

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

DAVID PHILLIPS, et al.,)	
)	
Plaintiffs,)	
)	
v.)	CIVIL ACTION NO.
)	
HOBBY LOBBY STORES, INC.,)	2:16-cv-837-JEO
)	
Defendant.)	
)	

STEVEN D. MARCRUM,)	
)	
Plaintiff,)	
)	
v.)	CIVIL ACTION NO.
)	
HOBBY LOBBY STORES, INC.,)	2:18-cv-01645-JEO
)	
Defendant.)	CLASS ACTION
)	

**ANSWER OF HOBBY LOBBY STORES, INC. TO
SECOND AMENDED CLASS ACTION COMPLAINT
FILED BY STEVEN D. MARCRUM**

Defendant, Hobby Lobby Stores, Inc. ("Hobby Lobby"), by and through its undersigned attorney, hereby submits its answer to the Second Amended Class Action Complaint filed by Steven D. Marcrum.

FIRST DEFENSE

This Court lacks general personal jurisdiction over Hobby Lobby, or the claims asserted against it by the named plaintiff Steven D. Marcum or on behalf of the putative class, because Hobby Lobby is not incorporated in Florida or Alabama, nor does it have its principal place of business there. Thus, Hobby Lobby is not "at home" in Florida, Alabama, or in this district.

SECOND DEFENSE

This Court lacks specific personal jurisdiction over Hobby Lobby with respect to the claims asserted on behalf of the putative class members who did not transact business with Hobby Lobby in Florida or in this district. The claims of out-of-state plaintiffs, who did not transact business with Hobby Lobby in Florida or in this district, have no relationship to this forum. None of those out-of-state putative class members suffered any injury from Hobby Lobby's business practices in Florida or in this forum.

THIRD DEFENSE

For its answer to the specifically-enumerated paragraphs of the Second Amended Class Action Complaint, defendant Hobby Lobby states as follows:

I. JURISDICTION AND VENUE

1. The allegations of paragraph 1 with regard to jurisdiction under 28 U.S.C. § 1332 constitute a legal conclusion to which no response is required.

Hobby Lobby denies all remaining allegations in paragraph 1, and specifically denies that this action should proceed as a class action, or that plaintiff is entitled to any relief or damages whatsoever.

2. Hobby Lobby does not contest that, after transfer, this is an appropriate or convenient venue for the claims of the Plaintiff. This is not an appropriate venue for the claims of any residents of states other than Florida or Alabama.

II. PARTIES

3. Hobby Lobby lacks sufficient knowledge or information to form a belief as to the truth of the allegations in paragraph 6 regarding the age and residency of plaintiff Steven D. Marcum, and must therefore deny same and demand strict proof thereof. Hobby Lobby denies all remaining allegations in paragraph 3.

4. Admitted.

III. NATURE OF CLASS ACTION

5. Admitted.

6. The allegations of paragraph 6 with regard to common law and state consumer protection laws in Florida constitute legal conclusions to which no response is required. Hobby Lobby denies all remaining allegations in paragraph

6, and specifically denies that this action should be maintained as a class action and that plaintiff is entitled to any relief or damages whatsoever.

7. Denied.

8. Denied.

9. Denied.

10. Hobby Lobby admits that the complaint seeks relief for plaintiff and other putative class members, but Hobby Lobby denies that they are entitled to any relief and further denies all remaining allegations of paragraph 10.

IV. FACTUAL ALLEGATIONS

A. Mr. Marcum's Purchases

11. Hobby Lobby lacks sufficient knowledge or information to form a belief as to the truth of the allegations in paragraph 11, and must therefore deny same and demand strict proof thereof.

12. Hobby Lobby lacks sufficient knowledge or information to form a belief as to the truth of the allegations in paragraph 12, and must therefore deny same and demand strict proof thereof.

13. Hobby Lobby lacks sufficient knowledge or information to form a belief as to the truth of the allegations in paragraph 13, and must therefore deny same and demand strict proof thereof.

