UC DAVIS LAW REVIEW ONLINE

VOL. 51 APRIL 2018

"Dishonest Search Disruption": Taking Deceptive-Pricing Tactics Seriously

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Concerns about fictitious-pricing and bait-and-switch practices, once commonplace, have been relegated to the regulatory attic for far too long. The singular theme that undergirds these tactics, "dishonest" search disruption, highlights a broader concern about how these tactics disrupt markets by leading consumers to make suboptimal transactional decisions. If treated collectively, regulators may find reason to take these deceptive tactics seriously. Addressing "dishonest search disruption" as a distinct phenomenon may ultimately frame a way for regulators to bring enforcement down from the attic and back into the active enforcement arena.

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INTRODUCTION

Retailers routinely use information to stop consumers from shopping any further, inducing them to transact on the spot. If shopping stops and the consumer transacts based on truthful information produced by retailers, the information helps the market work efficiently and fairly. Consumers have time constraints for searching, and truthful information helps them make the best bargain they can. In contrast, however, when retailers make *dishonest* claims about pricing and availability to induce consumers to purchase, such false information corrupts consumer decision making. This Essay contends that regulators would take "dishonest search disruption" ("DSD") more seriously, as they should, by treating classic tactics like "bait and switch" and deceptive discount pricing ("fictitious pricing")[1] as one, single category of tactics, rather than as discrete, obscure retailer behaviors.

The Federal Trade Commission ("FTC") deems bait-and-switch tactics and fictitious discount pricing tactics standing alone unlawful, but federal actions against sellers engaging in such tactics have been rare over the past fifty years.[2] Recently, these tactics have garnered more attention from lawmakers, regulators, and plaintiffs' lawyers, albeit in a scattered, uncoordinated manner. Treating these tactics collectively would serve to highlight the prevalence of DSD, providing a clearer justification for regulators to return to addressing these tactics seriously, as they once did over a generation ago.

Consumers rely in great part on seller-produced information to make transaction decisions. Sellers provide consumers with information that reduces the cost of shopping.[3] This information enables consumers to shorten their "search" process, to choose an

[1] For a description of bait-and-switch tactics and regulatory treatment of those tactics, see *infra* Section II.A. For a description of deceptive-discounting tactics, see *infra* Section II.C.

[2] *See* David Adam Friedman, *Explaining "Bait-and-Switch" Regulation*, 4 WM. & MARY BUS. L. REV. 575, 605-14 (2013) [hereinafter Friedman, *Bait-and-Switch*] (explaining that bait-and-switch practices have rarely been enforced since the 1960s); David Adam Friedman, *Reconsidering Fictitious Pricing*, 100 MINN. L. REV. 921, 921-22, 937-42 (2015) [hereinafter Friedman, *Fictitious Pricing*] (offering a thorough discussion of fictitious-pricing enforcement).

[3] *See* Howard Beales et al., *The Efficient Regulation of Consumer Information*, 24 J.L. ECON. 491, 492 (1981) ("The importance of information to the operation of efficient markets is, by now, fairly well accepted. Information about price, quality, and other attributes allows buyers to make the best use of their budget by finding the product whose mix of price and quality they most prefer.").

offer and transact.[4] Sellers stop the search process by providing consumers with the price, quality, and availability information necessary to support a transactional decision.[5] The ability to reduce search costs can create demonstrable social value.[6]

"Honest" advertising only communicates truthful basic search information, resulting in welfare gains.[7] When consumers evaluate an offer through basic search advertising, the offer may not ultimately be the "best" bargain in the commercial universe. The offer still may lead to a transaction, however, because it presents the best *available* bargain, when factoring in the marginal search costs of additional shopping.[8] Put simply, rational consumers do not scour the earth for the best bargain on everything they buy. They put their limited time to its best perceived use.

Some sellers subvert consumers' rational allocation of shopping time. Certain "dishonest" advertising practices disrupt the search process by asserting untruthful claims about the nature of the

[4] *See id.* at 492, 514.

[5] *See* REBECCA TUSHNET & ERIC GOLDMAN, ADVERTISING & MARKETING LAW 29 (3d ed. 2016) ("The economics of information begins with this proposition: efficient markets require that consumers have information about products and services to inform their decision-making. Price, quality, safety, and so on are attributes, each of which can be transmitted as information.") Of course, markets are not efficient when such information misleads.

[6] Amazon's rationale for acquiring Whole Foods invoked the power of tools that enable search-cost reduction. Through this acquisition, Amazon promises to bring its proprietary online-shopping ability to innovate search-cost reduction to the physical world of brick-and-mortar grocery. *See* Claire Cain Miller, *Amazon's Move Signals End of Line for Many Cashiers*, N.Y. TIMES (June 17, 2017), https://www.nytimes.com/2017/06/17/upshot/amazons-move-signals-end-of-line-for-many-cashiers.html ("Amazon has already made shopping for almost everything involve spending less time waiting, doing work or interacting with people, and now it could do the same for groceries."). For example, Amazon can bring to Whole Foods some of its conceptual and technological innovations that promote convenient and speedy shopping, realized from experiments from their cashless Amazon Go store. *See* Maura Judkis, *The Days of 'Whole Paycheck' are Over. Here's How the Amazon-Whole Foods Deal Affects You*, WASH. POST (Aug. 24, 2017), https://www.washingtonpost.com/news/food/wp/2017/08/24/the-amazon-whole-foods-deal-closes-monday-are-the-days-of-whole-paycheck-over/?utm_term=.3ea127c03e73.

[7] *See* Beales et al., *supra* note 3, at 493 ("Without such information [about price, quality, and other attributes], the incentive to compete on price and quality will be weakened, and consumer welfare will be reduced."). *See generally* Joseph E. Stiglitz, *Imperfect Information in the Product Market*, *in* 1 HANDBOOK OF INDUSTRIAL ORGANIZATION 769, 819 (Richard Schmalensee & Robert D. Willig eds., 1989) ("[F]irms expend resources [for advertising] to recruit customers.").

[8] *See* Stiglitz, *supra* note 7, at 790-94 (describing the role of search for informed and uninformed consumers).

advertised price and offering availability. These dishonest claims may be about the sincerity of an initial offer,[9] the integrity of a discount price,[10] or even quantity claims based on misleading packaging.[11] When a consumer stops a search based on dishonest price and quantity signals, the transaction for the purchased item may yield an inferior result for the consumer than if the search had continued based on truthful information.[12]

A transaction resulting from DSD inflicts harm not readily squared with common approaches to measuring damages through pecuniary harm to the consumer.[13] For example, expectation damages provide nothing to the washing-machine buyer who takes the “bait” on a seller’s insincere, but tantalizing, offer, and who is then deliberately “switched” by the seller to purchase a different machine.[14] In the end, at the cash register, the consumer knowingly paid an amount for the different machine, and took delivery. Individual harm, if rooted in “benefit-of-the-bargain” principles, appears absent in this circumstance — the promise made to the buyer at the final point of sale will appear satisfied.[15]

[9] The FTC guides against “bait” advertising. Guides Against Bait Advertising, 16 C.F.R. § 238 (2018). However, bait-and-switch practices have rarely been enforced since the 1960s. *See* Friedman, *Bait-and-Switch*, *supra* note 2, at 605-14.

[10] *See generally* Friedman, *Fictitious Pricing*, *supra* note 2 (offering a thorough discussion of fictitious-pricing enforcement).

[11] 21 C.F.R. § 100.100 (2018) (“[A] food shall be deemed to be misbranded if its container is so made, formed, or filled as to be misleading.”).

[12] *See generally* Stiglitz, *supra* note 7, at 791, 820-21 (describing how divergent individual search costs can lead to a market equilibrium with divergent prices).

[13] *See* Friedman, *Fictitious Pricing*, *supra* note 2, at 942-48 (discussing the difficulties presented by failure to prove individual pecuniary harm). *See, e.g.*, Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILL. COMP. STAT. 505 / 10a (2018) (“The court, in its discretion may award actual economic damages or any other relief which the court deems proper.”).

