FILED
2019 Dec-12 PM 03:07
U.S. DISTRICT COURT
N.D. OF ALABAMA

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

DAVID PHILLIPS, et al. Plaintiffs, v. HOBBY LOBBY STORES, INC., Defendant.	)))))))))	Case No. 2:16-cv-00837-JEO

STEVEN D. MARCRUM, Plaintiff, v. HOBBY LOBBY STORES, INC. Defendant.	)))))))))	Case No. 2:18-cv-01645-JEO

MEMORANDUM OPINION AND ORDER

Before the court is the motion for summary judgment filed by Defendant Hobby Lobby in this putative class action brought by Plaintiff Steven D. Marcrum. (16-837, Doc. 100; 18-1645, Doc. 29).[1] The case concerns the manner in which

[1] Citations to "Doc. __" is the to the document number of the pleadings, motions, and other materials in the court file, as compiled and designated on the docket sheet by the Clerk of the Court. Because this is a consolidated case, many of the documents are duplicated and filed under both case numbers. Some documents, however, are only filed in one case and not the other. Therefore, for ease of reference, the court will designate the case number for each cited document. Unless otherwise noted, pinpoint citations are to the page of the electronically filed document in

Hobby Lobby administers a weekly coupon offering "40% Off One Item at Regular Price." Marcrum used a 40% off coupon when he purchased a console table that was priced "Always 30% Off" the "marked price." In his second amended complaint, Marcrum alleges that this practice constitute a breach of contract and unjust enrichment (in the alternative), and violates the Florida Unfair and Deceptive Trade Practices Act ("FDUTPA"), Fla. Stat. § 501.201, *et seq.* (16-837, Doc. 94). Hobby Lobby contends it is due summary judgment as to all three claims. (16-837, Doc. 100; 18-1645, Doc. 29). The motion has been fully briefed by the parties and is ripe for decision. For the reasons that follow, the motion is due to be granted in part and denied in part.

I. SUMMARY JUDGMENT STANDARD

Under Federal Rule of Civil Procedure 56(c), summary judgment is proper "if the pleading depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The party seeking summary judgment bears the initial burden of informing the court of the basis for its motion and identifying the portions of the pleadings or filings which it believes demonstrate the absence of

---

the court's CM/ECF system, which may not correspond to pagination of the original "hard copy" of the document presented for filing.

a genuine issue of material fact. *Id* at 323. Once the movant has met its initial burden, the non-moving party must go beyond the pleading and by his own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue suitable for trial. *See id.* at 324; *see also* Fed. R. Civ. Pro. 56(e).

Substantive law identifies which facts are material and which are irrelevant. *See Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986). All reasonable doubts about the facts and all justifiable inferences must be resolved in favor of the non-movant. *See Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1115 (11th Cir. 1993). A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted. *See id.* at 249.

II. STATEMENT OF FACTS

Hobby Lobby is a retailer that operates over 700 stores nationally. It sells arts, crafts, frames, small pieces of furniture, and other similar items. (16-837, Doc. 94 ¶ 5; Doc. 95 ¶ 5). Marcrum's claims arise out of his purchase of a piece of furniture from a Hobby Lobby store located in Pensacola, Florida, and his use of a Hobby Lobby 40% off coupon with his purchase. (16-837, Doc. 94 ¶ 11).

A. Furniture Pricing

Hobby Lobby attaches two price tags to its furniture items. One is a green tag showing an item number and price. (*See e.g.*, 16-837, Doc. 101-2 at 25).[2] This tag is attached to the furniture by the manufacturer before shipment to Hobby Lobby. (16-837, Doc. 101-3 ("Fallon Dep.") at 109).[3] The second tag is an orange tag[4] stating that furniture is "Always 30% Off." (*See e.g.*, 16-837, Doc. 101-2 at 25). The orange tag shows the item's 30% off price, which is identified as "Your Price" for the item, which is handwritten in black marker on a line under "Your Price." (*Id*.). The orange tag is applied to the furniture at each store and the price is then hand-written on the tag. (*Id*.).

