IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
(EASTERN DIVISION)

JOHN DOE, and all others similarly situated, Plaintiffs, v. GREGORY SCOTT STEPHEN, BARNSTORMERS BASKETBALL, INC. d/b/a BARNSTORMERS BASKETBALL OF IOWA, AMATEUR ATHLETIC UNION OF THE UNITED STATES, INC., and ADIDAS AMERICA, INC., Defendants.	CASE NO. 3:20-CV-0005-JAJ-CFB PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

COMES NOW, Plaintiff John Doe, by and through the undersigned counsel, and submits the following motion for class certification pursuant to Federal Rule of Civil Procedure 23.

TABLE OF CONTENTS

I. INTRODUCTION

This case is about the Defendants multiple failures to protect youth athletes from known risks of harm. Those specific failures are set out in Plaintiff's Petition at Law. As a direct and proximate cause of their negligence, Defendants facilitated and permitted Defendant Gregory Stephen ("Stephen") to use his position of authority to sexually exploit minor Barnstormers Basketball, Inc. ("BBI") participants. Plaintiff John Doe seeks class certification on behalf of himself and all others similarly situated against Defendants BBI and Stephen for damages resulting from their victimization/privacy invasion by Stephen, facilitated and permitted by BBI.

II. FACTUAL BACKGROUND

A. Barnstormers Basketball, Inc.

BBI is a non-profit corporation founded/organized under the laws of the State of Iowa in 2004 with its principal place of business located at 1235 Deerfield Drive, North Liberty, Johnson County, Iowa, 52317. (App. 1-2; Articles of Incorporation). BBI fields club basketball teams for local youth athletes ranging from 4th through 11th grade. (App. 10; Johnson Depo, p. 109; lines 18-25). BBI hosts yearly tryouts to identify and select minor athletes to join its various teams. (App. 13; Johnson Depo, p. 171; lines 16-18). From approximately March to July, BBI's teams travel to various tournaments around the country to compete against other traveling club teams. (App. 4 and 12; Johnson Depo, p. 32; lines 12-22 and p. 136; lines 20-23). Jamie Johnson is the founder and director of BBI. (App. 18; BBI Answer to Interrogatory #1). As the sole coach/person on staff, the inaugural season of BBI was difficult on Jamie Johnson. (App. 5; Johnson Depo, p. 39; lines 18-25). At the conclusion of the season in July 2005, he was not sure if he was going to continue the program. (App. 5-6; Johnson Depo, p. 39-40; lines 25 and 1).

B. Greg Stephen

Jamie Johnson first met Greg Stephen in 2005 at a youth basketball tournament. (App. 8; Johnson Depo, p. 42; lines 1-5). At the time, Stephen was coaching his own youth boys club basketball team known as the Iowa Mavericks. (App. 6; Johnson Depo, p. 40; lines 16-23). After deciding Greg seemed "like a nice enough guy," without performing a formal interview, checking references, or having any formal policies or procedures in place to ensure Stephen did not pose a risk to BBI youth participants, Johnson asked Stephen to join BBI to coach and help run the program. (App. 6-7; Johnson Depo, p. 40-41). Stephen agreed. Even though there was overwhelming evidence that Stephen posed a risk to BBI participants, Johnson maintained the employment relations with Stephen until he fired Stephen in 2018 upon learning of the criminal investigation. (App. 11; Johnson Depo, p. 129; lines 5-8).

C. Criminal Proceedings

On February 18, 2018, Monticello Police were contacted by Stephen's former brother-in-law, V.E. (App. 22; Kedley Affidavit, p. 2; ¶ 5). While providing construction services at Stephen's home in Monticello, Iowa, V.E. found a black 1-inch by 1-inch by 1-inch cube, which he identified as a 32-gigabit USB covert recording device. (App. 23-24; Kedley Affidavit, pp. 4-5; ¶ 13). Upon inspection of the contents of the device, V.E. discovered video files of three (3) nude adolescent boys in a hotel bathroom. (App. 25; Kedley Affidavit, p. 6; ¶ 13). The boys were current players for the Iowa Barnstormers Basketball. (App. 25; Kedley Affidavit, p. 6; ¶ 19). These videos showed the boys disrobing and entering/exiting a hotel bathroom shower. (App. 22; Kedley Affidavit, p. 2; ¶ 5). V.E. turned the device over to Monticello Police on February 19, 2018. (App. 23-24; Kedley Affidavit, pp. 4-5; ¶ 13). Upon execution of a warrant, law enforcement officers found a hard drive that contained nude/sexually explicit photographs of over 400 minor boys.

(App. 24; Stephen Plea Agreement, p. 5; ¶ "e"). Upon receipt of the aforementioned hard drive, law enforcement located and notified the victims of Stephen's secret recordings/images. (App. 36; Sentencing Hearing Transcript, p. 138; lines 9-13).

