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

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

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

OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

Brian M. Clark
Allan Armstrong
Darrell Cartwright
Attorneys for Plaintiffs

OF COUNSEL:
Wiggins Childs Pantazis Fisher & Goldfarb, LLC
The Kress Building
301 19th Street North
Birmingham, AL 35203
205-314-0500
bclark@wigginschilds.com

Allan L. Armstrong
Armstrong Law Center, LLC
The Berry Building
2820 Columbiana Road
Vestavia Hills, Alabama 35216

Darrell Cartwright
Cartwright Law Center, LLC
P.O. Box 383204
Birmingham, AL 35238

Table of Contents

Plaintiff Steven Marcrum, states the following in Opposition to the Motion for Summary Judgment filed by defendant Hobby Lobby Stores, Inc. ("HL" or "Hobby Lobby").

I. FACTS

A. The 40% Off Coupon.

Hobby Lobby's 40% off coupons have been continuously disseminated since "around" 2010. Freebern Deposition Notice, Ex. A; Freebern Depo., Ex. B, pp. 82-83. Regardless of the format, the content of the coupon is the same. Ex. C. The coupon is good for one item at 40% off the "Regular Price." Conspicuously absent in **any** Hobby Lobby signage or advertisement is any definition of the term "Regular." Freebern Depo., p. 108.

B. All Furniture Is "Always" 30% Off.

Ms. Freebern cannot recall a time during her tenure at HL where furniture items were not marked "Always 30% Off." Freebern Depo., pp. 53-54, 57; Ex. D hereto.

1. The Pricing Scheme.

Hobby Lobby's pricing scheme for furniture results in two tags being affixed to the merchandise. There is an orange "Always" price, and a green "Never" price.

Ex. E.[1]

The green tag comes affixed to the items from the warehouse, and is applied at the factory in China at the time the product is shipped. Freebern Depo., pp. 101-02, 112, 113; Fallon Depo., p. 110. Hobby Lobby knows that when the tables like the one Mr. Marcrum purchased are shipped from the factory, nobody is ever going to pay that price. Fallon Depo., p. 113.

> Q: Okay. And that's true for all items of furniture, isn't it? Nobody ever walks in and pays the non-discounted price, do they?
> A: No.[2]

Kinnard Depo., Ex. H hereto, p. 68. See, Freebern Depo., p. 113.

[1] The tags depicted in Exhibit E are from the furniture purchased by co-plaintiff Browning. However, Hobby Lobby's representative testified that the tagging practice has remained consistent, Fallon Depo., Ex. F hereto, p. 109 and Mr. Marcrum testified that his tags were in the same form as Ex. G. Marcrum Depo., pp. 136-137.

[2] The cited testimony refers to the Browning purchase, but applies for "all furniture items, including Mr. Marcrum's." Freebern Depo., p. 113; Fallon Depo., p. 113.

The price the customers "Always" pay, just as the tag says, is the result of another corporate policy. Hobby Lobby's Pricing Manual for Furniture states:

> All furniture must be "hand marked" 30% off using a black Sharpie and the orange furniture ad price tag. Each and every price will need to be marked each time it is received.

Ex. I; See Ex. J. (Furniture hand marked on orange tag.)

For all of HL's supposed efficiency, Freebern Depo., p.112-113, it cannot explain why it would choose to hand write the actual or "Always" price.

> Q: Why not have that done in China much cheaper and you could save the man-hours that people have to have at your individual stores with their Sharpies?
> A: I could not tell you why we have this policy of doing it in the stores.

Freebern Depo., pp. 144-145. It is because the handwriting in Sharpie reinforces the idea that the orange tag price is an actual discount.

2. <u>Hobby Lobby's Own Documents Show That The "Always" Price Is Not A Discount</u>.

Hobby Lobby argues that the "Always" priced items are already "discounted." However, its own documents show that Hobby Lobby does not even believe this. Hobby Lobby's Pre-pricing and Discount Policy, Ex. K, describes merchandise that is "subject to frequent or continual discounting" by HL's competitors, then states:

> "[T]he buyer must avoid conveying a sense of urgency to customers that continuously discounted merchandise is being sold at a discount for a limited period of time by: ensuring print ads, electronic ads, and store signs state the discounts are always provided; [and] avoiding use of the term sale in print ads, electronic ads, and store signs."

Ex. K. Hobby Lobby wants the customer to believe she is getting a "discount" (off of what?), but the item is not on "sale."

When a 40% off coupon is used, the cashier hits the "coupon" button on the register screen in Hobby Lobby's computerized register system "under the discount button." Kinnard Depo., p. 167. The process is different from items "Always discounted:"

> Q: And what does the cashier do seeing the thirty percent off tag, orange tag we've been talking of, what does the cashier do then?
> A: The cashier rings in the price on the thirty percent off tag.
> Q: Do they hit discount?
> A: No.

Kinnard Depo., pp. 170-71.

3. <u>The "Marked Price" Is Literally A Made Up Price</u>.

Hobby Lobby's argument that signage and advertisements alert the consumers as to which price the 40% will be applied misses the mark. The issue is not whether the 40% off is to be taken from an undisclosed price. The issue is, what is the "regular price?"

Hobby Lobby's literature does not tell customers that the "marked price" is the price at which the item is "regularly" sold at.

> Q: You are not trying to tell the customer that that is the price that the item is regularly sold at Hobby Lobby for, are you?
> A: No. We are telling them it is the market value.

Freebern Depo., p. 105.

4. <u>The "Never" Price Is An Artificial Construct</u>.

Ms. Freebern agreed that **it would be a violation of company policy to charge a customer the "Never" price.** Freebern Depo., pp. 91-92. Discovery has revealed that it is never charged by any other retailer, either. Hobby Lobby defends the use of the term "marked price" by defining it as "comparable prices offered by other sellers for similar products." Ex. L. Defendant produced a computer printout entitled "Comparison Shopping Log," for "Continuously Discounted Merchandise," Ex. M, listing prices for tables sold by other retailers. Ex. M. Attached as Ex. N. are web page print-offs from other retailers showing pictures of tables with some of the same features as the one Mr. Marcrum purchased. Fallon Depo., p. 61; Mr. Fallon, HL's representative, Ex. O confirmed that the web pages attached hereto as Ex. N are the complete universe of the comparison shopping documents for the table Mr. Marcrum purchased. Fallon Depo., p. 61.

Those web pages are from October and November of 2018. Ex. N. Mr. Marcrum's purchase was in March of 2017. Ex. P. There is no evidence that anyone from Hobby Lobby did any comparison shopping to compare Hobby Lobby's price to any particular item either before it placed the $119.99 green sticker on the table, or prior to Mr. Marcrum's purchase. Fallon Depo., pp. 63-64. This is because, "There is no policy on how to do comparison shopping." Fallon Depo., p 64. Rather, Hobby Lobby relies on its buyers to "have general knowledge and experience" and "a general feel of continued – continuously going out and checking to have a

knowledge of his department." Fallon Depo., p. 64. Not only is there no systematic or required pre-pricing survey of items in order to determine price, there are no written guidelines for what is a similar product. Fallon Depo., p. 65. Instead, Hobby Lobby relies on its buyers' "general knowledge and experience in buying furniture and knowing what the use and the function and the material is and nothing formal." Fallon Depo., p. 65.

To the extent Hobby Lobby compares its prices to other retailers,[3] it happens **after** the price has already been determined. When Hobby Lobby chooses the price of furniture it wants to carry, it negotiates some features of the item, and then tells the factory what price it wants on the item. Fallon Depo., p. 113. Importantly, the "comparison shopping" that resulted in Ex. M and N for the table Mr. Marcrum purchased "comes after the fact." Fallon Depo., 120. The actual pricing decision is made on the buyer's "experience and knowledge, and because of his time doing this, he's been buying a long time . . ." Fallon Depo., p. 122. The Hobby Lobby buyers are not required to document their efforts in regard to how he comes to his pricing decisions. Fallon Depo., p. 122.

