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WHERE'S THE FIRST TEE AND WHAT'S THE COURSE RECORD?: THE PROS AND CONS OF USING ADR IN THE PGA TOUR-LIV GOLF ANTITRUST SUIT

Sean McDowell[*†]

I. INTRODUCTION

LIV Golf has taken the professional golfing world by storm. Started by golfing legend Greg Norman and funded by the Saudi Arabia Public Fund, LIV golf has brought a new league with a new format to golf, but it has also drawn its fair share of criticism due to its sources of funding.[1] In response to the rise of LIV Golf, the PGA TOUR, professional golf's principal league, announced it would suspend any player that signed a contract to play for LIV Golf.[2] Recently, eleven LIV Golf players and LIV Golf itself have filed an antitrust suit against the PGA TOUR.[3] Not only has this suit captured the interest of golf fans worldwide, but it also could serve as a blueprint for future antitrust lawsuits in the sports market.

This paper will analyze the pros and cons of using Alternative Dispute Resolution ("ADR") in this lawsuit as opposed to going to trial, which is set for early 2024. Section II will give some background information for both tours. Section III will discuss the antitrust lawsuit, including what the parties are claiming and the implications of each side winning. Section IV will look into the different ways ADR can be applied to antitrust suits in general. The paper will conclude by analyzing the pros and cons of using ADR in this antitrust and ultimately determine that ADR should not be used unless someone who specializes in antitrust law presides over the dispute.

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† This article was finalized prior to the PGA TOUR-LIV Golf merger announcement.

1. Michela Moscufo, *9/11 families slam Saudi-backed LIV Golf tournament in New Jersey*, ABC NEWS (July 27, 2022, 4:47 PM), https://abcnews.go.com/US/911-families-slam-saudi-backed-liv-golf-tournament/story?id=87489440.

2. Mark Cannizzaro, *PGA Tour commissioner Jay Monahan's full scathing takedown of LIV Golf defectors*, N.Y. POST, (June 5, 2022, 10:45 AM), https://nypost.com/2022/06/09/jay-monahans-full-pga-tour-letter-suspending-liv-golfers/.

3. Golf Channel Digital, *LIV Golf players vs. PGA Tour: Timeline of legal proceedings and full court documents*, GOLF CHANNEL, (Aug. 18, 2022, 2:34 PM), https://www.golfchannel.com/news/liv-golf-players-vs-pga-tour-timeline-legal-proceedings-and-full-court-documents.

II. BACKGROUND

Understanding the present dispute requires some background information about the two tours, and the events leading up to the plaintiffs' lawsuit, most notably the PGA TOUR's decision to ban any player that signs with LIV Golf.

A. The PGA TOUR

The PGA TOUR formally began in 1968 when the Tournament Players Division broke away from the Professional Golfers' Association of America.[4] Led by Commissioner Joe Dey, the new organization became what is known today as the PGA TOUR.[5] Under the PGA TOUR's second commissioner, Deane Beman, the PGA TOUR really began to flourish; total revenue grew from $3.9 million in 1974 to $229 million in 1993.[6] During the same period, the PGA TOUR's assets grew from $730,000 to more than $200 million.[7] Tim Finchem became the next PGA TOUR Commissioner in 1994 and served until 2016.[8] Under Commissioner Finchem's leadership, the PGA TOUR expanded internationally, particularly through the creation of The President's Cup in 1994, which pits the United States Team against the International Team, the World Golf Championships in 1999, and the Fed-Ex Cup Playoffs in 2007.[9]

Today, the PGA TOUR continues to expand on both the nationally and internationally.[10] In 2014, the PGA TOUR moved to a wrap-around schedule under which the season enjoys forty-five events in forty-three weeks.[11] Ordinarily, the season begins in September and concludes the following August. The Fed-Ex Cup competition completed its sixteenth season in the 2021-22 season.[12] During that sixteen-year period, some of the best golfers in the world won the Fed-Ex Cup, including Rory McIlroy (2016, 2019, 2022), Tiger Woods (2007, 2009), Justin Thomas (2017), and Jordan Spieth (2015).[13]

Today, the FedEx Cup "is a season-long points competition."[14] The top 125 players in the points ranking advance to the FedEx Cup Playoffs, which consists of three events with progressive cuts of 125, 70, and 30.[15] FedEx Cup Points are distributed to the winners of tournaments as follows: 500 points for official PGA TOUR events, 600 points for the four major and THE PLAYERS Championship, 550 points for the World Golf Championships (WGC) events, the Genesis Invitation, Arnold Palmer Invitational, and the Memorial Tournament, and 300 points for

4. *PGA TOUR History,* PGA TOUR MEDIA GUIDE, https://www.pgatourmediaguide.com/intro/tour-history-chronology (last visited May 11, 2023).
5. *Id*.
6. *Id*.
7. *Id*.
8. *Id*.
9. *Id*.
10. *PGA TOUR History, supra* note 4.
11. *Id*.
12. *Id*.
13. *Id*.
14. *FedExCup Playoffs and Eligibility Points List:Overview*, PGA TOUR, https://www.pgatour.com/fedexcup/fedexcup-overview.html (last visited Mar. 12, 2023).
15. *Id*.

any other events.[16] Additionally, in response to LIV Golf, the PGA TOUR has co-sanctioned three tournaments for 2021-22 with the European Tour's Race to Dubai: the Barbasol Championship, the Barracuda Championship, and the Genesis Scottish Open.[17]

Even with the rise of LIV Golf, the PGA TOUR is the world's premier professional golf tour.

