TABLE OF CONTENTS

¶1

TABLE OF AUTHORITIES

Paragraph No.

Cases

¶2 **LAW AND ARGUMENT**

¶3 **A. The Trial Court Erred in Finding that Palmer had a Fiduciary Relationship with Weist.**

¶4 The court found that Bank can collect only a portion of the outstanding balance on Loan No. 2010429 ($200,000); its analysis rested on the finding that Palmer owed a fiduciary duty to Wiest. (App. 82) The court's analysis of Loan No. 2010429 depended on the existence of a "fiduciary relationship" between Palmer and Wiest based on Palmer's presence at the loan meetings and advice to Wiest; it then recited the debt and other problems that Palmer *should* have disclosed to Wiest based on the fiduciary duty owed by Palmer. The Bank does not deny that Palmer acted improperly; however, there was no "fiduciary relationship" because Palmer was not directing Wiest's borrowing decisions. Lou was.

¶5 The cases relied upon by the trial court and by Wiest turn on unsophisticated and unknowledgeable borrowers, which is not the case here. While Wiest did testify that he had a lot of "confidence" in Palmer, his testimony and evidence shows that Wiest's actual faith, confidence, and trust was placed in *Lou*. The party that exercised domination, control or influence over Wiest's affairs was *Lou*. Moreover, as shown at trial, Wiest was an experienced investor, had a net worth of over $5 million, and was never in a position of inequality, dependence, or weakness in his business dealings.

¶6 The claim that Palmer was exerting control over Wiest in making loan decisions is contradicted repeatedly by Wiest's testimony on Lou's role as advisor. The trial court's finding was clearly erroneous in that it ignored or downplayed Wiest's *utter* reliance upon Lou. In turn, Wiest's brief glosses over his trust in Lou, never acknowledging the testimony

and exhibits regarding Wiest's relationship and dependance on Lou. As Wiest testified over and over, he depended on Lou for handling matters at Glass Blast Media – the glass contracts, erecting WJB's building, handling the matter of the truck titles. By ratifying Lou's actions, Wiest led others to believe Lou had authority to act on his behalf. He testified that he relied upon Lou's predictions about the production ability and potential profitability of GBM: "Well, again *those were projections I believe that Lou must have given the accountant to put in there*. There's no way we could process near that." (Trans. 112, 3-5 (*emphasis added*)) If Wiest had wanted financial information from GBM, he should have obtained from the officers a signed consent giving the Bank permission to disclose the financial information. None of the shareholders *ever* asked the Bank for additional information – all requests were made to Lou. Shareholder Kevin Johnson testified as follows:

> Q. You were in the courtroom during your brother's visit to the stand?
> A. Yes.
> Q. And you heard him talk about the financial information he had at that January meeting?
> A. Yes.
> Q. And did you have the same financial statements had?
> A. Yes.
> Q. Did you ever request additional financial information from the bank relative to what was owed the bank?
> A. We did not request financial, but it was discussed at the meetings with Lou that we wanted financial statements. Not necessarily from the bank but we wanted financial statements with more detail.

(Trans. 262, 6-20) As an investor, it was *Wiest's* duty to conduct his own due diligence on the financial health of any company he was investing in. He did not, and he now blames the Bank by claiming that Palmer "withheld" this information from him. Evidence showed that Palmer defrauded the Bank; Lou shepherded an overly-dependant Wiest into the loan.

¶7 Any lack of knowledge on Wiest's part was because he put all of his trust and faith in Lou, followed his advice, and didn't perform his own due diligence for these investments. Clearly, no "special circumstances" exist which would create a fiduciary relationship between Wiest and Palmer as contemplated in First Nat'l Bank & Trust Co. v. Brakken, 468 N.W.2d 633, 637 (N.D.1991).

¶8 **B. The Trial Court Erred in Granting Recission of Loan No. 2010171.**

¶9 The brief of the Bank addressed the two loans separately, noting that the trial court ordered recission of Loan No. 2010171($250,000) on the basis of fraud in the inducement. Nowhere in the trial court's discussion of Loan No. 2010171 did it state the presence of a fiduciary relationship regarding that loan; rather, the analysis turned on fraud.

¶10 The Bank does not dispute the existence of fraud in these transactions; rather, the evidence showed that Palmer was defrauding the Bank; Lou had a far more significant role than Palmer did in misleading Wiest (if indeed Wiest was mislead). Wiest claims that he was fraudulently induced into entering into this loan because the purpose was to buy trucks, which were not purchased. Even after he knew that he didn't have any trucks, Wiest advised Jon Primeau that he was in contact with *Lou* about that matter. (Exhibit D-80, comments 10/13/06, 11/29/06, 12/13/06) As Jon Primeau testified, even when he was aware that there were no trucks, Wiest did not hold the Bank responsible (until he was sued for non-payment of his notes):

> Q. And do you know when Mr. Palmer left American Bank Corp?
> A. I believe it was July of 2006.
> Q. At that point were you put in charge of loans that he had formerly handled for the Dickinson charter?
> A. Yes, I was.

