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U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

DAVID PHILLIPS and DIANE BROWNING, Individually and on behalf of a class of persons,	)	
Plaintiffs,	)	
v.	)	**2:16-cv-00837-JEO**
HOBBY LOBBY STORES, INC.,	)	**"CLASS ACTION"**
Defendant.	)	

MEMORANDUM IN SUPPORT OF DEFENDANT HOBBY LOBBY STORES, INC.'S MOTION FOR SUMMARY JUDGMENT AS TO PLAINTIFF MARY CARRARA'S STATUTORY AND INJUNCTIVE RELIEF CLAIMS

I. INTRODUCTION

Plaintiff, Mary Carrara, sues Hobby Lobby alleging that it deceived her in the manner it administers a weekly coupon. She claims that Hobby Lobby's Peoria, Illinois store violated Illinois law when it would not let Ms. Carrara use a Hobby Lobby coupon to obtain another 40% discount on items that were already discounted by 30%. Her claims, however, are based on nothing more than her own misinterpretation of the coupon's terms, an interpretation that ignores the key stated limitation on coupon usage -- that it could not be used to obtain an additional 40% discount on items already being sold at a discounted price. And, to arrive at her interpretation, which was not based on anything said to her by Hobby Lobby

personnel, Ms. Carrara had to ignore multiple items pointing to an opposite interpretation -- store signs, advertisements, fabric tickets, and sales receipts. All of these items reveal that Ms. Carrara's interpretation of the coupon was clearly erroneous, and if she was deceived, it was self-deception. Her case should be dismissed.

II. STATEMENT OF UNDISPUTED FACTS

A. Ms. Carrara's Familiarity And Satisfaction With Hobby Lobby's Products.

Ms. Carrara was a frequent shopper at Hobby Lobby, visiting the Peoria, Illinois store at least every other week. (DX 1 at 25.)[1] She felt satisfied with her shopping experiences there (most of the time); in her judgment, Hobby Lobby sold good quality products, and its store personnel were friendly and responsive to her needs. (Id. at 31-34.)

Ms. Carrara was satisfied with all of the Hobby Lobby items she purchased. (Id. at 74.) All were fit for the purposes for which she bought them, all worked as she wished they would, and none were of inferior quality. (Id. at 73.) She does not allege that the items she purchased from Hobby Lobby were not worth the price she paid for them. (See Doc. 49, pp. 7-8, 14, 17-20.) And, Ms. Carrara conceded that she has never determined, either before or after she filed this lawsuit, whether

[1] This is the only Hobby Lobby store Ms. Carrara ever visited. (DX 1 at 26, 69-70.) Cites to "DX __" refer to the Exhibits contained in Hobby Lobby's Evidentiary Submission.

she could have obtained the same or similar items from another store at prices lower than what she paid at Hobby Lobby. (DX 1 at 73.)

B. Hobby Lobby's Pricing And Coupon Programs

Hobby Lobby offers several arrangements for its customers to achieve savings in comparison to prices offered by competitors. The most pervasive arrangement was its everyday, non-discounted pricing, which it was able to establish at levels at or below that offered by most of its competitors. Hobby Lobby could achieve these low prices due to its purchasing prowess that allowed it to buy directly from manufacturers -- cutting out the middlemen, so to speak. (DX 4 at 104, 105, 135.) Hobby Lobby also frequently sells certain items at a discount, further reducing prices for its customers. (See e.g., DX 6; DX 7; DX 8; DX 4 at 53-54, 85.) Hobby Lobby's discounted prices take three forms: discounts that are temporarily or periodically offered; clearance discounts for discontinued or seasonal items; and discounts that were "always" provided. "Always discounted" items were usually marked as 30% or 50% off of a "marked price," which is a non-discounted price. (DX 2 at 62-63.) This "marked price" was generally not a previous price that Hobby Lobby actually charged, but was instead a comparable price that other sellers charged for similar products. (See e.g., DX 4 at 105, 128.) It is this latter category of items, where Hobby Lobby offers an always discounted

price, measured against comparable prices charged by other sellers, that is the subject of this lawsuit. (DX 1 at 71.)

In addition to these four pricing approaches, Hobby Lobby also provides a coupon that its customers could use (an example follows below) (DX 5):

Customers can either clip the coupon out of a newspaper advertisement, download it onto their mobile cellular device, or print it from Hobby Lobby's website. (DX 4 at 81-83.) As noted above, the coupon states that it could be used to take "40% Off One Item at Regular Price." (DX 5.) The coupon also restricts the frequency with which a customer could use a coupon -- "Limit one coupon per customer per day." (Id.) And, most importantly for this case, the coupon expressly limits the items that could be purchased with a coupon -- "Offer is not valid with any other coupon, **discount**, or previous purchase." (Id. (emphasis added).) Thus, although the term

"regular price" is not expressly defined, it is plain that a "regular price" cannot logically be a "discounted price."

C. Ms. Carrara's Use Of Coupons

Ms. Carrara frequently (but not always) used a Hobby Lobby coupon when she purchased items from the Peoria store. She usually cut the Hobby Lobby coupon out of the newspaper advertisement. (DX 1 at 70, 78.) Sometimes, she would use the coupon to gain a 40% reduction on an item that was not discounted. (DX 1 at 55.)[2] On other occasions, Ms. Carrara would use a coupon on items that were temporarily on sale for 30% off, or with items that were always discounted by 30%. (DX 1 at 70-71.) On those occasions, Hobby Lobby would not give her an additional 40% price reduction, but would instead give her another 10% price reduction for a total savings of 40%. (DX 1 at 145-48, 214; DX 2 at 69-71, 213 -- Hobby Lobby allows customers to use a 40% coupon on the non-discounted price of an item if it provides them a better deal.)

