IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior Judge R. Brooke Jackson

Civil Action No. 1:20-cv-01121-RBJ
Consolidated with 1:20-cv-01881-RBJ-KLM; 1:20-cv-01134-RBJ; 1:20-cv-01163-RBJ-KLM; 1:20-cv-01176-RBJ; 1:20-cv-01468-RBJ-KLM; 1:20-cv-01475-RBJ; 1:20-cv-01529-RBJ; 1:20-cv-01585-RBJ-KLM; and 1:20-cv-01364-KLM

MICHAEL McAULIFFE,
MCKENNA CONNOLLY,
STEPHEN CONTI,
STEVEN BEILEY,
TERRY CHECHAKLI,
NORMAN CHENEY, and
MATTHEW BALKMAN, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

THE VAIL CORPORATION,
D/B/A VAIL RESORTS MANAGEMENT COMPANY D/B/A VAIL RESORTS, INC.,

Defendant.

ORDER ON MOTION TO DISMISS

Plaintiffs Michael McAuliffe et al., on behalf of themselves and a class of similarly situated individuals who purchased 2019–2020 season passes ("Passholders") from defendant, the Vail Corporation ("Vail"), were unable to use their passes after Vail closed its ski resorts due to the COVID-19 pandemic. Passholders filed a second amended complaint with the Court after the Tenth Circuit remanded the case so that Passholders could plead their claims with prayers for relief other than refunds. *See McAuliffe v. Vail Corp.*, 69 F.4th 1130 (10th Cir. 2023). Vail

moved to dismiss all claims under Rule 12(b)(6). ECF No. 147. For the reasons stated below, Vail's motion is **GRANTED**.

BACKGROUND

This matter is before the Court on Vail's motion to dismiss. ECF No. 147 ("Motion" or "Motion to Dismiss"). Vail closed its resorts in March of 2020 as a result of the COVID-19 pandemic, and on April 27, 2020, after Passholders initially filed suit, Vail announced that it would issue credits varying from 20–28 percent of the pass purchase price to impacted passholders, who could redeem the credits by purchasing a 2020–2021 pass. ECF No. 62 at ¶¶ 40–41. Passholders brought a putative class action lawsuit asserting contractual, quasi-contractual, and state consumer protection claims and seeking refunds for the unused portions of their 2019–2020 passes. ECF No. 62. Vail previously moved to dismiss all claims, ECF No. 74, and the Court granted that motion, ECF. No. 103 ("Order"). Passholders appealed. ECF No. 108.

The Tenth Circuit agreed with my determination that Passholders failed to adequately plead their contractual claims and affirmed the dismissal of Passholders' two quasi-contractual claims. ECF No. 132-1 at 3. The Tenth Circuit held that dismissal of Passholders' breach of contract and breach of warranty claims was appropriate, since Passholders sought only refunds as a remedy for these claims—a remedy expressly prohibited by their contracts—but vacated and remanded the case for me to modify the judgment to be a dismissal without prejudice so that Passholders could refile their claims to seek an alternative remedy. ECF No. 132-1 at 3–4.

Passholders did so, filing a second amended complaint (now the operative complaint) with prayers for relief of "actual damages, exemplary and equitable monetary relief to Passholders and the Class and/or order Vail to return to Passholders and the Class the amount

each paid to Vail as allowed by applicable law," "pre-judgment and post-judgment interest on such monetary relief," "injunctive and/or declaratory relief," and reasonable attorneys' fees and costs. ECF No. 141 at 37 ("Second Amended Consolidated Complaint" or "SACC"). Vail moved to dismiss once more. Motion. Passholders responded. ECF No. 148 ("Response"). Vail replied. ECF No. 150 ("Reply").

LEGAL STANDARD

To survive a Rule 12(b)(6) motion to dismiss, the complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A plausible claim is a claim that "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). While the Court must accept the well-pled allegations of the complaint as true and construe them in the light most favorable to the plaintiff, *Robbins v. Wilkie*, 300 F.3d 1208, 1210 (10th Cir. 2002), conclusory allegations are not entitled to the presumption of truth. *Iqbal*, 556 U.S. at 681. However, so long as the plaintiff offers sufficient factual allegations such that the right to relief is raised above the speculative level, they have met the threshold pleading standard. *See, e.g., Twombly*, 550 U.S. at 556; *Bryson v. Gonzales*, 534 F.3d 1282, 1286 (10th Cir. 2008). The court may consider evidence beyond the complaint without converting a motion to dismiss to one for summary judgment if the documents are central to the claims, referred to in the complaint, and if the parties do not dispute their authenticity. *Cty. of Santa Fe, N.M. v. Pub. Serv. Co. of N.M.*, 311 F.3d 1031, 1035 (10th Cir. 2002).

