**IN THE UNITED STATES BANKRUPTCY COURT**
**FOR THE SOUTHERN DISTRICT OF INDIANA**
**INDIANAPOLIS DIVISION**

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| In re: | ) | Chapter 11 |
| | ) | |
| US GYMNASTICS, | ) | Case No. 18-09108-RLM-11 |
| | ) | |
| Debtor. | ) | |
| | ) | |

**RESPONSE TO DEBTOR'S OBJECTION TO CLASS CLAIM NO. 531**

**AND**

**CLASS CLAIMANT'S CROSS-MOTION TO SEEK LEAVE TO FILE AN AMENDED PROOF OF CLAIM NO. 531**[1]

[1] The Cross-Motion to Seek Leave to file an Amended Proof of Claim No. 531 is intertwined with Claimant's Response to Debtor's Objection, as the amendment would moot many concerns raised by the Debtor. Should the Court require the cross-motion be filed separately as an affirmative motion, Claimant will do so.

## I. INTRODUCTION

Rather than seeking to secure settlement and insurance proceeds from its Directors' and Officers'("D&O") policies, Debtor USA Gymnastics ("Debtor" or "USAG") instead seeks to eviscerate any opportunity for the survivors to access the millions of dollars available under those policies by filing Debtor's Objection to Class Claim No. 531 ("Class Claim") filed by Marcia Frederick Blanchette ("Claimant"). (Dkt. 885) ("Objection" or "Obj."). Indeed, the Class Claim is the only claim filed in the bankruptcy proceedings that can access the D&O policies, as the sexual abuse claims only involve general liability insurance policies, whereas the Class Claim involves liability of the Debtor's directors and officers for failing to report child abuse to law enforcement upon any suspicion of such abuse in violation of federal law. Sustaining the Debtor's Objection would only decrease the already limited funds available to the abuse survivors, further prejudicing them for the sole benefit of the Debtor's insurer.

The Debtor attempts to bar survivor-claimants from recovering millions of dollars of additional insurance proceeds by alleging unsubstantiated procedural hurdles for class claims in bankruptcy, and attempting to prematurely attack the merits of the underlying claim by arguing over the legislative intent behind the Protecting Young Victims from Sexual Abuse And Safe Sport Act of 2017, Pub. L. 115-126 ("Safe Sport Act" or "SSA") and fundamentally mischaracterizing application of the statute here.

Notably, entirely absent from the Debtor's Objection is any representation that USAG timely reported suspicions of sexual abuse to law enforcement, as required under The Safe Sport Act and for which the Debtor is subject to liability under the Class Claim. Instead, in seeking to disallow the Class Claim, Debtor incorrectly asserts that the class claims are unnecessary and "would complicate greatly a bankruptcy, without yielding significant compensation to injured

parties." (Dkt. 885 at p. 3). Not so. In fact, the D&O policies may provide millions of dollars in additional insurance coverage that would significantly increase compensation to the injured parties and are unavailable through any avenue of recovery other than the Class Claim.

Moreover, Claimant herewith seeks to amend Class Claim No. 531 in two primary respects which will moot many of Debtor's arguments in its Objection. First, Claimant proposes to amend the claim to limit the Class to claimants that have otherwise filed a valid proof of claim, thereby alleviating the Debtor's purported concerns of complexity, uncertainty of not "knowing how many claims must be resolved," and any prejudice to claimants who timely filed a proof of claim. (Dkt. 885 at p. 4). Second, the amended proof of claim will seek only statutory liquidated damages (limited to $150,000 per class member) to be paid from the D&O policies exclusively, as well as injunctive and declaratory relief. Furthermore, Claimant has asked the Debtor to consent to her counsel serving as special counsel on behalf of the Debtor to proceed with claims against the D&O carrier, Western World, to access the insurance proceeds for the abuse survivors with valid SSA claims.

All of this can be accomplished with remarkable ease by applying Federal Rule of Bankruptcy Procedure ("Bankruptcy Rule") 7023 to apply Federal Rule of Civil Procedure ("FRCP") 23 to the present bankruptcy proceedings. Indeed, USAG's own arguments demonstrate why allowing the Class Proof of Claim to proceed will neither delay the proceedings and nor prejudice the parties. First, USAG ***admits*** in its Objection that it is able to and, in fact, already has identified ***all*** reports of suspected abuse from its own records. (Dkt. 885 at p. 6). Thus, all that is required to ascertain the class members is to determine from USAG's own records which of those cases, if any, were timely reported to law enforcement and, from the docket, which victims filed proofs of claim for non-SSA claims here. Second, USAG also

***admits*** that its ***only*** defenses on the merits of Claimant's SSA claim are legal questions common to all class members. (Dkt. 885 at pp. 23-28). Finally, because the D&O policies constitute a limited fund, the distribution in equal parts of which will flow directly from the declaratory injunctive relief sought, no individual damages issues are present and class notice is also not required, as explained further below. As such, class certification and adjudication of Claimant's and Class' claims will be extremely straightforward and efficient.

Simply put, the Debtor's Objection should be disallowed, the Claimant should be allowed to amend Class Claim No. 531 to limit the Class to claimants with valid claims on file with the bankruptcy court and the relief sought to statutory liquidated damages, and the parties should have the opportunity to continue their discussions re Class Counsel being appointed Special Counsel to attempt maximize the recovery for all survivors.

## II. JURISDICTION

The Court has jurisidction over this matter pursuant to 28 U.S.C. §1334. This is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(A) and (B), and the Court may enter a final order consistent with Article III of the United States Constitution. Venue is proper pursuant to 28 U.S.C. §§1408 and 1409. The statutory and legal predicates for the relief requested herein are section 502 of the Bankruptcy Code, Bankruptcy Rule 3007, and Local Rule 3007-1.

## III. RELIEF REQUESTED

Pursuant to Bankruptcy Rules 9014(a) and (c) Claimant hereby moves this Court for an entry of an order directing that Bankruptcy Rule 7023 applies to the class proof of claim filed (and to be amended) by Claimant on behalf of herself and the Class and accordingly deny Debtor's Objection to Class Claim No. 531. If, after the Court directs that Bankruptcy Rule 7023 applies to the Class Claim, the Court determines that additional briefing is necessary on the issue

of class certification, Claimant respectfully requests that the order establish a briefing schedule for and scheduling a hearing, if necessary, on certification of the Class for all purposes in the Chapter 11 bankruptcy.

In addition, pursuant to Bankruptcy Rules 9014 and 7015, the Claimant also respectfully asserts a cross-motion for leave to amend Class Claim No. 531 to limit the class to the claimants with valid proofs of claim currently filed in the bankruptcy, and to seek only liquidated damages under the SSA from the Debtor's D&O policies, reasonable attorney's fees and costs, and injunctive and declaratory relief. *See In re Johnston*, 267 B.R. 717, 722 (5th Cir. 2001)("Amendments to claims under [Rule 7015] are liberally allowed."). Thus, the proposed class in the Amended Class Proof of Claim would include the following individuals:

> All current or former USAG-affiliated amateur athletes who have filed an individual proof of claim in these proceedings, for whom the Debtor USAG received information that the amateur athlete may have suffered an incident of child abuse, including sexual, emotional and/or physical abuse, and either (a) failed to report incidents occurring after February 14, 2018 to law enforcement authorities within 24 hours of learning of the incident, and/or (b) failed to report incidents occurring before February 14, 2018 to law enforcement authorities, within 24 hours of the Congress enacting the Safe Sport Act.

In addition, the Claimant respectfully requests an order scheduling a hearing on the class certification motion and allowing for reasonable discovery in advance of that hearing. As shown below, minimal discovery will be required and can be concluded within 30-60 days with the cooperation of the Debtor.

## III. BACKGROUND

### A. Marcia Frederick Blanchette's Class Claim

On April 29, 2019, Claimant Marcia Frederick Blanchette filed Class Sexual Abuse Claim No. 531. She attached and incorporated the class action complaint, which was filed on June 20, 2018 in the United States District Court for the District of Massachusetts. (See attached Proof of Claim 531 and attached Complaint, attached as **Exhibit 1**). The underlying complaint sought to certify a class defined as:

> All current or former USAG-affiliated and/or USOC affiliated amateur athletes for whom the USAG, the USOC, and/or their agents and/or employees received information that the amateur athlete may have suffered an incident of child abuse, including sexual, emotional and/or physical abuse, and either (a) failed to report incidents occurring after February 14, 2018 to law enforcement authorities within 24 hours of learning of the incident, and/or (b) failed to report incidents occurring before February 14, 2018 to law enforcement authorities, within 24 hours of the Congress enacting the Safe Sport Act.

(Complaint at ¶39 attached to **Exhibit 1**). As set forth above, Claimant seeks leave herewith to amend the Class Claim to limit the definition of class members and their damages in this context.

The Class Claim as filed requested actual, liquidated, and punitive damages arising from USAG's alleged failure to comply with the Safe Sport Act, and to report allegations of sexual abuse of minor athletes to the U.S. Center for Safe Sport within 24 hours of that law's enactment on February 14, 2018. (Id. at ¶148.) The liquidated damages that were sought were $150,000 for each class member, and Claimant asserted that the class was numerous enough that the aggregate damages would exceed $5,000,000. In addition, the Class Claim requested undefined declaratory and injunctive relief, as well as reasonable attorney's fees and costs.

Prior to seeking class certification, the District Court stayed the entire class action in light of this Court's order enjoining the continued prosecution of certain pre-petition lawsuits. (See

Frederick v. USAG, et al., No. 18-CV-11299, Dkt. 83 (D. Mass.); Adv. No. 19-50075, Civ. Dkt. 71.).

**B. The Debtor's Bankruptcy Filing**

On December 5, 2018, USAG filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. The Debtor remains in possession of its property and continues to operate and maintain its organization as debtor in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No request has been made for the appointment of a trustee or examiner in this chapter 11 case.

On December 19, 2018, the United States Trustee appointed the Additional Tort Claimants Committee Of Sexual Abuse Survivors to represent the interests of all creditors making claims against the Debtor based on sexual abuse. (Dkt. 97.) Marcia Frederick Blanchette, who brought an individual claim not subject to the Objection, and who also filed the Class Claim as the Class Representative, was appointed to the Additional Tort Claimants Committee Of Sexual Abuse Survivors. Id.

In its Objection, the Debtor states: "From the start, the Debtor's stated purpose in filing bankruptcy was to allow for a complete and equitable resolution of all of the sexual abuse claims. At the time it filed for bankruptcy, the Debtor faced hundreds of lawsuits and, while it has insurance applying to those claims, it feared that the insurance would not cover all of the claims. Thus, bankruptcy was the only option to ensure that all of the sexual abuse survivors would be treated equitably." The Debtor has failed to meet this objective in its entirety. (Dkt. 885 ¶9.).

### C. USAG's Bar Date and Notice Procedures

On February 25, 2019, the Court issued an order fixing April 29, 2019 as the bar date for claims arising from sexual abuse (the "Bar Date"). (See Dkt. 301 (the "Bar Date Order")). No party appealed the Bar Date Order and the Bar Date Order is now a final order. The Bar Date Order provided that any individuals who did not comply with the Bar Date would be "forever barred, estopped, and enjoined from asserting" their claims, and USAG would be "forever discharged from any and all indebtedness or liability with respect to or arising from" their claims. (Id. ¶18.).

### D. The Mediation Process

On May 17, 2019, this Court appointed Judge Gregg Zive to mediate "the resolution of the sexual abuse claims; the resolution of any disputes relating to the applicability of the Debtor's insurance coverage to the sexual abuse claims and the Debtor's insurance carriers' obligations to fund distributions on the sexual abuse claims, and related defense costs; and the resolution of any other matters necessary to equitably determine the rights of, and allocate recoveries to, survivors holding allowed sexual abuse claims." (Dkt. 514, ¶2.)

Judge Zive began the mediation process in late May 2019 and has conducted a series of in-person and telephonic mediation sessions over the past many months in which Class counsel and Claimant have participated. Since the initiation of Mediation, the Claimant and Class counsel have dedicated extensive time and resources toward reaching a global settlement, yet to no avail. The Debtor has failed to provide a reasonable settlement, and notably, Debtor's D&O insurer, Western World Insurance Group ("Western World") (with policies amounting to $5 million each year consecutively from 2018-2020), has failed to offer a penny of the insurance proceeds available to resolve these claims, despite Claimant's recent D&O policy limits demand.

Indeed, Western World is not included as a contributor in the Debtor's proposed bankruptcy plan. (Dkt. No. 932).

### E. The Creditors' Committee's Motion to Dismiss and Debtor's Filing of the Plan

Because the Debtor and the USOPC have failed to offer reasonable amounts to settle these matters, the Creditors' Committee, of which Claimant is a member, filed a motion to dismiss the bankruptcy, titled Motion of the Additional Tort Claimants Committee of Sexual Abuse Survivors for Entry of an Order Pursuant to 11 U.S.C. §§ 105(a), 349 and 1112(b) Dismissing The Bankruptcy Case on January 21, 2020. (Dkt. No. 892). As grounds therefore, and to summarize the prior 13 months of proceedings, the Committee noted:

> The coordinated strategy of USAG and the USOC was, and remains to be, to delay, deflect and deny [Nassar] and non-Nassar survivors justice for the horrible crimes committed upon them as children. Sadly, USAG and the USOC have used this bankruptcy proceeding as yet another tool to inflict pain upon these sexual abuse survivors – both Nassar and non-Nassar survivors – and to deny justice to these girls and women who competed for this institution and their country… This proceeding, and the purported "good-faith" attempts by USAG to reach a mutually agreeable plan for reorganization, are nothing but a concerted effort by USAG and the USOC to buy time and protect its collective asset in the 2020 Summer Olympic revenue stream, nothing more.
>
> The Survivors' Committee is compelled to seek dismissal of this Case because USAG, the USOC and their respective insurance carriers (the "Insurers") have failed to propose a fair, comprehensive settlement with the Survivors' Committee and its constituents. The three lengthy mediation sessions with the Survivors' Committee and the intra-insurance company mediations have not resulted in a compromise, neither monetary and importantly, non-monetary. Since the last mediation session on November 21, 2019, USAG has not initiated a single substantive plan-related communication with the Survivors' Committee. Indeed, this Case instituted by USAG, and which (in the Survivors' Committee's view) was done in coordination with and at the direction of the USOC, was a tactic taken by these entities to halt the vigorous civil discovery inquiry into their horrendous conduct in concealing its widespread child molestation problems, halt de-certification proceedings against USAG…This Case, having been filed more than 13 months ago, is yet another platform for USAG and the USOC to delay justice to the Survivors' Committee and their constituents, and the Court should no longer indulge USAG and the USOC by allowing them to continue dragging survivors through this morass. Extensive mediations on the monetary and non-

> monetary issues involved in this Case have resulted in an impasse between the parties; this proceeding serves only the interests of delay. The survivors' claims should be liquidated now in their respective venues, and this Case should be dismissed.

(Dkt. No. 892 at p. 104).

Rather than oppose the motion, and in an attempt to force an inadequate settlement, the Debtor filed a Chapter 11 Plan of Reorganization on January 30, 2020. Pursuant to the Court's order (Dkt. No. 909), on February 21, 2020, the Debtor filed its Notice of Hearing to Approve Disclosure Statement and Plan Confirmation Procedures. (Dkt. No. 932). Notably, had the motion to dismiss been granted, this objection would be moot and the Class Claim would proceed in the District Court of Massachusetts.

### F. Debtor's Objection to Class Claim No. 531 and Notice of Response Deadline

For the first time, on January 17, 2020, Debtor filed its Objection to Class Claim No. 531 and Notice of Response Deadline. Since that time, the parties have been conferring on amending Class Claim 531 as set forth herein, and the potential of appointing Class Counsel as special counsel to pursue the claims against the D&O carrier, Western World.

## IV. RESPONSE TO DEBTOR'S OBJECTIONS TO CLASS PROOF OF CLAIM

### A. Class Proof of Claim Are Commonly Permitted in Bankruptcy.

Debtor's argument that the establishment of a claims bar date and notice procedures precludes the application of Bankruptcy Rule 7023 flies in the face of the substantial body of case law that has emerged in the thirty years since the Seventh Circuit's decision in *In re American Reserve Corporation* ("*American Reserve*") confirmed that class proofs of claim are proper and serve an important role in the bankruptcy process. 840 F.2d 487, 489 (7th Cir. 1988) ("The class proof of claim may be essential to discover what the bankrupt's entire debts are, and therefore who should be paid what."). This is the majority rule. *See, e.g., In re Kaiser Group*

*Int'l, Inc.*, 278 B.R. 58, 62 (Bankr. D. Del. 2002) ("The vast majority of courts have concluded that class proofs of claim are permissible in bankruptcy proceedings, pursuant to Bankruptcy Rules 7023 and 9014."); *The Certified Class in the Chartered Sec's Litig. v. The Charter Co.* ("*Charter Co.*"), 876 F.2d 866, 873 (11th Cir. 1989) ("In light of Congress' inclusion of Rule 23 in bankruptcy proceedings [and] the clear congressional intent that the Bankruptcy Code encompass every type of claim . . . we conclude that class proofs of claim are allowable in bankruptcy."), *pet. for cert. dismissed*, 496 U.S. 944 (1990); *Reid v. White Motor Corp.*, 886 F.2d 1462, 1469 (6th Cir. 1989) (allowing class proofs of claim pursuant to Bankruptcy Rules 7023 and 9014 is the more "equitable resolution"), *cert. denied*, 494 U.S. 1080 (1990); *Birting Fisheries v. Lane (In re Birting Fisheries)*, 92 F.3d 939, 939-40 (9th Cir. 1996) (holding that the Bankruptcy Code "should be construed to allow class claims" and noting that three other circuits had so held as of that time); *Palmdale Hills Prop., LLC v. Lehman Comm'l Paper, Inc. (In re Palmdale Hills Prop., LLC)*, 457 B.R. 29 (B.A.P. 9th Cir. 2011) (same).

These courts have recognized that the class action device is consistent with the fundamental goals and objectives of the bankruptcy process:

> [T]he bankruptcy statute has the goal of facilitating creditor compensation. It would be incongruous for this bedrock policy to be thwarted by reading a procedural limitation into the Code. Bankruptcy also seeks to achieve equitable distribution of the estate. Persons holding small claims, who absent class procedures might not prosecute them, are no less creditors under the Code than someone with a large, easily filed claim. Applying Rule 23 to filing procedures will bring all claims forward, as contemplated by the Bankruptcy Code.

*Charter Co.*, 876 F.2d at 871.

### B. <u>The Claimant Has Complied With Procedural Requirements for Class Actions in Bankruptcy Cases.</u>

#### 1. The Plan Is in its Infancy Stage and Undoubtedly Will Be Subject to Significant Objections, Providing Sufficient Time for Class Certification.

Merely two and a half weeks have passed since the Debtor filed its Notice of Hearing to Approve Disclosure Statement and Plan Confirmation Procedures. (Dkt. 931). The deadline to object to the Plan has not yet passed. Undersigned counsel represents approximately 30 other claimants and understands from interaction with other claimants' counsel, that there will be significant objections to the plan. By contrast, Claimant believes minimal discovery will be needed to move for class certification of her claim and can efficiently litigate class certification with minimal delay.

#### 2. The Claimant Has Not Been Dilatory and Has Been Actively Participating in the Mediation Process.

To date, the parties have been actively mediating the claims, including the subject class claims. Now, Debtors have filed an objection to the class claim, signaling the breakdown of those negotiations and creating a "contested matter." *See* Section IV.A., *supra*, *see also American Reserve*, 840 F.2d at 492-94. In response, Claimant responds to the Objection and hereby includes cross-motions to 1) apply Bankruptcy Rule 7023 to the Class Proof of Claim, under Bankruptcy Rule 9014 and 2) seek leave to amend the Class Proof of Claim to narrow both the class definition and the relief sought.

USAG asserts that Claimant has taken a "lethargic approach" to class litigation, faulting Claimant for not having filed a motion to apply Bankruptcy Rule 7023 and FRCP 23 to her Class Proof of Claim prior to its objection. (Dkt. 855 at p. 12.) But any claimed delay in filing

this motion under Bankruptcy Rule 9014 ***is a direct result of USAG's own delay in filing an objection***.

In fact, Claimant has followed the procedure set forth by the Seventh Circuit in *American Reserve,* 840 F.2d at 488. The procedure begins with the putative class representative filing a proof of claim. *Id.* Next, the debtor, or some other properly situated party, file an objection to the class proof of claim, ***creating the contested matter***. *Id.* The putative class representative then files a motion with the bankruptcy court under Rule 9014 requesting that Rule 7023 be applied to the contested matter. *Id.* Finally, the court makes a decision as to whether to exercise its discretion to make Rule 7023 applicable to the contested matter of the class proof of claim. *Id.* at 493; *see also In re FirstPlus Fin., Inc.* 248 B. R. 60, 67-68 (describing the process the Seventh Circuit has set forth and collecting cases wherein other courts have adopted this process). A Rule 9014 motion centers on "whether the benefits of applying Rule 7023 (and Civil Rule 23) are superior to the benefit of the standard bankruptcy claims procedures." *Gentry v. Siegel*, 668 F.3d 83, 94 (4th Cir. 2012). Such a motion must be granted ***before*** the requirements of Civil Rule 23 apply. *Id.* at 95.

USAG's attempt to distort this process by stating that the Seventh Circuit "explained that filing a proof of claim constitutes a 'stage,' for purposes of Rule 9014(c)" not only ignores the procedural history of that case but also directly contradicts the reason for this explanation. (Dkt 855 ¶ 27.) The original quotation and surrounding sentences read as follows:

> Bankruptcy Rule 9014, which applies to "a contested matter in a case ... not otherwise governed by these rules" states that "[t]the court may at any stage in a particular matter direct that one or more of the other rules in Part VII shall apply." ***Rule 9014 thus allows bankruptcy judges to apply Rule 7023-and thereby Fed. R. Civ. P. 23, the class action rule-to "any stage" in contested matters***. Filing a proof of claim is a "stage".

*American Reserve*, 940 F.2d at 488 (emphasis added).

Similarly, in *Gentry v. Siegel*, the Fourth Circuit found that the named claimant's Rule 9014 motion, filed one year and two months after the bar date, was filed at the earliest time possible. 668 F.3d 83, 92 (4th Cir. 2012).[2] "Rule 9014 applies only to 'contested matters' and, as already noted, a 'contested matter' does not arise from a proof of claim until an objection to the claim has been interposed." (citing *Charter Co.*, 876 F.2d at 874-875.) And as stated in *Charter Co.*, "***[t]he first opportunity*** a claimant has to move under Bankruptcy Rule 9014... ***occurs when an objection is made to a proof of claim***. ***Prior to that time, invocation of Rule 23 procedures would not be ripe,*** because there is neither an adversary proceeding nor a contested matter. 876 F.2d at 874; *see also* Fed. R. Bankr. P. 9014(c) ("[i]n a ***contested matter***...relief shall be requested by motion.") (emphasis added).

The cases upon which USAG relies in support of its argument that Claimant was dilatory are inapposite. While it is true that in *In re Circuit City Stores, Inc.*, No. 08-35653 2010 WL 2208014 (Bankr. E.D. Virg. May 28, 2010) ("*In re Circuit City Stores*"), the court found claimant's motion under Rule 9014 untimely, the Fourth Circuit ***reversed*** the portion of the Bankruptcy Court's Order the Debtor cites. *Gentry v. Siegel*, 668 F.3d at 92, *aff'g in part on other grounds*, *In re Circuit City Stores*, 439 B.R. 652 (Ed. Va. 2010), *aff'g In re Circuit City Stores*, 2010 WL 2208014 ("At bottom, we also reverse the bankruptcy court's ruling that the Named Claimants' Rule 9014 motion was untimely.") Moreover, as noted above, *American*

[2] In rejecting the trustee's argument that forcing putative class representatives to wait until objections to their class proofs of claim are made will allow debtors in future cases to withhold their objection until "the eve of confirmation and the move to expunge the class claim on the grounds that applying Rule 23 would unduly delay distribution," the court noted that, "as court of equity, the bankruptcy court has the authority to ***disallow objections***...if they are employed in attempts to engage in some kind of "gotcha" behavior designed to gain an unfair advantage." *Gentry* , *supra*, 668 F.3d at 83 (emphases added)(citing *In re Ephedra. Products Liability Lit*., 329 B.R. 1, 5 (S.D.N.Y 2005). While Claimant refutes USAG's assertion that this matter is so far along that applying FRCP 23 would have any adverse impact, to the extent that this Court is inclined to find otherwise, it should exercise its discretion as a Court of equity to disallow USAG's objection given their own delay in bringing an objection.

*Reserve* confirms that the Seventh Circuit ***does*** allow class proofs of claim and that Claimant's timing is proper. 940 F.2d at 488. In both, *In re Thomas McKinnon Sec's, Inc.*, 150 B.R. 98, 101 (Bankr S.D.N.Y 1992), and *In re Tarragon Corp.*, No. 09-10555-DHS 2010 WL 3842409 at * 5 (Bankr. D.N.J. Sept. 24, 2010) the claimant ***never*** filed a motion under Rule 9014, thus they are distinguishable from the present case where Claimant has moved under Rule 9014 shortly after USAG's Objection (and as a part of Claimant's Response to Objection). Finally, in *In re Ephedra Products Liability Litigation*, 329 B.R. 1, 5 (S.D.N.Y. 2005), the Court granted expungement ***"on a no fault basis***", finding that applying FRCP 23 there would have greatly and unduly delayed distribution of the case. As explained below, however, the opposite is true here.

**C. Bankruptcy Rule 7023 Should Apply to the Class Proof of Claim.**

Determining whether a claim can proceed as a class proof of claim is a two-step process. First, the court must make the threshold decision of whether it is beneficial to apply Rule 7023 to a contested matter pursuant to Bankruptcy Rule 9014. *In re Chaparral Energy, Inc.*, 571 B.R. 642, 646 (Bankr. D. Del. 2017 ); *See* FED. R. BANKR. P. 9014(c). Second, if the Court determines that applying Bankruptcy Rule 7023 is appropriate, the court then must determine whether the class certification requirements of FRCP 23 have been satisfied. *Id.; see also Gentry*, 668 F.3d at 93 ("Civil Rule 23 factors do not become an issue until the bankruptcy court determines that Rule 7023 applies by granting a Rule 9014 motion."); *In re Computer Learning Centers, Inc.*, 344 B.R. 78, 86 (Bankr. E.D. Va. 2006); *see also* 10 COLLIER ON BANKRUPTCY ¶7023.01.9.

The first step in the analysis is determining "whether the benefits of applying Rule 7023 (and Civil Rule 23) are superior to the benefits of the standard bankruptcy claims procedures." *Gentry*, 688 F.3d at 93. In making that determination, courts generally consider three factors (the "*Musicland Factors*"): 1) whether the class was certified pre-petition; 2) whether members of the

putative class received notice of the bar date; and 3) whether class certification will adversely affect the administration of the estate. *In re Verity Health Sys. Of Cal.*, 2019 Bankr. LEXIS 1818, at *19-*20 (Bankr. C.D. Cal. June 11, 2019) (quoting *Chaparral*, 571 B.R. at 646 and *In re Musicland Holding Corp.*, 362 B.R. 644, 654 (Bankr. S.D.N.Y. 2007)). In addition, the court may also consider the timing of the motion to certify the class and the status of any proposed plan of reorganization for the debtor. *In re Craft*, 321 B.R. at 199 (identifying factors such as "prejudice to the debtor or its other creditors, prejudice to putative class members, efficient estate administration, the conduct in the bankruptcy case of the putative class members, and the status of proceedings in other courts"). The weight of each factor is determined on a case-by-case basis. *Verity*, 2019 Bankr. LEXIS 1818, at *19-*20; *Chaparral*, 571 B.R. at 646 ("No one factor is dispositive; a factor may take on more or less importance in any given case."). Here, taken as a whole, the factors weigh in favor of applying Bankruptcy Rule 7023 and FRCP 23.

