UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DENARD ROBINSON; BRAYLON EDWARDS; MICHAEL MARTIN; SHAWN CRABLE, Individually and on behalf of themselves and former University of Michigan football players similarly situated,

Plaintiffs,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION aka "NCAA", BIG TEN NETWORK "aka" BTN, and the BIG TEN CONFERENCE, INC.

Defendants.

Case No.: 24-12355
Honorable Terrence G. Berg

_____/

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT BIG TEN NETWORK'S MOTION TO DISMISS THE AMENDED COMPLAINT [ECF NO. 38]

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ISSUES PRESENTED

I. Whether this Honorable Court should deny Defendants' Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6) because Plaintiffs have alleged viable antitrust claims and injuries against Defendant BTN.

Plaintiffs answer "yes."
Defendants answer "no."

II. Whether this Honorable Court should deny Defendants' Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6) because Plaintiffs have pled viable unjust enrichment claims against Defendant BTN.

Plaintiffs answer "yes."
Defendants answer "no."

PREFACE

For nearly two decades, since 2006, the Big Ten Network ("BTN") has made untold millions of dollars off the backs of Big Ten athletes—more specifically, former college football players—through the airing of current games, of which the University of Michigan is always the network's #1 viewership draw - but moreover, through the airing of classic games. For nearly twenty years, BTN has routinely aired classic Michigan football games, dating back to the 1969 Michigan-Ohio State game. Every football season, and in fact even during the spring and summer, BTN airs classic Michigan games. Men who played years ago sit home and see themselves on BTN, but have never been compensated for the use of their name or image. This is unlawful. This filing is transparent: BTN does not want to have to engage in discovery and produce TV records with air dates going back to their inception in 2006, not do they want to produce financial records, showing just how much they profited off Plaintiffs without compensation. This premature Motion to Dismiss must be seen for what it is and dismissed forthwith.

INTRODUCTION

Defendant Big Ten Network ("BTN") portrays itself as a passive broadcaster uninvolved in the NCAA's anticompetitive conduct. However, BTN is not a mere a bystander. Rather, it is a knowing participant and vertically aligned with the NCAA as part of a collective anticompetitive regime and BTN's conduct caused

significant harm to Plaintiffs and the competitive NIL market. Importantly, the authority BTN relies on involves horizontally aligned parties accused of collectively agreeing to force a competitor out of the market. And where such parties never instigated such an agreement, and merely benefitted from it, there is no *per se* antitrust violation. Cases like that have no bearing on the vertically aligned Defendants, who conspired to monopolize and fix the value of Plaintiffs' NIL near zero, all the while preventing a competitive market for Plaintiffs' NIL.

Plaintiffs allege BTN derives substantial revenue from the unauthorized use of their NIL through broadcast agreements, broadcasts themselves, advertisements, promotional materials, and other commercial activities. These activities are directly tied to BTN's agreements with the NCAA and its member institutions, which enforce anticompetitive rules designed to suppress NIL compensation. BTN profits from this scheme by exploiting Plaintiffs' identities to attract viewers, secure advertising revenue, and promote its brand, all while excluding Plaintiffs from the economic benefits of their own NIL. Each instance of NIL use by BTN constitutes a new and independent wrongful act inflicting fresh harm on Plaintiffs, reinforcing the ongoing nature of the violations.

Moreover, BTN's argument against Plaintiffs' unjust enrichment claims are based on misstatements of their allegations and misapplications of relevant law. For example, Plaintiffs do allege repeatedly that BTN derived direct, substantial

and unjust benefits from its own inequitable actions in knowingly monetizing Plaintiffs' NIL, earning millions of dollars in advertising and subscription revenue, without paying a dime of compensation to the owners of that NIL.

The anticompetitive conduct alleged in this case is precisely what the Sherman Act was designed to address, and BTN's retention of profits derived from Plaintiffs' NIL constitutes the unjust enrichment the law seeks to remedy. Plaintiffs respectfully request that this Court deny BTN's motion to dismiss in its entirety.

STANDARD OF REVIEW

Rather than restate the oft-cited standard of review under Rule 12(b)(6), Plaintiffs simply emphasize that "all reasonable inferences" must be drawn in their favor. *DirectTV, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007). "If a reasonable court can draw the necessary inference from the factual material stated in the complaint, the plausibility standard has been satisfied." *Keys v. Humana, Inc*., 684 F.3d 605, 610 (6th Cir. 2012). "*Specific facts are not necessary; the statement need only give the defendant fair notice of what the ... claim is and the grounds upon which it rests*." *Keys*, 684 F.3d at 608 (quoting from *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (internal quotation marks omitted)) (emphasis added). "The ultimate question is whether the complaint, read sympathetically, shows that the plaintiff is at least plausibly entitled to relief." *Stratton v Portfolio Recovery Assocs, LLC*, 770 F.3d 443, 447 (6th Cir. 2014). And even where "recovery

[seems] very remote and unlikely," a complaint may survive a motion to dismiss. *Kovalchuk v City of Decherd, Tennessee*, 95 F.4th 1035, 1043 (6th Cir.), cert. denied, 145 S. Ct. 274 (2024) (quoting from *Stratton*, 770 F.3d at 447).

