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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**

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| **DAVID PHILLIPS, et al.,** | ) | |
| | ) | |
| **Plaintiffs,** | ) | |
| | ) | |
| **v.** | ) | **CIVIL ACTION NO.** |
| | ) | |
| **HOBBY LOBBY STORES, INC.,** | ) | **2:16-cv-837-JEO** |
| | ) | |
| **Defendant.** | ) | **OPPOSED** |
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| **STEVEN D. MARCRUM,** | ) | **CLASS ACTION** |
| | ) | |
| **Plaintiff,** | ) | |
| | ) | |
| **v.** | ) | **CIVIL ACTION NO.** |
| | ) | |
| **HOBBY LOBBY STORES, INC.,** | ) | **2:18-cv-01645-JEO** |
| | ) | |
| **Defendant.** | ) | |

**DEFENDANT HOBBY LOBBY STORES, INC.'S REPLY BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AS TO PLAINTIFF STEVEN MARCRUM'S CLAIMS**

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## I. RESPONSE TO MARCRUM'S FACTUAL STATEMENT

Hobby Lobby devoted fifteen pages of its brief to a statement of undisputed facts. (See Doc. 102 at 6-21.) Marcrum did not specifically refute any of those factual statements. This Court, therefore, may consider them established for purposes of determining whether summary judgment is warranted. See Fed. R. Civ. P. 56(e)(3).

Instead of refuting Hobby Lobby's statement of facts, Marcrum spends most of his time either distorting the factual record or drawing unsupported inferences. To that we now turn, focusing on the major distortions.

**Marked Prices.** Rampant throughout Marcrum's response brief are several statements about how Hobby Lobby establishes and then maintains its marked prices for furniture. The central theme throughout Marcrum's discussion is that there was no comparison shopping done by anyone at Hobby Lobby before it arrived at the $119.99 marked price for the furniture Marcrum purchased. (Doc. 38 at 10-11.) This is simply untrue, as the record evidence demonstrates.

Before Hobby Lobby arrives at its marked price for furniture shown on the green price tag, its buyer, Keith Davis, undertakes a multi-step process for determining the market price for that item. First, he utilizes his experience in buying furniture for over a decade to assess the price an item of furniture will usually bring in the market. Then, he checks that presumed price by looking at

what other retailers are charging for similar items. He accomplishes this by researching the prices charged by on-line sellers, and then he personally visits national retail competitors' stores to personally inspect their prices (and also checks the prices listed on their websites). Based on this, he sets the marked price, and Hobby Lobby then instructs the manufacturers to place the marked price on the green tag attached to the furniture before it is shipped to Hobby Lobby for subsequent distribution to the stores. (Doc. 58-4 at 4, 10, 32-34; Doc. 101-3 at 17-18, 23, 27, 31-35.) So, it is blatantly untrue to assert, as Marcrum does, that the only comparison shopping done by Hobby Lobby occurs after the price has already been determined.

But the evidence establishes that Hobby Lobby is not content just to conduct comparison shopping before it sets the prices. It also conducts comparison shopping after it sets prices to determine if its marked prices are still at or below the prices being charged by its competitors. (See Docs. 101-5, 101-6 & 101-7.) The post-price comparison studies reveal that Hobby Lobby's marked prices are truly at or below its competitors' prices. (Id.) So, once again, Marcrum misstates the evidence when he claims that Hobby Lobby's marked prices are at best an educated guess at what a comparable price would be for comparable merchandise.

**Discount Policies.** Marcrum argues that Hobby Lobby's own internal policies "show that Hobby Lobby does not even believe" that its "'Always' priced

items are already discounted." (Doc. 38 at 8.) Marcrum either does not understand or intentionally misconstrues Hobby Lobby's Pre-pricing and Discount Policy. (See Doc. 101-4 at 46-47.)

The Policy states that the company should avoid conveying a sense of urgency to the customers by refraining from the use of the term "sale" in its advertisements and store signs. (Id.) This is because the term "sale" connotes to customers that the favorable pricing only lasts for a limited period of time. So, Hobby Lobby avoids giving that impression to its customers by advertising that its "Always 30% off" pricing for furniture is a "discount provided every day." (See Doc. 101-2 at 29, 35.) Marcrum is right in the sense that Hobby Lobby does not convey the impression that its "Always 30% off" prices are "sale" prices, but he is wrong in implying that those prices are not "discount" prices. They are discount prices provided every day.

**Cash Register Buttons.** Nothing more clearly demonstrates just how much Marcrum will stretch to manufacture a genuine issue for trial than his assertions about the buttons on Hobby Lobby's cash registers. Marcrum claims that the cashier does not hit the "discount" button when computing the price for the "Always 30% off" items that are purchased without a coupon, but the cashier does hit the "discount" button whenever a coupon is presented. (Doc. 38 at 9, 13.) This, Marcrum claims, proves that the Always 30% off price is not a true discount. (Id.)

