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U.S. DISTRICT COURT
N.D. OF ALABAMA

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

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

OPPOSITION TO MOTIONS FOR SUMMARY JUDGMENT

Plaintiffs Robert Browning, as executor of the estate of Diane Browning;[1] and Mary Carrara, on behalf of themselves and the class of persons described in the Fourth Amended Complaint, state the following in Opposition to the Motions for Summary Judgment[2] filed by defendant Hobby Lobby Stores, Inc. ("HL" or "Hobby Lobby").

I. INTRODUCTION

[1] Diane Browning originally brought this case. Doc. 1, p. 1. Unfortunately, Mrs. Browning passed away. A suggestion of death was filed on November 21, 2016, and Mrs. Browning's husband, the executor of her estate, was properly substituted as a party on November 28, 2016. Doc. 40..

[2] Defendant filed two Motions for Summary Judgment, Docs. 55 and 57, and two Memoranda in Support thereof. Docs. 56 and 58. One of the Motions is titled "Motion for Summary Judgment as to the Remaining Plaintiffs' Breach of Contract Claims and as to the Estate's Statutory and Injunctive Relief Claims, Doc. 57, and the other is titled, "Motion for Summary Judgment as to Plaintiff Mary Carrara's Statutory and Injunctive Relief claims. Doc. 55. Because many of the factual and legal issues raised in the two Motions overlap, Plaintiffs' reply to both Motions in this single opposition.

This is a case where national retailer Hobby Lobby widely distributes coupons offering "40% Off One Item at Regular Price" with the intent that customers bring the coupon to one of its retail stores with the expectation that they receive 40$ off of one regular priced item.

Most Hobby Lobby fabrics, and all furniture items, are marked "Always 30% Off". These items, according to Hobby Lobby's Prepricing and Discount Policy, in order to compete with its competitors, are classified internally as "continuous discounts." It is undisputed that these items are always sold at the "Always" price.

Despite the plainly analogous meanings of "Always" and "Regular", Hobby Lobby does not want to offer 40% off of the price the merchandise is actually sold at, it wants to sell this merchandise, with a coupon, at an approximately 15% discount from the price at which the merchandise is always sold.

In order to provide only a 15% discount off of an item, but represent that it is giving the customer a 40% discount, Hobby Lobby creates, literally out of the heads of its buyers, a price it says is based upon, "Comparable prices offered by other sellers for similar products." Except this is not true. Hobby Lobby admits it does no survey, and has no policy to determine what "similar products" are, or what they are sold for. This conduct is definitionally deceptive.

The Regulations describing what are deceptive trade practices in Alabama and Illinois state that it is deceptive to represent a price as "comparable" to other seller unless:

> … he is reasonably certain that the higher price he advertises does not appreciably exceed the price at which substantial sales of the particle 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.

16 C.F.R. § 233.2(a); See, 14 Ill. Adm. Code § 5 470.270(a), 150 (accord). Hobby Lobby has absolutely failed to make such a showing.

Both customers were told by HL's documents that the "regular" prices were the "comparable" prices. Neither Plaintiff had any way to know that Hobby Lobby had no idea what comparable prices were, but paid for 40% off of the merchandise at that price, instead of getting 40% off of the true regular price. This pricing scheme creates liability for breach of contract, and under the Alabama and Illinois Deceptive Trade Practices Acts.

II. FACTS

A. The 40% Off Coupon

Hobby Lobby's 40% off coupons have been continuously disseminated in newspapers, as a phone app, in emails, on the HL website, in coupon books, and other electronic means 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 hereto; Freebern depo., p. 83

The coupon is good for one item at 40% off the "Regular Price". Cconspicuously absent in **any** Hobby Lobby signage or advertisement is any other mention or definition of the term "Regular" as it appears on the coupon. Freebern depo., p. 108. Instead, Ms. Freebern of Hobby Lobby argues that "any person would know that 'regular' actually means 'marked price'. Freebern depo., p. 111.

B. Items That Are Marked "Always" 30% Off.

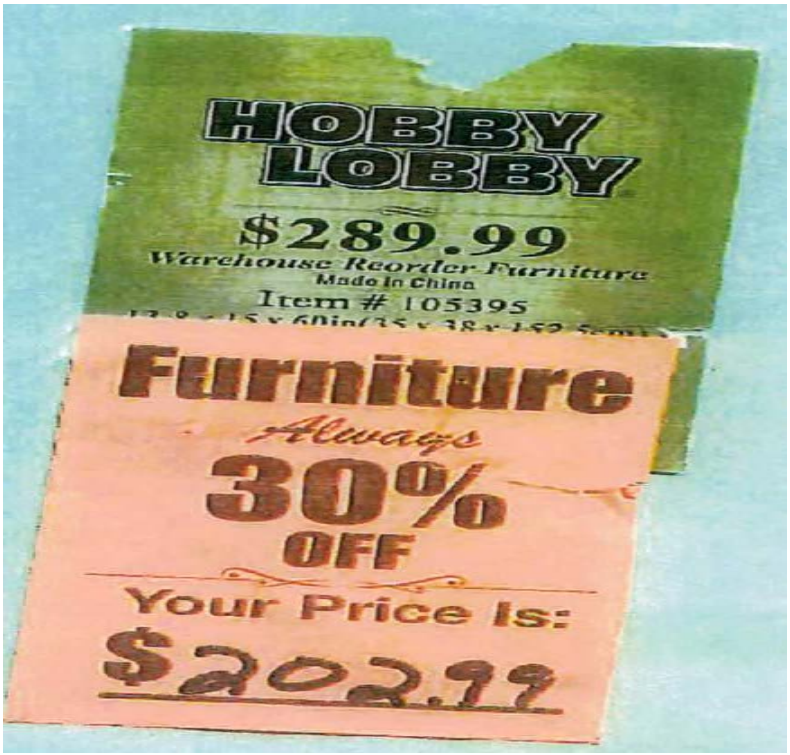
Ms. Freebern cannot recall a time during her tenure at HL where furniture items were not marked "Always 30% Off". Freebern depo., p. 99. This is corporate level policy followed by all stores, Freebern depo., p. 99. Hobby Lobby listed in response to Interrogatory No. 18, Ex. D hereto, a number of items that are marked

"Always 30% Off", including those items plaintiffs Browning and Carrara purchased, i.e., furniture; fleece, home décor, and calico fabrics. See, Freebern depo., pp. 53-54, 57.

1. Furniture

a. 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"[3] price. This uniform tagging policy is depicted on the tags from the Browning item (a small chest of drawers) shown below.



[3] The green sticker price, as explained below, is sometimes referred to herein as the "Never" price because it is never charged to any Hobby Lobby customer. Freebern depo., pp. 91-92.

Ex. E.

The green "Never" price, sometimes referred to by Hobby Lobby personnel deposed in this case as the "undiscounted" price, is a price that is literally made up by Hobby Lobby. 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. Hobby Lobby knows that when the chests like the one Mrs. Browning purchased are shipped from the factory, nobody is ever going to pay that $289.99 price.

> Q. All right. Does anybody ever walk in there and pay two eight-nine ninety-nine for that piece of furniture?
> A. Not that I am aware of.
> 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.

Kinnard depo., Ex. F hereto, p. 68. See, Freebern depo., p. 113.

The price that 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. G.

> Each and every piece of furniture must be hand marked as it is received with the orange 30% off tag. Attach with a stapler. Do not cover up the original price or country of origin.

Ex. H.

HL's representative testified that the reason the green tag price is displayed on the item as it comes from the factory, is to "Show the customer … we are good at our jobs … we go over to China and all these different countries, work directly with the factory, cut out the middle man." Freebern depo., p. 104. Yet for all this supposed efficiency, even though Hobby Lobby has the green sticker tags produced in China to cut costs, Freebern depo., pp. 112-13, it cannot explain why it would then choose to hand write the actual or "Always" price.

> Q. Because instead – the policy says they have to use a black Sharpie marker to neatly write the price; is that correct?
> A. Yes.
> Q. And that is a laborious process, isn't it?
> A. It is.
> Q. And that is man-hours; isn't it?
> A. Yes.
> Q. Y'all are all about trying to cut out the middle man and cut costs?
> A. Right
> 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 off of something.

b. Hobby Lobby's Own Documents Show That The "Always" Price Is Not A Discount.

Hobby Lobby argues that the "Always" priced items are "already discounted by 30%". See, Hobby Lobby Memorandum, Doc. 56, p. 1; Doc. 59, p. 1. However, its own documents show that Hobby Lobby does not even believe this. Hobby Lobby's Pre-pricing and Discount Policy, Ex. I, describes merchandise that is "subject to frequent or continual discounting" by HL's competitors. The Policy calls for HL to similarly, continuously advertise lower prices. The manual 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. I. Hobby Lobby wants the consumer to believe she is getting a "discount" (off of what?), but the item is not on "sale".

This bit of sophistry trickles all the way down to the Hobby Lobby point of sale system. 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 for items "Always" "discounted":

> Q. All right. So, let's say an item – let's say somebody come with a piece of furniture and they don't have a forty percent off coupon, all right?
> A. Uh-huh. Yes.
>
> * * *

Q. And what does the cashier do seeing the thirty percent off tag, orange tag we've been talking off, 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.

In its Order on the Motion to Dismiss, the Court recognized the inherent difficulty in calling something a "discount", when it is never offered at a higher price. The Court stated, "When the allegations are accepted and properly viewed, they provide that the lower price is the "regular" price and should have been the price from which the discount is calculated … [T]he court finds this aspect of the motion to dismiss is without merit." Doc. 37, p. 19.[4]

c. <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 because it rests on a fiction. The issue is not whether the 40% off is to be taken from an undisclosed price.

[4] The Court also rejected the "veiled assertion … that the items were offered at a higher price at some point …" Doc. 37, p. 19. Defendant argued in support of its Motion to Dismiss that, "The timing of when the discount occurs – first day or tenth day – does not detract from the fact that Hobby Lobby has discounted the price of the item (i.e., sold it at a reduced price). And because it has already discounted the price, the express terms of the coupon at issue do not allow the customer to receive another 40% discount." Doc. 37, p. 14. Discovery has revealed that, in fact, the furniture and fabric items made the subject of this case were <u>never</u> sold at the higher price. Kinnard depo., p. 68.

