resigned. *Id.* Ex. 64. U.S. Senator Ron Wyden, spoke out against the Oregon LIV event, citing a hit-and-run accident that killed an Oregon teen and how the Saudi-national defendant was shuttled out of the U.S. by the Saudi government before he could stand trial. *Id.* Ex. 66. In addition, several protesters, including members of 9/11 survivor families, gathered outside Pumpkin Ridge and again at the Trump resort in Bedminster, New Jersey, to protest LIV events. *Id.* Exs. 71, 81. The irreparable harm to the TOUR that would necessarily flow from forcing the TOUR to provide LIV golfers and their Saudi backers a greater platform weighs heavily against granting the requested relief.

C. An Injunction Would Harm the Public Interest

The Court also must "pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Disney Enters., Inc. v. VidAngel, Inc.*, 869 F.3d 848, 867 (9th Cir. 2017). A temporary restraining order would permit LIV and TRO Plaintiffs to unfairly reap the benefits of the TOUR's media and sponsorship rights, which are exclusive to TOUR members, and force the TOUR's partners and sponsors to be associated with LIV and its backers. Many of the TOUR's partners and sponsors have made independent decisions to have no relationship with LIV but would be forced into an affiliation with them. A preliminary injunction also will engender consumer confusion because players with dual, conflicting loyalties may promote LIV over the PGA TOUR while participating in TOUR events. Finally, as explained below, the TOUR's enforcement of its Regulations is not anticompetitive. Those Regulations are key to protect rule-abiding TOUR members and are procompetitive.

D. The Law and Facts Do Not Clearly Favor TRO Plaintiffs on the Merits

1. TRO Plaintiffs lack antitrust standing

Plaintiffs' antitrust claims under Section 1 and 2 fail at square one because Plaintiffs lack

antitrust standing. "A plaintiff may only pursue an antitrust action if it can show 'antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.'" *Am. Ad. Mgmt., Inc. v. Gen. Tel. Co. of Cal.*, 190 F.3d 1051, 1055 (9th Cir. 1999) (quoting *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990)). Plaintiffs allege that the TOUR's Regulations are anticompetitive, but the injury they claim is exclusion from the benefits of a contract they knowingly breached, not the exclusion of themselves or LIV from any relevant market. Compl. ¶¶ 7, 9, 11, 58–77. Having breached their agreements with the TOUR and thrown their lot in with LIV, Plaintiffs have no "right to the [TOUR] platform and the public exposure provided by playing on the Tour." *Id.* ¶¶ 212, 215, 218. Their purported "injury"—being denied the benefits of a contract they breached—is not the type of injury "the antitrust laws were intended to prevent." *Atl. Richfield*, 495 U.S. at 334. Moreover, Plaintiffs' antitrust claims are merely a stalking horse for claimed injury to LIV. Compl. ¶¶ 283–286, 290 293, 297; Dkt. 3 (disclosure of LIV as interested entity). Plaintiffs (falsely) allege that the TOUR is engaged in an "effort to exclude competition from LIV Golf," Mot. at 9, but Plaintiffs are not the "efficient enforcer" of any such claim and "therefore lack[] antitrust standing on that basis as well," *Gatt Commc'ns, Inc. v. PMC Assocs., L.L.C.*, 711 F.3d 68, 78–80 (2d Cir. 2013) (plaintiff that agreed to and then was excluded from alleged anticompetitive contract lacked standing because it was not "efficient enforcer" of alleged antitrust violation).

2. The law and facts do not clearly favor TRO Plaintiffs on their Section 2 claim

a. The TOUR lacks monopoly power

Plaintiffs' Section 2 claim fails because Plaintiffs cannot clearly show that the TOUR has "the power to exclude competition or control prices." *United States v. Syufy Enters.*, 903 F.2d 659, 664 (9th Cir. 1990). The "successful entry by LIV Golf" demonstrates that the TOUR lacks the power to exclude competition. Mot. at 13. In just its first year, LIV has established a tour that competes directly with the PGA TOUR, has more financial resources than the TOUR, and offers more guaranteed money to players than the TOUR. Plaintiffs' own economist states that LIV is on track to go from 0% of the market in 2021 to 20% of the market in 2023, while filling its fields with a greater percentage of elite golfers on average (24%) than the TOUR averages (16%).

Letizinger Decl. ¶¶ 33. 62–64; Goldberg Decl ¶ 49. LIV's recruitment of Plaintiffs as part of a full complement of 48 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." *Tops Mkts., Inc. v. Quality Mkts., Inc.*, 142 F.3d 90. 99 (2d Cir. 1998); *see also Syufy Enters.*, 903 F.2d at 665 (evidence that new competitor entered market and began taking market share from defendant was "conclusive" proof of defendant's lack of monopoly power); *Elite Rodeo*, 159 F. Supp. 3d at 745 (denying injunctive relief where competitor's "initial success" entering market demonstrated that defendant "does not have the ability to exclude competitors from the market"). Likewise, the fact that the TOUR responded to LIV's entrance into the market by increasing player pay refutes any argument that the TOUR has the power to "control prices." *Syufy Enters.*, 903 F.2d at 664.

b. The TOUR's Regulations do not restrict competition

TRO Plaintiffs' monopolization claim also falls short because the TOUR's Regulations do not "prevent PGA TOUR members from selling their services" to TOUR competitors like LIV. Mot. at 14. Unlike "non-compete" clauses, the TOUR's Regulations do ***not*** prohibit members from playing on a competing tour. Levinson Decl. ¶¶ 101–103; Israel Decl. ¶ 51. Any TOUR member is free to "sell[] their services" to LIV or any other TOUR competitor. Mot. at 14. Indeed, players including Dustin Johnson, Sergio Garcia, and Graeme McDowell have resigned from the TOUR in favor of doing so. Plaintiffs themselves have also already sold their services to join LIV, only without resigning. What Plaintiffs cannot do, however, is enter into annual agreements with the TOUR that grant the TOUR their media rights, breach those agreements by granting conflicting media rights to LIV, and then force the TOUR to allow LIV to freeride off the TOUR's investment and goodwill by compelling the TOUR to allow Plaintiffs to play in both TOUR and LIV events. The TOUR's eligibility and media rights provisions are analogous to an exclusive services contract. Israel Decl. ¶¶ 11, 50. Such agreements are common, including for independent contractors. *Id.*; *see also Cogan v. Harford Mem'l Hosp.*, 843 F. Supp. 1013, 1018, 1020 (D. Md. 1994) (rejecting antitrust claims where defendant hospital terminated contract with plaintiff independent contractor physician who operated a competing clinic because plaintiff "has

not been eliminated as a competitor in the market"). As Dr. Israel notes, Compass-Lexecon has exclusive relationships with independent contractor academics that prevent those academics from providing consulting services to different firms simultaneously. Israel Decl. ¶ 50. Such provisions are commonplace and procompetitive. *Id.*

Moreover, suspending Plaintiffs from the TOUR based on their breaches of the Regulations is perfectly legal: "businesses are free to choose the parties with whom they will deal, as well as the prices, terms, and conditions of that dealing." *linkLine Commc'ns*, 555 U.S. at 448. Plaintiffs' theory of exclusionary conduct boils down to their claim that the TOUR has an antitrust duty to allow Plaintiffs to play in TOUR events, even while Plaintiffs are breaching their contracts and competing against the TOUR as agents and "equity owner[s]" of LIV. Mot. at 14–15; Khosla Decl. ¶ 8. But the antitrust laws do not require the TOUR "to aid competitors." *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 410–11 (2004); *see also FTC v. Qualcomm Inc.*, 969 F.3d 974, 994 (9th Cir. 2020).

c. Any alleged harm to competition does not outweigh the procompetitive benefits of the TOUR's eligibility and media rights Regulations

TRO Plaintiffs also cannot show that any alleged anticompetitive harm outweighs the TOUR's procompetitive justifications. *See Qualcomm*, 969 F.3d at 991. The TOUR's Regulations are justified by several "legitimate business purpose[s]." *Universal Analytics, Inc. v. MacNeal-Schwendler Corp.*, 914 F.2d 1256, 1258 (9th Cir. 1990).

First, the TOUR's eligibility and media rights Regulations promote competition between tours—including not only LIV, but tours based outside North America as well—because they are an exclusive dealing agreement between the TOUR and its members during the applicable season. In exchange for TOUR membership benefits, members agree not to play in competing events in North America. Courts routinely acknowledge the "well-recognized economic benefits to exclusive dealing arrangements, including the enhancement of interbrand competition." *Omega Env't, Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1162 (9th Cir. 1997). "Exclusive dealing agreements are often entered into for entirely procompetitive reasons, and generally pose little threat to competition." *PNY Techs., Inc. v. SanDisk Corp.*, 2014 WL 2987322, at *4 (N.D. Cal. July 2, 2014) (citation omitted); *see Brown v. Hansen Publ'ns, Inc.*, 556 F.2d 969, 971 (9th Cir. 1977).

Here, as Dr. Israel explains, Plaintiffs' limited exclusivity commitment to the TOUR increases competition by requiring the TOUR and LIV to compete vigorously against one another to attract and retain the top players, which is already occurring. Israel Decl. ¶¶ 53–63.

Second, the Regulations are procompetitive because they encourage TOUR members to use their best efforts to support and promote the TOUR rather than competing tours. Without those obligations, players with conflicting interests would be incentivized to promote LIV at the expense of the TOUR, including by recruiting players for LIV while participating in TOUR events and forgoing conflicting TOUR tournaments in favor of LIV events. Israel Decl. ¶¶ 13, 88–95; Peters Decl. Exs. 2–4. Courts frequently recognize as procompetitive exclusive contracts that, like the Regulations here, are designed to encourage the best efforts and undivided commitment of a venture's participants. *See, e.g.*, *E. Food Servs., Inc. v. Pontifical Cath. Univ. Servs. Ass'n, Inc.*, 357 F.3d 1, 8 (1st Cir. 2004); *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 395 (7th Cir. 1984); *Sulmeyer v. Coca Cola Co.*, 515 F.2d 835, 840 n.2 (5th Cir. 1975).

Third, Plaintiffs' agreement to play exclusively in TOUR events in North America and to grant the TOUR their exclusive media rights prevents LIV from freeriding on the TOUR's platform and reputation. "Eliminating free riders" is a well-recognized "procompetitive advantage of alleged restraints on competition." *N. Am. Soccer League, LLC v. U.S. Soccer Fed'n, Inc.*, 883 F.3d 32, 43 (2d Cir. 2018); *see, e.g.*, *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 222–23 (D.C. Cir. 1986); *SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958, 969–70 (10th Cir. 1994). The TOUR has invested heavily to grow the game of golf and generate interest in its product. Levinson Decl. ¶¶ 2 –25. If Plaintiffs, in breach of their agreements with the TOUR, were permitted to play in TOUR and LIV events in North America, the TOUR would effectively be subsidizing its competitor by allowing LIV and its players to freeride off the TOUR's efforts in the United States. Israel Decl. ¶¶ 88–107. LIV would be using the TOUR's platform and hard-earned reputation to promote LIV and its players at TOUR events. *Id.* The TOUR's freeriding concerns explain why it grants releases to players for certain events on tours based outside of North America but withholds releases from players seeking to play in LIV events regardless of location. Because the majority of LIV's events are held in North America, they pose greater risk

to the TOUR's investment in its platform and reputation. *Id.* ¶¶ 96–98. Such freeriding harms players and fans because it disincentivizes the TOUR from continuing to invest in its product, players, and platform and disincentivizes LIV from doing the same. *Id.*

3. The law and facts do not clearly favor TRO Plaintiffs on their Section 1 claim

TRO Plaintiffs' jumble of conspiracy allegations fare no better than their Section 2 claim. TRO Plaintiffs assert the TOUR conspired with the DP World Tour either to boycott players who work with LIV or to boycott LIV itself. *See* Mot. at 19. Whatever claim they are making, neither is supported by anything other than counsel's mischaracterization of selective news reports, third-party statements, and LIV press releases. *Compare* Brass Decl. Ex. 22 *with* Goldberg Decl. Ex. 42. Even if Plaintiffs' hearsay upon hearsay upon hearsay were sufficient, their Section 1 theory bears no relationship to the relief TRO Plaintiffs seek here. Nor could it. As a matter of law, Plaintiffs cannot allege a Section 1 claim based on the TOUR's enforcement of its ***own*** eligibility and media rights Regulations. *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 769 (1984) ("[I]t is perfectly plain that an internal 'agreement' to implement a single, unitary firm's policies does not raise the antitrust dangers that § 1 was designed to police.").

Plaintiffs' conspiracy allegations fail for two other reasons. ***First***, their boycott theory is "limited to cases involving horizontal agreements among *direct competitors*." *Nova Designs, Inc. v. Scuba Retailers Ass'n*, 202 F.3d 1088, 1092 (9th Cir. 2000) (emphasis added). But Plaintiffs' own economist contends that the DP World Tour does ***not*** compete with the TOUR. Leitzinger Decl. ¶¶ 42–46. ***Second***, to establish a Section 1 boycott claim, TRO Plaintiffs must show that the TOUR "possesses a dominant market position." *Adaptive Power Sols., LLC v. Hughes Missile Sys. Co.*, 141 F.3d 947, 950 (9th Cir. 1998) (citation omitted). But LIV's successful entry into the market is "conclusive" proof that that the TOUR does ***not*** have such power. *Syufy Enters.*, 903 F.2d at 665; *Tops Mkts.*, 142 F.3d at 99. TRO Plaintiffs have not established that the law or the facts clearly favor them on their Section 1 claim.

4. TRO Plaintiffs are not entitled to play in TOUR events pending their appeals

Nor can TRO Plaintiffs prevail on their misguided argument that their suspensions must be "abated" while they appeal their intentional and ongoing violations of TOUR Regulations.

Mot. at 11–12. Nothing in the Regulations entitles TRO Plaintiffs to violate the rules repeatedly and deliberately but continue to play in TOUR events to the detriment of all other rule-abiding members, merely because they have lodged an appeal. On the contrary, Article VII.C of the Regulations empowers the Commissioner to immediately suspend serial offenders like Plaintiffs, and to maintain their suspensions until any appeal of an ensuing disciplinary action is concluded. The Commissioner exercised that authority here with respect to all three TRO Plaintiffs—a fact that they conveniently ignore in their pleadings. The Commissioner's power to suspend serial offenders goes to the heart of his duty to protect and promote the interests and reputations of the TOUR and its members. And it would be rendered all but meaningless if players with nefarious intent could override his decision by merely lodging appeals.

When private organizations establish regulations and disciplinary procedures for their members, courts must defer to their judgment on how those procedures should operate and avoid interfering with them. *See Scheire v. Int'l Show Car Ass'n (ISCA)*, 717 F.2d 464, 465 (9th Cir. 1983) (articulating "[t]he principle of judicial noninterference in internal disputes of voluntary associations"); *Oakland Raiders v. Nat'l Football League*, 131 Cal. App. 4th 621, 645–46 (2005) (warning that "judicial intervention in such disputes will have the undesired and unintended effect of interfering with the [organization]'s autonomy in matters where the [organization] and its commissioner have much greater competence and understanding than the courts"); Levinson Decl. Ex. 6 at 95 (Commissioner has power to "interpret and apply" the Regulations).

TRO Plaintiffs invite the Court to ignore the deference that should be afforded to the TOUR's interpretation of its own rules, and to do so with no basis in either the rules or common sense. Under Article VII.E, PGA TOUR members may stay enforcement of an Intermediate or Major ***penalty*** while it is being appealed. But there is ***no*** corresponding stay pending appeal for suspensions under Article VII.C resulting from a ***probation*** violation, as the plain language of the Regulations makes clear. The ***penalty*** procedures described in Section A include a 14-day period for notice and a 14-day period for member response, and expressly include a stay pending appeals under Section E. By contrast, the ***probation*** procedures described in Section C contain no reference to an appeal. Nor would such a procedure make any sense because the probation rule

exists to fill the gap while the disciplinary process runs its course, which may span several months. TRO Plaintiffs' interpretation—that repeat, willful, and ongoing violators of the rules can override the Commissioner's decision to immediately suspend them—would only invite abuse and would eviscerate the Commissioner's power to protect the TOUR and its members from parties who are actively trying to harm them.

Moreover, the continuous and ongoing nature of TRO Plaintiffs' violations presents a second, independent reason why they are not entitled to play in TOUR events during their appeals. Even for appeals of penalties under Section E, no stay applies to suspensions "from a tournament then in progress or scheduled for the calendar week in which the alleged violation occurred." Levinson Decl. Ex. 6 at Art. VII.E.2. By these means, the Regulations afford a stay to players who in good faith wish to contest a Penalty imposed for a discrete incident that occurred in the past, but ***not*** to players who continue actively violating the Regulations during their appeals. For this additional reason, TRO Plaintiffs are not entitled to stay their suspensions.

5. TRO Plaintiffs' "fair process" claim is meritless

Finally, TRO Plaintiffs' challenge to the TOUR's disciplinary process gains no traction. As TRO Plaintiffs concede, "fair process" claims apply only to organizations that are "tinged with public purpose." Mot. at 20 (quoting *McCune v. Wilson*, 237 So. 2d 169, 173 (Fla. 1970) (internal ellipses omitted)). But "the right to fair procedure is a limited one that applies to an organization that operates in the public interest—and not one that engages in activity of some interest to the public." *Flaa v. Hollywood Foreign Press Ass'n*, 2020 WL 8256191, at *4 (C.D. Cal. Nov. 20, 2020). Fair process claims have "not been applied in the field of entertainment." *See id.* (press association); *Yari v. Producers Guild of Am., Inc.*, 161 Cal. App. 4th 172, 180 (2008) (film producers' association). TRO Plaintiffs' lone case on this point, *McCune v. Wilson*, 237 So. 2d 169, 173 (Fla. 1970), is easily distinguishable because it involved a "quasi-public organization." Nor can TRO Plaintiffs establish that the TOUR has "monopolistic control" in any relevant market, as demonstrated by the emergence of LIV and the existence of other competitors. Section III.D.2, *supra*. Thus, Plaintiffs' fair process claim fails as a matter of law.

Even if TRO Plaintiffs' fair process claim applied to the TOUR's private disciplinary

procedures, it would not support any request for extraordinary injunctive relief. There is no "rigid procedure that must invariably be observed" to provide "fair procedure." *Ezekial v. Winkley*, 20 Cal. 3d 267, 278 (1977). All that is required is "adequate notice of the 'charges'" and a "reasonable opportunity to respond." *Id.* (citing *Pinsker v. Pac. Coast Soc'y of Orthodontists*, 12 Cal. 3d 541, 555 (1974)). The TOUR's disciplinary process easily meets this test. It is undisputed that the TRO Plaintiffs received adequate notice of the charges and have had a reasonable opportunity to respond. Levinson Decl. ¶¶ 26–99. Nothing more is required.

TRO Plaintiffs complain that the TOUR's Appeals Committee fails to provide "impartial review." Mot. at 21. But the Appeals Committee, which has not yet made any determinations, is comprised of independent non-player members of the TOUR Policy Board and "may affirm, modify (increase or decrease), or reverse the decision of the Commissioner." Levinson Decl. Ex. 17. TRO Plaintiffs have not and cannot explain how they would suffer irreparable injury by allowing their appeals to play out. TRO Plaintiffs also suggest that the Commissioner is supposedly "bias[ed]" against them. Mot. at 21. That's false. But regardless, the Commissioner has referred their appeals to the Appeals Committee, a separate body, for review. Levinson Decl. ¶¶ 55, 75, 94 & Exs. 17, 29, 40. Finally, TRO Plaintiffs' allegations about other supposed minor flaws in TOUR processes, Mot. at 21, are belied by the facts. Mr. Gooch ***was*** timely provided notice; the TOUR ***did*** send disciplinary notice letters to each TRO Plaintiff; and, as discussed above, the TOUR was under no obligation to "abate" TRO Plaintiffs' suspensions for their ongoing violations. Levinson Decl. ¶¶ 36–99. Regardless, none of these complaints change the ultimate fact that the TOUR's Regulations provide a "fair procedure," which TRO Plaintiffs continue to avail themselves of to this day. *Pinsker*, 12 Cal. 3d at 555.

IV. CONCLUSION

For the foregoing reasons, the PGA TOUR respectfully requests that the Court deny TRO Plaintiffs' motion for a temporary restraining order.

Dated: August 8, 2022

KEKER, VAN NEST & PETERS LLP

By: */s/ Elliot R. Peters*
ELLIOT R. PETERS
DAVID SILBERT
R. ADAM LAURIDSEN
NICHOLAS S. GOLDBERG
SOPHIE HOOD

Attorneys for Defendant
PGA Tour, Inc.

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

PATRICK FITZGERALD
ANTHONY J. DREYER
KAREN M. LENT

Attorneys for Defendant
PGA Tour, Inc.

Agenda

National Association of Attorneys General (NAAG)
Antitrust & Labor Issues Working Group Call (ALIWG)
Thursday June 27, 2022
12:00 PM EST/11:00 AM Central/10:00 AM Mountain/9:00 AM Pacific/6:00 AM (HI)

Join Zoom Meeting

https://naag-org.zoom.us (b)(6)

Meeting ID: (b)(6)

Passcode: (b)(6)

OPEN Call NON AAGs INCLUDED

I. Welcome

II. New to Our Call? Please Feel Free to Introduce Yourself/Your Organization

III. Topic: Antitrust & Athletes

- Guest Speaker Presentation-
  - **Gabe Feldman**, Sher Garner Professor Sports Law and Paul and Abram B. Barron Professor of Law --Tulane Law School
    - To what extent can professional sports leagues require the exclusive participation of member athletes?
      - The PGA Tour has allegedly responded to competition from a new league, LIV Golf, by suspending any tour member that also participates in LIV events.
    - What are the antitrust implications of the PGA's policy and what are the prospects for the litigation that was filed by LIV and the professional golfers?
  - Q&A

IV. Open Mic

- Any Public Announcements/Updates Re Recent or Upcoming Antitrust and Labor Matters?

V. Attachments:

- Amended Complaint—Mickelson et al v. PGA Tour, Inc.
- Answer- Liv Golf v. PGA Tour

- TRO Motion Liv Golf Players
- Opposition to TRO Motion

VI. Next Call:

- November 14, 2022 @ 2:00 EST--AAGs Only-- Closed Call

Appointment

From: Patel, Karuna [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=e048038b497a48c4bd77a368692ba9d2-0a42d819-26]
Sent: 2/14/2023 11:30:24 AM
To: Cady, Benjamin (CFPB) [Benjamin.Cady@cfpb.gov]

Subject: Accepted: FW: CFPB-FTC meeting re non-compete NPRM
Location: Microsoft Teams Meeting

Start: 2/27/2023 3:00:00 PM
End: 2/27/2023 3:30:00 PM
Show Time As: Busy

Appointment

From: Patel, Karuna [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=e048038b497a48c4bd77a368692ba9d2-0a42d819-26]
Sent: 2/21/2023 4:02:18 PM
To: Mackey, Sarah D. [smackey@ftc.gov]

Subject: Accepted: nprm
Location: Microsoft Teams Meeting

Start: 2/24/2023 3:00:00 PM
End: 2/24/2023 4:00:00 PM
Show Time As: Busy

Appointment

From: Patel, Karuna [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=e048038b497a48c4bd77a368692ba9d2-0a42d819-26]
Sent: 2/15/2023 4:07:15 PM
To: Fisher, David [dfisher@ftc.gov]

Subject: Accepted: Non-Compete NPRM Extension Request
Location: Microsoft Teams Meeting

Start: 2/17/2023 11:30:00 AM
End: 2/17/2023 12:30:00 PM
Show Time As: Busy

From: Cady, Benjamin (CFPB) [Benjamin.Cady@cfpb.gov]
Sent: 2/1/2023 10:01:44 AM
To: Cady, Benjamin (CFPB) [Benjamin.Cady@cfpb.gov]; Mackey, Sarah D. [smackey@ftc.gov]; Lane, Shannon [slane@ftc.gov]; Matthews, Andrea (CFPB) [Andrea.Matthews@cfpb.gov]; Oppenheim, Emma (CFPB) [Emma.Oppenheim@cfpb.gov]

Subject: CFPB-FTC meeting re non-compete NPRM
Location: Microsoft Teams Meeting

Start: 2/27/2023 3:00:00 PM
End: 2/27/2023 3:30:00 PM
Show Time As: Tentative

Recurrence: (none)

Thank you for meeting with us. Sarah and Shannon – please forward this to anyone else on your end who should join.

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From: Drory, Danielle (ATR) [Danielle.Drory@usdoj.gov]
Sent: 1/19/2023 3:18:01 PM
To: Mackey, Sarah D. [smackey@ftc.gov]

Subject: Accepted: non-competes NPRM
Location: Microsoft Teams Meeting

Start: 1/20/2023 1:00:00 PM
End: 1/20/2023 1:30:00 PM
Show Time As: Busy

Recurrence: (none)

Appointment

From: Lubell, Karina (ATR) [Karina.Lubell@usdoj.gov]
Sent: 1/19/2023 3:17:53 PM
To: Mackey, Sarah D. [smackey@ftc.gov]

Subject: Accepted: non-competes NPRM
Location: Microsoft Teams Meeting

Start: 1/20/2023 1:00:00 PM
End: 1/20/2023 1:30:00 PM
Show Time As: Busy

Recurrence: (none)

Appointment

From: Scheinman, Sarah (ATR) [Sarah.Scheinman@usdoj.gov]
Sent: 1/19/2023 4:35:53 PM
To: Mackey, Sarah D. [smackey@ftc.gov]

Subject: Accepted: non-competes NPRM
Location: Microsoft Teams Meeting

Start: 1/20/2023 1:00:00 PM
End: 1/20/2023 1:30:00 PM
Show Time As: Busy

Recurrence: (none)

From: Mackey, Sarah D. [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=1b7693bc755c4fcd8cd62e6b2fde67d4-smackey]
Sent: 1/19/2023 3:17:20 PM
To: Lubell, Karina (ATR) [Karina.Lubell@usdoj.gov]; Lane, Shannon [slane@ftc.gov]; Drory, Danielle (ATR) [Danielle.Drory@usdoj.gov]

Subject: non-competes NPRM
Location: Microsoft Teams Meeting

Start: 1/20/2023 1:00:00 PM
End: 1/20/2023 1:30:00 PM
Show Time As: Tentative

Required Attendees: Lubell, Karina (ATR); Lane, Shannon; Drory, Danielle (ATR)

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Appointment

From: Mackey, Sarah D. [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=1b7693bc755c4fcd8cd62e6b2fde67d4-smackey]
Sent: 2/1/2023 10:04:20 AM
To: Cady, Benjamin (CFPB) [Benjamin.Cady@cfpb.gov]

Subject: Accepted: CFPB-FTC meeting re non-compete NPRM
Location: Microsoft Teams Meeting

Start: 2/27/2023 3:00:00 PM
End: 2/27/2023 3:30:00 PM
Show Time As: Busy

Appointment

From: Mackey, Sarah D. [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=1B7693BC755C4FCD8CD62E6B2FDE67D4-SMACKEY]
Sent: 1/27/2023 1:58:46 PM
To: Lane, Shannon [slane@ftc.gov]

Subject: Accepted: NPRM Comment Processing
Location: Microsoft Teams Meeting

Start: 1/31/2023 1:00:00 PM
End: 1/31/2023 1:30:00 PM

Recurrence: (none)

Appointment

From: Mackey, Sarah D. [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=1b7693bc755c4fcd8cd62e6b2fde67d4-smackey]
Sent: 2/7/2023 4:10:12 PM
To: Carter, Paige [pcarter@ftc.gov]

Subject: Accepted: Noncompete NPRM Check-in
Location: Microsoft Teams Meeting

Start: 2/8/2023 4:00:00 PM
End: 2/8/2023 4:45:00 PM
Show Time As: Busy

Appointment

From: Mackey, Sarah D. [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=1b7693bc755c4fcd8cd62e6b2fde67d4-smackey]
Sent: 2/7/2023 2:51:46 PM
To: Carter, Paige [pcarter@ftc.gov]

Subject: Accepted: Noncompete NPRM Check-in
Location: Microsoft Teams Meeting

Start: 2/15/2023 4:00:00 PM
End: 2/15/2023 4:45:00 PM
Show Time As: Busy

From: Lane, Shannon [slane@ftc.gov]
Sent: 1/30/2023 9:51:03 AM
To: Mackey, Sarah D. [smackey@ftc.gov]; Karuna Patel [(b)(6)]@gmail.com]

Subject: NPRM Comment Processing
Location: Microsoft Teams Meeting

Start: 1/31/2023 10:00:00 AM
End: 1/31/2023 10:30:00 AM
Show Time As: Tentative

Required Attendees: Mackey, Sarah D.; Karuna Patel

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Appointment

From: Mackey, Sarah D. [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=1b7693bc755c4fcd8cd62e6b2fde67d4-smackey]
Sent: 5/25/2021 8:36:49 AM
To: Mackey, Sarah D. [smackey@ftc.gov]

Subject: work on Non-compete clauses

Start: 5/26/2021 1:30:00 PM
End: 5/26/2021 6:30:00 PM
Show Time As: Busy

From: Mary K. Engle [(b)(6)@bbbnp.org]
Sent: 1/27/2023 8:09:32 AM
To: Mackey, Sarah D. [smackey@ftc.gov]
Subject: RE: Keynote speaking invitation - Chair Khan

Yes, that works. I'm a(b)(6)

From: Mackey, Sarah D. <smackey@ftc.gov>
Sent: Thursday, January 26, 2023 9:46 PM
To: Mary K. Engle(b)(6)@bbbnp.org>
Subject: Re: Keynote speaking invitation - Chair Khan

Can I call you at 9:30 Friday morning?

Get Outlook for iOS

From: Mary K. Engle (b)(6)@bbbnp.org>
Sent: Thursday, January 26, 2023 6:10:25 PM
To: Mackey, Sarah D. <smackey@ftc.gov>
Subject: Re: Keynote speaking invitation - Chair Khan

Hi Sarah!

Yes, it will be great to catch up! I am available tomorrow except from 10 to 12.

Thanks,
Mary

On Jan 26, 2023, at 5:06 PM, Mackey, Sarah D. <smackey@ftc.gov> wrote:

Thank you Eric!

Mary,

It would be so nice to catch up and discuss our upcoming event. Do you have time tomorrow? Does 10:00 work for you?

I'm going to move Eric and Elizabeth into bcc to free up their inboxes.

Best
Sarah

From: Eric D. Reicin (b)(6)@BBBNP.org>
Sent: Thursday, January 26, 2023 5:01 PM
To: Wilkins, Elizabeth <ewilkins1@ftc.gov>
Cc: Mackey, Sarah D. <smackey@ftc.gov>; Mary K. Engle (b)(6)@bbbnp.org>
Subject: RE: Keynote speaking invitation - Chair Khan

Absolutely. Happy to explore that as well.

Sarah, I believe you know my colleague Mary Engle, our EVP, Policy and former FTC leader. I am copying Mary on this email as it might make sense for the two of you to chat initially about the art of the possible for us (or with us as a conduit to other reasonable folks).

Eric

Best Regards,

Eric D. Reicin

President and Chief Executive Officer
BBB National Programs
1676 International Drive, Suite 550
McLean, Virginia 22102
(o) (b)(6)
(c) (b)(6)
bbbprograms.org

<image001.png>

From: Wilkins, Elizabeth <ewilkins1@ftc.gov>
Sent: Thursday, January 26, 2023 2:30 PM
To: Eric D. Reicin (b)(6) BBNP.org>
Cc: Mackey, Sarah D. <smackey@ftc.gov>
Subject: RE: Keynote speaking invitation - Chair Khan

Eric, on a separate issue, I wanted to connect you with our deputy OPP director, Sarah Mackey. We're working on a potential event around the noncompete NPRM, which I know you all have interest in. Is there someone on your team Sarah could reach out to in terms of potential participation?

From: Eric D. Reicin (b)(6) BBBNP.org>
Sent: Wednesday, January 25, 2023 4:34 PM
To: Wilkins, Elizabeth <ewilkins1@ftc.gov>
Cc: Mary K. Engle (b)(6) bbbnp.org>; Farrar, Douglas <dfarrar@ftc.gov>
Subject: RE: Keynote speaking invitation - Chair Khan

Thank you Elizabeth. Look forward to working with you Doug,

Eric

Best Regards,

Eric D. Reicin

President and Chief Executive Officer
BBB National Programs
1676 International Drive, Suite 550
McLean, Virginia 22102
(o (b)(6)
(c
(b)(6) bbbnp.org
bbbprograms.org

<image001.png>

From: Wilkins, Elizabeth <ewilkins1@ftc.gov>
Sent: Wednesday, January 25, 2023 4:31 PM
To: Eric D. Reicin <(b)(6) BNP.org>
Cc: Mary K. Engle (b)(6) bbbnp.org>; Farrar, Douglas <dfarrar@ftc.gov>
Subject: RE: Keynote speaking invitation - Chair Khan

Thanks Eric, it was great meeting you. I'm looping Doug Farrar, our Public Affairs Director, to follow up.

Best,
Elizabeth

From: Eric D. Reicin <(b)(6) @BBBNP.org>
Sent: Wednesday, January 25, 2023 4:27 PM
To: Wilkins, Elizabeth <ewilkins1@ftc.gov>
Cc: Mary K. Engle (b)(6) bnp.org>
Subject: Keynote speaking invitation - Chair Khan

Elizabeth –

I really enjoyed our time together at the ABA Government Liaison Meeting earlier this week. I appreciate the warm regards you expressed as well. I agree with you that the FTC and BBB National Programs have a long history of working together to enhance consumer trust in the marketplace.

Among our many collaborations, we have referred dozens of matters to the FTC, have worked closely with FTC staff, and have appreciated the opportunity to present at important FTC workshops such as speaking right after Chair Khan at the FTC Protecting Kids from Stealth Advertising in Digital Media event last October.

While our nonprofit administers 18 self-regulatory and co-regulatory programs such as the National Advertising Review Board, DSSRC, Children's Food and Beverage Initiative (CFBAI), BBB Autoline, Digital Advertising Accountability Program (DAAP), and Children's Advertising Review Unit (CARU), my email today is focused on our National Advertising Division Annual Conference.

As a follow-up to our chat Elizabeth, attached is a formal invitation for Chair Khan to keynote the National Advertising Division Annual Conference on either September 19 or 20. In 2022, Commissioner Bedoya was our keynote speaker (remarks) and Commissioner Slaughter keynoted in 2021 (remarks).

I have copied Mary Engle on my team on this email as well. Mary joined BBB National Programs as EVP, Policy after a nearly 30-year career at the Commission, where she led the FTC's Division of Advertising Practices for over 18 years.

I look forward to our next time together.