In reality, it proves nothing. The cashier hits the discount button when a coupon is presented so that the computer can calculate the 40% savings and transfer that information to the sales receipt so that the customer can see how much he saved. On furniture items priced "Always 30% Off," the store personnel have already computed the 30% discount and handwritten it on the orange price tags for furniture. When a coupon is not used, there is nothing else for the cashier to do but enter the discounted price already computed on the orange tag.[1]

## II. ARGUMENT

### A. Marcrum Offers No Legitimate Reason Why This Court Should Come To A Different Outcome On His Breach Of Contract Claim Than The One This Court Reached In The Phillips Case – Dismissal.

Marcrum opens the discussion of his breach of contract claim by basically giving it away. He concedes that the key facts and circumstances underlying his breach of contract claim "are virtually the same" as in the Phillips case. (Doc. 38 at 14.) He also agrees with Hobby Lobby's legal analysis of the elements of a breach of contract claim, as well as its discussion about how a party may be bound

[1] Marcrum also seems to criticize Hobby Lobby for its practice of requiring its furniture department employees to compute the 30% discount on furniture and to write the discounted price on the orange tag. (Doc. 38 at 8.) They assert it would be cheaper to have the product manufacturer in China calculate the 30% discount and display it on the orange tag. It perhaps would be cheaper, but this lawsuit is not about finding ways for Hobby Lobby to shed costs in its daily operations. The bottom line is that there is nothing deceptive about Hobby Lobby taking this task on itself as opposed to outsourcing it to the Chinese.

to an agreement "in ways that he did not intend, foresee, or understand." (Id. at 14, 16-17.)

So, how does Marcrum seek to escape the same outcome as the Phillips plaintiffs? Essentially through a series of arguments previously advanced in Phillips and rejected by this Court. First, Marcrum cites to dictionary definitions of the terms "regular," "always," and "discount," (Doc. 38 at 18-19), and then asks: "How can an item be at a discount when it is "always" sold at that price? (Id.) This is the same question the Phillips plaintiffs posited, and the answer is the same: this argument sells the concept of discounts short. The term discount is broader than just a reduction in a price previously offered by the same seller. A discount means "a reduction from the full amount or value of something, esp. a price." B. Garner, Black's Law Dictionary, p. 476 (7th ed. 1999); see also American Heritage Dictionary (5th ed. 2011) (to "discount" is "to sell or offer to sell at a reduced price").

Here, the discount, or reduction in price, is measured from marked prices, which are expressly defined by Hobby Lobby in its advertisements and store signage as comparable to the prices at which other national retail sellers are selling similar merchandise. (Doc. 101-2 at 29, 36.) In other words, it is a reduction from the market price, which in essence is "a reduction from the full value" of the item. All of this is made clear to Hobby Lobby's customers, and Marcrum testified that

he understood this concept and that nothing was misleading or deceptive about the references to marked prices in the signs and advertisements. (Doc. 101-1 at 41.) Marcrum further acknowledged (i) that he understood that a coupon could not be used to gain another 40% off a discounted price, and (ii) that the signs he saw clearly said that the furniture he bought was being sold at discount prices. (Doc. 101-1 at 47-48; Doc. 101-1 at 38, 39-40, 46.) That should end the matter.

But Marcrum persists. He asserts that "[t]he parties dispute the meaning of the term 'regular price,'" "Always 30% off," or "discount." (Doc. 38 at 16, 18.) They really don't. Hobby Lobby has always maintained that the term "regular price" as used in the coupon cannot be the "discounted price." The coupon reflects this truism when it states that a customer cannot use the coupon to obtain a 40% reduction from another discount. (Doc. 58-5.) And, as established above, Marcrum's testimony reflects the same understanding.

But even if at times in his brief Marcrum appears to suggest he had a different understanding, this would not change the analysis under basic contract principles. Marcrum kept those alleged understandings to himself, never articulating them to Hobby Lobby. (Doc. 101-1 at 49-50.) This won't do, as even Marcrum agrees that the mental operations of one of the parties do not control a contract's interpretation, and that a party "may be bound by a contract in ways he did not intend, foresee, or understand." (Doc. 38 at 17) (quoting Lilley v.

Gonzales, 417 So. 2d 161, 163 (Ala. 1982).) As Hobby Lobby demonstrated in its initial brief, what is more important are the actions and the outward manifestations of assent between the parties, particularly when the actions are such that the other party may reasonably draw the inference of assent to the agreement. Uncommunicated expressions of one party's subjective understanding of the agreement have no legal consequence. (See Doc. 102 at 28-29.)

Finally, Marcrum trots out another argument this Court has already rejected -- he can elect to sue for damages (instead of rescission) as his remedy of choice. (Doc. 38 at 19.) Regardless of the remedy a buyer chooses, neither is available in the absence of a breach. Because Marcrum cannot establish a contractual breach, his claim must meet the same fate as the Phillips plaintiffs' identical claim.

