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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SHAWNNA MONTES, on behalf of herself and all others similarly situated, Plaintiff-Appellant, v. SPARC GROUP, LLC, Defendant-Appellee.	No. 23-35496 D.C. No. 2:22-cv-00201-TOR MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of Washington
Thomas O. Rice, District Judge, Presiding

Argued and Submitted October 23, 2024
Submission Withdrawn May 9, 2025
Resubmitted October 21, 2026
San Francisco, California

Before: S.R. THOMAS, WARDLAW, and COLLINS, Circuit Judges;
Partial Concurrence in the Judgment and Partial Dissent by Judge COLLINS.

Shawnna Montes appeals the district court's dismissal of her putative class action for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). We have jurisdiction under 28 U.S.C. § 1291.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Ms. Montes raised four theories of liability under the Washington Consumer Protection Act ("CPA"): that she would not have purchased the leggings but for the false advertising of a sale price, that she did not enjoy the advertised discount, that the items were worth less than the represented price, and that she paid a price premium. The district court viewed Ms. Montes's allegations as resting upon two theories of injury: "that she was misled into purchasing something of value and that she incurred a price premium injury." On appeal, Ms. Montes clarified that her claims were based on three theories: the purchase price theory, the benefit of the bargain theory, and the price premium theory.

Because this appeal raised unsettled questions regarding Washington's CPA, we certified the following question of state law to the Washington Supreme Court:

> When a seller advertises a product's price, coupled with a misrepresentation about the product's discounted price, comparative price, or price history, does a consumer who purchases the product because of the misrepresentation suffer an "injur[y] in his or her business or property" under Wash. Rev. Code §§ 19.86.020 and 19.86.090 if the consumer pays the advertised price?

On April 2, 2026, the Washington Supreme Court responded and addressed each of Ms. Montes's theories of injury. In light of the Washington Supreme Court's response, we conclude that while two of Ms. Montes's theories of liability are not viable, if given leave to amend her complaint, Ms. Montes may be able to allege sufficient facts to support a claim under the price premium theory.

We review a Rule 12(b)(6) dismissal for failure to state a claim de novo. *See Sanders v. Kennedy*, 794 F.2d 478, 481 (9th Cir. 1986). But, in doing so, "[a]ll material allegations in the complaint are to be taken as true and construed in the light most favorable to the non-moving party." *Id.* Washington law applies because "a federal court sitting in diversity applies the substantive law of the state." *Clark v. Eddie Bauer LLC*, 30 F.4th 1151, 1154 (9th Cir. 2022) (quoting *Albano v. Shea Homes Ltd. P'ship*, 634 F.3d 524, 530 (9th Cir. 2011)). Further, we review the district court's decision to dismiss the complaint with prejudice and without leave to amend for abuse of discretion. *See AE ex rel. Hernandez v. Cnty of Tulare*, 666 F.3d 631, 636 (9th Cir. 2012).

We affirm the district court's dismissal of Ms. Montes's complaint for failure to plead a cognizable injury under the CPA with respect to the purchase price and benefit of the bargain theories. Under Washington consumer protection law, "[a] consumer does not suffer an injury in 'her business or property' when she purchases—and obtains and keeps—the fungible product she sought to obtain but does so because the seller misrepresented the product's price history." *Montes v. SPARC Grp. LLC*, 586 P.3d. 999, 1002 (Wash. 2026). Regarding the purchase price theory, the notion "that Aéropostale wrongfully induced [Ms. Montes] to purchase leggings for $6.00 by misrepresenting that they typically sold for $12.50," the Washington Supreme Court held that, "[w]ithout more, the mere fact of a retail

transaction does not imply economic loss." *Id.* at 1005–6. Further, regarding the benefit of the bargain theory, the court held that "[Ms. Montes] may have been manipulated into purchasing the items because she believed she was getting a bargain does not necessarily mean she suffered economic harm." *Id.* at 1008 (citation modified). For these reasons, the court held that Montes's first two legal theories of injury were not viable. *Id.*

However, we read the Washington Supreme Court as holding that a price premium theory of injury may be cognizable under Washington's CPA when supported by sufficient facts.[1] *Id*. This is because "[a] consumer could allege economic loss if . . . the product she received was . . . less valuable than what was advertised." *Id*. at 1002. The Washington Supreme Court determined that Ms. Montes could not support a price premium theory argument because she "did not allege" a required factual element—the value and worth of the leggings. *Id*. The