[14] *See* Friedman, *Bait-and-Switch*, *supra* note 2, at 588 (discussing how at first glance, there might be no welfare distinction between a baited consumer and a non-baited consumer transaction). Expectation damages are measured by expectations at the time of formation, and even in a bait and switch, price and nature of offering have been agreed upon. *See* RESTATEMENT (SECOND) OF CONTRACTS § 347 cmt. a (AM. LAW INST. 1981) (“Contract damages are ordinarily based on the injured party’s expectation interest and are intended to . . . put him in as good a position as he would have been in had the contract been performed.”).

[15] A plaintiff pleading common law fraudulent misrepresentation faces the same barrier, requiring a showing of “pecuniary loss.” *See* RESTATEMENT (SECOND) OF TORTS §§ 525, 549 (AM. LAW INST. 1977) (“The damages necessary to give the plaintiff the benefit of the bargain that he has made with the defendant will depend, first of all, upon the nature of the bargain.”).

Basic private contract and tort remedies appear ill-equipped to correct any wrong or harm resulting from these practices, or to deter the practices, leaving that responsibility to regulators. However, information-economics theorists have established that manipulation of search may cause consumers to undervalue the benefits of marginal search cost, subjecting more consumers to pricing power usually of the type associated with monopolistic competition.[16]

Monopolistic competition leads to price divergence, even in commodity markets.[17] Consumers have different preferences and assign different valuations on their time for search, as they assess whether the marginal benefit from continued search (a better deal) will exceed the marginal cost (time, transportation, other opportunity costs) of that search.[18] Even after making an initial suboptimal transaction, consumers may cease searching and repeat that transaction, if they believe that renewing the search process would not prove worth the cost.[19] Prices diverge for retail commodities like gasoline, in part, because some offers reflect a price for those who attach a higher value to search costs, and will typically end up paying more.[20]

DSD leads to corrupted transactions and welfare losses. Policymakers should consider these losses when choosing enforcement priorities. Previously, I have explored at length the historic rationale for regulation of bait-and-switch tactics[21] and argued for renewed scrutiny of deceptive discount pricing.[22] I have also noted

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[16] *See* Steven Salop, *The Noisy Monopolist: Imperfect Information, Price Dispersion and Price Discrimination*, 44 REV. ECON. STUD. 393, 393 (1977) ("[W]hen consumers differ in their information-generating efficiencies and costs [of price, quality, and durability], dispersion serves as a device for splitting up the market to permit price discrimination. . . . The very presence of dispersion both splits the market and charges a higher purchase price to the submarket of inefficient searchers." (emphasis omitted)); Stiglitz, *supra* note 7, at 820-21 (discussing search costs and price discrimination).

[17] *See* Salop, *supra* note 16; Stiglitz, *supra* note 7, at 820-21.

[18] *See generally* Salop, *supra* note 16, at 394.

[19] *See* Phillip Nelson, *Information and Consumer Behavior*, 78 J. POL. ECON. 311, 312-14 (1970) [hereinafter Nelson, *Consumer Behavior*]. George Stigler began the landmark inquiry into "the phenomenon of search." *See generally* George J. Stigler, *The Economics of Information*, 69 J. POL. ECON. 213 (1961).

[20] *See* Salop, *supra* note 16, at 402-04. For gasoline, a rational consumer may stop searching for gasoline due to real search costs involved with time and distance to seek retailers. Some might use smartphone apps. Others, however, might be deceived by hidden charges for choice of payment method. *See infra* Section II.B.

[21] *See* Friedman, *Bait-and-Switch*, *supra* note 2, at 615-20.

[22] *See* Friedman, *Fictitious Pricing*, *supra* note 2, at 921-26 (discussing need for

the dormancy of public enforcement directed at fictitious pricing,[23] and bait-and-switch tactics.[24] In the few years since my previous explorations, however, state and federal enforcement appears to have resurfaced, somewhat. In this Essay, I discuss this recent reemergence and how policymakers can prioritize their efforts to "disrupt" modern DSD. Bait-and-switch concerns, for example, no longer center on home-improvement industry sales, but rather on the architecture of payment systems and website shopping checkout processes.

In Part I, I discuss the economics of "search" in advertising and the negative impact that DSD has on retail markets. In Part II, I describe the recent reemergence of enforcement efforts to counter DSD. Part III advocates viewing DSD as a collective problem involving a specific form of information manipulation, instead of treating bait-and-switch and fictitious-pricing practices as fragmented practices. Treating these tactics collectively, under the common theme of search disruption, highlights why DSD in various forms warrants closer regulatory attention. In Part IV, I briefly conclude that a unified policy of addressing DSD would enable regulators to look anew at old tactics and appropriately prioritize the allocation of scarce enforcement resources.

I. ADVERTISING AND DISHONEST SEARCH DISRUPTION

Advertising consists of producer-generated information designed in part to make buyers aware of an offering's availability, pricing, quality, and other attributes.[25] Advertising can serve to create a brand identity, or may merely signal that the seller has the resources (and the credibility associated with having resources) to engage in advertising.[26] Phillip Nelson observed that "[t]he primary information

more enforcement of deceptive price discounting).

23 *Id.* at 922 n.6 (noting the cessation of FTC enforcement of fictitious pricing in 1969).

24 A Westlaw search reveals that the FTC appears to have last aggressively enforced the Guides Against Bait Advertising, 16 C.F.R. § 238 (2018), in the 1970s, taking action against several players in the carpeting industry. *See In re* New Rapids Carpet Ctr., Inc., 90 F.T.C. 64 (1977); *In re* Carpets 'R' Us, Inc., 87 F.T.C. 303 (1976); *In re* Cent. Carpet Corp., Inc., 85 F.T.C. 1022 (1975); *In re* Tri-State Carpets, Inc., 84 F.T.C. 1078 (1974).

25 *See* Beales et al., *supra* note 3, at 492.

26 *See* Jack Hirshleifer, *Where Are We in the Theory of Information?*, 63 AM. ECON. REV. 31, 37-38 (1973) (illustrating that consumers view the act of advertising as "[signaling]" that the seller is effectively "putting money where its mouth is" — consumers believe that a seller would not rationally invest behind claims that were verifiably false).

content of advertisements . . . is the information that the brand *advertises*," and engaging in advertising creates not just awareness, but also credibility.[27]

Nelson further noted that the "most obvious procedure available to the consumer in obtaining information about price or quality is *search*."[28] Ultimately, sellers invest in advertising with the goal of providing information to buyers that will prove sufficient for the consumer to end the "search" process with a transaction. Nelson pointed out that "[t]he producer in his advertising is not interested directly in providing information for consumers. He is interested in selling more of his product."[29]

When presented dishonestly, the sellers' provision of information diminishes welfare.[30] This Essay discusses the consequences of tolerating *dishonest* seller information tactics that disrupt search in the quest to "sell[] more . . . product"[31] and the resulting consequences in retail markets. But first, the importance of "search" itself must be explained.

In section I.A, I briefly discuss the role of "search claims" in the information market, and the role of advertising in transmitting search claims. I then discuss in section I.B how dishonest search claims

[27] Phillip Nelson, *Advertising as Information*, 82 J. POL. ECON. 729, 741, 745 (1974) [hereinafter Nelson, *Advertising*] (emphasis added). Nelson observed this with respect to advertising relating "experience goods" — goods for which claims could only be verified through experiential consumption. *See* Nelson, *Consumer Behavior*, *supra* note 19, at 311-18.

[28] Nelson, *Consumer Behavior*, *supra* note 19, at 312 (emphasis added).

[29] Nelson, *Advertising*, *supra* note 27, at 729.