In the final analysis, Marcrum takes no issue with the main point Hobby Lobby established in its initial brief – that, as the master of the offer, it can structure the terms of any agreement with its customers in the manner it sees fit. (Doc 102 at 22-24.) Marcrum conceded he can accept the offer by paying for merchandise on Hobby Lobby's terms, or he can shop elsewhere. (Doc. 101-1 at 59.) So, what happened here? Marcrum acted in accordance with Hobby Lobby's terms. He used a coupon and received 40% off of the marked price of the merchandise, not 40% off of an already discounted price. (Doc. 101-2 at 41.) That has been Hobby Lobby's position since it introduced the discount coupon program.

By voluntarily paying for the items on Hobby Lobby's terms without protest or objection, and by never indicating to Hobby Lobby that he held a contrary interpretation, Marcrum manifested his assent to Hobby Lobby's terms. See Kim v. Carter's Inc., 598 F.3d 362, 364 (7th Cir. 2010) (contract terms in a consumer retail transaction were set forth in the receipt that plaintiff received at the cash register). And, because he did, there is no breach of contract. Count I should be dismissed.

### B. Because The Parties Had A Binding Contract, Marcrum's Unjust Enrichment Claim Fails.

Marcrum begins the defense of his unjust enrichment claim by mischaracterizing Hobby Lobby's true position as to that claim. He states that Hobby Lobby's sole argument "is that the unjust enrichment claim is due to be dismissed because Marcrum has an adequate remedy at law." (Doc. 38 at 20.) He then cites several cases stating that the existence of other legal remedies cannot defeat an unjust enrichment claim. (Id. at 20-24.)

What Hobby Lobby actually asserted in its opening brief is that the presence of a contract between the parties is what defeats an unjust enrichment claim. (See Doc. 102 at 32-33.)[2] On this point, even Marcrum's own authorities agree. See

[2] Marcrum erroneously asserts that this was the only ground asserted by Hobby Lobby to defeat the unjust enrichment claim. Not true. Hobby Lobby asserted the additional grounds that the furniture Marcrum purchased worked as intended, there was no evidence that Marcrum paid more than market value, and that Marcrum continued to use the furniture even after learning of the alleged deception. Thus, there is no basis to conclude that Hobby Lobby's retention of the

e.g., State Farm Mut. Auto. Ins. Co. v. Physicians Injury Care Ctr., 427 F. App'x 714, 723 (11th Cir. 2011) ("a showing that an express contract exists [means] that the unjust enrichment [claim] fails"); Williams v. Bear Stearns & Co., 725 So. 2d 397, 400 (Fla. Dist. Ct. App. 1998) (same).[3]

No party really disputes that there was a contract between Marcrum and Hobby Lobby. Marcrum even asserts in his operative complaint that there was a contract and that Hobby Lobby breached it. (See Doc. 94, ¶¶ 45-47.) He also asserts in his opposition brief that "[a]ll of the prerequisites" of "contract formation under Florida law" "have been met" in this case. (Doc. 38 at 14-15.) Based on these allegations, Marcrum concedes that if the Court holds there is a contract claim, the "rule applies" and the unjust enrichment claim fails. (Doc. 38 at 21).

But he will not quite give up. Ignoring these earlier admissions, Marcrum tries to hedge his bets, speculating that because the parties may have had different understandings about what the terms of the coupon meant, the contract may have failed because there was no meeting of the minds. (Doc. 38 at 20, n.6.) Yet, it matters not a whit that the parties may have had different and unexpressed

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purchase price would be inequitable. (See Doc. 102 at 33 n.15.) Marcrum never responded to any of those arguments.

[3] Ordinary consumer transactions at retail stores are generally considered express contracts between the customer and the store. See, e.g., Savett v. Whirlpool Corp., 2012 WL 3780451, at *7 (N.D. Ohio Aug. 31, 2012); White v. Microsoft Corp., 454 F. Supp. 2d 1118, 1133 (S.D. Ala. 2006).

subjective understandings as to contractual terms. This Court has already determined under virtually identical facts (and applying the same legal principles) that a contract existed between the Plaintiffs and Hobby Lobby in the Phillips case. (Doc. 78 at 18-22.) It was a contract formed on Hobby Lobby's terms because the Plaintiffs there objectively manifested their assent to the contract on those terms, voluntarily paid for the products on those terms, never objected or protested to paying on those terms, and never returned the items for a refund but instead continued to use and enjoy the benefits of those products. (Id.) The same thing happened here. (Doc. 102 at 21-31.) The existence of that contract defeats Marcrum's unjust enrichment claim, under the authorities cited by both parties.

Marcrum next distorts Hobby Lobby's position on the contract to try to save his unjust enrichment claim. He asserts that Hobby Lobby's position in this case "is that the parties had such disparate views that the contract claim must fail." (Doc. 38 at 21 n.8.) Hobby Lobby has never asserted that the contract it had with Marcrum (or with any of the Phillips plaintiffs) must fail because the parties had disparate views about contractual terms. Just the opposite -- Hobby Lobby established in Phillips and here that a contract was formed, just not on the basis of the uncommunicated interpretation urged now by Marcrum and earlier by the Phillips plaintiffs.

