

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Case No. 1:20-cv-03569-DDD-GPG

RANDY DEAN QUINT, JOHN LINN, and
MARK MOLINA, Individually and On Behalf
Of All Others Similarly Situated,

Plaintiffs,

v.

VAIL RESORTS, INC., a Delaware corporation,

Defendant.

**DEFENDANT’S PARTIAL MOTION TO DISMISS PLAINTIFFS’ CLASS AND
COLLECTIVE ACTION COMPLAINT**

I. INTRODUCTION

Plaintiffs lack standing to pursue claims under the law of any state where they have not worked for Defendant Vail Resorts, Inc. (“Vail Resorts”). The three named Plaintiffs here allege to have worked, or they currently work, in Beaver Creek, Colorado. They nevertheless seek to pursue state law claims in at least eight other states where they do not work for Vail Resorts: California, Minnesota, Wisconsin, Washington, New York, Vermont, Michigan, and Utah. (*See* Compl., Dkt. No. 1). Pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6), along with the well-settled law in this district, Vail Resorts moves to dismiss Plaintiffs’ statutory and common law claims brought under the laws of these eight states.

Vail Resorts is a recreational and hospitality company headquartered in Broomfield, Colorado. On December 23, 2020, Randy Dean Quint, John Linn, and Mark Molina (collectively, “Plaintiffs”) filed a purported class and collective action complaint that spans 165 pages. (*See*

generally Compl.) Plaintiffs purport to bring a nationwide collective action under the Fair Labor Standards Act (“FLSA”), as well as a variety of Rule 23 class actions under the wage and common laws of nine states; namely, Colorado, California, Minnesota, Wisconsin, Washington, New York, Vermont, Michigan, and Utah. (*See id.*)

Yet, the allegations in Plaintiffs’ Complaint allege and confirm they worked *only* in Colorado. (*Id.* ¶¶ 1, 4, 7.) Plaintiffs have not (and cannot) establish an injury in fact under the laws of California, Minnesota, Wisconsin, Washington, New York, Vermont, Michigan, or Utah. By their own allegations, Plaintiffs never worked in those states, and have not established they were otherwise subject to the laws of those states. As several cases from this district hold, Plaintiffs have no injury under the laws of those states and lack standing to assert claims under those laws on behalf of themselves or a putative class. *See, e.g., Clark v. Strad Energy Servs., USA, Ltd.*, No. 17-cv-1242-WJM-KMT, 2018 WL 3647922, at *5 (D. Colo. Aug. 1, 2018) (holding a plaintiff lacks standing to bring class claims on behalf of a class under the laws of states to which plaintiff has never been subject); *Smith v. Pizza Hut, Inc.*, No. 09-cv-01632-CMA-BNB, 2011 WL 2791331, at *7 (D. Colo. July 14, 2011) (dismissing class claims for states where named plaintiffs did not work and thus did not suffer injury-in-fact). Plaintiffs cannot escape the standing requirement of Article III by a pleading gambit of asserting claims on behalf of putative class members located in these other states. *See Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40 n.20 (1976) (“That a suit may be a class action, however, adds nothing to the question of standing, for even named plaintiffs who represent a class must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.”) (citation and internal quotation marks

omitted). As the weight of this authority demonstrates, Plaintiffs lack standing to allege such out-of-state violations, and these claims should be dismissed.

II. STATEMENT OF FACTS

Vail Resorts operates 34 ski resorts across North America. (Compl. ¶¶ 9, 20.) All three named Plaintiffs are current or past employees of Vail Resorts’ Beaver Creek resort located here in Colorado. (*Id.* at ¶¶ 1, 4.) Plaintiffs Randy Dean Quint (“Quint”) and John Linn (“Linn”) are former ski instructors at Beaver Creek. (*Id.*) Plaintiff Mark Molina works as a lift ticket scanner at Beaver Creek. (*Id.* at ¶ 7.)¹ Plaintiffs do not allege that they currently work or have worked for Vail Resorts in any other states.

