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

Civil Action No. 1:23-cv-1563-DDD-KAS

JAMES S. BENEDICT, CHRISTOPHER BOURJOS, RICHARD T. INGALLS, RANDALL G. JOHNSON, STEVEN E. JONGEWAARD, WILLIAM C. LATHAM, THEODORE LEKAS JR., TIMOTHY A. MCINTOSH, STEVEN POPE, RICK L. RAGAZZO, PAUL W. RUNGE, JEFFREY N. SCHOLZEN, DENNIS M. SHEEHAN, CHRISTOPHER J. SMITH, SCOTT TRCKA, GREGORY G. WHITWORTH, ROBERT D. WILFONG, PIERRE ARSENAULT, GORDON BLAKELEY, WILLIAM P. BLISS, MICHAEL BROWN, ROBERT CUMMINGS, JAMES M. DEDRICK, LANE DECKER, RICHARD EGAN, ROBERT ENGLE, ROBERT M. MINOR, WILLIAM R. MOORE, GREGORY R. MORHARDT, GARY PELLANT, ROSS SAPP, DUANE SHAFFER, TERRY TRIPP, EARL WINN, II, and JOHN LEON WURTH, individually and on behalf of all other similarly situated individuals,

Plaintiffs,

v.

ROBERT MANFRED, COMMISSIONER OF BASEBALL; THE OFFICE OF THE COMMISSIONER OF BASEBALL, an unincorporated association also d/b/a MAJOR LEAGUE BASEBALL, AZPB LIMITED PARTNERSHIP; ATLANTA NATIONAL LEAGUE BASEBALL CLUB, LLC; BALTIMORE ORIOLES LIMITED PARTNERSHIP; BOSTON RED SOX BASEBALL CLUB L.P.; CHICAGO CUBS BASEBALL CLUB, LLC; CHICAGO WHITE SOX, LTD.; THE CINCINNATI REDS, LLC; CLEVELAND GUARDIANS BASEBALL COMPANY, LLC; COLORADO ROCKIES BASEBALL CLUB, LTD.; DETROIT TIGERS, INC.; HOUSTON ASTROS, LLC; KANSAS CITY ROYALS BASEBALL CLUB LLC; ANGELS BASEBALL LP; LOS ANGELES DODGERS LLC; MARLINS TEAMCO LLC; MILWAUKEE BREWERS BASEBALL CLUB, L.P.; MINNESOTA TWINS, LLC; STERLING METS, L.P.; NEW YORK YANKEES PARTNERSHIP; ATHLETICS INVESTMENT GROUP LLC D/B/A OAKLAND ATHLETICS BASEBALL COMPANY; THE PHILLIES; PITTSBURGH ASSOCIATES; PADRES L.P.; SAN FRANCISCO BASEBALL ASSOCIATES LLC; THE BASEBALL CLUB OF SEATTLE, LLLP; ST. LOUIS CARDINALS, LLC; TAMPA BAY RAYS BASEBALL LTD.; RANGERS BASEBALL, LLC; ROGERS BLUE JAYS BASEBALL PARTNERSHIP; and WASHINGTON NATIONALS BASEBALL CLUB, LLC,

Defendants.

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**DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' FOURTH AMENDED COMPLAINT**

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All Defendants other than the Colorado Rockies, Ltd. (the "Colorado Rockies") move this Court for an Order dismissing the claims asserted in the Fourth Amended Complaint (Dkt. 60) pursuant to Fed. R. Civ. P. ("Rule") 12(b)(2) and 12(b)(3).

**CERTIFICATE OF CONFERRAL, D.C.COLO.LCIVR 7.1**

The undersigned conferred with Plaintiffs' counsel regarding this motion as early as August 22, 2023 and continuing thereafter, including after Plaintiffs filed the Fourth Amended Complaint. Plaintiffs oppose the relief requested herein. The identified defects are not curable by further amendment.

**PRELIMINARY STATEMENT**

Plaintiffs, former baseball scouts, bring claims under the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.* ("ADEA"), based on the allegation that each was denied employment with one or more MLB Clubs. The Fourth Amended Complaint names 32 different Defendants. Each of the 35 individual Plaintiffs—none of whom is a Colorado resident—purports to sue one or more of the 30 MLB Clubs ("Club Defendants") that allegedly refused to hire him, along with the Office of the Commissioner of Baseball d/b/a Major League Baseball ("MLB") and Commissioner Manfred (together with MLB, the "MLB Defendants") as alleged joint employers, in a single lawsuit in a single forum.

Defendants previously filed a Motion to Dismiss the Second Amended Complaint. (Dkt. 39). Thereafter, Plaintiffs filed a Third Amended Complaint [specifically to address the jurisdictional defects raised in the Motion to Dismiss (Dkt. 39)] and then, just two weeks later, Plaintiffs filed the Fourth Amended Complaint. The jurisdictional defects that doomed all prior iterations of the Complaint also compel dismissal of the Fourth Amended Complaint. Specifically,

this Court lacks personal jurisdiction over all Defendants who are alleged to be based in jurisdictions outside of Colorado (i.e., the MLB Defendants and all Club Defendants other than the Colorado Rockies) (collectively, "Non-Resident Defendants"). The Third Amended Complaint purported to address the jurisdictional defects by alleging that the Non-Resident Defendants stage professional baseball games in Colorado, engage in activities related to those games, including scouting players in Colorado, and derive a portion of their revenue from games played in this forum. The Fourth Amended Complaint then added eighteen additional Plaintiffs, none of whom is a resident of Colorado. The problem for the Plaintiffs is that, even accepting all allegations in the Fourth Amended Complaint as true, they do not come remotely close to satisfying either of the two tests for personal jurisdiction.

*First*, there can be no plausible claim that any of the Non-Resident Defendants are "at home" in Colorado such that they are subject to this Court's general jurisdiction under the exacting and purposefully high standard pronounced by the Supreme Court in *Daimler AG v. Bauman*, 571 U.S. 117, 137 (2014)—particularly where the Fourth Amended Complaint alleges that each Non-Resident Defendant maintains its principal place of business in, and is formed under the laws of, states other than Colorado.

*Second*, this Court lacks specific personal jurisdiction because Plaintiffs do not allege that any Non-Resident Defendant injured them in Colorado or that the complained of conduct occurred in Colorado. Plaintiffs' failure-to-hire claims against the Non-Resident Defendants are completely untethered to the limited contacts that are alleged to exist with this forum. Accordingly, Plaintiffs' claims against the Non-Resident Defendants should be dismissed pursuant to Rule 12(b)(2).

The Fourth Amended Complaint should also be dismissed pursuant to Rule 12(b)(3) and 28 U.S.C. § 1406(a) for the independent reason that venue is improper as to the Non-Resident Defendants under 28 U.S.C. § 1391(b)(2), the venue provision on which Plaintiffs rely. The Fourth Amended Complaint fails to allege that any events, much less a substantial part of the events giving rise to Plaintiffs' claims against the Non-Resident Defendants occurred here, as required under § 1391(b)(2). Thus, venue in this district is improper.