Eric

Best Regards,

Eric D. Reicin

President and Chief Executive Officer
BBB National Programs
1676 International Drive, Suite 550
McLean, Virginia 22102
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(c) (b)(6)
(b)(6) @bbbnp.org
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From: Rieke, Aaron [arieke@ftc.gov]
Sent: 11/3/2022 3:30:24 PM
To: Bedoya, Alvaro [abedoya@ftc.gov]; Miller, Max [mmiller6@ftc.gov]; Sanchez, Catherine [csanchez@ftc.gov]

Subject: noncompete debrief
Location: Microsoft Teams Meeting

Start: 11/3/2022 4:30:00 PM
End: 11/3/2022 5:00:00 PM
Show Time As: Tentative

Required Attendees: Bedoya, Alvaro; Miller, Max; Sanchez, Catherine

---

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From: Rieke, Aaron [arieke@ftc.gov]
Sent: 11/4/2022 1:04:31 PM
To: Bedoya, Alvaro [abedoya@ftc.gov]; Miller, Max [mmiller6@ftc.gov]; Sanchez, Catherine [csanchez@ftc.gov]

Subject: noncompete debrief, round 2
Location: Microsoft Teams Meeting

Start: 11/4/2022 1:30:00 PM
End: 11/4/2022 2:00:00 PM
Show Time As: Tentative

Required Attendees: Bedoya, Alvaro; Miller, Max; Sanchez, Catherine

Replacing our OPP checkin

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From: Miller, Max [mmiller6@ftc.gov]
Sent: 2/16/2023 11:56:53 AM
To: Bedoya, Alvaro [abedoya@ftc.gov]

Subject: Accepted: HOLD: Noncompete Listening Forum

Start: 2/16/2023 12:00:00 PM
End: 2/16/2023 3:00:00 PM

Recurrence: (none)

From: Miller, Max [mmiller6@ftc.gov]
Sent: 2/16/2023 11:56:52 AM
To: Bedoya, Alvaro [abedoya@ftc.gov]
CC: Drake, Aisha [adrake@ftc.gov]; Miller, Max [mmiller6@ftc.gov]

Subject: HOLD: Noncompete Listening Forum

Start: 2/16/2023 12:00:00 PM
End: 2/16/2023 3:00:00 PM
Show Time As: Tentative

Required Attendees: Bedoya, Alvaro
Optional Attendees: Drake, Aisha; Miller, Max

Now UPDATED with Link to the Speaker Room:

Public Webcast Link: https://kvgo.com (b)(6)

Speaker Room: https://openexc.zoom.us (b)(6)

Meeting ID: (b)(6)

Passcode: (b)(6)

From: Bedoya, Alvaro [abedoya@ftc.gov]
Sent: 11/14/2022 10:09:38 AM
To: Miller, Max [mmiller6@ftc.gov]; Sanchez, Catherine [csanchez@ftc.gov]; Wendling, Brett [bwendling@ftc.gov]; Greisman, Lois C. [LGREISMAN@ftc.gov]; Conlow, Kate [kconlow@ftc.gov]
CC: Tuttle, Bryce [btuttle@ftc.gov]

Subject: Franchisees and Noncompete
Location: Microsoft Teams Meeting

Start: 11/14/2022 1:15:00 PM
End: 11/14/2022 2:00:00 PM
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Recurrence: (none)

Required Attendees: Miller, Max; Sanchez, Catherine; Wendling, Brett; Greisman, Lois C.; Conlow, Kate
Optional Attendees: Tuttle, Bryce

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From: Miller, Max [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=7388bed73fae4f048bdd5da8e13010e2-mmiller6]
Sent: 1/24/2023 1:11:03 PM
To: Bedoya, Alvaro [abedoya@ftc.gov]; Bedoya, Alvaro [abedoya@ftc.gov]
CC: Drake, Aisha [adrake@ftc.gov]; Miller, Max [mmiller6@ftc.gov]

Subject: HOLD: Noncompete Listening Forum

Start: 2/16/2023 12:00:00 PM
End: 2/16/2023 3:00:00 PM
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Required Attendees: Bedoya, Alvaro
Optional Attendees: Drake, Aisha; Miller, Max

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From: Rieke, Aaron [arieke@ftc.gov]
Sent: 11/3/2022 3:30:26 PM
To: Rieke, Aaron [arieke@ftc.gov]; Bedoya, Alvaro [abedoya@ftc.gov]; Miller, Max [mmiller6@ftc.gov]; Sanchez, Catherine [csanchez@ftc.gov]

Subject: noncompete debrief
Location: Microsoft Teams Meeting

Start: 11/3/2022 4:30:00 PM
End: 11/3/2022 5:00:00 PM
Show Time As: Tentative

Required Attendees: Bedoya, Alvaro; Miller, Max; Sanchez, Catherine

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Sent: 11/4/2022 1:04:33 PM
To: Rieke, Aaron [arieke@ftc.gov]; Bedoya, Alvaro [abedoya@ftc.gov]; Miller, Max [mmiller6@ftc.gov]; Sanchez, Catherine [csanchez@ftc.gov]

Subject: noncompete debrief, round 2
Location: Microsoft Teams Meeting

Start: 11/4/2022 1:30:00 PM
End: 11/4/2022 2:00:00 PM
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Required Attendees: Bedoya, Alvaro; Miller, Max; Sanchez, Catherine

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From: Bedoya, Alvaro [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=d2266e5461a247afa7608a46e7db9436-abedoya]
Sent: 11/10/2022 4:21:30 PM
To: Tuttle, Bryce [btuttle@ftc.gov]

Subject: Accepted: OGC Call re Noncompete NPRM
Location: Microsoft Teams Meeting

Start: 11/10/2022 3:00:00 PM
End: 11/10/2022 3:30:00 PM
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From: Miller, Max [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=7388bed73fae4f048bdd5da8e13010e2-mmiller6]
Sent: 1/24/2023 1:11:03 PM
To: Bedoya, Alvaro [abedoya@ftc.gov]
CC: Miller, Max [mmiller6@ftc.gov]

Subject: HOLD: Noncompete Listening Forum

Start: 2/16/2023 12:00:00 PM
End: 2/16/2023 3:00:00 PM
Show Time As: Busy

Required Attendees: Bedoya, Alvaro
Optional Attendees: Miller, Max

Appointment

From: Childs, Annette [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=eb2afd1ac89b4c70a35b4f0e827b4ec5-2ba5f663-a8]
Sent: 1/20/2023 1:23:35 PM
To: Khan, Lina [lkhan@ftc.gov]

Subject: Noncompete Public Forum
Location: https://www.ftc.gov/news-event (b)(6)

Start: 2/16/2023 12:00:00 PM
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Public forum

From: Zhao, Daniel [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=d8d17e1a1b0644fd931c56ec899541e1-dzhao]
Sent: 2/10/2022 10:39:52 PM
To: Khan, Lina [lkhan@ftc.gov]

Subject: Meeting on Policy
Location: https://ftc.zoomgov.com/j/ (b)(6)

Start: 2/23/2022 3:45:00 PM
End: 2/23/2022 4:45:00 PM
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Sent: 2/10/2022 10:39:26 PM
To: Khan, Lina [lkhan@ftc.gov]

Subject: Meeting on Policy
Location: https://ftc.zoomgov.com (b)(6)

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Noncompete rulemaking – part 2

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Sent: 1/20/2023 1:23:35 PM
To: Khan, Lina [lkhan@ftc.gov]

Subject: NPRM

Start: 2/16/2023 12:00:00 PM
End: 2/16/2023 3:00:00 PM
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Appointment

From: Childs, Annette [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=eb2afd1ac89b4c70a35b4f0e827b4ec5-2ba5f663-a8]
Sent: 1/20/2023 1:23:35 PM
To: Khan, Lina [lkhan@ftc.gov]

Subject: NPRM
Location: https://www.ftc.gov/news-events/events/ (b)(6)

Start: 2/16/2023 12:00:00 PM
End: 2/16/2023 3:00:00 PM
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From: Sawkar, Anupama [asawkar@ftc.gov]
Sent: 1/19/2023 5:12:41 PM
To: Heimert, Andrew J. [AHEIMERT@ftc.gov]; Signs, Kelly [ksigns@ftc.gov]; Greene, Hillary [hgreene@ftc.gov]; Mark, Synda [smark@ftc.gov]; Mohr, Stephen A. [smohr@ftc.gov]; Andrew, Jordan S. [jandrew@ftc.gov]; Wohl, Sarah [swohl@ftc.gov]; Smith, Michael [msmith9@ftc.gov]; Gillen, Elizabeth A. [egillen@ftc.gov]; Green, Geoffrey [GGREEN@ftc.gov]; Ambrogi, Katherine A. [kambrogi@ftc.gov]; Frost, James [jfrost@ftc.gov]; Taronji, Jim [jtaronji@ftc.gov]; Jex, Elizabeth A. [EJEX@ftc.gov]; Holland, Caroline [cholland@ftc.gov]; Wilkins, Elizabeth [ewilkins1@ftc.gov]; Petrizzi, Maribeth [mpetrizzi@ftc.gov]; Huber, Susan [SHUBER@ftc.gov]; Mina, Angelike A. [AMINA@ftc.gov]; Horne, Kelly A. [khorne@ftc.gov]
CC: Mackey, Sarah D. [smackey@ftc.gov]; Sussman, Shaoul [ssussman@ftc.gov]

Subject: Roosevelt Institute discussion on innovation and antitrust (paper attached)
Attachments: Roosevelt Institute_Innovating Antitrust Law_202210.pdf
Location: https://us02web.zoom. (b)(6)

Start: 1/23/2023 3:00:00 PM
End: 1/23/2023 4:00:00 PM
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Required Attendees: Heimert, Andrew J.; Signs, Kelly; Greene, Hillary; Mark, Synda; Mohr, Stephen A.; Andrew, Jordan S.; Wohl, Sarah; Smith, Michael; Gillen, Elizabeth A.; Green, Geoffrey; Ambrogi, Katherine A.; Frost, James; Taronji, Jim; Jex, Elizabeth A.; Holland, Caroline; Wilkins, Elizabeth; Petrizzi, Maribeth; Huber, Susan; Mina, Angelike A.; Horne, Kelly A.
Optional Attendees: Mackey, Sarah D.; Sussman, Shaoul

Please feel free to forward to others who may be interested in attending.

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Innovating Antitrust Law:
How Innovation Really Happens and How Antitrust Law Should Adapt

Ketan Ahuja

October 2022

About the Author

Ketan Ahuja is a DPhil student in law at the University of Oxford. His research focuses on how to regulate market competition in ways that reduce inequality, share power, and support innovation and economic growth. He is currently investigating how we make sense of market competition using simplified heuristics and paradigms, and how these paradigms lead us to leave important considerations out of antitrust and competition policy. His work has been published by *Cambridge University Press*, Harvard Kennedy School's Center for Business and Government, and *ProMarket*.

Ketan also consults regularly on competitive strategy, industrial policy (with a focus on the clean energy sector), and competition policy issues. He is currently leading an initiative on Green Growth with The Growth Lab at Harvard University, which addresses how countries and regions can leverage industrial decarbonization to generate economic growth. His experience has spanned industrial policy and economic development initiatives with the US Department of Energy, commercial management in the private sector, and legal advisory work in antitrust and competition policy.

Acknowledgments

I am very grateful to Niko Lusiani, Emily DiVito, Erika Douglas, James McNerney, Beryl Frishtick, Suzanne Kahn, and Sonya Gurwitt for their helpful comments on this report. All errors remain my own.

Innovation is the most important driver of economic growth and is central to improving people's lives over the long run. Promoting innovation is, increasingly, a central feature of antitrust law, with antitrust practitioners in recent decades relying on economic analyses of innovation to interpret and enforce the law.

But antitrust practitioners' current paradigms on innovation are incomplete because they draw primarily on neoclassical approaches to economics, which analyze economic behavior as resulting from rational, utility-maximizing agents acting according to their own incentives. As a result, practitioners see innovation as a question primarily of the incentives of market agents. This mode of thinking came from 1970s market fundamentalist economists and commentators such as Robert Bork. But the ultimate dominance of neoclassical paradigms in antitrust occurred because the entire ideological spectrum of the antitrust community internalized neoclassical paradigms as it sought to improve antitrust law by incorporating economic research, which came largely from economics faculties employing a neoclassical methodology.

Incorporating diverse paradigms on innovation from other schools of economic thought into antitrust would lead competition policy to support innovation better, benefitting innovators, consumers, and workers—and leading to stronger, shared economic growth. In particular, competition policy must account for how innovation actually takes place. Research from across fields demonstrates that economic incentives alone don't just pull innovations into existence: Other factors and conditions must be present. A crucial theme in innovation research is that innovation is an emergent phenomenon resulting from mixing different capabilities (such as skillsets, technologies, or product components). Often, innovators have both pecuniary and nonpecuniary motivations, and the public sector plays a crucial role in shaping the rate and direction of innovation. It is time to bring these perspectives on innovation into competition policy.

Section 1 of this report addresses how economic paradigms shape antitrust interpretation. Section 2 contrasts incentive-based and capabilities-based views on innovation. Section 3 demonstrates that antitrust today primarily relies on an incentive-oriented understanding of innovation and ignores a capabilities-oriented understanding of innovation. Section 4 addresses how to integrate a capabilities-oriented understanding of innovation into antitrust. Section 5 covers examples and policy prescriptions.

1. ECONOMIC PARADIGMS FRAME ANTITRUST INTERPRETATION AND ENFORCEMENT, INCLUDING HOW WE THINK ABOUT THE INNOVATION PROCESS

Paradigms are beliefs that people or institutions hold that *structure* and *integrate* analytical solutions to narrow questions to solve complex problems. Paradigms represent assumptions about the way the world works: They shape what we decide to pay attention to when we model certain activities or attempt to explain certain phenomena. In short, paradigms are a form of worldview about a problem. Paradigms *structure* modeling and analysis of specific questions. In economic modeling, we need to form hypotheses about problems to render them analytically tractable. These hypotheses, which we base on our chosen paradigms, influence which features of a problem we consider relevant to a model. A standard paradigm in neoclassical economics is that economic agents are rational profit-maximizers, which leads to a modeling approach of maximizing the financial incentives of economic agents.

We also use paradigms to *integrate* narrow, technical analyses to build a broader understanding of a complex issue, using inductive reasoning. Integrating technical analyses into broader narratives requires us to fill in gaps, simplify, and generalize in a way that renders a complex problem tractable. Paradigms help us do this. For instance, we may develop a narrative around how innovation happens by combining different models or case studies about innovation in specific situations to infer a larger truth about innovation. Paradigms help us decide what aspects of models to pay attention to, and how to build an overall causal narrative.

Paradigms have more impact on an analysis when they *integrate* analyses into a broader narrative than when they *structure* a technical analysis on a narrow question. We can identify good answers to narrow questions, paying attention to case-specific nuances. But integrating technical analyses into broader narratives requires us to fill in gaps, simplify, and generalize, and we use paradigms extensively when doing so.

Of course, some paradigms are more accurate, and some less. Working with paradigms often means acknowledging that they represent only a part of the whole picture. Paradigms can be very hard to see from the inside of a coherent system because a paradigm shapes how we see the world—often, we need to step out of a particular worldview to understand its impact.

Paradigms about the economy affect many aspects of antitrust enforcement, with real implications for how firms compete. In some cases, antitrust enforcers use economic analysis to understand how the case might impact welfare, and paradigms structure these analyses. When creating general rules in antitrust, such as those prohibiting or allowing mergers under certain conditions, judges and policymakers rely on paradigms to integrate an understanding about how the economy works: They must do this to make decisions expediently, rather than exploring economic foundations in each case. For example, in antitrust we often design rules that are most likely to maximize the incentive of an economic agent to innovate, adopting a paradigm that innovation happens when incentivized agents apply effort to a problem.

Antitrust often decides whether to intervene to prevent harm to innovation according to general rules of law rather than case-specific economic analysis, which makes paradigms around innovation especially influential in deciding antitrust cases. Empirically evaluating the impact on economic welfare in all but the simplest cases is almost impossible (Hovenkamp and Scott Morton 2020). This is particularly true in innovation markets or when considering questions of harm to innovation, where evidence on new products is limited and often highly speculative, and it is often wiser to rely on general economic principles (Federico, Scott Morton, and Shapiro 2019).

Enforcers do, of course, pay close attention to case-specific features when applying antitrust rules to particular cases. Many theories of harm are decided under the rule of reason,[1] and enforcers conduct substantial analysis of economic effects in a given case. But even here, exactly what an enforcer must prove often depends more on general rules than specific contextual welfare evaluations. In innovation cases, proving empirically that firms reduced R&D on particular projects (thereby harming consumers) is generally impossible. Assertive antitrust enforcement only requires enforcers to show that firms would have less incentive to develop new products (Federico, Scott Morton, and Shapiro 2019).

2. TWO PARADIGMS ON INNOVATION: INNOVATION-AS-INCENTIVES OR INNOVATION-AS-CAPABILITIES

Innovation has been heavily studied in economics and the social sciences over the last 50 years. Two different approaches to understanding innovation are most relevant here.[2] The first approach, rooted in neoclassical economic traditions, understands innovation as taking place as a result of the efforts of appropriately incentivized market actors. This approach typically analyzes innovation as something that happens within a particular firm, and responds to clear material rewards. On this understanding, innovation policy should aim to maximize the financial incentives of discrete market actors (usually individual firms) to innovate.

The second approach understands innovation as "emerging" from a structure of social and technological relations that are conducive to innovation; for example, more innovation happens in Silicon Valley (where talent, funding, partners, universities, and customers exist in close proximity) than elsewhere. This approach focuses more on the relationships between firms, talent, customers, investors, research institutions, and partners, and understands innovation to come from sharing

[1] Under which antitrust litigators conduct a case-by-case analysis of the economic impacts of a specific practice to decide if it should be prohibited.

[2] Innovation research has arisen from many different perspectives. The vast and diverse literature on innovation is difficult to summarize comprehensively, and this report does not attempt to do so.

knowledge and resources among a variety of actors and classes" broadly, and research from different fields in the social sciences and suggests innovation policy should aim to structure social and technological relations in a way that supports innovation.

These approaches to understanding innovation are not mutually exclusive, and both make sense: From a venture capitalist's perspective, innovation happens because profit-motivated entrepreneurs take risks and work hard; from a bird's eye view economic perspective, the right circumstances draw innovation out of certain groups, firms, and places.

As explored below, competition policy primarily views innovation as a question of the incentives of market actors, and has neglected to consider what social and technological relationships might stimulate innovation. To best promote innovation, competition policy needs to combine its incentive-oriented approach with a richer understanding of how social relations can stimulate innovation.

a. Innovation-as-Incentives: Innovation Arises from Individual Market Actors Who Apply Effort to a Problem, Motivated by Appropriate Incentives

Neoclassical approaches to the economic analysis of industrial organization consider innovation to take place due to the efforts of appropriately incentivized market actors. We'll call this the Innovation-as-Incentives paradigm. These analyses try to balance the incentive created by letting innovators profit from their inventions with the pressure to innovate to stay ahead of competitors. Balancing these two sets of incentives will maximize the overall incentive to innovate (Federico, Scott Morton, and Shapiro 2019).

This Innovation-as-Incentives paradigm structures the way that neoclassical industrial organization economists analyze innovation in antitrust cases. For example, Federico, Langus, and Valletti (2017) detail a model in which all firms can eventually achieve a particular product innovation if they apply

sufficient effort. This model helps identify circumstances in which a merger reduces a firm's incentive to innovate. In this case, the paradigm that innovation arises from effort applied by a firm in response to incentives defines how Federico et al.'s model takes shape. The model works within this paradigm to structure an analysis to a narrow question on merger policy and innovation.

Policymakers and academics also use the Innovation-as-Incentives paradigm to integrate research to answer larger questions. Shapiro (2019) demonstrates this as he tries to tie together existing research on innovation into three principles:

- Contestability: Capturing profits from competitors spurs innovation.
- Appropriability: Being able to appropriate profits from an innovation spurs innovation activity.
- Synergy: Mergers of complementary assets can lead to innovation.

"Contestability" and "appropriability" are based on the incentives of innovators to innovate, and they predominate Shapiro's inquiry.

Shapiro's framework has been influential and is widely adopted by agencies and academics.[3] It has, for example, often been used to explain the European General Court's decision prohibiting the merger of Deutsche Börse and NYSE Euronext.[4] These competing stock exchanges pressured each other to innovate, and much of their innovation in trading technology came from their efforts to outdo each other to win business. While allowing them to combine would let the joint entity *appropriate* greater profits from each innovation (because the joint entity would apply innovations to more customers), on balance prohibiting their merger would maximize innovation incentives because the two stock exchanges were motivated to innovate to *contest* each other's business.

[3] See, for example, Competition Directorate-General of the European Commission, Competition Policy Brief: EU Merger Control and Innovation 2 (April 2016) and (Directorate-General for Research and Innovation (European Commission), Ezrachia, and Stuckeb 2020).

[4] See Case T-175/12 *Deutsche Börse v European Commission* (2015).

Exactly how this model of economic research informs competition and antitrust inquiry is complex, and covered in substantial detail elsewhere (Kokkoris and Valletti 2020; Federico, Scott Morton, and Shapiro 2019). For our purposes, it is enough to appreciate that a certain form of embedded paradigm shapes both the narrow analytical research that economists use to address scientific questions, as well as the broader conclusions that lawyers, economists, and policymakers draw around what promotes innovation in general. This paradigm embeds certain assumptions around how innovation takes place into antitrust that then determine the terrain of permissible policy interventions.

b. Innovation-as-Capabilities: Innovation Is an Emergent Phenomenon that Arises from Combining Capabilities in Conducive Environments

Where the Innovation-as-Incentives paradigm addresses how much effort market actors are likely to put into innovation in different circumstances, other research tries to understand the mechanics of how innovation actually happens. A standard paradigm within this line of research is that innovation takes place by combining pre-existing "ingredients" or capabilities in new ways. We'll call this the Innovation-as-Capabilities paradigm. Under this paradigm, innovations of a certain type are more likely to arise where more of the required capabilities are in close proximity to each other. Proximity here means relational proximity, or the ease with which market participants can combine different capabilities to come up with new products and services. This could include geographic proximity, but will also include the strength of social or professional ties between workers and customers, knowledge sharing between firms, and ease of access to opportunities or commercial partners. Innovations "emerge" from combining capabilities in new ways because the new system becomes more than the sum of its parts, achieving things its component capabilities cannot do alone.

Capabilities under this paradigm consist of the knowledge to do or make something. This knowledge can be recorded and transmitted as codes, manuals, or in books. But most useful knowledge in economic activity is tacit and is embedded in products, individuals, infrastructure, or organizations, particularly at a technological frontier. For example, to use a microwave, we do not have to

understand the physics behind a microwave, or how they are designed, built, or powered. All this knowledge is embedded in the microwave and made available to us to use as a functioning product.

A capability can therefore be transferred by moving a product through trade, moving teams or people with particular know-how, or moving knowledge through discussion or publication of manuals. As useful knowledge for production is often tacit, moving products or people often transfers a capability more effectively than sharing information in written publications. Capabilities are embedded practical knowledge that is difficult to transfer.

Research conducted under the Innovation-as-Capabilities paradigm is much more methodologically diverse than research conducted under the Innovation-as-Incentives paradigm. Research under the Innovation-as-Capabilities paradigm has touched disciplines as diverse as sociology, economic history, economic geography, complexity economics, and business strategy. These communities do not regularly engage with antitrust and competition practitioners and much of this research needs translating to apply it to competition policy.

Brian Arthur's (2009) foundational research elaborates how new technology emerges under the Innovation-as-Capabilities paradigm. He argues that new technologies are almost always a combination of existing technologies, and existing technologies are made up of smaller technologies organized into systems. Technology "evolves" as new components are added and systems are reorganized to improve a particular technology until the technology becomes mature and progress slows. New technologies can also emerge where they satisfy a particular need better than older ones. This paradigm informs a diverse collection of recent research from across the social sciences (see, for example, McNerney et al. 2011; Youn et al. 2015; Pichler, Lafond, and Farmer 2020; Cowan and Jonard 2003).

Innovation-as-Capabilities paradigms have substantially impacted work in economic geography, which examines why economic activity happens in certain places. Hidalgo and Hausmann's economic complexity framework infers a region's capabilities from what it produces and

demonstrates that processes with more capabilities and assets produce radically more—and more complex—products. Under this model, economic development takes place when particular areas acquire new capabilities, which they can recombine with their existing capabilities to produce new products and services.

Other research in economic geography validates that movement of knowledge workers is key to innovation. Saxenian (1996) argues that unrestricted movement of workers across firms was a key enabler of Silicon Valley's innovative dynamism. Hyde (2003) and Gilson (1999) argue that Silicon Valley as a whole outperformed Massachusetts so spectacularly in the 1980s and 1990s because California did not enforce employee noncompetes, leading to much more circulation of employees, know-how, and ideas between firms in California than in Massachusetts (Benkler 2017).

The Innovation-as-Capabilities paradigm has also influenced business writing on competitive strategy. Baldwin and Clark's (2000) research at Harvard Business School demonstrates that the computer industry has achieved remarkable levels of growth by embracing modularity and subsystems that can be innovated independently and integrated in new ways. In research conducted with the management consultancy BCG, Fink et al. (2017; 2019) model when companies should focus on acquiring more complex capabilities that would enable them to innovate in more complex ways, and when they should focus on exploiting their current capabilities.

c. Reconciling Innovation-as-Capabilities with Innovation-as-Incentives Frameworks

An Innovation-as-Capabilities paradigm does not necessarily conflict with an Innovation-as-Incentives approach: Innovation requires both incentives to motivate individual effort and required capabilities or ingredients to exist in a way that makes them easy to combine. Occasionally, however, there is tension between the policy prescriptions that incentive-based and capabilities-based approaches would suggest. An incentive-based understanding of innovation demands that the innovation is appropriable, and would therefore tend to privatize returns and allocate them to

particular innovators. Antitrust and intellectual property law, this approach has led to a strengthening of intellectual property rights (Benkler 2017). By contrast, a capabilities-based understanding of innovation would promote the sharing of capabilities across networks and among both market and non-market participants. In intellectual property law, a capabilities-based understanding would therefore suggest more sharing and weaker intellectual property rights (Benkler 2017). It may be that these two approaches to understanding innovation are challenging to hold together in different antitrust contexts, but this might be because policy has yet to seriously wrestle with an Innovation-as-Capabilities approach.

The government plays a different role under incentive-based and capabilities-based approaches to economic regulation: Under an incentive-based understanding of innovation, policy should aim to maximize the incentives of innovators to "pull" innovation from ordinary market processes. By contrast, a capabilities-based approach calls for a much more active "push" role for the state, in which government aims to supply missing capabilities, coordinate strategic networking and sharing of capabilities, and shape not just the rate but also the direction of innovative activity (Mazzucato 2013). Research accordingly suggests that policies to promote sharing of information on how to innovate are more effective than policies that increase incentives to innovate through the tax system, validating a capabilities-based understanding of innovation (Bell et al. 2019).

Moderna's recent patent dispute with the National Institutes of Health (NIH) demonstrates how this tension can be relevant to economic regulation. Moderna claims that its scientists deserve sole credit as inventors of a patent crucial to manufacturing its COVID-19 vaccine, whereas the NIH claims that this patent arose out of a multiyear collaboration during which the NIH and Moderna pooled their expertise, with many of the riskiest areas of research funded by the government (Robbins and Stolberg 2021). An Innovation-as-Incentives approach may give Moderna the patent—doing so would maximize Moderna's ability to appropriate returns from its investments in innovation and thereby incentivize future innovators. By contrast, an Innovation-as-Capabilities approach would recognize the deep collaboration involved in producing the COVID-19 vaccine, and support policies that

encourage this sort of sharing of information and collaboration, for which our current patent system may not be well-designed (Benkler 2017).

Both Innovation-as-Incentives and Innovation-as-Capabilities approaches are required to understand Moderna's creation of an mRNA COVID-19 vaccine. Government-directed industrial policy, sharing of information within networks, and public-private collaboration was just as important in the creation of the vaccine as private investment in response to incentives. Patent law must balance these approaches as it seeks to create economic regulation that supports innovation, and the same is true of antitrust and competition policy.

3. US ANTITRUST LAW PRIMARILY ADOPTS INNOVATION-AS-INCENTIVES PARADIGMS AND IGNORES INNOVATION-AS-CAPABILITIES PARADIGMS

US Antitrust practitioners to date have largely adopted the Innovation-as-Incentives paradigm (Shapiro 2019). The Innovation-as-Capabilities paradigm is missing almost entirely from US antitrust law—which suffers as a result.

We see this in US cases on the essential facilities doctrine, which obliges dominant companies to share essential infrastructure, facilities, or resources with smaller competitors. Where cornerstone essential facilities cases consider innovation, they adopt an Innovation-as-Incentives framing, which has shaped the parameters of legitimate debate around innovation and affected the development of the law. Analysis follows a similar pattern in other areas of antitrust, though it is beyond the scope of this report to address how innovation concerns arise in all areas of antitrust law.

An Innovation-as-Incentives approach was responsible for dramatically restricting the essential facilities doctrine in *Verizon v. Trinko* (2004), such that many practitioners consider it substantially impossible to bring a successful essential facilities claim against a dominant company (Guggenberger 2020). *Verizon v. Trinko* held that Verizon, in insufficiently sharing its

telecommunications infrastructure with rivals, did not violate antitrust doctrine on essential facilities. This decision was reached based on an incentive-oriented understanding of innovation: Not requiring companies to share innovations with their rivals would promote investment in innovation. Speaking for a majority on a unanimous Supreme Court, Justice Scalia stated:[5]

> The opportunity to charge monopoly prices—at least for a short period—is what attracts "business acumen" in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct.

Note that this application of the Innovation-as-Incentives paradigm did not mandate the particular result in *Trinko*. Innovation incentives can arise both from appropriating profits and from a need to stay ahead of close competitors (Federico, Scott Morton, and Shapiro 2019).[6] In *Trinko*, the Court could have obliged Verizon to share its network under the Innovation-as-Incentives paradigm if it thought that doing so would ensure that Verizon was subject to more acute competitive pressure.

But the Innovation-as-Incentives paradigm does structure how antitrust law frames the issue. This "framing" is not neutral: In *Trinko*, it led the Court to focus on a conception of innovation as a result of individual effort applied in response to incentives. Focusing on the individual firms in this way meant the Court did not engage with questions around what social relations would best facilitate innovation. The paradigm of Innovation-as-Incentives gave the Court a prism through which to view the case (adopted directly from neoclassical reasoning), which led the Court to focus on certain features at the expense of others. Legal commentary on the essential facilities doctrine and duties to

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[5] *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 US 398 (2004).

[6] Antitrust practitioners often refer to this tension as the Schumpeter/Arrow debate: Schumpeter argued that innovation incentives are often maximized when companies are allowed to exploit their innovations. Arrow, by contrast, argued that innovation incentives are often maximized where companies need to innovate to get ahead of close competitors.

deal has subsequently been dominated by the Innovation-as-Incentives paradigm, with similar results.[7]

The Federal Trade Commission's (FTC's) recent challenge to Facebook demonstrates just how much this incentive-oriented reasoning has scarred antitrust law. In its initial complaint, the FTC challenged Facebook's efforts to throttle access to its Application Programming Interfaces (APIs)—which determine how software applications can interoperate—and therefore degrade its competitors' ability to interoperate with its services. In dismissing the FTC's complaint, Judge Boasberg of the US District Court concluded that Facebook's refusal to interoperate with competitors could not violate US antitrust law. Consistent with previous decisions, Judge Boasberg relied on the Innovation-as-Incentives paradigm, stating:[8]

> [f]irms may acquire monopoly power by establishing an infrastructure that renders them uniquely suited to serve their customers. Compelling such firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities.

Based on a misunderstanding of how innovation works, Judge Boasberg insulated Facebook's most innovation-harming activities from antitrust challenge. He recused antitrust from taking a central role controlling key strategic interfaces for the recombination of technologies and components in the digital economy (APIs). Innovation-as-Capabilities research demands exactly the opposite: that antitrust meticulously safeguard the ability of new technologies to interoperate along key platform interfaces and stand firm against companies' attempts to bend these interfaces to their advantage. Antitrust law's failure to do so harms innovation and leaves us all worse off.

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[7] See Hovenkamp and Bohannan 2012, Chapter 11.

[8] Memorandum Opinion in *FTC v. Facebook* Case 1:20-cv-03590-JEB (D.D.C June 28, 2021) at page 35, quoting *Trinko*, 540 US at 407–08.

So what would an alternative judgment look like? As a thought experiment, we might consider how future Supreme Court Justices would frame their reasoning in *Verizon v. Trinko* in an alternate world where the Innovation-as-Capabilities paradigm is dominant, and the Innovation-as-Incentives paradigm was less gripping. Considering the facts of *Verizon v. Trinko*, a future Justice might reason:

> "The opportunity to innovate within a specific techno-economic domain requires that astute business people have access to that domain's essential capabilities, and that they can recombine these capabilities freely to create new products and services. Where unique capabilities are controlled by companies or their access is otherwise restricted, making these capabilities available for exchange as market commodities empowers entrepreneurs to experiment, which produces innovation and economic growth. To safeguard the ability to innovate, restricting access to a capability will be considered unlawful if that capability is not reasonably available elsewhere and that capability is required as an ingredient in new products and services."

Again, this reasoning does not predetermine whether Verizon must share its network with competitors, but it frames the impact of the case on innovation in a wholly different way (one that is well supported by economic research). To oblige Verizon to share its network, litigators must still demonstrate on the facts of the case that the network was an essential ingredient for innovation, and that equivalent capabilities were not available elsewhere (alongside other tests a court may choose to impose, such as those related to innovation incentives, proportionality, or materiality). Of course, properly integrating the Innovation-as-Capabilities paradigm into competition policy will require much more work than this thought experiment, but this example suggests one way to do so in the context of the essential facilities doctrine.

4. IMPLICATIONS OF INNOVATION-AS-CAPABILITIES PARADIGMS FOR ANTITRUST LAW AND POLICY

A competition policy based on Innovation-as-Capabilities paradigms would aim to maximize the available capabilities that innovators and economic actors can use to develop new ideas and launch new products. This sort of competition policy would aim to "modularize" markets where possible, by

ensuring that different components and capabilities that underlie broader technological systems are available to be sold, licensed, or provided for integration into other technologies. Protecting modularization is particularly important where new technologies or capabilities emerge that could lead to greater competition and innovation in a variety of related markets. In situations in which companies hoard or vigorously protect unique capabilities that could unlock broader innovation, competition policy would aim to make these capabilities tradable as market commodities when practicable—offering the company that owns the capability a fair rate of return to maintain innovation incentives.

Competition policy would also need to strictly control key interfaces between modules or around a network, technology, or platform, which would likely involve strong interoperability remedies. These interfaces dictate how capabilities can be recombined. Aside from technology interfaces, modularized innovation has many degrees of freedom and would not warrant heavy-handed intervention or scrutiny. These considerations are relevant to platforms as well as vertical and conglomerate theories of harm in antitrust.

An Innovation-as-Capabilities perspective suggests that competition policy should be concerned with ensuring workers can move easily between firms and knowledge can flow freely across networks. Since novel capabilities are often trapped in workers' tacit knowledge, movement of workers between firms is a key driver of innovation.

More generally, Innovation-as-Capabilities paradigms cast the role of government in competition policy in a different light. A commonly understood implication of the Innovation as Incentives paradigm is that government should conduct basic research as a public good (the results of which are rarely appropriable), but generally leave applied research to private sector actors motivated by their own incentives.

By contrast, the Innovation-as-Capabilities paradigm suggests that government has a key role in coordinating innovation communities, facilitating place-based clusters or ecosystems, and shaping

the pace and direction of innovation and many foundational technological breakthroughs have occurred through a blending of capabilities only achievable through government direction (Mazzucato 2013), most recently (and visibly) the development of mRNA COVID-19 vaccines. Placing emphasis on Innovation-as-Capabilities paradigms in antitrust demands that competition policy accepts an active role for government industrial policy, by curating innovation communities, sharing information, and modularizing technologies to open up access to key capabilities.

Integrating this understanding of government presents challenges for a competition policy achieved largely through judge-made antitrust law. Appreciating that government has an active, contextual role in facilitating collaboration, directing innovation and modularizing technologies puts competition policy in a domain that is increasingly administrative and less achievable through court litigation. A challenge for competition policy is how to filter these ideas on innovation into antitrust *law* that courts can apply, as opposed to policy criteria that properly belong to administrative government.

Capabilities paradigms would also bring social inequality on racial and gender lines more directly into antitrust analysis. Capabilities paradigms suggest that who can innovate depends on who has access to key capabilities that they can recombine. Access to these capabilities is distributed unequally in society, disadvantaging minorities and women (Bell et al. 2019). Antitrust theories of harm based on Innovation-as-Capabilities paradigms may consider whether disadvantaged groups lose access to key capabilities that hinder their ability to innovate.

Capabilities based policy solutions are not entirely new to antitrust: The essential facilities doctrine in the EU seems more congruent with a capabilities-oriented approach. Antitrust also has special provisions around research and development joint ventures that enable companies to share information and collaborate on innovation projects without violating antitrust rules.[9] And yet, where

[9] See the Research and Development Block Exemption under EU Competition law: Commission Regulation (EU) No 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements.

these solutions appear, they feel more like an afterthought, often justified without reference to economic research around Innovation-as-Capabilities, and as a side show to antitrust's dominant incentive-oriented economic reasoning.

To some degree, antitrust fails to integrate capabilities-based reasoning because of the skillsets of competition economists. Competition policy's increasing reliance on economic reasoning is valuable, but there is a certain methodological homogeneity in competition policy communities. Opening up competition policy to a greater diversity of economic thought would improve economic reasoning in competition policy.

More importantly, competition policy lacks a simple model based on Innovation-as-Capabilities paradigms that judges and lawyers can apply in legal reasoning. Innovation-as-Incentives paradigms provide a simple, tractable model for how innovation works. Its implications are easy to understand, and they frame the questions we ask, concerns we raise, and answers we give. Innovation-as-Incentives reasoning also coheres with broader neoclassical ideas within antitrust, making for a more cohesive (if simplified) explanatory framework. Competition policy must adopt similarly simple and tractable heuristics based on the Innovation-as-Capabilities paradigm.

Antitrust should adopt the Innovation-as-Capabilities paradigm with vigor, integrating it alongside the current incentive-oriented approach. Antitrust's exclusive reliance on the Innovation-as-Incentives paradigm may lead it to endorse the activities of economic agents who are blocking the progress of innovation in ways that may not be recognized. The specifics of adopting the Innovation-as Capabilities paradigm will involve careful contextual determinations. In general, antitrust must acknowledge an active role for government in shaping technological development and should see itself as a part of this project. Doing so would involve adopting heuristics around modularizing capabilities, strictly controlling platform interfaces or nodes that connect different subsystems, and promoting free flows of information and movement of workers.

