PUBLIC

Tribunal File No. CT-2002-004

THE COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.S.C., 1985, c.C-34, as amended;

AND IN THE MATTER OF an inquiry pursuant to subparagraph 10(1)(b)(ii) of the *Competition Act* into certain marketing practices of Sears Canada Inc.;

AND IN THE MATTER OF an Application by the Commissioner of Competition for an order pursuant to section 74.1 of the *Competition Act*.

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

-and-

SEARS CANADA INC.

Respondent

AFFIDAVIT OF DR. DONALD LICHTENSTEIN

I, Donald Lichtenstein, of the City of Boulder, in the State of Colorado, United States of America, MAKE OATH AND SAY:

1. I am a professor of marketing at the Leeds School of Business, at the University of Colorado in Boulder.

2. Attached hereto and marked as Exhibit "A" is a true copy of my evidence pertaining to the Constitutional Question. The contents of Exhibit "A" and the opinions expressed therein are to the best of my knowledge, information and belief.

3. Attached hereto and marked as Exhibit "B" is a true copy of my evidence pertaining to the Deceptive Marketing Case. The contents of Exhibit "B" and the opinions expressed therein are to the best of my knowledge, information and belief.

4. Attached hereto and marked as Exhibit "C" is a true copy of my Curriculum Vitae.

5. Exhibit "A" and Exhibit "B" of this affidavit are identical to Exhibits "A" and "B" to the affidavit I swore in this matter on September 22, 2003, except for the fact that they are now double-spaced.

6. I make this affidavit pursuant to Rule 47(1) of the *Competition Tribunal Rules.*

SWORN BEFORE ME, at the City of	)
Toronto, in the Province of Ontario,	)
this 10th day of October 2003.	)
	)

J.Patel

COMMISSIONER OF OATHS
(TRUPATI PATEL, LSUC# 46784G)

Donald Lichtenstein

DONALD LICHTENSTEIN

1.

THIS IS EXHIBIT "A" TO THE AFFIDAVIT OF DR. DONALD LICHTENSTEIN, SWORN BEFORE ME THIS 10TH DAY OF OCTOBER, 2003.
J. Patel
(TLOPATI PATEL)
COMMISSIONER OF OATHS (LSUC# 46784

Opinion of Donald R. Lichtenstein in the matter of the Commissioner of Competition v. Sears Canada Inc.

<u>Section 1 Report</u>

I. INTRODUCTION

1. This opinion relates to the question of a seller's own ordinary selling prices (OSPs).[1] OSPs are prices used by some retailers in their advertising as a means of promoting the sale of a given product and their commercial interests generally. OSP advertising entails advertising a current selling price that is accompanied by a higher OSP.
2. In the following advertisement – "Acme Store: Save 25% on widgets – Acme regular price $100, sale price $75," $100 is the price that Acme implies to be the OSP at which it sells widgets.
3. By using an OSP advertisement, the advertising retailer attempts to motivate the consumer to compare or contrast the lower sale price against the seller's OSP. The essence of an OSP is the notion that, whereas a consumer would ordinarily have to pay a certain sum to obtain a given product, while the product is on sale, normally for a limited duration, the consumer can obtain the product for a lesser amount by purchasing the item from the advertising retailer. Thus, the consumer can save money and realize a "good deal," in the example in paragraph 2, the consumer can purchase a $100 widget for $75.

4. My opinion in this matter proceeds as follows.

   a. I first address certain market mechanisms in a healthy market economy. Against this, I describe how the misuse of a seller's own OSP advertising can interfere with these mechanisms and lead to an adverse impact on consumers, competitors, and the market economic system in general.

   b. I next address the issue of whether, bearing in mind the market mechanisms and the harm or adverse impacts identified, the legislative response in Canada to a seller's own OSP advertising addresses the misuse of OSP advertising.

   c. Finally, I address the issue of whether or not there exist other, less intrusive legislative responses, which would adequately address the misuse of a seller's own OSP advertising.

II. WHY REGULATE OSP ADVERTISING?

A. The Workings of a Market Economy

5. A fundamental premise of a market economy is that the market operates most efficiently when informed consumers "vote" for brands/retailers with their dollars. When this occurs, price acts as an efficient allocator of resources. Consumers allocate their dollars to products that provide them with the most utility, and producers allocate the factors of production in line with consumer demand, or otherwise go out of business. In this way, consumers dictate what is produced in a market economy and which retailers will provide them with the products. However, when retailer actions provide consumers with inaccurate information,

[1] While opinion and much of the research evidence underlying it relates to OSPs in general (i.e., both a seller's own and market-related), in much of this report I couch my opinion specifically in terms of a seller's own OSP because of its relevance to the present case.

consumers are more likely to vote for products for which they would otherwise not vote because, in reality, the products do not to provide them with the highest quality (in terms of utility, need satisfying ability) for the money. The result is that these retailers (i.e., those providing less actual quality or utility for the money) are financially rewarded with concomitant immediate injury to consumers, competitor retailers, and manufacturers of competitor products. Additionally, and viewed from a more macro-economic perspective, there is injury to the economic system in that resources are not being allocated efficiently, i.e., in a manner that provides the highest utility for the dollar to consumers. The issue at hand is how to address this problem.

6. One school of thought is that, through its own mechanisms, the market punishes retailers that deceive consumers. That is, deceived consumers will become aware of the deception and, this information becoming generally known in the marketplace, consumers at large will refrain from "voting" for those retailers with their dollars, and thus, the retailers will be forced out of business, or at least be forced to alter their business practices. Thus, there are initially only short-term injuries, and as retailers learn of the longer-term consequences of providing deceptive information, they will behave in a more forthright manner. Under this scenario, over time deceptive behavior would cease to be present in the marketplace. If such were the case, the market would police itself and there would be less need for regulatory intervention.

7. However, based on the research cited below in paragraph 16 regarding the powerful influence of OSP advertising, in conjunction with consumer behavior-

and market-related factors that work against consumers learning of the deception, it is my opinion that the market does not operate this efficiently with respect to OSP advertising. The goal of the intervention should be to help provide a retail environment where incentives are aligned such that advertisers do not find it in their financial interest to actively engage in behaviors designed to deceive consumers through the misuse of OSP representations. To the extent this is achieved, consumer expenditures will align more closely with purchases that provide them with higher levels of utility (product need satisfying ability) for the money. I believe that regulatory intervention can provide for such an environment, an environment where all competitors compete on a level playing field and where it is in each business's financial interest to operate in a good faith manner.

1. Good Faith Business Practices in a Market Economy

8. In a market economy, normal business practice is reflected by retailers competing by keeping operating costs as low as possible, buying consumer-demanded products for resale at favorable prices, and relaying valid price and quality information to consumers. Retailers operating in such a fashion need to take several factors into account in setting prices. At a very general level, all of these factors can be classified into one of two categories: costs-based factors and demand-based factors. Regarding the former, in order for a business to survive in the long run, the business must charge prices high enough to cover all costs (fixed

and variable) and make a profit. Therefore, costs really set a floor on what has to be charged for a business to survive in the long run. Demand based factors, also known as market-based factors, tell what prices can be charged, what the market will bear, that is, what consumers are willing to pay for the product. A fundamental principle of economics is that consumers are willing to pay more for a product (are less sensitive to higher prices) to the degree that there is a lack of substitutable competitive products available in the marketplace at lower prices at a time when the consumer desires the product. Consequently, through the "4 P's" of the "marketing mix" (i.e., product, price, place, promotion), retailers operating in a normal fashion attempt to differentiate their offerings from competitors' offerings in the minds of consumers by providing true price and product quality information (albeit perhaps "puffed," e.g., "the best tires money can buy") in an effort to have consumers believe that their offering represents the best quality for the money.

9. Retailers operating in this manner attempt to compete by informing consumers, not misinforming them. To the degree the retailer is able to keep costs low and buy quality merchandise (in the eyes of consumers) at favorable prices, a strategy based on informing consumers can be profitable. These retailers are in a position where they are able to be profitable by relaying valid price and quality information to consumers. The scenario illustrates the basic tenet of a market economy, i.e. informed choice. Informed choice cannot be the "modus operandi" of consumers when retailers provide deceptive information and/or fail to provide information that, by its omission, leaves the consumer with inaccurate beliefs.

10. It should be noted that even retailers operating in normal, good faith manner may sell products to consumers who are misinformed, but it is not in good faith to engage in behaviors that purposefully deceive, mislead, or create less informed consumers. A market economy, if it is working efficiently, should lead to a situation where differences in product and retailer choice across consumers reflect differences in individual tastes and preferences, rather than differences in information. While retailers cannot insure that consumers are all well-informed (i.e., consumers do have some responsibility in a market economy, e.g., comparison shopping, collecting product information prior to purchase), the retailer operating in a good faith manner does not engage in behaviors that have as their purpose the creation of misinformed consumers (e.g., advertising inflated OSPs). That is, the success of a good faith pricing strategy does not hinge on consumers being misinformed or being less informed.

2. Business Practices at Variance with Good Faith in a Market Economy

11. It would not be a good faith business practice to purposefully advertise inaccurate price and/or quality information to the market. It would also not be a good faith business practice to omit providing material information that results in consumer misperception, so that consumers will have a heightened perception of value by purchasing from the advertising retailer, even though their perception does not match reality. Thus, a retailer would not be pursuing a good faith business

strategy if it purposefully relays quality and/or price information on products in a manner that creates a consumer that is less informed or misinformed.

12. One behavior that would be an example of purposefully misleading consumers would be the advertising of exaggerated seller's own OSPs. There is an abundance of research evidence that the average consumer (and even more informed consumers – see Grewal, Monroe, and Krishnan 1998) believes that OSPs featured in advertising relate in some fashion to actual prices charged by retailers, and thus, the lower sale price in these advertisements represents an exceptional value, a real bargain (Blair and Landon 1981; Urbany et al. 1988). Retailers in the practitioner community, including Sears Automotive (see NADM 8648S, "The Guidelines for Savings Claims (continued)"), are well aware of what an abundance of academic research has shown for many years, namely that OSPs have a "powerful" effect on consumer perceptions and behavior, i.e., they do work (research cited below in paragraph 16). This academic research evidence is also consistent with observable sales data in the retailing environment and the widespread use of OSPs by retailers (evidence cited below in paragraphs 22-24).

13. As consumer price perceptions are known to be situation or "context-dependent," it is further outside the domain of good faith to try to affect the context in which the perception of the exaggerated OSP occurs in order to maximize the influence it will have on the average consumer. For example, an advertising retailer may use language that connotes a sense of urgency to consumers such that if consumers do not act on the price offer with some immediacy, that they will lose the opportunity to do so. Language such as "Acme, Reg. $XX, Sale $XX"

connotes a temporary price reduction and as such, if consumers do not act with some immediacy, they will lose the opportunity to enjoy the savings. The perception of price in such a context serves to reinforce the perception of a real bargain. Additionally, a merchant operating in this mode may also be more likely to advertise inflated reference prices for products that do not lend themselves to comparison shopping. Examples of such products would include private label products or brands for which they have unique model numbers so that even if a consumer were motivated to check the validity of the price claim by comparing competitors' prices, they would have trouble in doing so.

14. I should note that these bad faith behaviors are by no means exhaustive. They were selected as examples. The outcome of these behaviors, of course, is that consumers are duped into receiving less value for their money than they were led to believe. It should be emphasized that the offering of poor values (i.e., higher prices and/or lower quality merchandise) is not in and of itself a bad faith market practice. Quality is based on subjective perception and in a market economy, consumers are the ones who decide what is and what is not good quality (hence a "poor" value) and they decide via their votes with dollars which retailers remain in business and which ones go out of business. However, where retailers actively engage in behaviors that create the false impression of a good price and savings by using an inflated OSP, the efficient allocation of resources is impeded by distorted consumer perceptions and the operation of the market system is hindered.

B. <u>Impacts of Exaggerated OSP Advertising on Consumers, Competitors, and the</u>

Market Economy

1. Impact on Consumers

15. Much research supports the conclusion that OSPs affect consumer perceptions of value and subsequent behavior. In this section, the process of OSP perception and the adverse outcomes of exaggerated OSPs on consumer behavior are addressed.

a. The Process of OSP Perception.

16. Consumer perceptions of the value of a purchase are an outcome based on a comparison of purchase price to some "*internal* reference price." For example, if a consumer purchases a product for $10.00 that s/he believes would normally cost $15.00, s/he would perceive the deal favorably. The internal reference price ($15.00 in this example) is that price to which consumers compare offering prices in order to make evaluations of the offering price. Internal reference prices have been hypothesized to possibly relate to a number of different prices, including the price the consumer last paid, price last saw, what the lowest price perceived in the market is, a price the consumer would expect to pay, what a fair price would be, and an arithmetic/geometric mean based on previously encountered prices (see Klein and Oglethorpe 1987 for a discussion of bases of internal reference prices). This list is not exhaustive but for purposes of the present situation, it is not so important as to what serves as the actual basis of the internal reference price.

What is more important is that these bases are positively inter-correlated (e.g., the higher the price last paid, the higher the expected future price) and an abundance of research evidence provides strong evidence that advertised OSPs, including seller's own OSPs, have a positive influence on internal reference prices such that they increase relative to an offering price. When this happens, consumer perceptions of deal value increase (Grewal et al. 1998; Lichtenstein and Bearden 1989; Monroe and Chapman 1987; Thaler 1985; Urbany and Bearden 1989).

17. To illustrate this point, imagine a consumer who, for example, needs a set of tires and perhaps has some vague notion of what a set of four tires may cost (e.g., $250). With this internal reference price in mind, s/he may visit a tire store and find that the EDLP on the store's tires is $300. The consumer may reject this price as too high. However, as this is a bona fide market price and consumer price knowledge is not held with a high degree of confidence, there may be an "assimilation effect" where the consumer shifts his/her internal reference price towards the $300 price. If the retailer is perceived as credible, the consumer may accept the offering price of $300 as a totally appropriate representation of what his/her internal reference price should be, thereby the purchase offer represents a fair deal. Alternatively, the consumer may shift their internal reference price not at all, or in the direction of, but not equal to, the offering price. In these latter cases, the consumer would be more likely to engage in further search rather than purchasing from the advertising merchant.[2]

18. Now consider this same consumer who, instead of being exposed to an everyday low price of $300, is exposed to the same exact tire in the advertised reference

price context of "Acme Reg. $125, Sale $75" (a price where a set of four also equals $300, but the external reference price equals $500). Such an advertisement is designed to encourage consumers to shift their internal reference price upwards where the offering price of $300 is perceived more favorably, thereby increasing the likelihood of purchase. There is much research evidence that higher OSPs ($500) are influential in shifting consumer internal reference prices ($250) more dramatically than if only the higher offering price ($300) were shown in the advertisement (references provided in paragraph 16). Thus, compared to the EDLP situation described above, the consumer would be expected to shift their internal reference price in the direction of the OSP (which is $500), resulting in the internal reference price also increasing relative to the offering price of $300. Often, the resulting internal reference price will exceed the offering price, not only leading to purchase, but also leading to perceptions of "transaction utility," i.e., "I got a great deal" (Thaler 1985).

19. Kaufmann et al. (1994) quote Ayers and Miller (1990) as stating "the ultimate question for the consumer is whether the widget is worth $12. The motive underlying the 'was $20, now $12' deception is that consumers are more likely to think a widget is worth $12 if they hear that it is regularly sold for $20 instead of for, say $15." The overwhelming evidence is that consumers are indeed likely to be more heavily influenced by the higher OSP.

b. <u>OSPs have a Powerful Influence on Consumers</u>.

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[2] Because of search costs, the consumer may still purchase from the advertising merchant even if the

20. The powerful effects of OSP advertising on consumer perceptions have consistently been found across research studies employing differing product categories, contexts, consumer samples, and research methodologies (e.g., Ahmed and Gulas 1982; Bearden, Lichtenstein, and Teel 1984; Berkowitz and Walton 1980; Biswas and Blair 1991; Blair and Landon 1981; Burton, Lichtenstein, and Herr 1993; Grewal et al. 1998; Lichtenstein and Bearden 1988, 1989; Lichtenstein, Burton and Karson 1991; Urbany, Bearden, and Weilbaker 1988, among many many others). Findings from these studies point to the same conclusions, namely, that OSPs do positively influence consumer perceptions of value and purchase intentions from the advertiser, and negatively influence intentions to search the marketplace for a better price (i.e., "I need look no further."). The evidence is further consistent in supporting the notion that the influence of a seller's own OSP on consumer perceptions and behaviors works, in part, by affecting consumer perceptions of market prices. When retailers advertise higher OSPs, consumers believe that prices are higher in the general market area.

21. In my many years of conducting my own research, and reading/reviewing the research of others, the influence of OSPs is one of the most, if not the most, robust effects I have run across. This statement applies not only with respect to the price perception literature, but it applies to the consumer behavior literature at large. Moreover, multiple studies find evidence that even consumers who are skeptical of the validity of OSPs are influenced by them (e.g., Blair and Landon 1981; Urbany et al. 1988). To take a couple examples of findings, Blair and Landon (1981, p. 65) found that "advertisements with reference price claims produced

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offering price exceeds the internal reference price.

responses indicating higher expected regular prices, a larger degree of saving, and a higher estimate of the lowest price around town, all showing increased perceptions of saving." In support of the pervasive effect of OSP advertising, Grewal et al. (1998, p. 54) open their discussion section with "As has been noted, price comparison advertising is a widely used price promotion tactic. Although research investigating issues on the relative effectiveness of this tactic spans nearly 20 years, we are still trying to understand how and why it works."[3]

22. The effects of OSP advertising found in the academic research literature are also very consistent with the widespread use of OSP advertising by retailers, and the increased sales actually realized by retailers when they employ this type of advertising. For instance, Ortmeyer (1991, p. 3) notes that:

> "In the women's coat category, Macy's Northeast adopted everyday low prices in the fall of 1989, and in its advertisements promised to 'cut through all the confusing sales, special buys, and clearances out there' by offering the lowest prices on an everyday basis. Like many retailers who have tried everyday low pricing on a limited basis, however, and have experienced significant short-term

[3] To be sure, there is an isolated study (maybe even a few studies) where researchers have interpreted results in a manner to suggests that reference prices do not have the impact on consumer behavior that those in the price perception research stream generally attribute to them (e.g., Liefeld and Heslop 1985). However, based on the isolated study or two that I have seen, these conclusions are, in my opinion, very questionable due to issues relating to study questions addressed and the study designs employed.

> decreases in sales volume, Macy's reinstituted sale pricing in the coat category in the 1990 season."

23. Citing Ortmeyer, Quelch and Salmon (1991), Kaufmann et al. (1994) note that Sears has had a similar experience:

> "most notable among these efforts was Sears, with its widely advertised switch to everyday low pricing in 1989. One year later, however, sales remained flat and net income decreased by 63 percent... Consequently, the relentless pressure to promote and the attractiveness of high-low pricing as a solution continue to create the potential for consumer deception."

24. Consistent with the experiences of Macy's and Sears, in describing the evolution of department store retailing in 1970s and 1980s, Kaufmann et al. (1994) note that:

> "A quicker alternative (than making operational changes for improved efficiency) for most department stores as a way to address increased competition was to boost sales volume by promoting. Initial increases in sales volume and gross profit dollars were enjoyed by department stores in

the 1970s and 1980s as consumers responded to their increasing number of sales events...Given the bump in sales volume that each promotional event inevitably produced, it appeared that consumers responded to the 'sale' message even if competitive everyday prices could be found elsewhere. Incorporating greater discounts into the sale events also spurred consumer response. Even with the same net purchase price, consumer response was greater to the retailer offering a greater percentage off the higher original price...Discontinuing a promotional event often meant giving up sales volume to the competitor that did promote. When asked by a reporter to discuss the practice of reference price markdowns, a senior vice president of Bloomingdale's was quoted as saying, 'You're talking about educating the consumer about markdowns. For us that would be self-defeating' (Vreeland 1991)."

