

**IN THE DISTRICT COURT OF JOHNSON COUNTY, KANSAS
CIVIL COURT DEPARTMENT**

BANK OF AMERICA, N.A.,)	
)	
Plaintiff,)	
)	
vs.)	Case No. 04 CV 06279
)	Div. 17
SANJIV NARULA, et al.,)	Chapter 60
)	
Defendants.)	

JOURNAL ENTRY OF JUDGMENT AS TO PUNITIVE DAMAGES

On December 30, 2008 the Court held a hearing pursuant to K.S.A. §60-3702 as to the amount of punitive damages to be awarded against the plaintiff Bank of America, N.A. Plaintiff appeared by and through its counsel, Christine L. Schlomann. Defendants appeared in person and through their counsel, Robert J. Bjerg and Michael D. Strohbahn.

After receiving evidence from the parties, hearing the arguments of counsel, and being fully advised in the premises, the Court hereby enters the following judgment.

1. Plaintiff's Objection to Defendant's Request for Punitive Damages.

Following the trial in this matter the Court issued its Journal Entry of Judgment which included an award of punitive damages. Plaintiff thereafter filed a written objection to the defendants' request for punitive damages, asserting that the defendants failed to plead such a claim for punitive damages pursuant to K.S.A. §60-3701 et seq. The Court rejects the plaintiff's argument for the following reasons. On September 6, 2007, the defendants filed their motion to assert a claim for punitive damages as is required by K.S.A. §60-3703. The Court held a hearing on the defendants' motion on November 30, 2007 and on December 14, 2007. At the conclusion

CLERK OF DISTRICT COURT
JOHNSON COUNTY, KS

2009 JUN 11 AM 9:46

of the hearing, the Court granted the defendants' motion to assert a claim for punitive damages. On December 20, 2008, a Journal Entry sustaining Defendants' motion to assert a claim for punitive damages was filed which ordered the defendants' counterclaims amended to include a claim for punitive damages. The Journal Entry was signed and approved by counsel for both parties. The Journal Entry expressly states that, "The Court orders that the defendants' First Amended Counterclaims are hereby amended to include a claim for punitive damages."

Accordingly, the defendants' pleading was deemed amended by the Court and the parties and no additional pleading was required to be filed. Although there is no claim for punitive damages included in the pretrial order filed in this case, it is apparent that plaintiff understood and consented, either expressly or impliedly, that the trial specifically included the defendants' claim for punitive damages. As evidence of this consent, the plaintiff submitted proposed Findings of Fact and Conclusions of Law to the Court at the conclusion of the trial and included seventeen specific proposed conclusions of law (Nos. 101 through 108 and 130 through 138) pertaining to whether the Court should award punitive damages against the plaintiff. Nowhere in the proposed findings did the plaintiff argue that the issue of punitive damages was not contained in the pretrial order. Therefore, the Court has no doubt that the plaintiff fully realized and consented to the trial of the punitive damages issue, and any complaint that the issue was not contained in the pretrial order has been waived. For these reasons, the Court rejects the plaintiff's argument that the defendants have not properly asserted a claim for punitive damages in this case.

2. Amount of Punitive Damages Awarded

The amount of punitive damages that can be awarded in this case is limited by K.S.A. §60-3702(e). Under this section, punitive damages cannot exceed the lesser of: (1) the Bank of America's highest gross annual income for any of the five years immediately preceding the wrongful act; and (2) \$5 million. As applied to Bank of America's income over the last five years, the statutory limitation is clearly \$5 million. Defendants introduced into evidence the Bank of America's annual 10-K for the year ending December 31, 2000, which recited the bank's annual gross income for the years 1996 through 2000, the five years prior to the act complained of, i.e. the failure to convert the construction loan to the permanent loan on December 31, 2001. Exhibit No. 600 lists the Bank of America's annual gross income for these years as follows:

- a. 1996 \$33.636 billion
- b. 1997 \$37.333 billion
- c. 1998 \$38.588 billion
- d. 1999 \$37.323 billion
- e. 2000 \$43.258 billion

Accordingly, the Bank of America's annual gross income for each of these years far exceeded the statutory cap of \$5 million, and the maximum amount of punitive damages that can be awarded in this case is that amount. During the hearing, counsel for the plaintiff also stipulated that \$5 million is the lesser of the two figures for the purposes of the punitive damages statute.

K.S.A. §60-3702(b) expressly lists seven (7) factors that the Court "may consider" in determining the amount of punitive damages to be awarded. These seven factors are:

- (1) The likelihood at the time of the alleged misconduct that serious harm would arise from the [plaintiff's] misconduct;
- (2) The degree of the [plaintiff's] awareness of that likelihood;
- (3) The profitability of the defendant's misconduct;
- (4) The duration of the misconduct and any intentional concealment of it;
- (5) The attitude and conduct of the defendant upon discovery of the misconduct;

- (6) The financial condition of the defendant; and
- (7) The total deterrent effect of other damages and punishment imposed upon the defendant as a result of the misconduct . . .