[30] For illustrations of the welfare impact of fictitious pricing, see Mark Armstrong & Yongmin Chen, *Discount Pricing*, *in* DISCOUNT PRICING 25-26 (Univ. of Oxford, Dep't of Econ., Discussion Paper Ser. No. 605, 2012), http://www.economics.ox.ac.uk/materials/papers/5819/paper605.pdf; see also Gorkan Ahmetoglu et al., *Pricing Practices: A Critical Review of Their Effects on Consumer Perceptions and Behavior*, 21 J. RETAILING & CONSUMER SERVS. 696, 699 (2014); Dhruv Grewal & Larry D. Compeau, *Comparative Price Advertising: Informative or Deceptive*?, 11 J. PUB. POL'Y & MARKETING 52, 55-58 (1992). To demonstrate that assessing the welfare impact of bait-and-switch practices has been more controversial, and less examined, see Eitan Gerstner & James D. Hess, *Can Bait and Switch Benefit Consumers?*, 9 MARKETING SCI. 114, 114 (1990), then see the response from William L. Wilkie et al., *Does "Bait and Switch" Really Benefit Consumers?*, 17 MARKETING SCI. 273, 273-74 (1998) [hereinafter Wilkie et al., *Response*]. In reply to Wilkie et al., see James D. Hess & Eitan Gerstner, *Yes, "Bait and Switch" Really Benefits Consumers*, 17 MARKETING SCI. 283, 283-84 (1998), and in reply to that salvo, see William L. Wilkie et al., *Does "Bait and Switch" Really Benefit Consumers? Advancing the Discussion* . . . , 17 MARKETING SCI. 290, 290-91 (1998).

[31] Nelson, *Advertising*, *supra* note 27, at 729.

distort and disrupt markets and diminish welfare. This groundwork enables discussion of specific, recent high-profile examples of DSD tactics in Part II.

A. The Role of Advertising in "Search"

Search advertising claims present the most apparently basic of information to consumers, including price points, availability, category of product, and quantity.[32] Advertisers typically present this information inexpensively, even if just at the point of sale.[33] Consumers can absorb this information quickly.[34] The simplicity and the value of this information to the consumer in the search process makes search-claim manipulation tempting because consumers may not highly scrutinize claims about seemingly readily-verifiable information.[35] In other words, consumers would trust a "scented kitty litter" packing label as a product category claim, because consumers can readily discern after opening the box whether it is kitty litter or mere beach sand. The seller could not easily make such a false claim without buyer objection and the buyer knows that.[36] Straight-up price claims also fall into this same category of "apparently" readily-verifiable information because the cash register (or check-out bin on an e-commerce site) offers a moment of truth to match the claim.[37]

The importance of "search" in the transaction process rose in profile when future Nobel laureate George Stigler declared in one of his seminal works, *The Economics of Information*, that he was elevating the role of information from the "slum dwelling" of economics into the mainstream.[38] Stigler elegantly described how information, and ultimately advertising, can drive dispersion of prices for a commodity.[39] These observations began to chip away at the notions

[32] *See* David Adam Friedman, *Refining Advertising Regulation*, 49 CONN. L. REV 837, 841-43 (2017) [hereinafter Friedman, *Refining Advertising*].

[33] "A consumer trying on a dress differs from a consumer determining the price of a dress only because the time required to try on a dress is longer." Nelson, *Consumer Behavior*, *supra* note 19, at 312.

[34] *See id.*

[35] *See* Nelson, *Advertising*, *supra* note 27, at 730 ("[C]onsumers can have some confidence that the advertising of search qualities bears a close relation to the truth.").

[36] *See id.*

[37] *See id.*

[38] Stigler, *supra* note 19, at 213; *see also* George J. Stigler, *Information in the Labor Market*, 70 J. POL. ECON. 94, 94, 96-97 (1962) (applying the same observations to labor markets).

[39] Stigler, *supra* note 19, at 219.

behind the "Law of the Single Price," which had "long been enshrined as one of the central tenets of classical economic theory."[40] Stigler demonstrated how differentials in search costs can yield different prices for the same commodity.[41]

Building on Stigler's approach, Phillip Nelson soon after began his own line of inquiry into the systemic interaction between consumer information gathering and producer advertising claims.[42] Nelson separated goods into two basic categories, search goods and experience goods.[43] Search goods, he generalized, maintain attributes that consumers could verify through inspection before purchase, while experience goods have attributes that can only be evaluated after purchase.[44] Because offerings have many features and facets, this observation evolved from general description of search and experience "goods" to search and experience "claims" — reflecting that sellers often make multiple claims.[45]

With dishonest experience claims (e.g., "this pizza has a crispy crust"), consumers can assess their veracity after the transaction and factor that experience into future purchase decisions. When sellers make certain dishonest search claims, however, consumers may not have ready access to the actual information necessary for assessment, which renders these claims more troubling. Consumers may not look back to see if a discount price was truly a discount, or whether the advertised washing machine was ever offered in good faith. DSD leads to suboptimal consumer decisions that are not easy for the consumer to self-correct.

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[40] Stiglitz, *supra* note 7, at 820.

[41] Stigler, *supra* note 19, at 219.

[42] Most notably, Phillip Nelson, *The Economic Consequences of Advertising*, 48 J. BUS. 213 (1975). *See also* Nelson, *Advertising*, *supra* note 27; Nelson, *Consumer Behavior*, *supra* note 19.

[43] Nelson, *Consumer Behavior*, *supra* note 19, at 312.

[44] *Id.*

[45] *See* Gary T. Ford et al., *An Empirical Test of the Search, Experience and Credence Attributes Framework*, 15 ADVANCES CONSUMER RES. 239, 239-44 (1988), http://www.acrwebsite.org/search/view-conference-proceedings.aspx?Id=6817 ("[I]n the past, researchers have often referred to 'goods' or 'attributes' of goods as having either search, experience or credence qualities. More appropriately, the focus must be on the advertising claim, rather than the attribute of the product."). The characterization of the information content of advertising claims further evolved into search, experience, and credence categories. *See* Lee Goldman, *The World's Best Article on Competitor Suits for False Advertising*, 45 FLA. L. REV. 487, 498-501 (1993) (summarizing the structure of search, experience, and credence claims). *See generally* Friedman, *Refining Advertising*, *supra* note 32, at 841-53 (reviewing categorizing search, experience, and credence claims).

B. The Impact of Dishonest Search Disruption

Time is the ultimate finite individual personal resource.[46] Individuals assign value to their time,[47] and sellers know it.[48] Search-disruption tactics take advantage of the limited time and resources consumers allocate to shopping and enable sellers to charge higher, monopolistically-characterized, prices to consumers who deem further search to be too costly.[49] As Joseph Stiglitz observed, shoppers will "search[] optimally given [individual] search costs and the price distribution."[50]

If a shopper encounters an orange-tagged item labeled "DISCOUNT" or "30% off," that type of pricing claim signals to time-constrained shoppers that they have found a bargain. Given that consumers have limited time and resources to search for the best deal, the consumer will be more likely to stop shopping and immediately transact, potentially forgoing the optimal transaction.[51] The perceived marginal benefit from additional searching drops, if the consumer deems that price-advertising signal credible. If that "30% off" claim was false because the advertised item was never offered at the full sticker price, the dishonestly-presented offer can prevail because of that signal.[52] The buyer might forgo a better bargain because the benefits of continued search were higher than perceived. In fact, the

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46 *See* Friedman, *Bait-and-Switch*, *supra* note 2, at 587 ("Time, the ultimate scarce resource, may constrain the consumer's choices, if the consumer has urgency to transact.").

47 *See* Howard Marmorstein et al., *The Value of Time Spent in Price-Comparison Shopping: Survey and Experimental Evidence*, 19 J. CONSUMER RES. 52, 52 (1992) ("It is commonly accepted that opportunity costs affect the extent of consumers' price-search behavior, choice of travel mode, search for employment, and other household . . . consumption decisions." (internal citations omitted)).

48 *See* NIELSEN CO., THE FUTURE OF GROCERY E-COMMERCE, DIGITAL TECHNOLOGY AND CHANGING SHOPPING PREFERENCES AROUND THE WORLD 19 (2015), http://www.nielsen.com/content/dam/corporate/us/en/reports-downloads/2015-reports/nielsen-global-e-commerce-new-retail-report-april-2015.pdf (presenting data describing how consumers use in-store technology to save shopping time).

49 *See* Stiglitz, *supra* note 7, at 787-99, 818-20 (describing how divergent individual search costs can lead to a market equilibrium with divergent prices).

50 *Id.* at 791.

