

**Exhibit 4–Public Version of the  
Expert Report of Kent Van Liere, Ph.D.**

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION  
600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20580

Plaintiff,

v.

WHOLE FOODS MARKET, INC.  
550 Bowie Street  
Austin, Texas 78703

and

WILD OATS MARKETS, INC.  
1821 30th Street  
Boulder, Colorado 80301

Defendants.

Civil Action No. 1:07-CV-01021

EXPERT REPORT OF KENT VAN LIERE, Ph.D.

1. I am Kent D. Van Liere. I am a Vice President at the Denver office of NERA Economic Consulting (“NERA”). I have expertise in statistics, sampling and survey methodology and I have provided expert testimony in these areas in a wide range of cases. My business address is 370 Interlocken Boulevard, 4th Floor, Broomfield, Colorado 80021. NERA is a firm providing expert economic, financial and statistical analysis.

### **Assignment**

2. I and NERA have been retained by the Federal Trade Commission principally to review and evaluate the survey conducted by the polling company<sup>TM</sup>, inc. and the expert opinions offered by Ms. Conway in support of Defendants Whole Foods Market, Inc. (Whole Foods) and Wild Oats Markets, Inc. (Wild Oats) in the proposed acquisition of Wild Oats by Whole Foods. I have also been asked to review the report submitted by Dr. Scheffman, to the extent that his report incorporates the results from the polling company<sup>TM</sup>, inc. survey.

### **Summary of Opinions**

3. My overall opinion in this matter is that Ms. Conway’s survey methodology and procedures are fundamentally flawed and render her data and results unreliable. In addition, it is my opinion that her survey does not provide a reliable basis to assess the issues associated with consumer perceptions of the substitutability of products and services across food retailers.<sup>1</sup> I explain the bases of these opinions in the sections below.

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<sup>1</sup> My use of various terms to describe food retailers is not meant to suggest that I am rendering expert opinion on which retailers do or do not belong inside the relevant antitrust market at issue in this case.

## Qualifications

4. I have an M.A. and a Ph.D. in Sociology from Washington State University. I specialized in social psychology and research methods and statistics, including survey research. From 1978 to 1985, I served as an Assistant, then Associate Professor with tenure, at the University of Tennessee where I taught classes in attitudes and opinions, survey research, research methods and statistics. I also regularly published academic research in leading journals based on data collected using surveys. From 1985 to 1995, I was a Principal and/or President of HBRS, Inc. HBRS was a survey research company that conducted surveys of consumers and businesses throughout the United States for a wide range of government, academic and business clients. HBRS was sold to Hagler Bailly, Inc. (a management consulting firm) in 1995, and I served as a Director and Senior Vice President of Hagler Bailly, Inc. from 1995 to 2000. During this period, I continued to direct the market analysis, market research, and survey research practice of Hagler Bailly, Inc. From 2000 to 2002, I served as President and CEO of Primen, a joint venture of the Electric Power Research Institute (EPRI) and the Gas Research Institute (GRI). This firm provided contract- and subscription-based information services including services based on ongoing surveys of consumers and businesses. From 2003 to 2005, I was a Principal of Freeman Sullivan/Liability Management Systems where I provided litigation support research and consulting on the application of surveys, sampling and statistics in a variety of legal cases. In Spring 2006, I joined NERA where I continue to provide strategic consulting and litigation-related research and consulting.
5. I have substantial experience using qualitative research and surveys to measure consumer opinions regarding products and services including purchase processes, branding and

positioning, market segmentations and communications strategies. I personally facilitated several hundred focus groups with consumers and businesses and I have directed several hundred engagements involving the design and implementation of surveys for clients. My survey experience includes all modes of survey research including mail, telephone, in-person, internet and mixed modes.

6. I have conducted qualitative and survey research on a wide range of consumer products that are sold through grocery stores and I have reviewed various forms of sales data by product for items sold through grocery stores.
7. I have reviewed the application of sampling and survey research methods in litigation for a variety of matters including trademark infringement, misrepresentative/deceptive advertising, labor disputes, construction defects, and telecom class actions. I have provided deposition testimony and testimony at trial on issues of sampling, survey research and statistical analysis.
8. I have lectured on survey research issues and on the use of surveys and statistics in litigation. I have published papers in peer-reviewed journals and monographs on a range of topics involving surveys. I am a member of the American Statistical Association and the American Association for Public Opinion Research (“AAPOR”). A copy of my current resume is attached as Appendix A to this report.
9. NERA is being compensated for my services in this matter at my usual rate of \$500 per hour.
10. I continue to review materials and documents related to this case and reserve the right to supplement this expert report based on any additional work that I may be asked to do.

## **Documents Reviewed**

11. As part of my assignment, I have reviewed the complaint filed by the FTC in this case and the expert reports of Ms. Kellyanne Conway and Dr. David Scheffman, as well as the relevant associated appendices. I have also reviewed the associated survey questionnaire and survey data provided with Ms. Conway's report. Additionally, I have reviewed a number of background documents provided by counsel including a number of market research studies by or relevant to Whole Foods and Wild Oats. A complete list of the documents reviewed by me or by members of my staff at my direction for this report is shown in Appendix B.

## **Background**

12. I understand that Whole Foods proposes to acquire Wild Oats and that this acquisition is being challenged by the FTC on grounds that it will harm consumers.

13. It is my understanding that Dr. Scheffman and Ms. Conway designed and conducted a survey to support Dr. Scheffman's analysis and report on the effects of this proposed merger.<sup>2</sup> I have been asked to review the survey instrument, sampling procedures, survey implementation, and analysis of the survey data along with the conclusions drawn from the analysis by Ms. Conway.

14. My understanding is that Ms. Conway's firm, the polling company<sup>TM</sup>, oversaw the implementation of a telephone survey that was conducted by a separate call center. The

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<sup>2</sup> Expert Report of David T. Scheffman, Ph.D., July 9, 2007, p. 19.

survey was implemented using Random Digit Dialing (RDD) to zip codes that were near Whole Foods and/or Wild Oats stores (presumably within 6 miles).<sup>3</sup> The survey consisted of approximately 55 questions.<sup>4</sup> Calls were made to 427,397 randomly generated telephone numbers and surveys were completed with 1,607 respondents. The surveys were done in eight cities selected by Dr. Scheffman and LECG.<sup>5</sup> In each city, calling was done until a quota of 100 “Frequent” shoppers and 100 “Cusp” shoppers was completed in each city. Ms. Conway defined the number of visits to a store for the Frequent and Cusp categories prior to setting the quotas.

### **Ms. Conway’s Survey Data are Methodologically Flawed and Consequently Are Not Reliable**

15. Ms. Conway’s study suffers from numerous methodological flaws any one of which raises serious questions about the reliability of her data and certainly, when taken in combination, indicate her data are unreliable. Both the *Reference Guide on Survey Research*<sup>6</sup> and the other industry guidelines (such as those set by AAPOR) establish basic standards surveys should meet to be considered reliable. These guidelines cover a range of issues. In reviewing Ms. Conway’s survey, I find that she fails to meet these basic standards in the following areas:

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<sup>3</sup> Scheffman Report, p. 66.

<sup>4</sup> This assumes that the gender question was recorded by observation. Not all questions were asked of all respondents; respondents in cities with only one of the store brands (either Whole Foods or Wild Oats) were asked between 36 and 39 questions.

<sup>5</sup> Scheffman Report, p. 65.

<sup>6</sup> Diamond, S. (2000) “Reference Guide on Survey Research” in the *Reference Manual on Scientific Evidence Second Edition*, Federal Judicial Center at: [http://www.fjc.gov/public/pdf.nsf/lookup/sciman00.pdf/\\$file/sciman00.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/sciman00.pdf/$file/sciman00.pdf).

- a) The response rate to her survey is so low that her results cannot be considered reliable;
- b) Her use of quota sampling renders her data unreliable for extrapolating the results of her survey to the population of Whole Foods/Wild Oats shoppers;
- c) Careful review of her data and questionnaire indicate that the survey included unqualified respondents given the protocol established by Dr. Scheffman; and
- d) A large portion of her questionnaire requires respondents to make mathematical calculations. There is substantial evidence in the survey research literature that appropriate methods be employed to ensure that respondents understand the questions. From her report there is nothing to suggest such methods were used. Moreover, her data suggest that many respondents did not understand or could not complete the questions accurately.