Whenever Ms. Carrara used a coupon, she presented it to the cashier along with the items she intended to purchase. (DX 1 at 160.) On those occasions, she knew that the coupon was not valid with any other coupon or discount. (Id. at 162.) And, she conceded in her deposition that if the price of an item that was always reduced 30% off of a "marked price" was a discounted price, she could not

[2] She has no complaints against Hobby Lobby when she used a coupon in purchasing those items. (DX 1 at 71.)

use her coupon to obtain another 40% savings from that reduced price. (Id. at 163.)

D. Hobby Lobby's Disclosures About Its Pricing

The core feature of Ms. Carrara's claims is that the price for which Hobby Lobby sold its items that were always "30% off" was the "regular price" for those items, not a discounted price. But Ms. Carrara was exposed to various information sources that should have disabused her of that notion.

1. Signs

Prominently displayed in areas where Hobby Lobby sold items that were always discounted, such as furniture and certain fabrics, were store signs (see below) indicating the prices for those discounted items. (DX 4 at 53.)

(See e.g., DX 6-8.) These signs denote the item offered for sale (here, Calico Prints & Solids fabrics), and then include the following terms: "Always 30% Off the Marked Price*". (DX 8). The sign states further below that the "Marked Prices" are "comparable prices offered by other sellers for similar products." (Id.) And, to the critical point: the signs also denote that the price that was "30% off the marked price" and was a "discount … provided every day." (Id.)

Ms. Carrara noticed, paid attention to, and read these signs. (DX 1 at 76-77, 105, 107.) She conceded that there was nothing deceptive, misleading, unfair, or untrue about these signs. (Id. at 77-78, 109.) She never asked any Hobby Lobby employees about what these signs meant or otherwise discussed them. (Id. at 77, 107.) She understood the terminology used in the signs -- that when an item was priced at 30% off a marked price, that meant Hobby Lobby was selling these items for a 30% reduction from the comparable prices that other sellers charged for similar items. (Id. at 115-16.) She also knew that the "marked price" was not a former price previously charged by Hobby Lobby for that item. (Id. at 110, 115.) And, most importantly, she conceded that the 30% reduced price referenced on the signs was a discount that Hobby Lobby provided every day. (Id. at 117-18.)[3] Nothing was misleading about those signs. (Id.)

[3] Hobby Lobby used a different type of sign when it advertised reductions in the price it previously charged for an item, *i.e.* items temporarily on sale or on clearance. (See e.g., DX 20.) These signs used different terms -- they indicated in bold terms that the discount (e.g., 50% off)

2. Advertisements

Much the same can be said with respect to Hobby Lobby's advertisements. The advertisements contained the same language as the signs in connection with the always discounted items -- "Always 30% off the Marked Price." (DX 1 at 128-29; DX 10.) The same definition of "Marked Price" was used -- those prices reflected "comparable prices offered by other sellers for similar products." (DX 10.) The advertisements likewise indicated that the "Always 30% off price" was a "discount provided every day." (Id.)

Ms. Carrara acknowledged reviewing Hobby Lobby's advertisements to determine what items were being sold at a discount. (DX 1 at 78.) These advertisements affected her purchase decisions. (Id. at 78-79.) The terms of these advertisements were clear to her, and she never asked any questions about them. (Id. at 79.) She conceded that there was nothing deceptive, misleading, unfair, or untrue about these advertisements. (Id. at 79, 126.)

3. Fabric Tickets

Ms. Carrara purchased many fabric items from Hobby Lobby, but she does not claim deception or injuries from all fabric purchases. Instead, her claims are limited just to those occasions involving her use of coupons on certain fabric

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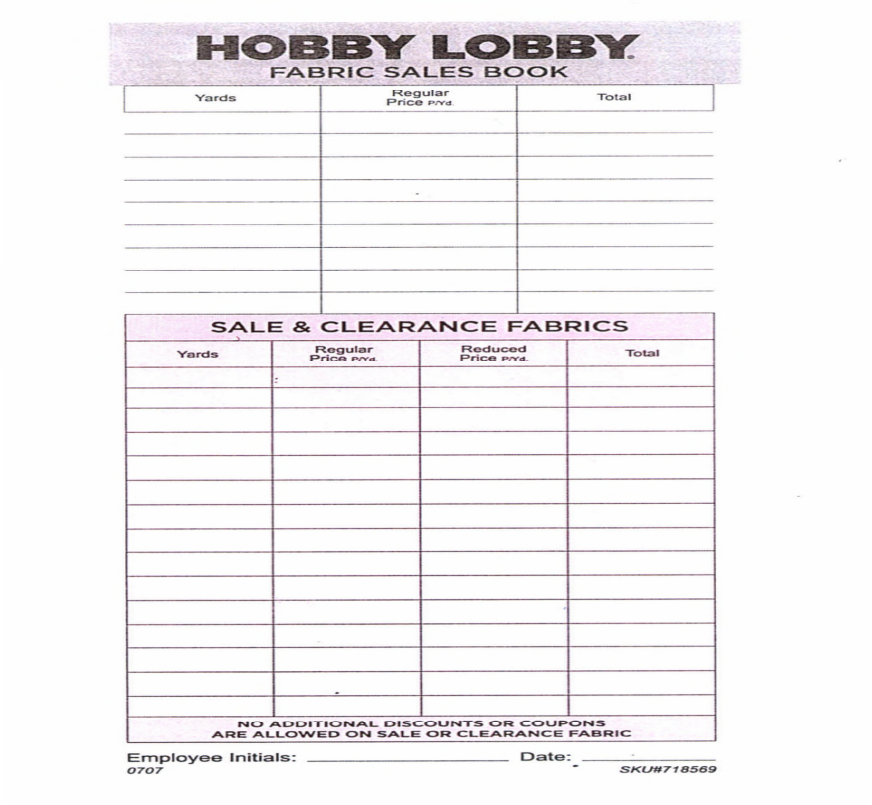
was measured from "our everyday low prices." (Id.) Ms. Carrara conceded these signs portray something different than the "Always 30% Off of the Marked Price" signs. Those latter signs reflected reductions from the prices charged by other sellers, not from a previous price charged by Hobby Lobby. (DX 1 at 122-23.)

