

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

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IN THE UTAH SUPREME COURT

FILED  
UTAH APPELLATE COURTS

OCT 21 2016

2010-1 RADC/CADC Venture, LLC, as  
successors in interest to America West  
Bank,

Plaintiff and Appellee,

v.

DOS LAGOS, LLC, a Utah limited  
liability company, MELLON VALLEY,  
LLC, a Utah limited liability company,  
ROLAND NEIL FAMILY LIMITED  
PARTNERSHIP; ROLAND N.  
WALKER, an individual and SALLY  
WALKER, an individual,

Defendants and Appellants

**BRIEF OF APPELLEE**

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

*Oral Argument Requested*

Appeal from the Court of Appeals

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## JURISDICTION

The Utah Supreme Court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78A-3-102(3)(a).

## STATEMENT OF THE ISSUES

This is an appeal of the Utah Court of Appeals' affirmation of the entry of summary judgment in favor of Appellee 2010-1 RADC CADC Venture, LLC ("RADC"). As stated by the Appellants, the issues before this Court are:

**Issue I:** Whether the court of appeals erred in concluding Appellee 2010-1 RADC/CADC Venture's claims against Appellant could be deemed to relate back to the filing of a complaint by another party under the provisions of Rule 15(c) of the Utah Rules of Civil Procedure.

**Issue II:** Whether the court of appeals erred in affirming the district court's award of 100% of the amount due on the note to Respondent 2010-1 RADC CADC Venture after determining Petitioner's argument was inadequately briefed.

**Standard of Review:** The standard of review for both issues is that of correctness, or *de novo*, to determine whether the Court of Appeals "accurately reviewed the trial court's decision under the appropriate standard of review." *Clark v. Clark*, 2001 UT 44, ¶ 8, 27 P.3d 538. This Court reviews the issues without deference to the trial court's legal conclusions, and considers the facts and all reasonable inferences therefrom in the light

most favorable to the non-moving party. *R & R Indus. Park, L.L.C. v. Utah Prop. & Cas. Ins. Guar. Ass'n*, 2008 UT 80, ¶ 18, 199 P.3d 917, 922.

### **DETERMINATIVE PROVISIONS OF THE LAW**

1. *Utah Code Ann. § 57-1-32. Sale of trust property by trustee -- Action to recover balance due upon obligation for which trust deed was given as security -- Collection of costs and attorney's fees.*

At any time within three months after any sale of property under a trust deed as provided in Sections 57-1-23, 57-1-24, and 57-1-27, an action may be commenced to recover the balance due upon the obligation for which the trust deed was given as security, and in that action the complaint shall set forth the entire amount of the indebtedness that was secured by the trust deed, the amount for which the property was sold, and the fair market value of the property at the date of sale. Before rendering judgment, the court shall find the fair market value of the property at the date of sale. The court may not render judgment for more than the amount by which the amount of the indebtedness with interest, costs, and expenses of sale, including trustee's and attorney's fees, exceeds the fair market value of the property as of the date of the sale. In any action brought under this section, the prevailing party shall be entitled to collect its costs and reasonable attorney fees incurred.

2. *Utah R. Civ. P. 15(c). Relation back of amendments.*

Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

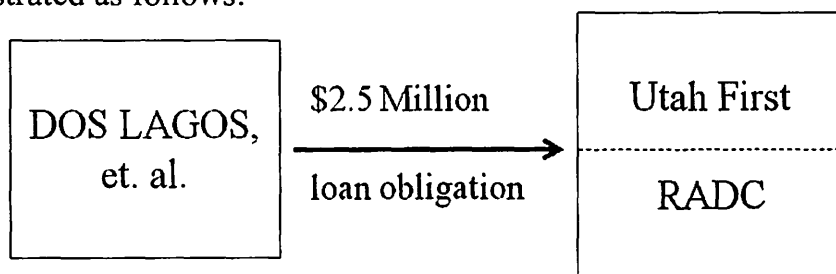
### **STATEMENT OF THE CASE**

RADC is collecting the deficiency judgment following foreclosure of a loan in the amount of \$2.5 million. Utah First Federal Credit Union ("Utah First") timely filed the deficiency action. Appellants, the makers and guarantors of the loan, seek to avoid the payment of the judgment on procedural grounds, arguing that RADC should have been added



as a plaintiff to the deficiency action much sooner than it was. Appellants further argue that even if RADC's entry into the lawsuit was timely, Appellants should not have to repay 100% of the debt to RADC because it only owns a 48% interest in the loan.