Store signs explaining Hobby Lobby's furniture pricing are posted throughout the areas where furniture is sold. The signs explain that furniture is always 30% off the "marked price." (16-837, Doc. 101-2 at 29). The furniture signs also state that the "marked price" "reflect[s] general U.S. market value for similar products" and

[2] Both parties cite to documents submitted in support and opposition to the motion for summary judgment filed in the consolidated case. The cited testimony applies equally to this case, including testimony regarding furniture pricing and application of the coupon with regard to furniture purchases.

[3] The deposition of Joe Fallon is also located at document 38-6 in 18-1645.

[4] At some point in time, the orange tags were replaced with yellow tags. (*See* 16-837, Doc. 101-40 at 30). Nothing else was changed other than the color and for ease of discussion, the court and the parties refer to the "always" price tag as orange, even though in some of the exhibits the tag is yellow.

that "marked prices reflect comparable prices offered by other sellers for similar products." (16-837, Doc. 101-2 at 29, 32, 33). The signs further explain that the "discounted price" of an item is "shown on [its] orange tag" and that the "discounts" are "provided every day." (*Id*.).

Hobby Lobby's advertisements convey the same pricing information. The advertisements state that furniture is "Always 30% Off the Marked Price." (16-837, Doc. 101-2 at 36). The same definition of "marked price" is used: marked prices reflect "general U.S. market value for similar products." (*Id*.). The advertisements likewise indicate that the "Always 30% Off" price is a "discount" provided every day. (*Id*.).

B. The 40% off Coupon

Hobby Lobby provides coupons that customers may use to obtain additional prices savings. Customers can clip the coupon out of a newspaper advertisement, download the coupon onto their mobile cellular device, or print the coupon from Hobby Lobby's website. (16-837, Doc. 58-4 ("Freebern Dep.") at 81-83). The coupon is good for "40% Off One Item at Regular Price." (16-837, Doc. 101-2 at 38). The term "regular price" is not defined in the coupon. (*Id*.). Certain stated restrictions apply to the coupon's use: customers are limited to one coupon per day; the coupon must be presented at the time of purchase; the coupon cannot be used on

certain items; and the coupon offer is "not valid with any other coupon, discount, or previous purchase." (*Id*.).

As of the end of September 2017, the 40% off coupon was not eligible for use with any items that have the "Your Price" designation on the yellow tag, including furniture items. (16-837, Doc. 101-4 at 30). Further, as of February 11, 2018, the coupon itself expressly states that it may not be used with "Your Price" items. (*Id*. at 28).

C. Marcrum's Furniture Purchase

On July 7, 2017, Marcrum purchased a console table from a Hobby Lobby store in Pensacola, Florida. (Marcrum Dep. at 21). The original green tag attached to the table indicated a marked price of $119.99; the orange tag stapled on top of the original tag reflected an "Always 30 % Off" price of 83.99. (*Id*. at 137-40; Doc. 101-1 ("Browning Dep.") at 137-38; Doc. 101-2 at 26).[5] Marcrum used the 40% off coupon to purchase the table. (*Id*. at 13-14, 25).

Marcrum was given a sales receipt at the time of his purchase. (Doc. 101-2 at 41). The receipt shows that Marcrum used the 40% off coupon on furniture marked at $119.99, that using the coupon saved him $48.00, and that the discounted price he

[5] The exhibit is not the actual price tag that was attached to the furniture purchased by Marcrum. Instead, the parties used the exhibit throughout multiple depositions to represent the one that would have been on the table he purchased and to show that a 30 % reduction from $119.99 is $83.99. Marcrum testified that he discarded the actual tag attached before the lawsuit, but agreed it displayed the same numbers. (Marcrum Dep. at 137-40).

paid after using the coupon was $71.99, plus sales tax in the amount of $5.40, for a total of $77.39. (*Id*.). The receipt also explained Hobby Lobby's return policy: if the original sales receipt is presented by the customer within 90 days of purchase, Hobby Lobby will exchange the merchandise, provide store credit, or issue a refund. (*Id*. at 42). Without an original receipt, the customer may either exchange the merchandise or receive a merchandise credit. (*Id*.).