The issue is, what is the "regular price"?[5] As to that question, Hobby Lobby admits that the term "regular price" is not defined at all, and never appears in any of its literature, Freebern depo., p. 108.

To close the loop, Ms. Freebern admitted that Hobby Lobby's literature does not tell customers that the "market price" "non-discounted price", "market value", or any other nomenclature for the "Never" price, is the price at which the item is "regularly" sold at.

> Q. You are not trying to tell the customer that that is a price at which the item is regularly sold at Hobby Lobby for, are you?
> A. We are telling them that is the market price.
> 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. As described below, the "Never" price cannot be understood as the "market value" under the accepted definition of that term.

d. <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

[5] This issue is recognized by the Court, Doc. 37, p. 15, ("allegations provide that the lower price is the 'regular' price and should have been the price from which the discount is calculated.'"); Plaintiffs, Doc. 31, p. 13 ("the questions becomes, 'what is the regular price of the items?'"); and even Defendant, Doc. 38, p. 12 ("Each received 40% off of the regular (not discounted) price of the items they purchased.").

other sellers for similar products." Ex. J. Defendant produced a computer printout entitled "Comparison Shopping Log", Ex. K, containing prices for chests of drawers sold by other retailers as a document used to create the green tag price. HL also produced web pages for other chests of drawers from other retailers. Ex. L., Freebern depo., pp. 117-18. None of the items were priced at $289.99. More importantly, while HL contends that these are documents upon which it based the $289.99 "Never" price for the Browning item, they are dated November 7, 2017, **a week before the deposition**. These web pages **could not** have constituted any sort of comparison for the item Mrs. Browning purchased on April 7, 2016.

None of the items in Hobby Lobby's post hoc survey are priced at $289.99, and it is clear that Hobby Lobby cherry picked "Comparables" that were priced higher than $289.99 from a simple Internet search. Attached are the results of another simple web search that turned up small chests of drawers as similar to the Browning chest as the HL "Survey", priced at $99.99, $132.47, $140.98, $141.99, $168.25, $189.99, and $207.99. Ex. M. No legitimate price survey was done on the Browning item.

The original pricing HL admits **it** sends to manufacturers, Freebern depo., pp. 121-22, is, at best, an educated guess at what a "comparable price" would be for "comparable merchandise." When questioned about how these green tag prices are arrived at, Ms. Freebern admitted, "There is no manual that tells you how to do it,"

and, "There is no formula." Freebern depo., pp. 123-24. Hobby Lobby does not create an average price for comparable items. Freebern depo., p. 124. It relies on the "experience" of furniture and fabric buyers, "We know from experience what the fabric value is or what the furniture value is of certain pieces." Freebern depo., p. 122.

> It is just pretty much knowledge that we have learned as buyers. That is how you kind of do things in the buying world … we do it based on what we know as a perceived market value in all of our studies in the market.

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

> A. … They have prior knowledge of what they purchased that is similar to this in the past years and I was able to retail it for this amount years ago. They know those things.
> Q. In their head?
> A. It is as a buyer, my knowledge and experience as a buyer.
> Q. That's not written down anywhere.
> A. No.
> Q. There is no policy on it?
> A. There is no policy.
> Q. Actually what you are telling me is that the two eighty-nine ninety-nine price was something that a buyer calculated in his head and sent to China?
> A. It is because of their knowledge and their experience as a buyer in that category.
> 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. The textbook definition of "value", as defined, infra, is the price arrived at between a willing seller and a willing buyer. The **only** price meeting that definition, absent coupon use, is the "Always" price.

HL's documents show that it is just as likely that these prices are reverse engineered to compete with prices charged by its competitors using a similar "false discount" scheme. The Pre-pricing and Discount Policy, Ex. I, explains that "In some instances, there are merchandise categories that are subject to frequent or continual discounting by other sellers." Ex. J. Hobby Lobby's response is to similarly "pass along continuous discounts on pre-priced merchandise to customers," Ex. I, by creating their own continuous discounts. Then the reason for this practice is disclosed. It is to "avoid lost sales to other sellers offering discounts." Ex. I.

Because the green tag price is necessarily tied to the "Always" price by mathematics (it has to be 30% of the "Always" price), if the "continuous discount" scheme is aimed at gaining market share by meeting or beating a competitor, as the HL manual states it is, then it is not the product of the amorphous process outlined by Ms. Freebern. It is the mathematical product of matching fictitious discounts given by competing retailers.

2. Hobby Lobby's Pricing Scheme For Fabric Follows The Same Principles.

The pricing scheme relating to fabrics mirrors the pricing scheme for furniture. Calico, fleece and home décor fabrics are "Always 30% Off" the "marked price". Ex. D. Hobby Lobby also defines "marked" in the fabric department as "comparable prices offered by other sellers for similar products," See Ex. I, and agreed that the only time the "non-discounted" price is used for these fabrics is when a 40% coupon is used. Kinnard depo., p. 78.

Just like furniture, the word "regular price" does not appear on any of the tagging or signage for fabrics. Kinnard depo., p. 85. Nor do Hobby Lobby's terms "non-discounted" or "market price". Kinnard depo., p. 85. However, like furniture, nobody actually ever pays that price.

> Q. Okay. Again, to go through this, if it's a calico print or solid and it's marked at four ninety-nine –
> A. Uh-huh.
> Q. -- isn't it true that nobody ever actually pays four ninety-nine for that piece of fabric?
> A. If it's marked with a sign, no.

Kinnard depo., pp. 88-89.

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

On April 7, 2016, Diane Browning purchased a small chest of drawers from the Jasper, Alabama, Hobby Lobby. See receipt, Ex. N; tags, Ex. E. Mrs. Browning passed away, but Mr. Browning, does know that she went out that day to purchase a "jewelry box". Browning depo., Ex. O hereto, p. 47. Mrs. Browning came home and showed Mr. Browning the chest of drawers she bought, and told Mr. Browning

that she saved 40% on the purchase. Browning depo., p. 48. Mr. Browning then asked to see the sales receipt. It was at that time that he, not Mrs. Browning, realized that "there's maybe 10 percent off." Browning depo., p. 48. By that, Mr. Browning meant that the sales tag said "Always" on it, and in his mind "she should have got a discount off of the always price." Browning depo., p. 65. While he was aware that Mrs. Browning did not actually receive a 40% discount, he stated that, "I think she was under the assumption that she got 40 percent off." Browning depo., p. 69.

Mrs. Browning's receipt, Ex. N, and the tags show that the item was tagged according to store policy, Ex. E, Freebern depo., p. 89. As far as Ms. Freebern knows, that policy regarding the redemption for 40% off coupons was used every time a 40% off coupon was redeemed, Freebern depo., pp. 92-93, and she has no evidence that the procedure was not used during Mrs. Browning's purchase. Freebern depo., p. 94.

Hobby Lobby's Pricing Policy Manual, Ex T, "The Coupon-40% key is to be used only when a customer presents a 40% off coupon." Ex. T; 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. There is a specific button for the 40% off coupons, and when it is punched another screen comes up, and the computation is done, Kinnard depo., p. 168, generating a receipt with the information. Ex. N. 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.

Mrs. Browning went to the store with a coupon entitling her to 40% off of the "regular price" of one item. Even if she understood that the "marked price" was a "comparable price offered by other sellers for similar products," she had every right to believe Hobby Lobby when it told her that the marked price truly was reflective of some comparable sale somewhere. The problem is that this is a falsehood, and "marked price" is not the product of any amalgam of "comparable" prices, but merely a fiction created by Hobby Lobby. If she had gotten the actual "regular" price, the price at which property changes hands between a willing buyer and seller, she would have gotten the "Always" price because, unbeknownst to her, **that** is the only price Hobby Lobby is aware of that this product ever sold for.

D. The Carrara Transaction.

Plaintiff Mary Carrara lives in Peoria, IL, and shopped at the Hobby Lobby located there. Carrara depo., Ex. P hereto, pp. 10, 69. Mrs. Carrara felt she was deceived, not on all of her Hobby Lobby purchases, but where the fabrics she purchased were marked "Always 30% Off," and she used a 40% off coupon. Carrara depo., pp. 70-71.

When Mrs. Carrara used a coupon, she would generally clip it from the local newspaper, Carrara dep., pp. 124-25, but occasionally would download it. To use

it, she would hand it to the Hobby Lobby cashier. Carrara depo., pp.82, 148. Mrs. Carrara made purchases of calico, fleece, and home décor fabric marked "Always 30% Off" and used a 40% off coupon on July 14, 2016; July 17, 2016; and July 29, 2016. Carrara depo., pp. 189, 191, 193.

As to the times where Mrs. Carrara purchased "Always 30% Off" fabrics, and used a 40% off coupon, she stated that, had she known that she was not getting 40% off of the everyday price, she would not have made some of the purchases. Carrara depo. p. 210. She knows this because she check[s] periodically "when I go into the fabric stores for prices … and see if another store carries the same fabric, and see if I can get it cheaper." Carrara depo., p. 211.

> Yes and no. I just feel that when they said already discounted – always discounted 30 percent, and then I didn't go to use the 40 percent coupon, to me that was – is deceiving if I don't get 40 percent.

Carrara depo., p. 212. Knowing what she now knows about Hobby Lobby's pricing schemes, she concluded that Hobby Lobby set out to intentionally deceive her. Carrara depo., pp. 220, 221.

The mechanics of Mrs. Carrara's use of the coupons is that she takes fabric off of the wall or table, and takes it to the cutting table. Carrara depo., p. 51. Then the Hobby Lobby "fabric lady" cuts the amount of fabric requested. Carrara depo., p. 51. At that point, Mrs. Carrara knows she is going to get 40% off, but does not know which is the "regular" price. She stated, "And if I buy two yards of fabric

that's marked 30% off, I don't know what the real price is." Mrs. Carrara went on to explain, "The way it is advertised is that those fabrics are always 30% off … So what's the real price?" Finally, she sums up her confusion at that point, "I want to know what the real price is, but I don't want it to – I want the 40% to come off whether they advertise it…A fabric that I pull off the wall that says always 30 percent off, that shouldn't have any bearing on the 40% coupon if that is what they consider the regular price." Carrara depo., pp. 54, 56.