ANALYSIS

I. BREACH OF CONTRACT

Passholders again allege breach-of-contract claims. The elements of a breach-of-contract claim under Colorado law are (1) the existence of a binding agreement; (2) plaintiff's performance of plaintiffs' obligations or some justification for non-performance; (3) defendant's failure to perform its obligations; and (4) damages resulting therefrom (causation). *W. Distrib. Co. v. Diodosio*, 841 P.2d 1053, 1058 (Colo. 1992); *Spring Creek Expl. & Prod. Co., LLC v. Hess Bakken Inv., II, LLC*, 887 F.3d 1003, 1033 (10th Cir. 2018).

In my previous Order, I found that Passholders failed to allege the third element, that Vail failed to perform its obligations, and that the contract required Vail to keep resorts open until it determined, in good faith, that skiing and snowboarding safely were no longer possible. Order at 6. I also found that Vail had discretion to determine when skiing became too dangerous and was obligated to exercise its discretion in good faith. *See Amoco Oil Co. v. Ervin*, 908 P.2d 493, 498 (Colo. 1995) ("The duty of good faith and fair dealing applies when one party has discretionary authority to determine certain terms of the contract."). Finally, I found that Passholders had failed to identify a textual basis for their proposed definition of a ski season. *Id*. On appeal, the Tenth Circuit determined that the term "ski season" in Passholders' and Vail's contracts is susceptible to more than one reasonable interpretation and could be "reasonably interpreted to mean a season ending when skiing and snowboarding are no longer: (1) safe; (2) possible based on snow conditions; or (3) permitted based on Vail's discretion, exercised in good faith," but that even if the meaning of "ski season" is ambiguous, Passholders are not entitled to the remedy they

seek. *McAuliffe*, 69 F.4th at 1146. As a result, Passholders did not successfully allege that Vail failed to perform its contractual obligations and any damages resulting therefrom.

In their Second Amended Consolidated Complaint, Passholders once again largely ignore the 2020–2021 ski season credits that Vail offered, stating only that the credits required an additional purchase from Vail, and that many 2019–2020 passholders did not renew their passes—in other words, use the credits—by Vail's September 2020 deadline. SACC at ¶¶ 38–39. In doing so, Passholders have failed to assert how Vail failed to perform its obligations under the contract, which specifically bars refunds, when it offered credits for the next ski season after closing its resorts in March of 2020 due to the COVID-19 pandemic.

In comparison, for example, Chief Judge Brimmer of the U.S. District Court for the District of Colorado granted a motion to dismiss, finding that airline ticket passengers who alleged that Frontier Airlines cancelled their flights, refused to give them refunds, and offered them 90-day travel credits failed to plausibly allege that the airline had breached its contract. *In re Frontier Airlines Litig.*, 559 F. Supp. 3d 1146 (D. Colo. 2021). In that case, consumers arguably faced a worse fare: Frontier credits expired in June of 2020, which meant that airline ticket passengers had a shorter window of opportunity to use their credits, as opposed to Passholders, who had until September of 2020 to use their credits to purchase a ski pass at a discounted rate, valid through the end of the 2020–2021 ski season. *Id*. at 1151. Frontier also falsely told one plaintiff in writing that she would receive travel credits that would be valid until March of 2021, even though the credits expired in June of 2020, *Id*. at 1152, whereas Passholders allege no such conduct on the part of Vail. And rather than stating that the airline would not issue refunds, Frontier's contract explicitly stipulated the possibility of refunds for canceled flights: "In the event a passenger's flight is canceled [by Frontier], . . . Frontier will provide

transportation . . . [but] [i]f Frontier cannot provide the foregoing transportation, Frontier shall, if requested, provide a refund for the unused portion of the passenger's ticket in lieu of the transportation under the foregoing." *Id*. at 1150. Judge Brimmer pointed out that "plaintiffs provide no allegations concerning Frontier's exercise of its discretion or whether it did so improperly under the Contract." *Id*. at 1161. Here, too, Passholders provide no allegations concerning Vail's exercise of its discretion over whether skiing and snowboarding safely were no longer possible after Vail decided to close its resorts. And, in fact, Passholders admit that "Vail had valid reasons for the closures" in their response. Response at 9.

Passholders also again fail to identify a textual basis for their proposed definition of a ski season. Under Passholders' breach of contract theory, "Vail breached its contract with Plaintiffs and the Class by failing to provide the promised and prepaid season-long access, rendering the 2019–2020 Epic Passes useless and void for a substantial portion of the ski season," SACC at ¶ 52, but do not point to language in the contract to support this assertion.

I find that Passholders have not alleged breach-of-contract claims, Count I in their Second Amended Consolidated Complaint, that "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678.

II. BREACH OF WARRANTY

Passholders again allege breach-of-warranty claims. To succeed on this claim, Passholders must allege sufficient facts to plausibly show that 1) a warranty existed; 2) the defendant breached the warranty; 3) the breach proximately caused the losses claimed as damages; and 4) timely notice of the breach was given to defendant. *McAuliffe*, 69 F.4th at 1151 (citing *Fiberglass Component Prod., Inc. v. Reichhold Chems., Inc.*, 983 F. Supp. 948, 953 (D. Colo. 1997); *Palmer v. A.H. Robins Co., Inc.*, 684 P.2d 187, 205–08 (Colo. 1984)).