**1. That the Class Was Not Certified Pre-Petition Is Not Dispositive.**

At the time USAG filed for bankruptcy protection, Claimant had filed her class action lawsuit, and motions to dismiss had been briefed and argued, but not yet decided. . Therefore, Claimant was denied the opportunity to move for class certification pre-petition. While this factor may weigh against applying Bankruptcy Rule 7023, no one factor is dispositive. *In re Chaparral Energy, Inc.*, No. 16-11144, 2017 WL 2292765 at *3 (Bankr. D. Del. May 24, 2017). And, as explained below, other factors weigh in favor of applying Bankruptcy Rule 7023 and FRCP 23 here. Notably, several courts have exercised their discretion to apply Bankruptcy Rule 7023 notwithstanding the absence of a prepetition certification. *Id.*; *In re Kaiser Group Intern., Inc.*, 278 B.R. 58, 62-63 (Bankr. D. Del. 2002); *Gentry*, 668 F.3d at 91; *In re MF Global*

*Inc.*, 512 B.R. 757, 763 (Bankr. S.D.N.Y. 2014); *In re Connaught Group, Ltd.*, 491 B.R. 88, 98-100 (Bankr. S.D.N.Y. 2013).

USAG contends that, in the absence of prior pre-petition class certification, Claimant's counsel "was not authorized to file the Class Claim[] on behalf of the unnamed claimants as their authorized representative" (Dkt 855 at p. 13)(citing *In re Circuit City Stores*, 2010 WL 2208014, at *4, and *Musicland*, 362 B.R. at 652). Again, USAG's reliance on *In re Circuit City Stores*, is misplaced because the Fourth Circuit ***reversed this portion of the Bankruptcy Court's ruling*** in *Gentry*. *Gentry*, 668 F.3d at 91, *aff'g in part on other grounds*, *In re Circuit City Stores*, 439 B.R. 652, *aff'g In re Circuit City Stores*, 2010 WL 2208014 ("In sum, insofar as the bankruptcy court ruled that claimants could not file class proofs of claim without first obtaining an order under Rule 9014, we reverse the ruling."). Citing extensively to *American Reserve*, the court in *Gentry* found,

> We agree with the Seventh Circuit's conclusion that the authorization for the filing of proofs of claim should not be construed strictly… Thus, if proofs of claim may be filed by ***agents*** of creditors, they may also be filed by ***putative agents*** on a conditional basis...We thus conclude that creditors may file proofs of claims for themselves and as putative agents for members of a class who are similarly situated. But such class proofs of claim serve their function only on a conditional basis. If the court approves class representation, the approval will function retroactively to legitimize the proof of claim, but if the court rejects such representation, the putative class members will have to file individual proofs of claim.

*Id.* (emphasis in original) (citing *America Reserve*, 840 F.2d at 493 (footnote and internal citation omitted). Although ultimately denying the claimant's motion for class certification, the *Musicland* Court similarly found that, "[b]y certifying the class, a court effectively ratifies the agent's authority *nunc pro tunc*. Conversely, if the court declines to apply Rule 23 to the proof of

claim, the putative agent never obtains the requisite authority." *Musicland*, 362 B.R. 644, 652 (citations omitted).

**2. Certification Will Not Adversely Affect Administration of the Estate.**

While courts may decline to apply Rule 23 if doing so would "'gum up the works' of distributing the estate," *In re MF Global Inc*., 512 B.R. 757, 763 (Bankr. S.D.N.Y. 2014), allowing the Class Proof of Claim to proceed here will not delay administration of the Debtor's estate or prejudice the existing claimants at all. Instead, allowing the Class Proof of Claim to proceed will maximize the amount of money available to victims and facilitate the orderly and efficient administration of the full value of the Debtor's estate.

**a. Class Members Are Easily Identified.**

All Class Members are easily identified from the Debtor's own records and this Court's docket, vastly reducing any chance of delay. Indeed, the Debtor ***admits*** that in its objection that it has already identified "***every*** individual to whom anyone had provided USAG with any indication that they had been abused." (Dkt 855, p. 16) (emphasis supplied). Its records will also demonstrate how many of these were not reported to law enforcement in a timely manner.

**b. Very Little Discovery Is Needed to Certify the Class.**

USAG contends that because the class was not certified prior to bankruptcy, pursuing class certification here would require "significant amount of discovery" and, therefore, will cause undue delay. (Dkt at p. 14). (citing *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 677 (7th Cir. 2001); *Dukes*, 564 U.S. at 350; *Comcast Corp. v. Behrend*, 569 U.S. 27, 33-34 (2013); and *In re Bally Total Fitness of Greater N.Y. Inc.*, 402 B.R. 616, 621 n.5 (Bankr. S.D.N.Y. 2009)). USAG's assertion is simply false. In fact, it is difficult to imagine an easier case to certify.

First, little (if any) additional discovery would be required for class certification. As noted above, the USAG has already ***admitted*** that it is able to, and in fact has already, identified all reports of potential abuse. (Dkt 885 at p. 6.) Furthermore, in the Proposed Amended Proof of Claim, the class will limited to individuals who have filed other claims. Thus, the only "discovery" needed is USAG's own records that will show if any of these cases were reported to law enforcement and, if so, when.

Second, ***every other*** significant issue in the case will hinge on common legal questions that will be resolved with common answers. In its Objection, USAG ***admits*** that its challenges to the merits of the class claims are limited to two common legal issues: 1) whether the statute provides for a private right of action; and 2) whether Claimants' theory requires retroactive application of the statute. (Dkt 885 at pp. 23-28.) Thus, even complete adjudication of the Class Claims will not cause significant delay.

For these reasons, this case is easily distinguishable from *Hurd v. Monsanto*, 164 F.R.D. 234, 237 (S.D. Ind. 1995), (Dkt 885 at p. 19.) As USAG admits, the *Hurd* plaintiffs sued Monsanto on behalf of over 3500 employees regarding exposure to chemicals over decades. *Id.* If anything, USAG's significant reliance on *Hurd* only amplifies the weakness of its argument. As noted above, unlike *Hurd*, the SSA claim turns entirely on objective evidence and common legal questions and does ***not*** require an individual finding of whether USAG "cause[d] harm and to whom" as USAG claims. (Dkt 885 at p. 20.)

In fact, none of the cases USAG relies upon to argue the Class Proof of Claim should be barred are analogous to this case. In *In re Bally Total Fitness*, the proposed class consisted of thousands of employees alleging a variety of different claims. 402 B.R. at 621 n.5. *Szabo, Wal-*

*Mart*, and *Dukes*, each rely upon *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 160-161 (1982), which provides:

> ***Sometimes the issues are plain enough from the pleadings*** to determine whether the interests of the absent parties are fairly encompassed within the named plaintiff's claim, and ***sometimes it may be necessary*** for the court to probe behind the pleadings before coming to rest on the certification question.

*Szabo*, 249 F.3d at 677; *Dukes*, 564 U.S. at 350; *Comcast*, 569 U.S. at 33-35. Neither, *Falcon*, nor any of the cited opinions address the amount of discovery which should or must be completed prior to class certification, and each involved the certification of a far wider reaching class with more complex issues of commonality. *See Falcon*, 457 U.S. at 159 (reversing and remanding certification of class comprised of all Mexican-American employees and applicants in suit for discrimination, instructing lower court to determine whether promotion and hiring decisions involved a common question); *Szabo*, 249 F.3d 672 (reversing and remanding certification of nationwide class in breach of warranty and fraud action where claims related to numerous models of the product sold by dealers around the country, instructing lower court that allegations in the complaint need not be accepted as true); *Dukes*, 564 U.S. 2541 (reversing certification of class comprising of 1.5 million current and former female employees of Wal-Mart alleging discretionary decision making was discriminatory practice, finding that without any clear policy, the reason for each particular employment decision would not result in common answer); *Comcast*, 569 U.S. 27 (reversing certification of class in antitrust litigation on the basis that model developed by plaintiff's expert could not be accepted as evidence that damages were susceptible of measurement across entire class).

**c. Class Notice Is Not Required Here.**

USAG also argues that notice is required to certify the Class and that such notice will be duplicative and time-consuming. (Dkt 885 at p.21.) USAG is wrong on both counts.

Certification under FRCP 23(b)(1)(B) (limited fund class) or FRCP 23(b)(2) (declaratory and injunctive relief) is proper here. And neither requires class notice. *See* FRCP 23(c)(2)(A).

A class may be certified under Rule 23(b)(1)(B) if "prosecuting separate actions by or against individual class members would create a risk of ... adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests." FRCP 23(b)(1). Because the Class Proof of Claim seeks liquidated damages of $150,000 per class member, it is likely the claims exceed the D&O policy limits. If so, FRCP 23(b)(1)(B)'s so-called "limited fund" class applies. *See Ortiz v. Fibreboard Corp*., 527 U.S. 815, 851 (1999) (approving use of insurance policy limits falling short of demonstrable claims to constitute a limited fund); *In re Orthopedic Bone Screw Prods. Liab. Litig.*, 176 F.R.D 158, 176 (E.D. Penn. 1997) (approving certification under 23(b)(1)(B) on the basis that the company's net assets and insurance coverage were vastly insufficient to satisfy the many claims against them).

Alternatively, certification under Rule 23(b)(2) is also appropriate because the USAG has, indeed, "acted or refused to act on grounds that apply generally to the class so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." FRCP 23(b)(2). USAG incorrectly argues that (b)(2) certification is improper merely because Class Members would be "entitled to an individualized award of monetary damages." (Dkt 885 at p. 22) (citing *Dukes*, 564 U.S. at 360-361). But "[t]he key to the (b)(2) class is the

indivisible nature of the injunctive relief or the declaratory relief remedy warranted' such as "conduct that was remedied by a single class-wide order." *Dukes*, 564 U.S. at 360-361. Thus, a FRCP 23 (b)(2) class is appropriate whenever the monetary relief will flow as a necessary consequence of a declaration of rights and injunction. *See also Johnson v. Mertirer Health Serv. Empl. Ret. Plan*, 702 F.3d 364, 371 (7th Cir. 2012). That is precisely the case here. Claimant seeks liquidated damages in a fixed amount as set by statute. Each class member will receive the same amount upon resolution of the contested legal theories. Moreover, USAG's refusal to act on and report facts they learn that give reason to suspect of incidents of abuse, make final injunctive and declaratory relief appropriate with respect to the Class as a whole.

However, even if the Court determines that FRCP 23(b)(3) must be satisfied, Claimant will diligently work with the Court and Debtor to ensure that class notice can be efficiently effectuated with minimal effort and expense by either party, particularly through its ECF system. As noted above Class Members are also individual claimants in this case and can be identified from USAG's records. Moreover, the proceedings are in the early stages. The Debtor only filed its plan for reorganization on February 21, 2020. It will take some time to develop an acceptable plan that fairly addresses all of the creditors' claims. Indeed, several objections to the proposed plan are anticipated. Thus, even if required to do so, giving notice and allowing an opt out period will not cause any significant delay.

USAG suggests that *In re Sacred Heart Hosp. of Norristown*, 177 B.R. 16 (E.D. Penn. 1995), provides useful guidance in determining whether a claim would present unwarranted delay. (Dkt 885 at p. 17), however that case is distinguishable both by its facts and because it relies on outdated law. As a preliminary matter, the court in *Sacred Heart*, questioned the strategy and adequacy of class counsel, a sole practitioner, who had filed and motions related to

class certification (as well as improperly serving a motion for reconsideration) on numerous occasions, moving forward only once there was an "emergency" need for class certification, shortly before the holidays, when a plan was before the court with "imminent confirmation." *Id.* at 24. Here, as explained above, Claimant's class certification motion was brought at the precise moment it should have been, shortly after Debtor's filed an Objection, confirmation of Debtor's plan is not "imminent", and the proposed Class Counsel is comprised of highly experienced class action litigators. Further, in the case the Court determined that Claimant's should have filed a motion ***prior*** to the Bar Date, as explained in Section IV.B.2, this is in direct contradiction to the process set forth by this Circuit in *American Reserve. Id.* Finally, the court in *Sacred Heart*, did not believe that a "virgin class," which had not been certified prior to bankruptcy, could proceed upon a class claim. *Id.* As explained above, prior certification is ***not*** a requirement for class proofs of claim. *Compare Sacred Heart*, 177 B.R. at 22, *with* Section 3.a. (citing *In re Chaparral Energy, Inc.*, 2017 WL 2292765 *3; *In re Kaiser Group Intern., Inc.*, 278 B.R.at 62-63; *Gentry*, 668 F.3d at 91; *In re MF Global Inc.*, 512 B.R. at 763; *In re Connaught Group, Ltd.*, 491 B.R. at 98-100).

The only two cases from the Seventh Circuit cited by USAG on this issue—*Matter of Chicago, Rock Island & Pacific R. Co.*, 788 F.2d 1280, 1284 (7th Cir. 1986), and *Matter of Plunkett*, 82 F.3d 738, 742 (7th Cir. 1996)—are also distinguishable, as both cases involve claims made ***several years*** following the proof of claim bar date ***and after*** the debtor's plan was approved. *Rock Island & Pacific R. Co.*, 788 F.2d 1280 (personal injury action enjoined where no proof of claim was ***ever*** filed and lawsuit was brought ***after*** creditors were paid; over eight years after the bar date for bankruptcy claims); *Matter of Plunkett*, 82 F.3d 738 (motion to allow informal proof of claim and amendment to proof of claim not permitted where only informal

proof was filed and claimant failed to amend proof of claim for nearly a decade and applied only after publication of approved plan).

**3. Permitting the Class Claim Will Serve as a Deterrent Against USAG's Continuing Violations of the SSA.**

Permitting the Class Proof of Claim to proceed under Bankruptcy Rule 7023, would also serve as an important deterrent against USAG's ongoing and future violations of the SSA. *In re Zenith Labs., Inc.*, 104 B.R. 659, 662 (D.N.J. 1989)(citing *American Reserve*, 840 F.2d at 489)("The class action increases the likelihood that small claimant will be represented and thereby 'serves a deterrent function by ensuring that wrongdoers bear the cost of their activities.'").The Court should give special consideration to this deterrence factor given the unspeakable pain and suffering USAG's abhorrent negligence and irresponsible failure to report has caused.

**4. Notice Notwithstanding, the Class Should Not Be Deprived of the Unique Benefits of the Class Claims.**

Finally, USAG argues that Bankruptcy Rule 7023 should not apply to the Class Proof of Claim simply because it contends the Bar Date Notice was sufficient. (Dkt. at p. 15-16.) But regardless of whether the notice was adequate,the Class Proof of Claim should proceed because it provides unique and additional remedies that victims will be denied if it is barred.

Where claims "may be contingent or of uncertain value, potential claimants may not realize that they can recover, unless the efforts of a representative make them aware." *Charter*, 876 F.2d at 870. "Likewise, the effort and cost of investigating and initiating a claim may be greater than many claimants' individual stake in the outcome, discouraging the prosecution of these claims absent a class action filing procedure." *Id.*

As demonstrated by the briefing pending in the district court, the SSA is a complex statute, which was enacted less than a year before the USAG filed its petition. It is unreasonable to expect individual Class Members to investigate and file their own individual SSA claims, especially where a pre-petition class action lawsuit asserting such claims on their behalf was already pending. This is even more pronounced in instant case, where taking legal action regarding ignored reports of abuse means revisiting yet additional traumas stemming not only from the abuse but also from USAG's failure to report abuse even when required to do so by the SSA.

It is also immaterial that Class Members' SSA claims are individually worth less than abuse claims under state law. "Bankruptcy also seeks to achieve equitable distribution of the estate. Persons holding small claims, who absent class procedures might not prosecute them, are no less creditors under the Code than someone with a large, easily filed claim." *Id.* at 871. The same is true here, particularly where new insurance policy money is available.

The class remedies sought are narrow and specific to the SSA claim. Claimant seeks recovery of liquidated damages in a statutorily mandated amount ($150,000 per class member) from the limited proceeds of the D&O policies, which absent the class claim will otherwise contribute ***nothing*** to the estate. Personal injury claims are undisputedly excluded from the Debtor's D&O policies, but failure to notify law enforcement of unlawful conduct as required under SSA is not excluded.

Because the Claimant seeks ***only*** proceeds from otherwise untapped policies and because ***only*** the SSA claim can reach those proceeds, creditors will not be negatively impacted at all. In fact, the existing claimants are ***also*** Class Members, although they did not assert the SSA claim and so they cannot seek any money from the D&O policies absent the Class Proof of Claim

proceeding. Despite months of mediation with Class counsel, the carriers have declined to, and the Debtor has failed to insist that these carriers contribute ***any*** proceeds (or agree to assign rights), and neither will budge until the Class Proof of Claim is allowed to proceed.

### D. <u>The Claimant's Class Action is Meritorious</u>

While now is not the stage to fully address the merits of Claimant's claims, Debtor's assertions that her Safe Sports Act claim lacks merit are unsupported and warrant a response.

#### 1. Section 2255 of the Safe Sport Act implies that civil remedies are available for the class

Debtor contends that Class Representative does not have a private right of action to assert claims for violation of the Safe Sport Act's reporting requirement. *See* Objection 57.[3] However, while federal courts have yet to address this issue head-on, a substantial body of jurisprudence indicates the Safe Sports Act confers a private right of action. Indeed, many courts have recognized that individuals, like Class Representative, may bring a private cause of action for injuries resulting from a failure to report suspected child abuse. *See Ham v. Hospital of Morristown*, 917 F. Supp. 531 (E.D. Tenn. 1995) (finding statute requiring medical personnel to report suspected child abuse to law enforcement official creates obligation to report, such that failure to report can give rise to civil liability); *see also Doe v. Corporation of President of Church of Jesus Christ of Latter-Day Saints*, 167 P.3d 1193 (Wash. Ct. App. Div. 2007) (finding private cause of action implied under statute mandating report of abuse or neglect); *Beggs v.*

[3] Cases cited by Defendant are inapposite because they primarily deal with regulation of violations by a governmental entity, a circumstance where there would be no private right of action and far different from here. *See Alexander v. Sandoval*, 532 U.S. 275, 276 (Sup. Ct. 2001) (noting the statute does not focus on the "individuals protected…but on the regulating agencies," finding it "expressly provides for enforcing regulations, which place elaborate restrictions on agency enforcement."); *Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320, 331 (Sup. Ct. 2015) (noting Section 30(A) of the Medicaid does not give providers a right to sue on a contract between a state Medicaid plan and the Federal government). Also, *Touche Ross & Co. v. Redington* is distinct from the present case because, unlike the Safe Sport Act, the statute at issue there did not proscribe any unlawful conduct, let alone confer rights to private parties. *See* 442 U.S. 560, 581 n.2 (Sup. Ct. 1979).

*State Dept. of Social & Health Services*, 247 P.3d 421 (Wash. 2011) (finding mandatory reporter statute, which imposed duty on specific professionals to report suspected child abuse implied cause of action against mandatory reporter who failed to do so, and thus medical malpractice statute did not preclude civil claim against doctor for failing to report suspected child abuse.); *see also Doran v. Priddy*, 534 F.Supp. 30, 33 (D.C. Kan. 1981).

Moreover, a private cause of action may be implied, even if the statute does not specifically provide it. *See Sternberg v. USA Nat. Karate-Do Federation, Inc.*, 123 F.Supp. 2d 659, 664 (E.D.N.Y. 2000) ("Even if a statute does not specifically provide for a private cause of action, one may be implied.") (citing *Cannon v. University of Chicago*, 441 U.S. 677, 688, (1979); *Cort v. Ash*, 422 U.S. 66 (1975)). Notably, *Sternberg* found an implied cause of action under the Amateur Sports Act, an act very similar to the Safe Sport Act. *Sternberg* explained:

> [when] deciding whether Congress designed the Sports Act to permit a private remedy for violations the following four *Cort* factors must be considered:
>
> 1) whether the ***plaintiff is "one of the class for whose especial benefit the statute was enacted*** ... that is, does the statute create a federal right in favor of the plaintiff"; 2) whether there is "any indication of legislative ***intent***, explicit or implicit, ***to create such a remedy or deny one***"; 3) whether it is "***consistent with the underlying purposes of the legislative scheme*** to imply such a remedy for the plaintiff"; and 4) whether the cause of action is "one traditionally relegated to state law, in ***an area basically the concern of the States***, so that it would be inappropriate to infer a cause of action based solely on federal law."

*Id*. at 664 (quotations omitted) (emphasis in original). Similar to the *Sternberg* discrimination case, "Plaintiff's case meets the first, third and fourth prongs of the *Cort* inquiry"; and here Class Representative's claims even meet the second prong. *See id.*

First, like the athlete in *Sternberg*, Claimant is "one of the class for whose especial benefit the statute was created." *Id.* Indeed, by mandating reporting of suspicions of abuse, the Safe Sport Act is specifically intended to protect athletes from assault. *See* Public Law No. 115-126 ("An Act to prevent the sexual abuse of minors"). For the third prong, "[a] private remedy is

consistent with the 'underlying purposes of the legislative scheme'" for both Sternberg and Class Representative. 123 F.Supp. 2d at 664. "One of the primary goals of the Sports Act is to 'encourage and provide assistance to women in amateur athletic activity'" *Id.* Likewise, one of the primary goals of the Safe Sport Act is "[t]o prevent the sexual abuse of minors and amateur athletes by requiring the prompt reporting of sexual abuse." *See* Public Law No. 115-126. A private remedy is therefore consistent with the underlying purpose of the Safe Sport Act's legislative scheme. The fourth prong, again like *Sternberg*, is met here because the "subject matter does not involve an area traditionally relegated to the States." No state has set forth laws requiring NGBs to be ***mandatory*** reporters, which falls instead under federal jurisdiction per the Safe Sport Act.

Finally, with respect to the second prong —"the design of Congress to provide a private remedy"—"[a]n 'explicit legislative purpose' to deny a private cause of action is controlling." 123 F.Supp. 2d at 665 (citations omitted). As in *Sternberg*, "[h]ere there is no congressional expression [and] [t]he legislative history … does not indicate that Congress wished to foreclose a private right of action." *Id.* To the contrary, Congress explicitly evidences its intent to create a private cause of action by enabling sexual assault victims — as defined by Safe Sport Act — to recover liquidated damages, the cost of the action, and potential punitive damages. *See* 28 U.S.C. § 2255 ("Section 2255"). Moreover, like the Sports Act for which "Congress has enunciated a strong policy against discrimination on the basis of gender," so too has Congress enunciated a strong policy against abuse of young children. *Id.* at 665-666 (citations omitted); *see* Section II.

Thus, a private cause of action is available to Claimant, and others similarly situated, for Debtor's failure to report the suspected abuse of which they were aware. Further, Claimant and the Class Members are the type of individual Congress intended to benefit from the Safe Sport

Act's civil remedies. *See* Plaintiff's Omnibus Opposition to USAG and USOC's Motion to Dismiss at 8-9, attached as **Exhibit 2**.

### 2. Claimant's Claims do not Involve Retroactive Application of the Safe Sport Act's Reporting Obligation

Debtor's arguments regarding any alleged retroactive application of the Safe Sport Act are misplaced. Claimant's allegations address violations of the Safe Sport Act that occurred post-passage, not pre-enactment, and therefore do not involve a retroactive application of the Act. Debtor's first violation of the Safe Sport Act, for instance, occurred when USAG did not report Plaintiff's (and others') allegations of child abuse within 24 hours of passage of the Safe Sport Act, specifically on February 15, 2018, despite having an open file and ongoing investigation pending. *See* **Exhibit 1**, Amended Complaint at ¶ 72-73. Debtor's conduct, which violated the Safe Sport Act, therefore, was not past conduct, but rather continued post-enactment in the form of Debtor's omissions and ongoing failures to report the abuse of which it was aware.

Yet the post-enactment failures of USAG comprising violations of the Safe Sport Act do not end there: there were multiple occasions after the enactment where USAG knew, or should have known, of additional facts leading to suspicion of child abuse and mandating reporting. For several months after passage of the Safe Sport Act, USAG specifically retained Claimant's sexual abuse case in-house for internal administrative hearings. During that time, the investigative report provided information to USAG substantiating the suspicion of child abuse of Claimant, as did the USAG administrative investigation produced in March 2018. The April, 2018 USAG hearing where Claimant was required to testify, along with her former coach Richard Carlson, about the sexual abuse, to a panel resulted in a finding in June 2018, that Claimant's allegations of sexual assault were substantiated and finding Mr. Carlson ineligible to coach amateur gymnastics in the future. Yet USAG neglected to report the abuse to law

enforcement, perpetuating precisely the wrongful conduct that the Safe Sport Act was implemented to stop. *See* Id. at ¶ 72-73; 158; *see also* Safe Sport Act ("An Act to prevent the sexual abuse of minors and amateur athletes by requiring the prompt reporting of sexual abuse to law enforcement authorities, and for other purposes.").

In light of these facts as pled in the FAC, Debtor's arguments regarding the tense that the law was written in are inapposite. The failure of Debtor to report on February 15, 2018, in April 2018 after the administrative hearing, and again in June 2018 after finding the abuse to be substantiated do not "implicate past events," "antecedent conduct," or "preenactment" conduct. *See* footnote 12, herein. Instead, Debtor's argument that the "present tense" of the Safe Sport Act means that it cannot apply to the conduct that they learned about before the enactment concedes that they knew about and suspected Claimant and other Class Members were abused before the passage of the Safe Sport Act. Moreover, as set forth in the dissent in *Carr v. U.S.*, Debtor's argument:

> … flies in the face of the widely accepted modern legislative drafting convention that the law should *not* be read to speak as of the date of enactment. The United States Senate Legislative Drafting Manual directly addresses this point: 'A legislative provision speaks as of any date on which it is read *(rather than as of when drafted, enacted, or put into effect)*'… [M]odern legislative drafting manuals teach that, except in unusual circumstances, all laws…should be written in the present tense."
>
> … By using the present tense, Congress remained neutral on the question whether the Act reaches pre-SORNA convictions … Congress cast all of these provisions in the present tense, but now the Attorney General has made SORNA applicable to individuals with pre-SORNA sex-offense convictions, all of these provisions must necessarily be interpreted as embracing preenactment conduct.

*Id.*, at 467. While Claimant need not rely on preenactment conduct to prevail on her Safe Sport Act claim, it is well established that such conduct may be considered regardless of the tense.

Lastly, "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory or legislative history to the

contrary," and in this case, it would not. *Landgraf v. USI Film Prod*., 511 U.S. 244, 277 (1994) (citation omitted). Notably, the Safe Sport Act does not "impose an additional or unforeseeable obligation," or "make unlawful conduct that was lawful when it occurred." *Id.* at 282 (citation omitted). Indeed, it could not have been lawful for USAG to ignore and conceal information regarding suspicions of sexual abuse of minors, as it had numerous other obligations to protect athletes and address and report sexual assault prior to the enactment of the Safe Sport Act. The Safe Sport Act merely "reflects Congress' desire to afford victims more complete redress for violations of rules established more than a generation ago…" *Id*.

Debtor's Objection to Claimant's Class Claim must be overruled because its claims do not require retroactive application of the Safe Sport Act, and rather reflect Congress' intent to hold USAG accountable for their misconduct, providing damages.