Each of these areas is discussed below.

16. The Survey has an Unacceptably Low Response Rate and No Analysis of Nonresponse is Provided That Would Demonstrate That the Respondents are Representative of the Total Population of Whole Foods/Wild Oats Shoppers. A key issue in evaluating the reliability of survey results is the response rate to the survey. If you draw a random sample of people to call and you talk to 100 percent of your sample, then the response rate is 100 percent and you can be confident that no sampling bias will affect your results because there is no group of people whose attitudes or opinions are unrepresented in your survey. It is almost unheard of to get a 100 percent response rate to a survey as there are always some sample members who

decline to respond or who are unable to respond for one reason or another. So an issue that arises is whether those who do not respond are different from those who respond—this is called nonresponse or selection bias. To the extent that responders are different from nonresponders, the results from the sample may be biased if they are extrapolated to the population.

17. For example, it is possible that the respondents to the Conway survey were those individuals who were easily contacted at home during the brief study period of June 22-28, 2007.<sup>7</sup> If the nonrespondents to the study were those with higher education levels (e.g., more likely to work longer hours, less likely to answer the phone or more likely to screen calls, etc.) then the final results would over-represent the opinions of those with lower education levels.

18. The *Reference Guide on Survey Research* establishes guidelines with regard to response rates for surveys used in litigation. Specifically, “if the response rate drops below 50 %, the survey should be regarded with significant caution as a basis for precise quantitative statements about the population. . .”<sup>8</sup> Additionally, this guide clearly states that determining the impact of nonresponse requires a calculation of the response rate and some analysis of the determinants of nonresponse. Ms. Conway does not perform either of these analyses. In her report she presents a calculation of the incidence rate<sup>9</sup> which is the number of completed surveys divided by those she contacted who were willing to take the survey and who were qualified to do so. This is not, however, the same as a response rate. The incidence rate is not an acceptable substitute for a response rate here because it cannot be taken as a measure

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<sup>7</sup> Given the very rapid data collection period for this study, this is not an unreasonable assertion.

<sup>8</sup> *Reference Guide*, p. 239.

<sup>9</sup> Results and Analysis of Whole Foods and Wild Oats Shopper Survey, Expert Report of Kellyanne E. Conway, Esq., p. 3.

of the rate of success in obtaining data from the desired sampled population. A response rate can be understood as the number of completed surveys divided by the number of dialed phone numbers that would be eligible to complete the study. The response rate takes into account the number of people who are eligible for the study but who could not be contacted during the study period, as well as those that refused to participate. The response rate – not the incidence rate – is the appropriate measure for judging whether some form of selection bias may have affected the data.

19. There are several ways to calculate response rates and AAPOR provides various formulas.<sup>10</sup> Depending on which AAPOR formula is used,<sup>11</sup> Ms. Conway's response rate varies from 6 percent to 0.5 percent (meaning one-half of one percent). Ms. Conway has made no effort to demonstrate how or why the very low response rate to her study results in data that can be used to say anything meaningful about the population of shoppers in these markets. On the basis of the drastically low response rate and lack of analysis of nonresponse, the survey results must be viewed as unreliable for purposes of making extrapolations to the population of Whole Foods and Wild Oats shoppers.

20. The Way in Which Ms. Conway Uses Quota Sampling Makes any Extrapolation of her Results to the Population of Whole Foods/Wild Oats Shoppers Invalid. Ms. Conway's study used a sampling procedure in which she randomly called phone numbers until she had at least 100 completed Frequent shopper interviews and 100 completed Cusp shopper

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<sup>10</sup> AAPOR Response Rate Calculator, <http://www.aapor.org/rrc.asp>.

<sup>11</sup> The actual rate also depends on how the categories in Ms. Conway's Appendix B are interpreted. Ms. Conway's reported disposition categories do not precisely correspond with the AAPOR standard calculator. We have allocated the categories in a variety of ways, from the most conservative to the most liberal and therefore present a range of possible rates.

interviews in each of her eight cities. At the outset of her report, she acknowledges that this methodological approach means that the survey results cannot “represent the actual ratio of Frequent to Cusp shoppers in any particular geographical area.”<sup>12</sup> Yet in her report and in Dr. Scheffman’s report, these survey results are regularly used to make statements about what the **total** population of Whole Foods/Wild Oats shoppers think or believe, in direct contradiction of her acknowledgment that such extrapolations are not correct in this case. For example, in her report she states:

“Overall, just 17 % of shoppers said they visit the Whole Foods at least once a week”  
(p.8)

“A significant majority (71%) of Whole Foods patrons allocate less than one of every five total dollars spent on groceries to Whole Foods,” (p. 9)

“Three-fourths (75%) of Wild Oats shoppers typically spend less than \$50 during a single visit to the retailer,” (p.12).

These types of statements cannot be accurately made given the nature of her sampling methods and it is inappropriate to represent that the data can be generalized in this way.

21. To be specific, the sampling approach Ms. Conway uses does not result in an accurate estimate of the proportion of Frequent and Cusp buyers in the population. Instead, her method forces the results to be 50 percent Frequent buyers and 50 percent Cusp buyers in each city. In the actual population of shoppers, the true proportions of these two groups are not likely to be 50/50, and in fact, it is quite possible that the true population of Frequent and

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<sup>12</sup> Conway Report, p. 2.

Cusp shoppers varies across the different cities and varies significantly from a 50/50 split. To illustrate why this causes problems for her analysis, I provide the following example: Assume that in the real population of Whole Foods shoppers there are 10 percent Frequent shoppers and 90 percent Cusp shoppers, but also assume we used quota sampling and our respondents are 50 percent Frequent and 50 percent Cusp shoppers as Ms. Conway did. Say that we want to calculate the overall average number of visits to the store per year in the population of shoppers. In my example, say that we find Frequent shoppers visit a Whole Foods store on average 24 times a year and Cusp shoppers visit a Whole Foods store an average of six times a year. If we follow Ms. Conway’s method, we would calculate the overall average number of visits to a Whole Foods store as 15 (i.e.,  $(24+6)/2=15$ ). However, this is not correct. To find the correct average, we need to weight each group appropriately to reflect the group’s true proportion in the population.<sup>13</sup> The correct calculation would be:

$$\text{Average} = ( (\text{Frequent Shopper Ave} * \text{Weight}) + (\text{Cusp Shopper Ave} * \text{Weight}) ) / 2$$

Or

$$\text{Average} = ( (24 * .1) + (6 * .9) ) / 2$$

or 3.9 visits per year—a dramatically different estimation. Ms. Conway did not collect her data in a manner that would allow her to know what the correct ratio of Frequent to Cusp shoppers is. As a result, her findings that are based on the combined responses of Frequent and Cusp shoppers cannot be correctly extrapolated to the population of all Whole Foods or

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<sup>13</sup> This example is for illustrative purposes only. To weight appropriately, weights would be applied to each respondent in the survey.

all Wild Oats shoppers. They are basically meaningless since there is no method to weight her data appropriately.<sup>14</sup>

22. Failure to Correct for Systematic Bias Associated with Unqualified Respondents Means the Results Cannot be Correctly Extrapolated to the Population of Whole Foods and Wild Oats Shoppers. In his report, Dr. Scheffman indicates that he purposefully selected sample cities “in order to emphasize a variety of competitive situations within a variety of geographic areas”<sup>15</sup> rather than choosing them randomly<sup>16</sup> from among the cities at issue in this litigation. In addition, he indicates that the specific areas used to sample shoppers for the survey were to be within six miles of a Wild Oats or Whole Foods store. Ms. Conway and Dr. Scheffman attempt to accomplish this by sampling from the listed zip codes within the six mile store radius and presumably matched these zip codes to appropriate telephone numbers.<sup>17</sup> The list of zip codes used for the study is found in Appendix A to Ms. Conway’s report.