On April 5, 2018, Stephen was indicted by a Grand Jury in the United States District Court for the Northern District of Iowa and was charged with violating Title 18 U.S.C. §§ 2252(a)(1) and 2252(b)(1), for acts related to the transportation of child pornography. (App. 42-43; Stephen Indictment). A superseding indictment was filed on June 27, 2018. (App. 44-51; Stephen Superseding Indictment). On June 28, 2018, Stephen was arraigned and charged with seven counts, including five counts of Sexual Exploitation of a Minor – Production of Child Pornography, in violation of 18 U.S.C. § 2251(a) & (e), one count of Possession of Child Pornography in violation of 18 U.S.C. 20 § 2252(a)(4)(B), and one count of Transporting Child Pornography in violation of 18 U.S.C. § 2252(a)(1) and (b)(2).

On October 18, 2018, a plea agreement was filed wherein Stephen admitted to all of the aforementioned charges. (App. 27-33; Stephen Plea Agreement). Stephen further admitted to:

- Having access to minors from age 9 to age 17 through basketball programs commonly referred to as Barnstormers or by other team names.[1] (App. 29; Stephen Plea Agreement, p. 5; sub ¶ "d").
- Having the personal information of minors by way of his connection to the aforementioned programs. (App. 29; Stephen Plea Agreement, p. 5; sub ¶ "d").

[1] Stephen started a spin off team known as the Iowa Mavericks for kids that did not make the Barnstormers team. Specifically, all kids would tryout for the Barnstormers. If they were not offered a spot on the Barnstormers, Stephen would offer them a spot on the Iowa Mavericks. (App. 9; Johnson Depo, p. 73; lines 3-20).

- Using fake teenage female personas on Facebook and Snapchat to initiate contact with the minors through Facebook and Snapchat and solicit sexually explicit images from them. (App. 30; Stephen Plea Agreement, p. 6; sub ¶ "g").
- Traveling to various sporting events, including basketball games and tournaments, with the minors. (App. 29; Stephen Plea Agreement, p. 5; sub ¶ "d").
- Using secret hidden camera devices (e.g., devices designed to look like smoke detectors and mountable bath towel hooks) to secretly record nude minor boys in hotel rooms and at his residences. (App. 29; Stephen Plea Agreement, p. 5; sub ¶ "b" and "c").
- secretly taking, recording, or soliciting visual depictions of approximately 400 minor boys. (App. 30; Stephen Plea Agreement, p. 6; sub ¶ "e").

On May 2, 2019, Judge C.J. Williams presided over the sentencing hearing at the Federal Courthouse in Cedar Rapids, Iowa. During the hearing, Special Agent Ryan Kedley, the lead investigative agent on Stephen's case, testified under oath as follows:

- Upon review of a hard drive found in Stephen's residence, it was determined Stephen obtained sexually explicit/nude photographs of more than 400 minors. (App. 35; Sentencing Hearing Transcript, p. 134; lines 2-4).
- Informing the victims of the aforementioned photographs was a traumatic event and resulted in shame and embarrassment on behalf of the victims. (App. 37; Sentencing Hearing Transcript, p. 141; lines 15-18).
- Stephen "often" brought Barnstormer players to his house in Monticello and lake house in Delhi; (App. 38; Sentencing Hearing Transcript, p. 170; lines 14-18).
- Stephen would also travel with players to professional basketball games and stay in hotels; (App. 38; Sentencing Hearing Transcript, p. 170; lines 5-10).

At the conclusion of the hearing, Judge Williams acknowledged Stephen "established a position of trust to give himself access to abuse children . . . ." (App. 40; Sentencing Hearing Transcript, p. 212; lines 17-23).

III. PROPOSED CLASS

Plaintiff John Doe proposes to certify the following class:

> All minor Barnstormer Basketball, Inc. participants (including those who attended Barnstormer Basketball, Inc.'s organized tryouts and were offered a spot on the Iowa Mavericks) in the United States from 2005 to present who have been identified by the Federal Bureau of Investigation, the Iowa Department of Criminal Investigations, and/or the United States Attorney's Office, as victims of the crimes to which Gregory Scott Stephen has admitted his guilt, and suffered damages as a result of Gregory Scott Stephen's intrusion upon seclusion.

IV. ARGUMENT

A. The proposed class satisfies the requirements of Rule 23(a)

Pursuant to Rule 23(a), a class must satisfy the requirements of "numerosity, commonality, typicality, and fair and adequate representation." *Luiken v. Domino's Pizza, LLC*, 705 F.3d 370, 372 (8th Cir. 2013).