Under Passholders' breach-of-warranty theory, "Vail created an express warranty through its advertising statements that the Epic Season Passes would provide access for the entire 2019–2020 season, and . . . Vail breached this warranty by failing to provide access to its resorts throughout the entire 2019–2020 ski season." SACC at ¶¶ 56, 58. In my Order, I found that "the promise that a pass would provide 'unlimited, unrestricted access' was a promise to impose no cap or holiday blackout dates on that pass." Order at 18. Plaintiffs do not allege that Vail imposed such limits or restrictions and do not provide additional support from the contract in support of their proposed definition of "ski season." *Id*. at 18–19. In their Second Amended Consolidated Complaint, Passholders again fail to allege that Vail breached the above promise.

Vail argues that Passholders' breach-of-warranty claim fails for the same reasons that Passholders' breach-of-contract claim fails: because Passholders "can recover no contract remedy and any losses were caused by COVID-19 and the governmental orders." *Id*. at 9. Vail argues that Passholders' breach-of-contract claims fail due to the lack of any plausible allegation of injury caused by Vail Resorts, rather than by a global pandemic unrelated to Vail Resorts' conduct. Motion at 7 (citing *Cty. of Westminster v. Centric-Jones Constructors*, 100 P.3d 472, 478 (Colo. App. 2003) ("Damages must also be traceable to and the direct result of the wrong sought to be redressed.") (internal quotes omitted). In short, Vail contends that because some or all of Vail's resorts were subject to state and local orders requiring non-essential businesses to implement various prevention measures or close entirely due to the COVID-19 pandemic, which the President declared a "national emergency," any injury Passholders "sustained was caused by the COVID-19 emergency and resulting government orders—not by Vail Resorts." *Id*. at 8. Passholders respond that "Vail points to COVID-19 and government actors to try and avoid responsibility for Plaintiffs' injuries" and that "Plaintiffs' loss of access to the resorts was the

direct result of Vail's closing the resorts. The fact that Vail had valid reasons for the closures does not break the chain of causation." Response at 9. Passholders argue that the question of proximate cause is one of fact for the jury. *Id*. (citing *Calandro v. First Cmty. Bank & Tr. Co. of Lone Grove, Oklahoma*, 991 F.2d 640, 642 (10th Cir. 1993)).

However, while the Tenth Circuit in *Calandro* acknowledged that "generally 'the question of proximate cause is one of fact for the jury,'" the "question of proximate cause becomes a question of law if there is no evidence from which the jury could find proximate cause." *Calandro*, 991 F.2d at 642 (citing *Henry v. Merck and Co., Inc.*, 877 F.2d 1489 (10th Cir.1989)). *See also Goodwill Indus. of Cent. Oklahoma, Inc. v. Philadelphia Indem. Ins. Co.*, 21 F.4th 704, 714 (10th Cir. 2021) (holding that the dominant cause of Goodwill's losses—the efficient proximate cause—was the outbreak and spread of COVID-19, not the insurance company's policy). And, again, Passholders' complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Ridge at Red Hawk, L.L.C.*, 493 F.3d at 1177.

I find that Passholders have not offered sufficient factual allegations such that the right to relief is raised above the speculative level, and therefore, they have not met the threshold pleading standard to survive a motion to dismiss. *See, e.g., Twombly*, 550 U.S. at 556. As such, I find that Passholders have not alleged breach-of-warranty claims, Count II in their Second Amended Consolidated Complaint, that "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678.

III. STATE CONSUMER PROTECTION CLAIMS

A. Colorado Consumer Protection Act

Passholders allege that Vail's actions violated the Colorado Consumer Protection Act ("CCPA"), Col. Rev. Stat. 6-1-101, *et seq*. More specifically, Passholders allege that Vail's

failure to disclose "that it would not make consumers whole if it closed the slopes before the end of the 2019–2020 season (despite favorable snow conditions) induced consumers" to enter into the transaction of purchasing ski season passes under Col. Rev. Stat. 6-1-105(u). SACC at ¶ 68. Passholders also allege that Vail "made false representation as to the characteristics, benefits, and uses of the ski passes when it represented to consumers that the passes will provide access for the entire 2019–2020 ski season, in violation of Col. Rev. Stat. 6-1-105(e)." *Id*. at ¶ 70. "Vail thereby engaged in an unfair, unconscionable, deceptive, deliberately misleading, false, and/or fraudulent act or practice in violation of Col. Rev. Stat. 6-1-105(rrr)," Passholders conclude. *Id*. at ¶ 69.

Vail argues that Passholders cannot plausibly allege that "Vail Resorts knew when Plaintiffs bought their passes that COVID-19 would cause its resorts to close in March 2020" or that Passholders "were misled into thinking that Vail Resorts would 'make them whole' for an allegedly shortened ski season, when the contract itself told consumers they would not receive a 'refund of any kind.'" Motion at 2. This is because "[t]o be a deceptive trade practice under the CCPA, 'a false or misleading statement' must be made 'with knowledge of its untruth, or recklessly and willfully made without regard to its consequences, and with an intent to mislead and deceive the plaintiff.'" *Id*. at 10 (quoting *Campfield v. State Farm Mut. Auto. Ins. Co.*, 532 F.3d 1111, 1120 (10th Cir. 2008)).