Finally, Marcrum asserts that the normal rule -- the existence of an express contract defeats an unjust enrichment claim -- does not apply here because Hobby Lobby is relying on "contested extrinsic documents to create an express, written contract." (Doc. 38 at 22.) Once again, Marcrum misstates Hobby Lobby's position. Hobby Lobby has never said that its furniture tags, or Hobby Lobby's signage or advertisements, were extrinsic documents that were incorporated to form its contract with Marcrum. (See Doc. 102 at 21-31.) Those documents were mere informational sources available to customers like Marcrum to explain Hobby Lobby's pricing and promotions. That Marcrum chose to ignore them cannot mean that no contract ever existed.

**C. Marcrum's FDUTPA Claim Cannot Survive Summary Judgment.**

Marcrum's FDUTPA claim is premised on the notion that he should have received 40% off what he calls the "regular price" of his furniture (the orange tag price of $83.99) when Hobby Lobby instead calculated the 40% coupon discount from the green tag price of $119.99. (See Doc. 38 at 30-31; Doc. 101-1 at 13-14, 63.) Because his contract claim rests on the exact same premise, and it fails as a matter of law, Marcrum's FDUTPA claim should fare no better.

***1. Conduct Allowed by a Contract.***

Unlike the situation in Phillips, where there is virtually no case law construing the Alabama Deceptive Trade Practices Act, there is extensive case law

in Florida interpreting FDUTPA. One well-established principle cited by Hobby Lobby is that a FDUTPA claim will not lie where the defendant has done what a contract allows. (See Doc. 102 at 34-36.) This rule makes perfect sense, because imagine the legal chaos that would ensue if a defendant's actions coincided with its contractual rights but he still faced liability on grounds that the same conduct deceived the plaintiff. Every breach of contract claim would then be converted into a FDUTPA claim. That is not the law in Florida.

None of the cases cited by Marcrum undermine this established principle. For example, in Siever v. BWGaskets, Inc., 669 F. Supp. 2d 1286, 1293 (M.D. Fla. 2009), the court recognized that while a FDUTPA claim may arise from a single contract, this does not "convert every breach of contract into a [FDUTPA] claim." The court then determined that the FDUTPA claim at issue was not premised on the contract terms, but instead was based on oral representations made to the plaintiff "during the course of their business relationship" that turned out later to be untrue. Id. Of course, that did not occur here -- Marcrum had no substantive discussions with Hobby Lobby store personnel. Thus, Siever does not justify departure from the general rule that actions consistent with a contract cannot form the basis of a FDUTPA claim.[4]

[4] Marcrum turns to Delgado v. J.W. Courtesy Pontiac GMC-Truck, Inc., 693 So. 2d 602 (Fla. Dist. Ct. App. 1997) seeking avoidance of this established principle. In Delgado, the plaintiff claimed that the defendant "perpetrated a fraud independent of the contract" by

Another of those cases cited by Marcrum, Richards v. Luxury Imports of Palm Beach, Inc., 877 So. 2d 944 (Fla. Dist. Ct. App. 2004), addressed a completely different situation and has no bearing on this case. In Richards, the plaintiff signed a contract to purchase a car for $11,300. After he obtained financing, he came back to the dealer and signed a new contract. Without telling him, the dealership had jacked up the sales price to over $16,000. The court held that this practice of "[o]btaining the signature of a customer on a contract which does not accurately reflect the agreement between the parties could constitute a deceptive trade practice as well as fraud." Id. at 945 (citation omitted). That obviously is not even close to what happened here.

***2. No Deception.***

Hobby Lobby established in its opening brief why Marcrum could not establish the deception element of a FDUTPA claim. (Doc. 102 at 36-39.) Marcrum essentially mounts only two challenges to Hobby Lobby's position: (i) this Court determined that there was a factual issue on deception in Phillips as it related to the Estate of Diane Browning's claim; and (ii) the receipt provided to Marcrum, which portrays the price charged for the furniture and expressly

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"intentionally failing to disclose a material fact … in violation of a statutory duty compelling disclosure." Id. at 605. The sole issue in Delgado was whether Florida's economic loss rule barred causes of action for common law fraud and FDUTPA. The court in Delgado held that the economic loss rule did not apply. Id. at 611. What was not present in Delgado was the core issue presented here -- whether conduct permissible under a contract could nevertheless constitute a FDUTPA violation.

contradicts Marcrum's theory of the price he should have paid, does not matter because it was provided post-transaction. Neither argument works.

First, this Court's observations in Phillips were made without reviewing any testimony of Mrs. Browning. She died before she could be deposed. Marcrum, on the other hand, was deposed, and it's his testimony that reveals there was no deception in this case, for the reasons already established. (See Doc. 102 at 6-21.)