1. Numerosity

Rule 23(a)(1) requires that a class be "so numerous that joinder of all members is impracticable." Fed R. Civ. P. 23(a)(1). It does not require the "impossibility of joinder." *United States Fid. & Guar. Co. v. Lord*, 585 F.2d 860, 870 (8th Cir.1978). Evidence of the exact number of the class is not required. *See Frazier v. PJ Iowa, L.C.*, 337 F. Supp. 3d 848, 869 (S.D. Iowa 2018); 1 *Newberg on Class Actions*, § 3:13 (5th ed. 2019). In this case, joinder is impractical due to (1) the size of the prospective class; (2) the willingness and ability of prospective class members to bring a claim individually; (3) the inability to identify all potential class members; and (4) the geographical disbursement of the prospective class.

a. Size of the prospective class

There is "no arbitrary rules regarding the necessary size of classes." *Paxton v. Union Nat'l Bank*, 688 F.2d 552, 559 (8th Cir. 1982). The Eighth Circuit has affirmed the certification of classes with as few as twenty members. *See, e.g., Ark. Educ. Ass'n v. Bd. of Educ.*, 446 F.2d 763, 765–66 (8th Cir. 1971). In this case, Greg Stephen sexually exploited 400 minors. (App. 29; Stephen Plea Agreement, p. 5; ¶ "e"). Moreover, the undisputed evidence unequivocally shows the vast majority of these individuals were BBI youth participants. Specifically, Stephen used his position as a youth basketball coach to gain access to the minors he abused. (App. 52-65; Michelle Peterson Expert Report)/(App. 39; Sentencing Hearing Transcript, pp. 196-197)/(App. 40; Sentencing Hearing Transcript, p. 212; lines 17-23). Even assuming arguendo that only 10% of the victims were BBI participants, the class would still encompass 40 individuals. This number alone is sufficiently numerous to make joinder impracticable in this particular case. *Murphy v. Piper*, 2017 WL 4355970, at *3 (D. Minn. 2017) (quoting Newberg on Class Actions) ("[A] class of 40 or more members raises a presumption of impracticability of joinder based on numbers alone."); *see also Briles v. Tiburon Financial, LLC*, 2016 WL 4094866, *2 (D. Neb. 2016) ("[A]s few as 40 class members should raise a presumption that joinder is impracticable.").

b. Willingness and ability of prospective class members to bring a claim individually

When analyzing the numerosity requirement, Courts also consider the willingness and ability of potential class members to bring individual suits. *Lucas v. Mike McMurrin Trucking, Inc.*, 2015 WL 5838488, at *3 (N.D. Iowa Oct. 5, 2015); *Bublitz v. E.I. du Pont de Nemours and Co.*, 202 F.R.D. 251, 256 (S.D. Iowa 2001) (holding that 17-member class sufficient, based on the "fear that comes with suing one's employer"); 1 *McLaughlin on Class Actions* § 4:6 (17th ed.) ("in determining whether the numerosity requirement has been satisfied, courts may consider the

financial resources, limited English-language skills and other potential impediments to putative class members' ability to bring individual suits."). In this case, the proposed class members were sexually exploited by a person many of the minors considered family. This exposure has caused a great deal of shame and embarrassment[2], making it highly unlikely the minor victims would be willing or psychologically able to bring individual suits and relive the trauma through the rigors of litigation, including but not limited to answering interrogatories, producing documents, and providing deposition testimony. In fact, the undisputed facts show minor victims declined to be interviewed by law enforcement after being identified as victims of Stephen's conduct. (App. 37; Sentencing Hearing Transcript, p. 141; lines 9-11). These particular circumstances make joinder impractical. *See e.g. N.B. v. Hamos,* 26 F. Supp. 3d 756, 769 (N.D. Ill. 2014) (finding joinder impracticable where class consists of a "vulnerable population").

c. The inability to identify all potential class members

The inability to identify all potential class members is also a factor that weights in favor of joinder impracticability. *Gries v. Stand. Ready Mix Concrete, L.L.C.*, 252 F.R.D. 479, 486 (N.D. Iowa 2008).[3] In this case, BBI failed to maintain information and/or documentation pertaining to the list of youth participants during Stephen's tenure. (App. 19; BBI Answer to Interrogatory #12).

[2] (App. 37; Sentencing Hearing Transcript, p. 141; lines 15-18).

[3] In identifying the inability to identify class members as an applicable factor, the Court provided the following string citation supporting the determination:

> *See Phillips v. Joint Legislative Committee on Performance and Expenditure Review of State of Miss.*, 637 F.2d 1014, 1022 (5th Cir.1981) (noting that joinder impracticable in part because neither party could identify class members), *cert. denied*, 456 U.S. 960, 102 S.Ct. 2035, 72 L.Ed.2d 483 (1982); *Primavera Familienstiftung v. Askin*, 178 F.R.D. 405, 410 (S.D.N.Y.1998) (noting that "[k]nowledge of names and existence of members ... renders joinder practicable."); *Moore v. Trippe*, 743 F.Supp. 201, 211 (S.D.N.Y.1990) ("[T]here appears to be little difficulty in joining all the members of the [class] in this one action ... all the members ... are clearly known ..."); *Block v. First Blood Assocs.*, 691 F.Supp. 685, 695 (S.D.N.Y.1988) (ruling that joinder was practicable where the plaintiffs knew the names and addresses of all 57 members of the proposed class); *see also Spectrum Fin. Cos. v. Marconsult, Inc.*, 608 F.2d 377, 382 (9th Cir.1979) (holding that the district court did not abuse its discretion in ruling that joinder of 92 class members was practicable