Marcrum does not recall speaking to anyone at Hobby Lobby at the time of his purchase. (Marcrum Dep. at 21-22). He did not object at the time of purchase to anyone at Hobby Lobby about the price he paid for the furniture. (*Id*. at 57). He never returned to complain to anyone at Hobby Lobby about the purchase or ask for an explanation as to why he did not receive a larger discount. (*Id*. at 17, 19). Marcrum did not return the furniture to Hobby Lobby to seek a full refund, but instead has continued to use the table. (*Id*. at 10, 17, 32, 55-56).

III. DISCUSSION

The second amended complaint contains three causes of action: (1) an "alternative claim" for breach of contract; (2) an "alternative claim" for unjust enrichment; and (3) violations of the FDUTPA. (16-837, Doc. 94). Hobby Lobby has moved for summary judgment as to all three claims. The court discusses each claim separately below.

A. Breach of Contract

"Under Florida law, the elements of a breach of contract action are (1) a valid contract; (2) a material breach; and (3) damages." *Bland v. Freightliner, LLC*, 206 F. Supp. 2d 1202, 1210 (M.D. Fla. 2002) (quoting *Abruzzo v. Haller*, 603 So.2d 1338, 1340 (Fla. Dist. Ct. App. 1992). A valid, binding contract requires offer, acceptance, consideration and sufficient specification of the essential terms. *See Vega v. T–Mobile USA, Inc.*, 564 F.3d 1256, 1272 (11th Cir. 2009) (citing *St. Joe Corp. v. McI*ver, 875 So. 2d 375, 381 (Fla. 2004)). A valid contract - premised on the parties' requisite willingness to contract - may be "manifested through written or spoken words or inferred in whole or in part from the parties' conduct." *L&H Constr. Co. v. Circle Redmont, Inc.*, 55 So. 3d 630, 634 (Fla. Dist. Ct. App. 2011) (internal quotation marks omitted). Florida courts use "an objective test . . . to determine whether a contract is enforceable." *See Robbie v. City of Miami*, 469 So. 2d 1384, 1385 (Fla. 1985).

The court has already granted summary judgment in the consolidated case on the breach of contract claim.[6] (18-1645, Doc. 38 at 14). As conceded by Plaintiff, the facts are virtually indistinguishable regarding the two furniture purchases. (*Id.*). Additionally, as laid out above, the law in Florida regarding the contracts and their

[6] Plaintiff acknowledges the uphill battle and states he "would be remiss . . . if he did not argue that this view should be altered." (18-1645, Doc. 38 at 9).

formation is the same as that in Alabama and Illinois. And Plaintiff makes essentially the same argument here as the Plaintiffs in the consolidated case: that Marcrum never assented to Hobby Lobby's position on the terms of the coupon.[7] (*Id*. at 17-18).

The court's view of that argument has not changed and the analysis remains the same. By paying the price reflected on the receipt, without objection, Marcrum evidenced his outward, objective manifestation of assent to the price Hobby Lobby charged. *See Consol. Red. Healthcare Fun I, Ltd. v. Fenelus*, 853 So. 2d 500, 504 (Fla. Dist. Ct. App. 2003) (assent to the contract can be shown through actions indicating assent, such as performance and retention of benefits); *Stevenson v. Stevenson*, 661 So. 2d 367, 369 (Fla. Dis. Ct. App. 1995) (a party's acceptance of the benefits of a contract estops her from questioning the contracts terms and "mandates legal ratification of the contract even if she evidenced a contrary intent."); *accord 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); *Mobile Attic, Inc. v. Kiddin' Around of Ala., Inc*., 72 So. 3d 37, 45

[7] Plaintiff argues that the court's restatement of the argument in the consolidated case was not entirely accurate. (18-1645, Doc. 38 at 16). The distinctions made by Plaintiff, however, are immaterial to the court's analysis of the breach of contract claim. Plaintiff's disagreement with the terms of the contract and his assertion that a jury should be able to decide what those contract terms actually were do not change the analysis under basic contract principles, especially where, as here, his actions clearly evidence assent to the terms set forth in the receipt. Instead, Plaintiff's argument is more well-taken with regard to his FDUTPA claim, discussed below.