Hobby Lobby claims that its signage defining "marked price" as "Comparable prices" tells the truth on this matter. Ex. J. However, discovery has revealed that this is no "price" at all. Nonetheless, Mrs. Carrara's actions were that when Hobby Lobby told her, through its actions upon presentation at the register with a 40% off coupon, that the "regular" price was the higher price, she believed them and paid it. She had no way to know at the time that Hobby Lobby's representation of the "regular" price as "comparable prices" was a falsity.

Mrs. Carrara's deception is apparent from her answer to why she did not try to remedy the situation[6] on her own. "I felt deceived, but I wasn't sure about it, because I didn't – I didn't know what the real price was. So I didn't think I could

[6] Mrs. Carrara stated that Hobby Lobby's policy is that cut fabrics cannot be returned. Carrara depo., p. 74. As such, when the fabric was cut after she pulled the bolt off of the wall, Carrara depo., p. 51, she no longer had the ability to unwind the transaction, and was at the mercy of Hobby Lobby's representation s to what the "regular" price was.

argue a case with them to …" Carrara depo., p. 88. Now she knows that Hobby Lobby claims the "real" or "regular" price is the "comparable price of other sellers for similar products." Discovery has revealed that this representation is a deception, and she should have received the **actual** regular price, which is the "Always" price.

Hobby Lobby presented Mrs. Carrara with its form fabric ticket at her deposition. Carrara depo., p. 132, and she testified that she "usually" received such a fabric ticket filled out by Hobby Lobby personnel at the fabric table, but sometimes just got a "little slip" from a cash register. Carrara depo., p. 132. This fabric ticket was filled out after the fabric had already been cut, and she never filled out this fabric ticket herself. Carrara depo., p. 142. The Hobby Lobby "fabric lady" would total up the price to be paid on the ticket. Carrara depo., p. 143. Mrs. Carrara would then take the fabric ticket and her coupon up to the register, and pay. Carrara depo., p. 143, 148.

Hobby Lobby claims this form exonerates it because the "Never" price is put in a column labelled "Regular" price, and the "Always" price appears in a column labelled "Reduced" price. The truth is that this fabric ticket only multiplies Hobby Lobby's deceptions because it cannot justify one deception by reference to terms in its fabric ticket that are definitionally deceptive.

First, the form states that it is for "Sale & Clearance Fabrics". This is deceptive, and HL knows it. HL's Prepricing and Discount Policy, supra, Ex. I,

directly forbids representations using any media in the way HL now urges the fabric ticket to be read. The manual says that HL "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: avoiding use of the term **sale** in the print ads, electronic ads, and store signs." Ex. I. That is **exactly** what Hobby Lobby has done by placing "Always 30% Off" fabrics on this particular ticket. It deceptively labels the "Always" price as a "Sale" price.

Second, the Regulations concerning the terms "Sale" and "Regular" set forth by the Illinois Attorney General defining deceptive acts define the deception. The

> It is an unfair or deceptive act for a seller to use such terminology as "sale", "sale prices", "now only $" or other words and phrases that imply a price savings unless the price of the product is reduced by a reasonable amount from the product's former (regular) price as determined in accordance with Section 470.220 of this Part.

14 Ill. Adm. Code 470.290. The Regulations similarly declare Hobby Lobby's use of the term "Regular" to describe a price that is **never** charged as deceptive.

> It is an unfair or deceptive act for a seller to current price with its former (regular) price for any product or service … unless one of the following criteria are met: (a) the former (regular) price is equal to or below the price(s) at which the seller made a substantial number of sales of such products in the recent regular course of its business; or (b) the former (regular) price is equal to or below the price(s) at which the seller offered the product for a reasonably substantial period of time in the recent regular course of its business, openly and actively, and in good faith, with an intent to sell that product at that price(s).

14 Ill. Adm. Code § 470.220. If HL contends that Mrs. Carrara should have relied upon terms "Sale" "Discount" or "Regular" on its fabric ticket, then it is asking Mrs. Carrara to rely upon definitionally deceptive practices. That is the sine qua non of a deceptive trade practices action.

An example of HL's pricing scheme is exemplified by Mrs. Carrara's July 14, 2016, purchase of a calico (always on sale) fabric. Carrara depo., p. 186. Ex. Q hereto. The receipt shows that she purchased three yards of calico (always on sale) fabric marked at $8.99 per yard (receipt lists $26.96 as beginning price, that number can only be arrive at by multiplying $8.99 by three). The receipt shows that HL applied the 40% coupon to the $26.96 price, for a total price to Mrs. Carrara of $16.18. Ex. Q. If HL had applied the **actual** regular price, it would have applied the 40% off coupon to three times the "Always 30% Off" price of $6.29, or $18.88. The application of a 40% off coupon to the actual regular price would have resulted in a charge for Mrs. Carrara of $11.33, a difference of $4.85.

III. ARGUMENT

A. Summary Judgment Standard.

Summary judgment can only be granted if everything in the record demonstrates that no genuine issue of material fact exists. Reese v. Herbert, 527 F.3d 1253, 1271 (11th Cir. 2008).

B. Both Plaintiffs Have Stated A Breach of Contract Claim.

The elements of a breach of contract claim are: (1) a valid contract binding the parties; (2) Plaintiffs performance of that contract; (3) the defendant's non-performance; and (4) damages. Shaffer v. Regions Fin. Corp., 29 So.3d 872, (Ala. 2009); Sheth v. SAB Tool Supply Co., 990 N.E.2d 738, 756 (Ill. App. 1st 2013). In order to prevail on a breach of contract claim, a contract must have been formed between the parties. The requirements for contract formation are: an offer, acceptance, consideration, and mutual assent to the essential contract terms. Id., quoting Ex Parte Grant, 711 So. 2d 464, 465 (Ala. 1997); Fries v. United Mine Workers, 338 N.E.2d 600, 604 (Ill. App. 1975). Defendant's argument seems to be that there was no contract formation because the parties interpret contract terms differently. Doc. 59, p. 22. In truth, there was mutual assent, and any ambiguity in the contract is for a jury to determine.[7]

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

A contract is formed where there is "an offer on one side to perform the contract, and an acceptance on the other, and the minds meeting, and that forms a contact." Landers v. Ramey, 16 So. 2d. 785 (Ala. 1944). In this case, a paper passed

[7] 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. Ward v. Check Into Cash of Alabama, Inc., 981 So.2d 434, 439 (Ala. 2007).

from Hobby Lobby to Plaintiffs outlining the terms of a proposed contract was accepted according to the terms of that offer. See, Shell Petroleum Corp. v. Bruce, 160 So. 527 (Ala. 1935) (a contract may be formed by accepting a paper continuing terms), and Plaintiffs accepted it by presenting the coupon at the register, per the condition of the offer.

The terms of that offer, accepted by Plaintiffs, 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.

Hobby Lobby's Manual states that a coupon must be presented at the register.[8] Ex. R. This begins the process for generating a receipt, and is to be used every time a coupon is used, Freebern depo., pp. 92-93. There is no evidence that the coupon was not presented at the register in either the Browning or Carrara transactions. Freebern depo., p. 94; Carrara depo., pp. 124-24, 148.

Neither Plaintiff attempted to use more than one coupon per visit, with another coupon or on a "previous purchase". The dispute is whether Plaintiffs received a discount on the "regular price" of the furniture/fabrics; and whether they attempted to use the coupon in conjunction with another "discount".

[8] Hobby Lobbby's coupon is only good for in store purchases. Exs. C, R.

2. Ambiguity In Contract Terms Does Not Obviate Mutual Assent.

The parties dispute the meaning of the term "regular price". A disagreement over the terms "regular price", "Always 30% Off", or "discount", does not defeat contract formation. "An ambiguity in a contract does not automatically make the contract void for uncertainty or invalid for lack of mutual assent. Once the trial court determines that a contract is ambiguous, it is for the jury to determine the true meaning of the contract." Ex parte Conway, 767 So.2d 1117, 1119 (Ala. 2000). "Indeed, ambiguity in the written language of a contract generally is not, in and of itself, a ground for not enforcing the contract." Cain v. Saunders, 813 So.2d 891, 905 n.4 (Ala. Civ. App. 2001).

In Lilley v. Gonzalez, 417 So.2d 161 (Ala. 1982), a purchaser of property brought an action for specific performance. The seller filed a motion for summary judgment arguing that the contract had never been formed because "there was never a meeting of the minds on the 'due on sale' clause" of the contract." Lilley, 417 so.2d at 163. The Alabama Supreme Court held:

> Gonzales's argument is premised upon a misconception of the time-honored phrase "meeting of the minds." It is true that there is no contract unless the parties assent to the same thing and in the same sense. But if one seeks to convey his meaning by expressions importing something different, or attaches to the proposition of the other a significance not authorized, whatever injury may result from the misunderstanding [**6] must be visited upon him. *Thompson v. Ray*, 46 Ala. 224 (1871). Stated another way, the law of contracts is premised

> upon an objective rather than a subjective manifestation of intent approach.
>
> * * *
>
> Agreement consists of mutual expressions; it does not consist of harmonious intentions or states of mind. . . .
>
> * * *
>
> [One] 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 expected." A. Corbin, *Corbin on Contracts* § 9 (1952).

Lilley, 417 So.2d at 163. The Lilley Court remanded the case for a jury trial regarding the proper meaning of the disputed terms. Similarly, the construction of the disputed terms in this case is a jury question.

3. Determination of True Meaning of Contract Terms Is A Jury Question.

Defendant does not dispute that Plaintiffs manifested assent. However, the dispute as to just what Plaintiffs assented to precludes summary judgment.

> … However, if the terms within the contract are ambiguous in any respect, the determination of the true meaning of the contract is a question of fact to be resolved by a jury.

Conaway, supra, quoting McDonald v. U.S. Die Casting & Dev. Co., 585 So.2d 853, 855 (Ala. 1991).