For these reasons and those that follow, the Fourth Amended Complaint fails to cure the jurisdictional defects that compelled dismissal of all prior versions of the Complaint. Indeed, the principal difference between the Fourth Amended Complaint and the Second Amended Complaint is that Plaintiffs have now abandoned all state and city law claims—as well as all Rule 23 class action allegations concerning those claims—that were alleged in the first three iterations of the Complaint. Plaintiffs dropped those claims because they concede that Rule 23 class-wide treatment is inappropriate—a supposed revelation that is not based on any new information. To the contrary, the unsuitability of class-wide treatment was or should have been known to Plaintiffs prior to the time they filed the original Complaint as well as its next three successors, as they were required to certify, "after an inquiry reasonable under the circumstances," that "the factual contentions have evidentiary support." Rule 11(b)(3). Plaintiffs also should have known that most of the state and city law claims were not "warranted by existing law." Rule 11(b)(2). In these circumstances, the dismissal of the dropped state and city law claims should be with prejudice and with an award of attorneys' fees and costs.

## STATEMENT OF ALLEGED FACTS

### A. Plaintiffs

Plaintiffs are former scouts who previously held scouting positions with one or more of the 30 MLB Clubs. (Dkt. 60 ¶ 1.) None of the thirty-five Plaintiffs is a resident of Colorado. (*Id.* ¶¶ 2-36.) After their employment ended, Plaintiffs allegedly sought employment with one or more Clubs. (*Id.* ¶ 111.) Plaintiffs allege that they were denied employment. (*Id.*) Each Plaintiff is suing only the specific Club or Clubs that allegedly refused to hire him plus the MLB Defendants under an alleged joint employer theory. (*Id.*)

### B. Defendants

With the exception of the Colorado Rockies, the Fourth Amended Complaint does not allege that any Defendant is a resident of Colorado. (*Id.* ¶¶ 37-69.) With respect to MLB, the First, Second and Third Amended Complaints alleged that MLB is an unincorporated association that can be served at its offices in New York. (Dkts. 6 ¶ 19, 26 ¶ 19, 59 ¶ 19.) The Fourth Amended Complaint struck those allegations because, according to Plaintiffs, MLB has appeared in this matter. To be clear, the sole reason the Non-Resident Defendants have filed pleadings in this matter is to contest jurisdiction and their position on jurisdiction has been made plain to the Plaintiffs from inception. The Fourth Amended Complaint alleges that each of the Non-resident Club Defendants has its principal place of business outside of Colorado and is formed under the laws of states other than Colorado. (Dkt. 60 ¶¶ 39-68.)

### C. Allegations of Age Discrimination

Plaintiffs allege that the Club Defendants, each acting as a joint employer with the MLB Defendants, violated the ADEA by denying employment to certain scouts over 40 years of age at

various times after 2020. (*Id.* ¶ 71.) Plaintiffs allege that this conduct constitutes age discrimination under the ADEA. (*Id.*)

## RELEVANT PROCEDURAL BACKGROUND

On June 21, 2023, Plaintiffs filed a Collective and Class Action Complaint against Commissioner Manfred, MLB and the 30 MLB Clubs. (Dkt. 1.) On August 3, 2023, Plaintiffs filed a First Amended Collective and Class Action Complaint against the same Defendants that added new factual allegations. (Dkt. 6.) On September 5, 2023, Plaintiffs filed a Second Amended Complaint, which corrected corporate information for certain Clubs. (Dkts. 25, 26.)

On October 10, 2023, the Non-Resident Defendants Moved to Dismiss the Second Amended Complaint for lack of personal jurisdiction and improper venue. (Dkt. 39). In addition, all Defendants moved to dismiss certain of the state and city law claims for failure to state a claim and/or lack of subject matter jurisdiction. (*Id*.) On December 15, 2023, the day their Opposition to the Motion to Dismiss was due, Plaintiffs filed a Motion for Leave to File Third Amended Complaint and attached a copy of their proposed amended pleading ("Motion for Leave"). (Dkts. 50, 50-1.) The proposed Third Amended Complaint added allegations in an effort to show personal jurisdiction. (*Id*.) The proposed Third Amended Complaint also eliminated all state and city law claims, as well as all allegations concerning Rule 23 class treatment of those claims, because Plaintiffs conceded that they cannot satisfy, at a minimum, Rule 23's numerosity requirement. (Dkt. 51 at 14).

Later that same night, Plaintiffs filed their Opposition to the Motion to Dismiss the Second Amended Complaint (the "Opposition"), relying exclusively on the new jurisdictional allegations

and legal argument contained in the proposed Third Amended Complaint. (*Id.* at 12.) Plaintiffs stated in the Opposition that they voluntarily dismissed all state and city law claims. (*Id.* at 14.)

On December 26, 2023, Defendants filed a Response to the Motion for Leave. (Dkt. 56). Because the new allegations, even if accepted as true, do not cure the myriad defects with respect to personal jurisdiction—and notwithstanding Plaintiffs' failure to confer, *see id.* ¶¶ 2-5—Defendants did not oppose the Motion for Leave, provided Defendants had the opportunity to address the futility of the proposed Third Amended Complaint via a Rule 12 motion. (*Id*. at ¶ 9.) Defendants also requested that the dismissal of state and city law claims be with prejudice and with an award of attorneys' fees and costs. (*Id*. at ¶ 10.)

On January 3, 2024, the Court granted Plaintiffs' Motion for Leave and permitted Defendants to challenge the futility of the amended complaint through a Rule 12 motion. (Dkt. 58.) With respect to Defendants' request for a dismissal of the dropped claims with prejudice and for an award of fees and costs, the Court ordered that any such request be included in Defendants' forthcoming Rule 12 motion. (*Id*.) The Court denied Defendants' Motion to Dismiss the Second Amended Complaint, and its request for an extension of time to file a reply in support thereof, as moot. (*Id*.) Plaintiffs filed the Third Amended Complaint on January 16, 2024.

Just three days later, on January 19, 2024, Plaintiffs asked Defendants to consent to their filing of a proposed Fourth Amended Complaint in which Plaintiffs sought to add eighteen additional named Plaintiffs. None of the new Plaintiffs—like the seventeen original Plaintiffs—is a resident of Colorado. Defendants consented to Plaintiffs' filing of the Fourth Amended Complaint subject to its right to challenge the pleading via a Rule 12 motion. Plaintiffs filed the Fourth Amended Complaint on January 30, 2024.

## ARGUMENT

### I. ALL CLAIMS AGAINST NON-RESIDENT DEFENDANTS SHOULD BE DISMISSED BECAUSE THE PLAINTIFFS HAVE NOT ALLEGED—AND CANNOT ALLEGE—ANY BASIS FOR THIS COURT TO EXERCISE PERSONAL JURISDICTION OVER ANY OF THEM.

For this Court to exercise personal jurisdiction over the Non-Resident Defendants, Plaintiffs must prove that: (1) Colorado's long-arm statute establishes personal jurisdiction; and (2) the Court's exercise of jurisdiction comports with the due process clause of the Fourteenth Amendment. *Old Republic Ins. Co. v. Cont'l Motors, Inc.*, 877 F.3d 895, 903 (10th Cir. 2017). "Colorado's long arm statute is coextensive with the constitutional limitations imposed by the due process clause; therefore, the inquiry collapses into a single inquiry: whether jurisdiction is consistent with the due process clause." *Shell v. Am. Family Rights Ass'n*, 899 F. Supp. 2d 1035, 1048 (D. Colo. 2012). The exercise of personal jurisdiction over a nonresident defendant is constitutionally permissible only if the nonresident defendant has minimum contacts with the forum state and the exercise of jurisdiction does not offend traditional notions of fair play and substantial justice. *Melea, Ltd. v. Jawer SA*, 511 F.3d 1060, 1065-66 (10th Cir. 2007).