purchases where the fabrics were always discounted by 30% off the marked price. (DX 1 at 55-56, 101.)[4] But even for this limited subset of fabric purchases, Ms. Carrara was provided additional documents with those purchases -- fabric tickets -- that completely undermine her legal theories.

Each time Ms. Carrara (or any Hobby Lobby customer) purchased fabrics from Hobby Lobby, she received a fabric ticket (or similar writing) that contained key pricing information. (DX 1 at 45-46, 132-33; DX 2 at 223-225, 230; see also DX 11.) A blank copy of a fabric ticket is set forth below:



HOBBY LOBBY

FABRIC SALES BOOK

Yards	Regular Price P/Yd.	Total

SALE & CLEARANCE FABRICS

Yards	Regular Price P/Yd.	Reduced Price P/Yd.	Total

NO ADDITIONAL DISCOUNTS OR COUPONS ARE ALLOWED ON SALE OR CLEARANCE FABRIC

Employee Initials: _____ Date: _____

0707 SKU#718569

[4] The only items purchased by Ms. Carrara that are at issue in this case are fabric items. She did not purchase any of the other items Hobby Lobby sold at the "always discounted" price of 30% off the marked price. (DX 1 at 200-01.)

Because fabric is usually priced by the yard, the customer will tell the Hobby Lobby employee working in the fabric department how many yards (or fractions of yards) she wishes to purchase. The employee then fills out a fabric ticket that captures the number of yards purchased, the applicable price per yard, and then multiplies those two in order to arrive at the total purchase price for that fabric item. (DX 1 at 129-59 (describing process); DX 2 at 223-25, 230.)

The portion of the fabric ticket completed by the employee depends upon the price at which these items are purchased. If the price is not a sales, clearance, or always discounted price, the fabric department employee typically completes only the top (white) portion of the fabric ticket. (DX 1 at 135.) Otherwise, when a sales, clearance, or always discounted fabric is involved, the employee completes the bottom (pink) portion of the fabric ticket. (DX 1 at 141.) In doing so, the employee (1) fills in the number of yards purchased, (ii) writes in the non-sale or non-discounted price under the heading "regular price," (iii) computes the sale or discount percentage to arrive at the "reduced price per yard," and (iv) multiplies the number of yards by the reduced price per yard to arrive at the total purchase price for that fabric item. (DX 1 at 141-43, 158-59; DX 2 at 223-25, 230.) Finally, at the bottom of the pink part of the ticket, there is an instruction that a customer cannot use a coupon to get another 40% discount on any of the fabrics that are listed in the pink part of the fabric ticket and sold at reduced prices. (DX 1 at 144;

see DX 11.) Ms. Carrara acknowledged her understanding of this limitation on coupon usage. (DX 1 at 144.)

Ms. Carrara conceded that this process occurred whenever she purchased certain fabrics that were on sale or were always discounted. (DX 1 at 144-48.) She acknowledged that when she presented the fabric ticket to the cashier along with the coupon, the cashier would not apply the coupon to the "reduced pricing." Instead, she would apply the 40% coupon to the "marked price," which was shown on the fabric ticket as the "regular price." (DX 1 at 145-48, 159; DX 11.)

Despite what she said in her complaint, Ms. Carrara conceded in her deposition that the "always 30% off" prices were a "reduction in price from the regular price," not the regular price itself. (DX 1 at 159.) Because of this, it should come as no surprise that she never complained to anyone at Hobby Lobby about this practice or objected that she was not receiving another 40% off of the reduced price. (DX 1 at 212.)

E. Information Disclosed On The Sales Receipts

That Hobby Lobby never tried to mislead or deceive Ms. Carrara is best reflected through an examination of the sales receipts provided to her.[5] Ms.

[5] Although Ms. Carrara indicated she shopped at Hobby Lobby at least every other week, (DX 1 at 25), and that she almost always buys something when she visits the store, (id.), she only retained and produced two sales receipts. (DX 1 at 40-41; DX 12 -13.) Hobby Lobby does not retain copies of sales receipts. (DX 14, p. 2, Resp. #3.) But through use of Ms. Carrara's credit card information provided by her counsel in this case, Hobby Lobby was able to electronically re-create documents that captured roughly the same information that would be found on the

Carrara conceded that she was personally handed a sales receipt each time she purchased an item at Hobby Lobby. (DX 1 at 206.) She acknowledged that whenever she used a coupon with her purchase, that fact was reflected on the receipt; also portrayed on the receipt was the math involved in reflecting the price savings she achieved through the use of the coupon. (DX 1 at 202, 222; DX 15.) In particular, each receipt reflected by department the item the coupon was used with, the price against which the coupon was measured, the savings she received by using the coupon, and the total purchase price for the item after using the coupon. (Id. at 203-04; see e.g., DX 12-13, 15.) Ms. Carrara conceded that she could clearly discern the price from which the 40% coupon was deducted simply by reading the receipt. (DX 1 at 207.)

