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United States Court of Appeals
Tenth Circuit

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UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

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

Plaintiffs - Appellants,

v.

THE VAIL CORPORATION, d/b/a Vail Resorts Management Company; VAIL RESORTS, INC.,

Defendants - Appellees.

No. 21-1400

Appeal from the United States District Court
for the District of Colorado
(D.C. No. 1:20-CV-01121-RBJ)

Nyran Rose Rasche, Cafferty Clobes Meriwether & Sprengel LLP, Chicago, Illinois (Katherine D. Varholak and Melissa K. Reagan, Sherman & Howard, Denver, Colorado; and Bryan L. Clobes, Cafferty Clobes Meriwether & Sprengel LLP, Media, Pennsylvania, with her on the briefs), for Plaintiffs – Appellants.

Michael J. Hofmann, Bryan Cave Leighton Paisner, LLP, Denver, Colorado (David L. Miller, Bryan Cave Leighton Paisner, LLP, Denver, Colorado; and Darci Madden, Bryan Cave Leighton Paisner, St. Louis, Missouri, with him on the brief) for Defendants – Appellees.

Before **HOLMES**, Chief Judge, **McHUGH**, and **EID**, Circuit Judges.

McHUGH, Circuit Judge.

In March 2020, as COVID-19 spread across the United States, The Vail Corporation and Vail Resorts, Inc. (collectively, "Vail") closed its ski resorts and did not reopen them until the start of the 2020–2021 ski season. Plaintiffs-Appellants ("Passholders") are a group of skiers and snowboarders who purchased Epic Passes from Vail to access its resorts during the 2019–2020 ski season. Passholders, on behalf of themselves and a class of similarly situated individuals, brought contractual, quasi-contractual, and state consumer protection law claims all based on the same issue—Vail's decision to close its ski resorts in March 2020 due to the COVID-19 pandemic without issuing refunds to Passholders. The district court granted Vail's Federal Rule of Civil Procedure 12(b)(6) motion to dismiss all of Passholders' claims for failure to state a claim. Passholders appeal, arguing the district court erred in its interpretation of their contracts with Vail.

The district court determined Passholders' contractual and state consumer protection law claims failed based on its interpretation of two parts of the contract between Passholders and Vail: (1) the meaning of "2019–2020 ski season" in the context of Vail's promise that Passholders could access its resorts for the entire 2019–2020 ski season; and (2) the impact of a no-refund clause in the contract between Vail and Passholders on Passholders' ability to seek refunds based on Vail closing its resorts prior to the end of the season. Although we do not agree with the district court's interpretation of "2019–2020 ski season," we are in accord with its

ultimate conclusion that Passholders have failed to state a contractual claim. Passholders sought only one form of relief in their complaint—refunds of the costs of their Epic Passes. But Passholders contracted for the purchase of passes under the condition that the passes were not eligible for refunds of any kind. And although Passholders point to authority suggesting some jurisdictions limit the application of no-refund clauses depending on which party terminates a contract, these cases are distinguishable and Passholders have identified no Colorado authority suggesting the contract should be interpreted any way other than according to the plain meaning of the words.

Therefore, we agree with the district court's determination that Passholders failed to adequately plead their contractual claims. Recognizing that Passholders might amend their breach of contract and breach of warranty claims to seek other forms of relief, however, we vacate the dismissal of these two claims with prejudice and remand for the district court to modify its judgment to a dismissal without prejudice. Because Passholders' breach of the implied covenant of good faith and fair dealing claim rested solely on Vail's exercise of its contractual right not to issue refunds, we affirm the dismissal of this claim with prejudice. We also affirm the district court's dismissal of Passholders' two quasi-contractual claims because Passholders failed to allege sufficient facts to show the claims were based on a dispute not already covered by their express contracts with Vail. Passholders attempted to plead these claims in the alternative, arguing their contracts with Vail may be illusory if interpreted to give Vail total discretion over the dates of the ski

season. But because no reasonable interpretation of Passholders' contracts with Vail would render the contracts illusory, the district court correctly granted dismissal of these two claims.

As with Passholders' breach of contract and breach of warranty claims, we conclude the district court correctly dismissed Passholders' consumer protection claims. Although we conclude a reasonable jury could find that Vail acted unfairly or deceptively by advertising Epic Passes as providing access to its resorts for the entire 2019–2020 ski season, Passholders' claims fail because they sought only refunds as a remedy for these claims—a remedy expressly prohibited by their contracts. Recognizing Passholders could refile these claims to seek an alternative remedy, however, we vacate the district court's dismissal of Passholders' state consumer protection law claims with prejudice so the district court may modify its dismissal of these six claims to be without prejudice.

I. BACKGROUND

A. Factual Background[1]

During the 2019–2020 ski season, Vail operated thirty-seven ski resorts and urban ski areas (collectively, "ski resorts" or "resorts") across the United States and the world. The majority of these resorts were in the United States, located in fifteen separate states. To recreate in Vail's various ski resorts, customers could buy lift tickets or Epic Passes. Lift tickets provided access to a specific ski area for a period

[1] All facts are drawn from Passholders' operative complaint.

of one to fourteen days, while Epic Passes provided broader access throughout the ski season. "The ski/snowboard season typically begins in mid-to-late October, and usually lasts through at least April, and, for many ski areas, often lasts through June, depending on the weather." App. at 27. Because they offer wider access and greater flexibility, Epic Passes are popular with skiers and snowboarders, and Vail sold approximately 1,140,000 Epic Passes for the 2019–2020 ski season.

For the 2019–2020 ski season, Vail sold four types of Epic Season Passes at varying prices, providing different levels of access to its ski resorts. Vail's most expensive pass, simply titled the Epic Pass, gave skiers and snowboarders unlimited access to most of Vail's ski resorts, with the occasional exception of blackout dates at certain resorts. For 2019–2020, Vail advertised that the Epic Pass would provide "Unlimited, Unrestricted Skiing at [Its] Best Resorts." *Id.* at 27–28. A lower cost version of the Epic Pass, the Local Epic Pass, provided "unlimited, unrestricted access" to many ski resorts, while providing more limited access to others. *Id.* at 28. Vail also sold Regional Epic Passes, that provided "unlimited, unrestricted access," for a specific ski resort or specific set of resorts, although sometimes only on certain days of the week. *Id.* As a fourth option, Vail sold Specialty Epic Passes that were available to specific groups—such as service members, veterans, and students. Like Regional Epic Passes, Specialty Epic Passes provided access to a limited set of ski areas, sometimes only on certain days of the week, but for the full season. All four types of Epic Season Passes "were marketed to provide access to the ski areas for the entire 2019–2020 ski season." *Id.* at 29.

In addition to Epic Season Passes, Vail sold Epic Day Passes, available for one to seven days. Epic Day Passes provided access to most Vail ski resorts for the number of days purchased, and "[we]re not required to be used on consecutive days or at the same ski area." *Id.*

For the 2019–2020 ski season, skiers and snowboarders could purchase the various Epic Passes either online or directly at one of Vail's ski resorts.[2] At the time, the Terms & Conditions for all of Vail's websites stated that use of Vail's websites was governed by Colorado state law and any legal proceedings against Vail must be brought in state or federal court in Denver, Colorado. To buy an Epic Season Pass, purchasers had to make an initial payment of forty-nine dollars and provide a credit card that Vail could charge for the outstanding balance in September 2019. Once purchasers made the initial payment, they were committed to paying the full price, as Vail did not allow cancellations or refunds. Passholders conceded in their operative complaint that "Vail's website stated that 2019–2020 Passes were not 'eligible for a refund of any kind.'" *Id.* at 30. Passholders understood this statement to mean they could not seek a refund based on personal reasons—not that Vail could close all its ski resorts prior to the end of the 2019–2020 ski season without refunding any portion of their payments.

[2] Passholders all purchased their Epic Passes from Vail's website and made no allegations in their complaint describing what information was given to individuals who purchased Epic Passes in person at ski resorts.

Passholders, Michael McAuliffe[3], Mckenna Connolly[4], Stephen Conti[5], Steven Beiley[6], Terry Chechakli[7], Norman Cheney[8], and Matthew Balkman[9], all purchased some type of Epic Pass for the 2019–2020 ski season from Vail's website. They purchased Epic Passes with the "expect[ation] that, as during all prior years, the Epic Passes would permit access to Vail's ski areas until snow conditions were such that skiing and snowboarding were not possible." *Id.* at 27. Specifically, Passholders "relied on Vail's statements concerning benefits conferred by the Pass[es] and expected that the Pass[es] would confer unlimited access for the entire 2019-2020 season." *Id.* at 26. All Passholders intended to use their passes after March 14, 2020,

[3] Mr. McAuliffe, a citizen and resident of Colorado, purchased an Epic Pass for $969.00 from the Vail website in September 2019.

[4] Ms. Connolly, a citizen and resident of Colorado, purchased an Epic Local Pass for $723.95 from the Vail website in October 2019.

[5] Mr. Conti, a citizen and resident of California, purchased a 4-Day Epic Pass for $411.00 from the Vail website in December 2019.

[6] Mr. Beiley, a citizen and resident of Florida, purchased three 4-Day Epic Passes and one 2-Day Epic Pass for himself and his family in September 2019. In November 2019, he upgraded one of the 4-Day Epic Passes to an Epic Local Pass. In total, he paid $1,721.00 for his family's passes.

[7] Mr. Chechakli, a citizen and resident of Illinois, purchased two Epic Passes for himself and his wife, for a total cost of $1780.00, from the Vail website in September 2019.

[8] Mr. Cheney, a citizen and resident of New York, purchased an Epic Local Pass for $724.00 from the Vail website in March 2020.

[9] Mr. Balkman, a citizen and resident of Washington, purchased an Epic Local Pass for $729.95 from the Vail website in September 2019.

and a couple had not yet used their passes as of March 14, 2020.[10] All Passholders would not have purchased their passes, or would not have been willing to pay as much for them, if they had been aware the passes would not be good for the entire 2019–2020 ski season.

The year 2020 brought unprecedented challenges, as the nation fell into the grip of the COVID-19 pandemic. On March 11, 2020, the World Health Organization classified the rapid spread of COVID-19 as a global pandemic, and a couple days later, the President of the United States declared a national emergency. COVID-19, a contagious respiratory virus, alarmed governments and the public because of its rapid, undetected spread across communities and the world. Starting in March 2020, state and local governments began responding to the pandemic by either restricting business operations or requiring them to shut down entirely.