"Depending on their relationship to the plaintiff's cause of action, an out-of-state defendant's contacts with the forum state may give rise to either general (all-purpose) jurisdiction or specific (case-linked) jurisdiction." *Old Republic*, 877 F.3d at 903 (citing *Intercon, Inc. v. Bell Atl. Internet Sols., Inc.*, 205 F.3d 1244, 1247 (10th Cir. 2000); *Daimler*, 571 U.S. at 117, 127). "General personal jurisdiction means that a court may exercise jurisdiction over an out-of-state party for all purposes." *Id.* (citing *Daimler*, 571 U.S. at 127). "Because general jurisdiction is not related to the events giving rise to the suit, courts impose a ***more stringent*** minimum contacts test, requiring the plaintiff to demonstrate the defendant's continuous and systematic general business

contacts." *Old Republic*, 877 F.3d at 904 (citation omitted) (emphasis added). Meanwhile, "[s]pecific jurisdiction means that a court may exercise jurisdiction over an out-of-state party only if the cause of action relates to the party's contacts with the forum state." *Id.*

Plaintiffs bear the burden of establishing personal jurisdiction. *OMI Holdings, Inc. v. Royal Ins. Co. of Can.*, 149 F.3d 1086, 1090 (10th Cir. 1998). As explained below, Plaintiffs have not met, and cannot meet, their burden to demonstrate that either general or specific jurisdiction exists over the Non-Resident Defendants.

**A. This Court Lacks General Jurisdiction over the Non-Resident Defendants.**

The Non-Resident Defendants (i.e., the MLB Defendants and all Club Defendants other than the Colorado Rockies) do not have sufficient contacts with Colorado for this Court to exercise general jurisdiction. "For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home." *Daimler*, 571 U.S. at 137 (citing *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 924 (2011)). As the *Daimler* Court made clear, it would be "unacceptably grasping" to approve the exercise of general jurisdiction whenever a corporation "engages in a substantial, continuous, and systematic course of business" in a forum state. *Id.* at 138. Indeed, it is the "exceptional case" where "a corporation's operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home in that State." *Id.* at 139 n.19.

Plaintiffs do not meet this exacting and purposefully high standard. The Fourth Amended Complaint does not contain a single allegation that the Non-Resident Defendants are domiciled in Colorado, much less have the magnitude of contacts such that they can properly be considered "at

home" here. *Daimler*, 571 U.S. at 137, 139 n.19. Plaintiffs admit as much. Indeed, Plaintiffs concede in the Fourth Amended Complaint that the Non-Resident Club Defendants are not subject to general jurisdiction,[1] and instead suggest that only the MLB Defendants are subject to general personal jurisdiction by virtue of MLB's status as an unincorporated association, one of whose members is based in Colorado. (Dkt. 60 at ¶ 69(a)(i).) Plaintiffs are wrong. The MLB Defendants are not subject to general personal jurisdiction in Colorado because they are not "at home" here, and their status as an unincorporated association with a member in Colorado does not change that conclusion.

As a threshold matter, Courts have confirmed that *Daimler*'s "at home" standard applies to unincorporated associations like MLB.[2] *See Waldman v. Palestine Liberation Org.*, 835 F.3d 317, 332 (2d Cir. 2016), *cert. denied*, *Sokolow v. Palestine Liberation Org.*, 138 S. Ct. 1438 (2018) ("there is no reason to invent a different test for general personal jurisdiction depending on whether

[1] Plaintiffs' concession was entirely appropriate, as every court to have considered this very issue post-*Daimler* has found general jurisdiction to be lacking. *See*, *e.g.*, *Payne v. Office of the Commissioner of Baseball*, No. 15-cv-03229-YGR, 2016 WL 1394369, at *5 (N.D. Cal. Apr. 8, 2016); *Senne v. Kansas City Royals Baseball Corp.*, 105 F. Supp. 3d 981, 1018-19 (N.D. Cal. 2015); *Concepcion v. Off. of Comm'r of Baseball*, No. 22-cv-1017 (MAJ/BJM), 2023 WL 4110155, at *4 (D.P.R. May 31, 2023), *report and recommendation adopted*, No. 22-cv-1017 (MAJ/BJM), 2023 WL 4109788 (D.P.R. June 21, 2023). Indeed, if the Non-Resident Club Defendants were subject to general jurisdiction in Colorado, they would also be subject to general personal jurisdiction in every forum where MLB Clubs play games. *Daimler* forecloses such an absurd result. 571 U.S. at 138-39. To the extent Plaintiffs seek to argue otherwise with respect to the Club Defendants in their opposition to this Motion, any such argument should be flatly rejected for the same reasons set forth herein.

[2] Although an unincorporated association is deemed to be a "citizen" of every state where its members are located, that is solely for purposes of diversity *subject matter* jurisdiction, 28 U.S.C. § 1332, and is irrelevant to the personal jurisdiction inquiry. *See Stacker v. Intellisource, LLC*, No. 20-2581-JWB, 2021 WL 2646444, at *3 n.2 (D. Kan. June 28, 2021) ("Although for subject matter jurisdiction purposes a limited liability company takes the citizenship of its members, that principle has not been applied to personal jurisdiction.")

the defendant is an individual, a corporation, or another entity"); *Stacker*, 2021 WL 2646444, at *3 (explaining that courts have applied *Daimler*'s at-home test to unincorporated entities); *Livnat v. Palestinian Auth.*, 82 F. Supp. 3d 19, 25 (D.D.C. 2015), *aff'd*, 851 F.3d 45 (D.C. Cir. 2017) (finding that an unincorporated association was not subject to personal jurisdiction on the same grounds articulated in *Daimler*).

Indeed, courts have confirmed that the status of sports leagues as unincorporated associations does not render the league "at home" in foreign jurisdictions for purposes of general jurisdiction simply because a member team is located there. The court's decision in *In re Nat'l Hockey League Players' Concussion Injury Litig.*, No. 14-2551, 2019 WL 5088516 (D. Minn. Oct. 10, 2019), holding that there was no general jurisdiction over the National Hockey League in Minnesota, is on point. The NHL, like MLB, is an unincorporated association. *Id.*, at *3. Just as MLB has one of its members located in Colorado, the NHL had one of its members located in Minnesota. *Id.*, at *4. And, as was the case with the NHL, which has "clubs and teams in several other states" and "operates out of many different cities and states," *id.*, the Fourth Amended Complaint similarly alleges that MLB's 29 other members are based in multiple jurisdictions outside of Colorado. (Dkt. 60 ¶¶ 21-50). Given the NHL's nationwide activities and its principal place of business in New York, the court held that the NHL was not at home in Minnesota and therefore could not exercise general jurisdiction over the NHL in that forum—despite one of its members being located there. 2019 WL 5088516, at *4.