ARGUMENT

I. PLAINTIFFS HAVE PLAUSIBLY ALLEGED CLAIMS UNDER THE SHERMAN ACT AGAINST DEFENDANT BTN.

A. Applicable Legal Principles.

The Sherman Anti–Trust Act states that "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 states, is declared to be illegal." 15 U.S.C. § 1. "[T]o establish a claim under section 1, the plaintiff must establish that the defendants contracted, combined or conspired among each other, that the combination or conspiracy produced adverse, anticompetitive effects within relevant product and geographic markets, that the objects of and conduct pursuant to that contract or conspiracy were illegal and that the plaintiff was injured as a proximate result of that conspiracy." *Davis–Watkins Co. v. Service Merchandise*, 686 F.2d 1190, 1195–96 (6th Cir.1982). "Vertical conspiracies…involve agreements between competitors at different levels of competition to restrain trade, such as agreements between a manufacturer and its distributors to exclude another distributor from a given product and geographic market." *Crane & Shovel Sales Corp. v. Bucyrus-Erie Co.*, 854 F.2d 802, 805 (6th Cir. 1988).

To state a claim under the rule of reason test, the complaint must allege: "(1) the defendants 'contracted, combined or conspired among each other'; (2) 'the combination or conspiracy produced adverse, anticompetitive effects within relevant product and geographic markets'; (3) 'the objects of and conduct pursuant to that contract or conspiracy were illegal'; and (4) 'the plaintiff was injured as a proximate result of that conspiracy.'" *Total Benefits Plan. Agency, Inc. v. Anthem Blue Cross & Blue Shield*, 552 F.3d 430, 436 (6th Cir. 2008) (quoting *Crane*, 854 F2d at 451.

B. BTN Is An Active, Purposeful Participant in An Unlawful Anticompetitive Conspiracy with NCAA and the Big Ten.

BTN believes it is insulated from antitrust review because it allegedly played no role in the adoption or enforcement of the NCAA rules restricting trade. Although Plaintiffs do not allege BTN co-drafted NCAA's bylaws and rules, Plaintiff *do allege* BTN is an integral part of a ongoing and evolving anticompetitive conspiracy with Defendants NCAA and the Big Ten to monetize Plaintiffs' NIL for their exclusive benefit.

Specifically, Plaintiffs allege that Defendant NCAA and the Big Ten are the policymakers behind a continuous, evolving, and systematic regime of anti-competitive rules, bylaws, practices, and contracts with BTN (Big Ten has a 39% ownership interest in BTN) to control and monopolize Plaintiffs' NIL, for Defendants' exclusive benefit. (Am. Compl. ¶¶ 72-77, ECF No. 24, PageID # 250-

253). BTN obtains exclusive broadcast rights from the Big Ten and the NCCA, relying entirely on the NCAA and Big Ten's anticompetitive NIL restrictions to ensure that Plaintiffs are precluded from receiving compensation for the use of their NIL. BTN's business model is built upon the commercial exploitation of Plaintiffs' NIL, which forms the core value of its broadcasts, advertisements, and promotional campaigns. Plaintiffs BTN has broadcasted college football games, including Michigan football games, since 2006. (Am. Compl. ¶ 21, ECF No. 24, PageID # 230). And BTN "generates hundreds of millions of dollars from broadcasting rights, advertising, and subscription fees." (*Id*.)

Moreover, BTN has "actively collaborated" with the NCAA and Big Ten to "develop strategies for maximizing revenue derived from…" Plaintiffs' NIL. (Am. Compl., ¶ 75, ECF No. 24, PageID # 252). Though its conspiracy with the NCAA and Big Ten, BTN ensures that it "retains exclusive access to valuable content," featuring Plaintiffs' NIL, such that the profits go to Defendants rather than the Plaintiffs. (Am. Compl., ¶ 77, ECF No. 24, PageID # 252). These agreements are vertical restraints of trade, with the NCAA and the Big Ten Conference as the suppliers of broadcasting rights at one level in the market structure, and BTN as the distributor at another level in the market structure. See *Crane & Shovel Sales Corp*, 854 F2d at 805 (Vertical restraints of trade are "combinations of [entities] at difference levels of the market structure, such as manufacturers and distributors.")