d. The geographical disbursement of the prospective class

Geographical disbursement is another factor that weighs in favor of joinder impracticability. *Guy v. Ford Storage & Moving Co*., 2019 WL 4804644, at *11 (S.D. Iowa Aug. 9, 2019); *Metge v. Baehler*, 77 F.R.D. 470 (S.D. Iowa 1978) (joinder was impracticable due to the fact that class members were geographically distributed across Iowa and several other states). In this case, the evidence clearly illustrates a potential class that is geographically dispersed. Specifically, as portrayed on BBI's public website, former players exposed to Stephen have now relocated to various different states. (App. 68-71; BBI Alumni Page).

2. Commonality

Under Rule 23(a)(2), before a court may certify a class, it must find that "there are questions of law or fact common to the class. "Commonality is not required on every question raised in a class action." *DeBoer v. Mellon Mortg. Co.*, 64 F.3d 1171, 1174 (8th Cir. 1995). Instead, commonality is present when a legal question "linking the class members is substantially related to the resolution of the litigation." *Paxton v. Union Nat'l Bank*, 688 F.2d 552, 561 (8th Cir. 1982). Only a single common question is required. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 359 (2011); *Vernon Gries v. Stand. Ready Mix Concrete, L.L.C.*, 2009 WL 427281, at *7 (N.D. Iowa Feb. 20, 2009). The commonality requirement is generally easily satisfied. 1 *Newberg on Class Actions*, § 3:20 (5th ed. 2019); *Vernon Gries v. Stand. Ready Mix Concrete, L.L.C.*, 2009 WL 427281, at *7 (N.D. Iowa Feb. 20, 2009).

---

where the plaintiffs were able to contact all members about joinder), *cert. denied*, 446 U.S. 936, 100 S.Ct. 2153, 64 L.Ed.2d 788 (1980); *Arnold v. United Artists Theatre Circuit, Inc.*, 158 F.R.D. 439, 448 (N.D.Cal.1994) (noting that where identities of class members were "unknown" and could not be "readily identified," joinder is impracticable.); *Strykers Bay Neighborhood Council, Inc. v. City of New York*, 695 F.Supp. 1531, 1538 (S.D.N.Y.1988) (denying certification as a class of thirty-two families living in a single neighborhood because joinder was not impracticable).

In this case, as fully outlined below (*see* predominance analysis), the question of compensatory damage liability, punitive damage liability, and amount of punitive damages are squarely common to all prospective class members. In other words, BBI's conduct and policies pertaining to the hiring, retention, and supervision of Stephen are common to all class members. These "overarching policies and practices" common to all prospective class members satisfies the Rule 23(a)(2) commonality requirement. *J.S.X. Through Next Friend D.S.X. v. Foxhoven*, 330 F.R.D. 197, 209 (S.D. Iowa 2019) ("It is well-established that when policies and practices 'uniformly subject members of the putative class to a *substantial risk of serious harm*,' commonality is satisfied even if the 'presently existing risk may ultimately result in different future harm for different [class members] ranging from no harm at all to death.'") (internal citations omitted).

3. Typicality

Rule 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed R. Civ. P. 23(a)(3). This requirement "is fairly easily met so long as other class members have claims similar to the named plaintiff." *Postawko v. Missouri Dept. of Corrections*, 910 F.3d 1030, 1039 (8th Cir. 2018) (quoting *DeBoer v. Mellon Mortg. Co.*, 64 F.3d 1171, 1174 (8th Cir. 1995)). "Factual variations in the individual claims will not normally preclude class certification if the claim arises from the same event or course of conduct as the class claims, and gives rise to the same legal or remedial theory." *Id.* (quoting *Alpern v. UtiliCorp United, Inc.*, 84 F.3d. 1525, 1540 (8th Cir. 1996)).

In this case, Plaintiff's claims are identical to the prospective class in that they arise from the same course of conduct and rely on the same legal theories. Specifically, like the other prospective class members, Stephen secretly obtained nude photographs of Plaintiff. Plaintiff is

relying on the same legal theory as the numerous other class members to establish liability against BBI and Stephen (*see* predominance analysis). Therefore, Plaintiff's claims are sufficiently "typical" to satisfy Rule 23(a)(3).

4. Adequacy

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." In other words, Rule 23(a)(4) is satisfied if the representatives "have common interests with the members of the class, and . . . will vigorously prosecute the interests of the class through qualified counsel." *Paxton v. Union Nat. Bank*, 688 F.2d 552, 562–63 (8th Cir. 1982).