25. The foregoing views are consistent with the position of the department store May D&F in the State of Colorado vs. The May Company. In that case, the May Company took the position that "imposing any standard either regarding the proportion of time merchandise must be at regular price or the proportion of sales that must be done at reference price and applying that standard only to May D&F

would place the retailer at a competitive disadvantage against retailers who continued to promote without such restrictions" (Ortmeyer 1991, p. 9).

26. In her Harvard Business School case write-up of the State of Colorado's case against the May Company, Ortmeyer (1991, p. 19) reviews consumer survey evidence collected by Professor Joel Urbany, a pricing expert hired by the State of Colorado for the case. In a study he conducted for the case, a significantly higher percent of respondents agreed with each the following statements when exposed to an OSP representation (i.e., OSP and offering price present) as compared to a price advertisement where only the offering price was present:

- "I'll save a lot if I buy from the advertising store"
- "The product is a bargain at the advertised sale price"
- "The retailer reduced the price a lot for this sale"
- "would rather consider buying today rather than comparison shopping"
- "perceived chance of buying from the advertised retailer."

27. Finally, I note parenthetically with specific respect to Sears, in NADM 8648S ("The Guidelines for Savings Claims (continued)"), Sears notes "Savings claims, properly used, are a powerful selling tool. Improperly used, they can be big trouble." By this statement, Sears recognizes what the consumer behavior

research has consistently shown.[4] Thus, academics and retailers agree – OSP advertising has a very powerful effect on consumer behavior.

c. <u>OSP advertising creates a general impression of savings for the average consumer, and positively affects intentions to purchase from the advertiser and negatively affects intentions to search competitors for a lower price.</u>

28. As noted above in paragraph 20, the effects of OSP advertising have been found across many different product categories, contexts, and consumer groups, from those consumers whose responses are studied in a controlled laboratory setting, to those consumers who respond to advertised reference prices in the marketplace. Given this variance in consumer groups for which the effects of OSP advertising have been found, it follows that the effects of OSP advertising are very robust and pronounced for the "average consumer." Thus, with the exception of those relatively few individuals who have particular expertise and price knowledge in a particular product category[5], this suggests that most consumers would be expected to respond in a relatively similar manner to OSP representations. The research evidence shows that OSP advertising increases the perceived value of the deal (i.e., perceptions of a "bargain"), it decreases consumer intentions to search the marketplace for a better price, and it increases intentions to purchase from the

[4] The qualification of "(if) properly used," is unnecessary. They are powerful selling tools if properly or improperly used. The only thing that differs between the two is the legitimacy of the practice and injury to consumers, competitors, and the market economy.

[5] I should note that with specific respect to tires, as noted by Mr. Cathcart (p. 470 of his transcript), the average consumer sees tires as "they're black and they're round."

advertiser (without further search) (e.g., Grewal, Monroe, and Krishnan 1998; Urbany, Bearden, and Weilbaker 1988).

d. <u>The average consumer has low levels of price knowledge and engages in very little prepurchase search to gain this knowledge, even for expensive items.</u>

29. There is an abundance of research evidence that consumers have very low levels of price awareness across product categories, and engage in very little prepurchase search across product categories, even for expensive items. As noted by Moorthy et al. (1997, p. 263), "A puzzling but consistent empirical finding is that consumers exhibit very limited prepurchase information-search activity, even for high-ticket durable goods (Beatty and Smith 1987; Newman 1977; Wilkie and Dickson 1985)" (cites provided in reference section). Similarly, Grewal and Marmorstein (1994, p. 453) note "Previous studies have consistently found that most consumers undertake relatively little prepurchase search for durable goods and do even less price-comparison shopping (Beatty and Smith 1987; Wilkie and Dickson 1985) despite the reported importance of price to consumers' purchase decisions (Rothe and Lamont 1973)" (cite provided in reference section).
30. Leading researchers in the field such as Steven Hoch (Presentation made at the Association for Consumer Research) and Jeffrey Inman (Inman et al. 1990; Inman et al. 1997) have characterized consumers as shopping with a "low need for cognition," as "cognitive misers," etc., and thus they do not critically evaluate offers that they encounter in the marketplace. Therefore, consumers are

vulnerable to deceptive OSP claims. As noted by Kaufman net al. (1994), "if consumers either lack the ability or are unwilling to go through the effort to compare prices, but still want to buy at a fair value, then a retailer with a reputation for fair prices may gain their loyal patronage." I note parenthetically that Sears own market research of a nationally representative sample of Canadians 18 years of age and older reported as part of the *Canadian Facts Multifacts Study 7/99* shows that Sears is the most frequently mentioned response to the following question: "Which companies come to mind when you think of: "Companies Canadians Perceive as Offering Good Value for the Money."

e. **Reference prices do not have to be taken at face value to affect consumer perceptions and behavior.**

31. There is much research evidence to suggest that while consumers may not take reference prices at face value, they are influenced by them – and this even extends to more knowledgeable groups of consumers. For example, regarding consumers in general, Blair and Landon (1981, p. 62) note that "Consumers may understand that a reference price is inflated or be skeptical of it, yet may not completely discount the claim; that is, consumers may be influenced even if they are skeptical." Consistent with this, they found that while consumers did not accept advertised reference prices at face value (they were consistently discounted about 25%), the advertised reference prices substantially increased consumers' perceptions of savings offered. Based on these findings, they concluded that

"consumers generally do not accept a reference price at face value, but still make higher attributions of savings than they would if the reference price were not presented" (p. 68).

32. It is worth noting that Blair and Landon's subject population was a general set of adult female consumers shopping for either a food processor or television, categories where more specialized knowledge would not be expected. Existing consumer behavior theory suggests that when consumers have more knowledge about a product category, they are better able to evaluate intrinsic product quality and the actual selling price. Therefore, the effect of an inflated reference price should lose impact as the consumer population becomes more knowledgeable about product characteristics/prices.

33. However, even though knowledgeable/ skeptical consumers appear to "discount the discount" more than the average consumer, they tend to perceive that some portion of advertised discount may be bona fide. That is, research findings show that even for consumer populations that are more knowledgeable about the product category (see Grewal et al. 1998), and even for consumers who are more skeptical of OSP claims (see Blair and Landon 1981; Urbany et al. 1988; Urbany and Bearden 1989), they are still influenced by OSP claims. For example, based on their findings, Urbany and Bearden (1989, p. 48) conclude "Our subject's perceptions were influenced significantly by the exaggerated reference price... even though, on the whole, they were skeptical of its validity...Even though it is discounted, the reference price still apparently increases subject estimates of (the advertiser's normal selling price) over those who are presented with no reference

price." Also, Urbany et al. (1998) found that although consumers mentally discount higher advertised reference prices at higher rates, the positive impact of the higher absolute level of the advertised reference price on consumer perceptions more than offsets the higher rate of mental discounting such that the outcome is that consumers perceive more savings for higher levels of advertised reference prices.

34. Moreover, given the value consumers place on their time, "if the advertised sale represents a large enough reduction from the retailer's regular price, the consumer might infer that another similar retailer...could not afford to put the item on sale with a noticeably greater discount" (Kaufmann et al. 1994, p. 121). From the consumer's point of view, the "worst case" is that although the reference price may not be a bona fide price, "it does assure that the consumer has not paid too much...and (thus) the consumer may use the limited information contained in high-low (reference price) sale advertising in an informed effort to find a satisfactory price for the product" (Kaufmann et al. 1994, p. 122). But even in cases where this occurs, a non-advertising competitor retailer offering the same product at the same purchase price would be injured in that a deceptive reference price was used to attract the customer to the advertiser's store. Moreover, the consumer's perceptions of transaction utility, which may actually be a significant influence in the decision to purchase, would not be based on bona fide perceptions.

f. <u>The effects of a seller's own OSP advertising on consumer perceptions and behavior are more pronounced as the credibility of the advertising retailer increases</u>.

35. As would be expected, consumers give more credence to advertised claims as the perceived credibility of the advertising retailer increases. Factors that positively consumer perception of credibility would include, among other factors, the size and history in the marketplace of a retailer. For example, all else being equal, consumers are more likely to perceive a larger retailer with a long history of doing business in the marketplace as more credible than some smaller, newer-to-the-market retailer on which they have less information.[6]

[6] I note that Sears' own market research of a nationally representative sample of Canadians 18 years of age and older reported as part of the Canadian Facts Multifacts Study 7/99 shows that Sears is the most frequently mentioned response to the "Which companies come to mind when you think of:

- "Companies You Trust?"
- "Companies that Have Good Customer Service?"
- "Companies that offer Good Quality Products Or Services?"
- "Companies You Really Respect?"
- "Companies That Offer Good Value For Your Money?"

This type of unaided recall is very strong evidence of the credibility that Sears enjoys in the marketplace and responses such as these would be more characteristic of larger, well-known retailers with a history of doing business in the marketplace. It should be noted that the frequency with which Sears was mentioned ranged from 2-4 times as much as the frequency with which Sears' chief competitor for the Tires, CTC, was mentioned.

g. **<u>By signaling a temporary bargain, a seller's own OSP advertising affects not only consumers who are currently contemplating the purchase of a given product but, particularly for products where wear-out occurs on a visible continuum, may also pull some consumers into the market sooner than otherwise would be the case.</u>**

36. For some product categories, an OSP advertisement may be less effective in affecting consumer behavior because the consumer has a perfectly functioning version of the product – a version that functions identically to a new version. For example, a watch may function in a perfectly fine manner until it functions no more. However, for other product categories (e.g., shoes, carpeting, tires), their useful life is an observable continuum such that consumers are aware on an ongoing basis regarding the time horizon they have for a replacement purchase. Thus, an OSP advertisement for such a product that signals an exceptional value to a consumer, and a value that the consumer must act upon with some immediacy, may pull her/him into the market sooner than would otherwise be the case. For example, a pair of shoes, carpeting in the hallway, or a set of tires may be worn, but still performing at an acceptable level in the mind of a consumer, until the consumer sees an OSP advertisement for shoes, carpeting, or tires, respectively. The ad may likely trigger problem recognition in that it serves as an impetus for consumers to feel a need that they otherwise would not have felt until some future point in time. This consumer who was not actively in the market for

products such as these and who would not have otherwise responded to a bona fide non-inflated OSP advertisement for one of these products, would be more likely to respond to an OSP that is inflated. Thus, it is not my opinion that the OSP advertisement can influence people to buy shoes, carpeting, or tires for which they have no need. However, it is my opinion that "when consumers need" products such as these is a continuum based on visible wear and an OSP advertisement can trigger problem recognition and pull someone into the market sooner than they would otherwise have been. What this means is that based on misleading information, consumers may allocate resources in a manner they would not have had the misleading information not been supplied. Thus, allocation has to do not only with what is purchased, but also, when it is purchased.

h. **Misleading OSP advertising can lead consumers to believe that by purchasing the advertised product, they will receive a quality level that is commensurate with the higher reference price, while only having to pay the lower sale price.**

37. In situations where consumers have difficulty evaluating the intrinsic attributes of a product that define quality to them, they tend to rely on extrinsic attributes as signals of product quality. For example, the average consumer would have a difficult time inspecting a tire and making certain inferences of quality based on intrinsic attributes (e.g., safety, traction in rain), i.e., intrinsic quality is difficult to

evaluate. As such, the consumer cannot directly evaluate the value of the deal (i.e., the quality/price ratio), so the consumer looks for some other cue upon which they can rely as an indirect indicator of quality for the money. The OSP serves as an extrinsic cue that serves as that indicator of quality for many consumers. That is, one of the most pervasive and generalizable beliefs in the marketplace is "the higher the price, the higher the quality," stated alternatively, "you get what you pay for" (cf. Lichtenstein and Burton 1989; Peterson and Wilson 1985). To the degree consumers have this belief, they are likely to evaluate the quality or worth of the item in line with the OSP, but they only have to pay the sale price (e.g., "I'm getting a $125 item for $75."). As such, acting on the offer serves to assure them that they are getting a good value.

38. Consistent with this, Monroe and Chapman (1987, p. 194) propose a theoretical model of OSP effects and postulate that OSPs have a positive effect on consumer perceptions of quality. Specifically, they state "Here the consumer may evaluate the quality of the product based on the regular (OSP) price and the sacrifice for the product based on the actual selling price."[7] In referring to probable inferences that consumers make from OSPs, Kaufman net al. (1994) note that "the regular price reflects the product's intrinsic value, and therefore is a fair price for the product (Thaler 1985)... (thus) under this scenario, the deception of high/low pricing policy would relate to the inflated quality of the product purchased and the consumer's disappointment in purchasing a product of lesser quality than implied

[7] In describing the Monroe and Chapman (1987) model, Urbany and Bearden (1989, p. 46) state "Monroe and Chapman's model predicts that, in addition to affecting perceived offer value through transaction utility, an advertised reference price might also increase (perceived value) through acquisition utility by increasing the perceived quality of the advertised product. For example, a high advertised reference price

by the advertisement." Moreover, in cases where the product category is more expensive, consumer perceived risk is higher (i.e., the fear of making a poor purchase decision is greater), and there is evidence that in these cases, consumers rely to a larger degree on price to indicate quality (Lichtenstein and Burton 1989; Monroe and Krishnan 1985). My opinion is that this effect would likely generalize to reference prices.[8]

i. **<u>The average consumer that purchases a product advertised with an inflated seller's own OSP is unlikely to become aware that s/he was misled, and thus, s/he remains susceptible for subsequent reference price deceptions.</u>**

39. When consumers are deceived by an inflated OSP, the level of harm could be limited if they became aware of the deception. With a liberal return policy, the injury may be limited to the time, effort, and aggravation of returning the product to the store (assuming the store would accept the used product on return). However, in my opinion, most consumers are unlikely to recognize that they were deceived by an OSP representation. The reason for this is that for them to become aware of deception, they must become aware that the OSP price is, in the case of a seller's own OSP representation, not in truth the seller's own bona fide OSP.

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might lead the consumer to categorize the product in a better model class (e.g., one with more features), than if no reference price is presented" (p. 49).

[8] It should be noted that, based on results of their study, Grewal, Monroe, and Krishnan (1998) conclude that consumers did not use the OSP as an indicator of product quality. However, it is my opinion that their

40. Several factors work against consumers becoming price aware. First, as the research evidence (cited above in paragraph 29) strongly suggests that consumers are not willing to engage in much pre-purchase search, it is reasonable to conclude that most consumers are unwilling to expend time/effort necessary to engage in post-purchase price search. Thus, they are unlikely to monitor that seller's prices after the fact. Second, consumers have a built-in desire to maintain "cognitive consistency" and thus, they avoid encountering price information that indicates that they were duped, thereby creating cognitive inconsistency (called "cognitive dissonance," or "buyer's remorse/regret" in this specific domain). Since this mental state creates discomfort for the consumer, they are motivated to engage in "selective exposure to information" by actively avoiding information that would suggest that they did not receive the value represented by the OSP (Eagly and Chaiken 1993, p. 478; Engel, Blackwell, Miniard, 1995).

j. **Receiving a "good deal," in and of itself, is a significant motivation for purchase for many consumers who purchase OSP advertised items.**

41. Beyond any factors associated with the physical product itself, there is much evidence that many consumers purchase due to reasons associated with "transaction utility" (Thaler 1983; 1985). Transaction utility is the joy that results strictly from "getting a good deal." For example, there is research evidence that many consumers will buy a $2.00 product with a 50 cent-off coupon where they would not have bought the same product at a regular price of $1.50 (Cotton and

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conclusion is questionable based on interpretation of their own data, and even more questionable from the

Babb 1978). The reason is that the coupon is a signal of a "good deal" to consumers and that the non-coupon price is the price that the consumer would have to pay without the coupon. These consumers carefully think through the deal and their savings, and the savings calculation is a significant factor influencing their purchase decision.

42. A seller's own OSP representation works in much the same way for many consumers. The OSP claims made by a retailer as to its own prices imply to the average consumer that the higher OSP (perhaps mentally discounted to some degree) is a price that consumers purchasing from that retailer have had to pay in the past and will have to pay in the future, and thus by purchasing the product at the sale price, they are getting a great deal. However, these perceptions are not reflective of reality where the OSP does not truly reflect a bona fide OSP. Thus, consumers who purchase from that retailer for reasons of getting a good deal are injured – they are not getting what they paid for (e.g., a $100 item for $75).

k. Retailers who misuse OSPs as a marketing tool capitalize on consumers who view OSP claims as "proxies" for a good deal.

43. Beyond those consumers who carefully and mentally calculate savings for reasons of transaction utility, many consumers simply assume that a promotion signals a good deal. That is, if it is being promoted, it is a good deal (Inman, McAlister, and Hoyer 1990). These consumers tend to be "cognitive misers" and look for cues that signal good values without engaging in extensive analyses to evaluate

standpoint of generalizing beyond their data.

the validity of the promotion. The credibility of the retailer also works to support this. Thus, when a retailer advertises using inflated seller's own OSPs, these consumers are likely to be deceived.

l. **<u>The verbiage used by certain retailers in their OSP claims implies to the average consumer that the "sale" price is only offered for a limited duration and creates a sense of urgency for the consumer to purchase the product from those retailers.</u>**

44. Semantic cues that accompany OSP claims often create a sense of urgency such that if the consumer does not act with some immediacy, they will lose the opportunity to take advantage of the exceptional price. When this occurs, consumers are more likely to act on the OSP promotion. A sense of urgency to purchase also lowers the probability of engaging in price search across competitors, thus making consumers even more vulnerable to a deceptive OSP. Also, when consumers have a felt need, many do not want to wait. Whatever need it was that led them into the market stays unfulfilled during any waiting period. Waiting to purchase until they can compare prices across stores would represent delayed gratification and getting closure on the task. Thus, many consumers have a predisposition not to want to wait, and the urgency created by the limited time offer-type OSP reinforces their desire not to wait. The semantics of "Acme reg. $XX, Sale, each $XX, 2 Day Power Sale" employed by certain

retailers signal to the average consumer that the sale price is a price that is only being offered for a limited duration of time.

m. <u>The increasing use of private label brands among retailers in conjunction with OSP advertising makes comparison shopping more difficult, resulting in the OSP representations having a larger effect on consumers.</u>

45. As noted above in paragraph 29, a large amount of research evidence suggests that the average consumer does not engage in much prepurchase search and comparison shopping, even for expensive goods. Many consumers are very likely to purchase from a retailer advertising a favorable price without additional search to check on the validity of the advertised price, especially when the retailer is perceived to be credible. However, even for those consumers who may attempt to comparison shop, the increased use of private label brands has made it exceptionally difficult for them to do so. For example, since the average consumer is unlikely to have the ability to assess quality for many types of goods based on intrinsic product attributes, one means by which consumers can assure themselves that they are receiving good values (i.e., quality/price ratios) is to shop competitors' prices for identical products. However, if competitors do not carry identical brands, then the consumer cannot compare "apples to apples" in their price comparisons. Private label goods are, by definition, not carried by competitors. Therefore, they lend themselves nicely to inflated seller's own OSP advertising.