14. Hobby Lobby lacks sufficient knowledge or information to form a belief as to the truth of the allegations in paragraph 14, and must therefore deny same and demand strict proof thereof.

15. Denied.

16. Denied.

B. Hobby Lobby's Signage and Advertisements Attempting to Justify the Artificial Price are, by Definition, Deceptive

17. Denied as phrased. Hobby Lobby's signs and advertisements clearly state the "marked price" and how it is derived, and its tags state the marked price for the furniture and that the reduced price the customer pays is a "discounted price." The Hobby Lobby coupon clearly states that it cannot be used to get another 40% off of an already discounted price.

18. Denied.

19. The FDUTPA speaks for itself. To the extent the allegations in paragraph 19 of the complaint accurately reflect the FDUTPA, they are admitted. Otherwise, they are denied. Hobby Lobby denies it has violated the provisions of FDUTPA.

20. The Federal Trade Commission Act and 16 C.F.R. § 1.8 speak for themselves. To the extent the allegations in paragraph 20 of the complaint accurately reflect the Federal Trade Commission Act and 16 C.F.R. § 1.8, they are

admitted. Otherwise, they are denied. Hobby Lobby denies that it has violated this FTC Regulation.

21. 16 C.F.R § 233.2 speaks for itself. To the extent the allegations or citations in paragraph 21 of the complaint accurately reflect 16 C.F.R. § 233.2, they are admitted. Otherwise, they are denied. Hobby Lobby denies all remaining allegations in paragraph 21.

22. Denied.

23. 16 C.F.R § 233.1 speaks for itself. To the extent the allegations or citations in paragraph 23 of the complaint accurately reflect 16 C.F.R. § 233.1, they are admitted. Otherwise, they are denied. Hobby Lobby denies that it has violated this FTC Regulation.

24. Denied.

25. The cited provision of 16 C.F.R. § 233.5 speaks for itself. To the extent the allegations in paragraph 25 accurately reflect this regulation, they are admitted. Otherwise, they are denied. Hobby Lobby denies that it has violated 16 C.F.R. § 233.5.

26. Denied.

27. Denied.

28. Denied.

29. Denied.

30. Denied

31. Defendant Hobby Lobby admits that it has stores in over 700 locations. It denies the remaining allegations of paragraph 31.

32. Denied.

33. Denied.

CLASS ALLEGATIONS

34. Defendant Hobby Lobby admits that plaintiff purports to bring this case as a class action, but Hobby Lobby denies that this case can properly be maintained as a class action. Hobby Lobby denies all remaining allegations in paragraph 34.

35. Defendant Hobby Lobby admits that plaintiff purports to bring this case as a class action on behalf of certain defined classes, but Hobby Lobby denies that this case can properly be maintained as a class action. Hobby Lobby denies all remaining allegations in paragraph 35.

36. Denied.

37. Denied.

38. Denied.

39. Denied.

40. Denied.

41. Defendant Hobby Lobby admits that while plaintiff may not himself anticipate that there will be difficulties in managing this case as a class action, there will in fact arise manageability concerns that will preclude this case from being maintained as a class action. Hobby Lobby denies all remaining allegations in paragraph 41.

COUNT I

(Alternative Class Claim for Breach of Contract)

42. Defendant Hobby Lobby responds to the allegations in paragraph 42 as fully set forth above.

43. Defendant Hobby Lobby admits that plaintiff purports to bring this case as a class action, but Hobby Lobby denies that this case can properly be maintained as a class action. Hobby Lobby denies all remaining allegations in paragraph 43.

44. Because Hobby Lobby is not at this time able to verify the facts surrounding plaintiff's alleged transaction, it is unable to either admit or deny this allegation at this time. Hobby Lobby does, however, admit that it routinely enters into contracts with its customers, with the terms of those contracts reflected in the sales receipts provided to those customers. The receipts reflect the items sold by Hobby Lobby and the purchase price paid for those items by the customers. Hobby Lobby exchanges its products for the customers' cash or credit payment.

