No. 18-

IN THE

Supreme Court of the United States

SURESHOT GOLF VENTURES, INC.,

Petitioner,

v.

TOPGOLF INTERNATIONAL, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Article III ripeness doctrine bars a competitor's antitrust claims against a monopolist who acquired essential and patented technology to foreclose competitors from the market.

2. Whether the lower courts erroneously applied a heightened pleading standard to a competitor's claims of monopoly and attempted monopoly, resulting in market foreclosure.

PARTIES TO THE PROCEEDING

SureShot Golf Ventures, Inc., petitioner here, was the plaintiff-appellant in the Court of Appeals.

Topgolf International, Inc., respondent here, was the defendant-appellee in the Court of Appeals.

RULE 29.6 DISCLOSURE STATEMENT

SureShot Golf Ventures, Inc., has no parent corporation, and no publicly held company owns 10% or more of its stock.

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SureShot Golf Ventures, Inc. ("SureShot") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The Fifth Circuit's opinion, affirming dismissal of SureShot's antitrust complaint at the pleading stage, is unreported but available at 2018 U.S. App. LEXIS 28454 (5th Cir., Oct. 9, 2018). Pet. App. 1a–13a. The District Court's memorandum opinion and order granting Respondent-Defendant Topgolf International, Inc.'s ("Topgolf") motion to dismiss is also unreported, but available at 2017 U.S. Dist. LEXIS 135796 (S.D. Tex., Aug. 24, 2017). Pet. App. at 14a–26a.

JURISDICTION

The Fifth Circuit entered judgment on October 9, 2018. Pet. App. 1a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, makes illegal any "contract, combination … or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations …."

Section 2 of the Sherman Act, 15 U.S.C. § 2, makes it unlawful for any "person … [to] monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade

or commerce among the several States, or with foreign nations."

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court …."

INTRODUCTION

This case presents two fundamental questions of antitrust law warranting this Court's review. The first question is the appropriate framework for determining ripeness under Article III and antitrust law when a monopolist acquires patented technology with the intent to preserve or increase its dominant market share and forecloses the market to new market entrants. In this case, monopolist Topgolf acquired Protracer, the owner and developer of a patented technology for tracking golf balls. Petitioner SureShot was building a competing golf entertainment center based on Protracer's patented technology. Topgolf had its own proprietary technology, separate and independent from Protracer's technology, on which it had built market dominance in the golf entertainment industry. Following Topgolf's acquisition of Protracer, Topgolf issued a press release that it would cease licensing the Protracer technology to competing golf entertainment centers, including SureShot. In other words, existing and new market competitors, and there are practically none now that SureShot has folded, must develop new technology which may be difficult or impossible considering the market realities. *See Standard Fashion Co. v. Magrane-Houston Co.*, 258 U.S. 346, 355-57 (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). Under well-settled antitrust principles, Topgolf's vertical acquisition violates antitrust laws. *See Aspen Skiing Co. v Aspen Highlands Skiing Corp.*, 472 U.S. 585, 587 (1985) ("If a firm has been 'attempting to exclude rivals on same basis other than efficiency,' it is fair to characterize its behavior as predatory.'") (quoting Robert Bork, The Antitrust Paradox 138 (1978));[1] *Lorain Journal Co. v. United States*, 342 U.S. 143, 153 (1951) (discussing "intent" to destroy a competitor); *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 that he knows when added to his existing share will afford him monopoly power."). Here, the courts below erroneously granted and affirmed Topgolf's motion to dismiss SureShot's antitrust complaint, ignoring this Court's antitrust precedent.

Although invoking slightly different reasoning, the district and appeals courts below wrongly concluded that SureShot's claims were not ripe until 2020 because of the existence of a five-year agreement SureShot and Protracer executed in April 2015, *before* Topgolf's acquisition of Protracer in March 2016. The lower courts require a market competitor like SureShot to continue

1. In *Aspen Skiing*, this Court defined exclusionary conduct as "'behavior that not only (1) tends to exclude to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessary restrictive way.'" 472 U.S. at 605 n. 32 (quoting Phillip Arreda & Donald Tuner, Antitrust Law 78 (1978)).

expending vast amounts of money and resources until the conclusion of the 5-year term of its agreement with Protracer, at which time its antitrust claims may ripen, despite the fact the anticompetitive conduct and harm have already occurred. *See Standard Fashion*, 258 U.S. at 353 (rejecting mootness argument based on term of "contract" because "[t]he bill prayed an assessment of damages as far as capable of ascertainment").

Topgolf has already stated that it would not share Protracer's essential technology with SureShot past the expiration date of the SureShot-Protracer agreement. When SureShot sought assurances, Topgolf's executives told SureShot, "If I was in your position, I would look for alternatives," and this fact was not accepted as true by the lower courts as required by *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). The courts below also did not accept as true SureShot's allegations that it ceased operations because of Topgolf's anticompetitive conduct. The courts below allowed the terms of an agreement between SureShot and Protracer to trump the Sherman and Clayton Acts, even though these laws apply to anticompetitive conduct irrespective of the existence of a "contract." It is the acquisition of Protracer by Topgolf that is the focus of SureShot's complaint. *See id.* at 355 (observing that the antitrust laws cover "'[a]ll contracts or acts which were unreasonably restrictive of competitive conditions, either from the nature or character of the contract or act or where the surrounding circumstances were such as to justify the conclusion that they had not been entered into or performed with the legitimate purpose …'") (quoting *Standard Oil Co. v. United States*, 221 U.S. 1, 58 (1911).

The failings of the lower courts stem from their refusal to follow this Court's precedent in ascertaining the scope of Section 4 of the Clayton Act. *See Lexmark Int'l, Inc. v. State Control Components, Inc.*, 572 U.S. 118, 126 (2014) (observing that in *Associated General Contractors*, the Court "sought to 'ascertain,' as a matter of statutory interpretation, the 'scope of the private remedy created by' Congress in § 4 of the Clayton Act …") (quoting *Assoc. Gen. Contractors*, 459 U.S. at 529 & 532).

This Court has stated that the antitrust laws are not intended to address tort-like conduct; rather, they serve to protect the *competitive process*. *See NYNEX Corp.* v. *Discon, Inc.*, 525 U.S. 128, 137 (1998). But showing harm to the "competitive process," such as allegations of illegal monopoly or intent to monopolize, cannot rest on "formalistic distinctions rather than actual market realities" in assessing whether Article III and antitrust standing have been satisfied. *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 466-67 (1992). Said differently, without a consideration of the "real-world effect[s]" of the harmful conduct tied to the substantive antitrust claims asserted, *see Trump v. Hawaii*, 138 S. Ct. 2392, 2416 (2018), a court should not dismiss a claim of illegal monopoly or attempted monopoly because it believes the claim to be unripe. The harm from an illegal monopoly or attempted monopoly often manifests itself in full or partial foreclosure that is far subtler than the type of injuries associated with conspiracies under Section 1 of the Sherman Act. *See Standard Fashion*, 258 U.S. at 353 ("The record shows that such damages were capable of at least partial ascertainment."); *Novell v. Microsoft Corp.*, 505 F.3d 302 (4th 2007) ("Microsoft's use of its monopoly power in the operating-system market to

foreclose the distribution channels for Novell's applications … would have naturally tended to decrease Novell's market share and consequently decrease the value of its applications ….''). Here, Topgolf acquired Protracer's technology, essential to SureShot's business, and has told SureShot it will not have access to the technology at the end of the agreement's expiration. Topgolf's acquisition of the Protracer technology was to stamp out its competitor SureShot. It succeeded, because SureShot is out of business, and now Topgolf can hide behind an unprecedented application of the ripeness doctrine to antitrust law to justify its anticompetitive conduct. The courts below sanctioned Topgolf's anticompetitive conduct.

This Court has stated "that a multi-factor analysis is required to determine whether a private plaintiff has antitrust standing." *Id.* at 311; *see also Assoc. Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 535 n. 31 (1983) ("Harm to the antitrust plaintiff is sufficient to satisfy the constitutional standing requirement of injury in fact[.]"). The erroneous holdings of the courts below rest on "formalistic distinctions," namely the existence of an option as a barrier to any antitrust claim, rather than "actual market realities." The lower courts' conclusions cannot be squared with the substantive analysis in *Aspen Skiing* and *Lorain Journal*, among other cases, which involve *partial* market foreclosure. The issue here is not a theoretical one: If a competitor cannot get beyond the pleading stage by asserting that a dominant actor's acquisition of a key patented input is a restraint of trade, monopolizes part of a trade, and injures business as forbidden by the antitrust laws, then monopoly power will continue to grow, unchecked by the Sherman and

Clayton Acts, simply because a plaintiff's allegations do not translate into "formalistic" understanding of harm. SureShot's antitrust allegations are not "abstract," do not involve "disagreements over administrative policies," and "withholding court consideration" will cause hardship, as SureShot has already ceased operations because its business is no longer feasible considering Topgolf's anticompetitive conduct. *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 807-08 (2003). The lower courts' ripeness analysis is wrong, and SureShot's claims were wrongly dismissed for lack of ripeness.

