# No. 17-20607

## In the United States Court of Appeals for the Fifth Circuit

SURESHOT GOLF VENTURES, INC.,
Plaintiff-Appellant,

*v.*

TOPGOLF INTERNATIONAL, INC.,
Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of Texas, Houston Division, No. 4:17-cv-00127

# Brief of Appellant SureShot Golf Ventures, Inc.

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Plaintiff-Appellant,
*v.*
TOPGOLF INTERNATIONAL, INC.,
Defendant-Appellee.

## CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Local Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualifications or recusal.

**Plaintiff-Appellant SureShot Golf Ventures, Inc.** is a closely held Texas corporation headquartered in Houston, Texas. SureShot does not have a parent corporation and no publicly-held corporation owns 10% or more of its stock. The following counsel have appeared on its behalf in this Court and in the district court:

District court and this Court: Mo Taherzadeh of Taherzadeh, PC.

District court: Collin J. Cox and Wendie Childress of Yetter Coleman LLP.

**Defendant-Appellee Topgolf International, Inc.** is a corporation and, according to its disclosures in the district court, the following entities have an interest in the outcome of this case:

- TGP Investors, LLC, is a more than 10% shareholder in Topgolf International, Inc.;
- PEP TG Investments, LP, is a more than 10% shareholder in Topgolf International, Inc.;
- DDFS Partnership, LP, is a more than 10% shareholder in Topgolf International, Inc.; and
- Callaway Golf Company, a publicly-traded corporation, is a more than 10% shareholder in Topgolf International, Inc.

ROA.23. The following counsel have appeared on its behalf in this Court and in the district court:

M. Sean Royall**,** Ashley E. Johnson, and William T. Thompson of GIBSON, DUNN & CRUTCHER LLP.

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## STATEMENT REGARDING ORAL ARGUMENT

SureShot Golf Ventures, Inc. (SureShot), respectfully requests oral argument. This appeal from an order of dismissal, pursuant to Federal Rule of Civil Procedure 12(b)(6), involves the important intersection of antitrust injury, standing, intellectual property, and the misapplied pleading standard of *Bell Atl. Corp. v. Twombly*, 550 U.S 544 (2007). Oral argument would aid the Court in understanding how these important antitrust issues come together in today's modern economy.

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## STATEMENT OF JURISDICTION

The district court had jurisdiction over SureShot's claims pursuant to 28 U.S.C. §§ 1331 and 1337. The district court entered a final judgment on September 5, 2017, granting defendant Topgolf International, Inc.'s motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). ROA.155-167. SureShot timely filed its notice of appeal on September 25, 2017. ROA.168-169. This Court has jurisdiction to review the decision below under 28 U.S.C. § 1291.

## STATEMENT OF THE ISSUES

1. **Ripeness/Standing**. The district court erred in construing the facts in the light most favorable to Defendant-Appellee and allowing contract law to restrict the scope of antitrust law.

2. **Antitrust injury**. The district court erred in concluding that allegation of market foreclosure in the market dominated by Defendant-Appellee does not satisfy the antitrust injury requirement, which the district court incorrectly labeled "antitrust standing."

## STATEMENT OF THE CASE

### A. Procedural History

SureShot filed this antitrust lawsuit on January 17, 2017, claiming that Topgolf, the dominant player in the golf entertainment market, purchased Protracer, a provider of proprietary technology for tracking golf balls, to foreclose SureShot's and other competitors entry into the gold entertainment market. ROA.4-6. Topgolf filed its motion to dismiss for failure to state a claim on April 13, 2017. ROA.36-67.

The district court granted Topgolf's motion to dismiss on the pleadings, issuing its "Memorandum Opinion & Order" on August 24, 2017. ROA.157-166. A final judgment was signed on September 5, 2017. ROA.167.

### B. Topgolf dominates the golf entertainment market.

Topgolf was founded in 2000, and the company is based in Texas. Topgolf operates golf entertainment centers throughout the United States, and it operates 8 facilities in Texas. Topgolf has expanded quickly, including internationally. ROA.7-8.

Topgolf combines a driving range-type environment, where golfers hit golf balls at outdoor targets, with food and beverage service, golf services, entertainment, and other amenities. Golfers tee off from a

hitting bay onto a landscaped driving range, with targets varying in distance. Using Topgolf's proprietary technology, golfers learn how far they have hit a shot and are allocated points based on a shot's distance and accuracy. The end result is a sports-bar-type entertainment facility merged with golf games. ROA.7.

