IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 22-cv-03322-RM-KAS

SARAH EHEKIRCHER,

Plaintiff,

v.

USA SWIMMING, INC.,
COLORADO SWIMMING, INC.,
MISSION AURORA COLORADO SWIM TEAM, and
JAMES SCOTT MACFARLAND,

Defendants.

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

ENTERED BY MAGISTRATE JUDGE KATHRYN A. STARNELLA

This matter is before the Court on the **Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6) and Fed. R. Civ. P. 12(b)(7)** [#79],[1] filed by Defendant Mission Aurora Colorado Swim Team ("MACS"); the **Motion to Dismiss and Motion to Strike** [#80], filed by Defendants USA Swimming, Inc. ("USA Swimming") and Colorado Swimming, Inc. ("Colorado Swimming"); and the **Motion to Dismiss** [#82], filed by Defendant James Scott MacFarland ("MacFarland") (collectively, the "Motions"). Plaintiff filed Responses [#89, #90, #109] to the Motions [#79, #80, #82], and Defendants filed Replies [#91, #92, #111]. The Motions [#79, #80, #82] have been referred to the undersigned for a Recommendation pursuant to 28 U.S.C. § 636(b)(1)(B), Fed. R. Civ. P. 72(b)(1), and D.C.COLO.LCivR 72.1(c)(3). *See* [#84, #104]; *Reassigning Magistrate Judge* [#99]. The

[1] "[#79]" is an example of the convention the Court uses to identify the docket number assigned to a specific paper by the Court's case management and electronic case filing system (CM/ECF). This convention is used throughout this Recommendation.

Court has reviewed the briefs, the entire case file, and the applicable law. For the reasons stated below, the Court **RECOMMENDS** that Defendant MACS' Motion [#79] be **DENIED**, that Defendants USA Swimming and Colorado Swimming's Motion [#80] be **GRANTED in part and DENIED in part**, and that Defendant MacFarland's Motion [#82] **be DENIED**.

I. Background

Plaintiff is a "former student-athlete who excelled in swimming[.]" *Third Am. Compl.* [#123] at 1.[2] After losing her mother to cancer and seeing her father struggle with alcoholism, "swimming became [Plaintiff]'s outlet" and her "safe place." *Id.* ¶¶ 26-28.

Plaintiff alleges that "[a]t some point in the 1980s, Mission Viejo," a California swim program, "created a Colorado branch of its swim club, which [Plaintiff] joined." *Id.* ¶ 31. Throughout high school, Plaintiff swam for this branch, which was known as "Mission Viejo – Colorado" ("MVC"). *Id.* ¶ 32. Plaintiff alleges that "MVC was affiliated with [Defendant USA] Swimming (the National Governing Body or 'NGB') and [Defendant] Colorado Swimming (the Local Swimming Committee or 'LSC')." *Id.* ¶ 34. Plaintiff further alleges that MVC "eventually became [Defendant] Mission Aurora Colorado Swim Team ('MACS')," which "is a d/b/a entity of [Defendant] USA Swimming" and "the successor in interest to the Mission Viejo Swim Club in Colorado." *Id.* ¶¶ 13, 17, 32.

Plaintiff alleges that Defendant MacFarland was recruited to coach the MVC and that he was Plaintiff's coach at MVC during the 1985-1986 school year. *Id.* ¶¶ 38, 50. When Defendant MacFarland became Plaintiff's coach, she alleges that he "began to take

[2] For the purpose of resolving the Motions [#79, #80, #82], the Court accepts as true all well-pleaded, as opposed to conclusory, allegations made in Plaintiff's Third Amended Complaint [#123]. *See Shero v. City of Grove, Okla.*, 510 F.3d 1196, 1200 (10th Cir. 2007) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *see also Minute Order* [#122] (stating that the previously-filed Motions to Dismiss [#79, #80, #82] would be addressed in connection with the Third Amended Complaint [#123]).

an 'interest' in [Plaintiff] outside of her swimming . . . [and] asked [Plaintiff] personal questions about her home and dating life." *Id.* ¶¶ 52-53. Plaintiff alleges that Defendant MacFarland later "had [Plaintiff] move into his one-bedroom apartment in Aurora, Colorado when [Plaintiff] was a seventeen-year-old (17) junior in High School." *Id.* ¶ 55. Plaintiff alleges that Defendant MacFarland then "took advantage of her vulnerable state and groomed and emotionally abused her for his own sexual gratification." *Id.* at 1.

Plaintiff alleges that Defendant "MacFarland took no steps to conceal his 'relationship' with [Plaintiff]," and that Defendant "MacFarland's 'relationship' with [Plaintiff] was openly discussed." *Id.* ¶¶ 59-60. Plaintiff further alleges that, "[i]n USA Swimming, Colorado Swimming, and MACS social circles, [Plaintiff] and [Defendant] MacFarland openly 'dated,'" and that "[s]taff and employees . . . knew that [Defendant] MacFarland and [Plaintiff] were dating." *Id.* ¶¶ 96-97. Plaintiff alleges that Defendants created a "culture that allowed [Defendant] MacFarland to openly 'date' and live with [Plaintiff] in 1986," while she was a minor. *Id.* ¶ 89.

In the summer of 1986, Defendant "MacFarland traveled to swimming competitions with [Plaintiff]," including a trip to Irvine, California in July 1986. *Id.* ¶¶ 57, 61. "For the first part of the [Irvine] meet, [Plaintiff] stayed with . . . another junior athlete." *Id.* ¶ 62. However, "[w]hen [the other athlete] was done competing, she left the meet and [Defendant] McFarland moved into the room that [Plaintiff] still occupied." *Id.* ¶ 63. Plaintiff alleges that, "[a]t the hotel room they shared . . . [Defendant] MacFarland raped [Plaintiff] for the first time[.]" *Id.* ¶ 64. At this time, Plaintiff was seventeen. *Id.*

After the Irvine meet concluded, Plaintiff and Defendant MacFarland traveled to another meet in Texas, where they "had sexual intercourse[.]" *Id.* ¶ 68. Plaintiff and

Defendant MacFarland then traveled to Arizona, where they "had sex in [Defendant MacFarland]'s car" and again in the home of Bob and Kathy Gillett, two USA Swimming coaches. *Id.* ¶¶ 69-72. Plaintiff and Defendant MacFarland then traveled to Las Vegas, where they "shared a hotel room[.]" *Id.* ¶ 77.

"Upon returning to Colorado for the start of school," Plaintiff alleges that she "was coerced into sexual acts [with Defendant] MacFarland countless times at his apartment between August 1986 and . . . the spring of 1987." *Id.* ¶ 78. Plaintiff further alleges that Defendant "MacFarland continued emotionally and sexually abusing [Plaintiff]" and "leveraged the fact [that] he was providing food and shelter to [Plaintiff], who had nowhere else to go, in exchange for sexual services." *Id.* ¶¶ 92, 99.

In May 1987, Plaintiff moved to San Diego. *Id.* ¶ 111. However, in July 1987, she "returned to Colorado and resumed swimming" for MVC and Defendant MacFarland. *Id.* ¶ 112. Then, after accepting a swimming scholarship from the University of Arkansas, Plaintiff moved to Fayetteville, Arkansas." *Id.* ¶¶ 114-16. "When [Plaintiff] came home [to Colorado] for Thanksgiving, Defendant [MacFarland] coerced [Plaintiff] into sex" and "impregnated [her] for the first time around the end of November 1987," when Plaintiff was eighteen years old. *Id.* ¶¶ 117-19. Plaintiff then returned to the University of Arkansas to finish her freshman year of college. *Id.* ¶ 121. However, Defendant MacFarland "continued to pressure and harass [her]." *Id.* At the start of her second semester, Plaintiff "left the University of Arkansas and moved back to Colorado to live with [Defendant] MacFarland." *Id.* ¶¶ 122-23.