In mid-March 2020, the media reported COVID-19 was spreading around ski areas in Colorado. Vail initially responded to the outbreak on March 15, 2020, announcing a temporary closure of all its ski resorts in North America through March 22, 2020. Two days later, Vail announced it would be closing all ski resorts in North America through the summer. Vail was required to close "some or all of [its] resorts" in response to state or local mandates. Vail offered refunds for those who had purchased lift tickets for the week of March 15 through March 22, 2020, but it

[10] Mr. Cheney and Mr. Beiley and his family did not use their passes at all prior to March 14, 2020.

refused to provide refunds to Epic passholders. "After closing its resorts, Vail furloughed employees and otherwise substantially reduced its operating costs for the remainder of the 2019–2020 ski season." *Id.* at 22.

Five of the Passholders, Ms. Connolly, Mr. Conti, Mr. Cheney, Mr. Beiley, and Mr. Balkman, contacted Vail seeking refunds for the unused portions of their passes, but Vail refused to return any payments. On April 27, 2020, after the initial complaint in this lawsuit had already been filed,[11] Vail announced it would provide credits to individuals who purchased Epic Passes for the 2019–2020 ski season to use towards the purchase of an Epic Pass for the 2020–2021 ski season. The credits ranged from 20–80% of purchase price, based on what type of pass individuals had purchased and how many times they had used it. The credit offer had a deadline of September 17, 2020. At least 200,000 purchasers of 2019–2020 Epic Passes, including Passholders, chose not to accept the credit offer. Vail refused to issue refunds of any amount to Passholders.

B. Procedural Background

Starting in April 2020, Passholders impacted by Vail's mid-March closure of its resorts filed multiple suits on similar legal theories in the United States District Court for the District of Colorado. The district court ordered that all related class action suits by Passholders be consolidated and appointed lead counsel for the

[11] The initial complaint in this lawsuit was filed on April 21, 2020.

consolidated class action. Following the consolidation of the cases and appointment of lead counsel, Passholders filed their operative complaint on November 19, 2020.

Passholders, pursuant to Federal Rule of Civil Procedure 23, brought claims on behalf of themselves and a nationwide class consisting of "[a]ll persons in the United States who purchased any Epic Season Pass or an Epic Daily Pass that had unused days after March 14, 2020." *Id.* at 33. Passholders also brought several state-specific claims on behalf of five subclasses—consisting of class members in California, Illinois, New York, Florida, and Washington, pursuant to Federal Rule of Civil Procedure 23(c)(5). In total, Passholders brought twelve claims falling into three categories—contractual claims, quasi-contractual claims, and state consumer protection law claims.

Passholders' first three causes of action alleged contractual violations: (1) breach of contract, alleging Vail breached its contract with Passholders and class members when Vail closed its resorts prior to the end of the 2019–2020 ski season without refunding any of the money it had received for Epic Passes; (2) breach of warranty, alleging Vail created an express warranty by advertising that Epic Passes would allow access for the entire ski season and then breached said warranty by closing early without issuing partial refunds; and (3) breach of the implied covenant of good faith and fair dealing, alleging "Vail acted dishonestly and/or outside the scope of accepted commercial practices to deprive Plaintiffs and the Class Members some benefit of the bargain originally intended by the parties"; *id.* at 38. In addition, Passholders brought two quasi-contractual causes of action, pleaded in the alternative

to their contract claims, also based on Vail's refusal to issue partial refunds despite closing its resorts prior to the end of the 2019–2020 ski season: (4) unjust enrichment and (5) "money had and received." *Id.* at 38–40. Finally, Passholders brought seven claims based on state consumer protection laws, on behalf of themselves and the relevant subclass for each state including: (6) violation of the California Consumer Legal Remedies Act; (7) violation of the California Unfair Competition Law; (8) violation of the California False Advertising Law; (9) violation of New York General Business Law § 349; (10) violation of the Illinois Consumer Fraud and Deceptive Business Practices Act; (11) violation of the Florida Deceptive and Unfair Trade Practices Act; and (12) violation of the Washington Consumer Protection Act. All of Passholders' claims were based on the same premise—Vail 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.

Vail responded to the complaint by submitting a Federal Rule of Civil Procedure 12(b)(6) motion, seeking dismissal of all of Passholders' claims for failure to state a claim. Vail argued that Passholders' claims failed because (1) Vail at no point promised Passholders access to its resorts for a season of any particular length; (2) Passholders had no contractual right to a refund because the contracts for purchase of Epic Passes expressly stated no refunds would be provided; (3) Passholders' quasi-contractual claims failed because they were based on issues already addressed by Vail's and Passholders' express contracts; (4) Passholders'

claims based on other states' consumer protection laws failed because of a choice-of-law provision on Vail's website; and (5) regardless, Passholders' state consumer protection law claims failed because Passholders had not identified any unfair or deceptive behavior by Vail. Vail also argued that Passholders' equitable claims under California law failed because they had an adequate remedy at law, and that Passholders' claim under the California Consumer Legal Remedies Act should be dismissed because the Act applies only to the sale of goods or services and Epic Passes did not fall into either category.

In their memorandum in opposition to Vail's motion to dismiss, Passholders disputed Vail's interpretation of their contracts. First, Passholders argued Vail's promise of season-long access had to mean more than access for as long as Vail chose to keep its resorts open and was best interpreted based on the customary meaning of ski season—a season starting and ending based on snow and weather conditions. Passholders argued at minimum, the term "2019–2020 ski season" was ambiguous and they had based their claim on a reasonable interpretation of their contracts. Thus, they argued dismissal at the pleading stage was inappropriate. Passholders also contended the no-refund clause did not apply when Vail breached its contractual obligations. Turning to their quasi-contractual claims, Passholders argued the claims should not be dismissed because the court might determine Vail's contracts with Passholders were unenforceable or silent as to refunds. Addressing their state consumer protection law claims, Passholders refuted Vail's arguments, stating (1) the choice-of-law provision applied only to claims based on the contract;

(2) Passholders adequately pleaded facts supporting the elements of the state consumer protection law claims; (3) Passholders' equitable claims under California law should not be dismissed because the California statutes allow Passholders to seek alternative remedies at the pleading stage; and (4) Passholders' claim under the California Consumer Legal Remedies Act should not be dismissed because Epic Passes were "services" under the statute.

After Passholders filed their class action claims against Vail, another group of skiers and snowboarders brought similar claims, also in the United States District Court for the District of Colorado, against Alterra Mountain Company ("Alterra"), another ski pass seller. *See Goodrich v. Alterra Mountain Co.*, No. 20-CV-01057-RM-SKC, 2021 WL 2633326, at *1 (D. Colo. June 25, 2021) (Moore, J.). In *Goodrich*, Ikon passholders brought nearly identical claims against Alterra as those advanced against Vail here, and Alterra sought dismissal of the claims on the same grounds as Vail. *See id.* Specifically, Alterra argued the Ikon passholders' contractual and state consumer protection law claims failed because Alterra had not promised them a season of any length and the passes were non-refundable. *Id.* at *2–6. This litigation and the *Goodrich* case were assigned to different judges in the District of Colorado. While Vail's Rule 12(b)(6) motion was pending, the district court issued a decision in the *Goodrich* case, denying in part and granting in part Alterra's Rule 12(b)(6) motion to dismiss. *See id.* at *15–16. The *Goodrich* court first explained the fact "[t]hat the date in which a ski season may end varies from season to season is not fatal to Plaintiffs' claim for the 2019/20 ski season." *Id.* at *3. Second, the court

determined the no-refund clause "d[id] not apply to allow a seller who cancel[ed] or revoke[d] the Ikon Pass to cancel and keep the consumer's money," *id.* at *5. Accordingly, the *Goodrich* court denied dismissal of the plaintiffs' breach of contract claim, as well as three state consumer protection law claims. *Id.* at *16. However, the court granted dismissal of the plaintiffs' other claims, concluding (1) the breach of implied covenant of good faith and fair dealing claim failed because the plaintiffs alleged Alterra acted outside of its scope of discretion, rather than acted in bad faith in exercising discretion; (2) the plaintiffs' equitable claims failed because they addressed a dispute covered by an express contract; and (3) several of the plaintiffs' state consumer protection law claims failed based on the elements of the particular state statutes. *Id.* at *7–9, *14–16.

After Passholders brought the *Goodrich* decision to the district court's attention, the court ordered supplemental briefing on how the instant case differed, or did not differ, from *Goodrich*. Passholders argued the only differences between the two cases were minor and generally the analysis in the *Goodrich* decision applied to Vail's pending motion to dismiss. In contrast, Vail argued there was a key factual difference because while Alterra did not allow refunds generally, Vail did not allow refunds "of any kind." App. at 132. After receiving the supplemental briefs, the district court requested and Passholders provided copies of Vail's advertisements and contract language referenced in Passholders' complaint.

Ultimately, the district court granted Vail's Rule 12(b)(6) motion and dismissed all of Passholders' claims with prejudice. Addressing Passholders' contract

claims, the district court interpreted Vail's promise that Epic Passes would provide access for the "ski season" to require "Vail to keep resorts open until it determined, in good faith, that skiing and snowboarding safely were no longer possible." *Id.* at 178. Interpreting the "no refund" language, the court concluded "*plaintiffs* could not seek to return their passes for a refund but [the provision] did not allow Vail to breach [its] contractual obligations with impunity." *Id.* at 179. The court determined, however, that the "no-refund clause can bar recovery when a seller has acted in good faith." *Id.* Applying these two conclusions, the court held Passholders had failed to state claims for breach of contract, breach of warranty, and breach of the implied covenant of good faith and fair dealing, because Vail closed its resorts only when skiing and snowboarding safely were no longer possible and declined to issue refunds in good faith—choosing instead to offer credits for passes the following year.

Turning to Passholders' quasi-contractual claims, the district court determined Passholders had not plausibly stated a claim for unjust enrichment or money had and received because Passholders and Vail had an enforceable contract covering the same subject matter.