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<sup>14</sup> This problem is exacerbated by the fact that Ms. Conway chose to use frequency of shopping as the basis for her quotas. Frequent shoppers are defined as those who shop at Whole Foods/Wild Oats once a month, a few times a month, once a week, and more than once a week. This arbitrarily combines shoppers who shop at Whole Foods/Wild Oats as few as 12 times a year with those that shop more than 100 times a year. No analysis was reported that indicates that shoppers with this range of shopping frequencies are appropriately combined into a single group and it is reasonable to expect that their opinions and behaviors may vary substantially. By grouping them in a single group for purposes of establishing quotas, Ms. Conway cannot break them back out in the correct proportions in the population. This means the data related to frequency of shopping cannot be used to make estimates for the population of things like the average number of trips per year, the average expenditures per year, or related calculations.

<sup>15</sup> Scheffman Report, p. 65

<sup>16</sup> Random sampling of cities would have been one method to avoid systematic biases associated with Dr. Scheffman’s selection rules as discussed below.

<sup>17</sup> Once the numbers were attained the two final digits of the number were replaced with random digits to allow for listed and unlisted numbers.

23. In analyzing Ms. Conway's data, we find that almost 20 percent<sup>18</sup> of respondents are not in the designated zip codes. This is an excessively high proportion of respondents that are not qualified for the study, using Dr. Scheffman's original criteria, but whose responses are included in Ms. Conway's data.<sup>19</sup> This finding demonstrates that the sample plan was not accurately implemented and that her results are unreliable due to the actual geographic location of the respondents. Ms. Conway's own questionnaire design allowed her to validate the actual zip code of the respondent and she could have screened the unqualified respondents out of the survey, yet she does not use this information to remove respondents who should not have been part of the study.

24. We further investigated this issue. In at least one of the cities, Los Angeles, the problem appears to be extensive. Los Angeles is one of the eight cities in the study, and it is one of only 4 cities in the study that include both Whole Foods and Wild Oats stores. The results from Los Angeles therefore represent a quarter of all of the results from cities where the two companies currently compete. In Los Angeles, there were 51 zip codes targeted by Ms. Conway for inclusion in her study. Of the 200 completed interviews from the Los Angeles area, only 31 respondents or 16 percent had zip codes from the sample list. In other words, 84 percent of the Los Angeles area respondents came from locations that were not meant to be included in Ms. Conway's study.

25. We also plotted the zip code locations for the Los Angeles respondents and the location of every Whole Foods or Wild Oats store in Southern California to determine what share of

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<sup>18</sup> This is based only on the 1,504 respondents who provided zip code information.

<sup>19</sup> By chance, we might expect a small number of randomly dialed phone numbers to be in zip codes outside those targeted for calling, as U.S. postal zip codes do not have an exact correspondence with telephone area codes and prefixes.

these respondents were within a roughly six mile radius of either a Whole Foods or a Wild Oats.<sup>20</sup> In total, only 40 percent of the Los Angeles respondents were approximately within six miles of a Whole Foods or Wild Oats store. A total of 22 percent of respondents in this city were more than 20 miles from the nearest Whole Foods or Wild Oats store. A few respondents were up to 100 miles away from a Whole Foods/Wild Oats store. See Figure 1. The *Reference Guide on Survey Research* states that each respondent must be carefully screened to determine whether or not they are indeed eligible to participate.<sup>21</sup>

26. Dr. Scheffman defines the population of interest in this merger as those within a six mile radius of the store. The fact that almost one quarter of all Los Angeles respondents come from areas far beyond this parameter calls into question the reliability of these findings for this city and also suggests that the Los Angeles findings may not be comparable to findings in other cities in this study. Thus, any results that combine Los Angeles and other cities in Ms. Conway's study include inappropriate respondents and therefore cannot be used to make conclusions about shoppers who live in close proximity to the Whole Foods and Wild Oats stores in the markets selected by Dr. Scheffman.

27. We have also reviewed the opening dates for the Whole Foods stores located in the cities chosen for her study.<sup>22</sup> We found that there is only one Whole Foods store in Portland, ME and, surprisingly, it had only opened on February 14, 2007. Portland is another city from the four that were selected to represent the areas with a Whole Foods and Wild Oats store. The

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<sup>20</sup> We used the center point of each zip code for distance calculations.

<sup>21</sup> "In a carefully executed survey, each potential respondent is questioned or measured on the attributes that determine his or her eligibility to participate in the survey. Thus, the initial questions screen potential respondents to determine if they are within the target population of the survey (e.g., Is she at least 14 years old? Does she own a dog? Does she live within 10 miles?)" . *Reference Guide*, p. 241.

<sup>22</sup> PX02052.

recent opening of the Whole Foods store in Portland means that respondents in this city had less than five months to shop and establish purchasing patterns at this location. Not surprisingly, as shown in Table 1, Portland respondents are far more likely to report they have never shopped at Whole Foods. Specifically, 27 percent of Portland respondents have never shopped at Whole Foods compared to 6 percent of respondents in other surveyed cities which have Whole Foods stores. Again, this indicates that it would be inappropriate to combine the data from Ms. Conway's study across the cities and draw conclusions about the population of all shoppers at Whole Foods or Wild Oats.

28. Finally, Ms. Conway's screening protocol for the study is designed to include as eligible respondents people who have only shopped at Whole Foods and/or Wild Oats once or twice. This is a questionable group to include since many of these individuals may be consumers who have no intention of ever going back to one of these stores. A consumer who has visited Whole Foods or Wild Oats only once and never plans on visiting again should not be considered a part of the population relevant to Ms. Conway's study since they are not planning to shop these stores in the future. This, of course, can be determined by screening respondents to determine whether they intend to shop in these stores in the future, a step she did not take, compounding further the unreliability of her survey results.

29. Ms. Conway Fails to Establish that Respondents Comprehend and can Accurately Respond to Her Questions Rendering Her Results Unreliable. There is no evidence that Ms. Conway pretested her questionnaire. Standard survey practice dictates that some form of pretest should be undertaken if the researcher is going to claim that respondents understood and

were able to answer the questions posed in a meaningful way.<sup>23</sup> This is particularly true when the survey uses terms or questions that may be new to the respondent, or may have many different meanings to different respondents. Ms. Conway's study uses a series of terms and concepts that are important to the analysis such as; "typically," "total grocery budget," and "supermarket," that may have many different meanings that affect how respondents understand the questions. Without a pretest, there is no way to determine how these particular ideas are being understood and interpreted by survey respondents. Additionally, a pretest could provide insight as to the impact of the length of the survey on respondent concentration and the ability of respondents to handle the cognitive demands of the questions.

30. The lack of a pretest is particularly at issue in this study because Ms. Conway's survey requires that respondents make mathematical estimations that are quite complex. For example, respondents are asked to estimate how much they spend on fresh produce in a month, then what percent of that produce they purchase at Whole Foods or Wild Oats, then what percentage of the produce they buy is organic, then how much they spend on organic food in a typical month, and finally what percent of that organic produce is bought at Whole Foods/Wild Oats. To answer these questions, a respondent must first determine what a "typical month" is. Given that most consumers shop for groceries multiple times each month, the respondent must add up how many times a month she shops, how often within each of these shopping trips she buys produce, and, for each of the trips when she bought produce, how much she spent. Only then can the respondent calculate the "typical" total monthly expenditure for fresh produce. After this, the respondent is asked to take the total amount of

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<sup>23</sup> *Reference Guide*, p. 243.

money spent and calculate what share is spent on items in Whole Foods or Wild Oats. This is even more complicated as it asks respondents to estimate the relative items and prices for the produce purchased over a month. Questions such as these place an extremely large burden on respondents and are likely to generate answers that are simply guessed as opposed to actual estimations.<sup>24</sup>

31. In analyzing Ms. Conway's results, it is clear that the complexity of her questions has resulted in data that are inconsistent or nonsensical. For example, as shown in Table 2A and Table 2B, anywhere from 15 percent to one quarter of all respondents are unable to accurately estimate the percent of a product category purchased at Whole Foods/Wild Oats when estimation is compared with an earlier response. For example, early in the survey, Ms. Conway asks respondents to determine how often a particular product type is purchased at Whole Foods/Wild Oats. The answer categories range from "Only at Whole Foods/Wild Oats" to "Do not purchase." Later in the survey, respondents are asked to calculate the percent of their typical monthly budget spent in the product category at Whole Foods/Wild Oats. Many of the answers to these two questions are inconsistent. Frequently, respondents underestimate the percent of their budget they spend on a particular product. For example, there are 35 respondents who say they only buy produce at Whole Foods but estimate the share of their produce budget as anything between zero and 80 percent. This table demonstrates that across a variety of questions, respondents were unable to consistently report their shopping habits.