In January 1988, Plaintiff "aborted the pregnancy[.]" *Id.* ¶ 120. Plaintiff alleges that, "within eight months of the first abortion," Defendant MacFarland "impregnated [her]

twice," which resulted in her "ha[ving] two abortions for pregnancy caused by [Defendant] MacFarland." *Id.* ¶¶ 125-26. Plaintiff alleges that she "last had sex with [Defendant] MacFarland in 1993," the same year that she "retired from competitive swimming[.]" *Id.* ¶ 124, 127.

Plaintiff alleges that, by the time that she and Defendant MacFarland began their relationship, Defendant "USA Swimming, its LSCs, and member clubs were not able to purchase commercial insurance on the open market because of the high incidence of child sexual abuse[.]" *Id.* ¶ 45. Despite the alleged wide-spread sexual abuse of minor athletes within Defendant USA Swimming and its LSCs, Plaintiff alleges that Defendants "USA Swimming, Colorado Swimming, and the Mission Viejo Nadadores (now Defendant "MACS") had no policies or procedures prohibiting sexual relations between coaches and the young athletes they coached." *Id.* ¶ 46.

Plaintiff further alleges that, "[n]umerous times during the last 30+ years, [she] has made formal and informal complaints to USA Swimming about [Defendant] MacFarland." *Id.* ¶ 129. "In 2010, [Defendant] USA Swimming convened a Board of Review in Dallas, Texas to adjudicate [Plaintiff]'s allegations against [Defendant] MacFarland." *Id.* ¶ 130. However, Plaintiff alleges that Defendant USA Swimming "intended [to] . . . f[i]nd that [Plaintiff] and [Defendant] MacFarland's sexual relationship started in the summer of 1987," when Plaintiff was eighteen, rather than the summer of 1986, when Plaintiff was seventeen. *Id.* ¶ 138. Plaintiff alleges that Defendant USA Swimming has since "provided the inaccurate date of 1987 as the commencement of sexual activity between [Defendant] MacFarland and [Plaintiff] to law enforcement." *Id.* ¶ 139.

Plaintiff alleges that Defendants "all actively abused and/or failed to act to protect [Plaintiff.]" *Id.* at 2. "As a result of being raped at a young age and during a vulnerable time, [Plaintiff] has suffered extreme emotional distress." *Id.* ¶ 140. Plaintiff alleges that Defendant "USA Swimming has contributed to [Plaintiff]'s distress," which has caused her to "be[ ] hospitalized with depression . . . [and] ma[k]e three suicide attempts." *Id.* ¶¶ 141-43.

As a result of these allegations, Plaintiff asserts five claims: (1) sexual battery of a minor, under California law, against Defendant MacFarland; (2) negligence, under California law, against Defendants USA Swimming and Colorado Swimming; (3) negligence, under California law, against Defendant MACS; (4) intentional infliction of emotional distress (IIED), under California law, against all four Defendants; and (5) negligent infliction of emotional distress (NIED), under California law, against all four Defendants. *Id.* at 18-24. In the present Motions [#79, #80, #82], Defendants seek dismissal of Claims One, Three, Four, and Five.

II. Analysis

A. Fed. R. Civ. P. 12(f): Motion to Strike

The Court first addresses the argument by Defendants USA Swimming and Colorado Swimming that portions of Plaintiff's Third Amended Complaint [#123] should be stricken pursuant to Fed. R. Civ. P. 12(f), *see Motion* [#80] at 14-17, before turning to Defendants' dismissal arguments under Fed. R. Civ. P. 12(b)(2), 12(b)(6), and 12(b)(7).

1. Legal Standard

Fed. R. Civ. P. 12(f) provides in relevant part: "The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter."

Generally, striking redundant or immaterial matter from a complaint usually occurs where such material violates the "short and plain statement" requirement of Fed. R. Civ. P. 8(a). *See Baker v. City of Loveland*, 686 F. App'x 619, 621-22 (10th Cir. 2017) (citations omitted). "[A]busive and offensive language" is also subject to dismissal as "impertinent or scandalous matter." *Pola v. Utah*, 458 F. App'x 760, 763 (10th Cir. 2010).

"The purpose of Rule 12(f) is to save the time and money that would be spent litigating issues that will not affect the outcome of the case." *United States v. Smuggler-Durant Mining Corp.*, 823 F. Supp. 873, 875 (D. Colo. 1993); *see also Resol. Tr. Corp. v. Schonacher*, 844 F. Supp. 689, 691 (D. Kan. 1994) (stating that Rule 12(f)'s purpose "is to minimize delay, prejudice, and confusion by narrowing the issues for discovery and trial"). However, granting a Rule 12(f) motion is a "generally-disfavored, drastic remedy" and therefore is rarely done. *Sierra Club v. Tri-State Generation & Transmission Ass'n, Inc.*, 173 F.R.D. 275, 285 (D. Colo. 1997); *United States v. Shell Oil Co.*, 605 F. Supp. 1064, 1085 (D. Colo. 1985). "[B]ecause federal judges have made it clear . . . in many substantive contexts, that Rule 12(f) motions to strike . . . are not favored, often being considered purely cosmetic or 'time wasters,' there appears to be general judicial agreement . . . that they should be denied unless the challenged allegations have no possible relation or logical connection to the subject matter of the controversy[.]" 5C CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCedure § 1382 (3d ed. 2024) (footnotes omitted). This means that, generally, Rule 12(f) motions are "only granted when the allegations have no bearing on the controversy and the movant can show that he has been prejudiced." *Kimpton Hotel & Rest. Grp., LLC v. Monaco Inn, Inc.*, No. 07-cv-01514-WDM-BNB, 2008 WL 140488, at *1 (D. Colo. Jan. 11, 2008).

Given the disfavored status of granting Rule 12(f) motions, the moving party's "burden of proof is a heavy one." *Holzberlein v. OM Fin. Life Ins. Co.*, No. 08-cv-02053-LTB, 2008 WL 5381503, at *1 (D. Colo. Dec. 22, 2008). "Even where the challenged allegations fall within the categories set forth in the rule, a party must usually make a showing of prejudice before the court will grant a motion to strike." *Sierra Club*, 173 F.R.D. at 285. "Further, regardless of whether the moving party has met its burden to prove that allegations contained in a pleading violate Rule 12(f), discretion remains with the Court to grant or deny the motion. *Mueller v. Swift*, No. 15-cv-01974-WJM-KLM, 2016 WL 11692343, at *2 (D. Colo. Apr. 14, 2016) (observing that allegations which are subject to Rule 12(f) "may" be stricken pursuant to the explicit language of the rule).

2. Analysis

Here, Defendants USA Swimming and Colorado Swimming ask the Court to strike six categories of statements from the Third Amended Complaint [#123]: (1) improper references to Mission California Swim, the Mission Viejo Nadadores, and Mark Schubert; (2) allegations pertaining to running shorts; (3) allegations pertaining to Plaintiff's relationship with Defendant MacFarland after she reached the age of majority; (4) allegations regarding investigations by Defendant USA Swimming and the U.S. Center for SafeSport occurring twenty-four years after the alleged abuse; (5) allegations regarding insurance coverage for Defendants USA Swimming and Colorado Swimming; and (6) allegations that Defendants Colorado Swimming and MACS are doing business as Defendant USA Swimming. *Motion* [#80] at 14-19.

