

**IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

SURESHOT GOLF VENTURES, INC.,	§	
	§	CIVIL ACTION NO. 4:17-cv-127
<i>Plaintiff,</i>	§	
	§	
v.	§	
	§	
TOPGOLF INTERNATIONAL, INC.,	§	
	§	
<i>Defendant.</i>	§	JURY DEMANDED
	§	

PLAINTIFF’S ORIGINAL COMPLAINT

Plaintiff SureShot Golf Ventures, Inc. (“SureShot”) respectfully files this action for treble damages under the antitrust laws of the United States against Defendant Topgolf International, Inc. d/b/a Topgolf Entertainment Group (“Topgolf”).

I. INTRODUCTION

1. The antitrust laws forbid a monopolist from foreclosing competition by vertical integration that makes rival entry or growth more costly, riskier, and less likely. For example, a firm who otherwise acquired its monopoly by lawful means may not, with the intent to foreclose entry of a new rival, acquire essential technology and then effectively make its use by rivals economically infeasible—even assuming a rival could overcome the right to exclude others inherent in intellectual property. When the monopolist acquires the essential technology without immediately employing it in its business, the lack of business justification for its wrongful conduct becomes even more obvious, in violation of the antitrust laws.

2. Topgolf is a monopolist in the golf entertainment center industry. It has close to 100 percent of the market share in the category of golf entertainment in the United States. Topgolf

prides itself as “the only entertainment center of its kind” and the global leader in sports entertainment. It has eight Texas locations, 28 U.S. locations, three U.K. locations, and plans to open another nine locations in the near future.

3. From its inception in 2000 until 2016, Topgolf was the only interactive entertainment, food and beverage golf facility in the United States. Thus, Topgolf enjoyed the entire market share in the industry and the unfettered power to set monopoly prices. In early 2016, Topgolf learned that a new competitor—Plaintiff SureShot—was primed and ready to enter the golf entertainment center market. Topgolf had a decision to make: allow its control of the market and market share to diminish, or undertake intentional, predatory action to foreclose new competition from emerging. Topgolf chose the latter strategy.

4. SureShot was created in 2014 to open a group of high-end, premier golf entertainment facilities to compete with Topgolf. SureShot’s founders personally invested in the business, worked to create a successful, competitive business model; developed and refined design and architectural drawings; negotiated and entered into supply and rental agreements; developed SureShot’s own technology to work seamlessly with technology owned by a Swedish company called Protracer; located and analyzed multiple sites across the country; and traveled the country to secure funding. In short, SureShot was poised to enter the market and compete with Topgolf.

5. Integral to SureShot’s business model was its licensing of software, hardware, and technology from Protracer. Protracer’s proprietary hardware and software is, according to Topgolf, “the only technology on the market that actively tracks all ball flight paths across an entire field of vision, powering television broadcasts and golf driving ranges.” Protracer was the only commercially available technology to meet SureShot’s needs. By building its own unique

technologies on top of the technical foundation provided by Protracer, SureShot would be able to create a highly differentiated offering compared to any competitor.

6. When Topgolf learned of SureShot's plans to open a competitive venue based on Protracer's essential technology that would transform the industry, acting as a monopolist, it purchased Protracer and thereby eliminated SureShot's competitive value proposition.

7. This anticompetitive behavior eliminates the public's choice of golf entertainment experiences and the quality of services in the United States, in violation of the antitrust laws.

II. PARTIES

8. Plaintiff SureShot Golf Ventures, Inc. is a Texas corporation. SureShot was injured in its business by reasons of Defendant's illegal conduct forbidden by the antitrust laws.

9. Defendant Topgolf International, Inc. is registered as a foreign for-profit corporation engaging in interstate and international commerce.¹ Summons may be served on its Texas registered agent, C T Corporation System, 1999 Bryan St., Suite 900, Dallas, Texas 75201-3136, or wherever else it may be found.

III. JURISDICTION AND VENUE

10. This action is brought under Sections 4 and 7 of the Clayton Act, 15 U.S.C. §§ 15, 18, to recover treble damages, costs, and attorney's fees for the injuries sustained by Plaintiff SureShot because of Defendant's violations of the Sherman Act, 15 U.S.C. §§ 1 and 2, and Section 7 of the Clayton act, 15 U.S.C. § 18.

¹ According to Topgolf's website: "In 2016, Topgolf International, Inc. created three new divisions: TEG (a DBA for Topgolf International, Inc.), Topgolf (the venues in the U.S. and U.K.), Topgolf International (the division focused on Topgolf's international expansion) and Topgolf Media (the division focused on enhancing the Topgolf experience through advanced digital media, strategic partnerships and sponsorships). Additionally, in 2016, Providence Equity Partners made a sizable minority investment in TEG." See topgolf.com/ownership, visited Jan. 4, 2017.