[1] The dissent interprets the Washington Supreme Court's statement that the price premium theory requires more than alleging that the leggings were less than the purchase price as an independent holding that such a theory is legally insufficient under the CPA. *See* Dissent at 3. The dissent quotes the following assertion extensively: "an allegation that under different, hypothetical conditions the seller would have had to charge less for the same product to enjoy the same level of demand is distinct from an allegation that at the time Montes bought the leggings, they were not worth $6." *Montes*, 586 P.3d at 1006 n.6. But it does not logically follow that the existence of two "distinct" allegations in proving a price premium theory means that the theory is legally unavailable. Moreover, the dissent focuses on the factual inadequacy of Ms. Montes's complaint to claim that the price premium theory is not legally cognizable. *See* Dissent at 4–6. But a lack of sufficient facts in a complaint is not reason to conclude that a claim is unavailable as a matter of law.

court also suggested that Ms. Montes's "factual concession" in her opposition to SPARC's motion to dismiss that "the leggings had the monetary value that she paid for them" defeated her price premium theory. *Id.* at 1008.

The "factual concession" discussed by the Washington Supreme Court is not a proper basis for affirming the dismissal of her case. While it is true that Ms. "Montes's factual assertions varied somewhat over the course of the litigation," *Id.*, her statement that the leggings were equal to the value she paid for them was made in a brief opposing SPARC's motion to dismiss, not her complaint.[2]

Under our precedent, "[i]n determining the propriety of a Rule 12(b)(6) dismissal, a court may not look beyond the complaint to a plaintiff's moving papers, such as a memorandum in opposition to a defendant's motion to dismiss." *Schneider v. Cal. Dep't of Corr.*, 151 F.3d 1194, 1197 n.1 (9th Cir. 1998) (alteration omitted). This is because "[t]he focus of any Rule 12(b)(6) dismissal—both in the trial court and on appeal—is the complaint." *Id.* While "[a] district court does not abuse its discretion in denying leave to amend where it would have been impossible for the plaintiff to amend the complaint to state a viable claim 'without contradicting any of the allegations of his original complaint,'" *Garmon v. Cnty. of Los Angeles*, 828 F.3d

[2] On closer inspection, Ms. Montes did not even wholly concede that the leggings she purchased were of equal value to the price she paid. She asserted that the leggings "had an actual value of *between $5.00 and $6.00*—the price range Aéropostale regularly offered them for sale" (emphasis added).

837, 846 (9th Cir. 2016) (quoting *Reddy v. Litton Indus., Inc.*, 912 F.2d 291, 296–97 (9th Cir. 1990)), the present case does not implicate this concern. As Ms. Montes did not allege that the leggings she bought were worth $6.00 in her complaint, amendment would only risk contradicting her opposition to SPARC's motion to dismiss. *Schneider*, 151 F.3d at 1197 n.1.

"Dismissal with prejudice and without leave to amend is not appropriate unless it is clear on de novo review that the complaint could not be saved by amendment." *Eminence Cap., LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003); *see also Sonoma Cnty. Ass'n of Retired Emps. v. Sonoma Cnty.*, 708 F.3d 1109, 1118 (9th Cir. 2013). Here, an amendment to Ms. Montes's complaint could save her claim under a price premium theory by alleging facts regarding the true value of the leggings she purchased. Thus, the district court abused its discretion in denying leave to amend. *See Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc.*, 368 F.3d 1053, 1061 (9th Cir. 2004) (explaining that "[d]ismissal without leave to amend is improper unless . . . the complaint could not be saved by any amendment"). As leave to amend pleadings "should [be] freely give[n] . . . when justice so requires" under Rule 15(a) of the Federal Rules of Civil Procedure, leave to amend is appropriate here. Fed. R. Civ. P. 15(a).

AFFIRMED in part, **REVERSED** in part, and **REMANDED** for leave to amend her complaint.

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Shawnna Montes v. SPARC Group, LLC, No. 23-35496

COLLINS, Circuit Judge, concurring in the judgment in part and dissenting in part:

In *Montes v. SPARC Grp., LLC*, 136 F.4th 1168 (9th Cir. 2025), we certified the following question of Washington law to the Washington Supreme Court:

> When a seller advertises a product's price, coupled with a misrepresentation about the product's discounted price, comparative price, or price history, does a consumer who purchases the product because of the misrepresentation suffer an "injur[y] in his or her business or property" under [the Washington Consumer Protection Act ("CPA"),] Wash. Rev. Code §§ 19.86.020 and 19.86.090[,] if the consumer pays the advertised price?