The court reached the same result in *Aldrich v. Nat'l Collegiate Athletic Ass'n*, 484 F. Supp. 3d 779 (N.D. Cal. 2020). The NCAA, an unincorporated association, with its headquarters in Indiana, had fifty-eight members located in California and 1,110 members across the United

States. *Id*. at 793. The court recognized that if the NCAA was deemed to be "at home" in California, then it would also be deemed to be "at home" and subject to general jurisdiction in virtually every other state—which would be "unacceptably grasping" within the meaning of *Daimler*. *Id*.[3] *See also Donatelli v. Nat'l Hockey League*, 893 F.2d 459, 470 (1st Cir. 1990) ("We reject the idea that, alone in the wide world of unincorporated associations, professional sports leagues are automatically to be yoked to the jurisdiction of every state where any member club may have established minimum contacts"); *Dallas Texans Soccer Club v. Major League Soccer Players Union*, 247 F. Supp. 3d 784, 788-89 (E.D. Tex. 2017) (holding that a player's union organized as an unincorporated association was not at home in Texas and therefore not subject to general jurisdiction there despite having fifty-nine members and two representatives from two teams within that forum.)

These well-settled principles compel the conclusion that the MLB Defendants are not subject to general personal jurisdiction in Colorado. Even accepting every allegation as true and drawing every inference in favor of Plaintiffs, the Fourth Amended Complaint alleges nothing more than MLB's business contacts in Colorado by virtue of MLB games being played there and the fact that it is an unincorporated association with one of thirty members located in Colorado. Even if those contacts were deemed to be "substantial, continuous, and systematic"—which they are not—the Supreme Court expressly rejected this as a basis for general jurisdiction because it

[3] The court in *Aldrich* also emphatically rejected plaintiffs' argument that because an unincorporated association's citizenship turns on where its members reside for purposes of subject-matter jurisdiction, the NCAA can be regarded as "at home" in California. The court appropriately characterized such an argument as a "red herring" because "[c]itizenship for purposes of subject-matter jurisdiction is different from citizenship for personal jurisdiction." *Id*.

would render the MLB Defendants "at home" in every single forum where its members play games, which would be "unacceptably grasping." *Daimler*, 571 U.S. at 138-39.

Simply put, nothing in the Fourth Amended Complaint remotely suggests that the MLB Defendants are "at home" in Colorado, and its status as an unincorporated association with one member based in Colorado does not change that result.[4] Because none of the Non-Resident Defendants are "at home" in Colorado, as a matter of law, this Court lacks general personal jurisdiction over them.

**B. This Court Lacks Specific Jurisdiction over the Non-Resident Defendants.**

Plaintiffs also fail to allege facts necessary to support specific jurisdiction over the Non-Resident Defendants. "A court may assert specific jurisdiction if the defendant has purposefully directed [its] activities at residents of the forum, ***and*** the litigation results from alleged injuries that arise out of or relate to those activities." *Rosenberg v. Deutsche Bank AG*, No. 11-cv-02200-WJM-CBS, 2012 WL 3744632, at *4 (D. Colo. May 22, 2012) (emphasis added), *report and recommendation adopted sub nom. Rosenberg v. Deutsche Bank A.G.*, No. 11-cv-02200-WJM-CBS, 2012 WL 3744631 (D. Colo. Aug. 28, 2012) (citing *Beyer v. Camex Equip. Sales & Rentals, Inc.*, No. 10-cv-01580-WLM-MJW, 2011 WL 2670588, at *3 (D. Colo. July 8, 2011), *aff'd*, 465 F. App'x 817 (10th Cir. 2012)). Even if Plaintiffs had alleged that the Non-Resident Defendants purposefully directed activities at the forum and their claims arise out of or relate to those activities,

[4] Even if this Court could exercise general jurisdiction over MLB, which it cannot, it cannot exercise jurisdiction over Commissioner Manfred. *See Keeton v. Hustler Mag., Inc.*, 465 U.S. 770, 781 n.13 (1984) ("[J]urisdiction over an employee does not automatically follow from jurisdiction over the corporation which employs him; nor does jurisdiction over a parent corporation automatically establish jurisdiction over a wholly owned subsidiary."). In this regard, the Fourth Amended Complaint is completely silent regarding Commissioner Manfred's contacts with Colorado.

specific jurisdiction still would not exist where "the exercise of personal jurisdiction would offend traditional notions of fair play and substantial justice." *Old Republic*, 877 F.3d at 909 (citing *Shrader v. Biddinger*, 633 F.3d 1235, 1240 (10th Cir. 2011)).

This Court cannot exercise specific jurisdiction over the Non-Resident Defendants because Plaintiffs' age discrimination claims do not arise out of, and are completely unrelated to, whatever limited contacts the Non-Resident Defendants are alleged to have had in Colorado. Indeed, the allegations in the Fourth Amended Complaint make plain that there is absolutely no nexus whatsoever between Plaintiffs' failure-to-hire claims against the Non-Resident Defendants and this forum. Accordingly, specific jurisdiction over the Non-Resident Defendants does not exist.

**1. The Non-Resident Defendants Did Not Purposefully Direct Activities at Forum Residents.**

The purposeful direction requirement "ensures that a defendant will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts, or of the unilateral activity of another party or a third person." *Rosenberg, supra* (citing *Rambo v. Am. S. Ins. Co.*, 839 F.2d 1415, 1419 (10th Cir. 1988)).

The Non-Resident Defendants' forum-related activities alleged in the Fourth Amended Complaint are limited to the MLB games played and officiated in Colorado, revenue allegedly derived therefrom, and the fact that players are scouted in Colorado and may be selected in the MLB amateur draft. (Dkt. 60 ¶¶ 69(a)(ii), 69(b)). However, since 2020, no non-resident Club has played more than ten out of its 162 games per year in Colorado, with most Clubs playing here far less and certain Clubs not playing here at all in the last four seasons. (*See* Dkt. 60 69(b)(1).)[5] These

[5] The Court should take judicial notice of the number of times each Club played in Colorado between 2020 and 2023, as there can be no dispute, let alone a reasonable one, concerning this

activities are insufficient to be deemed purposeful direction at forum residents. *See, e.g., Shepherd v. U.S. Olympic Comm.*, 94 F. Supp. 2d 1136, 1142 (D. Colo. 2000).

Similarly, there is no allegation in the Fourth Amended Complaint that Defendants targeted Plaintiffs in Colorado, much less targeted Plaintiffs in Colorado regarding employment as required under the specific jurisdiction analysis. *See infra* at I.B.2. To the contrary, the allegations in the Fourth Amended Complaint against the Non-Resident Defendants are that the Plaintiffs—all of whom are residents of states *other than Colorado*—reached out to Clubs located in jurisdictions outside of Colorado.

