

2016

**Dos Lagos, LLC; Mellon Valley, Roland Neil Family Limited Partnership; Roland N. Walker; And Sally Walker, Petitioners, vs. 2010-1 Radc/Cadc Venture, LLC, Respondent.**

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_sc2](https://digitalcommons.law.byu.edu/byu_sc2)



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah.

---

**Recommended Citation**

Reply Brief, *Dos Lagos mellon v 2010-1 RADCCADC*, No. 20160436 (Utah Supreme Court, 2016).  
[https://digitalcommons.law.byu.edu/byu\\_sc2/3242](https://digitalcommons.law.byu.edu/byu_sc2/3242)

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (2000– ) by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

---

IN THE UTAH SUPREME COURT

---

DOS LAGOS, LLC; MELLON VALLEY,  
LLC; ROLAND NEIL FAMILY LIMITED  
PARTNERSHIP; ROLAND N. WALKER;  
AND SALLY WALKER,

Petitioners,

vs.

2010-1 RADC/CADC VENTURE, LLC,

Respondent.

**REPLY BRIEF OF PETITIONERS**

Supreme Court Case No. 20160436-SC  
Court of Appeals Case No. 20140675-CA  
District Court Case No. 110700200

---

Appeal from the Utah Court of Appeals

RICHARD C. TERRY (3216)  
DOUGLAS A. OVIATT (12192)  
**TERRY JESSOP & BITNER**  
341 South Main Street, Suite 500  
Salt Lake City, Utah 84111  
Telephone (801) 534-0909  
Facsimile (801) 534-1948  
[richard@tjblawyers.com](mailto:richard@tjblawyers.com)  
[doug@tjblawyers.com](mailto:doug@tjblawyers.com)

*Attorneys for Respondent*

DOUGLAS B. THAYER (8109)  
ANDY V. WRIGHT (11071)  
**DURHAM JONES & PINEGAR**  
3301 North Thanksgiving Way, Suite 400  
Lehi, Utah 84043  
Telephone (801) 375-6600  
Facsimile (801) 375-3865  
[dthayer@djplaw.com](mailto:dthayer@djplaw.com)  
[awright@djplaw.com](mailto:awright@djplaw.com)

*Attorneys for Petitioners*

FILED  
UTAH APPELLATE COURTS

NOV 18 2016

---

IN THE UTAH SUPREME COURT

---

DOS LAGOS, LLC; MELLON VALLEY,  
LLC; ROLAND NEIL FAMILY LIMITED  
PARTNERSHIP; ROLAND N. WALKER;  
AND SALLY WALKER,

Petitioners,

vs.

2010-1 RADC/CADC VENTURE, LLC,

Respondent.

**REPLY BRIEF OF PETITIONERS**

Supreme Court Case No. 20160436-SC  
Court of Appeals Case No. 20140675-CA  
District Court Case No. 110700200

---

Appeal from the Utah Court of Appeals

RICHARD C. TERRY (3216)  
DOUGLAS A. OVIATT (12192)  
**TERRY JESSOP & BITNER**  
341 South Main Street, Suite 500  
Salt Lake City, Utah 84111  
Telephone (801) 534-0909  
Facsimile (801) 534-1948  
[richard@tjblawyers.com](mailto:richard@tjblawyers.com)  
[doug@tjblawyers.com](mailto:doug@tjblawyers.com)

*Attorneys for Respondent*

DOUGLAS B. THAYER (8109)  
ANDY V. WRIGHT (11071)  
**DURHAM JONES & PINEGAR**  
3301 North Thanksgiving Way, Suite 400  
Lehi, Utah 84043  
Telephone (801) 375-6600  
Facsimile (801) 375-3865  
[dthayer@djplaw.com](mailto:dthayer@djplaw.com)  
[awright@djplaw.com](mailto:awright@djplaw.com)