B. LIV Golf

LIV Golf has emerged as an alternative to the PGA TOUR, with a format that is shorter and smaller than PGA TOUR events.[18] Specifically, there are 48 players playing 54 holes compared to the PGA TOUR's 72-hole competitions with as many as three times the number of players in the LIV Golf events.[19] Additionally, there are not cuts on the PGA TOUR, and there is a shotgun start, "meaning players tee off from each hole on the course simultaneously and then proceed around the course's layout from there."[20] There are two competitions within each event. First, there is an individual stroke play competition where the lowest scorer wins.[21] At the end of seven events, the player with the most LIV ranking points will be the individual champion for the season.[22] Second, there is a the team portion of the event, in which the players are drafted onto twelve teams of four players each.[23] During each event, the top two scores count for each team for the first two rounds.[24] In the final round, the top three scores from each team count, and the team with the lowest score wins the team portion of the event.[25] LIV Golf's final event of a season is "a seeded four-day, four-round, match play knock-out."[26] There can be no doubt that LIV Golf's unique format may interest many golfers and even more golf fans, but there are two controversies surrounding the new league that some may find problematic to the league's entry onto the professional golf stage.

The primary criticism of LIV golf involves money. For one thing, the LIV Golf events contain the most prize money in the history of golf.[27] The winner of the event earns $4 million, and, since there is no cut, the person who finishes last is guaranteed $120,000 at every event.[28] In the team competition, the winning team of four splits $5 million among them.[29] Additionally, several of the more well-known players have accepted multi-million dollar appearance fees and signing bonuses.[30] For

16. *Id*.
17. *Id*.
18. Tariq Panja & Andrew Das, *What is LIV Golf? It Depends Whom You Ask,* N.Y. TIMES (May 9, 2023), https://www.nytimes.com/article/liv-golf-saudi-arabia-pga.html.
19. *Id*.
20. *Id*.
21. *THE LIV GOLF FORMAT,* LIV GOLF, https://www.livgolf.com/liv-format (last visited Mar. 12, 2023).
22. *See id*.
23. *See id*.
24. *See id*.
25. *See id*.
26. *See id*.
27. *See* Panja & Das*, supra* note 18.
28. *Id*.
29. *Id*.
30. *Id*.

example, Dustin Johnson, one of the best players in the world right now, has signed a deal rumored to be worth $150 million, and World Golf Hall of Famer Phil Mickelson's LIV deal is reported to be $200 million.[31] The amount of money has caused some PGA TOUR players, like Rory McIlroy, to question whether players are joining LIV Golf for the monetary incentives and whether these monetary incentives are healthy for the game of golf.[32]

Another element of LIV Golf that troubles some people, particularly the families of 9/11 victims, is its connection to the Saudi Arabian government.[33] One such family, Terry Strada, chair of 9/11 Families, believes the connection between the 9/11 terrorists and the Saudi government is "indisputable."[34] Strada claims that the Saudi government "actually provided the support network that was needed for the first arriving hijackers and most likely all of them to set up what they needed to plan, practice and carry out the attacks."[35] Additionally, many believe that the Saudi government is responsible for the death of journalist Jamal Khashoggi.[36] Thus, while LIV Golf certainly brings an exciting, new format to the game of golf, it also brings its fair share of controversy.[37]

C. Conflict Between the Two Leagues

On June 9, 2022, PGA TOUR Commissioner Jay Monahan announced that every player who joined LIV Golf had been suspended by the PGA TOUR.[38] In the letter, Monahan emphasized that the LIV players had violated the PGA TOUR's tournament regulations.[39] Monahan also assured PGA TOUR players that LIV golfers "*will not negatively impact your [PGA TOUR players'] tournament eligibility, your position in the Priority Rankings or your eligibility to compete in the FedEx Cup Playoffs."*[40] *Some players, like Phil Mickelson, chose not to comment about Commissioner Monahan's action when it was released.*[41] *Other players, like Ian Poulter, indicated their intention to fight the PGA TOUR's action:* "I've always had the ability

31. *Id*.
32. *See id.*
33. Moscufo, *supra* note 1.
34. *Id*.
35. *Id*.
36. *Id*.
37. *See* Panja & Das*, supra* note 18. The Saudi government is investing in LIV Golf and other sports, *id.* Indeed, The Crown Prince of Saudi Arabia, Mohammed bin Salman, has been investing greatly into different sports since 2015, *id.* Examples include "governments hosting Formula One races and professional boxing and wrestling matches; opening branches of world-class museums and universities like the Louvre Abu Dhabi and Georgetown University in Qatar; and buying up European soccer clubs[,]" such as Newcastle United, *id.* Indeed, in investing in golf, Kristian Coates Ulrichsten argues that the Saudis "are looking for an older, more professional market to try to make inroads to, a wealthier demographic," *id.* Many see this vast amount of spending on sports as a way for the Saudi government to move the country's reputation away from the 9/11 allegations and human rights abuses. *Id.* Some have even called it "sportswashing," "the process by which a group will launder reputation with professional sporting events, " *id.* As Terry Strada puts it: "they just try to buy respect. And you can't buy respect. You have to earn it," *id.*
38. Cannizzaro, *supra* note 2.
39. *Id*.
40. *Id*.
41. Mark Schlabach, *PGA Tour suspends all players taking part in first LIV Golf tournament,* ESPN (June 9, 2022, 9:40 AM), https://www.espn.com/golf/story/_/id/34063037/pga-tour-suspends-all-players-taking-part-first-liv-golf-tournament.

to play golf all around the world. What's wrong with that? I haven't done anything wrong. . . . I've played everywhere, the game of golf that I love. They're going take that opportunity away? That's disappointing."[42] In response, LIV Golf called the PGA TOUR's action "vindictive," arguing that it is "troubling that the Tour, an organization dedicated to creating opportunities for golfers to play the game, is the entity blocking golfers from playing"[43] Greg Norman added that "[w]e believe the players are independent contractors and have a right to go play wherever they want to go play."[44]