The Court has reviewed the allegations underlying these categories and finds that Defendants USA Swimming and Colorado Swimming have not met the heavy burden

required for the Court to strike those portions of Plaintiff's Third Amended Complaint [#123], particularly as the Complaint neither violates the "short and plain statement" requirement of Fed. R. Civ. P. 8(a) nor contains inappropriate "abusive and offensive language." *See Baker*, 686 F. App'x at 621-22; *Pola*, 458 F. App'x at 763. To the extent these Defendants argue that certain allegations are immaterial or irrelevant, the Court finds those issues best addressed in connection with dispositive motions and, where appropriate, later discovery. To the extent these Defendants argue that certain allegations are incorrect, the Court finds those issues best addressed in discovery, at summary judgment, or by the trier of fact. To the extent these Defendants argue that certain allegations are salacious, the Court notes that this lawsuit is based on alleged events of a largely sexual nature occurring over an extended period; thus, by its very complexion, many of the allegations will have a scandalous or even salacious quality. Given that these Defendants have not adequately demonstrated that they will incur or expect to incur any actual and specific prejudice from these statements, the Court finds that none of the allegations at issue should be stricken at this time pursuant to Fed. R. Civ. P. 12(f).

Accordingly, the Court **recommends** that the Motion [#80] be **denied in part** with respect to Defendants USA Swimming and Colorado Swimming's argument under Fed. R. Civ. P. 12(f).

B. Fed. R. Civ. P. 12(b)(2): Personal Jurisdiction

Defendant MacFarland, who proceeds as a pro se litigant,[3] argues that the Court has "no general, specific or personal jurisdiction over [him.]" *Motion* [#82] at 1. Plaintiff

[3] The Court must liberally construe the filings of a pro se litigant. *See Haines v. Kerner*, 404 U.S. 519, 520-521 (1972). In doing so, the Court should neither be the pro se litigant's advocate nor "construct a legal theory" on behalf of the litigant. *Whitney v. New Mexico*, 113 F.3d 1170, 1175 (10th Cir. 1997) (citing *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991)).

argues that, "[b]ecause there is no doubt that [Defendant] MacFarland lived and worked in Colorado at all times relevant to this lawsuit, and because personal jurisdiction is evaluated at the time of the alleged events giving rise to the lawsuit and not the time of filing, the Court has general and specific personal jurisdiction over [Defendant] MacFarland." *Response* [#109] at 10. Plaintiff further argues that "the exercise of jurisdiction over [Defendant] MacFarland does not 'offend traditional notions of fair play and substantial justice'" and therefore satisfies due process requirements.

1. Legal Standard

Rule 12(b)(2) of the Federal Rules of Civil Procedure allows a defendant to challenge the court's exercise of personal jurisdiction. The plaintiff bears the burden of establishing personal jurisdiction over the defendant. *Rambo v. Am. S. Ins. Co.*, 839 F.2d 1415, 1417 (10th Cir. 1988). When, as here, the Court decides a Rule 12(b)(2) motion to dismiss without holding an evidentiary hearing, "the plaintiff need only make a prima facie showing of personal jurisdiction to defeat the motion." *AST Sports Sci., Inc. v. CLF Distrib. Ltd.*, 514 F.3d 1054, 1057 (10th Cir. 2008). "To obtain personal jurisdiction over a nonresident defendant in a diversity action, a plaintiff must show that jurisdiction is legitimate under the laws of the forum state *and* that the exercise of jurisdiction does not offend the due process clause of the Fourteenth Amendment." *Far W. Cap., Inc. v. Towne*, 46 F.3d 1071, 1074 (10th Cir. 1995) (citing *Rambo*, 839 F.2d at 1416) (emphasis in original).

Federal Rule of Civil Procedure 4(k)(1)(A) permits federal courts to exercise personal jurisdiction over a defendant "who is subject to the jurisdiction of a court of general jurisdiction in the state where the district is located;" thus, Rule 4(k)(1)(A)

implicates Colorado's long-arm statute. Colorado's long-arm statute provides multiple bases for the exercise of personal jurisdiction, including: (1) the commission of a tortious act in Colorado; (2) transaction of business in Colorado; and (3) the ownership, use, or possession of any real property situated in this state. Colo. Rev. Stat. § 13-1-124(1). Additionally, "[t]he Colorado Supreme Court has interpreted Colorado's long-arm statute to extend jurisdiction to the fullest extent permitted by the Due Process Clause of the Fourteenth Amendment." *AST Sports Sci., Inc.*, 514 F.3d at 1057 (citing *Benton v. Cameco Corp.*, 375 F.3d 1070, 1075 (10th Cir. 2004) (referencing *Mr. Steak, Inc. v. Dist. Ct.*, 574 P.2d 95, 96 (Colo. 1978))).

"The Due Process Clause of the Fourteenth Amendment constrains a State's authority to bind a nonresident defendant to a judgment of its courts." *Walden v. Fiore*, 571 U.S. 277, 283 (2014) (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980)). The Supreme Court has distinguished between two kinds of personal jurisdiction: "general (sometimes called all-purpose) jurisdiction and specific (sometimes called case-linked) jurisdiction." *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 592 U.S. 351, 358 (2021) (citing *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)).

The Due Process Clause requires that the defendant have sufficient "minimum contacts" with the state, so that the exercise of jurisdiction would not violate "traditional conception[s] of fair play and substantial justice." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). The "minimum contacts" test may be established by general jurisdiction or specific

jurisdiction. *Otter Prods., LLC v. Phone Rehab, LLC*, No. 19-cv-00206-RM-MEH, 2019 WL 4736462, at *4 (D. Colo. Sept. 27, 2019).

A state court may exercise general jurisdiction over any claims against defendants who are "essentially at home" in the state—this is true when an individual is domiciled in the state. *Ford Motor Co.*, 592 U.S. at 352 (citing *Goodyear Dunlop Tires Operations, S.A.*, 564 U.S. at 919) (quotation marks omitted). In determining "whether a forum State may assert specific jurisdiction over a nonresident defendant," the Court "focuses on the relations among the defendant, the forum, and the litigation." *Keeton v. Hustler Mag., Inc.*, 465 U.S. 770, 779 (1984). A plaintiff must establish: (1) the defendant purposefully directed his activities toward the forum state, and (2) the litigation is a result of injuries that "arise out of or relate to" the defendant's contacts with the forum state." *Burger King Corp.*, 471 U.S. at 472.

2. Analysis

a. General Jurisdiction

Here, Plaintiff has not alleged that Defendant MacFarland is currently domiciled in Colorado, and concedes that, sometime after the alleged events, Defendant MacFarland "moved to Texas[.]" *Response* [#109] at 2. Therefore, the Court does not have general jurisdiction over Defendant MacFarland. *See Goodyear Dunlop Tires Operations, S.A.*, 564 U.S. at 924 ("For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile[.]").

b. Specific Jurisdiction

i. Minimum Contacts

The Due Process Clause "requir[es] that individuals have 'fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign[.]'" *Burger King Corp.*, 471 U.S. at 472 (quoting *Shaffer v. Heitner*, 433 U.S. 186, 218 (1977) (Stevens, J., concurring in judgment)). Thus, Plaintiff must show that Defendant "has purposefully directed his activities at residents of the forum, and the litigation results from alleged injuries that arise out of or relate to those activities[.]" *Burger King Corp.*, 471 U.S. at 472-73 (citations and quotation marks omitted). Similarly, the Colorado long-arm statute authorizes the Court to exercise personal jurisdiction over a defendant when the "cause of action aris[es] from": (1) "[his] transaction of any business within this state," or (2) "[his] commission of a tortious act within this state[.]" Colo. Rev. Stat. § 13-1-124(1)(a)-(b).