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<sup>24</sup> Converse, J. and Presser, S. (1990). *Survey Questions: Handcrafting the Standardized Questionnaire*. Sage University Publications: London, p. 14-17.

## **Ms. Conway's Survey Results do not Provide Information on Issues Related to Product and Service Substitutability**

32. Both Dr. Scheffman's report and the complaint filed by the FTC indicate that the issue of whether consumers view various products and/or store venues as substitutes versus complements is an important issue in this case. For example, Dr. Scheffman explains in his report that "*the* issue is the extent to which consumers consider WFM and WO to be sufficiently close substitutes" (italics in the original).<sup>25</sup> I have been asked by Counsel to review the extent to which Ms. Conway's survey results address consumers' views on the substitutability of products and services between Whole Foods, Wild Oats, and other grocers. In my opinion, Ms. Conway's survey does not provide information useful for assessing the substitutability of products and services across types of grocery channels either because her questions do not address the issues precisely (e.g., product categories versus specific products) or because she has chosen to ignore them (e.g., service-related attributes of Whole Foods and Wild Oats).

33. First, in describing shoppers at Whole Foods and Wild Oats, Ms. Conway concludes in her report that "Not only do they visit many different retail grocery outlets, but they also buy the **same** or similar products at each of them."<sup>26</sup> Note that she specifically mentions purchasing the "same" products. However, there is no basis for her to conclude whether shoppers are buying the same or even similar products within her eight selected product categories.

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<sup>25</sup> Scheffman Report, p. 100.

<sup>26</sup> Conway Report, p. 36. Emphasis added.

34. Her results must be interpreted as referring only to food **categories** and not **specific products** within those categories. The questions Ms. Conway uses to assess cross shopping do not address whether **specific products** found at Whole Foods and Wild Oats are also purchased at other stores. What Ms. Conway's survey does include is a battery of questions that ask respondents to indicate the extent to which they buy various categories of foods (e.g., fresh fruits and vegetables, dairy products, etc.) primarily from Whole Foods/Wild Oats or primarily at other grocers. These questions, however, are too generic to disentangle whether respondents are shopping for the same products at both types of stores or whether they go to Whole Foods/Wild Oats for one type of product in this category and to a traditional grocer for another type of product in this category. For example, a shopper may do his weekend shopping at a Whole Foods because of the broad array of organic cheeses (not to mention other organic products) that they carry which he may not find at a traditional grocer like Safeway. But during the week he might buy organic milk at a traditional store like Safeway because that store is more conveniently located. Such respondents are buying from the same product category (dairy products) from Whole Foods and Safeway but would not consider these stores to be substitutes for all dairy products other than perhaps organic milk. Ms. Conway's questions cannot sort out this type of situation, yet these types of examples are important to understanding issues of substitution.

35. I also note that Ms. Conway's own report concludes that, "For most, Whole Foods and Wild Oats are Regarded as Secondary and Supplemental."<sup>27</sup> This conclusion suggests that many shoppers at Whole Foods/Wild Oats, in fact, go to these stores because *they cannot find certain products in other types of grocery stores*. However, this conclusion is at odds with

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<sup>27</sup> Conway Report, p. 5.

her earlier conclusion that the items purchased by shoppers at Whole Foods and Wild Oats are the “same” as those purchased in other stores. This contradiction highlights yet another problem with the survey, which is the ambiguity of her data, however unreliable. Put differently, because the questions were poorly and imprecisely worded, it is unlikely that the responses that were generated from the questions regarding cross shopping reveal any useful information about shoppers’ views on product or service substitutability. As noted above, the resulting data could just as plausibly be interpreted to show that shoppers view other grocers as complements to Whole Foods and Wild Oats as opposed to substitutes.

36. Second, the way in which Ms. Conway constructed her cross shopping questions does not clarify whether Whole Foods shoppers are cross shopping at Wild Oats (and vice versa) in cities where both exist or whether they are cross shopping at other grocers. For example, Question 9 of Ms. Conway’s survey asks respondents who shop at Whole Foods to indicate for “Fresh produce like fruits and vegetables” whether they purchase these types of products:

1. ONLY AT WHOLE FOODS
2. MOSTLY AT WHOLE FOODS/RARELY AT **ANOTHER GROCER**
3. HALF THE TIME AT WHOLE FOODS/HALF THE TIME AT **ANOTHER GROCER**
4. MOSTLY AT **ANOTHER GROCER**/RARELY AT WHOLE FOODS
5. ONLY AT **ANOTHER GROCER**<sup>28</sup>
6. DO NOT PURCHASE

The use of the phrase “ANOTHER GROCER” in these response categories does not distinguish between Wild Oats and other grocers.<sup>29</sup> Thus, respondents who are shopping at

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<sup>28</sup> Emphasis added.

“another grocer” may be saying they are buying products from Wild Oats or from other grocers or from both. This distinction is important if the purpose of the question is to measure whether cross shopping for product categories is occurring between Whole Foods and Wild Oats stores or across other grocers. The question, as asked, cannot be used to separate these different forms of cross shopping.

37. Third, Ms. Conway’s questions focus on product categories. I found no questions in Ms. Conway’s study that attempted to measure other **service-related** or **experiential attributes** of shopping at Whole Foods/Wild Oats. None of her questions address consumers’ view of the buying experience or the level of services offered (such as: how knowledgeable staff is, tasting opportunities, community information, the trustworthiness of the brand, the commitment to social and ecological causes<sup>30</sup>). Thus, her survey provides no information on these services-related factors. This is surprising because both Whole Foods and Wild Oats differentiate their positioning with consumers on service dimensions, not just product offerings.<sup>31</sup> Beyond information on specific products and the impact of price change, the omission of questions on an important aspect of the stores being studied significantly undermines the usefulness of Ms. Conway’s study as a source of information about consumer substitutability between Whole Foods, Wild Oats, and other grocers.

38. I also find that Ms. Conway ignores several types of products or product categories that are important to Whole Foods and Wild Oats. For example, her survey does not include any questions on vitamins, beauty products and other holistic offerings yet, these are known to be

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<sup>29</sup> This form of question is also asked for Wild Oats shoppers and the same issue applies there. The “Another Grocer” does not distinguish between buying at a Whole Foods or some other grocer.

<sup>30</sup> Complaint, p. 8-9.

<sup>31</sup> Complaint, p. 9.

important categories for Whole Foods and Wild Oats. For example, a Wild Oats market research report demonstrates that holistic health products constitute 19 percent of the product mix found in Wild Oats stores.<sup>32</sup>

39. Finally, I understand from Counsel and from Dr. Scheffman's report that it may be valuable to understand how consumers respond to changes in price and other attributes of their shopping choices. For example, Dr. Scheffman suggests that: "The case law and Guidelines framework for assessing product market definition is dynamic rather than static. Most importantly, it is founded on the real world behavior of consumers. In other words, rather than looking at a snapshot of consumers at any point in time, the framework for market definition focuses on how these consumers would behave and what choices they would make if there was a change in the relative prices among the choices available to them."<sup>33</sup>

40. In reviewing Ms. Conway's survey instrument and her report, I find no questions that specifically attempt to measure how shoppers would respond to price changes. Thus, her data do not directly address this issue. I note, however, this type of information is often gathered using surveys in situations where hypothetical future conditions need to be assessed. This type of question, while possibly complex, is no more difficult for respondents to answer than the very complex questions Ms. Conway attempts to use in her current survey.<sup>34</sup> There is no methodological reason why shoppers' responses to hypothetical price changes could not have been measured.