The original pricing is, at best, an educated guess at what a "comparable price" would be for "comparable merchandise." Freebern Depo., pp. 121-22. When

[3] Hobby Lobby admitted that even its past-hoc, informal comparison practice is not performed for every price of furniture. Fallon Depo., p. 66. Hobby Lobby just relies on its buyers' "general knowledge" of the marketplace. Fallon Depo., p. 71.

questioned about how these green tag prices are arrived at, Ms. Freebern admitted, "There is no manual" or "formula." Freebern Depo., pp. 123-24

> It is just pretty much knowledge that we have learned as buyers. That is how you kind of do things in the buying world . . .

Freebern Depo., p. 26. It is not a stretch to say that it is created out of whole cloth.

> Q: My question is, is the two eighty-nine ninety-nine price something that the buyer calculated in his head and sent to China to purchase this item.
> A: I guess you could say it that way because it is.

Freebern Depo., pp. 137-139.

C. <u>The Marcrum Transaction</u>.

On March 7, 2017, Mr. Marcrum purchased a console table from a Hobby Lobby store in Pensacola, Florida. Ex. P, Marcrum Depo., p. 21. Mr. Marcrum has no recollection of any communication with any HL personnel, other than "the normal hi and bye that you would say when you purchase something." Marcrum Depo., pp. 21-22. Mr. Marcrum used the 40% off coupon to purchase the table, Marcrum Depo., p. 25, by simply telling the cashier that he wanted to use the 40% off coupon, Marcrum Depo., pp. 67-68, and presenting the coupon from his phone. Marcrum Depo., p. 184.

The receipt shows that the "never" price Hobby Lobby used to compute Mr. Marcrum's price for the table was $119.99. Ex. P. The receipt shows HL computed the 40% off coupon at $48.00, which is 40% off of the $119.99 price, and charged

Mr. Marcrum $71.99 for the table, and then added sales tax to the amount of $5.40, for a total charge of $77.39. Ex. M.

The table that Mr. Marcrum purchased had two tags on it. The first tag was a green tag that had a pre-printed price of $119.99 on it. Marcrum Depo., p. 136. The table also had an orange tag on it that stated: "Furniture always 30% off, Your Price is: $83.99" written in black Sharpie pen per policy. Marcrum Depo., pp. 136, 140. The $83.99 price is the price Mr. Marcrum would have paid for the table without a coupon. Marcrum Depo., p. 137. Mr. Marcrum did not receive 40% off the everyday price of the item. The difference is $21.60.

There is no reason to believe that this transaction, on the Hobby Lobby side was handled in any way than the method proscribed in the Hobby Lobby Pricing Policy Manual for HL counter personnel to use. The manual states, "The Coupon-40% key is to be used only when a customer presents a 40% off coupon." Ex. Q; Kinnard Depo., pp. 164-6. At that point, the cashier "hits the coupon button," Kinnard Depo., p. 165, and "the register will compute" the discount "under the discount button," Kinnard Depo., p. 168, generating a receipt with the information. Ex. P. Cashiers, however, **do not** go through the discount process when an "Always 30% off" item is presented without a coupon. Kinnard Depo., pp. 170-71.

Mr. Marcrum presented a coupon entitling him to 40% off of the "regular price" of one item or as he put it "40 percent off of the original price." Marcrum

Depo., p. 49. His understanding was that he should have been able to use the coupon to get 40% off of the $83.99 price tag for the furniture. Marcrum Depo., p. 133.

II. ARGUMENT

A. The Contract Claim.

Plaintiff is well aware that this Court granted summary judgment on the Breach of Contract Claims in Phillips v. Hobby Lobby Stores, Inc., 2018 U.S. Dist. Lexis 166247 (N.D. Ala. September 27, 2018.)[4] Plaintiff would be remiss, however, if he did not argue that this view should be altered. Marcrum does agree with the statement made by Hobby Lobby in its Memorandum, Doc. 102, p. 31, that "the facts and circumstances of this case as they relate to the transaction, tags, coupon language, and actions of the parties are virtually the same." This is just as true for the contract claim as it is for the analysis of the unjust enrichment and Florida Deceptive and Unfair Trade Practices Act ("FDUTPA") claims.

The elements of a breach of contract claim are: (1) a valid contract binding the parties; (2) plaintiff's performance of that contract; (3) the defendant's nonperformance; and (4) damages. Bland v. Freightliner, LLC, 206 F.Supp. 2d 1202, 1210 (M.D. Fla. 2002). The requirements for contract formation under Florida law are: an offer, acceptance, consideration, and sufficient specification of the essential terms. Kolodziej v. Mason, 774 F.3d 736, 740 (11th Cir. 2014. In addition,

[4] The September 27, 2018, summary judgment Opinion will be referred to herein as "Phillips II," using the Lexis citation. The Court's Opinion on the Motion to Dismiss, Doc. 37, From October 21, 2016, will be referred to as "Phillips I," and also use the Lexis citation.

there must be material assent arrived at by "analyzing the parties agreement process in terms of offer and acceptance." Id. All of these prerequisites have been met, but the terms of the contract are ambigious. Where that is the case, a jury is to determine the actual terms of the contract.[5]

1. A Contract Was formed On The Explicit Terms In The Coupon.

The coupon outlining the terms of a proposed contract was accepted according to the terms of that offer. AIG Centennial Ins. Co. v. O'Neill, 2013 U.S. Dist. Lexis 189750 (S.D. Fla. May 8, 2013). Plaintiff accepted Hobby Lobby's offer by presenting the coupon at the register, per the condition of the offer.

The terms of the written offer, accepted by Plaintiff, are:

- Customer is to receive 40% off of one item at regular price only
- One item per customer, per day
- Coupon must be presented at time of purchase
- Not valid with any other coupon, discount, or previous purchase

Ex. C. Marcrum Depo., pp. 67-68, 184. The dispute is whether Mr. Marcrum received a discount on the "regular price" of the furniture; and whether he attempted to use the coupon in conjunction with another "discount."

[5] Hobby Lobby drafted all terms between the parties. Of course, Courts are to use established rules of construction to interpret the contract. One of those rules is that contract terms are to be construed against the drafter. Excelsior Ins. Co., v. Pomona Park Bar & Package Store, 369 So.2d 938, 942 (Fla. 1979).

2. Mr. Marcrum Manifested Assent, And the Dispute As To What Was Assented To Is A Question of Fact For Jury Determination.

The Court's restatement of the plaintiffs' position in Phillips II is that they never assented to Hobby Lobby's position on the terms of the contract. The Court held that by their actions, however, they assented to Hobby Lobby's understanding of the contract term "regular price." This is not exactly Plaintiffs' position. Plaintiffs' position is that: (1) parties to the contract may manifest assent to contract term under two different understandings of those terms; (2) the parties' assent in such a case still creates a contract; (3) in such cases, ascertainment of the contract terms is a jury question; and (4) Mr. Marcrum is completely within his rights to affirm the contract and bring an action for damages as opposed to rescinding the contract.

a. Contract Ambiguity Does Not Destroy Assent.

The parties dispute the meaning of the term "regular price." That dispute, is However,

> "An agreement may be binding if the parties agree on the essential terms and understand and intend the agreement to be binding on them. A subsequent difference as to the construction of the contract does not affect the validity of the contract or indicate the minds of the parties did not meet with respect thereto."

Blackhawk Heating and Plumbing Co., v. Data Lease Fin. Corp., 302 So.2d 404, 408 (Fla. 1974), citing 17 C.J.S. Contracts § 31. "Indefiniteness must reach the point

where construction becomes futile, Blackhawk Hearing, 302 So.2d at 809. As the 11th Circuit has stated:

> "[O]ne may be 'bound' by a contract in ways that he did not intend, foresee, or understand. The juristic effect (the resulting legal relations) of a man's expressions in word or act may be very different from what he supposed it would be . . . But it is of much greater importance to realize that the courts must determine the requirements of justice [**7] and that the legal effects thus given to expressions of agreement are seldom exactly what one or both of the agreeing parties supposed or expects." A Corbin, *Corbin on Contracts* § 9 (1952).

L. Hey v. Gonzalez, 417 So.2d 161, 163 (Ala. 1962).

b. Determination of True Meaning Of Contract Terms Is A Jury Question.

The dispute as to just what Plaintiffs assented to precludes summary judgment. The law is that, "Where the wording of an agreement is ambiguous, its interpretation involves a question of fact, precluding summary disposition." Partyville Gifts, Inc. v. MacMillan, 898 F.Supp. 2d 1213, 1235 (M.D. Fla. 2012).