*Attorneys for Petitioners*

**TABLE OF CONTENTS**

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ..... ii

ARGUMENT..... 1

    I. THE COURT OF APPEALS ERRED WHEN IT FOUND THAT RADC AND UTAH  
    FIRST HAD AN IDENTITY OF INTEREST..... 1

    II. IF APPLIED, NEWLY AMENDED RULE 15(C) ALSO INDICATES THAT RADC’S  
    CLAIMS DO NOT RELATE BACK TO THE ORIGINAL COMPLAINT. .... 7

    III. THE COURT OF APPEALS ERRED WHEN IT AFFIRMED RADC’S JUDGMENT  
    OF 100% OF THE AMOUNT DUE. .... 11

CONCLUSION..... 14

CERTIFICATE OF SERVICE ..... 15

CERTIFICATE OF COMPLIANCE..... 16

## TABLE OF AUTHORITIES

### Cases

|   |         |
|---|---------|
| <i>Beaver Cty. v. Utah State Tax Comm'n</i> , 2010 UT 50, 254 P.3d 158 .....                    | 8       |
| <i>Express Recovery Servs., Inc. v. Rice</i> , 2005 UT App 495, 125 P.3d 108 .....              | 13      |
| <i>Highlands at Jordanelle, LLC v. Wasatch County</i> , 2015 UT App 173, 355 P.3d 1047<br>..... | 1, 2, 3 |
| <i>In re Syntex Corp. Sec. Litig.</i> , 95 F.3d 922 (9th Cir. 1996) .....                       | 10      |
| <i>Ottens v. McNeil</i> , 2010 UT App 237, 239 P.3d 308.....                                    | 2       |
| <i>Perry v. Pioneer Wholesale Supply Co.</i> , 681 P.2d 214 (Utah 1984).....                    | 6       |
| <i>Roark v. Crabtree</i> , 893 P.2d 1058 (Utah 1995) .....                                      | 8       |
| <i>Russell v. Standard Corp.</i> , 898 P.2d 263 (Utah 1995). .....                              | 5, 6, 7 |
| <i>VCS, Inc. v. Utah Community Bank</i> , 2012 UT 89, 293 P.3d 290.....                         | 7       |
| <i>Wright v. PK Transp.</i> , 2015 UT App 93, 325 P.3d 894 .....                                | 2       |
| <i>Young v. Lepone</i> , 305 F.3d 1 (1st Cir. 2002).....  | 10, 11  |

### Rules

|                         |          |
|-------------------------|----------|
| Fed. R. Civ. P. 15..... | 10       |
| Utah R. Civ. P. 15..... | 8, 9, 10 |
| Utah R. Civ. P. 4.....  | 9        |

## ARGUMENT

Applying Utah law to the facts of this case consistently confirms that RADC and Utah First lack an identity of interest sufficient for the application of the relation back doctrine. Further, under equitable principals and by the terms of Dos Lagos's<sup>1</sup> agreement, any judgment awarded to RADC must be limited to its proportional 48% ownership interest in the Note.

### I. THE COURT OF APPEALS ERRED WHEN IT FOUND THAT RADC AND UTAH FIRST HAD AN IDENTITY OF INTEREST.

Utah law consistently confirms that the court of appeals incorrectly held that RADC and Utah First share an identity of interest sufficient to trigger the relation back doctrine in Rule 15(c) of the Utah Rules of Civil Procedure.

First, despite RADC's attempt to distinguish it, the facts of the recent case, *Highlands at Jordanelle, LLC v. Wasatch County*, are actually quite similar to those in the instant case and indicate that RADC's claims do not relate back to Utah First's complaint. In the *Highlands* case, Pigeonhole Development, LLC purchased the right to bring claims on behalf of Prime West Jordanelle, LLC and filed its first complaint in November 2010. *Highlands at Jordanelle, LLC v. Wasatch County*, 2015 UT App 173, ¶ 47, 355 P.3d 1047. A year later, Pigeonhole purchased additional claims from PWJ Holdings, LLC and then attempted to amend its complaint to include the new claims. *Id.* The district court declined to allow the amended complaint to relate back to the first

---

<sup>1</sup> In keeping with the style of Petitioners' opening brief, "Dos Lagos" is used throughout to collectively refer to all of the Petitioners. Likewise, "RADC" is used throughout to refer to the Respondent.

