SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

DURAN, et al., **Plaintiffs,** **vs.** **U.S. BANK, N.A., et al.,** **Defendants.**	**No. 2001- 035537** **ORDER (1) GRANTING IN PART PLAINTIFFS' EX PARTE APPLICATION, (2) DENYING DEFENDANT'S EX PARTE APPLICATION AND (3) RE-SETTING BRIEFING AND HEARING DATES**

On January 21, 2015, the court denied Plaintiffs' request to re-open discovery but continued until April 3, 2015, the hearing on the defense motion to deny class certification. The purpose of the continuance was to give Plaintiffs a full and fair opportunity to present their best case in support of class certification in light of the California Supreme Court decision in this case. An appropriate briefing schedule was set, and it was the expectation of the court that on April 3 all class certification issues could be finally resolved. The court understood that the latter objective was what the defense dearly wanted and was in fact the reason why the defense took

the initiative in filing the motion to deny class certification and opposed Plaintiffs' request for further discovery.

Of course, all of this left Plaintiffs free to do whatever they thought was necessary to put their best foot forward in their opposition on March 20, 2015 – a filing that would, in effect, be a cross-motion for class certification. Plaintiffs had the fruits of years of discovery and a trial record. They also had access to their own clients and could develop whatever evidence they wished through further investigation or experts. It appears now that they chose to try to develop additional expert evidence by retaining a survey expert (Dr. Jon Krosnick). The expert sent out an "advance letter" to putative class members alerting them to the impending survey and the fact that they might be contacted. If Plaintiffs used the fruits of that survey in their March 20 filing, the defense would have had the option of either filing a reply brief or obtaining an extension of time so that it could depose the expert or do whatever else might be appropriate. Instead, the defense chose to have a senior vice president (Mr. Ted Biggs) send a letter out to the putative class members addressing the advance letter sent to them by Plaintiffs' expert. Among other things, the Biggs letter disputed the statement in the advance letter promising respondents that their identities would be kept confidential. Not surprisingly, Plaintiffs filed the current ex parte application seeking a corrective mailing, a TRO against further defense communications and a re-opening of discovery. They also allege that defense counsel must have been behind the Biggs letter and that such involvement raises serious issues under the Rules of Professional Conduct.

The court set Plaintiffs' ex parte application for hearing on February 25, 2015, and directed Defendant to respond. Defendant requested a continuance to February 27, 2015, which was granted, and filed a written opposition on February 26, 2015. It also filed its own ex parte application on February 25, 2015, in which it sought to halt Plaintiffs' survey and bar

"unapproved" communications with putative class members. Plaintiffs filed an opposition on February 26, 2015. Based on the written submissions and the arguments presented at the hearing, the court reaches the following conclusions and enters the orders set forth below:

1. Plaintiffs have a right to try to conduct a survey for use in opposition to the motion and in support of a cross-motion for class certification. Now is not the time to address whether such an effort was or is futile in light of the appellate decisions in this case. The court simply finds that Plaintiffs have a right to try.

2. Defendant has interfered with that attempt and done so in a manner that raises a number of questions that Plaintiffs have a right to pursue and try to correct if they can. No other issues need to be addressed at this time.

3. For these reasons, the court enters the following orders:

   a. The court GRANTS Plaintiffs' request to send a corrective mailing to putative class members for the purpose of trying to salvage (if they can) the survey attempted by Dr. Krosnick – provided, however, that the letter does not make any representations regarding the position of the court.

   b. The court GRANTS Plaintiffs' request to depose Mr. Biggs in order to get to the bottom of what happened (which request may include a subpoena duces tecum, although that may raise attorney-client privilege issues, leading to further disputes).

   c. After the Biggs deposition is taken and the corrective mailing is sent, Plaintiffs may renew their request for an order that Defendant pay for some or all of the cost of this exercise, and a decision on that issue is RESERVED until such time as Plaintiffs file such a motion and Defendant has an opportunity to respond.

d. Given these developments, Plaintiffs can no longer be held to the March 20 filing deadline and are GRANTED an extension of time until April 30, 2015, for the filing of the opposition, with the reply due on May 10, 2015, and the hearing continued to May 15, 2015 – subject, of course, to the defense having an opportunity to extend the reply and hearing dates if Plaintiffs' April 30, 2015 filing warrants an continuation of those dates (for example, because the defense chooses to conduct discovery of an expert whose opinions are offered by Plaintiffs).

e. Defendants are ORDERED not to communicate with putative class members on the subject of Dr. Krosnick's survey or any follow-up communication from him or Plaintiffs' counsel until after April 15, 2015, by which time any survey should have been concluded.

f. Except as provided in 3b above, Plaintiffs' request to re-open discovery is DENIED.

g. Defendant's ex parte application is DENIED.

By way of explanation regarding the above orders, the court makes a few observations:

First, it is important to note that the corrective mailing should be drafted with the input of Dr. Krosnick *for the sole purpose of trying to salvage the survey* he was/is trying to conduct and not, for example, to chastise Defendant for sending the Biggs letter. Plaintiffs' counsel may be interested in the latter, but the court is only interested in affording Plaintiffs' expert the opportunity to salvage his survey. The court prefers not to preview Plaintiffs' corrective mailing, as it is for the expert to craft advance letters, other survey instruments and the various survey protocols and then defend the validity of the overall enterprise if and when the survey and the opinions based thereon are challenged. The court offers no view at this juncture whether this or

any other Krosnick survey or opinion is admissible or has any probative value on the issues to be presented in the motions related to the merits of class certification. It is unclear to this court how a survey of putative class members in this unique context could help resolve the manageability issues identified by our Supreme Court, but such skepticism does not justify barring the attempt.