The named Plaintiff in this case is an adequate representative because he shares the prospective class's interest in establishing liability and obtaining compensatory and punitive damages from Defendants. Specifically, Plaintiff is a member of the proposed class he represents who was affected by Stephen's sexual exploits. Plaintiff's alleged damages arise from conduct and policies shared among all prospective class members. Plaintiff's position towards Defendants' actions and/or inactions are all shared among the prospective class members (*see* predominance analysis). There is no indication of any conflict of interest between Plaintiff and the class members.

The Plaintiff and prospective class members are represented by experienced and qualified counsel. Lead counsel Guy Cook has been a trial attorney for over 35 years and handled a number of complex matters in both state and federal courts. Class counsel has vigorously pursued and developed the viability of the prospective classes' cases. Therefore, Plaintiff has satisfied the "adequate representation" requirement of Rule 23(a)(4).

B. The proposed class satisfies the requirements of Rule 23(b)(3)

Rule 23(b)(3) provides that a class seeking money damages may be certified if:

> the court finds that the questions of law or fact common to class members *predominate* over any questions affecting only individual members, and that a class action is *superior* to other available methods for fairly and efficiently adjudicating the controversy.

Fed. R. Civ. P. 23(b)(3) (emphasis added).

1. Predominance

Rule 23(b)(3) requires "that questions of law or fact common to class members predominate over any questions affecting only individual members." The Eighth Circuit has succinctly articulated the predominance requirement as follows:

> The "predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 623, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997). Certification is appropriate if "the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues." *Tyson Foods, Inc. v. Bouaphakeo*, ––– U.S. ––––, 136 S.Ct. 1036, 1045, 194 L.Ed.2d 124 (2016) (quoting 2 William B. Rubenstein, *Newberg on Class Actions* § 4:49, at 195–96 (5th ed. 2012)). A class may be certified based on common issues "even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members." *Id.* (quoting 7AA Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1778, at 123–24 (3d ed. 2005)).

Stuart v. State Farm Fire & Cas. Co., 910 F.3d 371, 374–75 (8th Cir. 2018).

"An individual question is one where members of a proposed class will need to present evidence that varies from member to member, while a common question is one where the same evidence will suffice for each member to make a prima facie showing or the issue is susceptible to generalized, class-wide proof." *Tyson Foods, Inc. v. Bouaphakeo*, ––– U.S. ––––, 136 S.Ct. 1036, 1045, 194 L.Ed.2d 124 (2016). The predominance inquiry ultimately turns on "the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation. *Wal–Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011).

In this case, the common and predominate question is whether BBI was negligent in the hiring, retention, and supervision of Stephen. Pursuant to Iowa law, to establish a claim for negligent hiring, Plaintiffs must establish:

> 1. that the employer knew or in the exercise of ordinary care should have known of its employee's unfitness at the time of hiring;
>
> 2. that through the negligent hiring, the employee's incompetence, unfitness, or dangerous characteristics proximately caused the resulting injuries; and
>
> 3. that there is some employment or agency relationship between the tortfeasor and the defendant employer.

Godar v. Edwards, 588 N.W.2d 701, 708 (Iowa 1999).

To bring a claim for negligent supervision and retention, a plaintiff must prove similar elements except he or she must show the employer knew, or in the exercise of ordinary care should have known, of the employee's unfitness at the time the employee engaged in the wrongful or tortious conduct. *See Stricker v. Cessford Construction Co*., 179 F. Supp. 2d 987, 1018-19 (N.D. Iowa 2001). To establish a claim for negligent hiring, supervision, and/or retention, plaintiff must present "evidence of a specific standard of care" and its breach. *Alcala v. Marriott Intern., Inc.*, 880 N.W.2d 699, 708 (Iowa 2016).

All of the aforementioned elements are susceptible to classwide proof. Specifically, each and every class member's case is predicated on BBI's overarching failure to adhere to the applicable standard of care (e.g., conduct a formal screening prior to retention) and BBI's failure to exercise ordinary care to recognize Stephen's unfitness and dangerous characteristics (i.e., that he was a sexual predator). Given the fact BBI's aforementioned failures exposed each class member to the same employee/volunteer (i.e., Stephen) and the same conduct (i.e., capturing nude photos of minors), the proximate cause question is also susceptible to classwide proof. For the same aforementioned reason (i.e., each class member exposed to the same employee/volunteer),

the presence of an agency relationship between Stephen and BBI is also an issue susceptible to classwide proof. Moreover, because the totality of the liability analysis is common to all class members, the question of whether BBI's conduct constituted "willful and wanton disregard for the rights or safety" is susceptible to classwide proof. Iowa Code § 668A.1(1)(a).[4]

In addition to the above referenced elements being capable of classwide proof, under Iowa law, the cause of action for negligent hiring, supervision, and/or retention arises from the agent's underlying tortious conduct. *Kiesau v. Bantz*, 686 N.W.2d 164, 172 (Iowa 2004). "The underlying tort or wrongful conduct is simply a link in the casual chain leading to compensable damages." *Id*. In this particular instance, the underlying tort committed against Plaintiff and the prospective class by Stephen is "intrusion upon seclusion." An intrusion upon seclusion occurs when a person "intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns ... if the intrusion would be highly offensive to a reasonable person." *Koeppel v. Speirs*, 808 N.W.2d 177, 181 (Iowa 2011). In this case, each class member was intruded on by way of Stephen in the same manner, making the question of whether a coach/person of authority obtaining nude photographs of Plaintiff and the prospective class would be "offensive to a reasonable person" capable of classwide proof.