**2. Plaintiffs' Claims Do Not Arise Out of or Relate to Defendants' Forum-Related Activities.**

As the Supreme Court made clear, "[f]or specific jurisdiction, a defendant's general connections with the forum are not enough." *Bristol-Myers Squibb Co. v. Superior Ct. of Cal., S. F. Cnty.*, 582 U.S. 255, 264 (2017). "In order for a court to exercise specific jurisdiction over a claim, there must be an 'affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State.'" *Id*. at 262 (citing *Goodyear*, 564 U.S. at 919). When there is no connection between the defendant's activities and the plaintiff's alleged injuries, "specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the State." *Id*. at 264 (citing *Goodyear*, 564 U.S. at 930 n. 6) ("[E]ven regularly occurring sales of a product in a State do not justify the exercise of jurisdiction over a

information. *See generally*, *O'Toole v. Northrop Grumman Corp.*, 499 F.3d 1218, 1225 (10th Cir. 2007) ("It is not uncommon for courts to take judicial notice of factual information found on the world wide web."). The Colorado Rockies' schedule, and the number of times each Club played here, is readily available. *See* https://www.mlb.com/rockies/schedule/2020-07; https://www.espn.com/mlb/team/schedule/_/name/col/season/2020.

claim unrelated to those sales"). Thus, even if Non-Resident Defendants' traveling to Colorado to play baseball games and scout players in the state were to satisfy the purposeful direction prong (which it does not), Plaintiffs cannot show that their failure-to-hire claims against the Non-Resident Defendants arise out of or relate to those activities.

In *Bristol-Myers Squibb*, the Supreme Court explained the "danger" in exercising specific jurisdiction when there is an inadequate link between the plaintiffs' claims and the forum state. 582 U.S. at 264.

> The State Supreme Court found that specific jurisdiction was present without identifying any adequate link between the State and the nonresidents' claims. As noted, the nonresidents were not prescribed Plavix in California, did not purchase Plavix in California, did not ingest Plavix in California, and were not injured by Plavix in California. The mere fact that *other* plaintiffs were prescribed, obtained, and ingested Plavix in California—and allegedly sustained the same injuries as did the nonresidents—does not allow the State to assert specific jurisdiction over the nonresidents' claims. . . .
>
> In today's case . . .[t]he relevant plaintiffs are not California residents and do not claim to have suffered harm in that State. In addition, as in *Walden*, all the conduct giving rise to the nonresidents' claims occurred elsewhere. It follows that the California courts cannot claim specific jurisdiction.

*Id*. at 264-65 (emphasis in original).[6]

The very same danger in exercising specific jurisdiction over the Non-Resident Defendants is present here, where the injury Plaintiffs claim to have sustained is the denial of employment in other states. (Dkt. 60 ¶ 71.) But, the Fourth Amended Complaint contains no allegations tying the

[6] In *Ford Motor Co. v. Montana Eighth Jud. Dist.*, the Supreme Court reaffirmed the need for a connection between plaintiffs' claims and the forum state. "Removing the need for any connection between the case and forum State would transfigure our specific jurisdiction standard as applied to corporations. "Case-linked" jurisdiction . . . would then become not case-linked at all." 141 S. Ct 1017, 1027 (2021).

Non-Resident Defendants' hiring decisions to any of their alleged contacts with Colorado. Critically, there is no plausible nexus between a Non-Resident Defendant's employment decisions and the sparse contacts alleged in the Fourth Amended Complaint. Indeed, Plaintiffs do not allege that the Non-Resident Defendants' alleged discrimination harmed them in Colorado, in part because no Plaintiff is a citizen of this state. Likewise, Plaintiffs do not allege that any Non-Resident Defendant injured them based on alleged discrimination that took place in Colorado. The absence of any such allegations is exactly what prompted the Supreme Court in *Bristol-Myers Squibb* to hold specific personal jurisdiction to be lacking. *See Bristol-Myers Squibb*, 582 U.S. at 265.

Therefore, Plaintiffs have not shown—and cannot show—that their age discrimination failure-to-hire claims in this litigation resulted from the Non-Resident Defendants' limited contacts with Colorado so as to satisfy the "arise out of" or "relate to" requirement for specific jurisdiction. *See, e.g., Shepherd*, 94 F. Supp. 2d at 1143 (dismissing plaintiff's discrimination claims against non-resident defendant where claims did not arise out of defendant's alleged contacts with Colorado); *Rosenberg*, 2012 WL 3744632, at *5 (same); *see also Mobley v. CIG Logistics LLC*, No. 1:22-CV-00226-WJ-LF, 2022 WL 4103980, at *2 (D.N.M. Sept. 8, 2022) (dismissing claims for lack of personal jurisdiction where alleged failure to pay wages to non-New Mexico employees traveling to North Dakota and Texas did not pertain to Defendants' activities in New Mexico).

The court's decision in *Hill v. AMB Sport & Ent., LLC*, No. 22-cv-2961, 2023 WL 2058066, at *6 (N.D. Ill. Feb. 16, 2023), also is instructive. In that case, Hill, a professional soccer coach, alleged that several soccer teams based outside of Illinois refused to hire him because of his race. The court declined to exercise specific jurisdiction for two principal reasons. First,

because "the alleged discriminatory conduct occurred in the respective states where the employment decisions were made—not in Illinois where Hill resides"—the court lacked jurisdiction even where the defendants' alleged conduct affected Hill in his home state of Illinois. *Id*., at *6. Second, regardless of where the unlawful conduct occurred, the court deemed it significant that "Hill reached out to these teams about the possibility of employment in their respective states—they did not seek him out." *Id*. The same is true here, where Plaintiffs allege to have reached out to the Non-Resident Defendants to seek employment; there are no allegations that any Defendant reached out to Plaintiffs, much less reached out to them in Colorado. Indeed, the case for jurisdiction is far weaker here than in Hill because there is no Plaintiff who resides in Colorado. *See also In re Nat'l Hockey League Players' Concussion Injury Litig*., 2019 WL 5088516, at *4 (holding no specific jurisdiction over National Hockey League because its "attenuated contacts are clearly not connected to [plaintiff's] claims" where plaintiff did not plead any injury in forum state resulting from the league's acts or omissions.)

Accordingly, the absence of any relationship between Plaintiffs' discrimination claims and Non-Resident Defendants' alleged contacts with this forum ends the specific jurisdiction inquiry.

**3. Even if there was a Relationship Between Plaintiffs' Claims and Non-Residents' Forum Contacts, The Exercise of Specific Jurisdiction Would Offend Traditional Notions of Fair Play and Substantial Justice.**

Even if Plaintiffs could demonstrate that their claims arise out of or relate to the Non-Resident Defendants' forum-related contacts (which they cannot), jurisdiction would still be lacking because the exercise of jurisdiction in this case would offend traditional notions of fair play and substantial justice. *See Melea*, 511 F.3d at 1065-66 (citation omitted). In evaluating this factor, courts consider: (1) the burden on the non-resident defendants, (2) the forum state's interest

in resolving the dispute, (3) the plaintiffs' interest in receiving convenient and effective 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. *See OMI Holdings*, 149 F.3d at 1095 (citation omitted); *Epstein v. Ohio State Univ.*, No. 10-cv-01327-ZLW-CBS, 2010 WL 3927794, at *2 (D. Colo. Oct. 4, 2010) (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985)).

The first factor, burden on foreign defendants, weighs against jurisdiction because the burden on the Non-Resident Defendants to litigate here, in many cases thousands of miles away from their home states, would be significant. The second factor, the interest of the forum state, also weighs against exercising jurisdiction because none of the Plaintiffs is a Colorado resident and resolution of Plaintiffs' claims does not require an application of Colorado law. *See OMI Holdings*, 149 F.3d at 1096 (citations omitted). The third factor "hinges on whether the Plaintiff may receive convenient and effective relief in another forum." *Id.* at 1097. The Fourth Amended Complaint contains no information suggesting that Colorado is the most efficient forum in which to litigate Plaintiffs' age discrimination claims. Since Plaintiffs are not Colorado residents and they reside across the country, they cannot credibly allege that this Court is the most convenient forum for them. Thus, the third factor weighs against exercising jurisdiction.