The second question presented concerns the *sufficiency* of *allegations* necessary to support an inference of antitrust or Article III injury at the pleading stage. *See Johnson v. City of Shelby*, 135 S. Ct. 346, 347 (2014) (admonishing courts for requiring plaintiffs to do more than inform the defendant "of the factual basis for their complaint"). Here, the Fifth Circuit wrongly concluded that "all of the allegations SureShot identifies … are phrased in future terms, and SureShot has not alleged that any of the federal antitrust violations have resulted in the … feared actions." Pet. App. 13a. In other words, according to the Fifth Circuit, SureShot's claims are not ripe until the 5-year licensing agreement between it and Protracer has expired, regardless of the anticompetitive actions taken by Topgolf that led to SureShot's closing, clearly alleged in its complaint. The lower courts' conclusions improperly permit contract law to cabin antitrust law. *See Tampa Electric Co. v. Nashville Cola Co.*, 365 U.S. 320, 334-45 (1962) (reaffirming that market foreclosure by a dominant actor remains a critical part of the antitrust laws, irrespective of the existence of exclusive dealing contracts).

Following *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 588 (1986), *Twombly*, and this Court's recent antitrust jurisprudence, especially the expressed concern with "false inferences," courts reflexively dismiss antitrust lawsuits absent the presence of evidence, *at the pleading stage*, that typically can only be unearthed through discovery. *See, e.g.*, *Anderson News, LLC v. American Media, Inc.*, 680 F.3d 172, 169-70 (2nd Cir. 2012) (reversing 12(b)(6) dismissal and reciting contents of emails that may support evidence of a conspiracy cited in original complaint, thus reversing district court's dismissal at pleading stage); *In re Text Messaging Antitrust Litig.*, 630 F.3d 622, 629 (7th Cir. 2010) (rejecting contention that evidence of "smoking gun in a price-fixing case" is needed to get past the pleading stage). The procedural trend in antitrust law, then, has substituted earliest dismissal for a thorough analysis of the anticompetitive allegations considering the market realities. This case illustrates how this harmful trend has seized federal courts' view of antitrust lawsuits. The courts below vindicated that trend by applying a heightened pleading standard to SureShot's antitrust complaints. Pet. Appx. 11a ("The above-cited provisions from SureShot's complaint are ambiguous about the nature and immediacy of SureShot's injury …"), 22a–23a ("Further, the 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.") (italics added).

STATEMENT OF THE CASE

A. Factual Background

Topgolf was founded in 2000, and the company is based in Texas. Topgolf operates golf entertainment centers throughout the United States, and it operates multiple facilities in Texas. Topgolf has expanded quickly, including internationally. Pet. App. 15a; C.A. ROA.7-8.[2]

Topgolf combines a driving range-type environment, where customers 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 result is a sports-bar-type entertainment facility merged with golf games. Pet. App. 2a; C.A. ROA.7.

In 2013, SureShot was formed to compete with Topgolf and provide a unique golf entertainment experience, providing consumers more choice. The SureShot model utilizes high-speed video cameras and software to track the golf balls in flight, creating a unique and immersive Three-Dimensional (3-D) golf ball flight and gaming experience for its customers. SureShot's golf experience was intended to be superior to Topgolf's, attract customers away from Topgolf, thus providing consumers more choice, and reduce Topgolf's market share, thereby reducing or

2. "C.A. ROA." Refers to the Record on Appeal filed in the Court of Appeals.

eliminating Topgolf's ability to set a monopoly price. The SureShot golf entertainment centers would include sports bars and meeting rooms for corporate events. Pet. App. 2a; C.A. ROA.8.

SureShot expended significant effort and resources to position itself for success and to provide consumers a competitive choice in this fast-growing market. SureShot invested in the business by engaging design and architecture firms; building a prototype center; testing different ideas for golf ball tracking; building and testing prototype gaming software; engaging attorneys to create private placement memorandums and advise on and file patents for intellectual property; securing funding; researching and travelling across the globe to negotiate with technology providers and pinpoint appropriate locations; and entering important contracts for licensing, supplies, facilities, support, and technology. SureShot invested in technology to create a better, enhanced experience for SureShot's customers, giving it a competitive edge in the golf entertainment market. Pet. App. 3a; C.A. ROA.8-9.

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, a software technology company. 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. Pet. App. 2a; C.A. 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. Pet. App. 3a; C.A. 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. Pet. App. 3a; C.A. ROA.9-10.

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 considering the vast resources SureShot was investing for market entry. Protracer stated that it would not enter into exclusive dealing contracts with SureShot or others, to prevent its technology from falling into the hands of a single firm who might refuse to share Protracer's technology with competitors. 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]." Pet. App. 4a; C.A. ROA.11-12.

The Protracer-SureShot relationship also involved other contracts relating to supply, support, and maintenance. C.A. Pet. App. 4a; C.A. ROA.12-13. The contracts contemplated that both parties would have access to the other's sensitive, proprietary, and non-public confidential information. Pet. App. 3a-4a; C.A. ROA.12-13.

When Topgolf learned in 2015 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, intending for the acquisition to stamp out competition. Pet. App. 4a; C.A. 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 from Topgolf that Protracer would continue to be made available to SureShot even after the initial 5-year term (and after SureShot would have spent and invested 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." Pet. App. 4a; C.A. ROA.13.

Topgolf's sole intention in acquiring Protracer was to deprive SureShot and others from use of an essential and

important technology in the golf entertainment market. Given the vast investment needed to build and maintain its golf entertainment centers to compete with Topgolf, SureShot's continuing to license and use Protracer technology was no longer a viable option. Pet. App. 5a; C.A. ROA.13-14.

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 had 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. Topgolf now has total control over the Protracer system, including the ability to license the software only to those industries that do not compete with Topgolf. Pet. App. 20a–21a; C.A. ROA.14.

SureShot's complaint alleges 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. SureShot's complaint alleges it suffered injury as a direct result of Topgolf's anticompetitive conduct.

B. The Decisions Below

SureShot filed its original complaint on January 17, 2017, alleging monopolization, attempted monopolization,

and market foreclosure under the Sherman and Clayton Acts. 15 U.S.C. §§ 1, 2, 15, & 18. Pet. App. 16a–17a. Topgolf filed a motion to dismiss, contending that SureShot's claims were not ripe and its complaint failed to substantively allege anticompetitive or exclusionary conduct or a relevant market.

1. The District Court Dismissed the Complaint, Concluding SureShot's Antitrust Claims were Not Ripe.

The District Court dismissed the Complaint on August 24, 2017, concluding that SureShot had failed to allege antitrust standing and its claims were unripe under Article III. Pet. App. 27a.

The District Court committed two over-arching errors in dismissing SureShot's antitrust complaint. First, it concluded SureShot's claims were not ripe only by ignoring this Court's precedent that mandates consideration of the substantive antitrust claims alleged before making such a determination. *See, e.g.*, *Verizon Comm'ns, Inc. v. Law Office of Curtis V. Trinko, LLP*, 540 U.S. 398, 405 (2004) ("As to [dismissal at the pleading stage of] the antitrust portion [of the complaint], [the district court] concluded that respondent's allegations of deficient assistance to rivals failed to satisfy the requirement of § 2."). The District Court sought to justify its erroneous ripeness conclusion by relying on two cases that involve "options." Pet. App. 22a (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*)). The two cases are inapposite as they involve public utilities subject to

regulatory oversight, and the antitrust claims in *Destec* (*Middle South* is not an antitrust case) flow directly from those regulations (not to mention that *Destec* involved a summary judgment), making them far removed from the claims asserted by SureShot that are based on *Lorain Journal* and *Aspen Skiing*, among other cases. *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.").

By not analyzing the substance of SureShot's antitrust claims—to determine whether Topgolf's conduct "promotes competition or … suppresses competition"—the District Court violated a core principle of this Court's antitrust jurisprudence. *See Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1978) ("The trust test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition."). Admittedly, the District Court did, in two brief paragraphs, summarily and *without* any discussion of the market realities, wrongly conclude based on *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), that the same "injury-in-fact" would have occurred had a company of another size purchased the competing business." Pet. App. 25a–26a (citing *Brunswick*, 429 U.S. at 487; *Jebaco, Inc. v. Harrah's Operating Co., Inc.*, 587 F.3d 314, 321 (5th Cir. 2009); & *Anago, Inc. v. Tecnol Med. Prods., Inc.*, 976 F.2d 248, 251 (5th Cir. 1992)).

The District Court's second error was to misapply, as occurs too frequently in antitrust cases, the antitrust pleading standard established by *Twombly*. Under

Twombly, the District Court's task was to determine the legal significance of the allegations, not believe or disbelieve those allegations. SureShot's complaint alleged that Topgolf expressed its intention to foreclose the market to SureShot and other competitors with its acquisition of Protracer. However, 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." Pet. App. 22a (italics added). This was error. *See Johnson v. City of Shelby*, 135 S. Ct. 346 (2014) (reversing Fifth Circuit for affirming dismissal of complaint because of the complaint's "imperfect statement of the legal theory supporting the claim asserted"). At the motion to dismiss stage, 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 did not accept SureShot's allegations as true.

2. The Fifth Circuit Affirmed the Dismissal Solely on Article III Grounds, and Without Any Substantive Analysis of the Antitrust Claims.