PGA TOUR loyalists like Rory McIlroy worry that what LIV Golf is doing is going to fracture the game of golf.[45] He indicated at a press conference that LIV Golf is going to create destroy the cohesion of professional golf and confuse the public about which golfer is allowed to play in which tournament.[46] Justin Thomas, another PGA TOUR loyalist, wishes that LIV Golf players would have the courage "to say I'm doing this for the money."[47] At his Open Championship press conference, Tiger Woods, widely considered one of the greatest golfers of all time, heavily criticized LIV Golf saying he does not understand the new league and questions where the incentive is to get better and practice.[48]

*In a later interview, Jay Monahan made it clear that LIV Golfers would not be allowed back, saying, "*every player has a choice, and I respect their [the LIV players'] choice, but they've made it. We've made ours. We're going to continue to focus on the things that we control and get stronger and stronger. I think they understand that."[49] More recently, Greg Norman has indicated a similar disinterest in negotiating with the PGA TOUR: "[w]e have no interest in sitting down with them, to be honest with you, because our product is working."[50] Norman went on to explain, "[w]e tried awfully hard - I know I did personally for the past year. . . . When we knew we were never going to hear from them, we just decided to go."[51] Norman does not see a problem with golfers being able to play on any tour they want and claims LIV Golf is an "additive" to the rest of the golf tours, including the PGA TOUR.[52]

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42. *Id*.
43. *Id*.
44. *Id.*
45. *Id*.
46. *Id*.
47. Chris Cwik, *Justin Thomas blasts LIV golfers: 'Have the balls to say I'm doing this for the money'*, YAHOO! SPORTS (July 2, 2022), https://sports.yahoo.com/justin-thomas-blasts-liv-golfers-have-the-guts-to-say-im-doing-this-for-the-money-160828930.html?fr=sycsrp_catchall.
48. Bob Harig, *Tiger Woods Disappointed With Players Joining LIV Golf: 'I Don't Understand It',* SPORTS ILLUSTRATED (July 12, 2022), https://www.si.com/golf/news/tiger-woods-disappointed-players-liv-golf.
49. Joel Beall, *Jay Monahan delivers clear, blunt response to LIV players who may want to return to the PGA Tour in the future,* GOLFDIGEST (Aug. 24, 2022), https://www.golfdigest.com/story/jay-monahan-liv-golfers-tour-championship-2022#:~:text=LIV%20Golf-,Jay%20Monahan%20delivers%20clear%2C%20blunt%20response%20to%20LIV%20players%20who,PGA%20Tour%20in%20the%20future&text=Given%20the%20drastic%20schedule%20changes,and%20want%20to%20go%20back.
50. Mark Schlabach, *Greg Norman says LIV Golf circuit has 'no interest' in truce with rival PGA Tour*, ESPN (Sept. 15, 2022), https://www.espn.com/golf/story/_/id/34596838/greg-norman-says-liv-golf-circuit-no-interest-truce-rival-pga-tour.
51. *Id*.
52. *Id*.

III. THE ANTITRUST SUIT

This section will outline the antitrust suit itself, including the claims by LIV Golf and LIV Golf players, the recent TRO hearing, and the current status of the lawsuit.

A. The Complaint

On August 3, 2022, eleven LIV Golfers filed an antitrust lawsuit against the PGA TOUR.[53] The eleven golfers are: Phil Mickelson, Talor Gooch, Hudson Swafford, Matt Jones, Bryson DeChambeau, Abraham Ancer, Carlos Ortiz, Ian Poulter, Pat Perez, Jason Kokrak, and Peter Uihlein.[54] However, all eleven plaintiffs are not still in the lawsuit. Carlos Ortiz, Pat Perez, Abraham Ancer, and Jason Kokrak have since withdrawn their names from the lawsuit.[55] Additionally, LIV Golf intervened in the lawsuit on August 26, 2022, in an amended complaint filed with the United States District Court for the Northern District of California.[56]

The players' first claim is the unlawful monopsonization[57] of the market in violation of § 2 of the Sherman Act (15 U.S.C. § 2).[58] Section 2 of the Sherman Act makes it a felony for any monopolization of interstate commerce as well as any conspiracies or attempts to do so.[59]

In their complaint, the players identify six ways in which the PGA TOUR has violated § 2 of the Sherman Act.[60] Through these alleged violations of § 2 of the Sherman Act, the players claim nine injuries resulting from the PGA TOUR's

53. Golf Channel Digital, *supra* note 3.

54. *Id*.

55. Rex Hoggard, *Two more players drop out of antitrust lawsuit; LIV Golf added as interested party*, GOLF CHANNEL (Aug. 27, 2022), https://www.golfchannel.com/news/two-more-players-drop-out-antitrust-lawsuit-liv-golf-added-interested-party.

56. Bob Harig, *LIV Golf Added to Antitrust Suit Against PGA Tour; Two More Players Drop Out*, SPORTS ILLUSTRATED (Aug. 27, 2022), https://www.si.com/golf/news/2022-liv-golf-added-to-antitrust-suit-against-pga-tour-two-more-players-drop-out.

57. *See* Julie Young, *Monopsony: Definition, Causes, Objections, and Example*, INVESTOPEDIA, https://www.investopedia.com/terms/m/monopsony.asp (Sept. 14, 2022) ("A monopsony is a market condition in which there is only one buyer, the monopsonist. […] The difference between a monopoly and a monopsony is primarily in the difference between the controlling entities. A single buyer dominates a monopsonized market while an individual seller controls a monopolized market.").

58. Complaint & Demand For Jury Trial at 91, Mickelson v. PGA TOUR, Inc., No. 3:22-cv-04486 (N.D. Cal. Aug. 3, 2022).

59. 15 U.S.C. § 2 ("Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or person, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.").