complaint under Rule 15(c), because “Pigeonhole as successor in interest to PWJ’s claims does not share an identity of interest with Pigeonhole as successor in interest to the claims of Prime West.” *Id.*

In reviewing the case, the court of appeals reiterated the rule that “under limited circumstances, a new party may relate its claim back to the original complaint in the event of a ‘misnomer case’ or if there is a ‘true identity of interest’ between the new party and the original party.” *Id.* at ¶ 48 (quoting *Wright v. PK Transp.*, 2015 UT App 93, ¶ 5, 325 P.3d 894). According to the *Highlands* court, there are two elements to a “true identity of interest”:

- (1) the amended pleading alleged only claims that arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading; and
- (2) the defendant had received actual or constructive notice that the new plaintiff would have been a proper party to the original pleading such that no prejudice would result from preventing the defendant from using a statute-of-limitations defense that otherwise would have been available.

*Id.* at ¶ 49 (quoting *Ottens v. McNeil*, 2010 UT App 237, ¶ 43, 239 P.3d 308) (other internal citations and quotations omitted).

Pigeonhole attempted to argue that its amended complaint did not add a new party.

The court of appeals, though, rejected this argument:

[W]e consider plaintiffs who have purchased their claims to have stepped into the shoes of the former plaintiff. Pigeonhole has, in effect, purchased the right to step into the shoes of Prime West and PWJ. Therefore, Pigeonhole’s effort to amend its complaint to add the PWJ claims does attempt to add a new party.

*Id.* at ¶ 50 (internal citations omitted). After so holding, the court noted that Pigeonhole’s PWJ claims would be time barred “unless Pigeonhole can show that PWJ has a true

identity of interest with Prime West *independent of their connection via Pigeonhole.*” *Id.* (emphasis added).

Next, the court looked at the first prong of the identity of interest test: whether the new claims “arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading. *Id.* at ¶ 51 (internal citations omitted). The original complaint dealt with fees the Fire District imposed on property owned by Prime West. Thereafter, PWJ purchased the property from Prime West, after which time the Fire District also imposed additional fees on the same property. *Id.* The court of appeals held that the PWJ claims “concern a separate act of misconduct directed against a separate plaintiff,” that “[a]llegations of new or different actions of misconduct amount to new claims that cannot relate back to the original complaint,” and, therefore, that the PWJ claims “fail the first element of the identity-of-interest test.” *Id.* at ¶¶ 51-52. The court then affirmed the district court’s ruling that the new claims could not relate back to the original claims under Rule 15(c). *Id.* at ¶ 52.<sup>2</sup>

Following the reasoning and analysis in the *Highlands at Jordanelle* case, it is clear that RADC’s claims do not relate back to Utah First’s original complaint. First, the amended complaints clearly add a new party, RADC, where there was only one plaintiff, Utah First, in the original complaint. RADC’s claims are therefore time barred unless RADC can show that it has a true identity of interest with Utah First, independent of their

---

<sup>2</sup> Having found that the PWJ claims did not meet the first requirement of the identity of interest test, the court did not consider the second requirement. *Id.* at ¶ 52.

connection via the participation agreement.<sup>3</sup>

Next, the first prong of the identity of interest tests requires that Utah First's and RADC's claims arise "out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." At first glance, this appears to be the case. However, it is helpful to review the facts of the *Highlands at Jordanelle* case. There, the fees were all imposed on the same property, and yet the court held that the claims were separate and distinct because the fees were assessed against and paid by separate entities. Here, the claims arise from the same Note. However, Utah First's claims and RADC's claims are separate and distinct because they each own only a percentage of the Note. The original complaint only set forth Utah First's own claims to 52% of the amount due under the Note. Thus, the addition of RADC and its new claims, for its 48% of the amount due under the Note, allege new or different acts of misconduct and therefore cannot relate back to the original complaint.

