

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

NOT FOR PUBLICATION
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JERRY TRAHAN,

No. C 09-03111 JSW

Plaintiff,

**ORDER DENYING MOTION TO
 APPROVE SURVEY
 INSTRUMENT AND FIRST
 CONTACT LETTER**

v.

U.S. BANK NATIONAL ASSOCIATION,

Defendant.

This matter comes before the Court upon consideration of the motion to approve survey filed by Plaintiff, Jerry Trahan (“Trahan”). The Court has considered the parties’ papers, relevant legal authority, the record in this case, and it has had the benefit of oral argument. For the reasons set forth herein, the Court **HEREBY DENIES** Trahan’s motion.

BACKGROUND

Trahan originally filed this case in Alameda County Superior Court (“Superior Court”) in 2009, as a continuation of *Duran v. U.S. Bank National Association*, in which the plaintiffs, a group of Business Banking Officers (“BBO”), alleged that U.S. Bank National Association (“U.S. Bank”) mis-classified them as exempt employees under California Labor Code section 1171 (“the outside salesperson exemption”). (First Amended Complaint ¶ 12.)¹

¹ The First Amended Complaint is located at Docket No. 68-4 at ECF pages 35-44.

1 Trahan alleges that notwithstanding a judgment in the *Duran* case, U.S. Bank “has not
2 reclassified the [BBO] to nonexempt” status.² (*Id.* ¶ 13.) Trahan alleges that he and the class
3 members “were regularly scheduled as a matter of uniform company policy to work and in fact
4 worked as salaried bank employees in excess of eight hours per workday and/or in excess of
5 forty hours per workweek without receiving straight time or overtime compensation for such
6 overtime hours,” and that U.S. Bank cannot show he and the class members were subject to an
7 exemption. (*Id.* ¶ 14.)

8 Trahan contends that in this case, in contrast to *Duran*, liability in this case is an “all-or-
9 nothing proposition: either USB classified the BBO position properly or it did not.” (*See, e.g.*,
10 Declaration of Connor Moyle in Support of Defendant U.S. Bank National Association’s
11 Response to Plaintiff’s Discovery Plan and Trial Methodology (“Moyle Decl.”), and Ex. A
12 (Plaintiff’s Opposition to Defendant’s Petition for Peremptory Writ of Mandate and Stay of
13 Trial Proceedings at pages 2, 8)³; Plaintiff’s Reply ISO Plaintiff’s Discovery Plan and Trial
14 Methodology at 12:12-16⁴ (“Plaintiff’s theory is that evidence from class members, Defendant’s
15 corporate and supervisory employees, and documentary evidence will enable the trier of fact to
16 determine whether or not the *job* has been designed implemented and managed as a legitimate
17 outside sales position.”) (emphasis added).)

18 On July 9, 2009, U.S. Bank removed the case to this Court. This Court granted Trahan’s
19 motion to remand, and the United States Court of Appeals for the Ninth Circuit affirmed that
20 decision. On August 28, 2012, the Superior Court granted Trahan’s motion for class
21 certification and certified the following class: all current and former California-based
22 employees of U.S. Bank, N.A., who were employed as a [BBO] at any time from September 27,

23
24 ² On May 29, 2014, the California Supreme Court issued a decision in *Duran v.*
25 *U.S. Bank National Association*, 59 Cal. 4th 1 (2014), in which it affirmed the Court of
26 Appeal’s decision to vacate the judgment and decertify the class. This Court permitted the
parties to submit supplemental briefs to address how that ruling might impact the ruling on
this motion.

27 ³ This declaration is located at Docket No. 115-1 at ECF pages 60-61, and
Exhibit A is located at Docket No. 115-1 at ECF pages 62-95.

28 ⁴ This brief is located at Docket No. 70-8 at ECF pages 68-71 through Docket
No. 70-9 at ECF pages 1-15.

1 a sample of class members to serve as representative trial witnesses. *Duran*, 59 Cal. 4th at 42.
2 Here, as Trahan argues, the purpose of the survey is to provide the Court with information about
3 variability in the population. *See, e.g., id.* (noting that “[o]ne way to assess population
4 variability is through the use of surveys”). The Court would then use the results to select an
5 appropriately sized sample.

6 As in the *Duran* case, the Superior Court apparently certified the class before it had
7 received evidence on Trahan’s specific trial plan. *See Duran*, 59 Cal. 4th at 31-32. In addition,
8 class notice has been issued and the deadline to opt-out has passed. U.S. Bank argues that, as a
9 result, the survey population is inherently biased because of their financial stake in the
10 litigation, and, therefore, the Court cannot obtain an unbiased sample. In the Court’s view, the
11 fact that the population is comprised entirely of class members creates a different problem.

12 Trahan’s survey proposal advises respondents that their responses will be completely
13 confidential and that no one will know they participated in the survey. (*See, e.g., Plaintiff’s*
14 *Submission of Proposed Pre-Notification Letter re Survey; Third Report of Dr. Jon A. Krosnik*
15 *in Support of Plaintiff’s Motion to Approve Survey, Appendix A (Draft Survey Questionnaire*
16 *at p.2).)*⁷ Although the Superior Court stated that the responses would not be disclosed to either
17 party or their counsel, it did not rule out the possibility that the court might order disclosure of
18 the responses at a later time. At the hearing on this motion, the Court asked whether the parties
19 would agree to modify the first contact letter and the survey instrument to advise potential
20 respondents that their responses might not be kept confidential. Trahan opposed this suggestion
21 on the basis that to do so would violate best practices associated with survey methodology.

22 The proposed survey instrument is asking the population, which, as noted, is composed
23 entirely of class members, *i.e.* parties, for substantive information about their work experiences
24 at U.S. Bank. Those responses arguably would be discoverable information under Federal Rule
25 of Civil Procedure 26(b)(1). In light of that fact, the Court finds that it would be misleading to
26 advise class members that their responses will never be connected to their name, and the Court

27
28 ⁷ Plaintiff’s proposal regarding the first contact letter is located at Docket No. 116-2 at ECF pages 10-13. Dr. Krosnik’s Third Report is located at Docket No. 116-2 at ECF pages 58-89. The Draft Survey is located at Docket No. 116-2 at ECF pages 75-89.

1 is not willing to make a ruling that U.S. Bank should never have access to those responses. *See,*
2 *e.g., Duran*, 59 Cal. 4th at 40 (“Procedural innovation must conform to the substantive rights of
3 the parties.”).

4 However, if the survey is not conducted anonymously, it may well violate best practices
5 associated with survey methodology. Further, it is entirely possible that if Dr. Krosnik advises
6 potential respondents that their responses would not be completely anonymous, it would
7 exacerbate the issue of non-response bias as well as the issue of any bias associated with the
8 fact that each class member has an interest in the outcome of this litigation. *See, e.g., id.* at 43
9 (“A sample that includes even a small number of interested parties can produce biased
10 results.”).

11 Accordingly, the Court DENIES Trahan’s motion to approve the survey instrument and
12 the first contact letter. In light of this ruling on this motion, and without expressing any views
13 on the merits of a motion to decertify, the Court will permit U.S. Bank to file a motion to
14 decertify the class, but it will require that U.S. Bank limits arguments to the issues of
15 commonality, predominance, and manageability. U.S. Bank shall file its motion by no later
16 than September 12, 2014, and it shall notice the motion for a hearing in accordance with the
17 Northern District Civil Local Rules.

18 **IT IS SO ORDERED.**

19 Dated: July 29, 2014

20 
21 _____
22 JEFFREY S. WHITE
23 UNITED STATES DISTRICT JUDGE
24
25
26
27
28