60. Complaint & Demand For Jury Trial at 91, *Mickelson* ("(1) threatening to expel and impose a lifetime ban on all players who contract with LIV Golf; (2) imposing unreasonable and anticompetitive restrictions on players' ability to sell their independent contractor services, including the Media Rights Regulation and Conflicting Events Regulation in the Regulations, which have the effect of foreclosing competition; (3) threatening to enforce the terms of the Regulations beyond their meaning to deny players the freedom to play in competing tours; (4) enforcing the terms of the Regulations to deny Plaintiffs' competitive opportunities; (5) threatening to harm other agencies, businesses or individuals who would otherwise work with Plaintiffs and/or LIV Golf; and (6) suspending and punishing Plaintiffs for playing in LIV Golf and supporting it, all in order to punish and harm Plaintiffs, to prevent competition for their services, and to prevent LIV Golf from launching a competitive elite professional golf tour.").

actions.[61] In essence, the players are claiming that, by taking the above actions, the PGA TOUR is seeking to destroy LIV Golf in order to maintain its monopoly in the professional golf market.[62]

The players' second claim concerns the PGA TOUR's recent alliance with the European Tour. Specifically, the players allege that the PGA TOUR and the European Tour have engaged in a "group boycott" whereby the two leagues will work together to prevent their players from playing on the LIV Golf tour in violation of § 1 of the Sherman Act.[63] Section 1 of the Sherman Act proscribes any restraint on interstate commerce or trade.[64] The players draw a distinction between this PGA TOUR-European Tour alliance against LIV Golf and the history of players being able to play on multiple professional golf tours.[65] Historically, the PGA TOUR allowed its players to play in multiple leagues and grants permission to players to compete in events of other tours, including European Tour Events.[66] However, in the case of LIV Golf, the players allege that the PGA TOUR has purposefully "departed from its longstanding practices" in order to exclude LIV Golf.[67] Thus, the players argue these actions by the PGA TOUR and European Tour are "unreasonable restraints of trade that are unlawful under Section 1 of the Sherman Act" because they destroy competition offered by LIV Golf and reinforce the PGA TOUR's monopoly.[68]

The third claim made by the players is essentially a California state law claim that parallels the § 1 of the Sherman Act claim.[69] Cal. Bus. & Prof. Code § 16720(a) provides: "A trust is a combination of capital, skill or acts by two or more persons for any of the following purposes: (a) To create or carry out restrictions in trade or commerce. . . ."[70] The players assert the same argument as they did in their second claim: through the PGA TOUR's group boycott with the European Union to ban LIV players from their events, some of which take place in California, the PGA TOUR has taken actions to eliminate competition and preserve its monopoly.[71]

61. (1) "Preventing vigorous competition for elite professional golfer services; • Suspending Plaintiffs for playing professional golf;" (2) "Preventing LIV Golf from contracting with agencies, vendors, sponsors, advertisers and players needed to offer an elite professional golf entertainment product;" (3) "Impacting competition in contracting for the services of elite professional golfers;" (4) "Depressing compensation for the services of elite professional golfers below competitive levels;" (5) "Decreasing the output of elite professional golfer services opportunities;" (6) "Denying Plaintiffs the right to have free agency for their independent contractor services;" (7) "Interfering with Plaintiffs' and others' contractual negotiations with LIV Golf;" (8) "Interfering with LIV Golf's contractual negotiations with agencies, sponsors, venues, vendors, broadcasters, and partners to work with LIV Golf;" and (9) "Preventing LIV Golf from promoting elite professional golf to fans." *Id*. at 92.

62. *Id.*

63. *Id.* at 93.

64. 15 U.S.C. § 1 ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.").

65. Complaint & Demand For Jury Trial at 94, *Mickelson*.

66. *Id.*

67. *Id.*

68. *Id*. at 95.

69. *Id.*

70. Cal. Bus. & Prof. Code § 16720(a) (through 2012 Leg. Sess.).

71. Complaint & Demand For Jury Trial at 96, *Mickelson*.

Further, under California law, "except as provided in this chapter, every trust is unlawful, against public policy and void."[72] Therefore, the group boycott between the PGA TOUR and the European Tour violates California law.[73]

The players' fourth claim asserts that the PGA TOUR breached the contracts that it offered to the players.[74] The contracts were the players' membership applications and membership renewal applications.[75] In those applications, the players agreed to comply with the PGA TOUR Regulations, and the agreement was legally binding between the players and the PGA TOUR.[76] Section VII.E.2 of the PGA TOUR Regulations, the players allege, allows players who have been suspended or disciplined to continue to play PGA TOUR events if they players appeal the decision.[77] Thus, the players argue that they should be allowed to play in PGA TOUR Events and in the FedEx Cup Playoffs until their appeals are resolved by the PGA TOUR's Appeals Committees.[78] Because of the PGA TOUR's refusal to allow them to play while their appeals were pending, the players allege that they lost points in various rankings[79], their reputations, and other career opportunities, wages, and expenses.[80]

The final claim the players make is for declaratory judgment that the PGA TOUR violated the players' right a fair procedure.[81] In this claim, the players allege that the PGA TOUR is a "gatekeeper organization" in the professional golf market.[82] The players claim that the PGA TOUR is threatening their careers through procedurally unfair actions, including the Commissioner's suspensions being irrational and anti-competitive, the lack of process in issuing those suspensions, and the PGA TOUR's refusal to allow the players to play pending their appeals of their suspensions.[83] With these allegations, the players ask the court to rule that the alleged actions of the PGA TOUR were unlawful and violated their right to a fair procedure.[84]