An Innovation-as-Capabilities approach would suggest that antitrust take an assertive stance on particular questions, such as those related to vertical and conglomerate mergers, essential facilities, and employee noncompetes. This section explores these policy prescriptions (although full analysis of the impact of the Innovation-as-Capabilities paradigm on antitrust law lies beyond the scope of this report).

a. Prevent Vertical and Conglomerate Mergers that Restrict Access to Important Capabilities

Merger policy has the potential to keep important capabilities independent and make them available to many innovators, not just aggressive and well-funded acquirers. According to established thinking in US antitrust law, vertical and conglomerate mergers should only matter when they have the potential to affect horizontal competition within a market. To be sure, an innovation market may be different from a firm's ordinary market for antitrust purposes, as it encompasses all areas of activity the firm may wish to move into.[10] But the main focus is on horizontal parameters of competition that shape incentives to reduce prices, improve quality, and innovate.

An Innovation-as-Capabilities worldview would take vertical and conglomerate mergers much more seriously. It would aim to preserve different capabilities as separate elements, ensuring that unique technologies and services can exist on an independent footing, available to be integrated into multiple different processes, platforms, and systems at once. It would have a much stronger preference to license capabilities to different market actors on a non-exclusive basis than to integrate of a set of capabilities into a single firm through a merger, despite any synergies or efficiencies: Nonexclusive licensing allows capabilities to be repackaged into many different systems.

[10] See the concept of innovation spaces in Kokkoris and Valletti 2020.

In any given case, courts would need to make tricky determinations of fact about whether a merger would remove a unique set of capabilities from the market. Framing merger analysis in this way would represent a different approach in vertical and conglomerate merger cases. Economic research based on Innovation-as-Capabilities paradigms suggests that courts should be asking these questions, at the very least.

This approach would strengthen theories of harm in vertical and conglomerate mergers involving technology platforms. Google's recent acquisition of Fitbit demonstrates this dynamic: The Google-Fitbit merger deeply concerned many observers in the antitrust community as it involved Google folding another large company into its dominant platform ecosystem. But Google and Fitbit were not horizontal competitors and so their merger was unobjectionable under traditional theory. In an enforcement action in Europe, the European Commission's investigation raised concerns that acquiring Fitbit's data would entrench Google's monopoly in digital advertising. It cleared the transaction, accepting three principal remedies focused on acquisition and use of consumer data:

1) That Google would not use Fitbit's data in its online advertising;
2) That Google would allow competitors access to Fitbit's data through its (currently nascent) Application Programming Interfaces; and
3) That Google would continue to allow competitor health tracking products nondiscriminatory access to its Android software.

An Innovation-as-Capabilities perspective would approach the case differently. The primary concern would not be how the merger might affect horizontal competition in the market for digital advertising, but whether the merger would stymie the emergence of a capability "module" that comprises Fitbit and its functionality, one that could be integrated with other systems or components. This perspective would examine whether (outside Google) Fitbit would be much more likely to modularize its key features and license them to others on a nonexclusive basis to promote innovation in adjacent or related products or services. The European Commission's remedies, one of which was around preserving Fitbit's current open access Application Programming Interfaces, touch

on this area of concern. An Innovation-as-Capabilities approach would likely mandate a stricter remedy, as its concern is not Google's data monopoly in advertising markets but whether Fitbit would develop its Application Programming Interfaces into an independent modularized capability. A similar approach is applicable to ongoing merger reviews by antitrust authorities in technology platform cases, such as Illumina-Grail and Microsoft-Activision.

A legal test for vertical or conglomerate mergers based on this reasoning might suggest that they are permissible where they do not remove or hinder an important capability or set of capabilities from integration into new products, services, or applications on a nonexclusive basis (and do not otherwise fall foul of conventional approaches to merger analysis).

b. Strengthen Antitrust Doctrine around Essential Facilities, Margin Squeezing, and Vertical Theories of Harm in Unilateral Cases

An Innovation-as-Capabilities approach would support a much more assertive essential facilities doctrine in antitrust law around unilateral conduct. It would aim to make particular key capabilities of dominant unilateral companies available in adjacent markets to innovators and competitors. In digital markets, the Innovation-as-Capabilities paradigm would advocate for strong interoperability rules across platforms and between services.

A legal test for such a doctrine might look similar to what European competition law has developed in *IMS Health* and *Microsoft*, where a company must license access to an essential facility where it is needed to develop a new product or service or make technological progress on a secondary market. Courts and commentators should acknowledge that these tests represent a product of valid economic principles, even though they may at times be in tension with dominant neoclassical approaches to economics.

The burgeoning electric vehicle industry demonstrates how this approach might apply: Currently, electric vehicle charging in the US is highly fragmented, comprised of many different proprietary networks, apps, and subscription plans. This hinders efficient adoption of electric vehicles, as interoperable EV charging is a required capability for the adoption of electric vehicles (Hawkins 2021). An Innovation-as-Incentives approach may incline antitrust practitioners to support the current market dynamic, as electric charging network providers must be able to appropriate returns on their investments to maintain investment incentives. By contrast, an Innovation-as-Capabilities approach might decide that this dynamic triggers antitrust intervention under an assertive essential facilities doctrine, imposing interoperability and access requirements where administrable as a matter of law. Of course, careful inquiry into the facts of this situation (which is beyond our scope) would have to precede any remedy, but an assertive capabilities-based regime might consider this situation worthy of investigation.

Deft legal analysis could reconcile a strong essential facilities doctrines based on this approach with the general principle that a company does not have a duty to deal with its competitors.[11] It could, for example, mandate that a company only be required to give access to its technology or facilities when access would be required to promote technological development in an adjacent market, which would broadly mirror the essential facilities doctrine in European competition law. There are significant administrability concerns for judicial mandates around interoperability and access to essential facilities; these concerns could be addressed through a regulatory rather than a judicial approach to competition policy.

c. Prohibit Employee Noncompetes

An Innovation-as-Capabilities approach suggests that competition policy would ban employee noncompetes. Movement of employees between companies is a key enabler of innovation, even though it may reduce appropriability of a company's innovations and may therefore reduce

[11] See *United States v. Colgate & Co.*, 250 US 300 (1919).

investment incentives. A President Biden's Executive Order on Competition suggests that this is (rightly) a key administration priority: Section 5(g) of the order directs the Chair of the FTC to consider rulemaking around unfair restrictions of employee mobility. Innovation-as-Capabilities research suggests that these noncompete clauses are a central concern of competition policy rather than merely an "unfair" restriction on workers to be addressed with the FTC's administrative rulemaking authority on unfair methods of competition.

This approach may also bring competition policy in greater conflict with trade secret doctrines and intellectual property law. Other commentators have thoroughly examined the delicate relationship between competition law and intellectual property. For our purposes, it is sufficient to observe that the Innovation-as-Capabilities approach might modestly renegotiate this relationship to facilitate greater movement of ideas and less protection of trade secrets. Economic policy would thereby favor market actors appropriating profits from innovation through good execution to a relatively greater extent than by legally protecting innovations using intellectual property law.

6. CONCLUSION

To better support innovation, competition policy should embrace new economic voices. In particular, it should draw on research based on Innovation-as-Capabilities paradigms to augment existing incentive-oriented analyses familiar to neoclassical economic reasoning.

Translating economic research around Innovation-as-Capabilities into a tractable framework that lawyers can use represents a serious challenge. This report proposes that such a framework would prioritize modularization of technologies, control key interfaces for integration strictly, promote movement of employees between firms, and preserve emerging new technologies or capabilities as independent entities available for open-access licensing or use in multiple different contexts. This suggests three specific policy prescriptions:

1. Scrutinize vertical and conglomerate mergers closely, questioning whether they remove a set of capabilities from open market access;
2. Mandate a strong essential facilities doctrine, which modularizes key capabilities of dominant firms to make them accessible to the market, and controls key technological interfaces to make technologies interoperable. Competition policy must balance this approach with the need to ensure that remedies remain administrable and do not unduly harm innovation incentives; and
3. Refuse to enforce employee noncompetes to promote a free flow between firms of the tacit knowledge and capabilities that are essential to innovation.

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Appointment

From: Mackey, Sarah D. [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=1B7693BC755C4FCD8CD62E6B2FDE67D4-SMACKEY]
Sent: 7/26/2022 4:52:19 PM
To: Lipsitz, Michael [mlipsitz@ftc.gov]

Subject: Accepted: FTC Discussion of DC Noncompete Bill with Margaret O'Hora
Location: https://ftc.zoomgov.com/j (b)(6)

Start: 8/1/2022 11:00:00 AM
End: 8/1/2022 11:30:00 AM

Recurrence: (none)

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Sent: 7/28/2022 1:28:27 PM
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Start: 8/10/2022 1:00:00 PM
End: 8/10/2022 1:30:00 PM

Recurrence: (none)

From: Sawkar, Anupama [asawkar@ftc.gov]
Sent: 1/9/2023 7:20:15 PM
To: Heimert, Andrew J. [AHEIMERT@ftc.gov]; Signs, Kelly [ksigns@ftc.gov]; Greene, Hillary [hgreene@ftc.gov]; Mark, Synda [smark@ftc.gov]; Mohr, Stephen A. [smohr@ftc.gov]; Andrew, Jordan S. [jandrew@ftc.gov]; Wohl, Sarah [swohl@ftc.gov]; Smith, Michael [msmith9@ftc.gov]; Gillen, Elizabeth A. [egillen@ftc.gov]; Green, Geoffrey [GGREEN@ftc.gov]; Ambrogi, Katherine A. [kambrogi@ftc.gov]; Frost, James [jfrost@ftc.gov]; Taronji, Jim [jtaronji@ftc.gov]; Jex, Elizabeth A. [EJEX@ftc.gov]; Holland, Caroline [cholland@ftc.gov]; Wilkins, Elizabeth [ewilkins1@ftc.gov]
CC: Mackey, Sarah D. [smackey@ftc.gov]

Subject: Please Hold: Roosevelt Institute discussion on innovation and antitrust (paper attached)
Attachments: Roosevelt Institute_Innovating Antitrust Law_202210.pdf
Location: Video conference link to follow

Start: 1/23/2023 3:00:00 PM
End: 1/23/2023 4:00:00 PM
Show Time As: Tentative

Required Attendees: Heimert, Andrew J.; Signs, Kelly; Greene, Hillary; Mark, Synda; Mohr, Stephen A.; Andrew, Jordan S.; Wohl, Sarah; Smith, Michael; Gillen, Elizabeth A.; Green, Geoffrey; Ambrogi, Katherine A.; Frost, James; Taronji, Jim; Jex, Elizabeth A.; Holland, Caroline; Wilkins, Elizabeth
Optional Attendees: Mackey, Sarah D.

Please feel free to forward to others who may be interested in attending.

Innovating Antitrust Law:
How Innovation Really Happens and How Antitrust Law Should Adapt

Ketan Ahuja

October 2022

About the Author

Ketan Ahuja is a DPhil student in law at the University of Oxford. His research focuses on how to regulate market competition in ways that reduce inequality, share power, and support innovation and economic growth. He is currently investigating how we make sense of market competition using simplified heuristics and paradigms, and how these paradigms lead us to leave important considerations out of antitrust and competition policy. His work has been published by *Cambridge University Press*, Harvard Kennedy School's Center for Business and Government, and *ProMarket*.

Ketan also consults regularly on competitive strategy, industrial policy (with a focus on the clean energy sector), and competition policy issues. He is currently leading an initiative on Green Growth with The Growth Lab at Harvard University, which addresses how countries and regions can leverage industrial decarbonization to generate economic growth. His experience has spanned industrial policy and economic development initiatives with the US Department of Energy, commercial management in the private sector, and legal advisory work in antitrust and competition policy.

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Innovation is the most important driver of economic growth and is central to improving people's lives over the long run. Promoting innovation is, increasingly, a central feature of antitrust law, with antitrust practitioners in recent decades relying on economic analyses of innovation to interpret and enforce the law.

But antitrust practitioners' current paradigms on innovation are incomplete because they draw primarily on neoclassical approaches to economics, which analyze economic behavior as resulting from rational, utility-maximizing agents acting according to their own incentives. As a result, practitioners see innovation as a question primarily of the incentives of market agents. This mode of thinking came from 1970s market fundamentalist economists and commentators such as Robert Bork. But the ultimate dominance of neoclassical paradigms in antitrust occurred because the entire ideological spectrum of the antitrust community internalized neoclassical paradigms as it sought to improve antitrust law by incorporating economic research, which came largely from economics faculties employing a neoclassical methodology.

Incorporating diverse paradigms on innovation from other schools of economic thought into antitrust would lead competition policy to support innovation better, benefitting innovators, consumers, and workers—and leading to stronger, shared economic growth. In particular, competition policy must account for how innovation actually takes place. Research from across fields demonstrates that economic incentives alone don't just pull innovations into existence: Other factors and conditions must be present. A crucial theme in innovation research is that innovation is an emergent phenomenon resulting from mixing different capabilities (such as skillsets, technologies, or product components). Often, innovators have both pecuniary and nonpecuniary motivations, and the public sector plays a crucial role in shaping the rate and direction of innovation. It is time to bring these perspectives on innovation into competition policy.

Section 1 of this report addresses how economic paradigms shape antitrust interpretation. Section 2 contrasts incentive-based and capabilities-based views on innovation. Section 3 demonstrates that antitrust today primarily relies on an incentive-oriented understanding of innovation and ignores a capabilities-oriented understanding of innovation. Section 4 addresses how to integrate a capabilities-oriented understanding of innovation into antitrust. Section 5 covers examples and policy prescriptions.

1. ECONOMIC PARADIGMS FRAME ANTITRUST INTERPRETATION AND ENFORCEMENT, INCLUDING HOW WE THINK ABOUT THE INNOVATION PROCESS

Paradigms are beliefs that people or institutions hold that *structure* and *integrate* analytical solutions to narrow questions to solve complex problems. Paradigms represent assumptions about the way the world works: They shape what we decide to pay attention to when we model certain activities or attempt to explain certain phenomena. In short, paradigms are a form of worldview about a problem. Paradigms *structure* modeling and analysis of specific questions. In economic modeling, we need to form hypotheses about problems to render them analytically tractable. These hypotheses, which we base on our chosen paradigms, influence which features of a problem we consider relevant to a model. A standard paradigm in neoclassical economics is that economic agents are rational profit-maximizers, which leads to a modeling approach of maximizing the financial incentives of economic agents.

We also use paradigms to *integrate* narrow, technical analyses to build a broader understanding of a complex issue, using inductive reasoning. Integrating technical analyses into broader narratives requires us to fill in gaps, simplify, and generalize in a way that renders a complex problem tractable. Paradigms help us do this. For instance, we may develop a narrative around how innovation happens by combining different models or case studies about innovation in specific situations to infer a larger truth about innovation. Paradigms help us decide what aspects of models to pay attention to, and how to build an overall causal narrative.

Paradigms have more impact on an analysis when they *integrate* analyses into a broader narrative than when they *structure* a technical analysis on a narrow question. We can identify good answers to narrow questions, paying attention to case-specific nuances. But integrating technical analyses into broader narratives requires us to fill in gaps, simplify, and generalize, and we use paradigms extensively when doing so.

Of course, some paradigms are more accurate, and some less. Working with paradigms often means acknowledging that they represent only a part of the whole picture. Paradigms can be very hard to see from the inside of a coherent system because a paradigm shapes how we see the world—often, we need to step out of a particular worldview to understand its impact.

Paradigms about the economy affect many aspects of antitrust enforcement, with real implications for how firms compete. In some cases, antitrust enforcers use economic analysis to understand how the case might impact welfare, and paradigms structure these analyses. When creating general rules in antitrust, such as those prohibiting or allowing mergers under certain conditions, judges and policymakers rely on paradigms to integrate an understanding about how the economy works: They must do this to make decisions expediently, rather than exploring economic foundations in each case. For example, in antitrust we often design rules that are most likely to maximize the incentive of an economic agent to innovate, adopting a paradigm that innovation happens when incentivized agents apply effort to a problem.

Antitrust often decides whether to intervene to prevent harm to innovation according to general rules of law rather than case-specific economic analysis, which makes paradigms around innovation especially influential in deciding antitrust cases. Empirically evaluating the impact on economic welfare in all but the simplest cases is almost impossible (Hovenkamp and Scott Morton 2020). This is particularly true in innovation markets or when considering questions of harm to innovation, where evidence on new products is limited and often highly speculative, and it is often wiser to rely on general economic principles (Federico, Scott Morton, and Shapiro 2019).

Enforcers do, of course, pay close attention to case-specific features when applying antitrust rules to particular cases. Many theories of harm are decided under the rule of reason,[1] and enforcers conduct substantial analysis of economic effects in a given case. But even here, exactly what an enforcer must prove often depends more on general rules than specific contextual welfare evaluations. In innovation cases, proving empirically that firms reduced R&D on particular projects (thereby harming consumers) is generally impossible. Assertive antitrust enforcement only requires enforcers to show that firms would have less incentive to develop new products (Federico, Scott Morton, and Shapiro 2019).

2. TWO PARADIGMS ON INNOVATION: INNOVATION-AS-INCENTIVES OR INNOVATION-AS-CAPABILITIES

Innovation has been heavily studied in economics and the social sciences over the last 50 years. Two different approaches to understanding innovation are most relevant here.[2] The first approach, rooted in neoclassical economic traditions, understands innovation as taking place as a result of the efforts of appropriately incentivized market actors. This approach typically analyzes innovation as something that happens within a particular firm, and responds to clear material rewards. On this understanding, innovation policy should aim to maximize the financial incentives of discrete market actors (usually individual firms) to innovate.

The second approach understands innovation as "emerging" from a structure of social and technological relations that are conducive to innovation; for example, more innovation happens in Silicon Valley (where talent, funding, partners, universities, and customers exist in close proximity) than elsewhere. This approach focuses more on the relationships between firms, talent, customers, investors, research institutions, and partners, and understands innovation to come from sharing

[1] Under which antitrust litigators conduct a case-by-case analysis of the economic impacts of a specific practice to decide if it should be prohibited.

[2] Innovation research has arisen from many different perspectives. The vast and diverse literature on innovation is difficult to summarize comprehensively, and this report does not attempt to do so.

knowledge and resources among a variety of actors and draws broadly on research from different fields in the social sciences and suggests innovation policy should aim to structure social and technological relations in a way that supports innovation.

These approaches to understanding innovation are not mutually exclusive, and both make sense: From a venture capitalist's perspective, innovation happens because profit-motivated entrepreneurs take risks and work hard; from a bird's eye view economic perspective, the right circumstances draw innovation out of certain groups, firms, and places.

As explored below, competition policy primarily views innovation as a question of the incentives of market actors, and has neglected to consider what social and technological relationships might stimulate innovation. To best promote innovation, competition policy needs to combine its incentive-oriented approach with a richer understanding of how social relations can stimulate innovation.

a. Innovation-as-Incentives: Innovation Arises from Individual Market Actors Who Apply Effort to a Problem, Motivated by Appropriate Incentives

Neoclassical approaches to the economic analysis of industrial organization consider innovation to take place due to the efforts of appropriately incentivized market actors. We'll call this the Innovation-as-Incentives paradigm. These analyses try to balance the incentive created by letting innovators profit from their inventions with the pressure to innovate to stay ahead of competitors. Balancing these two sets of incentives will maximize the overall incentive to innovate (Federico, Scott Morton, and Shapiro 2019).

This Innovation-as-Incentives paradigm structures the way that neoclassical industrial organization economists analyze innovation in antitrust cases. For example, Federico, Langus, and Valletti (2017) detail a model in which all firms can eventually achieve a particular product innovation if they apply

sufficient effort. This model helps identify circumstances in which a merger reduces a firm's incentive to innovate. In this case, the paradigm that innovation arises from effort applied by a firm in response to incentives defines how Federico et al.'s model takes shape. The model works within this paradigm to structure an analysis to a narrow question on merger policy and innovation.

Policymakers and academics also use the Innovation-as-Incentives paradigm to integrate research to answer larger questions. Shapiro (2019) demonstrates this as he tries to tie together existing research on innovation into three principles:

- Contestability: Capturing profits from competitors spurs innovation.
- Appropriability: Being able to appropriate profits from an innovation spurs innovation activity.
- Synergy: Mergers of complementary assets can lead to innovation.

"Contestability" and "appropriability" are based on the incentives of innovators to innovate, and they predominate Shapiro's inquiry.

Shapiro's framework has been influential and is widely adopted by agencies and academics.[3] It has, for example, often been used to explain the European General Court's decision prohibiting the merger of Deutsche Börse and NYSE Euronext.[4] These competing stock exchanges pressured each other to innovate, and much of their innovation in trading technology came from their efforts to outdo each other to win business. While allowing them to combine would let the joint entity *appropriate* greater profits from each innovation (because the joint entity would apply innovations to more customers), on balance prohibiting their merger would maximize innovation incentives because the two stock exchanges were motivated to innovate to *contest* each other's business.

[3] See, for example, Competition Directorate-General of the European Commission, Competition Policy Brief: EU Merger Control and Innovation 2 (April 2016) and (Directorate-General for Research and Innovation (European Commission), Ezrachia, and Stuckeb 2020).

[4] See Case T-175/12 *Deutsche Börse v European Commission* (2015).

Exactly how this model of economic research informs competition and antitrust inquiry is complex, and covered in substantial detail elsewhere (Kokkoris and Valletti 2020; Federico, Scott Morton, and Shapiro 2019). For our purposes, it is enough to appreciate that a certain form of embedded paradigm shapes both the narrow analytical research that economists use to address scientific questions, as well as the broader conclusions that lawyers, economists, and policymakers draw around what promotes innovation in general. This paradigm embeds certain assumptions around how innovation takes place into antitrust that then determine the terrain of permissible policy interventions.

b. Innovation-as-Capabilities: Innovation Is an Emergent Phenomenon that Arises from Combining Capabilities in Conducive Environments

Where the Innovation-as-Incentives paradigm addresses how much effort market actors are likely to put into innovation in different circumstances, other research tries to understand the mechanics of how innovation actually happens. A standard paradigm within this line of research is that innovation takes place by combining pre-existing "ingredients" or capabilities in new ways. We'll call this the Innovation-as-Capabilities paradigm. Under this paradigm, innovations of a certain type are more likely to arise where more of the required capabilities are in close proximity to each other. Proximity here means relational proximity, or the ease with which market participants can combine different capabilities to come up with new products and services. This could include geographic proximity, but will also include the strength of social or professional ties between workers and customers, knowledge sharing between firms, and ease of access to opportunities or commercial partners. Innovations "emerge" from combining capabilities in new ways because the new system becomes more than the sum of its parts, achieving things its component capabilities cannot do alone.

Capabilities under this paradigm consist of the knowledge to do or make something. This knowledge can be recorded and transmitted as codes, manuals, or in books. But most useful knowledge in economic activity is tacit and is embedded in products, individuals, infrastructure, or organizations, particularly at a technological frontier. For example, to use a microwave, we do not have to

understand the physics behind a microwave, or how they are designed, built, or powered. All this knowledge is embedded in the microwave and made available to us to use as a functioning product.

A capability can therefore be transferred by moving a product through trade, moving teams or people with particular know-how, or moving knowledge through discussion or publication of manuals. As useful knowledge for production is often tacit, moving products or people often transfers a capability more effectively than sharing information in written publications. Capabilities are embedded practical knowledge that is difficult to transfer.

Research conducted under the Innovation-as-Capabilities paradigm is much more methodologically diverse than research conducted under the Innovation-as-Incentives paradigm. Research under the Innovation-as-Capabilities paradigm has touched disciplines as diverse as sociology, economic history, economic geography, complexity economics, and business strategy. These communities do not regularly engage with antitrust and competition practitioners and much of this research needs translating to apply it to competition policy.

Brian Arthur's (2009) foundational research elaborates how new technology emerges under the Innovation-as-Capabilities paradigm. He argues that new technologies are almost always a combination of existing technologies, and existing technologies are made up of smaller technologies organized into systems. Technology "evolves" as new components are added and systems are reorganized to improve a particular technology until the technology becomes mature and progress slows. New technologies can also emerge where they satisfy a particular need better than older ones. This paradigm informs a diverse collection of recent research from across the social sciences (see, for example, McNerney et al. 2011; Youn et al. 2015; Pichler, Lafond, and Farmer 2020; Cowan and Jonard 2003).

Innovation-as-Capabilities paradigms have substantially impacted work in economic geography, which examines why economic activity happens in certain places. Hidalgo and Hausmann's economic complexity framework infers a region's capabilities from what it produces and

demonstrates that places with more capabilities are able to produce radically more—and more complex—products. Under this model, economic development takes place when particular areas acquire new capabilities, which they can recombine with their existing capabilities to produce new products and services.

Other research in economic geography validates that movement of knowledge workers is key to innovation. Saxenian (1996) argues that unrestricted movement of workers across firms was a key enabler of Silicon Valley's innovative dynamism. Hyde (2003) and Gilson (1999) argue that Silicon Valley as a whole outperformed Massachusetts so spectacularly in the 1980s and 1990s because California did not enforce employee noncompetes, leading to much more circulation of employees, know-how, and ideas between firms in California than in Massachusetts (Benkler 2017).

The Innovation-as-Capabilities paradigm has also influenced business writing on competitive strategy. Baldwin and Clark's (2000) research at Harvard Business School demonstrates that the computer industry has achieved remarkable levels of growth by embracing modularity and subsystems that can be innovated independently and integrated in new ways. In research conducted with the management consultancy BCG, Fink et al. (2017; 2019) model when companies should focus on acquiring more complex capabilities that would enable them to innovate in more complex ways, and when they should focus on exploiting their current capabilities.

c. Reconciling Innovation-as-Capabilities with Innovation-as-Incentives Frameworks

An Innovation-as-Capabilities paradigm does not necessarily conflict with an Innovation-as-Incentives approach: Innovation requires both incentives to motivate individual effort and required capabilities or ingredients to exist in a way that makes them easy to combine. Occasionally, however, there is tension between the policy prescriptions that incentive-based and capabilities-based approaches would suggest. An incentive-based understanding of innovation demands that the innovation is appropriable, and would therefore tend to privatize returns and allocate them to

particular innovators. Antitrust and property law, this approach has led to a strengthening of intellectual property rights (Benkler 2017). By contrast, a capabilities-based understanding of innovation would promote the sharing of capabilities across networks and among both market and non-market participants. In intellectual property law, a capabilities-based understanding would therefore suggest more sharing and weaker intellectual property rights (Benkler 2017). It may be that these two approaches to understanding innovation are challenging to hold together in different antitrust contexts, but this might be because policy has yet to seriously wrestle with an Innovation-as-Capabilities approach.

The government plays a different role under incentive-based and capabilities-based approaches to economic regulation: Under an incentive-based understanding of innovation, policy should aim to maximize the incentives of innovators to "pull" innovation from ordinary market processes. By contrast, a capabilities-based approach calls for a much more active "push" role for the state, in which government aims to supply missing capabilities, coordinate strategic networking and sharing of capabilities, and shape not just the rate but also the direction of innovative activity (Mazzucato 2013). Research accordingly suggests that policies to promote sharing of information on how to innovate are more effective than policies that increase incentives to innovate through the tax system, validating a capabilities-based understanding of innovation (Bell et al. 2019).

Moderna's recent patent dispute with the National Institutes of Health (NIH) demonstrates how this tension can be relevant to economic regulation. Moderna claims that its scientists deserve sole credit as inventors of a patent crucial to manufacturing its COVID-19 vaccine, whereas the NIH claims that this patent arose out of a multiyear collaboration during which the NIH and Moderna pooled their expertise, with many of the riskiest areas of research funded by the government (Robbins and Stolberg 2021). An Innovation-as-Incentives approach may give Moderna the patent—doing so would maximize Moderna's ability to appropriate returns from its investments in innovation and thereby incentivize future innovators. By contrast, an Innovation-as-Capabilities approach would recognize the deep collaboration involved in producing the COVID-19 vaccine, and support policies that

encourage this sort of sharing of information and collaboration, for which our current patent system may not be well-designed (Benkler 2017).

Both Innovation-as-Incentives and Innovation-as-Capabilities approaches are required to understand Moderna's creation of an mRNA COVID-19 vaccine. Government-directed industrial policy, sharing of information within networks, and public-private collaboration was just as important in the creation of the vaccine as private investment in response to incentives. Patent law must balance these approaches as it seeks to create economic regulation that supports innovation, and the same is true of antitrust and competition policy.

3. US ANTITRUST LAW PRIMARILY ADOPTS INNOVATION-AS-INCENTIVES PARADIGMS AND IGNORES INNOVATION-AS-CAPABILITIES PARADIGMS

US Antitrust practitioners to date have largely adopted the Innovation-as-Incentives paradigm (Shapiro 2019). The Innovation-as-Capabilities paradigm is missing almost entirely from US antitrust law—which suffers as a result.

We see this in US cases on the essential facilities doctrine, which obliges dominant companies to share essential infrastructure, facilities, or resources with smaller competitors. Where cornerstone essential facilities cases consider innovation, they adopt an Innovation-as-Incentives framing, which has shaped the parameters of legitimate debate around innovation and affected the development of the law. Analysis follows a similar pattern in other areas of antitrust, though it is beyond the scope of this report to address how innovation concerns arise in all areas of antitrust law.

An Innovation-as-Incentives approach was responsible for dramatically restricting the essential facilities doctrine in *Verizon v. Trinko* (2004), such that many practitioners consider it substantially impossible to bring a successful essential facilities claim against a dominant company (Guggenberger 2020). *Verizon v. Trinko* held that Verizon, in insufficiently sharing its

telecommunications infrastructure with rivals, did not violate antitrust doctrine on essential facilities. This decision was reached based on an incentive-oriented understanding of innovation: Not requiring companies to share innovations with their rivals would promote investment in innovation. Speaking for a majority on a unanimous Supreme Court, Justice Scalia stated:[5]

> The opportunity to charge monopoly prices—at least for a short period—is what attracts "business acumen" in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct.

Note that this application of the Innovation-as-Incentives paradigm did not mandate the particular result in *Trinko*. Innovation incentives can arise both from appropriating profits and from a need to stay ahead of close competitors (Federico, Scott Morton, and Shapiro 2019).[6] In *Trinko*, the Court could have obliged Verizon to share its network under the Innovation-as-Incentives paradigm if it thought that doing so would ensure that Verizon was subject to more acute competitive pressure.

But the Innovation-as-Incentives paradigm does structure how antitrust law frames the issue. This "framing" is not neutral: In *Trinko*, it led the Court to focus on a conception of innovation as a result of individual effort applied in response to incentives. Focusing on the individual firms in this way meant the Court did not engage with questions around what social relations would best facilitate innovation. The paradigm of Innovation-as-Incentives gave the Court a prism through which to view the case (adopted directly from neoclassical reasoning), which led the Court to focus on certain features at the expense of others. Legal commentary on the essential facilities doctrine and duties to

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[5] *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 US 398 (2004).

[6] Antitrust practitioners often refer to this tension as the Schumpeter/Arrow debate: Schumpeter argued that innovation incentives are often maximized when companies are allowed to exploit their innovations. Arrow, by contrast, argued that innovation incentives are often maximized where companies need to innovate to get ahead of close competitors.

deal has subsequently been dominated by the Innovation-as-Incentives paradigm, with similar results.[7]

The Federal Trade Commission's (FTC's) recent challenge to Facebook demonstrates just how much this incentive-oriented reasoning has scarred antitrust law. In its initial complaint, the FTC challenged Facebook's efforts to throttle access to its Application Programming Interfaces (APIs)—which determine how software applications can interoperate—and therefore degrade its competitors' ability to interoperate with its services. In dismissing the FTC's complaint, Judge Boasberg of the US District Court concluded that Facebook's refusal to interoperate with competitors could not violate US antitrust law. Consistent with previous decisions, Judge Boasberg relied on the Innovation-as-Incentives paradigm, stating:[8]

> [f]irms may acquire monopoly power by establishing an infrastructure that renders them uniquely suited to serve their customers. Compelling such firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities.

Based on a misunderstanding of how innovation works, Judge Boasberg insulated Facebook's most innovation-harming activities from antitrust challenge. He recused antitrust from taking a central role controlling key strategic interfaces for the recombination of technologies and components in the digital economy (APIs). Innovation-as-Capabilities research demands exactly the opposite: that antitrust meticulously safeguard the ability of new technologies to interoperate along key platform interfaces and stand firm against companies' attempts to bend these interfaces to their advantage. Antitrust law's failure to do so harms innovation and leaves us all worse off.

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[7] See Hovenkamp and Bohannan 2012, Chapter 11.

[8] Memorandum Opinion in *FTC v. Facebook* Case 1:20-cv-03590-JEB (D.D.C June 28, 2021) at page 35, quoting *Trinko*, 540 US at 407–08.

So what would an alternative judgment look like? As a thought experiment, we might consider how future Supreme Court Justices would frame their reasoning in *Verizon v. Trinko* in an alternate world where the Innovation-as-Capabilities paradigm is dominant, and the Innovation-as-Incentives paradigm was less gripping. Considering the facts of *Verizon v. Trinko*, a future Justice might reason:

> "The opportunity to innovate within a specific techno-economic domain requires that astute business people have access to that domain's essential capabilities, and that they can recombine these capabilities freely to create new products and services. Where unique capabilities are controlled by companies or their access is otherwise restricted, making these capabilities available for exchange as market commodities empowers entrepreneurs to experiment, which produces innovation and economic growth. To safeguard the ability to innovate, restricting access to a capability will be considered unlawful if that capability is not reasonably available elsewhere and that capability is required as an ingredient in new products and services."

Again, this reasoning does not predetermine whether Verizon must share its network with competitors, but it frames the impact of the case on innovation in a wholly different way (one that is well supported by economic research). To oblige Verizon to share its network, litigators must still demonstrate on the facts of the case that the network was an essential ingredient for innovation, and that equivalent capabilities were not available elsewhere (alongside other tests a court may choose to impose, such as those related to innovation incentives, proportionality, or materiality). Of course, properly integrating the Innovation-as-Capabilities paradigm into competition policy will require much more work than this thought experiment, but this example suggests one way to do so in the context of the essential facilities doctrine.

4. IMPLICATIONS OF INNOVATION-AS-CAPABILITIES PARADIGMS FOR ANTITRUST LAW AND POLICY

A competition policy based on Innovation-as-Capabilities paradigms would aim to maximize the available capabilities that innovators and economic actors can use to develop new ideas and launch new products. This sort of competition policy would aim to "modularize" markets where possible, by

ensuring that different components and capabilities that underlie broader technological systems are available to be sold, licensed, or provided for integration into other technologies. Protecting modularization is particularly important where new technologies or capabilities emerge that could lead to greater competition and innovation in a variety of related markets. In situations in which companies hoard or vigorously protect unique capabilities that could unlock broader innovation, competition policy would aim to make these capabilities tradable as market commodities when practicable—offering the company that owns the capability a fair rate of return to maintain innovation incentives.

Competition policy would also need to strictly control key interfaces between modules or around a network, technology, or platform, which would likely involve strong interoperability remedies. These interfaces dictate how capabilities can be recombined. Aside from technology interfaces, modularized innovation has many degrees of freedom and would not warrant heavy-handed intervention or scrutiny. These considerations are relevant to platforms as well as vertical and conglomerate theories of harm in antitrust.

An Innovation-as-Capabilities perspective suggests that competition policy should be concerned with ensuring workers can move easily between firms and knowledge can flow freely across networks. Since novel capabilities are often trapped in workers' tacit knowledge, movement of workers between firms is a key driver of innovation.

More generally, Innovation-as-Capabilities paradigms cast the role of government in competition policy in a different light. A commonly understood implication of the Innovation as Incentives paradigm is that government should conduct basic research as a public good (the results of which are rarely appropriable), but generally leave applied research to private sector actors motivated by their own incentives.

By contrast, the Innovation-as-Capabilities paradigm suggests that government has a key role in coordinating innovation communities, facilitating place-based clusters or ecosystems, and shaping

the pace and direction of innovation and many foundational technological breakthroughs have occurred through a blending of capabilities only achievable through government direction (Mazzucato 2013), most recently (and visibly) the development of mRNA COVID-19 vaccines. Placing emphasis on Innovation-as-Capabilities paradigms in antitrust demands that competition policy accepts an active role for government industrial policy, by curating innovation communities, sharing information, and modularizing technologies to open up access to key capabilities.

Integrating this understanding of government presents challenges for a competition policy achieved largely through judge-made antitrust law. Appreciating that government has an active, contextual role in facilitating collaboration, directing innovation and modularizing technologies puts competition policy in a domain that is increasingly administrative and less achievable through court litigation. A challenge for competition policy is how to filter these ideas on innovation into antitrust *law* that courts can apply, as opposed to policy criteria that properly belong to administrative government.