This exact issue was raised by Defendant in its Motion to Dismiss, Doc. 27-2, where it argued, "Plaintiffs … own pleadings establish that they received the full 40% discount allowed by the coupon they used … Their claims is that they should have received another 40% off of the already discounted price of their purchased items … By any reasonable definition of 'discount', items already purchased at '30% off' would certainly constitute a discount." Doc. 28, pp. 12-13. This argument is re-hashed in this Motion where Defendant argues, "[T]he regular price is the 'marked price' and the coupon could not be used to obtain an additional 40% on items that are always discounted by 30%." Doc. 59, p. 22.

The Court rejected this argument at the motion to dismiss stage.

> The defendant argues that the plaintiffs' contract claim cannot survive the motion to dismiss because they each received the benefit of their bargain – "a 40% reduction off of the regular or full price of the items they purchased, which constituted an additional 10% savings off of the items that were already discounted by 30%." (Doc. 28 at 13).
>
> * * *
>
> The plaintiffs respond that the relevant question is "What is the regular price of the items?"… An item cannot be at a "discount" when it is "Always" sold at that price. That is no discount at all…
>
> * * *
>
> When the allegations are accepted and properly viewed, they provide that the lower price is the "regular" price and should have been the price from which the discount is calculated.

Doc. 37, pp. 13-15. The facts are unchanged here.

4. Because This Contract is Capable of Construction It Does Not Fail, and Its True Meaning Is A Jury Question.

"Not every ambiguity will make a contract void for uncertainty, or invalid for lack of mutual assent. As Judge Cardozo stated in Heyman Cohen & Sons, Inc. v. M. Lurie Woolen Co., 133 N.E. 370, 371 (1921) 'Indefiniteness must reach the point where construction becomes futile.'" Ex parte Conaway, 767 So.2d at 1117. In this case, the first canon of contract construction shows that the contract can be construed. "Intention must be gathered from the language used. The object of constructing a contract is to ascertain the intention of the parties, and that intention is to be determined from the language used in the instrument and not from any surmises that the parties intended certain conditions which they failed to express" Harrison v. Harrison 63 N.G.2d 283. (Ill. App. 2nd 1945).

"It is elementary that it is the terms of the written contract, not the mental operations of one of the parties, that control its interpretation."[9] Harbison v. Strickland, 900 So.2d 385, 391 (Ala. 2004), quoting Kinnon v. J.P. King Auction Co., 276 So.2d 569, 570 (1973). In construing those terms, a "court should give the terms of the agreement their clear and plain meaning and should presume that the parties intended what the terms of the agreement clearly state." Turner's West Ridge

[9] While not specifically incorporated into the contract, once ambiguity within the contract is found, extrinsic writings may be used to ascertain the meaning of contract terms. Rime-Shalten Dev. Co. v. Birmingham Cable Comms., 569 So.2d 332, 334 (Ala. 1990); McCarthy v. Ill. Cas. Co., 408 Ill. App. 3d 526, 535 (Ill. App. 3d 2011).

Apartments, Inc., 893 So.2d 332, 335 (Ala.2004). The question becomes "What is the regular price?"

Websters 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. Freebern depo., pp. 91-92. On the other hand, the orange "Always 30% Off" tag price is, like it says, always charged, absent a 40% off coupon. "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, not a price that is never charged.[10]

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 dictionary definition of "discount", used as a noun, 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 demand for the green tag price because that price is never demanded. Such a price is not a counting off of a price asked because

[10] For a further understanding of how the commercial law views these terms in light of a deceptive trade practices act claim. See Sections C and D, below, construing 16 C.F.R. §§ 233 et seq., and 14 Ill. Adm. Code § 470, et seq.

the green tag price is never asked. A price "Always" charged is not taken off or deducted from anything. Under the dictionary definition, a price "Always" charged cannot a "discount".

5. **Plaintiffs Have Properly Chosen To Affirm The Contract, and Bring This Action For Damages.**

Accepting receipts showing the computations of Hobby Lobby does not constitute acceptance of Hobby Lobby's construction. It has long been held that, "Ordinarily, a party has an election of remedies, to affirm the contract and sue for damages for the breach of warranty, or to rescind the contract, return the property, and seek a refund of the consideration paid. Kilborn v. Henderson, 37 Ala. App. 173, 178 (1953) (automobile purchase); Brown v. Freeman & Bynum, 79 Ala. 406, 410 (1885) ("[M]odern and, in our opinion, the better view, … . The purchaser may elect to rescind within a reasonable time, and return the subject matter of the sale; or he may retain it, and avail himself of the damage he has suffered …"); Lempa v. Finkel 663 N.E. 2d 158, (Ill. App. 2d Dist. (1966) (Doctrine of election of remedies in a contract action allows for a party to rescind the transaction, or affirm it and sue for damages); Jackson v. Industrial Bd. Of Illinois, 280 Ill. 526, 531 (1917) (Under election of remedies doctrine, party may affirm a contract and sue for damages rather than sue for the rescission of the contract).

Plaintiffs could have rescinded. However, at their election, they retained the goods and sue for damages. There is no inconsistency in that position. Additionally,

as argued at length below, Hobby Lobby's position is that "regular" means "marked prices", which are defined as "comparable prices". Discovery has revealed that to be untrue. At the time that Mrs. Browning and Mrs. Carrara received their receipts and walked out with their merchandise, they had no way of knowing that, and even if they brought the merchandise back to Hobby Lobby for a refund, they would not have received the benefit of the bargain they made when they presented the coupon for 40% off of the **true** "regular Price". They would have been denied that bargain. Retaining the merchandise and bringing this action is the only way that Browning and Carrara can enforce the bargain they made.

C. Browning Has Stated A claim Under The ADTPA.

Plaintiff Browning brings a claim under the Alabama Deceptive Trade Practices Act ("ADTPA" or "the Act") Ala. Code § 8-19-1 (1975) et seq. There are very few decisions construing the ADTPA, however, there are two relevant sources of substantive law: (1) Federal Trade Commission ("FTC") interpretations of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1); and (2) Decisions construing other states' Deceptive Trade Practices Acts, based on the Uniform Deceptive Trade Practices Act, ("UDTPA"), containing nearly identical language.

1. The Claim Under The ADTPA.

Browning's claim is that Hobby Lobby advertises and marks furniture items with artificially inflated fictitious prices, never sold by it, or any other retailer. In

further violation of the ADTPA, Hobby Lobby offers percentage discount coupons stating that they entitle the customer to 40% off of the "regular price" of one item. Hobby Lobby then computes the 40% from its artificially created, higher, price, instead of taking it off of the price that the item is "Always", or one might say "regularly" sold at. This is a violation of the ADTPA, at 8-19-5(11), which states that it is unlawful and deceptive to make "a false or misleading statement of fact concerning the reasons for, existence of, or amount of, price reductions."

2. The ADTPA Specifically Gives "Great Weight" To FTC Interpretations of The Federal Trade Commission Act.

The Act states that, "It is the intent of the Legislature that in construing § 8-19-5, due consideration and great weight shall be given where applicable to interpretations of the Federal Trade Commission and the federal courts relating to Section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)), as from time to time amended." Ala. Code § 8-19-6 (1975).

The Federal Trade Commission Act, 15 U.S.C § 45 (a) (1), states that, "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices, are hereby declared unlawful." The FTC uses that authority to promulgate rules and interpretations as to what is an "unfair or deceptive" act or practice.

> (T]he Commission is empowered to promulgate trade regulation rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce … A violation of a rule shall constitute an unfair or deceptive act or practice in violation

> of section 5(a)(1) of that Act, unless the Commission otherwise expressly provides in its rule.

16 C.F.R. §1.8.

3. The F.T.C. Has Promulgated Two Regulations Showing Precisely That Hobby Lobby's Actions Are Deceptive.

a. "Former Price" Advertising Deception.

Hobby Lobby's former 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 may argue 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 to use a "former" price never charged is deceptive, the Regulation expands the scope of the Regulation. "Other illustrations of fictitious price comparisons could be given. An advertiser might use a price at which ne 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 jewelry chests that cost less than

$202.99, (presumable HL makes a profit on the "Always" price)). "His regular price is $7.50" (HL's regular price for jewelry chests is $202.99). "In order subsequently to offer an unusual 'bargain', Doe begins offering Brand X at $10 per pen." (HL begins offering jewelry chests at $289.99). 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 $202.99 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 chest, even for a few days, at $289.99. 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). The Regulation even uses the term "Regularly" to state that merchandise can only be described as "regularly" priced at a certain level if it was actually sold at that price. In this case, the "Always" price is a

fictitious one that HL admitted was simply made up in the heads of its personnel.

b. "Comparison Price" Deception.

Hobby Lobby now claims 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 particle 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 advertised….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. [Guide II]

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[11] 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 Jasper, Alabama, prior to pricing the Browning chest of drawers. It did not. Ms. Freebern testified that, literally, the "green tag" price is

[11] 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 international in scope. Such prices cannot be said to be sales made "in the area" of Mrs. Browning's Jasper, Alabama, purchase.

calculated in the head of some buyer for Hobby Lobby, who then sends it to China to affix to the item. Freebern depo., pp. 137-39.

Similarly, "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. Hobby Lobby has no idea what comparable merchandise sells for near Jasper, Alabama. 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.