There is only one loan at issue. It was secured by one trust deed and it is the subject of this single deficiency action. The participation agreement determines which participants are entitled to what percentage of the loan payments. It does not divide the loan in two. It does not give the Appellants the right to pay 52% to Utah First, and 48% to RADC. Rather, Appellants are obligated to repay *the loan*. The loan obligation, and the relationship of the parties is illustrated as follows:



The matter was presented to the district court on dispositive motions for summary judgment filed by Utah First, RADC, and Appellants. The district court denied the motions filed by Utah First and Appellants but granted the motion filed by RADC. (R. 826-838.) In connection with Utah First's voluntary dismissal of its claims, the Court entered final judgment for the entire deficiency against the Appellants. (R. 936-939; *see also* R. 991-993, and 1097-1101.) Appellants first appealed to the Court of Appeals which affirmed the ruling of the district court and now seek review of the decision of the Court of Appeals.

## STATEMENT OF RELEVANT FACTS

1. In 2007, Dos Lagos, LLC and Mellon Valley, LLC entered into a business loan agreement with America West Bank (hereinafter “**Loan Agreement**”). (*See* R. 827; *see also* copy of Loan Agreement at R. 768.) A courtesy copy of the Loan Agreement is attached as Addendum A.

2. The Loan Agreement states that the Lender may “sell, transfer, assign or grant participations in all or any part of the loan. . . .” (R. 768.) The Loan Agreement also states, “Borrower further . . . unconditionally agrees that either lender or such purchaser may enforce borrower's obligation under the loan irrespective of failure or insolvency of any holder of any interest in the loan.” (R. at 771.)

3. The amount of the Loan was \$2,500,000.00 (hereinafter the “**Loan**”). (*See* R. 827; *see also* copy of Note at R. 774.)

4. The Roland Neil Family Limited Partnership, Roland Walker, and Sally Walker, each personally guaranteed the Loan. (*See* Personal Guarantees, R. 776-778.)

5. On December 6, 2007, America West Bank entered into a loan Participation Agreement (hereinafter “**Participation Agreement**”) with Utah First Federal Credit Union (hereinafter “**Utah First**”), wherein Utah First became a participant in the Loan with an undivided 52% interest, and America West Bank retained an undivided 48% interest. (*See* R. 827; *see also* Participation Agreement, R. 555-559. A courtesy copy of the Participation Agreement is attached as Addendum B.)

6. On or about November 13, 2007, Utah First sent a letter to Defendant Roland Walker, informing him that, prior to closing the loan, Utah First had purchased “a participation in the loan,” and asking him to sign a membership form to become a member of the credit union. (*See* R. 724.) Mr. Walker signed the application and became a member. (*See* R. 726-727.)

7. On December 5, 2008, Dos Lagos, LLC and Mellon Valley, LLC executed a Change in Terms Agreement, which restated, modified and extended their promissory note (hereinafter “**Note**”) with America West Bank. (*See* R. 827; *see also* copy of Change in Terms Agreement, R. 313.)

8. The Revolving Credit Deed of Trust (hereinafter “**Deed of Trust**”) on the real property securing the Note named America West Bank as beneficiary and trustee. (*See* R. 827; *see also* copy of Deed of Trust at R. 317.)

9. On May 1, 2009, the FDIC closed America West Bank and seized its interest in the Note. (*See* R. 827.)

10. Between May and December 2009, the FDIC sent Dos Lagos multiple letters, notifying them that their Loan with America West Bank was in default, and requesting payment. (*See* R. 827.)

11. In 2010, the FDIC auctioned and sold America West Bank's interest in the Note to RADAC. (*See* R. 828.)

12. The FDIC subsequently assigned and transferred the Deed of Trust to RADC.  
(See R. 828.)

13. On or about August 26, 2010, Dos Lagos, LLC and Mellon Valley, LLC were informed via letter that their Loan had been transferred from America West Bank to RADC.  
(See Letter from FDIC, R. 213.)