Passholders respond that they "never alleged that Vail saw the pandemic coming, but they *do* allege culpable knowledge at the time of advertising and sale. Plaintiffs allege Vail knew that, despite consumer expectations to the contrary, it would not make consumers 'whole' if, for any reason, it failed to provide access for the entire season." Response at 12. Passholders further argue that "consumers expect to be made whole for denial of pre-paid access, even if the

contract says 'no refunds,'" and cites music festivals Coachella and Summerfest, as well as the Colorado Rockies baseball team, as entities that provided access to the next year's events, full refunds, or credits as a result of cancellations due to COVID-19, despite contracts that all stated, "no refunds." *Id*. In fact, according to Passholders, that "Vail made a partial disclosure of its intentions (regarding "refunds") but did not disclaim any other legal remedies (such as replacement skiing time) would lead a reasonable consumer to believe that alternative remedies were NOT disclaimed and would instead be used to make them whole in the event Vail closed before the end of the season." *Id*. at 13 (internal punctuation omitted).

Finally, Passholders argue that "Vail's argument that a consumer would be placed 'on notice' they would not be made whole by the 'no refunds' provision" is "a factual argument which runs contrary to the allegations of the SACC, and . . . cannot be resolved on a motion to dismiss." *Id*. at 12–13 (citing *Wingert v. Auto-Owners Ins. Co.*, No. 19-cv-01917, 2020 WL 11193300 at *3 (D. Colo. July 29, 2020) (a question of fact is "inappropriate" for resolution on a motion to dismiss)). Likewise, Passholders argue, "the question whether specific conduct is deceptive, misleading, or unfair cannot be resolved at the dismissal stage," and the authorities that Vail cites, *Campfield v. State Farm Mut. Auto. Ins. Co.*, 532 F.3d 1111 (10th Cir. 2008) and *Rhino Linings USA, Inc. v. Rocky Mountain Rhino Lining, Inc.*, 62 P.3d 142 (Colo. 2003), were not decided on a motion to dismiss. *Id*. at 13–14 (citing *Benton v. Avedon Eng'g, Inc.*, No. 10-cv-01899, 2012 WL 5869126 at *15 (D. Colo. Aug. 15, 2012) ("whether a certain act is deceptive or misleading for the purposes of [a] CCPA claim[ ] is a question of fact for the fact-finder")).

Passholders' arguments are unpersuasive. Although "Passholders could have reasonably understood the advertisements to promise access to Vail's ski resorts for a period longer than the resorts remained open," *McAuliffe*, 69 F.4th at 1156, it would be speculative to assert that

Passholders were reasonably misled or deceived into believing Vail would provide other forms of monetary compensation—when its contract expressly bars refunds—or access to its resorts during subsequent ski seasons without having to purchase a new pass—when the contract is silent on this issue. Passholders vaguely claim that Vail's alleged misleading act was failing to disclose that "it would not make consumers whole if it closed the slopes before the end of the 2019–2020 season (despite favorable snow conditions)." SACC at ¶¶ 79, 91, 95. Passholders do not allege above the speculative level that Vail intended to mislead and deceive them.

As such, I find that Passholders have failed to provide sufficient factual allegations such that the right to relief is raised above the speculative level, and therefore, they have not met the threshold pleading standard. *See, e.g., Twombly*, 550 U.S. at 556; *Bryson v. Gonzales*, 534 F.3d 1282, 1286 (10th Cir. 2008). *See also Travelers Indem. Co. of Illinois v. Hardwicke*, 339 F. Supp. 2d 1127, 1133 (D. Colo. 2004) (granting motion to dismiss CCPA claim because plaintiff failed "to allege the required knowing false statements" under the statute). Passholders have not alleged Colorado Consumer Protection Act claims, Count III in the Second Amended Consolidated Complaint, that "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678.

B. Other State Consumer Protection Claims

Passholders also allege consumer protection violations under state consumer protection statutes in nine states other than Colorado—California, New York, Illinois, Florida, Washington, Connecticut, New Jersey, Minnesota, and Massachusetts—all of which prohibit deceptive business practices.[1] "All of Passholders' claims were based on the same premise—that Vail

[1] Passholders bring claims under the California Consumer Legal Remedies Act (on behalf of the California subclass), Cal. Civ. Code § 1750, *et seq.*, SACC at 19–21; the California Unfair

acted wrongfully by selling Passholders Epic Passes that it advertised as providing access to its resorts for the entire 2019–2020 ski season and refusing to issue partial refunds despite closing its resorts prior to the end of said season." *McAuliffe*, 69 F.4th at 1140.

