

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

DAVID PHILLIPS,)
DIANE BROWNING, and)
MARY E. CARRARA, individually and)
on behalf of the class of persons)
described herein,)

Plaintiffs,)

v.)

Civil Action No.: 2:16-cv-00837-JEO

HOBBY LOBBY STORES, INC.,)

Defendant.)

THIRD AMENDED CLASS ACTION COMPLAINT

Plaintiffs David Phillips, Mary E. Carrara, and Diane Browning (“Plaintiffs”) state the following as their Third Amended Class Action Complaint against Defendant Hobby Lobby Stores, Inc. (“Defendant” or “Hobby Lobby”).

I. JURISDICTION AND VENUE

1. This Court has jurisdiction over this matter pursuant to its diversity jurisdiction under the Class Action Fairness Act. 28 U.S.C. §1332. There is complete diversity between named Plaintiffs and Defendant in the action, and diversity between

all but Oklahoma class members. This is a class action case where there are more than 100 class members, and the amount in controversy exceeds \$5,000,000.00. Jurisdiction is proper under 28 U.S.C. § 1332 (d).

2. Venue is proper in this Court under 28 U.S.C. §1391 because this is the judicial district in which a substantial part of the events or omissions giving rise to the claims occurred.

II. PARTIES

3. David Phillips is a resident of Shelby County, and is over the age of nineteen (19) years. Mr. Phillips suffered an ascertainable loss and/or monetary damages as a result of the Defendant's unlawful conduct.

4. Diane Browning is a resident of Walker County, Alabama and is over the age of nineteen (19) years. Ms. Browning suffered an ascertainable loss and/or monetary damages as a result of the Defendant's unlawful conduct.

5. Mary E. Carrara is a resident of Peoria County, Illinois, and is over the age of nineteen (19) years. Mrs. Carrara suffered an ascertainable loss and/or monetary damages as a result of Defendant's unlawful conduct.

6. Hobby Lobby Stores, Inc. ("Hobby Lobby") is an Oklahoma Corporation, organized under the laws of the State of Oklahoma, with its principal place of business in Oklahoma City, Oklahoma.

III. NATURE OF CLASS ACTION

7. Hobby Lobby operates over six hundred retail stores nationwide, primarily selling arts, crafts, frames, small pieces of furniture and other similar merchandise. Hobby Lobby's merchandise is available for purchase online or in its stores. Through its online presence, Hobby Lobby sells and ships merchandise to all fifty states, Puerto Rico and the District of Columbia.

8. Common law and state consumer protection laws in Alabama and Illinois prohibit deceptive advertising. By advertising discounts that were not actually provided to its customers, Hobby Lobby violated common law of all fifty (50) states by breaching the contract described below, and the consumer protection laws of Alabama and Illinois as described below. Plaintiffs bring this action against Defendant Hobby Lobby for engaging in a systemic scheme of falsely advertising merchandise discounts and "never-ending" sales.

9. In violation of such laws, Hobby Lobby misleads its customers regarding the "regular" price on much of its merchandise. Hobby Lobby's "regular" price is an artificially inflated price at which the merchandise has never been sold by Hobby Lobby or any other retailer. In further violation of the law, Hobby Lobby offers percentage discount coupons and takes these percentage discount coupons from its artificially inflated price (the "regular" price for which the merchandise never sells)

rather than its everyday sales price. Hobby Lobby systemically refuses to give the advertised percentage discount coupon from the price at which the merchandise “always” sells. Hobby Lobby’s discount scheme operates identically for online and in store purchases.

10. At all times pertinent to this action, Hobby Lobby was utilizing this false and deceptive advertising scheme. Further, Hobby Lobby continues to engage in this unlawful conduct.

11. By advertising and purporting to offer discounts that were and are not actually provided to its customers, Hobby Lobby violated the common law and the various state consumer protection laws of Alabama and Illinois as outlined below.

12. Plaintiffs bring this action against Hobby Lobby seeking, *inter alia*, to stop this unlawful practice, recover overcharges paid by customers, and obtain the actual discounts that were denied to the customers.