Further, even if RADC's claims meet the first prong of the identity of interest test, it fails the second prong: the defendants, Dos Lagos, did not receive actual or constructive notice that RADC would have been a proper party to the original pleading such that no prejudice would result from preventing Dos Lagos from using a statute-of-limitations defense that otherwise would have been available. This stems from the simple fact that RADC and Utah First have no connection outside of the purchase agreement, and "privity of contract alone is an insufficient identity of interest for relation back under

---

<sup>3</sup> RADC argues that the "issue of privity of contract does not really apply" to this case, without citing to any case or law that allows it to disregard this important aspect of the identity of interest test. (Brief of Respondent at 14-15.)

rule 15(c).” *Russell v. Standard Corp.*, 898 P.2d 263, 265 (Utah 1995).

RADC’s argument throughout its brief, is that the “complaint has always sought the deficiency for the unpaid Note” and that Dos Lagos has “been on notice since the initial pleading that that was the relief sought.” (Brief of Respondent at 10.) RADC even goes so far as to claim that there “was no attempt to . . . seek a percentage of a deficiency.” (*Id.* at 13.) However, this claim is outright false. RADC seems to have conveniently forgotten that the original complaint, timely filed by Utah First, sought only Utah First’s proportional percentage of the deficiency, not the total amount of the deficiency on the Note. (R. 303-334.) Even RADC admits that the original complaint filed by Utah First “took into account only Utah First’s 52% interest in the Note.” (Brief of Respondent at 8, ¶ 28.) Thus, Dos Lagos has been on notice since the original complaint that Utah First sought a deficiency for its proportional share of the debt. Dos Lagos was not on notice that RADC intended to seek a deficiency for its proportional share of the debt. This is not a “misnomer case” and there is no “true identity of interest” between Utah First and RADC. By failing to bring an action within the time allowed by statute, RADC failed to preserve its claims. Allowing RADC to resurrect its claims now would severely prejudice Dos Lagos.

Second, RADC’s attempts to distinguish the three cases set forth in Dos Lagos’s opening brief are ineffectual. Yes, those three cases deal with the attempted addition of a defendant rather than a plaintiff. And yes, the fact scenarios are different from the one in this case, but there will almost never be two cases with identical facts. The three cases, *Perry v. Pioneer Wholesale Supply Co.*, *Russell v. Standard Corp.*, and *VCS, Inc. v. Utah*

*Community Bank*, all set forth and follow the analysis necessary to determine whether the addition of a new party can relate back to the filing of the original complaint under Rule 15(c). Following that analysis indicates that RADC's claims do not relate back to the filing of the original complaint.

In *Perry*, the claims all arose from some defective doors. *Perry v. Pioneer Wholesale Supply Co.*, 681 P.2d 214, 216 (Utah 1984). The general contractor originally sued the subcontractor and later wanted to bring in the supplier and the manufacturer. The court went through the same analysis. First, it was determined that the supplier and the manufacturer were obviously new parties. *Id.* at 216-217. Next, the court determined whether the new parties had an identity of interest with the original party. It determined that the parties did not have any relationship outside of privity of contract, which is "insufficient" for the purpose of Rule 15(c). *Id.* at 217. The analysis is the same for RADC and Utah First. Set forth in detail above, the short of it is that RADC and Utah First's claims both arose from the Note. However, they do not have any relationship outside of the participation agreement, *i.e.*, privity of contract, which is insufficient for the purpose of Rule 15(c).

In *Russell*, the claims all arose from the publication of one article. *Russell v. Standard Corp.*, 898 P.2d 263, 263-264 (Utah 1995). Having brought claims against two newspapers, the plaintiff sought to bring in another newspaper defendant. The court went through the same analysis. First, the new newspaper was clearly a new party, so the court next determined whether the new newspaper had an identity of interest with the newspapers from the original complaint. Again, the court found that the newspapers,

though they all published the exact same article, did not have any connection outside of contractual agreements, which is, again, “insufficient . . . for relation back under rule 15(c).” *Id.* at 265. Again, the analysis is the same for RADC and Utah First. They lack any connection sufficient to establish an identity of interest.