45. Denied.

46. Denied.

47. Denied. Defendant Hobby Lobby denies that it breached any contracts, and further denies that plaintiff is entitled to any judgment or relief whatsoever.

COUNT II

(Alternative Class Claim for Unjust Enrichment)

48. Defendant Hobby Lobby responds to the allegations in paragraph 48 as fully set forth above.

49. The allegations of paragraph 49 constitute a legal conclusion to which no response is required.

50. The allegations of paragraph 50 with regard to the equitable remedy of unjust enrichment constitute a legal conclusion to which no response is required. Hobby Lobby denies all remaining allegations in paragraph 50 and denies that plaintiff or any class members are entitled to recover under any unjust enrichment theory.

51. Denied.

52. Denied. Defendant Hobby Lobby denies that plaintiff is entitled to any judgment or relief whatsoever.

COUNT III

**(Class Claim Under the Florida Deceptive and
Unfair Trade Practices Act)**

53. Defendant Hobby Lobby responds to the allegations in paragraph 53 as fully set forth above.

54. The FDUTPA speaks for itself. To the extent the allegations in paragraph 54 of the complaint accurately reflect the FDUTPA, they are admitted. Otherwise, they are denied. Hobby Lobby denies that it has violated FDUTPA.

55. The FDUTPA speaks for itself. To the extent the allegations in paragraph 55 of the complaint accurately reflect the FDUTPA, they are admitted. Otherwise, they are denied. Hobby Lobby denies that it has violated FDUTPA.

56. The allegations of paragraph 56 with regard to the "Regulations interpreting the FTC Act" constitute a legal conclusion to which no response is required. Hobby Lobby denies all remaining allegations in paragraph 56. Hobby Lobby denies that it has violated FDUTPA or any FTC regulations.

57. The FDUTPA speaks for itself. To the extent the allegations in paragraph 57 of the complaint accurately reflect the FDUTPA, they are admitted. Otherwise, they are denied. Hobby Lobby denies that it has violated FDUTPA.

58. The FDUTPA speaks for itself. To the extent the allegations in paragraph 58 of the complaint accurately reflect the FDUTPA, they are admitted. Otherwise, they are denied. Hobby Lobby denies that it has violated FDUTPA.

59. Denied.

60. Defendant Hobby Lobby denies that plaintiff or the putative class members have been damaged or that they are entitled to any judgment or relief whatsoever. Defendant Hobby Lobby denies that this case can properly be maintained as a class action.

FOURTH DEFENSE

The Complaint, and each count therein, fails to state a claim upon which relief may be granted.

FIFTH DEFENSE

Plaintiff has not suffered a discrete and particularized injury needed to bestow Article III or statutory standing upon him.

SIXTH DEFENSE

This district is not a proper or convenient venue for the claims of Plaintiff or the claims of putative class members, particularly the out-of-state putative class members. This is not a proper venue to adjudicate the claims of any out-of-state putative class members who did not transact business with Hobby Lobby in this district because: (i) Hobby Lobby does not reside here and those out-of-state plaintiffs cannot obtain personal jurisdiction over Hobby Lobby here; (ii) this district is not where a substantial part of the events or omissions giving rise to the claim occurred; and (iii) there are other districts in which this action could otherwise have been brought.

SEVENTH DEFENSE

Plaintiff's and the putative class members' claims are barred in whole or in part by the doctrines of laches, waiver, estoppel and/or abandonment.

EIGHTH DEFENSE

Defendant's actions were performed in good faith and substantial conformity with applicable state and federal statutes, rules, regulations, and statutory interpretations.

NINTH DEFENSE

Plaintiff's and the putative class members' claims are barred because the alleged violation (if any) was not willful and because they cannot establish any actual damages.

TENTH DEFENSE

Plaintiff has failed to mitigate or reduce any damages he may have suffered and failed to take reasonable precautions to avoid those damages.

ELEVENTH DEFENSE

The claims of the Plaintiff and the class are barred if they used the 40% off discount coupons on other items that were not already discounted and therefore received the full value of the coupons.