11. This Court has jurisdiction under 28 U.S.C. §§ 1331, 1337 and Sections 4 and 7 of the Clayton Act, 15 U.S.C. §§ 15(a), 18.

12. Venue is appropriate in this District under Sections 4 and 12 of the Clayton Act, 15 U.S.C. §§ 15 and 22, and 28 U.S.C. § 1391(b), (c) and (d) because during the relevant period Defendant resided or transacted business in this District, a substantial portion of the affected commerce described herein was carried out in this District, and a substantial part of the events or omissions giving rise to the claims occurred in this District.

IV. The Facts

A. Topgolf dominates the golf entertainment center market.

13. Topgolf was founded in 2000 and now is based in Texas. It operates golf entertainment centers in the United States and the United Kingdom.

14. 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 ranging in distance. Using Topgolf's proprietary technology, golfers learn how far they have hit a shot and are allocated points based on distance and accuracy. The end result is a sports-bar-type entertainment facility merged with golf games.

15. In 2013, when Topgolf only had ten locations, it projected revenue to exceed \$95 million, it employed more than 2,000 individuals, and it estimated more than \$300,000 spent annual per site for marketing. Now, Topgolf has grown to 28 locations in the United States, including eight in Texas.

16. And Topgolf is expanding quickly. Other locations are currently under construction or just finished, including a flagship venue on the Las Vegas Strip and a new Texas location in

Fort Worth. Topgolf also is growing internationally and has formed an international division to begin expansion abroad. Australia, Dubai, France, Russia, South Africa, and Spain are all set to get a Topgolf facility in the near future. Topgolf projects its annual attendance to increase to more than 12 million this year.

17. Topgolf has released statements to the media that Topgolf has dozens of additional locations under contract or in firm negotiations for 2017 and 2018 openings.

B. SureShot was poised to enter the market.

18. In 2013, SureShot was formed with the idea of competing with Topgolf's golf entertainment centers. SureShot saw the opportunity to take a different approach and create a unique game experience. The SureShot model used high-speed video cameras and software that would 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. Similar to Topgolf, the planned facilities would consist of a golf-driving-like range, but it would be uniquely designed for the SureShot-designed games. The SureShot venues also would have a sports bar and meeting rooms for corporate events.

19. The founders of SureShot, Bob Peebler and Bryan Peebler, are innovative entrepreneurs who originally perceived the opportunity of creating a competitor in the large golf entertainment center market by taking the game experience to a new level of immersive experience. They leveraged their joint experience of technology management, food and beverage industry background, and building companies.

20. The Peeblers and their team expended significant effort and resources to position SureShot 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 traveled across the globe to negotiate with technology providers and pinpoint appropriate locations; and entered important contracts for licensing, supplies, facilities, support, and technology.

21. Selection 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.

C. SureShot built its model on the Protracer platform.

22. The bases of SureShot's unique game design were the high-speed cameras and sensors that track the golf ball in flight, which were developed by a Swedish company, Protracer. Founded in 2006, Protracer developed first-of-its-kind cameras combined with software capable of tracking the flight of multiple golf balls in a camera feed, adding graphics to make the ball flight visible in near real time on a TV monitor. The technology is featured in TV coverage from the largest golf tournaments in the world, including The Open Championship and Ryder Cup.

23. Based on its patented and propriety Protracer TV technology, in 2012 Protracer launched the Protracer Range System, which mimics the TV tracking system used at professional golf tournaments for TV viewers. As such, it 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 game experience. Protracer has also developed a turn-key system for managing and

maintaining a complex ball-tracking system across a large-scale driving range facility, addressing the challenges of keeping the system calibrated, tracking shots across multiple bays, mapping tracked shots to physical targets, and determining which shot came from which bay. Protracer is the only ball-tracking provider that provides such a comprehensive solution reliably and economically. In other words, 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.

24. In addition to being able to track balls across a wide field sufficient to meet the needs of a golf entertainment center, Protracer had other unique capabilities that made it the only viable technology platform for SureShot. For example, other tracking systems cannot track the ball when it hits the ground and rolls. With the high-resolution cameras and superior back-end processing available through Protracer, the ball can be tracked as it rolls, allowing for the design of a game where the player can be awarded points not only for its accuracy in the air, but also for how close a ball then rolls towards the target. Protracer was working to add ball-roll tracking to their features, and SureShot intended to use this feature in its future gaming designs.

25. It is this unique technology that SureShot chose as its technology platform when it built its own unique 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 qualify the Protracer system for use in its business, with Protracer even making a number of improvements to ensure the product met SureShot's specific business requirements.

D. SureShot contracted with Protracer.

26. 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. Moreover, Protracer stated that it would not enter into exclusive dealing contracts with SureShot or others, meaning its essential technology would not fall into the hands of a single firm (here, a monopolist) who would refuse to share it 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].”