The Fifth Circuit affirmed the District Court's order, albeit solely on Article III's case or controversy requirement. The court of appeals concluded the allegations in "SureShot's complaint are ambiguous about the nature and immediacy of SureShot's injury, and the remainder of its complaint reads in hypotheticals and future threatened injury." Pet. App. 11a. It further concluded that "[b]ecause the case is not ripe … it [is] unnecessary to analyze whether SureShot alleged a cognizable antitrust injury as

required for antitrust standing." Pet. App. 13a, n.3. As if recognizing that the District Court's antitrust-standing analysis was incorrect, the Fifth Circuit avoided any discussion of the two "option" cases on which the District Court rested its ruling. *Id.* at 12a, n.2. Thus, the Fifth Circuit concluded that its holding based on Article III's case or controversy requirement dispensed with a need "to analyze whether SureShot alleged a cognizable antitrust injury as required for antitrust standing." *Id.* at 13a, n.3.

This petition followed.

REASONS FOR GRANTING THE PETITION

I. The Fifth Circuit's Ripeness Decision Conflicts with this Court's and Other Circuits' Settled Antitrust Precedent by Improperly Cabining the Sherman Act.

A. *Clapper*'s Standing Analysis, if Unchecked by this Court, will Supplant Antitrust Standing and Thwart the Sherman Act.

Some of America's best-known industries—airlines, pharmaceuticals, telecommunications, and even beer, to name but a few—are now dominated by a handful of companies. This pace of consolidation in the hands of a few companies in the last 40-years is not slowing. It is growing, as intellectual property—the right to exclude others—plays an increasing role in creating or growing market dominance. *See generally* Tim Wu, The Curse of Bigness, Antitrust in the New Gilded Age 20-21 (2018). This case addresses whether a competitor may challenge a monopolist's actions to maintain and increase

its dominance in a market to foreclose the market to competitors and market entrants.

The Fifth Circuit affirmed the dismissal of SureShot's claim at the pleading stage by relying on an *unprecedented* application of the ripeness doctrine. The court did not cite a single antitrust case in support of its ripeness conclusion. Pet. App. 8a–12a. It concluded that SureShot's complaint is unripe because it is "ambiguous about the nature and immediacy of SureShot's injury, and the remainder of its complaint reads in hypotheticals and future threatened injury." *Id.* The Fifth Circuit made those invalid *factual* determinations without any attempt to tie the alleged injury—Topgolf's anticompetitive conduct that led to SureShot's closing—to SureShot's alleged antitrust claims, the harm to the competitive process. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1551 (2016) (Thomas, J., concurring) ("Common-law courts imposed different limitations on a plaintiff's right to bring suit *depending* on the type of right the plaintiff sought to vindicate.") (italics added).

The Fifth Circuit's error in not analyzing standing under the standing analysis for antitrust claims was compounded by its mistaken reliance on *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1143 (2013). Pet. App. 11a. The Fifth Circuit held that, like the plaintiffs in *Clapper*, SureShot "'cannot manufacture standing'" because its "alleged injury is not 'certainly impending.'" *Id.* (quoting *Clapper*). The Fifth Circuit's wooden application of *Clapper* to this antitrust case is error; because this case, unlike *Clapper*, involves allegations of monopoly and attempted monopoly, the court of appeals' error allows a monopolist to maintain or increase its monopoly without

consideration of the substantive claims asserted by a competitor. The flawed standing inquiry will also lead to other monopolists defending antitrust lawsuits on the same specious argument.

Under this Court's antitrust jurisprudence, antitrust standing is considered through the prism of harm to *competition* or the *competitive process*. *See FTC v. Ind. Fed'n of Dentists*, 476 U.S. 477 (1986) ("[T]he purpose of the inquiries into market definition and market power is to determine whether an arrangement has the *potential* for genuine adverse effects on competition[.]") (italics added). That means substantive antitrust claims must be considered in some detail when assessing standing. *See Assoc. Gen. Contractors*, 459 U.S. at 529-30 & n. 3 ("Harm to the antitrust plaintiff is sufficient to satisfy the constitutional standing requirement of injury in fact[.]"); *Brunswick*, 429 at 487 (considering antitrust injury only after a full evidentiary record based on the alleged claims). Of course, when the issue is "who" may assert an antitrust claim, this Court has adjudged standing at the pleading stage. *Assoc. Gen. Contractors*, 459 U.S. at 528 ("We think the Court of Appeals properly assumed that such coercion [as alleged] might violate the antitrust laws."), 545–46 (after considering a number of "relevant factors," including "the nature of the Union's injury, the tenuous and speculative character of the relationship between the alleged antitrust violation and the Union's alleged injury, the potential for duplicative recovery or complex apportionment of damages, and the existence of more direct victims of the alleged conspiracy," holding the Union-plaintiff lacked standing "within the meaning of § 4 of the Clayton Act").

The Fifth Circuit did not point to a single antitrust case that was dismissed at the pleading stage for lack of ripeness. Unable to do so, the court erroneously superimposed *Clapper*'s standing analysis—a challenge to an administrative ruling—onto this antitrust lawsuit. Cases like *Clapper* are inapplicable to this case because they involve non-economic interests that admittedly will not occur until sometime in the future, largely arising in challenges to governmental action or regulations. *Clapper*, 133 S. Ct. at 1142 ("Respondents assert that they can establish injury in fact because there is an objectively reasonable likelihood that the communications will be required under § 188a *at some point in the future*.") (italics added); *see also Nat'l Park Hospitality Ass'n*, 538 U.S. at 808 ("Ripeness is a justiciability doctrine designed to prevent the courts … from entangling themselves in abstract disagreements over *administrative policies* ….") (italics added; quotations omitted). Even in cases involving regulatory conduct, the impending harm may be sufficient to confer standing, setting aside that SureShot's complaint alleges concrete harm, making *Clapper* inapplicable. *See, e.g.*, *Susan B. Anthony List v. Dreihaus*, 134 S. Ct. 2334, 2341 (2014) (citing *Clapper* and holding "[a]n allegation of future injury may suffice if the threatened injury is 'certainly impending,' or there is a 'substantial risk' that the harm will occur.").

Indeed, the Fifth Circuit's own precedent shows that *Clapper* and, as explained further below, *Twombly* have combined to lead district and circuit courts to impose a heightened pleading standard in antitrust cases, contrary to this Court's teaching. *See, e.g.*, *Twombly*, 550 U.S at 569 n.14 ("[W]e do not apply any 'heightened' pleading standard[.]"); *Hosp. Bldg. Co. v. Trustees of Rex Hosp.*,

425 U.S. 738, 747 (1976) (stating that in antitrust cases "dismissals prior to giving the plaintiff ample opportunity for discovery should be sparingly granted"; district court's dismissal on the pleadings reversed in Sections 1 and 2 case); *Doctor's Hosp. of Jefferson, Inc. v. Southeast Med. Alliance, Inc.*, 123 F.3d 301, 304-06 (5th Cir. 1997) ("[S]tanding should not become the tail wagging the dog in 'classical' antitrust cases such as this one by an alleged excluded competitor.").

B. Allegations of Harm to the Competitive Process Should Not be Abrogated by the Ripeness Doctrine.

This case concerns the relationship between market dominance and ensuring competitive markets. If a dominant market participant can use its monopoly profits to buy up new technology and keep it out of the hands of competitors, or even acquire new competitors, market concentration will grow, resulting in harm to consumer welfare and the competitive process; it also diminishes economic freedom. *See, e.g.*, Jonathan B. Baker & Steven C. Salop, *Antitrust, Competition Policy, and Inequality*, 104 Geo. L.J. Online 1, 22 (2015) (discussing income inequality as a function of monopolization, which may involve "exclusionary conduct to achieve, maintain, or enhance that power").

Under the faulty and unprecedented ripeness analysis applied by the courts below, competitors will have their market foreclosure claims under the Sherman Act dismissed until they are completely deprived of all inputs or where market foreclosure is complete. That conclusion is contrary to this Court's settled antitrust precedent and

Section 4 of the Clayton Act's prescription for who may sue for "anything forbidden in the antitrust laws …." 15 U.S.C. § 15. It also will lead to greater market imbalance by further aiding concentration and denying fair competition to new entrants, competitors like SureShot.

In *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir.), *cert. denied*, 122 S. Ct. 350 (2001), the District of Columbia Circuit focused on the effect of exclusive dealing in creating or preserving Microsoft's market power. *Id.* at 60. Importantly, the court weighed the *practicality* of alternative choices given to computer manufacturers (OEMs) by Microsoft. *Id.* at 60-64 (rejecting any "total exclusion" test, holding that "although Microsoft did not bar its [browser] rivals from all means of distribution, it did bar them from the cost-efficient ones"). Thus, by raising rivals' input costs, Microsoft maintained its market dominance, even assuming the availability of less-efficient alternatives. *Id.* 58-74. Here, Topgolf appropriated a technology it was not using in its business and has stated it will not share that technology with competitors. Pet. App. 10a.

Like Microsoft's anticompetitive conduct, the effect of Topgolf's conduct is to make it impractical or virtually impossible, considering the economic realities of the industry, for a new entrant to compete with a monopolist who may simply acquire new technology to stave off competition. As Justice Scalia recognized, when a "defendant maintains substantial market power, his activities are examined through a special lens," and conduct that "might otherwise not be of concern to the antitrust laws" can "take on exclusionary connotation." *Eastman Kodak*, 504 U.S. at 488 (1992) (dissenting

on other grounds); *see also United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 187 (3rd Cir. 2005) ("Behavior that otherwise might comply with antitrust law may be impermissibly exclusionary when practiced by a monopolist.").