The only prospective issue that is arguably[5] not susceptible to classwide proof is the extent of damages to be awarded to Plaintiff and the prospective class members. This alone does not undermine predominance. *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 568 U.S. 455, 469

[4] The Plaintiff class has a viable claim for punitive damages. Specifically, as articulated by Plaintiff's liability expert, Michelle Peterson, Stephen's background, characteristics, and visible interactions with children made him an "obvious and extreme" example of a person who should not be left in the care and custody of youths. (App. 62; Michelle Peterson Expert Report, p. 11). In spite of this reality, BBI hired Stephen and granted him access to its minor athletes.

[5] Although there may be a need for some rudimentary individual inquiries as to the extent of the class members damages (see footnote 6), because each individual was exposed to Stephen's criminal conduct in the same way (secretly recorded), the question of general causation (i.e., the affect of Stephen's conduct on the minor athletes) is susceptible to classwide proof.

(2013) ("Rule 23(b)(3) . . . does *not* require a plaintiff seeking class certification to prove that each element of her claim is susceptible to classwide proof.") (emphasis added). "When one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members." *Tyson Foods, Inc. v. Bouaphakeo*, —– U.S. ——–, 136 S.Ct. 1036, 1045 (2016); *Guy v. Ford Storage & Moving Co.*, 2019 WL 4804644, at *15 (S.D. Iowa Aug. 9, 2019) ("the Eighth Circuit Court of Appeals has made clear that even if damages will have to be tried separately, a class may be certified on common questions."); 1 *Newberg on Class Actions*, § 4:54 (5th ed. 2019) ("[C]ourts in every circuit have uniformly held that the 23(b)(3) predominance requirement is satisfied despite the need to make individualized damage determinations and a recent dissenting decision of four Supreme Court Justices characterized the point as 'well nigh universal' "). Rather, this case is analogous to a wide variety of claims in which federal courts have certified similarly situated classes despite individual questions regarding the extent of damages. *See Mathers v. Northshore Mining Co.*, 217 F.R.D. 474, 487 (D. Minn. 2003) (certifying class of female employees seeking damages for past and future mental anguish and emotional distress damages arising from a company's alleged pattern or practice of discrimination)*; In re Federal Skywalk Cases*, 95 F.R.D. 483 (W.D. Mo 1982) (in a case dealing with a collapse of skywalks at a hotel, the Court held common issues pertaining to compensatory damage liability, punitive damage liability, and amount of punitive damages predominated over individual questions regarding extent of damages); *Alicea v. County of Cook*, 2019 WL 3318140, at *3 (N.D. Ill. July 24, 2019) (finding the predominance requirement was satisfied in an intrusion upon seclusion claim where class members sought damages resulting from mental anguish); *Rapuano v. Trustees of Dartmouth*

Coll., 334 F.R.D. 637 (D.N.H. 2020) (predominance requirement satisfied in negligent retention and supervision claim brought by class of female students who were sexually abused); *Bullock v. Sheahan*, 225 F.R.D. 227, 230 (N.D. Ill. 2004) (predominance requirement satisfied despite individual questions pertaining to the level of emotion distress experienced by each class member); *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 627 (5th Cir. 1999) (predominance requirement satisfied where class members sought personal injury damages arising from the same defective ventilation system.); *Butler v. Sears, Roebuck and Co.*, 727 F.3d 796, 801 (7th Cir. 2013) ("If the issues of liability are genuinely common issues, and the damages of individual class members can be readily determined in individual hearings, in settlement negotiations, or by creation of subclasses, the fact that damages are not identical across all class members should not preclude class certification."); *Ellis v. Costco Wholesale Corp.*, 285 F.R.D. 492, 539 (N.D. Cal. 2012) (concluding that individualized hearings required for damages are narrow in scope and significance when compared to the classwide issues subject to generalized proof); *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 141 (2d Cir. 2001) ("There are a number of management tools available to a district court to address any individualized damages issues that might arise in a class action, including: (1) bifurcating liability and damage trials with the same or different juries; (2) appointing a magistrate judge or special master to preside over individual damages proceedings; (3) decertifying the class after the liability trial and providing notice to class members concerning how they may proceed to prove damages; (4) creating subclasses; or (5) altering or amending the class.").