14. In the Fall of 2010, a Notice of Trustee's Sale was posted at the property securing the Note and published in a newspaper of general circulation. (See R. 828.)

15. On December 3, 2010, a Substitution of Trustee was recorded at the Washington County Recorder's Office naming Marlon L. Bates as the successor trustee under the Deed of Trust. (See R. 828.) The Senior Vice President of Utah First signed the Substitution of Trustee. (See R. 215.)

16. On December 6, 2010, the property securing the Note was sold at a trustee's sale (hereinafter "**Trustee's Sale**") for \$1,060,000.00 to the highest bidder, who was RADC.  
(See R. 828.)

17. The value of the property securing the Note was \$1,510,000.00 at the time of the Trustee's Sale. (See R. 828.)

18. On December 6, 2010, the outstanding payoff balance on the Deed of Trust was \$3,426,701.91. (See R. 828.)



19. On January 14, 2011, Utah First filed the subject deficiency action (hereinafter “**Original Complaint**”), intending to recover the difference between the entire debt under the Note and the value of the property. (*See* R. 1; *see also* R. 828.)

20. Utah First was the only plaintiff when the case was first filed. (*See* R. 1.) Utah First is not a party to this appeal.

21. On June 24, 2011, Dos Lagos filed a motion to dismiss pursuant to Rule 17(a). (R. 180.) It argued that Utah First was not the real party in interest because the Loan was transferred from America West Bank to RADC, who was not named in the Original Complaint. (*See* R. 183-203.)

22. Utah First subsequently filed a motion for leave to amend complaint, along with a proposed first amended complaint (hereinafter the “**First Amended Complaint**”). (R. 233.)

23. The First Amended Complaint proposed to add RADC as a party plaintiff and indicated that pursuant to a loan participation agreement entered by Utah First and RADC’s predecessor, America West Bank, Utah First received an undivided 52% interest in the Note, and America West Bank received an undivided 48% interest. (R. 303-311; *See also* 426-427.)

24. The First Amended Complaint indicated that the FDIC auctioned and sold America West Bank’s 48% undivided interest to RADC. (*See* R. 303, 305-306.)

25. On September 7, 2011, Dos Lagos stipulated to allow the First Amended Complaint. (R. 274-275.)

26. The First Amended Complaint was filed on November 15, 2011, adding RADC to the case as a party plaintiff. (R. 303.)

27. The Original Complaint mistakenly alleged a total indebtedness of only \$1,819,774.97 as of the Trustee's Sale. (*See* R. 3; *see also* R. 550-551.)

28. The alleged indebtedness of \$1,819,774.97 inadvertently took into account only Utah First's 52% interest in the Note, and failed to allege the remaining 48% interest in the Note. (*See* R. 550-551.)

29. When the First Amended Complaint was filed, Utah First and RADC inadvertently neglected to amend the amount of indebtedness to take into account the other 48% interest in the Note. (*See* R. 525.)

30. The indebtedness attributable to Utah First's 52% interest, \$1,819,774.97, plus the indebtedness attributable to RADC's 48% interest, \$1,606,926.94, equaled the actual payoff balance for the Note in the amount of \$3,426,701.91 as of December 6, 2010, the date of the Trustee's Sale. (*See* R. 524 and 833.)

31. On June 29, 2012, Utah First and RADC filed another motion for leave to amend complaint along with a proposed second amended complaint (hereinafter the "**Second Amended Complaint**"), to amend the total amount of alleged indebtedness to be \$3,426,701.91, the true payoff amount as of the Trustee's Sale. (R. 502; 626.)

32. Dos Lagos did not object to the Second Amended Complaint. (R. 836.)

33. The district court granted leave to amend, and the Second Amended Complaint was filed on September 7, 2012. (R. 633; 635.)

34. On April 25, 2013, the district court granted RADC's motion for summary judgment and awarded RADC the total deficiency amount. (R. at 826, 932, 936.)

### **SUMMARY OF ARGUMENTS**

The Court of Appeals correctly found that the amendment adding RADC as a plaintiff to the deficiency action satisfied the test for relation back under Rule 15(c). The claims were the same as alleged in the Original Complaint, which was sufficient notice to Appellants that they were being sued for failing to repay the Loan.

