

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

FILED
U.S. DISTRICT COURT
DISTRICT OF NEBRASKA

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OFFICE OF THE CLERK

LUIS EDUARDO SAN JUAN,

)

Case No. 8:10-cv-00133

)

Plaintiff,

)

)

v.

)

)

FIRST NATIONAL BANK OF OMAHA,

)

)

Defendant.

)

**ORDER ON
FINAL PRETRIAL
CONFERENCE**

A final pretrial conference was held on the 15th day of March, 2012.
Appearing for the parties as counsel were:

Michael B. Kratville for Plaintiff

Roderick V. Hannah for Plaintiff (by telephone)

Pelayo M. Duran for Plaintiff (by telephone)

Patrick J. Barrett for Defendant

Fraser Stryker PC LLO

500 Energy Plaza

409 South 17th Street

Omaha, NE 68102

402-341-6000

(A) Exhibits. See attached Exhibit List

(B) Uncontroverted Facts. The parties have agreed that the following
may be accepted as established facts for purposes of this case only:

1. Defendant First National Bank of Omaha is a federally chartered bank with its headquarters in Omaha, Nebraska.
2. Plaintiff Luis Eduardo San Juan was employed by Defendant from January 5, 2007 until February 6, 2009 in the position of Compliance Project Lead in Defendant's Bank Secrecy Act ("BSA") department.
3. Plaintiff was involuntarily terminated from his employment with Defendant on February 6, 2009.
4. Throughout his employment with Defendant, Plaintiff reported directly to Amy Wheeler, Vice President of BSA Compliance.

(C) Controverted and Unresolved Issues. The issues remaining to be determined and unresolved matters for the court's attention are:

1. Whether Plaintiff engaged in protected activity under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, specifically 12 U.S.C. §1831j ("FIRREA") when on January 23, 2009, he sent to the Office of the Comptroller of the Currency a complaint about certain conduct and transactions that had taken place at Defendant.
2. Whether Plaintiff was retaliated against by Defendant for engaging in protected activity under FIRREA.
3. Whether Defendant can establish by clear and convincing evidence that it would have engaged in the same challenged personnel decisions against Plaintiff in the absence of Plaintiff's protected activity under FIRREA.

4. What amount of lost back pay and compensatory damages, if any, is Plaintiff entitled to recover for any retaliatory personnel actions taken against him.
5. Whether Plaintiff is entitled to recover any punitive damages against Defendant, and if so, the amount of such damages.
6. Whether there is sufficient evidence to submit the issue of punitive damages to the jury?
7. Whether the Plaintiff is precluded from recovery by the doctrine of laches and unclean hands and whether these defenses are available to Defendant in this case.
8. Whether the Plaintiff has failed to mitigate his damages and, if so, the period of time during which he is eligible for back pay?
9. Whether the Plaintiff's disclosure to the OCC was a "contributing factor" in his termination.
10. Whether the Plaintiff reasonably believed he was engaged in "protected activity."
11. Whether the Plaintiff has stated a cause of action under 31 U.S.C. § 5328.
12. Whether the Plaintiff may seek the protection of 31 U.S.C. § 5329 by virtue of Subparagraphs (d)(1) and (2).

(D) Witnesses. All witnesses, including rebuttal witnesses, expected to be called to testify by plaintiff, except those who may be called for impeachment purposes as defined in NECiv.R 16.2(c) only, are:

1. Plaintiff Luis Eduardo San Juan (intend to call at trial)
c/o Plaintiff's counsel
Roderick V. Hannah, Esq.
4120 Davie Road Extension, Suite 303
Davie, FL 33024
Tel. (954) 362-3800
2. Amy Wheeler (intend to call at trial)
c/o Defendant

3. Cara James (intend to call at trial)
c/o Defendant
4. Diane Mahagan-Thompson (intend to call at trial)
c/o Defendant
5. Michael Foutch (intend to call at trial)
c/o Defendant
6. Nicholas Baxter (may call at trial)
c/o Defendant
7. Cheryl Friedenbach (may call at trial)
c/o Defendant
8. Jodie Schoemaker (intend to call at trial)
c/o Defendant
9. Susan Stephens (intend to call at trial)
c/o Defendant
10. John Langenfeld (may call at trial)
c/o Defendant
11. Pam Grutel (may call at trial)
c/o Defendant
12. Patrick Barrett (intend to call at trial)
c/o Counsel for Defendant
13. All witnesses listed by Defendant may be called at trial.