Here, Plaintiff alleges that she "filed this lawsuit to recover damages related to . . . Defendant MacFarland's emotional, physical, and sexual abuse of her from the mid-1980s through . . . 1993." *Response* [#109] at 1 (internal citation omitted). Plaintiff also states that "[a]ll of [her] claims against [Defendant] MacFarland are related to the time that he lived and worked in Colorado." *Id.* at 2. Additionally, Defendant MacFarland concedes that he "lived in Colorado [from] approx[imately] 1985 to 1990[.]" *Reply* [#111] at 1. The Court further notes that Plaintiff's claims stem from the actions that Defendant MacFarland allegedly took in his role as a "swim coach at [MVC]," which was "located in Aurora, Colorado." *Third Am. Compl.* [#123] ¶¶ 14, 35. Given Plaintiff's allegations that the cause of action arises from Defendant MacFarland's alleged tortious conduct while

he was living in Colorado and working at a Colorado entity, the Court finds that Plaintiff has satisfied her burden of proving that Defendant MacFarland "has such minimum contacts with [Colorado] 'that he should reasonably anticipate being haled into court [ ]here.'" *Emps. Mut. Cas. Co. v. Bartile Roofs, Inc.*, 618 F.3d 1153, 1159-60 (10th Cir. 2010) (quoting *OMI Holdings, Inc. v. Royal Ins. Co. of Can.*, 149 F.3d 1086, 1091 (10th Cir. 1998) (citation omitted)).

ii. Fair Play and Substantial Justice

In determining whether personal jurisdiction comports with "traditional notions of fair play and substantial justice," *Int'l Shoe Co.*, 326 U.S. at 316, the Court must consider: (1) "the burden on the defendant," (2) "the interests of the forum State," (3) "the plaintiff's interest in obtaining relief[,]" (4) "the interstate judicial system's interest in obtaining the most efficient resolution of controversies[,]" and (5) "the shared interest of the several States in furthering fundamental substantive social policies." *Asahi Metal Indus. Co., Ltd. v. Superior Ct. of Cal., Solano Cnty.*, 480 U.S. 102, 113 (1987) (citations and quotation marks omitted).

Regarding the burden on the defendant, Defendant MacFarland argues that he "cannot afford the expenses associated with traveling to Colorado . . . [and] taking off work to attend depositions and pretrial hearings, even if held virtually." *Reply* [#111] at 1. While the Court recognizes "the inconvenience to [Defendant MacFarland] of having to defend in a jurisdiction other than that of his residence," *Peay v. BellSouth Med. Assistance Plan*, 205 F.3d 1206, 1212 (10th Cir. 2000), the Court notes that "it is only in highly unusual cases that inconvenience will rise to a level of constitutional concern." *Republic of Panama v. BCCI Holdings (Luxembourg) S.A.*, 119 F.3d 935, 947 (11th Cir.

1997) (citing *Asahi*, 480 U.S. at 116) (Brennan, J., concurring in part)). Additionally, "even if [a defendant is financially unstable], Texas and Colorado are not geographically distant from each other, so the burden of traveling is generally not too great[.]" *Brinkman Constr., Inc. v. Lloyd*, No. 19-cv-03438-CMA-KLM, 2020 WL 9424363, at *7 (D. Colo. June 29, 2020) (citations omitted). Therefore, the first factor weighs against Defendant MacFarland.

Regarding the forum state's interests, Defendant MacFarland argues that "Colorado has no interest in addressing [Plaintiff's] spurious claims relating to events that took place decades ago and that she claims violate the laws of another state[.]" *Reply* [#111] at 2. However, "Colorado has a very strong interest in protecting victims of domestic abuse within its borders." *Parocha v. Parocha*, 418 P.3d 523, 530 (Colo. 2018). While Plaintiff asserts her claims under California law, she also alleges that she "was coerced into sexual acts [by Defendant] MacFarland countless times at his apartment" in Aurora, Colorado. *Third Am. Compl.* [#123] ¶ 78. Therefore, given that the vast majority of Defendant MacFarland's alleged conduct occurred in Colorado, while Plaintiff was a Colorado resident, the second factor weighs against Defendant MacFarland.

Regarding Plaintiff's interest in obtaining relief, Defendant MacFarland argues that Plaintiff does not have a legitimate interest because she "didn't file her . . . Complaint until 2023, 38 years after she claims these events took place." *Reply* [#111] at 2. However, the Court agrees with Plaintiff that her ability to "receive convenient and effective relief in another forum," *Benton v. Cameco Corp.*, 375 F.3d 1070, 1079 (10th Cir. 2004), would be hindered because "[m]ost of the witnesses and evidence are controlled by Colorado corporations, and suing [Defendant] MacFarland in Texas would require an entirely

separate lawsuit[.]" *Response* [#109] at 9. Therefore, the third factor weighs against Defendant MacFarland.

Regarding efficient resolution of the controversies, Defendant MacFarland argues that resolution in this forum would be inefficient because "[a]ny judgement [*sic*] against [him] in Colorado would then have to be forwarded to Texas for enforcement." *Reply* [#111] at 2. However, given that "[m]ost of the witnesses and evidence are controlled by Colorado corporations," and that most of the alleged conduct occurred in Colorado, the Court finds that this factor weighs against Defendant MacFarland. *Response* [#109] at 9; *see Emps. Mut. Cas. Co.*, 618 F.3d at 1163 ("Key to this inquiry are the location of the witnesses, [and] where the wrong underlying the lawsuit occurred[.]").

Regarding the furtherance of fundamental substantive social policies, Defendant argues that "[t]he state of Texas would be interested in preserving the Constitutional rights of its citizens and would not pander to decades-old claims[.]" *Reply* [#111] at 2. However, the Court agrees with Plaintiff that "Texas . . . has no greater social policy interest in hearing this matter than does Colorado." *Response* [#109] at 9; *see In re Marriage of Malwitz*, 99 P.3d 56, 63 (Colo. 2004) ("Indeed, all states share a common interest in protecting victims of domestic abuse and providing an effective means of redress for such victims."). Therefore, this factor weighs against Defendant MacFarland.

Given that Plaintiff satisfied her burden of demonstrating that Defendant MacFarland has sufficient minimum contacts, and that each fair play and substantial justice factor weighs against him, the Court finds that it may reasonably exercise personal

jurisdiction over Defendant MacFarland. Accordingly, the Court **recommends** that Defendant MacFarland's Motion [#82] be **denied**.[4]

C. Fed. R. Civ. P. 12(b)(7): Failure to Join a Necessary Party

Defendant MACS argues that Plaintiff's claims should be dismissed pursuant to Fed. R. Civ. P. 12(b)(7) for failure to join Mission Viejo Colorado ("MVC") and its parent company Mission Viejo Nadadores. *Motion* [#79] at 15.