51 *See* J. Yannis Bakos, *Reducing Buyer Search Costs: Implications for Electronic Marketplaces*, 43 MGMT. SCI. 1676, 1677 (1997) ("[E]ven modest search costs can lead to prices substantially higher than marginal costs, even when sellers do not behave collusively in commodity markets."); Stigler, *supra* note 19, at 216 ("The [chief] cost of search, for a consumer . . . is time.").

52 *See* Friedman, *Fictitious Pricing*, *supra* note 2, at 956-63.

very purpose of the advertising tactic is to prevent that continued search.

Since the late 1960s, federal regulators have taken a laissez-faire approach toward a host of these commonplace, dishonest search-disruption tactics.[53] These tactics include bait-and-switch schemes in various forms,[54] fictitious discount pricing,[55] and even deceptively-oversized packaging.[56] Consumers are especially susceptible to manipulation of discounting claims versus other types of advertising claims because they are difficult to verify, so disruptive tactics such as fictitious pricing may prove more likely to have effect.[57]

Because search discontinuation occurs sooner than it would in the absence of dishonest tactics, consumers are more likely to land on a suboptimal transaction when they are used. Not all of these tactics are equally socially damaging, and much of the ultimate welfare impact depends on whether consumers will continue to make purchases with

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[53] I have previously discussed the context of the Federal Trade Commission's shift in enforcement policy starting with the Nixon Administration. *See* Friedman, *Fictitious Pricing*, *supra* note 2, at 921-22, 937-42 (discussing deceptive price discounting); *see also* Friedman, *Bait-and-Switch*, *supra* note 2, at 615-20 (discussing, in part, how shifting political norms affected supermarket advertising and stock-out rules).

[54] *See generally* Friedman, *Bait-and-Switch*, *supra* note 2 (exploring the various contexts within which bait-and-switch tactics are used and how they are regulated).

[55] *See generally* Friedman, *Fictitious Pricing*, *supra* note 2 (discussing the history of enforcement of deceptive discount pricing and the social harms the practice inflicts).

[56] "Non-functional slack-fill," in essence, is unnecessary extra space in a food packaging box, like a box of candy. The extra packaging can lead the searching consumer to think that they are buying a higher quantity than they will actually receive. *See, e.g.*, Bratton v. Hershey Co., No. 2:16-cv-4322-NKL, 2017 WL 2126864 (W.D. Mo. May 16, 2017) (denying Hershey's motion to dismiss in a case where plaintiffs allege Hershey unlawfully oversized the packaging of Reese's® Pieces® and Whoppers® candies). Federal regulations define "slack-fill" as "the difference between the actual capacity of a container and the volume of product contained therein." 21 C.F.R. § 100.100(a) (2018). "[A] food shall be deemed to be misbranded if its container is so made, formed, or filled as to be misleading." 21 C.F.R. § 100.100. "A container that does not allow the consumer to fully view its contents shall be considered to be filled as to be misleading if it contains nonfunctional slack-fill. . . . Nonfunctional slack-fill is the empty space in a package that is filled to less than its capacity." 21 C.F.R. § 100.100(a). These regulations are functional, despite the consumer's ability to read volume and quantity disclosures, and even shake a box. Effectively, as the plaintiffs in *Bratton* contend, consumers take only thirteen seconds to shop, and under such time constraints, will likely choose to buy the bigger box, all things equal. *Bratton*, 2017 WL 2126864, at *1.

[57] Phillip Nelson noted that the "most obvious procedure available to the consumer in obtaining information about price or quality is search" because most such claims could be *apparently* verified through inspection. Nelson, *Consumer Behavior*, *supra* note 19, at 311-12.

the seller after the inducement to make the initial purchase. If a consumer continues to purchase an item after the initial transaction, the continued stream of transactions may stem in part from the initial decision to stop shopping and experience that particular offering.

Some purchases (e.g., automobiles, large household appliances) are "one-offs," and therefore are never corrected with subsequent searches for the next transaction. Others (e.g., packaged food, gasoline) may be more frequent, but search-disruption might be corrected in the next series of transactions through a post-purchase evaluation of the offer.

As noted, until recently, nominally unlawful, dishonest search-disruption tactics have remained at work, largely without interference. With respect to deceptive discount pricing, for example, the rationale offered for inaction was that the FTC did not want to slow a dynamic that looked like classic, welfare-enhancing, discount price competition,[58] regardless of other social costs.

In part, some of this reticence to intervene rests in the difficulty of ascertaining individual harm from these practices. Expectation damages will not avail to the buyer who took the seller's insincere offer as bait and was switched to a different offer.[59] At the cash register, the consumer paid an amount pursuant to the "switched" offer and accepted. If expectation damages are the default remedy, the seller can always claim that the ultimate price offer made at the point of sale was honored, leaving the buyer without private incentive to correct the sales practice.[60]

Broader social harm, however, results from resource misallocation in the consumer "search" process, especially when echoed across frequently-deployed tactics. Monopolistic competition yields an array of price points that naturally emerge as the product of differentiated consumer search preferences. Dishonest search-disruption, on the other hand, enables dishonest sellers to capture more welfare, rewarding dishonest behavior. Seller reputation might correct for dishonesty, but not in instances where consumers remain unaware of the deceit or choose to continue transacting with the seller, on the basis that resuming a search for alternatives would yield an insufficient return. State regulators and private actors can deter such marketplace behavior, largely through unlawful-trade-practice causes

[58] *See* Robert Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 HARV. L. REV. 661, 687-88 (1977). In a shorter piece, in 2004, Pitofsky reiterated similar concerns about enforcing fictitious pricing. *See* Robert Pitofsky et al., *Pricing Laws Are No Bargain for Consumers*, 18-SUM ANTITRUST 62, 64 (2004).

[59] *See* RESTATEMENT (SECOND) OF CONTRACTS § 347 (AM. LAW INST. 1981).

[60] *See supra* text accompanying notes 14–15.

of action,[61] some of which circumvent the need to prove individual pecuniary harm.[62]

In sum, retailers use dishonest search claims to exploit time limitations by signaling that an offer should be taken at that moment, based on distorted impressions that the marginal cost of continuing to shop or "search" would not be worth the marginal benefit from a better bargain.[63] In Part II, I note how these dishonest search claims, specifically, bait and switch and fictitious pricing, have reclaimed a higher profile, and discuss the welfare concerns that they raise.

II. BAIT AND SWITCH AND FICTITIOUS DISCOUNTS: CLASSIC SEARCH DISRUPTORS

Next, I explore two distinct areas where DSD has demonstrably resurfaced, evidenced through regulatory action. The fictitious-pricing practices of large, legacy retailers have resurfaced as a regulatory concern in California and New York after decades of dormancy at every level.

A. "Classic" Bait-and-Switch Tactics

Bait-and-switch tactics have advanced from the classic midcentury schemes involving door-to-door sales of aluminum siding.[64] Recently, the impact of bait-and-switch practices has emerged as a concern in scenarios where sellers lure in consumers with an initial price offer that leads them to complete a transaction that lands at a higher price. Of course, consumers, in some circumstances, may be aware that they have been baited and may "walk." Others may feel indifferent and be

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[61] As well as their equivalents.

[62] See, for example, Hinojos v. Kohl's Corp., 718 F.3d 1098, 1105 (9th Cir. 2013), where the plaintiff/consumer successfully alleged an economic injury for fictitious discount pricing under the California Fair Advertising Law. Not every state permits the finding of economic injury without benefit-of the bargain damages. *See* Friedman, *Fictitious Pricing*, *supra* note 2, at 924 n.14 (discussing fictitious-pricing claims in Illinois and Ohio, dismissed on the grounds that pecuniary harm had not been alleged).

[63] *See* Brief of First Amendment Scholars as Amici Curiae in Support of Respondents at 13, Expressions Hair Design v. Schneiderman, 137 S. Ct. 1144 (2017) (No. 15-1391), 2016 WL 7664633 (describing how the marginal cost of shopping can be manipulated in a manner harmful to consumers).