The *Microsoft* court relied, in part, on the principles developed in *Aspen Skiing* and *Lorain Journal*. *Id.* at 59, 80. These cases hold that complete market foreclosure is not necessary to maintain an antitrust lawsuit. Indeed, they stand for the opposite proposition—that partial foreclosure suffices. Rather than focusing solely on the nature or immediacy of the harm suffered by a plaintiff, this Court analyzed the intent behind defendant's anticompetitive conduct. *Aspen Skiing*, 472 U.S. at 587 (observing "intent is relevant to" showing "attempt to monopolize); *Lorain Journal*, 342 U.S. at 153 (discussing "intent" to destroy competition"). More importantly, "[a] n attempted monopolization claim necessarily involves conduct which has not yet succeeded[.]" *Taylor Publ'g Co. v. Jostens, Inc.*, 216 F.3d 465, 474 (5th Cir. 2000) ("Thus, we look to the defendant's conduct and the market at the time the conduct occurred, rather than evaluating the conduct's effects after-the-effect.").

The courts below erred.

C. This Court Has Never Addressed the Question Presented.

This Court has not addressed ripeness in the context of an antitrust claim. This case provides the Court with an ideal vehicle to address when a competitor may challenge a dominant competitor's anticompetitive acquisition of

technology used by competitors. The issue is likely to recur given the increasing consolidation and market domination of a few businesses in a host of industries. Lower courts, as illustrated by the opinions below and contrary opinions from other circuits, will continue to struggle with the relationship between injury-in-fact and a violation of a legal right when that right, under this Court's precedent, requires a showing of harm *to the competitive process*, an amorphous concept that requires fleshing out through fact discovery and market analysis before a judgment may be rendered. *See Omega Satellite Prods. Co. v. City of Indianapolis*, 694 F.2d 119, 127 (7th Cir. 1982) ("[T]he antitrust laws protect competition not only in, but for, the market—that is, competition to the firm to enjoy a natural monopoly, and by a modest extension competition to replace the existing natural monopolist.") (citing *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964)); *see also JetAway Aviation, LLC v. Board of Cty. Comm'rs of Cty. of Montrose, Colo.*, 764 F.3d 824 (10th Cir. 2014) ("And in any event, we have no right to enshrine the incumbent in its monopoly position simply because it is already there. The choice belongs to consumers.") (Tymkovich, J., concurring).

The lower courts will continue to struggle with standing in assessing the difference between the harm to the competitive process and demonstrable market or plaintiff-specific harm. *See, e.g.*, *Fishman v. Estate of Wirtz*, 807 F.2d 520, 535 (7th Cir. 1986) (observing that, determining whether a monopoly is "natural," and thus not in violation of the antitrust laws, "presents a difficult question requiring the most careful analysis and the weighing of conflicting policies and lines of authority in the application of antitrust laws"). Indeed, courts have

concluded that harm to the competitive process defines whether an antitrust violation occurred. *See, e.g.*, *Ovitron Corp. v. Gen. Motors Corp.*, 295 F. Supp. 373, 378 (S.D.N.Y. 1969) (observing that a natural monopolist violates Section 2 if it acquires its position by "means which are 'exclusionary, unfair or predatory'"). But showing harm to the competitive process should not require some magic words, as the District Court did below. Pet. App. 25a ("SureShot failed to plead that Topgolf's actions harmed competition overall, and not just SureShot's competitive advantage."). The old saw about antitrust law protecting "competition, not competitors" has led to confusion in the lower courts, especially because the phrase has been detached from its proper context. The Sherman and Clayton Acts *do* protect competitors, when the harm they are complaining about arises from anticompetitive conduct forbidden by the antitrust laws. *See, e.g., Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959) ("As such [the restraint] is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy.").

The courts below erred because they also failed to properly distinguish between harm to the competitive process enshrined in the Sherman and Clayton Acts and contract law. They appear to believe, even assuming they were right to weigh the allegations in Topgolf's favor, which obviously is error, that the existence of an option means that SureShot must exhaust the terms of that option before bringing a lawsuit. That approach is contrary to this Court's settled precedent that forbids contract law from cabining antitrust law. *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); *see also Medlmmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 133-36 (2007) (holding a patent licensee is not required to terminate or materially breach its license agreement in order to bring a lawsuit challenging validity or infringement of patents). For example, a for-term purchasing agreement would not bar a distributor from suing its supplier for price-fixing; in such a case, a defense by the supplier that until the term of the agreement is exhausted, the distributor has an unripe claim would wreak havoc on private antitrust enforcement.

D. "Concrete Injury," After *Spokeo*, Continues to Divide the Lower Courts.

This case also provides the Court with an opportunity to clarify when and how Article III and antitrust standing should be adjudged. In *Spokeo*, the Court explained that while "Article III standing requires a concrete injury even in the context of a statutory violation," it "does not mean, however, that the risk of real harm cannot satisfy the requirement of concreteness." *Spokeo*, 136 S. Ct. at 1549. The lower courts' decisions that have addressed *Spokeo* are divided on whether this Court intended to establish a new test for standing. For example, in *In re Nickelodeon Consumer Privacy Litig.*, the Third Circuit cited *Spokeo* in determining whether an "intangible" harm can satisfy the concrete injury rule, observing that "judges should consider whether the purported injury 'has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts.'" *Id.* at 274 (quoting *Spokeo*, 136 S. Ct. at 1549); *compare Boelter v. Hearst Commc'ns, Inc.*, 192 F.Supp.3d 427, 438 n.4 (S.D.N.Y. 2016) ("[*Spokeo*] does not

upset the Court's conclusion here that the violation of a statute by itself is insufficient to confer standing to sue but that Defendant's violation of the VRPA, as alleged, caused a concrete and particular injury to Plaintiffs."), *with In re Barclays Bank PLC Sec. Litig.*, No. 09-Civ-1989, 2016 U.S. Dist. LEXIS 75663, at *21–22 (S.D.N.Y. June 9, 2016) ("It has long been recognized that a legally protected interest may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute.") (internal quotations and alteration omitted), & *Sandoval v. Pharmacare US, Inc.*, No. 15-0120, 2016 U.S. Dist. LEXIS 140717, at *22 (S.D. Cal. June 10, 2016) ("The correct approach in this case is unclear, especially after *Spokeo*.").

Beyond *Spokeo*, this Court's *Brunswick* opinion continues to divide the lower courts, sometimes even within the same circuit. For example, in *Novell v. Microsoft Corp.*, the Fourth Circuit held that Novell had standing to challenge Microsoft's anticompetitive conduct that had *potentially* harmed Novell. 505 F.3d at 311-20. In contrast, in *Kloth v. Microsoft Corp.*, 444 F.3d 312 (4th 2006), the Fourth Circuit held the plaintiffs lacked standing, although they alleged largely the same market foreclosure conduct later found sufficient for standing in *Novell*. *Id.* at 317-18.

This confusion arises in part from lower courts making standing determinations, as happened in this case, without a detailed analysis of the substantive antitrust claims, whether at the pleading or summary judgment stage. The issue in *Brunswick* was "a narrow one" and followed a *full trial*, with expert testimony regarding the relevant

market, market share, and the impact of the acquisition on competitors, including the plaintiffs. *Brunswick*, 429 U.S. at 480 ("[P]etitioner [Brunswick] controlled only 2% of the bowling centers in the United States[.]"), 490 (observing the respondents-plaintiffs' "entire proof of damages was based on their claim to profits that would have been earned had the acquired centers closed."). Thus, it is wrong to summarily overlay *Brunswick*'s evidentiary and merits-based analysis over SureShot's claims at the pleading stage, as the District Court did in this case, without the same type of merits-based analysis and accepting all SureShot's alleged facts as true. *See Gulf States Reorganization Group, Inc. v. Nucor Corp.*, 466 F.3d 961-967-68 (11th Cir. 2005) (observing that to determine whether a plaintiff has antitrust standing, courts must "evaluate the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them"); *Doctor's Hosp.*, 123 F.2d at 305 ("Since 1983, we have pointed out a distinction between antitrust injury and injury to competition, the latter of which is often a component of substantive liability"; and "the antitrust laws do not require a plaintiff to establish a market-wide injury to competition as an element of standing.").

The standing question is an important one that this Court should decide because dismissal on the pleadings is a harsh outcome for a competitor who is forced to close its business because of a monopolist's anticompetitive conduct.

II. Because Lower Courts Are Erroneously Applying a Heightened Pleading Standard in Antitrust Cases, this Court's Review is Warranted.

"Over the last four decades, th[is] Court has increasingly … decided antitrust cases in favor of defendants." Leah Brannon and Douglas H. Ginsburg, *Antitrust Decisions of the U.S. Supreme Court, 1967 to 2007*, 3 Competition Policy Int'l 2, 3 (2007). That trend has left the lower courts with an inclination to dismiss antitrust cases early and often. *See 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 ….."). This case is illustrative; and absent this Court's intervention, the trend will continue unabated, harming private antitrust enforcement and, thus, the competitive process.