Vail argues that "all [the claims brought forth under state consumer protection laws] except the Colorado statutory claim are barred by the contract's choice-of-law provision." Motion at 2. Vail contends that because Passholders purchased their ski passes via Vail Resorts' website, which expressly provides that use of the website is governed by Colorado law, Passholders are barred from asserting claims under other states' provisions. Motion at 10. Additionally, Vail argues, "A federal court sitting in diversity (as here) must apply the substantive law of the forum state, including its choice-of-law rules," and because "Vail Resorts has its principal place of business in Colorado, there is a reasonable basis to apply Colorado law, and, because Colorado has its own consumer protection statute, the application of Colorado law is not contrary to the fundamental policy of another state." *Id*. (collecting cases in other districts and circuits).

Competition Law (also on behalf of the California subclass), Cal. Bus. & Prof. Code § 17200, SACC at 21–23; the New York General Business Law (on behalf of the New York subclass), N.Y. Gen. Bus. Law § 349, *et seq.*, SACC at 23–25; the Illinois Consumer Fraud and Deceptive Business Practices Act (on behalf of the Illinois subclass), 815 ILCS 505/1, *et seq.*, SACC at 25–26; the Florida Deceptive and Unfair Trade Practices Act (on behalf of the Florida subclass), Fla. Stat. § 501.201, *et seq.*, SACC at 26–28; the Washington Consumer Protection Act (on behalf of the Washington subclass), Wash. Rev. Code § 19.86.010, *et seq.*, SACC at 28–30; the Connecticut Unfair Trade Practices Act (on behalf of the Connecticut subclass), Conn. Gen. Stat. Ch. 735, *et seq.*, SACC at 30–31; the New Jersey Consumer Fraud Act (on behalf of the New Jersey subclass), N.J. Stat. § 5:8–2, SACC at 31–32; the Minnesota Consumer Fraud Act (on behalf of the Minnesota subclass), Minn. Gen. Stat. § 325F.69(1), SACC at 32–33; the Massachusetts Regulation of Business Practice and Consumer Protection Act (on behalf of the Massachusetts subclass), Mass. Gen. Laws Ch. 93A § 2, SACC at 34–35.

Again, I need not conduct a choice-of-law analysis to decide the issue before me. Assuming without deciding that the choice-of-law provision does not bar non-Colorado claims, I find that plaintiffs have failed to state claims under the other states' consumer protection statutes. Just as the record does not support the claim that "reasonable consumer[s]" expected refunds based on Vail's advertisements and representations, the record does not support the claim that reasonable consumers expected any other form of monetary compensation or access to Vail's resorts beyond granting credits for the subsequent ski season. SACC at ¶¶ 66, 79, 85, 91, 97, 98, 106, 115, 118, 124, 127, 138, 144, 153, 160, 166. As I previously noted, it is merely speculative to assert that Passholders were deceived into believing Vail would provide other forms of monetary compensation—when its contract expressly bars refunds—or access to its resorts during subsequent ski seasons without having to purchase a new pass—when the contract is silent on this issue.

I find that Passholders have not alleged claims under state consumer protection statutes in nine states other than Colorado, Counts IV–XIII in the Second Amended Consolidated Complaint, that "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678.

IV. MONETARY DAMAGES

Passholders seek monetary damages in an amount equal to the value of the access to Vail's resorts they would have had if the closure date had been determined by 2020 snow conditions. Second Amended Consolidated Complaint at ¶ 54. Passholders contend that they have suffered monetary damages "as a result of being denied the enjoyment of a substantial portion of their benefit under the contract" and that monetary damages are "a necessary and proper remedy to make them whole in light of Vail's breach." *Id.* at ¶ 179. Further, the

Colorado Consumer Protection Act stipulates that "[i]n a case certified as a class action, a successful plaintiff may recover actual damages, injunctive relief allowed by law, and reasonable attorney fees and costs." CO ST § 6-1-113 (2.9).

Vail argues that Passholders' attempt to seek "money damages in an amount equal to the value of [their] lost access" "is simply a disguised attempt to demand a refund and is barred by the Tenth Circuit's decision." Motion at 1. More specifically, "The 'value of lost access' is some percentage of the amount that the plaintiffs paid for their passes—that is, a refund. The Tenth Circuit has held that refunds are not available, and this holding is binding." *Id*. at 4 (citing *McAuliffe*, 69 F.4th at 1144).

Passholders respond that while the Tenth Circuit held that "refunds" are not available, *McAuliffe*, 69 F.4th at 1144, "Vail's argument that Plaintiffs cannot recover *any* form of money damages is wrong." Response at 2. In other words, although Vail cannot provide refunds to Passholders, it "can be ordered to provide a monetary *substitute* for the days of access that Plaintiffs lost. Neither the contract nor the Tenth Circuit decision prohibits compensatory money damages." *Id*. at 3.