46. Bergen, Dutta, and Shugan (1996, pp. 19-20) have noted that the trend among retailers to offer unique versions of a product is motivated by a desire to inhibit comparison shopping among consumers. Specifically, they note:

> "Manufacturers frequently offer myriad variations in branded products (called "branded variants") ...for the benefit of their most direct customers – retailers. With branded variants, a consumer must remember, evaluate, and process a wider variety of product features to make comparisons across variants and retail outlets... as branded variants increase, some consumers experience an increased cost of shopping for a branded product across retail stores. Consequently, fewer consumers shop across retail stores. This reduced shopping translates into reduced competition across retail stores."

47. The problem of branded variants in some categories for consumers is so severe that Bergen et al. note that:

> "it is nearly impossible... to shop across retailers to find a particular model at the best price, because each retailer may carry different models. It is often easier to select an item from a particular retailer...Consequently, more variants cause some consumers to choose to shop less across retail stores. This decreased shopping reduces competition across retail stores, thereby making manufacturer's variants more attractive to retail stores."

48. The offering of branded variants is, in and of itself, not deceptive. However, when coupled with inflated seller's own OSP advertising, the negative impact of the inflated reference prices on consumer behavior is accentuated. As noted by Kaufman net al. (1994):

> "in product categories... where consumers often lack the requisite skill to evaluate the product (for example, fine jewelry), direct price comparisons are much more difficult. In those cases, price differences may be attributed more readily to differences in quality, and therefore the informational importance of a retailer's reference to its previous price for the same product increases...Price comparisons also may be difficult in categories like electronics, appliances, and mattresses due to the proliferation of model names or numbers for essentially identical merchandise."

> "Even with product categories that should be highly comparable, it is important that the court take note whether retailers intentionally exacerbated the problem by making the price comparison task more difficult. For example, in categories such as hard goods and electronics, some retailers have negotiated with branded vendors to receive 'exclusive' models, differing only cosmetically from the same items sold by competitors. The net effect of this

proliferation of model numbers is to reduce dramatically the consumer's ability to compare prices, thus encouraging consumers to rely on reference/sale price comparisons as evidence of good value."

49. I note parenthetically that in the Commissioner's course of inquiry in this case, on page 566 of the transcript of the oral examination of Mr. Paul Cathcart (March 4, 2002, Volume 4), Sears' Retail Marketing Manager for Automotive states that "Pricing, in general pricing on flag (national) brand tires would be more sensitive to ensure that you're competitive, versus the private label because the private label tires were often – you were never comparing apples to apples with your competitor, exact apples to apples… on a flag product… you're competing against everybody because many people carried – potentially everybody would carry the same type of tire."

n. <u>That seller's own OSP advertising is common among retailers does not negate the adverse impact of an inflated OSP from a credible merchant.</u>

50. That consumers are exposed to many advertised reference prices in no way means that they believe them to be generally deceptive (and it also does not mean that they are not influenced by them, even if they do perceive a reference price to be inflated). A normal consumer attribution for the pervasiveness of OSP advertising in the general marketplace may likely be that the market is very

competitive and that retailers have to cut the prices on some merchandise to be competitive. Another attribution may be that the items are "loss-leaders" to build store traffic (see Lichtenstein and Bearden 1986 for a discussion and assessment of consumer attributions for OSP claims). I note that in his transcript of his oral examination of March 1, 2002 (Volume 3, p. 391), Mr. McMahon recognizes building store traffic as a motivation for using sales promotions, i.e., high-lo pricing is a means by which Sears builds store traffic (p. 391). There are many possible everyday consumer attributions other than an attempt at deception to account for the high frequency of OSP advertising among retailers.

2. Impact on Competitors

51. When a retailer induces consumers to purchase their goods via the nonvalid OSP advertising, competitors who may have otherwise been patronized by the consumers are necessarily harmed. In this section, factors contributing to, and outcomes resulting from, this harm are addressed.

a. The Nature of Demand and Competitor Harm.

52. In the consumer behavior literature, product demand is often addressed in terms of primary and selective demand. Primary demand is demand for the product category; selective demand is demand for a particular brand in the product category. One way of thinking about the difference in the two is that primary

demand "is the size of the pie" whereas selective demand is a brand's "slice of the pie." For many types of product categories, firm revenues can be increased by: a) increasing demand for the brand (selective demand), b) encouraging more consumer use of the product category (primary demand) while maintaining market share (selective demand), or c) a combination of both. However, strategies that rely in any way on increasing primary demand are unavailable to sellers of replacement tires. The level of primary demand for replacement tires is "derived demand," based almost exclusively on the number of cars on the road. As such, primary demand is externally imposed on sellers of replacement tires and thus increases in sales of tires of one brand necessarily come at the expense of other brands. As such, for product classes such as tires, any deceptive OSP advertising not only injures consumers, but necessarily also has a direct immediate negative impact on the welfare of competitors.

b. <u>The deceptive OSP ads from one retailer can result in negative goodwill to competitors who advertise in a non-deceptive manner.</u>

53. For consumers who do patronize a competitor and then encounter and encode a deceptive OSP from a high credibility source, they will be more prone to question the value from the retailer they patronized. They will be likely to experience cognitive dissonance and a loss of goodwill and future purchase intentions toward the retailer from who they purchased.

c. **<u>A retailer who uses inflated OSP advertising not only benefits from deceptive advertising on the products that are promoted in this manner, but the effect also extends to other nonpromoted product/service categories as well – items that also represent lost sales to competitors operating according to the tenets of a market economy</u>.**

54. The idea behind a "loss leader" promotion is to offer consumers an extremely attractive price on one product (the loss leader), in hopes that once in the store, consumers will purchase additional items that have more normal profit margins. Retailers selling multiple products recognize that their profit margin is on the basket of goods purchased by the customer rather than on any one good. Thus, it is a common retailer practice to use loss leaders. However, when the nature of the promoted price is misrepresented to consumers, for example, with an inflated seller's own OSP, retailers not only capture sales on that item that attracted consumers to the store, but also on other items consumers purchase once in the store. Thus, competitors operating in good faith lose the opportunity to compete on a level playing field not only for the promoted item, but all items that the consumer purchases. As would be expected, there is research evidence of a positive relationship between the purchase of promotional goods and nonpromotional goods (Mulhern and Padgett 1995).

d. <u>The adverse effects of deceptive OSP advertising on competition are accentuated in circumstances where the advertising retailer has a large advertising budget.</u>

55. When a retailer engages in deceptive OSP advertising, the harm to competition is directly related to the scope of the advertising. I note parenthetically that Sears is one of the largest retailers in Canada. Circulation data reported in NADM 4125-4126 ("Chronological Listing of Preprint for 1999") shows that its preprint advertisements for relevant products during relevant time period were in the 4-5 million range. Relative to the advertising budgets available to smaller competitors, Sears is omnipresent with its advertising. There is no problem with this as long as the information they advertise is accurate. However, when the information is deceptive, the negative effect is highly leveraged.

e. <u>Retailers use seller's own OSP advertising on private label brands, thereby further inhibiting consumer propensity to search (beyond its normal low levels). This practice further injures competitors who would otherwise be able to compete if consumers could make cross-store comparisons.</u>

56. One detrimental effect on competitors of deceptive OSP advertising is that it has a negative effect on consumer search – search that could otherwise result in sales to competitors. However, even beyond this effect, and as noted in paragraph 46,

Bergen, Dutta, and Shugan (1996, pp. 19-20) have noted that the trend among retailers to offer unique versions of a product is motivated by a further desire to inhibit comparison shopping among consumers.

3. Impact on the Market Economy

57. When advertiser behavior results in a consumers purchasing products that provide less value for the money, it motivates manufacturers to allocate factors of production to those items, instead of items that would otherwise be produced (i.e., those that "truly" provide higher value for the money). As noted by Kaufman net al. (1994), it is clear that deceptive OSP advertising:

> "harms competition and distorts price signals which interfere with the optimal allocation of productive resources, so that total consumer welfare is decreased (Schechter 1989, p.584, cite provided in reference section)...however, retailers are unlikely to cease the practice, given the competitive conditions and the limits on regulatory resources... It would put a retailer at a significant disadvantage if its competition continued the practice."

4. Conclusion

58. In my opinion, there significant negative consequences to the integrity and functioning of the market economy that result from the misuse in advertising of seller's own OSP representations. A market economy cannot, by itself, correct the problems associated with the misuse of OSP advertising. The negative consequences referred to above have an impact on both competition and consumers. Moreover, for retailers, there are compelling economic reasons to misuse OSP advertising. The contrast in outcomes when businesses operate in a manner consistent with, rather than inconsistent with, good faith with respect to OSP advertising, illustrates the importance of taking steps to create an environment where good faith is encouraged and behaviors that fall outside of the domain of good faith are discouraged. The objective is to ensure that consumers are provided with accurate information so that they may cast their votes in an informed way so as to ensure that markets function properly. Ultimately, the proper functioning of markets will, in turn, provide consumers with competitive prices and product choices.

III. CONNECTION BETWEEN SUBSECTION 74.01(3) OF THE COMPETITION ACT AND THE OBJECTIVE THAT IS BEING SOUGHT.

59. In my opinion, there is a rational connection between the subsection 74.01(3) of the Act and the objective set out above. Subsection 74.01(3) of the Act states:

(3) A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of

promoting, directly or indirectly, any business interest, by any means whatever, makes a representation to the public as to price that is clearly specified to be the price at which a product or like products have been, are or will be ordinarily supplied by the person making the representation where that person, having regard to the nature of the product and the relevant geographic market,

(a) has not sold a substantial volume of the product at that price or a higher price within a reasonable period of time before or after the making of the representation, as the case may be; and

(b) has not offered the product at that price or a higher price in good faith for a substantial period of time recently before or immediately after the making of the representation, as the case may be.

60. Critical to my opinion is the "good faith" element explicitly recognized by the time test of Subsection 74.01(3) of the Act.[9]

61. In my opinion, the volume and time tests as conceptualized in the Competition Act do effectively address the problem of deceptive seller's own OSP advertising, that is, there is a rational connection between the regulation and the problem it is designed to address. If the time and volume tests are applied in the manner outlined in the Competition Act (a manner that itself that is consistent with the "Rule of Reason" approach – discussed in paragraph 80), I cannot foresee a

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[9] In Information Bulletin, Ordinary Price Claims, Subsection 74.01(2) and 74.01(3) of the Competition Act, it states that "In assessing if a product was offered for sale in good faith, some of the factors that the Bureau would likely consider include whether:

a. the product was openly available in appropriate volumes;
b. the reference price was based on sound pricing principles and/or was reasonable in light of competition in the relevant market during the time period in question;
c. the reference price was a price that the supplier fully expected the market to validate, whether or not the market did validate this price; and/or
d. the reference price was a price at which genuine sales had occurred, or it was a price comparable to that offered by competitors.

scenario where a deceptive OSP advertising practice would not be addressed by these two tests.

62. The heart of the problem with seller's own OSP advertising is that consumers believe that the OSP relates to the seller's own "ordinary" selling price. Consumer perceptions of what a seller's ordinary price relate to two factors: (1) how long the product been offered at the price (consistency over time), and (2) how many other consumers have purchased the product at that price (consensus).[10] Consequently, in my opinion, there is definitely a rational between these two factors and consumer perceptions of a price as a bona fide OSP. Thus, any legislation that has the goal of addressing the potential for consumer deception with respect to OSP advertising necessarily must address time and volume considerations.

63. When thinking in terms of deception, it is helpful to ask the question, "what would consumers believe if they had full information?" If there is no difference between consumer perceptions with and without the full information, there is no problem with deception. In this case, consumer inferences from a seller's own OSPs would accurately reflect missing information. However, if consumers would respond differently if they had full information, then consumer inferences would not be accurate, and there would be a problem of deception. Consider the example of a consumer who encounters an OSP. If the consumer were provided with (a) the time schedule for when that product has been offered for sale at the OSP (time test criterion), and (b) the number of consumers who have purchased

[10] Consistency over time and consensus of others are two factors that are well entrenched in attribution theory for understanding the process by which people make inferences regarding "what is ordinary." As

the product at the OSP (volume test criterion), would the consumer accept the encountered OSP as the real bona fide "ordinary" selling price? If the answer to this question is "no," then there is an issue of deception.

64. Because consumers will not have this information, legislation is required to institute time and volume standards to bring them in line with consumer expectations so that consumers will not be deceived. In essence, the legislation fills the consumer information void in that with the legislation, consumers will be better able to rely on OSPs as bona fide selling prices. That is, instituted in a good faith manner, meeting time or volume tests will bring retailer practices more in line with consumer expectations such that where retailers offer products at OSPs, consumers will be able to rely on the OSPs as representing either the ordinary price from a time or volume perspective.

IV. THE TIME AND VOLUME TESTS, AS CONCEPTUALIZED IN THE COMPETITION ACT, MEET THE GOAL OF "MINIMAL IMPAIRMENT."

65. Critical to this opinion is the fact that when the court is scrutinizing the conduct at issue, the nature of the product and the relevant geographic market are to be explicitly considered by the court so as to custom-tailor the volume and time tests to the facts of the case at hand. As such, the volume and time tests are not determined in a vacuum, but rather recognize those market-based attributes of the product which are helpful in applying the tests to the case. Similarly, in terms of the geographic market, I note that the words used by the legislator are "relevant

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the consistency with which an event occurs over time increases, and as more people perceive/respond to geographic market". Again, in my view, this directs a line of inquiry which requires identifying the geographic market for the product that is helpful and relevant to the analysis required under the volume and time tests. Following this line of thought, t is my opinion that subsection 74.01(3) could not be less burdensome and still be effective.

66. To take one example, the time and volume test would be less burdensome on retailers if the word "substantial" was dropped from the Competition Act, or replaced with the word "some." However, with respect to the volume test, that some very small number of consumers may purchase an item at an inflated price would not validate it as a bona fide representation as to that seller's price. In any distribution of consumers, there will always be what statisticians refer to as "outliers," people who behave in an extreme manner relative to population norms. For instance, there may be some very wealthy consumer who never pays attention to price and therefore purchases at some very inflated price level. This would not validate the inflated price as a bona fide representation as to that seller's price.

67. To consider the issue in the context of the time test, that a retailer has an item at its OSP for "some" period of time (e.g., an hour, a day, a week) prior to or after offering it at the sale price would obviously not validate it as a bona fide representation as to that seller's price – a price where a "substantial" number of consumers would accept it as bona fide. Thus, I believe the word "substantial" is necessary, given that it is interpreted in the context of good faith considerations.

68. To consider another aspect of the Competition Act, the "good faith" criterion could be dropped from the time test. This would make it less burdensome on

the event similarly, a person mentally processing the event will perceive it as more ordinary.

retailers. However, as noted above, this would also clearly encourage retailers to undertake activities designed to meet the time test, but do so while advertising in a deceptive manner. The rotating of sales between substitute product lines would be an example of such a practice (see Kaufman, Smith, and Ortmeyer 1994). As noted by Kaufmann et al. (1994, p. 128):

> "With comparable brands (that in effect are fungible), it is possible for retailers to rotate sales on specific brands within a category, such that they are in compliance with state standards requiring a given percentage of time at a reference price, yet deception would remain. For example, consumers may assume the quality of major brand towels to be identical. A retailer need only have one major brand on sale at any one time to allow consumers to infer extraordinary value based on the reference/sale price

comparison. The high price on the other brands creates an illusion of value and can lend support to the price comparison given for the sale brand."[11]

69. Thus, the "good faith" element in the time test, and the consideration of product-related factors are necessary for assessing a seller's own OSP advertising under the Competition Act. The retail marketplace is simply too complex to allow for the legislation of a per se criterion that would be less burdensome for retailers,

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[11]Evidence generated by the Commissioner's inquiry in this case provides a good example of this phenomenon. Data offered in the table entitled "Summary of Time Analysis For the Six Month Period Preceding the Relevant Representations" show that for the five Tires, they are offered on price promotion from between 40-81% of the time for the six months immediately preceding the selected representations. The data offered in the table entitled "Summary of Time Analysis From the Date of Relevant Representation Back to January 1, 1999" show that the five Tires are on price promotion from between 46-75% of the time from the date of the selected representation back to January 1, 1999, which is almost a year for four of the five tires (and about 10 months for the other). From a time perspective (not to mention the low volume of sales at the non-promotional price), this frequency in and of itself calls the validity of the OSP into question as a valid reference price. However, even further, there is always at least one, and most often multiple, tires on sale. That is, Sears rotates the particular model of tire that is the feature of OSP advertising so that when consumers see the price promoted brand, at least some of the other four Tires may not be price promoted. For most people, tires are not "specialty goods" where consumers have a high degree of knowledge and a high degree of brand insistence. They are substitutable/fungible such that if one tire is not on sale, they will switch quite easily to another that is. That is, for tires, consumers are more willing to view alternative brands as near substitutes, and thus, are likely to be willing to purchase the brand that is on sale (especially since the ones not on sale are priced much higher).

That the survey results reported on NCBJ 5 states that no single brand name was mentioned by respondents as being purchased by more than 16% of the respondents suggest the market is more fragmented with no dominant brands – consistent with, but not definitive of, a lack of strong brand insistence in the market. Also, that price was the most frequently mentioned reason for choosing between brands (NCBJ 6) is also consistent with, and more definitive of, a lack of brand insistence.

Thus, even if Sears has just one of their Tires on price promotion at any given time, and they were to rotate the price promotion among the five Tires, they may look more reasonable in terms of time tests, yet given the nature of the product category, the deception would still remain. Thus, given this rotation and the lack of brand insistence, any per se time test becomes less meaningful as long as one brand is always on sale.

On page 567 of his transcript, Mr. Cathcart responds affirmatively to the question that the purpose of the checkerboard is to rotate tires through promotion. That said, the individual tires are still on promotion with a high level of consistency.

In the Sears Private Label Strategy (NADM 1869), Sears notes as one of their "tactics" for private label brands that they will "Concentrate the broadest assortment in both size on designs around the key price points and rotate these issues throughout our advertising program on a regular basis..."

that at the same time would also be applicable across situations such that it addressed the problem of deceptive OSP advertising in a valid manner. I should note that one of the most frequent responses of a professor to her/his student's question is "it depends." In assessing deception, I believe this response is very applicable – a blanket rule would simply lead to too many incorrect conclusions. It will simply depend on the particulars of the particular case.

Alternatives to the Section 74.01(3) Model

70. Blair and Landon (1981, p. 62) articulate the arguments, both pro and con, for the wholesale per se regulation of OSP advertising. They note:

> "Opponents of OSP advertising (per se) note that accurate reference prices are difficult to determine and that merchants face strong temptations to choose unrealistically high figures that make their own prices look lower. As a result, it is contended that few reference price claims are free of exaggeration. Consumers cannot distinguish what is true and what is false on the basis of the ad alone. The result is injury to consumers who seek genuine information in advertisements and harm to honest competitors. On this basis, the opponents of OSP advertising argue that the practice is unfair per se. Defenders of OSP advertising concede that puffery is common, that consumers have no means within the ad to recognize a false claim, and that stopping all OSP advertising would prevent abuse. However, they contend that such draconian

measures are inappropriate. They observe that truthful reference price claims can provide useful information and that false claims can be prosecuted. In addition, defenders of OSP advertising claim that consumers learn to discount reference price claims, thus protecting themselves from deception. On balance, defenders of OSP advertising see little likelihood of harm from such advertising, and argue that it should be permitted as part of a free market system for cases in which legitimate information is provided."