1. Legal Standard

Pursuant to Fed. R. Civ. P. 12(b)(7), a defendant may move for dismissal of claims against it based on the plaintiff's "failure to join a party under Rule 19." The Tenth Circuit Court of Appeals has explained application of Rule 19 as a three-step process. *See Citizen Potawatomi Nation v. Norton*, 248 F.3d 993, 997 (10th Cir. 2001). "The moving party bears the burden at each step." *Burgess v. Johnson*, No. 19-CV-00232-GKF-JFJ, 2021 WL 3418426, at *2 (N.D. Okla. Aug. 5, 2021) (citing *Davis v. United States*, 192 F.3d 951, 958 (10th Cir. 1999)). This burden can be met "by providing affidavits of persons having knowledge of these interests as well as other relevant extra-pleading evidence." *Citizen Band of Potawatomi Indian Tribe of Okla. v. Collier*, 17 F.3d 1292, 1293 (10th Cir. 1994) (internal quotation marks and citation omitted).

[4] The only argument asserted by Defendant MacFarland in the Motion [#82] concerns personal jurisdiction. Although he raises additional arguments in his Reply [#111], arguments raised for the first time in a reply brief are waived. *See, e.g.*, *Staheli v. Comm'r, SSA*, 84 F.4th 901, 908 n.4 (10th Cir. 2023) ("This argument is waived because [the plaintiff] raises it for the first time in [her] reply brief.") (citing *Mays v. Colvin*, 739 F.3d 569, 576 n.3 (10th Cir. 2014)); *Cruz v. City and County of Denver*, No. 21-cv-03388-KAS, 2024 WL 1346471, at *17 (D. Colo. Mar. 29, 2024) ("[A]rguments raised for the first time in a reply brief are waived.") (citing *In re: Motor Fuel Temperature Sales Pracs. Litig.*, 872 F.3d 1094, 1112 n.5 (10th Cir. 2017)).

At the first step, "the court must find that a prospective party is 'required to be joined' under Rule 19(a)." *N. Arapaho Tribe v. Harnsberger*, 697 F.3d 1272, 1278 (10th Cir. 2012). Pursuant to Fed. R. Civ. P. 19(a)(1):

> A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if: (A) in that person's absence, the court cannot accord complete relief among existing parties; or (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may: (i) as a practical matter impair or impede the person's ability to protect the interest; or (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

If the prospective party is required to be joined, then the Court turns to the second step, where it must decide whether the required party can feasibly be joined. *N. Arapaho Tribe*, 697 F.3d at 1278. "If joinder is feasible, the court must order it; the court has no discretion at this point because of the mandatory language of the rule." *Citizen Potawatomi Nation*, 248 F.3d at 997 (internal quotation marks and citation omitted). If the prospective party cannot feasibly be joined, the Court turns to the third step, where it must utilize Rule 19(b)'s factor-balancing test to determine "whether the required-but-not-feasibly-joined party is so important to the action that the action cannot 'in equity and good conscience' proceed in that person's absence." *N. Arapaho Tribe*, 697 F.3d at 1278-79. If so, then dismissal is appropriate. *Id.* at 1279.

2. Analysis

In short, Defendant MACS argues that it "is not the correct company for the allegations made and the correct company is the Mission Viejo Nadadores, whom Plaintiff states was the creator of the Mission Viejo Colorado team, hired Defendant MacFarland, and was in control of the team during the alleged events." *Motion* [#79] at 15. Defendant

MACS provides only two pieces of evidence in support of its argument. *See Citizen Band of Potawatomi Indian Tribe of Okla.*, 17 F.3d at 1293 (stating that the moving party's burden can be met "by providing affidavits of persons having knowledge of these interests as well as other relevant extra-pleading evidence" (internal quotation marks and citation omitted)). The first is a copy of Defendant MACS' Articles of Incorporation [#79-2], provided in support of the proposition that "Defendant MACS was formed in 1989 and was not an entity until 1996 when the Articles of Incorporation were filed with the Colorado Secretary of State." *Motion* [#79] at 14. The second piece of evidence is Mission Viejo Nadadores' Articles of Incorporation [#79-3], provided in support of the proposition that "it would be improper for Defendant MACS to stand in for the subsidiary of a company that is still an active company." *Id.* at 15.

Defendant MACS argues, without citation, that "it is not in the purview of a Fed. R. Civ. P. 12(b)(7) [motion] for the moving party to address the feasibility of joinder." *Reply* [#92] at 11. This is incorrect as a matter of law. Rule 12(b)(7) refers to Rule 19 generally, not just to Rule 19(a). As explained above, a Rule 19 analysis consists of three steps, and Defendant MACS bears the burden at all steps. Numerous courts have stated that Rule 19's feasibility analysis is to be addressed on a Rule 12(b)(7) motion. *See, e.g.*, *Rose v. Kenneth J. Rose Irrevocable Tr.*, No. CIV-24-76-SPS, 2024 WL 3606307, at *1 (E.D. Okla. July 31, 2024); *Newpath Mut. Ins. Co. v. Higgins*, No. 2:22-cv-709-TC-DAO, 2024 WL 2326795, at *1 (D. Utah May 22, 2024); *Credit Sage LLC v. Credit Wellness LLC*, No. 1:23-CV-110-SWS, 2024 WL 99474, at *2 (D. Wyo. Jan. 9, 2024).

Even assuming that the Court were to find in Defendant MACS' favor that it has adequately shown that Mission Viejo Nadadores and MVC are required parties pursuant

to Rule 19(a) (an assumption which, based on the record before the Court, is not a foregone conclusion), Defendant MACS has not addressed and therefore has not met its burden regarding the second and third steps of the Rule 19 analysis.

Accordingly, the Court **recommends** that Defendant MACS' Motion [#79] be **denied in part**, to the extent asserted under Fed. R. Civ. P. 12(b)(7).

D. Fed. R. Civ. P. 12(b)(6): Failure to State a Claim

Defendants MACS, USA Swimming, and Colorado Swimming argue that all claims asserted against them (with one exception discussed below) should be dismissed for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6).

1. Legal Standard

Fed. R. Civ. P. 12(b)(6) permits dismissal of a claim where the plaintiff has "fail[ed] to state a claim upon which relief can be granted." The Rule 12(b)(6) standard tests "the sufficiency of the allegations within the four corners of the complaint after taking those allegations as true." *Mobley v. McCormick*, 40 F.3d 337, 340 (10th Cir. 1994). "A complaint must contain 'enough facts to state a claim to relief that is plausible on its face.'" *Santa Fe All. for Pub. Health & Safety v. City of Santa Fe*, 993 F.3d 802, 811 (10th Cir. 2021) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "When the complaint includes 'well-pleaded allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.'" *Carraway v. State Farm & Cas. Co.*, No. 22-1370, 2023 WL 5374393, at *4 (10th Cir. Aug. 22, 2023) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009)).

"A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do . . . . [n]or does a complaint suffice if it tenders

naked assertion[s] devoid of further factual enhancement." *Iqbal*, 556 U.S. at 678 (internal quotation marks omitted). "[D]ismissal under Rule 12(b)(6) is appropriate if the complaint alone is legally insufficient to state a claim." *Brokers' Choice of Am., Inc. v. NBC Universal, Inc.*, 861 F.3d 1081, 1104-05 (10th Cir. 2017). "The court's function on a Rule 12(b)(6) motion is not to weigh potential evidence that the parties might present at trial[.]" *Sutton v. Utah State Sch. for the Deaf & Blind*, 173 F.3d 1226, 1236 (10th Cir. 1999).