Second, Marcrum was provided his sales receipt at the point-of-sale. He knew before he went to the sales register that he could not use the coupon with a product that was already discounted -- that much was clear on the face of the coupon. (Doc. 58-5; Doc. 101-1 at 48.) The receipt given to him at the point-of-sale showed that the 40% coupon discount was taken from the green tag price of $119.99, not the orange tag price of $83.99. (Doc. 101-2 at 41-42; Doc. 101-1 at 54, 57.) He conceded that all he had to do was read the receipt to understand this. (Doc. 101-1 at 54, 57.) Allowing someone under those circumstances to still claim deception would be no different than allowing a person to avoid a contract on the basis that he saw a non-conforming term when he read the contract for the first time after he signed it. Florida law does not allow that to occur. See Citibank v. Dalessio, 756 F. Supp. 2d 1361, 1367-68 (M.D. Fla. 2010). But, in any event, Marcrum was not stuck with what he might now feel was a bad deal. Both parties agree that all Marcrum had to do was ask the cashier to unwind the transaction and

cancel the credit sale, and it would have been done at that time, no questions asked. (See Doc. 101-1 at 56; Doc. 101-8 at 3, ¶ 10.)

Marcrum simply misses the main point in Tudor v. Jewell Food Stores, Inc., 681 N.E.2d 6 (Ill. App. Ct. 1997). When a person is given a receipt that clearly reveals the price charged for each item purchased, there can be no deception of the buyer about pricing when he can just read the receipt and see exactly what he paid. In Tudor, as Marcrum concedes, "the receipt revealed the [alleged] deception" (Doc. 38 at 32); so too here, as the receipt showed that the 40% coupon discount was not taken from the orange tag price. (See Doc. 101-2 at 41-42.) Where, as in Tudor and here, a customer can also immediately get a full price refund if not satisfied with the price, the case for deception vanishes.[5] Tudor, therefore, is just a logical extension of the principle, recognized by Florida courts construing FDUTPA, that a plaintiff cannot prove deception when he is given information that exposed the truth. (See Doc. 102 at 36-39) (collecting cases).)

***3. No FTC Violation.***

Hobby Lobby previously explained that it did not violate the FTC regulations cited by Marcrum in his complaint. (See Doc. 102 at 40-43.) In

[5] Marcrum attempts to distinguish Tudor on the grounds that the plaintiff in Tudor was entitled not only to a refund but also to keep the product he purchased. There is no basis to construe Tudor as holding that the result would have been different if all that Tudor could get was just a cash refund. The court focused on the right to get a guaranteed money-back refund, a right Marcrum also enjoyed had he chosen to exercise it. (See Doc. 101-2 at 42.)

response, Marcrum proceeds to distort those regulations and Hobby Lobby's pricing practices to try to show a violation of those regulations.

**Former Prices Deception.** First, Marcrum persists in asserting that Hobby Lobby violated 16 C.F.R. § 233.1, which expressly deals only with advertisements involving discounts from a store's "former prices." But as Marcrum well knows but refuses to admit, Hobby Lobby's discounted furniture pricing program has never been based on previous prices it charged for the furniture. The 30% discount is taken from the "marked price," which is in the nature of a market price other sellers charge for similar merchandise. (See Doc. 101-2 at 29.) Marcrum actually conceded he knew that Hobby Lobby's signs did not indicate that the "marked price" was a price Hobby Lobby previously charged for the furniture. (Doc. 101-1 at 39.) So, the "former pricing advertising" regulation does not even apply.[6]

**Comparable Prices Deception.** Marcrum next asserts that Hobby Lobby's "marked price" advertisements violate 16 C.F.R. § 233.2. (Doc. 38 at 36-38.) This too is untrue. The entire thrust of this regulation is to condemn a retailer's use of "comparable prices" that are actually higher than what similar types of retailers are charging for either the same (§ 233.2(a)) or similar (§ 233.2(c)) merchandise. Yet,

[6] Nor does the illustration cited by Marcrum and found in § 233.1(c). (Doc. 38 at 35.) Obviously, what that illustration shows is that a seller engaging in the cited practice never really established a true former price of $10.00 when it charged that price for just a few days, before it reverted to its normal price of $7.50. There is no basis in the record to assert that Hobby Lobby engaged in those practices.

Marcrum does not cite to any evidence in his opposition brief establishing that other retailers, operating either nationally or in the Pensacola market, were selling the same or similar furniture he bought for prices lower than Hobby Lobby's marked price or its always discounted price.