Since the filing of this lawsuit, ten additional individuals have filed “Consent Forms,” expressing their desire to participate in this action. (*See* Dkt. Nos. 5, 6, 7, 23, 25, 26, 28, 29, 30, 31.) None of these Consent Forms assert what particular jobs these individuals had or where they worked. (*See id.*)²

On December 3, 2020, Plaintiffs filed a 165-page Complaint containing 537 paragraphs, purporting to bring a nationwide collective action under the FLSA, as well as a variety of Rule 23 class actions under the minimum wage, overtime, and common laws of nine states—Colorado, California, Minnesota, Wisconsin, Washington, New York, Vermont, Michigan, and Utah. (*See generally* Compl.) Plaintiffs assert a wide variety of alleged wage and hour violations, across a wide variety of jobs (*e.g.*, ski instructors, lift operators, etc.), and purportedly across resorts

¹ Plaintiffs Quint and Linn allege they reside in Colorado. (Compl. ¶¶ 1, 4.) Plaintiff Molina alleges he resides in California, but works seasonally as a lift ticket scanner at Beaver Creek. (*Id.* ¶ 7.) He does not allege that he worked at a California resort, subject to California laws.

² As set forth below, standing is determined by looking at the allegations set forth in the Complaint at the time it is filed, and it is Plaintiffs’ burden to show standing to sue. In any event, Vail Resorts apprises the Court that nine of these consent filers likewise work or worked at properties in Colorado. Only one does not: company records show that Jill Adler works in Utah.

operated by Vail Resorts across the country. The allegations raise highly fact-specific inquiries and are derived from and entirely dependent upon individualized, employee-by-employee practices and resort-specific policies. Plaintiffs broadly claim that they should be compensated by Vail Resorts for:

- Alleged time spent on shuttles traveling from employee parking lots to a mountain base. (*See id.* ¶¶ 29-31.)
- Alleged time putting on ski uniforms and equipment. (*See id.* ¶¶ 33, 41.)
- Alleged time spent in “morning meetings.” (*See id.* ¶ 34.)
- Alleged time spent in various activities at the conclusion of ski lessons. (*See id.* ¶ 36.)
- Alleged time spent taking off ski uniforms and equipment. (*See id.* ¶ 37.)
- Alleged time on a return shuttle ride. (*See id.* ¶ 38.)
- Alleged reimbursements owed for obtaining various “ski certification” levels and purchasing and/or maintaining ski equipment and cell phones. (*See id.* ¶¶ 43-50.)

In addition to pursuing a nationwide collective action under the FLSA³, the Complaint asserts the following counts that are specifically at issue in the instant motion:

- Counts VI through XX for alleged violations of state wage and hour statutes in California, Minnesota, Wisconsin, Washington, New York, Vermont, Michigan and Utah. (*Id.* ¶¶ 238-519.)
- Count XXI for breach of contract, in all nine states at issue. (*Id.* ¶¶ 520-526.)

³ Since Vail Resorts has filed this partial motion to dismiss pursuant to Rule 12, its deadline for filing an answer will be 14 days after the Court issues a ruling thereon. *See* FED. R. CIV. P. 12(a)(4). Rule 12 states that, “[u]nless the court sets a different time,” the service of a motion to dismiss under Rule 12(b) alters the time to respond in that “the responsive pleading must be served within 14 days after notice of the court’s action” on the motion. FED. R. CIV. P. 12(a)(4)(A). Courts within this district have affirmed that Rule 12(a)(4)(A) operates to alter the timing of a defendant’s answer where, as here, the defendant files a partial motion to dismiss. *See Kent v. Geren*, No. CIV.A. 07-CV-02202-Z, 2008 WL 150060, at *1 (D. Colo. Jan. 11, 2008) (holding that a partial motion to dismiss alters a defendant’s answer deadline under Rule 12(a)(4)); *Kachadoorian v. United Airlines, Inc.*, No. 18-CV-01205-RBJ, 2019 WL 1953399, at *2 (D. Colo. May 2, 2019) (citing Rule 12(a)(4)(A)) (same).

- Count XXII for unjust enrichment, again in all nine states at issue. (*Id.* ¶¶ 527-537.)

The named Plaintiffs have failed to allege that they worked in or were denied appropriate pay for work performed in California, Minnesota, Wisconsin, Washington, New York, Vermont, Michigan or Utah. Nor can they. Absent any such allegations, Plaintiffs lack standing to assert alleged violations of wage laws in these non-Colorado states. The breach of contract and unjust enrichment counts are broadly pled to cover the entire nation, and thus these eight states as well. (*Id.* ¶¶ 520-537.) Similar to Counts VI through XX, these two Counts (XXI and XXII), contain no allegations as to how Plaintiffs—who *only* worked in Colorado—somehow had a contract breached in California, Minnesota, Wisconsin, Washington, New York, Vermont, Michigan or Utah. Respectfully, that defies common sense. Plaintiffs who only worked in Colorado cannot seek to pursue claims in states where they never—by their own allegations—worked or suffered any particularized harm.