In Phillips II, the Court recognized the ambiguity as to the term "regular price" in the coupon, and rejected Hobby Lobby's assertion that the term "regular price" is made certain by Hobby Lobby's other statements.

> 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 "misleading statement of fact concerning the . . . amount of [the] price reductions." Ala. Code § 8-19-5(11).
>
> The court is not persuaded that the coupon's statement that it is not valid with any other "discount" somehow clarifies the coupon's application. Again, a question of fact exists as to whether the orange tag stating

> "Furniture Always 30% Off" necessarily means it was a "discount" or if it was the "regular" price charged for that piece of furniture. This is especially true when the price on the orange tag was the only price for which the furniture was sold.

Phillips II, 2018 U.S. Dist. Lexis 166247 at * 26.

3. Because This Contract Is Capable Of Construction It Does Not Fail, And Its True Meaning Is A Jury Question.

The term "regular price" is the point of contention. Hobby Lobby wants to construe "regular" by reference to extrinsic signage and advertisements. However, the first canon of construction is that "language must be given its plain and ordinary meaning." Shipman v. Eastern Air Lines, Inc., 868 F.2d 401, 405 (11th Circ. 1989). That construction favors Mr. Marcrum.

Webster's defines "regular" as: (1) Customary or normal: usual . . . 5. Not varying: "constant." Hobby Lobby admits that the green tag price is never charged to customers. "Always" is defined by Webster to mean, "At every instance . . . 3. At any time." It seems fairly obvious given the plain, dictionary definitions of the words that the "regular" price is the price that is "Always" charged. Undeterred by the plain meaning of "regular," Hobby Lobby posits that the 40% cannot be taken from the "Always" price because the coupon states that the offer is not valid with any other "discount." How can an item be at a discount when it is "Always" sold at that price? The definition of "discount" is "A counting off as a deduction made from a gross sum on any account whatever; an allowance upon an account, debt, demand, price asked, and the like: something taken or deducted." www. Webster.dictionary.

org/definition/discount. Such a price is not a counting off of a price asked because the green tag price is never asked. At the very least, a jury question exists as to the meaning of the word "regular price" in the contract.

4. Defendant's Argument Ignores An Aggrieved Buyer's Proper Election of Remedies.

At bottom, Defendant argues, and the Court accepted in Phillips II, that Mr. Marcrum accepted its interpretation of the term "regular" because he did not object after receiving a receipt showing that the 40% was taken from the "never" price. This line of reasoning ignores that the election of remedies an aggrieved buyer may pursue. Defendant's argument presumes that the only remedy an aggrieved buyer has is to rescind the contract and seek a refund. However, a buyer may also, "affirm the contract and insist on the benefit of his bargain, and seek damages that would place him in the position he could have been had the contract been completely performed." Tabby Custom, Inc. v. Euler, 225 So.3d 408, 407 (Fla. Ct. App. 2, 2017); See, Rector v. Larson's Marine, Inc., 479 So.2d 783 (Fla. Dist. Ct. 2, 1985) (Breach of contract to repair boat).

Even if Mr. Marcrum had rescinded, he would not have received the benefit of the bargain he made when he presented the coupon for 40% off of the true "regular" price. Rescission denies Mr. Browning the benefit of Hobby Lobby's bargain. Bringing this action enforces that bargain.

B. In The Absence Of A Breach Of Contract Claim, The Unjust Enrichment Claim Is To Go Forward.

Plaintiffs' Complaint pleads an alternative equitable cause of action for unjust enrichment. Doc. 94, ¶ 49.[6] Defendant's sole argument[7] is that the unjust enrichment claim is due to be dismissed because Mr. Marcrum has an adequate remedy at law. This argument does not hold water under Florida law.

The 11th Circuit has specifically rejected the arguments HL makes with regard to unjust enrichment. In State Farm Mut. Auto. Ins. Co. v. Physicians Injury Care Ctr., 427 Fed. App. 714, 722 (11th Circ. 2011), the Court held that, "It is generally true that equitable remedies are not available under Florida law when adequate legal remedies exist. However, that rule does not apply to unjust enrichment claims". In State Farm, the 11th Circuit affirmed a jury verdict on fraud, unjust enrichment, and a FDUTPA claim on behalf of the plaintiff insurance company against the defendant

[6] If the term "regular price" is so essential to the contract that, because the parties' different understandings of the term that there is no 'meeting of the minds," then the contract fails, Browning v. Peyton, 918 F.2d 1516, 1531 (11th Cir. 1990), and there is certainly a viable claim for unjust enrichment.

[7] HL does not advance a substantive argument on the unjust enrichment claim. Nor could it. An unjust enrichment claim is made upon a showing that: (1) a benefit has been conferred on the defendant; (2) the defendant has knowledge of the benefit; (3) the defendant has accepted or retained the benefit conferred; and (4) the circumstances are such that it would be inequitable for the defendant to retain the value without paying for it. Auto Corp. v. Therapeutics, MD, Inc., 953 F.Supp. 2d 1269, 1287 (S.D. Fla. 2013). The difference in application of the 40% off coupon of between the "Always" and "Never" prices of $21.59 has been conferred on Hobby Lobby. Hobby Lobby knew it received that benefit because it set up its program knowing it would take 40% off of the "never" price. Freebern Depo., pp. 91-92. Hobby Lobby has retained the cash paid. Lastly, the Court has already found that a fact question exists as to whether HL made false or misleading statements, and whether it intended to deceive its customers in the way it credited 40% off coupons on furniture items. Phillips II, 2018 U.S. Dist. Lexis at 26, n. 11, and * 26. If true, it would clearly be inequitable to allow HL to retain the fruits of its deception.

where the physicians sent fraudulent bills to State Farm, who paid the bills. State Farm sued to recover the monies paid on the fraudulent bills. State Farm, 427 Fed. App. At 725. It is just not the law in Florida that FDUTPA and unjust enrichment claims cannot proceed together.

The State Farm Court relied upon, Williams v. Bear Stearns, 725 So.2d 397, 400 (Fla. 5th Dist. Ct. App. 1998). After holding that an adequate legal remedy is no bar to an unjust enrichment claim in Florida, the State Farm Court stated; "Until an express contract is proven, a motion to dismiss a claim for promissory estoppel or unjust enrichment on these grounds is premature." Williams, 725 So.2d at 400.[8] In this case, if the Court holds that there is a contract claim, then the rule applies. Until then, the unjust enrichment claim is due to go forward. See, Teiner v. Innovation Ventures, LLC, 2013 U.S. Dist. Lexis 77361 (S.D. Fla. 2013) (citing State Farm, supra, and allowing unjust enrichment and FDUTPA claims to go forward together).

In this case, the contract between the parties is the coupon. That contract contains a term – "regular price," that is not defined, and the parties dispute its meaning. Plaintiffs, supra, contend that the ambiguity as to "regular Price" creates a contract, the terms of which are the subject of a factual dispute. Defendant claims

[8] HL cites McElrath v. ABN AMRO Mtg. Grg., Inc., 2012 U.S. Dist. Lexis 17361 (S.D. Fla. Feb. 13, 2012), for the proposition that plaintiff need not succeed for the remedy to be "adequate." However, the actual Standard is whether the remedy "in its nature and character . . . is fitted for or adapted to the end in view." Justice v. United States, 6 F.3d 1414, 1482, n. 16 (11th Cir. 1993). By Defendants own formation, a breach of contract claim is not fitted for the "end view" in this case. HL's view is that the parties had such disparate views that the contract claim must fail.

that by reference to extrinsic evidence, i.e., the tags on the furniture and HL signage, "regular price" means "marked price." The Court in Phillips II, however, was not convinced that it was all that clear, stating that, "The collective use of the 'marked price,' the 'always price' and the 'regular price' necessarily creates confusion." Phillips II, supra at * 26.