[64] *See* All-State Indus. of N.C., Inc. v. FTC, 423 F.2d 423, 424 (4th Cir. 1970); *see also Unfair Practices in the Home Improvement Industry and Amendments to the FTC Act: Hearings on S.J. Res. 130, S. 3065 and S. 3066 Before the S. Comm. on Commerce*, 90th Cong. 1-2 (1968).

satisfied with the switch. However, some transactions put extra undue weight and costs on the consumer to abandon the transaction and resume search.

Although merchants do not “imprison[] [consumers] on site,” merchants do exercise “some control over the consumer’s physical presence and attention.”[65] When this control is exploited through false representations, the marginal cost of additional search is unduly inflated. Offering free food samples might induce a shopper to stay longer in a supermarket and buy items without much additional search. This is search manipulation of sorts, but not within the realm of untoward or dishonest behavior because this tactic is transparent. In contrast, consider the calculations of a consumer confronting an undisclosed fee after filling her tank with gasoline.[66] Knowing about that fee might have led the consumer to continue to search for a different gas station. The costs of unwinding that transaction, once the gasoline sits in the tank, appear high relative to the benefit of saving a small fee, so the rational consumer might tend to absorb that fee and move on.

There are a few different modern varieties of bait and switch, which look different from the “classic” bait-and-switch schemes that concerned the FTC in the late 1960s and early 1970s. A bait-and-switch scheme requires sellers to offer “bait,” of course, as the means to induce the buyer to make the ultimate transaction. The FTC defines “bait” as

> an alluring but insincere offer to sell a product or service which the advertiser in truth does not intend or want to sell. Its purpose is to switch consumers from buying the advertised merchandise, in order to sell something else, usually at a higher price or on a basis more advantageous to the advertiser.[67]

The “classic” bait-and-switch cases can be classified into three scenarios: the already-purchased offer as “bait,” the initial offer as “bait,” and advertising unavailable items as “bait” to lure consumers to a retail destination.[68]

65 Brief of First Amendment Scholars, *supra* note 63.

66 *See* Fourth Amended Complaint, Scharfstein v. BP W. Coast Prods. LLC, No. 111217046 (Or. Cir. Jan. 8, 2014), 2014 WL 2741574 (alleging that gas stations violated Oregon rules about price display when they failed to disclose debit-card fee).

67 Guides Against Bait Advertising, 16 C.F.R. § 238.0 (2018).

68 Friedman, *Bait-and-Switch*, *supra* note 2, at 606.

The "already-purchased-offer-as-bait" scenario involves a seller marketing and closing a transaction, then disparaging the sold item after generating a sense of buyer commitment, and then finally switching them to the seller's ultimate deal.[69] Take the example of a swimming pool salesperson pitching an exceptionally attractive offer for an above-the-ground pool to a homeowner.[70] Such a deal would stop the homeowner's search. Before delivering, the "trusted" sales representative disparages the ordered "bait" pool as inadequate and inferior, then pitches a more profitable offering, perhaps an upsell. If the consumer accepts this second offering and decides not to resume search — either due to a sunk costs perception or misplaced trust in the "savior" sales representative — the resulting transaction is the product of DSD.[71]

The "initial-offer-as-bait" scenario operates similarly, but with a different sequence. This swimming pool seller advertises bargains which serve as "bait" and disrupt the search. When the sales representative engages the homeowner, he or she schemes to present the advertised "bait" in a manner that will inevitably lead the homeowner to choose a more profitable alternative. The seller never intended to sell the advertised pool to anyone. The advertising serves to disrupt the search by diverting the consumer with an insincere offer, thus operating similarly to the "already-purchased" scenario.

The third scenario uses advertising of items that are not in stock or are otherwise unavailable to lure consumers to a destination where once they have arrived, the expenditure of limited search time leaves less time left to move to a different destination.[72] Thus, the consumers end up spending at that destination. The swimming-pool retailer advertises a sale on pool floats at the store but doesn't stock the items with regularity. Consumers visit the retail destination, where they buy other items that they otherwise might not.[73]

Also consider the car seller who advertises a deal on a non-existent car and invites consumers to test drive it. Consumers with limited

[69] *Id.* at 607-08.

[70] *See, e.g.*, *id.* at 609 (discussing already-purchased-offer-as-bait); *In re* S. States Distrib. Co., 83 F.T.C. 1126 (1973) (ordering an Atlanta, Georgia, seller and distributor of home improvement products, including swimming pools, to cease engaging in a wide variety of bait-and-switch-like sales practices).

[71] For a similar scenario involving the sale of aluminum siding, see All-State Indus. of N.C., Inc. v. FTC, 423 F.2d 423, 424-25 (4th Cir. 1970).

[72] *See In re* Leon A. Tashof, 74 F.T.C. 1361, 1361 (1968), *aff'd*, 437 F.2d 707 (D.C. Cir. 1970) (using bait without disparaging the bait).

[73] For a time, the FTC demonstrated concern about such practices in the limited zone of urban supermarkets. Friedman, *Bait-and-Switch*, *supra* note 2, at 615-20.

search time visit the dealer, due to dishonest search, and may similarly stunt their search because less time remains for the search. The reduced amount of time may lead the consumer to begin their search at the dealer who baited them.

These "classic" schemes all prove effective for sellers and prove socially harmful for similar reasons. At the same time, the buyers have difficulty proving pecuniary harm.

B. Modern Bait-and-Switch Tactics

Today's sellers use new tactics that echo classic bait-and-switch approaches. Technology and default settings can be used as dishonest search disrupters, as can the structure of payment systems. Sellers can create conditions to make it unduly difficult for consumers to opt out of a transaction, once lured toward it. Even after decades of non-enforcement of traditional bait-and-switch tactics, it appears that bait-and-switch enforcement has resurfaced in spirit, though not in name, to address modern forms of the tactic.

If consumers find it difficult or costly to continue shopping because of dishonest tactics, they may be prevented from reaching the ultimate optimal bargain. The Restore Online Shoppers Confidence Act ("ROSCA"),[74] passed in 2011, presented a policy shift toward concerns about bait-and-switch-like manipulation of consumers on the Internet. I discuss ROSCA next, followed by an examination of the challenge to the New York statute arguably designed to prevent consumers from being surprised at the cash register with a higher price for choosing to use credit cards for payment.[75] ROSCA and its enforcement, and New York's controversy with credit-card "surcharge" disclosure, offer illustrations that bait-and-switch concerns remain at the forefront, even if not named as such.

1. Restore Online Shoppers Confidence Act

ROSCA presented an Internet-commerce-driven policy shift toward addressing concerns about bait-and-switch-like manipulation of consumers. ROSCA governs Internet sellers' use of "negative option[s]" and "free-to-pay conversions,"[76] both of which can function

[74] 15 U.S.C. §§ 8401-8405 (2018).

[75] *See* Expressions Hair Design v. Schneiderman, 137 S. Ct. 1144, 1145 (2017) (prohibiting "seller[s] in any sales transaction [from] impos[ing] a surcharge on a holder who elects to use a credit card in lieu of payment by cash, check, or similar means" (quoting N.Y. GEN. BUS. LAW § 518 (2018))).

[76] 15 U.S.C. § 8401(8).

unduly to prevent consumers from undoing transactions, stopping a series of transactions and generally disrupting search away from default choices.

The statute incorporates the FTC definition of "negative options."[77] Negative options are "an offer . . . to sell . . . any goods or services, a provision under which the customer's silence or failure to take an affirmative action to reject goods or services or to cancel the agreement is interpreted by the seller as acceptance of the offer."[78] In essence, unless the seller takes specific corrective steps, such "acceptance by silence" tactics in Internet commerce are unlawful. To avoid regulatory exposure under ROSCA, sellers using negative options must take aggressive disclosure and consent-acquisition steps, and offer easy mechanisms for preventing recurring charges on credit cards and other financial accounts.[79]

"Free-to-pay conversions" are a specific form of the negative option. They encompass a seller's efforts "to sell . . . any goods or services, a provision under which a customer receives a product . . . for free for an initial period and will incur an obligation to pay for the product . . . if he or she does not take affirmative action to cancel before the end of that period."[80]

Both of these primary ROSCA concerns involve scenarios where a seller lures a consumer with an offering, leaving them to accept and pay for the offering unless the buyer overcomes general inertia and deliberately-enhanced transactional friction. This extra "drag" on the transaction may prevent a buyer from continuing to shop or may cause them to continue with a transaction that they might just otherwise reject. More so than traditional bait and switch, buyers confront not just sunk-cost perceptions, but real costs of undoing these transactions, unless the seller offers an easy way out, as ROSCA requires.