Additionally, Passholders argue, "Under Colorado law, where the purpose of a contract is frustrated by unexpected circumstances, restitution is due for nonperformance, regardless of fault." *Id*. at 6 (citing *Beals v. Tri-B Assocs.*, 644 P.2d 78, 80–81 (Colo. App. 1982); Restatement (Second) of Contracts § 265 ("Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the nonoccurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.")); *see also* Restatement (Second) of Contracts § 272 (under such circumstances,

restitution or other claims for relief may be available)). In a contract action seeking restitution, Passholders argue, "recovery may be measured as the reasonable value of what defendant received[.]" *Id*. at 7 (citing *Resol. Tr. Corp. v. Fed. Sav. & Loan Ins. Corp.*, 25 F.3d 1493, 1505 (10th Cir. 1994). "If Vail's duties were discharged as a result of frustration of purpose, then Plaintiffs paid for something they did not receive and are entitled to restitution. If Vail's duties were not discharged, then Vail breached the contract, and Plaintiffs are entitled to compensatory damages and/or specific performance." *Id*. at 8–9.

Vail replies reaffirming its position that Passholders are "mask[ing] their request for refunds," pointing out that the damages that Passholders seek "just happen to be the same amount they paid for their passes. (Opp. 2; SACC 37 (seeking an order for Vail to return to Plaintiffs and the Class the amount each paid to Vail.)" Reply at 1 (cleaned up).

I do not find Passholders' attempt to distinguish "refund" from "restitution" convincing. In fact, one definition of "refund" that the Tenth Circuit cited while deciding Passholders' appeal encompassed restitution:

> A "refund" is a "[a] repayment; the return of money paid." *Refund*, Oxford English Dictionary Online, https://www.oed.com (last accessed Jan. 25, 2023); *see also Refund*, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/refund (last accessed Jan. 25, 2023) (defining "refund" as "to give or put back" or "to return (money) in ***restitution***, repayment, or balancing of accounts"). These definitions favor Vail's interpretation of the contract—if Passholders agreed to purchase the Epic Passes knowing they could not receive a repayment or the return of money paid, then Vail could not be contractually obligated to do just that—return Passholders' money paid to them based on the closure.

McAuliffe, 69 F.4th at 1147 (emphasis added).

I am also not convinced that Passholders have distinguished refunds from compensatory damages or any other form of monetary damages. Passholders do not attempt to describe how compensatory damages would be calculated, other than "an amount equal to the value of [their]

lost access" to Vail's resorts—in other words, a refund equal to the value of extra ski days that Passholders could have or would have taken during the 2019–2020 season if not for Vail's closure of its resorts due to the pandemic. Passholders have not only failed to demonstrate how their proposed monetary damages would differ from refunds but also describe the value of their requested damages in a way that is either the equivalent of a refund, which is barred by their contracts and by the Tenth Circuit, or is speculative, which is barred by law. Damages must not be "remote or speculative, and only such as are the proximate consequence of the injury complained of can be recovered." *W. Union Tel. Co. v. Trinidad Bean & Elevator Co.*, 84 Colo. 93, 96 (1928). Additionally, "[w]here a legal injury is of an economic character, . . . legal redress in the form of compensation should be equal to the injury." *Department of Health v. Donahue*, 690 P.2d 243, 250 (Colo. 1984). Even if Passholders were to succeed on their breach-of-contract, breach-of-warranty, or consumer protection claims, they have failed to convince me that "a monetary *substitute* for the days of access that Plaintiffs lost" would be distinguishable from a refund.

V. RESORT ACCESS

Passholders seek access to Vail's resorts equivalent to the access they would have had if the closure date had been determined by 2020 snow conditions. SACC at 16. Passholders argue that the contract they entered into when they purchased Vail's ski passes entitled them to "unlimited, unrestricted access" to Vail's ski areas for the 2019–2020 season. *Id*. at ¶ 172. As a result, Passholders seek declaratory judgment, under the Declaratory Judgment Act, 28 U.S.C. § 2201, *et seq.*, and/or the Colorado Uniform Declaratory Judgments Law, C.R.S.A. § 13-51-101, *et seq.*, arguing that the Court should enter a judgment declaring that Passholders had a right to access Vail's ski areas so long as meteorological and facilities conditions permitted, that Vail

breached its contract with Passholders when it prematurely closed its ski areas, and that Vail's "breach caused the 2019–2020 Epic Passes to become useless and void for a substantial portion of the ski season, thereby depriving Plaintiffs and the Class of the benefit of their bargains." SACC at 35–36.

A. Access as an extra-contractual benefit

Vail argues that Passholders are seeking "*new and extra*-contractual benefits" in attempting to gain access to Vail's resorts in ski seasons subsequent to the 2019–2020 season. Motion at 4. (citing *Ballow v. PHICO Ins. Co.*, 878 P.2d 672, 680 (Colo. 1994) ("[S]pecific performance can only be accomplished according to the terms of the parties' contract.")).