TWELFTH DEFENSE

Plaintiff failed to comply with all applicable conditions precedent to assert some or all of the claims in the Complaint.

THIRTEENTH DEFENSE

Plaintiff has not complied with statutory prerequisites to bringing suit under the FDUTPA, and this action is further barred by the applicable statute of limitations.

FOURTEENTH DEFENSE

Plaintiff is not an adequate class representative, he does not have typical claims, and his claims are subject to several unique defenses.

FIFTEENTH DEFENSE

Individual issues permeating plaintiff's claims, as well as those of the putative class, predominate over any alleged common issues.

SIXTEENTH DEFENSE

The Complaint fails to satisfy the requirements for class action treatment as prescribed by Federal Rule of Civil Procedure 23.

SEVENTEENTH DEFENSE

This action cannot be maintained as a class action under Rule 23 of the Federal Rules of Civil Procedure because (i) the questions of law and fact are not common to the class, the legal issues differ from class member to class member, and the factual issues will differ depending on a number of different facts applicable to the various putative class members; (ii) the claims of the

representative parties are not typical of the claims of the class; and (iii) the Plaintiffs will not fairly and adequately protect the interests of the class.

EIGHTEENTH DEFENSE

A class cannot be certified under the allegations of the Complaint because to do so would violate the Fifth, Seventh, and Fourteenth Amendments to the United States Constitution (plus comparable provisions of the Florida Constitution), general principles of due process, as well as the Rules Enabling Act.

NINETEENTH DEFENSE

Defendant denies each and every material allegation of the Complaint as they relate to the request for class certification, and objects to any such class action certification on the following grounds:

- a. Plaintiff has failed to join indispensable parties;
- b. The Complaint fails to adequately define any class of persons who could properly maintain this action as a class action, since the proposed class definitions will require fact-intensive determinations;
- c. The purported class representatives have not sustained their burden of establishing standing;
- d. Defendant's time-based defenses, such as statutes of limitations and laches, mandate the denial of class certification;

e. Individualized determinations for each class member of controlling state substantive law and the applicability of different state substantive laws to claims by purported class members defeat the Rule 23(b)(3) requirements of predominance, superiority, and manageability, and, therefore, preclude class certification;

f. The class as defined is not ascertainable because Hobby Lobby does not ordinarily maintain customer information (such as names and addresses) on a routine basis, because the process of identifying putative class members cannot be undertaken in an administratively efficient or feasible manner but will instead require numerous individual inquiries, and because identification relies upon third parties to produce voluminous amounts of information. All this means that the implicit requirement of ascertainability cannot possibly be met here;

g. A Rule 23(b)(3) class is inappropriate because individualized issues predominate over common questions and because of insoluble manageability problems;

h. Lack of commonality of questions of law, particularly with respect to the varying contract laws of all of the states where individual transactions occurred;

i. Lack of commonality of questions of fact;

j. Lack of typicality;

- k. Lack of adequacy of representation;
- l. Lack of requirements for certification under Rule 23(b)(1) or 23(b)(2) of the Federal Rules of Civil Procedure;
- m. Lack of requirements for certification under Rule 23(b)(3) of the Federal Rules of Civil Procedure;
- n. Individual issues predominate over common issues;
- o. A class action is not superior to other available methods for the fair and efficient adjudication of this controversy; and
- p. There are difficulties that are likely to be encountered in the management of a class action that cannot be resolved in a manner that will allow a class to be certified.

TWENTIETH DEFENSE

The putative classes defined in the Complaint are not ascertainable because the class definitions will entail countless individual inquiries such that it is not administratively feasible to determine class membership.

TWENTY-FIRST DEFENSE

To the extent Plaintiff or any putative class member asserts a claim under the FDUTPA, that claim is barred to the extent that any of the events took place outside Florida without impact on Florida residents.

TWENTY- SECOND DEFENSE

Defendant complied with all the requirements of federal and state law regarding any transactions with Plaintiff.

TWENTY-THIRD DEFENSE

Plaintiff lacks standing or capacity to assert his claims, in whole or in part.