Finally, the district court dismissed Passholders' various claims based on state consumer protection laws because they failed to state a claim under the district court's interpretation of "ski season" and the no-refund clause. The court assumed, without deciding, that the choice-of-law provision did not prevent Passholders from bringing the non-Colorado state claims. The court also chose to assume, without deciding, that Epic Passes were "services" under the California Consumer Legal

Remedies Act. Based on its interpretation of Vail's and Passholders' contracts, the court determined Passholders had not pleaded sufficient facts to plausibly support any of their state consumer protection law claims, which required showing that Vail had acted unfairly, made misrepresentations, made misleading statements, acted deceptively, or acted unreasonably. Passholders withdrew their claim under the California Advertising Law before the district court issued its decision, and the district court did not address Vail's argument that Passholders' claim under the California Unfair Competition Law failed because Passholders had not alleged they lacked an adequate remedy at law.

Having granted Vail's Rule 12(b)(6) motion to dismiss all of Passholders' claims, the court entered final judgment. Passholders timely filed a notice of appeal.

II. DISCUSSION

Exercising jurisdiction under 28 U.S.C. § 1291, we review the district court's grant of Vail's Rule 12(b)(6) motion by addressing Passholders' claims in three categories: (1) contractual claims, (2) quasi-contractual claims, and (3) state consumer protection law claims. To begin, we discuss the applicable standard of review. Then, we assess the adequacy of each category of claims under that standard.

A. Standard of Review

We review the district court's grant of a motion to dismiss for failure to state a claim de novo. *Tavernaro v. Pioneer Credit Recovery, Inc.*, 43 F.4th 1062, 1066 (10th Cir. 2022). "Under Federal Rule of Civil Procedure 12(b)(6), a complaint must contain 'only enough facts to state a claim to relief that is plausible on its face.'"

Chilcoat v. San Juan Cnty., 41 F.4th 1196, 1207 (10th Cir. 2022) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A court need not accept legal conclusions as true, but "[w]hen there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). When a claim rests on interpretation of a contract, "ambiguous contract language may not be resolved in a motion to dismiss." *Sonoiki v. Harvard Univ.*, 37 F.4th 691, 711 (1st Cir. 2022); *see also Orlander v. Staples, Inc.*, 802 F.3d 289, 295 (2d Cir. 2015) ("[I]f a contract is ambiguous as applied to [the facts that furnish the basis of the suit], a court has insufficient data to dismiss a complaint for failure to state a claim." (alterations in original) (quoting *Eternity Glob. Master Fund Ltd. v. Morgan Guar. Tr. Co. of N.Y.*, 375 F.3d 168, 178 (2d Cir. 2004)); *ASARCO, LLC v. Union Pac. R.R. Co.*, 765 F.3d 999, 1008–09 (9th Cir. 2014) ("If the settlement agreement is ambiguous, then interpretation of the agreement presents a fact issue that cannot be resolved on a motion to dismiss.").

B. Passholders' Contract Claims

The district court dismissed Passholders' first three claims—(1) breach of contract, (2) breach of warranty, and (3) breach of the implied covenant of good faith and fair dealing. Because the district court's decision was based on its interpretation of the underlying contract terms, we must determine whether its reading of the contract is correct. To place that discussion in context, we first decide what law controls our analysis. Concluding the contract is governed by Colorado law, we next

set forth the substance of that law with respect to contract interpretation. Finally, we apply Colorado's law and interpret the terms of the parties' contract de novo.

1. Choice of Law

Passholders and Vail agree that based on the choice-of-law provision, their contracts are governed by Colorado law. *See* App. at 84 (quoting choice-of-law provision as stating "[t]his agreement is governed by and interpreted in accordance with the laws of the State of Colorado"); *see also* App. at 67. Accordingly, we apply Colorado law. *Grynberg v. Total S.A.*, 538 F.3d 1336, 1346 (10th Cir. 2008) ("Because the parties' arguments assume that Colorado law applies, we will proceed under the same assumption."). In doing so, we "follow decisions of the state's highest court, or, when none is [o]n point, predict how it would rule on the issue." *Id.* at 1354. "Our predictions may consider appellate decisions in other states with similar legal principles, federal district court decisions interpreting [Colorado] law, and the general weight and trend of authority." *Sinclair Wyo. Ref. Co. v. A & B Builders, Ltd.*, 989 F.3d 747, 766 (10th Cir. 2021) (internal quotation marks omitted).

2. Contract Interpretation under Colorado State Law

Under Colorado law, "[t]he primary goal of contract interpretation is to determine and give effect to the intent of the parties." *Ad Two, Inc. v. City & Cnty. of Denver ex rel. Manager of Aviation*, 9 P.3d 373, 376 (Colo. 2000). "Interpretation of a written contract and the determination of whether a provision in the contract is ambiguous are questions of law." *Dorman v. Petrol Aspen, Inc.*, 914 P.2d 909, 912 (Colo. 1996). "The intent of the parties is to be determined from the contract

language itself." *Union Rural Elec. Ass'n, Inc. v. Pub. Utilities Comm'n of State*, 661 P.2d 247, 251 (Colo. 1983). "When a document is unambiguous, it cannot be varied by extrinsic evidence." *Dorman*, 914 P.2d at 911.

"Terms used in a contract are ambiguous when they are susceptible to more than one reasonable interpretation" *Ad Two, Inc.*, 9 P.3d at 376. "The fact that the parties disagree as to [a term's] meaning does not in itself create an ambiguity." *Kuta v. Joint Dist. No. 50(J) of Cntys. of Delta, Gunnison, Mesa & Montrose*, 799 P.2d 379, 382 (Colo. 1990). "In ascertaining whether certain provisions of an agreement are ambiguous, the instrument's language must be examined and construed in harmony with the plain and generally accepted meaning of the words employed." *Ad Two, Inc.*, 9 P.3d at 376. "When an ambiguity is found to exist and cannot be resolved by reference to other contractual provisions, extrinsic evidence must be considered by the trial court in order to determine the mutual intent of the parties at the time of contracting." *Pepcol Mfg. Co. v. Denver Union Corp.*, 687 P.2d 1310, 1314 (Colo. 1984). "Only after a contract is deemed ambiguous may the trial court use extrinsic evidence to assist it in ascertaining the intent of the parties." *Cheyenne Mountain Sch. Dist. No. 12 v. Thompson*, 861 P.2d 711, 715 (Colo. 1993).

3. Passholders' Breach of Contract Claim

Although we are not in complete agreement with the district court's interpretation of Vail and Passholders' contracts, we agree that Passholders' breach of contract claim fails as currently pleaded. First, we conclude the contracts were ambiguous as to the meaning of "2019–2020 ski season," and that Passholders'

interpretation of the term was reasonable. Second, we hold Passholders cannot seek refunds as damages because the contract unambiguously states their passes were not eligible for a refund of any kind.

To state a breach of contract claim, a party must plead sufficient facts to plausibly allege four elements: "(1) the existence of a contract; (2) performance by the plaintiff or some justification for nonperformance; (3) failure to perform the contract by the defendant; and (4) resulting damages to the plaintiff." *W. Distrib. Co. v. Diodosio*, 841 P.2d 1053, 1058 (Colo. 1992) (internal citations omitted). Passholders alleged in their complaint, and Vail has not disputed, that Vail entered contracts with them when Passholders purchased their Epic Passes. In these contracts, Vail promised to provide Passholders with varying levels of access to its resorts for the entire 2019–2020 ski season, and Passholders promised to pay the full price of the Epic Passes. Passholders claimed to have performed their contracts fully by paying the costs of their Epic Passes. Vail has not disputed that Passholders pleaded facts that plausibly satisfy the first two elements of their breach of contract claim.

Rather, the parties' dispute centers on the third and fourth elements of the breach of contract claim, "(3) failure to perform the contract by the defendant; and (4) resulting damages to the plaintiff." *Id.* at 1058. Passholders alleged that Vail failed to perform, resulting in damages to them, when it closed its resorts prior to the end of the "2019–2020 ski season" while "retaining the consideration received from [Passholders]." App. at 36. Vail countered that it fully performed under the contract, because it had not promised Passholders a ski season of any particular length and

expressly stated no refunds would be given. Passholders' and Vail's dispute focuses on the meaning of "2019–2020 ski season" and the significance of the no-refund clause. We interpret each of those terms now, applying Colorado law.

a. Meaning of the term "ski season"

Because the term "ski season" is undefined in Passholders' and Vail's contracts, "we interpret it according to its plain meaning." *Renfandt v. N.Y. Life Ins. Co.*, 419 P.3d 576, 580 (Colo. 2018). "When determining the plain and ordinary meaning of words, we may consider definitions in a recognized dictionary." *Owners Ins. Co. v. Dakota Station II Condo. Ass'n, Inc.*, 443 P.3d 47, 51 (Colo. 2019) (quoting *Renfandt*, 419 P.3d at 580). If the term "ski season" is "susceptible to more than one reasonable interpretation . . . [it is] ambiguous." *Ad Two, Inc.*, 9 P.3d at 376.

Although the full term "ski season" is not included in dictionaries, definitions of the term "season" are helpful in interpreting the term. Oxford English Dictionary most relevantly defines "season" as "[t]he portion of a year regularly devoted to a particular business, sport, or amusement, or when the greatest activity prevails therein. Often with defining word, as the fishing, hunting, publishing, racing, theatrical, holiday season." *Season*, Oxford English Dictionary Online, https://www.oed.com (last accessed Jan. 25, 2023). Merriam-Webster Dictionary similarly defines "season" as "a period of the year characterized by or associated with a particular activity or phenomenon." *Season*, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/season (last accessed Jan. 25, 2023). If the modifier "ski" is inserted into these definitions they would read,

"[t]he portion of a year regularly devoted to [skiing]" or "a period of the year characterized by or associated with [skiing]." Based on these dictionaries, the plain meaning of "ski season" is the period or portion of the year characterized by, devoted to, or associated with skiing.

Passholders and Vail proposed two alternative definitions of "ski season." According to Passholders, the exact dates of a "ski season" vary annually, but the term refers to the period of time in which "snow conditions were such that skiing or snowboarding were [] possible." App. at 27. Vail countered that the absence of a specific length of the 2019-2020 ski season in its contracts with Passholders should be read as leaving the duration of the ski season to Vail's sole discretion, limited by the implied covenant of good faith and fair dealing. According to Vail, therefore, the 2019–2020 ski season ended when Vail closed its resorts in good faith due to the COVID-19 pandemic. The district court gave "ski season" a third construction, concluding the term referred to the period of time in which "skiing and snowboarding *safely* were possible." *Id.* at 216.