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<sup>32</sup> Project Green Space, PX01332-001.

<sup>33</sup> Scheffman Report, p. 16.

<sup>34</sup> As discussed above many of her questions are so complex that it is unlikely respondents were able to provide reliable answers.

## Conclusions

41. Based on my review as discussed in this report, it is my opinion that Ms. Conway's survey methodology and procedures are fundamentally flawed and render her data and results unreliable for purposes of extrapolating to the population of shoppers at Whole Foods and Wild Oats.
42. In addition, it is my opinion that her survey does not provide information useful for assessing the substitutability of products and services across types of grocery channels either because her questions do not address the issues precisely (e.g., product categories versus specific products) or because she has chosen to ignore them (e.g., service-related attributes of Whole Foods and Wild Oats).

Finally, to the extent that Dr. Scheffman's conclusions rely upon Ms. Conway's unreliable data, then in my opinion his conclusions would necessarily also be unreliable.

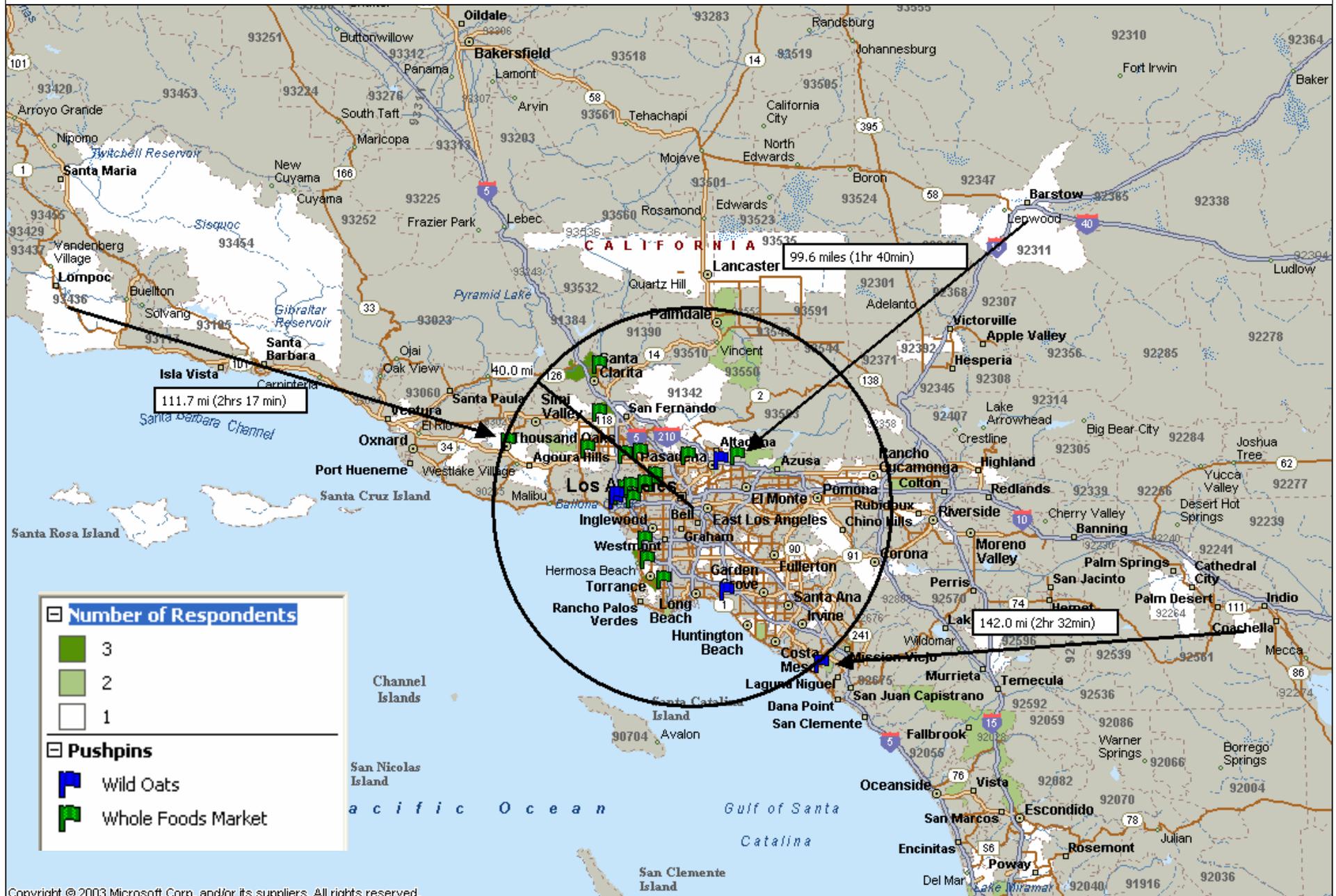
I declare under penalty of perjury that the foregoing is true and correct, and if called as a witness would testify competently thereto.

Dated: July 13, 2007



KENT D. VAN LIERE

Figure 1: Zip Codes of Respondents NOT Included in Select Zip Codes as Listed in Ms. Conway's Appendix A for the Los Angeles Area



**Table 1. Comparison of the Frequency of Shopping at Whole Foods for Respondents from Portland, Maine to All Respondents in All Other Cities with a Whole Foods**

<u>Frequency of Shopping at Whole Foods</u>	<u>Portland, Maine</u>		<u>All Other Markets</u>	
More than Once a Week	3.0%	6	6.6%	66
Once a Week	7.0%	14	11.7%	117
A Few Times a Month	12.0%	24	14.2%	143
Once a Month	15.0%	30	14.4%	145
A Few Times a Year	19.0%	38	29.3%	294
Once a Year or Less	6.0%	12	7.9%	79
Have Shopped There Once or Twice	11.0%	22	10.2%	102
Never	<b>27.0%</b>	54	<b>5.8%</b>	58
<b>Total</b>	100.0%	200	100.0%	1,004

**Table 2A. Comparison of the Frequency of Shopping for Product at Whole Foods with the Estimated Percent of Shopping for Product at Whole Foods**

<b>Product Category</b>	<b>Percent Purchased in Typical Month is Underestimated</b>	<b>Percent Purchased in Typical Month is Overestimated</b>	<b>Total Number of Respondents Incorrectly Estimating</b>	<b>Total Number of Respondents<sup>1</sup></b>	<b>Percent of Respondents Incorrectly Estimating</b>
Produce	23.2%	2.5%	267	1037	25.7%
Dairy	16.4%	4.7%	220	1043	21.1%
Meat and Fish	17.0%	3.0%	207	1037	20.0%
Prepared Foods	17.0%	6.7%	244	1028	23.7%

<sup>1</sup> This excludes respondents who answer for one or both questions "Don't Know or Refused"

**Table 2B. Comparison of the Frequency of Shopping for Product at Wild Oats with the Estimated Percent of Shopping for Product at Wild Oats**

<b>Product Category</b>	<b>Percent Purchased in Typical Month is Underestimated</b>	<b>Percent Purchased in Typical Month is Overestimated</b>	<b>Total Number of Respondents Incorrectly Estimating</b>	<b>Total Number of Respondents<sup>1</sup></b>	<b>Percent of Respondents Incorrectly Estimating</b>
Produce	21.5%	2.4%	177	739	24.0%
Dairy	12.9%	4.2%	127	742	17.1%
Meat and Fish	13.0%	2.4%	114	739	15.4%
Prepared Foods	16.7%	3.6%	147	724	20.3%

<sup>1</sup> This excludes respondents who answer for one or both questions "Don't Know or Refused"

## Appendix A

## **KENT D. VAN LIERE, Ph.D.** **VICE PRESIDENT**

Dr. Van Liere is a Vice President at NERA with expertise in survey research, sampling, statistics, risk analysis and market research. He has directed a wide range of projects involving the application of statistical methods and survey research to product liability, construction defect, intellectual property, mass tort, and securities litigation. He has testified at trial and in deposition on the application of statistical methods, sampling, questionnaire design, and the use of surveys.