Second, the defense argues that the Krosnick advance letter is misleading because it promises anonymity when, according to the defense, it will have the right in discovery to identify the person providing each response. The court would prefer to address the confidentiality issues if and when they arise rather than in advance, but notes Plaintiffs have submitted authority supporting the use of survey evidence without disclosure of the respondents' identities. (E.g., *State of Oklahoma v. Tyson Foods*, Case No. 05-CV-329-GKF-PJC [March 11, 2009].) If this issue is litigated, much will depend on details that are not known at this juncture – for example, will the survey process even record the identities of the respondents or, if those are recorded, would Plaintiffs' counsel have access to the identities of the individuals and their responses? The latter would obviously compromise any promised confidentiality. If the issue of confidentiality does need to be resolved in advance, however, the court would need to know the protocols, hear objections thereto and otherwise have a full record before a corrective mailing could be ruled upon and sent. That would obviously cause further delays. At this juncture all that can be said is that, if the defense were to establish a right of access inconsistent with the prior assurances of confidentiality, then Plaintiffs might be put to the election of disclosing the information under an appropriate protective order or withdrawing the survey evidence. Those issues are not now before the court.

Third, the court recognizes that the provisions in 3e above are a limited prior restraint but finds that the order is narrowly tailored to protect Plaintiffs and putative class members from the

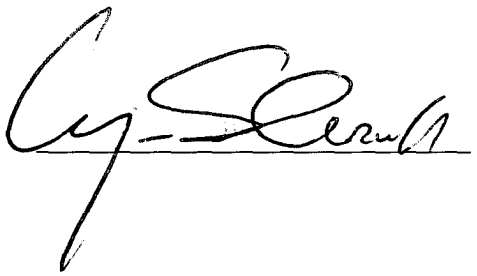
"direct, immediate and irreparable harm" that would be caused if Defendant were allowed to send additional communications seeking to dissuade potential respondents from participating in the survey and that no less restrictive means is available to protect the interests of Plaintiffs in conducting the survey and of putative class members in being able to participate in it without intimidation or coercion. (*Parris v. Superior Court* (2003) 109 Cal.App.4th 285, 300.) With respect to the Biggs letter, the court finds that it was implicitly coercive for the reasons explained in Plaintiffs' ex parte application, and that any legitimate interest Defendant may have in communicating on this subject with putative class members is fully and adequately served by allowing the defense to engage in unrestricted communications *after* the survey is completed. In short, the court only issues the order restricting defense communications because the order is limited to one subject for a short period of time, is based on Plaintiffs' strong evidentiary showing of Defendant's prior interference and the importance of the interests involved, and is the least restrictive means of protecting the First Amendment interests of Plaintiffs and putative class members while not unduly burdening the similar interests of Defendant.

As for Defendant's ex parte application, it is premised in large part on an incorrect reading of statements by The Hon. George Hernandez and others in the related case of *Trahan v. U.S. Bank* (Alameda County Sup. Ct. #RG09-454803.) There are at least two different approaches to surveys in the litigation context. One is to have the parties engage in a joint effort to develop a common survey. (See, e.g., *Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715 [joint survey of class members done in damages phase].) Prior to the Supreme Court's decision in this case, Judge Hernandez entertained the possibility of such an approach in *Trahan*, and indeed early in this case Judge Freedman had at one time endeavored to foster such an effort. But as *Duran* makes clear, if that approach fails, the trial court cannot simply direct such a

survey on its own. Rather in the absence of agreement, the party seeking to use a survey must retain an expert to develop one and sponsor the results. As with any other expert, once the work is done and the opinions formulated, the proponent of such evidence then decides whether to go forward with the expert and his/her opinion(s). If the expert opinions are presented, then the opposing party's right to discovery of the expert and the foundation of his/her opinions is triggered. If the parties have disagreements over the scope of those rights, they can bring those issues before the court by a properly noticed motion. But it is not appropriate for the court in advance to "supervise" a party's conduct of a survey – just as in the ordinary course the court does not supervise counsel's attempts to investigate the case by interviewing putative class members. Plaintiffs' counsel may interview putative class members, hire investigators to do so or even retain experts to conduct surveys of putative class members. If the defense believes the end product Plaintiffs actually try to use is fatally flawed, the defense can press its challenge at the appropriate time. That time is not now.

IT IS SO ORDERED.

Dated: February 27, 2015



Superior Court of California
Alameda County

Case # 2001 035537
Case Name: Duran vs. U.S. Bank
Document: Order (1) Granting in Part Plaintiffs' Ex Parte Application, (2) Denying Defendant's Ex Parte Application and (3) Re-Setting Briefing and Hearing Dates

CLERK'S CERTIFICATE OF SERVICE BY EMAIL (CCP 1013(g) CRC 2.251(j))

I certify that the following is true and correct:

I am a Deputy Clerk employed by the Alameda County Superior Court. I am over the age of 18 years. My business address is 1221 Oak St. Oakland, California. I served this **Order (1) Granting in Part Plaintiffs' Ex Parte Application, (2) Denying Defendant's Ex Parte Application and (3) Re-Setting Briefing and Hearing Dates** by emailing copies to the email addresses as shown below and by following standard court practices.

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Executive Officer/Clerk of the Superior Court

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