2. Analysis

a. Defendant MACS

i. Successor to Mission Viejo

Plaintiff alleges that "at some point in the 1980s, Mission Viejo created a Colorado branch of its swim club," i.e., Mission Viejo Colorado (MVC). *Second Am. Compl.* [#73] ¶ 34. Plaintiff alleges that Defendant MACS was the successor to MVC. *Id.* ¶ 35. In MACS' Motion [#79], Defendant MACS asserts that it "was never the successor swim team to MVC," and thus Plaintiff's claims against it should be dismissed. *See* [#79] at 6. In support, it relies on the Affidavit of Andrew Niemann [#79-1] and Defendant MACS' Articles of Incorporation [#79-2]. *See id.*

Normally, when considering a motion to dismiss, the Court must disregard facts supported by documents other than the complaint unless the Court first converts the motion to dismiss into a motion for summary judgment. *Jackson v. Integra Inc.*, 952 F.2d 1260, 1261 (10th Cir. 1991). However, a Court may consider documents outside of the complaint on a motion to dismiss in three instances. First, the Court may consider outside documents pertinent to ruling on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1). *Pringle v. United States*, 208 F.3d 1220, 1222 (10th Cir. 2000). Second, the Court may

consider outside documents subject to judicial notice, including court documents and matters of public record. *Tal v. Hogan*, 453 F.3d 1244, 1265 n.24 (10th Cir. 2006). Third, the Court may consider outside documents that are both central to the plaintiff's claims and to which the plaintiff refers in his complaint. *GFF Corp. v. Associated Wholesale Grocers*, 130 F.3d 1381, 1384 (10th Cir. 1997).

The first exception is not applicable here, as Defendant MACS' Motion to Dismiss [#79] is asserted, in relevant part, under Fed. R. Civ. P. 12(b)(6). The third exception is also not applicable here, as neither document is referenced in Plaintiff's Third Amended Complaint [#123]. The second exception is not applicable to the Affidavit of Andrew Niemann [#79-1], as this is not a document subject to judicial notice.

The Court likely could consider the business record consisting of Defendant MACS' Articles of Incorporation [#79-2] in Colorado. *See, e.g.*, *Llewellyn v. Allstate Home Loans, Inc.*, No. 08-cv-00179-WJM-KLM, 2011 WL 2533572, at *1-2 & 1 n.2 (D. Colo. June 27, 2011) (stating that the Court may take judicial notice of business records found on a state's Secretary of State's website). However, even in so doing, in the absence of any legal authority holding otherwise, the Court cannot find that this document, alone, is sufficient to demonstrate that Defendant MACS is not a successor to MVC. As Plaintiff points out, the general rule is that, "the surviving corporation takes on the liabilities of the predecessor entities merged into it." *Response* [#89] at 5 (quoting *United States v. Pioneer Nat. Res. Co.*, 309 F. Supp. 3d 923, 930 (D. Colo. 2018)). Given this general rule, and Plaintiff's allegations in the Third Amended Complaint [#123], the Court finds that Defendant MACS has not met its burden of showing that dismissal *at this time* is appropriate on the basis that it is purportedly not the successor entity to MVC.

Accordingly, the Court **recommends** that Defendant MACS' Motion [#79] be **denied** to the extent it argues dismissal on the basis that it was purportedly not a successor entity to MVC.

ii. Merits of Claims

In the Motion [#79], Defendant MACS states that "[t]he . . . Amended Complaint fails to assert why an action filed in the United States District Court for the District of Colorado against Colorado-based entities (MACS, United States Swimming, Inc., and Colorado Swimming, Inc.) arising from incidents and operative facts that primarily occurred in Colorado should have California law apply." *See* [#79] at 5 n.1. Defendant MACS "does not waive any right to challenge the applicability of California law to any of these counts, as Plaintiff's reasoning for using California law is not sufficient as a matter of law." *Id.* However, Defendant MACS does not raise such a challenge in the present Motion [#79].

Despite not raising this challenge, and despite Plaintiff's explicit statements in the operative complaint that her state law claims of negligence, IIED, and NIED are all asserted under California substantive law, Defendant MACS only raises arguments under *Colorado* substantive law as to why these claims should be dismissed. *Motion* [#79] at 6-10. Defendant MACS has provided no argument under California law why Plaintiff's California state law claims should be dismissed.

Accordingly, the Court **recommends** that Defendant MACS' Motion [#79] be **denied in part** to the extent Defendant MACS argues that Plaintiff's claims fail on the merits.

iii. Statute of Limitations

Defendant MACS argues that Colorado's statute of limitations bars Plaintiff's claims. *Id.* at 6-7. Defendant MACS asserts, without citation, that "[f]ederal courts are to apply the law of the state in which they sit and here the Court sits in the State of Colorado, as such, Colorado law should be used" regarding the statute of limitations. *Id.* at 7. This is correct insofar as it goes, but Defendant MACS' application of this statement is far less nuanced than is necessary here, for the reasons explained below.

Because the Court exercises diversity jurisdiction here, *see Third Am. Compl.* [#123] ¶ 19,[5] the choice of law rules of the forum state, i.e., Colorado, are controlling. *See Lehman Bros. Holding, Inc. v. Universal Am. Mortg. Co., LLC*, 660 F. App'x 554, 558 n.2 (10th Cir. 2016) (citing *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941)); *see also Jenkins v. Haymore*, 208 P.3d 265, 268 (Colo. App. 2007) (stating that, "by virtue of their function, borrowing statutes have traditionally been regarded as choice of law provisions"). Pursuant to Colo. Rev. Stat. § 13-82-104(1),[6] "[e]xcept as provided in section 13-82-106[7], if a claim is substantively based: (a) [u]pon the law of one other state, the

[5] Plaintiff also states that the Court has federal question jurisdiction, *see Third Am. Compl.* [#123] ¶ 18, but this appears to be a mistake, given that she voluntarily dismissed her only federal claim when she filed the present, operative complaint.

[6] The Colorado Supreme Court has found that Colo. Rev. Stat. 13-82-104(2) was repealed by implication. *Jenkins v. Panama Canal Ry. Co.*, 208 P.3d 238 (Colo. 2009). Other courts, including the Colorado Court of Appeals and the Tenth Circuit Court of Appeals, have since continued to apply Colo. Rev. Stat. § 13-82-104(1). *See, e.g.*, *Mountain States Adjustment v. Cooke*, 412 P.3d 819, 823 (Colo. App. 2016); *Lehman Bros. Holding, Inc.*, 660 F. App'x at 558 n.2; *Jenkins v. Duffy Crane & Hauling, Inc.*, No. 13-cv-00327-CMA-KLM, 2017 WL 4919221, at *5 (D. Colo. Oct. 27, 2017) (noting that the Colorado Supreme Court considered Colo. Rev. Stat. § 13-82-104(2) in *Jenkins*, 208 P.3d at 241, not Colo. Rev. Stat. § 13-82-104(1)(a)).

[7] Colo. Rev. Stat. § 13-82-106 provides: "If the court determines that the limitation period of another state applicable under sections 13-82-104 and 13-82-105 is substantially different from the limitation period of this state and has not afforded a fair opportunity to sue upon or imposes

limitation period of that state applies; or (b) [u]pon the law of more than one state, the limitation period of one of those states chosen by the law of conflict of laws of this state applies." In other words, "Colorado law provides that when a claim is based on another state's substantive law, that state's period of limitations is controlling." *Lehman Bros. Holdings, Inc.*, 660 F. App'x at 558 n.2.