IV. FACTUAL ALLEGATIONS

A. The Facts Relating to Diane Browning’s Hobby Lobby Purchases.

13. On April 2, 2016, Ms. Browning was shopping at Hobby Lobby for craft items, and decided that she would consider buying a chest of drawers.

14. Ms. Browning was told by another customer at the store that she could get 40% off of the purchase price by downloading a coupon onto her phone.

15. Ms. Browning did download the coupon, which stated that she would get 40% off of "one item at regular price only."

16. The small chest was marked as "Always 30% off," at a price of \$202.99. Because the item was marked as "Always" 30% off," Ms. Browning thought that she would get 40% off of that price, for a final price of \$121.80.

17. Ms. Browning did not receive a price of \$121.80 at the register when she went to check out. Instead, the 40% discount was taken off of a "Regular" price of \$289.99, making the price paid by Ms. Browning \$173.99.

18. The "Regular" price was on the item. However, Hobby Lobby's own information shows that this price is anything but "Regular." The ticket said "Furniture always 30% off." Simply put, the "Regular" price is the price at which an item is "regularly" sold. In this case, \$202.99, not an artificial price that does not correspond to any sale of the item made by Hobby Lobby.

19. The above-referenced scheme is not unique to this particular item. Rather, many items are "always" on sale, but coupon discounts are taken from a price the item never sells at, which is most definitely not the regular price referenced in the coupon. Moreover, this scenario plays out, not only for 40% off coupons downloaded onto smart phones, but also for 40% off coupons printed from Hobby Lobby's

website, and brought into the store, or clipped from advertisements and other printed sales circulars. The operational language is identical.

B. The Facts Relating to Mr. Phillips' Purchase.

20. Mr. Phillips was also affected by this scheme. On October 23, 2015, Mr. Phillips made a purchase of a museum glass at the Doug Baker Boulevard Hobby Lobby location in Shelby County, Alabama. He used the same 40% off coupon that Ms. Browning did.

21. The museum glass that Mr. Phillips purchased was marked "Always 30% off," and the museum glass indeed, was never sold for a price other than \$91.00.

22. However, instead of getting 40% off of the \$91.00 price, for a total of \$54.60, Mr. Phillips was "given" 40% off of a largely fictional price of \$130.00, and paid \$78.00.

C. The Facts Relating to Mrs. Carrara's Purchases.

23. Mrs. Carrara went to the Hobby Lobby Store in Peoria, Illinois on North University Street on several occasions in 2016. She would always bring in the Hobby Lobby coupon printed in the local newspaper entitling her to 40% off of one item at regular price.

24. The same basic fact pattern outlined above for plaintiffs Phillips and Browning presented itself in the case of Mrs. Carrara. Mrs. Carrara would bring an

item up to the register that had an “Always X% Off” tag, and also another, higher, price listed at which the item was “never” sold at.

25. Instead of the 40% discount, which was good for “one item at regular price”, being applied to the “Always” price, it was applied to a higher, “never” price, which means that the items did not receive a 40% discount from the “regular” price.

26. Mrs. Carrara made Hobby Lobby purchases from Hobby Lobby on the following dates in 2016: January 14, May 16, July 18, July 21, August 1, August 26, and September 9. She used a debit card for the purchases, but does not have the receipts to set forth the actual amounts like Ms. Browning and Mr. Phillips. However, on one or more of these occasions she purchased items that were marked “Always X%off” but received her discount from a higher “never” price. Additionally, she did the same thing in 2015 on several occasions.

D. The Scope of Hobby Lobby’s Scheme.

27. Hobby Lobby cannot claim that it does not know that advertising "permanent" or "never ending" sales is not misleading. In 2014, it agreed to pay civil penalties in an action brought by the State of New York’s Attorney General over "never ending" sales.

28. Hobby Lobby operates approximately 600 locations throughout the country. The policies regarding the items permanently on sale, and the 40% off

coupons relating to never actually used prices, emanate from Hobby Lobby's corporate offices. These policies, referenced above, are uniform throughout the country and apply to all stores and internet sales and shipments.

29. Hobby Lobby's unlawful conduct was utilized for the purpose of attracting customers to its stores with the promise of discounts that did not ever exist. Hobby Lobby kept its policies secret, thereby allowing its customers to unknowingly pay more than the purported discount price. Hobby Lobby's scheme was designed to avoid detection and to conceal the deception from its customers. By its very nature, Hobby Lobby's deceptive practices were self-concealing.