The tendency to dismiss cases at the pleading stage emerges from an overreaction to, and misapplication of, *Twombly*, and a larger concern about the costs of discovery (for defendants) in antitrust cases. *See* William H. Page, *Pleading, Discovery, and Proof of Sherman Act Agreements: Harmonizing Twombly and Matsushita*, 82 Antitrust L.J. 123 (2018) ("In antitrust litigation, this standard has had special influence, because of the unusual role of economic theory and ideology in the resolution of the decisive issues."). The cost-of-litigation concern that so permeated *Twombly*'s rational, 550 U.S. at 1967 ("Thus, it is one thing to be cautious about dismissing an antitrust complaint in advance of discovery … but quite another

to forget that proceeding to antitrust discovery can be expensive."), has been manifest in this Court's antitrust jurisprudence for decades. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 345-46 (1979) (Rehnquist, J., concurring) ("Any pronouncements from this Court exhorting district courts to be 'especially alert to identify frivolous claims brought to exhort nuisance settlements' will not be a complete solution for those courts which are actually on the firing line in this type of litigation.").

This case illustrates both above concerns and how they have morphed into the district courts' tendencies to reflexively dismiss antitrust lawsuits without a substantive analysis of the claims and denying plaintiffs any discovery to answer the question whether the challenged conduct increases or decreases competition. *See Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 691 (requiring a court to focus on whether the challenged conduct "promotes competition or … suppresses competition"). Even though the recently amended Rule 26 of the Federal Rules of Civil Procedure has increasingly given district courts more leeway to manage and limit discovery when necessary, the District Court refused to permit any discovery before dismissing this antitrust lawsuit. Unlike *Trinko*, however, the courts below did not analyze the substantive claims and conclude no cause of action is stated. *Trinko*, 540 U.S. at 405 ("To decide this case, we must first determine what effect (if any) the 1996 Act has upon the application of traditional antitrust principles.").

Dismissing these concerns as isolated and not worthy of this Court's attention increasingly turns the Sherman Act into a second-class statute, at least with respect to private enforcement, even as the national economy

becomes more and more consolidated. *See* Wu, *supra*; *see also* Paul J. Davies, *Big Buyers Beware the New Trustbusters*, WALL STREET JOURNAL, Dec. 28, 2018, at B12 ("The power of large companies has never been more apparent.").

To illustrate, the courts below took a straight-forward allegation relevant to the substantive claim of market foreclosure under the Sherman Act that *must be* accepted as true at the pleading stage, *Twombly*, 550 U.S. at 570 (at the pleading stage, courts must assume "all the allegations in the complaint are true"), namely that Topgolf's executive told SureShot's executives that, "If I was in your position, I would look for alternatives," and analyzed the statement as a matter of sufficiency of the allegation. Pet. App. 12a (the Fifth Circuit concluded that because the statement "did not immediately terminate the SureShot-Protracer agreement," it was unnecessary to substantively analyze the allegations of market foreclosure); 22a (the District Court concluded 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").

The misguided, confusing, and unpredictable approach of many lower courts in applying a heightened pleading standard to antitrust cases is also in direct conflict with "the doctrine of judicial self-restraint" embodied in standing jurisprudence, of which ripeness is one facet. John G. Roberts, *Jr.*, *Article III Limits on Statutory Standing*, 42 Duke L.J. 1219, 1221 (1993) (italics added). "If a court errs in its standing dismissal and should have reached the merits, that court is wrong," but when it parses a complaint's language and allegations to reach its standing conclusion, especially one not based on any of this

Court's antitrust precedent, it is not just wrong, if reflects a trend that is harming private antitrust enforcement. *Id.* at 1221 n. 14; *Evergreen Partnering Group*, 720 F.3d at 43-44 ("Courts have evaluated the line between 'merely" alleging parallel conduct and alleging plausible agreement on a case-by-case basis after *Twombly*, and that process has elicited considerable confusion among the lower courts ….").

The trend reflected in this Court's antitrust cases over the past several decades has left an impression, intended or not, on the lower courts: in antitrust cases, the outcome determination has moved from trial, *Poller v. CBS*, 368 U.S. 464 (1962), to summary judgment, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), to the pleading stage, under *Twombly*. Vigilance in seeking to avoid baseless antitrust cases from moving forward is an admirable goal, but it should not result in turning the Sherman Act, "the Magna Carta of free enterprise," into an afterthought. *See* Andrew I. Gavil, *Thirty Years On: The Past Influence and Continued Significance of* Matsushita, 82 ANTITRUST L.J. 1, 13 (2018) ("Looking back, it can be understood today as a lynchpin of the Supreme Court's effort to re-engineer antitrust doctrine, but it also added its own imprimatur, propelling those changes forward in ways that continue to influence antitrust law today.").

This second question presented is an important one that this Court should decide because lower courts are wrongly applying a different, heightened standard in assessing antitrust complaints.

CONCLUSION

This case squarely presents two important and pure questions of antitrust law, both of which illustrate harm to the proper functioning of private antitrust enforcement: whether the ripeness doctrine is appropriate for a claim of monopoly, attempted monopoly, and market foreclosure; and are the lower courts improperly applying a heighted pleading standard in antitrust cases. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 7, 2019

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED OCTOBER 9, 2018

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-20607

SURESHOT GOLF VENTURES, INCORPORATED,

Plaintiff-Appellant,

v.

TOPGOLF INTERNATIONAL, INCORPORATED,

Defendant-Appellee.

October 9, 2018, Filed

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:17-CV-127

Before STEWART, Chief Judge, and WIENER and HIGGINSON, Circuit Judges.

PER CURIAM:*

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Appendix A

Sureshot Golf Ventures, Inc. ("SureShot") appeals the dismissal of its various antitrust claims stemming from Topgolf International, Inc.'s ("Topgolf") acquisition of Protracer, a Swedish producer of innovative golf-balltracking technology. The district court held that SureShot's claims were not ripe for review and that SureShot lacked antitrust standing because it failed to allege antitrust injury. For the reasons set out below, we AFFIRM the district court's judgment as MODIFIED to reflect a dismissal without prejudice.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Topgolf was founded in 2000 and operates golf entertainment centers in the United States and abroad. Topgolf combines driving ranges, where golfers hit golf balls at outdoor targets, with food and beverage service, golf services, entertainment, and other amenities. Using Topgolf's proprietary ball-tracking technology, golfers learn how far they hit a shot and are allocated points based on distance and accuracy.

SureShot, a Texas corporation, was formed in 2014 with the hopes of competing with Topgolf's entertainment centers by opening high-end, premier golf entertainment facilities. SureShot took a different approach to the "sportsbar- type entertainment facility" mastered by Topgolf and sought to create a distinct golfing experience using high-speed video cameras and software that track balls in flight and create "a unique, immersive Three Dimensional (3-D) ball flight and gaming experience."

SureShot hoped that its new golf experience would lure customers away from Topgolf and reduce Topgolf's market share, "thus reducing or eliminating Topgolf's ability to set monopoly prices." SureShot's founders, Bob and Bryan Peebler, invested significant time and resources into developing SureShot's business model, including by, *inter alia*, entering important contracts for licensing supplies, facilities, support, and technology.

To create real competition with Topgolf, SureShot relied on ball-tracking technology developed by Protracer as the primary feature of its business. Protracer developed technology capable of both tracking the flight of multiple golf balls and displaying, with graphics, the ball's flight in near real time on a television monitor. In 2012, Protracer launched the Protracer Range System, "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 game experience. Protracer also developed a turnkey system for managing and maintaining a ball-tracking system across a large-scale driving range facility, *i.e.*, across more than 100 hitting bays, which is the scale of a golf entertainment center. Because of the Protracer system's unique capabilities, SureShot expended substantial time, effort, and resources to qualify the Protracer system for use in its business, and Protracer made several improvements to ensure the product met SureShot's specific business requirements.

SureShot and Protracer entered into a Frame Agreement for the Supply of License, Support and

Maintenance of Professional Services (the "Frame Agreement") on April 17, 2015. The initial term of the agreement was five years, expiring in 2020. Pursuant to the Frame Agreement, Protracer contracted to supply the ball-tracking technology and to support and maintain the system in up to 500 bays in up to five facilities each year during the Initial Term, with a maximum commitment of 1600 bays, or 16 facilities. Protracer's obligations under the support and maintenance provisions of the Frame Agreement gave Protracer access to SureShot's facilities and other "sensitive, proprietary, and nonpublic confidential information." SureShot also alleges that Protracer intended to "stay neutral as a tracking provider" for golf entertainment facilities and would not enter into exclusive dealing contracts with SureShot or others.

However, in 2016, "Topgolf used its position as a monopolist to acquire Protracer." SureShot alleges the Topgolf-Protracer acquisition was made with the "intent to foreclose the market to SureShot and other competitors." After Topgolf's acquisition, SureShot's owners met with Topgolf executives in Houston, seeking assurances that the Protracer Range System would remain available after the initial five-year term of the Frame Agreement and that the acquisition would not result in a de facto exclusivity agreement with respect to any direct competitor. Topgolf refused to provide SureShot assurances of continued access to the Protracer Range System beyond the expiration of the Frame Agreement, and one of Topgolf's executives stated, "If I was in your position, I would look for alternatives." According to SureShot, Topgolf's representations during and after this meeting made

it "obvious that Topgolf had no intention of allowing competition because the very purpose of its Protracer acquisition was to squelch competition." Although the Frame Agreement remains intact, SureShot alleges that Topgolf's control of the technology effectively eliminated the Protracer system as a viable option for SureShot's future needs and deprived SureShot of a competitive opportunity to enter the interactive virtual golf market.