(Ala. Civ. App. 2011) ("[T]he actions of the parties in reference to the contract can form the basis of mutual assent; that is, when the conduct of one party is such that the other party may reasonably draw the inference of assent to the agreement, that conduct is effective as assent."). As summed up by the court previously:

> [Marcrum] voluntarily paid the price [he was] charged by Hobby Lobby for [his] merchandise, [he was] given [a] receipt[] showing exactly what [he] paid and how the price was computed, and [he] never complained to store personnel about the amount [he] paid or how the[] coupon was applied. In addition, [he] never returned any of [his] merchandise to Hobby Lobby for a refund. Consequently, Plaintiff[] cannot show that Hobby Lobby breached any contract.

(16-837, Doc. 78 at 22). As such, summary judgment is due to be granted on Marcrum's breach of contract claim.[8]

B. Unjust Enrichment

"The elements of an unjust enrichment claim are a benefit conferred upon a defendant by the plaintiff, the defendant's appreciation of the benefit, and the defendant's acceptance and retention of the benefit under circumstances that make it inequitable for him to retain it without paying the value thereof." *Florida Power Corp. v. City of Winter Park*, 887 So. 2d 1237, 1242 n.4 (Fla. 2004) (quotation marks and citation omitted). "It is well settled that the law will not imply a contract where an express contract exists concerning the same subject matter." *Kovtan v. Frederiksen*, 449 So. 2d 1, 1 (Fla. Dist. Ct. App. 1984). Therefore, an "unjust

[8] Marcrum's argument regarding the election of remedies is irrelevant where there is no breach.

enrichment claim [is] precluded by the existence of an express contract between the parties concerning the same subject matter." *Diamond "S" Dev. Corp. v. Mercantile Bank*, 989 So. 2d 696, 697 (Fla. Dist. Ct. App. 2008); *see also 1021018 Alberta Ltd. v. Netpaying, Inc*., 2011 WL 1103635, at *5 (M.D. Fla. March 24, 2011) (Florida courts have held that "a plaintiff cannot pursue a quasi-contract claim for unjust enrichment if an express contract exists concerning the same subject matter."); *Zarrella v. Pac. Life Ins. Co.*, 755 F. Supp. 2d 1218, 1227 (S.D. Fla. 2010) (same).

That being said, a party may plead in the alternative for relief under an express contract and for unjust enrichment. *See ThunderWave, Inc. v. Carnival Corp*., 954 F. Supp. 1562, 1566 (S.D. Fla. 1997) (citing *Hazen v. Cobb–Vaughan Motor Co.*, 117 So. 853, 857-58 (1928)). "But unjust enrichment may only be pleaded in the alternative where one of the parties asserts that the contract governing the dispute is invalid." *Williams v. Wells Fargo Bank N.A.*, 2011 WL 4368980, at *11 (S.D. Fla. Sept. 19, 2011) (citing *Zarrella*, 755 F. Supp. 2d at 1227-28 and *In re Managed Care Litig.*, 185 F. Supp. 2d 1310, 1337-38 (S.D. Fla. 2002)).

Here, Plaintiff cannot maintain a claim for unjust enrichment because it is undisputed that a contract was formed. Marcrum does not dispute that he entered into a contract with Hobby Lobby when he selected the table to be purchased, presented the coupon at the register, paid for the item using the coupon, and took the item home. (18-1645, Doc. 38 at 38). Again, his only true dispute is with the terms

of the contract. Because he does not dispute that a contract was formed, he cannot maintain a claim for unjust enrichment, even in the alternative, under Florida law. *Williams*, 2011 WL 4368980, at *11 (S.D. Fla. Sept. 19, 2011) (citations omitted). Summary judgment is due to be granted on Marcrum's unjust enrichment claim.