71. Based on my own knowledge and expertise, and available research evidence, I find myself agreeing and disagreeing with portions of both of these positions. I agree with the opponents regarding merchant motivations, and consumer and competitor injury, but only when there is an environment where reference prices are not established and advertised in good faith. Thus, I disagree that the practice is unfair per se.[12] I agree with the position of the defenders, with the exception that consumers learn to discount reference price claims, thus protecting themselves from deception. As recognized by Blair and Landon (1981, p. 62), "Consumers may understand that a reference price is inflated or be skeptical of it, yet may not completely discount the claim; that is, consumers may be influenced

[12] To my knowledge, it is clear that the right of free speech does extend to nondeceptive commercial speech, thereby this position would not seem defensible. The US Federal Trade Commission has also taken a position with respect to first amendment freedoms and free speech. Wilkie et al. (1984, p.16) note that one criterion of corrective advertising is that "it not infringe upon the advertiser's First Amendment rights of freedom of speech (FTC 1979)… it is clear that the constitutional protection afforded commercial speech does not extend to deceptive speech, however ("First Amendment" 1978).

even if they are skeptical." The results of Blair and Landon (1981) and Urbany et al. (1989) provide support for this contention. For example, Blair and Landon (1981) note that "consumers generally do not accept a reference price at face value, but still make higher attributions of savings than they would if the reference price were not presented" (p.68)... reference price claims in this study were consistently discounted about 25% (p. 67).

72. Consistent with this, the totality of results obtained by led Urbany et al. (1988, p. 106) led them to conclude that: "these results are similar to Blair and Landon's (1981) findings, which indicate that consumers can be skeptical of advertised reference prices and at the same time be influenced by them. The results in this article appear to be particularly robust, as the $799 (exaggerated) reference price reduced ad believability yet increased market price estimates and offer value perceptions across both experiments when the sale price was $319. This result is consistent with ... our discounting hypothesis."

73. Thus, while the evidence supports the contention that consumers mentally discount exaggerated reference prices, research shows that the discounting is not enough to offset the deception.

74. The findings of Blair and Landon (1981, p. 68) led them to conclude that a government policy that "discourages all OSP advertising in areas where it frequently is abused (such as major appliance retailing) and handles other areas on a case-by-case basis might be appropriate. However, such a policy would be very difficult to implement."

75. Implementation issues aside, I do agree with the need for regulation. However, again I strongly disagree with any "all or nothing" type of approach in any industry. I believe that regulation should be instituted in a manner that allows all retailers to use the practice in an honest and good faith manner, and on a case-by-case basis, and disciplines those who violate the regulation.

76. Kaufmann et al. (1994) have noted that several state legislatures have imposed specific per se standards on the test of bona fide "regular" prices in an attempt to facilitate prosecution, i.e., how many days products must be at regular price, or what percent of sales represents "substantial" for volume test. (For examples of five such states, see Exhibit 2 in Ortmeyer 1991.) Kaufmann et al. (1994) note that the purpose of these specific standards "is to reduce the costs of prosecution by creating the equivalent of a per se rule for the deceptive advertising of high-low prices."

77. With respect to these per se rules, I agree with the perspective of Kaufmann et al. (1994) that these per se rules will not be effective in addressing deception. They state:

> "Per se rules relating to high-low pricing are not likely to detect all true deception nor exculpate all non-deceptive challenged pricing behavior. In the case of percentage of sales tests, few would argue with the presumption that if a retailer had 50% of its sales at the referenced price, that price had been set in good faith... A higher percentage test will certainly prevent deception, but at what cost?

Placing the percentage requirement high enough to be sure that all deception is routed out will preclude some consumers from receiving non-deceptive information that they may, in fact, value in making decisions. Retailing efficiency, in turn, would be affected adversely in that retailers may be constrained in making temporary price reductions or could not communicate them as effectively to their customers... Similarly, percent of time tests can be thwarted easily by the manipulation of the pricing calendars of comparable brands within a store. If compliance with a set time at the regular price (even relatively long periods of time) demonstrates good faith, some deception will escape further scrutiny. On the other hand, requiring products to stay at a mistakenly high price for substantial periods of time before the retailer can let customers know of its mistake through reference to that price again may deprive some consumers of important information about both the product and the retailer. In either case, these per se tests seem to offer much more in terms of financial savings for the litigants (on both sides) than they do in terms of ensuring a balance between the direct consumer interest in good price information and the indirect consumer interest in efficient retail practice."

78. Kaufmann et al. (1994) also note:

> "research has consistently linked reductions in price advertising to reductions in the level of price competition and to inflated prices. If the substantial sales test precludes advertisers from correcting pricing mistakes and has a chilling effect on the overall amount of price advertising, it could have a negative effect on consumer welfare (Muris 1991, cite provided in reference section)."

79. Consistent with the position of Kaufmann et al. (1994), I believe that without meeting any per se time or volume tests, OSP advertising can be non-deceptive and provide consumers with valuable information, provided of course that the seller had a good faith belief that the original asking price was a bona fide price. For example, a real estate developer selling condominiums may advertise "Prices Reduced by $20,000." Most consumers probably do not have very accurate assessments regarding what a fair market price for a condominium would be. With this price information, the consumer at least knows that it was above its market value at the previous price. .

80. As per se rules lack flexibility, I do not favor any per se rule. Rather, I endorse the "Rule of Reason" analysis of the retailer's pricing and advertising (consistent with Guidelines set forth in footnote 9) and effect on consumers as noted by Kaufmann et al. (1994):

> "Such an approach requires the court to explore issues relating not only to the retailer's activities and consumer perceptions, but also to industry and

product characteristics. It is informed by generic and case specific research in consumer behavior. Most important, it seeks to strike a balance between the direct interests of consumers in receiving clear, truthful information and the indirect interest in the lower prices derived from permitting retailers to operate efficiently. Evidentiary shortcuts such as percentage of sales made at the reference price or length of time the reference price was in effect are relevant but not dispositive."

81. The situation at hand has direct correspondence to measurement issues that behavioral researchers deal with on a continual basis. From a measurement theory perspective, it is generally recognized to be poor measurement practice to equate a concept that is not directly observable (e.g., deception) with a single observable behavior (e.g., "if a seller does X, it is deception; if the seller does Y, it is not deception") (see Lichtenstein, Netemeyer, and Burton 1990). That is, when the concept construct of "deception" is reduced to terms of a per se time or volume test, the validity of just what is "deception" is sacrificed. As a result, there may be many situations where the following per se rules leads to incorrect outcomes regarding determinations of deception that if the subjective factors (consistent with the "rule of reason" approach) were applied with its multiple criteria, this would not occur.

82. Also, and in reference to the administrative convenience for determining deception that per se time/volume tests allow (Kaufmann et al. 1994), a second analogy to measurement theory relates to: (1) the current dilemma of choosing

between "standardized" per se rules for assessments of deception as opposed to relying on subjective good faith assessments/rule of reason approach, and the relation of this decision to (2) issues of reliability and validity. Reliability is relates to consistency over time and across applications. Validity relates to issues of "is it true," or applied to the current context "is my measure of deception measuring what it is suppose to be measuring." While the per se tests will be very reliable (that is, they will yield consistent results over time and across situations), they will not measure what they are intended to measure, i.e., they will be "reliably wrong," that is, reliable but not valid. That is, per se time and volume tests do not validly measure deception. Retailers may reliably meet the tests, yet still be able to engage in deceptive OSP advertising. Thus, in my view, each case must be viewed on its particular facts in line with the rule of reason approach.

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THIS IS EXHIBIT "B" TO THE AFFIDAVIT OF DR. DONALD LICHTENSTEIN. SWORN BEFORE ME THIS 10TH DAY OF OCTOBER, 2003. J. Patel
(TRIPATI PATEL)
COMMISSIONER OF OATHS (LSUC#467846)

Opinion of Donald R. Lichtenstein in the matter of the Commissioner of Competition v. Sears Canada Inc.

I. INTRODUCTION

1. Sears Canada Inc. (Sears) has made seller's own "ordinary selling price" representations (hereafter referred to as "OSP" representations) on certain private label brands of all-season tires, specifically the "BF Goodrich Plus," "RoadHandler 'T' Plus," "Weatherwise/RH Sport," "Response RST Touring 2000," and "Silvergard Ultra IV" (hereafter referred to as "the Tires") over the calendar year 1999. At issue is whether the manner in which Sears employed the OSP advertising on the Tires in 1999 represented reviewable conduct under 74.01(3) of the Competition Act. That subsection:

(3) A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, makes a representation to the public as to price that is clearly specified to be the price at which a product or like products have been, are or will be ordinarily supplied by the person making the representation where that person, having regard to the nature of the product and the relevant geographic market,

(a) has not sold a substantial volume of the product at that price or a higher price within a reasonable period of time before or after the making of the representation, as the case may be; and

(b) has not offered the product at that price or a higher price in good faith for a substantial period of time recently before or immediately after the making of the representation, as the case may be.

2. My opinion proceeds as follows. First, the discipline of marketing is briefly discussed and its relevance to the matters under consideration is addressed. Second, as the nature of the product and the relevant geographic market must be considered in applying the volume and time tests, these two topics are addressed in turn. Then, the OSP advertising behavior of Sears is evaluated.

3. For purposes of this opinion, I have been asked to assume:

- a relatively small percentage of tires (not more than 10-15%) are purchased singly as opposed to in pairs or other multiples; and
- consumers who purchase tires singly purchase those tires because a tire on their vehicle has been damaged, destroyed or failed, rather than as part of routine vehicle/tire maintenance.

II. THE RELEVANCE OF THE MARKETING DISCIPLINE TO THE OSP ADVERTISING BEHAVIOR OF SEARS

4. There are many differing definitions of the domain of marketing. For example, the American Marketing Association defines marketing as "the process of planning and executing the conception, pricing, promotion, and distribution of ideas, goods, and services to create exchanges that satisfy individual and organizational objectives." At its most fundamental level, marketing addresses the domain of exchange transactions – including all factors that affect or facilitate the exchange. The domain is often described as relating to the "4 P's of marketing," i.e., price, promotion, product, and place (i.e., distribution).

5. Marketing has a well-established interdisciplinary domain. Its parent disciplines include economics, psychology, sociology, and anthropology. To my knowledge, all business schools (and definitely the top business schools) have designated marketing faculty and offer degree programs in marketing (as well as accounting, finance, management, and typically operations/information systems). While course offerings in marketing vary to some degree across universities, base courses offered by all schools typically include principles of marketing, marketing research, consumer behavior, marketing communications/promotional strategy, advertising, marketing strategy, and marketing management. It is also common for schools to offer courses in pricing strategy. Of particular relevance to the issue at hand, the topics of firm pricing behavior, firm advertising and promotion,

consumer behavior, the nature of product categories/product definitions, and relevant geographic markets fall directly within the domain of marketing. Several of these topics are addressed in many of the courses noted above in this paragraph and they represent topics of faculty research. For example, the influence of OSP representations on consumer behavior is addressed in marketing texts used in multiple courses and it has been a topic for marketing research for over two decades.

6. Marketing expertise is demanded in the marketplace. Marketing faculty frequently consult with those from the business community regarding marketing problems/opportunities that these firms face. Many business schools offer executive MBA programs where firms will pay for their employees to take marketing and other business courses on evenings and weekends to earn their MBA degree. Many business schools also offer non-degree executive education programs for the business community and marketing offerings are among the most popular. In the U.S. there is a national professional marketing association (the American Marketing Association) as well as local chapters of marketing professionals in virtually every major city in the country. The discipline has its own practitioner publications (*Marketing News*, *Marketing Management*).

7. The discipline also has its own leading academic journals (i.e., the *Journal of Marketing*, *Journal of Marketing Research*, *Journal of Consumer Research*, and *Marketing Science*) that serve as publication outlets for faculty research. The

discipline has its own criteria for faculty evaluation for promotion and tenure. Most faculty research tends to be empirical in nature, thus requiring extensive sampling, data aggregation, data analysis, and statistical skills. Courses in these areas are part of all doctoral programs, and these skills are taught by faculty in all marketing degree programs (undergraduate, masters, and Ph.D. programs).

8. As noted above in paragraph 4, the domain of marketing is often defined by topics that relate to the "4 P's of marketing," i.e., price, promotion, product, and place. Thus, the price promotion of tire products sold in various geographic places is most fundamentally a marketing issue. While the product category at issue is tires, in my view this is not a "tire" case per se – it is a deceptive marketing case.[1] Justification for this statement follows.

9. In addressing issues related to consumer perceptions of OSP representations, it must first be recognized that consumer perception of, and reaction to, price does not occur in a vacuum. Rather, perception of price is widely recognized to be context-dependent (Lichtenstein and Bearden 1989; Thaler 1985). Perception of price depends on many factors, including product-related variables (e.g., private vs. national brand), person-related variables (e.g., level of consumer price knowledge, product involvement), and situation-related variables (e.g., perception of price in the absence or presence of other prices, time pressure). Based on what is known from the fields of marketing and consumer behavior with respect to

[1] However, as discussed below, the "nature" of tires as a product is relevant.

certain categories of product-, person-, and situation-related variables, variables that relate to the general category of tires, I am able to provide an opinion informed by marketing principles, knowledge, and research regarding the issue at hand.

10. This perspective is consistent with that taken by academics in conducting research, and marketing managers who make strategic decisions on a daily basis. Regarding the former, academic researchers are interested in conducting research that generalizes beyond the immediate study context. Thus, when academics choose products as test stimuli for their studies, they may choose goods of high or low involvement, goods that are convenience goods or shopping goods (defined below) in order to be able to generalize to larger sets of goods that share similar characteristics with respect to these dimensions. For example, if a study investigating the influence of OSP advertising was conducted using a shopping good of one type (tires, washing machines, stereos), we would expect results to generalize to other shopping goods (and probably beyond) unless there was a specific theoretical reason to believe the contrary. We would not need to conduct an OSP study in each specific product category. Similarly, if a retail grocer began making OSP representations on a few products and sales for the products increased, s/he would assume that sales increases would be obtained for other grocery items if OSP representations were made for them, unless there was some reason to the contrary. It would not be necessary to test for OSP representations on each product in the store in order to logically conclude that use of OSP

representations would likely increase sales. Thus, no product category-level expertise would be required to make an educated inference of consumer response to OSP representations in the particular category.

11. To consider another issue, the impact of OSP representations openly promoted to consumers, while an EDLP (everyday low price) strategy is simultaneously being used on the same products, but not openly promoted to consumers, can be predicted regardless of the product category. That the tire category happened to be the product category in which Sears chose to use both strategies simultaneously does not require tire expertise for an analysis of the likely impact. Rather, it requires expertise in the compatibility of these two pricing strategies and expertise in consumer processing of price information – both of which fall within the domain of marketing.

12. Additionally, while many factors exert influence on consumer perceptions of value and purchase probabilities, across purchase situations, no factor exerts more influence than does consumer perception of price. In my opinion, the price representations that Sears made regarding the Tires would have also had a deceptive impact on consumers had the claims been made on some other product class.

13. To consider one final point, that the product category relates to tires gives no information for the issue of how the tires sales data should be most appropriately

aggregated for analysis with respect to time and volume tests. Issues relating to firm behavior with respect to market segmentation do however.

14. I offer my opinion in this case based on my knowledge of marketing principles and research findings relating to issues such as consumer product involvement, consumer price knowledge, product expertise, etc., factors that do relate to the product category of tires.

III. NATURE OF PRODUCT CATEGORY

15. There are several characteristics of the product category of tires that inform my opinion in this case. Some of these characteristics are more instrumental in applying the time and volume tests, while others are more instrumental for purposes of assessing materiality. Therefore, below I bifurcate the product-related factors according to these two dimensions.

A. Product-Characteristics that Relate to the Time and Volume Tests

16. Tires are a product category where the need satisfying ability of the product can only be realized with multiple units, and units that are typically the same brand. For most product categories, utility (need satisfying ability) can be provided by the purchase of a single quantity of the product. However, tires are "complementary goods" where the consumption of one tire must be realized in the

presence of three other tires in order to be useful. Utility is not provided until the consumer has four tires. Consistent with this notion, 85-90% of consumers purchase tires in multiple units rather than in single units. Thus, advertising an OSP below which tires can always be purchased if purchased in multiple quantities renders the OSP as inapplicable for the 85-90% of the market that must purchase tires in multiple units. In essence, there is an OSP that could only ever be valid for 10-15% of the market at most, yet it is being promoted to the market at large as the valid OSP.

17. Further, and very importantly, consumers who purchase tires singly are typically constrained to purchasing a model of tire that matches the tire opposite of that being replaced. Moreover, they are most likely to purchase in an emergency situation, thus they are a captive audience for purchasing an appropriate specific tire, whether or not it is "on sale." Thus, purchasers of single tires at the OSP should be discounted in a calculation of the volume test. These people were constrained to choose the tire that matched the opposite one – a tire that must be purchased at the OSP if it is not on sale. Any volume test should only consider purchases where consumers exercised free choice and with that choice, chose to purchase tires at the OSP. Only in a situation of free choice can we interpret purchase of a tire as validating the OSP. Given that multiple tires will never be purchased at the OSP, my opinion is that consumers, by definition, never validate the OSP via free choice.

18. Tires are a category where products are not likely to be stockpiled or where favorable prices will have much impact on the rate of consumption. For some product categories, retailers operating in good faith would be expected to have lower levels of sales at non-sale prices. That is, for some product categories, there are extremely large peaks in demand when the product is price-promoted, often followed by very low sales when the price-promotion is removed. For these product categories, given a bona fide "regular" price, it would not be unusual to see a very high percent of sales occurring at the "sale" price, with relatively fewer sales occurring at the regular price. Product categories that especially lend themselves to this type of situation are those where the rate of consumption may be increased and/or where the product can be stockpiled. For example, when 2-liter bottles of soda are price promoted, many consumers will increase their consumption and/or stock up and purchase quantities larger than that needed in the immediate future. To the extent they can forecast when the next sale period is likely and subject to storage ability in their house (Blattberg et al. 1978), they are likely to purchase enough to carry them to the next sale period.

19. Because tires are not a product category where people forward-buy and stockpile, or where prices have much effect on the rate of consumption, demand for tires is more stable over time. You would not expect to see a consumer purchasing eight tires and storing four because s/he got a sale price. While a sale price may pull someone in the market sooner than would otherwise be, it will not lead to increased tire consumption or stockpiling, both of which may occur for a category

such as soda. Thus, as demand for tires is more stable and less sensitive to stockpiling, I would not expect to see the spikes in demand caused by responses to promotional sales as we expect to see with some other product categories. Thus, due to this factor, for a bona fide OSP, I would expect to see more sales occurring at the regular price for tires. While it is true that consumers can somewhat delay purchase of replacement tires until a particular brand goes on sale, for a good faith OSP that is relevant to the entire market, I would expect to see a level of multiple tire sales (i.e., sales not counting those purchased singly) that exceeds that obtained by Sears at the OSP. That the level of sales at Sears OSP is so low (and virtually nonexistent for the purchaser of multiple tires) is strong evidence that it is, in my opinion, not a valid OSP.

20. The Tires are an all-season product. For some product categories, there are extreme seasonal and/or weather variations in sales. For example, consider the sale of winter coats. A retailer operating in good faith may purchase many heavy coats for sale to the public. However, an unseasonably warm winter may result in few sales at regular price. Thus, the retailer operating in good faith may promote using an OSP claim once the selling season has passed, even though the retailer has a very low volume of sales at regular price. Also, it could be the case (and indeed it is typical) that a retailer receives shipment of winter clothes prior to the cold winter weather actually occurring and thus, offering the clothes for sale at the OSP may likely result in few sales for the initial period of time that the winter clothes are offered for sale. In this case, the time period for evaluation should be

long enough to give consumers the opportunity to validate the price (i.e., it should encompass the winter selling season). Therefore, when products are seasonal, time and volume tests should be considered in light of the seasonality affecting demand.