The reliance on admittedly contested extrinsic documents to create an express, written contract, takes this contract out of those expressed contracts that preclude an unjust enrichment claim. Harris v. Nordyne, LLC, 2014 U.S. Dist. Lexis 189248 (S.D. Fla. Nov. 13, 2014), cited by HL, is instructive. In Nordyne, the plaintiff brought breach of contract and unjust enrichment claims arising out of written contracts relating to residential HAVC systems. The defendant argued that a "standard expressed warranty," extrinsic to the contract but incorporated by reference, disclaimed the liability the plaintiffs sought to impose on it, and thus no unjust enrichment claim could lie. The Court held that because the plaintiffs disputed that the incorporated standard express warranty disclaimed liability, its existence was "insufficient to prove the existence of an express written contract on those terms between Defendant and plaintiffs." Nordyne, supra, at * 25.

The Nordyne Court held that an unjust enrichment claim can be "pled in the alternative if one or more parties contest the existence of an express contract governing the dispute." Nordyne, supra, at * 23. The plaintiffs in Nordyne contested the existence and efficacy of the expressed warranty. Similarly, Mr. Marcrum

contests that the advertising and signage is part of the written contract between the parties. Those items are not even incorporated by reference. At best, they are evidence from HL's side as to meaning of a term – "regular price" – the advertising and signage, denied by the plaintiff as part of the contract, cannot preclude an unjust enrichment claim.

Nordyne cited Wiard v. EFG Park, 2012 U.S. Dist. Lexis 30323 (N.D. Fla. Feb. 1, 2012), as holding that an agreement incorporated by referenced is insufficient to establish an express contract that would preclude a unjust enrichment claim due to an adequate remedy at law. In Wiard, the Court held that an agreement incorporated by referenced could not create an express contract that would preclude an unjust enrichment claim from going forward. Wiard, 2012 U.S. dist. Lexis 30323. There is an express written contract between the parties in this case – the coupon. Either the term "regular price" is so essential to the contract that the ambiguity defeats mutual assent, and no contract exists at all, or that which makes the contract term definite is another document that plaintiff denies is applicable, thus allowing the unjust enrichment claim to go forward, alternatively under Fed. R. Civ. P 8(d)(2).[9]

[9] This is as basic as Rule 8(d)of the Federal Rules of Civil Procedure, which states that a party may set out two or more claims alternatively or hypothetically and that, "the pleading is sufficient if any one of them is sufficient." Fed. R. Civ. P. 8(d)(2). The claim for unjust enrichment is sufficient if pled alternatively. While it is true that judgment cannot be entered on both theories, no election is necessary, particularly where the contract theory of contract claim at the defendant relies upon extrinsic, or incorporated language that plaintiff denies is applicable.

In Hill v. Hoover Co., 899 F.Supp. 2d 1259 (N.D. Fla. 2012), the defendant argued that the unjust enrichment claim should be dismissed "on the grounds that the Plaintiff failed to clearly disclaim the existence of other proper legal remedies." Hill, 899 F.Supp. 2d at 1267. The Court rejected this argument, finding that the plaintiffs had adequately pleaded the unjust enrichment claim in the alternative, and allowing both claims to go forward. Hill, 899 F.Supp. 2d at 1268-69.

C. A Claim Has Been Stated Under The FDUTPA.

The Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"), Fla. State Ann. § 501.201, et seq., makes, ". . . unconscionable acts or practices, and unfair or deceptive acts or practices . . . unlawful." The FDUTPA does not enumerate specific practices as deceptive, but states that, "It is the intent of the legislature that, in construing subsection (1), due consideration and great weight should be given to the interpretation of the Federal Trade Commission and the federal courts relating to § 5(a)(1), of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1). Fla. Stat. § 50.204.[10] The Florida Department of Legal Affairs, pursuant to rulemaking authority, has stated, "It is not possible nor necessary to codify every conceivable deceptive and unfair trade practice prohibited by Part II, Chapter 501.202001, Florida Administrative Code See, Department of Legal Affairs v. Father & Son Moving and Storage, 643 So2d 22, 24 (Fla. Ct. App. 4th Dist. 1994).

[10] The Alabama Deceptive Trade Practices Act central to Ms. Browning's claim in Phillips II, similarly states that interpretations of the FTC are to be given great weight. Ala. Code § 8-19-6 (1975).

1. Hobby Lobby's Conduct In Taking The 40% Off Of A Non-Existent Price is Deceptive.

The fundamental unfair and deceptive act perpetuated by Hobby Lobby is that it stated in its coupons that customers would receive 40% off at the "regular price." of an item when, in fact, it calculated the 40% off of a price that is never charged.

> Here, there is a question of fact as to whether Hobby Lobby made any false or misleading statements to Mrs. Browning that could give rise to liability under the ADTPA. While the price tags and advertisements in and of themselves do not contain any false or misleading statements, the statements therein, when combined with the statements in the 40% off coupon create a jury question. 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 "misleading statement of fact concerning the . . . amount of [the] price reductions." Ala. Code § 8-19-5(11)..
>
> The court is not persuaded that the coupon's statement that it is not valid with any other "discount" somehow clarifies the coupon's application. Again, a question of fact exists as to whether the orange tag stating "Furniture Always 30% Off" necessarily means it was a "discount" or if it was the "regular" price charged for that piece of furniture. This is especially true when the price on the orange tag was the only price for which the furniture was sold. Therefore, the court concludes a question of fact exists as to whether Hobby Lobby made any false or misleading statement to Mrs. Browning that could support a claim for violation of the ADPTA. Summary judgment is due to be denied as to the Estate's ADTPA claim for statutory relief.

Phillips II, 2018 U.S. Dist. Lexis 166247 at 26-27. Summary judgment is due to be denied on the FUPTPA claim for the same reasons.

2. Hobby Lobby's Argument That The Failure On A Breach Of Contract Claim Defeats The FDUTPA Claim Is Not Correct, And Has Already Been Rejected By This Court.

Hobby Lobby's argument that the FDUTPA claim is "nothing more than a breach of contract by another name," Memorandum, Doc. 102, p.31, fails to understand the nature of a FDUTPA claim. The Florida Courts have consistently held that a FDUTPA action ". . . is an independent statutory claim that is severable from all the remaining claims. It does not arise out of contract, nor does it exist solely for the benefit of the parties to the contract." Management Computer Controls, Inc. v. Charles Perry Constr., 743 So.2d 627, 632 (Fla. Ct. App. 1st Dist. 1999).

In Delgado v. J.W. Courtesy Pontiac GMC-Truck, 693 So.2d 602 (Fla. Ct. App. 2nd Dist. 1997), the defendant filed a motion for judgment on the pleadings, arguing that no FDUTPA claim can lie under the economic loss doctrine in Florida, which says that no tort cause of action can lie on a matter covered by a contract where the same economic loss is claimed under both counts. The Delgado court disagreed.

> . . . by enacting the FUDTPA, the legislature clearly intended to establish a new cause of action for the benefit and protection of the consuming public . . . The FDUTPA constitutes a substantive law which creates, defines, and regulates rights which are to be administered by the courts.

Delgado, 693 So.2d at 606, citing Florida Wildlife Fed'n vs. State Dept. of Environmental Regulation, 390 So.2d 64, 66 (Fla. 1980); Calooks Property Owners

Ass'n v. Palm Beach County Bd. Of Comm's, 429 So.2d 1260, 1267 (Fla. 1st Dist. Ct. App. 1983) (new cause of action is substantive in nature). The economic loss rule would not have permitted a FDUPTA claim to exist due to a contract being the only cause of action. However, the Court held:

> [I]n administering the FDUTPA, the courts do not have the right to limit and, in essence, to abrogate . . . the expanded remedies granted to consumers under this legislatively created scheme by allowing the judicially created economic loss rule to override a legislative policy pronouncement and to eliminate the enforcement of those remedies.

Delgado, 693 So.2d at 609. Similarly, the application of a rule that would substitute common law contract elements for legislatively crafted FDUTPA actions would override the legislative policy pronouncement and eliminate a FDUPTA cause of action. "[A] claim under the FDUTPA is not defined by the express terms of a contract, but instead encompasses unfair and deceptive practices arising out of business relationships . . ." Siever v. VW Gaskets, Inc., 669 F.Supp. 2d 1286, 1293 (M.D. Fla. 2009).