Of these three interpretations, Passholders' and the district court's proposed definitions of "ski season" most closely align with the dictionary definition of "season." "The portion of a year regularly devoted to [skiing]," could be the portion of the year that snow conditions make skiing and snowboarding possible or the portion of the year that skiing or snowboarding safely are possible. *See Season*, Oxford English Dictionary Online, https://www.oed.com (last accessed Jan. 25, 2023). Both Passholders' and the district court's interpretations of the term ski season

are reasonable based on the term's plain meaning. *See Goodrich*, 2021 WL 2633326, at *3 (determining that purchasers of Ikon Passes had plausibly alleged the term "2019–2020 ski season" in their contracts referred to the time "when the resorts' ski conditions were such that skiing was feasible"). This is not to say Vail's interpretation of "ski season" is unreasonable. Within the context of the contract, Vail and Passholders could have reasonably understood "2019–2020 ski season" to refer to the dates Vail decided in good faith to operate its resorts for the season.

Vail argues on appeal that Passholders' proposed interpretation of "ski season" is unreasonable because Passholders could not have reasonably expected Vail to allow access to its resorts when the conditions were unacceptably dangerous. According to Vail, Passholders' proposed definition of ski season as referring to the period in which "snow conditions were such that skiing or snowboarding were [] possible," App. at 27, would include times when snow conditions made skiing or snowboarding possible but dangerous. But considering Passholders' complaint in its entirety, Vail's attempt to cast Passholders' interpretation of ski season as unreasonable is overly literal. As Passholders have explained on appeal, their complaint alleged, "the guiding principle for determining the end of the ski season should be consistency with the metrics that determined the end of the season during all prior years—snow conditions." Appellants' Br. at 16.

The term ski season in Passholders' and Vails' contracts is "susceptible to more than one reasonable interpretation." *Ad Two, Inc.*, 9 P.3d at 376. The term can 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. Because Passholders' claims are based on a reasonable interpretation of an ambiguous term, the district court erred by determining its meaning on a Rule 12(b)(6) motion to dismiss. *See 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."); *see also City of Farmington v. Amoco Gas Co.*, 777 F.2d 554, 560 (10th Cir. 1985); *Metro. Paving Co. v. City of Aurora*, 449 F.2d 177, 181 (10th Cir. 1971).[12] As we now explain, however, even if the meaning of ski season is ambiguous, Passholders are not entitled to the remedy they seek.

b. Impact of the "no refund" clause

Passholders argue that Vail breached its contracts with them by closing its resorts prior to the end of the 2019–2020 ski season, and accordingly, Vail owes them refunds as a remedy for this breach. Because Passholders pray for relief only in

[12] The dissent argues Passholders make only a "*legal* argument" as to how "'ski season' should be defined," suggesting there is no question of fact to be resolved. *See* Dissent at 8. But before the district court, Passholders argued only that their interpretation of "ski season" was a reasonable interpretation of an ambiguous term and, accordingly, sufficient for their claims to survive a motion to dismiss. Our resolution of this legal question—whether the meaning of ski season as used in the contract is ambiguous—in Passholders' favor, leads to the factual question of what the parties reasonably understood the ambiguous term to mean. *Jaeco Pump Co. v. Inject-O-Meter Mfg. Co.*, 467 F.2d 317, 320 (10th Cir. 1972).

the form of a cash refund, Vail points to the no-refund clause in its contracts as a defense to Passholders' claim. Although Passholders' breach of contract claim is based on a reasonable interpretation of the term ski season, we agree with Vail that this claim fails where Passholders' contracts plainly excluded the remedy they now seek.

Vail's website informed Passholders that 2019–2020 Epic Passes "were not eligible for a refund of any kind." App. at 30.[13] Accordingly, Vail argued the Passholders had failed to state a claim that Vail breached the contract by not providing a refund. Passholders argued in opposition to Vail's motion to dismiss that the no-refund clause "cannot insulate [Vail] from its own breach" because "[w]hen the *obligor* breaches, contractual provisions against providing refunds are unenforceable." *Id.* at. 74. Vail disagreed, asserting the no-refund clause meant what it said, and that Vail had no obligation to refund any pass payments regardless of the circumstances. The district court again took a middle route, concluding the no-refund clause barred recovery by Passholders so long as Vail acted in good faith. And because Passholders had conceded Vail acted in good faith in response to the COVID-19 pandemic, the district court granted the motion to dismiss with prejudice.

We now consider whether the district court was correct to dismiss the claim. Recall that at the pleading stage, Passholders needed to show only that their

[13] Passholders alleged Vail's website stated Passes "were not 'eligible for a refund of any kind'" and then referred to this statement as a "term[]" in their contracts. App. at 30. Accordingly, we accept this "well-pleaded factual allegation[]" as true. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

interpretation of the no-refund clause was reasonable. *Dorman*, 914 P.2d at 912. To determine whether Passholders have met that standard, we begin with the plain language in the contract, *see Renfandt*, 419 P.3d at 580. According to the operative complaint, the Vail website stated Epic Passes "were not eligible for a refund of any kind." App. at 30. Consistent with Colorado law, "[w]hen determining the plain and ordinary meaning of words, we may consider definitions in a recognized dictionary." *Renfandt*, 419 P.3d at 580.

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.

Passholders disagree, pointing to case law they claim suggests a more nuanced definition of "refund." Passholders rely here, as they did in the district court, on the *Goodrich* decision from a different district judge in the District of Colorado, denying Alterra's motion to dismiss Ikon passholders' breach of contract claim based on a no-refund clause. 2021 WL 2633326, at *6. In *Goodrich*, the Ikon passholders' contracts with Alterra contained a "Payment Plan & Cancellation Policy" stating that "ALL

IKON PASS AND IKON BASE PASS PURCHASES PAID-IN-FULL ARE NON-REFUNDABLE." *Id.* at *5. Alterra argued that, based on this clause, Ikon passholders could not recover part of their pass payments based on Alterra closing its resorts early. *Id.* Noting that it found the Sixth Circuit's analysis in *Allied Erecting & Dismantling Co. v. U.S. Steel Corp.*, 726 F. App'x 279 (6th Cir. 2018) (unpublished), persuasive, the *Goodrich* court held that under Colorado law, the no-refund clause "applie[d] such that if [Ikon passholders] cancelled or revoked the contract, they would not be entitled to a refund," but did not insulate Alterra from owing damages for closing its resorts early. *Id.* at *6.

In *Allied*, the Sixth Circuit applied Pennsylvania law to affirm the district court's summary judgment ruling that U.S. Steel was entitled to recover a $10 million "non-refundable advance payment" under a contract with Allied. 726 F. App'x at 281, 286–87. Although designated as "non-refundable," the contract provided that U.S. Steel would recoup the $10 million through discounts on invoices for steel produced by Allied over 120 months under non-cancelable manufacturing contracts. *Id.* at 287–88. The Sixth Circuit held that Allied's repudiation of its promise to provide manufacturing work prevented U.S. Steel from receiving the intended benefit of the bargain. *Id.* at 288. It therefore affirmed the district court's summary judgment order in favor of U.S. Steel on its claim to recover the $10 million advance payment.

In reaching its decision, the Sixth Circuit relied on an analogous Pennsylvania Supreme Court decision, *William F. Mosser Co. v. Cherry River Boom & Lumber Co.,* 138 A. 85, 88 (Pa. 1927). *Id.* at 286–87. There, the plaintiff paid a $150,000

advance that would be recouped at the rate of one dollar per ton on tree bark delivered by defendant. *William F. Mosser Co.*, 138 A. at 86. When the defendant failed to perform, the plaintiff sued for return of the $150,000 advance. *Id.* at 87. Focusing on the "implied promise to repay" through bark deliveries, the Pennsylvania Supreme Court held for the plaintiff. *Id.* The Sixth Circuit determined the district court did not err by following *Mosser* despite the distinguishing fact that U.S. Steel's advance payment was labeled as "non-refundable," because Allied had not demonstrated that either party "intended for Allied to keep the advance payment even if Allied itself totally breached." *Allied*, 726 F. App'x at 287.

The district court in *Goodrich* and Passholders' argument in opposition of Vail's motion to dismiss placed great weight on the Sixth Circuit's *Allied* decision. *See Goodrich*, 2021 WL 2633326, at *6. However, the present facts involve neither a complete failure to perform nor a contract with express provisions calling for repayment of the advance through discounts on goods provided by the recipient over time. Further, the *Allied* decision applied Pennsylvania law as set forth by the Pennsylvania Supreme Court in *Mosser. See Allied*, 726 F. App'x at 286–87. And because *Allied* is unpublished it lacks precedential authority even in the Sixth Circuit. Accordingly, *Allied* is not controlling here, where we must apply Colorado law to a contract that lacks any express provision for recoupment of the cost of the Epic passes and where Passholders have not alleged a complete failure to perform. Further, because *Goodrich* relied on *Allied*, we are similarly not persuaded by its analysis.

In contrast, Vail and the district court relied on *Stokes v. DISH Network, L.L.C.*, 838 F.3d 948 (8th Cir. 2016), an Eighth Circuit decision applying Colorado law, to support their interpretations of the no-refund clause. In *Stokes*, the Eighth Circuit interpreted a provision in Dish Network's contract with subscribers stating Dish was free to change its programming at any time and subscribers "[we]re not entitled to any refund because of deletion, rearrangement or change of any programming, programming packages or other Services." *Stokes, L.L.C.*, 838 F.3d at 951. The plaintiffs sought damages for breach of the implied covenant of good faith and fair dealing based on Dish's deletion of two channels from their programming for a period of several months, after the plaintiffs had paid for subscriptions. *Id.* at 950. The Eighth Circuit held the plaintiffs could not recover based on a breach of the implied covenant of good faith and fair dealing because they had expressly agreed to a contract stating Dish would not issue refunds based on changes in available programming. *Id.* at 955. The Eighth Circuit cited the Supreme Court of Colorado as having repeatedly recognized that the implied covenant of good faith and fair dealing could not be used to impose duties that conflict with express contractual terms. *See id.* at 953–54 (citing *USI Props. E., Inc. v. Simpson*, 938 P.2d 168, 173 (Colo. 1997)).