27. The Frame Agreement required Protracer to “deliver, install, calibrate and test the Protracer Range Systems” in up to 500 bays in up to five facilities each year during the Initial Term, to a maximum commitment of 1600 bays (“Supply Commitment”).

28. In addition, the Frame Agreement required Protracer to provide Support and Maintenance of the Protracer Range System to SureShot for five years after acceptance of the System by SureShot, pursuant to a Support and Maintenance Agreement, attached as Appendix E to the Frame Agreement (“Support and Maintenance Agreement”). The support and maintenance contemplated by the agreement necessarily provided Protracer access to SureShot’s facilities, as well as an intimate knowledge of how the facilities are operated.

29. Protracer's obligations under the Support and Maintenance Agreement included providing timely "Issue Corrections" to ensure that the Protracer System functions in accordance with its technical specifications, such as system malfunctions, calibration issues, and camera failures. Depending on the seriousness of the issue (defined as either Class A (Critical Issues), Class B (Serious Issues), or Class C (Minor Issues)), Protracer would initiate rectification within a short time period (30 minutes for Class A issues, 2 hours for Class B issues, or one business day for Class C issues) and then subsequently provide SureShot with an Action Plan to rectify the issue (48 hours for Class A issues, 72 hours for Class B issues, five business days for Class C issues). Significantly, Protracer had the right to reclassify an issue if it believes a "high classification" is unjustified, which lengthens the time that it had to respond. For Class C issues, the length of time to *initiate* an action plan was five business days.

30. The Support and Maintenance Agreement required Protracer to provide support of the Protracer Range System, including developer and on-site support. Specifically, Protracer Service Managers must "visit (i) each new Customer facility twice a year . . . and (ii) each existing Customer facility once a year" to inspect, maintain, and calibrate the system. This obligation meant that SureShot was required to inform Protracer of its plans to open new facilities, as well as providing access to its existing facilities.

31. The agreement also obligated Protracer to repair and replace defective Protracer Range Sensors at no charge pursuant to a five-year warranty against defects in materials and workmanship from the date of shipment of each sensor. The warranty allowed Protracer the option of repairing the sensors with new or refurbished parts or instead simply replacing the sensors.

32. Both the Frame Agreement and the Support and Maintenance Agreement contemplated that the parties would have access to the other's sensitive, proprietary, and non-

public confidential information. Thus, the agreements obligated the recipient of any such confidential information to protect it from unauthorized disclosure. The agreements also acknowledged that the disclosure of a party's confidential information would amount to irreparable injury to that party.

E. Topgolf's anticompetitive conduct forecloses competition.

33. In 2016, Topgolf learned of SureShot's intentions to enter the market. Hearing that a competitor was entering the market with the benefits of better 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 it would curtail threats of competition. Topgolf used its market power to foreclose SureShot from entering the market by effectively cutting off the supply to SureShot of the unique, leading-edge Protracer technology upon which the SureShot model was built and based.

34. 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 would have spent tens of millions dollars). SureShot's owners met with top executives of Topgolf in Houston, Texas. SureShot asked for those assurances, namely that Topgolf's acquisition of Protracer would not turn effectively into a de facto exclusivity arrangement with respect to any director competitor of Topgolf; Topgolf refused, with one of its top executives stating, "If I was in your position, I would look for alternatives." It was now obvious that Topgolf had no intention of allowing competition because the very purpose of its Protracer acquisition was to squelch competition. In short, TopGolf was unwilling to license the technology to SureShot under terms that would allow SureShot to build its business around the technology platform. In doing so, TopGolf made it clear

that it would not act as a neutral supplier of the essential and unique ball-tracking technology to golf entertainment facility competitors.

35. Under those circumstances, continuing to license and use Protracer technology was not a viable option given the vast investment needed to effectively compete with Topgolf. Even if Protracer continues to build on its protected intellectual property, Topgolf will have complete control over it, including the ability to license it only to those markets or industries that do not occupy the entertainment golf facility space. Indeed, given that Topgolf itself has shown no indication to incorporate Protracer's technology into its existing business, it is evident that its sole intention was to deprive the competition from use of an essential and important technology.

36. Even if Topgolf changes course, it 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 in terms of timing and quality. Further, Protracer may send less qualified service personnel or perform their contractual obligations in bad faith. Perhaps most problematic, Protracer did have and would have continued to have access to SureShot's confidential information, and Topgolf's knowledge of that confidential information would have harmed SureShot's competitive advantage. As one of many examples, any time that SureShot placed an order for a new installation, its top competitor—Topgolf—would have knowledge of where SureShot plans to open a new facility.

37. With SureShot out of the way, Topgolf can continue to dominate and monopolize the golf entertainment center market in the United States.