In conclusion, the predominance requirement is satisfied in this case because the questions common to class members (i.e., compensatory damage liability, punitive damage liability, and amount of punitive damages) drive the resolution of the case. Even if the extent of individual

damages question is not susceptible to classwide proof, determination of the question is minuscule compared to the extensive, fact intensive inquiries common to the class members. Establishing the extent of damages in this case can be as simple as brief statements and/or testimony on behalf of the class members.[6] For these reasons, the predominance requirement is satisfied.[7]

2. Superiority

Rule 23(b)(3) also requires Plaintiff to show that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed R. Civ. P. 23(b)(3). As recently noted by the United States District for the Southern District, the superiority analysis requires the Court to "compare the possible alternatives to determine whether Rule 23 is sufficiently effective to justify the expenditure of the judicial time and energy that is necessary to

[6] Because liability for negligent hiring, supervision, or retention is predicated on the underlying tort, Iowa law does not require proof of physical injury for said claims. *Kiesau* v. *Bantz*, 686 N.W.2d 164, 173 (Iowa 2004) (overruled on other grounds by *Alcala v. Marriot Intern., Inc*., 880 N.W.2d 699, 708 & n.3 (Iowa 2016)); *Johnson v. Moody*, 2016 WL 8904418, at *5 (S.D. Iowa Nov. 14, 2016). With regard to the underlying intrusion upon seclusion tort in this case, the Iowa Supreme Court has adopted the Restatement (Second) of Torts. *Koeppel v. Speirs*, 808 N.W.2d 177, 181 (Iowa 2011). Pursuant to the Restatement (Second) of Torts, the "proof of actual harm need not be of pecuniary loss and in the case of emotional distress may be simply the plaintiff's testimony." Restatement (Second) of Torts § 652H (1977). Therefore, the nature of the potential individual damage hearings would be limited, weighing in favor of a predominance finding. *See Butler v. Sears, Roebuck and Co.*, 727 F.3d 796, 801 (7th Cir. 2013) ("If the issues of liability are genuinely common issues, and the damages of individual class members can be readily determined in individual hearings . . . the fact that damages are not identical across all class members should not preclude class certification.")

[7] If the Court so chooses, Rule 23(c)(4) provides an alternative route, allowing a case to proceed "as a class action with respect to particular issues." Fed. R. Civ. P. 23(c)(4). Proceeding in this fashion allows courts to remove the individual damage question from the predominance analysis. *See e.g., Sellars v. CRST Expedited, Inc.*, 321 F.R.D. 578, 611 (N.D. Iowa 2017); *Smilow v. Sw. Bell Mobile Sys*., 323 F.3d 32, 41 (1st Cir. 2003) (finding that even if individualized determinations were necessary to calculate damages, Rule (23)(c)(4) would still allow the court to maintain the class action with respect to other issues); *In re Nassau Cty. Strip Search Cases*, 461 F.3d 219, 223 (2d Cir. 2006) ("a court may employ [Rule 23(c)(4)] to certify a class as to liability regardless of whether the claim as a whole satisfies Rule 23(b)(3)'s predominance requirement"); *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 441 (4th Cir. 2003) (affirming conditional certification of some claims and decertifying on other claims where reliance and the need for individual inquiry precluded a finding of predominance);*Front–Loading Washer Products Liability Litig.*, 722 F.3d 838, 860 (6th Cir. 2013) (finding the predominance requirement satisfied when the district court certified only a liability class and reserved all damages issues for individual determination); *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996) ("Even if the common questions do not predominate over the individual questions so that class certification of the entire action is warranted, Rule 23 authorizes the district court in appropriate cases to isolate the common issues under Rule 23(c)(4)(A) and proceed with class treatment of these particular issues.")

adjudicate a class action and to assume the risk of prejudice to the rights of those who are not directly before the court." *Guy v. Ford Storage & Moving Co.*, 2019 WL 4804644, at *16 (S.D. Iowa Aug. 9, 2019) (citations omitted). Rule 23(b)(3) provides the following factors to aid the Court in its analysis:

> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
>
> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
>
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
>
> (D) the likely difficulties in managing a class action.

Fed R. Civ. P. 23(b)(3)(A)-(D).

In this case, proceeding via the class action method in one forum is in the best interest of the proposed class members and the court system. Not consolidating this action into a single matter would result in numerous (potentially 400+) individual suits resulting in unnecessarily duplicative pleadings, discovery, and outcomes. As detailed above, the determinative issues are subject to classwide proof. Proceeding via the class action method in one forum would prevent the court from being flooded with duplicate individual suits and eliminate the potential for inconsistent outcomes. *Mejdrech v. Met-Coil Systems Corp*., 319 F.3d 910, 911 (7th Cir. 2003) ("If there are genuinely common issues, issues identical across all the claimants, issues moreover the accuracy of the resolution of which is unlikely to be enhanced by repeated proceedings, then it makes good sense, especially when the class is large, to resolve those issues in one fell swoop while leaving the remaining, claimant-specific issues to individual follow-on proceedings"). Indeed, when analyzing the question of superiority, courts consider the realistic possibility of settlement. *In re Sch. Asbestos Litig.*, 789 F.2d 996, 1009 (3d Cir. 1986). In this case, if the common issues are

decided in favor of Plaintiffs, it is highly improbable BBI would proceed with litigation and attempt to disparage the harm caused by Stephen's sexual exploits. In other words, the resolution of the common issues will "result in savings for all concerned." *Id.*