B. Defendants BTN's Alleged Status As a Beneficiary Has No Merit.

To argue it is merely the "beneficiary" of allegedly anticompetitive conduct, Defendant BTN relies largely on *Betkerur v Aultman Hosp Ass'n*, 78 F3d 1079, 1092 (6th Cir. 1996), which has no application here. In *Betkerur*, the plaintiff (a neonatologist) accused a group of OBGYN doctors of boycotting plaintiff's practice by instead referring all of their patients to another neonatologist, Dr. Magoon. *Betkerur*, 78 F.3d at 1082. Under a prior "cross coverage" agreement, the OBGYN defendants were required to refer their patients to the neonatologist who was "on call" at the time of the referral. *Id* at 1083. The OBGYN defendants terminated that agreement because it prevented them from exercising their individual preference for a particular neonatologist "who more closely shared their individual approaches to patient care." *Betkerur*, 78 F.3d at 1084. Betkerur argued this amounted to a horizontal restraint constituting *per se* antitrust violation. The Sixth Circuit disagreed, noting Betkruer still received some referrals from the doctors allegedly boycotting her, and although the Defendant OBGYNs certainly were horizontal competitors *among themselves*, they did not compete with Betkurer. And because there was no evidence to suggest plaintiff's only horizontal competitor, defendant Magoon, instigated such an agreement "she was merely the beneficiary of that agreement." *Id* at 1092.

It is this quote that BTN hangs its proverbial hat on, arguing it merely

replays footage and is thus a mere beneficiary of the NCAA's anticompetitive conduct. However, *Betkurer* involved *horizontally aligned* parties- the competing neonatologists. And Betkurer could not sustain an antitrust action where Dr. Magoon didn't instigate any anticompetitive agreement and merely benefitted from the OBGYN's defendants patient-referral decisions. *This case* involves vertically aligned parties who collabotated broadcast agreements for the primary purpose of exploiting Plaintiff's NIL. Accordingly, *Betkurer* does BTN no favors.

In sum, BTN's participation in the scheme is represents a vertical restraint on trade. Entities that derive financial benefit from anticompetitive arrangements are not shielded from liability merely because they did not create the framework. See *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984) (holding that entities that "consciously commit to a common scheme designed to achieve an unlawful objective" may be liable under the Sherman Act).

C. Plaintiffs Have Demonstrated Antitrust Injury

The district court balances five factors to determine if a complaint adequately pleads antitrust injury (standing): (1) the causal connection between the antitrust violation and harm to the plaintiff and whether that harm was intended to be caused; (2) the nature of the plaintiff's alleged injury including the status of the plaintiff as consumer or competitor in the relevant market;[9] (3) the directness or indirectness of the injury, and the related inquiry of whether the

damages are speculative; (4) the potential for duplicative recovery or complex apportionment of damages; and (5) the existence of more direct victims of the alleged antitrust violation. *Southaven Land Co., Inc. v. Malone & Hyde, Inc.*, 715 F.2d 1079, 1085 (6th Cir.1983) (citing *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 537–45 (1983)). No one factor controls. *Peck v. Gen. Motors Corp*., 894 F.2d 844, 846 (6th Cir.1990).

Here, Plaintiffs have suffered the requisite antitrust injury. A Section 1 claim requires a plaintiff to allege that he or she suffered injury as a "proximate result of the conspiracy." *Total Benefits*, 552 F.3d at 436. Plaintiffs' Complaint satisfies this requirement. As elaborated above, the Complaint properly alleges BTN's broadcast agreements with Defendant NCAA results in anticompetitive effects, including "fixing the compensation of Plaintiffs and the Proposed Class at artificially low levels since Plaintiffs and Class Members have been unable to negotiate for compensation in a free market" and "eliminating or suppressing, to a substantial degree, competition among Defendants for skilled labor in the market." (Am. Compl. ¶¶ 118, 123 and 155; ECF Non. 24, PageID # 268-270, 279).

Defendants generate "billions of dollars annually" for themselves through advertising sales, subscription fees, and promotional materials tied directly to the use of Plaintiffs' NIL. (Am. Compl. ¶¶ 13, 19, 37, 57, 77; ECF No. 24; PageID #

225, 228-229, 235, 243-244, 252). BTN's repeated and knowing use of Plaintiffs' NIL to drive viewership and revenue without providing compensation demonstrates BTN's active participation in and substantial benefit from the anticompetitive scheme, ultimately resulting in injury to the Plaintiffs.