## V. CROSS-MOTION TO AMEND PROOF OF CLAIM NO. 531

Certainly Claimant timely filed Class Claim No. 531. Amendments to claims, like the one sought here by Claimant, under Bankruptcy Rule 7015 "are liberally alowed: amendments to timely creditor proofs of claim have been liberally permitted to cure a defect in the claim as originally filed, ***to describe a claim with greater particularity*** or to plead a new theory of recovery on the facts set forth in the orignal action." *See In re Johnston*, 267 B.R. 717, 722 (5th Cir. 2001)(emphasis added)(quoting *In re Kolstad*, 928 F.2d 171, 175 (5th Cir.) *(*quoting *In re Int'l Horizons, Inc.*, 751 F.2d 1213, 1216 (11th Cir. 1985), *cert. denied*, 502 U.S. 958 (1991)). Rule 7015 simply "requires that an amendment arise out of the same 'conduct, transaction, or occurrence' set forth in the original claim." *Id.*

There is no question that the proposed amendment to Claimant's Proof of Claim No. 531 arises out of "the same conduct, transaction or occurrence," as none of the conduct set forth in

the proof has changed, and instead, the amendment only seeks to limit the number of claimants that may be included in the Class to those who have a valid proof of claim already filed in the bankruptcy proceedings and limiting remedies sought. See Section III. Like in *In re Johnston*, the amendment only seeks to describe the claim with greater particularity by limiting the number of class members to the current claimants. Such an amendment will not prejudice the Debtor or the Creditors, but instead will simplify the process of identifying the class members and the certification process. Moreover, the amendment to the Class Claim alleviates concerns raised in the Debtor's objection and, along with appointing Class Counsel as special counsel to proceed against Western World (motion forthcoming), it provides a streamlined way to access additional insurance proceeds for the sexual abuse survivors who reported their abuse to the Debtor and the Debtor took no action to report to law enforcement within 24 hours, as required under the Safe Sport Act. *See In re Unroe*, 937 F.2d 346, (7th Cir. 1991) (affirming allowance of proof of claim amendment to an earlier filed, timely claim, noting the "result may have been different had the late claim been unscheduled or exceeded the amount in the plan, in which cases the prejudice to the debtor and other creditors would have been more severe.").

## VI. CONCLUSION

For the reason stated herein, Debtor's Objection should be disallowed and Claimant should be allowed to amend Proof of Claim No. 531 as set forth above.

Dated: March 11, 2020

**Respectfully submitted,**
**Claimant/Creditor No. 531,**
**By her counsel,**

/s/ Kimberly A. Dougherty
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**CERTIFICATE OF SERVICE**

I, Kimberly A. Dougherty, hereby certify that a true and correct copy of the above and foregoing has been served on all known counsel of record via ECF, for those counsel registered to receive filings via ECF, on March 11, 2020.

*/s/ Kimberly A. Dougherty*
Kimberly A. Dougherty

# EXHIBIT 1

**CONFIDENTIAL SUBJECT TO BANKRUPTCY COURT ORDER**

**IN THE UNITED STATES BANKRUPTCY COURT**
**FOR THE SOUTHERN DISTRICT OF INDIANA**
**INDIANAPOLIS DIVISION**

**FILED**

APR 29 2019

By Rust / Omni, Claims Agent
For U.S. Bankruptcy Court
Southern District of Indiana

| | |
|---|---|
| In re:<br><br>USA GYMNASTICS,[1]<br><br>Debtor. | Chapter 11<br><br>Case No. 18-09108-RLM-11 |

**SEXUAL ABUSE PROOF OF CLAIM FORM**

**THIS FORM MUST BE *RECEIVED* NO LATER THAN APRIL 29, 2019 AT 4:00 P.M. (PREVAILING EASTERN TIME).**

**THIS PROOF OF CLAIM IS FOR SURVIVORS OF SEXUAL ABUSE ONLY. ANY PERSON ASSERTING A CLAIM BASED ON ANYTHING OTHER THAN SEXUAL ABUSE (DEFINED BELOW) MUST USE THE GENERAL PROOF OF CLAIM FORM (BANKRUPTCY FORM 410)**

**IF YOU HAVE GENERAL QUESTIONS REGARDING THIS FORM, YOU MAY CALL 888-682-0360—DO NOT CALL THIS NUMBER FOR LEGAL ADVICE**

**YOU MAY WISH TO CONSULT AN ATTORNEY REGARDING THIS MATTER**

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For purposes of this Sexual Abuse Proof of Claim Form, "**sexual abuse**" is defined as any and all acts or omissions that USA Gymnastics may be legally responsible for that arise out of, are based upon, or involve sexual conduct or misconduct, sexual abuse or molestation, sexual exploitation, indecent assault and/or battery, rape, pedophilia, ephebophilia, or sexually related psychological or emotional harm, humiliation, anguish, shock, sickness, disease, disability, dysfunction, or intimidation, or any other sexual misconduct or injury, or contacts or interactions of a sexual nature between an adult or child and a medical professional, coach, trainer, therapist, volunteer, or other authority figure affiliated with USA Gymnastics, or any current or former employee or volunteer of USA Gymnastics, or any other person for whose acts or failures USA Gymnastics is or was allegedly responsible, or the alleged failure by USA Gymnastics or its agents, employees, or volunteers to report the same. An adult or child may have been sexually abused whether or not this activity involved explicit force, whether or not this activity involved genital or other physical contact, and whether or not there was physical, psychological, or emotional harm to the adult or child.

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Carefully read the instructions included with this Sexual Abuse Proof of Claim Form and complete ALL applicable questions. Please print clearly and use blue or black ink. You may submit the Sexual Abuse Proof of Claim Form: (a) electronically by filing the Sexual Abuse Proof of Claim Form at: https://omnimgt.com/usagymnastics/sexualabuseclaims; or (b) by first-class U.S. Mail, overnight mail, or other hand-delivery system at the following address: USA Gymnastics Sexual

[1] The last four digits of the Debtor's federal tax identification number 7871. The location of the Debtor's principal office is 130 E. Washington Street, Suite 700, Indianapolis, Indiana 46204.

Abuse Claims Processing, c/o Omni Management Group, 5955 DeSoto Avenue, Suite 100, Woodland Hills, California 91367.

**TO BE VALID, YOU OR YOUR AUTHORIZED AGENT MUST SIGN THIS PROOF OF CLAIM. IF THE SEXUAL ABUSE SURVIVOR IS DECEASED OR INCAPACITATED, THE FORM MAY BE SIGNED BY THE SEXUAL ABUSE SURVIVOR'S REPRESENTATIVE OR THE ATTORNEY FOR THE ESTATE. IF THE SEXUAL ABUSE SURVIVOR IS A MINOR, THE FORM MAY BE SIGNED BY THE SEXUAL ABUSE SURVIVOR'S PARENT OR LEGAL GUARDIAN, OR THE SEXUAL ABUSE SURVIVOR'S ATTORNEY.**

Penalty for presenting a fraudulent claim: Fine of up to $500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

**UNLESS YOU INDICATE OTHERWISE BELOW, YOUR IDENTITY WILL BE KEPT STRICTLY CONFIDENTIAL, UNDER SEAL, AND OUTSIDE THE PUBLIC RECORD. HOWEVER, INFORMATION IN THIS CLAIM WILL BE PROVIDED PURSUANT TO COURT-APPROVED GUIDELINES TO COUNSEL FOR THE ADDITIONAL TORT CLAIMANTS COMMITTEE OF SEXUAL ABUSE SURVIVORS, THE DEBTOR, ITS INSURERS, AND TO SUCH OTHER PERSONS AS THE COURT DETERMINES NEED THE INFORMATION IN ORDER TO EVALUATE THE CLAIM.**

**THIS SEXUAL ABUSE PROOF OF CLAIM (ALONG WITH ANY ACCOMPANYING EXHIBITS AND ATTACHMENTS) WILL BE MAINTAINED AS CONFIDENTIAL UNLESS YOU EXPRESSLY REQUEST THAT IT BE PUBLICLY AVAILABLE BY CHECKING THE BOX AND SIGNING BELOW.**

☑ I do not want this Proof of Claim (along with any accompanying exhibits and attachments) to be kept confidential. Please verify this election by signing directly below.

Signature: _____

Print Name: Marcia Frederick

# SEXUAL ABUSE PROOF OF CLAIM FORM

***"You" and/or "Claimant" refers to the person alleging that she/he was sexually abused or is otherwise asserting any claim related to the Claimant's sexual abuse. If the person completing this form is not the person alleging that she/he was sexually abused, please provide the below information regarding the person alleging that she/he was sexually abused.***

***If you previously submitted a pre-mediation form ("Questionnaire") to USA Gymnastics (USAG) attesting to your claim of sexual abuse, and if that Questionnaire contains complete and current information regarding any and all sexual abuse claims you assert against USAG, you may elect to attach that form to this Sexual Abuse Proof of Claim Form instead of completing the questions in Parts I-VI below, provided that you sign the certification at page 8 verifying the information provided on your Questionnaire. If you have not previously submitted a Questionnaire to USAG, if the information concerning your claim substantively differs from that in the prior Questionnaire response, if you allege that someone other than Nassar sexually abused you, or if you prefer not to attach a Questionnaire, you must complete the questions below.***

***If the space provided is not sufficient to record your response, please attach additional pages.***

**PART I—CLAIMANT IDENTIFYING INFORMATION:**

Claimant's Current Name: Former Name(s) (if applicable):

Marcia Frederick Blanchette, individually and on behalf of similarly situated class members

Litigation Case Number, Court, and Alias (if applicable):

1:18-cv-11299-IT, US District Court Massachusetts

Claimant's Date of Birth: Claimant's Place of Birth:

01/04/1963 Springfield, MA

Claimant's Current Address:

105 High Street, Assonet, MA 02702

Name of Parents/Guardian (if Claimant is a minor):

Claimant's Relationship To Individual Alleging She/He Was Abused (only applicable if the claimant submitting this form is not the individual alleging she/he was abused):

Parent: _____ Spouse: _____ Other: _____

Claimant's Counsel (if applicable):

Kim Dougherty; Andrus Wagstaff, PC

Counsel's Address (if applicable):

19 Belmont St., S. Easton, MA 02375

Counsel's E-Mail Address and Phone Number (if applicable):

kim.dougherty@andruswagstaff.com; (508) 230-2700

**If the Claimant completing this form is not the person alleging that she/he was abused, but is claiming damages such as loss of consortium, please provide the identifying information below regarding the person who alleges that she/he was abused:**

Current Name: Former Name(s) (if applicable):

Litigation Case Number, Court, and Alias (if applicable):

Date of Birth: Place of Birth:

Current Address:

**PART II—NATURE OF COMPLAINT:**

1. Were you sexually abused by Larry Nassar?

   **YES NO (circle one)**
   ☐ ☑

2. Were you sexually abused by a person(s) for whom you contend USAG is responsible other than Nassar (including, without limitation, a coach, trainer, therapist, volunteer or USAG employee)? **YES NO (circle one)**
   ☑ ☐

   a. If yes, please provide the name of the person(s) who you allege sexually abused you and their role, title, and/or connection to USAG (this/these person(s) other than Nassar is referred to below as an "Other Abuser"):

   Not yet determined with respect to all class members.

3. When was the first time you were sexually abused by Nassar or the Other Abuser?

Not yet determined with respect to all class members.

4. On how many separate occasions were you sexually abused by Nassar or the Other Abuser?

Not yet determined with respect to all class members.

5. When and where did this sexual abuse occur? Please specify the location(s) (e.g., Michigan State University (MSU) Sports Medicine Clinic, Jenison Field House, Nassar's home, Twistars, meet/sporting event, USAG national competition, Karolyi Ranch) and the associated date(s). If you do not know the exact dates, please approximate the year or your age at the time.

Not yet determined with respect to all class members.

6. To the extent you were sexually abused by Nassar or any Other Abuser, at one or more meets or sporting events, please list the name and location of the meet(s)/event(s) and state whether the meet(s)/event(s) involved MSU, a USAG affiliated gym or coach, or USAG.

Not yet determined with respect to all class members.

7. If, during any incident of sexual abuse by Nassar or any Other Abuser,, any other person was in the room or nearby, please provide the name(s) of such person(s) and their relationship to you:

Not yet determined with respect to all class members.

8. Aside from your attorneys, did you, or your parent, or legal guardian tell anyone about the sexual abuse by Nassar or any Other Abuser? **YES** ☑ **NO** ☐ **(circle one)**

   a. If yes, please list the names of all persons told, the approximate date on which you told them, their relationship to you, a USAG affiliated coach or gym, or USA Gymnastics (if any), and describe, in detail, what you told them?

   Not yet determined with respect to all class members.

b. If you know, what did these people do in response when you told them about the sexual abuse?

Not yet determined with respect to all class members.

9. Did you, or your parent, or legal guardian report to anyone the sexual abuse of Nassar or any Other Abuser? **YES** ☑ **NO** ☐ **(circle one)**

a. If yes, please list the names of all persons to whom you, your parent, or legal guardian reported the sexual abuse by Nassar or any Other Abuser,, and their connection to a USAG affiliated gym or coach, or USAG (if any), the approximate date of the report, and describe in detail what was reported:

Not yet determined with respect to all class members.

b. If you know, what did these people do in response when you told them about the sexual abuse?

Not yet determined with respect to all class members.

10. When and how did you first discover that Nassar or any Other Abuser, sexually abused you?

Not yet determined with respect to all class members.

11. Please describe in your own words what Nassar, or any Other Abuser did that forms the basis of your claims:

See attached Complaint.

**PART III—CONTACT WITH LARRY NASSAR**

***If you do not allege that Nassar sexually abused you, you do not need to complete this Part III.***

1. Were you seen by Nassar for purported medical treatment? **YES** ☐ **NO** ☐ **(circle one)**

   a. If yes, please state when you began seeing Nassar for purported medical treatment and when you stopped seeing Nassar for purported medical treatment.

   For some class members, to be determined.

   b. If yes, please state the approximate number of times you saw Nassar for purported medical treatment during which he sexually abused you.

   For some class members, to be determined.

2. Did someone refer you to Nassar? **YES** ☐ **NO** ☐ **(circle one)**

   a. If yes, please list the name of each person who referred you to Nassar, their relationship to you, and if applicable, their connection to USAG, MSU, or Twistars.

   For some class members, to be determined.

**PART IV—CONNECTIONS TO USA GYMNASTICS AND MICHIGAN STATE UNIVERSITY**

1. Have you ever trained at a USAG member gym(s)? **YES** ☑ **NO** ☐ **(circle one)**

   a. If yes, please provide the name of the USAG gym and dates of training:

   Not yet determined with respect to all class members.

2. Have you ever trained with a USAG member coach(es)? **YES** ☑ **NO** ☐ **(circle one)**

   a. If yes, please provide the name of the USAG member coach(es) and the dates of training with the USAG member coach:

   Not yet determined with respect to all class members.

3. Have you ever been a member of USAG? **YES** ☑ **NO** ☐ **(circle one)**

   a. If yes, please provide your dates of membership:

   Not yet determined with respect to all class members.

4. Have you ever been a USAG national team member? **YES** ☐ **NO** ☐ **(circle one)**

   a. If yes, please provide your dates of membership:

   Not yet determined with respect to all class members.

5. Have you ever participated in a national competition, such as the U.S. National, U.S. Classic, or American Classic? **YES NO (circle one)**

   a. If yes, please provide the dates of your participation:

   Not yet determined with respect to all class members.

6. Have you ever attending a training camp or other event at the former National Team Training Center (Karolyi Ranch)? **YES NO (circle one)**

   a. If yes, please provide the dates of attendance:

   Not yet determined with respect to all class members.

7. Have you ever been a student at MSU? **YES NO (circle one)**

   a. If yes, please provide your dates of attendance and date of graduation, if applicable:

   Not yet determined with respect to all class members.

8. Do you have any past or present connection to MSU, including but not limited to participation in a MSU-sponsored program? **YES NO (circle one)**

   a. If yes, please describe, including the name, location, and date of any such program:

   Not yet determined with respect to all class members.

**PART V—DAMAGES:**

1. To date, have you sought medical treatment as a result of sexual abuse by Nassar or any Other Abuser? **YES NO (circle one)**

   a. If yes, please describe, including approximate dates of treatment, name of treating physician, diagnosis, treatment plan, and medical expenses incurred to date:

   Not yet determined with respect to all class members.

2. To date, have you sought mental health treatment or counseling as a result of sexual abuse by Nassar or any Other Abuser? **YES NO (circle one)**

   a. If yes, please describe, including approximate dates of treatment, name of treating physician, diagnosis, treatment plan, and medical expenses incurred to date:

   Not yet determined with respect to all class members.

3. Please describe any other damage you have suffered to date as a result of sexual abuse by Nassar or any Other Abuser:

Not yet determined with respect to all class members.

4. Have you ever received mental health treatment for reasons unrelated to the sexual abuse by Nassar or the Other Abuser? **YES** ☐ **NO** ☐ **(circle one)**

   a. If yes, please describe, including approximate dates of treatment, location of treatment, name of treating mental health professional, and diagnosis:

   Not yet determined with respect to all class members.

5. Are you the survivor of sexual abuse unrelated to Nassar or the Other Abuser? **YES** ☐ **NO** ☐ **(circle one)**

   a. If yes, please describe the abuse and the date(s) of the abuse:

   Not yet determined with respect to all class members.

6. Have you commenced any lawsuit seeking damages stemming from the sexual abuse described in this Sexual Abuse Proof of Claim Form? **YES** ☑ **NO** ☐ **(circle one)**

   a. If yes, please provide a copy of the complaint you filed and/or provide the case number of the lawsuit and state the court in which the lawsuit is pending:

   1:18-cv-11299-IT, US District Court Massachusetts

7. Have you received a settlement or judgment for any claims associated with the sexual abuse described in this Sexual Abuse Proof of Claim Form? **YES** ☐ **NO** ☑ **(circle one)**

   a. If yes, please provide a copy of the settlement or judgment and state: (1) the amount of the settlement; and (2) if the settlement was pre-litigation, the name of the entity(ies) being released by the settlement:

**PART VI—CLAIMANT BACKGROUND INFORMATION:**

***If Claimant does not seek damages for loss of income, Claimant does not need to complete these questions.***

1. Please provide your educational history (list all schools attended, degrees obtained, and date(s) of graduation:

   To be determined.

2. Please state your current employer, position, salary, and length of time with which Claimant has held that position:

   To be determined.

3. Please provide your work history, including all former places of employment, positions held, and approximate dates of employment:

   To be determined.

**CERTIFICATION:**

Pursuant to 28 U.S.C. §1746, I certify under penalty of perjury that the foregoing (or, to the extent I submitted a pre-mediation form, the information on that form) is true and correct to the best of my knowledge and recollection.

Dated: 4/29/2019

Signed: _____

Print Name: Marcia Frederick Blanchette

**UNITED STATES DISTRICT COURT**
**DISTRICT OF MASSACHUSETTS**

| | | |
|---|---|---|
| MARCIA FREDERICK, individually, and on behalf of all others similarly situated, | ) | |
| *Plaintiffs*, | ) | |
| v. | ) | PLAINTIFF DEMANDS TRIAL BY JURY |
| UNITED STATES OLYMPIC COMMITTEE, USA GYMNASTICS (formerly known as the United States Gymnastics Federation), RICHARD CARLSON, MURIEL GROSSFELD, GEORGE WARD, | ) | CLASS ACTION COMPLAINT BROUGHT UNDER THE PROTECTING YOUNG VICTIMS FROM SEXUAL ABUSE AND SAFE SPORT AUTHORIZATION ACT |
| *Defendants*. | ) | |

**CLASS ACTION COMPLAINT AND JURY DEMAND**

Comes now, Plaintiff MARCIA FREDERICK, on behalf of herself and all others similarly situated, by and through her attorneys, Andrus Wagstaff, PC and Andrus Anderson LLP, and for her causes of action against Defendants, alleges as follows:

## INTRODUCTION

This is an action in which Plaintiff, Marcia Frederick, a former Olympic gymnast, on behalf of herself and all others similarly situated, seeks relief and damages, statutory and otherwise, against Defendant United States of America Gymnastics (formerly known as United States Gymnastics Federation, hereinafter referred to as "USAG" or "USA Gymnastics") and Defendant United States Olympic Committee, ("USOC") (collectively referred to as "Class Defendants") for violations of the Protecting Young Victims from Sexual Abuse and Safe Sport

Authorization Act of 2017, (the "Safe Sport Act") by systemically failing to respond to and report suspected child abuse of amateur athletes to law enforcement.

Plaintiff Frederick also brings this claim individually, seeking injunctive relief and compensation for personal injuries and damages suffered when she was repeatedly molested, sexually abused and assaulted while training and competing as a minor elite gymnast for the United States across the nation by Defendant Richard Carlson, ("Perpetrator Carlson"), an agent or employee of Defendant USAG, Defendant USOC, Defendant Muriel Grossfeld, ("Defendant Grossfeld"), and Defendant George Ward, ("Defendant Ward").

The abuse and assault occurred as a result of the negligence and failures of all Defendants and each and every Defendant is jointly liable. Despite having the power, authority and responsibility to act, Defendants failed Plaintiff Frederick and numerous others by showing deliberate indifference to assault and abuse of minors, fostering an environment of abusive activity towards gymnasts, failing to institute corrective measures to protect gymnasts from assault and abuse, failing to investigate, train, oversee, monitor and supervise employees and agents, including but not limited to Perpetrator Carlson, failing to respond to the complaints of sexual abuse, and/or actively defending and covering up abuse, all at the expense of Plaintiff Frederick and other class members.

## JURISDICTION AND VENUE

1. This Court has jurisdiction over Defendants based on diversity of citizenship and pursuant to the Class Action Fairness Act, 28 U.S.C. § 1332(d)(2).

2. This Court also has federal question subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331, 34 U.S.C. § 20341, *et seq* and (c)(9), and 18 U.S.C. § 2255, *et seq*.

3. The amount in controversy exceeds $75,000, exclusive of costs and interest and the Class claims exceed $5 million.

4. This Court has supplemental jurisdiction over state law claims pursuant to 28 U.S.C. § 1367 because the state law claims arise out of the same common nucleus of facts and are so closely related to the federal law claims as to form the same case or controversy under Article III of the U.S. Constitution.

5. This Court has personal jurisdiction over Defendants as Defendants conducted substantial, continuous, and systematic business activities within this Commonwealth.

6. Venue is proper in the District of Massachusetts pursuant to 28 U.S.C. § 1391 because Plaintiff is a resident of the Commonwealth of Massachusetts and a substantial part of the events or omissions giving rise to claim occurred in the Commonwealth of Massachusetts.

7. Further, the Defendants have purposefully availed themselves of the benefits and the protections of the laws within the Commonwealth of Massachusetts. Defendants have had sufficient contact such that the exercise of jurisdiction would be consistent with the traditional notions of fair play and substantial justice.

8. Plaintiff seeks relief that is within the jurisdictional limits of the Court.

## PARTIES

9. Plaintiff Ms. Frederick is a former elite gymnast who is a resident and citizen of the Commonwealth of Massachusetts.

10. Perpetrator Richard Carlson is a former elite level gymnastics coach, who upon information and belief, resides and is a citizen of New York.

11. Upon information and belief, Defendant Muriel Grossfeld, at all times mentioned herein, was and is a resident and citizen of Connecticut

12. Upon information and belief, Defendant George Ward, at all times mentioned herein, was and is a resident and citizen of Connecticut.

13. Defendant USOC, at all times mentioned herein, was and is a federally-chartered nonprofit corporation, having its principal place of business in the State of Colorado and is headquartered in Colorado Springs, Colorado.

14. Defendant USAG, at all times mentioned herein, was and is a business entity of form unknown, having its principal place of business in the State of Indiana.

## SUBSTANTIVE ALLEGATIONS

## USOC AND USAG'S OBLIGATION TO PROTECT YOUNG ATHLETES

15. The USOC is a federally-chartered nonprofit corporation, which was reorganized by the Ted Stevens Amateur Sports Act, 36 U.S.C. §§220501, *et seq*. ("Ted Stevens Act"), originally enacted in 1978. As described on its website, "[t]he USOC has two primary responsibilities in its oversight of Olympic and Paralympic sport in the United States. The first is to generate resources in support of its mission, which is to help American athletes achieve sustained competitive excellence. The second is to ensure organizational resources are wisely and effectively used to that end." Furthermore, Defendant USOC claims that "USOC is committed to creating a safe and positive environment for athletes' physical, emotional and social development and to ensuring that it promotes an environment free of misconduct."

16. The USOC is the governing body for all American Olympic teams. Under the Ted Stevens Act, Defendant USOC has a mandatory obligation to ensure that before granting National Governing Bodies ("NGB"), including USAG, a sanction to host national or international events, "proper safety precautions have been taken to protect the personal welfare of the athletes." 36 U.S.C. §§220525(b)(4)(F). The USOC has the power to decertify USAG and all associated clubs,

gyms, and teams. Among other things, decertification would strip USAG of its ability to crown national champions and select Olympic teams.

17. USAG is the National Governing Body for gymnastics in the United States, as designated and permitted by Defendant USOC under the Ted Stevens Act, and selects and trains the United States gymnastics teams for the Olympics and World Championships, promotes and develops gymnastics locally and nationally, and serves as a resource center for members, clubs, fans and gymnasts throughout the United States. USAG has more than 174,000 athletes and professional members, more than 148,000 athletes registered in competitive programs, as well as more than 25,000 professional, instructor and club members. Approximately 4,000 competitions and events throughout the United States are sanctioned annually by USAG.

18. The USAG directly certifies and trains coaches for a fee, in part through USA Gymnastics University, an online training platform through which USAG provides courses, course material, and video training.

19. The USAG collects a fee from gymnasts to be a USAG member and to compete in USAG-sanctioned competitions.

20. The USAG sanctions gyms where gymnasts practice and compete. For a fee and proposed compliance with just five USAG policies, a gym can become certified to train under the USAG banner.

21. The USAG sponsors competitions in which members and gyms pay a fee to compete. These competitions take place throughout the country, and gymnasts of a variety of ages and skill levels compete. USAG was the primary entity owning, operating and controlling the activities and behavior of its certified, trained, and sanctioned professionals, members, and agents, including, but not limited to Defendant Grossfeld, Defendant Ward, and the Grossfeld's American

Gold Gym ("GAG" or "GAG Gym") owned and operated by Defendants Grossfeld and Ward and the certified head coach who committed the abuse described herein, Perpetrator Carlson.

**USOC AND USAG'S FAILURE TO PROTECT YOUNG ATHLETES AND THE PASSAGE OF THE SAFE SPORT ACT**

22. For decades, the USAG and the USOC have touted themselves as creating a positive and safe environment, including during the time Ms. Frederick was a gymnast. In fact, USAG touts that "prior to almost all other National Governing Bodies, USA gymnastics has provided awareness, prevention and reporting information regarding sexual misconduct to professional members, member clubs, athlete members and their families."

23. Moreover, the bylaws of USAG, or similar bylaws previously enacted, were made in conformance with, and under the mandate of, Defendant USOC, and were intended to protect minor gymnasts, including Ms. Frederick, from sexual abuse, a known and foreseeable risk posed to minor athletes in amateur sports.

24. The USOC similarly touts that it's policies prevent "…USOC employees, coaches, contracted staff, volunteers, board members, committee and task force members, and other individuals working with athletes or other sport participants while at an OTC, whether or not they are employees of the USOC" and "…[a]thletes training and/or residing at a USOC Olympic Training Center" from engaging in sexually-abusive misconduct, including "child sexual abuse" and "sexual misconduct." USOC Safe Sport Policies, Section II(c). USOC also has policies identify "grooming" behaviors, which it defines as, "…the most common strategy used by offenders to seduce their victims."