Capabilities paradigms would also bring social inequality on racial and gender lines more directly into antitrust analysis. Capabilities paradigms suggest that who can innovate depends on who has access to key capabilities that they can recombine. Access to these capabilities is distributed unequally in society, disadvantaging minorities and women (Bell et al. 2019). Antitrust theories of harm based on Innovation-as-Capabilities paradigms may consider whether disadvantaged groups lose access to key capabilities that hinder their ability to innovate.

Capabilities based policy solutions are not entirely new to antitrust: The essential facilities doctrine in the EU seems more congruent with a capabilities-oriented approach. Antitrust also has special provisions around research and development joint ventures that enable companies to share information and collaborate on innovation projects without violating antitrust rules.[9] And yet, where

[9] See the Research and Development Block Exemption under EU Competition law: Commission Regulation (EU) No 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements.

these solutions appear as they feel more like an afterthought, often justified without reference to economic research around Innovation-as-Capabilities, and as a side show to antitrust's dominant incentive-oriented economic reasoning.

To some degree, antitrust fails to integrate capabilities-based reasoning because of the skillsets of competition economists. Competition policy's increasing reliance on economic reasoning is valuable, but there is a certain methodological homogeneity in competition policy communities. Opening up competition policy to a greater diversity of economic thought would improve economic reasoning in competition policy.

More importantly, competition policy lacks a simple model based on Innovation-as-Capabilities paradigms that judges and lawyers can apply in legal reasoning. Innovation-as-Incentives paradigms provide a simple, tractable model for how innovation works. Its implications are easy to understand, and they frame the questions we ask, concerns we raise, and answers we give. Innovation-as-Incentives reasoning also coheres with broader neoclassical ideas within antitrust, making for a more cohesive (if simplified) explanatory framework. Competition policy must adopt similarly simple and tractable heuristics based on the Innovation-as-Capabilities paradigm.

Antitrust should adopt the Innovation-as-Capabilities paradigm with vigor, integrating it alongside the current incentive-oriented approach. Antitrust's exclusive reliance on the Innovation-as-Incentives paradigm may lead it to endorse the activities of economic agents who are blocking the progress of innovation in ways that may not be recognized. The specifics of adopting the Innovation-as Capabilities paradigm will involve careful contextual determinations. In general, antitrust must acknowledge an active role for government in shaping technological development and should see itself as a part of this project. Doing so would involve adopting heuristics around modularizing capabilities, strictly controlling platform interfaces or nodes that connect different subsystems, and promoting free flows of information and movement of workers.

An Innovation-as-Capabilities approach would suggest that antitrust take an assertive stance on particular questions, such as those related to vertical and conglomerate mergers, essential facilities, and employee noncompetes. This section explores these policy prescriptions (although full analysis of the impact of the Innovation-as-Capabilities paradigm on antitrust law lies beyond the scope of this report).

a. Prevent Vertical and Conglomerate Mergers that Restrict Access to Important Capabilities

Merger policy has the potential to keep important capabilities independent and make them available to many innovators, not just aggressive and well-funded acquirers. According to established thinking in US antitrust law, vertical and conglomerate mergers should only matter when they have the potential to affect horizontal competition within a market. To be sure, an innovation market may be different from a firm's ordinary market for antitrust purposes, as it encompasses all areas of activity the firm may wish to move into.[10] But the main focus is on horizontal parameters of competition that shape incentives to reduce prices, improve quality, and innovate.

An Innovation-as-Capabilities worldview would take vertical and conglomerate mergers much more seriously. It would aim to preserve different capabilities as separate elements, ensuring that unique technologies and services can exist on an independent footing, available to be integrated into multiple different processes, platforms, and systems at once. It would have a much stronger preference to license capabilities to different market actors on a non-exclusive basis than to integrate of a set of capabilities into a single firm through a merger, despite any synergies or efficiencies: Nonexclusive licensing allows capabilities to be repackaged into many different systems.

[10] See the concept of innovation spaces in Kokkoris and Valletti 2020.

In any given case, courts would need to make tricky determinations of fact about whether a merger would remove a unique set of capabilities from the market. Framing merger analysis in this way would represent a different approach in vertical and conglomerate merger cases. Economic research based on Innovation-as-Capabilities paradigms suggests that courts should be asking these questions, at the very least.

This approach would strengthen theories of harm in vertical and conglomerate mergers involving technology platforms. Google's recent acquisition of Fitbit demonstrates this dynamic: The Google-Fitbit merger deeply concerned many observers in the antitrust community as it involved Google folding another large company into its dominant platform ecosystem. But Google and Fitbit were not horizontal competitors and so their merger was unobjectionable under traditional theory. In an enforcement action in Europe, the European Commission's investigation raised concerns that acquiring Fitbit's data would entrench Google's monopoly in digital advertising. It cleared the transaction, accepting three principal remedies focused on acquisition and use of consumer data:

1) That Google would not use Fitbit's data in its online advertising;
2) That Google would allow competitors access to Fitbit's data through its (currently nascent) Application Programming Interfaces; and
3) That Google would continue to allow competitor health tracking products nondiscriminatory access to its Android software.

An Innovation-as-Capabilities perspective would approach the case differently. The primary concern would not be how the merger might affect horizontal competition in the market for digital advertising, but whether the merger would stymie the emergence of a capability "module" that comprises Fitbit and its functionality, one that could be integrated with other systems or components. This perspective would examine whether (outside Google) Fitbit would be much more likely to modularize its key features and license them to others on a nonexclusive basis to promote innovation in adjacent or related products or services. The European Commission's remedies, one of which was around preserving Fitbit's current open access Application Programming Interfaces, touch

on this area of concern. An Innovation-as-Capabilities approach would likely mandate a stricter remedy, as its concern is not Google's data monopoly in advertising markets but whether Fitbit would develop its Application Programming Interfaces into an independent modularized capability. A similar approach is applicable to ongoing merger reviews by antitrust authorities in technology platform cases, such as Illumina-Grail and Microsoft-Activision.

A legal test for vertical or conglomerate mergers based on this reasoning might suggest that they are permissible where they do not remove or hinder an important capability or set of capabilities from integration into new products, services, or applications on a nonexclusive basis (and do not otherwise fall foul of conventional approaches to merger analysis).

b. Strengthen Antitrust Doctrine around Essential Facilities, Margin Squeezing, and Vertical Theories of Harm in Unilateral Cases

An Innovation-as-Capabilities approach would support a much more assertive essential facilities doctrine in antitrust law around unilateral conduct. It would aim to make particular key capabilities of dominant unilateral companies available in adjacent markets to innovators and competitors. In digital markets, the Innovation-as-Capabilities paradigm would advocate for strong interoperability rules across platforms and between services.

A legal test for such a doctrine might look similar to what European competition law has developed in *IMS Health* and *Microsoft*, where a company must license access to an essential facility where it is needed to develop a new product or service or make technological progress on a secondary market. Courts and commentators should acknowledge that these tests represent a product of valid economic principles, even though they may at times be in tension with dominant neoclassical approaches to economics.

The burgeoning electric vehicle industry demonstrates how this approach might apply: Currently, electric vehicle charging in the US is highly fragmented, comprised of many different proprietary networks, apps, and subscription plans. This hinders efficient adoption of electric vehicles, as interoperable EV charging is a required capability for the adoption of electric vehicles (Hawkins 2021). An Innovation-as-Incentives approach may incline antitrust practitioners to support the current market dynamic, as electric charging network providers must be able to appropriate returns on their investments to maintain investment incentives. By contrast, an Innovation-as-Capabilities approach might decide that this dynamic triggers antitrust intervention under an assertive essential facilities doctrine, imposing interoperability and access requirements where administrable as a matter of law. Of course, careful inquiry into the facts of this situation (which is beyond our scope) would have to precede any remedy, but an assertive capabilities-based regime might consider this situation worthy of investigation.

Deft legal analysis could reconcile a strong essential facilities doctrines based on this approach with the general principle that a company does not have a duty to deal with its competitors.[11] It could, for example, mandate that a company only be required to give access to its technology or facilities when access would be required to promote technological development in an adjacent market, which would broadly mirror the essential facilities doctrine in European competition law. There are significant administrability concerns for judicial mandates around interoperability and access to essential facilities; these concerns could be addressed through a regulatory rather than a judicial approach to competition policy.

c. Prohibit Employee Noncompetes

An Innovation-as-Capabilities approach suggests that competition policy would ban employee noncompetes. Movement of employees between companies is a key enabler of innovation, even though it may reduce appropriability of a company's innovations and may therefore reduce

[11] See *United States v. Colgate & Co.*, 250 US 300 (1919).

investment incentives. President Biden's Executive Order on Competition suggests that this is (rightly) a key administration priority: Section 5(g) of the order directs the Chair of the FTC to consider rulemaking around unfair restrictions of employee mobility. Innovation-as-Capabilities research suggests that these noncompete clauses are a central concern of competition policy rather than merely an "unfair" restriction on workers to be addressed with the FTC's administrative rulemaking authority on unfair methods of competition.

This approach may also bring competition policy in greater conflict with trade secret doctrines and intellectual property law. Other commentators have thoroughly examined the delicate relationship between competition law and intellectual property. For our purposes, it is sufficient to observe that the Innovation-as-Capabilities approach might modestly renegotiate this relationship to facilitate greater movement of ideas and less protection of trade secrets. Economic policy would thereby favor market actors appropriating profits from innovation through good execution to a relatively greater extent than by legally protecting innovations using intellectual property law.

6. CONCLUSION

To better support innovation, competition policy should embrace new economic voices. In particular, it should draw on research based on Innovation-as-Capabilities paradigms to augment existing incentive-oriented analyses familiar to neoclassical economic reasoning.

Translating economic research around Innovation-as-Capabilities into a tractable framework that lawyers can use represents a serious challenge. This report proposes that such a framework would prioritize modularization of technologies, control key interfaces for integration strictly, promote movement of employees between firms, and preserve emerging new technologies or capabilities as independent entities available for open-access licensing or use in multiple different contexts. This suggests three specific policy prescriptions:

1. Scrutinize vertical and conglomerate mergers closely, questioning whether they remove a set of capabilities from open market access;
2. Mandate a strong essential facilities doctrine, which modularizes key capabilities of dominant firms to make them accessible to the market, and controls key technological interfaces to make technologies interoperable. Competition policy must balance this approach with the need to ensure that remedies remain administrable and do not unduly harm innovation incentives; and
3. Refuse to enforce employee noncompetes to promote a free flow between firms of the tacit knowledge and capabilities that are essential to innovation.

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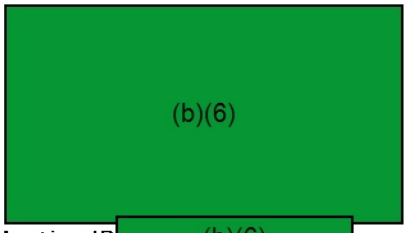

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Innovating Antitrust Law:
How Innovation Really Happens and How Antitrust Law Should Adapt

Ketan Ahuja

October 2022

About the Author

Ketan Ahuja is a DPhil student in law at the University of Oxford. His research focuses on how to regulate market competition in ways that reduce inequality, share power, and support innovation and economic growth. He is currently investigating how we make sense of market competition using simplified heuristics and paradigms, and how these paradigms lead us to leave important considerations out of antitrust and competition policy. His work has been published by *Cambridge University Press*, Harvard Kennedy School's Center for Business and Government, and *ProMarket*.

Ketan also consults regularly on competitive strategy, industrial policy (with a focus on the clean energy sector), and competition policy issues. He is currently leading an initiative on Green Growth with The Growth Lab at Harvard University, which addresses how countries and regions can leverage industrial decarbonization to generate economic growth. His experience has spanned industrial policy and economic development initiatives with the US Department of Energy, commercial management in the private sector, and legal advisory work in antitrust and competition policy.

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Innovation is the most important driver of economic growth and is central to improving people's lives over the long run. Promoting innovation is, increasingly, a central feature of antitrust law, with antitrust practitioners in recent decades relying on economic analyses of innovation to interpret and enforce the law.

But antitrust practitioners' current paradigms on innovation are incomplete because they draw primarily on neoclassical approaches to economics, which analyze economic behavior as resulting from rational, utility-maximizing agents acting according to their own incentives. As a result, practitioners see innovation as a question primarily of the incentives of market agents. This mode of thinking came from 1970s market fundamentalist economists and commentators such as Robert Bork. But the ultimate dominance of neoclassical paradigms in antitrust occurred because the entire ideological spectrum of the antitrust community internalized neoclassical paradigms as it sought to improve antitrust law by incorporating economic research, which came largely from economics faculties employing a neoclassical methodology.

Incorporating diverse paradigms on innovation from other schools of economic thought into antitrust would lead competition policy to support innovation better, benefitting innovators, consumers, and workers—and leading to stronger, shared economic growth. In particular, competition policy must account for how innovation actually takes place. Research from across fields demonstrates that economic incentives alone don't just pull innovations into existence: Other factors and conditions must be present. A crucial theme in innovation research is that innovation is an emergent phenomenon resulting from mixing different capabilities (such as skillsets, technologies, or product components). Often, innovators have both pecuniary and nonpecuniary motivations, and the public sector plays a crucial role in shaping the rate and direction of innovation. It is time to bring these perspectives on innovation into competition policy.

Section 1 of this report addresses how economic paradigms shape antitrust interpretation. Section 2 contrasts incentive-based and capabilities-based views on innovation. Section 3 demonstrates that antitrust today primarily relies on an incentive-oriented understanding of innovation and ignores a capabilities-oriented understanding of innovation. Section 4 addresses how to integrate a capabilities-oriented understanding of innovation into antitrust. Section 5 covers examples and policy prescriptions.

1. ECONOMIC PARADIGMS FRAME ANTITRUST INTERPRETATION AND ENFORCEMENT, INCLUDING HOW WE THINK ABOUT THE INNOVATION PROCESS

Paradigms are beliefs that people or institutions hold that *structure* and *integrate* analytical solutions to narrow questions to solve complex problems. Paradigms represent assumptions about the way the world works: They shape what we decide to pay attention to when we model certain activities or attempt to explain certain phenomena. In short, paradigms are a form of worldview about a problem. Paradigms *structure* modeling and analysis of specific questions. In economic modeling, we need to form hypotheses about problems to render them analytically tractable. These hypotheses, which we base on our chosen paradigms, influence which features of a problem we consider relevant to a model. A standard paradigm in neoclassical economics is that economic agents are rational profit-maximizers, which leads to a modeling approach of maximizing the financial incentives of economic agents.

We also use paradigms to *integrate* narrow, technical analyses to build a broader understanding of a complex issue, using inductive reasoning. Integrating technical analyses into broader narratives requires us to fill in gaps, simplify, and generalize in a way that renders a complex problem tractable. Paradigms help us do this. For instance, we may develop a narrative around how innovation happens by combining different models or case studies about innovation in specific situations to infer a larger truth about innovation. Paradigms help us decide what aspects of models to pay attention to, and how to build an overall causal narrative.

Paradigms have more impact on an analysis when they *integrate* analyses into a broader narrative than when they *structure* a technical analysis on a narrow question. We can identify good answers to narrow questions, paying attention to case-specific nuances. But integrating technical analyses into broader narratives requires us to fill in gaps, simplify, and generalize, and we use paradigms extensively when doing so.

Of course, some paradigms are more accurate, and some less. Working with paradigms often means acknowledging that they represent only a part of the whole picture. Paradigms can be very hard to see from the inside of a coherent system because a paradigm shapes how we see the world—often, we need to step out of a particular worldview to understand its impact.

Paradigms about the economy affect many aspects of antitrust enforcement, with real implications for how firms compete. In some cases, antitrust enforcers use economic analysis to understand how the case might impact welfare, and paradigms structure these analyses. When creating general rules in antitrust, such as those prohibiting or allowing mergers under certain conditions, judges and policymakers rely on paradigms to integrate an understanding about how the economy works: They must do this to make decisions expediently, rather than exploring economic foundations in each case. For example, in antitrust we often design rules that are most likely to maximize the incentive of an economic agent to innovate, adopting a paradigm that innovation happens when incentivized agents apply effort to a problem.

Antitrust often decides whether to intervene to prevent harm to innovation according to general rules of law rather than case-specific economic analysis, which makes paradigms around innovation especially influential in deciding antitrust cases. Empirically evaluating the impact on economic welfare in all but the simplest cases is almost impossible (Hovenkamp and Scott Morton 2020). This is particularly true in innovation markets or when considering questions of harm to innovation, where evidence on new products is limited and often highly speculative, and it is often wiser to rely on general economic principles (Federico, Scott Morton, and Shapiro 2019).

Enforcers do, of course, pay close attention to case-specific features when applying antitrust rules to particular cases. Many theories of harm are decided under the rule of reason,[1] and enforcers conduct substantial analysis of economic effects in a given case. But even here, exactly what an enforcer must prove often depends more on general rules than specific contextual welfare evaluations. In innovation cases, proving empirically that firms reduced R&D on particular projects (thereby harming consumers) is generally impossible. Assertive antitrust enforcement only requires enforcers to show that firms would have less incentive to develop new products (Federico, Scott Morton, and Shapiro 2019).

2. TWO PARADIGMS ON INNOVATION: INNOVATION-AS-INCENTIVES OR INNOVATION-AS-CAPABILITIES

Innovation has been heavily studied in economics and the social sciences over the last 50 years. Two different approaches to understanding innovation are most relevant here.[2] The first approach, rooted in neoclassical economic traditions, understands innovation as taking place as a result of the efforts of appropriately incentivized market actors. This approach typically analyzes innovation as something that happens within a particular firm, and responds to clear material rewards. On this understanding, innovation policy should aim to maximize the financial incentives of discrete market actors (usually individual firms) to innovate.

The second approach understands innovation as "emerging" from a structure of social and technological relations that are conducive to innovation; for example, more innovation happens in Silicon Valley (where talent, funding, partners, universities, and customers exist in close proximity) than elsewhere. This approach focuses more on the relationships between firms, talent, customers, investors, research institutions, and partners, and understands innovation to come from sharing

[1] Under which antitrust litigators conduct a case-by-case analysis of the economic impacts of a specific practice to decide if it should be prohibited.

[2] Innovation research has arisen from many different perspectives. The vast and diverse literature on innovation is difficult to summarize comprehensively, and this report does not attempt to do so.

knowledge and resources among a variety of actors and draws broadly on research from different fields in the social sciences and suggests innovation policy should aim to structure social and technological relations in a way that supports innovation.

These approaches to understanding innovation are not mutually exclusive, and both make sense: From a venture capitalist's perspective, innovation happens because profit-motivated entrepreneurs take risks and work hard; from a bird's eye view economic perspective, the right circumstances draw innovation out of certain groups, firms, and places.

As explored below, competition policy primarily views innovation as a question of the incentives of market actors, and has neglected to consider what social and technological relationships might stimulate innovation. To best promote innovation, competition policy needs to combine its incentive-oriented approach with a richer understanding of how social relations can stimulate innovation.

a. Innovation-as-Incentives: Innovation Arises from Individual Market Actors Who Apply Effort to a Problem, Motivated by Appropriate Incentives

Neoclassical approaches to the economic analysis of industrial organization consider innovation to take place due to the efforts of appropriately incentivized market actors. We'll call this the Innovation-as-Incentives paradigm. These analyses try to balance the incentive created by letting innovators profit from their inventions with the pressure to innovate to stay ahead of competitors. Balancing these two sets of incentives will maximize the overall incentive to innovate (Federico, Scott Morton, and Shapiro 2019).

This Innovation-as-Incentives paradigm structures the way that neoclassical industrial organization economists analyze innovation in antitrust cases. For example, Federico, Langus, and Valletti (2017) detail a model in which all firms can eventually achieve a particular product innovation if they apply

sufficient effort. This model helps identify circumstances in which a merger reduces a firm's incentive to innovate. In this case, the paradigm that innovation arises from effort applied by a firm in response to incentives defines how Federico et al.'s model takes shape. The model works within this paradigm to structure an analysis to a narrow question on merger policy and innovation.

Policymakers and academics also use the Innovation-as-Incentives paradigm to integrate research to answer larger questions. Shapiro (2019) demonstrates this as he tries to tie together existing research on innovation into three principles:

- Contestability: Capturing profits from competitors spurs innovation.
- Appropriability: Being able to appropriate profits from an innovation spurs innovation activity.
- Synergy: Mergers of complementary assets can lead to innovation.

"Contestability" and "appropriability" are based on the incentives of innovators to innovate, and they predominate Shapiro's inquiry.

Shapiro's framework has been influential and is widely adopted by agencies and academics.[3] It has, for example, often been used to explain the European General Court's decision prohibiting the merger of Deutsche Börse and NYSE Euronext.[4] These competing stock exchanges pressured each other to innovate, and much of their innovation in trading technology came from their efforts to outdo each other to win business. While allowing them to combine would let the joint entity *appropriate* greater profits from each innovation (because the joint entity would apply innovations to more customers), on balance prohibiting their merger would maximize innovation incentives because the two stock exchanges were motivated to innovate to *contest* each other's business.

[3] See, for example, Competition Directorate-General of the European Commission, Competition Policy Brief: EU Merger Control and Innovation 2 (April 2016) and (Directorate-General for Research and Innovation (European Commission), Ezrachia, and Stuckeb 2020).

[4] See Case T-175/12 *Deutsche Börse v European Commission* (2015).

Exactly how this model of economic research informs competition and antitrust inquiry is complex, and covered in substantial detail elsewhere (Kokkoris and Valletti 2020; Federico, Scott Morton, and Shapiro 2019). For our purposes, it is enough to appreciate that a certain form of embedded paradigm shapes both the narrow analytical research that economists use to address scientific questions, as well as the broader conclusions that lawyers, economists, and policymakers draw around what promotes innovation in general. This paradigm embeds certain assumptions around how innovation takes place into antitrust that then determine the terrain of permissible policy interventions.

b. Innovation-as-Capabilities: Innovation Is an Emergent Phenomenon that Arises from Combining Capabilities in Conducive Environments

Where the Innovation-as-Incentives paradigm addresses how much effort market actors are likely to put into innovation in different circumstances, other research tries to understand the mechanics of how innovation actually happens. A standard paradigm within this line of research is that innovation takes place by combining pre-existing "ingredients" or capabilities in new ways. We'll call this the Innovation-as-Capabilities paradigm. Under this paradigm, innovations of a certain type are more likely to arise where more of the required capabilities are in close proximity to each other. Proximity here means relational proximity, or the ease with which market participants can combine different capabilities to come up with new products and services. This could include geographic proximity, but will also include the strength of social or professional ties between workers and customers, knowledge sharing between firms, and ease of access to opportunities or commercial partners. Innovations "emerge" from combining capabilities in new ways because the new system becomes more than the sum of its parts, achieving things its component capabilities cannot do alone.

Capabilities under this paradigm consist of the knowledge to do or make something. This knowledge can be recorded and transmitted as codes, manuals, or in books. But most useful knowledge in economic activity is tacit and is embedded in products, individuals, infrastructure, or organizations, particularly at a technological frontier. For example, to use a microwave, we do not have to

understand the physics behind a microwave, or how they are designed, built, or powered. All this knowledge is embedded in the microwave and made available to us to use as a functioning product.

A capability can therefore be transferred by moving a product through trade, moving teams or people with particular know-how, or moving knowledge through discussion or publication of manuals. As useful knowledge for production is often tacit, moving products or people often transfers a capability more effectively than sharing information in written publications. Capabilities are embedded practical knowledge that is difficult to transfer.

Research conducted under the Innovation-as-Capabilities paradigm is much more methodologically diverse than research conducted under the Innovation-as-Incentives paradigm. Research under the Innovation-as-Capabilities paradigm has touched disciplines as diverse as sociology, economic history, economic geography, complexity economics, and business strategy. These communities do not regularly engage with antitrust and competition practitioners and much of this research needs translating to apply it to competition policy.

Brian Arthur's (2009) foundational research elaborates how new technology emerges under the Innovation-as-Capabilities paradigm. He argues that new technologies are almost always a combination of existing technologies, and existing technologies are made up of smaller technologies organized into systems. Technology "evolves" as new components are added and systems are reorganized to improve a particular technology until the technology becomes mature and progress slows. New technologies can also emerge where they satisfy a particular need better than older ones. This paradigm informs a diverse collection of recent research from across the social sciences (see, for example, McNerney et al. 2011; Youn et al. 2015; Pichler, Lafond, and Farmer 2020; Cowan and Jonard 2003).

Innovation-as-Capabilities paradigms have substantially impacted work in economic geography, which examines why economic activity happens in certain places. Hidalgo and Hausmann's economic complexity framework infers a region's capabilities from what it produces and

demonstrates that processes with more capabilities and assemblages can produce radically more—and more complex—products. Under this model, economic development takes place when particular areas acquire new capabilities, which they can recombine with their existing capabilities to produce new products and services.

Other research in economic geography validates that movement of knowledge workers is key to innovation. Saxenian (1996) argues that unrestricted movement of workers across firms was a key enabler of Silicon Valley's innovative dynamism. Hyde (2003) and Gilson (1999) argue that Silicon Valley as a whole outperformed Massachusetts so spectacularly in the 1980s and 1990s because California did not enforce employee noncompetes, leading to much more circulation of employees, know-how, and ideas between firms in California than in Massachusetts (Benkler 2017).

The Innovation-as-Capabilities paradigm has also influenced business writing on competitive strategy. Baldwin and Clark's (2000) research at Harvard Business School demonstrates that the computer industry has achieved remarkable levels of growth by embracing modularity and subsystems that can be innovated independently and integrated in new ways. In research conducted with the management consultancy BCG, Fink et al. (2017; 2019) model when companies should focus on acquiring more complex capabilities that would enable them to innovate in more complex ways, and when they should focus on exploiting their current capabilities.

c. Reconciling Innovation-as-Capabilities with Innovation-as-Incentives Frameworks

An Innovation-as-Capabilities paradigm does not necessarily conflict with an Innovation-as-Incentives approach: Innovation requires both incentives to motivate individual effort and required capabilities or ingredients to exist in a way that makes them easy to combine. Occasionally, however, there is tension between the policy prescriptions that incentive-based and capabilities-based approaches would suggest. An incentive-based understanding of innovation demands that the innovation is appropriable, and would therefore tend to privatize returns and allocate them to

particular innovators. Antitrust and intellectual property law, this approach has led to a strengthening of intellectual property rights (Benkler 2017). By contrast, a capabilities-based understanding of innovation would promote the sharing of capabilities across networks and among both market and non-market participants. In intellectual property law, a capabilities-based understanding would therefore suggest more sharing and weaker intellectual property rights (Benkler 2017). It may be that these two approaches to understanding innovation are challenging to hold together in different antitrust contexts, but this might be because policy has yet to seriously wrestle with an Innovation-as-Capabilities approach.

The government plays a different role under incentive-based and capabilities-based approaches to economic regulation: Under an incentive-based understanding of innovation, policy should aim to maximize the incentives of innovators to "pull" innovation from ordinary market processes. By contrast, a capabilities-based approach calls for a much more active "push" role for the state, in which government aims to supply missing capabilities, coordinate strategic networking and sharing of capabilities, and shape not just the rate but also the direction of innovative activity (Mazzucato 2013). Research accordingly suggests that policies to promote sharing of information on how to innovate are more effective than policies that increase incentives to innovate through the tax system, validating a capabilities-based understanding of innovation (Bell et al. 2019).

Moderna's recent patent dispute with the National Institutes of Health (NIH) demonstrates how this tension can be relevant to economic regulation. Moderna claims that its scientists deserve sole credit as inventors of a patent crucial to manufacturing its COVID-19 vaccine, whereas the NIH claims that this patent arose out of a multiyear collaboration during which the NIH and Moderna pooled their expertise, with many of the riskiest areas of research funded by the government (Robbins and Stolberg 2021). An Innovation-as-Incentives approach may give Moderna the patent—doing so would maximize Moderna's ability to appropriate returns from its investments in innovation and thereby incentivize future innovators. By contrast, an Innovation-as-Capabilities approach would recognize the deep collaboration involved in producing the COVID-19 vaccine, and support policies that

encourage this sort of sharing of information and collaboration, for which our current patent system may not be well-designed (Benkler 2017).

Both Innovation-as-Incentives and Innovation-as-Capabilities approaches are required to understand Moderna's creation of an mRNA COVID-19 vaccine. Government-directed industrial policy, sharing of information within networks, and public-private collaboration was just as important in the creation of the vaccine as private investment in response to incentives. Patent law must balance these approaches as it seeks to create economic regulation that supports innovation, and the same is true of antitrust and competition policy.

3. US ANTITRUST LAW PRIMARILY ADOPTS INNOVATION-AS-INCENTIVES PARADIGMS AND IGNORES INNOVATION-AS-CAPABILITIES PARADIGMS

US Antitrust practitioners to date have largely adopted the Innovation-as-Incentives paradigm (Shapiro 2019). The Innovation-as-Capabilities paradigm is missing almost entirely from US antitrust law—which suffers as a result.

We see this in US cases on the essential facilities doctrine, which obliges dominant companies to share essential infrastructure, facilities, or resources with smaller competitors. Where cornerstone essential facilities cases consider innovation, they adopt an Innovation-as-Incentives framing, which has shaped the parameters of legitimate debate around innovation and affected the development of the law. Analysis follows a similar pattern in other areas of antitrust, though it is beyond the scope of this report to address how innovation concerns arise in all areas of antitrust law.

An Innovation-as-Incentives approach was responsible for dramatically restricting the essential facilities doctrine in *Verizon v. Trinko* (2004), such that many practitioners consider it substantially impossible to bring a successful essential facilities claim against a dominant company (Guggenberger 2020). *Verizon v. Trinko* held that Verizon, in insufficiently sharing its

telecommunications infrastructure with rivals, did not violate antitrust doctrine on essential facilities. This decision was reached based on an incentive-oriented understanding of innovation: Not requiring companies to share innovations with their rivals would promote investment in innovation. Speaking for a majority on a unanimous Supreme Court, Justice Scalia stated:[5]

> The opportunity to charge monopoly prices—at least for a short period—is what attracts "business acumen" in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct.

Note that this application of the Innovation-as-Incentives paradigm did not mandate the particular result in *Trinko*. Innovation incentives can arise both from appropriating profits and from a need to stay ahead of close competitors (Federico, Scott Morton, and Shapiro 2019).[6] In *Trinko*, the Court could have obliged Verizon to share its network under the Innovation-as-Incentives paradigm if it thought that doing so would ensure that Verizon was subject to more acute competitive pressure.

But the Innovation-as-Incentives paradigm does structure how antitrust law frames the issue. This "framing" is not neutral: In *Trinko*, it led the Court to focus on a conception of innovation as a result of individual effort applied in response to incentives. Focusing on the individual firms in this way meant the Court did not engage with questions around what social relations would best facilitate innovation. The paradigm of Innovation-as-Incentives gave the Court a prism through which to view the case (adopted directly from neoclassical reasoning), which led the Court to focus on certain features at the expense of others. Legal commentary on the essential facilities doctrine and duties to

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[5] *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 US 398 (2004).

[6] Antitrust practitioners often refer to this tension as the Schumpeter/Arrow debate: Schumpeter argued that innovation incentives are often maximized when companies are allowed to exploit their innovations. Arrow, by contrast, argued that innovation incentives are often maximized where companies need to innovate to get ahead of close competitors.

deal has subsequently been dominated by the Innovation-as-Incentives paradigm, with similar results.[7]

The Federal Trade Commission's (FTC's) recent challenge to Facebook demonstrates just how much this incentive-oriented reasoning has scarred antitrust law. In its initial complaint, the FTC challenged Facebook's efforts to throttle access to its Application Programming Interfaces (APIs)—which determine how software applications can interoperate—and therefore degrade its competitors' ability to interoperate with its services. In dismissing the FTC's complaint, Judge Boasberg of the US District Court concluded that Facebook's refusal to interoperate with competitors could not violate US antitrust law. Consistent with previous decisions, Judge Boasberg relied on the Innovation-as-Incentives paradigm, stating:[8]

> [f]irms may acquire monopoly power by establishing an infrastructure that renders them uniquely suited to serve their customers. Compelling such firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities.

Based on a misunderstanding of how innovation works, Judge Boasberg insulated Facebook's most innovation-harming activities from antitrust challenge. He recused antitrust from taking a central role controlling key strategic interfaces for the recombination of technologies and components in the digital economy (APIs). Innovation-as-Capabilities research demands exactly the opposite: that antitrust meticulously safeguard the ability of new technologies to interoperate along key platform interfaces and stand firm against companies' attempts to bend these interfaces to their advantage. Antitrust law's failure to do so harms innovation and leaves us all worse off.

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[7] See Hovenkamp and Bohannan 2012, Chapter 11.

[8] Memorandum Opinion in *FTC v. Facebook* Case 1:20-cv-03590-JEB (D.D.C June 28, 2021) at page 35, quoting *Trinko*, 540 US at 407–08.

So what would an alternative judgment look like? As a thought experiment, we might consider how future Supreme Court Justices would frame their reasoning in *Verizon v. Trinko* in an alternate world where the Innovation-as-Capabilities paradigm is dominant, and the Innovation-as-Incentives paradigm was less gripping. Considering the facts of *Verizon v. Trinko*, a future Justice might reason:

> "The opportunity to innovate within a specific techno-economic domain requires that astute business people have access to that domain's essential capabilities, and that they can recombine these capabilities freely to create new products and services. Where unique capabilities are controlled by companies or their access is otherwise restricted, making these capabilities available for exchange as market commodities empowers entrepreneurs to experiment, which produces innovation and economic growth. To safeguard the ability to innovate, restricting access to a capability will be considered unlawful if that capability is not reasonably available elsewhere and that capability is required as an ingredient in new products and services."

Again, this reasoning does not predetermine whether Verizon must share its network with competitors, but it frames the impact of the case on innovation in a wholly different way (one that is well supported by economic research). To oblige Verizon to share its network, litigators must still demonstrate on the facts of the case that the network was an essential ingredient for innovation, and that equivalent capabilities were not available elsewhere (alongside other tests a court may choose to impose, such as those related to innovation incentives, proportionality, or materiality). Of course, properly integrating the Innovation-as-Capabilities paradigm into competition policy will require much more work than this thought experiment, but this example suggests one way to do so in the context of the essential facilities doctrine.

4. IMPLICATIONS OF INNOVATION-AS-CAPABILITIES PARADIGMS FOR ANTITRUST LAW AND POLICY

A competition policy based on Innovation-as-Capabilities paradigms would aim to maximize the available capabilities that innovators and economic actors can use to develop new ideas and launch new products. This sort of competition policy would aim to "modularize" markets where possible, by

ensuring that different components and capabilities that underlie broader technological systems are available to be sold, licensed, or provided for integration into other technologies. Protecting modularization is particularly important where new technologies or capabilities emerge that could lead to greater competition and innovation in a variety of related markets. In situations in which companies hoard or vigorously protect unique capabilities that could unlock broader innovation, competition policy would aim to make these capabilities tradable as market commodities when practicable—offering the company that owns the capability a fair rate of return to maintain innovation incentives.

Competition policy would also need to strictly control key interfaces between modules or around a network, technology, or platform, which would likely involve strong interoperability remedies. These interfaces dictate how capabilities can be recombined. Aside from technology interfaces, modularized innovation has many degrees of freedom and would not warrant heavy-handed intervention or scrutiny. These considerations are relevant to platforms as well as vertical and conglomerate theories of harm in antitrust.

An Innovation-as-Capabilities perspective suggests that competition policy should be concerned with ensuring workers can move easily between firms and knowledge can flow freely across networks. Since novel capabilities are often trapped in workers' tacit knowledge, movement of workers between firms is a key driver of innovation.

More generally, Innovation-as-Capabilities paradigms cast the role of government in competition policy in a different light. A commonly understood implication of the Innovation as Incentives paradigm is that government should conduct basic research as a public good (the results of which are rarely appropriable), but generally leave applied research to private sector actors motivated by their own incentives.

By contrast, the Innovation-as-Capabilities paradigm suggests that government has a key role in coordinating innovation communities, facilitating place-based clusters or ecosystems, and shaping

the pace and direction of innovation and many foundational technological breakthroughs have occurred through a blending of capabilities only achievable through government direction (Mazzucato 2013), most recently (and visibly) the development of mRNA COVID-19 vaccines. Placing emphasis on Innovation-as-Capabilities paradigms in antitrust demands that competition policy accepts an active role for government industrial policy, by curating innovation communities, sharing information, and modularizing technologies to open up access to key capabilities.

Integrating this understanding of government presents challenges for a competition policy achieved largely through judge-made antitrust law. Appreciating that government has an active, contextual role in facilitating collaboration, directing innovation and modularizing technologies puts competition policy in a domain that is increasingly administrative and less achievable through court litigation. A challenge for competition policy is how to filter these ideas on innovation into antitrust *law* that courts can apply, as opposed to policy criteria that properly belong to administrative government.