Dr. Van Liere's litigation and project experience includes sampling, survey research, design of field protocols, and statistical analysis of large data files (i.e., claims, customers, transactions) in a number of areas including:

### Intellectual Property

- **Trademark Infringement:** Design, analysis, and critique of surveys used to measure consumer confusion, secondary meaning, and dilution in trademark infringement cases.
- **Copyright infringement:** Analysis of the rates of infringing material in populations of shared information (such as through websites or other sharing medium).
- **Patent Infringement:** Sample designs and surveys to establish rates at which infringing material exist in populations of products or unique use of features in product user populations.

### Mass Torts and Class Actions

- **Product Liability and Construction Defects:** Analysis of statistical samples of products and product use to determine product performance issues, statistical evaluation of causes of product failures, and damages in product liability and construction defect class action litigation. Analysis of sales records to forecast total sales. Products have included a wide range of consumer and building products.
- **Representations and Omissions:** Many class actions focus on misleading and deceptive information or omissions of information. Design and analysis of sampling plans and surveys to measure consumers' awareness of key documents or facts, reliance on representations, materiality of information for decisions, satisfaction with products, purchase processes, and analysis of choice behaviors in range of consumer and business products areas.
- **Asbestos and Toxic Torts:** Estimation of future claims and claim costs arising from asbestos exposures including modeling future liability for purposes of setting financial reserves, analysis of large claim files, insurance allocations, and insurance buybacks.

- Labor: Analysis of employment records, methods for sampling records or employees, and use of surveys for purposes of estimating key facts in labor class actions including time to complete activities, exempt/nonexempt activities, and meal and rest break issues.

#### Energy/Environment/Water/Infrastructure

- Customer Demand—Design and analysis of customer surveys to measure preferences for a wide range of product and rate offerings including pricing or rate options, incentive programs, information programs, new service offerings.
- Value of Service/Outage Costs—Design and analysis of value of service and outage cost studies based on surveys using lost profits and willingness to pay methodologies
- Evaluation of programs and services including customer satisfaction and program impacts

#### Market Definition/Market Segmentation/New Products

- Analysis of consumer choice and business decision making for purposes of measuring and evaluating market potential, market segmentation, strategy formulation, new product offerings, positioning/branding, and customer retention/switching behavior in the areas of consumer household products, automobiles, lighting and building products, energy efficiency and solar products, telecommunications services, industrial products, and information and subscription services.

Prior to joining NERA, Dr Van Liere served as a Principal of Freeman Sullivan where he directed survey research and sampling projects for litigation, President of Primen (a firm that conducted market research for the energy industry), Senior Vice President of Hagler Bailly where he directed the survey research and market analysis practice; the President and Principal of HBRS (a highly regarded survey research firm), and Associate Professor at the University of Tennessee where he taught statistics, survey research, and research methods at both the graduate and undergraduate levels.

## Education

### **Washington State University**

Ph.D. Sociology, specialization in research methods and statistics (1979).

### **Washington State University**

M.A. Sociology, (1976).

### **Hamline University**

B.A. Sociology, with Honors (1974).

## Professional Experience

2006 **NERA Economic Consulting**  
Vice President

2002-2005 **Freeman, Sullivan & Co., San Francisco**  
Principal

- Primen (a joint venture of the Electric Power Research Institute and the Gas Research Institute)**  
2000-2002 President and Chief Executive Officer
- Hagler Bailly, Inc. (HBIX)**  
1995-2000 Senior Vice President (1997-2000), Director (1995-1997)
- HBRS, Inc., Madison, WI**  
1985-1995 President (1992-1995), Principal (1985-1992)
- University of Wisconsin-Madison**  
1985 Visiting Associate Professor, Department of Rural Sociology (summer)
- University of Tennessee**  
1978-1985 Associate Professor (with tenure), Department of Sociology (1984-1985), Assistant Professor, Department of Sociology (1978-1984)
- Tennessee Valley Authority**  
1983-1984 Visiting Analyst, Strategic Planning Staff, Office of Planning and Budget

## Expert Analysis and Testimony

Javier Olguin vs Fed Ex Ground Package Systems, Superior Court of California, County of Orange--Expert rebuttal declaration on sampling and survey design issues in a pre-certification labor class action (Expert Declaration: March 2007; Deposition: April, 2007)

Zill et. al vs Sprint Spectrum L.P. and Wireless Co. LP, Superior Court of California, County of Alameda--Expert declaration on sampling, survey design, survey implementation, and the use of contingent valuation survey to estimate damages in a wireless communications class action (Expert Declaration: December, 2006 and February, 2007; Deposition: April 2007; Expert Report: June 2007).

Adelphia Communications Corp vs Deloitte and Touche, LLP, Court of Common Pleas, Philadelphia, Pennsylvania--Expert rebuttal report on use of surveys to estimate business process inputs to calculation of capitalizable costs for accounting restatement. (Expert Report: December, 2006; Deposition: February 2007)

Wallace et al. vs Monier Lifetile et al., Superior Court of California, County of Placer--Deposition testimony and expert report on statistical and survey research, sample design, data analysis regarding issues related to representations and consumer expectations for product longevity in a pre-certification class action (Expert Report and Declarations: October/November 2005; Deposition: November 2005).

Melvin Weiner, et al., vs Shake Company of California, Inc., et. al., Superior Court of California, County of Contra Costa--Testifying expert on statistical analysis, sample design, causation issues, and damages regarding the prevalence of roofing failure in homes made with Cal Shake Roofing products. (For Liability Phase Trial: Multiple declarations and depositions in 2005,

trial testimony June 2005. For Damage Phase Trial: Expert declaration, September, 2006; Deposition: September 2006.)

Align Technology, Inc. vs. Orthoclear, Inc. and Orthoclear Holdings, Inc., United States District Court, Northern District of California, San Francisco/Oakland Division--Consulting rebuttal expert on survey design, sampling, survey implementation, and study design in trademark infringement and confusion analysis in a dental products area

Simpson Strong-Tie Company, Inc. vs. Pierce Gore, and The Gore Law Firm, Superior Court of California, County of Santa Clara--Consulting expert on design and analysis of a survey to measure damage to brand image from advertising by other parties.

Click Defense Inc. vs. Google, Inc., United States District Court, Northern District of California, San Jose Division--Consulting expert on sampling strategies and survey designs to estimate confusion on contract terms regarding protection from internet fraud in point per click advertising in a pre-certification class action.

Sheri Lotzer, et al. vs International Window Corporation, et al., Superior Court of California, County of Solano--Consulting expert on statistical analysis for purpose of estimating sales from invoice data and design of sampling strategies for product field tests in post-certification class action

Kishan Chand & Eric Farley vs. Target Corporation, Superior Court of California, County of Los Angeles--Consulting expert on use of survey research procedures a pre-certification labor class action involving issues of exempt versus nonexempt activities of managers.

Confidential client--Analysis of asbestos claims, exposures by occupation, settlement costs, and future claims costs associated with a major boiler manufacturer.

Confidential Client, United States Bankruptcy Court, District of Delaware--Statistical surveying, analysis and consultation regarding the prevalence of failure in homes constructed with a specific building product.

Sherry McIlhargie, et al. vs Moulded Fiberglass Companies et al., Superior Court of California, County of San Joaquin--Consulting expert on statistical analysis, sampling design, and consultation on prevalence of construction building product defect in pre-certification class action.

Barbara Bowen-Fromm vs Terra Shake Products, et al., Superior Court of California, County of Alameda--Statistical analysis, sampling design, and consultation on prevalence of product defects in a class action lawsuit.

Bayview Hunters Point, All Hallows, Shorview and LaSalle Apartments L.P. vs Colorworks Collegiate Painters; Simonton Building Products, United States District Court, Northern District of California--Statistical analysis and sampling design for estimation of the prevalence of construction defects in windows, doors, and siding.

Kaiser Aluminum Chemical Corporation vs Certain Underwriters at Lloyd's London et. al., Superior Court of California, County of San Francisco--Statistical analysis related to allocation of liability among excess insurers for asbestos claims.

Laser Vision Eye Institute of California vs Nidek, Inc., Superior Court of California, County of Alameda--Expert declaration on estimation of economic damages from business interruption due to equipment availability issues (Expert Declaration, March 2003).