25. Despite their obligations under the Ted Stevens Act and their bylaws, rules, policies and procedures purporting to protect young athletes, Defendants USOC and USAG never ensured,

audited, or checked to confirm that these policies were properly implemented, enforced, or effective at detecting, preventing, and remedying abuse perpetrated by certified coaches and at sanctioned facilities. Had Defendant USOC and USAG upheld their duties under federal law, the repeated sexual abuse suffered by Ms. Frederick and so many others could have been avoided.

26. Indeed, the USAG and the USOC affirmatively allowed a culture of gymnast assault and abuse by its certified coaches to persist by taking overt acts to conceal the abuse and assault in the interest of protecting themselves and their criminal coaches, while simultaneously inflicting emotional and physical harm on countless young athletes who trusted that USOC and USAG would ensure their safety.

27. The USAG and the USOC failed to protect their gymnasts, including Ms. Frederick, from perpetrators of abuse and assault.

28. Defendant USOC expressly admitted its wrongdoing. In January 2018, former USOC Chief Executive Officer Scott Blackmun issued an apology to victims, stating that USOC is "sorry you weren't afforded a safe opportunity to pursue your sport dreams. The Olympic family is among those that have failed you."

29. On January 31, 2018, amid public outcry and a threat by USOC to wholly decertify the organization, all 21 members of the board of directors for USAG resigned.

30. The USAG and the USOC's conduct has been so egregious and with utter disregard for young gymnasts, including Ms. Frederick, that Congress responded by enacting the Safe Sport Act in February 14, 2018, which was promulgated "to promote a safe environment in sports that is free from abuse, including emotional, physical, and sexual abuse, of any amateur athlete."

31. As of February 14, 2018, the Safe Sport Act mandates that USAG and the USOC, along with their agent coaches and members, report any assault or abuse to authorities within 24

hours. The Safe Sport Act makes non-reporting assault or abuse a federal crime and imposes a significant fine, as well as other damages. Additionally, under the Safe Sport Act, an independent body, the U.S. Center for Safe Sport ("Center for Safe Sport"), was created to adjudicate the sexual abuse cases in the Olympic Movement and other amateur athlete settings.

32. There are 47 National Governing Bodies ("NGB") of various amateur sports. Of those NGB, eight (8) turned over a total of approximately twenty-five (25) cases to the Center for Safe Sport after its opening in March, 2017. Only four (4) of the NGBs that had pending investigations declined to transfer them to the Center for Safe Sport, including USAG and Ms. Frederick's case.

33. The Center for Safe Sport has already received approximately 540 total reports across 38 different sports. Thus far, those cases have led to 73 lifetime bans and continued investigations. Unfortunately, Defendants USAG and USOC have failed and continue to fail to report countless other reports of assault and abuse to law enforcement as required, including Ms. Frederick's case.

34. The Safe Sport Act was enacted in direct response to the widespread reports of sexual abuse and assault at USAG and USOC sanctioned gyms, clubs and events, at the hands of USAG trained and certified coaches. For decades, USAG and USOC have failed to protect young member athletes, including Ms. Frederick, from perpetrators of abuse and assault. And generations of young men and women have been forced to bury their abuse and leave the sport.

35. In June 2018, the USAG was required to testify at Congressional hearings. During those hearings, Steve Penny, Past President of USAG, pled the Fifth Amendment, refusing to answer any questions. During that same hearing, Rhonda Faehn, former Director of the Women's

program for USAG, testified that Penny told her not tell anyone about accusations of sexual assault and molestation of gymnasts.

36. Although USOC has acknowledged its responsibility for allowing years of abuse, upon information and belief, to date, the USOC has not decertified the USAG. The USAG still retains the power to appoint and control coaches, clubs, and athletes, despite USAG's negligent conduct and ongoing violations of the Safe Sport Act.

37. At all times relevant to Ms. Frederick's repeated sexual abuse at the hands of Perpetrator Carlson, Defendants USOC and USAG, and others, were responsible for Ms. Frederick's safety, supervision and well-being.

## CLASS ACTION ALLEGATIONS

38. Plaintiff incorporates by reference the allegations contained in the previous paragraphs.

39. Plaintiff alleges violations of the Safe Sport Act on behalf of herself individually, and on behalf of the following class of other athletes similarly situated (herein after the "Class"):

> All current or former USAG-affiliated and/or USOC affiliated amateur athletes for whom the USAG, the USOC, and/or their agents and/or employees ("Class Defendants") received information that the amateur athlete may have suffered an incident of child abuse, including sexual, emotional and/or physical abuse, and either (a) failed to report incidents occurring after February 14, 2018 to law enforcement authorities within 24 hours of learning of the incident, and/or (b) failed to report incidents occurring before February 14, 2018 to law enforcement authorities, within 24 hours of the Congress enacting the Safe Sport Act.

40. Plaintiff and the members of the Class: (a) were amateur athletes as defined under the Safe Sport Act[1] at the time of the suspected abuse; (b) were amateur athletes for which Class

[1] "'Amateur Athlete' means an athlete who meets the eligibility standards established by the national governing body or paraolympic sports organization for the sport in which the athlete competes." 18 U.S.C. § 220501.

Defendants, as a covered individual[2], learned facts that gave reason to suspect he/she suffered an incident of child abuse when the Class member was a minor and (c) were amateur athletes for which Class Defendants failed to make a report of the suspected abuse to a law enforcement agency within 24 hours, and/or by February 15, 2018 for incidents reported prior to enactment of the Safe Sport Act. Plaintiff and Class members suffered a personal injury as a result of the failure to report the suspected abuse to a law enforcement agency.[3] Plaintiff and Class members can be readily ascertained from Class Defendants' own records.

41. The proposed Class meets the requirements for certification pursuant to Federal Rule of Civil Procedure 23(a), as well as subsections (b)(3) and (c)(4), as described below.

**Numerosity**

42. On information and belief, the Class consists of hundreds of amateur athletes, too numerous to make joinder practicable.

**Common Questions of Law and Fact**

43. Numerous questions of law and fact common to the Plaintiff and the Class exist, including, without limitation: (a) whether Class Defendants unlawfully failed to report suspected abuse of Class Plaintiffs to law enforcement agencies; (b) whether Class Defendants failure to report violated the Safe Sport Act; (c) whether, in addition to actual damages, Class members are entitled to liquidated damages in the amount of $150,000 each, as well as the cost of the action, including reasonable attorney's fees and other litigation costs, and (d) whether the Class members are entitled to punitive damages and other preliminary and equitable relief.

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[2] "[T]he term 'covered individual' means an adult who is authorized, by a national governing body, a member of a national governing body, or an amateur sports organization that participates in the interstate or international amateur athletic competition, to interact with a minor or amateur athlete at an amateur sports organization facility or at any event sanctioned by a national governing body, a member of a national governing body, or such an amateur sports organization." 34 U.S.C. § 20341(c)(9).
[3] *See* 18 U.S.C. § 2255.

44. The answers to these common questions will be the same for Plaintiff Frederick and all Class members and will establish liability under the Safe Sport Act.

**Typicality**

45. Plaintiff Frederick's Safe Sport Act claims are typical of the claims of the Class. The relief sought by the Plaintiff Frederick for violation of the Safe Sport Act complained of herein is also typical of the relief sought on behalf of the Class.

46. Like all members of the Class, Plaintiff Frederick was an amateur athlete for which Class Defendants learned of facts that gave rise to suspect that she had suffered an incident of child abuse during the liability period but failed to report those abuses to law enforcement within 24 hours after the passage of the Safe Sport Act.

**Adequacy of Representation**

47. Plaintiff Frederick's interests are co-extensive with those of the Class. Plaintiff Frederick seeks remedies as provided for under the Safe Sport Act. Plaintiff is willing and able to represent the Class fairly and vigorously.

48. Plaintiff Frederick has retained counsel who are qualified, experienced, and able to conduct this litigation and to meet the time and fiscal demands required to litigate a class action of this size and complexity. The combined interests, experience, and resources of Plaintiff's counsel to litigate competently the individual and class claims at issue in this case satisfy the adequacy of representation requirement.

**Requirements of Rule 23(b)(2)**

49. Class Defendants have acted or refused to act on grounds that apply generally to the Class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the Class as a whole.

50. Class Defendants have failed to report suspected child abuse to law enforcement agencies described herein.

51. Class Defendants have acted, or failed to act, on grounds generally applicable to the Plaintiff Frederick and the Class by adopting and implementing systemic policies, practices, and procedures resulting in a failure to report suspected child abuse. Failing to respond to and report suspected child abuse of amateur athletes to law enforcement are Class Defendants' standard operating procedures rather than sporadic occurrences.

52. Class Defendants' systemic refusal to act on and report facts they learn that give reason to suspect of incidents of child abuse, have made appropriate the requested final injunctive and declaratory relief with respect to the Class as a whole.

**Requirements of Rule 23(b)(3)**

53. The common issues of fact and law affecting the claims of Plaintiff Frederick and the Class members predominate over any issues affecting only individual claims. Core issues in the case that are amenable to classwide treatment include whether Class Defendants violated the Safe Sport Act by: (a) learning facts that give reason to suspect Plaintiff and other similarly situated Class members suffered an incident of abuse as a minor; and (b) unlawfully failing to report suspected abuse to law enforcement agencies when required to do so under the Safe Sport Act.

54. Prosecution of these claims on a class-wide basis is the most efficient and economical means of resolving the questions of law and fact common to the claims of Plaintiff Frederick and the Class.

55. Without class certification, the same evidence and issues would be subject to re-litigation in a multitude of individual lawsuits with an attendant risk of inconsistent adjudications

and conflicting obligations. Additionally, pursuing individual litigation would be prohibitively expensive.

56. Certification of the Class is the most efficient and judicious means of presenting the evidence and arguments necessary to resolve such questions for and the Class, as well as for the Defendants.

**Requirements of Rule 23(c)(4)**

57. Plaintiff also meets the requirements of Rule 23(c)(4), because particular issues that are core to every Class members' claim present common issues capable of class-wide resolution, which would advance the interests of the parties in an efficient manner. These issues include, inter alia, whether Class Defendants were required to report Class member incidents upon passage of the Safe Sport Act and whether it failed to do so.

**PLAINTIFF FREDERICK'S ALLEGATIONS IN SUPPORT OF HER INDIVIDUAL SAFE SPORT VIOLATION**

58. Plaintiff incorporates by reference the allegations contained in the previous paragraphs.

59. Plaintiff Frederick filed a claim with the USAG related to the sexual abuse she suffered as an amateur athlete at the hands of her USAG certified Coach, Richard Carlson, while a minor, in or around 2015.

60. After Ms. Frederick made her complaint to the USAG, the USAG and USOC learned facts that gave reason to suspect that she had suffered an incident of child abuse.

61. As of the passing of the Safe Sport Act on February 14, 2018, the USAG and USOC were obligated to report the suspected child abuse that Ms. Frederick suffered to law enforcement within 24 hours, specifically by February 15, 2018.

62. The USAG and USOC failed to report the suspected child abuse of Ms. Frederick to law enforcement on February 15, 2018 and even as of the date of this filing, in direct violation of the Safe Sport Act.

63. Ms. Frederick suffered personal injury as a result of the failure to report the suspected abuse to a law enforcement agency.

64. The USAG and USOC are liable to Ms. Frederick for actual damages, liquidated damages in the amount of $150,000, the cost of the action, including reasonable attorney's fees and other litigation costs, punitive damages and other preliminary and equitable relief.

**FAILURES OF DEFENDANTS RESULTING IN INJURY AND DAMAGES TO PLAINTIFF MARCIA FREDERICK**

65. Plaintiff incorporates by reference the allegations contained in the previous paragraphs.

66. In addition to her Safe Sports Act claims, Ms. Frederick has common law claims for injuries occurring before the Act was passed that are timely pursuant to MGL c. 206, s. 4C1/2.

67. Ms. Frederick was an elite level gymnast and was the first American female gymnast to win a Gold medal at the World Gymnastics Championships. She qualified for the 1980 U.S. Women's Olympic Gymnastics Team.

68. Prior to qualifying for the 1980 Olympic Gymnastics Team, Ms. Frederick, at the age of thirteen (13) joined GAG, a USAG and USOC sanctioned facility, on or around 1975 to further her training in Gymnastics.

69. GAG was formed by Defendants Grossfeld and Ward in 1968.

70. Defendant Grossfeld is a retired United States gymnast and member of the U.S. Gymnastics Olympic team.

71. Defendant Ward was the common-law husband of Defendant Grossman. Upon information and belief, he handled the finances for GAG, and had significant investments in the gym.

72. GAG's purpose was to train elite level gymnasts in order to prepare them for World Gymnastic Competitions such as the World Championships and the Olympics.

73. GAG paid fees to and was sanctioned by the USAG and USOC.

74. In order to accomplish their lofty goals of making the Olympic gymnastics team, GAG and its employees, particularly its coaches, were given complete control of the young gymnasts' lives, including, but not limited to, training schedules, education, daily meals and even sleep schedules.

75. Because of the rigorous training schedules required to become an elite gymnast, many gyms including both training and a dormitory that housed the young athletes. The GAG facility was one such gym that provided housing, schooling and training for the minor athletes. During the pertinent years of this complaint, the GAG facility housed approximately 11 girls aged 12-16 at a cost of several thousands of dollars per year.

76. From 1975 to 1978, Ms. Frederick trained with GAG Coach, Don Peters, infamous former gymnastics coach later banned by USAG for allegations of sexual misconduct with minor gymnasts.

77. In 1978, Don Peters' employment was terminated by Defendant Grossfeld after an incident at the 1978 World Championship in Strasbourg, France.

78. In or around late 1978, Defendant Grossfeld assigned Perpetrator Carlson, another USAG certified and trained coach, to be the new head coach of the GAG Gym and Ms. Frederick.

79. Defendants Grossfeld, Ward, and Perpetrator Carlson had direct and complete custody and control of the Ms. Frederick and were members and participants sanctioned and trained by Defendants USAG and USOC.

80. Ms. Frederick was a participant and dues paying member of USAG and USOC.

81. As a member and participant of USAG while Perpetrator Carlson was a USAG certified head coach, Ms. Frederick was under Perpetrator Carlson and Defendant Grossfeld's direct supervision, control and care, which created a special, confidential, and fiduciary relationship between Ms. Frederick, her parents, and them. Because of such relationship, Perpetrator Carlson and Defendant Grossfeld owed Plaintiff a special duty of care. Additionally, as the employers and supervisors of Perpetrator Carlson, with knowledge that he was in contact with and providing care to children, Defendants USAG and USOC were also in a special, confidential, and fiduciary relationship with Ms. Frederick, owing her a duty of care.

82. Perpetrator Carlson was hired by Defendant Grossfeld to coach at the GAG Gym and was Ms. Frederick's head coach and during much of the time she lived in the GAG dorms. Perpetrator Carlson was a "dorm parent" who lived on the first floor of the housing facility.

83. Throughout her time at the GAG Gym, Ms. Frederick lived in a single-occupancy dorm room on the second floor, while many other gymnasts lived with roommates.

84. Perpetrator Carlson was charged with overseeing the minor gymnasts including Ms. Frederick within the housing facility, while at the gym and while on excursions and USAG and USOC competitions outside of the gym.

85. Perpetrator Carlson was the team head coach of the GAG Gym, and a certified coach of USAG. While a head coach and dorm parent at the GAG Gym, Perpetrator Carlson's employment duties included coordinating the training and providing individual care and providing

for the physical needs and well-being of participants and members of USAG (and in accord with Defendants' USAG and USOC policies, procedures, and mandates), and care including but not limited to treatment to participants and members of USAG, which included Ms. Frederick.

86. Perpetrator Carlson commenced the process of grooming Ms. Frederick in late 1978, when she was 15 years old.

87. Plaintiff is informed and believes the Perpetrator Carlson's physical and sexual abuse of Plaintiff commenced after the grooming of Ms. Frederick began, and occurred numerous times while Ms. Frederick was on the GAG Gym properties, while traveling for competitions and before and after competitive gymnastics meets from in or around 1978 through 1980. Specifically, the Plaintiff was sexually abused by Perpetrator Carlson in Connecticut at the GAG Dormitories, located in Millford, Connecticut and at numerous locations around the country. During this period, Ms. Frederick was a participant, member, and ward under the Perpetrator's Carlson and Defendants' direct supervision and control.

88. Perpetrator Carlson used his position of authority, trust and confidence in an abusive manner to sexually assault, batter, molest, and harass Ms. Frederick over the course of his tenure as her coach.

89. Based upon what was told to Ms. Frederick by the adults tasked to supervise her and the culture that USAG and USOC cultivated, and allowed to be cultivated, both in and out of the gym, Ms. Frederick believed she had to submit to Perpetrator Carlson's sexual demands in order to continue training for the 1980 Olympics.

90. In 1980, Ms. Frederick qualified for the U.S. Olympic team and attended the U.S. Gymnastics Olympic Training Camp in Colorado.

91. On or about March 21, 1980, after hearing of the U.S. boycott of the 1980 Olympics, Ms. Frederick traveled directly to GAG and told Defendant Grossfeld about the abuse and molestation she was suffering at the hands of Perpetrator Carlson. Ms. Frederick told Defendant Grossfeld where the abuse had occurred, describing with specificity what Defendant Carlson had forced her to do. Defendant Grossfeld appeared visibly angry, but did not say anything on the subject.

92. In approximately 1980, Ms. Frederick also disclosed the abuse to Defendant Ward who, like Defendant Grossfeld, took no actions to remedy the situation.

93. Defendants Grossfeld and Ward resumed normal activities as if the report had not been made. This inaction, coupled with Perpetrator Carlson's continual remarks that the sexual acts were part of her training and were necessary to her gymnastics career and reaching her goals, caused Ms. Frederick to believe that the abuse was "normal." As a young gymnast, Ms. Frederick was lead to believe that enduring this pain was required because she had "to be close with her coach" in order to be the best gymnast and become an Olympian.

94. In 1982, Ms. Frederick participated in the American Classic gymnastics competition, winning first place. This was her last competition with Defendant Carlson. She chose to forego the following 1984 Olympics because she was afraid to and physically could not continue training with Perpetrator Carlson and at the GAG Gym.

95. At all times that Ms. Frederick was training and competing nationwide all Defendants, took care, custody and control of her and stood in loco parentis and had a duty to protect Ms. Frederick from danger, such as the abuse and molestation by Carlson, and to properly train, hire, monitor, oversee, investigate, remove and report Carlson; remedial action which they never took to protect Ms. Frederick.

96. At all times relevant to Ms. Frederick's repeated sexual abuse at the hands of Perpetrator Carlson, Defendants were responsible for Ms. Frederick's supervision. Despite being the body responsible for Ms. Frederick's safety and well-being, Defendants provided no adequate or effective measures to ensure her protection from the risk of sexual abuse. At all times relevant to Ms. Frederick's sexual abuse at the hands of Perpetrator Carlson, Defendants were responsible for Ms. Frederick's supervision. Despite their responsibility for Ms. Frederick's safety and well-being, Defendants provided no adequate or effective measures to ensure her protection from the risk of sexual abuse and now, they have compounded their misconduct by denying Ms. Frederick access to the forum that can fully and finally adjudicate the harm she endured for years.

97. At all times pertinent hereto, including the years 1978 to 1981, Perpetrator Carlson was an employee, representative, and/or agent of Defendants acting under their control and supervision.

98. At all times pertinent hereto, Perpetrator Carlson was employed by and/or an agent of Defendants serving in various positions, including but not limited to coach, head coach, traveling coach and dorm parent.

99. While employed by Defendants, Perpetrator Carlson sexually assaulted, abused and molested Ms. Frederick by engaging in nonconsensual sexual assault, battery, molestation, and harassment, including but not limited to groping and forced sexual contact.

100. Despite Ms. Frederick's complaints to Defendant Grossfeld and Defendant Ward, her concerns and reports of abuse went unaddressed.

101. Defendants had a duty to report allegations of Perpetrator Carlson's inappropriate sexual conduct directed at Ms. Frederick to law enforcement. All Defendants knew, or should

have known, of the abuse alleged herein, and did not report or sanction the abuser, their employee or agent.

102. Defendants, and their employees, agents, and/or representatives, through planned artifice, attempted to prevent inquiry or escape investigation regarding the tortious acts of Perpetrator Carlson by hindering the acquirement of information and expressly misleading Ms. Frederick as described more fully in this Complaint.

103. At all times material hereto, Perpetrator Carlson was under the direct supervision, management, agency and control of Defendants.

104. By designating Perpetrator Carlson as a certified head coach team of GAG under the mandated and control of Defendants, all Defendants represented to the community and participants and members of USAG that Perpetrator Carlson was safe, trustworthy, and of high moral and ethical repute, such that parents of participants and members need not worry about having Perpetrator Carlson interact with, and provide care to their minor children. Defendants did so in order to preserve their own public image and reputation, so they could retain past participants and members and recruit new participants and members, thus allowing donations and other financial support to continue flowing into their coffers for financial gain.

105. Plaintiff is informed and believes, and on that basis, alleges that Defendants knew or should have known that sexually abusive staff, such as Perpetrator Carlson, were violating USOC and USAG policies, without enforcement or abatement, and were continually allowed to be in contact with minor children, such as Ms. Frederick.

106. It was not until in or around 2000, that Defendant USOC created the Safe Sport program and issued a handbook detailing specific procedures for preventing sexual abuse of minors, and access to minors by sexual abusers. Despite instituting this handbook and program,

Defendant USOC maintained its course and culture of ignoring abuse, ignoring its internal policies and procedures, and placing minors in the way of danger.

107. Plaintiff is informed and believes and on that basis, alleges Defendants knew of, or should have known of, Perpetrator Carlson's propensity and disposition to engage in sexual misconduct with minors.

108. Defendant failed to implement reasonable safeguards to avoid acts of unlawful sexual conduct by Perpetrator Carlson. Defendants ignored the sexual misconduct Perpetrator Carlson had engaged in, and concealed that information from Ms. Frederick's family and law enforcement.

109. Because of the relationship between Plaintiff and Defendants, Defendants had an obligation and duty under the law not to hide material facts and information about Perpetrator Carlson's deviant sexual behavior and propensities. Additionally, Defendants had an affirmative duty to inform, warn, monitor, oversee and institute appropriate protective measures to safeguard minors who were reasonably likely to come in contact with Perpetrator Carlson, including Ms. Frederick at the time. Defendants refused to notify, give adequate warning, monitor, oversee and implement appropriate safeguards, thereby creating the peril that ultimately damaged Ms. Frederick.

110. Plaintiff is informed and believes, and on that basis alleges, that prior to Ms. Frederick's sexual abuse by Perpetrator Carlson, Defendants engaged in a pattern and practice of employing sexual abusers and molesters. Defendants concealed these facts from participants and members, their parents, the gymnastics community, the public at large, other National Governing Bodies, the United States government, various local governments, and law enforcement agencies.

111. As is set forth herein, Defendants and each of them have failed to uphold numerous mandatory duties required of them by state and federal law, as well as their own internal written policies and procedures, including:

a. Duty to use reasonable care to protect participants and members from known or foreseeable dangers;
b. Duty to inform Ms. Frederick and her parents of the known risks to the health and well-being of their daughter while in USAG and/or USOC sponsored, authorized, and supervised programs, events and trainings;
c. Duty to enact policies and procedures that are not in contravention of the Federal Civil Rights Act, section 1983 and the 14th amendment of the United States Constitution;
d. Duty to protect participants and members and staff, and provide adequate supervision;
e. Duty to ensure that any direction given to participants and members is lawful, and that adults act fairly, responsible and respectfully towards participants and members;
f. Duty to properly train staff so that they are aware of their individual responsibility for creating and maintaining a safe environment;
g. Duty to review the criminal history of applicants and current employees;
h. Duty to monitor and oversee their staff, employees and agents, including Carlson;
i. Duty to provide diligent supervision to minors;
j. Duty to act promptly and diligently and not ignore or minimize problems; and
g. Duty to report suspected incidents of child abuse and more specifically childhood sexual abuse;

112. Defendants and each of them had and have a duty to protect participants and members, including Ms. Frederick. Defendants were required to, and failed, to provide adequate training, supervision, monitoring and failed to be properly vigilant in seeing that training, supervision and monitoring was sufficient at USAG and USOC to ensure the safety of Ms. Frederick and others.

113. Despite having a duty to do so, Defendants failed to adequately train and supervise all staff to create a positive and safe environment, specifically including training to perceive, report and stop inappropriate sexual conduct by other members of the staff, specifically including Perpetrator Carlson.

114. Defendants failed to enforce their own rules and regulations designed to protect the health and safety of the participants and members. Further, they failed to adopt and implement safety measures, policies and procedures designed to protect minor children such as Ms. Frederick from the sexually exploitive and abusive acts of their agents and employees such as Perpetrator Carlson.

115. Plaintiff is informed and believes and on that basis alleges that as part of Defendants' conspiratorial and fraudulent attempt to hide Perpetrator Carlson's propensity to molest from public scrutiny and criminal investigation, Defendants implemented various measures designed to make molestation conduct harder to detect and ensure minors came into contact with molesters, such as Ms. Frederick, would be subject to abuse, including:

a. Permitting Perpetrator Carlson to remain in a position of authority and trust after Defendants knew or should have known that he was a molester.
b. Allowing Perpetrator Carlson to be in an environment, at USAG and USOC authorized camps and events, including assigning him unfettered access and control over minor participants and members that included individual and private coaching sessions, access to minor's private sleeping quarters without a chaperone, and allowing Perpetrator Carlson to physically and sexually interact with Ms. Frederick;
c. Failing for decades to disclose Perpetrator Carlson's sexual abuse, harassment and molestation and his propensity to commit such acts towards participants and members in USAG's and USOC's program, the public at large and law enforcement;
d. Allowing Perpetrator Carlson's unsupervised and un-controlled access to minors, including Ms. Frederick;
e. Holding out Perpetrator Carlson to Ms. Frederick, other participants and members of USAG and USOC, and the public at large as a trustworthy and honest person of high ethical and moral repute who was capable and worthy of being granted unsupervised access to the children of USAG;
f. Failing to investigate or otherwise confirm or deny such facts about Perpetrator Carlson;
g. Failing for decades to inform, or concealing from Plaintiff and law enforcement officials the fact that Ms. Frederick has been abused, harassed and molested, after Defendants knew or should have known that Perpetrator Carlson may have sexually abused Ms. Frederick, thereby enabling Ms. Frederick to continue to be endangered and sexually abused, harassed, molested, and/or creating the circumstance where Ms. Frederick and others were subject to harm;

h. Holding out Perpetrator Carlson to Ms. Frederick and to the community as being in good standing and trustworthy;
i. Cloaking Perpetrator Carlson's sexual misconduct with the facade of normalcy, thereby disguising the nature of his sexual abuse and contact with Ms. Frederick;
j. Failing to take reasonable steps and to implement reasonable safeguards to avoid acts of unlawful sexual conduct by Perpetrator Carlson such as avoiding placement of Perpetrator Carlson in functions or environments in which his solitary contact Ms. Frederick was inherent;
k. Failing to put in place a system or procedure to supervise or monitor coaches, athletic trainers, and agents to insure they do not molest or abuse minors in Defendants' care; and
m. Failing to implement any reasonable, meaningful, or adequate supervision policies, practices or procedures at the GAG, which would have prevented Perpetrator Carlson solitary access to minors, including the Plaintiff.