21. By their very nature, sales of "all-season" tires are less sensitive to seasonal variation. As such their sales are more stable and predictable. While sales data reveals that there is an increase in sales of tires in the spring and fall seasons, these are stable and predictable patterns that are easily smoothed out by examining volume of sales over a twelve-month period. However, that said, *and extremely germane to the issue at hand*, as volume of sales of the Tires at the OSP are viewed in relative terms (as a percent of total tire sales), and fungible tires are always on sale, I would expect little variation in sales over different sales periods (especially since at least one of the Tires is always on sale). Therefore, in terms of the volume test, even shorter periods of time would be sufficient. With respect to the time test, that the fall and spring are the higher selling season, and the winter and summer are the lower selling season, any contiguous six-month period of sales encompasses equal amounts of the higher and lower selling season. Therefore, I cannot imagine that a period longer than six months would be necessary for evaluating sale representations at the OSP. Consistent with sampling theory, for a period longer than this time period to be justified would require evidence that Sears OSP behavior deviates in a material manner from

behavior that would be captured within a contiguous six-month period. In the sales data that I reviewed, I saw no evidence of such deviation.

22. Tires are an established product category. For some "new to the world" products, demand is hard to predict. For example, every year new toys hit the market in advance of the Christmas season. Because toy companies attempt to have something new to appeal to consumers, they attempt to differentiate their toys to consumers. However, this differentiation can also make demand harder to predict. Thus, a retailer operating in good faith may purchase a large quantity of a particular toy for resale, only to find that it did not appeal to consumers. Thus, with a very low volume of sales, retailers operating in good faith may promote using an OSP claim once the selling season has passed. Consequently, in situations such as this, the volume test should be interpreted in light of the unpredictability of consumer demand at the OSP.

23. The case for tires is different. They are an established product category, with little change in the nature of offerings from year to year (as noted by Mr. Cathcart). Thus, buying mistakes are not characteristic of the tire category. As soon as tires arrive into inventory, they are more likely to be demanded by consumers in a stable and predictable manner. Retailers do not have to rely on the product idea gaining acceptance with consumers. Therefore, this too suggests that the time period for evaluating volume of sales at the OSP would be shorter, and that Sears

OSP pricing behavior would be more stable, suggesting that shorter periods of time would be sufficient for evaluations of the time test.

B. Product Characteristics that Relate to the Issue of Materiality

24. Tires are "shopping goods." In the field of marketing, products have been classified using several different taxonomies. One taxonomy (that is actually more accurately conceptualized as a continuum) is whether a product is a convenience, shopping, or specialty good. This taxonomy is relevant for the situation at hand because it relates to the degree of consumer brand insistence, involvement, and effort expended in the purchase decision process.

25. A convenience good is one where the consumer is not highly involved in the purchase. By low involvement, marketers mean that the purchase has low relevancy to the consumer (from a financial, safety, psychological, social, and/or functional perspective). Thus, the consumer is not willing to expend much time or energy searching and comparing brand alternatives. Virtually any of a large number of brands will suffice. For example, the purchase of gasoline might be an example of a convenience good.

26. For shopping goods, there is some intermediate level of involvement and consumers are willing to expend some time and energy in the decision process prior to making a purchase, albeit research evidence cited subsequently in

paragraph 39 suggests that even for relatively expensive shopping goods, the absolute amount of effort consumers are willing to expend is surprisingly low (in actuality, making them closer to convenience goods on the "effort" continuum). For example, washing machines are probably shopping goods for many consumers.

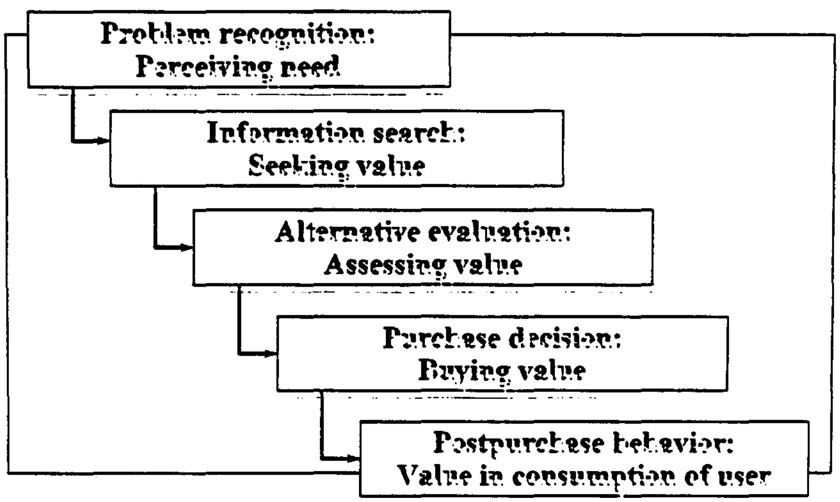
27. Finally, a specialty good represents the ultimate in brand insistence and reflects the consumer's desire to "accept no substitute." This is a high-involvement purchase situation. For example, for a consumer whose ego is aligned with the clothes they wear, a suit may very well be a specialty good. Such a consumer will search long and far for their favored brand and will likely delay purchase until they are able to purchase their preferred brand.

28. As noted above, this is more of a continuum than a discrete taxonomy, and to be sure, one person's convenience good might be another's specialty good, e.g., wine. That said, when marketers speak of a good as a convenience, shopping, or specialty good, they do so based on their perception as how the market under consideration views the good.

29. The convenience-shopping-specialty good taxonomy is relevant to the present situation because, as it relates to the level of involvement, it has strong correspondence to both the number of stages, and degree of effort expended at each stage, in the consumer decision-making process.

30. The consumer decision process as conceptualized in the consumer behavior literature views consumers as "information processors" who go through various stages in making a purchase. That is, the act of purchase itself is considered to be a distinct act/stage in a larger process. The process is generally considered to be composed of up to five stages, those being problem recognition, information search, alternative evaluation, purchase decision (including the decision not to purchase any alternative), and post-purchase behavior (see Figure below).

Consumer Decision-Making Process



31. Problem recognition is when consumers first have a felt need to purchase. It is triggered by a difference in the perceived actual state of affairs and the desired state of affairs. When the perceptual gap between the actual state of affairs ("My tires are becoming worn") and desired state of affairs ("I want to have tires that

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are safe") becomes large enough to surpass the threshold, problem recognition is triggered.

32. As a result, the consumer then has some level of tension caused by an unfulfilled need and therefore s/he is motivated to engage in search behavior (second stage of the decision-making process) in an attempt to uncover alternatives that will address the problem. The consumer is likely to first go through some low cost "internal search," i.e. a mental search of information stored in memory. If the consumer believes that the information generated by this limited search is insufficient (i.e., the perceived marginal return from additional external search exceeds the perceived marginal cost), the consumer will engage in external search (e.g., visiting stores, reviewing newspapers for advertisements, asking knowledgeable others for information). Depending on the immediacy of the need (e.g., "These tires are becoming worn but I can get a little more mileage out of them" vs. "These tires are dangerously bald."), consumers might be more prone to engage in "passive" external search (e.g., "I need to be on the lookout for a good deal on tires") vs. more "active" external search (e.g., "I need to find a place immediately where I can purchase tires at a good value.").

33. When the consumer believes that the search process has resulted in a list of alternatives (quite possibly a single alternative) such that the costs of additional search exceed the benefits, the next stage in the consumer decision-making process is alternative evaluation. In this stage, consumers weigh the relative costs

and benefits of purchasing the alternative(s) generated by search. Note that in the case of a credible seller's own OSP, the credibility of the retailer may add weight to the benefits of purchasing without further search.

34. The next stage is the purchase-no purchase stage. At this stage, the consumer may decide that none of the alternatives satisfy the need in an amount that offsets their costs -- i.e., none are a good enough value for the money to motivate purchase. In this case, the consumer will either delay/suspend the purchase process, or iterate through another search cycle. If the consumer believes that at least one of the alternatives will serve to reduce the perceived gap between the actual and desired state of affairs in an amount that offsets the cost (i.e., a good enough value), the consumer will make a purchase. If multiple alternatives will meet this minimal level, then the consumer will need to make cost/benefit tradeoffs among the alternatives and choose the one that provides the best value for him/her.

35. The final stage in the purchase decision process is outcome. This relates to consumer satisfaction or dissatisfaction. Basically, satisfaction and dissatisfaction are consumer evaluations based on a comparison of pre-purchase expectations with post-purchase experience.

36. The foregoing description portrays a more extensive consumer-decision making process. As one might imagine, consumers are not willing to expend this level of time/effort for all purchases. Rather, the number of steps, as well as the

time/effort expended at each step, is positively related to consumer involvement in the decision. For specialty goods, consumers may go through each step and expend much effort at each step.[2] For convenience goods, because involvement is lower, consumers would be unlikely to expend the time and effort required by a protracted decision-making process. In fact, exposure to the product itself may trigger problem recognition and the consumer may purchase it without any search or alternative evaluation. Impulse items at the check-out aisle of a grocery store are examples of convenience items of this type. In the middle of this continuum is shopping goods.

37. Based on the nature of the product category (e.g., price level, product involvement), I believe that for most consumers, the purchase of tires approximates a shopping good that falls at some intermediate level of time/effort that the average consumer expends in the purchase decision-making process. That is, most consumers will expend more effort in the decision-making process than if they were purchasing gasoline, but not as much as if they were purchasing an item of higher involvement, e.g., a suit for the ego-involved person. And, to be certain, there are some consumers for whom tires are a high involvement specialty good – car enthusiasts purchasing performance tires might be likely to fall into this category. However, at issue in the present case are all-season tires for the mass market to which Sears advertises using Sears' own OSP representations.

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[2]Although this is not even necessarily so. For example, although wine is a specialty good for a wine connoisseur, the connoisseur may have enough information and experience stored in memory that once problem recognition occurs (e.g., "I am out of wine."), s/he knows exactly what wine s/he wants and where to purchase it such that s/he goes straight from problem recognition to purchase.

38. I should note that statements made by Mr. Cathcart of Sears are consistent with my opinion that for most consumers, the level of involvement with the product category of tires is not especially high. In response to a question regarding retailer motivations for the possible need to refresh product lines, i.e., replace existing tires with newer models, Mr. Cathcart does not give this much credence. On page 470 of his transcript he states "As a general statement, it is in the retail business. In tires, it's – you know, they're black and they're round, and there's not a lot of exciting tires. So in general, people would not stop shopping because you're selling the same tire." Moreover, on page 565, Mr. Cathcart responded affirmatively to the question "You had some knowledge of what customers were looking for in terms of tires?" – suggesting that his opinion is an informed opinion. Mr. Cathcart's statements converge with my view about most consumers view tires, their level of product knowledge vis-à-vis intrinsic attributes (discussed more specifically below in paragraph 45), and my contention that for the mass market, tires are a shopping good (as opposed to a specialty good).

39. Given that consumers will expend more time and effort as they move from the purchase of convenience to shopping to specialty goods, an issue is, at an absolute level, how effortful are consumers in the search and alternative evaluation stages of the decision making process for a shopping good such as tires? As a baseline, there is an abundance of evidence in the marketing literature that many consumers have a tendency to behave as "cognitive misers," to shop with a "low level of cognition," and thus shortcut the effort/stages in the decision-making process

(Hoch 1997; Inman, McAlister, and Hoyer 1990; Inman, Peter, and Raghubir 1997). Thus, even before any effects of OSP representations, there is a predisposition for low levels of effort/search for many consumers – a surprisingly large number of consumers are simply not vigilant shoppers even for expensive shopping goods (see Moorthy et al. 1997).

40. Of particular relevance to the current case, there is also an abundance of evidence which suggest that, even against this low effort/search base, OSP representations positively influence consumer value perceptions and negatively influence consumer intent to search for a better alternative, thereby further truncating the effort/number of stages in the decision-making process. This effect has been found many times, and for shopping goods (cf. Lichtenstein and Bearden 1989; Lichtenstein, Burton, and Karson 1991; Urbany, Bearden, and Weilbaker 1988). The negative influence on search is due in part to the perception that, now that this "exceptional value" has been found, the marginal value of additional search is reduced relative to the marginal costs (time, effort) of additional search (Urbany et al. 1988). Moreover, often times influence is also due to language in the OSP representations such as "Sears, Reg. $XX, Sale $XX" that connote that the price reduction is temporary and if consumers do not act with some immediacy they will lose the opportunity to enjoy the savings. Thus, it is my opinion that exposure to an OSP claim for tires from a credible merchant (which accurately describes Sears – evidence provided subsequently in paragraph 52) that signals a good deal to consumers would be expected to have a negative effect on the

expected time and effort expended in the search and alternative evaluation stages of the consumer decision-making process (where comparison shopping takes place) and a positive effect on the probability of purchase of tires from the advertising merchant. This opinion is consistent with empirical effects found in research (cited above in this paragraph).

41. I should note that if the OSP claim is made in a good faith manner, it can have a positive impact on consumer welfare. That is, consumers can purchase a product at a fairly represented value, and when they can rely on the OSP representation, the truncation of search represents a positive to consumers, i.e., their search costs are lower. However, when the OSP claim is not made in a good faith manner, reliance on the claim by consumers results in injury to consumers and competition.

42. Tires are a product category where "problem recognition" generally occurs on a continuum as opposed to a discrete point in time. Consumers who have "problem recognition" triggered by some stimulus or cue, or a combination thereof would likely be motivated to reduce the tension created by the unfulfilled need – especially if the product is a necessity. However, for some necessity product categories problem recognition occurs at a discrete point in time, while for others, it occurs on a continuum. That is, as opposed to products that function perfectly fine until they function no more (e.g., a light bulb, perhaps a furnace, a car battery – or a single tire blowout) and where there is no advance warning that the product

is about to fail, other products wear visibly and the need to replace them is a continuum rather than at a discrete point in time (e.g., shoes, toothbrush, tires). Thus, for these categories, the difference in the gap between the perceived and desired state of affairs is a visible continuum to the consumer and widens gradually over time.

43. As the experience of problem recognition on a continuum as opposed to a discrete point in time affords consumers a time horizon to engage in passive search (as opposed to needing to rush out to purchase a replacement immediately), this difference has implications for consumer search behavior. For example, and placed in the context of tires, consumers always know that the desired state of affairs is to have safe tires, but as consumers continue to drive on existing tires, those tires approach becoming unsafe. Thus, except for the case of the purchase of a single tire for reasons of road hazard (at maximum 10-15% of the market), when to purchase new tires is a continuum based on when the benefit of new tires exceeds the cost of obtaining them. Given this state of being for consumers, worn tires themselves are not a surprise and are unlikely to send someone directly into a tire store. Rather, as consumers notice that their tires are becoming worn, they will most likely go into a passive search mode where they more readily perceive tire advertisements (this is known as "perceptual vigilance," a type of "selective perception"). Thus, the percent of consumers who have forewarning/time to engage in this passive search and be perceptually vigilant for price advertisements, and thus are influenced by OSP representations, is higher than

would be the case if problem recognition for the necessity product occurred without warning (e.g., an emergency visit to the tire dealer for a single tire).

44. Therefore, that fact that problem recognition occurs on a continuum for tires for approximately 85-90% of the market (i.e., for all of those other than those needing a single tire because of a road hazard), as opposed to a discrete point in time, means that these consumers have time to engage in passive search and be influenced by OSP representations. Additionally, the large promotional budgets (see NADM 4125, "Chronological Listing of Preprint for 1999") that create "top-of-mind" awareness would further increase the likelihood that consumers would be exposed to Sears OSP ads, either as a function of consumers actively seeking out the ads, or being passively exposed to them.

45. The Tires are private label brands in a product category where several intrinsic attributes are difficult for the average consumer to evaluate. Consumers seek to maximize value (i.e., the quality they get for the price they pay) in purchase situations. When consumers need a product where there are several brand alternatives, there are various purchase strategies they may employ to maximize value. First, for product categories where intrinsic attributes are easy for the consumer to evaluate (i.e., those physical attributes that comprise the brand), consumers can simply evaluate brand alternatives within and across merchants on a "quality for the money" criterion and select that brand from that merchant that offers the best value.

46. However, where intrinsic product attributes are difficult for consumers to evaluate, consumers can at least turn to a second strategy that encompasses comparing prices for like brands across merchants. By doing so, they can at least purchase a brand that represents the lowest price for that brand across merchants. In this manner, while consumers would not explicitly know how much quality they received for their dollar, they would at least know that they received the most for their dollar for that particular brand. However, when consumers lack the ability to evaluate products on intrinsic attributes *and* competing retailers carry brands unique to them, neither of these strategies is open to consumers.

47. What strategy is left for consumers? Research shows that in cases where consumers cannot evaluate product quality based on intrinsic attributes, they will take "shortcuts," i.e., rely on "decision heuristics" in making quality assessments. Most commonly, they will rely on "extrinsic cues" to signal product quality and a good deal (e.g., OSP claim, store name, brand name). Thus, the likelihood increases that they would respond to a merchant advertising "exceptional values," and especially if the merchant is perceived to be credible. As noted by Kaufmann et al. (1994), there is widespread recognition that OSP representations are likely to be more impactful for product categories where intrinsic attributes are hard for consumers to assess.

48. Consider this in the case of private label tires. My belief is that for most consumers, they do not have the ability to evaluate the quality of tires based on "intrinsic attributes," e.g., tread pattern, tire construction. This opinion is based on my experience with consumers in their evaluation of attributes for many categories of infrequently purchased shopping goods. It is also consistent with Mr. Cathcart's (of Sears) statement noted above with respect to consumer perception of tires, i.e., "In tires, it's – you know, they're black and they're round, and there's not a lot of exciting tires" (p. 470). Also in support of my opinion, Mr. McMahon of Sears notes, in his affidavit, that in setting prices:

> "...Sears Automotive compared its 'BF Goodrich Plus' Relevant Product with [redacted] tire. The BF Goodrich Plus tire was superior to the [redacted] tire, however, consumers tended not to perceive the inherent value of the BF Goodrich Plus tire when Sears Automotive's opening price point was more than [redacted] for the inferior [redacted] tire. As a result, Sears Automotive set the price for its BF Goodrich tire in such a manner that consumers would compare the value of that tire against the value of [redacted] tire." (NADM 4117S, paragraph 251)

49. Additionally, in Mr. Cathcart's transcript (p. 446-448), he recognizes that although the Sears relevant tire is better in terms of objective quality, consumers do not perceive it.

50. These statements by Sears personnel support my opinion that the mass market for tires generally cannot evaluate intrinsic product quality. Thus, the ability to evaluate quality for the money across product alternatives and retailers based on intrinsic attributes would be a difficult calculation for most consumers to make. Being aware of this, and with respect to the first strategy noted above, consumer motivation to engage in search is reduced.

51. With respect to the second strategy noted above (i.e., comparing products across merchants), even for the most unknowledgeable consumer of tires, for national brands, the same exact tires can be evaluated across merchants for accurate relative assessments of value. That is, consumers would be more motivated to search to the extent they could at least compare prices of like tires across retailers. However, by definition, private label tires are unique to each retailer. Thus, consumer ability, hence motivation, to engage in search would be further diminished. (See transcript of examination of Mr. Paul Cathcart, Volume 4, p. 566.)