Furthermore, the cases cited by Dos Lagos for the proposition that contractual privity alone is insufficient to establish an identity of interest for the purposes of relation back, are all distinguishable. Contrary to those cases, which involve multiple parties and/or multiple contracts, Dos Lagos and the other defendants signed one loan which was subject to foreclosure and collection by either of the participant lenders. The judgment awarded to RADC is the deficiency, the difference between the debt owed on the Note and the fair market value of the property. The procedure in arriving at the judgment in favor of RADC did not create two debts owed to two parties. The addition of RADC as a party plaintiff did not prejudice Dos Lagos because it relates back to the filing date of the Original Complaint under Rule 15(c).

Next, Appellants argue that judgment should not have been entered in favor of RADC for the entire amount because RADC only holds a 48% interest in the loan. The Court of Appeals correctly held that Appellants failed to fully brief this issue. Indeed, Appellants concede that even now they have no legal authority to support their position. RADC is the only judgment creditor for the full deficiency. Dos Lagos is not prejudiced where it is obligated to repay the entire debt, regardless of which participant is pursuing it. By entering the Loan Agreement, Dos Lagos agreed that the involvement of a participant would not affect its liability under the Note or Deed of Trust. The complaint has always sought the deficiency for the unpaid Note. Defendants have been on notice since the initial pleading that that was the relief sought.

### **ARGUMENT**

#### **I. THE ADDITION OF RADC AS A PARTY RELATES BACK TO THE ORIGINAL COMPLAINT.**

After filing its deficiency action, Utah First added RADC as a party-plaintiff in response to Appellants' motion to dismiss, which alleged that Utah First was not the real party in interest. (*See* R. 180.) Appellants' premised their motion on the idea that they were prejudiced by the omission of RADC. (*See* R. 183-203.) Appellants then stipulated to allow Utah First to add RADC as a plaintiff. (R. 274-275.)

Although the filing of the First Amended Complaint occurred more than three months after the foreclosure sale, it related back to the filing of the Original Complaint pursuant to



Rule 15(c) of the *Utah Rules of Civil Procedure*. Rule 15(c) provides for the amendment of pleadings so long as the facts and claims in the amended pleading arise out of the same transaction or set of circumstances which gave rise to the original pleading. *See URCP 15(c)*. A core purpose of Rule 15 is to allow “a plaintiff to cure defects in his or her original complaint despite the intervening running of a statute of limitations.” *Russell v. Standard Corp.*, 898 P.2d 263, 265 (Utah 1995) (citation omitted). While Rule 15(c) does not expressly apply to amendments adding a party to the case, this Court has extended the rule to amendments where there is an “identity of interest” between the parties. *Wright v. PK Transport*, 2014 UT App 92, ¶ 5, 325 P.3d 894.

**A. Appellants are not Prejudiced Where the New Party is Pursuing the Same Debt.**

The “identity of interest” standard is designed to protect unknowing parties from being added to litigation after the applicable statute of limitations has passed. This exception was first set forth in Utah in *Doxey-Layton Co. v. Clark*, 548 P.2d 902, 906 (Utah 1976). In *Doxey-Layton*, this Court explained that the “exception operates . . . when new and old parties have an identity of interest; so it can be assumed or proved the relation back is not prejudicial.” *Id.* The exception avoids the “mechanical use of a statute of limitations” to prevent adjudication of a claim. *Id.*<sup>1</sup> The *Doxey-Layton* court further explained that this

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<sup>1</sup>This exception has been explained in the federal context as follows: “As long as defendant is fully apprised of a claim arising from specified conduct and has prepared to defend the action, defendant's ability to protect itself will not be prejudicially affected if a new plaintiff is added, and defendant should not be permitted to invoke a limitations

exception is valid in cases where the real parties in interest are “sufficiently alerted to the proceedings, or were involved in them unofficially, from an early stage.” *Id.* As noted with regard to the federal corollary to Utah’s Rule 15(c), “[n]otice is the critical element involved in Rule 15(c) determinations.” *Williams v. United States*, 405 F.2d 234, 236-237 (5th Cir. 1968).