The fourth factor—the interstate judicial system's interest in obtaining the most efficient resolution of controversies—turns on the location of witnesses, where the underlying wrong occurred, which forum's law governs the case and whether jurisdiction is necessary to avoid piecemeal litigation. *Id.* (citations omitted). Plaintiffs do not allege that the Non-Resident Defendants committed any underlying wrong in Colorado, and they have not invoked Colorado

law in the Fourth Amended Complaint. The nature of Plaintiffs' failure to hire claims suggests that potential witnesses will be the Non-Resident Club Defendants' officials involved with hiring scouts, nearly all of whom are located outside of Colorado. As such, this factor also weighs against exercising personal jurisdiction over the Non-Resident Defendants.

The fifth and final factor "focuses on whether the exercise of personal jurisdiction by [the forum] affects the substantive social policy interests of other states or foreign nations." *Benton v. Cameco Corp.*, 375 F.3d 1070, 1080 (10th Cir. 2004) (citation omitted). Because at least some of the states where Plaintiffs reside have an express interest in preventing age discrimination in employment, *see, e.g.,* Fla. Stat. § 760.01(2); Tex. Labor Code Ann. § 21.001, this factor is at least neutral.

On balance, even if Plaintiffs could establish that their claims arise out of or relate to Non-Residents Defendants' forum-related activities—which they cannot—exercise of jurisdiction would not be appropriate because it would offend notions of fair play and substantial justice based on the five factors discussed above.

### C. Plaintiffs' Joint Employment, Conspiracy and Collective Action Allegations Do Not Confer Personal Jurisdiction Over Non-Resident Defendants.

In apparent recognition that Plaintiffs cannot satisfy the traditional tests for personal jurisdiction based on Non-Resident Defendants' contacts with Colorado, Plaintiffs purport to base personal jurisdiction on "joint employer/co-conspirator/collective action/class action theories." (Dkt. 60, ¶ 69 (c)). None of these so-called "theories" cures the fatal jurisdictional defects in the Fourth Amended Complaint.

**1. Joint Employment Allegations Do Not Confer Jurisdiction Over the Non-Resident Defendants.**

As noted above, each Plaintiff is suing only the specific Club or Clubs that allegedly refused to hire him plus the MLB Defendants as purported joint employers with each distinct Club. (Dkt. 60 ¶ 111.) Thus, only the MLB Defendants—not the Club Defendants—are alleged to be joint employers with the Colorado Rockies. (*Id.*) Plaintiffs' allegations of a joint employer relationship between each Club on the one hand and the MLB Defendants on the other cannot salvage their claims against Non-Resident Defendants because the Colorado Rockies' contacts in this forum cannot be imputed to the MLB Defendants. Any suggestion that the Non-Resident Clubs are subject to jurisdiction here based on an alleged joint employment theory is even more far-fetched because the Colorado Rockies and the twenty-nine other Clubs are not even alleged to be joint employers.

In any event, allegations of a joint employer relationship where only one of the alleged joint employers is a Colorado resident are insufficient to establish jurisdiction over the non-resident alleged joint employers. *See Kennedy v. Mountainside Pizza, Inc.*, No. 19-cv-01199-CMA-STV, 2020 WL 4454897, at *5 (D. Colo. May 14, 2020), *report and recommendation adopted*, No. 19-cv-01199-CMA-STV, 2020 WL 4448771 (D. Colo. Aug. 3, 2020) (noting that a majority of courts have rejected the joint employer theory of liability as a basis for personal jurisdiction) (citing *Wright v. Waste Pro USA, Inc.*, No. 17-cv-02654, 2019 WL 3344040, at *11 (D. S.C. July 25, 2019) (collecting cases); *Green v. Fishbone Safety Sols., Ltd.*, No. 16-cv-01594-PAB-KMT, 2017 WL 4012123, at *3 (D. Colo. Sept. 12, 2017) (collecting cases).

Instead, each Non-Resident Defendant's contacts with the forum state must be assessed individually. *E.E.O.C. v. Roark-Whitten Hosp. 2, LP*, No. 1:14-cv-00884-MCA-KK, 2016 WL

10587968, at *7 (D.N.M. Mar. 31, 2016) (citing *Keeton*, 465 U.S. at 781 n.13). That is because "[p]ersonal jurisdiction is proper only 'where the contacts proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum State." *Id.* (citing *Burger King Corp.*, 471 U.S. at 475 (emphasis in original)). Because the Non-Resident Defendants' lack sufficient contacts for this Court to exercise either general or specific personal jurisdiction, Plaintiffs cannot cure that defect by alleging a joint employment relationship.

**2. Plaintiffs Cannot Establish Jurisdiction by Alleging a Conspiracy to Violate the ADEA.**

Plaintiffs' suggestion that all Defendants are subject to personal jurisdiction based on a supposed "co-conspirator" theory is wrong. (Dkt. 60 ¶ 69(c).) That is because the conspiracy theory of jurisdiction requires the existence of a legally recognized conspiracy, which is absent here. *See Purple Onion Foods, Inc. v. Blue Moose of Boulder, Inc.*, 45 F. Supp. 2d 1255, 1258 (D.N.M. 1999). The Fourth Amended Complaint is limited to one count based on an alleged violation of the ADEA and is entirely devoid of any conspiracy cause of action.

Moreover, Plaintiffs cannot rely on an alleged conspiracy to violate the ADEA because that is not a legally cognizable conspiracy. As courts have consistently found, "[t]he deprivation of a right created by [the ADEA] cannot be the basis for a civil conspiracy cause of action." *Francis v. Perez*, 256 F. Supp. 3d 1, 6 (D.D.C. 2017); *see also Schwinn v. Hum. Affairs Int'l, Inc.*, No. 99-4140, 2000 WL 731785, at *1 (10th Cir. June 8, 2000) ("Violation of the ADEA cannot form the basis for a § 1985(3) claim.") (unpublished opinion) (citing *Sherlock v. Montefiore Med. Ctr.*, 84 F.3d 522, 527 (2d Cir. 1996)); *Piersall v. Crane Carrier Co.*, No. 08-CV-116-TCK-SAJ, 2008 WL 4632920, at *2 (N.D. Okla. Oct. 16, 2008) ("…the Court concludes that age-based discriminatory animus cannot be the underlying 'class-based' animus forming the basis of a § 1985(3) claim.");

*Watkins v. Rite Aid Corp.*, No. 4:06cv00299, 2006 WL 2085992, at *3 (M.D. Pa. July 25, 2006) ("We initially note that ample applicable case law reveals that no valid claim for conspiracy to violate the ADEA exists.") (collecting cases); *Apsley v. Boeing, Co.*, No. 05-1368-MLB, Dkt. 239 at 6-7 (D. Kan. May 21, 2008) (denying plaintiff's motion to amend complaint to add cause of action for civil conspiracy under state law as futile because civil conspiracy claim was preempted by ADEA).