Id. at 1169. In certifying this question, we noted that Plaintiff-Appellant Shawnna Montes, who alleged such a false-discounting scheme in connection with her purchase of $6 leggings from Defendant-Appellee SPARC Group, LLC ("Aéropostale"), had raised "three theories of injury." *Id*. at 1169–70 & n.2. Our certification order "set forth all of Montes's theories of injury so that the Washington Supreme Court may discuss the viability of these theories under Washington law in the false discounting context to the extent it sees fit":

> First, she alleges that she was injured because but for the deceptive discount advertising she would not have purchased the leggings at the price that she paid, the "purchase price theory." Second, she alleges that she was injured because she did not receive the discount that she thought she was getting, the "benefit of the bargain" theory. Finally, Montes argues that the false discounting scheme raised the cost of Aéropostale's clothes for all consumers, and therefore she

> purchased the leggings at an inflated price, the "price premium theory."

Id. at 1169 n.2.

The Washington Supreme Court accepted our certification request, and it answered as follows:

> [The Ninth Circuit] asked whether a consumer who alleges she purchased a product at its advertised price because of a misrepresentation about the product's discounted price, comparative price, or price history has alleged that she suffered a cognizable CPA injury, that is, an injury in her business or property. The answer is no. She has not alleged a cognizable CPA injury in her business or property because she does not allege an objective economic loss.

Montes v. SPARC Grp. LLC, 586 P.3d 999, 1008 (Wash. 2026).

Notwithstanding the Washington Supreme Court's negative answer to our certified question, the majority concludes that Montes should be granted leave to amend with respect to her "price premium" theory only. *See* Memo. Dispo. at 4–6. Because I conclude that all of Montes's theories—including her price premium theory—fail under the reasoning of the Washington Supreme Court's opinion and that leave to amend would be futile, I would affirm the district court's judgment dismissing Montes's complaint. To the extent that the majority concludes otherwise, I respectfully dissent.

As we noted in our certification order, Montes's "price premium theory" was based on the allegation "that the false discounting scheme raised the cost of

Aéropostale's clothes for all consumers, and therefore she purchased the leggings at an inflated price." 136 F.4th at 1169 n.2. As Montes alleged in her complaint, "[b]ut for the false advertising scheme, Aéropostale would have had to charge less money for its products in order to enjoy the same level of demand for its products."

The Washington Supreme Court squarely rejected this theory as insufficient under Washington law: "an allegation that under different, hypothetical conditions the seller would have had to charge less for the same product to enjoy the same level of demand is distinct from an allegation that at the time Montes bought the leggings, they were not worth $6." *Montes*, 586 P.3d at 1006 n.6. As the court explained, Montes never made the latter allegation, which would be required to state a claim under the CPA. Because "the market determines the fair market value," "a seller's abstract claim about value"—such as a "misrepresentation related only to the price history of the product"—"does not create an *objective* difference between two otherwise identical fungible items." *Id.* at 1006 (emphasis added). Montes, however, failed to allege any such misrepresented objective difference, such that the leggings could be said to be worth objectively less than the $6 market price she paid for them. Montes's complaint did not allege that there was anything objectively inferior or unexpected concerning the leggings she received, and she affirmatively pleaded that the price she paid ($6.00) was within the $5.00–$6.00 range of the market price of the leggings over the six months

preceding Montes's purchase.

The dissenting opinion in the Washington Supreme Court disagreed with the court majority on these precise points. According to the dissenting Justices, the majority was wrong in "holding that such a consumer"—*i.e.*, a "consumer who purchases a product because of a misrepresentation regarding the product's price history"—"suffers no injury so long as [she] receive[s] goods with the same 'objective value' as those advertised." *Id*. at 1008 (Stephens, C.J., dissenting). The dissent specifically disagreed with the majority's rejection of the price premium theory, arguing that Montes "could establish injury through a 'price premium' theory by proving that the deceptive or misleading price history artificially increased demand for the leggings, causing an increase in the product's market price." *Id*. at 1009.