### C. SureShot was poised to enter the golf entertainment market.

In 2013, SureShot was formed to provide a unique golf entertainment experience and compete with Topgolf's centers. The SureShot model uses high-speed video cameras and software to track the balls in flight, creating a unique, immersive Three Dimensional (3-D) ball flight and gaming experience for customers. SureShot's game experience would be superior to Topgolf's, attract customers away from Topgolf, and reduce Topgolf's market share, thus reducing or eliminating Topgolf's ability to set a monopoly price. The SureShot golf entertainment centers would include sports bar and meeting rooms for corporate events. ROA.8.

SureShot expended significant effort and resources to position itself for success. SureShot invested in the business; engaged design and architecture firms; built a prototype center; tested different ideas for ball tracking; built testing and prototype gaming software; engaged attorneys

to create private placement memorandums and advise on and file patents for intellectual property; secured funding; researched and travelled across the globe to negotiate with technology providers and pinpoint appropriate locations; and entered important contracts for licensing, supplies, facilities, support, and technology. Selection of and investment in technology were key elements of the SureShot business model. Investing in technology allowed SureShot to create a better, enhanced experience for its customers, giving it a competitive edge in the market. ROA.8-9.

### D. SureShot built its model on the Protracer platform.

The essence of SureShot's unique golf entertainment center design was the high-speed cameras and sensors that track a golf ball in flight, developed by Protracer. Founded in 2006, Protracer developed cameras with software to track the flight of multiple golf balls in a camera feed, adding graphics to make a golf ball's flight visible in near real time on a TV monitor. ROA.9.

Protracer's system is the only technology on the market that actively tracks and analyzes every shot hit on a driving range across an entire field of vision, significantly enhancing a golfer's practice session

or, in the case of a golf entertainment center, enhancing the entire golfing game experience. Protracer is the only system that has been developed and demonstrated to work effectively across more than 100 bays, which is the scale of a golf entertainment center. ROA.9.

It is Protracer's unique technology that SureShot chose as its technology platform when it built its own unique golf game software, making the technology vital to its business model. Indeed, SureShot invested considerable time and money building its own infrastructure around Protracer. It took SureShot nearly nine months to integrate the Protracer system for use in SureShot's concept, with Protracer even making a number of improvements to ensure the product met SureShot's specific requirements. ROA.9-10.

### E. SureShot contracted with Protracer.

On April 17, 2015, SureShot and Protracer entered into a "Frame Agreement for the Supply of License, Support and Maintenance of Professional Services" (the "Frame Agreement"), which governs "the sale of Protracer Range Sensors, license of Protracer Software Products, Professional Services and Support and Maintenance of Protracer Range Systems in Customer facilities." The Initial Term of the Frame

Agreement was five years, ending in 2020, with the understanding that future terms would be agreed to in light of the vast resources SureShot was investing for market entry. Protracer stated that it would not enter into exclusive dealing contracts with SureShot or others, in order to prevent its technology to falling into the hands of a single firm (here, a monopolist) who might refuse to share Protracer's technology with competitors. Importantly, given the barriers to entry without Protracer's intellectual property, SureShot inquired about Protracer's long-term plans; Protracer responded that its "aim [was] to stay neutral as a tracking provider for GEF [golf entertainment facilities]." ROA.11-12.

The Protracer-SureShot relationship also involved other written contracts relating to supply, support, and maintenance. ROA.12-13. The contracts contemplated that both parties would have access to the other's sensitive, proprietary, and non-public confidential information. ROA.12-13.

### F. Topgolf acquires Protracer, and its anticompetitive conduct forecloses competition.

When Topgolf learned of SureShot's intentions to enter the market with the benefit of Protracer's proprietary technology, Topgolf used its position as a monopolist to acquire Protracer, who had until then,

expressed its intention to remain vendor neutral. On May 24, 2016, Topgolf announced its acquisition of Protracer, knowing that the acquisition would stamp out competition. ROA.13.

Topgolf's intent to foreclose the market to SureShot and other competitors is illustrated by its reaction to SureShot's request for assurances that Protracer would continue to be made available to SureShot even after the initial 5-year term (and after SureShot having spent tens of millions of dollars). In June 2016, SureShot's owners met with top executives of Topgolf in Houston, Texas. SureShot asked Topgolf for those assurances. Topgolf refused an extension of the licensing agreement, with one of its top executives stating, "If I was in your position, I would look for alternatives." ROA.13.

Topgolf now has total control over the Protracer system, including the ability to license the software only to those markets or industries that do not compete with Topgolf. Thus, SureShot's continuing to license and use Protracer technology was no longer a viable option, given the vast investment needed to build and maintain its golf entertainment centers to compete with Topgolf. Topgolf's sole intention in acquiring Protracer

was to deprive SureShot and others from use of an essential, and important technology in the gold entertainment market. ROA.13-14.

