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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.	)	

PLAINTIFFS' SUR-REPLY ON MOTION FOR SUMMARYJUDGMENT

Plaintiffs submit the following as their Sur-Reply to pp. 2-5 of Defendant Hobby Lobby Store, Inc.'s Reply Brief on Summary Judgment.

A. Plaintiffs Short and Plain Statement of the Facts Has Remained Consistent.

Federal R. Civ. P. 8, requires "only a short and plain statement … showing that the pleader is entitled to relief 'in order to give the defendant fair notice of what the claim is and the grounds upon which it rests.'" Harris v. Bd. Of Trustees of Univ. of Ala., 846 F.Supp2d 1223, 1235 (N.D. Ala. 2012). Plaintiffs have pled:

1. "Hobby Lobby's 'regular' price is an artificially inflated price at which the merchandise has never been sold by Hobby Lobby. Rather, it is a fiction created by Hobby Lobby." Doc. 49, ¶ 10.

2. "By advertising and purporting to offer discounts that are not actually provided for its customer, Hobby Lobby violated the common law and the various State consumer protection laws…" Doc. 49, ¶ 12.

3. "Hobby Lobby's own information shows that this [regular] price is anything but 'regular' … [T]he 'Regular' price is the price at which an item is 'regularly' sold, … not an artificial price that does not correspond to any sale of the item made by Hobby Lobby." Doc. 49, ¶ 19.

4. Finally, Plaintiffs explicitly state that it is deceptive to represent as the 'regular' price of goods a price that is never charged, alleging, "Because Hobby Lobby represents that customers will get 40% off of the "regular" price of the goods, but in reality gives the 40% discount off of a price at which the goods are never sold, it has made a false or misleading statement regarding the reasons, existence of, or amount of its 40% coupon savings and the 'Always' price. 'A discount off of an illusory price is no discount at all.'" Doc. 49, ¶ 62.

The allegation has consistently been that the deceptions are to tell customers they get 40% off of the "regular" price merchandise is "always" sold at, and then to only give them 40% off of another, fictional price. It was Defendant that tried to explain this away by arguing that Plaintiffs were "exposed to various information sources that would have disabused [plaintiffs] of that notion." Doc. 56, p. 6. Hobby Lobby argued that "regular" actually means "marked price", defined as "comparable prices offered by other sellers for similar products." It was Defendant who insisted that the allegedly deceptive act "must be looked upon in light of the totality of the information available ... ." Def's. Brief, Doc 56, p. 15.

If HL's summary judgment position is that "regular price" is defined as "comparable prices offered by other sellers for similar products", Plaintiffs may argue that the applicable Regulations specifically state that such statements are

deceptive unless actually true. Plaintiffs are entitled to point out that the signage is deceptive under the applicable Regulations.

The pleadings reflect this by alleging causes of action under Ala. Code § 8-19-5(11), and 815 ILCS § 510/2(a)(11) for making a "false or misleading statement regarding the reasons, existence of, or amount of its 40% coupon savings and the 'Always' price." Doc. 49, ¶ 62 (emphasis in original). Plaintiffs merely point out that, by Regulation, if a retailer is going to make such a statement on "comparables", it must meet certain criteria. This does not change the base allegations that calling something a "regular" price is deceptive when that price is artificial.

B. The Cases Cited by Defendant Are Clearly Distinguishable.

The claims in the case continue, without interruption, to be breach of contract; and claims under Ala. Code § 8-19-5 (1975), and the Illinois Consumer Fraud Act, 815 ILCS 505/2. Plaintiffs cite those sections of the Alabama and Illinois Deceptive trade Practices Acts, Ala. Code § 8-19-5, and 815 ILCS § 505/4, which specifically refer to FTC Regulations and the Regulations promulgated by the Illinois Attorney General, to "define with specificity acts or practices which are unfair or deceptive acts or practices …" 16 C.F.R. § 1-8; See also, 14 Ill. Admin. Code § 470.110 (Illinois Attorney General may "promulgate such rules and regulations as may be necessary").

The Regulations specifically define acts which are violations of the actual statutes, i.e., "false or misleading statements of facts concerning the reasons for, existence of, or amounts of, price reductions." Ala. Code § 8-19-5(1), 815 ILCS § 510/2(a)(11). **Defendant** has insisted the "comparable" language is a "reason for" its price, citing a number of cases where the court refused to allow plaintiffs to assert new claims in response to summary judgment. In Gilmour v. Gates, McDonald & Co., 382 F.3d 1312 (11th Cir. 2004), the plaintiff brought promissory estoppel, bad faith, infliction of emotional distress, and tortious interference claims. In response to summary judgment, the plaintiff asserted a new "breach of contractual duty" claim. The Court held that the plaintiff "may not raise a contractual claim" for the first time on a reply. Gilmour, 382 F.3d at 1315. These are cases where a new legal cause of action was set forth in response to summary judgment. No "new claim" has been raised here. The legal claims remain breach of contract and violations of Ala. Code § 8-19-11, and 815 ILCS § 805/2. The Administrative Regulations cited only explain how the substantive provisions of the ADTPA and ICFA are violated where Hobby Lobby tries to justify as "regular", prices that have never been charged. This is not the assertion of a "new" claim.

WHEREFORE, Defendant's argument on this point should be rejected.

/s/ Brian M. Clark
Brian M. Clark
Attorney for Plaintiffs

WIGGINS CHILDS PANTAZIS
FISHER & GOLDFARB, LLC
The Kress Building
301 19th Street North
Birmingham, Alabama 35203
Telephone: (205) 314-0530
bclark@wigginschilds.com

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

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

CERTIFICATE OF SERVICE

A copy of the foregoing has been served via operation of the Court's electronic filing system this the 4th day of April, 2018, upon:

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

/s/ Brian M. Clark
Brian M. Clark

Of Counsel