Passholders respond that the remedy they seek is not extra-contractual. Response at 4. They distinguish the present case from *Ballow v. PHICO Ins. Co.*, 878 P.2d 672 (Colo. 1994), highlighting that the Colorado Supreme Court determined that "specific performance should not have been granted because neither the insurance policy nor the brochure promised free tail coverage if PHICO failed to renew the malpractice policies; instead, the documents provided that a tail policy could be purchased upon nonrenewal and that either party could elect not to renew." Response at 3 (citing *Ballow*, 878 P.2d at 687–79) (emphasis omitted). Here, Passholders argue, "Plaintiffs do not request anything new or separate, such as free lodging or food. Instead, Plaintiffs seek an order requiring Vail to provide access for the portion of the ski season it promised (and received payment for) but failed to provide." *Id*. at 4.

While it is true that Passholders do not request free lodging or food, neither their contracts with Vail nor Vail's advertising promised access to its resorts during subsequent ski seasons if Vail closed its resorts for the rest of the ski season in March, and it cannot be held liable for misrepresentation simply because it failed to tell Passholders that it might decide to

close its resorts due to a global pandemic or because it did not state "no free access to Vail resorts in subsequent seasons should resorts close in March," in addition to stating "no refunds." *See Ballow*, 878 P.2d at 678 ("The insurer is not required to affirmatively set forth every circumstance which could precipitate the nonrenewal decision. Thus, PHICO cannot be held liable for misrepresentation simply because it failed to tell the doctors that it might decide to nonrenew their policies for business reasons."). Passholders have not demonstrated beyond mere speculation that they legitimately expected to be granted access to Vail's resorts during subsequent ski seasons beyond the access Vail offered when it granted credits for the following season. *See Id*. at 680 ("A decree of specific performance is designed to remedy a past breach of contract by fulfilling the legitimate expectations of the wronged promisee.").

B. Ambiguity

Vail argues that it "cannot be compelled to provide future access unless the contract unambiguously requires what Plaintiffs demand," and "because the Tenth Circuit has already held that the contract was ambiguous in that regard, *see McAuliffe*, 69 F.4th at 1146, Plaintiffs' access remedy is unavailable as a matter of law." Motion at 2 (internal quotes omitted). *See McAuliffe*, 69 F. 4th at 1146 (quoting *Jaeco Pump Co. v. Inject-O-Meter Mfg. Co.*, 467 F.2d 317, 320 (10th Cir. 1972) ("[O]nce it has been determined that a contract is ambiguous and that its construction depends upon extrinsic facts and circumstances, then the terms of a contract become questions of fact and are thereafter for the triers of fact to decide.")).

Specifically, Vail argues that because the Tenth Circuit held that the term "ski season" in Passholders' and Vails' contracts is "susceptible to more than one reasonable interpretation" and is therefore "ambiguous," this ambiguity "is fatal to a claim seeking specific performance." *Id.* at 5 (quoting *Engineered Data Prod., Inc. v. Art Style Printing, Inc.*, 71 F. Supp. 2d 1073, 1080

(D. Colo. 1999)). Vail argues that not only is "ski season" ambiguous, but also, "Epic Pass contracts never mention 'snow conditions,' let alone define when or how they end the ski season." Reply at 3. Additionally, Vail points out, "not even Plaintiffs claim a jury could ever 'clearly ascertain' the 'precise' date Vail Resorts 'should' have closed." *Id*. (citing *Mestas v. Martini*, 155 P.2d 161, 165 (Colo. 1944) ("The contract itself must make the precise act which is to be done clearly ascertainable.")).

Vail quotes several Colorado state court cases supporting its position that in order for a court to decree specific performance, the terms of the contract must be "free from ambiguity," *Hill v. Chambers*, 314 P.2d 707, 709 (Colo. 1957), require "a degree of certainty," *Howard v. Beavers*, 264 P.2d 858, 861–62 (Colo. 1953), or must be "clear, definite, certain, and complete," *Schreck v. T & C Sanderson Farms, Inc.*, 37 P.3d 510, 514 (Colo. App. 2001). Motion at 5–6. Vail contends that the 2019–2020 ski season ended in summer of 2020, and so after that time, "any demand for access to Vail's resorts necessarily requires the Court to improperly make a contract for the parties and then order it to be specifically performed, since the period during which Vail Resorts promised access to the Resorts [for 2019–2020 ski season passes] ended, at the latest in the summer of 2020." *Id.* (internal quotations omitted). As a result, Vail concludes, "[b]ecause the contract did not unambiguously require Vail Resorts to give access beyond the 2019–2020 'ski season,' or to put human life and health at risk by providing access during a pandemic, specific performance is not available as a matter of law." *Id*. at 6 (citing *Ballow*, 878 P.2d at 680).

Passholders argue that "[a]mbiguity at the pleadings stage is not a bar to specific performance because the trier of fact will eventually resolve the ambiguity, and may use extrinsic evidence to do so." Response at 4. Passholders distinguish the present case from

Engineered Data Prod., Inc. v. Art Style Printing, Inc., 71 F. Supp. 2d 1073 (D. Colo. 1999), highlighting that in *Engineered*, no contract existed at all, whereas here, "the contract is sufficiently definite." *Id*. at 5 (citing *Air Solutions, Inc. v. Spivey*, 529 P.3d 644, 659 (Colo. Ct. App. 2023) ("Contracts must be *reasonably certain* to justify a decree of specific performance. . .. But this means only that the contract's terms must be 'sufficiently certain to provide a basis for an appropriate order.' . . . It doesn't mean that absolute certainty concerning every aspect of the contract is required.") (internal punctuation omitted)).