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72. § 16726.
73. Complaint & Demand For Jury Trial at 97, *Mickelson*.
74. *Id.* at 98.
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. *E.g.*, Official World Golf Rankings points, FedEx Cup Playoffs points, etc.
80. Complaint & Demand For Jury Trial at 98, *Mickelson*.
81. *Id.*
82. *Id.*at 99.
83. *Id.* at 99-100 ("[(1)] The Tour's Commissioner imposed the suspensions to penalize Plaintiffs for participating in golf tournaments sponsored by LIV Golf in order to further the Tour's unlawful objective of foreclosing competition; [(2)] The Plaintiffs are denied any hearing or meaningful opportunity to respond to the charges against them considering the severity of the sanctions imposed; [(3)] The Plaintiffs are denied any review by an impartial decision maker. Instead, their appeals would be decided by a three-person appeals committee, composed of members of the Tour's Policy Board—i.e., the same Tour leadership that has been engaged in a public and well-documented vendetta against anything and everything related to LIV Golf for the last two years; [(4)] The suspensions imposed on the Plaintiffs are substantively irrational because they are premised on violations of unlawful Regulations, which are designed to achieve, have of the effect of achieving, and have been wielded in a discriminatory manner to further the Tour's anticompetitive end; and [(5)] The Tour has refused to honor its Regulations that require it to stay suspensions pending Plaintiffs' appeals of the career-threatening, long-term and indefinite suspensions which is particularly unfair in light of Plaintiffs' serious allegations against the unlawful nature of the Regulations they allegedly violated and the severity of their sanctions.").
84. *Id.* at 100.

In sum, the LIV Golf players state that the PGA TOUR is intentionally and maliciously excluding them from playing in PGA TOUR events and, through its alliance with the European Tour, other events as well.

B. The TRO Hearing

On August 3, 2022, three of the plaintiffs in the lawsuit, Talor Gooch, Hudson Swafford, and Matt Jones, filed a motion for a temporary restraining order ("TRO").[85] In their motion, the players asked the court to enjoin their suspensions and allow them to play in the FedEx Cup Playoffs.[86] In order to receive a TRO, they players were required to "establish (1) that he is likely to succeed on the merits; (2) that he is likely to suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in his favor; (4) and that an injunction is in the public interest."[87]

The first element requires the players to prove they are likely to succeed on the merits. Here, the players present four arguments: (1) "[t]he Tour breached its regulations by refusing to abate TRO Plaintiffs' suspensions pending appeal"; (2) "[t]he Tour unlawfully maintains a monopoly under Section 2 of the Sherman Act; (3) [t]he Tour has unlawfully agreed with others to boycott players under Section 1 of the Sherman Act; (4) [t]he Tour's appeal process does not justify the suspensions, both because the suspensions were an illegal exercise of monopoly power, and because they were unfair."[88] These arguments, which mirror the players' claims in their complaint, are discussed in the preceding section.

The second element requires the plaintiffs to show that they will likely suffer irreparable harm absent preliminary relief.[89] Concerning this element, the players presented five examples of how they will suffer irreparable harm if the TRO is not granted: the players will "(1) lose the opportunity to qualify for the 2023 Majors, (2) lose opportunities to accumulate points, (3) lose chances to qualify for other premier tournaments, (4) lose income earning opportunities, and (5) suffer irreparable losses to goodwill, reputation, and brand."[90] In support of this argument, the players cite a Ninth Circuit case that held "restricting professional golfers' ability to play golf causes 'immeasurable injuries' and irreparable harm."[91] Thus, the players argue, if the PGA TOUR "is allowed to proceed with its anti-competitive behavior," they will be irreparably harmed.[92] In response to this, the PGA TOUR offers two main points: the LIV players delayed seeking relief, and the LIV Players

85. Notice of Motion & Motion for Temp. Restraining Order at 1, Mickelson v. PGA TOUR, Inc., No. 3:22-cv-04486 (N.D. Cal. Aug. 3, 2022).

86. *Id.*

87. Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008).

88. Notice of Motion & Motion for Temp. Restraining Order at 11–22, *Mickelson*.

89. *Winter*, 555 U.S. at 20.

90. Notice of Motion & Motion for Temp. Restraining Order at 22, *Mickelson*.

91. *Id.* at 23 (quoting Gilder v. PGA Tour, Inc., 936 F.2d 417, 423 (9th Cir. 1991) (forcing golfers not to use the club of their choice would cause irreparable harm because it would "have an immediately discernible but unquantifiable adverse impact on their earnings, their ability to maintain their eligibility for the tour, and for endorsement contracts")).

92. *Id.*

claimed damages are inadequate to constitute irreparable harm.[93] Indeed, some courts have held that "delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm."[94] Additionally, the PGA TOUR points out that monetary damages are usually not considered irreparable.[95] Further, insofar as the LIV players are seeking non-monetary relief, the PGA TOUR argues that their non-monetary relief is mere speculation, especially given the fact that some of their fellow LIV players have not sought to compete in the FedEx Cup Playoffs.[96]

In response, the PGA TOUR claimed the LIV Players will not succeed on the merits for five principle reasons: (1) "the players lack antitrust standing"; (2) "[t]he law and facts do not clearly favor TRO Plaintiffs on their Section 2 [of the Sherman Act] claim"; (3) "[t]he law and facts do not clearly favor TRO Plaintiffs on their Section 1 [of the Sherman Act] claim; (4) the players "are not entitled to play on the PGA TOUR pending their appeals"; (5) the players' "'fair process' claim is meritless."[97]

The next element requires the balance of equities favors the players.[98] Given the alleged injuries noted by the players above, the players claim that the PGA TOUR cannot demonstrate how it will be harmed by allowing the LIV golfers to play in the FedEx Cup playoffs.[99] Indeed, the players had already qualified for the playoffs by their own play this past season.[100] Furthermore, the players do not see how the participation of three golfers in the playoffs can harm the PGA TOUR more than the players would be harmed if they were not allowed to play.[101] Therefore, the players argue that the balance of equities favors them.[102] In contrast, the PGA TOUR claims its harm would be greater than the LIV players allege because it will not be able to enforce its regulations against those who break them, and its reputation will be harmed "if it is forced to give a stage to players engaged with LIV and to associate the PGA TOUR brand with the Saudi government's efforts to "sports-wash" its deplorable reputation."[103]