116. By his position within the Defendants' institutions, Perpetrator Carlson attained a position of influence over Ms. Frederick, her parents, and others. Defendants' conduct created a situation of peril that was not, and could not be appreciated by Ms. Frederick. By virtue of Defendants' conspiratorial and fraudulent conduct, and in keeping with their intent to fail to disclose Perpetrator Carlson's conduct from the community, the public at large and law enforcement, Defendants allowed Perpetrator Carlson to remain in a position of influence where his unsupervised or negligently supervised conduct with Ms. Frederick and minor participants and members made molestation and abuse possible.

117. During the period Ms. Frederick was being sexually abused and harassed by Perpetrator Carlson, Defendants had the authority and ability to prevent such abuse by removing Perpetrator Carlson from his position as head coach at GAG, USAG and in his status with the USOC. They failed to do so, allowing the abuse to occur and to continue unabated.

118. Plaintiff is informed and believes and on that basis, alleges that this failure was a part of Defendants' conspiratorial plan and arrangement to conceal Perpetrator Carlson's wrongful acts, to avoid and inhibit detection, to block public disclosure, to avoid scandal, to avoid the disclosure of their tolerance of child sexual molestation and abuse, to preserve a false appearance

of propriety, and to avoid investigation and action by public authority including law enforcement. Such actions were motivated by a desire to protect the reputation of Defendants and protect the monetary support of Defendants, while fostering an environment where such abuse could continue to occur.

119. As a direct result of the sexual harassment and abuse that Ms. Frederick suffered by Perpetrator Carlson and Defendants' failures, Ms. Frederick lost her chance to succeed as Olympic gymnast. She has been traumatized by the sexual abuse, and upset of knowing that Defendants could have prevented or stopped such abuse had Defendants conveyed the appropriate information. This inability to interact creates conflict with Ms. Frederick's values of trust and confidence in others, and has caused Ms. Frederick substantial emotional distress, anxiety, nervousness and fear. Ms. Frederick gets physically ill when reminded of the molestation and has difficulty with men in vulnerable situations and trusting men generally.

120. As a direct result of this conduct, Ms. Frederick suffered immensely, including, but not limited to, encountering issues with a lack of trust, various negative psychological and emotional sequelae, depressive symptoms, anxiety, and nervousness. This psychological trauma and association of her abuse with gymnastics cut Ms. Frederick's gymnastics career short, as participating in gymnastics reminded her of the repeated sexual abuse that she suffered at the hands of Perpetrator Carlson, which she eventually suppressed as a survival mechanism. Having been one of the most famous gymnasts in U.S. (and World) history, Ms. Frederick lost millions of dollars in economic damages, as a result of her sexual abuse at the hands of Perpetrator Carlson, and continues to suffer from such loss.

121. Moreover, Ms. Frederick continues to worry, distress, and experience concern, anxiety, and depression, over whether Perpetrator Carlson still has access to minors and could continue to sexually abuse and harass them, as no criminal action has taken place.

122. As a direct and proximate result of Defendants' tortious acts, omissions, wrongful conduct and breaches of their duties, Ms. Frederick's employment and professional development has been adversely affected. She has lost wages, endorsements, and many financial opportunities in an amount to be determined at trial. Ms. Frederick has suffered substantial economic injury, all to Ms. Frederick's general, special and consequential damage in an amount to be proven at trial, but in no event less than the minimum jurisdictional amount of this Court.

123. As a further direct and proximate result of Defendants' wrongful actions, as herein alleged, Ms. Frederick has been hurt in her health, strength and activity. Ms. Frederick has sustained permanent and continuing injury to her nervous system and person, which has caused and continues to cause great mental, physical and nervous pain, suffering, fright, upset, grief, worry and shock in an amount according to proof at trial but in no event less than the jurisdictional minimum requirements of this Court.

124. In subjecting Ms. Frederick to the wrongful conduct herein described, Defendants acted in gross negligence and disregard of Ms. Frederick's rights, so as to constitute wrongful conduct and/or oppression.

125. Ms. Frederick is informed and believes, and on that basis alleges, that specifically, the Defendants acted in concert, and under their authority as child care providers, with reckless disregard for the concern of the minor participants in its charge, including Ms. Frederick, in order to further financially benefit their respective business' growth. Defendants created an environment that harbored molesters, put the vulnerable minor participants, including Ms. Frederick, at-risk of

harm, ignored clear warning signs and their duties to report sexual abusers and molesters in their ranks, to maintain a façade of normalcy, in order to maintain its funding and provide further financial growth of USAG and USOC, on the international level. The safety of the minor participants who were entrusted to USAG and represented as being protected through USOC procedures, was compromised due to Defendants' desire to maintain the status quo of the USAG and USOC organizations, and avoid any public scrutiny for their misconduct.

126. Ms. Frederick is informed, and on that basis alleges, that these acts, as alleged herein above, were ratified by the officers, directors, and/or managing agents of the Defendants. Ms. Frederick is therefore entitled to recover punitive damages, in an amount to be determined by the court, against Defendants.

**EQUITABLE TOLLING OF STATUTE OF LIMITATIONS**

127. Plaintiff incorporates by reference the allegations contained in the previous paragraphs.

128. Class members' claims and Plaintiff Frederick's individual claims for violations of the Safe Sport Act are timely under 18 U.S.C. § 2255(b).

129. Plaintiff Frederick's common law claims are timely under MGL c. 260, s. 4C1/2, as Ms. Frederick discovered that an emotional or psychological injury or condition was caused by the sexual assault she suffered as a result of the Defendants wrongful conduct in 2015 when she saw an online photograph of Perpetrator Carlson at a gymnastic competition involving young girls. At that time, the memories that she suppressed for many years came flooding back and Plaintiff Frederick finally realized over the next months that she was injured by her molestation.

130. In addition, Defendants' failure to report, document, or investigate the complaints against Perpetrator Carlson, and concealment of the sexually illicit conduct of Perpetrator Carlson,

constitute fraudulent concealment that equitably tolls any proffered statute of limitation that may otherwise bar the recovery sought by Ms. Frederick herein.

131. Defendants are estopped from relying on any statute of limitations defense because they continued to refute and deny reports and allegations of sexual harassment and assault perpetrated by Perpetrator Carlson and intentionally concealed sexually illicit conduct, suppressed the complaints of Ms. Frederick, and failed to disclose known dangerous behaviors and serious increased risks to the Ms. Frederick.

132. Defendants represented that Perpetrator Carlson was a competent coach and entrusted him with overseeing the safety and wellbeing of minor athletes, including Ms. Frederick, instead of upholding their duty to Ms. Frederick to protect her from harassment and abuse.

133. At all relevant times, Defendants were under a continuing duty under federal law and parallel state laws to protect members and participants, including Ms. Frederick from harassment and abuse while under their care, and to disclose the true character, quality, and nature of their employees and/or agents.

134. As a result of Defendants' concealment of the true character, quality and nature of Perpetrator Carlson and his conduct, they are estopped from relying on any statute of limitations defense.

135. Defendants furthered their fraudulent concealment through acts and omissions, including misrepresenting known dangers of sexual harassment and abuse and a continued and systematic failure to disclose and/or cover up such information from/to the members and participants, their parents, and the public.

136. Defendants' acts and omissions, before, during, and/or after the act causing Ms. Frederick' injury prevented her from discovering the injury or cause thereof until recently when suppressed memories were unrevealed.

137. Defendants' conduct, because it was purposely committed, was known or should have been known by them to be dangerous, heedless, reckless, and without regard to the consequences or the rights and safety of Ms. Frederick.

138. The failure of USOC and USAG to take any meaningful action against Perpetrator Carlson and report his actions to law enforcement mirrors a larger pattern of willful ignorance and inaction by USOC and USAG.

## CAUSES OF ACTION

### FIRST CAUSE OF ACTION
### VIOLATION OF THE SAFE SPORT ACT, 18 U.S.C. § 2255, *et. seq.*
### (By Plaintiff on Behalf of Herself and the Class Against the Class Defendants)

139. Plaintiff re-alleges and incorporates by reference herein each and every allegation contained herein above as though fully set forth and brought in this cause of action.

140. The Protecting Young Victims from Sexual Abuse and Safe Sport Authorization Act of 2017 (herein known as the "Safe Sport Act") was written into law on or about February 14, 2018.

141. The Safe Sport Act amended the Ted Stevens Olympic and Amateur Sports Act to include among the purposes of the U.S. Olympic Committee to promote a safe environment in sports that is free from abuse, including emotional, physical and sexual abuse of any amateur athlete.

142. The Safe Sport Act expands those who must do mandatory reporting of child abuse to include "an adult who is authorized, by a national governing body, a member of a national

governing body, or an amateur sports organization that participates in interstate or international amateur athletic competition, interact with a minor or amateur athlete at an amateur sports organization facility or at any event sanctioned by a NGB, a member of a NGB, or such amateur sports organization."

143. The report of child abuse must be done "as soon as possible" which within the statute means within a twenty-four (24) hour period.

144. Defendants USAG and USOC became aware of reports that Plaintiff and Class members had been the victims of sexual abuse prior to or since the Safe Sport Act came into effect. For example, Defendants USAG and USOC learned facts that gave rise to a suspicion of Perpetrator Carlson's sexual abuse of Ms. Frederick on September 12, 2015, when she filed her formal complaint with USAG.

145. Neither USAG nor USOC complied with the mandatory reporting required by the Safe Sport Act and did not report the abuse to local law authorities.

146. The Safe Sport Act was enacted to protect amateur athletes from serial predatory abusers who prey upon young and naïve athletes. As the legislative intent is protect those athletes in the future who may become victims to the serially abuser, it is apparent the Safe Sport Act retroactively applies to all previously reported abuses and not simply those that occur after February 14, 2018.

147. USAG and USOC have not reported Ms. Frederick's abuse to authorities.

148. Ms. Frederick is informed and believes, and on that basis alleges, that Defendants have failed to follow the mandate of timely reporting all of the claims to law enforcement within 24 hours of learning facts that gave rise to the suspicion of abuse prior to the enactment of the Safe Sport Act on February 14, 2018.

149. As a result of the above-described conduct, Ms. Frederick and those similarly situated have suffered and continue to suffer great pain of mind and body, shock, emotional distress, physical manifestations of emotional distress including embarrassment, loss of self-esteem, disgrace, humiliations, and loss of enjoyment of life; has suffered and continues to suffer and was prevented and will continue to be prevented from performing daily activities and obtaining the full enjoyment of life; will sustain loss of earnings and earning capacity, and/or has incurred and will continue to incur expenses for medical and psychological treatment, therapy, and counseling.

**SECOND CAUSE OF ACTION**
**NEGLIGENCE**
**(By Plaintiff Frederick, Individually, Against All Defendants)**

150. Plaintiff re-alleges and incorporates by reference herein each and every allegation contained herein above as though fully set forth and brought in this cause of action.

151. Defendants owed a duty of care to hire, train, monitor, investigate and oversee its USAG/USOC certified and sanctioned coaches, including Perpetrator Carlson. Defendants' duties were increased because Perpetrator Carlson served as the "dorm parent" on behalf of the Defendants and was in a position of authority and power over Ms. Frederick.

152. Ms. Frederick's care, welfare and physical custody was entrusted to Defendants. Defendants voluntarily accepted the entrusted care of Ms. Frederick. As such, Defendants owed Ms. Frederick, a minor child, a special duty of care that adults dealing with children owe to protect them from harm.

153. Defendants had a duty to protect and warn arising from the special, trusting, confidential, and fiduciary relationship between Defendants and Ms. Frederick.

154. Prior to during the "grooming period" and after the first incident of the Perpetrator Carlson's sexual harassment, molestation and abuse of Ms. Frederick, through the present, Defendants Grossfeld, Ward, USOC and USAG, knew and/or should have known that the Perpetrator Carlson was capable of sexually abusing and harassing Ms. Frederick or other victims.

155. Defendants Grossfeld, Ward, USOC and USAG breached their duty to take reasonable protective measures to protect Plaintiff from the risk of childhood sexual harassment, molestation and abuse by the Perpetrator Carlson, by failing to supervise and stop employees and agents, including the Perpetrator Carlson, from committing wrongful sexual acts with minors, including Ms. Frederick.

156. Defendants Grossfeld, Ward, USOC and USAG breached their duties of care to the minor Plaintiff by allowing the Perpetrator Carlson to come into contact with Ms. Frederick and other participants and dues-paying members, without supervision; by failing to adequately hire, train, supervise and retain the Perpetrator Carlson whom they permitted and enabled to have access to Plaintiff; by concealing from Plaintiff, her family, and law enforcement that the Perpetrator Carlson was sexually harassing, molesting and abusing her; and by holding the Perpetrator Carlson out to Plaintiff and her family as being of high moral and ethical repute, in good standing and trustworthy.

157. Defendants Grossfeld, Ward, USOC and USAG breached their duties to Plaintiff by failing to investigate facts of sexual abuse by the Perpetrator Carlson, which they knew or should have known about. Defendants failed to reveal such facts of abuse to Plaintiff, her parents, the community and law enforcement agencies, and failed to reveal that they do not investigate and monitor their USAG/USOC certified coaches and dorm parents. Defendants also failed by placing

the Perpetrator Carlson into a position of trust and authority, holding him out to Plaintiff, her parents, and the public as being in good standing and trustworthy.

158. Defendants Grossfeld, Ward, USOC and USAG breached their duty to Plaintiff by failing to adequately train, monitor and supervise the Perpetrator Carlson and failing to prevent the Perpetrator Carlson from committing wrongful sexual acts with minors including Ms. Frederick. Defendants Grossfeld, Ward, USOC and USAG knew or should have known of the Perpetrator's Carlson grooming process and incapacity to serve as a USAG/USOC certified head coach, providing for the physical care and coaching of minor females, including Ms. Frederick.

159. As a result of the above-described conduct, Ms. Frederick has suffered and continues to suffer great pain of mind and body, shock, emotional distress, physical manifestations of emotional distress including embarrassment, loss of self-esteem, disgrace, humiliations, and loss of enjoyment of life; has suffered and continues to suffer and was prevented and will continue to be prevented from performing daily activities and obtaining the full enjoyment of life; will sustain loss of earnings and earning capacity, and has incurred and will continue to incur expenses for therapy and counseling.

**THIRD CAUSE OF ACTION**
**NEGLIGENT SUPERVISION/RETENTION**
**(By Plaintiff Frederick Individually, Against Defendants Grossfeld, Ward, USOC, and USAG)**

160. Plaintiff re-alleges and incorporates by reference herein each and every allegation contained herein above as though fully set forth and brought in this cause of action.

161. By virtue of Ms. Frederick's special relationship with Defendant Grossfeld, Ward, USOC and USAG, and Defendants Grossfeld, Ward, USOC and USAG's relation to the Perpetrator Carlson, they owed Plaintiff a duty to provide reasonable supervision and oversight of USAG/USOC certified and sanctioned coach CARLSON, to use reasonable care in investigating

the Perpetrator Carlson's background, and to provide adequate oversight of Perpetrator Carlson's dangerous propensities and unfitness. As organizations and individuals responsible for, and as representatives of Defendants Grossfeld, Ward, USOC and USAG, where many of the participants and dues-paying members thereof are vulnerable minors, like Plaintiff Frederick, entrusted to these Defendants Grossfeld, Ward, USOC and USAG, these Defendants Grossfeld, Ward, USOC and USAG's agents expressly and implicitly represented that certified coaches and staff, including the Perpetrator Carlson, were not a sexual threat to children and others who would fall under Perpetrator Carlson's influence, control, direction, and care.

162. Defendants Grossfeld, Ward, USOC and USAG, by and through their respective agents, servants and employees, knew or should have known if they properly investigated, supervised and monitored Carlson, of the Perpetrator Carlson's exploitive and inappropriate propensities and that Perpetrator Carlson was an unfit agent.

163. Despite such knowledge, Defendants Grossfeld, Ward, USOC and USAG negligently failed to supervise and monitor Perpetrator Carlson in his position of trust and authority as a USAG/USOC certified head coach, authority figure over children, and dorm parent, where he was able to commit wrongful acts of sexual misconduct against Ms. Frederick.

164. Defendants Grossfeld, Ward, USOC and USAG failed to provide reasonable supervision and monitoring of the Perpetrator Carlson, failed to use reasonable care in investigating Perpetrator Carlson, and failed to ascertain his dangerous propensities and unfitness.

165. Defendants Grossfeld, Ward, USOC and USAG further failed to take reasonable steps to ensure the safety of minors, including Ms. Frederick from sexual harassment, molestation, and abuse.

166. At no time during the periods of time alleged did Defendants Grossfeld, Ward, USOC and USAG have in place a reasonable system or procedure to train, investigate, supervise and monitor the certified head coach or staff, including the Perpetrator Carlson, to prevent pre-sexual grooming and sexual harassment, molestation and abuse of children, nor did they implement a system or procedure to oversee or monitor conduct toward minors and others in Defendants Grossfeld, Ward, USOC and USAG's care.

167. Defendants Grossfeld, Ward, USOC and USAG were aware or should have been aware of how vulnerable children were to sexual harassment, molestation and abuse by teachers, coaches and other persons of authority within Defendants Grossfeld, Ward, USOC and USAG's entities.

168. Defendants Grossfeld, Ward, USOC and USAG were put on notice, knew and/or should have known that the Perpetrator Carlson was engaging in unlawful sexual conduct with Ms. Frederick, and had committed other misconduct for his own personal sexual gratification, and that it was foreseeable that he was engaging, or would engage in sexual activities with Plaintiff, and others, under the cloak of the authority, confidence, and trust, bestowed upon him through Defendants Grossfeld, Ward, USOC and USAG.

169. Defendants Grossfeld, Ward, USOC and USAG were placed on actual or constructive notice that the Perpetrator Carlson had molested participants and dues paying member, Plaintiff Frederick, during his employment with Defendants Grossfeld, Ward, USOC and USAG.

170. Defendants Grossfeld, Ward, USOC and USAG should have been informed of molestations of Ms. Frederick committed by the Perpetrator Carlson, and of conduct by the

Perpetrator Carlson that would put a reasonable person on notice of such propensity to molest and abuse children.

171. Even though Defendants Grossfeld, Ward, USOC and USAG knew or should have known of these sexual activities by the Perpetrator Carlson, Defendants Grossfeld, Ward, USOC and USAG did not reasonably investigate, supervise or monitor the Perpetrator Carlson to ensure the safety of the minor participants and dues paying members, including Plaintiff Frederick.

172. Defendants Grossfeld, Ward, USOC and USAG's conduct was a breach of their duties to Ms. Frederick.

173. Defendants Grossfeld, Ward, USOC and USAG, and each of them, breached their duty to Plaintiff by, inter alia, by failing to adequately monitor and supervise the Perpetrator Carlson and stop the Perpetrator Carlson from committing wrongful sexual acts with Plaintiff Frederick.

174. As a result of the above-described conduct, Ms. Frederick has suffered and continues to suffer great pain of mind and body, shock, emotional distress, physical manifestations of emotional distress including embarrassment, loss of self-esteem, disgrace, humiliations, and loss of enjoyment of life; has suffered and continues to suffer and was prevented and will continue to be prevented from performing daily activities and obtaining the full enjoyment of life; will sustain loss of earnings and earning capacity, and/or has incurred and will continue to incur expenses therapy and counseling.

**FOURTH CAUSE OF ACTION**
**NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS**
**(By Plaintiff Frederick, Individually, Against All Defendants)**

175. Plaintiff re-alleges and incorporates by reference herein each and every allegation contained herein above as though fully set forth and brought in this cause of action.

176. Defendants' misconduct conduct as described herein constituted negligence and caused significant emotional distress and physical injury to Ms. Frederick.

177. Defendants could reasonably foresee that Perpetrator Carlson's actions would have caused the emotional distress.

178. Defendants acted with negligence, recklessness, and disregard, knowing that Ms. Frederick would likely endure emotional distress because of what she was subjected to while under the care and control of Defendants.

179. Defendants' conduct directly caused Ms. Frederick suffering that no person should have to endure.

180. Any reasonable person in under the same circumstances that Plaintiff Frederick was placed by the Defendants' misconduct would have also suffered emotional distress.

181. As a result of the above-described conduct, Ms. Frederick has suffered and continues to suffer great pain of mind and body, shock, emotional distress, physical manifestations of emotional distress including embarrassment, loss of self-esteem, disgrace, humiliations, and loss of enjoyment of life; has suffered and continues to suffer and was prevented and will continue to be prevented from performing daily activities and obtaining the full enjoyment of life; will sustain loss of earnings and earning capacity, and/or has incurred and will continue to incur expenses for therapy and counseling.

## PRAYER FOR RELIEF

On behalf of herself and all others similarly situated, Plaintiff prays this Court enter judgment against each of the Defendants and grant:

A. Compensatory and consequential damages, including damages for emotional distress, humiliation, loss of enjoyment of life, and other pain and suffering on all claims allowed by law in an amount to be determined at trial;

B. Economic losses on all claims allowed by law;

C. Special damages in an amount to be determined at trial;

D. Punitive damages on all claims allowed by law against individual Defendants in an amount to be determined at trial;

E. Injunctive relief as allowed by law;

F. Attorney's fees and costs associated with this action

G. Pre- and post-judgment interest at the lawful rate; and,

H. Any further relief that this Court deems just and proper, and any other appropriate relief at law and equity.

**Plaintiff hereby demands a trial by jury on all claims so triable.**

Respectfully submitted this 20th day of June, 2018.

**RESPECTFULLY SUBMITTED,**

**PLAINTIFF,**

/s/ Kimberly A. Dougherty
Kimberly A. Dougherty (BBO. No. 658014)
Vance Andrus (to be admitted *pro hac vice*)
Aimee Wagstaff (to be admitted *pro hac vice*)
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AND

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JS 44 (Rev 06/17)

# CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. *(SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)*

**I. (a) PLAINTIFFS**

MARCIA FREDERICK, individually, and on behalf of all others similarly situated

**(b)** County of Residence of First Listed Plaintiff Bristol County, MA
*(EXCEPT IN U.S. PLAINTIFF CASES)*

**(c)** Attorneys *(Firm Name, Address, and Telephone Number)*
Kimberly A. Dougherty, Andrus Wagstaff PC
19 Belmont Street, South Easton, MA 02375
(508) 230-2700

**DEFENDANTS**
UNITED STATES OLYMPIC COMMITTEE, USA GYMNASTICS (formerly known as the United States Gymnastics Federation), RICHARD CARLSON, MURIEL GROSSFELD, and GEORGE WARD

County of Residence of First Listed Defendant El Paso County, CO
*(IN U.S. PLAINTIFF CASES ONLY)*

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED

Attorneys *(If Known)*

**II. BASIS OF JURISDICTION** *(Place an "X" in One Box Only)*

- ☐ 1 U S Government Plaintiff
- ☒ 3 Federal Question *(U.S. Government Not a Party)*
- ☐ 2 U S Government Defendant
- ☐ 4 Diversity *(Indicate Citizenship of Parties in Item III)*

**III. CITIZENSHIP OF PRINCIPAL PARTIES** *(Place an "X" in One Box for Plaintiff and One Box for Defendant) (For Diversity Cases Only)*

| | PTF | DEF | | PTF | DEF |
|---|---|---|---|---|---|
| Citizen of This State | ☒ 1 | ☐ 1 | Incorporated *or* Principal Place of Business In This State | ☐ 4 | ☐ 4 |
| Citizen of Another State | ☐ 2 | ☐ 2 | Incorporated *and* Principal Place of Business In Another State | ☐ 5 | ☒ 5 |
| Citizen or Subject of a Foreign Country | ☐ 3 | ☐ 3 | Foreign Nation | ☐ 6 | ☐ 6 |

**IV. NATURE OF SUIT** *(Place an "X" in One Box Only)* Click here for: Nature of Suit Code Descriptions.

**CONTRACT**
- ☐ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment & Enforcement of Judgment
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loans (Excludes Veterans)
- ☐ 153 Recovery of Overpayment of Veteran's Benefits
- ☐ 160 Stockholders' Suits
- ☐ 190 Other Contract
- ☐ 195 Contract Product Liability
- ☐ 196 Franchise

**REAL PROPERTY**
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

**TORTS**

PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers' Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury
- ☐ 362 Personal Injury - Medical Malpractice

PERSONAL INJURY
- ☐ 365 Personal Injury - Product Liability
- ☐ 367 Health Care/ Pharmaceutical Personal Injury Product Liability
- ☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

**CIVIL RIGHTS**
- ☐ 440 Other Civil Rights
- ☐ 441 Voting
- ☐ 442 Employment
- ☐ 443 Housing/ Accommodations
- ☐ 445 Amer w/Disabilities - Employment
- ☐ 446 Amer w/Disabilities - Other
- ☐ 448 Education

**PRISONER PETITIONS**

Habeas Corpus:
- ☐ 463 Alien Detainee
- ☐ 510 Motions to Vacate Sentence
- ☐ 530 General
- ☐ 535 Death Penalty

Other:
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Condition
- ☐ 560 Civil Detainee - Conditions of Confinement

**FORFEITURE/PENALTY**
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 690 Other

**LABOR**
- ☐ 710 Fair Labor Standards Act
- ☐ 720 Labor/Management Relations
- ☐ 740 Railway Labor Act
- ☐ 751 Family and Medical Leave Act
- ☐ 790 Other Labor Litigation
- ☐ 791 Employee Retirement Income Security Act

**IMMIGRATION**
- ☐ 462 Naturalization Application
- ☐ 465 Other Immigration Actions

**BANKRUPTCY**
- ☐ 422 Appeal 28 USC 158
- ☐ 423 Withdrawal 28 USC 157

**PROPERTY RIGHTS**
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 835 Patent - Abbreviated New Drug Application
- ☐ 840 Trademark

**SOCIAL SECURITY**
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

**FEDERAL TAX SUITS**
- ☐ 870 Taxes (U S Plaintiff or Defendant)
- ☐ 871 IRS—Third Party 26 USC 7609

**OTHER STATUTES**
- ☐ 375 False Claims Act
- ☐ 376 Qui Tam (31 USC 3729(a))
- ☐ 400 State Reapportionment
- ☐ 410 Antitrust
- ☐ 430 Banks and Banking
- ☐ 450 Commerce
- ☐ 460 Deportation
- ☐ 470 Racketeer Influenced and Corrupt Organizations
- ☐ 480 Consumer Credit
- ☐ 490 Cable/Sat TV
- ☐ 850 Securities/Commodities/ Exchange
- ☒ 890 Other Statutory Actions
- ☐ 891 Agricultural Acts
- ☐ 893 Environmental Matters
- ☐ 895 Freedom of Information Act
- ☐ 896 Arbitration
- ☐ 899 Administrative Procedure Act/Review or Appeal of Agency Decision
- ☐ 950 Constitutionality of State Statutes

**V. ORIGIN** *(Place an "X" in One Box Only)*

- ☒ 1 Original Proceeding
- ☐ 2 Removed from State Court
- ☐ 3 Remanded from Appellate Court
- ☐ 4 Reinstated or Reopened
- ☐ 5 Transferred from Another District *(specify)*
- ☐ 6 Multidistrict Litigation - Transfer
- ☐ 8 Multidistrict Litigation - Direct File

**VI. CAUSE OF ACTION**

Cite the U.S. Civil Statute under which you are filing *(Do not cite jurisdictional statutes unless diversity)*:
28 U.S.C. § 1332(d)(2), 18 U.S.C. § 2255, and 34 U.S.C. § 20341

Brief description of cause:
Violations of the Safe Sport Act for failing to report suspected abuse of amateur athletes to law enforcement and other claims

**VII. REQUESTED IN COMPLAINT:**

☒ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

**DEMAND $** In excess of 5,000,000.00

CHECK YES only if demanded in complaint:
**JURY DEMAND:** ☒ Yes ☐ No

**VIII. RELATED CASE(S) IF ANY** *(See instructions)*: JUDGE _____ DOCKET NUMBER _____

DATE 06/20/2018

SIGNATURE OF ATTORNEY OF RECORD /s/ Kimberly A. Dougherty

**FOR OFFICE USE ONLY**

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG JUDGE

**HIGHLY CONFIDENTIAL**

**UNITED STATES DISTRICT COURT**
**DISTRICT OF MASSACHUSETTS**

1. **Title of case (name of first party on each side only)** MARCIA FREDERICK, individually, and on behalf of all others similarly situated v. UNITED STATES OLYMPIC COMMITTEE, et al.