Although the Eighth Circuit's analysis in *Stokes* is consistent with Colorado's focus on the plain language of the contract, it is also distinguishable. The *Stokes* contract stated no refunds would be given for the exact reason the plaintiffs later sought refunds. The same is true of the other decisions relied upon by Vail. *See Stathakos v. Metro. Transit Auth. Long Island R.R.*, 971 N.Y.S.2d 557, 558–59 (N.Y.

App. Div. 2013) (holding plaintiffs failed to state a breach of contract claim seeking a refund for monthly train passes based on weather cancellations under a contract that stated no refunds would be given based on route cancellations and delays); *see also Jacobs v. Metro. Transp. Auth.*, 11 N.Y.S.3d 702, 703–04 (N.Y. App. Div. 2020) (holding plaintiffs failed to state a claim for breach of contract based on metro line service disruptions where the Metro Authority expressly informed them that no refunds would be given based on service disruptions). Unlike these decisions, the contracts here contain no disclaimer focused on a ski season impacted by a global pandemic.

Consequently, the authorities highlighted by Passholders and Vail are not particularly helpful to our analysis. The case law identified by Passholders reveals that some courts have considered no-refund clauses inapplicable when one party wholly breaches, thereby eliminating an opportunity provided by the contract for recoupment of an advance. In turn, Vail points us to decisions that have enforced no-refund provisions expressly tied to the complained-of nonperformance. But neither Passholders nor Vail have directed us to Colorado law suggesting courts may deviate from the plain language of a contract containing a blanket prohibition on refunds. To the contrary, the Supreme Court of Colorado has repeatedly stated a contract's "language must be examined and construed in harmony with the plain and generally accepted meaning of the words employed." *Ad Two, Inc.*, 9 P.3d at 376; *see also Renfandt*, 419 P.3d at 580 ("Where the [contractual] language is undefined, we interpret it according to its plain meaning.").

Here, Passholders alleged they contracted to purchase passes that were "not eligible for a refund of any kind." App. at 30. Applying the plain meaning of refund, "[a] repayment; the return of money paid," *Refund*, Oxford English Dictionary Online, https://www.oed.com (last accessed Jan. 25, 2023), this means Passholders agreed that Vail would not return the money paid for Epic passes. Indeed, the broad reach of that no-refund provision is emphasized by the inclusion of the phrase "of any kind." App. at 30. The plain meaning is to deny all refunds no matter the circumstances and Passholders cannot now seek the exact remedy they contracted away.

Importantly, the contract does not include the limiting principle Passholders now invoke—that the passes would be eligible for a refund if Vail failed to fully perform its obligations. Although the no-refund clause "greatly limits the available damages [Passholders] can recover in the event of breach, it is not the courts' role to create or enforce a different contract than the one the parties negotiated." *SOLIDFX, LLC v. Jeppesen Sanderson, Inc.*, 841 F.3d 827, 838 (10th Cir. 2016) (applying Colorado law and vacating portions of jury verdict awarding lost profits despite exclusion of such damages in the contract). Accordingly, because refunds are the only remedy sought by Passholders in their complaint, their breach of contract claim fails and was correctly dismissed by the district court. *See* Appellants' Br. at 29 ("Plaintiffs do *not* allege that Vail was merely obligated to come up with some form of 'compensation' of its own choosing. Indeed, the term 'compensation' does not

appear a single time in the Complaint. The Complaint clearly seeks refunds[.]" (emphasis in original)).

This, however, does not prevent Passholders from seeking some other type of relief from Vail if they 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. For example, Passholders could 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.[14] Accordingly, we vacate the district court's dismissal with prejudice of this claim and remand for the court to modify its judgment to a dismissal

[14] The dissent acknowledges this would be different from the credits Vail offered after Passholders initially filed suit, which would have required Passholders to pay Vail additional money for 2020–21 Epic Passes. *See* Dissent at 2 n.2.

without prejudice.[15] *See Brereton v. Bountiful City Corp.*, 434 F.3d 1213, 1219 (10th Cir. 2006) ("A dismissal with prejudice is appropriate where a complaint fails to state a claim under Rule 12(b)(6) and granting leave to amend would be futile.").

4. Passholders' Breach of Warranty Claim

Like their breach of contract claim, Passholders' breach of warranty claim fails because Passholders sought refunds as the sole remedy for the alleged breach—a

[15] The dissent contends "[a]ny argument that the dismissal should have been without prejudice has been waived," as Passholders did not seek this relief in their appeal. *See* Dissent at 3. We disagree. On appeal, Passholders argue the district court erred both in its interpretation of "ski season" and the no-refund clause. Thus, Passholders sought reversal of the district court's opinion and remand for trial. Because we agree with the first of Passholders' propositions, but not the second, we are affirming on narrower grounds than those supporting the district court's dismissal with prejudice. In the past, we have vacated a district court's dismissal with prejudice and remanded for it to be modified to a dismissal without prejudice when the basis on which we affirmed dismissal of the complaint did not support a dismissal with prejudice, even where the appellant sought only reversal of the district court's decision on appeal. *See, e.g., Gallagher v. Shelton*, 587 F.3d 1063, 1068 (10th Cir. 2009) ("remand[ing] to the district court with directions to vacate its dismissal only to clarify that [its] dismissal is without prejudice" because the "dismissal [was] based on a failure to exhaust administrative remedies" and therefore "should be without prejudice"), *and* Brief of Appellant, *Gallagher*, 587 F.3d 1063 (making no argument dismissal should be modified to be without prejudice); *Fitzgerald v. Corr. Corp. of Am.*, 403 F.3d 1134, 1139–40 (10th Cir. 2005) ("[W]hile we uphold the [district court's] determination that [Appellant] failed to exhaust, we vacate and remand for the court below to either modify its opinion to specify that the dismissal is without prejudice, or make a determination on the merits[.]"), *and* Brief of Appellant, *Fitzgerald*, 403 F.3d 1134 (making no argument for dismissal to be modified to without prejudice); *Fourth Corner Credit Union v. Fed. Rsrv. Bank of Kan. City*, 861 F.3d 1052, 1053 (10th Cir. 2017) (per curiam) (with each panel member writing separately, "remanding with instructions to dismiss the amended complaint without prejudice . . . [to] effectuate[] the judgment of the two panel members who would allow the [appellant] to proceed with its claims"), *and* Brief of Appellant, *Fourth Corner Credit Union*, 861 F.3d 1052 (not advancing argument to modify dismissal to without prejudice), *and* Supp. Brief of Appellant, *Fourth Corner Credit Union*, 861 F.3d 1052 (not advancing argument to modify dismissal to without prejudice).

remedy their contract excluded. To state a claim for breach of express warranty,[16] Passholders needed to 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." *Fiberglass Component Prod., Inc. v. Reichhold Chems., Inc.*, 983 F. Supp. 948, 953 (D. Colo. 1997) (citing *Palmer v. A.H. Robins Co., Inc.*, 684 P.2d 187, 205–08 (Colo. 1984)). Under Colorado law, Vail created an express warranty if it made "an affirmation of fact or promise" to Passholders about the Epic Passes which "bec[ame] part of the basis for the bargain." Colo. Rev. Stat. § 4-2-313(1)(a). Vail breached this warranty if the Epic Passes did not "conform to the affirmation or promise." *Id.* "It is not necessary to the creation of an express warranty that the seller use formal words such as 'warrant' or 'guarantee' or that he have a specific intention to make a warranty." Colo. Rev. Stat. § 4-2-313(2).

Passholders alleged that through its advertisements, Vail created an express warranty that Passholders would be able to access its ski resorts, subject to the various pass-level limitations, for the entire 2019–2020 ski season. Passholders alleged this warranty became a "basis of the bargain" as "[Passholders] and the Class relied on the Warranty in deciding to purchase a [p]ass from Vail." App. at 37. Passholders alleged Vail breached this warranty when it closed its resorts prior to the

[16] Because neither Vail, Passholders, nor the district court discussed whether Passholders' breach of warranty claim against Vail properly fell within the scope of the Colorado Uniform Commercial Code, we do not address this issue. *See* Colo. Rev. Stat. § 4-2-102.

end of the 2019–2020 ski season. Passholders claimed the breach caused them damages because they would not have purchased Epic Passes at the same price if they had been aware the Epic Passes would not allow them to access Vail's resorts for the entire 2019–2020 ski season. Finally, Passholders alleged they notified Vail of the breach, reaching out to Vail to seek refunds when it closed its resorts prior to the end of the ski season.

The district court granted dismissal of Passholders' breach of warranty claim based on the same analysis it applied to Passholders' breach of contract claim, determining Vail did provide Passholders access to its resorts for the entire 2019– 2020 ski season and was not obligated to provide Passholders refunds.[17] Accordingly, the district court determined Vail had not breached any warranty to Passholders. Although we disagree with the district court's decision to the extent it relied on its erroneous interpretation of "ski season," the claim fails as it stands because Passholders sought only refunds as a remedy for the alleged breach. As with the breach of contract claim, we vacate the district court's dismissal with prejudice of this claim and remand for the district court to modify its judgment to a dismissal without prejudice so that Passholders may refile seeking relief not expressly barred by the contracts.

[17] The district court also concluded that even if Vail was obligated to provide Passholders refunds, it had done so by offering partial credits for 2020–2021 passes. We disagree with this analysis because a partial credit for a future pass is not a refund. *See Refund*, Oxford English Dictionary Online, https://www.oed.com (last accessed Jan. 25, 2023) (defining refund as "[a] repayment; the return of money paid").

5. Passholders' Breach of the Implied Covenant of Good Faith and Fair Dealing Claim

Passholders' final contract claim alleged Vail breached the implied covenant of good faith and fair dealing "by failing to refund to [Passholders] the money paid for the unusable portion of their Epic Passes covering the dates when the resorts were closed due to the COVID-19 pandemic." App. at 38. In opposition to Vail's motion to dismiss, Passholders argued the breach was two-part. First, Vail announced the season was over when it closed its resorts in March 2020, rather than stating it was closing prior to the end of the season due to the pandemic. Second, based on its decision to treat its closure as the end of the season, Vail failed to issue refunds to Passholders. Unlike Passholders' breach of contract and breach of warranty claims, Passholders alleged the failure to issue refunds was itself the breach of the implied covenant. *See* Appellants' Br. at 44 ("Plaintiffs allege that Vail breached the duty of good faith by failing to recognize that because it closed its ski areas prior to the end of the 2019-2020 season it owed passholders pro-rated refunds."); *see also id.* at 46 ("It was Vail's *failure to provide refunds* that was inconsistent with reasonable expectations, and denied Plaintiffs the benefit of their bargain." (emphasis in original)). Because Passholders' contracts expressly disallowed refunds, the district court correctly granted dismissal of this claim.