Furthermore, Topgolf controls all servicing and installation requests relating to the Protracer systems, which means SureShot would have taken a back seat to the needs of Topgolf. Most problematic, Protracer did have and would continue to have access to SureShot's confidential information, and Topgolf's access to SureShot's confidential information would harm SureShot's competitive advantage in the golf entertainment market. As one of many examples, any time that SureShot placed an order for a new installation, its top competitor—Topgolf—would know of where SureShot planned to open a new facility. ROA.14.

The facts as alleged in SureShot's Complaint show that Topgolf's purchase of Protracer violates the antitrust laws because the acquisition forecloses the market to competitors and constitutes a monopoly or an attempt at securing a monopoly illegally.

## SUMMARY OF ARGUMENT

SureShot's Complaint fully sets forth the elements of it antitrust claims under Sections 1 and 2 of the Sherman Act and Section 7 of the Clayton Act. This Court should reverse the district court's judgment to allow SureShot to have its day in court against Topgolf.

The district court committed two over-arching errors in dismissing SureShot's Complaint. First, the district court misapplied the pleading standard for antitrust cases established by *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007), and, in doing so, erroneously held SureShot's antitrust claims are not ripe. *Evergreen Partnering Group, Inc. v. Pactiv Corp.*, 720 F.3d 33, 44 (1st Cir. 2013) ("The slow influx of unreasonably high pleading requirements at the earliest stages of antitrust litigation has in part resulted from citation to case law evaluating antitrust claims at the summary judgment and post-trial stages ….").

Under *Twombly*, the district court's task was to determine the legal significance of a set of facts, not believe or disbelieve those facts. SureShot's Complaint alleged that Topgolf expressed its intention to foreclose the market to SureShot and other competitors with its

acquisition of Protracer, but the district court arbitrarily decided that it was "*unpersuaded* that the lack of assurance and the statement to look for alternatives [by Topgolf] … is equivalent to a denial of access." ROA.163 (italics added). This was error. SureShot's allegations must be read in the light most favorable to SureShot, *not* Topgolf. *Twombly*, 550 U.S. at 570 (at pleading stage, courts must assume "all the allegations in the complaint are true"). The district court improperly favored Topgolf's interpretation of the facts and rejected SureShot's.

The district court further erred by concluding that because the SureShot-Protracer agreement is a 5-year contract under which Protracer, Topgolf, must perform, SureShot has no antitrust complaint at this time. However, the possibility that in 5 years Topgolf may renew the contract does not bar SureShot's antitrust claim. *See Continental Wall Paper Co. v. Louis Voight & Sons Co.*, 212 U.S. 227, 262 (1909) (holding a contract will not shield a party to that contract from being found to have violated the antitrust laws).

The lynchpin of SureShot's Complaint is Topgolf's anticompetitive intent, but the analysis of intent is missing from the district court's reasoning. *See Aspen Skiing Co. v Aspen Highlands Skiing Corp.*, 472

U.S. 585, 587 (1985) (observing "intent is relevant to" showing "attempt to monopolize"); *Lorain Journal Co. v. United States*, 342 U.S. 143, 153 (1951) (discussing "intent" to destroy competitor). The district court erred when it concluded that SureShot has not been denied access to Protracer, when that is precisely what Topgolf's management told SureShot. Topgolf could have reassured SureShot that it would fully comply with the initial 5-year term and/or keep an open mind about extending the agreement beyond 5 years, but it did neither. Instead, it explicitly told SureShot, "If I was in your position, I would look for alternatives." ROA.13. SureShot's allegations must be accepted as true under the standard of review, and SureShot's allegations are that Topgolf was not interested in allowing competitors to use the Protracer system.

Second, the district court wrongly concluded that SureShot had not established "antitrust standing."[1] ROA.164-166 ("SureShot failed to plead that Topgolf's actions harmed competition, and not just SureShot's competitive advantage.")

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1 Although both antitrust injury and standing are addressed here, the district court conflated the analysis. The existence of an antitrust violation, which requires a general showing of harm to the competitive process is distinct from the question of antitrust standing, which requires a specific showing by a private plaintiff it suffered an injury-in-fact caused by the antitrust violation. *See Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 344 (1990).