SureShot filed its complaint on January 17, 2017, alleging several federal antitrust claims: conspiracy in restraint of trade under Section 1 of the Sherman Act, 15 U.S.C. § 1; monopolization and attempted monopolization under Section 2 of the Sherman Act, 15 U.S.C. § 2; and unlawful acquisition under Section 7 of the Clayton Act, 15 U.S.C. § 18. SureShot sought a judicial declaration that Topgolf's actions violated federal antitrust laws and an award of treble damages. Topgolf subsequently sought to dismiss SureShot's complaint for lack of jurisdiction under Federal Rule of Civil Procedure 12(b)(1) and for failure to state a claim under Rule 12(b)(6). In short, Topgolf argued that SureShot's claims, which stemmed from "SureShot's fear that Topgolf [would] decline to renew or extend SureShot's license to the Protracer Range System when the current service contract expires in 2020," were not ripe for resolution because SureShot continued to have access to the ball-tracking system. Topgolf also argued that SureShot did not adequately allege that Topgolf's acquisition was illegal or resulted in anticompetitive effects. Specifically, Topgolf contended that SureShot had not been denied access to an "essential facility" necessary for its Sherman Act claims, that the acquisition did not

threaten competition, and that SureShot had not plausibly pled a relevant market as required under federal antitrust law.

SureShot filed a response, arguing that the facts alleged in its complaint adequately state a claim for relief under the Sherman Act and the Clayton Act. SureShot emphasized that Topgolf's intent in acquiring the Protracer Range System—which was different from the proprietary technology developed and used at Topgolf's golf entertainment facilities—was to foreclose competition, and that this intent violated antitrust laws. SureShot also challenged the proposition that it failed to allege a relevant product market, arguing that its allegations that Topgolf was a player in the "golf entertainment market" were legally adequate at the pleading stage. Topgolf filed a reply memorandum, reiterating its jurisdictional and substantive objections to SureShot's claims.

The district court granted Topgolf's motion to dismiss, holding that SureShot's claims were not ripe for consideration under Article III and that SureShot failed to plead antitrust injury sufficient to confer antitrust standing. The district court accepted Topgolf's argument that SureShot failed to allege that it was in fact denied access to the Protracer technology. Because of this, the district court found that "SureShot's perceived threats of monopolistic behavior [were] speculative and [did] not confer standing." The district court also held that SureShot lacked antitrust standing because it suffered no "antitrust injury." That is, according to the district court, SureShot failed to plead that Topgolf's actions harmed competition within the relevant market and not merely

SureShot's competitive advantage. The district court did not address the plausibility of SureShot's substantive claims. The district court dismissed SureShot's claims with prejudice on September 5, 2017,[1] and SureShot filed a notice of appeal on September 25, 2017.

II. DISCUSSION

The two issues on appeal are (1) whether SureShot's claims against Topgolf were ripe for consideration, and (2) whether SureShot alleged a cognizable antitrust injury.

A. Standard of Review

SureShot challenges the district court's Rule 12(b)(1) dismissal of its claims against Topgolf. This court reviews the grant of a motion to dismiss for lack of jurisdiction de novo. *In re FEMA Trailer Formaldehyde Prods. Liab. Litig.*, 668 F.3d 281, 286 (5th Cir. 2012); *see also Jebaco, Inc. v. Harrah's Operating Co., Inc.*, 587 F.3d 314, 318 (5th Cir. 2009) ("We review *de novo* motions to dismiss . . . ."). SureShot bears the burden of establishing subject-matter jurisdiction. *Castro v. United States*, 560 F.3d 381, 386 (5th Cir. 2009), *vacated on other grounds*, 608 F.3d 266 (5th Cir. 2010).

Under Rule 12(b)(1), a claim is "properly dismissed for lack of subject-matter jurisdiction when the court lacks the statutory or constitutional power to adjudicate"

1. The parties do not raise on appeal arguments related to SureShot's substantive claims except as necessary to address the jurisdictional issues.

the claim. *In re FEMA*, 668 F.3d at 286 (quoting *Home Builders Ass'n, Inc. v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998) (internal citation omitted)). The court should consider the Rule 12(b)(1) jurisdictional attack before addressing any attack on the merits, and lack of subject-matter jurisdiction may be found in the complaint alone. *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001) (per curiam). A motion to dismiss for lack of subject-matter jurisdiction should be granted only if it appears certain that the plaintiff cannot prove any set of facts in support of his claims entitling him to relief. *Wagstaff v. U.S. Dep't of Educ.*, 509 F.3d 661, 663 (5th Cir. 2007) (per curiam).

B. Ripeness

1. Applicable Law

This court reviews the jurisdictional issue of ripeness de novo. *See Choice Inc. of Tex. v. Greenstein*, 691 F.3d 710, 714 (5th Cir. 2012). "As the party asserting federal jurisdiction," SureShot has "the burden of demonstrating that jurisdiction is proper." *Stockman v. FEC*, 138 F.3d 144, 151 (5th Cir. 1998). Under Article III of the Constitution, federal courts are confined to adjudicating "cases" and "controversies." *Choice Inc. of Tex.*, 691 F.3d at 714-15. To be a case or controversy for Article III jurisdictional purposes, the litigation "must be ripe for decision, meaning that it must not be premature or speculative." *Shields v. Norton*, 289 F.3d 832, 835 (5th Cir. 2002); *see also Choice Inc. of Tex.*, 691 F.3d at 715 ("The justiciability doctrines of standing, mootness, political question, and ripeness 'all

originate in Article III's 'case' or 'controversy' language . . . .'" (omission in original) (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352, 126 S. Ct. 1854, 164 L. Ed. 2d 589 (2006))). In other words, "ripeness is a constitutional prerequisite to the exercise of jurisdiction." *Shields*, 289 F.3d at 835.

This court has previously set forth the prevailing standards for determining whether a dispute is ripe for adjudication:

> A court should dismiss a case for lack of "ripeness" when the case is abstract or hypothetical. The key considerations are "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." A case is generally ripe if any remaining questions are purely legal ones; conversely, a case is not ripe if further factual development is required.

New Orleans Pub. Serv., Inc. v. Council of New Orleans, 833 F.2d 583, 586-87 (5th Cir. 1987) (internal citations omitted).

2. Analysis

SureShot preliminarily argues that the district court failed to credit the allegations in its complaint as true, and this misconstruction of SureShot's pleading led the court to its erroneous ripeness decision. According to SureShot, the district court should have taken the Topgolf executive's

statement about seeking alternatives to the Protracer Range System as an immediate denial of future access to the technology and should not have determined for itself that the statement was not severe enough to qualify as denial of access.

SureShot maintains that, contrary to the district court's opinion, SureShot adequately alleged that the anticompetitive actions forming the basis of its complaint had occurred at the time this lawsuit was filed, and therefore its claims were ripe. SureShot emphasizes that the district court mischaracterized SureShot's antitrust claim as a complaint about a future contractual decision and that its case should make it beyond the motion to dismiss stage. SureShot also cites various pages in its complaint which SureShot contends adequately allege it was forced to cease operations because of the Topgolf-Protracer acquisition.

The district court interpreted SureShot's complaint to allege that Topgolf might, in the future, deny SureShot a license to use the Protracer ball-tracking system in its business. On this basis, the district court held that SureShot's claims were not ripe. On appeal, SureShot argues that its complaint "is littered with references to it ceasing operations" of its golf entertainment business because of the Topgolf-Protracer acquisition and Topgolf's subsequent refusal to provide assurances that the ball-tracking technology at the core of SureShot's business model would be available in the future. In support, SureShot specifically identifies the following record citations from its complaint:

- Topgolf "eliminated SureShot's competitive value proposition" and Topgolf's "anticompetitive behavior eliminates the public's choice of golf entertainment experiences."

- "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."

- "Under those circumstances, continuing to license and use Protracer technology was not a viable option . . ." and referencing advantages Topgolf would enjoy "[w]ith SureShot out of the way . . . .".

The above-cited provisions from SureShot's complaint are ambiguous about the nature and immediacy of SureShot's injury, and the remainder of its complaint reads in hypotheticals and future threatened injury. In *Clapper v. Amnesty International USA*, 568 U.S. 398, 133 S. Ct. 1138, 185 L. Ed. 2d 264 (2013), the plaintiffs challenged the constitutionality of a federal surveillance program but could not show that the government would "imminently" surveil them. *Id.* at 411. Because government surveillance of the plaintiffs was not "certainly impending," they lacked standing. *Id.* at 414. Undeterred, the plaintiffs argued that they had taken reasonable precautions "to avoid [the challenged] surveillance" and had thereby "suffer[ed] present costs and burdens that are based on a fear of surveillance." *Id.* at 415-16. The Supreme Court firmly rejected that argument, ruling that plaintiffs "cannot

manufacture standing" by "incur[ring] certain costs," even "as a reasonable reaction to a risk of harm." *Id.* at 416.

Similarly, SureShot's alleged injury is not "certainly impending." The complaint does not allege that the SureShot-Protracer Frame Agreement included an option to renew,[2] nor does it allege that Topgolf unequivocally stated it would not extend the Frame Agreement beyond 2020. The closest Topgolf came to denying future use of the Protracer technology was the statement of its unnamed top executive who advised SureShot to seek alternative ball-tracking technology in developing its business, which did not immediately terminate the SureShot-Protracer agreement.