Here, all five claims are asserted under California law. *Third Am. Compl.* [#123] at 18-23. Therefore, pursuant to Colo. Rev. Stat. § 13-82-104(1), California's statute of limitations applies. However, Defendant MACS only provides argument regarding why Plaintiff's claims are barred under Colorado's two-year statute of limitations on negligence actions. *Motion* [#79] at 6-7 (citing Colo. Rev. Stat. § 13-80-102(1)(a)). Because California's statute of limitation applies, and Defendant MACS has provided no argument regarding why Plaintiff's claims are barred under California's statute of limitations,[8] the Court finds that Defendant MACS' Motion [#79] should be denied.

Accordingly, the Court **recommends** that Defendant MACS' Motion [#79] be **denied in part** to the extent Defendant MACS argues that Plaintiff's claims are barred by the statute of limitations.

b. Defendants USA Swimming and Colorado Swimming

Plaintiff asserts three causes of action against Defendants USA Swimming and Colorado Swimming: (1) negligence, under California law, (2) intentional infliction of

an unfair burden in defending against the claim, the limitation period of this state applies." This provision is known as the "escape clause." *Jenkins*, 208 P.3d at 268. No party has argued that this provision is applicable here.

[8] *See* Colo. Rev. Stat. § 13-80-110 ("If a cause of action arises in another state . . . and, by the laws thereof, an action thereon cannot be maintained in that state . . . by reason of lapse of time, the cause of action shall not be maintained in this state.").

emotional distress, under California law, and (3) negligent infliction of emotional distress, under California law. *Third Am. Compl.* [#123] ¶¶ 158-61, 166-77. Their Motion [#80] seeks dismissal of all claims *except* the negligence claim. *See also Reply* [#91] at 5 ("Here, Defendants' Motion to Dismiss does not challenge Plaintiff's negligence claim under which she can recover emotional distress damages[.]").

i. Intentional Infliction of Emotional Distress

Under California law, "[t]he elements of a cause of action for IIED are as follows: (1) defendant engaged in extreme and outrageous conduct (conduct so extreme as to exceed all bounds of decency in a civilized community) with the intent to cause, or with reckless disregard to the probability of causing, emotional distress; and (2) as a result, plaintiff suffered extreme or severe emotional distress." *Berry v. Frazier*, 90 Cal. App. 5th 1258, 1273 (Cal. Ct. App. 2023). The conduct must be "directed at the plaintiff, or occur in the presence of the plaintiff of whom the defendant is aware." *Id.* (internal quotation marks and emphases omitted). "Conduct is 'outrageous' or 'extreme' where it 'exceed[s] all bounds of that usually tolerated in a civilized society.'" *Bohnert v. Roman Cath. Archbishop of San Francisco*, 67 F. Supp. 3d 1091, 1099 (N.D. Cal. 2014) (quoting *Schneider v. TRW, Inc.*, 938 F.2d 986, 992 (9th Cir. 1991)). "Where reasonable persons may differ, the trier of fact is to determine whether the conduct has been sufficiently extreme and outrageous to result in liability." *Id*. (quoting *Tekle v. United States*, 511 F.3d 839, 856 (9th Cir. 2007)).

Plaintiff relies on the following allegations in support of her IIED claim against Defendants USA Swimming and Colorado Swimming. *Response* [#90] at 5-9.

(1) "By 1986 USA Swimming, its LSCs, and the member clubs of USA Swimming were not able to purchase commercial general liability insurance on the open insurance market." *Third Am. Compl.* [#123] ¶ 43.

(2) "By 1986 in order to purchase insurance USA Swimming had to pay 'one million dollars, for one million dollars of coverage.'" *Id.* ¶ 44.

(3) "USA Swimming, its LSCs, and member clubs were not able to purchase commercial insurance on the open market because of the high incidence of child sexual abuse in USA Swimming." *Id.* ¶ 45 (footnote omitted).

(4) "In 1986, USA Swimming, Colorado Swimming and the Mission Viejo Nadadores (now Defendant "MACS") had no policies or procedures prohibiting sexual relations between coaches and the young athletes they coached." *Id.* ¶ 46.

(5) "In 1986, USA Swimming, Colorado Swimming, and the Mission Viejo Nadadores (now Defendant MACS) had no policy prohibiting coaches from living with the children they coached." *Id.* ¶ 48.

(6) "In 1986, USA Swimming, Colorado Swimming, and the Mission Viejo Nadadores ([n]ow Defendant MACS) had no policy prohibiting male coaches from living with the female minors they coached." *Id.* ¶ 49.

(7) "The potential harm of an adult male living with a minor female who is not biologically or legally related is obvious." *Id.* ¶ 56.

(8) "The culture of USA Swimming and its LSCs, including Colorado Swimming, have long enabled and turned a blind eye to adult male coaches having sex with the young girls they coach." *Id.* ¶ 86.

(9) "It was not noteworthy or unusual that [Defendant] MacFarland was having sex with a minor swimmer." *Id.* ¶ 88.

(10) "It was this very culture that allowed [Defendant] MacFarland to openly 'date' and live with [Plaintiff] in 1986." *Id.* ¶ 89.

(11) "In USA Swimming, Colorado Swimming, and MACS social circles, [Plaintiff] and [Defendant] MacFarland openly 'dated.'" *Id.* ¶ 96.

(12) "[Plaintiff's] 'relationship' with [Defendant] MacFarland has been well known in USA Swimming circles since it started when [Plaintiff] was 17." *Id.* ¶ 128.

(13) "Numerous times during the last 30+ years, [Plaintiff] has made formal and informal complaints to USA Swimming about [Defendant] MacFarland." *Id.* ¶ 129.

(14) "In 2010, USA Swimming convened a Board of Review in Dallas, Texas to adjudicate [Plaintiff's] allegations against [Defendant] MacFarland." *Id.* ¶ 130.

(15) "John Morse, USA Swimming's former counsel, was the 'chair' aka 'Judge' for the Board of Review." *Id.* ¶ 131.

(16) "USA Swimming's outside counsel, Bryan Cave, 'prosecuted' [Plaintiff's] allegations against [Defendant] MacFarland." *Id.* ¶ 132.

(17) "Bryan Cave also served as USA Swimming counsel defending sexual abuse civil cases across the United States until 2015 or 2016." *Id.* ¶ 133.

(18) "Under oath, [Plaintiff] testified that [Defendant] MacFarland first had sex with her in July 1986 at a hotel in Orange County, California." *Id.* ¶ 134.

(19) "Under oath, [Defendant] MacFarland admitted to having a sexual relationship with [Plaintiff] when he was her coach but denied having sex with her in California in 1986." *Id.* ¶ 135.

(20) "USA Swimming claims they are unable to find meet results from the Irvine meet in 1986 or the meet from Austin in 1986." *Id.* ¶ 136.

(21) "USA Swimming's Board of Review included a 'jury' of three." *Id.* ¶ 137.

(22) "As intended, USA Swimming's Dallas Board of Review found that [Plaintiff] and [Defendant] MacFarland's sexual relationship started in the summer of 1987 not the summer of 1986." *Id.* ¶ 138.

(23) "USA Swimming or the Center for Safe Sport or both have provided the inaccurate date of 1987 as commencement of sexual activity between [Defendant] MacFarland and [Plaintiff] to law enforcement." *Id.* ¶ 139 (footnote omitted).

(24) "Over the last 30+ years, USA Swimming has contributed to [Plaintiff's] distress." *Id.* ¶ 143.

(25) "USA Swimming has sought to discredit [Plaintiff] to protect the reputation of the USA Swimming, the Mission Viejo Swim teams, Mark Schubert, and to a lesser extent, [Defendant] MacFarland." *Id.* ¶ 144.