Finally, in *VCS*, the claims all arose from a construction contract. The contractor sued the developer for payment and later attempted to bring in the financing bank. *VCS, Inc. v. Utah Community Bank*, 2012 UT 89, ¶ 26, 293 P.3d 290. With the financing bank a new party, the court went, as it should have, to the identity of interest analysis. Again, the court found that the developer and the financing bank had no connection sufficient to establish an identity of interest and that “[o]ur precedent accordingly forecloses *VCS*’s assertion that [the two defendants] shared an identity of interest based on their contractual relationship. *Id.* at 27. And again, this is the same analysis (and result) that applies to RADC and Utah First.

In sum, in light of clear Utah law, the amended complaints attempted to add a new party, RADC, and new claims, RADC’s 48% of the deficiency. Those claims cannot relate back to the original complaint, because Utah First and RADC have no true identity of interest. Thus, this Court should reverse the court of appeals and dismiss RADC’s claims against Dos Lagos with prejudice.

**II. IF APPLIED, NEWLY AMENDED RULE 15(C) ALSO INDICATES THAT RADC’S CLAIMS DO NOT RELATE BACK TO THE ORIGINAL COMPLAINT.**

The new version of Rule 15 does not save RADC’s tardy claims. The revised Rule 15(c) went into effect November 1, 2016. The new version adopts the federal rule and

specifically allows for the relation back doctrine to apply to a new party under certain circumstances. Utah R. Civ. P. 15(c) (2016).

Generally, under Utah law, statutes and rules<sup>4</sup> do not “operate retrospectively unless the legislature has clearly expressed that intention” or the statute or rule “changes only procedural law by providing a different mode or form of procedure for enforcing substantive rights without enlarging or eliminating vested rights.” *Beaver Cty. v. Utah State Tax Comm’n*, 2010 UT 50, ¶ 10, 254 P.3d 158 (internal citations and quotations omitted). Thus, a rule may be retroactively applied if it is “enacted subsequent to the initiation of a suit which does not enlarge, eliminate, or destroy vested or contractual rights.” *Id.* (internal citations and quotations omitted).

Here, the approved amendment to Rule 15(c) was explicitly noted to be “effective November 1, 2016.” Utah R. Civ. P. 15(c) (2016). Further, Utah courts have “consistently maintained that the defense of an expired statute of limitations is a vested right.” *Roark v. Crabtree*, 893 P.2d 1058, 1062 (Utah 1995). Since Rule 15(c)’s provisions explicitly apply to the operation of claims in relation to the defense of expired statutes of limitation, the rule is substantive and should not be applied retroactively.

However, even if it is found to be a procedural change and is applied to the facts of this case, the new version of Rule 15(c) essentially codifies the analysis contained in Utah’s cases on the subject. The new provision provides as follows:

(c) Relation back of amendments. An amendment to a pleading relates back to the

---

<sup>4</sup> “[W]e hold that the same substantive analysis may be applied to either statutes or rules in determining the appropriateness of retroactivity.” *Beaver Cty. v. Utah State Tax Comm’n*, 2010 UT 50, ¶ 10 n.5, 254 P.3d 158.

date of the original pleading when:

(c)(3) the amendment adds a party, substitutes a party, or changes the name of the party against whom a claim is asserted, if paragraph (c)(2) is satisfied and if, within the period provided by Rule 4(b) for serving the summons and complaint, the party to be brought in by amendment:

(c)(3)(A) received such notice of the action that it will not be prejudiced in defending on the merits; and

(c)(3)(B) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.

Utah R. Civ. P. 15(c) (2016). Paragraph (c)(2) provides as follows: “the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading.” Utah R. Civ. P. 15(c)(2). Rule 4(b) requires that a complaint be “served no later than 120 days after the complaint is filed.” Utah R. Civ. P. 4(b).