"Colorado, like the majority of jurisdictions, recognizes that every contract contains an implied duty of good faith and fair dealing." *Amoco Oil Co. v. Ervin*, 908 P.2d 493, 498 (Colo. 1995), *as modified on denial of reh'g* (Jan. 16, 1996). "Good

faith performance of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party." *Wells Fargo Realty Advisors Funding, Inc. v. Uioli, Inc.*, 872 P.2d 1359, 1363 (Colo. App. 1994). The Supreme Court of Colorado "ha[s] implied the duty of good faith and fair dealing when one party has discretionary authority to determine certain terms of the contract, such as quantity, price, or time." *Bayou Land Co. v. Talley*, 924 P.2d 136, 154 (Colo. 1996). "The covenant may be relied upon only when the manner of performance under a specific contract term allows for discretion on the part of either party." *Amoco Oil Co.*, 908 P.2d at 498. "The concept of discretion in performance refers to one party's power after contract formation to set or control the terms of performance." *Id.* (internal quotation marks omitted).

Passholders' argument—that Vail breached the implied covenant by not issuing refunds—is not plausible under the plain language of the contract. As discussed above, the plain language of the no-refund clause, that Epic Passes were "not eligible for a refund of any kind," App. at 30, means that Passholders could not reasonably expect a return of their money after purchasing the passes. Further, "the duty of good faith cannot be used to contradict terms or conditions for which a party has bargained." *ADT Sec. Servs., Inc. v. Premier Home Prot., Inc.*, 181 P.3d 288, 293 (Colo. App. 2007). Accordingly, Vail did not breach the implied covenant of good faith and fair dealing by refusing to issue refunds, and we affirm the dismissal of this claim with prejudice.

C. Passholders' Quasi-Contractual Claims

We now turn to Passholders' two quasi-contractual claims: unjust enrichment and money had and received. Because they are based on issues covered by Passholders' express contracts with Vail, the district court correctly granted Vail's motion to dismiss these claims.

1. Unjust Enrichment

To state a claim for unjust enrichment, Passholders needed to allege sufficient facts to show: "(1) at [Passholders'] expense (2) [Vail] received a benefit (3) under circumstances that would make it unjust for [Vail] to retain the benefit without paying." *DCB Const. Co. v. Cent. City Dev. Co.*, 965 P.2d 115, 119–20 (Colo. 1998). Unjust enrichment is a quasi-contractual claim, based on the law of restitution. *See id.* at 118–19. "A party generally cannot recover for unjust enrichment, however, where there is an express contract addressing the subject of the alleged obligation to pay." *Pulte Home Corp., Inc. v. Countryside Cmty. Ass'n, Inc.*, 382 P.3d 821, 833 (Colo. 2016); *see also Dudding v. Norton Frickey & Assocs.*, 11 P.3d 441, 445 (Colo. 2000) ("[C]ourts will refuse quantum meruit recovery when expressly contrary to the provisions of the written contract between the parties.").

Colorado courts have recognized two exceptional circumstances where a party could recover based on an unjust enrichment claim despite the existence of an express contract covering the same subject matter: (1) when "the express contract fails or is rescinded," *Pulte Home Corp., Inc.*, 382 P.3d at 833 (citing *Dudding*, 11 P.3d at 445); or (2) "the claim covers matters that are outside of or arose after the

contract," *id.* (citing *Interbank Invs., LLC v. Eagle River Water & Sanitation Dist.*, 77 P.3d 814, 816 (Colo. App. 2003)). A contract fails if it is "unenforceable for some reason." *Gravina Siding & Windows Co. v. Gravina*, 516 P.3d 37, 46 (Colo. App. 2022), *cert. denied sub nom. Frederiksen v. Gravina Siding & Windows Co.*, No. 22SC438, 2022 WL 17754128 (Colo. Dec. 19, 2022).

Passholders argue on appeal that the district court erred in dismissing this claim by not recognizing that the Federal Rules of Civil Procedure allow for pleading in the alternative. But the district court did not dismiss Passholders' unjust enrichment claim because it was pleaded in the alternative. Rather, Passholders did not plead *any* facts, whether in the alternative or not, that would plausibly state a claim for unjust enrichment. Passholders' complaint does not allege facts supporting a finding that (1) there was no contract between Passholders and Vail, (2) the contract between Passholders and Vail has failed or should be rescinded, or (3) Passholders' claim relating to the early closure of the resorts is outside the scope of the contract. Thus, their unjust enrichment claim does not fall into any of the exceptions recognized by Colorado.

Passholders also argue they pleaded sufficient facts to show their contracts with Vail may be illusory if Vail had sole discretion to decide when the 2019–2020 ski season ended. A contract is illusory when it "le[aves] sole discretion whether or not to perform to one party." *Bernhardt v. Hemphill*, 878 P.2d 107, 111 (Colo. App. 1994) (citing *Sentinel Acceptance Corp. v. Colgate*, 424 P.2d 380 (Colo. 1967)). Passholders, however, did not allege that Vail had discretion over when the ski

season ended, even as an alternative allegation. App. at 21–54. Further, Vail acknowledges that if the meaning of "ski season" was when Vail decided to open and close its resorts in its sole discretion, this discretion would be constrained by the covenant of good faith. As a result, the contracts are not illusory and Passholders cannot rely on an unjust enrichment claim simply because the contracts could be interpreted in a way that does not provide them the relief they seek. *See Interbank Invs., LLC*, 77 P.3d at 818–19 (holding unjust enrichment claim is not available based on inadequacy of the remedy under an express contract). Accordingly, the district court correctly dismissed this claim with prejudice.

2. Money Had and Received

Passholders' second quasi-contractual claim, money had and received, fails for the same reason.[18] Like unjust enrichment, a plaintiff cannot recover based on a money had and received claim where the claim is based on an allegation that defendant breached an express contract.

"A plaintiff can maintain an action for money had and received whenever the defendant 'has received money which, in equity and good conscience, he ought to pay over.'" *Monday v. Robert J. Anderson, P.C.*, 77 P.3d 855, 857 (Colo. App. 2003)

[18] Vail argues on appeal that Passholders have waived any dispute to the district court's dismissal of their money had and received claim by not addressing this claim in their opening brief. *See* Appellees' Br. at 12–13. We disagree. In their opening brief, Passholders argue the district court erred in dismissing their "quasi-contractual claims," presumably addressing both "unjust enrichment" and "money had and received" with the same analysis. Appellants' Br. at 12, 46–47; Reply at 25. Thus, we do not agree that Passholders waived this argument.

(quoting *Spencer v. Brundage*, 194 P. 1104, 1105 (Colo. 1921)); *see also Mullens v. Hansel-Henderson*, 65 P.3d 992, 999 (Colo. 2002), *as modified on denial of reh'g* (Jan. 13, 2003*)* ("Under [the principle governing 'money had and received claim,'] a party will not be allowed to keep money which in equity and good conscience should be returned to another.").

Colorado has adopted the "economic loss rule," meaning "a party suffering only economic loss from the breach of an express or implied contractual duty may not assert a tort claim for such a breach absent an independent duty of care under tort law." *Town of Alma v. AZCO Const., Inc.*, 10 P.3d 1256, 1264 (Colo. 2000). "The key to determining the availability of a contract or tort action lies in determining the source of the duty that forms the basis of the action." *Id.* at 1262. When the source of the duty is independent from any contract, the economic loss rule is not implicated. *Id.* But when the source of the duty is the contract itself, it "must be redressed under contract." *Id.* (quoting *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 463 S.E.2d 85, 88 (S.C. 1995)).

Applying this test to Passholders' claim, all of Passholders' allegations stem from the contract between Passholders and Vail. Passholders alleged Vail wrongfully kept their money despite closing its resorts prior to the end of the 2019–2020 ski season. Passholders alleged they were promised access to Vail's resorts for the entire 2019–2020 ski season in their contracts with Vail. Importantly, Passholders did not allege Vail violated any independent, common-law duty. Nor did Passholders plead

facts, even in the alternative, plausibly showing their contracts with Vail were illusory. Thus, Passholders money had and received claim fails.

D. Passholders' State Consumer Protection Law Claims

In addition to their contractual and quasi-contractual claims, Passholders brought six causes of action based on allegations that Vail violated various state consumer protection laws.[19] These claims are all tied to an individual Passholder, who lives in the relevant state, as well as a sub-class of all Passholders from the relevant state.[20] The specific elements of each of these causes of action vary according to the relevant state statute, but all of the claims require Passholders to demonstrate Vail engaged in a deceptive or unfair act or practice. On appeal, Vail has relied on one overarching argument to address these six claims—that it did not engage in any deceptive or unfair act when it sold the Epic Passes, advertising them as providing access to its resorts for the entire 2019–2020 ski season, and then closed

[19] Passholders originally brought seven state consumer protection law claims, but they withdrew their claim under the California False Advertising Law prior to the district court issuing its decision.

[20] In its motion to dismiss, Vail argued that all of Passholders' non-Colorado consumer law claims failed because Passholders were bound by a choice-of-law provision on Vail's website that stated use of the website was governed by Colorado law. App. at 67–68. The district court chose to "assum[e] without deciding that the choice-of-law provision does not bar non-Colorado claims . . . find[ing] that [Passholders] have failed to state claims under the other states' consumer protection statutes." *Id.* at 233. In its brief on appeal, Vail does not argue that the choice-of-law provision provided an alternative basis to affirm the district court. *See* Appellees' Br. at 41–47. Accordingly, we do not address this argument.

its resorts due to the COVID-19 pandemic in mid-March 2020 without issuing refunds.

The district court granted dismissal on these six claims based on its interpretation of "2019–2020 ski season" and the no-refund clause. Because the district court determined "2019–2020 ski season" unambiguously referred to the period it was safe for Vail to keep its resorts open, the district court concluded Vail did not act unfairly or deceptively by advertising Epic Passes as providing access for the entire 2019–2020 ski season. The district court also concluded that even if Vail had failed to provide access for the entire ski season, Passholders could not have reasonably expected refunds when the advertisements for Epic Passes included no language such as "unlimited, unrestricted access *or your money back*[,]" *id.* at 234 (emphasis in original), and Vail's representations "disclaimed 'refunds of any kind,'" *id.* (quoting App. at 30).