All witnesses expected to be called to testify by defendant, except those who may be called for impeachment purposes as defined in NECivR 16.2(c) only, are:

DEFENDANT
EXHIBIT
3/19/12

1. Amy J. Wheeler (Will Call)
First National Bank of Omaha, 1620 Dodge Street, NE 68197,
402-341-0500
2. Cara James (Will Call)
First National Bank of Omaha, 1620 Dodge Street, NE 68197,
402-341-0500
3. Michael Foutch (Will Call)
First National Bank of Omaha, 1620 Dodge Street, NE 68197,
402-341-0500
4. Nathaniel Auxier (May Call)
First National Bank of Omaha, 1620 Dodge Street, NE 68197,
402-341-0500
5. Maureen O'Connor (Will Call)
First National Bank of Omaha, 1620 Dodge Street, NE 68197,
402-341-0500
6. Diane Mahagan-Thompson (Will Call)
First National Bank of Omaha, 1620 Dodge Street, NE 68197,
402-341-0500
7. Nick Baxter (May Call)
First National Bank of Omaha, 1620 Dodge Street, NE 68197,
402-341-0500
8. Dana Wilwerding (May Call)
First National Bank of Omaha, 1620 Dodge Street, NE 68197,
402-341-0500
9. Luis Eduardo San Juan, c/o Plaintiff's counsel (Will Call)
10. Cheryl Friedenbach (Will Call)
First National Bank of Omaha, 1620 Dodge Street, NE 68197,
402-341-0500
11. Deb Simkin (May Call)
205 W. Randolph, Suite 1220
Chicago, IL 60606
(312) 635-1127

12. Spencer Doak (May Call)
Office of the Comptroller of the Currency
13710 FNB Parkway, Suite 110, Omaha, NE 68154
402-493-0654
13. Pam Grutel (May Call)
First National Bank of Omaha, 1620 Dodge Street, NE 68197,
402-341-0500

14. Any and all witnesses identified by Plaintiff.

15. **ROD HANNAH, COUNSEL FOR PLAINTIFF**

8-095 E-51 3/19/12

It is understood that, except upon a showing of good cause, no witness whose name and address does not appear herein shall be permitted to testify over objection for any purpose except impeachment. A witness whose only testimony is intended to establish foundation for an exhibit for which foundation has not been waived shall not be permitted to testify for any other purpose, over objection, unless such witness has been disclosed pursuant to Federal Rule of Civil Procedure 26(a)(3). A witness appearing on any party's witness list may be called by any other party.

(E) Expert Witnesses' Qualifications. Experts to be called by plaintiff and their qualifications are: The parties have identified no expert witnesses who will testify.

(F) Voir Dire. Counsel have reviewed Federal Rule of Civil Procedure 47(a) and NECivR 47.2(a) and suggest the following with regard to the conduct of juror examination: Court asking preliminary questions and then counsel for each party being given 30 minutes each to ask questions. The parties also propose to provide the Court with voir dire questions to be asked by the Court.

(G) Number of Jurors. Counsel have reviewed Federal Rule of Civil Procedure 48 and NECivR 48.1. ~~Plaintiff's counsel suggests that the this matter be tried to a jury of six (6) members and one (1) alternate. The Defendant suggests that~~ This matter be tried to a jury composed of twelve (12) members.

with 12. 3/19/12

12. 3/19/12

(H) Verdict. The parties will not stipulate to less-than-unanimous verdict.