Nature Guard Cement Roofing Shingles Cases in Davis vs Louisiana-Pacific Corporation, Superior Court of California, County of Stanislaus--Consulting expert on statistical analysis of evidence regarding prevalence of construction defects.

People of the State of California, v. Apartment Investment and Management Company, et. al., Superior Court of California, County of San Francisco--Consulting expert on statistical analysis and sampling designs related to the prevalence of hazards and other construction and maintenance issues leading to notice of violations in buildings. (Expert report, October, 2003)

Naef, et. al. v. Masonite, Superior Court, County of Mobile, Alabama--Consulting expert on statistical surveying and analysis of the prevalence of siding failure in homes made with Masonite siding. Identification of factors contributing to failure, projection of failure rates observed during the survey to the population of homes manufactured with subject siding, calculation of expected future costs of legal settlement under the various terms and conditions.

Cinergy--Review of labor force exposure and estimation of future claims and claims cost for asbestos-related premise liability in power plants. Estimates used in negotiating insurance settlements and buyback.

Iberdrola--Analysis of the biofuels markets and market opportunities for a large European company

California Energy Commission--Research methods and statistical analysis related to measurement of utility customer outage costs.

California Public Utilities Commission--Research methods and statistical analysis related to measurement of utility customer outage costs.

## **Summary of Market Analysis, Survey Research and Policy Evaluation Experience**

**Over the past 20 years have served as a Practice Leader, Principal Investigator, and President/CEO for companies in market analysis and customer research. Principal investigator for over 300 market assessment, customer segmentation, customer choice, consumer opinion and public policy evaluation engagements in energy, telecom, environment, infrastructure, transportation, and consumer products and services industries. Key areas have included:**

Measurement of Consumer and Customer Attitudes, Opinions, and Choice Studies --Directed more than 125 major projects measuring customer attitudes, customer intentions, and customer choices using broad range of survey techniques. Research projects used to assess new markets, track satisfaction and company image, segment customers, and in support of litigation related to brand awareness, confusion, trademark issues, and use of products. Surveys included data collection from industrial companies, commercial companies, agricultural firms, and consumers.

Areas included telecom, financial services, energy, environment, consumer products, industrial products, water, and business services.

Value of Service and Outage Cost Research – Led teams that designed and implemented new methods of measuring valuing service reliability by measuring outage costs for electricity and gas service using customer surveys. These surveys measured residential, commercial, industrial, and agricultural customers’ outage costs and their preferences for different scenarios of service reliability. These projects included clients throughout the United States. The studies involved several thousand surveys with all customer segments including residential, commercial, industrial, and agricultural customers.

Energy, Environment, and Transportation – Led teams conducting evaluations of major energy efficiency, demand management, environmental and transportation programs including rate programs, rebate programs, information programs and load control programs for major utilities, government agencies, and research institutes. Projects included sampling designs, survey designs, survey implementation using all modes of surveys (in-person, telephone, mail, internet), and statistical analysis of surveys of customers, and cost benefit evaluations. Over 150 program evaluations over past 20 years.

Environmental Attitudes and Behaviors—Early research focused on environmental attitudes and environmental behaviors in a wide range of settings. Co-developer of one of the most widely used environmental attitude scales (New Environmental Paradigm (NEP) scale).

## **Publications**

Van Liere, Kent. D. “Use of Sample Surveys in Product Liability Litigation”, *The International Legal Guide to: Product Liability 2007*, forthcoming.

Lawton, Leora, Michael Sullivan, Kent D. Van Liere, Aaron Katz, and Joseph Eto “A Framework and Review of Customer Outage Costs: Integration and Analysis of Electric Utility Outage Cost Surveys,” Energy Storage Program, Office of Electric Transmission and Distribution, U.S. Department of Energy, LBNL-54365, 2004.

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Malloy, Ken, Jamie Wimberly, and Kent D. Van Liere. 1999. “The Customer Stewardship Program: Successfully Linking Consumer Education and Corporate Strategy,” *The Electricity Journal*, August/September 1999.

The High Efficiency Laundry Metering and Marketing Analysis (THELMA) Project. EPRI, Palo Alto, CA: 1997. TR-109147-Volumes 1 to 9.

Market Tracking: Assessing Sources and Access to Appliance Sales Data, EPRI, Palo Alto, CA: 1997. TR-108928

Performance Measurement in Utilities: A Framework for Creating Effective Management Systems. EPRI, Palo Alto, CA: 1996. TR-106860 3269-34.

Van Liere, Kent D., Rick Winch, Kathleen Standen, Shel Feldman, and Dale Brugger. 1994. "The Design and Structure of a Statewide Sales Tracking System for Residential Appliances. In *Energizing the Energy Policy Process*, edited by Roberta W. Walsh and John G. Heilman, Westport, Connecticut, Quorum Books, pp. 199-216.

Van Liere, Kent D. and William Lyons. 1986. "Measuring Perceived Program Quality." In *Performance Funding in Higher Education*, edited by Trudy W. Banta, Boulder, Colorado, National Center for Higher Education Management System, pp. 85-94.

Dunlap, Riley E. and Kent D. Van Liere. 1984. "The Dominant Social Paradigm and Concern for Environmental Quality: An Empirical Analysis." *Social Science Quarterly*, 65: 1013-1028.

Hand, Carl M. and Kent D. Van Liere. 1984. "Religion, Mastery Over Nature and Environmental Concerns." *Social Forces*, 63: 555-570.

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Dunlap, Riley E. and Kent D. Van Liere. 1977. "Response to Heberlein." *Journal of Social Issues*, 33: 211-212.

Dunlap, Riley E. and Kent D. Van Liere. 1979. "Decline in Public Concern for Environmental Quality: A Reply." *Rural Sociology*, 44: 204-212.

## **Professional Associations**

Member, American Association of Public Opinion Research

Member, American Statistical Association

June 2007

## Appendix B

**Documents Reviewed in connection with  
*Federal Trade Commission v. Whole Foods Market, Inc. and Wild Oats Markets, Inc.***