C. FDUTPA

FDUTPA provides for a civil cause of action for "[u]nfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce." Fla. Stat. § 501.204(1); *see also Smith v. 2001 S. Dixie Highway, Inc.*, 872 So. 2d 992, 993 (Fla. Dist. Ct. App. 2004). "A consumer claim for damages under FDUTPA has three elements: (1) a deceptive act or unfair practice; (2) causation; and (3) actual damages." *Rollins, Inc. v. Butland*, 951 So. 2d 860, 869 (Fla. Dist. Ct. App. 2006). To satisfy the first element, a plaintiff must show "the alleged practice was likely to deceive a consumer acting reasonably in the same circumstances." *State, Office of the Att'y Gen. v. Commerce Comm. Leasing, LLC*, 946 So. 2d 1253, 1258 (Fla. Dist. Ct. App. 2007) (quotation omitted). Deception may occur under FDUPTA "if there is a representation, omission, or practice that is likely to mislead the consumer acting reasonably under the circumstances to the consumer detriment." *Zlotnick v. Premier Sales Grp., Inc.*, 480 F.3d 1281, 1284 (11th Cir. 2007) (quoting *PNR, Inc. v. Beacon Prop. Mgmt., Inc.*, 842 So. 2d 773, 777 (11th Cir. 2003)).

Marcrum contends that Hobby Lobby violated the FDUTPA in multiple ways. First, he argues that Hobby Lobby violated the FDUTPA by applying the 40% off the "regular" price coupon to the "marked" price, rather than the "Always 30% Off" price, which the Marcrum claims was the true "regular" price of the merchandise. (18-1645, Doc. 38 at 25). As to his second and third arguments, Marcrum points to specific examples and illustrations contained in the Federal Trade Commission regulations as deceptive and contends that Hobby Lobby's pricing and application of the coupon mirror specific violations contained therein.[9] Specifically, Marcrum argues that Hobby Lobby violated the FDUPTA in its statements that the "marked" price reflects "comparable prices offered by other sellers for similar products." (*Id*. at 36-38). Finally, Marcrum contends that Hobby Lobby's use of the term "regular" in its coupon is deceptive because the "marked" price is actually a price at which the item is never sold. (*Id*. at 34-35). The court addresses each alleged violation separately below.

[9] The Federal Trade Commission Act gives the Federal Trade Commission the power "to promulgate trade regulation rules which define with specificity acts or practices which are unfair or deceptive. . . . [A] violation of a rule shall constitute an unfair or deceptive act or practice in violation of . . . the Act." 16 C.F.R. § 1.8. In turn, FDUPTA states that in determining what is deceptive, "due consideration and great weight shall be given to the interpretations of the Federal Trade Commission and the Federal courts relating to 5.5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1)." Fla. Stat. § 501.204.

1. Application of Coupon to "Marked" Price

As to Marcrum's first alleged violation of the FDUTPA, Hobby Lobby contends that Marcrum's claim fails because he cannot establish a deceptive act in the way it applied the coupon.[10] (16-837, Doc. 102 at 36-43). The court has already addressed the same argument in the consolidated case and found that a question of fact exists. The court makes the same determination here with regard to this alleged violation of the FDUTPA. While the price tags and advertisements in and of themselves do not necessarily contain a "representation [or] omission . . . that is likely to mislead the consumer acting reasonably," the statements therein, when combined with the statements contained in the 40% off coupon create a jury question as to whether or not the way in which Hobby Lobby applies the coupon is deceptive. The collective use of the "marked price," "always price" and the "regular price" necessarily creates confusion on the part of the consumer that a reasonable juror could conclude equates with a "deceptive act" under FDUTPA.

[10] As in *Phillips*, the court rejects Hobby Lobby's arguments that Marcrum's FDUTPA claim fails because: (1) Marcrum cannot predicate his FDUTPA claim on Hobby Lobby's alleged failure to honor the contractual promise it made in its coupon, (16-837, Doc. 102 at 34-36); and (2) there is no substantial evidence that any deceptive action or statement by Hobby Lobby caused Marcrum any compensable loss, (*id*. at 43-45). First, the court is not persuaded that Marcrum's allegations as they relate to the FDUTPA essentially amount to a claim for breach of contract. While the court agrees with Hobby Lobby's argument in regard to the terms of the contract established by the receipt, that conclusion does not dictate a finding that Plaintiff has not created a jury question that the application of the coupon to the "marked" price, as opposed to the "Always" price is deceptive. Instead, the allegations clearly fall within those practices proscribed by the Act and none of the cases cited by Hobby Lobby persuade the court otherwise. As to the second argument, Marcrum suffered a compensable loss in that he paid more for the table than he would have paid if the 40% coupon was applied to the "always" price. The monetary damage is clear and easily calculable.