In addition, as previously stated, the class members were sexually exploited by a person many of the minors considered family. This exposure has caused a great deal of shame and embarrassment, making it highly unlikely the minor victims would be willing or psychologically able to bring individual suits and relive the trauma through the litigation process. In addition, circumstantial evidence suggests the class members lack the resources to pursue separate actions. (App. 16-17; Jamie Johnson Deposition, p. 174-175; lines 23-25 and 1-7). Absent a class action, many prospective class members will be left without recourse. *Scott v. Aetna Services, Inc.*, 210 F.R.D. 261, 268 (D. Conn. 2002) (finding class action superior because class members "would not be inclined to pursue individual claims").

The desirability of concentrating the litigation in this particular forum also ways in favor of a superiority finding. BBI is domiciled in the Southern District of Iowa. Moreover, the overwhelming majority of the events giving rise to this action (e.g., hiring, retention, supervision), occurred in the Southern District of Iowa. *Johnson v. GMAC Mortg. Group, Inc.*, 2006 WL 2433474 (N.D. Iowa 2006) (finding superiority met when defendant's premises on which the injury giving rise to the action occurred was located in the district).

Finally, no known litigation concerning this matter exists, weighing in favor of class certification. *Dirks v. Clayton Brokerage Co. of St. Louis Inc.*, 105 F.R.D. 125, 137 (D. Minn. 1985); 1 *Newberg on Class Actions*, § 4:70 (5th ed. 2019) (lack of other pending litigation is evidence of a lack of interest in prospective class members controlling their own litigation). To the extent a potential class member elects to sue individually, that person can opt out of a Rule 23(b)(3)

class action and proceed individually. *Johnson v. GMAC Mortg. Group, Inc.*, 2006 WL 2433474, at *3 (N.D. Iowa Aug. 21, 2006) ("the interest of Class members who wish to individually control the litigation process is adequately protected by the opt-out provisions included within Rule 23"); *Grove v. Principal Mut. Life Ins. Co.*, 200 F.R.D. 434, 441 (S.D. Iowa 2001).

V. CONCLUSION

For the reasons set forth herein, Plaintiff respectfully asks this Court to certify the Class described in this motion.

Certificate of Service

The undersigned certifies that the foregoing instrument was served upon the parties to this action by serving a copy upon each of the attorneys listed as receiving notice on March 1, 2021, by CM/ECF.

/s/ Guy R. Cook

Copies to:

Martha L. Shaff
Brandon W.Lobberecht
Betty, Neuman & MCMahon, P.L.C.
1900 East 54th Street
Davenport, IA 52807-2708
martha.shaff@bettylawfirm.com
brandon.lobberechtl@bettylawfirm.com

ATTORNEYS FOR DEFENDANT, BARNSTORMERS BASKETBALL, INC. d/b/a BARNSTORMERS BASKETBALL OF IOWA

Matthew A. Levin, *Pro Hac Vice*
Stanton Gallegos, *Pro Hac Vice*
MARKOWITZ HERBOLD PC
1455 SW Broadway, Suite 1900
Portland, OR 97201
MattLevin@MarkowtizHerbold.com
StantonGallegos@MarkowitzHerbold.com

Connie Alt
Molly Parker
SHUTTLEWORTH & INGERSOLL, P.L.C.
115 3rd St. SE, #500
Cedar Rapids, IA 52401

GREFE & SIDNEY, P.L.C.

By: */s/ Guy R. Cook*
Guy R. Cook, AT0001623

By: */s/ Laura N. Martino*
Laura N. Martino, AT0005043

By: */s/ Benjamin T. Erickson*
Benjamin T. Erickson, AT0012927

500 E. Court Ave., Ste. 200
Des Moines, IA 50309
Phone: 515/245-4300
Fax: 515/245-4452
gcook@grefesidney.com
lmartino@grefesidney.com
berickson@grefesidney.com

ATTORNEYS FOR PLAINTIFF

cma@shuttleworthlaw.com
mmp@shuttleworthlaw.com

ATTORNEYS FOR DEFENDANT ADIDAS AMERICA, INC.

Jeffrey L. Goodman
Nicole L. Keller
Goodman Law, P.C.
1501 42nd Street.Suite 300
West Des Moines, IA 50266
jeff@golawpc.com
nicole@golawpc.com

ATTORNEYS FOR DEFENDANT AMATEUR ATHLETIC UNION OF THE UNITED STATES, INC.