The uncoupling of FDUTPA claims from contracts results in cases where a claim fails under a breach of contract theory, but is sustained as a claim under the FDUTPA. In Siever, supra, the Court granted summary judgment on breach of contact claim, but denied summary judgment on the FDUTPA claim, stating that an argument based on meeting the contract "fail[s] to address the representations made by [Defendant] to the plaintiffs during the course of their business relationship." Siever, 669 F.Supp. 2d at 1293. See also, Richards v. Luxury Imps. of Palm Beach,

Inc., 877 So.2d 944 (Fla. Ct. App. 4th Dist. 2004) (Court granted summary judgment on contract claim in retail automobile transaction, but reversed summary judgment on fraud and FDUTPA claims.)

This Court recognized the distinction and disconnect between breach of contract and deceptive trade practices acts claims in Phillips II. The Court, on indistinguishable facts, granted the motion for summary judgment on the breach of contract claim, but denied it on the claim under the Alabama Deceptive Trade Practices Act. The Court specifically rejected "Hobby Lobby's argument that . . . the Estate cannot predicate its ADTPA claim on Hobby Lobby's alleged failure to honor the contractual promises it made in its coupon." Phillips, 2018 U.S. Dist. Lexis at 26, n. 11. The Court was "not persuaded" that the Estate's allegations as they relate to the ADTPA essentially amount to a claim for breach of contract. Like the Delgado Court held with regard to the FDUTPA, the Court in Phillips II held that "the allegations fell within those practices proscribed by § 8-19-5(11)." Id. Similarly, the practices of Mr. Marcrum's case are not merely breach of contract claims.

The cases cited by HL offer it no help when confronted with the law relating to the interplay between FDUTPA and breach of contract claims. First, the Court actually denied the motions to dismiss the FDUTPA claims in Circeo-Loudon v. Green Tree Svcing, LLC, 2015 U.S. Dist. Lexis 54794 (S.D. Fla. April 27, 2015), and Indulgence Yacht Charters, Ltd. v. Ardell, Inc., 2008 U.S. Dist. Lexis 80832

(S.D. Fla. September 16, 2008). In Zlotnick v. Premier Sales Grp., Inc., 431 F.Supp. 2d 1290 (S.D. Fla. 2006), the Court granted a motion to dismiss because it found nothing deceptive in the operation of arguing a contract to reserve the right to purchase a condominium to be developed, and the development company returned the deposit forwarded as the result of the reservation agreement. In this case, the Court has already held that a fact question exists as to whether the interplay between the terms "regular price," "marked price," and "always price," as practiced by Hobby Lobby, was deceptive. Phillips II, supra.

In TRG Night Hawk Ltd. v. Registry Dev. Corp. 17 So.3d 782 (Fla. Dist. Ct. App. 2009). The plaintiffs' claim under the FDUPTA was rejected because it sought to recover based on oral representations that were expressly contradicted in a later written contract. In this case, oral representations are not at issue and the Court has already concluded that the pricing representations "necessarily" created confusion, and that a question of fact exists as to whether the "always" price is a "discount" or the "regular price." Phillips, 2018 U.S. Dist. Lexis 166247 at * 26-27. Lastly, the holding in Silver v. Countrywide Home Loans, Inc., 483 F. App. 568 (11th Cir. 2012), was that a plaintiff cannot be deceived by oral representations at variance with a written contract. That is not what happened in this case.

3. Hobby Lobby Mis-states The Burdens In A FDUTPA Claim.

The elements of a FDUTPA claim are: (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. 4th 2006). This Court has already concluded that, "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 misleading statement of fact . . .'" Phillips, supra. To the extent the standard is "likely to mislead the consumer," this Court has already held the practice "necessarily creates confusion." Phillips, supra. A representation that "necessarily creates confusion" goes beyond a practice that is "likely to mislead." More importantly, "Whether conduct constitutes an unfair or deceptive trade practice is also a question of fact for the fact finder." Witt v. La Gorce County Club, Inc., 35 So.3d 1033, 1040 (Fla. Dist. Ct. App. 2010), citing Suris v. Gilmore Liquidating, Inc., 651 So.2d 1282 (Fla. 3d Dist. Ct. App. 1995).

Hobby Lobby continues to argue it disclosed to Mr. Marcrum that he would not receive 40% off of the "Always" price. That is just not so. Mr. Marcrum clearly testified that he thought he was going to get 40% off of the "Always" price. Moreover, the Court has stated that, "a question of fact exists as to whether the orange tag stating 'Furniture Always 30% off' necessarily means it was a 'discount'

or if it was the 'regular' price charged for the piece of furniture." Phillips, 2018 U.S. Dist. Lexis 166247 at * 26

The fact that HL never made a disclosure as to which is the "regular" price, as referenced above, makes cases like Washington v. LaSalle Bank Nat'l Assn., 817 F.Supp. 2d 1345 (S.D. Fla. 2011) in apposite. In Washington, the Court dismissed the FDUTPA claim because the mortgage loan related fees were disclosed. The Court held that the plaintiff saw the fees at the closing, and did not "allege or otherwise show" that she was misled by the fees. In this case Mr. Marcrum alleged he was misled by the coupon language, in particular, what a "regular" price is. There never was a clear disclosure of just which price the 40% off was applied to.

Finally HL's reliance on the post-transaction receipt, and citation to Tudor v. Jewell Food Stores, Inc., 681 N.E. 2d 6, 8 (Ill. App. Ct. 1997), puts things out of order. First, a buyer who is the victim of a misrepresentation in a sales transaction has an election of remedies. He may either rescind the transaction and demand his money back, or "stand by the bargain, even after he has discovered the fraud, and may therefore . . . in an independent action for the tort that has been committed through the opposite party's fraud and deceit . . ." Storrs v. Storrs, 130 Fla. 711, 715-16 (Fla. 1937); Neisz v. Gehris, 418 So.2d 448 (Fla. 5th Dist. Ct. App. 1982) (victims of misrepresentation "could have either affirmed the contract and sued for monetary damages or could have disaffirmed and sued to rescind the contract).

Defendant relied heavily on Tudor in arguing that Mr. Browning's ADTPA case was due to be dismissed. Doc. 59, pp. 28-29. The Court did not find it persuasive then, it should not find it persuasive now. The complaint in Tudor was that a grocery store's scanned and charged register prices were higher than advertised or "shelf" prices. The Court held that the plaintiffs did not plead "the first prong of a Consumer Fraud Act violation, that defendant's acts were deceptive or unfair." Tudor, 681 N.E.2d at 8. The Court found that the defendant had not intended the customer to rely on an incorrectly scanned price because "defendant's internal audits show its electronic scanners were accurate 96% of the time, which exceeds the 75% to 92% accuracy rate indicative of a 'serious violation.'" Tudor, 681 N.E.2d at 8.

The mere fact that a receipt was provided is in no way dispositive. In Tudor, the receipt revealed the deception. The scanned prices shown on the receipt could be readily compared to the grocery shelf or advertised prices, and the deception could be revealed. In this case, there is **nothing** Mr. Marcrum could have looked at to reveal that the "comparable prices offered by other sellers for similar products" was a fiction. The comparison also fails due to the differences in the refund programs. In Tudor, the policy was that, "If the scanned price on any marked item is different from the price on the shelf, you will get the item for free." Tudor, 681 N.E.2d at 8. In other words, Jewel would not just refund the money, but it would allow the customer to keep the merchandise. Jewel's offer to place the consumer in a better

position than had it not made a rare mistake led the Court to conclude no deception, and no intent for the plaintiff to rely on a false statement.

This is far different from Hobby Lobby's return policy allowing a store credit, exchange, or refund. The customer does not retain the merchandise. Had Mr. Marcrum returned the item, he could have gotten his money back, but he would not have gotten the benefit of the bargain represented by Hobby Lobby. The intentions of the two refund programs are entirely different. The Jewel refund program says, "If one of our scanners makes a mistake, we will refund the money, and let you keep the merchandise." That puts the consumer in a better position than had the misrepresentation never been made. Mr. Marcrum is entitled to elect the benefit of the bargain. Jewel's program belies an intent to give the customer better than he bargained for if it made a mistake, HL's program belies an intent to keep the fruits of the deception unless caught, in which case HL will not be out anything.