Q. And did that include Dr. Wiest's loan?
A. Yes, it did.
Q. And did you have a meeting with Dr. Wiest?
A. I had a few telephone calls with Dr. Wiest inquiring about payments and the situation in I believe it was October of 2006. A group of us from both the Bismarck and the Dickinson, Minot bank traveled to Fargo and met with the 4investors.
Q. And did you subsequently have phone calls with Dr. Wiest relative to his loans?
A. A couple, yes, after the -- and primarily inquiring as to the delinquency of payments and when we could expect to receive payments on his loans.
Q. Okay. Did Dr. Wiest ever complain to you about the bank not taking titles from GBM on his behalf?
A. Not to my recollection, no.
Q. And did he complain to you about any misrepresentations relative to his credit by the bank?
A. Not that I recall, no.

(Trans. 182, 6-25; 183, 1-5) Also, as the loan comments indicate, Jon Primeau advised Wiest that the Bank did not have titles to the trucks and Wiest tried to track down the trucks and sort things out by talking to *Lou.* (Ex. 80, 10/13/06) Until he was sued by the Bank, Wiest held Lou responsible for the lack of titles, claimed he was duped into entering into that loan by Lou, and mentioned suing *Lou. Id.* This is consistent with the fact that Lou was the one who induced Wiest into making the loan. Palmer's role was to mislead the Bank into making the loan. However, realizing Lou is broke, Wiest now claims that Palmer (meaning the Bank) fraudulently induced him into entering into the loan. The Bank suspects that Wiest never did want to purchase trucks – he didn't make the required $180,000 down payment and he didn't, as is customary, take the necessary steps to provide titles to the Bank. In retrospect, it appears what Wiest *did* want was the Bank's money to pay GBM's bills, meet the SBA equity requirements, and improve his position for obtaining the SBA loan.

¶11 Wiest also relies on Palmer's deviation from Bank policy as evidence of fraud against him. However, as Don Maus testified, the loan policy is *not* a contract between the Bank and

its customers – borrowers never see the loan policy, and it's not referenced in any lending document. (Trans. p. 5-10) It's a contract between the Bank and its employees and violation of its provisions indicates fraud against the Bank, not Wiest.

¶12 **C. The Trial Court Erred in Imputing Palmer's Fraud to the Bank.**

¶13 As expected, Mr. Palmer has swaddled himself in the law of agency and dedicated his brief to the proposition that he shouldn't be liable for his wrongdoing because he was an employee of the Bank. Wiest also asserts that during the course of the transactions, Palmer was an employee of the Bank and therefore "the Bank is chargeable with the knowledge and fraud of Palmer." (Brief 19) However, imputation of knowledge of an agent to a principal is not absolute – there exist exceptions to the general rule that knowledge of facts gained by an agent while in the employ of the principal is imputed to the principal. *See, e.g* Aetna Indemnity Co. v. Schroeder, 95 N.W. 436 (N.D. 1903). When the agent is acting fraudulently toward his principal, his knowledge is not binding on the principal; if the agent is acting adversely to the corporation, the corporation may not be bound by the agent's activity or knowledge. *See, e.g.* FDIC v. Ernst & Young, 967 F.2d 166, 171 (5th Cir.1992) ("Generally, courts impute a bank officer or director's knowledge to the bank unless the officer or director acts with an interest adverse to the bank.") Some circuits have adopted the "adverse interest" exception to the imputation rule, and this Court should do so in this matter:

> "The adverse interest exception is entirely consistent with the principles of agency law.... Normally courts will impute the knowledge of an agent acting within the scope of his agency to his principal, because courts presume that such an agent communicates that knowledge to his principal. The practice of presuming the transfer of knowledge, and thus imputing the agent's

> knowledge to the principal, is a fiction.... That fiction is untenable, however, when an agent has totally abandoned the interests of his principal, and acted entirely in his own or a third party's interest, because an agent cannot be presumed to have disclosed that which would expose and defeat his fraudulent purpose."

Ernst & Young v. Bankruptcy Services, Inc. *(In re CBI Holding Co., Inc.)*, 311 B.R. 350, 369-70 (S.D.N.Y.2004)(*citation and internal quotations omitted*), *on rehearing* In re CBI Holding Co., Inc., 318 B.R. 761 (S.D.N.Y. Oct 25, 2004), *affirmed in part, reversed in part* In re CBI Holding Co., Inc., 529 F.3d 432 (2nd Cir. 2008). Notice of Palmer's fraud should not be imputed to the Bank because Wiest did not deal with it in good faith – he prevented "red flags" that would have brought Palmer to the Bank's attention earlier, and the Bank did not ratify or knowingly retain a benefit from Palmer's action. *See also*, Grove v. Sutliffe, 916 S.W.2d 825, 830 (Mo.App.1995); Askanase v. Fatjo, 130 F.3d 657, 666 (5th Cir.1997) (recognizing an exception to imputation "if the plaintiff can show that the officer/director was acting adversely to the corporation and entirely for his own or another's purpose . . . The officer/director, though, must act so that his endeavors are so incompatible that they destroy the agency.") Here, Palmer's actions were so incompatible with the interests of the Bank that they destroyed the agency and harmed the Bank by millions of dollars. The fraudulent activity referred to by Wiest in his brief indicate that Palmer's intent was to defraud the Bank; the violations of the Bank's internal rules are offenses against the Bank, not the customer. (Brief 9-13) Palmer mislead the Bank to help GBM and Lou Burkhardsmeier, which also benefitted Wiest because its money went to pay GBM's bills and kept it alive to this day. Moreover, Wiest's "red flag" avoidance hindered the Bank in discovering Palmer's activities, putting this case squarely within the *exception* to imputability. Wiest's claim that