Capabilities paradigms would also bring social inequality on racial and gender lines more directly into antitrust analysis. Capabilities paradigms suggest that who can innovate depends on who has access to key capabilities that they can recombine. Access to these capabilities is distributed unequally in society, disadvantaging minorities and women (Bell et al. 2019). Antitrust theories of harm based on Innovation-as-Capabilities paradigms may consider whether disadvantaged groups lose access to key capabilities that hinder their ability to innovate.

Capabilities based policy solutions are not entirely new to antitrust: The essential facilities doctrine in the EU seems more congruent with a capabilities-oriented approach. Antitrust also has special provisions around research and development joint ventures that enable companies to share information and collaborate on innovation projects without violating antitrust rules.[9] And yet, where

[9] See the Research and Development Block Exemption under EU Competition law: Commission Regulation (EU) No 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements.

these solutions appear, they feel modern and often justified without reference to economic research around Innovation-as-Capabilities, and as a side show to antitrust's dominant incentive-oriented economic reasoning.

To some degree, antitrust fails to integrate capabilities-based reasoning because of the skillsets of competition economists. Competition policy's increasing reliance on economic reasoning is valuable, but there is a certain methodological homogeneity in competition policy communities. Opening up competition policy to a greater diversity of economic thought would improve economic reasoning in competition policy.

More importantly, competition policy lacks a simple model based on Innovation-as-Capabilities paradigms that judges and lawyers can apply in legal reasoning. Innovation-as-Incentives paradigms provide a simple, tractable model for how innovation works. Its implications are easy to understand, and they frame the questions we ask, concerns we raise, and answers we give. Innovation-as-Incentives reasoning also coheres with broader neoclassical ideas within antitrust, making for a more cohesive (if simplified) explanatory framework. Competition policy must adopt similarly simple and tractable heuristics based on the Innovation-as-Capabilities paradigm.

Antitrust should adopt the Innovation-as-Capabilities paradigm with vigor, integrating it alongside the current incentive-oriented approach. Antitrust's exclusive reliance on the Innovation-as-Incentives paradigm may lead it to endorse the activities of economic agents who are blocking the progress of innovation in ways that may not be recognized. The specifics of adopting the Innovation-as Capabilities paradigm will involve careful contextual determinations. In general, antitrust must acknowledge an active role for government in shaping technological development and should see itself as a part of this project. Doing so would involve adopting heuristics around modularizing capabilities, strictly controlling platform interfaces or nodes that connect different subsystems, and promoting free flows of information and movement of workers.

An Innovation-as-Capabilities approach would suggest that antitrust take an assertive stance on particular questions, such as those related to vertical and conglomerate mergers, essential facilities, and employee noncompetes. This section explores these policy prescriptions (although full analysis of the impact of the Innovation-as-Capabilities paradigm on antitrust law lies beyond the scope of this report).

a. Prevent Vertical and Conglomerate Mergers that Restrict Access to Important Capabilities

Merger policy has the potential to keep important capabilities independent and make them available to many innovators, not just aggressive and well-funded acquirers. According to established thinking in US antitrust law, vertical and conglomerate mergers should only matter when they have the potential to affect horizontal competition within a market. To be sure, an innovation market may be different from a firm's ordinary market for antitrust purposes, as it encompasses all areas of activity the firm may wish to move into.[10] But the main focus is on horizontal parameters of competition that shape incentives to reduce prices, improve quality, and innovate.

An Innovation-as-Capabilities worldview would take vertical and conglomerate mergers much more seriously. It would aim to preserve different capabilities as separate elements, ensuring that unique technologies and services can exist on an independent footing, available to be integrated into multiple different processes, platforms, and systems at once. It would have a much stronger preference to license capabilities to different market actors on a non-exclusive basis than to integrate of a set of capabilities into a single firm through a merger, despite any synergies or efficiencies: Nonexclusive licensing allows capabilities to be repackaged into many different systems.

[10] See the concept of innovation spaces in Kokkoris and Valletti 2020.

In any given case, courts would need to make tricky determinations of fact about whether a merger would remove a unique set of capabilities from the market. Framing merger analysis in this way would represent a different approach in vertical and conglomerate merger cases. Economic research based on Innovation-as-Capabilities paradigms suggests that courts should be asking these questions, at the very least.

This approach would strengthen theories of harm in vertical and conglomerate mergers involving technology platforms. Google's recent acquisition of Fitbit demonstrates this dynamic: The Google-Fitbit merger deeply concerned many observers in the antitrust community as it involved Google folding another large company into its dominant platform ecosystem. But Google and Fitbit were not horizontal competitors and so their merger was unobjectionable under traditional theory. In an enforcement action in Europe, the European Commission's investigation raised concerns that acquiring Fitbit's data would entrench Google's monopoly in digital advertising. It cleared the transaction, accepting three principal remedies focused on acquisition and use of consumer data:

1) That Google would not use Fitbit's data in its online advertising;
2) That Google would allow competitors access to Fitbit's data through its (currently nascent) Application Programming Interfaces; and
3) That Google would continue to allow competitor health tracking products nondiscriminatory access to its Android software.

An Innovation-as-Capabilities perspective would approach the case differently. The primary concern would not be how the merger might affect horizontal competition in the market for digital advertising, but whether the merger would stymie the emergence of a capability "module" that comprises Fitbit and its functionality, one that could be integrated with other systems or components. This perspective would examine whether (outside Google) Fitbit would be much more likely to modularize its key features and license them to others on a nonexclusive basis to promote innovation in adjacent or related products or services. The European Commission's remedies, one of which was around preserving Fitbit's current open access Application Programming Interfaces, touch

on this area of concern. An Innovation-as-Capabilities approach would likely mandate a stricter remedy, as its concern is not Google's data monopoly in advertising markets but whether Fitbit would develop its Application Programming Interfaces into an independent modularized capability. A similar approach is applicable to ongoing merger reviews by antitrust authorities in technology platform cases, such as Illumina-Grail and Microsoft-Activision.

A legal test for vertical or conglomerate mergers based on this reasoning might suggest that they are permissible where they do not remove or hinder an important capability or set of capabilities from integration into new products, services, or applications on a nonexclusive basis (and do not otherwise fall foul of conventional approaches to merger analysis).

b. Strengthen Antitrust Doctrine around Essential Facilities, Margin Squeezing, and Vertical Theories of Harm in Unilateral Cases

An Innovation-as-Capabilities approach would support a much more assertive essential facilities doctrine in antitrust law around unilateral conduct. It would aim to make particular key capabilities of dominant unilateral companies available in adjacent markets to innovators and competitors. In digital markets, the Innovation-as-Capabilities paradigm would advocate for strong interoperability rules across platforms and between services.

A legal test for such a doctrine might look similar to what European competition law has developed in *IMS Health* and *Microsoft*, where a company must license access to an essential facility where it is needed to develop a new product or service or make technological progress on a secondary market. Courts and commentators should acknowledge that these tests represent a product of valid economic principles, even though they may at times be in tension with dominant neoclassical approaches to economics.

The burgeoning electric vehicle industry demonstrates how this approach might apply: Currently, electric vehicle charging in the US is highly fragmented, comprised of many different proprietary networks, apps, and subscription plans. This hinders efficient adoption of electric vehicles, as interoperable EV charging is a required capability for the adoption of electric vehicles (Hawkins 2021). An Innovation-as-Incentives approach may incline antitrust practitioners to support the current market dynamic, as electric charging network providers must be able to appropriate returns on their investments to maintain investment incentives. By contrast, an Innovation-as-Capabilities approach might decide that this dynamic triggers antitrust intervention under an assertive essential facilities doctrine, imposing interoperability and access requirements where administrable as a matter of law. Of course, careful inquiry into the facts of this situation (which is beyond our scope) would have to precede any remedy, but an assertive capabilities-based regime might consider this situation worthy of investigation.

Deft legal analysis could reconcile a strong essential facilities doctrines based on this approach with the general principle that a company does not have a duty to deal with its competitors.[11] It could, for example, mandate that a company only be required to give access to its technology or facilities when access would be required to promote technological development in an adjacent market, which would broadly mirror the essential facilities doctrine in European competition law. There are significant administrability concerns for judicial mandates around interoperability and access to essential facilities; these concerns could be addressed through a regulatory rather than a judicial approach to competition policy.

c. Prohibit Employee Noncompetes

An Innovation-as-Capabilities approach suggests that competition policy would ban employee noncompetes. Movement of employees between companies is a key enabler of innovation, even though it may reduce appropriability of a company's innovations and may therefore reduce

[11] See *United States v. Colgate & Co.*, 250 US 300 (1919).

investment incentives. President Biden's Executive Order on Competition suggests that this is (rightly) a key administration priority: Section 5(g) of the order directs the Chair of the FTC to consider rulemaking around unfair restrictions of employee mobility. Innovation-as-Capabilities research suggests that these noncompete clauses are a central concern of competition policy rather than merely an "unfair" restriction on workers to be addressed with the FTC's administrative rulemaking authority on unfair methods of competition.

This approach may also bring competition policy in greater conflict with trade secret doctrines and intellectual property law. Other commentators have thoroughly examined the delicate relationship between competition law and intellectual property. For our purposes, it is sufficient to observe that the Innovation-as-Capabilities approach might modestly renegotiate this relationship to facilitate greater movement of ideas and less protection of trade secrets. Economic policy would thereby favor market actors appropriating profits from innovation through good execution to a relatively greater extent than by legally protecting innovations using intellectual property law.

6. CONCLUSION

To better support innovation, competition policy should embrace new economic voices. In particular, it should draw on research based on Innovation-as-Capabilities paradigms to augment existing incentive-oriented analyses familiar to neoclassical economic reasoning.

Translating economic research around Innovation-as-Capabilities into a tractable framework that lawyers can use represents a serious challenge. This report proposes that such a framework would prioritize modularization of technologies, control key interfaces for integration strictly, promote movement of employees between firms, and preserve emerging new technologies or capabilities as independent entities available for open-access licensing or use in multiple different contexts. This suggests three specific policy prescriptions:

1. Scrutinize vertical and conglomerate mergers closely, questioning whether they remove a set of capabilities from open market access;
2. Mandate a strong essential facilities doctrine, which modularizes key capabilities of dominant firms to make them accessible to the market, and controls key technological interfaces to make technologies interoperable. Competition policy must balance this approach with the need to ensure that remedies remain administrable and do not unduly harm innovation incentives; and
3. Refuse to enforce employee noncompetes to promote a free flow between firms of the tacit knowledge and capabilities that are essential to innovation.

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Sent: 11/2/2021 10:32:45 AM
To: Moore, Derek [dmoore3@ftc.gov]; Signs, Kelly [ksigns@ftc.gov]; Mackey, Sarah D. [smackey@ftc.gov]; Gilman, Daniel [dgilman@ftc.gov]; Lipsitz, Michael [mlipsitz@ftc.gov]

Subject: Labor/Noncompete Brainstorming
Location: https://ftc.zoomgov.com/ (b)(6)

Start: 11/2/2021 2:30:00 PM
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From: Cady, Benjamin [bcady@ftc.gov]
Sent: 1/19/2022 9:56:11 AM
To: Cady, Benjamin [bcady@ftc.gov]; Signs, Kelly [ksigns@ftc.gov]; Mackey, Sarah D. [smackey@ftc.gov]; Merber, Kenneth [kmerber@ftc.gov]; Lipsitz, Michael [mlipsitz@ftc.gov]; Gilman, Daniel [dgilman@ftc.gov]

Subject: HOLD for additional non-compete NPRM policy development meeting
Location: Microsoft Teams Meeting

Start: 1/26/2022 2:00:00 PM
End: 1/26/2022 3:00:00 PM
Show Time As: Busy

Required Attendees: Signs, Kelly; Mackey, Sarah D.; Merber, Kenneth; Lipsitz, Michael; Gilman, Daniel

This is a calendar hold for one more policy development meeting next week, in case we need it.

Microsoft Teams meeting

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Appointment

From: Signs, Kelly [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=a02d2881180f491789abe52204d2cc99-ksigns]
Sent: 1/11/2022 3:05:11 PM
To: Cady, Benjamin [bcady@ftc.gov]

Subject: Accepted: HOLD for Non-Compete NPRM Policy Development Meeting
Location: Microsoft Teams Meeting

Start: 1/21/2022 1:00:00 PM
End: 1/21/2022 2:00:00 PM
Show Time As: Busy

Appointment

From: Signs, Kelly [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=a02d2881180f491789abe52204d2cc99-ksigns]
Sent: 1/19/2022 1:07:57 PM
To: Cady, Benjamin [bcady@ftc.gov]

Subject: Accepted: HOLD for additional non-compete NPRM policy development meeting
Location: Microsoft Teams Meeting

Start: 1/26/2022 2:00:00 PM
End: 1/26/2022 3:00:00 PM
Show Time As: Busy

From: Signs, Kelly [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=a02d2881180f491789abe52204d2cc99-ksigns]
Sent: 1/4/2022 2:41:03 PM
To: Cady, Benjamin [bcady@ftc.gov]

Subject: Accepted: Non-Compete NPRM Policy Development Meeting
Location: https://ftc.zoomgov.com/j/ (b)(6)

Start: 1/19/2022 1:00:00 PM
End: 1/19/2022 2:00:00 PM
Show Time As: Busy

Appointment

From: Signs, Kelly [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=a02d2881180f491789abe52204d2cc99-ksigns]
Sent: 1/26/2022 4:29:02 PM
To: Cady, Benjamin [bcady@ftc.gov]

Subject: Accepted: Non-compete NPRM policy development meeting
Location: Microsoft Teams Meeting

Start: 1/28/2022 2:00:00 PM
End: 1/28/2022 3:00:00 PM
Show Time As: Busy

Appointment

From: Signs, Kelly [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=a02d2881180f491789abe52204d2cc99-ksigns]
Sent: 1/31/2022 10:28:22 AM
To: Cady, Benjamin [bcady@ftc.gov]

Subject: Accepted: Non-Compete NPRM Team Meeting
Location: https://ftc.zoomgov.com/[redacted] (b)(6)

Start: 2/2/2022 12:30:00 PM
End: 2/2/2022 1:30:00 PM
Show Time As: Busy

Appointment

From: Signs, Kelly [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=a02d2881180f491789abe52204d2cc99-ksigns]
Sent: 12/22/2021 9:07:14 AM
To: Cady, Benjamin [bcady@ftc.gov]

Subject: Accepted: Non-Compete NPRM Policy Development Meeting
Location: https://ftc.zoomgov.com/j (b)(6)

Start: 1/20/2022 1:00:00 PM
End: 1/20/2022 2:00:00 PM
Show Time As: Busy

Appointment

From: Signs, Kelly [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=a02d2881180f491789abe52204d2cc99-ksigns]
Sent: 12/22/2021 9:07:09 AM
To: Cady, Benjamin [bcady@ftc.gov]

Subject: Accepted: Non-Compete NPRM Policy Development Meeting
Location: https://ftc.zoomgov.com/ (b)(6)

Start: 1/13/2022 1:00:00 PM
End: 1/13/2022 2:00:00 PM
Show Time As: Busy

Appointment

From: Slaughter, Rebecca [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=883978106 4f54d2eb18809bc18d110f8-rslaughter]
Sent: 1/25/2023 9:12:40 AM
To: Slaughter, Rebecca [rslaughter@ftc.gov]

Subject: HOLD: noncompete forum

Start: 2/16/2023 12:00:00 PM
End: 2/16/2023 3:00:00 PM
Show Time As: Busy

From: Greer, Kristin [kgreer@ftc.gov]
Sent: 6/13/2022 11:00:28 AM
To: Slaughter, Rebecca [rslaughter@ftc.gov]

Subject: FW: NAAG Antitrust and Labor Issues Working Group Call--OPEN call
Attachments: Balan Noncompetes Writeup Sketch.pdf; CPI-Balan_2020.pdf; Non-Competes_Antitrust Bulletin_Published Online.pdf; 06 13 2022 ALIWG Agenda Open Call..pdf
Location: zoom

Start: 6/13/2022 2:00:00 PM
End: 6/13/2022 3:00:00 PM
Show Time As: Tentative

FYI-Would you like these added to the calendar when they come in?

-----Original Appointment-----
From: Walker, Schonette <swalker@oag.state.md.us>
Sent: Friday, June 10, 2022 4:13 PM
To: Walker, Schonette; Alacoque Nevitt; Amanda Lee; Berger, Thomas J; Black, Christina (ATG; Bloom, Bryan; Bradshaw, Grace (AGO; Bryan Sanchez; CalebSmith-contact; Canaday, James; Christopher Hallock; David Sonnenreich; Demers, Nicole; Dunlap, Jeffrey; Durst, Arthur (OAG; Elizabeth Mxeiner; Emily Myers; Etie-Lee Schaub; Hoffmann, Elinor; Honick, Gary; Hubbard, Robert; Isabella Pitt; Jackson, Catherine; Jacob.murray@atg.in.gov; Jamison T. Ball; Thomson, Jennifer; Jessica Agarwal; jkirk; Joseph 'Chervin; joseph.meyer; Kemerer, Hannibal; Khan, Meryum (AGO; Laura Namba; LynetteBakker-Contact; Marie W. Martin; Marisa Hernandez-Stern; Mark, Cynthia (AGO; Mary Martin; Matelis Christy; Matlack, William (AGO; Max.Miller; McFarlane, Amy; Michaloski, Matthew; Moler, Jonathan; Morejon, Amanda (AGO; Nicholas Niemiec; Nodit, Luminita (ATG; Olson, John; Pamela Pham; Paul Harper; philip.rizzo@atg.in.gov; Queyn Toland; Rao, Rahul (ATG; Robert J Yaptangco; Robert Yaptangco; Satoshi Yanai; Sharp, Margaret; Shencopp, Erin; steve provazza; Tara Pincock; Timothy Fraser; Tucker, Lucas; Tulin, Leah; Walker, Nancy A.; William Rogers; Yale Leber; Zach Biesanz; Alexander James Colvin; Amezcua, Carrie G.; (b)(6) .europa.eu; Anne Schneider; avery gardiner; Batal, Mohamad; belga; Bond, Slade; Braun, Christi; (b)(6) @hoganlovells.com; (b)(6) ucsd.edu; dave balan; DAVID DESARIO; (b)(6) brandeis.edu; DEMIROGLOU Aristeidis; Doha.Mekki; Eric Posner; Eric.posner@usdoj.gov; Funk, Stephanie; Gerstein, Terri Ellen; Greer, Kristin; Harsch, Ryan F.; Harvey, Dean; Holland, Caroline; Ioana Marinescu; Jane Flanagan; Johnson, Heather; Jon Leibowitz; (b)(6) @omm.com; Berg, Karen E.; I (b)(6) ec.europa.eu; Levine, Gail; Marc Edelman; Mark, Synda; Mast, Andrew (ATR; (b)(6) @duke.edu; megan jones; Myriam E Gilles; (b)(6) @economicliberties.us; Robinson, Tabatha; Salahi, Yaman; STROUVALI Konstantina; Tanuja Gupta; Terri Gerstein; vaheesan; Van Wye, Joseph; Wilkins, Elizabeth; William Wu; Woolery, Ricardo; (b)(6) @edelson.com
Subject: NAAG Antitrust and Labor Issues Working Group Call--OPEN call
When: Monday, June 13, 2022 2:00 PM-3:00 PM (UTC-05:00) Eastern Time (US & Canada).
Where: zoom

These open WG calls will be held on the 2nd Monday in February, April, June, August, October and December at 2PM EST. Calendar invites will be updated with agendas shortly before the calls. Thank you. ~Schonette

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June 9, 2022

Introduction:

- This note is about the effects of non-competes on the workers who are party to them. It is not about the effects of non-competes on third parties.

- Recent research strongly suggests that non-competes are harmful to workers.[1] More specifically, and contrary to an argument that is commonly offered in support of non-competes, they are often imposed on workers involuntarily, rather than being the product of negotiation in which the worker receives something that they value at least as much as they dislike the non-compete.

- This harm to workers is not necessarily a competitive harm.[2] The purpose of this note is to argue that it can in fact reasonably be considered a competitive harm, and to briefly sketch an approach for bringing antitrust cases challenging non-competes.

Monopsony Power as a Basis for Antitrust Action Against Non-competes:

- A commonly-held view is that for non-competes to be an antitrust problem, they must be caused by monopsony power in the labor market.

- It may therefore seem natural for a central element of an investigation to be about identifying monopsony power among the firms that impose non-competes on workers.

- In my view, in many or even most cases this is likely to be a mistake, for two reasons.

- First, monopsony power may genuinely not be present. And even if it is present, it may be very difficult or impossible to prove.[3]

- Second, even if monopsony power could be proven, it is not clear that it can work as a basis for an enforcement action. The reason is as follows. Unless the claim against the non-competes is accompanied by a conventional Section 2 or Section 7 claim, the FTC/DOJ or the state AG will in effect be conceding that the monopsony power possessed by the firms was

[1] See the empirical work by Evan Starr and his many co-authors (including BE economist Michael Lipsitz), and also Balan (2021).

[2] This note is about non-competes that cause harm to the workers who are party to them. For cases where the competitive harm is to third parties (such as business that cannot find qualified workers, and their customers and workers), the problem is quite obviously a competition problem.

[3] There is some new research suggesting that monopsony power is more prevalent than had previously been believed, even for low-wage workers. This may somewhat lower the burden for showing that monopsony power exists. But to my knowledge this new research has not been tested in court, and even under this lower burden monopsony power may still be absent or at least difficult to prove.

acquired legally. And as a general matter, exercising legally-acquired market power is legal. So if the firm decides to exercise its market power by imposing a non-compete, how is that more illegal than another avenue of exercising it, such as lowering the wage? This strikes me as basically a fatal objection to the idea of basing non-competes enforcement on monopsony power possessed by the firm.

An Alternative Approach for Antitrust Enforcement Against Non-Competes (Main Idea):

- I suggest a different approach.[4] To see how different it is from a monopsony-based approach, begin by assuming that the labor market is extremely competitive, in the sense that on the day the worker accepted their job that worker had essentially an unlimited number of observationally equivalent job offers.[5] Obviously this is an extreme assumption, but it serves to emphasize the point.

- The basis for the alternative approach lies in the following facts: (i) dissolving job matches is costly for both the worker (who must engage in a costly search for another job) and the firm (that must engage in a costly search for another worker); and (ii) labor agreements are incomplete (meaning that not every term is specified up front before the match is formed) and costly to enforce (meaning that even terms that are specified up front may be performed only partially or not at all).

- Another way of saying that dissolving the match is costly to the worker and the firm is that preserving the match generates match-specific economic surplus to be divided between the worker and the firm. This surplus can be very substantial. And the fact that labor agreements are incomplete and imperfectly enforceable means that the division of this surplus cannot be fully determined up front. Instead, the division will be determined largely by informal bilateral bargaining between the worker and the firm. The worker will try to grab more of the surplus in the form of (say) demanding longer breaks, and the firm will try to grab more of the surplus in the form of (say) insisting on shorter breaks.

- In this informal bargaining, as in any other bargaining, the division of the surplus depends on how much each side "needs" an agreement. This in turn depends on how good or bad is each party's next-best alternative to reaching an agreement (often called the "outside option"). The worse the worker's outside option (i.e., the more costly it is for the worker to be fired), the lower their bargaining leverage relative to the firm, and the worse the terms they will receive. Similarly, the worse the firm's outside option (i.e., the more costly it is

[4] What follows is largely based on Balan (2020), but has been refined and expanded since that article was published.
[5] That is, the jobs need not all be identical; the assumption is only that any differences could not be discerned by the worker at the time the job was accepted.

for the firm to have the worker quit), the lower its bargaining leverage relative to the worker, and the worse the terms it will receive.

- Non-competes make the worker's outside option worse. Without the non-compete, the worker's outside option is the best job they can get. With the non-compete, the worker's outside option is the best job they can get that does not violate the non-compete. If the non-compete is binding to any significant degree, then the latter outside option will be substantially worse than the former.

- **This brings us to the central claim of this note. Non-competes are a competition problem NOT because they are the product of monopsony power possessed by firms, but rather because they make it more difficult for the worker to access the benefits of the competitive labor market. Put another way, the problem is not that the labor market is bad because it is monopsonized; the problem is that the labor market is competitive and good but the worker cannot participate in it.**

Discussion:

- There are two points related to this approach that merit discussion.

- First and perhaps most important, this approach **DOES** require that non-competes are imposed on workers against their will, rather than being something that workers freely agree to in exchange for something that they value at least as much. The empirical evidence plus the discussion in Balan (2021) strongly suggest that this is true (especially but **NOT** exclusively for low-wage workers), but it is still a necessary condition and it would need to be demonstrated in court. In other words, this approach is about showing that the harmfulness to workers of non-competes, **once demonstrated**, is specifically an antitrust problem. But it does not eliminate the need to perform the prior step and demonstrate that non-competes are harmful to workers.

- Second, the fact that this approach is not rooted in monopsony power does not mean that competition in the labor market is irrelevant. It is still necessary to show that the restraint imposed on the worker by the non-compete is meaningful. If there were 1000 equivalent jobs, and the non-compete denied the worker access to 100 of them, there would still be 900 equivalent jobs remaining and the non-compete would not have caused any harm. So there would still be a need to show that the jobs that the non-competes prevent the workers from taking are meaningfully preferable, to a sufficient number of workers, to other

available jobs. In many cases this will likely not be very difficult (jobs really are quite differentiated, even low-wage jobs), but it will still be necessary to prove it.[6]

An Alternative Approach for Antitrust Enforcement Against Non-Competes (Additional Idea):

- The main idea for this new approach was described above. There is an additional idea that is both less important and more difficult to understand. But it does identify an additional source of harm from non-competes, so I describe it here briefly.

- As discussed above, the outcome of the informal bargaining between the worker and the firm over the match-specific surplus depends on each side's outside option. This is commonly modeled in antitrust economics using the Nash Bargaining model. In that model, reducing the value of **either** side's outside option increases the total match-specific surplus. This means that the match-specific surplus is greater with a non-compete than without: when one side's outside option gets worse, that side needs a deal more, and when **either** side needs a deal more, the total surplus from the match is higher.

- There might appear to be a contradiction, or at least a tension, between the claim that the non-compete makes the worker worse off by degrading their bargaining leverage and the claim that the non-compete increases the match-specific surplus. But there is no contradiction: the non-compete does increase the surplus, because the worker's weaker relative bargaining position makes them value the match more. It also harms the worker, because it was precisely that weakening of the worker's bargaining leverage that caused the increase in the surplus.

- A numerical example will help clarify the point. Suppose that the non-compete degrades the worker's outside option by $100. That is, if the negotiation fails and the match is dissolved the worker will be worse off by $100 relative to what it would be absent the non-compete. The total surplus is the sum of how much the worker values the match plus how much the firm values the match, so the non-compete has increased total surplus by $100.

- That additional surplus has to be divided somehow. In the Nash Bargaining model, the division of the surplus is determined by the "split parameter." So for example if the split parameter was 0.5, that would mean that each side captures half of the surplus. So if the non-compete increased the surplus by $100, the worker would capture $50 of that surplus. So the degradation of the worker's outside option made them worse off by $100, but they

[6] This idea is related to market definition. Whether it should be treated literally as market definition (i.e., defined according to the Hypothetical Monopolist Test as laid out in the Horizontal Merger Guidelines), or if some alternative approach should be used instead, is an important question that is beyond the scope of this note.

recaptured $50, leaving them worse off by $50 on net. The firm would capture the other $50, making it $50 better off on net.

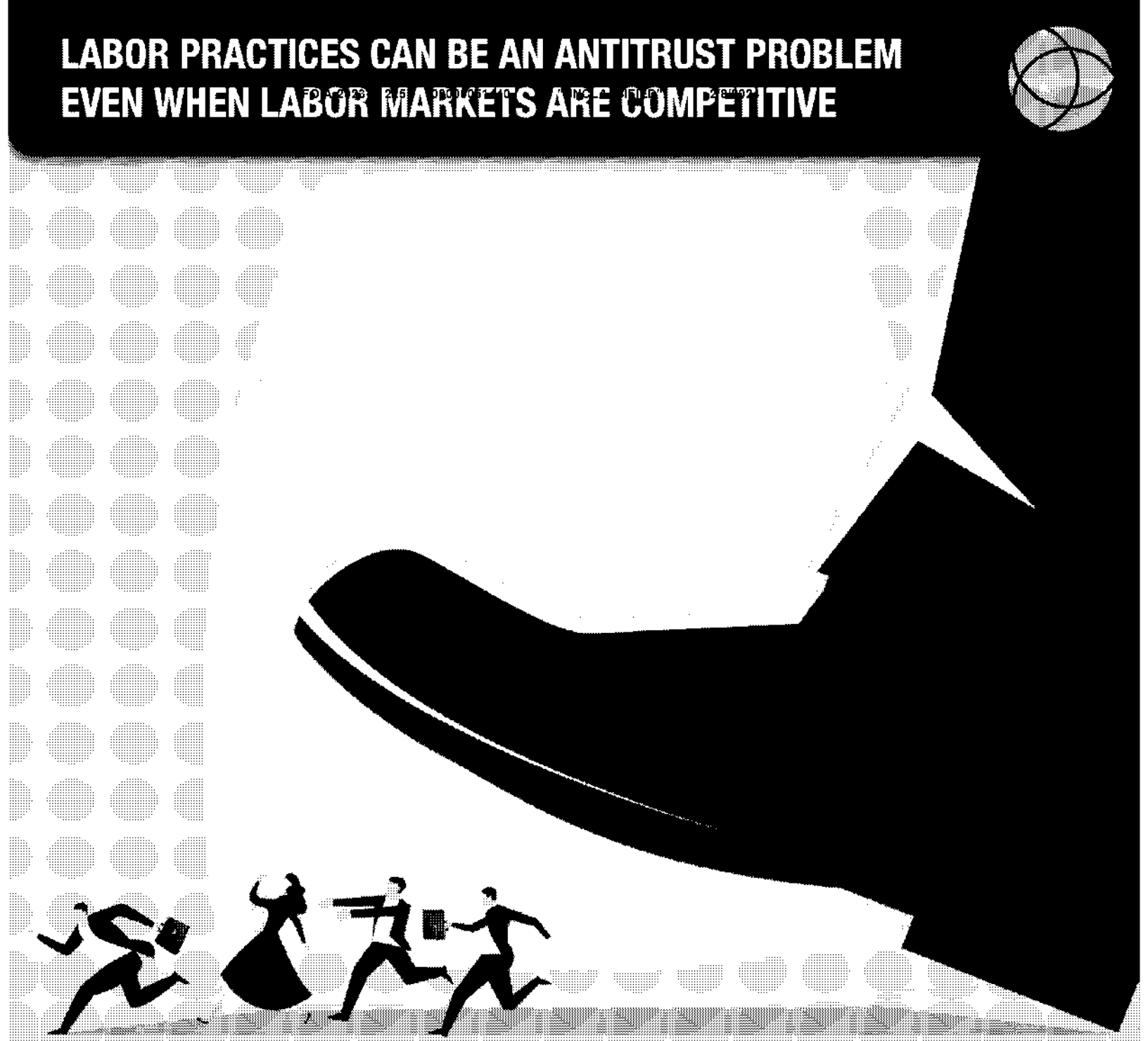
- But now suppose (realistically) that the split parameter is not 0.5, but something much more lopsided, say 0.9, meaning that the firm captures 90% of the surplus and the worker captures 10%. Now the worker would only recapture $10, being $90 worse off on net, and the firm would capture $90, being $90 better off on net.

- The fact that the firm likely captures most of the surplus is not an antitrust problem in itself. But it does have two important implications for the antitrust analysis. First, as shown in the above example, the harm caused to the worker by the non-compete is larger than it would be if the split was more equal. Second, the benefit to the firm is larger than it would be if the split was more equal. This gives the firm a stronger incentive to impose the non-compete in the first place. For both of these reasons, a highly unequal split parameter makes the antitrust harm from non-competes worse.

Conclusion:

- There is strong reason to believe that non-competes harm workers. For this to be a problem that the FTC/DOJ or state AGs can address, that harm needs to be competitive harm of some sort. A natural source of such harm is monopsony power wielded by the firm imposing the non-compete. But I believe this to be a weak basis for an enforcement action against non-competes, for both practical and conceptual reasons. My proposed alternative approach is to argue that non-competes are a competition problem because they prevent workers from accessing and enjoying the benefits of the competitive labor market, thereby weakening their bargaining leverage in informal negotiations with the firm over match-specific job surplus. In addition, the fact that the firm is likely to appropriate most of that match-specific surplus both increases the harm to the worker from the non-compete and increases the incentive of the firm to impose it.

LABOR PRACTICES CAN BE AN ANTITRUST PROBLEM EVEN WHEN LABOR MARKETS ARE COMPETITIVE



BY DAVID J. BOLAN[1]

[1] David Bolan is an employee of the Federal Trade Commission. The views expressed in this paper are solely those of the author.

[2] I thank Keith Brand, Wally Mullin, and Jeremy Sandford for helpful comments.

I. INTRODUCTION

In conventional antitrust analysis, there are certain conditions that must be met for a matter to be an antitrust problem. A merger is only likely to be a problem if the merging firms are close competitors to each other and there are not very many other close competitors. Coordination is only likely to be a problem if the coordinating firms collectively represent a large fraction of the sellers of the product. And conduct, including a variety of contractual restraints, is only likely to be a problem if the restraining firm has significant market power as that term is conventionally understood.[3]

Assuming, at least for the sake of argument, that this is true of output markets, it may appear that it must be true of input markets as well, including labor markets. Indeed, the textbook analysis of monopsony and oligopsony is very similar to that of monopoly and oligopoly,[4] and this similarity is explicitly recognized in the DOJ/FTC Horizontal Merger Guidelines.[5] It may therefore appear, and it is often argued, that labor market practices engaged in by firms can only be an antitrust problem in the presence of conventional labor market power, defined (roughly) as there being only one or a small number of possible employers for the type of labor in question.

The purpose of this article is to argue to the contrary. Specifically, I argue that firms can impose harmful conditions on workers even when workers have many (roughly) equivalent job offers to choose from.[6] **I further argue that this harm can reasonably be thought of as antitrust harm.**[7]

The basic argument is as follows. Even if the labor market is very competitive *ex ante* (i.e. the time of hiring), once the job match is formed, dissolving it is costly to both the worker and the firm, which means that **preserving** the match generates surplus, and this surplus must be divided between the worker and the firm. The more valuable the match (i.e. the more the worker prefers preserving the match to looking for another job, and the more the firm prefers preserving the match to looking for another worker), the more surplus there is to be divided.

This division will be determined via bilateral bargaining. This bargaining can be modeled using standard methods familiar from conventional antitrust analysis, specifically a model known as the Nash Bargaining model. In that model, the division of the surplus depends on the relative bargaining **leverage** between the worker and the firm, which loosely means that the less a party has to gain from reaching a deal, the more favorable the terms that party will receive; and on the relative bargaining **power** between the worker and the firm, which means that the stronger a party's capabilities for capturing surplus, the larger the share of the surplus that party will receive. Having more bargaining leverage and more bargaining power are both beneficial to a party, but an important and under-emphasized result from the theory of Nash Bargaining is that a party that has all of the bargaining power captures all of the surplus, regardless of relative bargaining leverage. Specifically, if one party has all of the bargaining power, they can make a take-it-or-leave-it offer to the other party that leaves that party no better off than they would be if the match was dissolved.

Whether a worker or a firm has more bargaining leverage is difficult to say, and there is no strong empirical evidence on the subject that I am aware of. However, there is some reason to suspect that workers often "need" a deal more than firms do, giving firms more relative bargaining leverage. With regard to bargaining power, matters are much clearer. Bargaining power is very likely to be held mostly by the firm, not the worker. Firms have myriad advantages in size, resources, and sophistication, and they can unilaterally set non-negotiable firm policies. An ordinary worker has little prospect of matching these advantages, and so will be at a major disadvantage in capturing the match-specific surplus.

Bargaining power as it appears in the Nash Bargaining model corresponds to power in the ordinary English sense of the word. While not without bound (the worker can still quit), the firm is able to use its advantages to acquire bargaining power, and to use that bargaining power to benefit itself at the expense of the worker. This can take the form of chiseling on wages and hours, or poor working conditions, or even abusive or degrading treatment.