Marcrum seeks to deflect from his failure to present evidence on this issue by misstating what the regulation actually says about "trade areas" and then mischaracterizing the applicable burden of proof. First, Marcrum argues that Hobby Lobby did not show prices other sellers operating in the Pensacola trade area charged for a table similar to the one he bought from Hobby Lobby. But the regulation does not require this showing. It only requires that if a seller does make a representation that its comparable pricing reflects what others in the local area are charging, then he must be "reasonably certain that the higher price he advertises does not appreciably exceed the prices at which substantial sales of the article are being made in the area." 16 C.F.R. § 233.2(a). Hobby Lobby does not make representations about pricing in local markets. Its signs and advertisements state that the marked price "reflects general U.S. market value for similar products." (Doc. 101-2 at 29, 36.)[7]

[7] Marcrum asserts that Hobby Lobby has misled the Court by suggesting that its advertisements defined the marked price to reflect "general U.S. market value," because Marcrum asserts those signs and advertisements containing this language were not used by Hobby Lobby until December 18, 2018, well after Marcrum's purchase on March 3, 2017. (Doc. 38 at 38 n.13.) Not true. Hobby Lobby changed to the current "marked price" language in its

Second, Marcrum seeks to reverse the normal burden of proof attendant to claims brought under FDUTPA. He seeks to establish *per se* deception under FDUTPA by asserting that Hobby Lobby violated the FTC's regulations found in 16 C.F.R. § 233. It seems fairly evident that someone maintaining this theory of deception under FDUTPA must first shoulder the burden of providing that a violation of § 233 actually occurred. Yet, Marcrum claims he wins unless Hobby Lobby shows it complied with § 233. He is wrong. The fact that regulations may require certain actions be taken or avoided does not mean that a defendant, alleged to have violated those regulations, has the burden in the first instance to prove compliance or else lose. Suing under FTC regulations does not reverse the ordinary rule in civil litigation under FDUTPA -- the plaintiff who claims a violation of FDUTPA has the burden to present evidence of the violation, failing which his case cannot survive summary judgment. See Fraker v. Bayer Corp., 2009 WL 5865687, at *8 (E.D. Cal. Oct. 6, 2009) (refusing to reverse the normal burden of proof and holding that the plaintiff has the burden to prove a defendant's non-compliance with a statute or regulation.)

**Causation / Damages.** Even if Marcrum could establish deception by showing that Hobby Lobby violated 16 C.F.R. § 233 in the use of its "marked

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signs referencing general U.S. market value on or about February 15, 2017, before Marcrum's March 3, 2017 purchase. (See Doc. 101-4 at 22-23.)

price" advertisements, Marcrum's FDUTPA claim based on that alleged violation still fails because Marcrum cannot show that the violation caused Marcrum to suffer an actual loss. Under his unique theory about a deceptive "marked price," Marcrum could only establish causation and harm in this scenario if: (1) he actually noticed the "marked price," (2) made a purchase decision that was caused by that form of advertisement, and (3) suffered an actual loss by paying more than he would have paid had the "marked price" actually reflected what other sellers charged for similar merchandise.

This theory breaks down at each level. First, there is no evidence that Marcrum paid any attention to the "marked price" at all -- he focused on the always discounted price shown on the orange price tag, thinking he should get 40% off that price by using a coupon. He has never alleged, much less submitted any evidence, that the orange tag price was too high because the 30% price reduction reflected on that tag was based off of a green tag "marked price" that was higher than what other sellers were charging for the same furniture. Second, Marcrum presented no evidence that he could have purchased the same or similar furniture at another store for a lower price. In fact, he admits that he never shopped around to determine if a lower price was available. (Doc. 101-1 at 16-18, 57.) And, third, because he cannot establish that the table he purchased was available somewhere else for a lower price, he cannot show he incurred an actual loss. See Mulligan v.

QVC, Inc., 888 N.E.2d 1190, 1197 (Ill. Ct. App. 2008) (plaintiff could not recover under a consumer fraud act claim where she failed to show that the prices she paid were more than what others charged for similar items in the marketplace -- this meant she could not show that the value she received was less than the value she was promised). Accord, Kim, 598 F.3d at 365-66.

* * *

In the final analysis, Marcrum has to show that he can avoid summary judgment even if (as the undisputed evidence shows) he was provided the following information:

- The coupon stated that it could not be used with any other discount -- he admits this. (Doc. 101-1 at 48.)
- The signs displayed wherever furniture was sold in Hobby Lobby's stores said that the orange tag price was a discounted price -- he admits this. (Doc. 101-1 at 36, 40.)
- The cash register screens displayed the price of the furniture as the cashier rang up the transaction -- he does not deny this. (Doc. 101-8, ¶ 9.)
- The sales receipt given to Marcrum clearly showed that the 40% coupon discount was taken from the marked price (the green tag price) not from the discounted price (the orange tag price) -- he admits this. (Doc. 101-1 at 54.)

And, then, armed with all this information, Marcrum paid the amount shown on the sales receipt. He never objected to the price he paid, never asked the cashier to unwind and cancel the transaction, never later returned the furniture for a full price refund, and has continued to use and enjoy the benefits of the furniture up until the

present day. Hobby Lobby has not seen any case that would support a FDUTPA claim under similar circumstances. Marcrum certainly did not cite one.

### D. Marcrum Lacks Standing To Sue For Injunctive Relief Because He Faces No Risk Of Future Harm.

As the party seeking to invoke federal jurisdiction here, Marcrum bears the burden of establishing standing to sue. FN/PBS, Inc. v. City of Dallas, 493 U.S. 215, 231 (1990). "Standing to sue is a doctrine rooted in the traditional understanding of a case or controversy." Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547 (2016). Standing must be satisfied for each claim and for each form of relief. DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 352 (2006).