Additionally, BTN's argument ignores how the anticompetitive conduct alleged here results in *exclusion* of the Plaintiffs from the market in which they would have participated in but for the anticompetitive conduct. One form of antitrust injury is "[c]oercive activity that prevents its victims from making free choices between market alternatives." *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 528 (1983). As the Complaint alleges, "[t]he NCAA, the Big Ten and BTN have imposed a regime of restrictive agreements that artificially fixed the value of Plaintiffs' NIL at zero, resulting in profound economic harm. In a free market, Plaintiffs would have had the ability to negotiate and profit from their NIL through endorsements, licensing, and commercial ventures." (Am. Compl. ¶ 123, ECF No. 24, PageID # 269-270). As in *Glenn Holly Entertainment, Inc. v. Tectronix, Inc.*, 352 F.3d 367 (9th Cir. 2003), Defendants' anticompetitive conduct here has caused and continues to cause antitrust injury to Plaintiffs and putative Class Members by excluding them from the market. *Id* at 374 ("The injury alleged flowed from the discontinuation of the only competing product on the market by agreement

between the only two competitors in the market."); *Total Renal Care, Inc. v. Western Nephrology and Metabolic Bone Disease*, 2009 WL 2596493 at *5 (D. Colo. Aug 21, 2009) (antitrust standing evident where plaintiff alleges defendant "engaged in an exclusionary practice designed to rid the market of the plaintiff or to preclude its entry . . ."); *Golden Bridge Technology, Inc. v. Nokia, Inc*., 416 F. Supp. 2d 525, 534 (E.D. Tex. 2006) (antitrust injury and standing adequately alleged where plaintiff alleged it was excluded from market for licensing technology although plaintiff never previously was able to license such technology)); *Re/Max Inter*., *Inc v Realty One, Inc*, 173 F3d 995, 1023 (6th Cir. 1999) (National real estate brokerage had standing where competitors paid agents associated with plaintiff lower commissions on split sales commissions).

Similarly here, Plaintiffs allege they were excluded from participating in the NIL market due to BTN's conduct, which is intrinsically tied to the NCAA and Big Ten's restrictive policies and practices. BTN's actions deprived Plaintiffs of the ***opportunity*** to negotiate and receive compensation for their NIL, resulting in concrete and quantifiable monetary harm. "That the NCAA's rules deny the plaintiffs all opportunity to receive this compensation is sufficient to endow them with standing to bring this lawsuit." *O'Bannon v. National Collegiate Athletic Ass'n*, 802 F.3d 1049, 1069 (2015).

Moreover, BTN's conduct was not incidental to Plaintiffs' injuries—it was a direct and proximate cause. BTN profited from Plaintiffs' NIL without providing any compensation, effectively transferring the economic value of Plaintiffs' identities to itself. This type of harm is precisely what the Sherman Act seeks to prevent. See *Blue Shield of Va. v. McCready*, 457 U.S. 465, 482-483 (1982) (holding that the Sherman Act prohibits conduct that deprives individuals of their ability to participate in competitive markets).

Much like the Defendants' joint 12(b)(6) motion, Defendant BTN once again relies on *Marshall v ESPN*, 668 F Appx 155 (6th Cir. 2016) to argue BTN could not have caused any antitrust injury here. Again, the result in *Marshall* hinged on Tennessee law governing rights to publicity. Specifically, Tenn Code Ann §47-25-1107(a) "expressly permits the use of any player's name or likeness in connection with any 'sports broadcast.'" *Id* at 157. Michigan has no such law. In fact, under MCL 390.1731, colleges may not prevent students from fully participating in athletics based on the student earning compensation through use of the NIL. Further, there is no Michigan equivalent to the Tennessee law permitting NIL use for sports broadcasters. Rather, Michigan's common law protects against the "[appropriation, for the defendant's advantage, of the plaintiff's name or likeness." See *Tobin v Civil Service Comm,* 416 Mich 661, 672 (Mich. 1982).

The broadcast defendants in *Marshall* (Defendant BTN) also benefitted from the Supreme Court not yet deciding *NCAA v. Alston*, 594 U.S. 69 (2021). Despite how *Alston* shifted the legal landscape since *Marshal* was decided, Defendant BTN latches onto *Marshall's* observation that "Plaintiffs fail to show how Defendants' behavior (most particularly that of Network and Broadcast Defendants), *in complying with NCAA rules, can be said to be the cause of reduced competition and any concomitant antitrust injury.*" *Marshall,* 111 F. Supp. 3d at 835, (emphasis added). Of course, at this point in the opinion, the District Court had already ruled NCAA regulations regarding NIL "will be presumed procompetitive" under *NCAA v Bd of Regents*, 468 US 85, 117 (1984). Because of *Alston*, we now know the passage from *Bd of Regents* relied on in *Marshall* was dicta. *Alston*, 594 U.S. at 93.