30. Plaintiffs have suffered an ascertainable loss and/or monetary damages as a result of Hobby Lobby's unlawful conduct.

31. Plaintiffs Browning and Phillips have provided Hobby Lobby with a written demand for relief reasonably describing the foregoing unfair and deceptive practices that caused them to suffer injury, and Hobby Lobby has failed to respond to Plaintiffs' demand.

CLASS ALLEGATIONS

32. Plaintiffs bring this case as a class action in conformity with the 11th Circuit's opinion in Lisk v. Lumber One Wood Preserving, 792 F.3d 1331 (11th Cir.

2015), which held that Rule 23 class actions are maintainable for substantive claims under the Alabama Deceptive Trade Practices Act.

33. Class Definition: Pursuant to Fed.R.Civ.P. 23(b)(1), (2) and (3), Plaintiffs bring this action on behalf of themselves and all others similarly situated, as members of the proposed Plaintiff Class and Subclasses:

- a. National Breach of Contract Class: Representatives Browning, Carrara, and Phillips are the representatives for this class. The class is defined as all persons within the applicable statute of limitations period who purchased goods with a coupon at a Hobby Lobby in the United States that were marked as “always on sale” but where a price higher than the “sale” price was never charged for the goods, and the coupon discount was taken off of that higher price.
- b. Alabama Deceptive Trade Practices Act Subclass: Representatives Browning and Phillips are the representatives for this class. The class is defined as all persons within the applicable statute of limitations period who purchased goods with a coupon at a Hobby Lobby in Alabama that were marked as “always on sale” but where a price higher than the “sale” price was never charged for the goods, and the coupon discount was taken off of that higher price.
- c. Illinois Consumer Fraud and Deceptive Trade Practices Act Subclass: Representative Carrara is the representative for this subclass. This class is defined as all persons within the applicable statute of limitations period who purchased goods with a coupon at a Hobby Lobby in the United States that were marked as “always on sale” but where a price higher than the “sale” price was never charged for the

goods, and the coupon discount was taken off of that higher price.

34. Numerosity: The members of each class and subclass are so numerous that their individual joinder would be impracticable in that: (a) the Class includes at least hundreds of individual members; (b) the precise number of Class members and their identities are unknown to Plaintiffs, but are well known to Hobby Lobby, and can easily be determined through discovery; (c) it would be impractical and a waste of judicial resources for each of the at least hundreds of individual class members to be individually represented in separate actions; and (d) the relatively small amount of damages suffered by the class members does not make it economically feasible for those class members to file individual actions.

35. Commonality/Predominance: Common questions of law and fact predominate over any questions affecting only individual class members. These common legal and factual questions include, but are not limited to, the following:

- a. Whether Hobby Lobby's practices violated the Deceptive Trade Practices Act of Alabama.
- b. Whether Hobby Lobby's practices violated the Deceptive Consumer Fraud and Deceptive Trade Practices Act of Illinois.
- c. Whether Hobby Lobby took coupon discounts which were supposed to be taken off of regular prices, off of prices that were never used but were simply marked on items as a never used "regular" price.

- d. Whether Plaintiffs are entitled to damages under Alabama and Illinois statutes referenced above.
- e. Whether Hobby Lobby has breached the contracts between it and the class members by the practices described herein.

36. Typicality: Plaintiffs are typical of the claims of the class members and each subclass. Plaintiffs and all class members have been injured by the same wrongful practices engaged in by Hobby Lobby. Plaintiffs' claims arise from the same practices and course of conduct that give rise to the claims of the class and subclass members, and are based on the same legal theories for the class and each subclass.

37. Adequacy: Plaintiffs will fully and adequately assert and protect the interests of the class. Plaintiffs and each subclass have counsel experienced in class actions and complex mass tort litigation. Neither Plaintiffs nor their counsel have interests contrary to or conflicting with the interests of the class or subclasses.