Because there is no conspiracy claim in the Fourth Amended Complaint—and there can be no conspiracy to violate the ADEA—Plaintiffs cannot rely on a co-conspirator theory to establish personal jurisdiction over the Non-Resident Defendants.

**3. There is No "Collective Action/Class Action" Theory of Jurisdiction.**

Plaintiffs' reliance on a "collective action/class action" theory of personal jurisdiction is equally unavailing. (Dkt. 60 ¶ 69(c).) As an initial matter, the Fourth Amended Complaint no longer contains any class action allegations. Plaintiffs dropped all state and city law claims alleged in the Second Amended Complaint that had been the subject of their proposed Rule 23 classes, and those claims are no longer part of this case. *See infra* at III.

Although Plaintiffs purport to bring their ADEA claims as a putative collective action, that is irrelevant to the personal jurisdiction inquiry. When a case is filed on a representative basis, courts may not consider the hypothetical claims of unnamed putative collective members when considering jurisdiction; only the claims of the named plaintiffs are relevant to the jurisdiction inquiry. *See Orion Prop. Grp., LLC v. Hjelle*, No. 17-cv-2738-KHV, 2018 WL 6570495, at *7 n. 10 (D. Kan. Dec. 13, 2018) (citations omitted) (holding that "the claims of unnamed members of a proposed class which has not been certified are not relevant to whether the Court has personal

jurisdiction over defendant."); *Marso v. Safespeed, LLC*, No. 19-cv-2671-KHV, 2020 WL 4464410, at *5 n.7 (D. Kan. Aug. 4, 2020) (same).

Insofar as this Court has neither general nor specific personal jurisdiction over the Non-Resident Defendants, the Court should dismiss the Non-Resident Defendants for lack of personal jurisdiction.

## II. ALL CLAIMS AGAINST NON-RESIDENT DEFENDANTS SHOULD BE DISMISSED BECAUSE PLAINTIFFS HAVE NOT ALLEGED—AND CANNOT ALLEGE—ANY FACTS TO SUPPORT VENUE IN THIS DISTRICT.

This Court should dismiss the Fourth Amended Complaint for the independent reason that venue is improper as to the Non-Resident Defendants. Plaintiffs predicate venue on 28 U.S.C. § 1391(b)(2) based on their allegations that (i) the Colorado Rockies are located in this district; (ii) each Defendant conducts business in this district by playing, officiating or otherwise conducting MLB games in this division; and (iii) a substantial part of the conduct giving rise to Plaintiffs' claims occurred in this district. (Dkt. 60 ¶ 70.) These conclusory allegations are insufficient to establish venue in this judicial district and are contrary to the allegations in the Fourth Amended Complaint.

The general venue statute, 28 U.S.C. § 1391 applies to Plaintiffs' ADEA claims. *See, e.g., Standifer v. J.B. Hunt Transp., Inc.*, No. 22-cv-2069-JAR-GEB, 2022 WL 5038198, at *3 (D. Kan. Oct. 4, 2022). The specific venue provision Plaintiffs invoke in the Fourth Amended Complaint, 28 U.S.C. § 1391(b)(2) (Dkt. 60 ¶ 52), provides that "[a] civil action may be brought in . . . a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated."

"[V]enue statutes are generally designed for the benefit of defendants, and in determining what events or omissions give rise to a claim the 'focus [is] on relevant activities of the defendant, not of the plaintiff.'" *Nagim v. Jackson*, No. 10-cv-00328-PAB-KLM, 2010 WL 4318896, at *3 (D. Colo. Aug. 10, 2010), *report and recommendation adopted*, No. 10-cv-00328-PAB-KLM, 2010 WL 4318888 (D. Colo. Oct. 25, 2010) (citing *Goff v. Hackett Stone Co.*, No. 98–7137, 1999 WL 397409, at *1 (10th Cir. June 17, 1999)).

Plaintiffs do not (and cannot) allege that the Non-Resident Defendants' decisions not to hire Plaintiffs occurred in this district or that any of the activities associated with those decisions, *e.g.*, interviews or other communications initiated by the Non-Resident Defendants, occurred in this district. Moreover, Plaintiffs are not Colorado residents, and they do not allege any activity in this judicial district related to their efforts to obtain employment.

In these circumstances, Plaintiffs cannot establish that *any* events or omissions giving rise to their claims against the Non-Resident Defendants occurred in this district, much less a "substantial part of the events or omissions" as required under the venue provision on which Plaintiffs rely. 28 U.S.C. § 1391(b)(2). *See*, *e.g.*, *Allman v. Barr*, 826 F.App'x 702 (10th Cir. 2020) (affirming dismissal where plaintiff failed to show that a substantial part of the events or omissions giving rise to the claim occurred in the forum) (unpublished); *Transp. Funding, LLC v. HVH Transp., Inc.*, No. 2:17-CV-2106-JAR-GLR, 2017 WL 4223126, at *4 (D. Kan. Sept. 22, 2017) (finding venue improper under § 1391(b)(2) where "all the significant acts undertaken by [defendant] that give rise to [plaintiff's] claims occurred outside" the forum); *Smith v. Patel*, No. CIV-15-7-M, 2015 WL 3407389, at *2 (W.D. Okla. May 26, 2015) (finding improper venue under § 1391 (b)(2) where plaintiffs failed to allege a substantial part of the events or omissions giving

rise to the claim occurred). Accordingly, the Fourth Amended Complaint should be dismissed for improper venue.

## III. THE STATE AND CITY LAW CLAIMS PLAINTIFFS ABANDONED SHOULD BE DISMISSED WITH PREJUDICE AND WITH AN AWARD OF FEES AND COSTS.

The Second Amended Complaint that was the subject of Defendants' prior Motion to Dismiss contained thirteen purported causes of action under the laws of eleven different states and one city. (*See* Dkt. 26, Counts II-XIV.) All Defendants moved to dismiss five of those counts; and most Defendants moved to dismiss the balance of the claims for either failure to state a claim and/or lack of subject matter jurisdiction. (*See* Dkt. 39 at 29-42.)

Plaintiffs did not oppose Defendants' Motion to Dismiss the state and city law claims (Dkt. 51), and instead filed the Motion for Leave and proposed Third Amended Complaint that dropped all of the state and city law claims. (Dkt. 50, 50-1). According to Plaintiffs, they abandoned all state and city law claims because they determined that they cannot satisfy the numerosity requirement of Rule 23 for class-wide treatment for any of the proposed classes. (Dkt. 51 at 14.) Plaintiffs stated that they "voluntarily dismiss these claims without prejudice." (*Id*.) For the reasons set forth below, the dismissal of the state and city law claims should be with prejudice and with an award of attorneys' fees and costs.[7]

### A. The Dropped Claims Should Be Dismissed With Prejudice.

A court may dismiss a plaintiff's claims with prejudice pursuant to granting a plaintiff's Rule 15 motion for leave to amend where the proposed amendment drops the claims at issue. *See*

[7] In its Order granting Plaintiffs' Motion for Leave, the Court stated that Defendants may seek a with prejudice dismissal of the dropped claims and an award of attorneys' fees and costs in this instant Rule 12 motion. (Dkt. 58.)