In fact, for substantially the same reasons, the district court in *House* correctly rejected application of *Marshall* to a case factually similar to the present case. *House*, 545 F.Supp.2d at 816.

For all of these reasons, BTN's reliance on *Marshall* to say there is no antitrust injury here is totally without merit.

D. BTN's Conduct Distorted Competition in the NIL Market

In addition to directly harming Plaintiffs, BTN's conduct distorted the broader NIL market by suppressing competitive forces. By enforcing and benefiting from the NCAA's restrictions, BTN contributed to a monopsonistic marketplace in which student-athletes were excluded from negotiating the value of their NIL rights. This suppression of competition enabled BTN to exploit Plaintiffs' NIL at below-market rates—effectively zero—while preventing Plaintiffs from accessing alternative opportunities to monetize their NIL.

This case is analogous to *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.* 334 U.S. 219 (1948), where sugar refiners conspired to artificially lower prices paid to farmers for sugar beets. *Id.,* at 221-222. The Supreme Court recognized here that buyer-side restraints, such as those that depress wages or compensation, harm competition and violate the Sherman Act. BTN's actions align with this principle, perpetuating the NCAA's monopsonistic control over the NIL market, ensuring that BTN can profit from NIL exploitation without facing competitive pressure to pay for it.

BTN's conduct also creates a chilling effect on the NIL market as a whole. By participating in a scheme that suppresses NIL compensation, BTN contributes to an environment in which market participants—such as advertisers, sponsors, and other broadcasters—are discouraged from engaging in NIL deals that would

benefit Plaintiffs and other student-athletes. This systemic harm to market competition further accentuates the antitrust injury caused by BTN's conduct.

II. PLAINTIFFS HAVE SUFFICIENTLY ALLEGED UNJUST ENRICHMENT UNDER MICHIGAN LAW

"A person who has been unjustly enriched at the expense of another is required to make restitution to the other." *Kammer Asphalt Paving Co. v. E. China Twp. Sch.*, 443 Mich. 176, 185; 504 N.W.2d 635, 640 (Mich. 1993) (quoting Restatement, Restitution, § 1, p. 12). Whether a party was unjustly enriched is generally a question of fact, meaning BTN's motion to dismiss at this stage is premature. *Hayes-Albion Corp v. Kuberski*, 421 Mich 170, 186; 364 NW2d 609, 616 (Mich. 1984).

A. Defendant BTN's Vague Direct Contact/Benefit Claim Fails.

As an initial matter, BTN's argument is predicated on vague references to "direct benefit" and "direct contact," an unpublished (and inapposite) Michigan Court of Appeals decision, and a mischaracterization of Plaintiffs' allegations (without any reference to specific allegations).

The vagueness of BTN's argument suggests that, in its view, privity is required between an unjust enrichment plaintiff and the defendant. However, privity is not required under Michigan law to establish a claim for unjust enrichment. "The right to bring this action for money exists whenever a person, natural or artificial, has in his or its possession money which in equity and good

conscience belongs to the plaintiff, *and neither express promise nor privity between the parties is essential*." *Michigan Educ. Emps. Mut. Ins. Co. v. Morris*, 460 Mich. 180, 197–98; 596 N.W.2d 142, 151 (Mich. 1999) (emphasis added). See also *Wright v. Genesee Cnty*., 504 Mich. 410; 934 N.W.2d 805 (Mich. 2019).

Second, aside from vagueness, BTN's argument suffers from a lack of analysis. For example, BTN essentially concludes that *Trotta v American Airlines, Inc*., 741 F. Supp. 3d 673 (Ed. Mich. 2024), is dispositive of this claim. However, *Trotta* is easily distinguishable as it involved an entirely different unjust enrichment theory. Plaintiffs are not claiming, like the plaintiff in *Trotta*, that they bought a product and the proceeds are wrongfully going, in part, to a party that did nothing to earn them. Simply put, unlike *Trotta*, Plaintiffs are not purchasers of products complaining about the disposition of the sale proceeds. *Trotta* is inapposite.