2. **Category in which the case belongs based upon the numbered nature of suit code listed on the civil cover sheet. (See local rule 40.1(a)(1)).**

   ☐ I. 410, 441, 470, 535, 830*, 835*, 891, 893, 895, R.23, REGARDLESS OF NATURE OF SUIT.

   ☐ II. 110, 130, 140, 160, 190, 196, 230, 240, 290,320,362, 370, 371, 380, 430, 440, 442, 443, 445, 446, 448, 710, 720, 740, 790, 820*, 840*, 850, 870, 871.

   ☑ III. 120, 150, 151, 152, 153, 195, 210, 220, 245, 310, 315, 330, 340, 345, 350, 355, 360, 365, 367, 368, 375, 376, 385, 400, 422, 423, 450, 460, 462, 463, 465, 480, 490, 510, 530, 540, 550, 555, 625, 690, 751, 791, 861-865, 890, 896, 899, 950.

   *Also complete AO 120 or AO 121. for patent, trademark or copyright cases.

3. **Title and number, if any, of related cases. (See local rule 40.1(g)). If more than one prior related case has been filed in this district please indicate the title and number of the first filed case in this court.**

   _____

4. **Has a prior action between the same parties and based on the same claim ever been filed in this court?**

   YES ☐ NO ☑

5. **Does the complaint in this case question the constitutionality of an act of congress affecting the public interest? (See 28 USC §2403)**

   YES ☐ NO ☑

   **If so, is the U.S.A. or an officer, agent or employee of the U.S. a party?**

   YES ☐ NO ☐

6. **Is this case required to be heard and determined by a district court of three judges pursuant to title 28 USC §2284?**

   YES ☐ NO ☑

7. **Do all of the parties in this action, excluding governmental agencies of the United States and the Commonwealth of Massachusetts ("governmental agencies"), residing in Massachusetts reside in the same division? - (See Local Rule 40.1(d)).**

   YES ☑ NO ☐

   A. **If yes, in which division do all of the non-governmental parties reside?**

   Eastern Division ☑ Central Division ☐ Western Division ☐

   B. **If no, in which division do the majority of the plaintiffs or the only parties, excluding governmental agencies, residing in Massachusetts reside?**

   Eastern Division ☐ Central Division ☐ Western Division ☐

8. **If filing a Notice of Removal - are there any motions pending in the state court requiring the attention of this Court? (If yes, submit a separate sheet identifying the motions)**

   YES ☐ NO ☐

**(PLEASE TYPE OR PRINT)**

**ATTORNEY'S NAME** Kimberly A. Dougherty

**ADDRESS** 19 Belmont Street, South Easton, MA 02375

**TELEPHONE NO.** (508) 230-2700

(CategoryForm6-2017.wpd )

# EXHIBIT 2

**IN THE UNITED STATES DISTRICT COURT**
**DISTRICT OF MASSACHUSETTS**

| | | |
|---|---|---|
| MARCIA FREDERICK, individually, and on behalf of all others similarly situated,<br><br>Plaintiffs,<br><br>v.<br><br>UNITED STATES OLYMPIC COMMITTEE, USA GYMNASTICS (formerly known as the United States Gymnastics Federation), RICHARD CARLSON, MURIEL GROSSFELD, GEORGE WARD,<br><br>Defendants. | ) | C.A. No. 1:18-cv-11299-IT<br><br>LEAVE TO FILE OMNIBUS RESPONSE AND EXCESS PAGES GRANTED ON NOVEMBER 14, 2018[1] |

**PLAINTIFF'S OMNIBUS OPPOSITION TO USAG AND USOC'S MOTIONS TO DISMISS**

[1] Despite significant effort, recognizing the difficulty of responding to briefs from USAG and USOC (who filed separate motions in excess of page limits) on complicated issues, Plaintiff's filed an Amended Motion for Leave to File Excess Pages on November 16, 2018 [Dkt # 56], upon which the Court has not had the opportunity to rule. The Omnibus Opposition currently exceeds the authorized page limits by 3 pages. Plaintiff respectfully requests the Court allow the additional excess pages.

**TABLE OF CONTENTS**

## I. INTRODUCTION

Plaintiff, Marcia Frederick, ("Plaintiff"), a former Olympic gymnast, brings claims[2] against Defendant United States of America Gymnastics ("USAG") and Defendant United States Olympic Committee ("USOC") (collectively referred to as "Defendants"), among others. Despite having the power, authority and responsibility to act, Defendants failed Plaintiff, and countless other young athletes, by showing deliberate indifference to their assault and abuse, fostering an environment of abusive activity towards gymnasts, failing to sufficiently investigate, train, or supervise employees and agents such as Defendant Carlson, failing to respond to complaints of sexual abuse or report them, failing to take corrective measures, and actively defending and covering up abuse. Plaintiff asserts these allegations in her adequately pled First Amended Complaint ("FAC"), and thus Defendants' motions to dismiss should be denied in their entirety.

## II. BACKGROUND

Plaintiff was an elite level gymnast and the first American female to win Gold at the World Gymnastics Championships. *See* FAC ¶ 78. Prior to qualifying for the 1980 Olympic Gymnastics Team, Plaintiff joined Grossfeld's American Gym ("GAG"), a USAG and USOC sanctioned facility to further her training. *Id.* ¶ 79. GAG and its employees, particularly its coaches, including Defendant Carlson, were given complete control of the young gymnasts' lives, including training, education, meals and even sleep schedules. *Id.*, ¶¶ 85-86. From 1975 to 1978, Plaintiff trained with Don Peters, GAG's infamous former coach later banned by USAG for sexual misconduct with minor gymnasts. *Id.* ¶¶ 87-88. In 1978, Defendant Carlson, also certified and trained by USAG, became Plaintiff's new head coach. *Id.* ¶ 89. Defendant Carlson was also a "dorm parent" who lived on the first floor of the housing facility where Plaintiff lived. *Id.* ¶ 93. Defendant Carlson began "grooming" Plaintiff when she was 1978, and began sexually abusing her shortly thereafter, while on the GAG properties and

[2] On behalf of herself and all others similarly situated, Plaintiff seeks relief and damages, statutory and otherwise, for negligence, negligent supervision and retention, negligent infliction of emotional distress, violation of M.G.L. c. 93A, and violations of the Protecting Young Victims from Sexual Abuse and Safe Sport Authorization Act of 2017 (the "Safe Sport Act").

while traveling for USAG and USOC competitions in numerous locations around the country. *Id.* ¶¶ 97-98.

Although Plaintiff disclosed the abuse in 1980, she was led to believe the abuse was "normal" and that enduring this pain was required because she had "to be close with her coach" in order to be the best gymnast and become an Olympian. *Id.* ¶¶ 103-104. Not long after, Plaintiff felt forced to give up on her gymnastics dreams and she then suppressed her memories of the abuse for decades. *Id.* ¶¶ 105, 131, 140. However, in or around 2015, they came flooding back when she saw a photograph of Defendant Carlson at a gymnastic competition involving young girls. *Id*. Plaintiff then filed a formal complaint with USAG regarding Defendant Carlson's abuse. *Id.*, ¶ 155. USAG investigated the claim, held a hearing in April 2018, and in June unanimously found "that a preponderance of the evidence shows Mr. Carlson engaged in unprofessional and inappropriate sexual relations with an athlete under his authority."[3]

Around the time that Plaintiff reported her abuse, and during the ensuing investigation, other athletes and Olympians began to come forward publicly. Learning at Congressional Hearings, "how bad the problem of sexual abuse in youth sports has become, how long it went on, how many athletes were affected, and, in some cases, how slow the response was from those charged with ensuring these young athletes' safety,"[4] Congress passed (with unprecedented numbers and bipartisan support[5]) the Safe Sport Act, promulgated "to promote a safe environment in sports that is free from abuse [] of any amateur athlete." FAC ¶ 40.

Many legislators—including one of the law's sponsors, Senator Feinstein—confirmed this purpose while revealing disgust at Defendants' misconduct and the intent to hold them accountable:

> The very institutions tasked with protecting these athletes allowed this egregious conduct to occur…these governing bodies were, at best, complicit in the devastation wrought on these young children and their families. They did far too little to prevent abuse from happening in the first place, and when they saw signs of abuse, they did

[3] These are facts that Plaintiff is able to plead on amendment should the Court deem it necessary.
[4] *See* Sen. Grassley testimony, https://www.congress.gov/congressional-record/2018/01/30/senate-section/article/S589-2.
[5] *See* http://clerk.house.gov/evs/2018/roll045.xml (406 Yeas (226 Republicans and 181 Democrats), 3 Nays, 21 Did Not Vote).

> little to stop it…[Investigator] Daniels stated, 'The overall impression received externally is that the athlete protection function is, at best, secondary to the primary focus: winning medals.' That is completely unacceptable. The legislation we will soon pass [will] help protect sex abuse victims and reform institutions like USA[G].[6]

As of February 14, 2018, the Safe Sport Act mandates that USAG and the USOC, along with their agent coaches and members, report any assault or abuse to authorities within 24 hours. FAC ¶ 41.[7] The Safe Sport Act makes non-reporting assault or abuse a federal crime, imposing a significant fine as well as other damages (including punitive), and creates an independent body, the U.S. Center for Safe Sport ("Center for Safe Sport"), to adjudicate sexual abuse cases. *Id.*

Representative Brooks described the Safe Sport Act as "strengthening protections for victims to ensure transparency and accountability, and putting the safety and the health of our athletes and every young athlete who has ever dreamed of the Olympic stage first."[8] Likewise, Representative Scout described the legislation as "[i]ntervention and prevention measures … desperately needed to keep our children safe and hold offenders and entities accountable for their actions and their silence," *id.* while Senator Bishop expressed Congress' "disbelief" over USAG and USOC's misconduct:

> I must say in all candor, I stand before you today in absolute disbelief; disbelief in the layers of mismanagement that should have prevented this from happening, but also disbelief that it takes an act of Congress to ensure a congressionally chartered organization fulfill its obligation to care for and protect the young athletes with whom their parents have entrusted. *Id.*

Despite Congressional action, Defendants USAG and USOC continue to fail to report countless suspicions of assault and abuse to law enforcement, including Plaintiff's abuse. FAC ¶ 43.

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[6] *See* https://www.congress.gov/congressional-record/2018/01/30/senate-section/article/S589-2; *see also generally*, https://www.congress.gov/congressional-record/2018/01/29/house-section/article/H633-4 (Sen. Jackson Lee: "The shocking failure of anyone to report accusations to law enforcement or even keep track of complaints internally made it possible for some of these predators to commit multiple horrific acts over time.").

[7] *See also, supra*, n.5 (Rep. Brooks: "This bill requires any individual who interacts with our amateur athletes to report suspected child abuse, including sexual abuse, within 24 hours. If they fail to do so, they will be held accountable by the new law.").

[8] *See* https://www.congress.gov/congressional-record/2018/01/29/house-section/article/H633-4.

## III. LEGAL STANDARD

When evaluating a Rule 12(b)(6) motion to dismiss, a court must accept all factual allegations in the complaint as true and draw all reasonable inferences in the plaintiff's favor. *Langadinos v. American Airlines, Inc.*, 199 F.3d 68, 68 (1st Cir. 2000). This is a "context-specific task" which "requires the reviewing court to draw on its judicial experience and common sense." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (citations omitted). Ultimately, a complaint need only allege "a plausible entitlement to relief," and while this "requires more than labels and conclusions," "detailed factual allegations are not necessary." *Lexington Ins. Co. v. Johnson Controls Fire Prot. Ltd. P'ship*, Case No. CV 18-10516-TSH, 2018 WL 5891689, at *2 (D. Mass. Nov. 9, 2018)(internal citation omitted). "The relevant inquiry focuses on the reasonableness of the inference of liability that the plaintiff is asking the court to draw from the facts alleged in the complaint." *Ocasio-Hernandez v. Fortuno-Burset*, 640 F.3d 1, 13 (1st Cir. 2011). Further, greater leeway is granted "where the facts are peculiarly within the possession and control of the defendant." *Lexington Ins. Co.*, 2018 WL 5891689, at n.1 (citation omitted).

Finally, even if a court determines that a complaint's allegations are insufficient, it "should 'freely give leave to amend where the interests of justice so require." *Brown v. CitiMortgage, Inc.*, Case No. 16-CV-11484-LTS, 2016 WL 9223830, at *1 (D. Mass. Oct. 20, 2016) (granting leave to amend, despite many concerns, "out of an abundance of caution and fairness") (citations omitted).[9]

## IV. DEFENDANTS' MOTIONS TO DISMISS MUST FAIL.

### A. Civil Remedies Are Available Against USAG and USOC for Their Misconduct, Including Violation of the Safe Sport Act.

Congress took two important steps toward halting abuse of minor athletes when it enacted the Safe Sport Act: first, Congress made clear that national governing bodies ("NGBs"), like Defendants USAG and USOC, are mandatory reporters of child abuse and so obligated to report suspected abuse

[9] "Consistent with our liberal practice as to amendments, the expressed tendency is in favor of allowing amendments, and a motion to amend should be allowed unless some good reason appears for denying it." *Afarian v. Massachusetts Elec. Co.*, 449 Mass. 257, 269, 866 N.E.2d 901, 910–11 (2007) (internal quotation omitted).

within 24 hours. Second, Congress provided a private cause of action and civil remedies, including punitive damages, for athletes like Plaintiff who suffered personal injuries from sexual abuse, empowering them to seek redress against responsible parties, including Defendants.

**1. Plaintiff and the Proposed Class May Pursue Civil Remedies Against USAG and USOC For Their Failure to Report Abuse.**

Learning of the horrendous sexual assault abuse of minor athletes that had been ongoing for decades, and discovering that USAG and USOC had not only failed to address it, but were also covering up the abuse, Congress passed the Safe Sport Authorization Act of 2017. *See* Public Law No: 115-126 (02/14/2018). As relevant here, the Act amended Sect. 20341 (Child Abuse Reporting), updating the definition of "covered individual" to make USAG and USOC mandatory reporters of child abuse. *See id.*, ¶¶ a.2, c.9. Thus, while USAG and USOC had pre-existing common law responsibilities to protect athletes from abuse and to report it, Congress felt the need to make it explicit in the Safe Sport Act and to also require the reporting by USAG and USOC to be done "within 24 hours." *Id.*, ¶¶ a.2, c.12.

Defendants contend that Plaintiff does not have a private right of action to assert claims for violation of the Safe Sport Act's reporting requirement. *See, e.g.*, USOC Motion to Dismiss ("MTD") at 8.[10] However, many courts have recognized that individuals, like Plaintiff, may bring a private

[10] Cases cited by Defendant are inapposite because they primarily deal with regulation of violations by a governmental entity, a circumstance where there would be no private right of action and far different from here. *See Forsythe v. Sun Life Financial, Inc.*, 417 F.Supp.2d 100, 107 (D.Mass. 2006)(holding the statute "not only lacks 'rights-creating language' but also specifically authorizes only the SEC-not private litigants-to take enforcement action."); *San Juan Cable LLC v. Puerto Rico Tel. Co., Inc.*, 612 F.3d 25, 32 (1st Cir. 2010)(where the FCC may enforce the Act, the court noted the "difference between a rights-granting statute and a purely prohibitory statute is significant in determining the existence…of an implied private right of action."); *Gibbs v. SLM Corp.*, 336 F.Supp.2d 1, *14-16 (D.Mass. 2004) (finding the "no private right of action to enforce regulations enacted under the [Higher Education Act]," "it only provides for a suit brought by or against the Secretary of Education"); *Frazier v, Fairhaven School Com.*, 276 F.3d 52, 68 (1st Cir. 2002) ("FERPA expressly authorized the Secretary of Education-and only the Secretary of Education-to take 'appropriate actions' to enforce its provisions."); *Upshaw v. Andrade*, F.Supp.2d (2012)("language unambiguously states that a person may bring a complaint to the Secretary" and the Secretary may force compliance); *Northwest Airlines, Inc. v, Transport Workers Union of Am.*, 451 U.S. 77, *93 (Sup. Ct. 1981) (no private right of action under Title VII for employer's against unions); *Ziglar v. Abbasi*, 137 S.Ct. 1843, 1848 (Sup. Ct. 2017) ("Congress provided a specific damages remedy for plaintiff whose constitutional rights were violated by the state officials, but Congress provided no corresponding remedy for constitutional violates by agents of the Federal Government."); *Alexander v. Sandoval*, 532 U.S. 275, 276 (Sup. Ct. 2001) (noting the statute does not focus on the "individuals protected…but on the regulating agencies," finding it "expressly provides for enforcing regulations, which place elaborate restrictions on agency enforcement."). Both *King v. Keller*, 211 Fed.Appx. 764 (10th Cir. 2007)

cause of action for injuries resulting from a failure to report suspected child abuse. *See Ham v. Hospital of Morristown*, 917 F.Supp. 531 (E.D. Tenn. 1995) (finding statute requiring medical personnel to report suspected child abuse to law enforcement official creates obligation to report, such that failure to report can give rise to civil liability); *see also Doe v. Corporation of President of Church of Jesus Christ of Latter-Day Saints*, 167 P.3d 1193 (Wash. Ct. App. Div. 2007) (finding private cause of action implied under statute mandating report of abuse or neglect); *Beggs v. State Dept. of Social & Health Services*, 247 P.3d 421 (Wash. 2011) (finding mandatory reporter statute, which imposed duty on specific professionals to report suspected child abuse implied cause of action against mandatory reporter who failed to do so, and thus medical malpractice statute did not preclude civil claim against doctor for failing to report suspected child abuse.); *see also Doran v. Priddy*, 534 F.Supp. 30, 33 (D.C. Kan. 1981).

As set forth in *Kassey S. v. City of Turlock*, because police officers are mandated reporters, a police officer has a mandatory duty to investigate and report known or reasonably suspected child abuse that arises within the scope of employment. 212 Cal. App. 4th 1276, 1280 (2013) (citation omitted). Thus, where a police officer breaches that duty, the municipal employer is also subject to civil liability for any injuries caused by the breach. *Id.* Likewise, *Landeros v. Flood* held that a claim existed in favor of the abused child against a hospital and a physician who failed to comply with a mandatory reporting statute involving a minor's injurieswhich appeared to be non-accidental. 17 Cal. 3d 399, 413 (1976).

Moreover, a private cause of action may be implied, even if the statute does not specifically provide it. *See Sternberg v. USA Nat. Karate-Do Federation, Inc.*, 123 F.Supp. 2d 659, 664 (E.D.N.Y. 2000) ("Even if a statute does not specifically provide for a private cause of action, one may be implied.") (citing *Cannon v. University of Chicago*, 441 U.S. 677, 688, (1979); *Cort v. Ash*, 422 U.S. 66 (1975)). Notably, *Sternberg* found an implied cause of action under the Amateur Sports Act, an

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and *Graham v. Rawley*, 2016 WL 7477756 (D.N.J. 2016) are irrelevant because they dealt with federal criminal statutes enforceable by the government only.

act very similar to the Safe Sport Act. *Sternberg* explained:

> [when] deciding whether Congress designed the Sports Act to permit a private remedy for violations the following four *Cort* factors must be considered:
>
> 1) whether the ***plaintiff is "one of the class for whose especial benefit the statute was enacted*** ... that is, does the statute create a federal right in favor of the plaintiff"; 2) whether there is "any indication of legislative ***intent***, explicit or implicit, ***to create such a remedy or deny one***"; 3) whether it is "***consistent with the underlying purposes of the legislative scheme*** to imply such a remedy for the plaintiff"; and 4) whether the cause of action is "one traditionally relegated to state law, in ***an area basically the concern of the States***, so that it would be inappropriate to infer a cause of action based solely on federal law."

*Id*. at 664 (quotations omitted) (emphasis in original). Similar to the *Sternberg* discrimination case, "Plaintiff's case meets the first, third and fourth prongs of the *Cort* inquiry"; and here Plaintiff's claims even meet the second prong. *See id.*

First, like the athlete in *Sternberg*, Plaintiff Frederick is "one of the class for whose especial benefit the statute was created." *Id.* Indeed, by mandating reporting of suspicions of abuse, the Safe Sport Act is specifically intended to protect athletes from assault. *See* Public Law No. 115-126 ("An Act to prevent the sexual abuse of minors"). For the third prong, "[a] private remedy is consistent with the 'underlying purposes of the legislative scheme'" for both Sternberg and Plaintiff. 123 F.Supp. 2d at 664. "One of the primary goals of the Sports Act is to 'encourage and provide assistance to women in amateur athletic activity'" *Id.* Likewise, one of the primary goals of the Safe Sport Act is "[t]o prevent the sexual abuse of minors and amateur athletes by requiring the prompt reporting of sexual abuse." *See* Public Law No. 115-126. A private remedy is therefore consistent with the underlying purpose of the Safe Sport Act's legislative scheme. The fourth prong, again like *Sternberg*, is met here because the "subject matter does not involve an area traditionally relegated to the States." No state has set forth laws requiring NGBs to be ***mandatory*** reporters, which falls instead under federal jurisdiction per the Safe Sport Act.

Finally, with respect to the second prong—"the design of Congress to provide a private remedy"—"[a]n 'explicit legislative purpose' to deny a private cause of action is controlling." 123 F.Supp. 2d at 665 (citations omitted). As in *Sternberg*, "[h]ere there is no congressional expression

[and] [t]he legislative history … does not indicate that Congress wished to foreclose a private right of action." *Id.* To the contrary, like the Sports Act for which "Congress has enunciated a strong policy against discrimination on the basis of gender," so too has Congress enunciated a strong policy against abuse of young children. *Id.* at 665-666 (citations omitted); *see* Section II.

For the foregoing reasons, a private cause of action is available to Plaintiff, and others similarly situated, for Defendants' failure to report the suspected abuse of which they were aware.

**2. Damages Under Section 2255 for USAG and USOC's Misconduct Are Available to Plaintiff and the Proposed Class.**

It was Congress' intent to provide a civil remedy or actual damages, liquidated damages, reasonable attorneys' fees and costs, and punitive damages, to Plaintiff and other survivors of sexual abuse as a result of USAG and USOC's misconduct, including their failing to report the sexual abuse. *See* 28 U.S.C. § 2255 ("Section 2255"). "Civil remedy for personal injuries," include;

> recover[ing] the actual damages such person sustains or liquidated damages in the amount of $150,000, and the cost of the action, including reasonable attorney's fees and other litigation costs reasonably incurred. The court may also award punitive damages and such other preliminary and equitable relief...

*Id.* Although Congress did not specifically identify whether these damages are available to Plaintiff and others so-situated, it is well established that "the language of the statute must be read in their totality." *Lucas v. Commissioner*, 388 F.2d 472, 474 (1st Cir. 1967). Indeed, "[i]t is this Court's duty to interpret Congress's statutes as a harmonious whole rather than at war with one another." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1619 (2018). Thus, reading the Safe Sport Act in its totality, and alongside its legislative history, it is evident that Congress was extremely concerned by USAG and USOC's failure to report abuse and, worse, their efforts to conceal the abuse for their own gain. *See supra*, Section II; FAC ¶ 36.

Accordingly, Congress' changes to the reporting obligations in Section 101 of the Safe Sport Act—followed directly by Section 102 of the Act enumerating the civil remedies available to sexual abuse victims, and along with the commentary in Congressional Hearings requiring testimony of

USAG and USOC—indicates Congress' intent that Plaintiff recover damages under Section 2255 for USAG and USOC's failure to report the sexual abuse she suffered.[11]

Regardless of whether the Court finds that damages may be recovered under Section 2255 for USAG and OSUC's failure to report, Plaintiff (and the proposed class) remain entitled to both remedies available for the suffering caused by USAG and USOC's breach of their duty report under the Safe Sport Act; and for damages available under Section 2255 for USAG and USOC's violations of the sections specifically referenced, *i.e.* 28 U.S.C. §§ 1589, 1590, 1591, 2241(c), 2242, 2243, 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, and 2423.[12]

Further, despite what Defendants would like the Court to believe, nothing in Section 2255 prohibits Plaintiff from recovering damages under that section against USOC and USAG, as the statute does not limit damages solely against the perpetrator of the sexual assault. If Congress had wanted to so limit the civil remedy and damages available, it would have done so. *See Doe v. Royal Caribbean Cruises, Ltd.*, 860 F.Supp. 2d 1337, 1340 (S.D.F.L. 2012) (citations omitted). *Doe* involved the sexual assault of a 17 year old on a cruise ship, but when the defendants sought to limit the remedies available, like Defendants here, the court refused:

> [The court] has not found any clear expression of congressional intent to limit liability only to the criminal offender or to otherwise dispense with applicable principles of vicarious liability … [and] further notes that Congress amended §2255 for a second time in 2006, but it again did not limit liability to the criminal offender.

*Id.* The *Doe* court ultimately found that the cruise ship line could be held liable for the sexual assault the plaintiffs suffered on its cruise ship under Section 2255. *Id.* Similarly here, "[h]ad Congress intended to deviate from that long-standing principle" of protecting minors and allowing them redress

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[11] The only cases cited by Defendants remotely addressing Section 2255, are either supportive of a private cause of action or distinguishable. *See Davis v. City of New Haven*, 2014 WL1315660 *6 (D.Conn. 2014) (acknowledging that "§2255 [] creates a private right of action for victims of child pornography," but finding it was not pled). *Cruz v. New York*, 2017 WL 6021838, *13, fn. 12 (N.D.N.Y. 2017) does not support USAG's representation, but instead finds "no private right of action" ***under 42 USC sect. 3631***, and in *Banks-Bennett v. O'Brien*, 2007 WL 4556672 (M.D.P.A. 2007), a pro se plaintiff's "passing reference" to §2258 referred to a school official's failure to report and was not well pled, as the court held "Plaintiff has not alleged the Defendant engaged in any of the purported misconduct," and the unreported decision was pre-Safe Sport Act.

[12] Should the Court find the First Amended Complaint needs clarification of the Safe Sport Count and the damages available under Section 2255, Plaintiff seeks leave to amend to do so.

for sexual assault, it would have done so when amending Section 2255 through the Safe Sport Act. *Id.* Indeed, Congressional scrutiny of the USAG and USOC for their part in allowing decades of abuse for their own financial gain—without consequences for perpetrators, but rather with utter disregard for Plaintiff and others being abused—was the impetus for the enactment of the Safe Sport Act. *See supra*, Section II; FAC ¶ 36.

### 3. Plaintiff's Claims Do Not Involve Retroactive Application of the Safe Sport Act, as Defendants' Wrongful Conduct Occurred *After* Passage of the Act.