Spurred by the enactment of ROSCA, the FTC initiated two enforcement actions in 2014 that involved practices that bear some resemblance to the long-abandoned enforcement of bait-and-switch tactics. One action, brought against a weight-loss supplement seller,[81]

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[77] *Id.* § 8403.

[78] 16 C.F.R. § 310.2(w) (2018).

[79] 15 U.S.C. § 8403.

[80] 16 C.F.R. § 310.2(r).

[81] Complaint for Permanent Injunction and Other Equitable Relief at 3-4, FTC v. Health Formulas, LLC, No. 2:14-cv-01649-JAD-GWF (D. Nev. Oct. 7, 2014), https://www.ftc.gov/system/files/documents/cases/141020healthformulascmpt.pdf.

typified this resemblance.[82] The FTC alleged that the defendants "trick[ed] consumers into disclosing their credit and debit card information to enroll them into expensive programs with recurring monthly charges" and "deceptively tout[ed] offers for purportedly 'free' trials that cost only a nominal shipping and handling fee or for greatly discounted prices."[83] In this instance, the FTC alleged that consumers would then often receive "substantial and unexpected recurring charges or debits" and that "getting a refund [was] an exercise in frustration."[84] In other words, consumers would arrive upon searching one thing, but would encounter search-disruption tactics in the form of negative options and free-to-pay, resulting in transactions for something else or something different.

2. Credit-card "Surcharges" and *Expressions Hair Design*

A recent United States Supreme Court decision, *Expressions Hair Design*, involved a challenge to the constitutionality of a New York statute that prohibited sellers from declaring a "surcharge" price above the "sticker" price for credit-card users.[85] The statute did not prohibit establishing different prices, it merely prohibited sellers from declaring that credit-card usage was associated with a "surcharge" or "extra charge."[86] Offering a "discount" for cash usage off the "sticker" price would be permissible under the statute, however. The case was remanded for consideration of whether the statute, which regulated price communication, could survive First Amendment scrutiny.[87]

Though the locus of this case centered on the nature of commercial speech, some *amici curiae* arguments shed light on a different debate around the powerful role of price labeling in signaling.[88] Among the

82 *Id.* For the other action, see Complaint for Permanent Injunction and Other Equitable Relief at 3-5, FTC v. JDI Dating, Ltd., No. 14-cv-8400 (N.D. Ill. Oct. 27, 2014), https://www.ftc.gov/system/files/documents/cases/141028jdidatingcmpt.pdf. This enforcement action, involving an online dating service, bore similarities to the one involving the weight-loss supplement company. *Id.* at 1-3. Users of the dating service confronted an unlawfully cumbersome process for unsubscribing for the service that included the "negative option" cancellation structure. *Id.* at 2.

83 Complaint for Permanent Injunction and Other Equitable Relief, *supra* note 81, at 4.

84 *Id.*

85 Expressions Hair Design v. Schneiderman, 137 S. Ct. 1144, 1148 (2017).

86 *Id.* at 1151-52.

87 *Id.* at 1146-47.

88 Professor Ronald Mann noted "[t]he remarkable volume of amicus briefs" filed in this case. *See* Ronald Mann, *Argument Preview: Merchants Bring Payment-card Interchange Wars to the Supreme Court*, SCOTUSBLOG (Jan. 3, 2017, 5:06 PM),

slew of amicus briefs, I discuss a few that debate the behavioral economics behind the practice of differential pricing for credit card users and those who use other forms of payment. Although the decision did not turn on such issues, this case was about a form of search disruption relating to price signaling and discounts, and as such, raised concern among scholars and interest groups concerned about such things. I focus on these particular concerns.

"Scholars of Behavioral Economics" submitted an amicus brief in support of the Petitioners in *Expressions Hair Design*, offering a behavioral-based policy argument that retailers should be able to communicate credit-card pricing differentials as "surcharges."[89] Prospect theory and anchoring perceptions dictated that consumers would use credit cards less if the state permitted merchants to communicate differentials as such.[90] This brief presented the argument that the New York statute's prohibition of the term "surcharge" forced merchants to withhold "material information" about the price differential, ultimately functioning to steer consumers toward credit-card usage.[91] Professor Adam Levitin, in a separate brief, offered a similar concern about the interference with price signaling that results from merchants using terms like "discount" in lieu of "surcharge."[92] By prohibiting sellers from using the word "surcharge" to describe a price, this statute "interfere[d] with . . . free flow of information, depriving customers of important facts about the true costs . . . and disrupting the incentives that would otherwise encourage the use of

http://www.scotusblog.com/2017/01/argument-preview-merchants-bring-payment-card-interchange-wars-supreme-court.

[89] *See* Brief of Scholars of Behavioral Economics as Amici Curiae in Support of Petitioners at 2-3, *Expressions Hair Design*, 137 S. Ct. 1144 (No. 15-1391), 2016 WL 6994874, http://www.scotusblog.com/wp-content/uploads/2016/11/15-1391-tsac-Scholars-of-Behaviorial-Economics.pdf. Nobel laureate Daniel Kahneman was among these *amici*. *Id.*; *see* Daniel Kahneman, *Daniel Kahneman-Biographical*, NOBELPRIZE.ORG, https://www.nobelprize.org/nobel_prizes/economic-sciences/laureates/2002/kahneman-bio.html.

[90] *See* Brief of Scholars of Behavioral Economics, *supra* note 89, at 2-3.

[91] *Id.* at 3. "The state no-surcharge laws at issue in this case limit the manner in which merchants communicate to their customers the costs of credit-card transactions, forcing merchants to frame those costs in a way that biases consumers toward credit-card use." *Id.* at 2.

[92] *See* Brief of Amicus Curiae Professor Adam J. Levitin in Support of Petitioners at 4, *Expressions Hair Design*, 137 S. Ct. 1144 (No. 15-1391), 2016 WL 6994877, https://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs_2016_2017/15-1391_amicus_pet_professor_adam_j_levitin.authcheckdam.pdf.

lower-cost payment mechanisms.”[93] These *amici* recognized the role of price description information in “search.”

In contrast, in a brief in support of the Respondents, a group of “First Amendment Scholars” articulated a behavioral problem that emerges from consumer surprise by a higher price at the cash register.[94] These *amici* defended the New York statute on the basis that it prevented the type of search disruption resulting from being led to believe that an item was one price, only to discover at the point of sale that there was a surcharge.[95] Enabling merchants to evade or muddy the disclosure of a credit-card “surcharge,” when “a customer has invested time and effort pursuing a transaction, [makes] him less likely to back out even if the terms of the deal become less attractive at the point of sale.”[96] Or, “[p]ut another way, a surcharge system allows merchants to raise prices in the middle of a transaction.”[97]

If the choice of payment system leads to a price differential discovered only at the point of sale, it should be considered that some goods are not easily put back on the shelf. If a consumer fills a tank with gasoline and discovers that paying with a credit card leads to a surcharge, the consumer has few practical choices if he or she has no cash on hand but to pay the surcharge.[98] Though the words “negative option” are not used by the First Amendment Scholars *amici*, one could equate such a pricing scheme as a negative option. The gasoline purchase illustrates that very scenario. The First Amendment Scholars brief offers further support for the notion that the “significance of . . . harms” from “unannounced price increases” finds root in established economic theory.[99]

Perhaps disappointingly for the scholars offering and attacking behavioral economics arguments in their briefs in this case,[100] the

93 *Id.* at 5.

94 *See* Brief of First Amendment Scholars, *supra* note 63, at 6.

95 *Id.* at 12.