4. Hobby Lobby's Additional Deception Concerning Its "Comparison Prices".[11]

The FDUTPA states that, "unfair or deceptive acts on practices in the conduct of any trade or commerce are hereby declared unlawful." Fla. Stat. Ann. § 501.204(1). The FDUTPA, however, in determining what is deceptive, states that, "due consideration and great weight shall be given to the interpretations of the

[11] In Phillips II, the plaintiffs made argument relating to the FTC's Regulations concerning comparative prices. The Court, however, did not consider those arguments because no claim predicated on the FTC Regulations was pled in the Complaint. Phillips II, supra, at * 16. In this case, the FTC Regulations have ben clearly pled. Doc. 94, ¶¶ 20-29, 56.

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)."

The Complaint in this case states that two particular representations made by HL in order to justify its scheme are deceptive: (1) HL states that its "never" price reflects "comparable prices offered by other sellers for similar products;" and (2) HL's use of the term "regular" in its coupon is deceptive if HL, as it apparently does, uses that term to describe a price of which the item is never sold.

a. "Former Price" Advertising Deception.

Hobby Lobby's "never" price is fictitious. Where that is the case, "The 'bargain' being offered is a false one . . . the 'reduced' price is, in reality, probably just the seller's regular price." 16 C.F.R. § 233-1(a).

Hobby Lobby argues that the Regulations concerning "former" prices do not apply to this case because it now admits it never charged the "never" price. This distinction makes no difference. First, after stating that the use of a "former" price in advertising that is never charged is deceptive, the Regulation expands its scope. "Other illustrations of fictitious price comparisons could be given. An advertiser might use a price at which he never offered the article at all . . ." 16 C.F.R. § 233.1(d). Second, explained below is a companion Regulation stating that fictitious "comparable prices," as HL wants to term its representation, are also deceptive. 16 C.F. R. § 233.2

An illustration used by the FTC at 16 C.F.R. § 233.1(c) is spot on. The illustration uses an example: "John Doe is a retailer of Brand X fountain pens, which cost him $5 each" (HL is a retailer of tables that cost less than $81.99," presumable HL makes a profit on the "Always" price). "His regular price is $7.50" (HL's regular price for table is $81.99). "In order subsequently to offer an unusual 'bargain', Doe begins offering Brand X at $10 per pen." (HL begins offering jewelry chests at $199.99). "The retailer 'maintains that price for only a few days. Then he 'cuts' the price to its usual level – $7.50 – and advertises: 'Terrific Bargain: X Pens were $10, Now Only $7.50!'" (HL "cuts" the price to $81.99 and advertises it as a "discount"). "This is obviously a false claim. The advertised bargain is not genuine." 16 C.F.R. § 233.1(c).

The only divergence between Hobby Lobby's scheme and the illustration is that HL never even bothered to sell the table, even for a few days, at $119.99. Section 233.1(d) of the Interpretation quoted above covers this, and is **exactly** what Hobby Lobby does. Section (e) states, "If the former price is set forth in the advertisement, whether accompanied or not by descriptive terminology such as Regularly, Usually, Formerly, etc., the Advertiser should make certain that the former price is not a fictitious one." 16 C.F.R. § 233.1(e). In this case, the term "marked" is used, which is functionally indistinguishable from the Regulation examples "regularly," "usually," "formerly." This price is a fictitious one.

b. <u>"Comparison Price" Deception</u>.

Hobby Lobby now admits that the "Never" price is not a "former" price, but relies on its signage to say that "Marked Prices reflect comparable prices offered by other sellers for similar products." This offers Hobby Lobby no safe harbor:

- (a) Another commonly used form of bargain advertising is to offer goods at prices lower than those being charged by others for the same merchandise in the advertiser's trade area (the area in which he does business). . . . the advertised higher price must be based upon fact, and not be fictitious or misleading. Whenever an advertiser represents that he is selling below the prices being charged in his area for a particular article, he should be reasonably certain that the higher price he advertises does not appreciably exceed the price at which substantial sales of the article are being made in the area--that is, a sufficient number of sales so that a consumer would consider a reduction from the price to represent a genuine bargain or saving. Expressed another way, if a number of the principal retail outlets in the area are regularly selling Brand X fountain pens at $10, it is not dishonest for retailer Doe to advertise: "Brand X Pens, Price Elsewhere $10, Our Price $7.50."

- (b) The following example, however, illustrates a misleading use of this advertising technique. Retailer Doe advertises Brand X pens as having a "Retail Value $15.00, My Price $7.50," when the fact is that only a few small suburban outlets in the area charge $15. All of the larger outlets located in and around the main shopping areas charge $7.50, or slightly more or less. The advertisement here would be deceptive, since the price charged by the small suburban outlets would have no real significance to Doe's customers, to whom the advertisement of "Retail Value $15.00" would suggest a prevailing, and not merely an isolated and unrepresentative, price in the area in which they shop.

- (c) A closely related form of bargain advertising is to offer a reduction from the prices being charged either by the advertiser or by others in the advertiser's trade area for other merchandise of like grade and quality--in other words, comparable or competing merchandise--to that being advertise . . . The advertiser should, however, be reasonably certain, just as in the case of comparisons involving the same merchandise, that the price advertised as

> being the price of comparable merchandise does not exceed the price at which such merchandise is being offered by representative retail outlets in the area. For example, retailer Doe advertises Brand X pen as having "Comparable Value $15.00." Unless a reasonable number of the principal outlets in the area are offering Brand Y, an essentially similar pen, for that price, this advertisement would be deceptive.

16 C.F.R. § 233.2.

"The advertised price must be based upon fact." Whenever an advertiser represents that he is selling below the prices being charged in his area[12] for a particular article, "he should be reasonably certain that the higher price he 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). Hobby Lobby is reasonably certain of no such thing. In order to do so, it would have had to produce some evidence that it surveyed merchandise near Pensacola, Florida relevant to Mr. Marcrum, **prior** to pricing the Marcrum table. It did not.

HL argues that Marcrum has not met his burden to show that other sellers in the market area sell similar tables at prices higher than HL's "marked prices" by conducting market surveys or comparison shopping. It is not his burden to do so. The Regulation is clear that the burden is on HL to show that it has done such a

[12] The post hoc created "survey" of prices does not help Hobby Lobby here. First, it was not created until well after this sale. Second, in a true comparison, prices must be based on sales "made in the area." The coupons are only to be used for in store purchases. An Internet search for "comparable" prices, even if it were thoroughly conducted in good faith, is national in scope. Such prices cannot be said to be sales made "in the area" of Mr. Marcrum's Pensacola, Florida, purchase. Hobby Lobby argues for a "national" area, that 16 C.F.R. § 233.2(b) clearly analyzes prices using the consumer local market area. It says, "the price charged by the small Alabama outlets would have no real significance . . . 'Retail value of $15.000 would suggest a prevailing, and not merely an isolated and unrepresentative price in the area in which they shop.

survey. It states the seller "should be reasonably certain that the higher price he advertises does not appreciably exceed the price at which substantial sales of the article are being made in the area." 18 C.F.R. § 233.2(a) Mr. Marcrum is not a seller. Mr. Marcrum does not have to show that he is reasonably certain that the higher price does not appreciably exceed the price of which substantial sales are made. Hobby Lobby's absolute failure to show any fact from which it could be concluded that it knew, at all, what tables like Mr. Marcrum's were being sold for in March of 2017, dooms its summary judgment motion on this point. The movant on summary judgment "always bears the initial responsibility by making submissions to demonstrate the absence of a material fact. Celetex Corp. Catrett, 477 U.S. 317, 323 (1986). Only after the movant has met this burden does the nonmovant need to produce facts to show a genuine factual issue for trial. Hobby Lobby has not produce a single fact to meet its burden to show that it was "reasonably certain" that tables in Pensacola sold at or higher than $119.99 on March 2, 2017. Hobby Lobby has no idea what comparable merchandise sells for near Pensacola, Florida. It has no policy manual, or procedure for making such comparisons and it makes no such comparisons. As such, it cannot meet the FTC standard.[13]

[13] Hobby Lobby's assertion at footnote 21 of its Memorandum, Doc. 102, p. 39, its representations that its "marked" price "reflects general U.S. market value for similar products." Doc. 101-4, pp. 25, 29, is misleading as applied to this case. Mr. Marcrum made his purchase on March 2, 3017. Ex. P. The signage in place at that time stated "marked prices reflect comparable prices offered by other sellers for similar products." Ex. L. The change in language, according to an internal Hobby Lobby Memorandum, did not occur until after December 18, 2018. Ex. R. It is just not

5. Mr. Marcrum Has Suffered Actual Damages.

Mr. Marcrum's damages are actual, and easily calculable. Mr. Marcrum testified that he expected to receive 40% off of the "Always" price because, "That's what was stated on the coupon." Marcrum Depo., p. 133. Forty percent off of $83.99, would be $50.39. What Mr. Marcrum actually got was 40% off of $119.99. The exact calculation of damages was done in Phillips II, supra, for the chest of drawers purchased by Mrs. Browning. The Court held that she "suffered a compensable loss in that she paid more for the chest than she would have paid if the 40% off coupon was applied to the 'Always' price. The monetary damage is clear and easily calculable." Phillips, supra at * 26, n. 11.