F. Ms. Carrara's Opportunity To Question Or Challenge Hobby Lobby's Coupon Practices

It is not as though Hobby Lobby tried to obscure its coupon practices or divert Ms. Carrara's attention from those practices. Ms. Carrara was free to (and often did) view the screen at the cash register to discern how much she was charged for the items she bought, including those times when a coupon was used. (DX 1 at 204-05.) The screen was not covered. (Id.) She also was given the receipt. (DX 12-13, 15.) She conceded she could have looked at the screen or read

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receipts. (See e.g., DX 15; DX 22 at 28-37) This information includes the price of items purchased by Ms. Carrara, as well as the sales price against which the 40% coupon reduction was taken. (DX 15.)

the receipt to make sure she was being accurately charged, (DX 1 at 205), or even to ask questions about the information portrayed on the receipt. (Id. at 206; DX 16.) But she never asked any questions to Hobby Lobby's cashiers about the prices she paid when using a coupon and certainly never objected to those prices. (Id. at 206, 212.) And, even though she was always given the receipt to take home with her, and even though she could tell from reading the receipt what price she was charged for the items after deducting the 40% coupon, she never brought any of those items back to the store to seek a refund on the basis she was overcharged for them. (Id. at 207-10.) And, even now, after she believes she was deceived, Ms. Carrara continues to use the items she purchased, never returning any of them for a refund. (Id. at 210.) She actually admitted she was satisfied with all of the items she purchased from Hobby Lobby. (Id. at 74.)

Finally, by not objecting to the sales price she was charged or returning the items, Ms. Carrara concedes that it would be reasonable to assume she consented to the price she paid. (DX 1 at 214.) She made the decision to purchase the items for the price she paid, even though she acknowledges the receipts showed that she did not receive another 40% off of the always discounted price when she used her coupon. (Id.) This purchase decision was hers alone -- no one made her do it, forced her to do it, or coerced her. (Id. at 214-15.)

III. ARGUMENT

A. Ms. Carrara Cannot Establish A Plausible Claim Under The Illinois Consumer Fraud Act.

Ms. Carrara alleges that, on several occasions, she bought fabric items from Hobby Lobby and presented a 40% off coupon to the cashier. (Doc. 49 at 7.) She claims that Hobby Lobby failed to abide by the terms of the coupon when it applied the coupon discount to the higher price displayed on the item (the "Marked Price"), as opposed to the lower discounted price, which Ms. Carrara deemed to be the "regular price." (Id.) This conduct by Hobby Lobby, she claims, violated the Illinois Consumer Fraud and Deceptive Trade Practices Act, 815 Ill. Comp. Stat. 505/1, *et seq*. ("ICFA"). (Id. at 17-20.)

1. Ms. Carrara Falls Short Of Proving The Elements Needed To Sustain An ICFA Claim.

To prevail under ICFA, a plaintiff must present substantial evidence demonstrating: (1) a deceptive act or practice by the defendant; (2) the defendant intended that the plaintiff rely on the deception; (3) the deception occurred in the course of trade and commerce; (4) actual damage to the plaintiff; and (5) the damages were proximately caused by the deception. Davis v. G.N. Mortg. Corp., 396 F.3d 869, 883 (7th Cir. 2005); Zekman v. Direct Am. Marketers, Inc., 695 N.E.2d 853, 860-61 (Ill. 1998). We demonstrate below that Ms. Carrara cannot establish several of these elements.

a. Plaintiff Cannot Establish That She Was Actually Deceived.

The first element a plaintiff must prove to succeed on an ICFA claim is that defendant engaged in a deceptive act or practice, which resulted in the plaintiff being actually deceived. De Bouse v. Bayer, 922 N.E.2d 309, 316 (Ill. 2009).[6] In analyzing this element, courts have ruled that the allegedly deceptive act or statement "must be looked upon in light of the totality of the information made available to the plaintiff." Davis, 396 F.3d at 884; Tudor v. Jewel Food Stores, Inc., 681 N.E.2d 6, 8 (Ill. App. Ct. 1997). In other words, "a statement that would have been deceptive in isolation can be non-deceptive when placed in context." Muir v. Playtex Prods., LLC, 983 F. Supp. 2d 980, 988 (N.D. Ill. 2013).

Both federal and state courts construing ICFA have relied on circumstances similar to those present here in holding that a plaintiff could not prove the "actual deception" elements of ICFA. For example, in Clark v. Experian Information Solutions, Inc., 256 F. App'x 818, 823 (7th Cir. 2007), the Seventh Circuit affirmed the dismissal of the plaintiff's ICFA claim, partially on the grounds that the

[6] Ms. Carrara asserts in several places in her complaint that ICFA does not require reliance, deception, or damages. (Doc. 49 at 17, ¶ 59; at 18, ¶ 63.) This is true with regard to enforcement actions brought by the Illinois Attorney General, but not true with respect to individual consumer actions. A "private cause of action brought under [ICFA] requires proof of 'actual damage' … as a result of the deceptive act or practice." Oliveira v. Amoco Oil Co., 776 N.E.2d 151, 160 (Ill. 2002), quoting 815 Ill. Comp. Stat. 505/10a(a). Thus, deception, damages, and proximate causation are essential elements under an ICFA claim brought by a consumer plaintiff. Siegel v. Shell Oil Co., 612 F.3d 932, 935 (7th Cir. 2010).

plaintiff was exposed to information that undermined his allegation of deception. The Seventh Circuit concluded that had plaintiff read the website disclosures, he would have received the information he alleged was not disclosed. Id. Accord Saunders v. Michigan Ave. Nat'l Bank, 662 N.E.2d 602, 608 (Ill. App. Ct. 1996) (rejecting an ICFA claim after finding no possible deception because plaintiff had access to information sources (pamphlets) that expressly stated the bank could assess $20 per day overdraft fees).