The often repeated statement that it is "competition not competitors" that the antitrust laws protect has so often been taken out of context that it now interferes with sensible antitrust analysis. SureShot properly alleged that Topgolf's acquisition of Protracer constituted a violation of the antitrust laws because it harms the *competitive process*. *See United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391-92 (1956) ("Monopoly power is the power to control prices or exclude competition."). Topgolf's conduct was competition-reducing, not competition-increasing or competition-neutral. The Supreme Court has long held that a showing of injury-in-fact is not necessary, assuming it is missing here, which it is not, to establish a challenged conduct has an *anticompetitive effect* in violation of the antitrust laws. The correct analysis focusses on whether the conduct "promotes competition or … suppresses competition." *National Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 691 (1978); *see also Clamp-All Corp. v. Cast Iron Soil Pipe Inst.*, 851 F.2d 478, 486 (1st Cir. 1988) (antitrust bars "actions that harm the competitive process") (Breyer, J.). Topgolf's anticompetitive conduct suppresses any and all competition in the golf entertainment market.

SureShot is entitled to have its day in court, having alleged sufficient facts to withstand Topgolf's motion to dismiss. This case is about a monopolist's power to foreclose a market to any competitors. By dismissing SureShot's lawsuit, the district court erroneously rewarded a dominant actor's anticompetitive conduct. The antitrust laws were created to protect businesses like SureShot:

> Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete ….

*United States v. Topco Assocs.*, 405 U.S. 596, 610 (1972).

## STANDARD OF REVIEW

This Court reviews de novo the district court's order on a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). The "court accepts all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff." *Martin K. Eby Constr. Co. v. Dallas Area Rapid Transit,* 369 F.3d 464, 467 (5th Cir. 2004) (internal quotations omitted). To survive a Rule 12(b)(6) motion to dismiss, a plaintiff must plead

"enough facts to state a claim to relief that is plausible on its face." *Twombly,* 550 U.S. at 570. "Factual allegations must be enough to raise a right to relief above the speculative level … on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Id.*at 555 (quotation marks, citations, and footnote omitted).

## ARGUMENT

SureShot alleges that Topgolf violated Sections 1 and 2 of the Sherman Act and Section 7 of the Clayton Act by its acquisition of Protracer and intent to foreclose competition in the golf entertainment market to SureShot and others. 15 U.S.C. §§ 1, 2, & 18.

The district court improperly dismissed SureShot's antitrust complaint for two reasons. First, the district court wrongly concluded that SureShot's antitrust claims are not ripe, depriving the court of Article III jurisdiction over the case. *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 57 n. 18 (1993) (observing that ripeness implicates "Article III limitations on judicial power"). Second, the district court erroneously concluded SureShot lacked "antitrust standing." ROA.164-166.

The district court mistakenly conflated two distinct analyses, as there is an overlap between the parallel requirements necessary to show Article III standing generally and antitrust injury. Ripeness implicates antitrust standing, which requires a specific showing by a plaintiff that it suffered an injury-in-fact caused by the antitrust violation. *See Atlantic Richfield Co.*, 495 U.S. at 339-44. Antitrust injury, in contrast, refers to a showing of harm to the competitive process. *Id.* 339 ("Antitrust injury does not arise … until a party is adversely affected by an anticompetitive aspect of the defendant's conduct.").

Antitrust labels aside, SureShot properly alleged that (1) it suffered an antitrust injury under substantive antitrust laws; and (2) it is the proper party to enforce such laws. *Id.* at 344 (observing that proof of antitrust "violation and of antitrust injury are distinct matters that must be shown independently") (citation and quotation omitted).

## A. SureShot properly alleged an antitrust violation.

SureShot shut down because Topgolf's anticompetitive acquisition of Protracer foreclosed the golf entertainment market to SureShot. Said differently, SureShot's injury is *caused* by a violation of the economic rationale of the antitrust laws. *See Aspen Skiing*, 472 U.S. at 601 ("The

high value that we have placed on the right to refuse to deal with other firms does not mean that the right is unqualified.").

Topgolf's acquisition of Protracer facilitates Topgolf's exercise of monopoly, making a current or future rival's market entry more costly, riskier, and less likely, because it restricts or denies to them the access they need to compete in the market. *Id.* at 603 ("The qualification on the right of a monopolist to deal with whom he pleases is not so narrow that it encompasses no more than the circumstances of *Lorain Journal*."). Topgolf's control of vital intellectual property—Protracer's system—injures competition by forcing any competitor to expend enormous capital to develop alternative technology, which may be difficult or impossible. *See Standard Fashion Co. v. Magrane-Houston Co.*, 258 U.S. 346, 362-63 (1922) (one way to maintain a monopoly is to force competitors to create a line of their own products, which may be difficult or even impossible).