Passholders also argue that other cases Vail cited to maintain that specific performance is not available where a contract contains an ambiguous term actually support *Passholders'* argument that neither ambiguity nor the passage of time should bar an order for specific performance. *Id*. at 4, 6 (citing, e.g., *Hill v. Chambers*, 314 P.2d 707–710 (Colo. 1957) (Passholders state that "[t]he court found that, despite the lack of detailed descriptions of the property, extrinsic evidence could be used to determine the property to be transferred, and granted specific performance.") (Passholders note that "the court affirmed the grant of specific performance more than six years after the parties entered into the contract, and three years after the plaintiff initiated suit.")); *Howard v. Beavers*, 264 P.2d 858, 543 [sic] (Colo. 1953) (Passholders note that "the case was not dismissed—rather, it proceeded to trial and the court considered extrinsic evidence to resolve the parties' competing interpretations."); *Schreck v. T & C Sanderson Farms, Inc.*, 37 P.3d 510, 512–14 (Colo. App. 2001) (Passholders note, "The contract described that property, but excluded 'the house and out buildings' (which were not defined) and did not set a sale price. . . . [T]he trial court required the transfer to go forward, and . . . [t]he appellate court affirmed" and also point out that "the court affirmed the grant of specific performance four years after the parties' contractual relationship ended.").

"Specifically," Passholders argue, "should the trier of fact determine that Vail promised access until snow conditions reached the point at which the resorts would have been closed during prior years, the ambiguity will be resolved and the Court may order specific performance." Response at 5–6 (citing *McAuliffe*, 69 F.4th at 1144, 1146) (if Passholders "establish Vail breached its contracts with Passholders by closing its resorts prior to the end of the '2019–2020 ski season,' as that term is defined by the trier of fact," they may seek "future access to Vail's resorts for the amount of time Vail closed its resorts prior to the end of the 2019–2020 ski season").

Regardless of whether ambiguity in the contract bars specific performance as a remedy and whether free access to Vail Resorts for subsequent seasons would constitute an extra-contractual benefit, Passholders have failed to establish that Vail breached its contracts with Passholders by closing its resorts or that a particular state of snow conditions would determine when Vail is obligated under its contracts with Passholders to close its resorts or keep them open. As such, Passholders have failed to adequately allege their breach-of-contract, breach-of-warranty, and consumer protection claims, so injunctive relief requiring specific performance is not warranted. Passholders do not convince me that the fact that a number of 2019–2020 Epic Pass holders chose not to renew their passes (and therefore declined to use the credit Vail offered) by Vail's September 17, 2020 deadline means that Vail should be required to grant access to its resorts equivalent to the access Passholders would have had if the closure date had been determined by 2020 snow conditions. SACC at ¶ 39.

VI. DECLARATORY JUDGMENT

In Count XIV of their Second Amended Consolidated Complaint, Passholders seek declaratory judgment, under the Declaratory Judgment Act, 28 U.S.C. § 2201, *et seq.*, and/or the

Colorado Uniform Declaratory Judgments Law, C.R.S.A. § 13-51-101, *et seq.*, arguing that the Court should enter a judgment declaring that Passholders had a right to access Vail's ski areas so long as meteorological and facilities conditions permitted, that Vail breached its contract with Passholders when it prematurely closed its ski areas, and that Vail's "breach caused the 2019–2020 Epic Passes to become useless and void for a substantial portion of the ski season, thereby depriving Plaintiffs and the Class of the benefit of their bargains." SACC at 35–36.

I will not enter a judgment declaring any of the above because, as previously noted, Passholders failed to adequately allege that Vail broke its promise to them when it closed its resorts due to the COVID-19 emergency and resulting government orders.

As such, I find that Passholders have not alleged claims supporting a finding that would warrant declaratory judgment, Count XIV in the Second Amended Consolidated Complaint, and that "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. Passholders cannot survive Vail's motion to dismiss unless they "state a claim on which relief can be granted," Fed. R. Civ. P. 12(b)(6), and even in the light most favorable to Passholders, they have not alleged sufficient factual allegations such that the right to relief is raised above the speculative level. *See, e.g., Twombly*, 550 U.S. at 556.

CONCLUSION AND ORDER

The Court For the above reasons, defendant's 12(b)(6) motion to dismiss for failure to state a claim is GRANTED. This case is DISMISSED with prejudice. As the prevailing party, defendant is awarded costs to be taxed by the Clerk pursuant to Fed. R. Civ. P. 54(d)(1) and D.C.COLO.LCivR 54.1.

DATED this 25th day of June, 2024.

BY THE COURT:

R. Brooke Jackson
Senior United States District Judge