III. CERTIFICATE OF CONFERRAL PURSUANT TO DDD Civ. P.S. III.D.

On February 24, 2021, Vail Resorts’ counsel conferred with Plaintiffs’ counsel concerning the basis for this Motion by telephone. Plaintiffs oppose the relief requested herein. The basis for the opposition was not based on Plaintiffs’ ability to cure, but instead, on Plaintiffs’ and Defendant’s disagreement as to the scope and applicability of the law on standing.

IV. STANDARD OF REVIEW

A. Motions to Dismiss Based Upon Standing Are Jurisdictional in Nature and Appropriately Brought Under Rule 12(b)(1).

Vail Resorts brings this motion pursuant to Rule 12(b)(1). That rule provides for dismissal over those claims for which a court lacks “subject matter jurisdiction.” FED. R. CIV. P. 12(b)(1). “Motions to dismiss under Rule 12(b)(1) are, generally, either a facial attack on the complaint’s allegations as to the existence of subject matter jurisdiction or a factual attack which goes beyond

the allegations and challenges the facts on which subject matter jurisdiction is based.” *Valverde v. Xclusive Staffing, Inc.*, No. 16–cv–00671–RM–MJW, 2017 WL 3866769, at *3 (D. Colo. Sept. 5, 2017) (citing *Stuart v. Colo. Interstate Gas Co.*, 271 F.3d 1221, 1225 (10th Cir. 2001)). It is well-settled that the question of standing is jurisdictional in nature. *See, e.g., Hill v. Vanderbilt Capital Advisors, LLC*, 702 F.3d 1220, 1224 (10th Cir. 2012) (citing *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1155 (10th Cir. 2005); *Schutz v. Thorne*, 415 F.3d 1128, 1132 (10th Cir. 2005) (“Our court has repeatedly characterized standing as an element of subject matter jurisdiction.”)).

Indeed, whether a plaintiff has standing to bring a claim is a threshold jurisdictional matter that is “inflexible and without exception.” *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–95, 102 (1998) (citation omitted). A court must determine whether a plaintiff “has alleged such a personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf.” *Warth v. Seldin*, 422 U.S. 490, 498–99 (1975) (citation and internal quotation marks omitted). Until this threshold is crossed, “the court cannot proceed at all in any cause.” *Steel Co.*, 523 U.S. at 94 (citation omitted); *see also Clark*, 2018 WL 3647922, at *4 (recognizing a federal court should “satisfy itself as to the justiciability of the dispute presented” at each stage of the case, and “[i]f a plaintiff cannot establish standing, the court may not proceed with the case”) (citing *Citizens Concerned for Separation of Church and State v. City and Cty. of Denver*, 628 F.2d 1289, 1296 (10th Cir. 1980)).

B. Alternatively, Under Rule 12(b)(6), a Complaint Must Plead a Plausible Claim for Relief.

Vail Resorts brings this motion in the alternative under Rule 12(b)(6). To survive a motion to dismiss under Rule 12(b)(6), Plaintiffs must present actual factual allegations that state a claim for relief that is plausible on its face. *Ridge at Red Hawk v. Schneider*, 493 F.3d 1174, 1177 (10th

Cir. 2007) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A court must dismiss a cause of action for failure to state a claim when the factual allegations fail to “state a claim to relief that is plausible on its face,” or when an issue of law is dispositive. *Twombly*, 550 U.S. at 555.

Here, Plaintiffs did not (and cannot) plausibly state a claim for relief under state laws where they never worked and never suffered any harm.

V. ARGUMENT

Plaintiffs lack standing as a matter of law to assert claims under the laws of any state other than Colorado because they do not allege they ever worked or suffered harm in *any* of the eight other states identified. Accordingly, the Court should dismiss Plaintiffs’ claims under other state laws for lack of standing and, alternatively, for failure to state a plausible legal claim.

A. Article III Standing Is a Threshold Issue to Be Determined at the Outset of Litigation.

Article III of the U.S. Constitution restricts federal courts to deciding “cases” and “controversies.” *See* U.S. Const. art. III, § 2, cl. 1. These words have been interpreted to restrict federal courts from giving “advisory opinions,” *Flast v. Cohen*, 392 U.S. 83, 96 (1968), meaning that a federal court may not resolve questions in the abstract, but instead may only resolve “disputes arising out of specific facts when the resolution of the dispute will have practical consequences to the conduct of the parties,” *Columbian Fin. Corp. v. BancInsure, Inc.*, 650 F.3d 1372, 1376 (10th Cir. 2011). To safeguard this restriction, the Supreme Court has articulated a three-element test for “Article III standing”:

First, *the plaintiff* must have suffered an “injury in fact”—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) “actual or imminent, not ‘conjectural’ or ‘hypothetical.’ ” Second, there must be a causal connection between the injury and the conduct complained of . . . Third, it must be “likely,” as opposed to merely “speculative,” that the injury will be “redressed by a favorable decision.”