96 *Id.*

97 *Id.*

98 *Id.*; *see also* Fourth Amended Complaint, *supra* note 66, at 2 (involving a debit-card surcharge at gasoline stations).

99 Brief of First Amendment Scholars, *supra* note 63, at 12-13.

100 Other *amici* of note included “scholars specializing in constitutional, administrative, contracts, and health law,” warning that “[e]conomic regulations that shape ‘choice architecture’ would become targets of litigation.” Brief of Amici Curiae Constitutional, Administrative, Contracts, and Health Law Scholars in Support of Respondents at 21, Expressions Hair Design v. Schneiderman, 137 S. Ct. 1144 (2017) (No. 15-1391), 2016 WL 7494904. For a wholesale attack on the role of choice architecture and behavioral economics generally in this context, see Brief of Amici

Court decided *Expressions Hair Design* on narrower grounds, remanding the case to the Second Circuit for consideration of the statute as speech regulation.[101] Nonetheless, the background debate about the effects of price signaling indicate that the underlying concerns about bait and switch remain, even if they do not use the term. The notion that search disruption might (or might not) impede the flow of information was alive and well in the *amici* briefs.

In sum, bait-and-switch practices remain a subject of conceptual concern, despite the recent absence of federal enforcement of the FTC Guides Against Bait Advertising,[102] at least by name. These tactics still yield DSD through insincere lures of an initial offering. This initial offering may, by design, appear costly to the consumer to shake off at the point of purchase, if the check-out is "virtual" and online, hence the enactment and enforcement of ROSCA.

The traditional retail setting remains an atmosphere still ripe for DSD, if the consumer is drawn to the physical check-out counter with a surprise, but difficult-to-avoid, charge that changes the transaction to the consumer's disadvantage. Perhaps more insidious than a bait and switch, which in some scenarios can be identified by consumers, is fictitious pricing. The consumer may be taken in by a dishonest representation about a discount but may never know that their search had been prematurely disrupted by such tactics because the "regular price" proves difficult for the buyer to verify.[103] I discuss this further below.

C. *Fictitious-Pricing Discounts*

After decades of dormancy,[104] concerns about fictitious-pricing practices have resurfaced over the past few years.[105] An insincere

Curiae International Center for Law & Economics and Scholars of Law and Economics in Support of Respondents at 4-7, *Expressions Hair Design*, 137 S. Ct. 1144 (No. 15-1391), 2016 WL 7438451 ("Behavioral economic theories are malleable and should not be relied upon without empirical support.").

[101] Simply put, the Court merely found that the statute regulated speech. *Expressions Hair Design*, 137 S. Ct. at 1151-52; *see also* Ronald Mann, *Opinion Analysis: Justices Offer Minimalist Decision on New York Credit-card Surcharge Statute*, SCOTUSBLOG (Mar. 30, 2017, 7:01 AM), http://www.scotusblog.com/2017/03/opinion-analysis-justices-offer-minimalist-decision-new-york-credit-card-surcharge-statute ("[T]he only thing that we know now that we did not know before is that the First Amendment applies.").

[102] *See* Friedman, *Fictitious Pricing*, *supra* note 2, at 922 n.6 (FTC enforcement has been dormant since 1970).

[103] *See* Friedman, *Refining Advertising*, *supra* note 32, at 866-70.

[104] Friedman, *Fictitious Pricing*, *supra* note 2, at 922 n.6 (FTC enforcement has been dormant since 1970).

discount price — a price discount based off of a fictitious prior-reference price — disrupts and distorts search.[106] A price claim that signals that the consumer has found a bargain will induce that consumer to stop their search prematurely — before finding the optimal transaction.[107] A host of studies show that fictitious-pricing practices prove injurious to overall welfare and put a drag on retail market efficiency.[108]

Recently, some high-profile local law enforcement actors have brought enforcement actions. In December 2016, the Office of the Los Angeles City Attorney filed a round of "false reference pricing" lawsuits on behalf of the State of California against four major brick-and-mortar retailers:[109] Macy's,[110] Kohl's,[111] J.C. Penney,[112] and Sears,

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[105] I have previously discussed fictitious-pricing practices, their effects, and the history of enforcement extensively. *See id.*; Friedman, *Refining Advertising*, *supra* note 32, at 867 n.153 (describing recent fictitious-pricing actions brought and settlements reached by state regulators); *see also id.* at 868 n.154 (describing private civil actions involving fictitious pricing).

[106] Friedman, *Fictitious Pricing*, *supra* note 2, at 952 ("A strong consensus supports the finding that fictitious pricing interferes with markets, yields inefficiency, and reduces welfare.").

[107] Larry D. Compeau & Dhruv Grewal, *Comparative Price Advertising: An Integrative Review*, 17 J. PUB. POL'Y & MARKETING 257, 263 (1998) (finding "little doubt that comparative price advertisements work," and that "the potential for deception [from fictitious pricing] seem[ed] rife because external reference prices have a strong influence on consumers, even when they are exaggerated").

[108] *See* Gorkan Ahmetoglu et al., *Pricing Practices: A Critical Review of Their Effects on Consumers*, 21 J. RETAILING & CONSUMER SERVS. 696, 702 (2014) (providing an empirical analysis on the effectiveness of various pricing practices and their effect on consumer perceptions and behavior); Dhruv Grewal & Larry D. Compeau, *Comparative Price Advertising: Informative or Deceptive?*, 11 J. PUB. POL'Y & MARKETING 52, 55 (1992) (describing a meta-analysis of twenty-eight studies of the welfare impact of fictitious pricing). For a more recent analysis yielding similar findings, see Armstrong & Chen, *supra* note 30.

[109] In California, district attorneys have the power to enforce certain state consumer protection regulations. CAL. BUS. & PROF. CODE § 17508(b) (2018). Any consumer action in California against national retailers is of note because California represented approximately fourteen percent of the United States Gross Domestic Product in 2016, and national retailers would have to alter their practices significantly to accommodate California. *See Regional Data, Gross Domestic Product by State*, BUREAU ECON. ANALYSIS, https://www.bea.gov/iTable/iTable.cfm?reqid=70&step=10&isuri=1&7003=200&7035=-1&7004=sic&7005=1&7006=xx&7036=-1&7001=1200&7002=1&7090=70&7007=-1&7093=levels#reqid=70&step=10&isuri=1&7003=200&7004=naics&7035=-1&7005=1&7006=xx&7001=1200&7036=-1&7002=1&7090=70&7007=-1&7093=levels (last visited Nov. 6, 2017).

[110] Complaint at 2, People v. Macy's Inc., No. BC 643040 (Cal. Super. Ct. Dec. 8, 2016), 2016 WL 7369815.

[111] Complaint at 2, People v. Kohl's Dep't Stores, Inc., No. BC643037 (Cal. Super.

Roebuck.[113] Upon filing these actions, the City Attorney articulated the premise of DSD, even if he did not state it directly. "Customers have the right to be told the truth about the prices they're paying — and to know if a bargain is really a bargain . . . . My office will fight to hold retailers responsible for their practices and to ensure consumers can make informed choices when spending their hard-earned money."[114] The local actors in these cases are focused on ensuring that larger retail players accurately signal to consumers when to stop their search processes, transacting on the basis of "informed choices" rather than misinformed choices.

Though the FTC has remained inactive on the fictitious-pricing front, the Commission reportedly made some noise about investigating fictitious-pricing practices when Amazon sought antitrust clearance to acquire Whole Foods.[115] A public interest group, Consumer Watchdog, raised a complaint with the FTC, calling for them "to block Amazon's proposed $14 billion purchase of Whole Foods Inc. until the online retailing giant formally consents to halt its deceptive-pricing practices that falsely lead consumers to believe they are getting deals with discounted prices."[116] A news report indicated that "[f]ollowing receipt of the letter, the agency made informal inquiries about the [Consumer Watchdog] allegations," while Amazon publicly replied to Consumer Watchdog's analysis, deeming it "deeply flawed."[117]

Ct. Dec. 8, 2016), 2016 WL 8302036.

[112] Complaint at 2, People v. J.C. Penney Corp., No. BC643036 (Cal. Super. Ct. Dec. 8, 2016), 2016 WL 7157603.