A similar result occurred in Ibarrola v. Kind, LLC, 83 F. Supp. 3d 751 (N.D. Ill. 2015). There, a plaintiff claimed she was deceived by the defendant's use of the term "no refined sugars" on its product label. The court granted a motion to dismiss her ICFA claims, basing its dismissal in part on the fact that the plaintiff "should have considered the other information she encountered on the product's packaging." Id. at 759. This "other" information, the court concluded, eliminated any basis for an allegation of deceptive labeling. Id. Accord Davis, 396 F.3d at 884 (no deception where plaintiff was alerted in a "number of ways" that her understanding was inconsistent with defendant's other disclosures).

The presence of "other information" from a variety of sources dooms Ms. Carrara's ICFA claims.[7] The coupon clearly indicated that it could not be used to

[7] There was no actionable deception here for another reason. In essence, what Ms. Carrara asserts as a deceptive act -- refusing to allow her the full value of a 40% coupon on an item that is always discounted -- is really nothing more than a difference between the parties over

obtain another 40% price reduction on items that were already discounted. The signs and advertisements explained that items always sold at 30% off of the "Marked Price" were in fact discounts that Hobby Lobby provided to its customers every day. The fabric tickets given to Ms. Carrara removed all doubt on this issue when they revealed that the "Marked Price" was the "Regular Price" and that coupons could not be used to get another 40% off the reduced price of the fabrics. All of this eliminates any possibility of deception.[8]

b. There Is No Evidence That Hobby Lobby "Intended To Deceive" Ms. Carrara.

Aside from showing she was actually deceived, Ms. Carrara must also show that Hobby Lobby crafted its coupon terms with an intent to deceive her. Tudor, 681 N.E.2d at 8-9; Lidecker v. Kendall Coll., 550 N.E.2d 1121, 1124 (Ill. App. Ct. 1990).

Here, there is no evidence that Hobby Lobby designed, implemented, or represented its coupon with an intent to deceive Ms. Carrara. She claims that the coupon terms were deceptive, particularly with respect to the use of the term "regular price." (Doc. 49 at 7-8, 17-20.) But, as Ms. Carrara concedes, the coupon

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the interpretation to be given to the coupon's terms. But "[t]aking a position on the interpretation of legal documents, even if erroneous, is not a deceptive act or practice." Randazzo v. Harris Bank Palatine, N.D., 262 F.3d 663, 671 (7th Cir. 2001) (affirming dismissal of ICFA claim).

[8] Ms. Carrara was forced to concede that other Hobby Lobby shoppers who saw all the same things she saw -- the signs, the advertisements, the fabric tickets, and the coupon -- could arrive at a different place, could come to a different conclusion than the one she reached, about Hobby Lobby's alleged deception. (DX 1 at 221-22.)

clearly provides that customers cannot use the coupon to get another 40% discount on an item that has already been discounted. (DX 5; DX 1 at 162.) Ms. Carrara further conceded that the items she purchased and over which she sues (certain fabric items that were always reduced by 30%) were advertised as a "discount." (DX 1 at 117, 128-29; DX 6-8, 10.)

Plaintiff's theory also fails because she never challenged anyone at Hobby Lobby about use of the coupon with always discounted items. (DX 1 at 57-58.) Nor does she allege that she was led astray by statements of Hobby Lobby personnel that induced her to believe that by using a coupon she could get another 40% discount on the fabric items that were always discounted by 30%. (Doc. 49 at 7-8, 17-20; DX 1 at 57-58.) It is clear that her liability theory is based solely on her own mistaken interpretation of the coupon, rather than anything said to her by Hobby Lobby personnel. (DX 16.)

The court's decision in Tudor demonstrates why Ms. Carrara's ICFA claims must fail. In Tudor, the plaintiff claimed that the grocery store violated ICFA by charging an electronically-scanned price at the cash register that was higher than what the store displayed on the shelf or in newspaper advertisements. The court in Tudor affirmed dismissal of the ICFA claims on the grounds that the store gave plaintiff a receipt, which would enable plaintiff to determine if the scanned price accurately reflected the shelf price, and because the store had a policy of not

charging anything for an item where the scanned price exceeded the shelf price. 681 N.E.2d at 8. "[T]he combination of the issuance of the receipt, along with the money-back guarantee if the scanned price differs from the shelf price, indicates defendant did not intend that plaintiff rely on an incorrectly scanned price." Id. at 8-9; accord Lidecker, 550 N.E.2d at 1124 (dismissing ICFA claim where there was no evidence the college intended to deceive the nursing students about the college's lack of accreditation).

This case is identical to Tudor in essential respects. Like the plaintiff in Tudor, Ms. Carrara was given a receipt that showed precisely how the price of the fabrics were calculated when a coupon was presented. Ms. Carrara conceded she could easily determine from the receipt that she did not get a 40% discount on top of the 30% discount she already received on some of the fabrics she purchased. (DX 1 at 207-10.) And, similar to the plaintiff in Tudor, Ms. Carrara could receive her payment back through a refund if she was not satisfied with the price she paid for her fabrics. (DX 12-13 at 2.) Under these circumstances, Hobby Lobby is entitled to summary judgment on the ICFA claims because there is no plausible evidence of an intent to deceive on its part.

c. Ms. Carrara Suffered No Actual Damages Proximately Caused By Any Deception.

The foregoing deficiencies in Ms. Carrara's ICFA claim are sufficient, standing alone, to defeat that claim. But there is more. Her ICFA claim also fails

because there is no substantial evidence that any deceptive action or statement by Hobby Lobby proximately caused Ms. Carrara to suffer a compensable loss.