52. With respect to the third strategy noted above – relying on extrinsic cues for assessment of value -- as Sears market research shows, Sears is perceived to be tops in the market with respect to perceived credibility.[3] Consequently, based on

[3] See market research reports entitled "Companies Canadians Really Trust," "Companies Canadians Perceive as Having Good Customer Service," "Companies Canadians Perceive as Offering Good Quality

the savings implied by the reference price advertising of Sears (a highly credible merchant in the eyes of consumers)[4] on private label tires that are dual-branded with a well-known credible brand, it is my opinion that consumers who are in the market for tires and who are exposed to the Sears OSP claim are likely to be influenced to visit the Sears auto store and purchase Sears tires during that visit. It is very likely that Sears will be the first and only store that many consumers visit for the purchase of tires. This opinion is consistent with the evidence on consumer search behavior provided in paragraph 39 with respect to shopping goods, even expensive shopping goods.

53. <u>Tires are a necessity good for any consumer driving a car</u>. Another taxonomy (that too is somewhat of a continuum) that can be used for the classification of products is whether the product is more of a necessity or luxury good. This of course has implications with respect to consumer ability to opt out of the market. Consumers who have uncertainty about the value of a luxury good may choose to delay purchase until the uncertainty is addressed or they may choose to totally opt out of the market indefinitely. For a necessity good, consumers do not have this option -- consumers must purchase from some retailer. Therefore, that the consumer does not reach a comfort level with his/her knowledge prior to purchase is a moot point – s/he still must purchase from some retailer. As noted above, the

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Products or Services," "Companies Canadians Really Respect," "Companies Canadians Perceive as Offering Good Value for the Money."

[4] In Sears Buyer's Letter 1999 (NADM 1782), it is stated that in 1998, Sears "maintained [its] position of the largest retailer of tires by outlet in Canada." Also, in a competitive analysis provided in a document entitled "Commodity Competitive Review: Primary Competitors" (NADM 1868), Sears notes "trust" as a

choice is likely to be from a high credibility retailer that is advertising an "exceptional value."

IV. RELEVANT GEOGRAPHIC MARKET FOR SEARS TIRES

54. The term "geographic market" is one that has meaning depending of the context in which it is used. For example, in many antitrust matters, the term will relate to the "trade area" of a retail store or chain of stores, i.e., that geographic region from which a retailer draws most of its customers (Ghosh and McLafferty 1987). For example, a particular tire store may have a trading area of 10 miles (e.g., 80% of their customers live within 10 mile radius). Also, it may also be the case that the there are several locations in which the tire store chain operates in a city such that the entire city is the trading area.

55. This "trade area" based definition of geographic market is the one regulatory agencies typically consider when the question of if a particular merger will substantially lessen competition in a geographic area is considered. Addressing this question requires examining data on the basis of individual trading areas. However, using the same definition of geographic market for the issue at hand confuses two different questions, each responsive to different lines of inquiries, each with its own definition of geographic market.

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competitive advantage relative to CTC and "Tire Stores." Both of these documents are consistent with my

56. The present question relates to what level of data aggregation will yield the most appropriate insights into Sears OSP advertising behavior and consumer responsiveness to that behavior. In contrast to the definition of geographic market that relates to trade area size, the question of geographic market in the present case relates to the presence or absence of *differences* across geographic areas with respect to Sears OSP advertising behavior or consumer responsiveness to that behavior. This is a question that marketers address on an ongoing and regular basis. It is well-accepted within the marketing discipline (and indeed all social science disciplines) that, in the absence of the systematic differences across geographic areas/observations (e.g., stores), data are most appropriately examined at an aggregate level rather than on an individual store basis.

57. For example, consider a situation in which a supermarket chain is interested in the relationship between the purchase of eggs and the purchase of cake mix. This may be important because as the relationship gets stronger, the supermarket may wish to place their cake mix closer to the dairy aisle. Would supermarket management be served best by examining the relationship between egg and cake mix sales data on a store-by-store basis, or alternatively, should they pool the data across stores in differing geographic areas and examine the data on an overall aggregated basis? Which approach would generate the best insights? It is well-accepted in marketing (and the social sciences more generally) that the appropriate level of aggregation will depend on the presence/absence of

belief that consumers perceive Sears as a high-credibility retailer.

systematic differences across observations (i.e., stores) that relate to the phenomenon of interest. For example, if store management had reason to believe that some stores were located in areas where people were more likely to bake and some stores were located in areas where people were less likely to bake (perhaps based on some stores being located in areas where demographics, e.g., age, related to baking were systematically different), then it would be appropriate to at least initially examine the egg and cake mix sales data based on stores that reflected differences in consumer propensity to bake. In the absence of such differences, it would be most appropriate to aggregate across stores in order to get the most accurate view of the relationship.

58. To take another example, in situations where there companies conduct test markets, they will *systematically* vary marketing mix elements between stores (e.g., shelf placement of a product) and then examine data (e.g., sales of the product) on a between-store basis in order to make inferences regarding the effect of altering the marketing mix element on the outcome variable (i.e., sales). Thus, the X number of stores where the product placement is in one location will be aggregated in one group (as there are no systematic differences within stores in this group) and the Y number of stores where the product placement is in a second location will be aggregated into a second group (as there are no systematic differences within stores in this group), and then a comparison of the mean sales

of the product between the two groups of stores will be compared for product placement decision-making purposes.[5]

59. However, in other studies where there are *not* systematic differences between stores (marketing mix or otherwise) that may be expected to affect the phenomenon of interest, it is appropriate to aggregate data across stores and examine the data as a whole. In this way, idiosyncratic/random differences between stores that may affect the phenomenon of interest are smoothed out and a more accurate picture of the phenomenon can be obtained. For example, there are countless studies using scanner data (i.e., data on product sales that are gathered at the point-of-purchase where items are scanned) where relationships between variables (e.g., how many people that purchase eggs also purchase cake mix?) are aggregated and examined on a chain-wide national basis on the assumption that the relationships between these variables would be systematically unaffected by the store in which the data were collected (e.g., Kalyanaram and Little 1994; Winer 1986). Thus, unless there are significant differences in the modes of operation between stores, differences that would be expected to have a systematic

[5] Until and unless data demonstrate at a level of statistical significance that product placement makes a difference in terms of sales, the assumption of classical hypothesis testing would be that product placement does not make a difference in sales. Stated more generally, accepted procedure of hypothesis testing dictates that data should be treated as coming from one distribution and thus treated in an aggregate manner unless there is demonstrated evidence of systematic differences across observations (e.g., stores) with respect to the phenomenon of interest (e.g., OSP price claims). In terms of hypothesis testing, this means that we fail to reject the null hypothesis of "no differences between stores" (therefore aggregation is appropriate) unless there is a demonstration of systematic differences (in which case, analysis of stores based on those differences is appropriate). I should also note the entire rationale of experimental design and the analysis of variance techniques used to analyze the data in all sciences where experiments are conducted is built on the premise of aggregating observations where there is an absence of systematic differences across observations.

effect on the effect of OSP advertising on consumer responses (as in the product placement example above), then it is appropriate to aggregate data across stores for examination. As this is the norm, there are countless examples of this approach. Because of a lack of between store systematic differences in relationships between study variables, I have aggregated data across stores in my own published research (e.g., Lichtenstein, Ridgway, and Netemeyer 1993; Lichtenstein, Netemeyer, and Burton 1995).

60. This is also sound measurement practice. That is, while there are idiosyncratic differences across observations in practically any distribution (e.g., some stores are newer vs. older, some have more vs. less parking), the key is if there are differences between observations (stores) that systematically relate to the phenomenon of interest, in this case OSP representations made by Sears and their effect on consumers. In the absence of these systematic differences, data should be aggregated across all observations (i.e., stores) in order to smooth out idiosyncratic differences and gain a more complete and general view of the phenomenon (Churchill 1979).

61. Consequently, in forming my opinion about the relevant geographic market, the issue I examined was if there were systematic differences in Sears marketing mix across Canada that would affect consumer response to OSP representations made

by Sears. To this point, in his affidavit at NADM 4003S-4004S Mr. McMahon notes that:

- Sears Automotive divides Canada into four regions: (1) a Central District (Manitoba and a part of Ontario), (2) an Eastern District (New Brunswick, Nova Scotia, Prince Edward Island, Newfoundland and the other part of Ontario), (3) a Western District (British Columbia, Alberta, and Saskatchewan), and (4) a Quebec district.[6]
- "Sears Automotive did not produce or distribute separate marketing and promotional material for each region during relevant period ... There were no regional variations in the national advertisements which Sears Automotive published in newspapers across Canada in relation to the promotion of the Relevant Products during the Relevant Period, with the possible exception of the above-mentioned snow tires in the Province of Quebec.[7]"
- In NADM 4118S, Mr. McMahon states that with respect to Sears "Regular Price," there was "No Regional Variation." He states that "Sears Automotive adopted standard pricing during the Relevant Period with respect to the Sears Regular Price at which each Relevant Product was

[6] That Sears has four districts based on geography is not indicative of geographic market segmentation. Rather, in this case, the four districts appear to be based on administrative structure (much in the same way as a retailer such as Walmart has different regions, each with different regional managers). Geographic segmentation would relate to variance in marketing mix elements across geographic areas.

[7] The General Manager of Sears Automotive did note that they promoted Snow tires in Quebec, and that the same snow tires may not have been promoted in other regions at the same time. However, snow tires are not one of the Tires, tires that were priced, promoted, and distributed in an identical fashion.

offered for sale. In each market which Sears Automotive operated a Sears Retail Automotive Centre, the same Relevant Product was offered at the same Sears Regular price. Sears Automotive did not offer the same Relevant Product for sale at different Sears Regular Prices in different markets in Canada."

- In NADM 4113S, Mr. McMahon notes that "the principles discussed below upon which Sears Automotive developed its pricing strategies were applied in a consistent manner with respect to all of the models of the Relevant Products that were offered for sale and sold in Canada at Sears Retail Automotive Centres… during Relevant Period."

62. Further, in the McMahon's affidavit at NADM 4074S-NADM 4076S, data are provided that show a wide range of locations (and perhaps an exhaustive set of locations) in each of the four districts stocked all of the Tires during 1999 and sold them at a "Sears Reduced Price in accordance with Sears Automotive's Retail unadvertised promotional programs…" This is an indication that Sears is behaving consistently across geographic regions, i.e., a lack of systematic differences across geographic regions. Finally, in the McMahon affidavit at NADM 4090S, Mr. McMahon stated that in considering whether to promote an item at a "Sears Reduced Price," Sears considered [redacted] suggesting that Sears viewed consumers in Canada as relatively homogeneous with respect to the purchase of all-season passenger tires. Based on these data, there is between-store

marketing homogeneity with respect to marketing mix variables. In my opinion, it is clear that in 1999, Sears was not practicing geographic market segmentation, rather, they treated Canada as one large market. Stated alternatively, assuming Sears is a profit maximizing firm, Sears does not perceive there to be returns in revenues large enough to offset the increased costs of treating markets differently.

63. I should also note one final perspective that also supports aggregating the data across stores in this case. As noted above, if Sears' OSP behavior differed across stores, then it would be appropriate to examine the data at a level of aggregation such that there was minimal within group heterogeneity with respect to the pricing behavior (i.e., group like stores together). In the absence of OSP pricing heterogeneity, all stores should be aggregated in one group.

64. Considering this same issue from a different perspective, if there were data to suggest that Sears customers perceived the OSP behavior at Sears varied across stores in Canada, then there would be a rationale for at least *initially* grouping stores by consumer price perceptions for an initial examination to see if analyzing data at this level of aggregation yielded a different picture of the phenomenon, i.e., the OSP pricing behavior. A couple of points are noteworthy here. First, it is well accepted in the social sciences that the "null hypothesis," that is, the accepted state of affairs is that there is no difference in perceptions across observations, stores, etc., unless there is evidence presented to the contrary which leads to a rejection of the null hypothesis. Thus, the assumption would be to aggregate the

data unless evidence can be provided for why this should not be done. Second, addressing this issue in a more proactive manner, that Sears is a national chain, with a long history of national publications (e.g., the Sears Catalog), with national advertising, and with national corporate management, it is my opinion that consumers would likely infer that the pricing and promotional practices of Sears were national. To my knowledge, there is no specific study in the academic literature on this point. Given my experience in the field of consumer behavior, including serving on the editorial review board of the leading consumer research journal, my strong belief is that the reason that this question has not been addressed in the academic literature is that it is "uninteresting and obvious." For a researcher to provide evidence that people perceive the pricing practices of a national chain to be constant across the chain, in the absence of any data suggesting otherwise, would be uninteresting and would most certainly lead to a rejection for publication at the journal.

65. Thus, based on the facts of this case, in applying the time and volume tests, I conclude that it is most appropriate to aggregate data across the 67 tire stores operated by Sears on a national basis.

V. <u>VOLUME TEST: WAS A SUBSTANTIAL VOLUME OF THE PRODUCT SOLD AT OSP WITHIN A REASONABLE PERIOD OF TIME BEFORE THE MAKING OF THE OSP REPRESENTATION</u>

A. Reasonable Period of Time

66. I have been asked for my opinion regarding if twelve months of sales data is a reasonable period of time for evaluating the volume of sales. In my opinion, it is very reasonable in the case of all-season tires.

67. A fundamental principle of sampling theory is that in order to get an accurate assessment of the "sales picture" for any product category, it is fundamental that the time period under consideration encompass the range of sales cycles for the product category. For example, consider the sales of soft drinks. As I expect that sales of this product category has considerable variance across seasons, if the purpose of the exercise was to do an annual sales forecast, it would be important that the full range of sales (especially seasons of highest and lowest sales) be considered in order to gain a more complete picture of the sales of this category.

68. The question at hand does not relate to an accurate assessment of the sales scenario per se (i.e., as would be required in an annual sales forecast for example), but rather, what is the most appropriate time period for the evaluation of what is considered "substantial." To address this question for a product that has seasonality in its sales and when "substantial" is measured in *absolute units*, it is important to consider a "high" season in the consideration of substantial. For example, consider winter coats. It would be inappropriate to claim that a retailer had not achieved "substantial sales" by considering only the summer months for

the period of evaluation. A more legitimate assessment of substantial sales would focus on sales that occurred during the winter (or, more precisely, the sales season for winter coats). By considering the selling season as the most relevant time period, a retailer has the best opportunity of achieving "substantial sales."

69. As the name suggests, "all-season" tires do not have the seasonality in sales that products such as winter coats, or probably soft drinks, do. Thus, each time period should be relatively more representative of the others such that it is of lesser consequence what time period of evaluation is considered for the evaluation of substantial sales. However, this said, there is strong rationale that even a much shorter time period of evaluation would be necessary in the present situation. That is, data do indicate that there is evidence of some seasonal fluctuation in the sales of tires (i.e., higher sales in the fall and spring -- see page 466 of Mr. Cathcart's transcript). However, *and most importantly*, it is my opinion that consideration of "substantiality" of sales of the Tires should be considered on a *percentage-wide basis* (what percent of tires are sold at OSP). Consequently, this percentage should not vary as a function of season. Thus, any time period should be relatively representative of other time period. Following this logic, I can see no reason that a period encompassing twelve months (which captures two high and two low selling seasons) would not be adequate for assessing the issue of substantiality. And again, given that substantiality is evaluated on "what percent of tires are sold at OSP" rather than "what amount of tires are sold at OSP," the issue of seasonality is moot.

B. Substantial Volume

70. To be certain, the volume of sales that constitutes "substantial" depends on the particular product category and, within some plausible range, is subjective. For example, and as noted above in paragraph 18, some products better lend themselves to stockpiling than others and, all else being equal, we would expect a relatively larger percent of purchases at a sale price for these product categories (e.g., canned soup, candy bars, soft drinks).

71. In section f of their document entitled "Pricing Policy Sears Corporate Bulletin, Sears notes, "In addition, the comparison price should reflect a substantial sales volume. What will be regarded as 'substantial' will depend on the nature of the product and industry" (NADM 1847). While what is "substantial" is subjective and would be expected to vary across product category, it is my opinion that the 3.79% of sales made at the "Sears, Reg" price (see report entitled "Volume of Sales at Sears Regular and Reduced Prices Going Back 12 Months from Relevant Representations (as taken from Exhibits 'A' and 'B')" Tab 248) falls significantly below any level that could be defended as representing "substantial."

72. The basis for my opinion is my belief that consumers purchasing tires would believe that a "regular" price, if legitimately employed, would represent a price at which significantly more than 3.79% of tires are sold – and as noted in this Sears

policy, consumer impressions are at the heart of the issue when assessing deception. There is empirical evidence to support my opinion. In her case write-up of the State of Colorado's case against the May Company, Ortmeyer (1992, p. 8) reviews consumer survey evidence collected by Professor Joel Urbany, an expert hired by the State of Colorado for this case. On page 8 of the case, she notes "...the majority of the respondents believed that 'regular' or 'original' priced merchandise represented at least 25% of the unit sales of a product in the previous 90 days and that the 'regular' or 'original' price was the price charged for the majority of the selling period." The ads to which consumers responded were department store OSP representations (identity of store concealed) either for a vacuum cleaner or frying pan – both shopping goods.

73. Again, accepting different percentages of sales across different product categories as legitimizing an OSP, whatever sales volume would be reasonable to conclude that the "Sears, Reg." price is a legitimate Sears' price, the sales volumes actually achieved by Sears (3.81%)[8], in my opinion, do not reach this level. Based on my many years of conducting pricing research, the pronounced effect that OSP representations have had on respondents in pricing research (and in practice), and the results of Urbany's research noted above, I am confident that consumers would believe that significantly more sales occur at the OSP advertised by Sears

[8] According to the data provided in the document entitled "Volume of Sales at Sears Regular, '2 for' and Various Promo Prices from Date of Relevant Representations Back to January 1, 1999" (Tab 249), across the five Tires for a period of time of approximately 10 to 11 months, Sears sold from between 2.23% and 5.26% (avg. of 3.81%) of the tires at the OSP. This is in contrast to 80.66% sold at a "temporary" promotion price (Tab 249) and 96.21% sold at a price less than the "Sears, Reg" price (Tab 248). As this

than was actually achieved. Stating this in different terms, if it was disclosed to consumers that only 3.79% of sales occurred at the OSP, I believe the OSP would lose influence with consumers.

74. Moreover, as stated in paragraph 17, because these 3.79% of sales are for single units where it is very likely that consumers were not able to exercise unconstrained choice with respect to which tire they purchased, I do not believe this 3.79% can be interpreted as evidence of validation of the OSP. Stated differently, "what percent of tires sales occurred at the OSP *where consumers exercised free choice?*"

75. I should note that on page 907 of Volume 6 of the oral examination of Mr. William McMahon, Mr. Syme, counsel for the Commissioner, asked Mr. McMahon "Good faith means that you have an expectation that you are going to sell some tires at that comparison price?" to which Mr. McMahon replied affirmatively. In a subsequent response to Mr. Syme's query that if volume of sales were at the level of "one or two or five per cent," Mr. McMahon stated "that would be a concern." This suggests to me that the volume of sales at the OSP realized by Sears did not meet the level of "substantial" in the eyes of Sears.

76. With respect to geographic market, given the relative lack of variance across Canada in the marketing and sales of the five relevant tires, my opinion regarding

2.23%-5.26% was distributed over the 10-11 months, it is my opinion that at no time did they have a substantial volume would also not change if data were examined on a less aggregated basis. There are several pieces of evidence that suggest that my conclusion holds across all regions where Sears does business. For example, the pattern of sales data across the six regions examined for all Sears' tires sold for January to June (NADM 1866) and for July-Sept (NADM 1867, which are part of Sears Automotive Review Spring '99) for the years 1994 through 1998 appears relatively constant. That is, while there is variance in quantity of tires sold year-to year, the pattern (i.e., ranking) of sales across the years appears relatively constant across region.