The question is whether this power is **market** power in the antitrust sense. I argue that it is. As discussed above, the division of the match-specific surplus takes place outside the context of the competitive labor market, so the competitive labor market does not protect the worker from efforts by the firm to capture it.[3] Practices that allow the firm to capture most or all of that surplus can be thought of as efforts to become a monopolist over that surplus with respect to that worker, which makes it an antitrust problem.[4]

The fact that harm from these practices might reasonably be thought of as antitrust harms does not necessarily mean that they should always be dealt with in the context of antitrust. In many cases, regulation by the Department of Labor or by OSHA may be more appropriate. Nor is it obvious which practices by a firm should or should not be regarded as antitrust violations. The purpose of this article is not to resolve these questions. The purpose is only to establish that there is a reasonable basis for considering these harms to be antitrust harms, and therefore to consider antitrust action as one possible avenue for addressing them.

There is one labor market practice that is particularly likely to be an antitrust problem, namely labor non-compete agreements. Unlike other labor practices, whose purpose is to affect the division of **existing** match specific surplus, non compete agreements have the effect of **increasing** the match-specific surplus. They do this by making it more difficult for the worker to re-access the competitive labor market, thereby degrading the worker's prospects outside the match. When the worker's outside option is worse, they value the match by more, increasing the amount of match-specific surplus available to be captured by the firm. Practices that distance workers from the opportunity to participate in competitive markets are quite clearly an antitrust problem.

[illegible]

[illegible]

[illegible]

This view of non-competes is at odds with the familiar argument that their voluntary nature is strong grounds for believing them to be both mutually beneficial and efficient.[16] But this is only true if non-competes are truly voluntary, and if the agreed-upon compensation offered to the worker in exchange for accepting a non-compete is actually delivered. In a separate article (Balan, 2019), I argue that these conditions are often not satisfied.[17] This argument is bolstered by a wealth of recent empirical evidence that, while somewhat mixed, largely finds non-competes to be harmful to workers.[18] And if these conditions are not satisfied, then non-competes are not to be presumed beneficial to the worker, but are rather to be understood as a restraint imposed on workers **without** compensation, to the benefit of the firm and to the detriment of the worker.

II. *EX POST* BARGAINING OVER MATCH-SPECIFIC SURPLUS

Suppose that a worker entering the labor market can choose between many jobs that *ex ante* appear to be identical. Once the worker chooses a job and a match is formed, that match is costly to dissolve, for both the worker and the firm. For the worker, the costs include the direct financial costs of a new job search, the lost income during the search (the damage from which is exacerbated by the fact that many workers have no financial cushion), and the fact that being fired is an emotionally traumatic experience for workers. In addition, the worker might need a recommendation from the firm to find another job, which they may not get if the match ends in acrimony. Finally, the worker may have signed a non-compete agreement or be subject to other restrictive covenants, which further increases the cost of leaving their job. For the firm, the costs include the direct recruiting and hiring costs to replace the worker, the indirect costs of being temporarily understaffed until a replacement is hired, and possible morale problems among remaining workers. These costs can be substantial.

Another way of saying that dissolving the match is costly is to say that **preserving** the match generates surplus arising from avoiding those costs. This surplus must somehow be divided between the worker and the firm. If labor contracts were complete and also fully and costlessly enforceable, then the division of this surplus would be determined within the context of the competitive labor market, and workers would receive competitive overall terms.

In reality, however, contracts are neither complete nor fully enforceable. This means that much of what happens between the worker and the firm is determined **after** the match has formed. There are things that the firm can do to benefit itself at the expense of the worker (chisel on wages and hours, poor working conditions, or even abusive or degrading treatment), and there are things that the worker can do to benefit themselves at the expense of the firm (shirking, theft, even sabotage). Which of these things will happen will be determined via bilateral bargaining between the worker and the firm, and not within the context of the competitive labor market.

This does not mean that the competitive labor market is irrelevant. A key concept in bargaining is that neither side can be forced to do worse than they would do if the match was dissolved (this is often referred to as their "outside option" or "disagreement payoff"). The worker will not agree to terms that are worse than being fired and having to look for another job, nor will the firm agree to terms that are worse than letting the worker quit and having to look for another worker. The more competitive the labor market, the better the worker's outside option, and the better the terms the worker will receive. That is, a labor market characterized by conventional market power makes things worse for workers, for the conventional reasons. But even in a competitive labor market, a substantial amount of surplus will be divided via bilateral bargaining outside the context of the competitive labor market.

This kind of bilateral bargaining is standard in economics, including antitrust economics. The standard framework for studying it is a well-known model called the Nash Bargaining model. In the remainder of this section, I summarize and present key results from this model.

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

A. Bargaining Leverage

As discussed above, the worker's surplus from the match is the difference between what they receives if a deal is reached and what they receive if a deal is not reached, and similarly for the firm. The total surplus from the match is the sum of the worker's surplus and the firm's surplus.

Somewhat counter-intuitively, the party that contributes **less** to the total surplus has **greater** bargaining leverage. To see why, note that the surplus must be divided somehow. Suppose, for example, that the surplus is to be divided equally (though this is not necessary). A party that contributes little surplus shares little surplus with the other party (half of very little is also very little), but that party still receives half of the surplus contributed by the other party. An analogy would be a guest who brings a small side dish to a potluck dinner, but then eats the full meal like everybody else. Put another way, the party that contributes less to the total surplus has less to gain from a deal. That party "needs" a deal less, and so is able to bargain for better terms.

Whether workers or firms have greater relative bargaining leverage is difficult to say, and it may differ across employment matches and perhaps even over time within a match. While there is no direct empirical evidence that I am aware of, for the above reasons it appears that firms may often have greater relative bargaining leverage (i.e. having the match end is worse for the worker than it is for the firm).[12]

B. Bargaining Power

In Section II.A I assumed that the total surplus from reaching an agreement is divided equally between the parties. But this need not be the case. A given amount of surplus can be divided so that it goes entirely to one party, entirely to the other party, or anywhere in between. What share of the surplus a party can command is referred to as their bargaining **power**, which is distinct from the bargaining leverage described above. If one party has all of the bargaining power, then it will capture all of the surplus, and the other party will only receive value equal to their outside option, making them no better off than they would be if the match were dissolved. Any intermediate amount of bargaining power is also possible.

Bargaining power is an economic term of art, but it corresponds quite closely to the ordinary English usage of the word "power." When there is a pool of surplus to be divided between a single worker and a large firm, who has the power to capture it? Is that division likely to be 50/50 (the worker and the firm share the surplus equally)? Or is it more likely to heavily favor the firm, say 90/10 or 95/5? The massive size, sophistication, and resources of the firm strongly suggest the latter, as does the fact that the firm unilaterally sets non-negotiable rules, policies, and employment practices that can be used to apply pressure to the worker. It simply strains credulity that ordinary individual workers can outperform large, heavily resourced firms in a competition to capture a pool of surplus. That is power, and it is the firms, not the workers, that have it.[13]

There is an additional point that is a standard result of Nash Bargaining, but that is not widely appreciated. If one party has (almost) all of the bargaining power, then it matters little who has more bargaining leverage. Recall that bargaining leverage is about the relative contributions of the two parties to the total pool of surplus. But if one party has **all** of the bargaining power, then this is moot, because that party receives **all** of the surplus, regardless of who contributed it. This will be made clearer in the next sub-section.

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[12] [illegible]

[13] [illegible]

[illegible]

C. Numerical Examples

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Define W^D as the value that the worker receives if a deal is reached (the job match continues) and W^{ND} as the value that the worker receives if a deal is not reached (the job match is dissolved and the worker receives their outside option).[14] The difference between these two $(W^D - W^{ND})$ is the gain to the worker from reaching a deal. Note that $(W^D - W^{ND})$ can be large because W^D is large (getting a deal is very good), or because W^{ND} is small (not getting a deal is very bad), or some combination of the two. Similarly, define F^D as the value that the firm receives if a deal is reached, F^{ND} as the value that the firm receives if a deal is not reached, and $(F^D - F^{ND})$ as the gain to the firm from reaching a deal.

The total surplus *TS* from continuing the job match is

$$TS = (W^D - W^{ND}) + (F^D - F^{ND}),$$

where *TS* is the sum of the amount by which the worker is better off with a deal than without, plus the amount by which the firm is better off with a deal than without.

Each party will receive their outside option (W^{ND} for the worker and F^{ND} for the firm) plus some share of the match-specific surplus. For simplicity I assume that this surplus will be divided via a lump-sum payment *P* from the worker to the firm (this payment can be negative, which would mean a payment from the firm to the worker). It is important to note that this does not literally mean that the worker will hand money over to the firm, or vice-versa. Rather, the "payment" will take the form of one side or the other getting away with under-performing the terms of the original agreement, or with interpreting ambiguities in that agreement in a manner favorable to themselves. Workers may get away with a certain amount of shirking, and firms may get away with a certain amount of mistreatment of one kind or another.[15]

In our examples we will assume, as is common in antitrust economics, that *P* will be determined as predicted by the Nash Bargaining model. There are five inputs into this model: W^D, W^{ND}, F^D, F^{ND}, and a "bargaining power" parameter α that governs the share of the surplus that is kept by the worker. According to the model, the equilibrium *P* will be the one that maximizes the following expression:

$$((W^D - P) - W^{ND})^{\alpha} \times ((F^D + P) - F^{ND})^{1-\alpha}.$$

Less technically, the *P* that comes out of the Nash Bargaining Model is the one that causes the worker to receive their outside option plus surplus equal to αTS, and the firm to receive its outside option plus surplus equal to $(1 - \alpha)TS$.

Now consider the following examples. In each example, $TS = 200$.

$$\text{Example 1: } (W^D - W^{ND}) = 100,\ (F^D - F^{ND}) = 100, \text{ and } \alpha = ½.$$

The two parties are identically positioned, so we would expect $P = 0$ to be the answer. This is indeed the case. The worker and the firm have equal bargaining leverage; they each prefer a deal to no deal by 100, so they each contribute 100 to the $TS = 200$. They also have equal bargaining power, because $\alpha = ½$ and $(1 - \alpha) = ½$, so they each are to receive their outside option plus 100 (half of the *TS*) net of *P*. $P = 0$ is the *P* that accomplishes this, as this is what they each already receive gross of *P*.

$$\text{Example 2: } (W^D - W^{ND}) = 150,\ (F^D - F^{ND}) = 50, \text{ and } \alpha = ½.$$

Now the firm has more relative bargaining leverage than in Example #1, because the worker prefers a deal to no deal by 150, and the firm prefers a deal to no deal by only 50, meaning that the worker contributes more than half of *TS*. But as in Example #1, the bargaining power is equal (α = ½), so the worker and the firm will each receive their outside option plus half of *TS* (i.e. their outside option plus 100) net of *P*. Since the worker

[illegible]

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[illegible]

receives their outside option plus 150 gross of P, and the firm receives its outside option plus 50 gross of P, a payment of $P = 50$ is required. If the 150 and the 50 were reversed, then P would be –50, and the firm would be paying the worker.

Example 3: $(W^{in} - W^{out}) = 100$, $(F^{in} - F^{out}) = 100$, and $\alpha = 0$.

Now the two parties have the same bargaining leverage (as in Example #1), with each preferring a deal to no deal by 100, and so each contributing 100 to *TS*. But now the firm has **all** of the bargaining power, which means that the worker will receive no surplus net of P, only receiving their outside option. The firm will receive its outside option plus 200 (all of *TS*) net of P. Since they each receive their outside option plus 100 gross of P, a payment of $P = 100$ is required. If we replaced $\alpha = 0$ with $\alpha = 1$, P would be –100, the firm would receive its outside option, and the worker would receive their outside option plus 200.

Example 4: $(W^{in} - W^{out}) = 0$, $(F^{in} - F^{out}) = 200$, and $\alpha = 0$.

Now the worker has all of the bargaining leverage (they are indifferent between a deal and no deal, but the firm prefers a deal to no deal by 200 and so contributes all of the *TS*). But as in Example #3, the firm has all of the bargaining power. In this case, the worker **still** receives no surplus net of P, only receiving their outside option, and the firm still receives its outside option plus 200 (all of *TS*) net of P. Since the worker receives no surplus beyond its outside option gross of P, the payment will be $P = 0$. If we replaced $\alpha = 0$ with $\alpha = 1$, P would be –200, the firm would receive its outside option, and the worker would receive their outside option plus 200.

This last example is somewhat subtle but very important. If the firm has most or all of the bargaining power, then it will receive most or all of the bargaining surplus, regardless of bargaining leverage. When one side can capture all of the surplus from a deal, it does not matter who contributed how much to that surplus.

These examples are highly stylized, and they omit many important factors. However, they capture an essential point, namely that when the firm has a lot of bargaining leverage, and (more importantly) when the firm has almost all of the bargaining power, it is possible for workers to be harmed by firms *ex post* even when they participate in a highly competitive labor market *ex ante*.

III. IS THIS AN ANTITRUST PROBLEM?

The existence of costs to dissolving a job match creates match-specific surplus, and that surplus must be divided somehow between the worker and the firm. Labor market practices that firms engage in to the detriment of workers can be understood as efforts to capture that surplus. There are many such practices, including cheating on wages and hours, poor working conditions, or even abusive or degrading treatment.[17]

Some of these practices may be actionable under labor law, but the question for this article is whether they can be considered **antitrust** violations, even if the labor market is highly competitive *ex ante*.[18] I argue that they can. The key fact is that the surplus that these practices are intended to capture are specific to the job match, and so by definition the harm suffered by the worker from these practices cannot be ameliorated by labor market competition. These are practices of **a single firm** against the worker. When the firm has disproportionate bargaining leverage or (more importantly) most or all of the bargaining power, it can reasonably be regarded as a monopolist with respect to that worker over the match-specific surplus.

It might be argued that these practices represent a permissible exercise of existing market power, and not an impermissible acquisition of market power. Setting aside the question of whether exercising existing market power is in fact always permissible, I believe that the practices represent the acquisition of market power, and not the exercise of it. It is true that the practices do not create the surplus, which exists exogenously by virtue of the value of the match. But that surplus does not start out belonging to the firm. The surplus exists and it must be divided somehow, and the labor practices are the means by which that division comes out to the benefit of the firm at the expense of the worker. **The exercise of bargaining power is the exercise of market power.**

[17] For a review of the evidence, see [illegible]

[18] See also [illegible]

[19] See [illegible]

The above is not a worked-out apparatus for treating labor practices as antitrust violations. There are many questions that are beyond the scope of this article, including which practices are harmful at all, and of those which are best dealt with through labor law rather than antitrust. There is also the conceptual question of how much of the match specific surplus firms should be allowed to try to capture. Should they be allowed to try to capture half of it? Would an antitrust case hinge on what fraction of the surplus the firm refrained from trying to capture?

These are difficult questions, and it is unclear whether it is possible to build a workable regime for challenging harmful labor market practices as antitrust violations. It may be or it may not be. But the fundamental point remains. These practices represent firms trying to become monopolies with respect to their workers regarding the match specific surplus. This is the exercise of market power.

IV. LABOR NON-COMPETE AGREEMENTS

Another labor practice that firms sometimes engage in is to impose non-compete agreements on their workers. Non-competes are fundamentally different from the labor practices discussed in Section III above. Those practices represent attempts by the firm to capture a fixed quantity of match-specific surplus. In contrast, non-compete agreements **increase** the amount of surplus available to be captured. A non-compete agreement denies the worker access to the full benefits of the competitive labor market, thereby degrading that worker's outside option. The worker now has more to gain from the match, increasing the total surplus arising from the match, and the firm can use its superior bargaining power to capture most or all of that additional surplus as well.[14]

For this reason, the argument for treating non-compete agreements as an antitrust problem is even stronger than the argument discussed above for treating other labor practices as antitrust problems. A practice that denies the worker the ability to re-access the full benefits of the competitive labor market appears to fall quite squarely within the domain of antitrust, especially when combined with the firm's ability to use its bargaining power to capture the resulting increased surplus.

As discussed above, if contracts were complete and fully and costlessly enforceable, all terms of the labor contract would be determined in the context of the competitive labor market, and hence restraints such as non-competes would not be an antitrust problem (assuming that they also did not harm third parties). This is closely related to a standard defense of non-competes, namely that workers would not agree to them unless they receive compensation that they value at least as much as they dislike the restraint. In a separate article (Balan, 2019), I argue that this is often not the case, and that in fact non-competes are a means of extracting value from workers without having to compensate them for it.[15]

V. CONCLUSION

There is reasonable consensus that conventional labor market power can exist when there are only one or a few employers that hire a particular type of worker, and that antitrust is applicable to those situations. Some hold the view that the existence of such market power is a necessary condition for antitrust to apply to labor markets, meaning that when there are many employers who hire a particular type of worker, any problems that may arise from the conduct of an individual firm cannot be antitrust problems.

The purpose of this article is to argue against this view. Even with an *ex ante* competitive labor market, once a job match is formed, dissolving it is costly to one or both parties, meaning that there is often substantial economic surplus associated with continuing it. The division of this surplus will be determined via bilateral bargaining between the two parties, and not within the context of the competitive labor market.

Firms often have major advantages over workers in capturing that surplus. They often have more relative bargaining leverage, as workers may "need" the match more than they do. More importantly, firms almost certainly have much more bargaining power. Given the massive

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asymmetry of resources, sophistication, and agenda-setting power between an individual worker and a large firm, it strains credulity that the firm would not have a massive advantage allowing it to out-compete the worker in any contest to capture it. This gives the firm power over the worker, in the ordinary English meaning of the word, in the formal meaning of the word in the context of the Nash Bargaining model, **and in the antitrust sense**: certain labor market practices represent an attempt to become a monopolist with respect to the worker over that match-specific surplus.

The case for treating non-compete agreements as an antitrust problem is even stronger. Firms imposing non-competes on workers is not only a means of capturing an existing quantity of surplus, it is a way of increasing that surplus by denying the worker the ability to fully access the competitive labor market (degrading the worker's outside option), and then using its power to capture that additional surplus as well.

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Labor Noncompete Agreements: Tool for Economic Efficiency or Means to Extract Value from Workers?

David J. Balan*

Abstract

A number of theoretical arguments have been offered in favor of noncompete provisions in labor agreements. While there has been considerable empirical research on the effects of those provisions, there has been little direct evaluation of the arguments themselves. In this article, I lay out and evaluate three commonly heard arguments, namely, (1) the voluntary nature of labor agreements justifies a strong inference that the terms of those agreements, including noncompete provisions, are beneficial for both workers and firms and that they are economically efficient, 2(*A*) noncompetes facilitate efficient knowledge transfer from firms to workers, and 2(*B*) noncompetes encourage efficient firm-sponsored investment in worker training. These arguments, though not entirely without merit, mostly do not survive close scrutiny, and in fact such scrutiny reveals strong arguments that point in the opposite direction. In addition, noncompetes may cause important additional harms that are not measured in conventional economic research.

Keywords

noncompetes, labor noncompetes, postemployment restrictive covenants, PERCs

I. Introduction

Noncompete provisions in labor agreements have become widespread in the United States.[1] In recent years, empirical researchers have studied the effects of noncompetes on worker mobility, hiring, entrepreneurship, investment, innovation, wages, and other economic outcomes. This research agenda is quite new, and determining the true, causative effect of noncompetes on those outcomes is

1. *See* Evan P. Starr et al., *Noncompete Agreements in the US Labor Force*, 64 J.L. & ECON. 53–84 (2021); ALEXANDER J. S. COLVIN & HEIDI SHIERHOLZ, NONCOMPETE AGREEMENTS (Econ. Policy Inst. 2019).

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challenging. But recognizing these limitations, the evidence as it exists today, while somewhat mixed, generally shows noncompetes to be economically harmful and not beneficial.

This empirical evidence must be interpreted in light of the strength of the theoretical arguments for or against noncompetes. If there were strong theoretical arguments in their favor, the empirical evidence accumulated to date may not be sufficient to convincingly demonstrate that noncompetes are harmful on balance. But if the theoretical arguments in favor of noncompetes are weak, or if there are strong theoretical arguments against them, then the theory and the empirical evidence would both point in the same direction, strongly indicating that noncompetes are likely to be harmful and even more strongly indicating that they are unlikely to be highly beneficial.[2]

The purpose of this article is to provide a critical evaluation of those theoretical arguments. There are three major arguments that are commonly offered in favor of noncompetes, namely, (1) the voluntary nature of labor agreements justifies a strong inference that the terms of those agreements, including noncompete provisions, are mutually beneficial to workers and firms and that they are economically efficient in the sense of increasing total economic surplus, 2(A) noncompetes facilitate efficient knowledge transfer from firms to workers, and 2(B) noncompetes encourage efficient firm-sponsored investment in worker training.

There is a substantial body of literature that makes or develops these theoretical arguments.[3] The structure of this article is to enumerate, explain, and respond to these arguments one by one.[4]

To summarize my conclusions, these arguments sound plausible and have some limited merit, but all three largely fail upon close scrutiny, and in fact such scrutiny reveals strong arguments to the contrary. This theoretical conclusion, combined with the empirical evidence (discussed below) that mostly finds noncompetes to be harmful, together constitute strong reason to believe that noncompetes are in fact harmful, and even stronger reason to believe that they are not highly beneficial such that restricting or banning them would risk major economic damage.[5]

Moreover, noncompetes may cause harms that are not generally within the purview of economics and that are not normally studied in economic research. A worker who is bound by a noncompete has a large barrier to leaving a firm (on top of other barriers that likely exist), rendering them less able to avoid or resist mistreatment at their firm, including true exploitation or abuse by a predatory employer

2. In Bayesian terms, if the theoretical arguments in favor of noncompetes are strong, then the priors would be strong that noncompetes are highly beneficial, and it would take a large amount of contrary evidence to overturn those priors. But if those arguments are weak, and/or if there are strong arguments that noncompetes are harmful, then the priors would be that noncompetes are harmful (or at least not highly beneficial), and it would take a large amount of contrary evidence to overturn *those* priors.
3. Perhaps the clearest exposition of Argument #1 is at David D. Friedman, *Non-Competition Agreements: Some Alternative Explanations*, daviddfriedman.com, April 2, 1991, http://www.daviddfriedman.com/Academic/non-comp/Non-Competition.html. *See also* Maureen B. Callahan, *Post-Employment Restraint Agreements: A Reassessment*, 52 U. CHI. L. REV. 703–28 (1985). Articles that advance Argument #2(*A*) include Jonathan M. Barnett & Ted Sichelman, *The Case for Noncompetes*, 87 U. CHI. L. REV. 953–1049 (2020); and Brandon S. Long, *Protecting Employer Investment in Training: Noncompetes vs. Repayment Agreements*, 54 DUKE L.J. 1295–320 (2005). Articles that advance Argument #2(*B*) include Paul H. Rubin & Peter Shedd, *Human Capital and Covenants Not to Compete*, 10 J. LEGAL STUD. 93–110 (1981); and Long, *supra* note 3.
4. Points similar to some of those made in this article can be found in Eric A. Posner, *The Antitrust Challenge to Covenants Not to Compete in Employment Contracts*, 83 ANTITRUST L.J. 165–200 (2020) and in the survey articles referenced in note 6. *See also* NON-COMPETE CONTRACTS: ECONOMIC EFFECTS AND POLICY IMPLICATIONS (U.S. DEPT OF THE TREASURY, OFFICE OF ECON. POLICY 2016); NON-COMPETE AGREEMENTS: ANALYSIS OF THE USAGE, POTENTIAL ISSUES, AND STATE RESPONSES (The White House 2016).
5. Returning to the Bayesian framing from note 2, the conclusion of this article is that the correct priors are that noncompetes are likely to be harmful and are very unlikely to be highly beneficial. Given these priors, the existing empirical evidence provides little grounds for updating. In other words, there is a consonance rather than a tension between the empirical evidence and the theory.

or manager. In addition, a person bound by a noncompete is simply less free, and the personal freedom to use one's body and one's labor as one wishes is a value in itself. Policy makers should have a high threshold for interfering with this fundamental freedom.

II. Summary of the Empirical Literature

There is now a substantial empirical research literature on noncompetes, dealing with their effects on several important outcomes, including worker mobility, hiring, and entrepreneurship; investment and innovation; and wages. A brief summary follows.[6]

A. Worker Mobility, Hiring, and Entrepreneurship

The evidence shows that workers bound by noncompetes stay in their jobs longer (are less mobile). In one study, being bound by a noncompete is associated with an 11% increase in job tenure. According to another study, the 2015 Hawaii ban on noncompetes for tech workers increased employee mobility in the sector by 11%. Similar results are found for executives, patent holders, and the universe of individuals with LinkedIn records. An analysis of Oregon's 2008 ban on noncompetes for hourly workers finds similar results.

Four studies find evidence consistent with the notion that firms have trouble hiring workers in higher enforceability regimes, with young firms hit particularly hard. Two studies suggest that individuals bound by noncompetes are redirected to other industries, including 11% of those who have ever signed one. Other studies find that tech workers and patent holders are more likely to leave states that enforce noncompetes.

Seven recent studies examined the relationship between noncompete enforceability and entrepreneurship, finding generally that the enforceability of noncompetes dampens new firm creation. One study found that greater enforceability reduced new firm entry by 18%.

B. Investment and Innovation

The evidence regarding investment and innovation is mixed. The enforceability of noncompetes is associated with more firm-sponsored training of workers, increases in net capital investment rates, the exploration of new fields, and the creation of riskier patents. However, the mobility-inhibiting effects of noncompete enforceability also dampen knowledge flows and make venture capital less effective in spurring the creation of new patents and employment.

C. Wages

A number of studies attempt to estimate the effect of noncompetes on wages by exploiting variation in state policies on the enforceability of noncompetes. Most of these studies use some version of a "difference-in-differences" study design, in which the change in wages (for some category of workers) in a state that changed its enforceability policy is compared to the change in wages in "control" states that did not. These studies consistently show that the enforceability of noncompetes is associated with

6. This summary draws heavily, with permission, from EVAN STARR, THE USE, ABUSE, AND ENFORCEABILITY OF NON-COMPETE AND NO-POACH AGREEMENTS: A BRIEF REVIEW OF THE THEORY, EVIDENCE, AND RECENT REFORM EFFORTS (Econ. Innovation Grp. Issue Brief 2019); and from Evan Starr, *Are Noncompetes Holding Down Wages?*, *in* INEQUALITY AND THE LABOR MARKET: THE CASE FOR GREATER COMPETITION 127–49, Sharon Block and Benjamin H. Harris, editors, (Brookings Institution Press, 2021). It also relies on John M. McAdams, *Non-Compete Agreements: A Review of the Literature* (2019) (unpublished manuscript). To save space, many citations are suppressed. They can be found in those articles.

lower wages.[7] Perhaps the most notable of these studies is Starr and Lipsitz (2020),[8] which finds that banning noncompetes for hourly workers increased hourly wages by 2%–3% on average. Since only a subset of workers sign noncompetes, scaling this estimate by the prevalence of noncompete use in the hourly paid population suggests that the effect on employees actually bound by noncompetes may be as great as 14%–21%, though the true effect on bound workers is likely lower than that due to labor market spillovers which may cause part of the wage reduction to be borne by unbound workers.

The above studies attempt to measure the effects of noncompetes indirectly by comparing wages across states with different enforceability policies. Three other studies attempt to measure these effects more directly by comparing wages of workers who are bound by noncompetes to those of workers who are not. One of these studies finds that workers with noncompetes have 9.7% higher wages than similar workers without, but only if they were informed of the noncompete before accepting the job; workers who were informed of the noncompete after they accepted had no such benefit.[9] The second of these studies finds that noncompetes increase wages for CEOs, and the third finds that they increase wages for primary care physicians.[10]

The former group of studies associates noncompetes with lower wages, and the latter group associates them with higher wages. There are several possible ways to reconcile this discrepancy. First and perhaps most likely, the study design of the latter group may not be suitable for measuring the *causative* effect of noncompetes on wages; the fact that workers bound by noncompetes have higher wages does not mean that the noncompetes caused the higher wages. In contrast, the difference-in-differences study design used in the former group (and commonly used across many areas of empirical economics) exists precisely because it is often a valid way to measure causative effects; if wage trends in states that changed their policy are different from trends in otherwise similar control states, a reasonable interpretation is that the policy change caused the change in trend. For this reason, the former group of studies may be more reliable.

A second possible reason for the discrepancy is that noncompetes may be beneficial for the workers who are bound by them, but harmful overall, because of external effects on workers who are not bound by them. A third possibility has to do with the type of workers being studied. As noted above, one of the studies in the latter group is about corporate CEOs, who represent a tiny slice of workers and for whom the notion that noncompetes are beneficial is much more plausible than it is for almost all other workers. Another study in that group is about primary care physicians. Importantly, that study does not disentangle the effect of noncompetes from the effect of nonsolicitation provisions (where the physician is free to leave but is not free to take their patients with them). Nonsolicitation provisions have a much stronger claim to being beneficial than do noncompetes, and it is possible that this benefit, rather than a benefit from the noncompete itself, is what is causing the higher wages found in that study.[11]

D. Summary

In sum, though somewhat mixed, the empirical literature is largely negative regarding the effects of noncompetes, and it certainly does not support the conclusion that they are highly beneficial. This is

7. There are a number of such studies, cited and discussed in Starr, *supra* note 6.
8. Michael Lipsitz & Evan Starr, *Low-Wage Workers and the Enforceability of Noncompete Agreements*, MGMT. SCI. (forthcoming, 2021).
9. *See* Starr et al, *supra* note 1.
10. Omesh Kini et al, *CEO Noncompete Agreements, Job Risk, and Compensation*, 34 REV. FINANC. STUD. (forthcoming, 2021); Kurt J. Lavetti et al, *The Impacts of Restricting Mobility of Skilled Service Workers: Evidence from Physicians*, 55 J. HUM. RESOUR. 1025–67 (2020), respectively.
11. *See* Nataraja Balasubramanian, et al, *Bundling Postemployment Restrictive Covenants: When, Why, and How It Matters* (2021) (unpublished manuscript) for a discussion of the fact that noncompetes are often bundled together with other postemployment restrictive covenants such as nonsolicitation agreements, and the resulting difficulty in empirically identifying the effect of any individual restriction in isolation.

expressed clearly by Evan Starr, a leading empirical researcher in the field who, in recent Congressional testimony, summarized the empirical research as follows: "Taken together, these results are hard to square with theories that suggest workers should benefit from non-competes."[12]

III. Three Commonly Offered Arguments in Favor of Noncompetes

I now turn to the three major arguments that are commonly offered in favor of noncompetes.

A. Argument #1: If Both Parties Agreed to the Noncompete, It Must Be Efficient

Argument #1 begins with the simple and intuitive premise that people can generally be assumed to act in their own best interest, so if both a worker and a firm voluntarily agree to a noncompete then doing so must make them both better off, otherwise at least one would not have agreed. And if the noncompete makes both parties better off, then it follows that banning or restricting noncompetes would make them both worse off. By this argument, the mere existence of noncompetes is strong evidence that they are mutually beneficial.

Spelled out in more detail, the argument goes as follows. Suppose that a worker and a firm negotiate over employment terms before the job match is formed. In that negotiation, each side exploits their bargaining position as best they can,[13] so the terms that arise from that negotiation will be the very best ones that the worker can get and also the very best ones that the firm can get. Now suppose that the firm wishes to add a noncompete provision to the previously negotiated terms. All else equal, this restriction on the worker's outside opportunities makes the worker worse off: The reduced ability to leave is harmful in itself, and the reduced ability to threaten to leave weakens the worker's bargaining position relative to the firm with respect to any employment terms that could become the subject of disagreement (i.e., all terms except those that were fixed and not subject to any revision, neither legally nor practically, *ex ante* before the job match was formed). For the same reasons and others, the noncompete makes the firm better off.[14]

Knowing that the noncompete harms the worker and makes the firm better off, what should we expect to happen? It might appear that the firm, if it has a sufficiently strong bargaining position, could simply compel the worker to accept the noncompete. But Argument #1 says that this is incorrect,

12. Antitrust and Economic Opportunity: Competition in Labor Markets: Hearings before the Subcomm. on Antitrust, Commercial, and Administrative Law, of the House Judiciary Comm., 117 Cong. (October 29, 2019) (Statement of Evan Starr).

13. The economic theory of bargaining distinguishes between bargaining "leverage" (the less one side "needs" a deal, relative to the needs of the other side, the better the terms it will receive) and bargaining "power" (the deal creates some surplus to be divided between the two sides, and the more effective one side is at capturing that surplus, relative to effectiveness of the other side, the better the terms it will receive). Here, I informally use the term bargaining "position" to capture both of these; the more favorable the combination of leverage and power that a side has, the better the terms it will receive in the negotiation. For a discussion of the distinction between bargaining leverage and bargaining power and its relevance for evaluating noncompetes, *see* David J. Balan, *Labor Practices Can Be an Antitrust Problem Even When Labor Markets Are Competitive*, CPI ANTITRUST CHRON. (2020).

14. Once the match is formed, it is costly to dissolve, for both the worker and the firm. These costs can be substantial. Another way of saying that dissolving the match is costly is to say that *preserving* the match generates surplus arising from avoiding those costs. This match-specific surplus must somehow be divided between the worker and the firm. If labor contracts were complete and also fully and costlessly enforceable, then the division of this surplus would be determined ex-ante, before the match was formed. But in reality, this surplus is largely divided via (informal) ex-post bargaining after the match has formed. A noncompete weakens the bargaining position of the worker in this ex-post negotiation, to the worker's detriment and the firm's advantage. *See* Balan, *supra* note 13 for a discussion of this issue and its implications for the question of whether noncompetes should be treated as an antitrust problem.

because all else is not equal. The reasoning is as follows. Recall that in the initial negotiation, each side got the very best terms that they could. But that must mean that each side *fully* exploited their bargaining position; to do otherwise would be to voluntarily leave money on the table. In other words, the negotiated terms reflect the result when each side has shot every arrow in their quiver, which means that neither side has any *remaining* arrows that can be used to extract *additional* concessions from the other, and which in turn means that the firm has no ability to compel the worker to accept a noncompete involuntarily.[15]

If the firm cannot compel the worker to accept a noncompete, then its only alternative is to *compensate* the worker (above and beyond the compensation agreed to in the initial agreement) by an amount sufficient to induce them to agree. The minimum compensation that the worker would accept is the amount by which they are harmed by the noncompete, and the maximum compensation that the firm would pay is the amount by which it makes the firm better off. If the former is greater than the latter, then mutually beneficial agreement to add a noncompete is not possible, and so the noncompete will not exist. If the latter is greater than the former, then an agreement under which the worker agrees to the noncompete, and the firm pays the worker compensation that lies somewhere between those two amounts, is mutually beneficial.[16] and for that reason, there is strong reason to believe that such an agreement will occur. By the same token, if a noncompete is observed, goes Argument #1, the correct inference is that *this compensation has occurred*. and both parties must be better off. Otherwise, the noncompete would simply not exist.[17]

A striking and perhaps counterintuitive feature of this argument is that it does not depend at all on the relative bargaining positions of the worker versus the firm. The idea is as follows. If the worker's relative bargaining position is strong, they will command favorable terms. If it is weak, they will command unfavorable terms. But even if it is weak, it remains true that the unfavorable terms are the result of both sides *fully exploiting* their bargaining position. Even if the worker starts with few arrows in their quiver and the firm starts with many, at the end of the negotiation both quivers are empty, and so the firm has no way to compel the worker to accept any *additional* unfavorable terms, including a noncompete. So once again, the only way for the firm to induce the worker to accept a noncompete is in exchange for sufficient compensation, which will only occur if the firm values having the noncompete by more than the worker values avoiding it.

15. *See* Friedman, *supra* note 3, and Callahan, *supra* note 3.
16. The exact amount of the compensation will depend on the relative bargaining position as discussed in note 13, *supra*. But the argument does not depend on these specifics.
17. In the highly stylized scenario in the main text, I assume that the worker and the firm first decide that they are going to form a match and negotiate the terms that would pertain without a noncompete, and then negotiate over how those terms would change if a noncompete was added. But this is merely for clarity, it is not necessary for the logic of the argument. That logic would work essentially the same way if the worker and the firm negotiated the terms that would pertain *with* a noncompete, and then negotiated over how those terms would change if the noncompete was *removed*. If the noncompete makes the firm better off by more than it harms the worker, then it is mutually beneficial and so it will remain in place. But if the reverse is true, then the worker and the firm would negotiate its removal in exchange for other terms of the agreement (likely the wage) being adjusted in favor of the firm (i.e., the worker will compensate the firm for the removal of the noncompete). In this scenario, as in the one in the main text, one should infer from the existence of the noncompete that it is mutually beneficial. The above logic also works essentially the same way in other scenarios, including (i) where the alternative to a noncompete is working for a different firm, rather than working for the original firm but without a noncompete or (ii) where employment terms are unilaterally set by the firm rather than being negotiated (this scenario is discussed further below). Finally, this logic is not specific to noncompetes: It applies to any negative attribute of a job, such as noisy or dangerous working conditions. Such conditions will only exist if they harm the worker by less than they make the firm better off, otherwise both parties would prefer an alternative that eliminates the negative attribute and also pays a lower wage. In sum, Argument #1 says that job attributes that are not mutually beneficial will not exist, and job attributes that do exist must be mutually beneficial.