(I) Briefs, Instructions, and Proposed Findings. Counsel have reviewed NECivR 39.2(a), 51.1(a), and 52.1, and suggest the following schedule for filing trial briefs, proposed jury instructions, and proposed findings of fact, as applicable:

Per this Court's Order Re: Trial Preparation (Civil Jury Trial) (Doc. #74), all such submissions shall be made no later than five (5) working days prior to the scheduled date of trial.

(J) Length of Trial. Counsel estimate the length of trial will consume not less than two (2) days, not more than four (4) days, and probably about four (4) days.

(K) Trial Date. Trial is set for the week of April 9, 2012.

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Email: kratvillelaw@yahoo.com

By s/ Roderick Hannah
Roderick V. Hannah
Florida Bar No. 435384

By _____
Michael B. Kratville
Nebraska Bar No. 18255

PATRICK J. BARRETT, #17246
Counsel for Defendant
Fraser Stryker PC LLO
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PELAYO M. DURAN
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Law Office of Pelayo M. Duran,

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Telephone: (305) 266-9780


Facsimile: (305) 269-8311

Email:

By s/ Pelayo M. Duran

Pelayo M. Duran
Florida Bar No. 0146595

BY THE COURT:

 3/19/12
F.A. GOULET
4-1. M46. J4268

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEBRASKA

LUIS EDUARDO SAN JUAN,

Plaintiff(s),

v.

FIRST NATIONAL BANK OF OMAHA

Defendant(s).

Case No. 8:10-cv-00133

~~Defendant's Objections~~
~~to Plaintiff's Exhibits~~

JA
3/19/12

Trial Date(s): April 10, 2012

PLAINTIFF'S AMENDED TRIAL EXHIBIT LIST

Plaintiff Luis Eduardo San Juan, through undersigned counsel (admitted *pro hac vice*) and pursuant to this Court's Amended Order Setting Final Progression of Case (Doc. #38), submits the following as his Amended Trial Exhibit List:

PLF	DF	DESCRIPTION	OFF	OBJ	RCVD	NOT RCVD
1		Proposed Separation Agreement			✓	
2		1/23/2009 letter from Luis Eduardo San Juan to Spencer W. Doak, Office of the Comptroller			✓	
3		1/23/2009 e-mail from Eduardo San Juan to Amy Wheeler re: BSA/AML Compliance Concerns Disclosure			✓	
4		1/26/2009 memorandum from Michael Foutch to Eduardo San Juan cc: Roderick V. Hannah, Esq; Patrick J. Barrett, Esq.; Amy Wheeler; Cara James; and Nick Baxter			✓	
5		1/27/2009 e-mail string between Eduardo San Juan and Michael Foutch re: Retaliation Complaint (A12009)			✓	

OBJECTIONS

R: Relevancy
H: Hearsay
A: Authenticity
O: Other (specify)

PLF	DF	DESCRIPTION	OFF	OBJ	RCVD	NOT RCVD
6		2/4/2009 e-mail from Diane Mahagan-Thompson to Eduardo San Juan cc: Michael Foutch and Deb Simkin re Response to formal investigation			✓	
7		2/5/2009 e-mail from Eduardo San Juan to Michael Foutch and Nick Baxter with all attachments re: Retaliatory Complaint (B3-2009)			✓	
8		2/6/2009 e-mail from Eduardo San Juan to Michael Foutch, Cara James Nick Baxter, and Diane Mahagan-Thompson re: Today's Incident (B4-2009)		A, H		
9		1/23/2009 and 1/29/2009 e-mail string between Eduardo San Juan and Amy Wheeler re: MSB(s) Examination Manual		A, H		
10		1/29/2009 Weekly Update of Eduardo San Juan				
11		3/9/2009 Unemployment Initial Benefits Request form for Luis Eduardo San Juan		R		
12		Nebraska Appeal Tribunal Decision Docket No. 09-2022, dated April 29, 2009 in the Matter of the Claim of Luis E. San Juan		H, R		
13		Defendant's Employee Handbook/Policy Manual			✓	
14		November 24, 2008 report of Eduardo San Juan for FNBO Corporate Compliance BSA/AML Department Trade Finance Operation – Internal Ref No. EXP08400153			✓	
15		1/29/2009 e-mail string between Eduardo San Juan and Amy Wheeler, and forwarding e-mail from Amy Wheeler to Diane Mahagan-Thompson, re: Merchant/Global Meeting			✓	
16		January 7, 2009 letter from Roderick V. Hannah, Esq. to Bruce Lauritzen, Chairman of the Board, First National Bank of Omaha			✓	
17		First National Bank of Omaha Code of Business Conduct (October 29, 2008)			✓	
18		12/1/08 e-mail string between Eduardo San Juan and Amy Wheeler regarding VTB Due Diligence (only if needed)		A, H, R		
PLF	DF	DESCRIPTION	OFF	OBJ	RCVD	NOT RCVD