TWENTY-FOURTH DEFENSE

Plaintiff's claims for equitable relief and unjust enrichment are barred, in whole or in part, because he has a plain, common, adequate, and speedy remedy at law. The unjust enrichment claim is also barred because of the existence of a contract between Marcrum and Hobby Lobby.

TWENTY-FIFTH DEFENSE

Plaintiff's claims are barred, in whole or in part, because the alleged conduct of Hobby Lobby was lawful and undertaken in good faith.

TWENTY-SIXTH DEFENSE

Plaintiff's claims are barred, in whole or in part, because plaintiff would be unjustly enriched if he were to prevail on any of the causes of action.

TWENTY-SEVENTH DEFENSE

Plaintiff's claims are barred, in whole or in part, to the extent plaintiff seeks cumulative remedies.

TWENTY-EIGHTH DEFENSE

Plaintiff's claims are barred, in whole or in part, because plaintiff did not and could not have reasonably or justifiably relied on the alleged misrepresentations or omissions asserted in the Complaint.

TWENTY-NINTH DEFENSE

Plaintiff's claims are barred, in whole or in part, because plaintiff expressly and/or impliedly consented to (and/or had actual or constructive knowledge of) all activities or conditions alleged in the Complaint to have caused him harm.

THIRTIETH DEFENSE

Plaintiff's claims are barred by the doctrine of estoppel, acceptance, acquiescence, and ratification. In particular, Plaintiff had full knowledge or awareness, or a reasonable person standing in his shoes would have gained such knowledge or awareness, that he did not receive an additional 40% off of the already discounted price of the goods he purchased. Yet, armed with this actual or imputed knowledge or awareness, he went forward with the transactions and obtained full use and enjoyment of the products he purchased. Had plaintiff informed Hobby Lobby of his views as to the meaning to be given to the coupon, Hobby Lobby would not have gone forward with the transaction.

THIRTY-FIRST DEFENSE

Plaintiff's breach of contract claim must fail as a matter of law because Defendant's advertisements do not constitute an offer.

THIRTY-SECOND DEFENSE

Plaintiff's claims are barred because, with full or sufficient knowledge of the purported legal violations and the amount he was being charged, he proceeded with the transactions and voluntarily paid for and then used the items he purchased.

THIRTY-THIRD DEFENSE

Plaintiff's claims are barred by the doctrine of accord and satisfaction, and because the requested monetary relief is too speculative, remote, and/or impossible to prove or allocate.

THIRTY-FOURTH DEFENSE

Plaintiff's claims are barred because Plaintiff have already received the benefit of his bargain, and neither law nor equity may be invoked to obtain a windfall.

THIRTY-FIFTH DEFENSE

Plaintiff does not allege any act that would constitute any of the deceptive trade practices proscribed in FDUTPA.

THIRTY-SIXTH DEFENSE

Plaintiff does not have standing or the legal ability to seek injunctive relief, because he is fully aware of Hobby Lobby's practices and is, therefore, not in danger of an imminent or threatened injury that is certainly impending.

RESERVATION OF DEFENSES

This defendant specifically reserves all separate or affirmative defenses that it may have against the putative class members. It also expressly reserves the right to raise such additional affirmative defenses as may be established through discovery in this case. Any specific averments in the complaint that have not been expressly admitted or denied above are hereby denied.

REQUEST FOR ATTORNEY'S FEES AND COSTS

If the Court determines that defendant Hobby Lobby is the prevailing party on plaintiff Marcrum's claims under FDUTPA, then Hobby Lobby requests the Court to award Hobby Lobby its reasonable attorneys' fees and litigation costs against plaintiff Steven Marcrum that were incurred in defense of the FDUTPA claim. Defendant Hobby Lobby seeks this relief pursuant to Fla. Stat. § 501.2105 and the common law of Florida.

s/ Robert H. Rutherford
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Answer of Defendant Hobby Lobby Stores, Inc. to Second Amended Complaint 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 27th day of February, 2019.

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