It is clear that the damages were a result of the violation. The Court in Phillips, supra at * 26, held that it is a questions of fact as to whether the orange tag "was a 'discount' or it was the 'regular' price charged for that piece of furniture." If it was the "regular" price, then Hobby Lobby's practice of calculating the coupon reduction from the "never" price clearly caused Mr. Marcrum $21.60 in damages." Marcrum's damage claim is not that he "paid more" than the furniture was, objectively, worth. His claim is that he paid more than HL represented he would have to if he used his coupon. The FDUTPA does not define "actual damages," Rollins v. Hiller, 484 So.2d 580, 588 (Fla. Ct. App. 3 Dist. 1984). Rollins cited the

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true that HL defined the market areas as a national market in March of 2017, and any allusion thereto – in this proceeding is simply not true.

Texas DTPA case of Raye v. Fred Oakley Motors, Inc., 646 S.W. 2d 288, 290 (Tex. App. 1983), as setting out the correct measure of damages. The Raye Court stated that, "actual damages" are "damages recoverable at common law." Raye, 646 S.W. 2d at 290. Cited in Rollins, 484 So.2d at 515. In a breach of contract claim, "the nonbreaching party may affirm the contract insist was the benefit of his bargain, and seek the damages that would place him in the position he could have been in had the contract been completely performed." Tubby's Custom, Inc. v. Euler, 225 So.3d 405, 407 (Fla. 2 Ct. App. 2017), quoting Citizens Prop. Ins. Corp. v. Anot, 198 So. 3d 730, 734 (Fla. 2 Dist. Ct. App. 2016). Similarly, the measure of damages in a tort action is "to restore the injured party to the position it would have been had the wrong not been committed." Nardyre, Inc. v. Florida Mobile Home Supply, 625 So.2d 1203, 1286 (Fla. 1 Dist. App. 1993). Common law damages in tort actions are through the "benefit of the bargain" analysis outlined above, or the "out of pocket" rule. Id. In either case, the bargain was that Mr. Marcrum was to receive the benefit 40% off of the orange tag price, and is out of pocket $21.59.

6. Mr. Marcrum Is Entitled To Bring A Claim for Injunctive Relief.

Statutory language must be given its plan and ordinary mearing. A.R. Douglas, Inc. v. McRainey, 509 So.2d 269 (Fla. 1927). This bedrock principle is followed closely by the rule that courts are required to give effect to every word, phrase, sentence and part of the statute. Edwards v. Thomas, 229 So.2d 277, 284

(Fla. 2017). The FDUPTA contains a particular statutory provision for injunctive relief:

> Without regard to any other remedy or relief to which a person is entitled, anyone aggrieved by a violation of this part may bring an action to obtain declaratory judgment that an act or practice violates this part, and to enjoin a person who has violated, is violating, or is otherwise likely to violate this part.

Fla. Stat. Ann. § 501.211.

This Court denied the claims of the Estate of Diane rowing and former plaintiff Mary Carrara for injunctive relief under the Alabama and Illinois Deceptive Trade Acts. In both cases, the Court found that the plaintiffs lacked standing because they could not show any likelihood of future deception. HL's argument with regard to Mr. Marcrum is the same. Memorandum, Doc. 102, pp. 42-43. However, the FDUTPA contains a partialized statutory, grant of standing to bring injunctive relief that does not exist in Alabama or Illinois.

The legislature created an injunctive remedy "without regard to any other remedy." The Act, under its plan terms, grants standing to "anyone aggrieved by a violation of this part." Fla. Stat. Ann. § 501.211. Mr. Marcrum has been so aggrieved. It grants such persons standing to bring a declaratory judgment "that an act or practice violates this part." Id. Finally, it creates this injunctive relief, not just against those who may be likely to violate the FDUPTA in the future, but against one who "has violated" the FDUPTA. That is in the past tense, and applies to Hobby Lobby.

Defendant argued, and the Court's ruling with regard to the Illinois and Alabama Acts, is that injunctive relief is not proper because the individuals had no more need for a remedy since they could not longer be deceived. However, an individual benefit from injunctive relief is not necessary under the particular statutory injunctive relief remedy authorized by Fla. Stat. § 501.211(1). The defendant in Davis v. Powertel, 776 So.2d 971, 975 (Fla. Dist. Ct. App. 1 2000), made the same argument that defendant makes in this case. The Court rejected this argument due to the unique statutory language of the FDUTPA:

> We also conclude that the plaintiffs' claims for declaratory and injunctive relief should be certified for class litigation under Rule 1.220(b)(2). Powertel maintains that injunctive relief is not available because the trade practice at issue will not cause continuing harm to the named plaintiffs or to the class of existing Powertel customers. However, this argument appears to be at odds with the applicable remedy provision in the Deceptive and Unfair Trade Practices Act, as well as the general purpose of the Act.
>
> Section 501.211(1), Florida Statutes is broadly worded to authorize declaratory and injunctive relief even if those remedies might not benefit the individual consumers who filed the suit.
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> * * *
>
> The statute is clear on its face. It merely requires an allegation that the consumer is in a position to complain (that he or she is aggrieved by the alleged violation) and that the violation has occurred, is now occurring, or is likely to occur in the future. Nothing in the statute requires proof that the declaratory or injunctive relief would benefit the consumer filing the suit.

Davis, 776 So.2d at 975; accord, Holt v. O'Brien Imports of Ft. Myers, 862 So. 2d 87, 89 (Fla. 2 Dist. Ct. App. 2017). The FDUTPA is designed to protect not only

the rights of litigants, but also rights of the consuming public at large. Id., citing Rollins, supra. Under the plain meaning of Fla. Stat. Ann,. § 501.211(1), Mr. Marcrum has stated a claim for declaratory and injunctive relief.

7. The Voluntary Payment Doctrine Does Not Apply.

The voluntary payment doctrine bars recovery for one who pays money voluntarily "unless he can show fraud, coercion, or mistake of fact." Parker v. Am. Traffic Solutions, Inc., 2015 U.S. Dist. Lexis 105522 (S.D. Fla. 2015), citing City of Miami v. Keton, 115 So.2d 547, 551 (Fla. 1989). The voluntary payment doctrine "only applies in the absence of fraud." State Farm v. Goldstein, 2004 U.S. Dist. Lexis 32308 (N.D. Fla. Ju7ly 15, 2004), citing Byers v. Fidelity Cas. Co., 759 F.2d 1542 (11th Cir. 1985). In this case, the Court has held a fact question to exist as to whether HL "made any false or misleading statements." Phillips II, supra, at 27. On its face, the exception exists, and the voluntary payment doctrine does not apply.

When asked whether he voluntarily paid the price he was charged for the furniture, Mr. Marcrum stated that, "he intended to buy it for the less price" and that he was "deceived into doing it." Marcrum Depo., p. 223. It is true that the price Mr. Marcrum paid was available to him on the receipt, but as Mr. Marcrum stated, this was "after the purchase." Marcrum Depo., p. 223. Mr. Marcrum stated that he "didn't volunteer to pay that price, it was just that price was charged . . . [and] I didn't know until after I have purchased it." Marcrum Depo., p. 225.