38. Superiority: A class action is superior to all other available methods for the fair and efficient adjudication of this lawsuit because individual litigation of the claims by each of the class and subclass members is economically unfeasible and impractical. While the aggregate amount of the damages suffered by the class and subclasses is in the millions of dollars, the individual damages suffered by each as a result of the wrongful conduct by Hobby Lobby are too small to warrant the expense

of individual lawsuits. Even if the individual damages were sufficient to warrant individual lawsuits, the court system would be unreasonably burdened by the number of cases that would be filed.

39. Plaintiff does not anticipate any difficulties in the management of this litigation management of this litigation.

COUNT I

(Class Claim for Breach of Contract)

40. Plaintiffs incorporate by reference, as if fully set forth herein, the factual allegations contained in paragraphs 1 through 31 above.

41. This claim is brought by representatives Browning, Carrara, and Phillips on behalf of the National Breach of Contract Class, as pled by paragraphs 32-39 above.

42. Plaintiffs and class members entered into contracts with Hobby Lobby when they manifested their acceptance of Hobby Lobby's offer by presenting goods at the Hobby Lobby registers, along with their coupons.

43. Hobby Lobby breached the contract by charging Plaintiffs and the class members a discount off of another, irrelevant, higher, price, as opposed to the regular price of the item.

44. Plaintiffs and the class members have been damaged in an amount calculated as the difference between the price they paid taken off of an illusory, higher, price, and 40% off of the price items were regularly, or "always" sold at.

WHEREFORE, Plaintiffs and the class demand damages in an amount to be determined by struck jury.

COUNT II
(Class Claim Under the Alabama Deceptive Trade Practices Act)

45. Plaintiffs incorporate by reference, as if fully set out herein, the factual allegations contained in paragraphs 1 through 31 above. However, the factual allegations relating to Mrs. Carrara's transactions, paragraphs 23 through 26, do not apply here.

46. This claim is brought by representatives Browning and Phillips on behalf of the Alabama Deceptive trade Practices Subclass as pled by paragraphs 32-39 above.

47. The Alabama Deceptive Trade Practices Act, Ala. Code § 8-19-1 (1975) *et seq.* sets forth certain actions that are considered to be deceptive, and the remedies for violating those provisions.

48. Ala. Code § 8-19-5 (11) (1975) states that it is unlawful to mak[e] a false or misleading statement of fact concerning the reasons for, existence of, or amounts of, price reductions.

49. The Alabama Deceptive Trade Practices Act provides for a civil action where the commission of acts described by Ala. Code § 8-19-5 "causes monetary damage to a consumer". Ala Code § 8-19-10 (a) (1975).

50. Ms. Browning should have gotten forty percent (40%) off of the "Always" price, because that is the regular price of the goods. As such, she has been injured in the amount of \$52.19. Similarly, Mr. Phillips should have gotten 40% off of the "Always" price. He has been injured in the amount of \$23.40.

51. It is not just the items that Ms. Browning and Mr. Phillips purchased that employ this scheme. Hobby Lobby employs the "coupon" and "permanent sale" schemes on many items, and has throughout the class period. Exactly which items have been sold in this fashion are readily ascertainable from Hobby Lobby's records.

52. Plaintiffs have provided Hobby Lobby with their written demand for relief reasonably describing the foregoing unfair and deceptive practice that caused them to suffer injury, and Hobby Lobby has failed to respond to Plaintiffs' demand.

53. As a result of Hobby Lobby's unlawful conduct, Plaintiffs and class members have suffered damage, and will likely suffer additional injury if Defendant's conduct continues.

WHEREFORE, Plaintiffs, on behalf of themselves, and the class described above, demand damages, including statutory damages where applicable (to be trebled

or otherwise increased as permitted by the respective jurisdiction's applicable law), costs, attorney's fees and such other and additional relief deemed appropriate by this court.

COUNT III
**(Class Claim under the Illinois Consumer Fraud and
Deceptive Trade Practices Act)**

54. Plaintiff Mary Carrara incorporates by reference, as if fully set forth herein, paragraphs 1 through 32, above.

55. This case is brought by Representative Carrara on behalf of the Illinois Consumer Fraud and Deceptive Trade Practices Act Subclass, pled at paragraphs 32-39 above. The Illinois Consumer Fraud and Deceptive Trade Practices Act is contained at 815 Ill. Comp. Stat. 505/1 (2016) *et. seq.*

56. The Illinois Consumer Fraud Act states that “methods of unfair competition or deceptive acts or practices ... in the conduct of any trade or commerce are hereby declared unlawful whether any person has in fact been misled, deceived, or damaged thereby ...” 815 ILCS 505/2.