Reduced to its requirements, the new version demands that the following three elements be met, within 120 days of the filing of the original complaint, in order for relation back to apply to a new plaintiff:

- (1) “the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading”;
- (2) defendants “received such notice of the action that it will not be prejudiced in defending on the merits”; and
- (3) defendants “knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party’s identity.”<sup>5</sup>

---

<sup>5</sup> “The relation back of amendments changing plaintiffs is not expressly treated in revised Rule 15(c) since the problem is generally easier. Again the chief consideration of policy is that of the statute of limitations, and the attitude taken in revised Rule 15(c) toward

Utah R. Civ. P. 15(c). In considering these requirements, many courts use an identity of interest test similar to that employed in the Utah cases. *See, e.g., Young v. Lepone*, 305 F.3d 1, 14 (1st Cir. 2002); *In re Syntex Corp. Sec. Litig.*, 95 F.3d 922, 935 (9th Cir. 1996).

In *Young v. Lepone*, the court considered whether individual shareholders of a corporation had a sufficient identity of interest to permit relation back under the federal rule. The court followed a similar analysis to those in the Utah cases discussed above, ultimately found that the shareholders did not have an identity of interest, and explicitly rejected the argument that notice of an action by one plaintiff extended notice of an action by a separate plaintiff:

We repudiate the conceit that an action filed by one plaintiff gives a defendant notice of the impending joinder of any or all similarly situated plaintiffs. Such a rule would undermine applicable statutes of limitations and make a mockery of the promise of repose. We, like other courts, flatly reject the proposition that relation back is available merely because a new plaintiff's claims arise from the same transaction or occurrence as the original plaintiff's claims.

*Young*, 305 F.3d at 15–16. The court acknowledged that the language in the federal rule does not explicitly apply to adding new plaintiffs but noted that “it suggests that when a new plaintiff attempts to enter a pending action under the aegis of Rule 15(c)(3), courts should require substantial structural and corporate overlap to ensure that the defendant is not called upon to defend against new facts and issues.” *Id.* at 15. Reaching the merits of the issue, then, the court held that “[p]ersons who are identified with each other only by

---

change of defendants extends by analogy to amendments changing plaintiffs.” Fed. R. Civ. P. 15 (1966 Advisory Committee Notes).

their ownership of stock in the same publicly-traded corporation share some of the same rights, but that fact, standing alone, does not place them in the kind of proximity needed to invoke Rule 15(c)(3).” *Id.*

The three requirements of the new Rule 15(c), as it relates to relation back of new parties and as interpreted by federal courts, mirrors the requirements of Utah law discussed above. It therefore follows that the result is the same: RADC does not qualify for relation back. Like the shareholders in *Young*, RADC and Utah First are identified with each other only by their ownership in the same note. They share some of the same rights, but that fact, standing alone, does not place them in the kind of proximity needed to invoke Rule 15(c).

### **III. THE COURT OF APPEALS ERRED WHEN IT AFFIRMED RADC’S JUDGMENT OF 100% OF THE AMOUNT DUE.**

Both equitable principles and contractual provisions indicate that any judgment awarded to RADC must be limited to RADC’s 48% ownership interest in the Note.

Equitably, it makes little sense to award RADC a judgment for 100% of the deficiency left on the Note, when it owns only a 48% interest in that Note. As noted in Petitioner’s opening brief, RADC’s 48% share of the amount due on the Note is approximately \$1,644,816.92, and where RADC received the foreclosed property worth \$1,510,000.00, RADC is left with just \$134,816.92 owed to it. In this context, awarding RADC judgments of almost \$3 million is inequitable. RADC, of course, argues that it is accountable to Utah First for any funds it collects in excess of the amount due to it. However, this is inequitable too, where Utah First lost its motion for summary judgment

and dismissed its claims against Dos Lagos.