VI. TIME TEST: WAS THE PRODUCT OFFERED FOR SALE, IN GOOD FAITH, AT THE OSP FOR A SUBSTANTIAL PERIOD OF TIME RECENTLY BEFORE THE MAKING OF THE REPRESENTATION.

A. Substantial Period of Time

77. The substantial period of time provision relates to that amount of time a product should be offered at an OSP (either immediately before or after making the sales representation) such that it has the opportunity to be verified by the market as the "regular price." Given the lack of seasonal variation in sales of the Tires, the fact that six contiguous months captures the small amount of seasonal variation that there is, and more importantly, that there is little reason to expect month-to-month

substantial sales volume at the OSP that would have made it a bona fide price for comparison purposes.

variations in the *percent* of tires sold at the OSP, there is little reason to believe that an accurate picture of the OSP behavior of Sears cannot be captured in a contiguous six-month period.

78. That said, the very high frequency with which the Tires were promoted at their sale prices leads me to conclude that the OSP representations were not established "regular prices" either immediately before or after the sale representations. The data offered in the table entitled "Summary of Time Analysis For the Six Month Period Preceding the Relevant Representations" (Tab 267) show that for the Tires, they are offered on price promotion from between 40-81% of the time for the six months immediately preceding the selected representations. The data offered in the table entitled "Summary of Time Analysis From the Date of Relevant Representation Back to January 1, 1999" (Tab 268) show that Tires are on price promotion from between 46-75% of the time from the date of the selected representation back to January 1, 1999, which is almost a year for four of the five tires (and about 10 months for the other). While this in and of itself calls the validity of the OSP into question, considering the OSP in the full context in which the Tires were offered for sale suggests that the time period under consideration becomes less meaningful. I address the context below under the heading of "Good Faith."

B. Good Faith

1. Rotation of OSP advertisements across substitute products.

79. Kaufmann et al. (1994, p. 128) note:

> "With comparable brands (that in effect are fungible), it is possible for retailers to rotate sales on specific brands within a category, such that they are in compliance with state standards requiring a given percentage of time at a reference price, yet deception would remain. For example, consumers may assume the quality of major brand towels to be identical. A retailer need only have one major brand on sale at any one time to allow consumers to infer extraordinary value based on the reference/sale price comparison. The high price on the other brands creates an illusion of value and can lend support to the price comparison given for the sale brand."

80. Thus, even if Sears has just one of their Tires on price promotion at any given time, and they were to rotate the price promotion among the five Tires, they may look more reasonable in terms of time tests, yet given the nature of the product category, the deception would still remain. Thus, given this rotation and the lack

of brand insistence, any per se time test becomes less meaningful as long as one brand is always on sale.

81. Consistent with this, beyond the high frequency with which each of the Tires are promoted using OSP representations, there is generally at least one, and most often multiple, of the Tires on sale. That is, Sears rotates the particular model of tire that is the feature of OSP claim so that when consumers see the price promoted brand, at least some of the other four Tires may not be price promoted. For most people, tires are not "specialty goods" where consumers have a high degree of knowledge and a high degree of brand insistence. They are substitutable such that if one tire is not on sale, they will switch quite easily to another that is. That is, for tires, consumers are more willing to view alternative brands as near substitutes, and thus, are likely to be willing to purchase the brand that is on sale (especially since the ones not on sale are priced much higher).

82. In page 567 of his transcript, Mr. Cathcart responds affirmatively to the question that the purpose of the checkerboard is to rotate tires through promotion. That said, the individual tires are still on promotion with a high level of consistency.

83. In the Sears Private Label Strategy (NADM 1869), Sears notes as one of their "tactics" for private label brands that they will: "Concentrate the broadest assortment in both size on designs around the key price points and rotate these issues throughout our advertising program on a regular basis."

84. That the Tires are at different price points with different tread lives does not mean that they are not close substitutes in the minds of consumers. First, as noted above, most consumers are not able to evaluate tires on intrinsic attributes. Second, given this lack of ability, it would be rational for consumers to evaluate tires based on perceived value of the deal (defined as perceived quality/price) as tread life (warranty) for the dollar – suggesting a lack of brand insistence. Following this logic, the Tires are substitutable.

85. All of this said, in Sears Guidelines for Savings Claims at NADM 8647SC, Sears notes that their policy is that [redacted] While I am not a proponent of per se time tests, based on information provided in the report entitled "Summary of Time Analysis for the Six Month Period Preceding the Relevant Representations," for four of the five Tires, Sears has violated its own policy, and by implication of that policy of [redacted] being some threshold – deceived consumers. (Again, I do not favor per se time tests for assessing deception. However, when accompanied by a "good faith" criterion, I am more comfortable with them. That said, the [redacted] appears arbitrary – only selected because it means off sale more than on sale. However, there is no reason to believe that this is the perceptual threshold with respect to consumer impressions.) I should also note that NADM 8647SC suggests that Sears views [redacted]s the appropriate basis for evaluations of the time test.

2. Reasonableness of Sears' Reference Prices in Light of Competition

86. One of the most obvious indicators of a good faith OSP is the relationship between that price and competitive prices on like merchandise in the marketplace. If consumers at large do not perceive the OSP on a product to be competitive with similar products in the marketplace, and the advertising merchant is aware of this, then the OSP would not be a good faith price.

87. In several places in Sears' internal documents, they identify competing tires at CTC at various price points for their private label brands, suggesting that Sears recognizes the comparability in the eyes of consumers of the tires identified. I note that Sears states as follows:

- in NADM 1782, Sears notes "This pricing will be within [redacted] of the similar line at [redacted] with a full warranty package."
- In his affidavit (NADM 4116S-4117S), Mr. McMahon states that the price of [redacted] tires for similar tires to those of their relevant products was a major factor in setting prices.
- In NADM 1869 and NADM 1885, Sears notes that their private label strategy is to "index our every day pricing to [redacted] Private Brand retailer) to be equal to or within [redacted] of their every

day low price with a better warranty package. On sale we will be lower than the equivalent tire at [redacted]

- In NADM 1873 and NADM 1878, Sears explicitly compares prices of its private label tires to those of [redacted] There are many additional documents where Sears explicitly compares their private label tires to those of [redacted] including various competitive profiles (e.g., NADM 3054, 3058).

88. As Kaufmann et al. (1994) note, a "comparison of the initial mark-up taken by the focal retailer with industry norms in the same product category will be important to a full ... analysis of deceptive high-low pricing." Noticing the everyday price of the identified [redacted] tires, the OSP representations of Sears were not reasonable. In fact, by the mere fact that Sears indexed their everyday "2 for" prices, and not their "Sears, Reg" prices to the prices of [redacted] is strong evidence that the "Sears, Reg" prices were not reasonable in light of competition. Also, the relative low level of sales at the OSP (and a level that is virtually nonexistent for unconstrained sales) is indeed consistent with the notion that Sears tires are not so different in the eyes of consumers from the tires of competitors (most notably [redacted]) where they can command the price premium represented by the OSP representation. Therefore, Sears must offer prices that are competitive with [redacted] – which their OSPs clearly are not.

3. <u>**Expectations Regarding Market Validation of the OSP**</u>

89. Another factor that relates to good faith is the market potential for an OSP as known to the firm. For example, if an OSP were advertised as bona fide to the mass market, yet there were structural reasons in the market known to the retailer that precluded the OSP from ever being relevant to the vast majority of the mass market, then the OSP would not be set in good faith. Moreover, if there was easily available data showing that that the market was not validating the OSP and the retailer failed to revise their OSP advertising practices, then the OSP would not be a good faith price. Another indicator of the lack of a good faith OSP is if retailer sales forecasts do not anticipate sales at that price. I believe that the evidence shows that: a) there are structural realities in the marketplace known to Sears that preclude the OSP from being valid for the vast majority of the market (and probably to the entire market when covarying out constrained sales), b) Sears knew, or should have known, that the market was not validating their OSP via purchases, and c) Sears did not include sales at the OSP in their sales forecast, reflecting a lack of expectation of sales at the OSP. All of these individually and collectively provide strong evidence that Sears had no reasonable expectation that the market would validate the OSP as a bona fide market price.

A. Structural Realities in the Marketplace.

90. My opinion is that Sears advertised their OSPs to the mass market, however, for structural reasons, the prices were never relevant to at least 85-90% of the market.

Rather, a much lower nonpromoted "regular ordinary selling price" (i.e., the "2 for" price) was always available for them, making the promoted OSP invalid.

91. Because multiple tire purchasers can always purchase at the "2 for" price offered every day, a nonpromoted price that is lower than the "Sears, Reg." price, it is my opinion that the OSPs could not be valid bona fide market price for any consumer looking to purchase multiple tires (85-90% of the market). Thus, for the 85-90% purchasing multiple tires, at most, the savings for those purchasing tires at the advertised sale price would be the difference between the "2 for" price and the sale price, yet consumers are led to believe that the savings is the difference between the OSP and the sale price. There is empirical evidence to support this. In her case write-up of the State of Colorado's case against the May Company, Ortmeyer (1992, p.19) reviews consumer survey evidence collected by Professor Joel Urbany, an expert hired by the State of Colorado for this case. She notes that Urbany's results show that "the majority of respondents believe that, after the sale was over, the price would return to the regular or original level stated in the ad."

92. And, even for that portion of the 10-15% of the market that may potentially purchase at the OSP – again, for reasons of constrained choice, this is not evidence that even these consumers are validating the OSP as a bona fide price.

B. Sears Knowledge of Sales at the OSP

93. That significant sales were not occurring at the OSP (as would be easily predicted based on the structural reason noted above) should have been obvious to Sears so that they would be able to adjust their OSP to a good faith price. With this data, they would be in a position to revise their OSP to be in line with marketplace prices. With regard to this issue, Kaufmann et al. (1994) note that in assessing "good faith," "current 'regular' prices should be compared with historical prices for the product to determine whether the retailer is actively incorporating consumer purchase response data into its pricing policies."

94. I cannot imagine that Sears does not have access to their own sales data showing the percents of sales they were actually achieving at the advertised OSPs. As noted in Mr. McMahon's affidavit (p. 314), [redacted] This is normal operating procedure for retailers – consumer response to sales promotion data is valuable input into the design of future promotions. Thus, with this data in hand, expectations of future higher volume of sales at the OSP would seem unrealistic.

95. On page 490-495 of his transcript, Mr. Cathcart states that [redacted] On pages 497-501 he specifically notes that [redacted]

[redacted] Thus, this collectively suggests that based on historical data to which Sears should have had access, they knew or should have known that they were not achieving sales at the advertised OSP.

C. <u>Sears' Sales Forecasts</u>

96. A retailer's sales forecast reflects the retailer's future sales expectations at various price points. It appears that Sears own sales forecast suggests that they did not have an expectation of *any* sales at the "Sears, Reg" price. [redacted]

[redacted]”

[redacted]

4. **Sears Advertises Using a High-Low (OSP) and EDLP Pricing Strategy Simultaneously on the Same Products**

97. Two predominant pricing strategies that retailers may employ are a “high-low” (OSP) pricing strategy or an “everyday low pricing” strategy (EDLP) (see Grewal et al. 1998; Hoch, Dreze, and Purk 1994). In a high-low strategy, retailers offer products at some “regular price” (i.e., the OSP) for some time duration, and then openly advertise and offer the product at a temporarily reduced price for some

period of time, before having the price return to the higher, regular OSP. In an EDLP context, prices remain constant at a level that is usually somewhere between the high and low prices in a high-low pricing context. Retailers operating in good faith may use either strategy, or alternatively, they may use a combination of both strategies. Regarding the latter, a retailer may choose to offer some products using an EDLP strategy, whereas for other products, they use a high-low strategy. Retailers may even vary over time the strategy they employ for a given product. However, by definition, a good faith retailer would not employ both strategies simultaneously on a given product because, by definition, the "high" price in the high-low strategy would not be a good faith OSP. For example, if a product was advertised using a high-low strategy as "Regularly $69.95, Sale $39.95," yet the product could always be purchased for $49.95 in an EDLP context, the $69.95 price would have no validity. Having simultaneous high-low and EDLP pricing strategies on the same product is something that is not common – in fact, I have never run across such a practice.

98. In his affidavit at NADM 4113S, Mr. McMahon states that they "did not develop its pricing strategies based upon 'High/Low Pricing' or 'Everyday Low Pricing'." I disagree. I believe Sears has chosen to use both approaches simultaneously on the same product. That is, given that 85-90% of the market buys multiple tires and therefore can always purchase tires at the EDLP "2 for" price, the "high" OSP price in the advertisements that Sears uses for the mass market has no validity to them. My concern on this matter would be reduced if Sears would provide full

disclosure in their advertisements regarding their EDLP "2 for" prices on the promoted tires. But then again, that would drastically reduce the effectiveness of their inflated OSPs – making their impact on consumers nonexistent. After all,

how can an advertised high price in a "high-low" pricing format have any influence on consumers if there is also a lower ("2 for") EDLP present? Holding consumer confusion constant, it cannot. It is only by the fact that the EDLP is unknown to consumers who encounter the advertised "high" price that the advertised high OSP price has influence. It should be noted that in addition to deception occurring when companies make false objective claims, Hoyer and McInnis (2001, p. 514) note that "Consumers can also be deceived by what is *not* said in the ad... consumers can be left with a false impression because information has been left out." By omitting the fact that tires can be purchased everyday at the "2 for" price, I believe the Sears ads are deceptive by omission. That is, consumers would have a materially different perception of the OSP than that which would be the case if this valid piece of information was provided in the advertisement.

99. Also, based on my review of the McMahon affidavit (NADM 4035S), OSPs were advertised in the store, at the same time and place where the "2 for" prices were being offered, albeit not advertised. That is, "Each promotional signing insert identified the Sears Regular Price for each unit of the Relevant Product being

promoted for sale at a Sears Reduced Price at Sears Retail Automotive Centers, the Sears Regular Price and the Sears Reduced Price (i.e., the savings) and the effective dates of the promotion." Thus, when a product was being promoted at the sale price, a savings calculation was provided that the salespeople knew was fictitious for every multiple tire purchaser.

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THIS IS EXHIBIT "C" TO THE AFFIDAVIT OF DR. DONALD LICHTENSTEIN SWORN BEFORE ME THIS 10TH DAY OF OCTOBER, 2003
J Patel (TRUPATI PATEL)
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June 1988 to May 1991	Assistant Professor of Marketing, College of Business Administration, University of Colorado
August 1984 to June 1988	Assistant Professor of Marketing, College of Business Administration, Louisiana State University
August 1980 to August 1984	Instructor and Research Assistant, College of Business Administration, University of South Carolina

EDUCATION

Bachelor of Science	1978 University of Alabama, Major: Marketing
Ph.D.	1984 University of South Carolina, Major: Marketing

HONORS AND AWARDS

Undergraduate

Elton B. Stephens Marketing Scholarship
Beta Gamma Sigma
Marketing Merit Award

Graduate

Alpha Mu Alpha Marketing Honorary
Two Time Recipient of the Purchasing Managers' Association of the Carolinas and Virginia Scholarship
1981-82 Marketing Ph.D. Candidate Teaching Award
1983 Doctoral Consortium Representative
1984 University Dissertation Research Grant

Faculty

Finalist for the College of Business Frascona Teaching Excellence Award (University of Colorado, 1993)
Nominated for the Hazel Barnes Prize Teaching Award (University of Colorado, 1993, 1997)
Recipient of the American Marketing Association Hugh G. Wales National Award for Outstanding Faculty Advisor of the Year (1994)
Recipient of the Dean's Teaching/Research Scholar Award (1998)
Journal of Consumer Research Outstanding Reviewer Award (2001)
Selected to Participate in the University of Colorado Emerging Leader's Program (2001-2002)

PROFESSIONAL AFFILIATIONS

- American Marketing Association
- Association for Consumer Research

TEACHING EXPERIENCE

University of Colorado

- Marketing Analysis (Undergraduate)
- Adding Value with Management and Marketing (Undergraduate)
- Principles of Marketing (Megasection - Undergraduate)
- Marketing Research (Undergraduate)
- Marketing Research (MBA)
- Pricing/Sales Promotion Seminar (Ph.D.)
- Introductory Seminar in Marketing (Ph.D)

Georgia State University

- Principles of Marketing (Megasection - Undergraduate)
- Consumer Behavior Seminar (Ph.D)

Louisiana State University

- Principles of Marketing (Undergraduate)
- Marketing Research (Undergraduate)
- Marketing Research (MBA)

University of South Carolina

- Marketing Management (Undergraduate)
- Consumer Behavior (Undergraduate)
- Principles of Marketing (Undergraduate)

COLLEGE/UNIVERSITY SERVICE

Louisiana State University

Undergraduate Marketing Advisor (1987-1988)
Member of MBA Curriculum Committee (1986)
Faculty Coordinator for the Alpha Mu Marketing Honorary (1984-1988)
Faculty Co-advisor for the Pi Sigma Epsilon Marketing and Sales Fraternity (1986-1987)

University of Colorado

Member of Research Committee (1988-1991, 1998-1999)
Member of Julie Johnson's Thesis Committee (1989)
Member of Dave Mason's Dissertation Committee (1992)
Member of Ken Chapman's Dissertation Committee (1994-96)
Member of Charles Brooks Dissertation Committee (1995-96), Student at Georgia State University
Member of Lisa Moet's Dissertation Committee (1995-97)
Faculty Advisor for the Undergraduate Chapter of the American Marketing Association (1991-1994)
Chair of the Marketing Recruiting Committee (1991)
Co-Chair of the Marketing Speaker Series (1991-1992)

University of Colorado (continued)

Member of the College of Business Faculty Appointments Committee (1991)
Member of the University Library Committee (1992-1994)
Recording Secretary for the College Faculty (1993-1994)
Member of the Undergraduate Committee to Restructure Majors (1993-1994)
College Core Committee to Integrate the Undergraduate Curriculum (1995-1998)
Developed and Coordinated the College of Business Subject Pool (1996)
Member of the College of Business Ethics Committee (1996)
Member of the College of Business Entrepreneurship Committee (1996)
Developed the BCOR 2050 Adding Value With Management and Marketing Course (1995-96)
Member of the College of Business Budget Committee (1997)
Member of the College of Business Resource Allocation Review Committee (1997)
Member of the Marketing Department Ph.D. Committee (1997 to 1999)
Member of Sally Widener's Dissertation Committee (1998 to 1999)
College of Business FTEP Technology Liaison (1998 to 1999)
Participant in the FTEP Technology & Summer Teaching Program (1998)
Chair of Steve Engel's Personnel Committee for Reappointment (1996, 1997, 1998)
Marketing Department Executive Committee (1998 to Present)
Member of the College of Business Technology Committee (1998 to 1999)
Member of the College of Business Research Committee (1989-1992, 1998 to 1999)
College of Business Freshman Seminar Professor (1998)
Member of Professor Edward Gac's Personnel Committee (1998-1999)
Chair of Peggy Sue Lorang's Dissertation Committee (1998-Present)
Faculty Representative to the Haring Symposium at the Univ. of Indiana (1999)
Member of the University Administrator Appraisal Committee (1999)
Member of the College of Business Post-Tenure Review Committee (1999)
Member of Dean's Faculty Policy Committee (1999)
Member of College Personnel Committee (1999)
Member of Special Programs Committee (1999)

COMMUNITY SERVICE

Raised $2350 for the Rocky Mountain Chapter of the Leukemia Society via sponsorship for the Los Angeles Marathon (1993)

ACADEMIC SERVICE

Editorial Review Board Member for the Journal of Marketing (1996-2002), Ad Hoc Reviewer (1990-1996, 2002-present).
Editorial Review Board Member for the Journal of Consumer Research (since 1999), Ad Hoc Reviewer (1988-1999).
Editorial Review Board Member for the Journal of Business Research (since1994), Ad Hoc Reviewer (1986-1994).