On the final element for a temporary restraining order, the players argue that "there is a strong public interest in enforcing the antitrust laws and preserving free and fair competition.[104] The players also see a public interest in promoting competition, which the TRO would accomplish by allowing the three players to compete in the FedEx Cup Playoffs.[105] The PGA TOUR counters this point by claiming that the TRO would allow LIV players to "unfairly reap the benefits of the TOUR's

93. PGA TOUR's Opposition to Motion for a Temp. Restraining Order at 12–15, Mickelson v. PGA TOUR, Inc., No. 5:22-cv-04486-BLF (N.D. Cal. Aug. 8, 2022).
94. Oakland Trib., Inc. v. Chron. Pub. Co., 762 F.2d 1374, 1377 (9th Cir. 1985).
95. PGA TOUR's Opposition to Motion for a Temp. Restraining Order at 13, *Mickelson* (quoting hiQ Labs, Inc. v. LinkedIn Corp., 31 F.4th 1180, 1188 (9th Cir. 2022)).
96. *Id*.
97. *Id*. at 17–25.
98. Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008).
99. Notice of Motion & Motion for Temp. Restraining Order at 24, Mickelson v. PGA TOUR, Inc., No. 3:22-cv-04486 (N.D. Cal. Aug. 3, 2022).
100. *Id.*
101. *Id.*
102. *Id.* at 25.
103. PGA TOUR's Opposition to Motion for a Temp. Restraining Order at 16, Mickelson v. PGA TOUR, Inc., No. 5:22-cv-04486-BLF (N.D. Cal. Aug. 8, 2022).
104. Notice of Motion & Motion for Temp. Restraining Order at 24, *Mickelson*, No. 3:22-cv-04486 (N.D. Cal. Aug. 3, 2022) (citing Boardman v. Pac. Seafood Grp., 822 F.3d 1011 (9th Cir. 2016)).
105. *Id.*

media and sponsorship rights, which are exclusive to TOUR members, and force the TOUR's partners and sponsors to be associated with LIV and its backers."[106] Additionally, the PGA TOUR argues that a TRO would "engender consumer confusion because players with dual, conflicting loyalties may promote LIV over the PGA TOUR while participating in TOUR events."[107]

Ultimately, Judge Beth Freeman denied the TRO.[108] Judge Freeman reasoned that the three players "knew the potential consequences of joining the rival LIV circuit and should not be granted emergency injunctive relief to play in the Tour's lucrative postseason."[109] Judge Freeman also noted that the three players have been "well-compensated" by signing with LIV Golf.[110] Therefore, the Court ruled that the players did not show that they will suffer irreparable harm if the TRO is not granted.[111]

The TRO hearing was a huge first win for the PGA TOUR. However, with the trial set for the beginning of 2024, the fight between the PGA TOUR and LIV Golf has only just begun.

IV. APPLYING ADR IN ANTITRUST LAWSUITS

This section examines how Alternative Dispute Resolution ("ADR") can be applied in antitrust lawsuits, how it has been applied in antitrust suits, and how the United States government approaches ADR in antitrust suits.

A. Different Ways ADR Can Be Applied to Antitrust Suits

Most antitrust litigators "view ADR with skepticism."[112] While almost 90 percent of antitrust lawsuits do settle, most antitrust litigators prefer "the traditional approach of settling after completion of discovery, when the parties' positions have crystallized and counsel are in a position to give their clients a fairly realistic estimate of the prospects of success at trial and the likely damage exposure."[113] One possible reason for this is that antitrust cases are becoming "increasingly complex" with most judges performing economic and econometric analysis.[114] Thus, antitrust does not consist of "per se rules and bright line prohibitions" anymore.[115] However, the law and economics movement has shifted antitrust suits to a case-by-case approach where "judges and juries are frequently called upon to determine which

106. PGA TOUR's Opposition to Motion for a Temp. Restraining Order at 17, *Mickelson*.
107. *Id.*
108. Ryan Lavner, *Judge denies temporary restraining order; LIV Golf players cannot compete in playoffs*, GOLF CHANNEL, (Aug. 9, 2022, 6:37 PM), https://www.golfchannel.com/news/judge-denies-temporary-restraining-order-liv-golf-players-cannot-compete-playoffs.
109. *Id.*
110. *Id.*
111. *Id.*
112. Janet L. McDavid, *Using Alternative Dispute Resolution in Antitrust Cases*, 4-SPG ANTITRUST 25, 25 (1990).
113. *Id.*
114. Michael R. Baye & Joshua D. Wright, *Is Antitrust Too Complicated for Generalist Judges? The Impact of Economic Complexity and Judicial Training on Appeals*, J. L. AND ECON., 1, 1 (2010).
115. *Id.* at 2.

business arrangements are anticompetitive, and which are not."[116] Therefore, most antitrust litigators might favor at least going through discovery in order to run these economic analyses, so ADR may not be the right way to handle these complex lawsuits.

However, Courts are increasingly receptive to ADR techniques.[117] Federal Rule of Civil Procedure 16 "authorizes the court to use pretrial conferences to facilitate settlements and suggests that judges consider the use of extrajudicial techniques to settle lawsuits."[118] Some courts have used FRCP 16 to compel parties to engage in a summary jury trial.[119] However, there is other authority indicating that courts compelling parties to engage in summary trials is wrong.[120]

The Center for Public Resources (CPC) published two reports in 1987 that discuss the characteristics of antitrust suits that could make them amenable to ADR.[121] First, the parties and their attorneys must give ADR a chance.[122] In other words, the parties must take any ADR procedures seriously and act in good faith. "In some cases, this may require that ADR techniques be used after substantial pretrial proceedings; in other cases, the potential savings of time and/or money may be sufficient, particularly coupled with the inherent risks involved in litigation."[123] Second, the parties "must cooperate on procedural issues."[124] For example, the parties should not be objecting or opposing the other party's issues, requests, or motions simply for the sake of objection or opposition. The parties of course can disagree on procedural issues, but those disagreements must be reasonable and in good faith. Third, ADR works better for parties that have had prior business relationships with one another and/or may have future business relationships with one another.[125] Fourth, the fewer the parties, the better ADR will work, but none of the parties "can be pursuing the litigation for ulterior purposes."[126] In other words, there can be no hidden motives from either party if ADR methods are to succeed.