57. The same code section specifically enumerates as an unfair or deceptive act, “any practice described in Section 2 of the ‘Uniform Deceptive Trade Practices Act.’” 815 ILCS 505/2.

58. Section 2 of the Uniform Deceptive Trade Practices Act catalogues a number of practices as deceptive, following the Uniform Deceptive trade Practices Act. 815 ILCS 510/2. Included in the list of deceptive trade practices is a person making “false or misleading statements of fact concerning the reasons for, existence of, or amounts price reductions.” 815 ILCS 510/2(a)(11). This language mimics the language in the Alabama Act, as well it should when both are patterned after the model act.

59. Like Ms. Browning and Mr. Phillips, Mrs. Carrara should have gotten 40% off of the “Always” price that is the “regular” price of the goods, instead of 40% off of the “never” price, which cannot be considered the “regular” price of the goods. Because Hobby Lobby represents that customers will get 40% off of the “regular” price of the goods, but in reality gives the 40% discount off of a price at which the goods are never sold, it has made a false or misleading statement regarding the reasons, existence of, or amount of its 40% coupon savings and the “Always” price. A discount off of an illusory price is no discount at all.

60. Neither the Illinois Consumer Fraud Act, or the Illinois Deceptive Trade Practices Act, require reliance, deception, or damages for a breach to have occurred.

- The Consumer Fraud Act states that actions violating the Uniform Deceptive Trade Practices Act are unlawful “whether any person has in fact been

misled, deceived, or damaged thereby.” 815 ILCS 505/2.

- Similarly, the Uniform Deceptive Trade Practices Act states that, “In order to prevail in an action under this Act, a plaintiff need not prove competition between the parties or actual confusion or misunderstanding.” 815 ILCS 510/2(b).

Remedies Under the Illinois Act

61. The Illinois Consumer and Deceptive Trade Practices Acts provide two remedies, by statute, and Mrs. Carrara, on behalf of the Illinois Consumer Fraud and Deceptive Trade Practices Act Subclass requests the following:

- a. Damages: Pursuant to 815 ILCS 505/10a Mrs. Carrara and the subclass she represents have suffered damages as a result of violations fo the Consumer Fraud Act. Those damages are the difference between the 40% discount off of the “Always” price that they should have received, and the 40% discount off of the “never”, largely fictional price that they actually did receive. That remedy is provided under 815 ILCS 505/10a.
- b. Injunctive Relief: The Illinois statutory scheme specifically provides for injunctive relief. The Code states that in an action commenced under the “Action for actual damages” section, the court “may grant injunctive relief where appropriate ...” 815 ILCS 505/10a(c). Moreover, 815 ILCS 510/3 states that, “A person likely to be damaged by a deceptive trade practice of another may be granted injunctive relief upon terms that the court considers reasonable. Proof of monetary damages, loss of profit or intent to deceive is not required.”

62. Mrs. Carrara was likely to be damaged by the violations of the Deceptive Trade Practices Act, and then was damaged.

63. Pursuant to those grants of authority for injunctive relief under the above-referenced sections, Mrs. Carrara, on behalf of the subclass she represents, requests that Hobby Lobby be enjoined from: (a) advertising prices that are a percentage discount off of another price when the goods are never actually sold at that price; and (b) applying discount coupons from a price at which the goods are never sold at.

64. Plaintiffs also demand, under the Illinois Consumer Fraud and Deceptive Trade Practices Acts, the costs of this action, and a reasonable attorneys' fee.

**PLAINTIFF DEMANDS TRIAL BY STRUCK JURY ON
ALL ISSUES SO TRIABLE.**

Respectfully Submitted,

/s/ Brian M. Clark

Brian M. Clark

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Third Amended Complaint has been electronically filed with the Clerk of the Court using the CM/ECF system has been served on the following CM/ECF participant on this 11th Day of November, 2016.

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