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19		1/28/2008 and 1/23/2008 e-mail string (with attachments) between Eduardo San Juan and Amy Wheeler re: Meeting of 7/21		H, A, R		
20		1/17/08 e-mail string between Eduardo San Juan and Amy Wheeler re: VTB Due Diligence (only if needed)		H, A, R		
21		1/20/08 e-mail string between Eduardo San Juan and Amy Wheeler re: VTB Due Diligence (only if needed)		H, A, R		
22		First National Bank Bank Secrecy Act/Anti-Money Laundering Policy (April 16, 2008)		A		
23		Chapter 14 Foreign Correspondent Banking Management Summary (September 2008)		A, H, R		
24		1/30/2009 e-mail from HEATSVC to Eduardo San Juan re: Call Ticket 00202152		A, H, R		
25		Computer screen images showing Eduardo San Juan Outlook Email, Contacts and other information gone as of 1/29/2009		A, H, R		
26		Meeting report between Eduardo San Juan and Ken Kephart of 2/3/2009 showing Outlook contacts having disappeared		H, A, R		
27		2/3/2009 e-mail from HEATSVC to Eduardo San Juan re: Call Ticket 00202152		H, A, R		
28		Offer Letter to Luis Eduardo San Juan from First National Bank of Omaha			✓	
29		Work Profile for Luis Eduardo San Juan with First National Bank of Omaha		A		
30		Personal Effectiveness Appraisal for 12/31/2007 – 9/30/2008 for Luis Eduardo San Juan with First National Bank of Omaha			✓	
31		November 28, 2008 Eduardo San Juan Response to Personal Effectiveness Appraisal		A		
32		1/28/2009 e-mail from Eduardo San Juan to Pam Grutel re: Declined: FNMS and Global International planning discussion			✓	
33		2/6/2009 e-mail string between Eduardo San Juan and Amy Wheeler re: RDC Meeting			✓	

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PLF	DF	DESCRIPTION	OFF	OBJ	RCVD	NOT RCVD
34		1/30/2009 e-mail (with attachments) from Eduardo San Juan to Make Dunetts and Dave Harris cc to Mary Jo Strong, Amy Wheeler, Jodie Schoemaker, and James Stewart re: RDC FNN-FNBO Policy		A, R, H		
35		2/8/2008 Comments to San Juan Performance Effectiveness Appraisal			✓	
36		7/24/2008 through 7/31/2008 e-mail string between Eduardo San Juan and Michael Foutch re: Costs and Compliance			✓	
37		12/8/2008 through 12/9/2008 e-mail string between Eduardo San Juan and Amy Wheeler re: High Risk Customer Files			✓	
38		11/19/2008 through 11/21/2008 e-mail string between Eduardo San Juan and Nathaniel Auxier re: Contacts in e-hr (only if needed)			✓	
39		Dr. Jacqueline Chanlatte's physician's note of 11/18/08 (only if needed)			✓	
40		12/16/2008 through 12/19/2008 e-mail string between Eduardo San Juan and Diane Mahagan-Thompson re: Document rendered on 12/10/2008		A, R, H		
41		Eduardo San Juan IRS income tax returns for 2007 (redacted)			✓	
42		Eduardo San Juan IRS income tax returns for 2008 (redacted)			✓	
43		Eduardo San Juan IRS income tax returns for 2009 (redacted)			✓	
44		Eduardo San Juan IRS income tax returns for 2010 (redacted)			✓	
45		All IRS W-2s for 2007 through 2010 (redacted)			✓	
46		9/7/10 community health of South Florida consultation report (Arnold Oper, MD) for Luis Eduardo San Juan		A, R, H		
47		Updated summary table and chart of all lost income damages since termination from First National Bank of Omaha		R, A, H		