Further, contractual provisions, found in the Business Loan Agreement and the Participation Agreement, indicate that RADDC must be limited to its 48% share of the Note. RADDC hangs its hat on language that a loan participant “may enforce borrower’s obligation under the loan irrespective of failure or insolvency of any holder of any interest in the loan.” (R. 771.) There are two problems with reliance on this provision alone. First, the condition in the provision has not been met: Utah First has not failed or become insolvent. Second, when read in the context of other provisions, it becomes clear that a participant may enforce the borrower’s obligation only up to its percentage of ownership. Here is the provision in full:

Consent to Loan Participation. Borrower agrees and consents to Lender’s sale or transfer, whether now or later, of one or more participation interests in the Loan to one or more purchasers, whether related or unrelated to Lender. Lender may provide, without any limitation whatsoever, to any one or more purchasers, or potential purchases, any information or knowledge Lender may have about Borrower or about any other matter relating to the Loan, and Borrower hereby waives any rights to privacy Borrower may have with respect to such matters. Borrower also agrees that the purchasers of any such participation interests will be considered as the absolute owners of such interest in the Loan and will have all the rights granted under the participation agreement or agreements governing the sale of such participation interests. Borrower further waives all rights of offset or counterclaim that it may have now or later against Lender or against any purchaser of such a participation interest and unconditionally agrees that either Lender or such purchaser may enforce Borrower’s obligation under the Loan irrespective of the failure or insolvency of any holder of any interest in the Loan. Borrower further agrees that the purchaser of any such participation interests may enforce its interests irrespective of any personal claims or defenses that Borrower may have against Lender.

(R. 771 (emphasis added).) When read in context, it becomes clear that a loan participation agreement cleaves the Note in two (or more) pieces. A participant “may

enforce *its* interests,” and the participant, as an “absolute owner” of its percentage ownership interest, may do so “irrespective of any personal claims or defenses that Borrower may have against Lender.”<sup>6</sup> Thus, the participant’s rights are conceptually separate from those of the original lender.

Further, the participation agreement limits American West Bank’s (and therefore RADC’s) participation to the principal amount of “\$1,200,000.00.” (R. 556.) RADC collected more than that when it obtained the foreclosed property, and the district court’s judgments grant RADC the right to collect almost an additional \$3 million. The judgments violate the clear contractual provisions governing the parties.

This court should therefore reverse the holding of the court of appeals and hold that RADC is entitled to only its pro rata share of the loan.

---

<sup>6</sup> Again, as the drafter of the agreements, any ambiguities are construed against America West Bank and its successor, RADC. *See, e.g., Express Recovery Servs., Inc. v. Rice*, 2005 UT App 495, ¶ 3, 125 P.3d 108.

## CONCLUSION

Therefore, Petitioners respectfully request that this Court reverse the court of appeals, dismiss RADC's claims as untimely, set aside RADC's judgments, and award Petitioners their attorneys' fees and costs pursuant to both statute and the contracts at issue in this case.

RESPECTFULLY SUBMITTED this 18th day of November 2016.

DURHAM JONES & PINEGAR

/s/ Douglas B. Thayer  
Douglas B. Thayer  
Andy V. Wright  
*Attorneys for Petitioners*

## CERTIFICATE OF SERVICE

I hereby certify that, on the 18th day of November 2016, two true and correct copies of the foregoing **REPLY BRIEF OF PETITIONERS** were served via U.S. Mail, postage prepaid, to the following:

Richard C. Terry (3216)  
Douglas A. Oviatt (12192)  
**TERRY JESSOP & BITNER**  
341 South Main Street, Suite 500  
Salt Lake City, Utah 84111  
Telephone (801) 534-0909  
Facsimile (801) 534-1948  
[richard@tjblawyers.com](mailto:richard@tjblawyers.com)  
[doug@tjblawyers.com](mailto:doug@tjblawyers.com)

/s/ Kim Altamirano

## CERTIFICATE OF COMPLIANCE

Petitioners, through counsel and pursuant to Rule 24 of the Utah Rules of Appellate Procedure, hereby certify that the Reply Brief of Petitioners complies with the type-volume limitation of Rule 24(f)(1) of the Utah Rules of Appellate Procedure. Specifically, the Reply Brief of Petitioners contains 3,927 words (according to the word count feature in Microsoft Word), exclusive of the cover page, table of contents, table of authorities, certificate of service, and this certificate of compliance.

DATED this 18th day of November 2016.

DURHAM JONES & PINEGAR

/s/ Douglas B. Thayer  
Douglas B. Thayer  
Andy V. Wright  
*Attorneys for Petitioners*