The settled principles of *Lorain Journal* and *Aspen Skiing* illustrate Topgolf's anticompetitive conduct as alleged in SureShot's Complaint. In *Lorain Journal*, the Court held that a monopolist daily newspaper in the town of Lorain, Ohio, violated Section 2 by refusing ads by advertisers who also placed ads with the Lorain Journal's only other potential media

rivals, the local radio stations. *Lorain Journal Co.*, 342 U.S. at 155-56. The key to *Lorain Journal*'s holding similarly applies to SureShot's allegations. At the pleading stage, there is no efficiency justification for Topgolf's behavior as alleged in SureShot's Complaint because Topgolf's system does not rely on Protracer's technology. Rather, Topgolf purchased Protracer to foreclose competition. *Id.* at 154 ("a single newspaper, already enjoying a substantial monopoly in its area, violates the 'attempt to monopolize' clause of § 2 when it uses its monopoly to destroy threatened competition"). Topgolf's acquisition of Protracer does not reduce Topgolf's costs or enhance its existing process; the purchase becomes profitable for Topgolf *because* it forecloses competition.

SureShot was in a situation also similar to the plaintiff in *Aspen Skiing*. In *Aspen Skiing*, the defendant owned three of the four skiing mountains in Aspen, and the plaintiff owned the fourth. 472 U.S. at 589-90. For many years, the parties had sold a ski pass that allowed skiers to ski on all four mountains. The parties divided the profits from the pass. *Id.* at 590-91. A disagreement about the division ensued, and the defendant terminated the arrangement. The plaintiff established at trial that it made increasingly favorable offers to defendant, including offering

to buy defendant's ski-lift tickets at face value, yet the defendant refused. *Id* at 593-94 & n.14. The Supreme Court affirmed a jury verdict for plaintiff because defendant had used its monopoly power improperly. *Id*. at 610 ("Although [defendant's] pattern of conduct may not have been as bold, relentless, and predatory as the publisher's actions in *Lorain Journal*, the record in this case comfortably supports an inference that the monopolist made a deliberate effort to discourage its customers from doing business with its smaller rival.") (internal quotations and footnote omitted).

Topgolf is behaving like the defendants in *Lorain Journal* and *Aspen Skiing*. Topgolf already has a monopoly resting on its existing business, so it is free to use or not use the intellectual property Topgolf has developed. However, its acquisition of the intellectual property owned by Protracer constitutes a misuse and attempt to foreclose future competition in the golf entertainment market. *See Standard Fashion*, 258 U.S. at 362-63; *see also Lorain Journal*, 342 U.S. at 149 (Lorain Journal's anticompetitive conduct "was effective. Numerous Lorain County merchants testified that, as a result of the publisher's policy, they either ceased or abandoned their plans to advertise over WEOL."); *United*

*States v. Microsoft, Inc.,* 253 F.3d 34, 78-79 (D.C. Cir. 2001) (per curiam) (en banc) (recognizing that harm to competition may be defined more broadly than the effect of the practice on price and output).

Before shutting down due to Topgolf's anticompetitive conduct, SureShot was working on combining Protracer's patented system with its own software improvements to open a group of high-end, premier golf entertainment facilities to compete with Topgolf, giving consumers greater choice. Topgolf's deliberate, anticompetitive conduct in purchasing Protracer, with its proprietary system, to exclude SureShot from the golf entertainment market was effective, as SureShot shut down. Topgolf's monopolist conduct violates the antitrust laws.

### B. The district court's ripeness reasoning is incorrect and creates dangerous antitrust precedent.

The district court improperly reframed SureShot's antitrust injury, inaccurately describing it as complaints in the future about Topgolf's management of the contract between SureShot and Protracer and the possibility that Topgolf would not renew the Protracer-SureShot contract in 5 years. ROA.163-164 ("The court observes that none of the antitrust actions which SureShot alleges has actually occurred …."). The district court wrongly concluded that SureShot's alleged injury is "speculative

and may never occur." *Roark & Hardee LP v. City of Austin*, 522 F.3d 533, 544 n.12 (5th Cir. 2008) (internal quotations and citation omitted).[2] The district court's analysis is flawed for several reasons.

First, the ripeness inquiry turns on whether SureShot suffered an injury traceable to a recognized cause of action. *Id.* at 542. Here, SureShot's allegations satisfy the ripeness inquiry: (1) in violation of the antitrust laws, Topgolf acquired Protracer to foreclose the market to SureShot and other competitors; and (2) Topgolf's anticompetitive conduct caused SureShot to shut down its business. *See Allen v. Wright*, 468 U.S. 737, 751-52 (1984) ("In many cases the standing question can be answered chiefly by comparing the allegations of the particular complaint to those made in prior standing cases.").