Thus, even though someone like Marcrum may have standing to bring a damages action based on a past injury, that does not mean he has standing to seek injunctive relief as well. "[T]o demonstrate that a case or controversy exists to meet the Article III standing requirement when a plaintiff is seeking injunctive or declaratory relief, a plaintiff must allege facts from which it appears there is a substantial likelihood that he will suffer injury in the future." Worthy v. City of Phenix City, 930 F.3d 1206, 1215 (11th Cir. 2019) (citation omitted) (emphasis in original). This threat of future injury must be real and immediate, or "certainly impending." Clapper v. Amnesty Int'l USA, 568 U.S. 398, 409 (2013) (citation omitted). Past exposure to illegal conduct does not in itself establish a present case

or controversy regarding injunctive relief. O'Shea v. Littleton, 414 U.S. 488, 495-96 (1974); see also City of Los Angeles v. Lyons, 461 U.S. 95, 105-06 (1983).

Marcrum cannot possibly meet these standing burdens because there is no chance he could suffer a future injury since Hobby Lobby shoppers can no longer use a coupon with a furniture purchase. (Doc. 101-4 at 30.)[8] See Nicosia v. Amazon.com, Inc., 834 F.3d 220, 239 (2d Cir. 2016) (plaintiff could not show a likelihood of future harm because Amazon no longer sold the product at issue on its website). But even if the old practice remained in effect, Marcrum expressed no present intention of shopping at Hobby Lobby in the future. (Doc. 101-1 at 34-35.) That too eliminates any basis for injunctive relief, as this Court previously recognized in Phillips. (See Doc. 78 at 26.)[9]

Marcrum believes he can sidestep these Article III standing principles in this case because, he claims, the Florida Legislature has relaxed standing principles for

[8] This change occurred in September 2017 because furniture margins were already too tight even when a sale occurred at the normal 30% reduction. (Doc. 101-4 at 24, 30; Doc. 101-3 at 10.) There is no evidence that Hobby Lobby will ever return to its previous practice of allowing coupons to be used with furniture purchases. In fact, the coupon itself now expressly provides that "Your Price" items, which include furniture, are not eligible for the coupon discount. (Doc. 101-4 at 28.)

[9] The injunctive relief claim fails for an additional reason. If Hobby Lobby decided to reverse course and return to its old policy of allowing furniture purchasers to use a 40% coupon, and if Marcrum changed his mind and decided to shop at Hobby Lobby again, he still could not obtain injunctive relief because he could not show an imminent threat of deception. By now, he certainly knows how Hobby Lobby administers its coupon program. When those circumstances exist, courts have not allowed injunctive relief claims to proceed. See e.g., Camasta v. Jos. A. Bank Clothiers, Inc., 761 F.3d 732, 740-41 (7th Cir. 2014); McNair v. Synapse Grp., Inc., 672 F.3d 213, 225 (3d Cir. 2012).

those asserting injunctive relief claims under FDUTPA. (See Doc. 38 at 40-43.) Marcrum emphasizes that in § 501.211(1), the Florida Legislature grants the right to "anyone aggrieved by a violation of [FDUTPA]" to pursue injunctive relief. See Fla. Stat. Ann. § 501.211(1). Because this statute is drafted in the past tense, Marcrum asserts, his alleged past injuries allow him to pursue injunctive relief claims against Hobby Lobby in this case.

Because Article III's "case or controversy" requirement does not apply in state court, ASARCO Inc. v. Kadish, 490 U.S. 605, 617 (1989), this argument might make some sense in state court proceedings in Florida. But it makes no sense in federal court and flies in the face of established precedent. Standing is a jurisdictional issue; if the plaintiff lacks standing to pursue injunctive relief, a federal court has no jurisdiction to entertain the claim. J.W. ex rel. Williams v. Birmingham Bd. of Educ., 904 F.3d 1248, 1264 (11th Cir. 2018). State policy judgments reflected in its own laws cannot justify a departure from ordinary Article III principles; nor can a state through its own legislation "alter th[e] role [of federal courts] simply by issuing to private parties who otherwise lack standing a ticket to the federal courthouse." Hollingsworth v. Perry, 570 U.S. 693, 715 (2013). Not even Congress can "erase Article III's standing requirements" by statutorily granting the right to sue to a plaintiff who would not otherwise have standing. Raines v. Byrd, 521 U.S. 811, 820 n.3 (1997); see also Spokeo, 136 S.

Ct. at 1547-48. Thus, even if what Marcrum says about Florida's statutory scheme is true, it is still not enough to carry him across the standing threshold with regard to his injunctive relief claim. That claim must be dismissed.