4. Mrs. Browning Has Actual Damages.

The ADTPA provides for a private cause of action where an unlawful action "causes monetary damage to another person … for [a]ny actual damages sustained by the consumer, or person, or the sum of $100, whichever is greater …" Ala. Code § 8-19-10(a)(1). The monetary damage is clear and easily calculable. The "Never" price of the jewelry chest was $289.99. Hobby Lobby applied the 40% of coupon to that price, and she was charged $173.99. Ex. N. Had the coupon been applied to the actual, regular price of $202.99, she would have only paid $121.99. The differences between the products of those two calculation sis $52.20. Those are Mrs. Browning's damages.[12]

[12] This case is materially different from those cases where a plaintiff sues a retailer for a "permanent sale", but there is no coupon involved. If a consumer pays $7.00 for an item that a retailer deceptively states is sold at a 30% discount from $10.00, the representation is still deceiving, but

5. Hobby Lobby Did Make False Statements To Mrs. Browning.

Defendant cites Jackson v. CIT Group/Sales Fin., 630 So.2d 368 (Ala. 1993), for the proposition that an ADTPA claimant must "prove essential fraud elements". This is not what this case holds. In Jackson, the plaintiffs financed a mobile home, and alleged that at the closing of the transaction they asked the defendant's representative if the note they were signing could be assumed by a third party in the event of a sale, and the representative said it could. When the plaintiffs went to sell the mobile home, the potential buyer was rejected by the lender. The facts were that the agreement the plaintiffs signed said, "ASSUMPTION – Someone buying my commodity may, subject to the conditions, be allowed to assume the contract …" Jackson, 630 So.2d at 370. The court granted summary judgment, holding that the defendant's representative had not said anything false (for the purposes of the fraud claim in the case), or deceiving ("misrepresented terms of the contract") in stating that the contract was assumable. On its face, the contract **was** assumable, "subject to conditions," i.e., approval of the proposed assuming party. The defendant's representative did not say that the note was "assumable without conditions; or

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the $10.00 price does not translate into what he actually pays for the item. In this case, the deception creates a different price than would have been charged without it. Using the example above, the deception, combined with use of a 40% off coupon from the deceptive price, creates a final price of $6.00, as opposed to a final price of $4.20 (40% off of the actual regular price).

assumable under any circumstances," he made a true and facially accurate statement that that contract was assumable.

That is not the case here. In this case, Hobby Lobby made two objectively deceptive statements: (1) The statement in the coupon that the 40% would be taken off of the "regular" price (when the 40% was actually taken off of a price the item never sold for at Hobby Lobby, or anywhere else); and (2) that the $289.99 was a "comparable price offered by other sellers for similar products," when under FTC interpretations, such a statement is deceptive unless the retailer has knowledge of actual merchandise in the area sold at that price or higher. Hobby Lobby has made no efforts to do this work, and under the FTC interpretation referenced above, without such knowledge, the statement is deceptive.[13]

The reference to the store signage is most curious. The coupon says 40% off of "regular" price. Reference to a "marked" price does nothing to define regular. However, the tag itself that states "Always 30% Off" indicates that "Always" means

[13] Defendant's reliance on Lynn v. Fort McClellan Credit Union, 2013 U.S. Dist. Lexis 151021 (N.D. Ala. Oct. 21, 2013), is similarly misplaced. In Lynn, the customer complained of a misalignment of numbers on the Retail Buyer's Order in an automobile transaction led him to believe that a processing fee was another fee related to the transaction. The Court held that this was a bona fide mistake in dismissing the plaintiffs TILA Claim, and that the plaintiff suffered no damages because the total price paid was laid out on the form, before he signed it, and he knew exactly what he was to pay when he agreed to the "final price." That is indeed what he paid. In the instant case, HL's pricing scheme is no "mistake". It is planned. Also, Mrs. Browning thought she was getting 40% off of $202.99, when she presented the chest at the register, and instead got 40% off of $289.99, which, as explained above, damaged her in the amount of $52.20. In one case, the plaintiff paid what he expected to pay. In the other, he paid more than he expected to pay.

regular. In either case, the question of whether a particular statement is deceiving is ordinarily one of fact, not suitable for summary judgment.[14] Udell v. Kan. Counselors, Inc., 313 f. Supp. 2nd 1135, 1145 (D. Kan. 2004) (Kansas version of UDTPA), Patterson v. Beal, 19 B.3d 839, 847 9Okl. 2000) (whether a practice is unfair is a fact question); Siever v. BW Gaskets, Inc., 669 F. Supp.2d 1286, 1293 (M.D. Fla. 2009) (whether a particular conduct is unfair or deceptive is a question of fact): Gaddy v. Galarza Motor Sport, L.T.D., 2000 U.S. Dist. Lexis 13881 at * 9 (N.D. Ill. 2000) (Illinois Act). Taken together, the documents are deceptive at both levels. First, the term "regular" would lead one to believe that [s]he is getting a discount off of the price the item is "regularly" sold at. This turned out to be untrue. Second, under the FTC interpretation, calling something a discount when it: (a) has never sold at a higher price at Hobby Lobby; and (b) Hobby Lobby never even made an attempt to determine a true "comparable" price, is textbook deceptive.

Defendant's reliance upon Tudor v. Jewel Food Stores, 681 N.E.2d 6 (Ill. App. Ct. 1997) is misplaced. The complaint in Tudor was that a grocery store's scanned and charged register prices were higher than advertised or "shelf" prices. The Court

[14] The Uniform Deceptive Trade Practices Act has been adopted by both Alabama and Illinois. Ala. Code § 8-19-1 et seq., and § 15 Ill. Comp. Stats. 510/1 et seq.. In particular § 2(a) of the Uniform Act states that, "A person engages in a deceptive practice when, in the course of his business, vocation, or occupation, he: does any of the following …. The Uniform Act then enumerates a list of acts deemed deceptive. The Uniform Act's § 2(a)(11) ("Makes false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions) is incorporated verbatim by Ala. Code § 8-19-5(11), and § 15 ILL. Comp. Stat. § 501/2 (11). The cases referenced above are from states also adopting the Uniform Act.

held that the plaintiffs had 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' according to the Law and Regulation Committee of the National Conference of Weights and Measures." Tudor, 681 N.E.2d at 8. In the present case, the governmental entity charged with overseeing whether commercial transactions are deceptive has specifically found actions like Hobby Lobby's to be deceptive.

The Court did not find that in order to make such a claim, one must show an intent to deceive. Illinois law is clear that "an intent to deceive" is not essential to a finding of unfair or deceptive conduct under Section 2 of the Consumer Fraud Act. People ex rel. Hartigan v. Stianos, 131 Ill. App. 3d 575, 579 (Ill. App. 2 Dist. 1985); Duhl v. Nash Realty, Inc., 102 Ill. App.3d 483, 495 (1st Dist. Ct. App,. 1981), ([I]t is well established that under the Act the intention of the seller (his or her good faith) is not important and a plaintiff can recover under the Act for an innocent misrepresentation."); American Buyers Club, Inc. v. Honecher, 361 N.E. 2d 13790, (Ill. App. Ct. 1977) (intention of seller not important).

The reference to intent in Tudor is taken right from the statutory language, i.e., an "intent that others rely on the concealment." The question is not whether the seller intended to make a false statement, but whether the seller intended the purchaser to rely on the statement at all. And then if it turns out that the statement is false, liability attaches. In Tudor, the Court held that because the scanners had such a high accuracy rate, and because a receipt was provided, "plaintiff has failed to adequately plead the first prong of a Consumer Fraud Act violation, defendant's acts were deceptive or unfair."

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** Mrs. Browning could have looked at to reveal that the "comparable prices offered by other sellers for similar products" was a fiction. So she took Hobby Lobby's word for it, and paid what HL claimed to be 40% off of the "regular" price. Had she gotten 40% off of the "regular" price, she would have saved $52.20.

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 The Hobby Lobby receipt allows a customer a store credit, exchange, or refund. However, the customer does not retain the merchandise. Had Mrs. Browning returned the item, she could have gotten her money back, but she would not have gotten the benefit of the bargain represented by Hobby Lobby. The intentions of the two refund programs are entirely differently. 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. The Hobby Lobby refund program says, "If you disagree with our deception, you can return the merchandise, and it will be as if you never came to the store. But we **are not** going to give you the benefit of the bargain we misrepresented to you under any circumstance." Jewel's programs belies an intent to give the customer better than she 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.

Defendant's reliance on Great Atlantic & Pacific Tele. Co., 502 S.E.2d 785 (Ga. App. 1978) also misses the mark. In that case, "After the cashier rang up the items without the discount, Agnew asked about the promotion and was told the sale

only applied to certain items. Agnew then paid the full price" with full knowledge that he would not get the discount. In the present case, Mrs. Browning did not know she did not receive a 40% discount off of the "regular" price because she believed that HL told her that regular price was a price it had calculated as "comparable" to other retailers in the area. Based on that representation, she paid HL what it asked for. That turned out to be plain false. Mrs. Browning did not know she had been deceived until she came home, and told her husband she had gotten a 40% discount. It was only then that he told her that she had gotten "maybe 10% off." Browning depo., p. 15.

Reliance on Agnew, also fails due to a distinct difference to the way the Georgia courts treat deceptive trade practices actions. The Georgia courts have held that its act, "Specifically incorporates the 'reliance' element of the consumer law tort of misrepresentation with the causation element of an individual claim, which in turn means 'the claimant is not entitled to recover if he had an equal and ample time to ascertain the truth but failed to exercise due diligence to do so.'" Agnew, 232 Ga. App. at 709.

The Alabama courts have specifically separated a common law fraud claim from an ADTPA claim. The Sam Court rightly noted that, "The ADTPA, § 8-19-5 et seq. is a consumer protection statute designed to punish persons that engage in deceptive trade practices. An ADTPA claim has a different purpose than a common

law fraud claim aimed at compensation of victims. See, Ex parte Lewis, 416 So.2d 410, 417 (Ala. 1982) ("If the fraud was committed, and is proven according to the rules of law, the plaintiff is entitled to recover such damages as will compensate her for the loss …"). Recognizing the different orbits the separate causes of action operate in, the Sam Court stated that the "statutory provisions in §8-19-5 are designed to have limited application, and are intended to replace the common law and statutory actions for fraud only in specifically designated situations." Sam, 685 So.2d at 744.