The final step in Argument #1 is the claim that mutually beneficial noncompetes are also economically efficient, both in the sense of Pareto Efficient (there is no way to make one party better off without making the other worse off), and in the sense of increasing total economic surplus (sometimes known as Kaldor-Hicks Efficiency). But it is important to note that even if noncompetes are mutually beneficial, they may not be economically efficient if they negatively affect third parties who did not agree.[18] There are good reasons to believe that noncompetes do harm third parties,[19] and this constitutes an independent reason to believe that they are harmful on net.[20] Since this is not the main subject of the present article, in what follows the effect of noncompetes on third parties is assumed away except in the discussion about Argument #2(*A*) below. That is, in what follows the question of the economic efficiency of a noncompete (in the sense of increasing total economic surplus) reduces to whether or not the noncompete makes the firm better off by more than it harms the worker.

Responses to Argument #1. The logic behind Argument #1 is sound: Given the premises, the argument is correct. The problem is that the premises are faulty. To see why, begin by supposing that, contrary to Argument #1, the firm *does* have some way, unspecified for now (but discussed below), to impose a noncompete on the worker (i.e., to induce the worker to accept it *without* compensation).[21] If the firm could do that, it would be in its interest to do so; as noted above, the firm is made better off by restricting the worker's outside opportunities. And of course this is harmful to the worker. So a firm that has the ability to impose a noncompete on a worker without compensation has a means by which to *extract value* from that worker.

If in fact a noncompete can be used as a means of extracting value from the worker (i.e., making the firm better off *at the worker's expense*), then it is clear that its mere existence no longer guarantees that it must mutually beneficial. If the firm's ability to use a noncompete to extract value from the worker is sufficiently high, then the worker will be made worse off than if the noncompete never existed.

Even if the noncompete makes the worker worse off, that does not necessarily mean that it is inefficient in the sense of reducing total economic surplus.[22] It is still possible that the noncompete makes the firm better off by more than it harms the worker, but the firm's ability to use the noncompete to extract value from the worker enables it to capture more than 100% of that efficiency. But it is also possible that the noncompete is inefficient: It may hurt the worker by more than it makes the firm better off, but it exists nevertheless because of its usefulness to the firm as a means of extracting value. (It is also possible that the noncompete is both efficient and mutually beneficial, but with the worker receiving less than they would have received if the noncompete could not also be used as a means of extracting value.)

For this reason, Argument #1 depends crucially on the premise that imposing a noncompete on a worker without compensation is impossible or nearly so. That is, the argument requires that the

18. This is closely related to the economics of exclusive dealing contracts, where exclusives that are beneficial to all of the parties that agreed to them can be harmful to parties that did not agree, and can therefore be economically inefficient. *See* MICHAEL D. WHINSTON, LECTURES ON ANTITRUST ECONOMICS, Chapter 4 (2006).

19. *See* Liyan Shi, *The Macro Impact of Non-Compete Contracts* (2020) (unpublished manuscript). That paper, using a methodology that is very different from those described above, concludes that "the optimal restriction on noncompete duration is close to a ban."

20. Possible harmed third parties include owners, workers, and customers of firms that would have been started or made more productive by the unimpeded flow of workers. This possibility is sometimes acknowledged even by supporters of noncompetes, though it is often skipped over lightly.

21. The discussion in the main text assumes that the firm can impose a noncompete on the worker without any compensation at all. The same points would apply, in an attenuated form, if the firm needed to pay some compensation, but less than the amount that would have been agreed to in a free negotiation without imposed terms.

22. As discussed above, here I assume away the effect of the noncompete on third parties. But in fact it is likely that those effects are negative, which makes it more likely that the noncompete is not efficient.

worker's formal agreement to the noncompete can never be obtained unless it truly makes the worker better off. This premise is rather obviously incorrect. The remainder of this section describes five ways in which firms can obtain formal agreement to a noncompete even when it is harmful to the worker. They are:

- The firm can mislead the worker about the very existence of the noncompete. If the noncompete is buried in the fine print of a complicated employment contract, the worker may "agree" to it without ever knowing that it was there. Similarly, the worker could see the noncompete language but not understand what it means, either in the literal sense of not having a factually accurate understanding of what they are agreeing to or in the psychological sense of not regarding as salient an abstract restraint that might be relevant only in the distant future.[23]
- In some cases, the worker is not told that the noncompete is part of the employment contract until they have already started the job. But by that time, it is more difficult to refuse. The worker is likely eager to start the new job and would not want to quit. In addition, the worker may have already turned down other job offers, so that quitting would mean starting a new job search with the attendant costs, delays, distress, and lost income. Therefore, the worker might agree to a noncompete ex post that they would not have agreed to ex ante on the day that they accepted the job.[24]
- If there is any ambiguity in the terms of the noncompete, the firm can exploit that ambiguity, along with its large advantage in the ability to bear the costs, financial and otherwise, of fighting in court, to bind the worker to an interpretation of the noncompete that is more restrictive than what the worker agreed to and was (possibly) compensated for.[25]
- Suppose the worker agrees to a noncompete in exchange for compensation in the form of a promise of better employment terms (such as a higher wage) in the future. Now suppose that the firm does not deliver on that promise. What recourse does the worker have? One natural recourse is to quit. *but that is the very thing that the noncompete deters the worker from doing.*[26] That is, the firm may be able to renege on delivering the compensation promised to the worker in exchange for agreeing to the noncompete precisely because the noncompete itself decreases the cost of doing so. This is a key point: The compensation is what makes the noncompete mutually beneficial, but then the noncompete can cause the worker not to receive the compensation.[27]
- The discussion of Argument #1 above was about *negotiating* over the inclusion of a noncompete provision in a labor agreement. But in many cases, no such negotiation is possible; the noncompete is unilateral firm policy, required of all workers. It might appear that if firms can

23. Note that even if the noncompete is not understood by or salient to the worker, that is not true for the *firm*. The firm fully understands what it has to gain from the noncompete. This asymmetry in sophistication between the worker and the firm is one reason why both sides might "agree" to a noncompete that is not mutually beneficial.
24. The possibility that a firm might exploit the reluctance of the worker to quit once they have accepted the job is not limited to noncompetes. The firm might do this with any employment term, including wages. However, the comprehension/salience point described above is relevant here as well. A worker who is told on Day 1 that they will not receive the promised wage may be more likely to quit than a worker who is told of the existence of a noncompete, and even if they do not quit they are more likely to be a disgruntled employee. So the asymmetry in sophistication between the worker and the firm gives the firm the incentive to extract value from workers ex-post by modifying opaque terms instead of salient ones.
25. Perhaps a rational worker would anticipate this possibility and so would require compensation for the stronger noncompete that the firm might try to impose ex-post, rather than the weaker one that was agreed to ex-ante. But this requires a level of foresight and "meta rationality" that is unrealistic even for relatively sophisticated workers.
26. There are other factors that give firms an incentive to deliver on their promises, including formal contracts and reputation effects. But the ability of the worker to quit is a very important one.
27. Perhaps a rational worker would anticipate this possibility and refuse to sign the noncompete in the first place. But as in note 25, this requires a level of foresight and "meta rationality" that is unrealistic even for relatively sophisticated workers.

literally impose noncompetes on workers, then there need be no compensation and noncompetes can be used as a means to extract value from workers.

However, a proponent of Argument #1 would say, correctly, that this does not follow from standard economic theory. Many standard economic models include firms that post nonnegotiable terms (e.g., the price of cereal at the supermarket). This does not mean that firms can impose whatever terms they want. Firms are still constrained by competition, which requires them to offer terms favorable enough to make workers want to work for the firm. Moreover, competition tends to work to eliminate provisions that are inefficient (i.e., that harm workers by more than they make the firm better off), for reasons similar to those discussed in note 17 above; if the provision is inefficient then there would exist a mutually beneficial agreement to eliminate it in exchange for a change in some other provision of the employment agreement. And if most firms persisted in requiring an inefficient noncompete, one or a few firms could outcompete those firms by not requiring it, either displacing them or forcing them to follow suit.

The argument in the preceding paragraph is correct as far as it goes. But if the assumptions are made a bit more realistic, it becomes clear that requiring noncompetes as a nonnegotiable provision of the job can be an effective means of imposing them on workers without compensation. Specifically, if nonnegotiable (and uncompensated) noncompetes are widespread in an industry it is unlikely that competition will dislodge them.[28] The reason is as follows. In order for competition to dislodge harmful noncompetes, firms that do not require a noncompete, and that hope to attract workers on that basis, would have to make that fact a large and salient part of their worker recruitment message, otherwise prospective workers will not even know about it. But firms can capture only a limited amount of the attention of prospective workers, and it is likely that other recruiting messages would be a better use of that limited attention, particularly if the noncompete is not highly salient for workers. In addition, if one or a few firms did recruit based on a "no noncompetes" message, the workers that they would attract would not be a random sample of workers. Rather, they would be the workers who care the most about avoiding noncompetes, and those workers may be undesirable in other ways, such as being more likely to quit.[29] In sum, once harmful noncompetes have become widespread in an industry, they are likely to persist because the competitive pressure to eliminate them, while present, may not be sufficiently strong.

In the above arguments, no distinction was made between low- and high-wage workers. It is sometimes suggested that noncompetes are a problem for the former but not for the latter, who are more sophisticated and for whom the efficiency justifications (discussed below) are more likely to apply. There may be some truth to this; to cite a recent well-known case, requiring sandwich makers at Jimmy Johns to sign a broad noncompete provision likely exploits some disadvantages that are specific to low-wage workers, and it certainly lacks any plausible efficiency justification.[30] However, the reasons to doubt Argument #1 are not confined to low-wage workers. All five of the above points apply at least to some extent to higher wage workers, particularly the last two.

28. This point is different from the others in that it depends on the assumption that noncompetes are already widespread in the industry (though a weaker version of the point applies even if they are not widespread). The other points do not depend on this assumption.

29. For a similar mechanism in a different context, *see* David J. Balan & Dan Hanner, *Job Insecurity Isn't Always Efficient* (2014) (unpublished manuscript).

30. Illinois Attorney General, *Madigan Announces Settlement with Jimmy John's for Imposing Unlawful Non-Compete Agreements*, December 7, 2016, https://illinoisattorneygeneral.gov/pressroom/2016_12/20161207.html. *See also* Illinois Attorney General, *Attorney General Madigan Reaches Settlement with National Payday Lender for Imposing Unlawful Non-Compete Agreements*, January 7, 2019, https://illinoisattorneygeneral.gov/pressroom/2019_01/20190107b.html.

B. Argument #2: Noncompetes Facilitate Beneficial Economic Activity

By the logic of Argument #1, in order for a noncompete to be economically efficient, it must have some positive benefit. If it did not, then it could not make the firm better off by more than it harms the worker. And if it is not efficient, then it cannot be mutually beneficial, and if it was not mutually beneficial then it would not be observed. But since noncompetes are observed, goes Argument #1, these positive benefits *must* exist, and they must be sufficiently large to render the noncompete efficient, otherwise one party or the other would not have agreed to it.[31]

The conviction that positive benefits must exist, and must be sufficiently large to render the noncompete efficient, does not guarantee that any particular claimed source of such benefits must be valid. However, that conviction does influence the evaluation of individual claims of positive benefits from noncompetes: If it is certain that substantial benefits must exist, and if there are a relatively small number of candidate sources of those benefits, then the evaluation of one or more individual proposed sources *must* begin with the premise that the benefit is likely to be real and substantial. That is, believing Argument #1 necessarily requires being less skeptical about claimed sources of benefits than one would be absent that belief.

But as discussed above, Argument #1 is not correct: Noncompetes can be imposed on workers by firms without compensation as a means of extracting value from them. And in that case, noncompetes can exist even if they have little or no positive benefits (and as discussed below, those "benefits" can even be negative). This does not mean that substantial positive effects do not exist; it is possible that noncompetes can be *both* a means of extracting value from workers *and* a source of meaningful positive benefits, either simultaneously for a single worker or differentially across different workers.[32] So an inquiry into claimed positive benefits is still worthwhile, but there is no a priori supposition that the claims must be valid; if the claims are found to be weak or inconsistent with evidence then the correct conclusion is that those benefits simply do not exist (or are small or even negative), and not (as Argument #1 would have it) that large benefits *must* exist and the only question is what exactly they are.

Below, I discuss the two most commonly argued claims of positive benefits from noncompetes, namely, (A) that they facilitate efficient knowledge transfer from firms to workers and (B) that they encourage efficient firm-sponsored investment in worker training. While these justifications are not completely without merit, I argue that they are both weak, and that scrutiny of them in fact reveals strong arguments in the opposite direction. These arguments, combined with the empirical evidence discussed above, support the conclusion that noncompetes are likely to be harmful on balance (being harmful to workers and likely also harmful to efficiency), and that they are very unlikely to have effects so positive that heavily restricting or banning them would risk major economic harm.

1. Argument #2(A): Noncompetes Facilitate Efficient Knowledge Transfer

Suppose a firm has some knowledge (e.g., a trade secret or a manufacturing process or a customer list) that, if shared with a worker, would make that worker more productive and more valuable to the firm. In that case, sharing the knowledge will be economically efficient. But if that knowledge is also valuable to competitors, then competitors will be willing to offer a worker in possession of that

31. Even strong supporters of noncompetes probably do not believe in a strictly literal version of Argument #1. But even in a nonliteral version of the argument, the mere existence of noncompetes, and their voluntary nature, are taken to be strong evidence that they are likely to be mutually beneficial and economically efficient. This in turn means that important positive effects are very likely to exist (in Bayesian terms, there are strong priors), whether there is clear evidence for them or not.

32. It should be noted, however, that the fact that firms impose noncompetes on low-skill workers such as sandwich makers when there are quite clearly no positive effects from doing so is grounds for additional skepticism regarding other claims of positive effects that are more facially plausible.

knowledge a wage that reflects its value. This means that the original firm will either lose the worker (and have the knowledge fall into the hands of the competitor) or it will have to match the higher wage. This may make the firm worse off than if it had never shared the knowledge in the first place. If so, the firm might design the job so that the knowledge sharing will not occur, even though sharing is efficient. The inability to protect the knowledge might even cause the firm not to develop it in the first place, or in the extreme case, it might cause the firm to eliminate the job altogether. But with a noncompete agreement in place to protect the knowledge, the firm would have the appropriate incentive to develop and share it.[33]

Responses to Argument #2(A). This argument has some plausibility. It is not difficult to imagine situations where a firm has knowledge that workers must also have in order to be fully productive, that competitors would pay a lot for, and that firms cannot otherwise protect. However, there are a number of factors that limit the strength of this argument:

- In order for the argument to hold, it must be true that the firm really will forbear from sharing the knowledge if it cannot use a noncompete. That is, there must be a more efficient way to run the business (with sharing), and another, less efficient way to run it (without sharing), and the more efficient way must be more profitable than the less efficient way if and only if the worker is bound by a noncompete.[34] If this is not true, then the sharing will occur with or without a noncompete, and so banning noncompetes, while harmful to the firm's profits, will not hurt economic efficiency (as long as it does not cause the firm to go out of business).
- Argument #2(*A*) is correct in that the possibility that knowledge might escape the firm is harmful to efficiency, because it can cause the firm not to share the knowledge within the firm, or even not to develop it in the first place. But it ignores the fact that when knowledge *does* escape a firm, and flows to other firms, that is often a *good* thing, because the receiving firms can do valuable things with the knowledge as well, including using it as an input in the creation of additional knowledge. So there is a tradeoff. Noncompetes provide an incentive to efficiently develop and share knowledge within the firm, but the absence of noncompetes causes more sharing of knowledge across firms.[35]

This tradeoff is very similar to the one that lies at the heart of the debate regarding whether intellectual property (IP) protections should be stronger or weaker: Stronger IP means stronger incentives to innovate, and weaker IP means more sharing and cross-pollination of knowledge, which among other advantages reduces the cost of subsequent innovation. It is worth noting that there is a widely held view among economists and IP experts (though not a consensus) that IP protection in the United States is too strong, not too weak.[36] That is, it probably should be *easier* to spread ideas than it currently is, even at the cost of some reduction in the ability to capture the returns to the innovation. And if this is true of IP, it may be true of noncompetes as well; if noncompetes were weaker or did not exist, the gains from spreading knowledge across firms may exceed the harm from less development and sharing of information within the firm.

The experience of California (CA) is a key piece of evidence on this point. In CA, noncompetes are legally unenforceable. And yet CA is a worldwide center of innovation. While it is possible that CA is

33. *See* Barnett & Sichelman, *supra* note 3; Long, *supra* note 3.

34. In the main text, I assume that there are two discrete ways of organizing the job. In reality, there may be a continuum of ways, but the basic point still applies.

35. This is an example of a situation where a noncompete can harm third parties that did not agree to it, even if it is mutually beneficial to the worker and the firm. *See* Shi, *supra* note 19.

36. *See* Bronwyn H. Hall & Dietmar Harhoff, *Recent Research on the Economics of Patents*, 4 ANN. REV. ECON. 541–65 (2012); and Bronwyn H. Hall, *Patents, Innovation, and Development*, INT'L L. REV. APPLIED ECON. (forthcoming, 2021).

innovative despite the restrictions on noncompetes and not because of them, at a minimum the experience of CA shows that such a policy is not severely damaging to innovation. It is also possible that the restrictions on noncompetes might be one of the *causes* of CA's success. It may cause beneficial knowledge sharing across firms similar to what might be achieved through weaker IP, and this advantage may outweigh the disadvantage of reduced incentive to develop and share knowledge within the firm.[37,38]

- While a noncompete may increase the *firm's* incentive to create new knowledge, it decreases the *worker's* incentive to do so. A worker who develops new knowledge absent a noncompete gains by being more attractive to outside firms, which allows them to either switch jobs or to bargain with their current firm from a stronger position.[39] The existence of a noncompete reduces this gain and so reduces the incentive to create knowledge.[40]
- Aside from their effects on the creation and dissemination of information within and across firms, noncompetes impede the efficient flow of *people* across firms. Not every worker/firm match is the right one. Sometimes, it was a mistake from the beginning, and other times, it was the right one once but is no longer. The normal way to improve upon a suboptimal match is for the worker to switch jobs. Noncompetes impede this switching, as it is more difficult for the worker to quit because they are barred by the noncompete from the best available alternative jobs.[41] So workers are either stuck in suboptimal matches or they are forced to take a (likely inferior) job that is not prohibited by the noncompete or even to leave the workforce entirely. Noncompetes interfering with better matches between workers and firms may be a significant source of inefficiency.[42]

Given the above points, the claim that noncompetes can lead to an increase in efficient information sharing is not entirely without merit. But close scrutiny reveals the argument to be weak and also suggests some strong arguments to the contrary.

2. *Argument #2(B):* Noncompetes *Facilitate Efficient Investment in Worker Training*

Firms sometimes engage in costly investment in worker training and skills. But they may be less likely to do so if those workers can use that training to attract better outside job offers. If training the worker means either losing that worker or having to pay a higher wage to retain that worker, the firm may not

37. For versions of this argument, *see* Orly Lobel, *Noncompetes, Human Capital Policy & Regional Competition*, 45 J. CORP. L. 931–51 (2020); and *Exit, Voice & Innovation: How Human Capital Policy Impacts Equality (& How Inequality Hurts Growth)*, 57 HOUS. L. REV. 781 (2020).
38. It is important to note, however, that many labor contracts in California contain noncompete provisions, even though they are unenforceable according to state law. It is therefore possible that some workers *believe* that they are constrained by a noncompete when in fact they are not, and this perceived constraint may have an effect similar to that of an actual constraint due to an *in terrorem* effect. For this reason, the policy regime in California is not (as a practical matter) a complete ban on noncompetes, which complicates the interpretation of California's innovation success. *See* Evan Starr, et al, *The Behavioral Effects of (Unenforceable) Contracts*, 36 J. L. ECON. & ORG. 633–87 (2020). *See also* Evan Starr & J. J. Prescott, *Subjective Beliefs about Contract Enforceability* (2021) (unpublished manuscript) for evidence that workers are often poorly informed about the enforceability of noncompete provisions in their labor agreements.
39. The reference here is not to knowledge that would be owned by the firm if it were created, such as a patent. Rather it is to knowledge that the worker can create, the creation of which would be economically efficient, but will only actually be created if the worker can use it to become more valuable to outside firms.
40. *See* Mark J. Garmaise, *Ties that Truly Bind: Non-competition Agreements, Executive Compensation and Firm Investment*, 27 J. LAW, ECON. & ORG. 376–25 (2011).
41. If the match is sufficiently bad, the firm may fire the worker. But there are many bad matches that persist.
42. If the worker is more efficient with another firm, it is possible that there could be a mutually beneficial exchange in which the worker pays the firm to release them from the noncompete. But there are many practical barriers to this happening, and so it is rare.

provide the training in the first place, even if doing so is economically efficient. But if there was a noncompete agreement in place, then the firm would have the appropriate incentives to provide the training.[43]

Responses to Argument #2(B).

- A similar point to one made above about Argument #2(*A*) applies here as well. The argument does not work if the training is inherent in the job. For example, if hospital nurses gain skills that make them more attractive to outside employers, and if those skills arise simply from the experience of being a hospital nurse, then the firm has no choice but to provide that "training," and will do so with or without a noncompete. And even if the training is formal training and not on-the-job training, it may be so necessary for the job that the firm would be willing to provide it at its own expense even if doing so will make the worker more attractive to outside employers. In order for a noncompete to lead to more training, there must be a version of the job where training is provided, another version where it is not provided, and the firm must prefer the version where it is provided if and only if the worker is bound by a noncompete.
- Labor economists distinguish between industry-specific human capital (HC) and firm-specific HC. (There is also a concept of "general" HC that is useful across industries, but for our purposes this can be folded into the concept of industry-specific HC.) Firm-specific HC is defined as HC that makes the worker more valuable at the current firm but not at other firms. Clearly, noncompetes do not cause firms to increase training that imparts firm-specific HC, because by definition firm-specific HC is not useful to any competitor; providing it to the worker does not raise the worker's outside wage, and so will not put the firm in a position where providing the HC means either losing the worker or matching a higher outside wage offer. To the contrary, firm-specific HC tends to bind workers more tightly to their firms, because it makes the existing match more valuable relative to alternative matches.

Industry-specific HC, in contrast, is valuable to other firms in the industry as well as to the original firm.[44] In the simplest labor economics models, training that imparts industry-specific HC is not paid for by the firm at all. Precisely because the HC increases the worker's value to outside firms, the benefit from that HC accrues to the worker and not to the firm, and so only the worker is willing to pay for it, either directly in the form of education or indirectly in the form of a lower wage for a period of time (or in the case of many internships, a zero wage) in exchange for on-the-job training. So even when the firm appears to be providing training for industry-specific HC at its own expense, that training is often actually indirectly financed by the worker.[45]

Given this, it might appear that firms would be willing to pay for training that imparts industry-specific HC if it could be protected by a noncompete, as then the firm would capture the benefit. But according to the simplest model of labor market competition, if the training imparts a benefit (increased industry-specific HC) that exceeds its cost, then it will occur regardless; with a noncompete, the firm will pay the cost and receive the benefit, and without a noncompete, the worker will do the same. That is, in the simplest model a noncompete removes a barrier to the firm paying

43. *See* Rubin & Shedd, *supra* note 3; Long, *supra* note 3.

44. The distinction between the types of human capital is not always so clear. For example, going to Hamburger University presumably increases the trainee's value as a manager at any fast food restaurant (industry-specific), but probably increases their value at McDonald's the most because the practices being taught are the exact ones used at McDonald's (firm-specific). Despite this, the basic point still applies.

45. *See* Gary S. Becker, *Investment in Human Capital: A Theoretical Analysis*, 70 J. POL. ECON. 9–49 (1962).

for industry-specific HC training, but it will not cause training to happen that would not have happened anyway.[46]

If we complicate slightly the model of labor market competition, there can be circumstances in which firms *do* impart industry-specific HC at their own expense and to the benefit of the worker. Minimum wage laws can limit the extent to which workers can be made to pay for their own HC in the form of lower wages. Credit constraints or behavioral factors may limit workers' willingness or ability to self-fund training by accepting a job with lower wages today in order to be able to command higher wages in the future. In these situations, it is possible that this training will be facilitated by noncompetes to the benefit of workers. And it is even possible that without the noncompetes, some jobs will be eliminated altogether.

In sum, given the above points, the claim that noncompetes lead to an increase in efficient worker training is not entirely without merit. But overall, close scrutiny reveals the argument to be weak, weaker than Argument #2(*A*), and also suggests strong arguments to the contrary.

IV. Noncompetes Versus Other Postemployment Restrictive Covenants (PERCs)

Noncompetes are only one of a number of PERCs that exist. Other PERCs include nondisclosure agreements, nonsolicitation agreements, and nonrecruitment agreements. A full evaluation of these other PERCs is beyond the scope of this article, and I offer no policy recommendations regarding them. But a few points are worth noting:

- Like noncompetes, other PERCs may be imposed on workers without compensation (or made unreasonably broad) as a means of extracting value. This is grounds for skepticism about them.[47]
- However, the argument that these other PERCs have positive benefits is stronger than is the case for noncompetes. The idea that efficient information creation and sharing requires the protection of a nondisclosure agreement (so that the worker cannot simply sell the knowledge to the highest bidder) is much more reasonable than the idea that it requires the protection of a noncompete (so that the worker's alternative sources of employment are restricted or foreclosed). Similarly, nonsolicitation agreements and nonrecruitment agreements may legitimately be necessary for certain kinds of businesses and professional practices to be willing to integrate new partners without fear that the partner will leave and take the business with them.
- By the same token the potential for harm to the worker from these other PERCs, even if they are imposed without compensation in the manner described above, is much smaller than with noncompetes. There is a fundamental difference between restricting what a worker can take with them when they leave (knowledge, customer contacts, recruitable employees) and restricting the worker in where they can go if they wish to leave.
- For these reasons, in some settings, other PERCs may be a reasonable alternative to noncompetes; they may be a less restrictive alternative means of achieving the positive benefits that are often claimed for noncompetes. The availability of this alternative further strengthens the case for greatly restricting or banning noncompetes.

46. *See* Garmaise, *supra* note 40.

47. *See* Balasubramanian, et al. *supra* note 11, for evidence that workers who are subject to one PERC are often subject to the others as well and that, for the average worker, the motivation for this appears to be what the authors term "value capture" by the firm, which is synonymous with what in this article is termed "value extraction." (For top managers, the paper finds the opposite result).

- However, it should be noted that noncompetes do have one important advantage over other PERCs, namely, that violations of noncompetes are much more easily detected. It is much easier to know and to prove that a worker has accepted a job that violates their noncompete than it is to prove that they have not shared information in violation of a nondisclosure agreement or subtly recruited customers or workers in violation of a nonsolicitation or nonrecruitment agreement.

V. Discussion

Sections II and III combine to show that noncompetes are likely to be harmful on balance and are very unlikely to be so beneficial that restricting or banning them would risk major economic damage.

The material in those sections is based on standard economic analysis, attempting to understand the effect of noncompetes on such conventional outcomes as worker mobility, hiring, and entrepreneurship, investment, innovation, and wages. It does not capture other, potentially more serious worker harms that are not typically studied by economists. A worker who is stuck in a bad job match might merely be less productive or less well-compensated than they otherwise would be. But they might also be less happy, and worse, they might be a target for genuine exploitation, degradation, or abuse. A worker who is known by a predatory employer or manager to be stuck is likely to be mistreated, because they have no choice but to accept it. There are many reasons why a worker might be stuck, but a noncompete adds an additional one: A worker trying to muster the courage to quit might be reminded of the noncompete that they signed and threatened with legal action if they violate it. It is not altogether an exaggeration to call this a human rights issue.

Even aside from these concrete harms, noncompetes represent a limitation on human freedom. The ability of a person to leave a bad situation has value in and of itself. Policy makers can choose to make a normative judgment that assigns weight to this value, for which they may be willing to sacrifice some economic efficiency. However, it would only be a sacrifice if noncompetes were economically efficient, which as discussed above is likely not the case.

Even if noncompetes are harmful, the question remains of what should be done about them.[48] One possible approach would be treat them as an antitrust problem. It is not obvious that this is the correct approach; noncompetes could be harmful without necessarily belonging within the purview of antitrust (though the very term "noncompete" should be a red flag). Or perhaps noncompetes are an antitrust problem, but only in situations where they are imposed on workers as a consequence of monopsony power in the labor market. In a companion article, I argue that noncompetes can be reasonably regarded as an antitrust problem even absent conventional monopsony power (i.e., even if the labor market was highly competitive in the sense that the worker had many job offers similar to the one that they accepted).[49]

VI. Conclusion

Defenders of labor noncompetes often claim that they were voluntarily agreed to, and so they must be both mutually beneficial and economically efficient. This claim rests on faulty premises: Firms have

48. A common argument against any policy action limiting noncompetes is that it would constitute a paternalistic violation of freedom of contract between two willing parties. But whatever one's general view on the appropriateness of paternalistic government interventions, it is important to note that of the five points listed in response to Argument #1 above, all five apply at least to some extent to higher wage workers, particularly the last two. Only the first point, and to a lesser extent the second, depends heavily on a lack of rationality or capability on the part of the worker that might be ameliorated by government paternalism. The others are ways that firms can extract value by imposing noncompetes on workers who are highly (though not infinitely) rational and capable. A ban on noncompetes therefore protects workers from being victimized by firms, not from their own poor decisions.

49. *See* Balan, *supra* note 13. *See also* Rohit Chopra & Lina M. Khan, *The Case for 'Unfair Methods of Competition' Rulemaking*, 87 U. CHI. L. REV. 357–79 (2020) for an argument for combatting noncompetes using the Federal Trade Commission's antitrust rulemaking authority.

both motive and means to induce workers to accept noncompetes that are not to their benefit, but rather are a means by which the firm extracts value from them. This is true even though the noncompetes are nominally voluntary. In addition, the most commonly made claims of positive effects from noncompetes (that they facilitate efficient knowledge transfer within firms and that they facilitate efficient worker training), while not completely without merit, do not stand up to critical scrutiny, and in fact that scrutiny reveals strong arguments to the contrary.

The weakness of the arguments in favor of noncompetes, combined with the substantial body of empirical literature that mostly finds them to be harmful, as well as the experience of California which has flourished as a center of innovation despite (or perhaps because of) not enforcing them, is sufficient to conclude that noncompetes are likely to be harmful on balance. And even if they are beneficial on balance, they are very unlikely to be so beneficial that restricting them would risk major economic harm.

In addition, noncompetes may cause harms that are not commonly measured by economists, such as increasing worker vulnerability to exploitation and abuse. Finally, the ability of a human being to take their body and their labor where they choose is a human right. Perhaps some extremely strong economic efficiency benefits would outweigh these harms, but as discussed above, such benefits do not exist.

Author's Note

David J. Balan is an employee of the Federal Trade Commission. The views expressed in this article are solely those of the author.

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Agenda

National Association of Attorneys General (NAAG)
Antitrust & Labor Issues Working Group Call (ALIWG)
Monday June 13, 2022
2:00 PM EST/1:00 PM Central/12:00 PM Mountain/11:00 AM Pacific/8:00 AM (HI)

https://naag-org.zoom.us/j (b)(6)

Meeting ID: (b)(6)
Passcode:

OPEN Call NON AAGs INCLUDED

I. Welcome

II. New to Our Call? Please Feel Free to Introduce Yourself/Your Organization

III. Topic: Antitrust Challenges to Labor Non-Competes

- Guest Speaker-
  - **David Balan,** Managing Director, Econ One
  - Q&A

IV. Open Mic

- Any Public Announcements/Updates Re Recent or Upcoming Antitrust and Labor Matters?

V. Attachments:

- Articles by D. Balan
  i. Labor Noncompete Agreements: Tools for Economic Efficiency or Means to Extract Value from Workers (Antitrust Bulletin);
  ii. Labor Practices Can Be An Antitrust Problem Even When Labor Markets are Competitive (CPI);
  iii. Article Sketch (Worker Harm as Antitrust Violation) (forthcoming)

VI. Next Call:

- July 11, 2022 AAGs Only-- Closed Call

Appointment

From: Slaughter, Rebecca [rslaughter@ftc.gov]
Sent: 1/5/2023 7:34:10 AM

Subject: NPRM Call - Diana Moss
Location: RKS to call Diana Moss at (b)(6)

Start: 1/5/2023 10:30:00 AM
End: 1/5/2023 11:00:00 AM
Show Time As: Busy

Recurrence: (none)

Diana Moss	American Antitrust Institute	Advocate	Becca (call)	(b)(6) (b)(6) ntitrustinstitute.org

From: Slaughter, Rebecca [rslaughter@ftc.gov]
Sent: 1/5/2023 7:33:58 AM

Subject: NPRM Call - Jane Flannagan
Location: RKS to Call Jane Flannagan at (b)(6)

Start: 1/5/2023 10:00:00 AM
End: 1/5/2023 10:30:00 AM
Show Time As: Busy

Recurrence: (none)

You met Jane Flanagan when she spoke at the January 2020 noncompete workshop.

Jane Flanagan	Acting Director, Illinois Department of Labor (former AG of IL)	Gov't	Becca (call)		(b)(6) jane.flanagan@illinois.gov

From: Slaughter, Rebecca [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=883978106 4f54d2eb18809bc18d110f8-rslaughter]
Sent: 1/25/2023 9:12:40 AM
To: Slaughter, Rebecca [rslaughter@ftc.gov]

Subject: Noncompete Public Forum
Location: https://openexc.zoom. (b)(6)

Start: 2/16/2023 12:00:00 PM
End: 2/16/2023 3:00:00 PM
Show Time As: Busy

Public Webcast Link: https://kvgo.com/ftc/public-forum-february-16-2023

Speaker Room: https://openexc.zoom.us/j (b)(6)

Meeting ID: (b)(6)
Passcode: (b)(6)

From: McDermott, Patricia [pmcdermott@ftc.gov]
Sent: 3/17/2022 11:42:11 AM
To: McDermott, Patricia [pmcdermott@ftc.gov]; Wilkins, Elizabeth [ewilkins1@ftc.gov]; Cady, Benjamin [bcady@ftc.gov]; Green, Geoffrey [GGREEN@ftc.gov]

Subject: Canceled: Noncompete Discussion with ACP
Location: https://ftc.zoomgov.com/ (b)(6)

Start: 3/18/2022 11:00:00 AM
End: 3/18/2022 11:30:00 AM
Show Time As: Free

Importance: High

Required Attendees: Wilkins, Elizabeth; Cady, Benjamin; Green, Geoffrey

Patricia McDermott is inviting you to a scheduled ZoomGov meeting.

Join ZoomGov Meeting
https://ftc.zoomgov.com (b)(6)

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Join by SIP
(b)(6) omgov.com

Join by H.323
(b)(6)

From: McDermott, Patricia [pmcdermott@ftc.gov]
Sent: 3/17/2022 11:41:49 AM
To: McDermott, Patricia [pmcdermott@ftc.gov]; Wilkins, Elizabeth [ewilkins1@ftc.gov]; Green, Geoffrey [GGREEN@ftc.gov]; Cady, Benjamin [bcady@ftc.gov]; Vedova, Holly L. [HVEDOVA@ftc.gov]
CC: Agostinho, Helder G. [hagostinho@ftc.gov]; Signs, Kelly [ksigns@ftc.gov]

Subject: Noncompete Discussion
Location: https://ftc.zoomgov.com/ (b)(6)

Start: 3/18/2022 2:30:00 PM
End: 3/18/2022 3:00:00 PM
Show Time As: Tentative

Required Attendees: McDermott, Patricia; Wilkins, Elizabeth; Green, Geoffrey; Cady, Benjamin; Vedova, Holly L.
Optional Attendees: Agostinho, Helder G.; Signs, Kelly

Patricia McDermott is inviting you to a scheduled ZoomGov meeting.