Likewise, the court is not persuaded by Hobby Lobby's argument that Marcrum could not have been deceived because he was provided all the information regarding the application of the coupon in the coupon, furniture signs, and receipt.[11] (16-837, Doc. 102 at 36-39). It is precisely the combination of the terms and statements contained in the coupon, the furniture signs, and the price tags on the furniture that creates the jury question as to whether or not those statements are deceptive when taken collectively. The coupon's statement that it is not valid with any other "discount" in no way clarifies the coupon's application under the circumstances because it is unclear whether the "always" price is a discount when it is the price every customer pays for the item and the "marked" price is never charged to the customer. And the signs displayed in the area where furniture is sold do nothing to illuminate what the "regular" price is, as stated in the coupon - the signs use and define the term "marked" price.

Finally, the fact that his receipt shows that the coupon was taken from the "marked" price, as opposed to the "always" price does not somehow negate the jury question as to the alleged deception. The receipt was not given to Marcrum until after his purchase. Additionally, although the receipt does list the "marked" price as

[11] The court is also not persuaded by the cases cited in support of Hobby Lobby's argument that there can be no deception because Marcrum had all the information before him. The two example cases deal with a loan closing and a mortgage. Both situations are factually dissimilar from the consumer transaction presented here.

the price from which the coupon is applied, that contention is more well taken with regard to Marcrum's breach of contract claim, as discussed above. The alleged deception occurs from the combination of the statements surrounding the terms "regular," "marked" and "always off." Therefore, for the foregoing reasons, the court concludes summary judgment is due to be denied as to Marcrum's FDUPTA claim regarding the application of the 40% off coupon to the "marked" price.

2. "Marked" Price vs. Comparable Prices

As to Marcum's second alleged violation of FDUTPA, Marcrum argues that Hobby Lobby's statement that the "marked prices reflect comparable prices offered by other sellers for similar products" is deceptive. Specifically, Marcum contends that Hobby Lobby's signs violate 16 C.F.R. § 233.2. That regulation states that when a retailer represents that it is selling items below the prices being charged in the area, the retailer "should be reasonably certain that the higher prices [it] advertises does not appreciably exceed the price at which substantial sales of the article are being made in the area." 16 C.F.R. § 233.2(a). Marcrum contends that "Hobby Lobby is reasonably certain of no such thing" and it did not produce any "evidence that it surveyed merchandise near Pensacola, Florida, relevant to Mr. Marcum, prior to pricing the Marcrum table." (18-1645, Doc. 38 at 37) (emphasis omitted).

Marcrum's argument misses the mark for the simple reason that Hobby Lobby does not make representations about pricing in local markets. Instead, the signs and

advertisements state that the marked price "reflects general U.S. market value for similar products." (Doc. 101-1 at 29, 36). And even if the court were to apply the reasoning behind the regulation to the representations made by Hobby Lobby, there is evidence in the record that Hobby Lobby researched prices at which other national retailers were selling similar merchandise so that they could be "reasonably certain" that the higher prices advertised did not appreciably exceed the prices at which those national retailers sold similar products.[12] (16-837, Doc. 67-9 at 2; Doc. 101-7 ("Theresa Webster Decl.") at 2-3, 5-19; Fallon Dep. at 17-34). As such, the court rejects Marcrum's second alleged violation of the FDUPTA and summary judgment is due to be granted as to this claim.