Those specifically designated situations include §8-19-5(11). The questions becomes, where the deceit falls within those specifically designated situations, are the common law fraud requisites necessary to a cause of action? The answer is provided by the specific guidelines for interpretation which state that, "due consideration and great weight shall be given where applicable to interpretations of the Federal Trade Commission and the federal courts relating to Section 5(a)(1) of the Federal Trade Commission Act." These interpretations and decisions emphatically hold that common law reliance is not an element of a deceptive trade practices act claim. "A § 5 claim simply is not a claim of fraud as that term is commonly understood … unlike the elements of common law fraud, the FTC need not prove scienter, reliance, or injury to establish a § 5 violation." FTC v. Freecom Comms., Inc., 401 F.3d 1192, 1203, n.7 (10th Cir. 2005). The 11th Circuit puts a

finer point on the particular type of reliance that is necessary in a deceptive trade practices action. "A presumption of actual reliance arises once the [FTC] has proved that the defendant has made material misrepresentations, that were widely disseminated, and that consumers purchased the defendant's product." McGregor v. Chierico, 206 F.3d 1378, 1382 (11th Cir. 2000), citing FTC v. Figgie Int'l, Inc., 994 F.2d 595, 605-06 (9th Cir. 1993).

"State legislatures beginning in the early 1960s enacted broad new measures to compliment the Federal Protection of deceptive practices." Blue Cross & Blue Shield of N.J., Inc. v. Phillip Morris, Inc., 178 F.Supp.2d 198, 239 (E.D. N.Y. 2001), See Ala. Code § 8-19-2 (1975), ("The public health, welfare and interest require a strong and effective consumer protection program to protect the interest of both the consuming public and the legitimate business person.") Those state enactments (modeled after the UDTPA like Alabama) create separate private rights of action. "Some statutes completely revamped old common law obstacles to fraud suits. Many discarded causation and privity requirements and discarded reliance and intent elements." Blue Cross, supra. Those state statutes enacted in the wake of the recognition of a need for consumer protection departed from common law tort actions.

> The absence from the foregoing discussion of any mention of the common law action for fraud and deceit is entirely intentional. … As numerous FTC cases have made clear, the definition of an actionable "unfair or deceptive act or practice" goes far beyond the scope of the

> common law action for fraud and deceit. To cite only a few distinctions, in the statutory action proof of actual reliance by the plaintiff on a representation is not required, *United States Retail Credit Assn. Inc.* v. *Federal Trade Commn.* 300 F. 2d 212, 221 (4th Cir. 1962), and it is not necessary to establish that the defendant knew that the representation was false, *Montgomery Ward & Co.* v. *Federal Trade Commn.* 379 F. 2d 666, 670 **[*704]** (7th [***28] Cir. 1967). The § 9 claim for relief is the creation of that statute. It is, therefore, sui generis. It is neither wholly tortious nor wholly contractual in nature, and is not subject to the traditional limitations of preexisting causes of action such as tort for fraud and deceit.

Slaney v. Westwood Auto, Inc., 366 Mass. 688, 704-04 (1975)

> In Davis, Judge Padavano recognized that the Florida Deceptive and Unfair Trade Practices Act provides a cause of action "against a party who has engaged in 'unfair or deceptive acts or practices in the conduct of any trade or commerce,' but it does not define the elements [**23] of such an action." Id. at 974 (citing § 501.204(1), Fla. Stat. (1999)). "Instead, the statute provides that the Florida courts must give 'due consideration and great weight' to Federal Trade Commission and federal court interpretations of section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C § 45(a)(1). See § 501.204(2), Fla. Stat. (1999)." Id. Federal decisions provide that "a deceptive practice is one that is 'likely to mislead' consumers." Id. (citing In re Int'l Harvester Co., 104 F.T.C. 949 (1984); In re Cliffdale Assocs., Inc., 103 F.T.C. 110 (1984); Sw. Sunsites, Inc. v. FTC, 785 F.2d 1431 (9th Cir. 1986)). According to Judge Padavano, however, "this standard does not require subjective evidence of reliance, as would be the case with a common law action for fraud." Id.; see also State, Office of Atty. Gen., Dept. of Legal Affairs v. Wyndham Int'l, Inc., 869 So. 2d 592, 598 (Fla. Dist. Ct. App. 2004) ("A deceptive or unfair trade practice constitutes a somewhat unique tortious act because, although it is similar to a claim of fraud, it is different in that, unlike fraud, a party asserting a deceptive trade practice claim need not show actual reliance on the representation [**24] or omission at issue."); Latman v. Costa Cruise Lines, N.V., 758 So. 2d 699 (Fla. Dist. Ct. App. 2000) ("It is sufficient if a reasonable person would have relied on the representations."). Thus, in a FDUTPA action "the question is not whether the plaintiff actually relied on the alleged deceptive trade practice, but whether the

> practice was likely to deceive a consumer acting reasonably in the same circumstances." Id.

Jovine v. Abbott Labs, Inc., 795 F.Supp2d 1331, 1342 (S.D. Fla. 2011). The Alabama courts follow the great majority of courts considering UDTPA enactments in separating them from traditional common law fraud claims. But in any case, Mrs. Browning did rely on Hobby Lobby's statement that the "marked price" was a "comparable" price in paying the price calculated therefrom. This turned out to be a falsehood.

6. Both Plaintiffs' Deceptive Trade Practices Claims Are Far More Than Breach of Contract Claims.

Mr. Browning and Mrs. Carrara are permitted to pursue both a breach of contract theory, and a deceptive trade practices act theory under the Rules of Civil procedure allowing the pursuit of multiple claims. Fed. R. Civ. P. 8(a) (party may join either an independent or alternate claims, as many claims … as the party has against an opposing party). A plaintiff may even (although it is not the case here) pursue alternative, inconsistent theories of liability. Fed. R. Civ. P. 8 c)(2). In this case, the facts support recovery on both a breach of contract theory, and an ADTPA claim.

It is true that every breach of contract does not give rise to ADTPA liability. For instance, had Mrs. Browning or Mrs. Carrara paid for their merchandise, but then Hobby Lobby simply failed to deliver it, they would have a breach of contract

claim, or perhaps a claim under Article 2 of the Uniform Commercial Code. That is not the case here. Hobby Lobby made representations that fall directly within the ambit of those practices described as deceptive in 8-19-5(11). It represented to Mrs. Browning that it would give her 40% off of the regular price of one item with the presentment of its coupon with full knowledge that the price it was going to give Mrs. Browning the 40% off was not its "regular" or "Always" price, but a price at which the item "never" sold at. Hobby Lobby represented to Mrs. Browning that the "Never" price was a "comparable price" offered by other sellers for similar products without having any clue whether this was true.

Similarly, Mrs. Carrara's claims are far more than breach of contract claims. Greenberger v. GEICO General Insurance Co., 631 F.3d 392 (7th Cir. 2011), and Avery v. State Farm Mutual Auto Ins. Co., 835 N.D.2d 801 (Ill. 2005), stand for the proposition that where allegations of consumer fraud arise in a contractual setting, the plaintiff must prove that the defendant engaged in deceptive acts or practices distinct from the underlying breach of contract." Greenberger, 392 F.3d at 399. Mrs. Carrara has met this burden. Her breach of contract claim is that Hobby Lobby did not take her 40% off of the "regular" price of the fabric, as the term is commonly understood. Her deceptive trade practices act claims are based upon the fact that representations made to her to make her pay the price she paid are textbook deceiving.

- Representing something as a "regular price without ever having charged it is deceiving. 14 Ill. Admin. Code § 470.220.

- Representing something as "comparable' to other prices charged in the marketplace when the seller has no basis for making such a claim is deceiving. 14 Ill. Admin. Code § 470.270.

This is far more than failure to live up to contractual promises.

7. The Estate Is Entitled To Injunctive Relief.

Hobby Lobby entered into a consent decree with the Attorney General of the State of New York in July of 2014. Ex. S. Hobby Lobby did not change its practices. Prior to filing her action, Diane Browning, pursuant to Ala. Code § 8-19-16(e), wrote a letter of complaint. Ex. T. Hobby Lobby has not changed its practices. On June 7, 2016, this action was filed. Hobby Lobby did nothing to change its practices. On December 30, 2016, former plaintiff Wendy Calma sent a letter to Hobby Lobby complaining of these practices. Hobby Lobby did nothing. Ex. U. On October 2, 2017, the Court in Chase v. Hobby Lobby Stores, Inc., 2017 U.S. Dist. Lexis 162909 (S.D. Cal. Oct. 2, 2017), denied in part, and granted leave to amend the Complaint in its decision regarding Hobby Lobby's Motion to Dismiss a case based upon the allegation that the "marked price" on its merchandise is a total fiction. It is obvious that Hobby Lobby will not change its practices unless a court orders it to.

"If plaintiff demonstrates that effective legal relief can be secured only be a multiplicity of suits, actions as, for example, when the injury is of a continuing nature

… [or] if defendant's acts pose a threat to some unique property interest … the court may issue an injunction." Moore v. Walter Coke, Inc., 294 F.R.D. 620, 632 (N.D. Ala. 2013). Hobby Lobby's actions are continuing, and it is clear that without an injunction, the conduct will continue.

D. Mrs. Carrara Has Stated A Claim Under The Illinois Consumer Fraud And Deceptive Trade Practices Act.

Defendant cites Davis V. G.N. Mortg. Corp., 396 F.3d 869, 883 (7th Cir. 2005) for the elements of a damage claim under the Illinois Consumer Fraud and Deceptive Trade Practices Act ("ICFA"), and then argues that in order to make out a cause of action under ICFA, a plaintiff must prove traditional common law fraud elements. This is not so, and the Davis Court itself says it is not so. Right after listing the elements cited in Defendant's Brief, the Davis Court states, "[T]he ICFA does not require a plaintiff to 'show actual reliance' or diligence in ascertaining the accuracy in mis-statements." Davis, 396 F.3d at 883, quoting Zimmerman v. Northfield Real Estate, Inc., 510 N.E.2d 409, 417-18 (Ill. App. Ct. 1986).