With respect to the parties, "[d]efendants are more likely to be receptive to ADR if they recognize a real prospect of liability, the time value of money does not outweigh the cost of litigation, and/or they want to avoid public disclosure of sensitive facts or documents."[127] On the other hand, "[p]laintiffs are more likely to participate if there is a real chance of advancing the date on which they collect, they can minimize litigation costs, and they can obtain enough factual information

116. *Id.*
117. McDavid, *supra* note 112, at 25.
118. *Id.* at 25–26.
119. *In re* Atl. Pipe Corp., 304 F.3d 135, 148 (1st Cir. 2002); Home Owners Funding Corp. of Am. v. Century Bank, 695 F. Supp. 1343, 1347 n.3 (D. Mass. 1988); Fed. Rsrv. Bank of Minneapolis v. Carey-Can., Inc., 123 F.R.D. 603 (D. Minn. 1988); Arabian Am. Oil Co. v. Scarfone, 119 F.R.D. 448 (M.D. Fla. 1988).
120. Strandell v. Jackson Cnty., Ill., 838 F.2d 884 (7th Cir. 1987); In re NLO, Inc., 5 F.3d 154, 157–58 (6th Cir. 1993).
121. Center for Public Resources Antitrust Committee, *Pretrial Management and Judicial Settlement Strategies in Antitrust Litigation* (1987); Center for Public Resources Antitrust Committee, *Private ADR in Antitrust Disputes* (1987).
122. McDavid, *supra* note 112, at 26.
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*

through discovery in advance of ADR to prepare adequately and have some confidence in the outcome."[128]

While it rarely occurs in practice, the success of ADR is maximized when it is used early in the litigation.[129] Discovery is a great example. The CPR Antitrust Committee has outlined a two-phase discovery plan using ADR.[130] In the first phase of discovery, the court and the parties would "learn the significant facts and understand the case. It would last approximately six months and would be followed by the filing of dispositive motions, if appropriate."[131] After this phase, the parties could use various ADR techniques such as a mini-trial, a summary jury trial, or settlement negotiations involving a neutral expert."[132] If the settlement negotiations or the ADR techniques fail, the parties could move into a second phase of discovery.[133] The CPR argues that "[a] phased discovery program will require cooperation among trial counsel and the court's willingness to utilize a novel approach. It is unlikely to succeed in the absence of either component."[134]

There are many different ways that ADR can be applied in antitrust suits. However, the above applications to antitrust suits were only in the context of the parties to the litigation, and the court. Since golf is prominent on both the domestic and the international stage, it is also useful to understand the ADR-antitrust policies of the United States and the European Union, two of the most popular golf markets. The next section discusses the policies of these governments.

B. United States Views of ADR in Antitrust Suits

For the United States Department of Justice (DOJ), it is "the policy of the Antitrust Division to encourage the use of ADR techniques in those civil cases where there is a reasonable likelihood that ADR would shorten the time necessary to resolve a dispute, reduce the taxpayer resources used to resolve a dispute, or otherwise improve the outcome for the United States."[135] The DOJ views ADR as a way to shorten the time span of antitrust lawsuits and to produce better outcomes between the parties in antitrust suits.[136] However, the DOJ emphasizes that ADR, specifically arbitration, may only be useful "in appropriate circumstances."[137] The DOJ provides three examples of such circumstances: first, arbitration can be used to resolve a specific issue.[138] Second, the parties can use their own procedures "beyond what courts can offer."[139] Third, the parties have more control over the remedy than they

128. McDavid, *supra* note 112, at 26.
129. *Id.*
130. *Id.* at 27.
131. *Id.*
132. *Id.*
133. *Id.*
134. McDavid, *supra* note 112, at 27.
135. Memorandum from the U.S. Dep't of Just. on Updated Guidance Regarding the Use of Arb. and Case Selection Criteria (Nov. 12, 2020) (on file with author).
136. *Id.*
137. *Id.*
138. *See id.*
139. *Id.* at 2.

would in litigation.[140] Thus, the DOJ appears to support ADR in antitrust suits in the appropriate circumstances.

In its guidance, the DOJ also provides factors for when ADR, specifically arbitration, would be appropriate in antitrust suits and factors where ADR would be less appropriate in antitrust suits. For factors in favor of arbitration, the first factor is "conservation of enforcement resources," meaning arbitration is usually more efficient than trial.[141] Second, if the "issues in the case lend themselves to efficient resolution via arbitration because they are clear and easily agreed upon for presentation to an arbitrator," then arbitration should be used.[142] Third, "factual or technical complexity," meaning an arbitrator would be more beneficial to the parties than a trial judge or a jury.[143] Lastly, a need by the parties to "control the timing of the resolution" and "the scope of relief," which harkens back to the efficiency benefits of ADR as compared to trial.[144] The factors weighing against use of arbitration are two-fold: judicial intervention is "required" or "necessary."[145] In other words, some cases simply cannot be resolved with ADR and must go to trial to achieve the proper resolution.

In essence, the DOJ emphasizes that arbitration is not required and should be assessed on a case-by-case basis.[146] Indeed, the DOJ emphasizes that DOJ officials "become knowledgeable concerning ADR techniques so that the Division can take advantage of the benefits that ADR provides."[147] Therefore, in the right circumstances, the DOJ appears to support the use of ADR, specifically ADR, in antitrust lawsuits.

IV. ANALYSIS

There are a number of pros and cons to using ADR in this specific antitrust. Before engaging in that analysis, it is important to note what is at stake in LIV Golf's antitrust suit. Golf is a very popular sport, with an estimated 24.8 million people playing in 2020, the largest increase in play in 17 years.[148] The number of people playing golf increased by 16.1% from 2020 to July 2021, partially as a result of the COVID-19 pandemic.[149] Additionally, equipment sales are up, and golf is expanding to venues such as TopGolf.[150] Also, millions of viewers watch golf, so this antitrust suit will have a huge impact on the future of golf.