Moreover, the Michigan Court of Appeals dictum regarding unjust enrichment, in *A&M Supply Co. v. Microsoft Corp*., No. 274164, 2018 WL 540883 (Mich. Ct. App. Feb. 28, 2018),[1] does not help BTN either. *A&M Supply Co*. was an indirect, "pass on" antitrust case, brought under Michigan Antitrust Reform Act,

[1] *A&M Supply*'s discussion on the merits of an indirect purchaser's claim for unjust enrichment is dicta because the Michigan Court of Appeals ultimately upheld dismissal of the case for failure to prosecute. See *Freed v Thomas*, 976 F3d 729, 738 (6th Cir., 2020) ("[D]ictum is anything not necessary to the determination of the issue on appeal.")

where the plaintiff was an end user who allegedly suffered pass-on costs from computer manufacturers who had been allegedly overcharged for software by Microsoft (due to its alleged monopoly power). This unpublished case too is distinguishable. Notably, in *A&M Supply Co*., the plaintiff could not establish actual damages, namely pass-on costs to itself as an indirect user. *A&M Supply Co. v. Microsoft Corp*., 252 Mich App 580, 584; 654 NW2d 572 (Mich. 2002). Nor could the plaintiff establish that it provided Microsoft "with any direct payment or other benefit." *A&M Supply Co*., 2008 WL 540883, at *2. In contrast, here, Plaintiffs do not pursue liability against BTN on an indirect, "pass on" antitrust theory. Plaintiffs do not claim to be end users paying more for a product (in pass-on costs) because of overcharging by a monopolistic manufacturer. Rather, as BTN glosses over, Plaintiffs allege that "BTN directly profits from BTN's use of [their] NIL through live broadcasts, archival footage, and promotional campaigns." (Am. Compl. ¶ 72, ECF No. 24, PageID # 250-251).[2] Plaintiffs also allege active

[2] Plaintiffs assert that *Kammer Asphalt Paving Co., Inc. v. East China Township Schools*, 443 Mich. 176; 504 N.W.2d 635 (1993) better states Michigan law regarding indirect versus direct benefits. In *Kammer*, the defendant school district entered into a general construction contract with a general contractor, who, in turn, obtained performance bonds to assure completion of the work and payment bonds to assure payments to subcontractors. *Id* at 179. The general contractor failed to pay the plaintiff-subcontractor for its services, but assured plaintiff payment was guaranteed because of the payment bonds. The bonds turned out to be fraudulent (the bonding companies didn't exist), causing the school district terminate the general contractor. The plaintiff subcontractor sued both the school district and general contractor for unjust enrichment. *Id* at 180. The Michigan

anticompetitive collaboration between BTN, Big Ten, and NCAA to exploit Plaintiffs' NIL, e.g., by "develop[ing] strategies for maximizing revenue derived from" Plaintiffs' NIL, contributing to marketing and promotional strategies that integrate athlete's NIL into its offerings (from subscription-based streaming services to high-profile sponsorship deal). (Am. Compl. ¶¶ 72-73,75-76, ECF No. 24, PageID # 250-252).

In short, Plaintiffs do not allege that BTN is a mere "indirect" passive bystander-beneficiary, reaping millions of dollars by happenstance. Nothing in Plaintiffs' Amended Complaint even suggests that BTN's utilization of their NIL, and reaping of profits from NIL, is done indirectly or passively. Because of BTN's direct receipt of millions of dollars based, in part, on BTN's direct use of Plaintiffs' NIL, without their consent or compensation (***and with knowledge of this fact***), in participation with the NCAA and Big Ten, it is no passive bystander-beneficiary.

Supreme Court held plaintiff could claim unjust enrichment against the defendant school district, even where plaintiff *indirectly* provided the school a benefit when the school's contract was with the general contractor, who received $1.3 million from the school. *Id* at 187-188. See also *Morris Pumps v. Centerline Piping, Inc*., 273 Mich. App. 187, 729 N.W.2d 898 (2006). The foregoing analysis is important because the Court must apply the law it believes the Michigan Supreme Court would apply. See *Shields v Government Employees Hosp Ass'n, Inci.,* 450 F3d 643, 649 (6th Cir. 2006); *J.C. Wyckoff & Assoc. v Standard Fire Ins. Co.*, 936 F2d 1474, 1485 (6th Cir. 1991) (noting a state's immediate appellate court judgment is "datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.")