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48		Financial records and net worth documentation for First National Bank of Omaha		R, H, A		
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IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEBRASKA

LUIS EDUARDO SAN JUAN,

Plaintiff,

v.

FIRST NATIONAL BANK OF OMAHA,

Defendant.

**DEFENDANT'S
EXHIBIT LIST**

Case Number: 8:10-cv-00133
Courtroom Deputy: Marian Frahm
Court Reporter: Brenda Fauber

Trial Date(s): April 9, 2012

EXHIBIT NO.							
PLF	DF	TITLE	OFF	OBJ	R C V D	NOT RECVD	DATE
	101	Offer letter, 1/8/2007 (00199)			✓		
	102	Letter from San Juan to Wheeler, 7/25/2007 (00094-96)			✓		
	103	Performance Effectiveness Appraisal, 1/8/07 - 12/31/2007 (00246-249)			✓		
	104	Comments to Performance Effectiveness Appraisal, 2/8/2008 (00241-242)			✓		
	105	Banking the Unbanked Initiative, 12/19/2007 (244-253)			✓		
	106	FNBO Suspicious Activity Reports for Year 2007, 4/23/2008 (288-296)		R			
	107	E-mail from Wheeler to San Juan, 7/8/2008 (00349) re: Foreign Correspondents and the Unbanked.			✓		
	108	Email from Wheeler to San Juan, re: Meeting of 7/21, 7/21/2008 (00056)			✓		
	109	Email from San Juan to Wheeler, re: Foreign Corr. Bank, 7/25/2008 (00152)			✓		

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EXHIBIT NO.							
PLF	DF	TITLE	OFF	OBJ	R C V D	NOT RECVD	DATE
	110	Email from San Juan to Wheeler, 7/29/2008 (00344)			✓		
	111	Email from Wheeler to San Juan, re: CLRA meeting, 7/29/2008 (00341)			✓		
	112	Email from San Juan to Wheeler, re: one-on-one meeting, 7/30/2008 (00339-340)			✓		
	113	Weekly Update for 7/31/2008 (00337-339)			✓		
	114	Verbal Warning, 8/12/2008 (00099)		R, H, A O (Unfairly Prejudicial)			
	115	Email from San Juan to Wheeler, re: High Risk Customer files, 8/15/2008 (00064)			✓		
	116	Personal Effectiveness Appraisal, 12/31/07 - 9/31/08 (00250-254)			✓		
	117	Email from San Juan to Wheeler, re: VTB Due Diligence, 10/20/2008 (00138-140)			✓		
	118	Email from Wheeler to San Juan, re: HRC Ratings, 10/24/2008 (00065)			✓		
	119	Email from Wheeler to San Juan, re: High Risk Customers, 8/24/2008 (00071-73)			✓		
	120	Email from San Juan to Wheeler, re: going home sick, 11/11/2008 (00128)			✓		
	121	Note from Dr. Chanlatte, re: excuse from work for 72 hours, 11/8/2008 (00332)			✓		
	122	Email from Mahagan-Thompson to San Juan, re: Performance Effectiveness Appraisal, 11/10/2008 (00110)			✓		
	123	Email from Wheeler to San Juan, re. HRC Files, 11/17/2008 (00075-76)			✓		
	124	Email from Auxier to San Juan re: Florida phone number, 11/19/2008 (00331)		R			