For the six state consumer protection law causes of action to survive a Rule 12(b)(6) motion to dismiss, Passholders needed to plead facts that plausibly demonstrated Vail engaged in either an unfair or deceptive act or practice. *See* Cal. Civ. Code § 1770(a) (prohibiting "unfair or deceptive acts or practices"); Cal. Bus. & Prof. Code § 17200 ("[U]nfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising."); N.Y. Gen. Bus. Law § 349 (prohibiting "[d]eceptive acts or practices in the conduct of any business"); 815 Ill. Comp. Stat. 505/2 (prohibiting "[u]nfair methods of competition and unfair or deceptive acts or practices"); Fla.

Stat. § 501.204 (prohibiting "[u]nfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce"); Wash. Rev. Code § 19.86.020 (prohibiting "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce"). Passholders alleged that Vail engaged in two unfair and deceptive acts: (1) advertising Epic Passes as providing access to its resorts for the entire 2019–2020 ski season and subsequently closing its resorts prior to the end of the season and (2) not informing consumers that Vail would not issue refunds if it closed its resorts prior to the end of the 2019–2020 ski season.

Only the first of these two allegations is potentially meritorious. As outlined above, the district court erred in its interpretation of "2019–2020 ski season" because the term was ambiguous and Passholders reasonably interpreted it to refer to the period of time in which skiing and snowboarding were practical based on weather conditions. Accordingly, Passholders have plausibly alleged the advertisements were unfair or deceptive as Passholders could have reasonably understood the advertisements to promise access to Vail's ski resorts for a period longer than the resorts remained open. However, due to the no-refund clause, Passholders could not have been reasonably misled or deceived into believing Vail would provide refunds if it closed its resorts prior to the end of the season.

Ultimately, these six claims suffer the same fatal flaw as Passholders' breach of contract and breach of warranty claims. Based on Vail's alleged violations of these six consumer protection statutes, Passholders seek refunds as a remedy. As discussed

above, Passholders are not entitled to refunds when they signed contracts expressly prohibiting this remedy. *See SOLIDFX, LLC*, 841 F.3d at 838. Accordingly, the district court correctly granted dismissal of these claims. However, as with Passholders' breach of contract and breach of warranty claims, we vacate the district court's dismissal of these six claims with prejudice and remand for the district court to modify its judgment to a dismissal without prejudice so that Passholders may refile seeking relief not expressly barred by the contracts.

III. CONCLUSION

We AFFIRM in part and VACATE in part. We AFFIRM the district court's dismissal of Passholders' implied covenant of good faith and fair dealing, unjust enrichment, and money had and received claims. We VACATE the district court's dismissal of Passholders' breach of contract, breach of warranty, and state consumer protection claims, so that the district court may modify the dismissal of these claims to be without prejudice.

No. 21-1400, *McAuliffe v. Vail Corp.*

EID, J., concurring in part and dissenting in part

The majority concludes that Passholders' claims fail because the only relief they seek is a refund, and the agreement with Vail says in plain and unambiguous terms that there will be no refunds. *See* maj. op. at 26 (noting that passes "were not eligible for a refund of any kind" (quoting App'x at 30)). I agree. But I disagree with the majority's decision to vacate the district court's "with prejudice" dismissal in order to allow Passholders to amend their complaint to add a request for other forms of relief. As the district court found, Passholders are not interested in other forms of relief; they want "cash only." App'x at 221. Moreover, Passholders did not argue below or in their submissions to us that the dismissal should have been without prejudice in order to allow them to amend. Accordingly, because I would affirm the district court's dismissal order as it was issued—that is, with prejudice—I respectfully concur in part and dissent in part.[1]

I.

As an initial matter, the majority's decision to vacate the district court's "with prejudice" dismissal just gets the facts wrong. The majority repeatedly suggests that the dismissal should be without prejudice because Passholders may want to amend

[1] The majority vacates the district court's dismissal order with regard to Passholders' contract, breach of warranty, and consumer protection claims. *See* maj. op. at 3–4. I therefore dissent with regard to its disposition of those claims. It affirms the dismissal order with regard to Passholders' breach of implied covenant of good faith and fair dealing claim and their two quasi-contractual claims. *See id.* I therefore concur with its disposition of those claims.

their complaint to seek something other than refunds. *See, e.g.*, maj. op. at 3–4, 32–33, 35, 45. It even goes so far as to suggest something that might get around the "no refunds" clause—namely, "Passholders could seek future access to Vail's resorts for the amount of time Vail closed its resorts . . . ." *Id.* at 32. But that is the remedy that Passholders were offered and that they rejected.[2] As explained by the district court, Passholders claimed that Vail failed to compensate them for closing the resorts. The court concluded that Vail did indeed compensate them—through the issuance of credits toward a pass for the following season. But Passholders wanted to be compensated "in cash and only in cash." App'x at 220. As the district court explained, "[m]erchants regularly compensate customers in free products, discount codes, gift cards, or through other non-cash methods. . . . [Passholders] may have reasonably expected adequate compensation in the event of an unexpected closure, but they could not have expected cash only." *Id.* at 221. The court ultimately concluded that "Vail [did not] fail to compensate [Passholders], [as it] issued satisfactory credits." *Id.* at 223. Passholders in this case simply did not redeem the credits by the deadline. *See id.* at 33. In sum, as the district court found, Passholders argued that anything short of a cash refund would be insufficient compensation.

[2] There may be a slight distinction between credits toward a ski pass for a full ski season that must still be purchased with additional money (what was offered) and credits of only the amount of time for which Passholders could not ski without an additional purchase necessary to make use of the ski time. But, again, Passholders did not request this sort of remedy in any case.

Indeed, this theory forms the very basis of Passholders' class action suit, as they refused the credit remedy in order to seek a cash remedy. *See* maj. op. at 9.

Passholders could have asked the district court on reconsideration for a dismissal without prejudice and then sought to amend their complaint to seek additional non-cash relief. *See* Fed. R. Civ. P. 41(a). But they did not. Nor did they challenge the dismissal "with prejudice" in their arguments to us, let alone suggest that they might need such a dismissal in order to amend their complaint. It was not enough to challenge on appeal the dismissal generally. Passholders needed to challenge the prejudice determination too. Any argument that the dismissal should have been without prejudice has been waived.[3]

That Passholders have not challenged the "with prejudice" dismissal is not at all surprising, given that—as the district court correctly concluded—the core of their dispute with Vail is getting a cash refund. Passholders should not be given another bite at the apple to test other theories of recovery now that we have rejected their refund-only theory based on the plain and unambiguous "no refunds" language. The majority's decision otherwise is counterfactual and unpreserved.[4]

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[3] Any non-jurisdictional argument not presented in the appellants' opening brief has been waived. *See High Desert Relief, Inc. v. United States*, 917 F.3d 1170, 1187 (10th Cir. 2019) (citing *Medina v. Catholic Health Initiatives*, 877 F.3d 1213, 1227 n.6 (10th Cir. 2017); *Flores-Molina v. Sessions*, 850 F.3d 1150, 1172 n.16 (10th Cir. 2017)) ("This argument . . . is waived because, while it was raised in HDR's reply brief and Rule 28(j) letter, it was not mentioned in its opening brief." (citing *Medina*, 877 F.3d at 1227 n.6; *Flores-Molina*, 850 F.3d at 1172 n.16)).

[4] The majority's cases purporting to show the contrary are distinguishable. *See* maj. op. at 33 & n.15 (citing *Brereton v. Bountiful City Corp.*, 434 F.3d 1213, 1219

(10th Cir. 2006); *Gallagher v. Shelton*, 587 F.3d 1063, 1068 (10th Cir. 2009); *Fitzgerald v. Corr. Corp. of Am.*, 403 F.3d 1134, 1139–40 (10th Cir. 2005); *Fourth Corner Credit Union v. Fed. Rsrv. Bank of Kan. City*, 861 F.3d 1052, 1053 (10th Cir. 2017) (per curiam)). It is worth noting that although we have held "that denial of leave to amend and dismissal with prejudice are two separate concepts," *Brereton*, 434 F.3d at 1219 (citing *N. Assurance Co. of Am. v. Square D Co.*, 201 F.3d 84, 88 (2d Cir. 2000)), we have held that "[t]he two concepts do not overlap in those cases where, although amendment would be futile, *a jurisdictional defect calls for a dismissal without prejudice*," *id.* (emphasis added) (citing *Hutchinson v. Pfeil*, 211 F.3d 515, 519, 523 (10th Cir. 2000); *Bauchman ex rel. Bauchman v. W. High Sch.*, 132 F.3d 542, 549–50, 561–62 (10th Cir. 1997)). This jurisdictional aspect distinguishes cases like *Brereton*, where the concepts do not overlap, from the case at hand, where they do.

Jurisdiction or the failure to exhaust administrative remedies in prisoner lawsuits has generally been the issue in the cases in which we have changed the district court's dismissal to one without prejudice despite the futility of amendment in the instant case. *See id.* at 1219–20 (no jurisdiction); *Hutchinson*, 211 F.3d at 523 (no jurisdiction); *Bauchman*, 132 F.3d at 549–50, 561–62 (no jurisdiction); *Gallagher*, 587 F.3d at 1068 (failure to exhaust administrative remedies in prisoner suit); *Fitzgerald*, 403 F.3d at 1139–40 (failure to exhaust administrative remedies in prisoner suit). Neither of those is at issue here.

We have also changed a dismissal to be without prejudice as a form of compromise to effectuate a result in a case. *See Fourth Corner Credit Union*, 861 F.3d at 1053 (per curiam). However, the reasoning allowing such a dismissal without prejudice is not coherent enough to guide us here because every panel member wrote separately and had different rationales and desired judgments. One panel member "would [have] affirm[ed] the dismissal with prejudice." *Id.* Another panel member "would [have] reverse[d] the dismissal of the amended complaint." *Id.* Only one panel member wanted to "vacate and remand with instructions to dismiss the amended complaint without prejudice" and based this "on prudential ripeness grounds." *Id.* The dismissal without prejudice effectuated the result of allowing the plaintiff "to proceed with its claims." *Id.* But the only panel member arguing for this result did so on prudential ripeness grounds, *id.* at 1058–59 (Matheson, J., opinion)—which, as another panel member noted, may no longer be good law. *See id.* at 1076 n.13 (Bacharach, J., opinion) (citing *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 167 (2014); *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125–26 (2014); *Reddy v. Foster*, 845 F.3d 493, 501 n.6 (1st Cir. 2017)) (noting that the Supreme Court has cast doubt on the continuing viability of prudential ripeness). As a result, this varied reasoning can hardly guide us in the present case.