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (citations omitted) (emphasis added).

It is the *plaintiff's* burden to prove that he or she has standing to sue. *Id.* at 561.⁴

Because Article III standing impacts subject matter jurisdiction, it must be addressed at the beginning of litigation, rather than at any later stage (e.g., after any class certification). *See, e.g., Smith*, 2011 WL 2791331, at *7 (“Whether a Plaintiff has Article III standing is a threshold issue that ‘determines the power of the court to entertain the suit.’”) (quoting *Warth*, 422 U.S. at 498 (rejecting plaintiff’s argument in opposition to a motion to dismiss that the court should address standing after class certification, holding that “the issue of Plaintiff’s standing is appropriately addressed at this time.”)); *see also Nova Health*, 416 F.3d at 1155 (quotation omitted) (“As with all questions of subject matter jurisdiction except mootness, standing is determined as of the date of the filing of the complaint.”).⁵ Standing is a threshold question impacting jurisdiction, and thus it is appropriately considered at the outset of litigation.

B. Colorado District Courts Dismiss Employment Claims for Lack of Standing Where, as Here, the Plaintiffs Pursue Claims in States Where They Did Not Work.

Courts in this district have addressed the precise issue here numerous times—i.e., whether a named plaintiff who was allegedly harmed under a Colorado law has standing to sue on behalf of non-Colorado, non-plaintiff residents for violations of other, non-Colorado states’ laws. The weight of that authority holds that such plaintiffs lack standing to sue for harms under other states’ laws—harms that they have not themselves experienced.

⁴ *See also United States v. Bustillos*, 31 F.3d 931, 933 (10th Cir. 1994) (“The party seeking to invoke the jurisdiction of a federal court must demonstrate that the case is within the court’s jurisdiction. The facts supporting jurisdiction must be affirmatively alleged, and if challenged, the burden is on the party claiming that the court has subject matter jurisdiction.”).

⁵ *See also Auday v. Wet Seal Retail, Inc.*, 698 F.3d 902, 904 (6th Cir. 2012) (holding that “standing” is a “threshold question”).

For example, in *Smith v. Pizza Hut, Inc.*, a case directly on point, a former pizza delivery driver asserted minimum wage claims under both federal and state law. 2011 WL 2791331, at *1. The complaint sought to pursue both a nationwide collective action under the FLSA and Rule 23 class actions under seventeen states' wage laws. *Id.* at *7. The defendant moved to dismiss the state law claims outside of Colorado, asserting that "Plaintiff lacks standing to assert claims under the laws of states other than Colorado because Plaintiff has never worked or resided in those other states." *Id.* Judge Christine M. Arguello agreed, noting the fact that a complaint which pleads a putative class action "adds nothing to the question of standing, for even named plaintiffs who represent a class must allege and show that they personally have been injured, not that the injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent." *Id.* (quoting *Simon*, 426 U.S. at 40). Judge Arguello dismissed the non-Colorado state law claims, holding:

It is well established that a plaintiff does not have standing to allege claims on his own behalf under the laws of states where he has never lived or resided because he has not suffered an injury under those laws, nor is he protected by those laws.

Id. at *8 (citing *Glass v. Kemper Corp.*, 133 F.3d 999, 1000 (7th Cir. 1998)) (emphasis added).⁶

Similarly, in *Clark v. Strad Energy Services*, Judge Martinez faced a similar set of facts and reached a similar result. 2018 WL 3647922, at *1. The plaintiff in *Clark* asserted FLSA

⁶ The plaintiff in *Smith* attempted to overcome the gateway issue of standing by arguing such an inquiry was "premature and that the Court should resolve the issue of standing after the class certification stage." *Id.* at *7. The court rejected this invitation to punt, holding that "the issue of Plaintiff's standing is appropriately addressed at this time. Whether a Plaintiff has Article III standing is a threshold issue that 'determines the power of the court to entertain the suit.'" *Id.* (quoting *Warth*, 422 U.S. at 498). Instead, the court found "more persuasive the numerous cases holding that named plaintiffs lack standing to bring claims on behalf of a class under the laws of states where the named plaintiffs have never lived or resided." *Id.* at *9.