Once again, to prevail under ICFA, the plaintiff must present substantial evidence of an actual loss proximately caused by the deception. Avery v. State Farm Mut. Auto. Ins. Co., 835 N.E.2d 801, 860-63 (Ill. 2005); see also, Siegel, 612 F.3d at 935. Most courts analyzing the "actual loss/proximate causation" element of ICFA have focused on whether the plaintiff "was deprived of the benefit of the bargain because he paid more than the actual value of the property." Camasta v. Omaha Steaks Int'l, Inc., 2013 WL 4495661, at *10 (N.D. Ill. Aug. 21, 2013) (without allegations or evidence that the items purchased were worth less than what the plaintiff paid, the plaintiff could not establish the actual harm needed to sustain a claim under ICFA) (citation omitted).

The Seventh Circuit addressed this issue in a pair of cases affirming the dismissal of similar ICFA claims. In Camasta v. Jos. A. Bank Clothiers, Inc., 761 F.3d 732 (7th Cir. 2014), the plaintiff sued Jos. A. Bank challenging its alleged practice of advertising normal retail prices as temporary price reductions -- its buy one, get two free promotion. Camasta claimed that this sales technique "encourage[d] a sense of urgency and [made] customers feel 'pressure' to make purchases before an expected deadline. However, Camasta failed to provide any evidence he paid more than the actual value of the merchandise he received." Id. at

739. Even though Camasta asserted that he could have "shopped around and found the same shirts for a lower price," the Seventh Circuit found this assertion insufficient as a matter of law in the absence of any evidence that he actually shopped around and "found the same shirts for a lower price." Id. His assertion, the Seventh Circuit concluded, was too "speculative and conclusory" to prove actual damages required under ICFA. Id. Accord Wiegel v. Stork Craft Mfg. Co., 946 F. Supp. 2d 804, 809 (N.D. Ill. 2013) (plaintiff failed to meet ICFA's proximate causation element, which requires the plaintiff to show that, but for the defendant's conduct, she "would have made a different purchasing decision … [and] would have been in a materially better position had [she] done so").

Previously, the Seventh Circuit had affirmed the dismissal of another ICFA claim in similar pricing litigation. See Kim v. Carter's Inc., 598 F.3d 362 (7th Cir. 2010). In Kim, the plaintiffs purchased children's clothing from Carter's retail outlets for a discount off the listed suggested price. The plaintiffs asserted that the "suggested price" induced purchasers into believing that the items were being sold at a significant discount, when in reality this supposed savings was deceptive because the "suggested prices" were fictitious and substantially higher than what the products sold for on a regular basis. Id. at 363.

Despite this, the district court and the Seventh Circuit agreed that the ICFA claim must be dismissed. Id. at 365-66. This result was proper, the courts

concluded, because plaintiffs had not alleged that the clothing they bought "was defective or worth less than what they actually paid." Id. at 365. Nor had the plaintiffs alleged that 'but for Carter's deception, they would have shopped around and obtained a better price in the marketplace." Id. And, finally, the court concluded that it was not enough for the "plaintiffs to allege that Carter's price comparisons deceived the plaintiffs and induced them to buy Carter's clothing." Id. at 366. All of this meant that plaintiffs suffered no actual harm and instead received the benefit of their bargain. Id. at 365-66. Accord Ice v. Hobby Lobby Stores, Inc., 2015 WL 5731290, at *7 (N.D. Ohio Sept. 29, 2015) (considering similar claims and concluding that without an allegation that a 50% off frame was "not worth what [plaintiff] paid, or that he would have obtained a better price in the relevant market," plaintiff's consumer fraud act claim failed).[9]

All of these cases demonstrate that a plaintiff must show what she could have done differently to avoid her alleged loss. See DW Data v. C. Coakley Relocation Sys., Inc., 951 F. Supp. 2d 1037, 1046 (N.D. Ill. 2013). But Ms. Carrara's evidence on this front falls far short of the mark. She does not allege that had she known the truth about the coupon, she would have shopped around in

[9] Ms. Carrara's continued use of the items she purchased at Hobby Lobby also undermines her ICFA claim. See Smith, Allen, Mendenhall, Emons & Selby v. Thompson Corp., 862 N.E.2d 1006, 1009 (Ill. App. Ct. 2006) (plaintiff could not satisfy the actual loss/proximate causation element of its ICFA claim in part because the plaintiff continued to value the product and use it after the sale occurred).

search of better prices. (Doc. 49 at 7-8, 17-20.) Nor does she allege that if she had conducted such comparison shopping, she would have actually obtained a better price. (Id.; DX 1 at 73.) And, she has not alleged that the fabric items she purchased were defective or not fit for their intended uses, or that those items were not worth what she paid for them. (Doc. 49 at 7-8, 17-20; DX 1 at 73-74.) She even admits that had she fully appreciated the truth -- that she could not use the coupon to get another 40% reduction in price on an item that was always discounted by 30% -- she still would have purchased some of the items. (DX 1 at 210.) Under these circumstances, she cannot survive the summary dismissal of her ICFA claims. See Mulligan v. QVC, Inc., 888 N.E.2d 1190, 1197-1200 (Ill. App. Ct. 2008) (affirming summary judgment on an ICFA claim where plaintiff could not show a loss because she did not prove she could have obtained lower prices by shopping elsewhere and because she admitted she still would have purchased the jewelry even had she been privy to the omitted information).

2. Ms. Carrara's ICFA Claim Also Fails Because It Is Based On Nothing More Than An Alleged Breach Of a Contractual Promise.