SureShot's claims of market foreclosure stemming from the Topgolf-Protracer acquisition are similarly speculative. SureShot alleges that Topgolf's acquisition of the Protracer Range System would "cut off the supply to SureShot of the unique, leading-edge Protracer technology," give Topgolf control over licensing agreements, and authorize it to extend agreements to businesses interested in using the Protracer technology to open businesses other than golf entertainment facilities, thereby controlling prices and sending less qualified personnel for installation and service requests. However,

2. As such, this court does not analyze the cases cited by Topgolf and the district court, *Middle S. Energy, Inc. v. City of New Orleans*, 800 F.2d 488 (5th Cir. 1986) and *Destec Energy, Inc. v. S. Cal. Gas Co.*, 5 F. Supp. 2d 433 (S.D. Tex. 1997), for the conclusion that a claim against a party for exercising an option is not ripe until the option is actually exercised.

all of the allegations SureShot identifies for us are phrased in future terms, and SureShot has not alleged that any of the federal antitrust violations have resulted in the above-referenced feared actions.[3]

III. CONCLUSION

Because the resolution of this case is based solely on lack of subject-matter jurisdiction, SureShot's claim is dismissed without prejudice. *See, e.g., Pillar Panama, S.A. v. DeLape*, 326 F. App'x 740, 745 (5th Cir. 2009); *Ramming*, 281 F.3d at 161. Accordingly, the district court's judgment is AFFIRMED as MODIFIED to reflect a dismissal without prejudice.

3. Because the case is not ripe, we find it unnecessary to analyze whether SureShot alleged a cognizable antitrust injury as required for antitrust standing. *See Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 535, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983) (stating antitrust standing supplements the Article III standing requirements).

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION, FILED AUGUST 24, 2017

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION H-17-127

SURESHOT GOLF VENTURES, INC.,

Plaintiff,

v.

TOPGOLF INTERNATIONAL, INC.,

Defendant.

August 24, 2017, Decided
August 24, 2017, Filed, Entered

Memorandum Opinion & Order

Pending before the court is defendant Topgolf International, Inc.'s ("Topgolf") motion to dismiss. Dkt. 10. Having reviewed the motion, response, reply, and the applicable law, the court is of the opinion that Topgolf's motion to dismiss (Dkt. 10) should be GRANTED.

Appendix B

I. Background

This is an antitrust case between plaintiff SureShot Golf Ventures, Inc. ("SureShot") and defendant Topgolf. Topgolf was established in 2000 with multiple locations in the United States and the United Kingdom as a "golf entertainment center"[1] which offers point-scoring golf games as well as food and beverages. Dkt. 1. Customers hit golf balls toward a series of holes and are scored based on distance and accuracy. *Id.* SureShot was established at or around 2014 with the intent to compete with Topgolf's golf entertainment centers. *Id.* at 5.

At issue is the technology used to track the location of each golf ball. Topgolf developed its own proprietary technology to track the location of the golf balls. Dkt. 1. SureShot has licensed the use of the ball-tracking technology, the Protracer Range System, produced by the Swedish company Protracer. Dkt. 1. SureShot alleges that the Protracer model is "superior" to Topgolf's because the Protracer's software tracks the balls in flight, adds graphics to make the ball visible in near real time on a television monitor, and thus creates a three-dimensional gaming experience. *Id.* SureShot contends that Protracer's proprietary hardware, technology, and licensed software is integral to SureShot's business model. *Id.*

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1. SureShot uses the terms "golf entertainment centers," "golf entertainment facilities," and "golf entertainment venues" interchangeably throughout its complaint. *See e.g.*, Dkt. 1 at 1, 2, 5, 8, 12, 13. For purposes of this order, the court will use the term "golf entertainment centers."

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On April 17, 2015, SureShot entered into a five-year licencing agreement with Protracer, that lasts from 2015 to 2020 (the "Frame Agreement"). The Frame Agreement required Protracer to install Protracer Range Systems in up to 500 SureShot bays and five SureShot facilities each year and provide support and maintenance. *Id.* SureShot also alleges that Protracer stated that it would not enter into any exclusive contracts with a licensee. *Id.*

On May 24, 2016, Topgolf acquired Protracer and the Protracer Range System. Dkt. 1. According to Topgolf, SureShot continues to use the Protracer technology and it has not been deprived of any access. Dkt. 10. SureShot, however, argues that Topgolf's acquisition of Protracer means that Topgolf controls the very technology that SureShot built its business model upon, and thereby "den[ies] SureShot access to long-term, continued licencing of Protracer technology and purchasing of Protracer equipment." Dkt. 1 at 12. SureShot argues that TopGolf intends to foreclose market competition. Dkt. 1 at 10. SureShot cites TopGolf's refusal to give SureShot assurances that Protracer would continue to be available after the expiration of the five-year Frame Agreement as evidence. Dkt. 1 at 10. SureShot alleges that an executive from Topgolf said to SureShot that, "If I was in your position, I would look for alternatives." *Id.*

On January 17, 2017, SureShot filed a complaint against Topgolf alleging four federal antitrust claims: (1) conspiracy under Section 1 of the Sherman Act, (2) monopolization and (3) attempt to monopolize under Section 2 of the Sherman Act (15 U.S.C. § 1, 2), and (4)

unlawful acquisition under section 7 of the Clayton Act (15 U.S.C. § 18). Dkt. 1. On April 13, 2017, Topgolf filed a motion to dismiss. Dkt. 10. SureShot responded and Topgolf replied. Dkts. 14, 16.

II. Legal Standards

A. Motion to Dismiss for Lack of Jurisdiction

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) challenges a federal court's subject matter jurisdiction. Federal courts have limited jurisdiction; without jurisdiction conferred by statute, they lack the power to adjudicate claims. *See Stockman v. Fed. Election Comm'n*, 138 F.3d 144, 151 (5th Cir. 1998). Under Rule 12(b)(1), a claim is properly dismissed for lack of subject matter jurisdiction when the court lacks the statutory or constitutional power to adjudicate the claim. *Home Builders Ass'n, Inc. v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998).

B. Motion to Dismiss for Failure to State a Claim

"Federal Rule of Civil Procedure 8(a)(2) requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)). In considering a Rule 12(b)(6) motion to dismiss a complaint, courts generally must accept the factual allegations contained in the complaint as true. *Kaiser Aluminum & Chem. Sales, Inc. v. Avondale*

Shipyards, Inc., 677 F.2d 1045, 1050 (5th Cir. 1982). The court does not look beyond the face of the pleadings in determining whether the plaintiff has stated a claim under Rule 12(b)(6). *Spivey v. Robertson*, 197 F.3d 772, 774 (5th Cir. 1999).

"[A] complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, [but] a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (citations omitted). The "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Id.* The supporting facts must be plausible—enough to raise a reasonable expectation that discovery will reveal further supporting evidence. *Id.* at 556. When considering a motion to dismiss for failure to state a claim, "a district court must limit itself to the contents of the pleadings, including attachments thereto." *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir. 2000).

C. Sherman Act, § 1

Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." 15 U.S.C. § 1. While section 1 could be interpreted to proscribe all contracts, *see, e.g., Board of Trade of Chicago v. United States*, 246 U.S. 231, 238, 38 S. Ct. 242, 62 L. Ed. 683 (1918), it is never "taken [as] a literal approach to [its] language." *Texaco Inc. v. Dagher*,

547 U.S. 1, 5, 126 S. Ct. 1276, 164 L. Ed. 2d 1 (2006). Rather, section 1 "outlaw[s] only unreasonable restraints [on trade]." *State Oil Co. v. Khan*, 522 U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997).

D. Sherman Act, § 2

Section 2 of the Sherman Act makes it unlawful for an entity to "monopolize." 15 U.S.C. § 2. Monopoly power is "the power to control price or exclude competition." *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391, 76 S. Ct. 994, 100 L. Ed. 1264 (1956). To prove monopolization, 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." *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966). A prerequisite of an attempted monopolization or monopolization claim is proof of the relevant market. *C.E. Servs., Inc. v. Control Data Corp.*, 759 F.2d 1241, 1244 (5th Cir. 1985).

E. Clayton Act, § 7

Section 7 of the Clayton Act forbids mergers in any line of commerce where the effect may be "substantially to lessen competition or tend to create a monopoly." 15 U.S.C. § 18; *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 531, 93 S. Ct. 1096, 35 L. Ed. 2d 475 (1973). But proof of a "mere possibility of a prohibited restraint or tendency to monopol[ize] will not establish the statutory requirement. . . ." *du Pont*, 353 U.S. at 598.

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III. Analysis

SureShot raises four claims under the Sherman Act and the Clayton Act, for conspiracy, attempt to monopolize, monopolization, and unlawful acquisition. 15 U.S.C. §§ 1, 2, 18. Specifically, SureShot alleges that (1) TopGolf acquired the very technology that is essential to SureShot's operations, (2) TopGolf refused to provide SureShot assurances that the Protracer technology will be continuously available after its five-year licencing agreement expires, and (3) any support and maintenance requests placed through Protracer would expose confidential information or SureShot's plans to open a new facility.

Topgolf moves to dismiss the claims because (1) SureShot's claims are not ripe, (2) SureShot failed to plead anticompetitive or exclusionary conduct in its complaint, and (3) SureShot failed to plead a relevant market. Dkt. 10. As a threshold matter, the court will first address whether SureShot's claim is ripe, to confer standing. *Lujan v. Def. of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992).