3. Item Never Sold at "Marked" Price

Marcrum's final argument is the way in which Hobby Lobby advertises prices – i.e. it marks furniture with a price it never charges – is deceptive and a violation of FDUTPA. (18-1645, Doc. 38 at 34-35). Marcrum contends that the "marked" price is fictitious and violates 16 C.F.R. § 233.1 in that "'the 'bargain' being offered is a

[12] For example, Hobby Lobby's furniture buyers research on-line offerings from other national furniture sellers gain a better understanding of products and prices. (Fallon Dep. at 33-34). Hobby Lobby's furniture buyers also personally travel to competitor's stores to determine the prices at which competitors are actually selling the same or similar products. (*Id*. at 17, 20, 27, 32). Finally, even after the furniture is priced, Hobby Lobby continues to check to ensure that its "marked prices" for furniture remain at or below the prices charged by its national retail competitors and to make price adjustments if necessary. (*Id*. at 31; Doc. 101-5; Doc. 101-6; Webster Decl. at 2-19).

false one . . . [because] the 'reduced' price is, in reality, probably just the seller's regular price.'" (18-1645, Doc. 38 at 34 (quoting 16 C.F.R. § 233.1(a)).

Hobby Lobby argues that the regulation cited by Marcrum does not apply to the facts presented here. (16-837, Doc. 102 at 40-41; Doc. 114 at 18). Specifically, Hobby Lobby contends that the regulation covers "forms of bargain advertising [where the seller] offer[s] a reduction from [its] own former price for an article." 16 C.F.R. § 233.1. And when that type of advertising occurs, the advertised former price must be "the actual, bona fide price at which the article was offered to the public on a regular basis for a reasonably substantial period of time." *Id*. Therefore, Hobby Lobby maintains that because it does not reference former prices charged by Hobby Lobby for furniture items, the regulation does not apply. Instead, Hobby Lobby's "marked" price is a comparison price to what other sellers in the national market sell similar furniture items. As such, Hobby Lobby contends the regulation does not apply.

While the court agrees with Hobby Lobby that § 233.1(a) applies only to advertisements involving discounts from the store's former prices, Marcrum also contends that Hobby Lobby's practice violates 16 C.F.R. § 233.1(d). (18-1645, Doc. 38 at 34-35). That regulation gives the example of a fictitious price comparison as when "[a]n advertiser . . . use[s] a price at which he never offered the article at all ...." 16 C.F.R. § 233.1(d). Marcrum asserts that this section is exactly what Hobby

Lobby is doing with its "marked" price. Although Hobby Lobby does not specifically address § 233.1(d), it maintains that its signs are clear that the "marked" price is not a former price charged by Hobby Lobby, but instead a comparison price, as defined by the signs in the furniture department. (16-837, Doc. 114 at 18).

Although it is a close call, the court agrees with Marcrum that a jury question exists as to whether the statements made by Hobby Lobby with respect to the "marked" prices violates the FDUTPA in that the "marked" price is a price never offered by Hobby Lobby. While the court acknowledges that signs in the furniture department define the "marked" price as a price "reflect[ing] general U.S. market value for similar products," the alleged deception occurs from the way in which the "marked" price is displayed on the furniture itself. A reasonable juror could conclude that the two-tag method of portraying furniture prices used by Hobby Lobby gives the appearance that the green tag is a former price at which the item was sold by Hobby Lobby. Although the signs clearly defined "marked" price, nothing on the green tag states that it is the "marked" price.[13] Additionally, Marcrum testified that he did not even recall seeing the signs when he made his furniture purchase. (Marcrum Dep. at 147).

[13] And the 40% off coupon with the term "regular" price only adds to the confusion.

4. Injunctive Relief

Notwithstanding all of the above, the court agrees with Hobby Lobby that Marcrum is not entitled to injunctive relief under the FDUPTA because Marcrum does not have standing to seek injunctive relief. To establish standing for injunctive relief, a plaintiff "must show a sufficient likelihood that he will be affected by the allegedly unlawful conduct in the future." *Houston v. Marod Supermarkets, Inc.*, 733 F.3d 1323, 1328 (11th Cir. 2013) (internal quotation marks omitted). Standing for injunctive relief depends on "a real and immediate—as opposed to a merely conjectural or hypothetical—threat of future injury." *Id*. at 1334 (internal quotation marks omitted). Marcrum is unable to establish standing because there is no evidence that he could suffer a future injury for the simple reason that Hobby Lobby shoppers can no longer use a coupon with furniture purchases. (Doc. 101-4 at 28, 30). Additionally, there is no evidence that Marcrum will even purchase furniture from Hobby Lobby again. (*See* Marcrum Dep. at 132-33).