claims, a claim under Colorado wage law, and “violations of the overtime and/or minimum wage laws of various other states.” *Id.* Like the instant matter, the Colorado plaintiff sought to pursue an FLSA collective action and a Rule 23 class action for non-Colorado state law claims. *Id.* at *2. The defendant moved to dismiss the state law claims pled under Pennsylvania and Utah law, arguing that “because Plaintiff did not reside or work in either Pennsylvania or Utah, Plaintiff lacks standing to allege claims on his own behalf or on behalf of a putative class under the laws of those states.” *Id.* at *3.

The *Clark* court agreed, finding as follows:

The Court is persuaded that a plaintiff lacks standing to bring class claims on behalf of a class under the laws of states to which plaintiff has never been subject or where plaintiff has never resided. In a class action, the named plaintiffs must allege an actual injury, not an ‘injury that has been suffered by other, unidentified members of the class.’ . . . Standing is not dispensed in gross. Each plaintiff must ‘demonstrate standing for each claim he seeks to press’ and ‘for each form of relief’ sought. Under the ‘injury in fact’ requirement of standing, an injury must ‘affect the plaintiff in a personal and individual way.’

Id. at *5 (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 n.6 (2016) and *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006)).

Applying these principles, the *Clark* court held the Colorado plaintiff had not “established an injury in fact under the laws of Pennsylvania or Utah. Plaintiff never worked or resided in those states, and has not established that he is otherwise subject to the laws of those states.” *Id.* (citations omitted). Notably, the court in *Clark* also declined plaintiff’s invitation to forestall the threshold question of standing until class certification, holding that, “[e]ven if the Court were to allow Plaintiff’s claims under Pennsylvania and Utah law to go forward, there is no guarantee that an opt-in plaintiff would have a claim under Pennsylvania or Utah law. Courts do not dispense standing in gross; they require an actual case or controversy to be presented.” *Id.* at *5.

At least one other Colorado district court has addressed the same issue and likewise ruled that Colorado plaintiffs do not have standing to sue for harms suffered by other individuals who worked in states outside of Colorado. *See Valverde*, 2017 WL 3866769, at *7 (ruling that to the extent the class action claims “are based on laws of states other than Colorado, such claims are dismissed without prejudice for lack of standing.”). Likewise, numerous courts outside this district have examined this question and issued similar holdings. *See Carver v. City of New York*, 621 F.3d 221, n.6 (2d Cir. 2010) (internal citations omitted) (“[A] class action allegation adds nothing to the standing inquiry since the named plaintiffs must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.”); *Glass*, 133 F.3d at 1000 (holding that the lower court’s dismissal of the statutory claim was correct because the plaintiff was not protected by Illinois’ Wage Payment and Collection Act because Plaintiff never resided or worked in Illinois).⁷

C. Application of this Authority to the Complaint Demonstrates Plaintiffs’ Lack of Standing to Sue in States Other than Colorado.

The weight of the above authority demonstrates Plaintiffs lack standing to pursue statutory and common law claims in California, Minnesota, Wisconsin, Washington, New York, Vermont, Michigan and Utah. Counts VI through XX of the Complaint should be dismissed. Additionally,

⁷ *See also Mitchell v. Abercrombie & Fitch*, 2005 WL 1159412, at *3 (S.D. Ohio May 17, 2005) (holding that Ohio Minimum Fair Wage Standards Act could not be applied to regulate the plaintiff’s out-of-state employment); *White v. Osmose, Inc.*, 204 F. Supp. 2d 1309, 1316-18 (M.D. Ala. 2002) (rejecting nationwide collective action where plaintiffs worked only in Alabama during the class period; plaintiffs’ theory based on nationwide policies insufficient); *Pope v. City of Clearwater*, 138 F.R.D. 141, 145 (M.D. Fla. 1991) (named plaintiff alleges personal injury only in the Middle District of Florida and could not bring claims on behalf of other, unidentified members of the class who may have suffered injuries in other localities); *In re Potash Antitrust Litig.*, 667 F. Supp. 2d 907, 923-24 (N.D. Ill. 2009) (“Plaintiffs fail[ed] to provide any support establishing their individual standing to assert claims under the laws of states where they neither reside nor have alleged to have suffered injury.”).

the Complaint's counts for breach of contract and unjust enrichment should be dismissed, to the extent those claims pursue claims in these eight states.