the Bank "benefitted" because his loans were used to save the "Bank's 'sunken ship' of bad loans made by Palmer" (Brief 28) is unsupported by basic accounting. The thousands of dollars Wiest expended in "red flag" avoidance kept the Bank's attention off of Palmer while he racked up *millions* of dollars in bad loans that remain uncollected. Wiest's assertion that the "red flag" avoidance did *not* prevent the Bank from discovering Palmer's fraud (Brief 29) is a misstatement of testimony. Don Maus, did *not* testify that "red flags began to pop up in the Bank on Palmer's loans 3-4 months prior to July. *Id.* They began to pop up in May 2006 *after* Wiest stopped making payments:

> Q. So we've talked a little bit about, with the other witnesses, about internal auditing or credit type checking to see what's -- what the credit quality is. Were there issues arising with regard to Dr. Wiest's loans not having collateral? Did they ever arise?
> A. Yes, they did after -- after our internal discovery process revealed some of the shortcomings.
> Q. When was that? Would that have been in this July time?
> A. It probably, you know, it probably started prior to that and continued through July. But I know there were audits being conducted prior to that and it was revealed -- revealed to myself along with other bank staff that caused us probably to look deeper.
> Q. So did you ever contact Dr. Wiest and say, "Dr. Wiest, we don't have your titles, what's going on?"
> A. I personally did not talk to Dr. Wiest. I believe Jon Primeau did.
> Q. Excuse me. That was after July of 2008? [sic]
> A. Yes. The concern with the titles, knowing that -- knowing that the borrower themselves needs to endorse the title in order for it to transfer I guess Dr. Wiest would have known those titles were lacking.
> Q. Well, he wouldn't necessarily sign them if -- if they were coming directly from the seller and your name was noted right from the seller, would he?
> A. In order for the motor vehicle department to record the transferred title Dr. Wiest would have had to sign it.
> Q. Do you think Dr. Wiest knew that?
> A. I think Dr. Wiest has bought many vehicles so he probably knows that.

(Trans. p. 485, 14-25; p. 486, 1-19) Not only was Wiest's loan performing through the end

of May, the Bank didn't notice irregularities in Palmer's portfolio because Wiest was making payments on loans to which he had no connection in order to prevent "red flags" that would jeopardize his plans to refinance. (Trans. 46, 2-18) Wiest should bear responsibility for actively concealing from the Bank the true state of Palmer's portfolio, concealment meant to benefit himself.

¶14 **CONCLUSION**

¶15 For all of the reasons set out above, the Bank respectfully requests that this Court reverse the trial court on the issues as set out in its Appellate Brief.

¶16 Dated this 3rd day of May, 2010.

OLSON & BURNS P.C.

Richard P. Olson (ID #03183)
Attorneys for Appellant American Bank Center
P.O. Box 1180
Minot, ND 58702-1180
(701) 839-1740

¶17 **CERTIFICATE OF SERVICE**

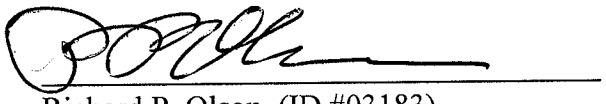
I hereby certify that on the 3rd day of May, 2010, true and correct copies of the **Reply Brief of Appellee** was served electronically upon the following:

Joseph A. Turman, attorney for David Wiest - jturman@turmanlaw.com

David J. Hogue, attorney for Howard Palmer - dhogue@srt.com

A true and correct copy of the **Reply Brief of Appellee** was mailed to Lou Burckhardsmeier on May 3, 2010, at the following address:

Lou Burckhardsmeier
P.O. Box 7122
Fargo, ND 58106



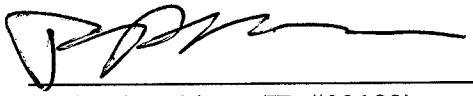
Richard P. Olson (ID #03183)

¶18 **CERTIFICATE OF COMPLIANCE**

The undersigned, as attorney for Appellant American Bank Center and as the author of the above brief, hereby certify, in compliance with Rule 32 of the North Dakota Rules of Appellate Procedure, that the brief was prepared with proportional typeface (Times New Roman) and that the brief, excluding the table of contents, the table of citations, and certificate of compliance, does not exceed 2,500 words.

Dated this 3rd day of May, 2010.

OLSON & BURNS P.C.



Richard P. Olson (ID #03183)
Attorneys for Appellant American Bank Center
P.O. Box 1180
Minot, ND 58702-1180
(701) 839-1740