Under the Washington Supreme Court's decision in this case, Montes's theory that the demand curve was shifted by a misrepresentation of the price history fails as a matter of law. Instead, to assert a claim based on a price premium theory, Montes would have to allege that SPARC's leggings were worth less than their "fair market value" due to falsity bearing upon "an objective difference" between SPARC's actual leggings and other, "otherwise identical fungible" leggings. 586 P.3d at 1006. Montes has never alleged any such objective difference, nor has she provided any basis in her supplemental brief concerning the

Washington Supreme Court's opinion to suggest that she could.[1]

On the contrary, Montes's supplemental brief makes clear that she intends to amend her allegations to state more clearly the price premium theory that the Washington Supreme Court has already *rejected* and that the dissenting Justices in that court endorsed. Under Montes's view, the Washington Supreme Court's opinion supposedly leaves it open to her to argue that the market price was distorted by the false-discounting scheme: if granted leave to amend, Montes states that she will allege that the $6 price did not "reflect the leggings' actual value *without* the false discount advertising," and she will later present "expert evidence . . . to show what the actual value of the leggings was at the time of the purchase if they were advertised truthfully." Indeed, Montes candidly confirms that she plans to re-run her prior theory when she states that she "admittedly could have explained this better in her opposition to Aéropostale's motion to dismiss" in the district court. But, as I have explained, this theory has *already* been rejected by the Washington Supreme Court, which held that Montes cannot establish injury under

[1] Thus, contrary to what the majority suggests, *see* Memo. Dispo. at 4 n.1, the Washington Supreme Court rejected both "distinct" theories it discussed: (1) the demand-shift theory is not legally valid under Washington law, and (2) Montes never provided any factual basis for concluding that the leggings she purchased were objectively different from what was represented, such that they would be worth less than the market price. Because Montes has not contended that she can plead facts establishing that there was such an objective difference, both theories still fail, and there is no basis for a remand.

the CPA by alleging, as this theory does, "that under different, hypothetical conditions the seller would have had to charge less for the same product to enjoy the same level of demand." 586 P.3d at 1006 n.6; *see also id*. at 1008 (noting that the court addressed one version of her varying "factual assertions" concerning her price premium theory in footnote 6). Such a theory, the court explained, "is distinct from an allegation that at the time Montes bought the leggings, they were not worth $6." *Id*. at 1006 n.6. The latter allegation is what is required, but that, in turn, would require Montes to plead facts plausibly showing that something about the product's objective characteristics has been misrepresented. *Id*. Montes has not made such an allegation, and she still does not assert that she can.

By remanding so that Montes can re-plead a price premium theory that the Washington Supreme Court has already rejected and that was instead embraced by the dissenting opinion in that court, the majority defies the Washington Supreme Court's opinion answering our certified question, which we were "bound" to accept. *United States v. Manning*, 527 F.3d 828, 838 (9th Cir. 2008). I respectfully dissent from that portion of the majority's judgment.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate electronic filing system or, if you are a pro se litigant or an attorney with an exemption from the electronic filing requirement, file one original motion on paper.

Petition for Panel Rehearing and Petition for Rehearing En Banc (Fed. R. App. P. 40; 9th Cir. R. 40-1 to 40-4)

(1) Purpose

A. Panel Rehearing:

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - A material point of fact or law was overlooked in the decision;
  - A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Rehearing En Banc

- A party should seek en banc rehearing only if one or more of the following grounds exist:
  - Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
  - The proceeding involves a question of exceptional importance; or

- The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing or rehearing en banc must be filed within 14 days after entry of judgment. Fed. R. App. P. 40(d).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(d). The deadlines for seeking reconsideration of a non-dispositive order are set forth in 9th Cir. R. 27-10(a)(2).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- See Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-4.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- Attorneys must file the petition electronically via the appellate electronic filing system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-8000.

Petition for a Writ of Certiorari

- The petition must be filed with the Supreme Court, not this Court. Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov.

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
    - Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Maria Evangelista, maria.b.evangelista@tr.com);
    - **and** electronically file a copy of the letter via the appellate electronic filing system by using the Correspondence filing category, or if you are an attorney exempted from electronic filing, mail the Court one copy of the letter.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 10. Bill of Costs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form10instructions.pdf

9th Cir. Case Number(s)

Case Name

Name of party/parties requesting costs to be taxed:

I swear under penalty of perjury that the copies for which costs are requested were actually and necessarily produced, and that the requested costs were actually expended.

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*(use "*s/[typed name]*" to sign electronically-filed documents)*

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