Third, although Plaintiffs have in fact alleged the receipt of a direct benefit by BTN, in the form of their NIL, it is perhaps worth pointing out how frequently BTN's "direct benefit" argument has been rejected by federal courts applying Michigan law around the country. See, e.g., *In re Auto. Parts Antitrust Litig*., 29 F. Supp. 3d 982, 1021 (E.D. Mich. 2014); *In re Cardizem CD Antitrust Litig*., 105 F. Supp. 2d 618, 670 (E.D. Mich. 2000); *Roche Diagnostics Corp. v. Shaya*, 427 F. Supp. 3d 905, 925–26 (E.D. Mich. 2019); *In re TFT-LCD (Flat Panel) Antitrust Litig*., 599 F. Supp. 2d 1179, 1189–90 (N.D. Cal. 2009); *In re Packaged Seafood Prods. Antitrust Litig*., 242 F. Supp. 3d 1033, 1091 (S.D. Cal. 2017); *In re Pork Antitrust Litig*., 495 F. Supp. 3d 753, 795 (D. Minn. 2020); *In re Suboxone (Buprenorphine Hydrochloride & Naloxone) Antitrust Litig*., 64 F. Supp. 3d 665, 707 (E.D. Pa. 2014), on reconsideration in part sub nom. *In re Suboxone (Buprenorphine Hydrochloride & Nalaxone) Antitrust Litig*., No. 13-MD-2445, 2015 WL 12910728 (E.D. Pa. Apr. 14, 2015); *Sheet Metal Workers Loc. 441 Health & Welfare Plan v. GlaxoSmithKline, PLC*, 737 F. Supp. 2d 380, 438 (E.D. Pa. 2010); *In re Hard Disk Drive Suspension Assemblies Antitrust Litig*., No. 19-MD-02918-MMC, 2021 WL 4306018, at *27 (N.D. Cal. Sept. 22, 2021); *In re Takata Airbag Prods. Liab. Litig*., 462 F. Supp. 3d 1304, 1329 (S.D. Fla. 2020); *In re Santa Fe Nat. Tobacco Co. Mktg. & Sales Pracs. & Prods. Liab. Litig*., 288 F. Supp. 3d 1087, 1266 (D.N.M. 2017); and *In re Static Random Access Memory*

(SRAM) Antitrust Litig., No. 07-MD-01819 CW, 2010 WL 5094289, at *7 (N.D. Cal. Dec. 8, 2010).

Finally, even Plaintiffs' allegations are ignored and BTN could somehow be (counterfactually) construed as a passive downstream bystander-beneficiary, Plaintiffs' unjust enrichment claim would still be viable. This is because when third parties benefit from illegal activity, the injured party may obtain disgorgement from the violator, even if that violator never controlled the funds. *Osborn v. Griffin*, 865 F.3d 417 (6th Cir. 2017). As such, because Plaintiffs have plausibly alleged that BTN knowingly derived and retained unjust financial benefits from NCAA and Big Ten's regime of anticompetitive rules, bylaws, and regulations, their claim is both legally sound and factually well-supported. Allowing BTN to retain these ill-gotten gains would undermine the fundamental purpose of unjust enrichment law: to prevent parties from profiting from wrongdoing at the expense of those harmed. Accordingly, BTN's motion to dismiss this claim must be denied.

B. BTN Caused an Unjust Taking of Plaintiff's NIL And Its Conduct is Inequitable.

BTN's next line of attack – that its conduct was not inequitable – is essentially a reiteration of its first argument and, as such, is equally unavailing. As set forth below, BTN relies on another distinguishably unpublished Michigan Court of Appeals decision, namely, *Jackson v. Southfield Neighborhood*

Revitalization Initiative, No. 361397, 2023 WL 6164992 (Mich. Ct. App. Sept. 21, 2023 (per curiam).

In *Jackson*, the plaintiffs asserted an unjust enrichment claim against defendant Southfield Neighborhood Revitalization Initiative ("SNRI"). Defendant SNRI had purchased a property through the defendant City of Southfield, which had acquired title to the property at a tax foreclosure sale from defendant Oakland County. The previous owners of the property then filed a lawsuit asserting various claims against defendants county, city, and SNRI to recover the property's equity (the value above the tax debt). The court held that plaintiffs had stated a viable unlawful takings claim against the defendant county, but failed to state an unjust enrichment claim against defendant SNRI. The court reasoned that the unlawful taker of the property acted inequitably, not SNRI which gave valuable consideration for the property.

Jackson is inapposite here because BTN's conduct is not comparable to SNRI's conduct. SNRI did nothing illegal or inequitable in purchasing the plaintiffs' property; the unlawful acts were done exclusively by the county. Unlike *Jackson*, Plaintiffs allege that the NCAA, Big Ten, *and* BTN have acted in furtherance of a conspiracy to monetize Plaintiffs' NIL and take all of the compensation for themselves. Unlike SNRI, BTN is a direct and knowing participant in the alleged unlawful conduct and, also unlike SNRI, has paid

Plaintiffs nothing for what they have taken. Plaintiffs allege that BTN repeatedly and knowingly used their NIL in broadcasts, advertisements, and promotional materials to attract viewers, secure advertising contracts, and generate subscription revenue and without paying them a dime. These uses are not incidental to BTN's operations; rather, Plaintiffs' NIL is the core value of BTN's programming, which centers on showcasing student-athletes' performances. BTN's use of Plaintiffs' NIL is a direct and substantial source of revenue, as advertisers and subscribers are drawn to programming that prominently features Plaintiffs' identities and athletic achievements.