In analyzing and applying the above seven factors, the Court specifically adopts and incorporates by reference herein all of its Findings of Fact and Conclusions of Law contained in its Journal Entry of Judgment & Memorandum previously filed herein on November 21, 2008.

At the hearing on punitive damages, the defendants also introduced into evidence Exhibit No. 601, the plaintiff's most recent annual report for the calendar year ending December 31, 2007. In this annual report, the plaintiff reported its 2007 annual gross income as \$68.068 billion, its total shareholder's equity as \$146.8 billion, and its total assets as \$1.715 trillion.

Plaintiff claims it will suffer \$2.3 million in losses as a result of its business transaction with the defendants and as a result of the Court's entry of judgment against the plaintiff in this case. At the hearing on punitive damages, plaintiff failed to present any evidence addressing any of the above seven statutory factors, and the plaintiff did not present any testimony or evidence that it intended to make any changes in its procedures or policies as a result of the Court's decision in this case.

The Kansas Supreme Court has clearly stated that the purposes of punitive damages are twofold: deterrence and punishment. *See Hayes Sight & Sound, Inc. v. Oneok, Inc.*, 136 P.3d 428, 452 (Kan. 2006); *Cerretti v. Flint Hills Rural Electric Coop. Ass'n*, 837 P.2d 330 (Kan. 1992).

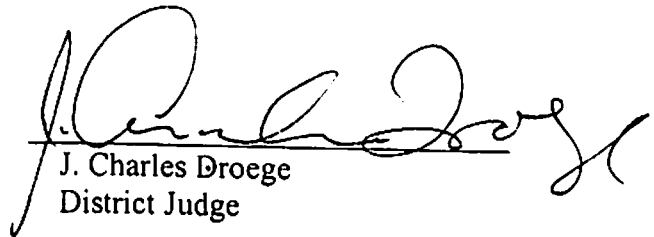
After considering the evidence presented by the defendants as to the plaintiff's earnings and financial condition, and after applying the Court's Findings of Fact and Conclusions of Law to the seven factors contained in K.S.A. §60-3702(b), the Court hereby awards punitive damages against the plaintiff in the amount of \$750,000 (Seven Hundred Fifty Thousand Dollars). The

Court is convinced that the plaintiff intentionally defrauded the defendants and intentionally failed to act with due regard for the defendants' interests as their fiduciary or "trusted financial advisor". The Court does not believe that the plaintiff will now or ever recognize or accept the wrongfulness of its actions, and the plaintiff has presented no such evidence to the Court for its consideration. Given the plaintiff's financial wherewithal, the Court finds that judgment of \$750,000 in punitive damages against the plaintiff will promote the two purposes of punishment and deterrence. In so awarding this amount, the Court is also aware of previous Kansas appellate decisions as allowable ratios between the amount of compensatory damages and the amount of punitive damages, and the Court observes that an award of \$750,000 as punitive damages in this case is well within such allowable ratios.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that an additional judgment in the amount of \$750,000.00 (Seven Hundred Fifty Thousand Dollars) as punitive damages be awarded against the plaintiff Bank of America, N.A. and in favor of the defendants.

Date:

6-11-09



J. Charles Droege
District Judge

CERTIFICATE OF MAILING

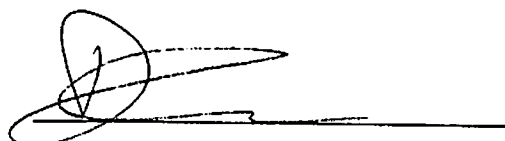
The undersigned hereby certifies that a copy of the above and foregoing document was emailed and mailed by U.S. Mail, this 11 day of June, 2009 to the following:

Robert J. Bjerg
Colantuano, Bjerg, Guinn, LLC
7015 College Blvd., Suite 375
Overland Park, KS 66211

Michael Strohhahn
Walters Bender Strohhahn & Vaughan, P.C.
2500 City Center Square
1100 Main Street
Kansas City, MO 64105-2112

Christine L. Schlomann
Armstrong Teasdale LLP
2345 Grand Blvd., Suite 2000
Kansas City, MO 64108

David L. Going
Armstrong Teasdale LLP
One Metropolitan Sq. 26th Floor
St. Louis, MO 63102

A handwritten signature in black ink, appearing to read 'DAN CALDERON', is written over a horizontal line. The signature is stylized with a large loop at the beginning and a long horizontal stroke extending to the right.

DAN CALDERON
Law Clerk, Division 8