If *Lorain Journal* were filed today, it would be improper to dismiss the lawsuit as unripe based on the invalid reasoning that the advertisers' claims were not ripe because the complaint did not offer *proof* that they

2 Ripeness cases typically involve a request for declaratory relief regarding constitutional questions, administrative law, or parties in a regulated industry. *See, e.g.*, *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967) (regulatory rules for pharmaceuticals).

failed to sell their wares through other available mediums, or that Lorain Journal's boycotted rivals still had not completely gone out of business?

The district court's ripeness decision is further erroneous because it was made at the pleading stage and without the presumption that SureShot's allegations are true. *See, e.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) ("The party invoking federal jurisdiction bears the burden of establishing [standing] … in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree required at the *successive stages of litigation*.") (italics added); *Land v. Dollar*, 330 U.S. 731, 735 n.4 (1947) (observing that "the court may inquire, by affidavits or otherwise, into the [jurisdictional] facts as they exist"); *Gulf States Reorganization Group, Inc. v. Nucor Corp.*, 466 F.3d 961-967-68 (11th Cir. 2005) (reversing summary judgment on question of antitrust injury).

Unlike allegations of a conspiracy or whether a claim is even recognized under the antitrust laws, questions about intent to monopolize and business justifications for anticompetitive conduct cannot be answered at the pleading stage. *Aspen Skiing*, 472 U.S. at 605 ("It is … appropriate to examine the effect of the challenged pattern of

conduct on consumers, on [defendant's] smaller rivals, and on [defendant] itself."); *compare NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 136-37 (1998) (holding a buyer's decision to buy from seller rather than another" does not implicate antitrust law); *Marucci Sports v. National Collegiate Athletic Ass'n*, 751 F.3d 368, 374-76 (5th Cir. 2014) (dismissing claims of conspiracy under Section 1 of the Sherman Act). Questions about Topgolf's reasons for its acquisition of Protracer cannot be answered without pre-trial discovery. *Aspen Skiing Co.*, 472 U.S. at 587.

The district court, in its Memorandum Opinion, sought to justify its erroneous ripeness conclusion by relying on two cases that involve "options." ROA.163 (citing *Middle South Energy, Inc. v. City of New Orleans*, 800 F.2d 488 (5th Cir. 1986), and *Destec Energy, Inc. v. Southern Cal. Gas Co.*, 5 F. Supp.2d 433 (S.D. Tex. 1997) (relying on *Middle South*)). These two cases are distinguishable from this case as they involve public utilities subject to regulatory oversight and the antitrust allegations in them are far removed from the claims asserted by SureShot based on the established antitrust rules of *Lorain Journal* and *Aspen Skiing*.

In *Middle South*, an electrical utility company serving the city of New Orleans sought a declaration barring the city from exercising an option to purchase the utility. 800 F.2d at 489. The district court had denied injunctive and declaratory relief because "until the City actually decides to exercise its options, there is no actual case or controversy between the parties …." *Id.* at 490. That conclusion was buttressed by *evidence*: the "City Council chairman *testified* that the Council has no present intent to purchase" the utility company's facilities. *Id.* (italics added).

There is no meaningful parallel between *Middle South* and this case. First, unlike the clear testimony in *Middle South* to not interfere with the utility, here Topgolf specifically expressed its intent to *not renew* the Protracer-SureShot agreement. Second, *Middle South* is not an antitrust lawsuit. *See Home Ins. Co. v. Moffitt*, 1993 U.S. App. LEXIS 38511 *9 (5th Cir. March 22, 1993) (distinguishing *Middle South* on whether "the controversy was hypothetical" and observing that it "involved the sensitive realm of public law"). The district court's reliance on *Middle South* was misplaced.

*Destec*, the second case cited by the district court, is no more relevant, as it too involves "the field of public law.'" *Destec Energy, Inc.*, 5 F. Supp.2d at 462 (quoting *Middle South*). It involves a complicated set of transactions involving public utilities and state regulations of those utilities. Tellingly, *Destec*'s ripeness analysis is based on a summary judgment record, including depositions and numerous affidavits. *Id.* 439-440.