### E. The Voluntary Payment Doctrine Defeats All of Marcrum's Claims.

We begin with Marcrum's assertion that he "is unaware of the application of the voluntary payment doctrine to any claim under the FDUTPA," and that "[c]ourts throughout the country have held that the voluntary payment doctrine is not applicable … [to] claims based on violation of consumer protection statutes." (Doc. 38 at 46-47.) Marcrum does not cite any Florida cases for this latter proposition. And, even the Florida cases cited by Marcrum implicitly recognized that the defense is available against a FDUTPA claim, because the courts in those cases went through an extensive analysis of the doctrine to determine its applicability there. If the doctrine was simply unavailable as a defense to a FDUTPA claim, as Marcrum suggests, then why bother even analyzing whether it applied under the facts of those cases? The obvious answer is that the defense applies to FDUTPA claims in the appropriate case. This is one of those cases.

Marcrum then shifts course and asserts that even if the voluntary payment doctrine is generally applicable, it does not apply here because he can satisfy the "fraud" exception to the doctrine. He cites this Court's observation in Phillips, that there was an issue of fact as to whether Hobby Lobby made any "false or

misleading statement to Mrs. Browning,"[10] and asserts that this somehow shows that the fraud exception applies here. This assertion ignores three essential points: (1) statements by this Court about the proof submitted in Mrs. Browning's case do not necessarily correlate to this case, where the testimony is different; (2) this Court's statements about "false and misleading statements" were not tied to the voluntary payment defense, as that defense was not at issue in the summary judgment proceedings in Phillips; and (3) more is needed to show "fraud" than just the presence of a false or misleading statement (e.g., a plaintiff must also prove justifiable reliance and causation).[11] Marcrum does not even allege, much less show, that these other elements of a fraud claim are present here.[12]

The key cases Marcrum relies upon to defeat the voluntary payment doctrine -- Cox, Brink, and Southern Wind Aviation, -- involved completely different circumstances:[13]

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[10] See Doc. 78 at 25.

[11] See Indulgence Yacht Charters Ltd. v. Ardell Inc., 2008 WL 4346749, at *6 (S.D. Fla. Sept. 16, 2008) (citing elements of a fraud claim). Marcrum also does not contend that the evidence supports the other two exceptions to the voluntary payment doctrine (coercion or mistake of fact).

[12] Marcrum pushes against an open door when he argues that the judicially-created economic loss rule does not limit the damages recoverable in a FDUTPA action. (Doc. 38 at 46-47.) Hobby Lobby does not seek summary judgment based on the economic loss rule, so it is hard to understand why Marcrum interjects that issue into this case.

[13] See Doc. 38 at 44-46 for full cites.

- Cox: There was a genuine factual dispute over whether the plaintiff knew, at the time of the transaction, the key fact in the case -- that treating his trade-in value as cash would result in higher costs to him than if the trade-in value was credited against the capitalized costs. Cox, 342 F. Supp. 3d at 1290.

- Brink: There was a genuine factual dispute over whether plaintiff had "any knowledge" that the Processing Fee charged by the defendant was "greatly in excess of the actual costs associated with the [defendant] executing and clearing her transactions," and that those charges could be considered "hidden commissions," which were forbidden by the parties' agreement. Brink, 341 F. Supp. 3d at 1320-21.

- S. Wind Aviation: There was no evidence that plaintiffs voluntarily paid the charges in the invoices billed by defendant knowing those charges were excessive, which could only be discovered after an expert reviewed the invoices. S. Wind Aviation, 2014 WL 12570958, at *12.

This case is completely different. Marcrum concedes that no one coerced him into making his purchase. (Doc. 101-1 at 57.) He also knew that he could not use a coupon with another discount. (Id. at 48; Doc. 58-5.) He was given access to information (furniture signs) disclosing that the "orange tag" price on the furniture was a discount price. (Doc. 101-1 at 39-40; Doc. 101-2 at 29.) Marcrum concedes he saw furniture signs at Hobby Lobby, (Doc. 101-1 at 38), and that there was nothing misleading about them, (Id. at 41). When he was at the cash register, if he looked he could easily see the prices for his furniture displayed on two computer screens. (Doc. 101-2 at 38-40; Doc. 101-8 at 3, ¶ 9.) He was then given a sales receipt that clearly displayed the price he was charged for the furniture and how it

was calculated -- 40% off the green tag price of $119.99, not the orange tag price of $83.99. (Doc. 101-2 at 41-42; Doc. 101-1 at 54-56.) He admitted that had he simply taken the time to review the receipt, he would have instantly known that the 40% coupon reduction was not taken from the orange tag price of $83.99. (Doc. 101-1 at 54, 57.) And, even without looking at the receipt, anyone with a grade school education who paid attention would know that the price he paid ($71.99) was not 40% off of the orange tag price of $83.99.

Despite all this, he paid the price shown on the sales receipt without protest, objection, coercion, or fraudulent inducement. If the voluntary payment doctrine does not apply here, it has no operation anywhere.

## III. 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 all of Plaintiff Steven Marcrum's claims with prejudice.

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**CERTIFICATE OF SERVICE**

I hereby certify the foregoing Defendant's Reply Brief In Support of Its Motion for Summary Judgment as to Plaintiff Steven Marcrum's 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 5th day of September, 2019.

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