- Complaint for Temporary Restraining Order and Preliminary Injunction Pursuant to Section 13(b) of the Federal Trade Commission Act, dated 06/06/07
- Temporary Restraining Order, dated 06/07/07
- Plaintiff's Memorandum in Opposition to Defendant Whole Food Market, Inc.'s Motion for Entry of a Final Protective Order, dated 06/20/07
- Document Number: WFM-006-00005912 Nielsen document: Email from Chris Taylor to Walter Robb re: Price/Value FINAL questionnaire, dated 10/02/06
- Document Number: WFM-006-00005913 Nielsen document: Attachment: Whole Foods market Price/Value Study, dated 10/02/06
- Document Number: WFM-008-00006733 Nielsen document: Email from Tommy Navarre to [wflt@wholefoods.com](mailto:wflt@wholefoods.com) re: Update FT134: National Purchasing & Dist. dated 10/08/04
- Document Number: WFM-001-00000783 Hartman document: Email from Will Paradise to swln re: Customer research - Words that Sell, Tell, Fail
- Document Number: WFM-001-00000784 Hartman document: Attachment: "Sell, Tell & Fail" A Hartman Group Study of Whole Foods Market Consumer vocabulary, dated 03/01/04
- Document Number: EOAT-0030638 Answer Line 1 document: Email from Kristin Lidstrom to store directors re: Answerline Complaint Report for October 24-29, dated 11/04/05
- Document Number: EOAT-0040912 Answer Line 1 document: Email from Michelle Albert to store directors re: Answerline Report March 5-10, 2007, dated 03/20/07, EOAT 0040912-0040913
- Document Number: EOAT-0041498 Answer Line 1 document: Email from Michelle Albert to store directors re: Answerline Report Feb. 26-Mar.3, 2007, dated 03/12/07, EOAT 0041498-0041499
- Document Number: EOAT-0046200 Answer Line 1 document: Email from Michelle Albert to store directors re: Answerline Report March 5-10/2007 dated 03/20/07 EOAT 0046200-0046201
- Document Number: EOAT-0059564 Answer Line 1 document: Email from Michelle Albert to store directors re: Answerline Report Dec. 18-23, 2006 dated 01/05/07 EOAT 0059564-0059565
- Document Number: EOAT-0068112 Answer Line 1 document: Email from Michelle Albert to store directors re: Answerline Report October 16-21, 2006 dated 11/07/06 EOAT 0068112-0068113
- Document Number: EOAT-0071292 Answer Line 1 document: Email from Michelle Albert to store directors re: Answerline Report Nov. 27-Dec. 2, 2006 dated 12/20/06 EOAT 0071292-0071293
- Document Number: EOAT-0071772 Answer Line 1 document: Email from Michelle Albert to store directors re: Answerline Report November 20-25, 2006 dated 12/07/06 EOAT 0071772-0071773
- Document Number: EOAT-0242854 Answer Line 1 document: Email from Michelle Albert to store directors re: Answerline Report March 5-10/2007 dated 03/20/07 EOAT 0242854-0242855
- Document Number: EOAT-0243373 Answer Line 1 document: Email from Michelle Albert to store directors re: Answerline Report Feb. 26-Mar.3, 2007 dated 03/12/07 EOAT 0243373-0243374
- Document Number: EOAT-0258706 Answer Line 1 document: Email from Steve Kaczynski to sales & leadership team re: Answerline anticipated questions for 4/8 briefing dated 04/01/05 EOAT 0258706
- Document Number: EOAT-0258707 Answer Line 1 document: Answerline Anticipated Consumer Questions for Merchandising EOAT 0258707-0258708
- Document Number: EOAT-12841391 Answer Line 1 document: Email from Sonja Tuitele to Laura Coblentz re: Standards Answerline Complaints to date, 08/11/05 EOAT 12841391
- Document Number: EOAT-0046920 Answer Line 2 document: Email from Michelle Albert to store directors re: Answerline Report Feb. 26-Mar.3, 2007 dated 03/12/07 EOAT 004620-0046921
- Document Number: EOAT-0048936 Answer Line 2 document: Email from Jim Nielsen to San Martin re: Answerline Report Feb. 19-24, 2007 dated 03/05/07 EOAT 0048936-0048938

- Document Number: EOAT-0048946 Answer Line 2 document: Email from Michelle Albert to store directors re: Answerline Report Feb.19-24, 2007 dated 03/02/07 EOAT 0048946-0048947
- Document Number: EOAT-0059308 Answer Line 2 document: Email from Michelle Albert to store directors re: Answerline Report Dec. 26-30, 2006 dated 01/09/07 EOAT 0059308-0059309
- Document Number: EOAT-0072226 Answer Line 2 document: Email from Michelle Albert to store directors re: Answerline Report Nov. 13-18, 2006 dated 11/30/06 EOAT 0072226-0072227
- Document Number: EOAT-0072537 Answer Line 2 document: Email from Michelle Albert to store directors re: Answerline Report Oct. 30-Nov. 4, 2006 dated 11/21/06 EOAT 0072537-0072538
- Document Number: EOAT-0073819 Answer Line 2 document: Email from Sam Martin to Jim Nielsen re: Answerline Report March 5-10, 2007 dated 03/20/07 EOAT 0073819-0073820
- Document Number: EOAT-0091411 Answer Line 2 document: Email from Scott Reed to Sam Martin re: Answerline Report Dec. 11-16, 2006 dated 01/03/07 EOAT 0091411-0091412
- Document Number: EOAT-0660254 Answer Line 2 document: Email from Sam Martin to Jim Nielsen re: Answerline Report June 12-17, 2006 dated 07/03/06 EOAT 0660254-0660256
- Document Number: EOAT-12841387 Answer Line 2 document: Email from Laura Coblentz to Sonja Tuitele re: Standards Answerline complaints to date, 08/11/05 EOAT 12841387-12841388
- Document Number: EOAT-12841389 Answer Line 2 document: Email from Sonja Tuitele to Steve Kaczynski re: Standards Answerline complaints to date, 08/11/05 EOAT 12841389
- Document Number: EOAT-12841390 Answer Line 2 document: Email from Steve Kaczynski to Sonja Tuitele re: Standards Answerline complaints to date, 08/11/05 EOAT 12841390
- Document Number: WFM-001-00001113 Hartman document: Email from Doug Wallace to Lauren Romero re: WB supplement research dated 01/21/05
- Document Number: WFM-004-00005982 Hartman document: Email from Chris Taylor to Walter Robb re: Hartman Study dated 10/30/06
- Document Number: WFM-004-00005983 Hartman document: Attachment: Hartman Group report: The Evolution of the Whole Foods Market Consumer Base
- Document Number: WFM-006-00002259 Hartman document: Email from Margaret Wittenberg to Chris Taylor re: Hartman letter-Please review by Wednesday dated 10/24/05
- Document Number: WFM-006-00002260 Hartman document: Attachment: letter to Laurie Demeritt - Hartman Group dated 10/28/05
- Document Number: WFM-008-00004225 Hartman document: Email from Margaret Wittenberg to eteam re: Hartman Update dated 10/12/03
- Document Number: WFM-008-00004226 Hartman document: Attachment: Current Proposed Research Activity Remaining FY03-FY04 involving the Hartman Group
- Document Number: WFM-008-00004227 Hartman document: Attachment: Whole Foods Consumer Insights-Knowledge Management and Proprietary Information
- Document Number: EOAT-0244557 Spins document: Consumer Drivers Study EOAT 0244557-0244584
- Document Number: EOAT-0247931 Spins document: SPINS reports through 10/7/06 dated 11/17/06 EOAT 0247931-0247935
- Document Number: EOAT-0260412 Spins document: SPINS report Top 50 Items by Department through 2/21/04 EOAT 0260412-0260490
- Document Number: EOAT-0268913 Spins document: Email from Steve Kaczynski to Babette Brown SPINS reports 061204 dated 07/29/04 EOAT 0268913-0268914
- Document Number: EOAT-0275050 Spins document: Email from Steve Kaczynski to Sales and Leadership team re: SPINS Summary through 12/3/05 dated 01/19/06 EOAT 0275050-0275052
- Document Number: EOAT-0275062 Spins document: Email from Steve Kaczynski to Kande DeGraw re: SPINS Summary through 12/3/05 dated 01/17/06 EOAT 0275062-0275064

- Document Number: EOAT-01632259 Spins document: Email from Tom Rice re: SPINS 2007 price list dated 12/14/06 EOAT 01632259
- Document Number: EOAT-01632260 Spins document: SPINS report - Category Listing, Tiers and Pricing 2007 EOAT 01632260-01632268
- Document Number: EOAT-01632512 Spins document: Email from Laura Coblenz to Charlie Kingery re: Wild Oats follow up dated 09/06/06 EOAT 01632512
- Document Number: EOAT-01637192 Spins document: Email from David Brossmer re: SPINS Reports - Period 13 ending 12/30/06 dated 02/12/06 EOAT 01637192-01637196
- Document Number: EOAT-01682113 Spins document: Spreadsheet: Category and Brand Development Index 2004 EOAT 01682113-01682124
- Protective Order dated 7/9/07
- Declaration of Kellyanne E. Conway (with Appendix A-D and Exhibits) dated 7/9/07
- Expert Report of David T. Scheffman, Ph.D. (with Appendix A-G, Figures and Tables) dated 7/9/07
- Conway/"What Women Really Want" Methodology Chapter - Appendix A - Polling Methodology and Results
- Expert Report of John L. Stanton, Ph.D. (with Appendix A and B) dated 7/9/07
- Expert Report of Kevin M. Murphy, Ph.D. (with Appendix A-C and Exhibits) dated 7/9/07
- Memorandum in Support of Plaintiff's Motions for Temporary Restraining Order and Preliminary Injunction dated 6/6/07
- WF Opening Dates.xls
- Document Number: PX01332 Wild Oats Markets presentation - Project Green Space PX01332-001-025
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- Converse, Jean M. and Stanley Presser, "Survey Questions – Handcrafting the Standardized Questionnaire," a Sage University Paper from the Series: Quantitative Applications in the Social Sciences.