The court rejects Marcrum's argument that the Florida legislature has somehow relaxed standing principles for injunctive claims under the FDUPTA. (18-1645, Doc. 38 at 40-43). Standing is a jurisdictional issue and when a plaintiff lacks standing to pursue injunctive relief, a federal court does not have jurisdiction to entertain the claim. *J.W. ex rel. Williams v. Birmingham Bd. of Educ.*, 904 F.3d 1248, 1264 (11th Cir. 2018). A state cannot "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). Hobby Lobby's summary judgment motion, as it relates to injunctive relief under the FDUTPA, is due to be granted.

5. Voluntary Payment Doctrine

Finally, Hobby Lobby contends that Marcrum's FDUPTA claims fail because of the voluntary payment doctrine.[14] (16-837, Doc. 102 at 46-48). "[U]nder Florida's voluntary payment doctrine, money voluntarily paid under a claim of right, with full knowledge of the material facts, cannot be recovered merely because the paying party, at the time of the payment, mistook the law as to his liability to pay." *Schojan v. Papa John's Int'l Inc*., 2014 WL 3661105, at *3 (M.D. Fla. July 23, 2014) (citing *Hassen v. Mediaone of Greater Fla., Inc*., 751 So. 2d 1289, 1290 (Fla. Dist. Ct. App. 2000) ("It does not matter that the payment may have been made upon a mistaken belief as to the enforceability of the demand, or liability under the law, as long as payment is made with knowledge of the factual circumstances.")); *see also Kunzelman v. Wells Fargo Bank, N.A.*, 2012 WL 2003337, at *1, 3 (S.D. Fla. June 4, 2012) ("[w]here one makes a payment of any sum under a claim of right with

[14] The voluntary payment doctrine is an affirmative defense under Florida law. The court notes that Hobby Lobby did not plead this affirmative defense in its answer to the second amended complaint. Marcrum, however, did not argue that Hobby Lobby waived this defense from its failure to plead, but instead addressed the affirmative defense on its merits. The court will do so as well.

knowledge of the facts, such payment is voluntary and cannot be recovered") (internal quotations omitted). The voluntary payment doctrine requires the party asserting it to show that the person who made the payment had full knowledge of the relevant facts, including allegedly wrongful conduct. *See Jackson v. U.S. Bank, N.A.*, 2014 WL 4179867 (S.D. Fla. Aug. 22, 2014).

Hobby Lobby's argument ignores the core of Marcrum's FDUPTA claim - that he was deceived by the way in which Hobby Lobby applied the 40% off the "regular" price coupon to the "marked" price, rather than the "Always 30% Off" price. The court has already found that a question of fact exists as to whether or not Hobby Lobby's practice of applying the coupon in this manner is in fact deceptive. Additionally, the court found a question of fact exists as to whether the statements made by Hobby Lobby with respect to the "marked" prices is deceptive where the "marked" price is a price never offered by Hobby Lobby. For these reasons, the voluntary payment doctrine is inapplicable to the facts at hand.[15]

IV. CONCLUSION

For the foregoing reasons, Hobby Lobby's motion for summary judgment against is **GRANTED IN PART** and **DENIED IN PART**. (16-837, Doc. 100; 18-1645, Doc. 29). The motion **GRANTED** as it relates to Plaintiff's claims for breach

[15] The court questions whether the voluntary payment doctrine is applicable to FDUPTA claims but does not need to make such a conclusion because it is clear that it is not applicable in this case.

of contract, unjust enrichment, and the claim for injunctive relief under the FDUTPA. The motion is also **GRANTED** as to Marcrum's alleged violation of the FDUTPA with regard to the comparison pricing FTC regulations. The motion is **DENIED** as to the other claims for statutory relief under the FDUTPA.

DATED this 12th day of December, 2019.

JOHN E. OTT
Chief United States Magistrate Judge