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EXHIBIT NO.							
PLF	DF	TITLE	OFF	OBJ	R C V D	NOT RECVD	DATE
	125	Email from San Juan to Wilwerding, re: unproductive emails, 11/21/2008 (00077-80)			✓		
	126	Email from Wheeler to San Juan re: deadline to complete HRC assignment, 11/24/2008 (00081)			✓		
	127	Email from San Juan to Axier, re: doctor's note, 11/21/2008 (184)			✓		
	128	Report of Trade Finance project, 11/24/2008			✓		
	129	Email from San Juan to Wheeler, re: projects, 11/21/2008 (00129-130)			✓		
	130	San Juan response to Performance Evaluation Appraisal, 11/25/2008 (00102-103)			✓		
	131	Weekly update for 11/26/2008 (95)			✓		
	132	Email from Wheeler to San Juan, re: meetings with Global, 12/1/2008 (00169-170)			✓		
	133	Weekly Update for 12/3/2008 (170)			✓		
	134	Email from San Juan to Wheeler, re: HRC rating assignments, 12/5/2008 (0060-63)			✓		
	135	Email from San Juan to Wheeler, re: completing HRC files, 12/9/2008 (00091)			✓		
	136	Email from Mahagan-Thompson re: severance offer, 12/22/2008 (00098)			✓		
	137	Email from Mahagan-Thompson re: severance offer, 1/8/2009 (00097)			✓		
	138	Weekly Update for 1/8/2009 (00116-118)			✓		
	139	Letter from Roderick Hannah to Bruce Lauritzen, 1/7/2009		R O(Confidential/in admissible settlement communication)			
	140	Email from San Juan to Wheeler, re: declining meeting for update (00119-120)			✓		

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EXHIBIT NO.						
PLF	DF	TITLE	OFF	OBJ	R C V D	NOT RECVD DATE
	141	Letter from San Juan to Spencer Doak, OCC, 1/23/2009			✓	
	142	Email from San Juan to Wheeler, re: notice of report to OCC, 1/23/09			✓	
	143	Letter from Foutch to San Juan, re: report to OCC, 1/26/09			✓	
	144	Email from San Juan to Foutch, re: ID badge, 1/27/09 (00323)			✓	
	145	Email from Foutch to Deb Simkin, re: ID badge, 1/27/09 (00322)			✓	
	146	Email from San Juan declining FNMS and Global meeting, 1/28/2009 (119)			✓	
	147	Weekly Update for 1/29/2009 (120-121)			✓	
	148	E-mail from Wheeler to San Juan, re: Merchant/Global meeting, 1/29/2009 (0342)			✓	
	149	Email from San Juan to Wheeler, re: extension of deadline, 1/29/09 (00321)			✓	
	150	Email from Wheeler to San Juan, re: FNMS and Global meeting, 1/30/09 (00138-139)			✓	
	151	Email from Mahagan-Thompson to San Juan, re: insubordination, 2/4/09 (00318)			✓	
	152	Email from San Juan to Foutch and Baxter, re: retaliatory complaint, 2/5/2009 (111-112)			✓	
	153	Weekly Update for 2/5/2009 (122-123)			✓	
	154	Email from Wheeler to San Juan, re: RCD meeting, 2/6/09 (00317)			✓	
	155	Email from Foutch to San Juan re: termination, 2/9/09 (00315)			✓	
	156	Timeline of Plaintiff's Employment		R, H, A		

OBJECTIONS

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3/11/12
fj

EXHIBIT NO.						
PLF	DF	TITLE	OFF	OBJ	R C V D	NOT RECVD DATE
	157	Plaintiff's NEOC Discrimination Charge		R	AD	NOT
	158	Employee Handbook/Policy Manual			✓	

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CERTIFICATE OF SERVICE

I hereby certify that on _____, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following: _____

, and I hereby certify that I have mailed by United States Postal Service the document to the following non CM/ECF participants:
_____.

s/ _____