A. Article III Standing

Standing requires plaintiffs "to demonstrate: they have suffered an 'injury in fact;' the injury is 'fairly traceable' to the defendant's actions; and the injury will 'likely . . . be redressed by a favorable decision." *Public Citizen, Inc. v. Bomer*, 274 F.3d 212, 217 (5th Cir. 2001) (quoting *Lujan*, 504 U.S. at 560-61). "An injury in fact

[is] an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560. Standing is jurisdictional in nature and should be decided by the court before reaching the merits of the case. *See Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 93-94, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998).

Topgolf moves to dismiss SureShot's claims, arguing that none of the claims is ripe for judicial determination because SureShot complains of an anticipated denial of access or future breach of contract. Dkt. 10 at 14; Dkt. 14 at 5. Topgolf argues that SureShot has not suffered any harm because Topgolf has continued to honor the terms of the licensing agreement between Protracer and SureShot. Dkt. 10 at 8. Topgolf argues that SureShot's legal theory is based solely on a prediction that someday Topgolf will decline to renew the existing service contract and thereby eliminate SureShot's continued access to the Protracer Range System. *Id.*

SureShot argues that it is harmed by Topgolf's acquisition of Protracer because (1) all of SureShot's support and maintenance requests must go through Protracer, at which point Topgolf would control the timing, quality, and efficiency of the repairs and replacement parts; (2) Protracer, and thereby Topgolf, would have access to "sensitive, proprietary, and non-public confidential information" that would harm SureShot's competitive advantage; and (3) when SureShot places an order with Protracer for a new installation, Topgolf will have knowledge of SureShot's plans to open a new facility.

Dkt. 1 at 8-10. SureShot also argues that Topgolf has deprived SureShot of a competitive opportunity to enter the market and alleges that Topgolf "*will have* complete control over [Protracer], including the ability to license it only to those markets or industries that do not occupy the entertainment golf facility space." Dkt. 1 at 11 (emphasis added).

Topgolf contends that this situation is an option contract, where "challenges to an option are not ripe for resolution before the option is exercised." Dkt. 10 at 13 (citing *Destec Energy, Inc. v. S. Cal. Gas Co.*, 5 F. Supp. 2d 433, 461-62 (S.D. Tex. 1997) (Rosenthal, J.)). Topgolf argues that it simply possesses an option not to renew SureShot's license of the Protracer Range System at the end of the five-year contract, and that SureShot is prematurely suing under the fear that Topgolf will decline to renew or extend the existing contract "when and if it occurs" in the future. Dkt. 10 at 6 (citing *Middle South Energy, Inc. v. City of New Orleans*, 800 F.2d 488 at 489-90 (5th Cir. 1986)).

The court agrees with Topgolf that SureShot has failed to plead that Topgolf has denied it access to the Protracer Range System. *See* Dkt. 14 (Pl. Resp.) at 3 (alleging Topgolf is "[f]orcing its competitor SureShot to incur considerable sums to become a significant competition only to *later* pull the plug on the license in 5 years . . . .") (emphasis added). The Fifth Circuit has held that challenges to an option are not ripe for resolution before the option is exercised. *See Middle South Energy*, 800 F.2d at 490. Further, the 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. *See* Dkt. 1 at 10. SureShot has not pled that Topgolf has denied it access to the Protracer technology.

At this point, the court finds that SureShot's perceived threats of monopolistic behavior are speculative and do not confer standing. *Phototron Corp. v. Eastman Kodak Co.*, 842 F.2d 95, 100 (5th Cir. 1988) (holding that the plaintiff must show antitrust injury and that the threat of defendant's monopolistic behavior is not enough to create standing). The court observes that none of the antitrust actions which SureShot alleges has actually occurred (i.e. controlling prices, foreclosing competitors from access to technology, sending less qualified personnel for installation and service requests, licensing the technology only to companies outside of golf entertainment centers). "Under *Cargill*, a competitor of two merging entities has standing to challenge the merger if an allegation and proof of predatory pricing is made." *Id.* (citing *Cargill*, 479 U.S. at 109); *see* Dkt. 1. Further, in *Red Lion Med. Safety, Inc. v. Gen. Elec. Co.*, a district court denied a motion to dismiss only after the plaintiff had successfully pled that after the defendant entered into an exclusive distributor agreement, other companies were charged a 20% premium on the purchase price of parts and experienced delayed shipments. No. 2-15-CV-307, 2016 U.S. Dist. LEXIS 94638, 2016 WL 3770958, at *1 (E.D. Tex. Mar. 31, 2016). Unlike in *Red Lion*, SureShot's allegations that Topgolf may prolong the wait time or provide lower quality work on SureShot's requests for maintenance and repair have not yet occurred. *Id.*

B. Antitrust Standing

Further, the court finds that SureShot not only lacks Article III standing, but also antitrust standing. "A plaintiff has standing to pursue an antitrust suit only if he shows: '1) injury-in-fact, an injury to the plaintiff proximately caused by the defendants' conduct; 2) antitrust injury; and 3) proper plaintiff status, which assures that other parties are not better situated to bring suit.'" *Waggoner v. Denbury Onshore, L.L.C.*, 612 Fed. App'x. 734, 736 (5th Cir. 2015) (citing *Doctor's Hosp. of Jefferson, Inc. v. Se. Med. Alliance, Inc.*, 123 F.3d 301, 305 (5th Cir. 1997).

The burden is on the plaintiff to prove that "it has or will suffer antitrust injury." *Anago, Inc. v. Tecnol Med. Prods., Inc.*, 976 F.2d 248, 249 (5th Cir. 1992). The Supreme Court has defined antitrust injury as an injury "of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Id.* (quoting *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 109, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986)). The Fifth Circuit has "narrowly interpreted the meaning of antitrust injury [to include increased prices and decreased output, and] excluding from it the threat of decreased competition." *Anago*, 976 F.2d at 249 ; *FUNimation Entm't v. A.D. Vision, Inc.*, 4:12-CV-1736, 2013 U.S. Dist. LEXIS 70855, 2013 WL 2189881, at *5 (S.D. Tex. May 20, 2013) (Ellison, J.) (identifying antitrust injury as "some form of predatory pricing or illegal tying . . . when the rival has engaged in something more than vigorous price, produce, or service competition"). The antitrust

laws were enacted for "the protection of competition not competitors." *Brown Shoe Co. v. United States*, 370 U.S. 294, 320, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962). "To have antitrust standing, a party must do more than meet the basic case or controversy requirement that would satisfy constitutional standing." *FUNimation Entm't*, 2013 U.S. Dist. LEXIS 70855, 2013 WL 2189881, at *5.

SureShot failed to plead that Topgolf's actions harmed competition overall, and not just SureShot's competitive advantage. SureShot argues that it has experienced antitrust injury because "long-term, continued licensing of Protracer technology and purchasing of Protracer equipment" is foreclosed and that SureShot does not have the financial means to develop its own technology or work with another supplier. Dkt. 1 at 12-13.

The Supreme Court has held that a plaintiff lacks antitrust standing if the same injury-in-fact would have occurred had a company of another size purchased the competing business. *Brunswick Corp. v. Pueblo Bowl—O—Mat, Inc.*, 429 U.S. 477, 487, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977) (holding plaintiff's injury of loss of income bore no relationship to the size of the defendant's company because a smaller company acquiring the competing business would harm the plaintiff just the same); *Jebaco, Inc. v. Harrah's Operating Co., Inc.*, 587 F.3d 314, 321 (5th Cir. 2009) (finding horizontal restraint of trade did not arise when plaintiff would have suffered the same harm whether defendant retained its assets or sold them to another party); *Anago*, 976 F.2d at 251 (holding plaintiff did not show that higher prices and decreased

competition will cause plaintiff injury and that plaintiff "will suffer a loss of independence whether or not [the] takeover violates antitrust principles").

The court finds that SureShot failed to plead that Topgolf's acquisition of Protracer would substantially lessen competition or tend to create a monopoly in the market overall. A federal court may not take jurisdiction over a matter unless it presents an actual controversy. *Md. Cas. Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 272-74, 61 S. Ct. 510, 85 L. Ed. 826 (1941). At this time, the court finds that SureShot has not presented any plausible factual allegations that Topgolf is foreclosing competition through its acquisition of Protracer. Because SureShot has not pled that Topgolf has denied or refused access to the Protracer Range System, SureShot's claims are not ripe for judicial determination. Accordingly, Topgolf's motion to dismiss is GRANTED.

IV. Conclusion

Topgolf's motion to dismiss (Dkt. 10) is GRANTED.

Signed at Houston, Texas on August 24, 2017.

/s/ Gray H. Miller
Gray H. Miller
United States District Judge

APPENDIX C — FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION, DATED SEPTEMBER 5, 2017

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION H-17-127

SURESHOT GOLF VENTURES, INC.,

Plaintiff,

v.

TOPGOLF INTERNATIONAL, INC.,

Defendant.

FINAL JUDGMENT

Pursuant to the memorandum, opinion and order entered on August 24, 2017, defendant Topgolf International, Inc.'s motion to dismiss (Dkt. 10) is GRANTED. Plaintiff SureShot Golf Ventures, Inc.'s claims are DISMISSED WITH PREJUDICE. Judgment is ENTERED in favor of the defendant.

Appendix C

This is a FINAL JUDGMENT.

Signed at Houston, Texas on September 5, 2017.

/s/Gray H. Miller
Gray H. Miller
United States District Judge