(26) "USA Swimming has withheld evidence, namely meet results and transcripts from [Plaintiff], to prevent [Plaintiff] from proving the allegations underlying this complaint." *Id.* ¶ 145.

(27) "Upon information and belief, in 2018 or 2019 the US Center for Safe Sport opened an investigation into [Plaintiff's] allegations against [Defendant] MacFarland." *Id.* ¶ 146.

(28) "Upon information and belief, USA Swimming did not provide meet results that could have corroborated [Plaintiff's] participation in the 1986 Irvine and Austin swim meets." *Id.* ¶ 147.

(29) "Upon information and belief USA Swimming or the Center for Safe Sport provided inaccurate information to law enforcement in California." *Id.* ¶ 149.

In sum, Plaintiff asserts that Defendants USA Swimming's and Colorado Swimming's culture enabled her sexual abuse and those of other young athletes and that these Defendants' abject failure to do anything allowed the inappropriate relationship to commence and continue with knowledge among those in USA Swimming and Colorado Swimming social circles. *Third Am. Compl.* [#123] ¶¶ 89, 96, 128. Moreover, USA Swimming has allegedly sought to discredit her and stymied her efforts to shed light on the truth by providing inaccurate information to law enforcement and withholding evidence of meet results and transcripts from her and US Center for Safe Sport. *Id*. ¶¶ 144-147, 149. The abuse and USA Swimming's actions or inactions have allegedly caused Plaintiff "extreme emotional distress," which has led to three suicide attempts and hospitalization for depression. *Id*. ¶¶ 140-144.

In their Motion [#80], Defendants USA Swimming and Colorado Swimming argue that Plaintiff has "fail[ed] to identify any affirmative act *at all* on the part of" either of these Defendants, "let alone any *intentional conduct* by these Defendants that purportedly caused her emotional distress." *Motion* [#80] at 9. The Court disagrees.

In considering whether Plaintiff's IIED claim survives Rule 12(b)(6) dismissal, the Court finds *Bohnert v. Roman Catholic Archbishop of San Francisco*, 67 F. Supp. 3d 1091 (N.D. Cal. 2014) persuasive. There, the district court considered whether the plaintiff alleged enough for her IIED claim to survive dismissal. The plaintiff, a teacher, was a victim in a student challenge to obtain "up-skirt" photographs of their teachers. 67 F. Supp.

3d at 1094. The plaintiff informed school administrators that a photo of her was circulating among students and she identified the students she believed were responsible. *Id*. Administrators investigated the situation and eventually reported the incident to the police who also investigated. *Id*. The police investigation revealed that school administrators "allegedly deleted photos from phones confiscated from students, failed to report past incidents of 'up-skirt' photographs of other teachers to the police, and failed to verify reports that one of its coaches had directed student athletes to delete such photographs from their phones." *Id*. The plaintiff further alleged that school administrators "actively misrepresented the scope and breadth of the problems relating to the photographs and videos to the [school] community and the police, [and] failed to take any action to isolate, retrieve or otherwise minimize the ongoing and further distribution of the photographs and videos[.]" *Id*. Due to "the harassment and [the] defendants' failure to take prompt and effective remedial action to correct [the situation], [the plaintiff] was forced to take an extended leave[,]" and she was unable to return work. *Id*.

Based on those allegations, the district court rejected the defendants' arguments that the plaintiff failed to attribute any extreme or outrageous conduct to them and that she "is merely unhappy about the promptness and effectiveness of the investigation." *Id*. at 1099. The court allowed the plaintiff's IIED claim to proceed because of the allegations that the defendants deleted evidence, refused to investigate or take corrective action, and failed to address past incidents" which occurred for the previous three years. *Id*. The court concluded that "[a] reasonable observer or trier of fact could find these actions to be 'outrageous,' 'extreme,' and beyond 'that usually tolerated in a civilized society.'" *Id*.

For the same reasons articulated in *Bohnert*, the Court concludes that Plaintiff's IIED claim should proceed. Plaintiff's allegations plausibly state conduct that is outrageous, extreme, and beyond that usually tolerated in a civilized society. Plaintiff alleges that these Defendants' permissive culture enabled and allowed the abuse to occur, they have withheld evidence, they have sought to discredit her, and their actions have contributed to her emotional distress which has required hospitalization. These allegations plausibly demonstrate "conduct so extreme as to exceed all bounds of decency in a civilized community." *Berry*, 90 Cal. App. 5th at 1273. Plaintiff has alleged enough to proceed to the fact-finding phase of this litigation.

Accordingly, the Court **recommends** that Defendants USA Swimming and Colorado Swimming's Motion [#80] be **denied in part** to the extent it seeks dismissal of Plaintiff's intentional infliction of emotional distress claim.

ii. Negligent Infliction of Emotional Distress

"Negligent infliction of emotional distress is not an independent tort in California, but is regarded simply as the tort of negligence." *Klein v. Child.'s Hosp. Med. Ctr.*, 46 Cal. App. 4th 889, 894 (Cal. Ct. App. 1996). "Whether plaintiffs can recover damages for [NIED] is dependent upon traditional tort analysis, and the elements of duty, breach of duty, causation and damages must exist to support the cause of action." *Id.*

Here, therefore, Plaintiff's NIED claim may be dismissed on the basis of not being an independent cause of action under California law and/or on the basis that it is subsumed in a general negligence cause of action under California law. Given that Plaintiff has separately asserted a negligence claim under California law, the NIED claim should be dismissed.

Accordingly, the Court **recommends** that Plaintiff's NIED claim against Defendants USA Swimming and Colorado Swimming be **dismissed with prejudice**. *See, e.g.*, *Reynoldson v. Shillinger*, 907 F.2d 124, 126-27 (10th Cir. 1990) (holding that dismissal with prejudice is appropriate where the plaintiff could not correct the defect in the claim by filing an amended complaint).

IV. Conclusion

Based on the foregoing,

IT IS HEREBY **RECOMMENDED** that Defendant MACS' Motion [#79] be **DENIED**, that Defendants USA Swimming and Colorado Swimming's Motion [#80] be **GRANTED in part** and **DENIED in part**,[9] and that Defendant MacFarland's Motion [#82] be **DENIED**.

IT IS FURTHER **ORDERED** that any party may file objections **within 14 days** of service of this Recommendation. In relevant part, Fed. R. Civ. P. 72(b)(2) provides that, "within 14 days after being served with a copy of the recommended disposition, a party may serve and file specific written objections to the proposed findings and recommendations. A party may respond to another party's objections within 14 days after being served with a copy." "[A] party's objections to the magistrate judge's report and recommendation must be both timely and specific to preserve an issue for de novo review by the district court or for appellate review." *United States v. 2121 E. 30th St.*, 73 F.3d 1057, 1060 (10th Cir. 1996). The objection must be "sufficiently specific to focus the district court's attention on the factual and legal issues that are truly in dispute." *Id.* "[A] party who fails to make a timely objection to the magistrate judge's findings and

[9] If this Recommendation is adopted with respect to Defendant USA Swimming and Colorado Swimming's Motion [#80], only Plaintiff's negligence and intentional infliction of emotional distress claims will remain against them.

recommendations waives appellate review of both factual and legal questions." *Morales-Fernandez v. I.N.S.*, 418 F.3d 1116, 1119 (10th Cir. 2005).

Dated: August 27, 2024

BY THE COURT:

Kathryn A. Starnella
United States Magistrate Judge