Applying the CPC characteristics to this particular antitrust suit, it is unknown whether these parties would actually give ADR a chance, which is the first characteristic outlined by the CPC. Both LIV Golf and the PGA TOUR would likely require "substantial pretrial proceedings" because, as well-off golf leagues, neither

140. *Id.*
141. Memorandum from the U.S. Dep't of Just., *supra* note 135, at 2.
142. *Id.*
143. *Id.*
144. *Id.* at 3.
145. *Id.*
146. *Id.*
147. Memorandum from the U.S. Dep't of Just. *supra* note 135.
148. Ian Thomas, *Golf's growth in popularity is much bigger than a pandemic story*, CNBC (Sept. 26, 2021), https://www.cnbc.com/2021/09/26/callaway-dicks-sporting-goods-score-with-growth-of-golf.html.
149. *Id.*
150. *Id.*

LIV Golf nor the PGA TOUR probably prioritizes "the potential savings of time and/or money" or "the inherent risks involved in litigation."[151] Indeed, LIV Golf CEO Greg Norman indicated in September that LIV Golf has "no interest" in negotiating with the PGA TOUR, claiming that LIV Golf tried but decided to move on because "our product is working."[152] PGA TOUR Commissioner Jay Monahan has also ruled out negotiating with LIV Golf.[153] Thus, the first CPC characteristic weighs against using ADR in this lawsuit.

With regard to the second characteristic, cooperating on procedural issues, the parties' contempt for one another also indicates that there probably will not be much cooperation on procedural issues. It bears repeating that Greg Norman has indicated that LIV Golf has no desire to even negotiate with the PGA TOUR, and PGA TOUR Commissioner Monahan has indicated the same unwillingness to negotiate with LIV Golf.[154] Thus, the parties seem firmly entrenched in those positions, so the second CPC characteristic weighs against using ADR in this lawsuit.

The same can be said about the third characteristic: prior business dealings.[155] Although Greg Norman and all the LIV Golf players are former PGA TOUR players, those previous affiliations are not the prior business dealings that would be required. Indeed, the PGA TOUR and LIV Golf have never had any prior business dealings directly with one another due to the hostilities between the leagues and LIV Golf launching just this year. Thus, the third factor probably weighs against using ADR in this lawsuit.

The "fewer the parties the better" factor weighs in favor of using ADR in this antitrust suit.[156] However, there is a caveat to this characteristic, namely, none of the parties "can be pursuing the litigation for ulterior purposes."[157] There do not appear to be any ulterior motives in this lawsuit as the parties' goals are clear: the LIV Golf is trying to enter the professional golf market, and the PGA TOUR is trying to protect its own league and its players. As such, there are no identifiable ulterior motives from either party. Thus, the fourth characteristic weighs in favor of using ADR in this antitrust suit.

Many of the DOJ's factors in favor of using arbitration in antitrust revolve around efficiency of time and money in the lawsuit.[158] For reasons outlined in the preceding paragraph, it is unlikely either league is focused on time and money because they are well-funded and want to achieve a favorable outcome. However, one of the factors bears more discussion: "factual or technical complexity," meaning an arbitrator would be more beneficial to the parties than a trial judge or a jury.[159] This factor is the best argument in support of using ADR in antitrust suits because

151. McDavid, *supra* note 112, at 26.
152. Tim Daniels, *Greg Norman Says LIV Golf Has 'No Interest' in Truce with PGA TOUR Amid Rivalry*, BLEACHER REP. (Sept. 15, 2022), https://bleacherreport.com/articles/10049065-greg-norman-says-liv-golf-has-no-interest-in-truce-with-pga-tour-amid-rivalry.
153. Jeff Kimber, *PGA Tour Commissioner Rules Out Ever Linking Up With LIV Golf*, GOLF MONTHLY (September 22, 2022), https://www.golfmonthly.com/news/pga-tour-commissioner-rules-out-ever-linking-up-with-liv-golf.
154. *Id.;* Daniels, *supra* note 152.
155. McDavid, *supra* note 112, at 26.
156. *Id.*
157. *Id.*
158. *See generally* Memorandum from the U.S. Dep't of Just., *supra* note 135.
159. *Id.*

antitrust suits are very complex, so an arbitrator who specializes in antitrust law rather than an ordinary judge and jury may produce a better outcome than a trial judge or a jury.[160] Antitrust law is very complicated, and it requires knowledge of some basic economic theories that form the basis of antitrust law. Further, it is very difficult to explain these complicated and abstract theories to a lay jury or even a federal judge because most federal judges are not experts in antitrust law. Thus, an arbitrator, experienced in antitrust law, may resolve an antitrust suit better than a lay jury or an ordinary judge would resolve it in litigation.

V. CONCLUSION

For the game of golf, the stakes of the PGA TOUR-LIV Golf antitrust suit could not be higher. Given the parties' contempt for one another and the fact that they have ample resources, they probably would not be open to ADR in this antitrust lawsuit since both sides feel that they need to win a favorable judgment. However, since antitrust is a complicated field of law, especially for a lay jury and an ordinary federal district judge, arbitration with an expert in antitrust law could achieve not only a more reasoned and knowledgeable outcome, but also an outcome that would be quicker and less unpleasant than litigation. Indeed, even if the parties wanted a binding judgment, they could get a binding judgment with arbitration, and it would come from an arbitrator skilled in antitrust law, not a lay jury most, if not all of whom know nothing about antitrust. Therefore, ADR would be beneficial in this antitrust suit as long as the arbitrator or mediator specialized in antitrust law.

160. I thank Professor Lambert for bringing my attention to this possibility.