Defendants' arguments regarding any alleged retroactive application of the Safe Sport Act are misplaced.[13] Plaintiff's allegations address violations of the Safe Sport Act that occurred post-passage, not pre-enactment, and therefore do not involve a retroactive application of the Act. Defendants' first violation of the Safe Sport Act, for instance, occurred when USAG and USOC did not report Plaintiff's (and others') allegations of child abuse within 24 hours of passage of the Safe Sport Act, specifically on February 15, 2018, despite having an open file and ongoing investigation pending. *See* FAC ¶ 72-73. Defendants' conduct, which violated the Safe Sport Act, therefore, was not past conduct, but rather continued post-enactment in the form of Defendants' omissions and ongoing failures to report the abuse of which it was aware.

Yet the post-enactment failures of USAG and USOC comprising violations of the Safe Sport Act do not end there: there were multiple occasions after the enactment where USAG and USOC knew, or should have known, of additional facts leading to suspicion of child abuse and mandating reporting. For several months after passage of the Safe Sport Act, USAG specifically retained Plaintiff's sexual abuse case in-house for internal administrative hearings. During that time, the investigative report provided information to USAG substantiating the suspicion of child abuse of Plaintiff, as did the USAG administrative investigation produced in March 2018. The April USAG

[13] Indeed, all of Defendants cases involve "pre-enactment" conduct resulting in retroactive application of a law. *See Carr v. U.S.*, 560 U.S. 438, 448 (2010) (addressing "preenactment travel"); *Arevalo v. Ashcroft*, 344 F.3d 1, 10 (2003) (evaluating retroactivity of "antecedent conduct"); *Landgraf v. USI Film Prod.*, 511 U.S. 244, 284 (1994) (addressing conduct "arising before the Act's effective date"); *Weaver v. Graham*, 450 U.S. 24, 30-31 (1981) (taking issue with a more "onerous [law] than the law in effect the date of the of the offense."); *Vartelas v. Holder*, 566 U.S. 257, 267-269 (2012) (conduct "well before the provisions enactment" deemed a retroactive application).

hearing that lead to a USAG where Plaintiff was required to testify, along with Defendant Carlson, about the sexual abuse, to a panel resulted in a finding in June 2018, that Plaintiff's allegations of sexual assault were substantiated and finding Defendant Carlson ineligible to coach amateur gymnastics in the future.[14] USOC, as an entity governing USAG, knew or certainly should have known about these findings, however, neither Defendants reported the abuse to law enforcement, perpetuating precisely the wrongful conduct that the Safe Sport Act was implemented to stop. *See* FAC ¶ 72-73; 158; *see also* Safe Sport Act ("An Act to prevent the sexual abuse of minors and amateur athletes by requiring the prompt reporting of sexual abuse to law enforcement authorities, and for other purposes.").

In light of these facts as pled in the FAC, Defendants' arguments regarding the tense that the law was written in are inapposite. The failure of Defendants to report on February 15, 2018, in April 2018 after the administrative hearing, and again in June 2018 after finding the abuse to be substantiated do not "implicate past events," "antecedent conduct," or "preenactment" conduct. *See* footnote 12, herein. Instead, Defendants' argument that the "present tense" of the Safe Sport Act means that it cannot apply to the conduct that they learned about before the enactment concedes that they knew about and suspected Plaintiff was abused before the passage of the Safe Sport Act. Moreover, as set forth in the dissent in *Carr v. U.S.*, Defendants' argument:

> flies in the face of the widely accepted modern legislative drafting convention that the law should ***not*** be read to speak as of the date of enactment. The United States Senate Legislative Drafting Manual directly addresses this point: 'A legislative provision speaks as of any date on which it is read ***(rather than as of when drafted, enacted, or put into effect)***'… [M]odern legislative drafting manuals teach that, except in unusual circumstances, all laws…should be written in the present tense.[15]
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> …By using the present tense, Congress remained neutral on the question whether the Act reaches pre-SORNA convictions … Congress cast all of these provisions in the present tense, but now the Attorney General has made SORNA applicable to individuals with pre-SORNA sex-offense convictions, all of these provisions must necessarily be interpreted as embracing preenactment conduct.

[14] These are facts that occurred and can be specifically pled on amendment should the Court like further detail.
[15] 560 U.S. 438, 463 (2010) (*quoting* Senate Office of the Legislative Counsel, Legislative Draft Manual sect. 103(a), p. 4 (1997) (emphasis in original).

*Id.*, at 467. While Plaintiff need not rely on preenactment conduct to prevail on her Safe Sport Act claim, it is well established that such conduct may be considered regardless of the tense.

Lastly, "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory or legislative history to the contrary," and in this case, it would not. *Landgraf v. USI Film Prod.*, 511 U.S. 244, 277 (1994) (citation omitted). Notably, the Safe Sport Act does not "impose an additional or unforeseeable obligation," or "make unlawful conduct that was lawful when it occurred." *Id.* at 282 (citation omitted). Indeed, it could not have been lawful for the USOC and USAG to ignore and conceal information regarding suspicions of sexual abuse of minors, as Defendants had numerous other obligations to protect athletes and address and report sexual assault prior to the enactment of the Safe Sport Act. The Safe Sport Act merely "reflects Congress' desire to afford victims more complete redress for violations of rules established more than a generation ago…" *Id.*

Defendants' Motions to Dismiss Plaintiff's Safe Sport Act claim must be denied because they claims do not require retroactive application of the Safe Sport Act, and rather reflect Congress' intent to hold USAG and USOC accountable for their misconduct, providing damages.

**B. Plaintiff's Negligence Claims Against USOC and USAG Are Well Pled.**

Defendants USOC and USAG each assert that they had no duty to protect Plaintiff from Perpetrator Carlson. Defendants argue it should bear no responsibility for the safety of its athletes because Plaintiff has not alleged sufficient facts to establish the necessary "special relationship" between Plaintiff and the organization. Alternatively, they argue that the harm to Plaintiff was not foreseeable, that Plaintiff has failed to establish causation and, finally, that they are not liable for negligent supervision and retention because Perpetrator Carlson was not an employee.[16] The USOC and USAG are wrong on all counts.

[16] *See* USOC MTD, pp. 10-18. USAG for its part argues it neither employed nor controlled Perpetrator Carlson, and that the organization could not have reasonably foreseen the harm to Plaintiff. *See* USAG MTD, pp. 18-20.

### 1. The Relationship Between Plaintiff and USOC and USAG Gives Rise to a Duty to Protect Her, Which Was Breached

USAG and USOC seek to escape liability by arguing that special relationships are limited a handful of specific circumstances, none of which apply here. *See* USOC MTD, pp. 12-14. That simply is not the law. While a person generally does not owe a duty to protect against criminal acts of third parties, such a duty will be found where a special relationship exists between the defendants and the plaintiff, arising either from common law or a statutorily defined standard of care. *See Mullins v. Pine Manor College*, 389 Mass. 389 Mass. 47, 50–51 (1983).

#### a. Plaintiff Adequately Alleges a Special Relationship Under Common Law.

At common law, a ***special relationship arises from a plaintiff's reasonable expectations and reliance*** that a defendant will anticipate harmful acts of third persons and take appropriate measures to protect the plaintiff from harm. *Mullins*, 389 Mass. at 56; *Fund v. Hotel Lenox of Boston, Inc.*, 418 Mass. 191, 192 (1994); *Irwin v. Ware*, 467 N.E.2d 1292, 1300 (1984). The special relationship doctrine is not stagnant, but instead continues to evolve over time, to meet the "expectations of a maturing society." *Id.* at 757.

Some relationships by their nature have been deemed to be "special relationships". *Husband v. Dubose*, 531 N.E.2d 600, 602–03 (1988). For example, "common carriers, bars and other businesses, colleges, or even hospitals have been held to be required to foresee that their patrons, students, or patients could suffer criminal attacks by third persons." *Id.* (citations omitted). Such obligations find their "source in existing social values and customs." *Mullins*, 389 Mass., at 51 (quotations omitted). Further, an affirmative duty to protect arises where, as here, a defendant voluntarily assumes a duty of care to the plaintiff. *Id*. at 52-53.

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertakings, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking.

*Id.*, at 53 (quoting Restatement (Second) of Torts, Sec. 323 (1965), and collecting cases).

Thus, contrary to USAG and USOC's arguments, a "special relationship" does not turn on the existence of an employer-employee relationship. *Copithorne v. Framingham Union Hosp.*, 401 Mass. 860, 860 (1988) ("At the time of the incident, Helfant was … not a hospital employee, but had been affiliated with the hospital for about seventeen years.").

The exchange of money further weighs in favor of finding a special relationship. *See Mullins*, 389 Mass. at 53. For example, "[c]olleges generally undertake voluntarily to provide their students with protection from the criminal acts of third parties. [T]his undertaking … was not gratuitous. Students are charged, either through their tuition or a dormitory fee, for this service." *Id.*; *see also Rawson v. Massachusetts Operating Co.*, 328 Mass. 558 (1952) (plaintiff was a paying patron of the defendant theater); *Silva v. Showcase Cinemas Concessions of Dedham, Inc.*, 736 F.2d 810 (1st Cir.), cert. denied, 469 U.S. 883 (1984) (same).

Applying these principles here, Plaintiff adequately alleges a special relationship giving rise to a duty to protect here. Indeed, as "the governing body for all American Olympic teams," USOC has undertaken "to ensure that … 'proper safety precautions have been taken to protect the personal welfare of the athletes.'" *See* FAC ¶ 16 (quoting 36 U.S.C. § 220525(b)(4)(F)). Likewise, USAG purports to "select and train the United States gymnastics teams …, promote and develop gymnastics…, and serve as a resource center for … gymnasts." *Id.*, ¶ 17. These undertakings are not gratuitous; the USAG, for example, "directly certifies and trains coaches for a fee, … collects a fee from gymnasts to be a USAG member and to compete in USAG-sanctioned competitions," and collects "revenue … from admissions, merchandise sold or services performed, or facilities furnished in any USAG sanctioned activity." *Id.* ¶¶ 18-20; *see also* ¶¶ 22 ("The USAG sanctions gyms where gymnasts practice and compete … [f]or a fee"), 23 ("The USAG sponsors competitions in which members and gyms pay a fee to compete"). Likewise, "[t]he USOC has a direct commercial relationship with each Olympic athlete," which, "[i]n 2016 alone generated $339 million in unconsolidated revenue." *Id.* ¶¶ 24, 26-31.

Simultaneously, USAG and USOC together exert control over every aspect of the gymnastics organization, from "[t]he USOC [retaining] the power to decertify USAG and all associated clubs, gyms, and teams," to the USAG certifying coaches, permitting "gymnasts to be a USAG member," and "requir[ing] [membership] for participation as a coach, judge or athlete in USAG sanctioned events." *Id.* ¶¶ 16, 18-19. Plaintiff's allegations therefore demonstrate that USAG and USOC have undertaken a duty to guard their athletes' welfare and protect them.

The evolving nature of the special relationship doctrine indicates that, at minimum, these issues should be the subject of discovery and presented to a jury for determination. *Silvers v. Associated Tech. Inst., Inc*, Case No. 934253, 1994 WL 879600 (Mass. Super. Oct. 12, 1994). In *Silvers*, the trial court refused to dismiss a negligence claim at summary judgment where the plaintiff, a student, had been sexually assaulted by an employer that her defendant-college's employment-placement office had coordinated for her. *Id.* at *3. "Here, having received tuition payments, defendant agreed to furnish its students a training program and job placement service. Defendant thus committed itself to exercise due care in delivering those services." *Id.*

When considering the existence of a special relationship under the common law, "[t]he prime litmus is simply: Should defendant have foreseen a reasonable need for proactive intervention and—most important—a substantial risk of harm to plaintiff from failure to act?" *Id.* (quotations omitted). As in *Silvers*, where "students, including plaintiff, could reasonably expect that the school's placement office would make some effort to avoid placing them with an employer likely to harm them." *Id.* Here, Plaintiff reasonably expected that Defendants would take steps to insure their certified coaches and facilities posed no unreasonable risk to Plaintiff.

**b. A Special Relationship Also Arises Pursuant to Statute.**

A party's obligation to protect individuals from the torts of a third-party can also arise by statute. *Irwin*, 392 Mass. at 754-59. In *Irwin*, for example, the court determined that police officers owed a duty to remove intoxicated motorists from the road, and that they could be held liable to "a

member of the public who suffers injury as a result of th[eir] failure to do so." *Id.* at 762. This decision was "rooted, at least in part, in statutory responsibilities, [as] the proper conduct of public law enforcement personnel with regard to intoxicated motor vehicle operators is provided by several statutes." *Id.*, at 759 (citations omitted); *see also Id.*, at 760 ("[M]any cases have established that liability may arise solely from the violation of an affirmative duty to act with reasonable care to prevent harm to another caused by a third person") (collecting cases).

Here, similarly, Plaintiff's allegations establish the existence of a special relationship based upon USAG and USOC statutory responsibilities. Specifically, the Ted Stevens Olympic and Amateur Sports Act of 1978, 36 U.S.C. § 220501, *et seq*, imposes numerous requirements on USAG and USOC, many of which are directed at protecting young athletes such as Plaintiff. Foremost, as a NGB, USAG commits to "be responsible to the persons and amateur sports organizations it represents." 36 U.S.C. § 220524(1). It is also obligated to provide procedures for the prompt and equitable resolution of grievances of its members. 36 U.S.C. § 220522(a)(13). For its part, and as it highlights in its own brief, "USOC's statutory role [involves] ensuring that the NGBs meet the ASA's eligibility criteria and providing financial assistance to the NGBs." USOC MTD, 3 (citing 36 U.S.C. § 220522(a)(5); *S.F. Arts & Athletics, Inc*., 483 U.S. at 544–45). USOC's obligations do not stop there: USOC is tasked with ensuring that the NGBs it oversees "provide an equal opportunity to amateur athletes … to participate in amateur athletic competition, without discrimination on the basis of … sex [or] age." 36 U.S.C. § 220522(a)(8). Further, USOC must ensure that the NGBs are "prepared to meet [their own] obligations," 36 U.S.C. § 220522(a)(15), including that "proper safety precautions have been taken to protect the personal welfare of the athletes," and "will implement and abide by the policies and procedures to prevent the abuse, including emotional, physical, and child abuse, of amateur athletes participating in amateur athletic activities." 36 USC § 220525(b)(4)(F), (G).

Plaintiff has sufficiently pled these statutory obligations. *See e.g.* FAC ¶¶ 15-16 ("Defendant USOC has a mandatory obligation to ensure that …'proper safety precautions have been taken to

protect the personal welfare of the athletes.'") (citations omitted). Further, as alleged, the Safe Sports Act is specifically directed at protecting young athletes from the type of abuse which Plaintiff suffered, and which USAG and USOC failed to prevent. *See, e.g.*, FAC, ¶¶ 40, 41.

**2. Plaintiff's Negligent Supervision and Retention Claims Are Properly Plead.**

USAG and USOC argue that Plaintiff's negligent supervision and retention claims must fail because Defendant Carlson was not their employee. *See* USOC MTD at 17018; USAG MTD at 18. USAG cites no authority to support its argument, and while USOC cites three cases, none of them hold that an employer-employee relationship is required to state a claim.[17]

On the contrary, while negligent supervision is "typically referenced in the context of an employer/employee relationship…[t]his is not to suggest, however, that a claim for negligent supervision can only survive in the context of an employer/employee relationship." *Destefano v. Endicott College*, 34 Mass.L.Rptr. 579, 2017 WL 7693452 (2017) (citing *Worcester Mut. Ins. Co. v. Marnell*, 398 Mass. 240, 241 (1986)). For example, in *Cooke v. Lopez*, the court held that a plaintiff can pursue a negligent supervision claim against a parent for the harm caused by their child. 785 N.E.2d 1247, 1250-51 (2003). "Therefore, this court sees no reason why, in theory, [plaintiff] could not bring a claim for negligent supervision simply because no employer/employee relationship existed between the Defendants and [plaintiff]." *Destefano*, 2017 WL 7693452, at *5. The *Beal v. Broadard* case is also instructive. 19 Mass.L.Rptr. 114, 2005 WL 1009632 (2005). There, a nine-year-old girl was sexually abused by a perpetrator designated by the church to provide ministerial services, including Bible study in the victim's family home. The perpetrator was not an employee of the church, but rather an appointed "ministerial servant." In denying the defendants' motion for summary judgement against the church, the court explained:

> [O]rdinary negligence principles dictate that where a church or its agent assumes the care and control of an individual for Bible study or other ministerial or religious purposes, and that individual relies on the instructor's status of good standing within

[17] *See* USOC MTD at 17-18 (citing *Saldivar v. Racine*, 818 F.3d 14, 21 (1st Cir. 2016); *Jalbert*, 554 F.Supp.2d at 76 (D. Mass 2008); *Petrell*, 902 N.E. 2d at 408-09).

> her church, the church must reasonably guard against the agent's foreseeable criminal acts.

*Id.* (citations omitted). For Plaintiff, as alleged, being a USAG-certified athlete and training with a USAG-certified coach are unquestionably integral and necessary to compete on a national or international level. *See* FAC, ¶ 19. Because USOC and USAG have taken and been statutorily designated to certify and organize the network of coaches and gyms, they are charged with guaranteeing the young gymnasts' safety. *Id.* at ¶¶ 16, 36, 47, 136. Despite this, USOC and USAG took no steps to audit or otherwise ensure that their athletes were safe, even in the face of widespread reports of abuse. *Id.* at ¶¶ 107, 125. As a result, Plaintiff's claims of negligent supervision and retention against USOC and USAG are adequately alleged.

**3. Defendants' Cited Cases Do Not Involve Relationships Similar to Those Between Plaintiff and Defendants Here.**

The cases cited by USAG and USOC are fundamentally distinct, and thereby readily distinguished, from the relationships among Plaintiff, Defendant Carlson, USAG and USOC. As she alleges, during the time of her abuse, every aspect of Plaintiff's life was controlled and monitored by Defendant Carlson, and USAG and USOC maintained control over the athletes, coaches, and gyms. *See*, e.g., FAC, ¶¶ 18-25, 34, 46, 85, 93-94, 106, 107, 88.

In contrast, the cases USAG and USOC rely upon do not involve any relationships with this degree of control over the victims' lives and do not support dismissal of Plaintiff's claims. In *Doe v. Emerson*, for example, the plaintiff alleged that her university had negligently failed to protect her from being raped at a party held off-campus and hosted by a fraternity of a different university. 153 F.Supp. 3d 506, 514 (D. Mass. 2015) at 515. The court found, however, that while the university unquestionably owed a duty to protect its students, "that duty did not extend so far as to require Emerson to protect [the plaintiff] when she voluntarily left the campus and attended a party that was not affiliated in any way with Emerson." *Id.* In *McCloskey v. Mueller*, again, the focus was on the relationships (or lack thereof) between the defendant-FBI, on one hand, and the perpetrator or the victim on the other. 446 F.3d 262, 268–69 (1st Cir. 2006).

Further, none of the cases USAG and USOC cite involve the isolation of the victim, or expectations that the defendant organization would offer protection or monitor the guardians they certified. *Doe v. Cultural Care, Inc.*, considered a relationship between a company which placed *au pairs* in US households, and the parents of the child who was abused by one of the *au pairs*. Case No. 10-11426-DJC, 2011 WL 4738558, *6-7 (D. Mass. Oct. 7, 2011). Thus, unlike here, the entities accused of negligence had reason to expect that the victim's own parents could prevent abuse. Similarly, in *Doe v. Corp. of President of Church of Jesus Christ of Latter Day Saints*, the abuse was committed by a volunteer babysitter which took place during church meetings, and thus the court's analysis focused on the absence of any evidence that church members "relied on the [church] to screen babysitters at that time, or that screening of volunteers was so widespread that reliance could otherwise be inferred." 2012 WL 1080445, at *2. Plaintiff, in contrast, had not only been entrusted to USOC and USAG's protection and oversight, but had also been isolated such that she was easily preyed upon the coaches certified by USAG and USOC certified. This fundamental distinction plagues nearly all of Defendants' cited cases.[18]

Relatedly, public policy considerations—society's desire to protect young athletes from abuse by their coaches while they are secluded in training camps—weigh heavily in favor of imposing a duty on USAG and USOC but are simply not present in USAG and USOC's cited cases. *See Medina v. Hochberg*, 987 N.E.2d 1206, 1212-13; *see also, infra,* Section IV.B.5. Finally, several of USAG and USOC's cases actually support finding a duty of care here. In *Nguyen v. Massachusetts Inst. of Tech.*, the court found that "a university has a special relationship with a student and a corresponding duty to take reasonable measures to prevent [] suicide," despite the fact that "[u]niversity students are

[18] *See Luoni v. Berube*, 729 N.E. 2d 1108, 1111–12 (Mass. 2000) (finding no duty owed to landowners hosting a 4th of July party to prevent ***an unknown individual*** from discharging fireworks); *Kavanagh v. Trustees of Boston Univ.*, 795 N.E.2d 1170, 1177-78 (Mass. 2003) (finding no duty between a basketball player and the university of an ***opposing basketball team***); *Afarian v. Mass. Elec. Co.*, 866 N.E.2d 901, 906 (Mass. 2007) (following a long line of cases regarding "a utility company's liability for personal injury when a vehicle collides with the utility pole"); *Roe No. 1 v. Boy Scouts of America Corp.*, 147 Conn. App. 622, 638, 645 (2014) (finding that because abuser was victim's step-father, the "nexus between the plaintiff and [the perpetrator] was the plaintiff's mother, not the [institutional] defendants"). *Lev v. Beverly Enterprises-Massachusetts, Inc.* did not even involve sexual abuse, but instead an automobile accident.

young adults, not young children." 96 N.E.3d 128, 142 (Mass. 2018) ("[universities] are clearly not bystanders or strangers in regards to their students … [They] sponsor and have special relationships with their students [and] are also property owners and landlords responsible for their students' physical safety) (citations omitted; collecting cases).[19] Defendants' reliance on *Harbi v. Mass. Inst. of Tech.*, is also ill-founded as it ultimately denied a university's motion to dismiss negligence claims because it was reasonably plausible that the perpetrator's harassment was foreseeable, and final factual determinations "is a question for another day."[20] Moreover, several of USOC and USAG's cited authorities descend from foreign jurisdictions,[21] while nearly all of them address ***summary judgment***, after evidence has been developed.[22]

**4. The Harm to Plaintiff Was Not Only Foreseeable, It Was Foreseen.**

In determining whether a defendant has an obligation to protect the plaintiff from a third party, courts look "[f]oremost ... [to] whether a defendant reasonably could foresee that he would be expected to take affirmative action to protect the plaintiff and could anticipate harm to the plaintiff from the failure to do so." *Irwin*, 392 Mass. at 756. Foreseeability is not a bar to a plaintiff's negligence claim unless "the risk which results in the plaintiff's injury ***is not one which could be reasonably anticipated by the defendant***." *Husband v. Dubose*, 531 N.E.2d 600, 602 (1988) (emphasis supplied). Thus, in "a situation showing that a danger should have been anticipated, or customs which clearly

[19] *See also Roe No. 1.*, 16 N.E.3d 1044, 1048-49 (Mass. 2014) ("[court had] little doubt that [defendant] Children's Hospital had a duty to supervise and monitor [the abuser's] conduct while he was employed as a physician there, and owed a duty of reasonable care to his minor patients to prevent foreseeable harm to them.").

[20] Case No. 16-CV-12394-FDS, 2017 WL 3841483, *8 (D. Mass. Sept. 1, 2017); *see also Boy 1 v. Boy Scouts of America*, 832 F.Supp. 2d 1282, 1287, 1289 (W.D. Wash. 2011) (confirming "'special relationships … need not be custodial where there is a direct, supervisory component, … [and] the duty to protect … arises where one party is 'entrusted with the well-being of another.'") (internal citations omitted).

[21] *See Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d 677, 680 (9th Cir. 2009); *Roe No. 1 v. Boy Scouts of America Corp.*, 147 Conn. App. 622 (2014); *Bradley v. Nat'l Collegiate Athletic Ass'n*, 249 F.Supp. 3d 149 (D.D.C. 2017). *Bradley*'s finding of no-duty between an athletic league in which the university competed and one of the university's athletes was premised on the fact that the athletic league had not established or adopted any policies by which it undertook to protect the athletes from concussions. 249 F. Supp. 3d at 176. Here, however, the USAG and USOC have both committed to protecting young athletes like Plaintiff from abuse. *See* FAC ¶¶ 32-35.

[22] *Medina*, 987 N.E.2d at 1208; *Nguyen*, 96 N.E.3d at 131; *Roe No. 1.*, 147 Conn. App. at 624; *Slaven v. City of Salem*, 438 N.E.2d 348, 349 (Mass. 1982); *Corp. of President of Church of Jesus Christ of Latter Day Saints*, Case No. 11-P-610, 2012 WL 1080445, at *1; *Luoni*, 729 N.E. 2d at 1110; *Kavanagh*, 795 N.E.2d at 1173; *Afarian*, 866 N.E.2d at 903; *Lev*, 929 N.E.2d at 306; *Cultural Care, Inc.*, 2011 WL 4738558, at *1; *Jalbert v. Grautski*, 554 F.Supp. 2d 57, 63 (D. Mass. 2008); *Petrell v. Shaw*, 902 N.E. 2d 401, 403 (Mass. 2009).

impose a duty of protection or a preferred form of response," an entity is liable for its failure to act to prevent third-party criminal acts. *Id.* at 670.

Foreseeability is a determination made on the basis of numerous factors, considering all of the circumstances and facts. In *Fund*, for example, the court reversed summary judgment, holding that a trier of fact could find that a hotel's failure to protect its guest from intruders created a risk guests would encounter and be harmed by the intruder. 418 Mass. at 194. In *Jupin v. Kask*, the court held that a homeowner could be found liable for failing to secure firearms in her house because "a third party's criminal conduct is not unforeseeable if 'the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a ... crime.'" 447 Mass. 141, 148 (2006) (quoting Restatement (Second) of Torts § 448 (1965)).

Here, it is not merely a question of whether the risk of abuse by a coach was foresee***able***, it was indeed ***foreseen***. In *Mullins*, the court rejected the argument that a rape of the defendant-university's student by a third-party "was not foreseeable," finding the argument untenable because "the precautions which Pine Manor and other colleges take to protect their students against criminal acts of third parties would make little sense unless criminal acts were foreseeable." 389 Mass. at 54-55. Thus, the court found that warnings provided to "students during freshman orientation of the dangers inherent in being housed at a women's college near a metropolitan area," indicated that "[t]he risk of such a criminal act was not only foreseeable but was actually foreseen." *Id.* Similarly, here, "[t]he USOC touts that its policies prevent '…USOC employees, coaches, contracted staff, volunteers, board members, committee and task force members, and other individuals working with athletes or other sport participants while at an OTC, whether or not they are employees of the USOC' and '…[a]thletes training and/or residing at a USOC Olympic Training Center' from engaging in sexually-abusive misconduct, including 'child sexual abuse' and 'sexual misconduct.'" *See* FAC, ¶ 34. "USOC also has policies identify[ing] 'grooming' behaviors, which it defines as, '…the most

common strategy used by offenders to seduce their victims.'" *Id.* As in *Mullins*, that USOC implemented these policies, and claims to hold its NGBs to such standards, demonstrates that the risk of sexual abuse which Plaintiff suffered "was not only foreseeable but was actually foreseen." *Mullins*, 389 Mass. at 55.

Because it focuses on numerous, situation-specific details and circumstances, foreseeability is a question that must be presented to and resolved by a jury. *Id.*, at 56 ("standard of foreseeability turns on an examination of all the circumstances") (citing *Mounsey*, 363 Mass. at 708–709). "[T]he reasonable care standard will give the jury the flexibility they need to assess the burden of liability on the facts of each case and in accordance with community standards as to what constitutes acceptable behavior." *Mounsey*, 363 Mass. at 709.