This case is more analogous to the *published* Michigan Court of Appeals opinion in *Morris Pumps v. Centerline Piping, Inc.*, 273 Mich App 187; 729 N.W.2d 898, 904 (Mich. 2006). In *Morris Pumps*, a general contractor terminated its subcontractor who had not paid the material suppliers and then hired a replacement subcontractor who used the material suppliers' material and equipment (left behind at the jobsite) to finish the job without compensating the material suppliers. The Michigan Court of Appeals concluded that the general contractor was unjustly enriched by its replacement subcontractor's actions. The court reasoned that "[r]egardless of whether [the general contractor] itself retained and used the materials, or merely acquiesced in the replacement contractor's retention and use of the materials, defendant was necessarily a party to the decision

and use and retain the materials without paying plaintiffs." *Morris Pumps*, 273 Mich App at 197. The court concluded that "we simply cannot classify defendant's act of retaining and using the materials, without ever ensuring that plaintiffs were compensated for the materials, as innocent, just, or equitable." *Id.*

Indeed, the inequity here is greater than in *Morris Pumps* because BTN is doing more than just quietly using and retaining Plaintiffs' NIL. BTN's business model is built on retaining and commercializing Plaintiffs' NIL (without compensation) through broadcast agreements with the NCAA and the Big Ten. Whether BTN directly controlled the NIL restrictions or merely acquiesced in the NCAA's bylaw, rules, and practices, BTN knowingly obtained the benefits of a system that suppressed Plaintiffs' ability to negotiate fair compensation. Just as the contractor in *Morris Pumps* could not avoid liability by pointing to the inequitable conduct of its subcontractor, BTN cannot avoid liability by pointing to the NCAA and Big Ten's bylaws, policies, and practices.

Finally, the Supreme Court's decision in *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), accentuates that the unauthorized use of an individual's identity for profit constitutes an unjust benefit to the user at the expense of the individual. Like the broadcaster in *Zacchini*, BTN has unfairly capitalized on Plaintiffs' NIL, retaining significant financial benefits that rightfully belong to Plaintiffs.

In summary, Plaintiffs have plausibly alleged that BTN's profits are directly tied to its active anticompetitive cooperation with Defendants to knowingly monetize Plaintiffs' NIL (without compensation), making restitution not only appropriate but necessary to prevent BTN from unjustly benefiting from a system that artificially suppressed Plaintiffs' rightful compensation. Because unjust enrichment law exists to prevent precisely this type of economic inequity, BTN's motion to dismiss must be denied.

C. Michigan Public Policy Supports Plaintiffs' Unjust Enrichment Claim.

"The public policy of the government is to be found in its statutes…" *Skutt v. City of Grand Rapids*, 275 Mich. 258, 265, 266 N.W. 344, 346 (Mich. 1936). Public policy "may be said to be the community common sense and common conscience, extended and applied throughout the state to matters of public morals, public health, public safety, public welfare, and the like." *Skutt*, 275 Mich. at 264.

The Michigan Legislature enacted Mich. Comp. Laws § 390.1732(a) to prohibit the NCAA from interfering with college students' "full participation in intercollegiate athletics based upon the student earning compensation as a result of the student's use of his or her name, image, or likeness rights." The public policy underpinning this statute is that, "A person's name, image, and likeness belong to the individual, and the individual should be able to explore opportunities to benefit from his or her skill and achievements. This is especially true for those in sports

with a high risk for injury." Michigan House Fiscal Agency Bill Analysis, H.B. 5217, 3/12/2020. This expression of public policy is particularly relevant in relation to the Plaintiffs' equitable claim. It buttresses the equities in favor of a determination of liability against BTN, especially as BTN's actions in monetizing Plaintiffs' NIL is counter to the public policy of this state.

CONCLUSION

For the reasons set forth above, Defendant Big Ten Network's Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b) (ECF No. 38) should be denied in its entirety.

Respectfully submitted,

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Dated: March 13, 2025

PROOF OF SERVICE

I declare under penalty of perjury that on March 13, 2025, I served a copy of the foregoing instrument via electronic filing through the Eastern District of Michigan, Southern Division, efile website. The above statement is true to the best of my knowledge and information.

/s/ *Karrie Ohlsson*