Relying on *Phototron Corp. v. Eastman Kodak Co.*, 842 F.2d 95, 100 (5th Cir. 1988), which involves an interlocutory appeal of a temporary injunction, the district court here concluded "that none of the antitrust actions which SureShot alleges has actually occurred (i.e., controlling prices, foreclosing competitors from access to technology …)." ROA.163-164. But market foreclosure because of Topgolf's anticompetitive acquisition of Protracer is precisely the antitrust injury SureShot alleged in its Complaint. Topgolf acquired a technology it did not previously use in its business to deprive competitors of the same technology. Topgolf's conduct is not competition-inducing, unlike the challenged merger in *Phototron*. *Id.* ("Phototron may have a monopoly or price discrimination action against Kodak as a manufacturer of chemicals and paper, but it

cannot use the perceived anticompetitive effects of Colorwatch to challenge this merger.").

In its Memorandum Opinion, the district court misconstrued *Red Lion Med. Safety, Inc. v. General Elec. Co.*, 2016 U.S. Dist. LEXIS 94638 (E.D. Tex. March 31, 2016). In *Red Lion*, the district court granted a defendant's motion to dismiss (the court denied co-defendant GE's motion to dismiss plaintiff's antitrust claims) because the "facts Plaintiffs identify appear to be more appropriately characterized as a 'business dispute,' such as breach of a contract." *Id.* at *7-*8. The plaintiff's complaints in *Red Lion* were all about the manner and pricing of timely shipments. *Id.* In contrast, SureShot's description of the ways in which a monopolist such as Topgolf may further foreclose competition via price squeeze or slow service are characteristics of other ways Topgolf will harm the competitive process, but not the focus of SureShot's Complaint. *See Times-Picayune Publ'g Co. v. United States*, 345 U.S. 594, 626 (1953) (specific intent to monopolize means "a specific intent to destroy competition or build monopoly.").

### C. The district court improperly weighed the allegations in Topgolf's favor at the pleading stage.

The district court erroneously concluded that SureShot had not sufficiently alleged it was denied access because of the possibility that in 5 years Topgolf *may* elect to renew the SureShot-Protracer licensing agreement. However, the district court need not wait 5 years to get Topgolf's answer about the renewal: Topgolf told SureShot how things would turn out, "If I was in your position, I would look for alternatives." ROA.158.

This statement by Topgolf was unequivocal in telling SureShot it would not renew the Protracer agreement. However, even if it could be read as anything less than a candid admission of Topgolf's position prohibiting competitors from using Protracer in the golf entertainment market, the pleading stage is not the time to make that determination. *Twombly*, 550 U.S. at 556 ("[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely") (citation and quotations omitted); *see also Montez v. Department of Navy*, 392 F.3d 147, 149-150 (5th Cir. 2004) ("[W]here the issues of fact are central to both the subject

matter jurisdiction and the claim on the merits, we have held that the trial court must assume jurisdiction and proceed to the merits.").

The district court disregarded the proper standard with this conclusion: "[T]he court is unpersuaded that the lack of assurances and the statement to look for alternatives that was allegedly made by an unidentified Topgolf executive is equivalent to a denial of access." ROA.163. The Supreme Court has admonished courts for making credibility determinations in favor of a moving party at the pleading stage. *Tolan v. Cotton*, 134 S. Ct. 1861, 1863 (2014) (holding it is improper to make inference in favor of defendant at summary judgment stage).

Indeed, the inferences that logically follow the Topgolf executive's statement favor SureShot. If Topgolf really wanted or intended to uphold its end of the Protracer contract and include competitors to use Protracer in the future, surely it would have said something different and more certain, like: "We are not sure for now, but we *assure you* that we will work hard to hold up our end of the bargain and make sure performance is not hindered just because we now own the software company that helps you compete with us and which we don't even use in our current business." But Topgolf said no such thing.

The district court's ripeness reasoning is also undermined by Supreme Court precedent. "Dismissal for lack of subject-matter jurisdiction because of the inadequacy of the federal claim is proper only when the claim is so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy." *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 89 (1998) (quotations omitted).

### D. SureShot established antitrust injury.

The Supreme Court has long recognized that a showing of injury-in-fact is not necessary to establish the anticompetitive effect of conduct in violation of the antitrust laws. The issue is whether conduct "promotes competition or … suppresses competition." *National Soc'y*, 435 U.S. 679 at 691. Of course, discovery in this case may reveal additional anticompetitive effects of Topgolf's acquisition by demonstrating increases in prices or foreclosure of the market to others as well as SureShot, which would further manifest the anticompetitive nature of Topgolf's acquisition of Protracer. However, even if an actual price increase is not proven or a complete foreclosure is hard to prove beyond

SureShot's injury, antitrust still bars "actions that harm the competitive process." *Clamp-All Corp.*, 851 F.2d at 486 (Breyer, J.).