In Cox v. Porsche Fin. Servs., 342 F.Supp. 3d 1271 (S.D. Fla. 2018), the plaintiff bought a FDUTPA claim, among others, against an automobile leasing company for failing to disclose that he was not getting proper credit for his trade-in on the lease transaction. In the case, the calculation of the plaintiff's charges for the lease over and above the value of the plaintiff's trade-in was based in part on the value of his trade. The defendant argued voluntary payment because, even if it did not properly value the plaintiff's trade-on, the plaintiff still paid the amount based upon what he now contends was an improper valuation of his trade-in. The Court denied summary judgment on the plaintiffs FDUTPA claim because, "Plaintiff has addressed sufficient evidence from which a jury may find that the failure to disclose net trade-ion value and the failure to reduce capitalized costs were deceptive." Cox 342 F.Supp. 3d at 1288. Similarly, HL's failure to disclose it was going to compute the coupon discount from the "never" price, and failure to give Mr. Marcrum the proper price is deceptive.

Because the Cox Court found a fact question as to deception, it found that the voluntary payment doctrine did not apply. Like HL in this case, the Cox defendant argued that the plaintiff, "knew the deal he was entering . . ." Cox, 342 F.Supp. 3d at 1290. However, the Court denied summary judgment as an affirmative defense because "Plaintiff testified that he only learned of the factual circumstances known to Defendants after he paid." Cox, 342 F. Supp. 3d at 1250. Similarly, Mr. Marcrum testified that he only learned of the factual circumstances, i.e., that HL had applied

the 40% to the "never" price after he paid. This Court has already stated that whether HL "intended to deceive Mrs. Browning as a question of fact, Phillips, 2018 U.S. Dist. Lexis 166247 at 26, n. 11, and that "there is a question of fact as to whether Hobby Lobby made any false or misleading statements to Mrs. Browning that could give rise to liability under the ADTPA," or the exact same documents at issue from HL in this case. Where there is evidence that a plaintiff did not have "knowledge of the factual circumstances, i.e., did not know that HL's policy was to apply the 40% coupon off of the "never" price, as opposed to the "regular" price it charged every day. The voluntary payment doctrine cannot apply."

The fraud exception was applies similarly in Brink v. Jones, 341 F.Supp. 2d 1314 (S.D. Fla. 2018). Brink was a case where the defendant moved for summary judgment on a claim that brokerage fees labelled as "processing fees" were actually hidden commission. The Court denied the application of the voluntary payment rule even though the client saw the fee, and paid it. The Court held it was not voluntary because the courts did not have "full knowledge" of the factual circumstances making the payments excessive or illegal. Brink, 341 F.Supp. 2d at 1321. Similarly, Mr. Marcrum did not have full knowledge that the "never" price was actually a fiction, and that the item never sold for that – anywhere. Moreover, he did not have full knowledge that the 40% off could be taken from the "never" price when he entered the transaction. Under Brink and Cox payment of a known fee alone did not put it within the voluntary payment doctrine. Unless the customer knew why he was

paying the excess fee – the factual basis for it, the doctrine did not apply. As Mr. Marcrum testified, he had no idea why he was paying the higher price, and no idea it was based on a fictitious price. See, Southern Wind Aviation, LLC v. Cessna Aircraft Co., 2014 U.S. Dist. Lexis 194299, 2014 WL 12570958, at * 12 (M.D. Fla. July 15, 2014) (rejecting voluntary payment doctrine where "Defendant did not provide any evidence to show that Plaintiffs voluntarily paid the sums Defendant charged knowing that they were excessive. To the contrary, plaintiffs have asserted that they were overcharged the Defendant's service and that they discovered the overcharges after retaining an analyst to review past invoices.")

This writer is unaware of the application of the voluntary payment doctrine to any claim under the FDUTPA. The court in Delgado, supra., analyzed the application of a common law affirmation defense, in that case the economic loss rule, to the cause of action for damages created by the FDUTPA. The Court held that, "by enacting the FPUTPA, the legislature clearly intended to create a new cause of action for the benefit and protection of the consuming public. As a new cause of action, the FDUTPA constitutes a substantive law which creates, defines, and regulates rights which are to be administered by the courts." Delgado, 693 So. 2d at 606. Accordingly, the Court held that the judicially created economic loss rule cannot be applied to a statutorily created FDUTPA action.

> We hold that the judicial policy pronouncement in the form of the economic loss rule promulgated by our supreme court has no application within the realm of a statutory cause of action brought under

> the FDUTPA when the genesis of such a claim is founded on a written sales contract. Accordingly, in administering the FDUTPA, courts do not have the right to limit and, in essence, to abrogate, as the trial court did in this case, the expanded remedies granted to consumers under this legislatively created scheme by allowing the judicially favored economic loss rule to override a legislative policy pronouncement and to eliminate the enforcement of those remedies. *See* Burke v. Napieracz, 674 S.2d 756, 759 (Fla. 1st DCA 1996); Rubio v. State Farm Fire & Casualty Co., 662 So.2d 956, 957 n. 2 (Fla. 3d DCA 1995), *review denied*, 669 So.2d 252 (Fla. 1996). In sum, any tension between the legislative policy embodied in the FDUTPA and the judicial policy embodied in the economic loss rule must be resolved under the doctrine of the separation of powers in favor of the legislative will so long as the FDUTPA passes constitutional scrutiny.

Delgado, 693 So.2d at 609. Similarly, the judicially created voluntary payment rule cannot be applied to the FDUTPA in this case. Courts throughout the country . . . have held that the voluntary payment doctrine is not applicable as an affirmative defense barring claims based on violation of consumer protection statutes. See Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc., 162 Wn.2d 59, 170 P.3rd 10, 23 (Wash. 2007) (*en banc*) ("the voluntary payment doctrine is inappropriate as an affirmative defense in the [consumer protection statute] context, as a matter of law, because we construe the [consumer protection statute] liberally in favor of plaintiffs"); Huch v. Charter Communs. Inc., 290 S.W.3d 721, 727 (Mo. 2009) (*en banc*) ("In light of the legislative purpose of the merchandising practices act [protecting consumers], the voluntary payment doctrine is not available as a defense to a violation of the act."); Sobel v. Hertz Corp., 698 F.Supp. 2d 1218, 1224 (D. Nev. 2010) (as a matter of law the voluntary payment

doctrine cannot be used as a defense to violation of the Nevada Deceptive Trade Practices Act), *rev'd on other grounds*, 674 Fed. App'x 663 (9th Cir. 2017); MBS-Certified Public Accountants, LLC v. Wisconsin Bell, 2012 WI 15, ¶ 4, 338, Wis. 2d 647, 809 N.W.2d 857 (the conflict between allowing the voluntary payment doctrine to apply to the deceptive tele-communications billing statute and "the statute's manifest purpose leaves no doubt that the legislature intended that the common law defense should not be applied to bar claims under the statute"); State ex rel. Miller v. Vertrue, Inc., 834 N.W.2d 12, 32 (Iowa 2013) (voluntary payment doctrine does not apply to preclude actions alleging violations of consumer protection statutes, and application of the doctrine in consumer protection actions would have the effect of judicially vitiating consumer protection legislation).

The Florida Courts have already held that applying judicially created affirmative defenses to statutorily created causes of action and the FDUTPA is an impermissible encroachment of the judiciary on the legislature. The application of the voluntary payment doctrine to the FPUTPA would be a similar impermissible encroachment.

III. CONCLUSION

For the foregoing reasons, Defendant's Motion for Summary Judgment is due to be denied.

/s/ Brian M. Clark
Brian M. Clark
Allan Armstrong
Darrell Cartwright
Attorneys for Plaintiffs

OF COUNSEL:
Wiggins Childs Pantazis Fisher & Goldfarb, LLC
The Kress Building
301 19th Street North
Birmingham, AL 35203
205-314-0500
bclark@wigginschilds.com

Allan L. Armstrong
Armstrong Law Center, LLC
The Berry Building
2820 Columbiana Road
Vestavia Hills, Alabama 35216

Darrell Cartwright
Cartwright Law Center, LLC
P.O. Box 383204
Birmingham, AL 35238

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document has been properly served by way of the CM/ECF system, electronic mail, and/or U.S. Mail to all counsel of record on this the 16th day of August, 2019.

Robert H. Rutherford
BURR & FORMAN LLP
420 North 20th Street
Suite 3400, Wells Fargo Tower
Birmingham, Alabama 35203
Telephone: 205-251-3000
Facsimile: 205-458-5100

/s/ Brian M. Clark
Of Counsel