II.

Because Passholders cannot recover refunds no matter how long or short the "ski season" is, I would not need to reach the question of how "ski season" should be defined. Indeed, the majority acknowledges that the definition of "ski season" only matters because, in its view, the dismissal should be vacated to allow Passholders to seek relief other than refunds. *See* maj. op. at 32–33, 35, 45. But setting this disagreement aside, the majority's decision to vacate the "with prejudice" dismissal has collateral—and problematic—consequences.

The majority starts with the premise that "[w]hen a claim rests on interpretation of a contract, 'ambiguous contract language may not be resolved in a motion to dismiss.'" *Id.* at 17 (quoting *Sonoiki v. Harvard Univ.*, 37 F.4th 691, 711 (1st Cir. 2022)) (citing *Orlander v. Staples, Inc.*, 802 F.3d 289, 295 (2d Cir. 2015); *ASARCO, LLC v. Union Pac. R.R. Co.*, 765 F.3d 999, 1008–09 (9th Cir. 2014)). The majority also cites *Jaeco Pump Co. v. Inject-O-Meter Mfg. Co.*, 467 F.2d 317 (10th Cir. 1972), for the proposition that "[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." *Id.* at 24 (quoting *Jaeco Pump Co.*, 467 F.2d at 320); *see also id.* (citing *City of Farmington v. Amoco Gas Co.*, 777 F.2d 554, 560 (10th Cir. 1985)) (cited for same proposition). But the majority is wrong to suggest that these cases establish a general rule that under Rule 12(b)(6) differences in opinion regarding

legal interpretations make the legal issue ambiguous and, therefore, convert the legal issue to a factual one.

We must apply Colorado law to interpret this contract and our law for procedural purposes. Yet the majority loses sight of both binding sources of law—improperly finding ambiguity where Colorado law does not support it and failing to follow our circuit's case law on what kind of ambiguity prevents resolution at the motion to dismiss stage. The majority's purported federal rule about when we can interpret contract language given differences in legal interpretations is not supported by the Tenth Circuit's case law. *See Metro. Paving Co. v. City of Aurora*, 449 F.2d 177, 181 (10th Cir. 1971) ("[T]he mere fact that the parties to the contract disagree on the construction to be given it does not necessarily establish a case of ambiguity." (citing generally *Whiting Stoker Co. v. Chi. Stoker Corp.*, 171 F.2d 248 (7th Cir. 1949))). In neglecting to interpret the contract in this case at this stage of the litigation, the majority ignores our case law and improperly bases the decision in the law of other circuits. But even if this were our rule, the cited cases are inapposite because the contractual language here is not ambiguous in the same sense as the contractual language in the cited cases.

In determining ambiguity under Colorado case law, referring to *Dorman v. Petrol Aspen, Inc.*, 914 P.2d 909 (Colo. 1996)—which the majority cites, *see* maj. op. at 18 (quoting *Dorman*, 914 P.2d at 912); *id.* at 19 (quoting *Dorman*, 914 P.2d at 911); *id.* at 26 (citing *Dorman*, 914 P.2d at 912)—is helpful but shows that *Dorman* is substantively unavailing here for the majority. In *Dorman*, the district court

granted the employer's motion to dismiss a discharged employee's claim on the ground that the employee was at-will; and the Colorado Court of Appeals affirmed the dismissal. *See* 914 P.2d at 911. The Colorado Supreme Court reversed, stating that the employment contract was ambiguous as to the employee's at-will status due to, inter alia, stock option provisions, listing of salaries for particular years, and other references to the employee's long-term status. *See id.* at 912. According to the Court, under such circumstances, the employee "must be afforded the opportunity to present to a fact-finder extrinsic evidence of the parties' intentions concerning the term of the employment contract, . . . including any evidence supporting Dorman's assertion that oral negotiations supplemented or expanded upon the written contract terms." *Id.* (citations omitted). There is nothing like that going on in this case.

Likewise, the majority cites *Cheyenne Mountain School District No. 12 v. Thompson*, 861 P.2d 711 (Colo. 1993), for the related proposition that "[o]nly after a contract is deemed ambiguous may the trial court use extrinsic evidence to assist it in ascertaining the intent of the parties." Maj. op. at 19 (quoting *Cheyenne Mountain Sch. Dist. No. 12*, 961 P.2d at 715). Like *Dorman*, *Cheyenne Mountain School District No. 12* was an employment contract dispute for which parol evidence was necessary to determine meaning. *See Cheyenne Mountain Sch. Dist. No. 12*, 861 P.2d at 715–16.

But the majority's reliance on these cases does not further its argument that this contract is ambiguous under Colorado law. These cases did not involve simply judging competing interpretations. *See id.*; *Dorman*, 914 P.2d at 912–15. Indeed,

another case cited by the majority makes this point about our interpretive role. *See* maj. op. at 24 (citing *Metro. Paving Co.*, 449 F.2d at 181). As noted above, *Metropolitan Paving Co. v. City of Aurora*, 449 F.2d 177 (10th Cir. 1971), states that "the mere fact that the parties to the contract disagree on the construction to be given it does not necessarily establish a case of ambiguity." *Id.* at 181 (citing generally *Whiting Stoker Co. v. Chi. Stoker Corp.*, 171 F.2d 248 (7th Cir. 1949)). The majority ignores that this is our case law when it attempts to import a rule to the contrary from other circuits.

Unlike the parties in the majority's cited cases, Passholders made the *legal* argument in the district court, and repeat it before us, that "ski season" should be defined as "when snow conditions and weather require[] closing." App'x at 77 (Plaintiffs' Response to Defendants' Rule 12(b)(6) Motion to Dismiss); *see also* maj. op. at 23. Using that definition, Passholders argue, "discovery and scientific evidence" would help determine the "fact question" of the exact date. App'x at 77. Therefore, under Passholders' own argument, the fact issue only comes into play if we adopt their legal interpretation of "ski season." In other words, here Passholders cannot avoid dismissal simply by arguing the term "ski season" is legally ambiguous in a *Chevron*-like way, as the majority seems to suggest. *See* maj. op. at 23–24 (holding that Passholders can avoid dismissal on this basis because there are three possible legal interpretations of "ski season"); *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984); *see also Goodwill Indus. Of Cent. Okla., Inc. v. Phila. Indem. Ins. Co.*, 21 F.4th 704, 713–14 (10th Cir. 2021) (affirming the

granting of a motion to dismiss while interpreting a contractual term); *Montgomery v. City of Ardmore*, 365 F.3d 926, 942–43 (10th Cir. 2004) (affirming the granting of a motion to dismiss while interpreting a state statute); *S. Furniture Leasing, Inc. v. YRC, Inc.*, 989 F.3d 1141, 1144 (10th Cir. 2021) (affirming the granting of a motion to dismiss while interpreting a federal statute).

Moreover, although Colorado case law provides that "[a] document is ambiguous 'when it is reasonably susceptible to more than one meaning,'" *Cheyenne Mountain Sch. Dist. No. 12*, 861 P.2d at 715 (quoting *N. Ins. Co. of N.Y. v. Ekstrom*, 784 P.2d 320, 323 (Colo. 1989)), it is not determined to be ambiguous before considering local usage of terms in analyzing plain meaning: "In deciding whether a contract is ambiguous, a court 'may consider extrinsic evidence bearing upon the meaning of the written terms, such as evidence of local usage and of the circumstances surrounding the making of the contract,'" *see id.* (quoting *KN Energy, Inc. v. Great W. Sugar Co.*, 698 P.2d 769, 777 (Colo. 1985)) (citing *Pepcol Mfg. Co. v. Denver Union Corp.*, 687 P.2d 1310, 1314 n.3 (Colo. 1984)). "[T]he court may not consider the parties' own extrinsic expressions of intent" at this stage. *See id.* (quoting *KN Energy, Inc.*, 698 P.2d at 777) (citing *Pepcol Mfg. Co.*, 687 P.2d at 1314 n.3). But that is unnecessary here. Even if we must use local custom in addition to common sense to determine the meaning of a ski season, that is done *before* declaring that a contract is ambiguous because it can be used "[i]n deciding whether a contract is ambiguous." *Id.* (citations omitted). And here we can successfully use common

sense—and if necessary, local custom—to determine the meaning.[5] The common-sense meaning simply cuts against Passholders' position.

In my view, the district court's reading of "ski season" is correct. That term cannot mean what Passholders propose—namely, that the ski season must go on even though it is unsafe to ski. *See* App'x at 215–16. Notably, the majority simply rejects this definition as "overly literal" (although apparently "reasonable"). Maj. op. at 23. There is no disputed fact issue. At issue is a legal interpretation question that we may decide at the motion to dismiss stage. The existence of competing arguments does not leave us helpless at the motion to dismiss stage. *See Metro. Paving Co.*, 449 F.2d at 181 (citing generally *Whiting Stoker Co. v. Chi. Stoker Corp.*, 171 F.2d 248 (7th Cir. 1949)).

In sum, even if Passholders had challenged the "with prejudice" dismissal and eventually amended their complaint to seek something other than a cash-only remedy, they still could not maintain a consumer protection claim under the theory proposed by the majority—namely, that under their definition of "ski season" that requires a season to continue as long as weather and conditions permit, "a reasonable jury could find that Vail acted unfairly or deceptively by advertising Epic Passes as providing access to its resorts for the entire 2019–2020 ski season." Maj. op. at 4. Nor could they make out a contract or warranty claim under this theory. *Cf. id.* at

[5] To be clear, I do not think that we need to go beyond common sense here. But to the extent that the majority thinks we need to consider something more than common sense such as local custom regarding the meaning of a "ski season," that may be done before declaring the contractual phrase to be ambiguous.

32–33 (contract); *id.* at 35 (warranty). The district court properly dismissed all of Passholders' claims with prejudice.

III.

For these reasons, I would affirm the district court's judgment in its entirety and respectfully concur in part and dissent in part.