The district court short-circuited any inquiry into the harms to the competitive process, contending this Court has "narrowly interpreted the meaning of antitrust injury [to include increased prices and decreased output, and] excluding from it the threat of decreased competition.'" ROA.165 (quoting *Anago, Inc. v. Tecnol Med. Prods., Inc.*, 976 F.2d 248, 249 (5th Cir. 1992)). That is not a correct statement of the law. Group boycotts, for example, do not hinge on a showing of increased prices or decreased output. *See, e.g.*, *MM Steel, L.P. v. JSW Steel (USA) Inc.*, 806 F.3d 835, 844 (5th Cir. 2015) (observing that group boycotts—"a concerted agreement among competitors to refuse to deal with a manufacturer unless the manufacturer refuses to deal with an additional (typically new) competitor"—are per se illegal). Group boycotts are *per se* illegal because they harm the competitive process.

Likewise, *Phototron* does not stand for the broad position that only increased prices and decreased output give rise to antitrust claims. ROA.165. Rather, the court in *Phototron* concluded that, following a temporary injunction hearing, the record did not support "that Phototron

would prevail on the merits of its predatory pricing allegation." *Id*. at 100. The plaintiff in *Phototron* also sought to establish antitrust injury based on other vague claims of "advertising" and "limit pricing" injuries, which also lacked support in the record. Tellingly, this court observed, "Phototron may have a monopoly or price discrimination action against [defendant] Kodak …." *Id*. at 101.

In its Complaint, SureShot alleged facts to support an antitrust injury. The district court's improper approach to the antitrust injury analysis rests on a series of cases that state that the antitrust laws protect competition (for example, efficient markets; robust innovation; price competition), not rivals per se. *See, e.g.*, *Atlantic Richfield*, 495 U.S. at 340-41; *Cargill, Inc. v. Montford of Colo., Inc.*, 479 U.S. 104, 116 (1986); *Bayou Bottling, Inc. v. Dr. Pepper Co.*, 725 F.2d 300, 204 (5th Cir. 1984).[3]

SureShot is not complaining about a rival's *efficient* business practices. Topgolf did not innovate on its own; it did not engage in a horizontal merger to bring efficiencies; and it did not vertically integrate operations to achieve efficiencies. SureShot's allegations are that Topgolf

3 All three cases analyzed injury-in-fact based on a developed evidentiary record, further illustrating the error in the district court's reasoning.

feared an emerging rival's access to a unique, proprietary technology that Topgolf itself did not use, so it decided to acquire that technology to foreclose the market to competitors. *See SCM Corp. v. Xerox Corp.*, 645 F.2d 1195, 1205 (2nd Cir. 1981) ("Patent *acquisitions* are not immune from the antitrust laws. Surely, a § 2 violation will have occurred where, for example, the dominant competitor in a market acquires a patent covering a substantial share of the same market shows that he knows when added to his existing share will afford him monopoly power.") (italics in original). Unlike the cases relied upon by the district court in its Memorandum Opinion, SureShot's Complaint properly alleges that it suffered antitrust injury because of Topgolf's anticompetitive acquisition of Protracer, in violation of the antitrust laws.

## CONCLUSION

The law of antitrust, like American law in general, creates incentives to engage in good behavior and to avoid bad behavior. It champions competition, but abhors conduct that has no redeeming value but to injure competition or a competitor by engaging in anticompetitive conduct. This case is about such conduct; Topgolf feared a new competitor, SureShot, so it used its dominant position to purchase

Protracer and to push all competitors, including SureShot, out of the market. The district court's judgment should be reversed.

## PRAYER

SureShot respectfully asks for reversal and remand of the district court's judgment to allow the case to continue to discovery and ordinary case management. SureShot further prays for all other relief to which it is justly entitled.

Respectfully Submitted,

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## CERTIFICATE OF SERVICE

I certify that on December 14, 2017, the foregoing Appellant's Brief was electronically filed and served via the appellate CM/ECF system. A copy was also emailed to the following counsel of record:

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## CERTIFICATE OF COMPLIANCE

I certify that:

1. This appellant's brief complies with the type-volume limitation in Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6090 words, exclusive of the portions of the brief that are excluded from the type-volume limitation by Rule 32(a)(7)(B)(iii), the word count having been obtained through the word processing system used to create this brief, namely Microsoft Word 2010.

2. This brief further complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6), because it was prepared in Microsoft Word 2010 in 14-point, proportionally spaced Century Schoolbook font, except that 12-point font is used for any footnotes as permitted by Fifth Circuit Rule 32.1.

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