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From: Goldman, Tanya L - OSEC [Goldman.Tanya.L@dol.gov]
Sent: 5/25/2022 4:42:45 PM
To: Goldman, Tanya L - OSEC [Goldman.Tanya.L@dol.gov]; Nanda, Seema - SOL [Nanda.Seema@dol.gov]; Nayak, Raj - ASP [Nayak.Raj@dol.gov]; Fernandes, Rhea M - SOL [Fernandes.Rhea.M@dol.gov]; Dasgupta, Anisha [adasgupta@ftc.gov]; Wilkins, Elizabeth [ewilkins1@ftc.gov]

Subject: FTC/DOL - Noncompete Issues
Location: Microsoft Teams Meeting

Start: 6/6/2022 2:30:00 PM
End: 6/6/2022 3:00:00 PM
Show Time As: Tentative

Recurrence: (none)

FTC:

- Wilkins, Elizabeth
- Dasgupta, Anisha

DOL:

- Goldman, Tanya
- Nanda, Seema – SOL
- Fernandes, Rhea
- Nayak, Raj

Contact: Bekah Levine (levine.rebekah@dol.gov) (5/25/22)

Microsoft Teams meeting

Join on your computer or mobile app
Click here to join the meeting

Join with a video conferencing device
teams@meet.dol.gov
Video Conference ID: (b)(6)
Alternate VTC instructions

Or call in (audio only)
(b)(6) United States, Washington DC
Phone Conference ID: (b)(6)
Find a local number | Reset PIN

Learn More | Meeting options

Appointment

From: Emily Carew (b)(6) epi.org]
Sent: 2/6/2023 3:08:47 PM
To: Emily Carew (b)(6) epi.org]; Terri Gerstein (b)(6) @gmail.com]; Wilkins, Elizabeth [ewilkins1@ftc.gov]; (b)(6) @umd.edu

Subject: Speaker Hold for Webinar - Noncompete clauses cut worker power off at the knees
Location: You will use your individual panelist link to join.

Start: 3/1/2023 2:40:00 PM
End: 3/1/2023 4:00:00 PM
Show Time As: Tentative

Recurrence: (none)

Updating the time for the event since we like to jump on zoom 20 minutes before the webinar for a practice session. Thanks!

Appointment

From: Zhao, Daniel [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=D8D17E1A1B0644FD931C56EC899541E1-DZHAO]
Sent: 2/10/2022 10:39:52 PM
To: Khan, Lina [lkhan@ftc.gov]

Subject: Meeting on Policy
Location: https://ftc.zoomgov.com/ (b)(6)

Start: 2/23/2022 3:45:00 PM
End: 2/23/2022 4:45:00 PM
Show Time As: Busy

Noncompete rulemaking – part 1

Daniel Zhao is inviting you to a scheduled ZoomGov meeting.

Topic: Room B for internal check-ins
Time: This is a recurring meeting Meet anytime

Join ZoomGov Meeting
https://ftc.zoomgov.com/ (b)(6)

Meeting ID: (b)(6)
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One tap mobile

(b)(6)

Dial by your location

(b)(6)

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Join by SIP

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Join by H.323

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From: Zhao, Daniel [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=D8D17E1A1B0644FD931C56EC899541E1-DZHAO]
Sent: 2/10/2022 10:39:26 PM
To: Khan, Lina [lkhan@ftc.gov]

Subject: Meeting on Policy
Location: https://ftc.zoomgov.com/ (b)(6)

Start: 2/24/2022 1:00:00 PM
End: 2/24/2022 2:00:00 PM
Show Time As: Busy

Noncompete rulemaking – part 2

Daniel Zhao is inviting you to a scheduled ZoomGov meeting.

Topic: Room B for internal check-ins
Time: This is a recurring meeting Meet anytime

Join ZoomGov Meeting
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From: Wilkins, Elizabeth [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=283B3B96FE4B4A94B139CAB290F92BEA-EWILKINS1]
Sent: 3/17/2022 5:55:14 PM
To: Signs, Kelly [ksigns@ftc.gov]

Subject: FW: Noncompete Discussion
Location: https://ftc.zoomgov.com/ (b)(6)

Start: 3/18/2022 2:30:00 PM
End: 3/18/2022 3:00:00 PM
Show Time As: Tentative

-----Original Appointment-----
From: McDermott, Patricia <pmcdermott@ftc.gov>
Sent: Thursday, March 17, 2022 11:42 AM
To: McDermott, Patricia; Wilkins, Elizabeth; Green, Geoffrey; Cady, Benjamin; Vedova, Holly L.
Cc: Agostinho, Helder G.
Subject: Noncompete Discussion
When: Friday, March 18, 2022 2:30 PM-3:00 PM (UTC-05:00) Eastern Time (US & Canada).
Where: https://ftc.zoomgov.com/ (b)(6)

Patricia McDermott is inviting you to a scheduled ZoomGov meeting.

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Find your local number: https://ftc.zoomgov.c (b)(6)

Join by SIP
(b)(6) p.zoomgov.com

Join by H.323
(b)(6)

Appointment

From: Emily Carew (b)(6) @epi.org]
Sent: 2/6/2023 3:08:36 PM
To: Terri Gerstein [(b)(6) @gmail.com]; Wilkins, Elizabeth [ewilkins1@ftc.gov] (b)(6) umd.edu

Subject: Speaker Hold for Webinar - Noncompete clauses cut worker power off at the knees
Location: You will use an individual panelist link to join - that will be sent a few days before the event.

Start: 3/1/2023 3:00:00 PM
End: 3/1/2023 4:00:00 PM
Show Time As: Tentative

Recurrence: (none)

I am holding this since we are all confirmed for March 1 at 3pm, if there are any changes I will let you all know!

From: Emily Carew (b)(6) epi.org]
Sent: 2/21/2023 10:46:23 AM
To: Terri Gerstein (b)(6) @gmail.com]; Wilkins, Elizabeth [ewilkins1@ftc.gov]; (b)(6) @umd.edu

Subject: Speaker Hold for Webinar - Noncompete clauses cut worker power off at the knees
Location: You will use an individual panelist link to join - that will be sent a few days before the event.

Start: 3/1/2023 2:40:00 PM
End: 3/1/2023 4:00:00 PM
Show Time As: Tentative

Recurrence: (none)

Updating the time for the event since we like to jump on zoom 20 minutes before the webinar for a practice session. Thanks!

From: McDermott, Patricia [pmcdermott@ftc.gov]
Sent: 3/17/2022 11:42:11 AM
To: Wilkins, Elizabeth [ewilkins1@ftc.gov]; Cady, Benjamin [bcady@ftc.gov]; Green, Geoffrey [GGREEN@ftc.gov]

Subject: Canceled: Noncompete Discussion with ACP
Location: https://ftc.zoomgov.com/j/(b)(6)

Start: 3/18/2022 11:00:00 AM
End: 3/18/2022 11:30:00 AM
Show Time As: Free

Importance: High

Required Attendees: Wilkins, Elizabeth; Cady, Benjamin; Green, Geoffrey

Patricia McDermott is inviting you to a scheduled ZoomGov meeting.

Join ZoomGov Meeting
https://ftc.zoomgov.com/j/(b)(6)
Meeting ID: (b)(6)
Passcode: (b)(6)
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(b)(6)
Meeting ID: (b)(6)
Find your local number: https://ftc.zoomgov.c(b)(6)
Join by SIP
(b)(6)oomgov.com
Join by H.323
(b)(6)

From: Levine, Bekah - OSEC [Levine.Rebekah@dol.gov]
Sent: 5/25/2022 4:42:14 PM
To: Nanda, Seema - SOL [Nanda.Seema@dol.gov]; Nayak, Raj - ASP [Nayak.Raj@dol.gov]; Fernandes, Rhea M - SOL [Fernandes.Rhea.M@dol.gov]; Dasgupta, Anisha [adasgupta@ftc.gov]; Wilkins, Elizabeth [ewilkins1@ftc.gov]

Subject: FTC/DOL - Noncompete Issues
Location: Microsoft Teams Meeting

Start: 6/6/2022 2:30:00 PM
End: 6/6/2022 3:00:00 PM
Show Time As: Tentative

Recurrence: (none)

FTC:

- Wilkins, Elizabeth
- Dasgupta, Anisha

DOL:

- Goldman, Tanya
- Nanda, Seema – SOL
- Fernandes, Rhea
- Nayak, Raj

Contact: Bekah Levine (levine.rebekah@dol.gov) (5/25/22)

Microsoft Teams meeting

Join on your computer or mobile app
Click here to join the meeting

Join with a video conferencing device

teams@meet.dol.gov
Video Conference ID: (b)(6)
Alternate VTC instructions

Or call in (audio only)

(b)(6) nited States, Washington DC
Phone Conference ID: (b)(6)
Find a local number | Reset PIN

Learn More | Meeting options

From: McDermott, Patricia [pmcdermott@ftc.gov]
Sent: 3/17/2022 11:41:47 AM
To: Wilkins, Elizabeth [ewilkins1@ftc.gov]; Green, Geoffrey [GGREEN@ftc.gov]; Cady, Benjamin [bcady@ftc.gov]; Vedova, Holly L. [HVEDOVA@ftc.gov]
CC: Agostinho, Helder G. [hagostinho@ftc.gov]

Subject: Noncompete Discussion
Location: https://ftc.zoomgov.com/ (b)(6)

Start: 3/18/2022 2:30:00 PM
End: 3/18/2022 3:00:00 PM
Show Time As: Tentative

Required Attendees: Wilkins, Elizabeth; Green, Geoffrey; Cady, Benjamin; Vedova, Holly L.
Optional Attendees: Agostinho, Helder G.

Patricia McDermott is inviting you to a scheduled ZoomGov meeting.

Join ZoomGov Meeting
https://ftc.zoomgov.com (b)(6)
Meeting ID (b)(6)
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Meeting ID: (b)(6)
Find your local number: https://ftc.zoomgov.com (b)(6)

Join by SIP
(b)(6) sip.zoomgov.com
Join by H.323
(b)(6)

Appointment

From: Emily Carew (b)(6) pi.org]
Sent: 2/27/2023 9:40:32 AM
To: Terri Gerstein (b)(6) gmail.com]; Wilkins, Elizabeth [ewilkins1@ftc.gov]; (b)(6) umd.edu

Subject: Speaker Hold for Webinar - Noncompete clauses cut worker power off at the knees
Location: You will use your individual panelist link to join.

Start: 3/1/2023 2:40:00 PM
End: 3/1/2023 4:00:00 PM
Show Time As: Tentative

Recurrence: (none)

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From: Emily Carew [(b)(6)]@epi.org]
Sent: 2/6/2023 3:08:47 PM
To: Emily Carew [(b)(6)]@epi.org]; Terri Gerstein [(b)(6)]@gmail.com]; Wilkins, Elizabeth [ewilkins1@ftc.gov]; estarr@umd.edu

Subject: Speaker Hold for Webinar - Noncompete clauses cut worker power off at the knees
Location: You will use an individual panelist link to join - that will be sent a few days before the event.

Start: 3/1/2023 3:00:00 PM
End: 3/1/2023 4:00:00 PM
Show Time As: Tentative

Recurrence: (none)

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Appointment

From: Emily Carew (b)(6) pi.org]
Sent: 2/6/2023 3:08:47 PM
To: Emily Carew (b)(6) epi.org]; Terri Gerstein (b)(6) @gmail.com]; Wilkins, Elizabeth [ewilkins1@ftc.gov]; (b)(6) @umd.edu

Subject: Speaker Hold for Webinar - Noncompete clauses cut worker power off at the knees
Location: You will use an individual panelist link to join - that will be sent a few days before the event.

Start: 3/1/2023 2:40:00 PM
End: 3/1/2023 4:00:00 PM
Show Time As: Tentative

Recurrence: (none)

Updating the time for the event since we like to jump on zoom 20 minutes before the webinar for a practice session. Thanks!

From: Lane, Shannon [slane@ftc.gov]
Sent: 2/15/2023 10:09:24 AM
CC: Carter, Paige [pcarter@ftc.gov]; Mackey, Sarah D. [smackey@ftc.gov]
Subject: RE: FTC Panel on the Non-competes NPRM - Thursday, February 16

Good morning,

In preparation for tomorrow, please remember that each panelist will have a maximum of four minutes to give an introduction and overview. Moderated questions for the panel will follow. The panel will last for approximately one hour.

Again, please let us know if you have any questions before the panel, and thank you again for participating.

Best,
Shannon

From: Mackey, Sarah D. <smackey@ftc.gov>
Sent: Tuesday, February 14, 2023 1:53 PM
Cc: Lane, Shannon <slane@ftc.gov>; Carter, Paige <pcarter@ftc.gov>
Subject: FTC Panel on the Non-competes NPRM - Thursday, February 16

We are looking forward to hearing from you on Thursday! The session starts at noon (Eastern time) and we ask that you sign into the link that Shannon sent about 30 minutes before noon. We want to ensure sound and video are working so that we can able to fix any issues that might arise. Once you check in, you can turn off the video and mute yourself and do other work until five minutes before noon.

If you've not already used the test link Shannon sent, please do so soon.

We thought you'd like to see the agenda and who your other panelists are. This link has the agenda and lists the panelists in the order in which you will be speaking. This second link has the event description and provides the link for the live webcast. The webcast link won't work until shortly before the event. If your friends, coworkers, or family want to watch, this link is what you should send them.

Finally, I believe you already have this information, but we wanted to ensure you do. The following are the questions the moderator may ask, but she may also adapt these questions to the context of the conversation.

1. What impact would banning non-competes have on your industry?
2. Should non-competes be banned for all types of workers? For example, should non-competes be allowed for certain workers based on wages or skill level, or for senior executives?
3. The FTC preliminarily found that non-compete clauses are exploitative and coercive for most workers. Do you agree or disagree and why?
4. Are there any costs or benefits to non-competes that many people might not be aware of?
5. Can employers protect their investments without the use of non-compete clauses, and how?

If you have any questions, please feel free to reach out to Shannon and me.

Best
Sarah

Sarah Mackey (she/her/hers)
Deputy Director

Office of Policy Planning • Federal Trade Commission
600 Pennsylvania Ave., N.W.
Washington D.C. 20580

☎ (202) 326-3254 (b)(6) ✉ smackey@ftc.gov

Message

From: Mackey, Sarah D. [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=1B7693BC755C4FCD8CD62E6B2FDE67D4-SMACKEY]
Sent: 2/14/2023 1:52:53 PM
CC: Lane, Shannon [slane@ftc.gov]; Carter, Paige [pcarter@ftc.gov]
BCC: Chatrane Birbal [(b)(6)@hrpolicy.org]; Ani Huang [(b)(6)@execcomp.org]; [(b)(6)]@seiu26.org; [(b)(6)]@baesystems.com [(b)(6)]@gmail.com; [(b)(6)]@outlook.com; Baird [(b)(6)]blueprint-local.com]; [(b)(6)]steamlogistics.com [(b)(6)]@comcast.net
Subject: FTC Panel on the Non-competes NPRM - Thursday, February 16

We are looking forward to hearing from you on Thursday! The session starts at noon (Eastern time) and we ask that you sign into the link that Shannon sent about 30 minutes before noon. We want to ensure sound and video are working so that we can able to fix any issues that might arise. Once you check in, you can turn off the video and mute yourself and do other work until five minutes before noon.

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If you have any questions, please feel free to reach out to Shannon and me.

Best
Sarah

Sarah Mackey (she/her/hers)
Deputy Director
Office of Policy Planning • Federal Trade Commission
600 Pennsylvania Ave., N.W.
Washington D.C. 20580

☎ (202) 326-3254 [(b)(6)] ✉ smackey@ftc.gov

From: Mackey, Sarah D. [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=1B7693BC755C4FCD8CD62E6B2FDE67D4-SMACKEY]
Sent: 2/14/2023 12:10:36 PM
To: Lane, Shannon [slane@ftc.gov]
CC: Fisher, David [dfisher@ftc.gov]; Carter, Paige [pcarter@ftc.gov]
Subject: FW: Noncompete forum agenda draft press release
Attachments: Agenda for the Noncompetes Public Forum_FINAL1203.docx; Short Bios for Noncompete NPRM_Feb. 16 2022.docx

Shannon

Please send the attached information to the panelists once the press release is issued.

Thanks
Sarah

PUBLIC FORUM

FOR THE

PROPOSED RULE ON NONCOMPETES

Agenda

12:00 – 12:05pm	Opening Remarks **Chair Lina Khan** Federal Trade Commission
12:05 – 12:10pm	Rulemaking Presentation **Marie Choi** Office of General Counsel, Federal Trade Commission
12:10 – 12:15 pm	Overview of the Notice of Proposed Rulemaking for Noncompetes **Elizabeth Wilkins** Director, Office of Policy and Planning
12:15 – 1:05pm	Panel **Steve Cox** Steam Logistics **Johnna Torsone** Former CHRO of Pitney Bowes Participating on Behalf of HR Policy Association **Dr. Sameer Baig** Cancer Specialists of North Florida **Ross Baird** Blueprint Local **Emily Glendenning** BAE Systems, Inc. **Kevin Borowske** Formerly FirstService Residential

PUBLIC FORUM

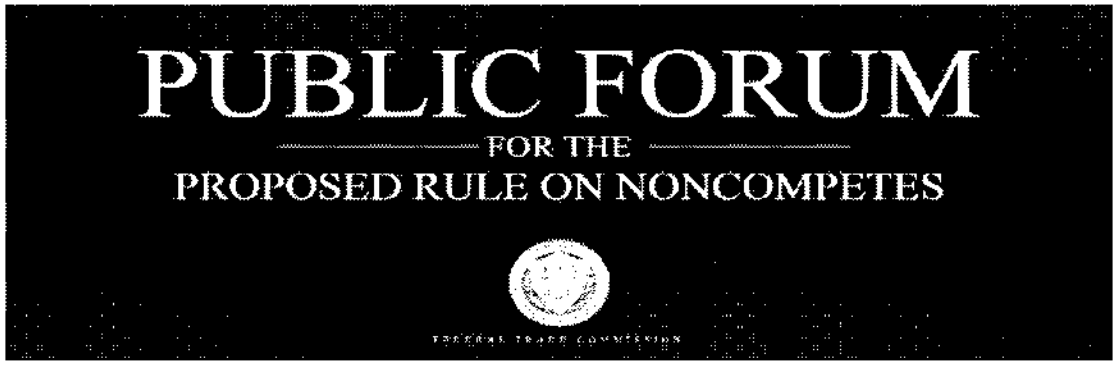
FOR THE

PROPOSED RULE ON NONCOMPETES

1:05pm – 1:10pm Reactions
Commissioner Rebecca Kelly Slaughter
Federal Trade Commission

1:10 - 2:55pmPublic Comment

2:55 – 3:00pm Closing Remarks
Commissioner Alvaro Bedoya
Federal Trade Commission



Speaker Bios

Introductory Remarks

Lina M. Khan was sworn in as Chair of the Federal Trade Commission on June 15, 2021. Prior to becoming head of the FTC, Khan was an Associate Professor of Law at Columbia Law School. She also previously served as counsel to the U.S. House Judiciary Committee's Subcommittee on Antitrust, Commercial, and Administrative Law, legal adviser to FTC Commissioner Rohit Chopra, and legal director at the Open Markets Institute. Khan's scholarship on antitrust and competition policy has been published in the Columbia Law Review, Harvard Law Review, University of Chicago Law Review, and Yale Law Journal. She is a graduate of Williams College and Yale Law School.

Marie Choi is an attorney in the Federal Trade Commission's Office of General Counsel. Choi works on a wide variety of matters for the Office of General Counsel's Legal Counsel group, including rulemaking, procurement, and other contract matters. She holds a J.D. from New York University School of Law and a B.A. from the University of California, Los Angeles.

Elizabeth Wilkins joined the Federal Trade Commission in April 2022. Prior to becoming Director of the Office of Policy and Planning, Wilkins served as Senior Advisor to the White House Chief of Staff. Prior to that, she worked in several senior leadership roles at the Office of the Attorney General for the District of Columbia, including Senior Counsel for Policy and Chief of Staff. Wilkins also previously served as a law clerk to Associate Justice Elena Kagan of the U.S. Supreme Court, and to then-Chief Judge Merrick Garland of the U.S. Court of Appeals for the D.C. Circuit. Before law school, Wilkins was a policy advisor in the White House Domestic Policy Council. She graduated from Yale University and holds a J.D. from Yale Law School.

Speakers

Steve Cox has worked in third party transportation for 28 years in various roles. Currently, President at Steam Logistics in Chattanooga, TN a hypergrowth logistics company that has grown from $33M in sales in 2019 to $765M in 2022. Steve's passion is providing an opportunity where employees can change their lives.

Johnna Torsone served as Chief HR Officer and a member of senior management team for close to 30 years before her retirement from Pitney Bowes in August of last year. Before her employment at Pitney Bowes as employment counsel in 1990, Ms. Torsone was a partner with the New York Law firm of Parker Chapin Flattau and Klimpl where she practiced labor and employment law predominantly on the management side for 15 years. During her tenure as CHRO, she was active in professional organizations such as the HR Policy Association and recognized for innovations in employee health, diversity and inclusion, talent and leadership development and HR transformation.

Sameer Baig is a hematologist and oncologist in Palm Coast, FL. He completed his internal medicine residency training at Griffin Hospital and Yale School of Medicine, and his fellowship in Hematology and Oncology at East Carolina University. Sameer is active in the grass-roots physician advocacy group 'Take Medicine Back'.

Ross Baird is the founder and CEO of Blueprint Local, a firm that invests in creating opportunity economically distressed communities. Prior to Blueprint, Ross was co-founder and CEO of venture capital firm Village Capital, and his firms collectively have invested ~$250M in entrepreneurs and projects creating new businesses, economic development, and jobs across the U.S. He is also author of the best-selling book The Innovation Blind Spot and has held a fellowship with the Kauffman Foundation, focused on increasing access to capital for the vast majority of the country, and chairs the board of the American Economic Liberties Project.

Emily Glendinning is the Vice President & Associate General Counsel for Employment and the Chief Privacy Officer at BAE Systems, Inc., a global defense, security, and aerospace company. She began her career practicing employment law at Wiley Rein LLP and Hogan Lovells LLP in Washington, DC. Ms. Glendinning received her B.A. from Williams College and her J.D. from the University of Chicago Law School.

Kevin Borowske is a residential Caretaker. Borowske is a recently terminated 8-year employee of FirstService Residential at Centre Village Condominiums in downtown Minneapolis. On top of his departure papers was a copy of a non-compete agreement he signed back in 2014.

Panel Remarks

Commissioner Rebecca Kelly Slaughter was sworn in as a Federal Trade Commissioner on May 2, 2018. Commissioner Slaughter brings to the Commission extensive experience in competition, privacy, and consumer protection. She builds consensus for a progressive vision, and staunchly advocates for our nation's consumers and workers, particularly those traditionally underrepresented and marginalized. In addition, Commissioner Slaughter strongly supports working families and work-life balance. Before joining the FTC, Ms. Slaughter served as Chief Counsel to Senator Charles Schumer of New York, the Democratic Leader.

Closing Remarks

Alvaro Bedoya was sworn in as a Federal Trade Commissioner on May 16, 2022. Before joining the Commission, Bedoya was the founding director of the Center on Privacy & Technology at Georgetown

University Law Center, where he was also a visiting professor of law. He has been influential in research and policy at the intersection of privacy and civil rights, and co-authored a 2016 report on the use of facial recognition by law enforcement and the risks that it poses to privacy, civil liberties, and civil rights. He previously served as the first Chief Counsel to the Senate Judiciary Subcommittee on Privacy, Technology and the Law after its founding in 2011, and Chief Counsel to former Senator Al Franken, of Minnesota. Prior to that, he was an associate at the law firm WilmerHale.

From: Lane, Shannon [slane@ftc.gov]
Sent: 2/8/2023 4:59:16 PM
To: 'Glendinning, Emily (US)' [(b)(6)]@baesystems.com]
CC: Mackey, Sarah D. [smackey@ftc.gov]; Carter, Paige [pcarter@ftc.gov]
Subject: RE: Invitation to Speak at FTC Public Forum on Non-Compete Clauses

Hi Emily,

We are looking forward to hearing from you at our public forum on February 16, 2023. As you know, the forum starts at noon. Before the 16th, we ask that you test your set up.

Testing Information:

Ahead of the **FTC Public Forum**, please find the necessary OpenExchange video conference test link below. We strongly encourage you to test your video connection by clicking on the 'test' link, at your earliest convenience. Please join on the device that will be used the day of the event so our OpenExchange video specialist can walk through how to test both the audio and video.

Event Testing ID: (b)(6)

Testing Link: (b)(6)

On February 16, we ask that you try to log into the session before noon so that we know you're present and we can ensure that if there are any issues, we can trouble shoot them in time. If possible, could you sign in around 11:30? Once you're in, you can turn off your video and mute yourself so that you can continue working until the session starts at noon. You will be logging into the Commissioner Room for this forum. Here is the relevant information.

Commissioner Room:

Link: https://openexc.zoom.us/ (b)(6)

Meeting ID: (b)(6)

Passcode: (b)(6)

Once the panel part of the session is over, and if you wish to continue watching, then it is best to go here: **Public Webcast Link:** https://kvgo.com/ftc/public-forum-february-16-2023. Please do not have this link open when you are in the Commissioner Room as it will cause technical difficulties. This is also the link you can share with whomever you'd like to watch the forum.

In addition to this technical information, we would also like to share the key topics for the panel. Please note that the moderator may adapt these questions to the context of the conversation.

1. What impact would banning non-competes have on your industry?
2. Should non-competes be banned for all types of workers? For example, should non-competes be allowed for certain workers based on wages or skill level, or for senior executives?
3. The FTC preliminarily found that non-compete clauses are exploitative and coercive for most workers. Do you agree or disagree and why?
4. Are there any costs or benefits to non-competes that many people might not be aware of?
5. Can employers protect their investments without the use of non-compete clauses, and how?

Finally, if you could send us a brief description of your introductory remarks at your earliest convenience, we would appreciate it.

Again, thank you so much for adding your voice to this conversation.

Best,
Shannon

From: Lane, Shannon
Sent: Friday, February 3, 2023 12:09 PM
To: Glendinning, Emily (US) <(b)(6)@baesystems.com>
Subject: RE: Invitation to Speak at FTC Public Forum on Non-Compete Clauses

Hi Emily,

Thank you very much for sending over your bio, and thank you again for joining the panel. We'll send you more information when it becomes available.

Please let me know if you have any questions in the meantime.

Best,
Shannon

From: Glendinning, Emily (US) <(b)(6)@baesystems.com>
Sent: Friday, February 3, 2023 12:05 PM
To: Lane, Shannon <slane@ftc.gov>
Subject: RE: Invitation to Speak at FTC Public Forum on Non-Compete Clauses

Dear Shannon,

It was a pleasure to speak with you today. Following up on our conversation, here is my bio:

Emily Glendinning is the Vice President & Associate General Counsel for Employment and the Chief Privacy Officer at BAE Systems, Inc., a global defense, security, and aerospace company. She began her career practicing employment law at Wiley Rein LLP and Hogan Lovells LLP in Washington, DC. Ms. Glendinning received her B.A. from Williams College and her J.D. from the University of Chicago Law School.

And I can confirm that no third party has funded my participation in the panel or compensated me for my participation. I look forward to receiving the information on the other panelists and the proposed questions when you have them.

Best,

Emily

Emily J. Glendinning
Vice President & Associate General Counsel
Chief Privacy Officer, CIPP/US
BAE Systems, Inc.

T: (b)(6) E: (b)(6)baesystems.com
2941 Fairview Park Drive, Falls Church, Virginia 22042

From: Lane, Shannon <slane@ftc.gov>
Sent: Thursday, February 2, 2023 11:36 AM
To: Glendinning, Emily (US) (b)(6) baesystems.com>
Cc: Mackey, Sarah D. <smackey@ftc.gov>; Carter, Paige <pcarter@ftc.gov>
Subject: Invitation to Speak at FTC Public Forum on Non-Compete Clauses

Dear Ms. Glendinning,

Last month, the FTC proposed a rule to ban employers from imposing non-compete clauses on their employees, preliminarily finding that they are an unfair method of competition. The FTC is currently seeking public comment on the proposed rule. As part of the process of seeking public input, the FTC will be holding a virtual public forum to discuss the proposed rule and allow stakeholders to share their experiences with non-competes.

We are reaching out to invite you to speak as a panelist at the public forum on the proposed rule. We think your experience will be a valuable addition to our understanding.

The public forum will be held on **February 16, 2023 from 12:00-3:00 (ET)**; FTC Commissioners will be in attendance along with FTC staff. We will provide brief opening remarks, we will then ask you and the other panelists each to speak for 4 minutes before we have a moderated discussion. So that you can be prepared for the moderated portion of the panel, we will send you proposed questions before the forum. We anticipate the moderated portion of the forum that you will be participating in will take about an hour, but we are still fleshing out the agenda. After the panel discussion, someone from the FTC will give short comments. There will also be time reserved at the end for members of the public to comment. This will be an FTC event and will be recorded and transcribed as part of the rulemaking record.

We believe the public comment period is an important process and we want to hear from all voices who are interested in this proposed rule. Please let us know if you would like to participate by close of business **Wednesday, February 8, 2023**. Once you confirm your interest, we will send you the necessary links and technical details for participating.

As the listening session is right around the corner, if you are interested in participating, could you quickly provide us with:

- **A Short Bio:** We ask that your bio be no more than three sentences. All bios will be collated into a list of speaker bios that will be made public as part of the listening forum materials.
- **A Brief Description of your Remarks:** Please give us a few bullets on what you hope to discuss during your remarks. We are happy to discuss further if you have questions.
- **Responses to the Following Financial Disclosure Questions, for the FTC's Record:**

a) Whether any third party funded or otherwise provided financial assistance for the commentary/research/analysis you will present at the hearing? If yes, who?
b) Whether any third party will compensate you for your participation at the hearing or otherwise provide financial assistance for your participation (e.g., reimburse your travel expenses)? If yes, who?

If you have any additional questions, please feel free to contact us. You can reach me by email at slane@ftc.gov or by phone at (b)(6)

Best regards,

Shannon Lane
Attorney Advisor
Office of Policy Planning • Federal Trade Commission
600 Pennsylvania Ave., N.W.
Washington D.C. 20580
Work: 202-326-2084
Cell: (b)(6)

From: Mackey, Sarah D. [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=1B7693BC755C4FCD8CD62E6B2FDE67D4-SMACKEY]
Sent: 1/31/2023 9:08:41 AM
To: Wilkins, Elizabeth [ewilkins1@ftc.gov]
Subject: FW: Keynote speaking invitation - Chair Khan

We have a recommendation from the BBB for our public forum. She looks like a good participant.

Do you want me to run this by the team or have Shannon/Paige send her an invite?

From: Mary K. Engle (b)(6) @bbbnp.org>
Sent: Monday, January 30, 2023 6:23 PM
To: Mackey, Sarah D. <smackey@ftc.gov>
Subject: RE: Keynote speaking invitation - Chair Khan

Hi Sarah,

It was great catching up with you on Friday. We have a suggested speaker for your event: Emily Glendinning at BAE Systems, Inc. Eric Reicin has known Emily for more than a decade and believes she will be a thoughtful panel participant. Her contact information and a short bio are attached for your consideration (understanding that if she participates, you will want a shorter bio!).

Emily J. Glendinning
Vice President & Associate General Counsel
Chief Privacy Officer, CIPP/US
BAE Systems, Inc.

T: (b)(6) baesystems.com
2941 Fairview Park Drive, Falls Church, Virginia 22042

Emily Glendinning is the Vice President & Associate General Counsel for Employment & Labor and the Chief Privacy Officer at BAE Systems, Inc., a global defense, security, and aerospace company. She provides comprehensive advice to the enterprise on a variety of employment and privacy matters and is the co-lead of the company's insider threat program. Ms. Glendinning serves on the senior leadership teams of both the Legal organization and the Human Resources organization.

Prior to joining BAE Systems, Inc., Ms. Glendinning practiced law at Hogan Lovells LLP, where she provided counseling to Fortune 500 corporations on labor and employment matters. She began her career practicing employment law at Wiley Rein LLP.

Ms. Glendinning has authored numerous articles for legal publications on developments in labor and employment law, and she has been a frequent speaker on these topics for the Association of Corporate Counsel and the Society of Human Resource Management. Ms. Glendinning is the Chair of the Board of Directors for MATHCOUNTS Foundation, an organization that promotes math in middle schools.

Ms. Glendinning received her B.A. from Williams College and her J.D. from the University of Chicago Law School.

Let me know if you need anything else.

Best,
Mary

From: Mackey, Sarah D. <smackey@ftc.gov>
Sent: Thursday, January 26, 2023 5:07 PM
To: Mary K. Engle (b)(6) @bbbnp.org>
Subject: RE: Keynote speaking invitation - Chair Khan

Thank you Eric!

Mary,

It would be so nice to catch up and discuss our upcoming event. Do you have time tomorrow? Does 10:00 work for you?

I'm going to move Eric and Elizabeth into bcc to free up their inboxes.

Best
Sarah

From: Eric D. Reicin (b)(6) @BBBNP.org>
Sent: Thursday, January 26, 2023 5:01 PM
To: Wilkins, Elizabeth <ewilkins1@ftc.gov>
Cc: Mackey, Sarah D. <smackey@ftc.gov>; Mary K. Eng (b)(6) @bbbnp.org>
Subject: RE: Keynote speaking invitation - Chair Khan

Absolutely. Happy to explore that as well.

Sarah, I believe you know my colleague Mary Engle, our EVP, Policy and former FTC leader. I am copying Mary on this email as it might make sense for the two of you to chat initially about the art of the possible for us (or with us as a conduit to other reasonable folks).

Eric

Best Regards,

Eric D. Reicin

President and Chief Executive Officer
BBB National Programs
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National Programs

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From: Wilkins, Elizabeth <ewilkins1@ftc.gov>
Sent: Thursday, January 26, 2023 2:30 PM
To: Eric D. Reicin <(b)(6) BBBNP.org>
Cc: Mackey, Sarah D. <smackey@ftc.gov>
Subject: RE: Keynote speaking invitation - Chair Khan

Eric, on a separate issue, I wanted to connect you with our deputy OPP director, Sarah Mackey. We're working on a potential event around the noncompete NPRM, which I know you all have interest in. Is there someone on your team Sarah could reach out to in terms of potential participation?

From: Eric D. Reicin (b)(6) BBBNP.org>
Sent: Wednesday, January 25, 2023 4:34 PM
To: Wilkins, Elizabeth <ewilkins1@ftc.gov>
Cc: Mary K. Engle (b)(6) bbbnp.org>; Farrar, Douglas <dfarrar@ftc.gov>
Subject: RE: Keynote speaking invitation - Chair Khan

Thank you Elizabeth. Look forward to working with you Doug,

Eric

Best Regards,

Eric D. Reicin

President and Chief Executive Officer
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From: Wilkins, Elizabeth <ewilkins1@ftc.gov>
Sent: Wednesday, January 25, 2023 4:31 PM
To: Eric D. Reicin (b)(6) BBBNP.org>

Cc: Mary K. Engle (b)(6) @bbbnp.org>; Farrar, Douglas <dfarrar@ftc.gov>

Subject: RE: Keynote speaking invitation - Chair Khan

Thanks Eric, it was great meeting you. I'm looping Doug Farrar, our Public Affairs Director, to follow up.

Best,
Elizabeth

From: Eric D. Reicin (b)(6) @BBBNP.org>
Sent: Wednesday, January 25, 2023 4:27 PM
To: Wilkins, Elizabeth <ewilkins1@ftc.gov>
Cc: Mary K. Engle (b)(6) @bbbnp.org>
Subject: Keynote speaking invitation - Chair Khan

Elizabeth –

I really enjoyed our time together at the ABA Government Liaison Meeting earlier this week. I appreciate the warm regards you expressed as well. I agree with you that the FTC and BBB National Programs have a long history of working together to enhance consumer trust in the marketplace.

Among our many collaborations, we have referred dozens of matters to the FTC, have worked closely with FTC staff, and have appreciated the opportunity to present at important FTC workshops such as speaking right after Chair Khan at the FTC Protecting Kids from Stealth Advertising in Digital Media event last October.

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As a follow-up to our chat Elizabeth, attached is a formal invitation for Chair Khan to keynote the National Advertising Division Annual Conference on either September 19 or 20. In 2022, Commissioner Bedoya was our keynote speaker (remarks) and Commissioner Slaughter keynoted in 2021 (remarks).

I have copied Mary Engle on my team on this email as well. Mary joined BBB National Programs as EVP, Policy after a nearly 30-year career at the Commission, where she led the FTC's Division of Advertising Practices for over 18 years.

I look forward to our next time together.

Eric

Best Regards,

Eric D. Reicin

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From: Wilkins, Elizabeth [ewilkins1@ftc.gov]
Sent: 1/26/2023 2:30:25 PM
To: Eric D. Reicin (b)(6) BBBNP.org]
CC: Mackey, Sarah D. [smackey@ftc.gov]
Subject: RE: Keynote speaking invitation - Chair Khan

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Eric

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Eric D. Reicin

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From: Nevo, Aviv [anevo@ftc.gov]
Sent: 3/7/2023 8:51:00 AM
To: Lipsitz, Michael [mlipsitz@ftc.gov]
CC: Schmidt, David R. [DSCHMIDT@ftc.gov]; Raval, Devesh [draval@ftc.gov]
Subject: A paper on optimal non compete policy
Attachments: 18128-3.pdf

Mike,

(b)(5)

Best,
Aviv

Page 952 to Page 997

Withheld pursuant to exemption

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of the Freedom of Information and Privacy Act