The decisions in *Smith*, *Clark* and *Valverde* are directly on point and fatal to Plaintiffs' claims brought under state laws where they never worked and could not have suffered any harm. Just like the plaintiffs in each of those cases, Plaintiffs in the instant matter all worked in Colorado, specifically, at Beaver Creek in Eagle County. (*See* Compl. ¶¶ 1, 4, 7.) There is no allegation that *they* have worked at a Vail Resorts property outside of Colorado or that *their* rights have been violated in states outside of Colorado. As such, Plaintiffs lack standing to pursue claims in California, Minnesota, Wisconsin, Washington, New York, Vermont, Michigan and Utah.⁸

The filing of ten "Consent Forms" does not save these claims. As the Tenth Circuit has observed, "standing is determined *as of the date of the filing of the complaint.*" *Nova Health*, 416 F.3d at 1155 (emphasis added). As of the date the Complaint was filed, there was no connection alleged between any one of the named Plaintiffs and any one of the non-Colorado states. This is still the case. Moreover, none of the Consent Forms state where any of their signatories work or worked. (*See* Dkt. Nos. 5, 6, 7, 23, 25, 26, 28, 29, 30, 31.) Nor do they identify where any of the signatories reside. Even if the Consent Forms were relevant to the analysis here (and they are not), neither the Complaint nor the Consent Forms articulate facts supporting the notion that Plaintiffs here have standing to sue in these other states. It is Plaintiffs' burden to plead "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. Plaintiffs have not

⁸ Plaintiff Molina pleads that he works as a lift operator in Beaver Creek but is a resident of California. (Compl. ¶ 7). Nowhere does the Complaint allege that he worked at a California property. Nor does the Complaint provide any plausible basis for how an individual working in Colorado was somehow harmed under the laws of California or has standing to sue under that state's laws.

satisfied that burden here.⁹

Plaintiffs lack standing to pursue claims under the laws of California, Minnesota, Wisconsin, Washington, New York, Vermont, Michigan, and Utah because “a plaintiff does not have standing to allege claims on his own behalf under the laws of states where he has never lived or resided because he has not suffered an injury under those laws, nor is he protected by those laws.” *Smith*, 2011 WL 2791331, at *6. The Complaint provides no hint at all in its many pages on how Plaintiffs have standing to sue under the laws of these states where they never worked. (*See generally* Compl.)

As was the case in *Clark*, the mere fact that the Complaint pleads class aspirations is irrelevant to the jurisdictional issue of standing, and threshold questions about standing cannot wait until the class certification phase. *See Smith*, 2011 WL 2791331, at *7, 9; *see also Clark*, 2018 WL 3647922, at *5 (finding the court should review a plaintiff’s standing prior to the class certification stage); *Simon*, 426 U.S. at 40 n.20 (holding even named plaintiffs who represent a class must establish “they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and purport to represent.”).

Simply put, the law is clear: Plaintiffs cannot escape the standing requirement of Article III by simply rolling the dice and hoping the correct assortment of putative class members join. Standing is not a pleading gambit. Plaintiffs’ claims under the law of any state other than Colorado should be dismissed for lack of standing.

⁹ As stated above, Vail Resorts represents to the Court that nine of the ten filers of Consent Forms currently work or have worked in Colorado. One, Jill Adler, works in Utah. That fact does not save the Plaintiffs’ Utah claims. Standing is determined as of the date of the filing of the Complaint, and it is, again, Plaintiffs’ burden to plead a plausible claim that they have standing to sue in Utah. The Complaint fails to do so.

VI. CONCLUSION

Plaintiffs do not work in California, Minnesota, Wisconsin, Washington, New York, Vermont, Michigan or Utah. They were not subject to the laws of those jurisdictions, they have suffered no harm by alleged violations of statutory or common law in those states, and they lack standing to pursue claims in those eight states. For the foregoing reasons, Vail Resorts moves for the dismissal of Counts VI through XX of the Complaint, in their entirety. Additionally, Vail Resorts moves for the dismissal of the Complaint's breach of contract and unjust enrichment claims (i.e., Counts XXI and XXII) to the extent they seek relief under the laws outside of Colorado.

Respectfully submitted this 26th day of February 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of February 2021, I electronically filed the foregoing **DEFENDANT'S PARTIAL MOTION TO DISMISS PLAINTIFFS' CLASS AND COLLECTIVE ACTION COMPLAINT** the Clerk of Court using the CM/ECF system which will send electronic notification of such filing to counsel for Plaintiffs, as follows:

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