Barred from showing that she paid more than the items were worth, Ms. Carrara may seek to salvage her ICFA claims by asserting that Hobby Lobby failed to honor an alleged commitment to give her another 40% price reduction on the fabrics she purchased. Properly analyzed, this allegation is really nothing more

than a breach of contract claim by another name. It cannot form the basis of an ICFA claim, because the Illinois courts have repeatedly "rejected efforts by the plaintiff to enforce contractual promises through a consumer fraud action." Shaw v. Hyatt Int'l Corp., 461 F.3d 899, 901 (7th Cir. 2006) (rejecting ICFA claim based on a patron's allegation that he did not get the hotel rate promised on the hotel's web-site). Accord Avery, 835 N.E.2d at 844 ("[a] breach of contractual promise, without more, is not actionable under the Consumer Fraud Act [ICFA]."). As the Avery court noted, "[w]ere our courts to accept plaintiff's assertion that promises that go unfulfilled are actionable under [ICFA], consumer plaintiffs could convert any suit for breach of contract into a consumer fraud action…. [But ICFA] was not intended to apply to every contract dispute or to supplement every breach of contract claim with a redundant remedy." Id. (citation omitted); see also Zankle v. Queen Anne Landscaping, 724 N.E.2d 988, 991-93 (Ill. App. Ct. 2000) (no ICFA claim against a landscaper whose performance of its contractual duty to provide lawn care was unsatisfactory in several respects).

Numerous courts have followed Avery's lead and dismissed ICFA claims that were really contract claims dressed up in different clothing. In Greenberger v. GEICO General Insurance Co., 631 F.3d 392, 399-400 (7th Cir. 2011), for example, the Seventh Circuit affirmed the dismissal of an ICFA claim predicated on allegations that GEICO falsely promised to restore its insureds' vehicles to their

pre-loss condition. The Seventh Circuit observed that where "allegations of consumer fraud arise in a contractual setting, the plaintiff must prove that the defendant engaged in deceptive acts or practices distinct from any underlying breach of contract." Id. at 399.[10] Finding no deception that existed apart from the alleged contractual breach, the Seventh Circuit affirmed dismissal of the consumer fraud claim. Greenberger, 631 F.3d at 399.[11] See also M.W. Widoff, P.C. v. Encompass Ins. Co. of Am., 2012 WL 769727, at *4 (N.D. Ill. Mar. 2, 2012) ("The deceptive act must involve something more than the promise to do something and a corresponding failure to do it.").

Thus, where the "breach of contract and [ICFA] counts rely on the same facts," the ICFA claim should be dismissed because "it is clear that the [ICFA] claim 'is merely a breach of contract clothed as a violation of [ICFA].'" DW Data, Inc., 951 F. Supp. 2d at 1046 (citation omitted). That is unquestionably the case here.

[10] "A 'deceptive act or practice' involves more than the mere fact that a defendant promised something and then failed to do it. That type of 'misrepresentation' occurs every time a defendant breaches a contract." Avery, 835 N.E.2d at 844, quoting Zankle, 724 N.E.2d at 993.

[11] The Seventh Circuit also rejected the argument that a "widespread" or "systemic" breach of contract is sufficient to state a claim for violation of ICFA. Where there is "no stand-alone allegation of a fraudulent act or practice," ICFA is not implicated. Greenberger, 631 F.3d at 400. Accord Duffy v. Ticketreserve, Inc., 722 F. Supp. 2d 977, 992-93 (N.D. Ill. 2010).

B. Carrara Cannot Obtain Injunctive Relief Under the Illinois Statutes.

Plaintiff Carrara seeks injunctive relief under two Illinois statutes. (Doc. 49 at ¶¶ 58-61, 64(b).) All of these injunctive relief claims should be dismissed, however, because she cannot establish a factual or legal basis for such relief.

1. Carrara's Injunctive Relief Claims Fail Because She Cannot Establish A Violation of ICFA.

Ms. Carrara's injunctive relief claims under ICFA should be dismissed for the initial -- and fundamental -- reason that she has no valid ICFA claim. (See Part III-A, *supra*.) "Absent a showing of a violation of ICFA, a plaintiff is not entitled to injunctive relief." Jos. A. Bank Clothiers, 761 F.3d at 740. Accord B. Sanfield, Inc. v. Finlay Fine Jewelry Corp., 76 F. Supp. 2d 868, 873 (N.D. Ill. 1999).

2. Injunctive Relief Is Not Available To Private Citizens Under ICFA.

Even if she could assert a valid ICFA claim, Ms. Carrara still could not obtain injunctive relief. ICFA does provide for injunctive relief, but only in enforcement actions brought by the Attorney General or one of the State's attorneys. See 815 Ill. Comp. Stat. 505/7. Private persons such as Ms. Carrara cannot obtain injunctive relief from a defendant. Id.; see also McLaughlin v. LVNV Funding, LLC, 971 F. Supp. 2d 796, 802 (N.D. Ill. 2013); Zanni v. Lippold, 119 F.R.D. 32, 33-34 (C.D. Ill. 1988).

3. Carrara Cannot Establish The Imminent Threat of Future Harm Required To Obtain Injunctive Relief Under The Illinois Deceptive Trade Practices Act.

Foreclosed from seeking injunctive relief under ICFA, Ms. Carrara turns to another statute for that relief -- the Illinois Deceptive Trade Practices Act. 815 Ill. Comp. Stat. 510/1, *et seq*. Under Section 2 of the Deceptive Trade Practices Act, a person may violate the statute in a number of explicit ways. See 815 Ill. Comp. Stat. 510/2(a)(11). The sole remedy for these statutory violations is injunctive relief (plus attorneys' fees). 815 Ill. Comp. Stat. 510/3. See Kljajich v Whirlpool Corp., 2015 WL 12838163, at *4 (N.D. Ill. Sept. 25, 2015); Disc Jockey Referral Network, Ltd. v. Ameritech Publ'g of Ill., 596 N.E.2d 4, 9 (Ill. App. Ct. 1992).