V. RELEVANT MARKET

38. The relevant product/service market in which the restraint and other anticompetitive conduct of Defendant has had and will continue to have significant effects and

cause antitrust injury is the market for golf entertainment facilities involving technology that tracks balls and provide other information to customers in an entertainment venue. The relevant geographic market is the United States.

VI. ANTITRUST INJURY

39. Topgolf's predatory behavior has been effective. SureShot will not open. Protracer is a platform technology provider, and SureShot built its business model on that basis. By acquiring Protracer, Topgolf purposefully froze out competition and furthered its monopolization of the market area. SureShot does not have the financial resources as a start-up to develop its own technology nor to work with another supplier over time to develop a new technology platform.

40. Topgolf's conduct deprives SureShot of a competitive opportunity to enter the interactive virtual golf market, violating the antitrust laws. This conduct also constitutes actual and/or attempted monopolization, in that it has used its dominant market power to keep and expand its monopoly in the market. By eliminating SureShot as a competitor, Topgolf will continue to strengthen its monopoly in the State. It will also deprive consumers of choice; a choice that would have offered a better experience at lower costs.

41. SureShot has suffered injury, including the loss of its business and property.

VII. VIOLATIONS ALLEGED

A. Foreclosure and unfair competition by a monopolist.

42. SureShot realleges the material fact allegations in the preceding paragraphs.

43. Defendant possesses dominant market power and monopolies in the market for golf entertainment venues in the United States. It has used its power to purchase and control Protracer, thereby denying SureShot access to long-term, continued licensing of Protracer technology and

purchasing of Protracer equipment. By its acts, practices, and conduct, Defendant has insulated itself from and foreclosed competition with SureShot for customers in the United States.

44. By its acts, practices, and conduct, Defendant has pursued a course of conduct that amounts to monopolization or unlawful exercise of dominant market and monopoly power in violation of the antitrust laws.

45. Defendant's conduct has significant anticompetitive effects and no pro-competitive benefits. The public has been deprived of the freedom to choose where and how to enjoy a golf entertainment experience and of the likely pricing choices that would naturally result from healthy competition.

46. As a direct and proximate result of Defendant's unlawful conduct, SureShot has been injured in its business and property, including by being foreclosed from competitive long-term access to technology necessary to compete in the industry. These are injuries to the competitive process and are the type that the antitrust laws are intended to prohibit under the following statutes:

- a. **Count 1**—Section 1 of the Sherman Act, 15 U.S.C. § 1;
- b. **Count 2**—Section 2 of the Sherman Act, 15 U.S.C. § 2; and
- c. **Count 3**—Section 7 of the Clayton Act, 15 U.S.C. § 18.

B. Attempt to monopolize—Count 4.

47. SureShot realleges the material fact allegations in the preceding paragraphs.

48. Through its anticompetitive conduct, Defendant did and does intend to secure dominant market power and monopolies in the markets for golf entertainment venues in the United States. As evidenced by its market shares here, its abuse of market power, its ability to exclude or foreclose competition and control access to essential technology, and the high barriers of entry into

the relevant markets, Defendant's anticompetitive practices have had a direct adverse effect on competition.

49. Defendant's conduct constitutes attempted monopolization in violation of the antitrust laws. This unlawful conduct has been willful and flagrant.

50. As a direct and proximate result of Defendant's unlawful conduct, SureShot has been injured in its business and property, including by being foreclosed from competitive long-term access to technology necessary to compete in the industry. These are injuries to the competitive process and are the type that the antitrust laws are intended to prohibit.

VIII. ATTORNEYS' FEES & COSTS

51. Plaintiff SureShot is entitled to an award of attorneys' fees and costs under Section 4 of the Clayton Act, 15 U.S.C. § 15 and other statutory provisions.

IX. JURY REQUEST

52. Pursuant to the U.S. Const. amend. 7, Federal Rule of Civil Procedure 38, and Local Rule 38.1, Plaintiff SureShot hereby demands a trial by jury on all issues of fact.

X. PRAYER

Plaintiff SureShot respectfully prays for the following relief:

- a. That the acts alleged above by Defendant Topgolf be adjudged violations of Sections 1 and 2 of the Sherman Act and Section 7 of the Clayton Act, 15 U.S.C. §§ 1, 2, and 18.
- b. That judgment be entered for Plaintiff SureShot against Defendant for three times the amount of actual damages sustained;
- c. That Plaintiff SureShot recover from Defendant Topgolf all costs of Court and attorneys' fees;
- d. That Plaintiff SureShot be awarded pre- and post-judgment interest at the highest legal rate; and

- e. That Plaintiff SureShot receives such other relief as the Court may deem just and proper under law or equity.

Dated: January 17, 2017

Respectfully Submitted,

TAHERZADEH, PC

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