ACADEMIC SERVICE (continued)

Editorial Review Board Member for the Journal of Public Policy & Marketing (since 1998), Ad Hoc Reviewer (1997-1998).
Ad Hoc Reviewer for Journal of Marketing Research (1989-Present).
Ad Hoc Reviewer for Decision Sciences (1990).
Ad Hoc Reviewer for Journal of Advertising (1991-1996).
Ad Hoc Reviewer for the Journal of the Academy of Marketing Science (1989-1994, 1998).
Ad Hoc Reviewer for Journal of Economic Psychology (1993).
Ad Hoc Reviewer for Research in Consumer Behavior (1993-1998).
Ad Hoc Reviewer for the Journal of Retailing (1998, 1999).
Ad Hoc Reviewer for the Journal of Consumer Affairs (1999).
Ad Hoc Reviewer for Perceptual and Motor Skills Psychological Reports (1998).
Reviewer for McGraw-Hill for the second edition of Pricing: Making Profitable Decisions by Kent B. Monroe (1989
Reviewer for numerous national conferences (annually)
Session Chairperson for Southwestern Marketing Conference (1985)
Reviewer for the 1993 American Marketing Association Dissertation Award
Member of the Association for Consumer Research Program Committee (1992-1993, 1996-1997, 1998-1999)
Session Chairperson for the Marketing and Public Policy Conference (1995)
Session Discussant for the Society for Consumer Psychology Conference (1996)
Special Session Co-chair for a session entitled "Correlates of Deal Proneness and Deal-Responsive Behavior" at the 1996 Association for Consumer Research Conference
Arrangements co-chair for the 1997 Association for Consumer Research Conference
Reviewer for 1997 Sheth Dissertation Awards
Member of the Association for Consumer Research Publications Committee (1998-Present)

PRESENTATIONS

Presented a paper entitled "An Assessment of the Moderating Effects of Market Mavenism and Value Consciousness on Price-Quality Perception Accuracy" at the 1989 Association for Consumer Research Conference.

Presented a paper entitled "The Relationship Between Perceived and Objective Price-Quality" at the Working Series at the University of Georgia and also for the University of Colorado Marketing Department Faculty (1989).

Presented a paper entitled "The Role of Specific-Item Causal Dispersion in Attribution Focus and Confidence Determination" at the 1987 Association for Consumer Research Conference.

<u>PRESENTATIONS</u> (continued)

Presented a paper entitled "The Measurement and Moderating Role of Confidence in Attributions" at the 1987 Association for Consumer Research Conference.

Presented a paper entitled "Measurement and Structure of Kelley's Covariance Theory: A Replication" at the 1988 American Marketing Association Summer Educators Conference.

Presented a paper entitled "Using a Theoretical Perspective to Examine the Psychological Construct of Coupon Proneness" at the 1990 Association for Consumer Research Conference.

Presented a paper entitled "A Multidimensional View of Price Salience: A Field Study" at the Sharing Scholarship Series at the University of South Carolina and also for the University of Colorado College of Business Faculty (1991).

Made a presentation entitled "Consumer Price-Quality Perceptions" to the University of Colorado Alumni Directors' Summer Conference (1991).

Presented a paper entitled "Price Perceptions and Consumer Shopping Behavior: A Field Study" at Colorado State University (1992).

Presented a paper entitled "Assessing the Domain Specificity of Deal Proneness: A Field Study" at the University of Florida and also for the University of Colorado College of Business Faculty (1992). Presented revisions of this paper at Louisiana State University (1994), the University of South Carolina (1994), the University of Arkansas (1995), the University of Georgia (1995), Georgia State University (1995).

Presented a paper entitled "Psychological Correlates of Deal Proneness: A Domain-Specific Analysis at the Association of Consumer Research Conference" (1996).

Presented a paper entitled "Toward an Understanding of Inefficient Consumer Mutual Fund Investment Decisions: Implications for Public Policy" at the University of Colorado (1997).

Presented a paper entitled "A Range Theory of Price Perception" at the University of Florida, Emory University, and the University of North Carolina (1998).

Made a presentation entitled "Trends in Pricing Research" at the 1999 Albert Haring Symposium at the University of Indiana (1999).

Made a presentation entitled "Teaching the Large Class" as part of a roundtable discussion at the American Marketing Association's Summer Educator's Conference (1999).

PRESENTATIONS (continued)

Made a presentation entitled "Increasing Customer-Corporation Identification by Partnering with Nonprofits: Beneficial Effects for Customer, Corporation, and Nonprofit" at the University of Colorado, the University of Florida, and Duke University (2000). Also presented a later version of this paper entitled "Perceptions of Corporate Giving on Customer-Corporation Identification: Beneficial Effects for Customer, Corporation, and Nonprofit" at the Marketing Science Institute Conference on Marketing, Corporate Social Initiatives, and the Bottom Line in 2001, to the University of Colorado Division of Marketing in 2002, to the University of South Carolina Marketing Department, to the University of Virginia McIntire School of Commerce, and to London Business School.

GRANTS

Received two research grants in 1989 from the University of Colorado Council on Research and Creative Work.

Received a competitive summer research grant from the University of Colorado College of Business, Summer 1990.

Received a competitive summer research grant from the University of Colorado College of Business, Summer 1991.

Received a competitive summer research grant from the University of Colorado College of Business, Summer 1992.

Received a competitive summer research grant from the University of Colorado College of Business, Summer 1993.

Received a competitive research grant from the American Marketing Association (eligible for faculty advisors to student chapters), 1994.

Received a competitive summer research grant from the University of Colorado College of Business, Summer 1997.

Received a competitive summer research grant from the University of Colorado College of Business, Summer 1998.

Received a competitive summer research grant from the Real Estate Center, University of Colorado College of Business, Summer 1999.

INDUSTRY EXPERIENCE

August 1978 to August 1980	Distribution Services, Western Electric Company, Atlanta, Georgia

APPLIED RESEARCH EXPERIENCE

Miller-Penniman, Inc.- Developed a sales plan for the introduction of satellite dishes to John Deere dealers in Louisiana (1985).

Traq Technologies, Inc.- Evaluated the viability of the Traq Technology marketing plan for entry into the point-of-sale computer market, and also performed an economic impact analysis for the location of Traq in Denham Springs, Louisiana (1986).

Picadilly Cafeterias- Participated in a management training seminar (1987).

Louisiana Association of Business and Industry- Developed territorial boundaries for its salespeople (1987).

Zigarelli and Associates- Evaluated the company's data collection procedures (1988); served as a consultant for the designing of a survey and specification of a sampling procedure for a study on public perception of a proposed sales tax to support the construction of a baseball stadium in Denver (1990).

May Company- Served as a consultant regarding a legal suit (alleging deceptive price advertising) filed against the company by the Colorado State Attorney General (1989).

Westin Hotels & Resorts- Participated in an educational seminar and made a presentation to sales and marketing executives entitled "Pricing for Profit" (1990).

Arnold & Porter and Shook, Hardy, and Bacon Law Firms- served as a consultant (and potential expert witness) regarding the effect of advertising on product use decisions (1991-1992, 1996).

Sutherland, Asbill & Brennan- Served as a consultant for brand infringement litigation (1993).

Hydrosphere, Inc.- Served as a consultant (and potential expert witness) for brand infringement litigation (1995-1996).

Dunlap & Codding, P.C.- Served as a consultant (and potential expert witness) for brand infringement litigation (1998).

Bureau of Commerce, Justice Department of Canada – Served as a consultant (and potential expert witness) for deceptive advertising litigation (1998, 2002).

State of Colorado – Served as an expert in deceptive advertising litigation (2000-2001).

Mastbaum & Moffat, P.C.- Served as a consultant (and potential expert witness) for brand infringement litigation (2002).

NONREFEREED PUBLICATIONS

Lichtenstein, Donald R. (1997), "To Buy or Not to Buy? Consumer Responsibility," in CU Business Portfolio, (Spring), p. 4.

Netemeyer, Richard G., Scot Burton, and Donald R. Lichtenstein (1999), "Vanity," in Peter Earl and Simon Kemp (eds.), The Elgar Companion to Consumer Research and Economic Psychology, Northampton, MA: Edward Elgar Publishing, Inc., 605-609.

NATIONALLY REFEREED PROCEEDINGS

Bearden, William O., Donald R. Lichtenstein, and Jesse E. Teel (1983), "Reassessment of the Dimensionality, Internal Consistency, and Validity of the Consumer Alienation Scale," in Murphy et al. (Eds.), 1983 Educators' Conference Proceedings, Chicago: American Marketing Association, 35-40.

Lichtenstein, Donald R. and William B. Simmons (1985), "The Role of Confidence in Consumer Attributions: An Exploratory Analysis," in B. Hartman and J. Rinquest, (Eds.), Proceedings of the American Institute for Decision Sciences, Las Vegas, NV, 508-510.

Lichtenstein, Donald R., Daniel L. Sherrell, and Joseph F. Hair (1986), "Advertising Message Effects on Attitude Towards the Ad and the Deal," in S.M. Lee, L. Digman, and M.J. Schniederjans, (Eds.), Proceedings of the Decision Sciences Institute, 831.

Lichtenstein, Donald R. (1988), "The Role of Specific-Item Causal Dispersion in Attribution Focus and Confidence Determination," in Michael J. Houston (Ed.), Advances in Consumer Research, Provo, UT: Association for Consumer Research, Vol. 15, 89-95.

Lichtenstein, Donald R. and Scot Burton (1988), "The Measurement and Moderating Role of Confidence in Attributions," in Michael J. Houston (Ed.), Advances in Consumer Research, Provo, UT: Association for Consumer Research, Vol. 15, 468-475.

Burton, Scot and Donald R. Lichtenstein (1988), "The Reliability of Measures of the Latitude of Price Acceptance," in Gary Frazier et al. (Eds.), Proceedings of the 1988 AMA Summer Educators Conference, Chicago, IL: American Marketing Association, 320-325.

O'Hara, Bradley S. and Donald R. Lichtenstein (1988), "Measurement and Structure of Kelley's Covariance Theory: A Replication," in Gary Frazier et al. (Eds.), Proceedings of the 1988 AMA Summer Educators Conference, Chicago, IL: American Marketing Association, 117-122.

Burton, Scot, Donald R. Lichtenstein, and Edward Blair (1988), "Cognitive Processes Used to Answer Expenditure Questions," in American Statistical Association 1988 Proceedings of the Section of Survey Research Methods, Alexandria, VA: American Statistical Association, 155-160.

NATIONALLY REFEREED PROCEEDINGS (continued)

Lichtenstein, Donald R. and Scot Burton (1990), "An Assessment of the Moderating Effects of Market Mavinism and Value Consciousness on Price-Quality Perception Accuracy," in Goldberg et al. (Eds.), Advances in Consumer Research, Provo, UT: Association for Consumer Research, Vol 17, 53-59.

Burton, Scot and Donald R. Lichtenstein (1990), "Assessing the Relationship Between Perceived and Objective Price-Quality: A Replication," in Goldberg et al. (Eds.), Advances in Consumer Research, Provo, UT: Association for Consumer Research, Vol 17, 715-722.

Lichtenstein, Donald R., Richard G. Netemeyer, and Scot Burton (1991), "Using a Theoretical Perspective to Examine the Psychological Construct of Coupon Proneness," in Rebecca H. Holman and Michael R. Solomon (Eds.), Advances in Consumer Research, Provo, UT: Association for Consumer Research, Vol. 18, 501-508.

Rao, Akshay, Donald R. Lichtenstein, and Scot Burton (1991), "The Influence of Objective Price-Quality Variations on Price Acceptability, Price Predictions and Price-Quality Judgments," in the Proceedings of the 1991 American Marketing Association Winter Educators Conference.

Lichtenstein, Donald R., Scot Burton, and Richard G. Netemeyer (1997), "Psychological Correlates of a Proneness to Deals: A Domain-Specific Analysis," in Merrie Brucks and Deborah J. MacInnis (Eds.), Advances in Consumer Research, Provo, UT: Association for Consumer Research, Vol. 24, 274-280.

Minette E. Drumwright, Donald R. Lichtenstein, and Bridgette Braig (2001), "Corporate Volunteerism" in "The Role of Markeitng in the Development and Distribution of Social Capital," Marketing & Public Policy Conference Proceedings, Ronald Paul Hill and Charles R. Taylor, eds., Chicago: American Marketing Association, 57-59.

REFEREED JOURNAL PUBLICATIONS

Bearden, William O., Donald R. Lichtenstein, and Jesse E. Teel (1984), "Comparison of Price, Coupon, and Brand Effects on Consumer Reactions to Retail Newspaper Advertisements," Journal of Retailing, 60 (Summer), 11-34.

Shuptrine, F. Kelly and Donald R. Lichtenstein (1985), "Measuring Readability Levels of Undergraduate Marketing Textbooks," Journal of Marketing Education, 7 (Fall), 38-45.

Lichtenstein, Donald R. and William O. Bearden (1986), "Measurement and Structure Kelley's Covariance Theory," Journal of Consumer Research, 13 (September), 290-296.

Burton, Scot and Donald R. Lichtenstein (1988), "The Effects of Ad Claims and Ad Context on Attitude Toward the Advertisement," Journal of Advertising, 17, 3-11. (*Finalist for the Best Article Award)

REFEREED JOURNAL PUBLICATIONS (continued)

Lichtenstein, Donald R. (1988), "At What Level of Abstraction Should Attributions Be Operationalized and Conceptualized?" Basic and Applied Social Psychology, 9 (June), 85-97.

Lichtenstein, Donald R. and William O. Bearden (1988), "An Investigation of Consumer Evaluations of Reference Price Discount Claims," Journal of Business Research, 17, 189-200.

Lichtenstein, Donald R., Peter H. Bloch, and William C. Black (1988), "Correlates of Price Acceptability," Journal of Consumer Research, 15 (September), 243-252.

Lichtenstein, Donald R., Scot Burton, and Bradley S. O'Hara (1989), "The Effect of Marketplace Attributions on Consumer Evaluations of Reference Price Discount Claims," Psychology & Marketing, Vol 6, No 3, 163-180.

Bloch, Peter H., William C. Black, and Donald R. Lichtenstein (1989), "Involvement with the Equipment Component of Sport: Links to Recreational Commitment," Leisure Sciences, 11, 187-200.

Lichtenstein, Donald R. and William O. Bearden (1989), "Contextual Influences on Perceptions of Merchant-Supplied Reference Prices," Journal of Consumer Research, 16 (June), 55-66.

Lichtenstein, Donald R. and Scot Burton (1989), "The Relationship Between Perceived and Objective Price-Quality," Journal of Marketing Research, 26 (November), 429-443.

Lichtenstein, Donald R., Richard G. Netemeyer, and Scot Burton (1990), "Distinguishing Coupon Proneness From Value Consciousness: An Acquisition-Transaction Utility Theory Perspective," Journal of Marketing, 54 (July), 54-67.

Netemeyer, Richard G., Srinivas Durvasula, and Donald R. Lichtenstein (1991), "A Cross-National Validation of the Concept and Measure of Consumer Ethnocentrism," Journal of Marketing Research, 28 (August), 320-327.

Lichtenstein, Donald R., Scot Burton, and Eric Karson (1991), "The Effect of Semantic Cues on Consumer Perceptions of Reference Price Advertisements," Journal of Consumer Research, 18 (December), 380-391.

Lichtenstein, Donald R., Nancy M. Ridgway, and Richard G. Netemeyer (1993), "Price Perceptions and Consumer Shopping Behavior: A Field Study," Journal of Marketing Research, 30 (May), 234-245. (*Synopsis reprinted in Stores Magazine.)

Burton, Scot, Donald R. Lichtenstein, and Paul M. Herr (1993), "An Examination of the Effects of Information Consistency and Distinctiveness in a Reference Price Advertisement Context," Journal of Applied Social Psychology, 23 (December), 2074-2092.

REFEREED JOURNAL PUBLICATIONS (continued)

Low, George M. and Donald R. Lichtenstein (1993), "The Effect of Double Deals on Consumer Attitudes," Journal of Retailing, 69 (Winter), 453-466.

Burton, Scot, Donald R. Lichtenstein, Abhijit Biswas, Katerine Fraccostoro (1994), "The Role of Attributions in Consumer Perceptions of Retail Advertisements Promoting Price Discounts," Marketing Letters, 5 (April), 131-140.

Netemeyer, Richard G., Scot Burton, and Donald R. Lichtenstein (1995), "Trait Aspects of Vanity: Measurement and Relevance to Consumer Behavior," Journal of Consumer Research, 21 (March), 612-626.

Burton, Scot, Richard G. Netemeyer, Donald R. Lichtenstein (1995), "Gender Differences for Appearance-Related Attitudes and Behaviors: Implications for Consumer Welfare," Journal of Public Policy & Marketing, 14 (Spring), 60-75.

Lichtenstein, Donald R., Richard G. Netemeyer, and Scot Burton (1995), "Assessing the Domain Specificity of Deal Proneness: A Field Study," Journal of Consumer Research, 22 (December), 314-326.

Tepper, Kelly, Donald R. Lichtenstein, and Corliss Green (1996), "Influences on Consumer Response to Preferred Customer Programs," Pricing Strategy and Practice, 4, 14-24.

Lichtenstein, Donald R., Scot Burton, and Richard G. Netemeyer (1997), "An Examination of Deal Proneness Across Sales Promotion Types: A Consumer Segment Analysis," Journal of Retailing, Vol. 73 (2), 283-297.

Burton, Scot, Donald R. Lichtenstein, Judith Garretson, and Richard G. Netemeyer (1998), "A Scale for Measuring Attitudes Toward Private Label Products and an Examination of its Psychological and Behavioral Correlates," Journal of the Academy of Marketing Science, Vol 26, No. 4, 293-306.

Janiszewski, Chris and Donald R. Lichtenstein (1999), "A Range Theory Account of Price Perception," Journal of Consumer Research, 25 (March), 353-368.

Lichtenstein, Donald R., Patrick J. Kaufmann, and Sanjai Bhagat (1999), "Why Consumers Choose Managed Mutual Funds Over Index Funds: Hypotheses from Consumer Behavior," Journal of Consumer Affairs, Vol 33, No. 1, 187-205.

Burton, Scot, Donald R. Lichtenstein, and Richard G. Netemeyer (1999), "Exposure to Sales Flyers and Increased Purchases in Retail Supermarkets," Journal of Advertising Research, (September/October 1999), 7-14.

REFEREED JOURNAL PUBLICATIONS (continued)

Brooks, Charles M., Patrick J. Kaufmann, and Donald R. Lichtenstein (forthcoming), "The Influence of Travel Configuration on Consumer Trip-Chained Store Choice: Predictions From Reference-Dependent Theory," Journal of Consumer Research.

WORK IN PROGRESS

Lichtenstein, Donald R., Minnette Drumwright, and Bridgette Braig, "The Effect of Corporate Social Responsibility on Customer Donations to Corporate-Supported Nonprofits." Revision Requested at the Journal of Marketing.

Loroz, Peggy Sue and Donald R. Lichtenstein, "The Moderating Role of Perceived Susceptibility Variation on Consumer Estimates of Health Risk." Under second review at the Journal of Public Policy & Marketing.