**5. USAG and USOC's Failure to Protect Plaintiff is Counter to Public Policy.**

Another important consideration in the finding of a duty, even to third parties, is the public policy implicated thereby. *Jupin*, 447 Mass. 141, 150–51 (2006) ("That the harm in this case was reasonably foreseeable or even actually foreseen is persuasive, but not conclusive, of the existence of a duty of care. … We conclude that sound public policy favors imposition of a duty in these circumstances."). Public policy is generally evaluated by weighing the relative risk presented by neglecting that duty against the cost or burden of imposing the duty. *Id.* at 151. In *Mullins*, for example, the court held that "[t]he concentration of young people, especially young women, on a college campus, creates favorable opportunities for criminal behavior," while the costs of imposing the duty sought are modest. 389 Mass. at 51. Similarly, here, the risk presented by Defendant Carlson's unsupervised and unfettered access to Plaintiff, as a "dorm parent" in a position of authority and power, presented an undeniable risk of abuse, while the cost of imposing a duty to protect child-athletes isolated at training camps is negligible. Plaintiff's factual allegations are sufficient to support her negligence claims on public policy alone. *See e.g.* FAC ¶ 162.

**6. Defendant USOC's Failure to Take Adequate Steps to Protect Gymnasts Was the Proximate Cause of Plaintiff's Injuries.**

Defendant USOC disingenuously claims that Plaintiff has not adequately pled causation because Defendant Carlson's abuse was not reasonably foreseeable. *See* USOC's MTD, at 17. However, as explained above, the risk of such abuse "was not only foreseeable but was actually foreseen," as demonstrated by USOC's numerous assertions that it would protect its athletes. *Mullins*, 389 Mass. at 55; *see also* FAC ¶ 34; USOC Safe Sport Policies, Section II(c). Further, Defendants cannot reasonably contest that their approval and certification was the only reason Plaintiff attended GAG or was exposed to Defendant Carlson's abuse. As it has recently done (although much too late to protect Plaintiff), the USOC should have—but failed to—revoke the accreditation of USAG for its failure to adequately protect its young gymnasts. *See* FAC ¶¶ 16, 35.[23]

Further, courts have acknowledged that a school's negligence leading to the sexual abuse of minors can be imputed to its overseeing entity, even to the point of piercing the corporate veil, if, "it could be shown that abuse at the school was so routine as to constitute a general practice or policy, … [and] even if the abuse was not committed for the benefit of the corporation." *Worcester Ins. Co. v. Fells Acres Day Sch., Inc.*, 408 Mass. 393, 409 (1990). At the very least, such claims cannot be dismissed "in the absence of a more fully developed factual record." *Id.*

### C. Plaintiff's Chapter 93A Claims Against Defendants Are Sufficiently Pled.

#### 1. Defendants USOC and USAG are liable under Plaintiff's negligence-based 93A claims

Contrary to Defendants' broad assertion, Plaintiff's negligence theories are capable of supporting a 93A claim. *See* USOC at 22-23, USAG at 15, n. 8. While "[a] negligent act standing by itself does not give rise to a claim under [G.L.] c. 93A," negligence that was or resulted in an unfair or deceptive act or practice does constitute a violation. *Darviris v. Petros*, 442 Mass. 274, 278 (2004) (*quoting Squeri v. McCarrick*, 32 Mass.App.Ct. 203, 207 (1992)). Additionally, "a negligent misrepresentation of fact the truth of which is reasonably capable of ascertainment is an unfair and

[23] "The USOC has the power to decertify USAG and all associated clubs, gyms, and teams."…"Had Defendant[s] upheld their duties under federal law, the repeated sexual abuse suffered by Ms. Frederick and so many others could have been avoided."

deceptive act or practice under G. L. c. 93A, § 2(a)." *Brown v. Sav. Bank Life Ins. Co.*, 93 Mass. App. Ct. 572, 587 (2018) (citation omitted).

In *Libby v. Park*, 298 F.Supp. 3d 292, 296 (D. Mass. 2018), the court found that a misrepresentation by the defendant as to the quality of care at its facility was sufficient to support a 93A claim because it concerned "entrepreneurial and business aspects," not mere negligence. The plaintiff had provided sufficient facts to support a practice of understaffing by the defendant, as evidenced by her unsupervised fall and subsequent unsupervised choking incident; a plausible inference that the defendant understaffed its facility in order to maximize profits; and a misrepresentation by the defendant as to the quality of the care at its facility related to staffing. *Id.* (emphasis added). In *Klairmont v. Gainsboro Rest., Inc.*, 465 Mass. 165, 174-77 (2013), defendants had violated the building code for decades to avoid the expense and complications of required improvements, creating a hazardous environment of which the defendants were well aware and were found liable under Chapter 93A. Similarly, in this case, Plaintiff alleges that USOC and USAG's negligent conduct was motivated by their entrepreneurial and business interests in protecting their reputation to continue profiting off of athletes, creating a dangerous practice and culture of failing to protect athletes from sexual abuse. *See* FAC, ¶¶ 110-129. In fact, USOC expressly admitted its failure to provide athletes a safe environment. *Id.*, at ¶ 38.

In *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 24-25 (2016), the proposed causal chain was shot through with conjecture, extending the rampant guesswork to the effect of alleged misrepresentations on an indeterminate number of third parties. Here, Defendants represented that they were responsible for providing a safe environment for athletes and yet failed to enforce mandatory duties required by law and internal policies and procedures and even implementing various measures designed to make molestation conduct by coaches they certified harder to detect. *See* FAC, ¶¶ 111-129.

**2. USOC and USAG Are Liable Under Plaintiff's Fraud-Based 93A Claims.**

"Pleadings which portray a conspiracy to defraud or conceal may not be painted in broad

strokes; they must state the factual foundations of that claim with particularity. Fed. R. Civ. P. 9(b). That means the plaintiff must at least tell who said (or failed to say) what, when, and where." *Wajda v. R.J. Reynolds Tobacco Co.*, 103 F.Supp. 2d 29, 32-33 (D. Mass. 2000) (internal citations omitted). "Courts should, however, apply the [9(b)] rule with some flexibility and should not require plaintiffs to plead issues that may have been concealed by the defendants." *Rolo v. City Investing Co. Liquidating Trust*, 155 F.3d 644, 658 (3d Cir. 1998) (citation omitted). The First Circuit has ruled that the requirement of specificity "extends only to the particulars of the allegedly misleading statement itself. The other elements of fraud, such as intent and knowledge, may be averred in ***general terms***." *Rodi v. S. New England Sch. of Law*, 389 F.3d 5, 15 (1st Cir. 2004) (emphasis supplied). The representations by USOC and USAG regarding their commitment to create and ensure a safe environment for athletes were made consistently throughout their history. 36 U.S.C. § 220525(b)(4)(F); *see also* FAC, ¶¶ 15-16. Ms. Faehn testified that Steve Penny, past president of USAG, told her not to tell anyone about accusations of sexual assault and molestation of gymnasts supports a practice of concealment and misrepresentation by USAG and USOC. *Id.* at ¶ 45.

USAG had a right to control the manner of work by its agents George Ward, Muriel Grossfeld and the Grossfeld's American Gold Gym ("GAG"). *Green v. Cosby*, 138 F.Supp. 3d 114, 138 (D. Mass. 2015) ("When a third party is harmed by an agent's conduct, the principal is subject to respondent superior liability, a form of vicarious liability, if the agent was acting within the scope of work performed for the principal and the principal controlled or had ***a right to control*** the manner of the agent's work. Restatement (Third) of Agency §§ 7.03, 7.07 (2006)" (emphasis added)). USAG and USOC are arguably joint venturers with "joint [but not necessarily equal] control of the objectives of the undertaking and of the means of achieving those objectives." *Payton v. Abbott Labs*, 512 F.Supp. 1031, 1036 (D. Mass. 1981). Plaintiff's allegations detail when she told defendant Grossfeld, USAG's agent, about the abuse and molestation she suffered at the hands of Defendant Carlson. *See* FAC ¶¶ 100-105. Defendants engaged in an ongoing pattern and practice of concealment and misrepresentation for decades to avoid investigation and scrutiny that would have jeopardized their

reputation and monetary support. *Id.*, at ¶¶ 106-137.

**3. Defendant USOC's Conduct was Undertaken in a Commercial Context.**

Plaintiff paid several thousands of dollars per year to train at GAG, a USAG and USOC sanctioned facility. *See* FAC, ¶¶ 84, 86. GAG in turn paid dues to both USAG and USOC to become sanctioned and certified. *Id.*, at ¶ 84. Plaintiff was also a participant and dues paying member of USAG and USOC. *Id.*, at ¶ 91. Also, Defendant USOC concedes that it profited from its oversight of Olympic competitions evidencing a commercial relationship with Plaintiff, a former Olympic athlete that competed in the Olympics. USOC MTD at 22. In the alternative, Plaintiff is entitled to relief under 93A on the premise that she had a business/commercial relationship with USAG, and USOC and USAG have a business/commercial relationship. *Maillet v. ATF-Davidson Co., Inc.*, 407 Mass. 185, 190-92 (1990) (Lack of privity does not bar recovery under 93A so long as the plaintiff "has been injured by [defendant's] use or employment of any method, act or practice declared to be unlawful by section two or any rule or regulation issued thereunder…"); *see also* FAC, ¶ 16. Defendants' motion to dismiss Plaintiff's 93A claims must be denied.

**D. Plaintiff's Common Law Claims Are Timely[24]**

Given the seriousness of the societal harm inflicted by those who prey on minors, Massachusetts provides a generous timeframe in which to file a lawsuit and applies the "discovery rule" to extend the statute of limitations in appropriate cases, e.g seven years from the time she discovered (or reasonably should have discovered) that an emotional or psychological injury was caused by sexual abuse that occurred while she was a minor. Mass. Gen. Laws c. 260 § 4C1/2. Moreover, the ultimate question of ***when*** Plaintiff discovered that her injury was caused by Defendants' conduct is one for the trier of fact. At the pleading stage, the Court only considers whether Plaintiff's allegations of timeliness are sufficiently pled. They are.

[24] Plaintiff's 93A claims are sufficiently tort-like in nature to be subject to the discovery rule set forth in G. L. c. 260 § 4C1/2 as set forth in this section. *Bridgwood v. A.J. Wood Constr., Inc.*, 480 Mass. 349, 356 (2018) (a civil action brought by plaintiff homeowner against a contractor for deceptive act under G. L. c. 93A, §§ 2 and 9, was sufficiently tort-like to be subject to the six-year statute of repose set forth in G. L. c. 260, § 2B).

**1. Timeliness is a Question of Fact for the Jury**

Whether a claim is time-barred is ordinarily a question of fact for the jury, *Riley v. Presnell*, 409 Mass. 239, 240 (1991), and should not be decided on a motion to dismiss. Otherwise, a plaintiff will be denied the opportunity to seek and provide evidence tending to show that a reasonable person in the Plaintiff's position would not have been able to discern the harm or the cause of harm at the time of the violation.

In *Riley*, for example, ***at the summary judgment stage***, the plaintiff refuted defendants' evidence of concurrent knowledge of harm with affidavits and expert testimony of his own, supporting his contention that he did not know or discover that the emotional and psychological injuries he was suffering were the result of his relationship with a therapist he had seen years prior. *Id*. at 245. Given this conflicting evidence, the Supreme Judicial Court held that "any disputed issues relative to the statute of limitations ought to be decided by the jury." *Id*., at 248. The same is true here. Although USOC and USAG point to various allegations in the Complaint that they claim demonstrate Plaintiff's comprehension of her injuries contemporaneous with Defendant Carlson's abuse,[25] ***no*** discovery has been taken, and a dispositive ruling on the statute of limitations question would deprive Plaintiff of the ability to present expert and other witness testimony supporting the timing, and the reasonableness, of her discovery of the psychological harm inflicted upon her.

**2. The Discovery Rule is Appropriately and Sufficiently Invoked in this Matter Given the Facts Alleged in the FAC.**

Although the Court should not attempt to resolve the question of timeliness at this stage, the Plaintiff, like many other teenage victims of sexual abuse before her, has sufficiently pled that her injuries could not reasonably have been understood until that day when she was jarred by the discovery that Defendant Carlson—thirty-some years later—was ***still*** coaching teenage girls. It was only then that Plaintiff recognized the harm caused by Defendant Carlson's conduct.

Under the appropriate standard of a person who has been subjected to similar conduct in a

[25] *See* USOC, p. 19, USOC's request for judicial notice, USOC MTD, p. 19, n.5, should be summarily denied, *see* Opposition to Request for Judicial Notice filed herewith; USAG, pp. 21-23; Carlson, pp. 18-19.

similar context, the timing of Plaintiff's discernment of her injuries was reasonable and finds support in several analogous state and federal cases.[26] As explained by the Supreme Judicial Court in *Ross v. Garabedian*, for example, the discovery rule tolls the statute of limitations on sexual assault claims where a plaintiff's "unconscious coping or blocking mechanisms commonly found in victims of sexual abuse" prevented the victim from discovering a legal cause of action. 433 Mass. 360, 361 (2001). Similar to *Ross*, Plaintiff has alleged that she suppressed the memories of her interactions with Defendant Carlson "as a survival mechanism." *See* FAC at ¶ 131. Notably, just like Plaintiff here, *Ross* ended the relationship as a minor, more than 30 years prior to filing suit. *See Ross* at 361. Also, like Plaintiff, *Ross* had contemporaneous concerns about the defendant's behavior: he knew the relationship was "wrong" and he was "scared" during the sexual encounters, which induced feelings of "guilt" and "shame." *Id*. at 365. Even still, the Court held that "triable issues of fact exist regarding when the plaintiff was aware of the 'causal connection' between the defendant's conduct and the resulting harm." *Id.* at 360. "A rational finder of fact could find that plaintiff, a teenager at the time, felt shame or a sense of wrong because his conduct was contrary to accepted church or family morals, but he was not aware that he had suffered any appreciable or legal recognizable 'harm.'" *Id*. at 366 (citations omitted).

Nor is it unusual for a victim to not appreciate the harm that was suffered as a child. *Armstrong v. Lamy*, 938 F.Supp. 1018 (D. Mass. 1996). In *Armstrong*, a high school-aged boy was sexually abused for years by his music teacher. *Id.* at 1028. The teacher directed the school's plays and was often alone with the victim on the school's premises; they saw each other on a daily basis. *Id.* at 1040. Over a period of years, the teacher sexually assaulted the boy at various locations, including at the

[26] In the interest of brevity, Plaintiff limits her briefing to the four cases providing the most expansive analysis of this important issue. Other cases supporting denial of the motions to dismiss here, but providing more limited analysis, include *Boudrot v. Russo*, Case No. 950776, 1996 WL 1250618 (Sup. Ct. Mass. Mar. 5, 1996) (motion to dismiss denied where plaintiff alleged he did not realize that the sexual abuse he endured as a minor caused his problems); *Legaski v. Melanson*, 2 Mass. L. Rptr. 614 (Sup. Ct. Mass. 1994) (denying motion to dismiss where plaintiff alleged that due to repressed memories she was not aware of the causal connection between the abuse she suffered as a child and her injuries, even though the "touching caused her fear of imminent bodily harm"); and *Gagne v. O'Donoghue*, Case No. CA 941158, 1996 WL 1185145 (Sup. Ct. Mass. Jun. 26. 1996) (denying summary judgment where plaintiff did not connect his sexual abuse with his injuries until many years later, in therapy).

teacher's residence, at the school, in his car, and on camping trips and other outings. *Id*. at 1028. The boy "admired" his teacher, even "enjoyed the attention," and due to his young age and the imbalance of power between them, the boy believed he was expected to participate in the sexual behavior even though, at the time, he felt "uncomfortable," "scared," "nervous," felt pain, and had difficulty sleeping.[27] *Id.*

Just as was the case for Plaintiff, the boy's painful high-school memories came flooding back when, in 1992, as a grown man, he went to see his own son performing in the school play. *Id*., at 1029; *compare* FAC, at ¶ 140 (Plaintiff discovered her injury many years later when she saw a photograph online and realized that Defendant Carlson was still coaching young girls). He filed suit two years later. 938 F.Supp. at 1026. On summary judgment, the parties presented conflicting testimony about whether the plaintiff had forgotten or repressed the memories of the alleged sexual contact for the nearly 20-year period prior to his filing a lawsuit. *Id.* at 1028. The defendants argued that the plaintiff knew or should have known of the harm inflicted on him—and its cause—at the time of the abuse, but the court disagreed. The court found that a genuine dispute of material fact existed such that, as a matter of law, the action could not be determined to have accrued before the statute ran. *Id.* at 1041.

*Pettengill v. Curtis*, also supports denial of the present Motions. 584 F.Supp.2d 348 (D.Mass. 2008). In that case, a boy was repeatedly sexually abused by his Boy Scout assistant scoutmaster over a number of years, but he did not understand that his psychic injuries were caused by the abuse until he went to therapy many years later. *Id*. at 353, 355. On a motion to dismiss on statute of limitations grounds, the district court held that "the questions of fact involved in the instant case cannot properly be resolved on a motion to dismiss." *Id*. at 364.*Pettengill*'s determination that "the complaint [adequately] alleges that Pettengill's psychological injuries were such that he believed his relationship

[27] These feelings are similar to those described by Plaintiff Frederick, who alleges that she did not compete in the 1984 Olympics because she was "afraid" and "physically could not continue." *See* FAC at ¶ 105. Like the plaintiff in *Armstrong*, despite her contemporaneous feelings, Plaintiff Frederick did not fully understand her injuries or their cause at the time. Particularly on a motion to dismiss, her claims should not be time-barred on such limited information, without full discovery and the benefit of a determination of when her legal claims accrued by the jury.

with [the offender] to be normal, and only much later realized that it was abusive and had caused him significant psychological injury," is directly applicable to the present case. *Id.* at 363. Like the victim in *Pettengill*, Plaintiff alleges here that, during the time she was being abused, she believed the sexual acts she was forced to perform were part of her athletic training. *See* FAC, ¶ 104. Defendant Carlson had not only been assigned to be the head coach of the GAG Gym, but was also Plaintiff's "dorm parent" and "[b]ased upon what [she] was told … and the culture that USAG and USOC cultivated … Ms. Frederick believed she had to submit to Perpetrator Carlson's sexual demands in order to continue training for the 1980 Olympics." *Id.* at ¶¶ 89, 93, 100. Remember, Coach Carlson was ***absolutely key*** to Plaintiff's Olympic aspirations. She was expected to do everything he told her to, and she did. According to Defendant Carlson, her performing fellatio on him was "required," because she could not win her competitions unless she was "close with her coach."[28] *Id.*, at ¶ 104.

Unless one has trained as an elite athlete, it may be difficult to fathom the dedication—and endurance of pain—necessary for success. Our nation's Olympic athletes sacrifice ***everything*** for their sport. They are indoctrinated to follow instructions without question and to maintain close relationships with their coaches. They are accustomed to being ordered to perform difficult, uncomfortable, and even painful tasks in pursuit of their goals. Their stamina and threshold for pain is exceedingly high. That dedication, coupled with the level of emotional immaturity possessed by most teenagers, means that the expectation of absolute adherence to a coach's routine can easily distort the judgment of a girl, and lead her to believe that such sexual behavior is "normal."[29]

Finally, *Carney v. Roman Catholic Archbishop of Boston* deserves close attention given the strikingly similar nature of its facts. 16 Mass. L. Rptr. 3 (Sup. Ct. Mass. 2003). In *Carney*, a high school athlete quit hockey (giving up his dreams of becoming a professional hockey player) and flunked out of school after a Monsignor raped him and sexually assaulted him on multiple occasions in 1981. *Id.* at *2. The victim testified that, for many years, he "shoved [the memories] down so far"

[28] Grossfeld and Ward reinforced that notion when they did nothing to stop Carlson. *See* FAC at ¶¶ 102-103.
[29] *Riley* also recognized that an adolescent subjected to sexual abuse can have his/her judgment altered such that recognition of the harm and its cause are masked. *See Riley*, 409 Mass. at 245.

that he had been unable to connect his difficulties in life with the abuse he experienced as a minor. *Id*. at *6. Finally, in 2002, when confronted with seeing his abuser on television, he became upset, was unable to sleep and experienced extreme anger and suicidal thoughts. *Id*. at *2. On these facts the court denied defendants' motion for summary judgment, despite evidence that the victim had been angry about the alleged abuse when it happened and over the subsequent months and years. *Id*. at *3. "[E]vidence of the plaintiff's bad feelings at the time of the abuse and thereafter are not enough to support a decision, as a matter of law, that he knew or reasonably should have known that he suffered appreciable harm." *Id*. at *4. To hold otherwise would constitute "impermissible fact-finding" by the court. *Id*.

Plaintiff's experience was nearly identical. Like Mr. Carney, she gave up her dreams of athletic stardom, and experienced negative emotions at the time of the abuse, and yet due to their young age at the time of the abuse, neither connected the lasting injuries they suffered to their abusers until much later in life. Instead, not until unexpectedly encountering their abusers as adults could they both finally comprehended the legally-cognizable harm they had suffered. Thus, just as Mr. Carney's claims survived summary judgment, Plaintiff's lawsuit should not be dismissed at the pleading stage.

**3. The Cases Defendants Rely on are Inapplicable and Distinguishable**

Each of the cases Defendants cite regarding the application of the "discovery rule" was decided at the summary judgment stage or later, when the court and the parties had the benefit of a full record, including affidavits, deposition testimony, and other evidence uncovered in discovery.[30] These cases therefore have no applicability to the present Motions and can be disregarded at this stage. Each of the cases, moreover, are factually distinct. Primarily, most of USAG and USOC's cited cases involve plaintiffs who were aware of the harm imposed by the abuse, and its connection to their injuries, at the time it occurred. In *Koe*, the plaintiff immediately informed his parents of the abuse,

[30] *See Koe v. Mercer*, 450 Mass. 97 (2007); *Doe v. Creighton*, 439 Mass. 281 (2003); *Doe v. Harbor Schools*, 63 Mass. App. Ct. 337 (2005); *Phinney v. Morgan*, 39 Mass. App. Ct. 202 (1995); *Doe v. Word of Life Fellowship, Inc.*, Case No. 11-40077-TSH, 2012 WL 2343671 (D. Mass. Jun. 19, 2012); *Clark v. Edison*, 881 F.Supp.2d 192 (D. Mass. 2012).

ran away from home after they did not protect him, and even thought about killing his abuser. 450 Mass. at 103. From the outset he rejected any claim that the abuse was mere "horseplay." Likewise, in *Harbor Schools*, the plaintiff knew immediately that the sexual relationship with her counselor was "morally wrong," and ended the sexual component of her relationship "shortly after it began." 63 Mass. App. Ct. at 344. The plaintiff in *Creighton* "maintained continuous memories" of her abuse and was not subjected to a flood of painful memories like Plaintiff, 439 Mass. at 282, n.1, while in *Phinney*, the plaintiff-daughters discussed bringing a lawsuit against their abusive parents and one ran away from home three times because of the abuse. 39 Mass. App. Ct. at 207.

In *Word of Life Fellowship*, the plaintiff's sexual relationship with her abuser continued after she turned 18. 2012 WL 2343671 at *1. Finally, *Clark* is wholly inapplicable as it considered (through pre-trial cross-motions *in limine* which involved an extended hearing and testimony from two psychiatrists and a psychologist) whether expert testimony on the topic of suppressed memory met the standard for admissibility. 881 F.Supp.2d at 196. Ultimately, resolving the statute of limitations dispute in this matter will be fact-intensive, and will require the development of a well-rounded and robust picture of the facts underlying Plaintiffs' complaint and the timing of her discernment of a legally-cognizable injury. For these reasons, the motions to dismiss should be denied.

**E. USOC'S "Group Pleading" Argument Fails**

Defendant USOC incorrectly claims that Plaintiff improperly "lumps all five [Defendants] together" in her Complaint. *See* USOC MTD, at 6. Interestingly, the very cases cited by USOC to support its "group pleading," instead demonstrate that it must fail. First, "group pleadings are not, *prima facie*, excluded by Rule 8(a). At the motion to dismiss stage a complaint generally will only be dismissed where it is 'entirely implausible' or impossible for the grouped defendants to have acted as alleged." *Zond, Inc. v. Fujitsu Semiconductor Ltd.*, 990 F.Supp.2d 50, 53 (D.Mass. 2014) (collecting cases; citations omitted).[31] Second, like in *Zond*, "it is not impossible for [multiple defendants] to

[31] Other cases cited by USOC are misrepresented and easily distinguishable. *See Sanchez v. Pereira-Castillo*, 590 F.3d 31 (1st Cir. 2009) (does not address group pleading and the court itself groups defendants in its analysis); *BBJ, Inc. v. MillerCoors, LLC*, Case No. 12-11305, 2015 WL 247977 (D. Mass. Jan. 20, 2015) (does not address group pleading);

have engaged in each of the acts alleged by [the plaintiff]." *Id.* (finding complaint's "group format means that it can be reasonably inferred that each and every allegation is made against each individual defendant.").[32] Third, "it is not for the Court to evaluate, at this stage, whether the plaintiff will be able to obtain the necessary evidence to prove its claims." *Id.*

Plaintiff identifies USOC and other Defendants throughout the amended complaint and names them specifically in the particular Counts, therefore, the "group pleading" argument is unavailing. *See* FAC ¶ 150-200. *See Ocasio v. City. of Hudson*, Case No. 2:14-00811, 2018 WL 707598, *4 (D.N.J. Feb. 5, 2018) (agreeing "with Plaintiff that Aviles' arguments concerning the NJLAD claim and Plaintiff's 'group pleadings' are unavailing."). Indeed, as in *Ocasio*, "Plaintiff alleges several facts sufficient to support" the relationship between Defendants, and the role of each in causing her injuries, and "there is nothing vague about Plaintiff's claims." *Id.* ("[Defendant] appears in Plaintiff's factual narrative in very specific instances during which he allegedly failed to take appropriate action and, in one instance, empowered Eady with the ability to exact his own disciplinary measures. Aviles' misconduct is plainly alleged."). USOC's motion to dismiss on this ground must be denied.

## V. CONCLUSION

For the reasons set forth herein, Plaintiff respectfully requests that Defendants USAG and USOC's Motions to Dismiss be denied.

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*Bagheri v. Galligan*, 160 Fed.Appx. 4 (1st Cir. 2005)(pro se plaintiff did not challenge that the complaint "failed to state clearly which defendant or defendants committed each of he alleged acts."); *Whitman & Co. v. Longview Partners*, 2015 WL 4467064, *10 (D.Mass. 2015)(plaintiff refers "collectively to Defendants when the specific factual allegations do not support a reasonable inference that all the Defendants were involved in the alleged conduct.").

[32] *See also Cota v. United States Bank Nat'l Ass'n*, Case No. 2:15-cv-486-GZS, 2016 WL 922784, *6 (D. Me. Mar. 10, 2016) (noting, on "the limited record before the Court, it is plausible that each Defendant engaged in the actions attributed to 'Defendants' in the Complaint," finding the "allegations against both Defendants that make out the elements of intentional misrepresentation, negligent misrepresentation, and fraud…taken together, comply with the First Circuit's instruction that, to survive a motion to dismiss, pleadings should be 'as to each defendant . . . sufficient to state a claim on which relief can be granted.'") (citations omitted).

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Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, Kimberly A. Dougherty, hereby certify that a true and correct copy of the above and foregoing has been served on all known counsel of record via ECF, for those counsel registered to receive filings via ECF, on November 16, 2018.

*/s/ Kimberly A. Dougherty*
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