[113] Complaint at 2, People v. Sears, Roebuck & Co., No. BC643039 (Cal. Super. Ct. Dec. 8, 2016), 2016 WL 7178866.

[114] *Los Angeles City Attorney Mike Feuer Sues Four Major National Retailers, Alleging False Reference Pricing; J.C. Penney, Kohl's, Macy's and Sears Allegedly Misled Customers with Pricing Schemes to Increase Sales*, L.A. CITY ATT'Y (Dec. 8, 2016), https://www.lacityattorney.org/single-post/2016/12/08/Los-Angeles-City-Attorney-Mike-Feuer-Sues-Four-Major-National-Retailers-Alleging-False-Reference-Pricing-JC-Penney-Kohl%E2%80%99s-Macy%E2%80%99s-and-Sears-Allegedly-Misled-Customers-With-Pricing-Schemes-to-Increase-Sales.

[115] Diane Bartz, *FTC Probing Allegations of Amazon's Deceptive Discounting*, REUTERS (July 20, 2017), https://www.reuters.com/article/us-whole-foods-m-a-amazon-ftc/ftc-probing-allegations-of-amazons-deceptive-discounting-idUSKBN1A52R5.

[116] Letter from John M. Simpson, Privacy Project Dir., Consumer Watchdog to Abbott Lipsky, Jr., Acting Dir., Bureau of Competition, Fed. Trade Comm'n & Andrew C. Finch Acting Assistant Att'y Gen., Antitrust Div., Dep't of Justice (July 6, 2017), https://web.archive.org/web/20170722051234/http://www.consumerwatchdog.org/resources/ltrftcdojamzon070617.pdf.

[117] Bartz, *supra* note 115.

With Amazon, however, the issue surfaced in a mismatched context because deceptive discounting constitutes a tactic used to disrupt a competitive market where buyers generally have choices.[118] Here, the concern about deceptive discounting was inserted into a review process designed to assess whether the merger complied with antitrust guidelines and did not unduly lead to an anticompetitive outcome.[119] The deceptive discounting allegations were not publicly addressed, as the FTC approved the merger without comment on the issue.[120]

Nonetheless, despite the mismatched context for considering deceptive discounting allegations, fictitious pricing and DSD did enter the public dialogue during this high-profile event. Prior to the whispers in the Amazon case, the FTC had not made *any* discernable noises about fictitious pricing since 1970.[121] Whether this off-the-record leak to a reporter signaled an openness to such complaints will only be revealed in time, but the actions taken in California signal that retailers will have to defend their discounting practices in the near future.

III. TREATING "DISHONEST SEARCH DISRUPTION" AS A DISTINCT PROBLEM

DSD encompasses a set of tactics that sellers use to deploy false information that interferes with the consumer search process, reducing welfare. Treating DSD as a broader category of commercial misbehavior would serve to heighten the notion that DSD is a distinct

[118] *See* Erin Fuchs, *FTC Likely to Approve Whole Foods Deal Even If Amazon Did Deceive Customers*, YAHOO! FIN. (July 21, 2017), https://finance.yahoo.com/news/ftc-likely-approve-whole-foods-deal-even-amazon-deceive-customers-132400581.html ("Normally, we don't think about deceptive pricing as a sign of market power and indeed if you look at the people who do it, they're not monopolists." (quoting leading antitrust scholar Herbert Hovenkamp)). Indeed, the retailer defendants in the recent California suit all compete to sell retail goods.

[119] *See id.*

[120] *See* Press Release, Fed. Trade Comm'n, Statement of Federal Trade Commission's Acting Director of the Bureau of Competition on the Agency's Review of Amazon.com, Inc.'s Acquisition of Whole Foods Market Inc. (Aug. 23, 2017), https://www.ftc.gov/news-events/press-releases/2017/08/statement-federal-trade-commissions-acting-director-bureau. Ironically, Amazon quickly heralded price cuts and discounting at Whole Foods after merger approval. *See* Abha Bhattarai, *Amazon to Lower Prices at Whole Foods as Soon as Purchase is Finalized Monday*, CHI. TRIB. (Aug. 25, 2017), http://www.chicagotribune.com/business/ct-amazon-whole-foods-deal-20170824-story.html.

[121] *See* Friedman, *Fictitious Pricing*, *supra* note 2, at 922 n.6 ("The last standalone FTC mention of 'fictitious' pricing appeared in an order on December 31, 1970, a follow-through of a holdover complaint filed in 1969.").

form of information manipulation worthy of concern. DSD, as framed here, should not be considered a "catch-all" or grab-bag of a fragmented set of tactics, but rather a description of a common set of tactics. Taken separately, tactics like "bait and switch" and "fictitious pricing" appear as distinct market problems, but distinct problems may appear smaller or arcane when not appropriately considered together. These tactics share a great deal in common in how they function to disrupt retail markets and should reside under the same umbrella.

Recently, some momentum has gathered toward addressing manifestations of DSD. These efforts would have more effect if they coalesced around the search-disruption theme, rather than around discrete tactics. Over the past few years, state attorneys general, their local proxies, and civil litigants have identified fictitious-pricing schemes as areas for concern and enforcement. The fictitious-pricing actions brought, and settlements reached, indicate that at a minimum, fictitious-pricing concerns have recovered forgotten attention. Viewed in concert with the bait-and-switch-flavored tactics embedded in ROSCA, and with the arguments made in the high-profile litigation about mandatory disclosure of credit-card surcharges, DSD surfaces as a common thread. Addressing the common thread serves to appropriately magnify the problem of DSD to its appropriate size.

The structure provided by long-standing guidance, such as the Guides Against Deceptive Pricing,[122] the Guides Against Bait Advertising,[123] and their state-level counterparts, should remain in place to provide measures of certainty to the regulators and the regulated. Similarly, the specificity of statutes like ROSCA serve targeted purposes. However, the fragmentation of these approaches obscures the commonality of the broader problem embodied in search disruption. A unified thematic enforcement effort can clarify efforts to ensure that consumers search to their optimal level.

Though the emphasis here has been on the negative welfare impact of search disruption, the "dishonesty" component also warrants attention. Many sellers who engage in deliberate dishonesty with respect to pricing tactics do not confine their dishonesty to the tactic *per se*. For example, one study revealed that bait-and-switch techniques tend to be "coordinated and practiced,"[124] by actors employing "hard sells" targeted toward the "poor, uneducated, and

[122] Guides Against Deceptive Pricing, 16 C.F.R. § 233 (2018).
[123] Guides Against Bait Advertising, 16 C.F.R. § 238 (2018).
[124] Wilkie et al., *Response*, *supra* note 30, at 274.

susceptible."[125] Post-transaction treatment of baited customers also reveals "contempt" through refusal to honor warranties and other promises.[126]

Addressing the commonality of dishonesty sends a categorical message to sellers that demonstrably false representations about pricing will be countered. Such a message also prevents the ethical deterioration and distrust that results from incentives to keep up with a tactical "race to the bottom."[127] Those that choose not to cheat are left at a disadvantage unless the cheating comes at a price. A broader statement about this type of cheating, if made properly, would reorder marketplace norms, urging regulators to take deceptive-pricing tactics "seriously."

CONCLUSION

Enforcement of fictitious-pricing and bait-and-switch guidelines have been relegated to the archives room of the FTC for far too long. The commonalities that undergird these tactics and their effects on the marketplace should create a larger concern, a concern that some state regulators have recently recognized. If treated collectively, regulators may find reason to take deceptive-pricing tactics seriously. They distort the consumer search process in a way that obstructs the path to more efficient, welfare-maximizing retail markets. Addressing "dishonest search disruption" may ultimately frame a way for regulators to bring enforcement out of the archives room and again return it to display, to promote honest competition and welfare.

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[125] *Id.* at 275.

[126] *Id.*

[127] *See generally* Friedman, *Bait-and-Switch*, *supra* note 2, at 589-90 (discussing race-to-the-bottom dynamics in bait and switch, rooted in George Akerlof's "lemons" literature).