The Illinois' Deceptive Trade Practices Act "was not intended to be a consumer protection statute but, rather, was intended to prevent unfair competition" among businesses. Robinson v. Toyota Motor Credit Corp., 735 N.E.2d 724, 735 (Ill. App. Ct. 2000), aff'd in relevant part, 775 N.E.2d 951 (2002). "It is primarily directed toward acts which unreasonably interfere with another's conduct of his business." Popp v. Cash Station, Inc., 613 N.E.2d 1150, 1156 (Ill. App. Ct. 1992). A consumer action is possible under this Act, however, in limited circumstances where a consumer can show that she is likely to be damaged in the future by a deceptive practice of the defendant. Id. Accord Howard v. Chicago Transit Auth., 931 N.E.2d 292, 299 (Ill. App. Ct. 2010).

Similar claims of injunctive relief based on future deception have almost uniformly been rejected by the courts. '"The problem in most consumer actions under the ILDTPA is the inability to allege facts indicating the likelihood of damage in the future.'" Aliano v. Louisville Distilling Co., 115 F. Supp. 3d 921, 928 (N.D. Ill. 2015) (quoting Howard, 931 N.E.2d at 299). Where the plaintiff is aware of the alleged deceptive practice at the time she files suit, as is surely the case here, courts have refused to grant injunctive relief because the possibility for future deception of the plaintiff has ended. See, e.g., McDonnell v. Nature's Way Prods., LLC, 2017 WL 1149336, at *2 (N.D. Ill. Mar. 28, 2017) (plaintiff's "present awareness of Nature's Way's alleged deceptive labeling practices—as evidenced by the filing of this lawsuit— means she is unlikely to be harmed in the future by Nature Way's labeling claims"); Aliano, 115 F. Supp. 3d at 929 (because plaintiff, now aware of defendant's alleged deception, cannot show that he will be deceived or confused in the future, he cannot obtain injunctive relief under the ILDTPA); Howard, 931 N.E.2d at 299 (same); Popp, 613 N.E.2d at 1157 (same).

This same "present awareness" of the defendant's alleged deceptive conduct was recently used by the Seventh Circuit in Jos. A. Bank Clothiers to affirm the dismissal of an injunctive relief claim in similar pricing litigation. After disposing of the plaintiff's damages claims under ICFA, the Seventh Circuit turned to the injunctive relief claims under the Illinois Deceptive Trade Practices Act. The

Seventh Circuit affirmed the dismissal of those claims as well, employing reasoning equally applicable here:

> Camasta cannot obtain injunctive relief under the UDTPA because he failed to sufficiently allege that JAB's conduct will likely cause him harm in the future. *See Kensington's Wine Auctioneers & Brokers, Inc. v. John Hart Fine Wine, Ltd.*, 909 N.E.2d 848, 857 (Ill. App. Ct. 2009) ("To be eligible for injunctive relief under the Deceptive Practices Act, a plaintiff must show that the defendant's conduct will likely cause it to suffer damages in the future.") Camasta's claim is based solely on the conjecture that because JAB harmed him in the past, they are likely to harm him in the future. However, "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief." *O'Shea v. Littleton*, 414 U.S. 488, 495 (1974). Since Camasta is now aware of JAB's sales practices, he is not likely to be harmed by the practices in the future. Without more than the speculative claim that he will again be harmed by JAB, Camasta is not entitled to injunctive relief.

761 F.3d at 740-41 (citations omitted). Accord Demedicis v. CVS Health Corp., No. 16-cv-5973, 2017 WL 569157, at *2 (N.D. Ill. Feb. 13, 2017) (dismissing injunctive relief claim because the plaintiff, currently aware of the defendant's allegedly deceptive practices, was not likely to be harmed in the future); Hayna v. Arby's Inc., 425 N.E.2d 1174, 1186 (Ill. App. Ct. 1981) (same); Brooks v. Midas-Int'l Corp., 361 N.E.2d 815, 821 (Ill. App. Ct. 1977) (same).

Ms. Carrara's claim for injunctive relief fails for the same reason. She too concedes that she would not be deceived in the future, because she is presently aware of Hobby Lobby's practices concerning coupon usage. (DX 1 at 97-98.) Her request for injunctive relief, therefore, fails. See Jaskulske v. State Farm Mut.

Auto. Ins. Co., 2014 WL 5530758, at *6 (D. Minn. Nov. 3, 2014) (dismissing claim for injunctive relief in a class action because the plaintiff "having experienced, investigated, and alleged" the fraudulent practice was" on notice of the practice and can no longer say that he will again be deceived by the practice"); Algaren v. Maybelline, LLC, 300 F.R.D. 444, 458 (S.D. Cal. 2014).

IV. CONCLUSION

For all of the foregoing reasons, defendant Hobby Lobby requests this Court to enter an order granting summary judgment in favor of Hobby Lobby and dismissing each of plaintiff Mary Carrara's claims with prejudice.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum in Support of Defendant Hobby Lobby Stores, Inc.'s Motion for Summary Judgment As to Plaintiff Mary Carrara's Statutory and Injunctive Relief Claims has been electronically filed with the Clerk of the Court using the CM/ECF system on the following CM/ECF participants, or if not a CM/ECF participant, it has been served by U.S. mail, postage prepaid, on this 21st day of December, 2017.

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