"The Act is a regulatory and remedial statute intended to protect consumers … It eliminated many of the common-law fraud elements creating a new cause of action that affords consumers broad protection. Rockford Mem. Hosp. v. Havrilesko, 368 Ill. App. 3d 115, 121 (Ill. App. 2d Dist. 2006). In addition to departing from the common law fraud reliance requirement, contrary to the assertions of Defendant, "An intent to deceive is not essential to the finding of unfair

or deceptive conduct under Section 2 of the Consumer Fraud Act." People ex. rel. Hartigan v. Stianos, 131 Ill. App. 3d 575, 579 (Ill. App. 2d Dist. 1985); Duhl v. Nash Realty, Inc., 102 Ill. App. 3d 483, 495 (7th Dist. Ct. App. 1981)("[I]t is well established that under the Act the intention of the seller (his or her good faith) is not important and a plaintiff can recover under the Act for an innocent misrepresentation."). Rather, "To make a case under the Illinois Act, the plaintiff must prove that the defendant (1) engaged in a deceptive act or practice; (2) while the intent that a party (including the consumer) rely upon the deception, (3) while engaged in trade or commerce. B. Sanfield, Inc. v. Finlay Fine Jewelry Corp., 168 F.3d 967, 976 (7th Cir. 1999). Under the statute an individual who suffers actual damage as a result of a violation of this Act has a cause of action for damages." 815 ILCS § 505/10a(a). Each of these elements have been met.

1. Whether the Acts Were Deceptive Is A Question of Fact.

In determining whether false charges placed on telecommunications billing violated the ICFA, the Court in Saltzman v. Enhanced Svcs. Billing, Inc., 348 Ill. App. 3d 740, 776 (Ill Dist. App. 7th 2004), held that, "the terms 'deceptive' and 'unfair' [are] not capable of precise definition, and whether a given practice [is] unfair or deceptive must be determined on a case-by-case basis. Saltzman, 348 Ill. App. 3d at 700, quoting, People ex rel. Hartigan v. Stianos, 131 Ill. App. 3d 575, 581 (Ill. 2nd Dist. App. 1985) (terms "unfair" and "deceptive" are not capable of precise

definition). The case by case determination as to whether an act is unfair or deceptive has been determined to be a question of fact around the country. [15]

In addition to mandating that consideration be given to the FTC Regulations in the same fashion as the Alabama Act does, the Illinois Act empowers the Illinois Attorney General, "to accomplish the objectives and carry out the duties prescribed" by the Act. Under those powers, the Illinois Attorney General may "promulgate such rules and regulations as may be necessary, which rules shall have the force of law." 815 ILCS § 505/4. Exercising this authority, the Illinois Attorney General has promulgated Regulations stating that, "The use of misleading price comparisons is injurious to both the consuming public and competitors and is an unfair or deceptive act and an unfair method of competition under Section 2 …" 14 Ill. Adm. Code § 470.110.

The Illinois Administrative Code states, like its Federal counterpart, that comparisons to another retailer's price are deceptive unless based upon some proof of actual comparable retail prices charged.

> It is an unfair or deceptive act for a seller to compare his price with the price at which he or any other seller is offering a

[15] See, e.g., Fayne v. Vincent, 301 S.W.3d 162, 170 (Tenn. 2009) ("Whether a particular act is unfair or deceptive is a question of fact."); Incase, Inc. v. Timex Corp., 421 F. Supp.2d 226,239 (D. Mass. 2006) (Whether conduct is unfair or deceptive is a question of fact); Dodson v. U-Needa Self Storage, 32 Kakn. App.2d 1213, 1216 (Kan. Ct. App. 2004) ("The issue of whether a deceptive act or practice, within the meaning of the KPCA, has occurred is a question of fact.").

> comparable product (for example: "69, compare at $99", "Comparable value $99") unless:
>
> **a)** The comparable product is currently being offered at the stated higher comparative price by the seller or by a reasonable number of other sellers in the sellers' trade area or another seller(s) specifically named in the ad; and
>
> **b)** There are no substantial differences in quality, grade, materials, or craftsmanship between the comparable product and the product offered by the seller; and
>
> **c)** If the comparable product is sold by the seller, the comparative price is determined in accordance with Section 470.220 of this Part.

14 Ill. Adm. Code § 470.270.

The burden is placed on the seller to show that the comparable product is currently being offered at the stated higher comparative price by the "seller or by a reasonable number of other sellers in the seller's trade area …" 14 Ill. Admin. Code § 470, 270(a). Hobby Lobby has abjectly failed to make such a showing. Hobby Lobby creates its "Never" prices for fabric in the same haphazard way it creates its "Never" furniture prices.

> Q. Is it the same process for fabric buyers as it is for furniture buyers?
> A. Yes.
> Q. They are not going to do the comparison until the product is already bought, correct? The comparison like Plaintiff's Exhibit 14.
> A. The actual written down saved format is not done until afterwards.
>
> * * *
>
> Q. There is no formula?

A. There is no formula.
Q. There is no averaging of any retail prices in the market done?
A. No.
Q. There is just a buyer using their judgment as to what it ought to be?
A. Right. Based on the market value.

* * *

Q. Are you saying that the buyers simply use their judgment in comparison with other products to put a, quote, marked price on it?
A. Yes.

Freebern depo., pp. 139-140, 142. The Regulation, "does not simply suggest that a comparison to the regular price **might** be misleading if substantial sales have not been made, or attempted at that price. The Regulation unequivocally states that the comparison **is** misleading unless one of those criteria is met." B. Sanfield, Inc., 168 F.3d at 924. Hobby Lobby's practices, by definition, are deceptive.

2. **Hobby Lobby Intended That Mrs. Carrara and Others Rely On The Deceptive Statements.**

It is self evident that Hobby Lobby intends for customers like Mrs. Carrara to rely upon its statements. HL disseminates coupons through newspaper circulars, on its website, and on phone applications. HL wants people to believe that if they present the coupon, they will get 40% off of the regular price of the items. The fact of the matter is that the 40% off they get is off of a price that is not charged to anyone, anywhere.

Defendant has equated "regular price" with "marked price". This comparison, like the comparison with "comparable prices of comparable merchandise charged by comparable sellers" is also, in and of itself, deceptive.

> It is an unfair or deceptive act to claim an actual savings from a "list price", "manufacturer's suggested retail price", or term of similar meaning unless the "list price" is the price at which the product is offered by a reasonable number of sellers in the seller's trade area (for example: "List Price $ 99, our price $ 69, save $ 30.00). However, a seller may reference a list price in relation to its regular price as long as no savings are claimed and the seller discloses that the list price may not necessarily be the price at which the product is sold in the trade area.

14 I11. Admin. Code § 470, 270. Hobby Lobby intends for consumers like Mrs. Carrara to rely on these "comparable" representations.

Freebern depo., p. 139 (same process applies to fabrics).

3. Neither Party Disputes That HL's Actions Occurred While it Was Engaged In Trade Or Commerce.

The third element of a claim under ICFA is undisputed.

4. Mrs. Carrara Was Damaged.

ICFA provides for a private right of action for any "person who suffers actual damage as the result of a violation of this Act." Mrs. Carrara has suffered actual damages because she acted upon Hobby Lobby's representation that, if she presented their coupon, she would get 40% off of the "regular price" of her fabric purchases.

Now that the true facts are known, Mrs. Carrara did not get 40% off of the "regular price" of any item. She got 40% off a price that under Illinois law, was a deception.

When Mrs. Carrara walked into the store to purchase fabrics, she "always uses[s] the 40% off coupon." Carrara depo., p. 49. She certainly would have a reasonable expectation of receiving 40% off of the "regular price" as that term is commonly understood. Hobby Lobby's own formulation of "regular" is that the term is defined by its signage. Hobby Lobby equates "marked price" with "regular price." Hobby Lobby then argues that "marked price" is defined by the language contained in the asterisk portion of its signage stating "Marked Prices Reflect Comparable Prices Offered by Other Sellers for Similar Products." Except this is not true. Not only is it not true, but under Ill. Adm. Code § 470. 270, it is deceptive by definition.

Under Hobby Lobby's formulation, Mrs. Carrara was entitled to 40% off of what other retailers charge for similar products. She did not get that, and the burden, under Illinois law is on Hobby Lobby to show that its statement of "comparability" is true. She got no such bargain. The only evidence of record as to what any retailers sold the same or similar merchandise for is Hobby Lobby's own price.[16] Under 14

[16] Hobby Lobby cannot escape this argument by stating that the "comparable price" cannot be a price HL charges (on "Always") price. The Regulations state that, "If the comparable product is sold by the seller, the comparative price is determined in accordance with Section 470.220 of this part." That section reads, "the former (regular price is equal to or below the prices) at which the seller offered the product for a reasonably substantive period of time in the recent regular course

Ill. Adm. Code 470.220, supra, taken directly from the statute, the "regular" price cannot be the "comparable" price because there is no record of Hobby Lobby, or any other retailer, selling these goods at those prices. The only price that meets the definition is the "Always" price. But Mrs. Carrara did not know this when she purchased fabric at HL.

Putting this into the concrete facts of this case, when Mrs. Carrara went to Hobby Lobby on July 14, 2016, she bought three yards of flannel fabric that had a "Never" price of $8.99 per yard. Carrara depo., pp. 186-87, Ex. Q hereto. Hobby Lobby told her that this or comparable merchandise was sold at other retailers for $8.99. If true, the "regular" price would have been $8.99 per yard. Taking HL at its word then, three yards of the fabric sell for $26.96, and 40% of $26.96, is $16.18 This is not what she paid. **However**, it is not true that this flannel was ever sold at $8.99 by any other retailer that Hobby Lobby can point to, and under the Regulations, the only price of record that fabric was ever sold at is $6.29, the "Always" price. If Mrs. Carrara had gotten the "regular" price as that term is defined by the Regulations, she would have gotten 40% off of three yards of flannel fabric sold at $6.29 ($18.87), which would have come to $11.32. The difference between what Mrs. Carrara was represented to be the "regular" price, and what was **actually**

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of its business, openly and actively in good faith, with an intent to sell the product at that price(s)." The only price that meets that definition is the "Always" price.

the regular price, is $4.86, for this transaction. Mrs. Carrara took Hobby Lobby's word for it that she was getting 40% off of the "regular" price, and paid for the merchandise. Had Hobby Lobby taken the 40% off of what was the **actual regular price**, as defined by the Regulations, the 40% off would have been taken off of the "Always" price. Because Mrs. Carrara paid what was deceptively represented to her as the "regular" price of the merchandise, she was damaged.