*Panduit Corp. v. All States Plastic Mfg. Co., Inc.*, No. 76 C 4012, 1981 WL 66992, at *1 (N.D. Ill. Mar. 20, 1981); *Bailey v. U.S.F. Holland, Inc.*, No. 3:15-cv-0025, 2015 WL 2125137, at *5 (M.D. Tenn. May 6, 2015). There are two reasons why the Court should dismiss the dropped claims with prejudice.

First, Defendants have been prejudiced by the inclusion of the state and city law claims in the first instance. The Second Amended Complaint contained fourteen purported causes of action—thirteen of which were state and city law claims under the laws of eleven different states and one city, which Plaintiffs simply drop. All thirteen of those state and city law claims were subject to dismissal because they failed to state a claim. Indeed, Defendants devoted a significant portion of the Motion to Dismiss to the state and city law claims. (*See*, *e.g.*, Dkt. 39 at 29-42). This briefing could have been avoided had Plaintiffs made a diligent, good faith inquiry into their claims prior to being filed—as they were required to do pursuant to Rule 11—when they would have discovered (i) that the class action allegations lacked evidentiary support, as the very same numerosity concerns that somehow manifested after Defendants filed their motion to dismiss certainly were present at the time Plaintiffs filed the first three versions of their complaint; and (ii) most of the state and city law claims were not "warranted by existing law," either because no private cause of action exists and, even if it did, Plaintiffs could not plead any set of facts that would entitle them to relief. (*See id.*)

Second, Plaintiffs have already submitted an Opposition in which they admittedly failed to respond to Defendants' arguments in support of the Motion to Dismiss the state and city law claims for failure to state a claim. (Dkt. 51 at 14.) In these circumstances, Plaintiffs have waived their claims as well as any argument that their claims should not be dismissed with prejudice. *See*

*Northcutt v. Fulton*, No. CIV-20-885-R, 2020 WL 7380967, at *2 (W.D. Okla. Dec. 15, 2020) ("Courts routinely deem an issue 'waived' when a party fails to respond to a movant's substantive argument."); *Rock Roofing, LLC v. Travelers Cas. & Sur. Co.*, 413 F. Supp. 3d 1122, 1128 (D.N.M. 2019) (plaintiff's failure to respond to defendant's argument in the motion to dismiss waived the issue).

**B. Defendants Are Entitled to Fees and Costs.**

A court may grant an award of fees and costs to a defendant as a condition on a grant to plaintiff of a leave to amend. *AeroTech, Inc. v. Estes*, 110 F.3d 1523, 1528 n.1 (10th Cir. 1997) (noting that a defendant may recover fees and costs with respect to a dismissal without prejudice).

"For example, a district court, in its discretion, may impose costs pursuant to Rule 15 as a condition of granting leave to amend in order to compensate the opposing party for additional costs incurred because the original pleading was faulty." *Creative Gifts, Inc. v. UFO*, No. 97-1266, 1999 WL 35809656, at *4 (D.N.M. Apr. 20, 1999) (citing *Gen. Signal Corp. v. MCI Telecomms. Corp.*, 66 F.3d 1500, 1514 (9th Cir. 1995)).

In *Gipson v. Southwestern Bell Telephone Co.*, No. 08-2017-KHV-DJW, 2008 WL 4307617, at *7 (D. Kan. July 18, 2008), the court ruled that plaintiff's dismissal of state law claims and Rule 23 class allegations under a Rule 15 motion for leave to amend be with payment of defendant's attorney's fees. The court reasoned that "Defendant was required to expend time and resources in filing its motion to dismiss concerning Plaintiff's state law claims and class allegations that it would not otherwise have had to expend had Plaintiff not asserted its [untenable] state law claims. Plaintiff's counsel should have determined, prior to filing the Complaint, that…those claims" could not be sustained. *Id.*, at *6.

The same concerns are present here. Like *Gipson*, Defendants here moved to dismiss Plaintiffs' state law claims, and, in their Third Amended Complaint, Plaintiffs abandon these claims for reasons known to them—or that should have been known—before they filed their claims. (Dkt. 50-1). Like in *Gipson*, Defendants expended time and resources in researching and drafting their Motion to Dismiss concerning Plaintiffs' claims under the laws of eleven different states and one city. And, as in *Gipson*, Plaintiffs' withdrawal of claims is not based on new information. To the contrary, Plaintiffs had an obligation to conduct a good faith investigation of the factual allegations underlying their claims; Plaintiffs could have determined—indeed, should have determined—prior to filing the initial Complaint and their first two amended Complaints, that their state and city law class claims could not be sustained. *See, e.g.*, Rule 11(b)(2). Accordingly, Defendants should be awarded fees and costs related to the dismissal of Plaintiffs' state and city law claims.

## IV. THE FOURTH AMENDED COMPLAINT SHOULD BE DISMISSED WITHOUT LEAVE TO AMEND.

After amending their Complaint *four times*—including *twice* after Defendants moved to dismiss the Second Amended Complaint—Plaintiffs have been unable to establish that this Court has personal jurisdiction over the Non-Resident Defendants. Indeed, Plaintiffs expressly stated that the purpose of the Third Amended Complaint was to cure the jurisdictional defects raised in Defendants' Motion to Dismiss the Second Amended Complaint. (Dkt. 50 at 5.) This Court now has the benefit of seeing two of Plaintiffs' proposed amendments following the Motion to Dismiss—amendments specifically intended to establish jurisdiction, and they are futile. Given their inability to sufficiently plead the threshold issue of jurisdiction after *five* attempts, Plaintiffs will be unable to demonstrate that they could plead additional facts on the next turn. Accordingly,

this Court should grant the Non-Resident Defendants' motion and dismiss the Fourth Amended Complaint without leave to amend. *See, e.g., Goodwin v. Bruggeman-Hatch*, No. 13-cv-02973-REB-MEH, 2014 WL 2109426, at *1 (D. Colo. May 20, 2014) (granting Rule 12(b)(2) motion and denying leave to amend); *Rosenberg*, 2012 WL 3744631, at *5 (denying plaintiff's request for leave to amend the complaint because it "would not change the Court's inability to maintain personal jurisdiction over Defendants").

## CONCLUSION

Defendants respectfully request that the Court dismiss the Fourth Amended Complaint as to the Non-Resident Defendants for lack of personal jurisdiction and for improper venue without leave to amend. Defendants further request that the dismissal of the state and city law claims that had been alleged in the Second Amended Complaint but dropped in the Third and Fourth Amended Complaints be with prejudice and with an award of attorneys' fees and costs to Defendants.

Dated: February 20, 2024

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**PRACTICE STANDARD III(A)(1) CERTIFICATION**

I hereby certify that the foregoing motion complies with the type-volume limitation set forth in Judge Domenico's Practice Standard III(A)(1), as modified by the Court's Order of February 8, 2024 (Dkt. 62).

*s/ Mary L. Will*

**CERTIFICATE OF SERVICE**

I hereby certify that on this 20th day of February 2024, a true and correct copy of the foregoing **DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' FOURTH AMENDED COMPLAINT** was e-filed with the Court and e-served through CM/ECF which will send notification of such filing to all registered participants.

*s/ Veronica Thomas*
Veronica Thomas, Legal Administrative Assistant

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