5. Hobby Lobby's Signage and Advertising Reinforce Plaintiffs' Analysis.

Mrs. Carrara took Hobby Lobby's word that the "regular price" was actually a "comparable" price, and took the 40% off of the price she was told. The true facts are that, by Regulation, the "regular price" was the "Always" price, and under ICFA, she had a right to 40% off of the "Always" price. She was damaged in the amount of the differential between the two.

Defendant cites Clark v. Experian Informatin Solutions, 256 F. App'x 818, 823 (7th Cir. 2007), and Ibarrola v. Kind, LLC, 83 F. Supp. 3d 151 (N.D. Ill. 2015), for the proposition that on ICFA claims, where other information is available to a plaintiff that would reveal the true facts, no cause of action lies. In Clark, the plaintiffs claimed that they were misled into subscribing to a credit reporting service by the representation that the service was "free" and "involved no obligation." The plaintiffs claimed that these representations were deceptive because they were charged money for the service after a month. The claims were dismissed because

the Court found that, had they looked elsewhere on the website, the plaintiffs would have seen where it said that if they did not cancel the service within thirty (30) days, they would be charged $79.99 for an annual description. Similarly, a deceptive labeling case was dismissed in Iberrola because the Court found the plaintiff's could have discovered from looking at the back label information on a drink sold to them, that the product contained "evaporated cane juice", which is a type of refined sugar, to determine that "no refined sugars" did not mean no sugars that had been refined at all.

Mrs. Carrara's case is entirely different. There is no Hobby Lobby sign, advertisement, or circular that would have told her that there actually were no comparable prices, and that Hobby Lobby's statement that its marked prices were "comparable to similar products offered by similar sellers", was a complete fiction.[17]

6. **Hobby Lobby Wrongfully Tries To Engraft an "Intent To Deceive" Requirement Onto An ICFA Claim.**

At p. 17 of its Brief, HL tries to engraft an "intent" requirement that the law does not require. In its Brief, Doc. 56, p. 17, HL argues, "There is no evidence that Hobby Lobby 'intended to deceive' Mrs. Carrara." This is a clear misunderstanding

[17] In Clark and Ibarrola, the true facts were actually contained on the applicable website and label. It does Hobby Lobby no good to argue that Mrs. Carrara could have done her own canvass to discover what the market prices for these items were. First, the Regulations place that burden on the seller making the representations. Second, ICFA does not require "actual reliance", or "diligence" in ascertaining of the accuracy in mis-statements. Davis, 396 F.23d a 883; Zimmerman, 510 N.E.2d at 417-18.

of the law. The case law is legion on holding that "An intent to deceive is not essential to the finding of unfair or deceptive conduct under Section 2 of the Consumer Fraud Act." See, Duhl, supra, (well established that intention of the seller is not important for recovery). Moreover, Mrs. Carrara never challenged Hobby Lobby about the coupon because she had no way, whatsoever, of knowing that there were no comparable sales of comparable merchandise that Hobby Lobby referred to. Under the law she had no obligation to perform HL's market surveys for them. She had the right to take their representations as true. In Tudor, supra, the plaintiff could look at the sales receipt, and look at the shelf price per newspaper ads, and readily see that she had paid more than the advertised price. There was **nothing** Mrs. Carrara could have looked at to let her know that the "comparable price" upon which her discount was taken was a sham, and by definition, a deception.

7. Mrs. Carrara's Loss Was Caused By Hobby Lobby's Deception.

While traditional fraud elements are not necessary in bringing an ICFA claim, it is necessary to show that the deceptive acts caused the damage complained of. Galvan v. Northwestern Mem. Hospital, 382 Ill. App.3d 259, 264 (Ill. App. 1st 2008). That causation has been shown. Hobby Lobby told Mrs. Carrara that she would get 40% off of the regular price of an item. Hobby Lobby told Mrs. Carrara that the regular price was a price charged by comparable sellers of comparable merchandise. So she paid 40% off of that price. If the true facts were known, the

only possible "regular price" for the fabrics was the "Always" price. Had Hobby Lobby been forthright, she would have been charged 40% off of the Always price. Because Hobby Lobby told her (incorrectly), that the regular price was the higher price, she paid it. Had Hobby Lobby not acted deceptively, she would have paid 40% off of the lower price.

This case is not like Camasta v. Jos. A. Banks Clothing Inc., 761 F.3d 732 (7th Cir. 2014), wherein a consumer simply claimed that a "buy one get two free" sale was deceptive. In Camasta, the retailer set forth a price, and the bargain was that the customer would get three shirts for that one price. That is exactly what the customer got. In this case, Hobby Lobby claimed that a customer presenting a coupon entitling her to 40% off would get 40% off of the price "comparable retailers sold comparable merchandise" for. Mrs. Carrara took HL's word for it, and assumed HL was being truthful, so she accepted its pricing scheme. She got no such bargain. She got 40% off of a deception. The true facts are that the only "regular" price was the "Always" price.

The same holds true in the Kim v. Carters' Inc., 598 F.3d 362 (7th Cir. 2016), case cited by Hobby Lobby. In Kim, the court found no damages because the plaintiffs did not allege the clothing was defective, or "was worth less than what they actually paid." In this case, their "value" of the merchandise was artificially inflated so that the plaintiff would not get a discount off of the actual "regular" price, and

would pay more than a 40% discount off of the actual price the goods are sold at. Hobby Lobby has failed to meet its burden to show that any sales were made at the higher price. In fact, it admits that the "Never" prices are not charged to any customer. Kinnard depo., pp. 88-89. What **is** of record is the Hobby Lobby regularly sells these fabrics at the "Always" price. To see that "value" is established by reference to actual sales only takes a rudimentary understanding of economic principles. "The value of the property is the price at which property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell, and both having reasonable knowledge of the relevant facts." 26 CFR 25. 2512-1 – Valuation of Property) in general. The fabric **never** changes hands at the "comparables" price. The record shows that it "always" changes hands at the "Always" price, absent a coupon. The inescapable conclusion is that Mrs. Carrara's 40% off price was higher than 40% off of the actual value or "what the fabric was worth" as established by Hobby Lobby's own pricing and sales practices.

8. Mrs. Carrara Has A claim For Injunctive Relief.

The Illinois Consumer Fraud and Deceptive Trade Practices Act ("ICFA") is codified at 815 I.L.C.S. § 8505/1, et seq. That statutory enactment provides a civil action for damages at 815 I.L.C.S. § 505/100, as discussed supra. ICFA incorporates into its provisions those acts and practices enumerated and deemed deceptive by 815

I.L.C.S § 510/2 when it states that, "The use or employment of any practice described in Section 2 of the "Uniform Deceptive Trade Practices Act" [815 I.L.C.S. § 510/2] in the conduct of any trade or commerce are hereby declared unlawful whether any person has been misled, deceived or damaged thereby." 815 I.L.C.S § 505/2.

In addition to its provision for a damages action for individuals under 815 I.L.C.S § 505/10a, ICFA provides that the Illinois Attorney General may pursue an injunction to prevent harm by violations of practices declared unlawful by the Act (including those enumerated deceptions in 815 I.L.C.S § 505/2. It is clear that this is the Illinois Attorney General's avenue for an injunction preventing deceptive trade practices.

However, the Uniform Deceptive Trade Practices Act, proper, creates a different species of injunction from the ICFA injunctive provision applying to the Illinois Attorney General. It states:

- 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 damage, loss of profits or intent to deceive is not required. Relief granted for the copying of an article shall be limited to the prevention of confusion or misunderstanding as to source.
- Costs or attorneys' fees or both may be assessed against a defendant only if the court finds that he has willfully engaged in a deceptive trade practice.

- The relief provided in this Section is in addition to remedies otherwise available against the same conduct under the common law or other statutes of this State.

815 I.L.C.S § 510/3. Mrs. Carrara has sewn her entire life, and she has continued to sew and purchase fabric through today. Carrara depo., pp. 24, 196. She certainly falls within the category of a person "likely to be damaged by a deceptive trade practice." Id.

Defendant ignores the plain language of the statute and argues that Mrs. Carrara cannot obtain injunctive relief, only the Illinois Attorney General can to that. This is not so under a simple reading of the statute. The statute states that "A person … may be granted injunctive relief: upon a showing that she is likely to be damaged by a deceptive trade practice. Mrs. Carrara is a person. Similarly, Defendant's argument that an injunction is not available to Mrs. Carrara because of the Attorney General's injunctive cause of action at 815 I.L.C.S. § 505/7 runs headlong into the plain statutory language that the relief provide under this section "is in addition to remedies otherwise available against the same conduct under the common law or other statutes of this State." That is what the statute says.

Contrary to the assertion of Defendant that 815 I.L.C.S § 510/7 is only available to commercial claimants, "injunctive relief is obtainable by an individual consumer where that consumer can allege facts that he likely would be damaged by the defendant's conduct in the future." Arch v. Teller, Levit & Silvertrust, P.C.,

2003 U.S. Dist. Lexis 16747 at * 19 (N.D. Ill. September 23, 2003), citing Smith v. Prime Cable, 658 N.E. 2d 1325, 1331 (Ill. App. 1st 1995). In Arch, the plaintiffs were allowed to go forward with claim upon proof of an ongoing business relationship with the defendant. Id.

In this case, Mrs. Carrara has continued to shop at Hobby Lobby. She has continued to shop there because she has sewn her entire life, and in Peoria, Il, there really is only one other fabric option, Jo-Ann. Mrs. Carrara has testified that Jo-Ann's is higher priced, and the two outlets carry different merchandise. Her testimony on this point is important because she **will** likely be harmed in the future. In Demedicis v. CVS Health Corp., 2017 U.S. Dist. Lexis 19589 (N.D. Ill. February 13, 2017), the plaintiffs claim for injunctive relief was dismissed with leave to amend to plead facts that he is likely to keep buying products with knowledge of the deception. Mrs. Carrara has alleged exactly those facts. She is likely to continue shopping at Hobby Lobby for lack of any other options.

IV. CONCLUSION

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

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CERTIFICATE OF SERVICE

A copy of the foregoing Opposition To Motions for Summary Judgment has been served via operation of the Court's electronic filing system this the 7th day of February, 2018, upon:

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