In the wake of the *Doxey-Layton* opinion, courts have employed a two-part test to determine the applicability of the identity of interest exception to the statute of limitations. To satisfy the first prong of the test, one must show the claims alleged in the amended pleading arise out of the same “conduct, transaction, or occurrence” described in the original pleading. *Wright v. PK Transport*, at ¶ 5; *Ottens v. McNeil*, 2010 UT App 237, ¶ 43, 239 P.3d 308; *Highlands at Jordanelle, LLC, v. Wasatch County*, 2015 UT App 173, ¶ 48, 355 P.3d 1047; *Gary Porter Constr. v. Fox Constr., Inc.*, 2004 UT App 354, ¶ 32, 101 P.3d 371. The second prong requires that one establish that the *added* party had either actual or constructive notice “that it would have been a proper party to the original pleading such that no prejudice would result from preventing the *new* party from using a statute of limitations defense” they could have used otherwise. *See id.*

Both elements are present in this case. While the Original Complaint was amended at times to clarify parties and dollar amounts, the core facts remained the same. The

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defense.” 6A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice and Procedure: Civil*, 3d, § 1501 at 212–22 (2010) (analyzing the applicability of Federal Rule of Civil Procedure 15(c)).

complaint and its subsequent amendments only ever sought to collect the deficiency on the Note from the Appellants in the wake of the foreclosure of the Trust Deed. As an interest holder in the Loan, RADC was a proper party to the original proceeding. The Participation Agreement expressly gave Utah First the right to direct the collection of the debt. (R. 555-559; *see also* Addendum B.) Utah First initially pursued the deficiency action in its own name, but then added RADC in response to Appellants' motion to dismiss. Appellants were not prejudiced by the addition of RADC under these circumstances. Indeed, Appellants allowed the amendment because they thought they were prejudiced *without* RADC as a party. The Appellants had actual notice that they were being sued for the deficiency from the outset, thus establishing the required identity of interest. *See Ottens*, at ¶¶ 43-44.

**1. Appellants Had Sufficient Notice That They Were Defending the Entire Deficiency.**

Both the Court of Appeals and the District Court concluded that there is only one transaction here. Neither the Original Complaint nor any of its amendments discuss two notes, two parties or two sets of collateral. There was no attempt to foreclose a percentage of the collateral or seek a percentage of a deficiency. Indeed, attempting to do so might be a violation of Utah's one-action rule. *See* Utah Code Ann. §78B-6-901. Utah First commenced and completed the foreclosure while America West Bank was in the throes of receivership with the FDIC. Appellants had actual knowledge of the Participation Agreement and they knew about the eventual conveyance of America West Bank's interest in the loan

to RADC. (*See* R. 213 and 724.) In the meantime, Utah First credited the full purchase price of the property to the outstanding debt in connection with the foreclosure. Consequently, there is only one interest at issue here. It is the remaining debt after applying the sale proceeds.

**B. Where Two Parties Hold the Same Interest, the “Privity of Contract”**

**Limitation on Identity of Interest does not Apply.**

The Court of Appeals concluded that, “There is perhaps no closer identity of interest than that shared by two parties who are joint holders of the same note.” *2010-1 RADC/CADC Venture, LLC v. Dos Lagos, LLC*, 2016 UT App 89, ¶13, 272 P.3d 683. Appellants claim this interest is simply privity of contract and is insufficient for purposes of relation back under Rule 15(c). This argument misconstrues the “identity of interest” doctrine.

Utah’s appellate courts have held that: “[p]arties have an identity of interest when the real parties in interest were sufficiently alerted to the proceedings, or were involved in them unofficially, from an early stage.” *Sweat v. Boeder*, 2013 UT App 206, ¶ 13, 309 P.3d 295. Appellants cite to *Perry v. Wholesale Supply Corp.*, 681 P.2d 214 (Utah 1984), which states that “an ‘identity of interest’ exists where the parties are so closely related in their business operations that notice of the action *against* one serves to provide notice of the action to the other.” *Perry* at 217 (emphasis added). Almost all of the cases interpreting Rule 15(c) deal with the addition of party defendants and the analysis of whether or not they had sufficient notice of the proceeding to deny them their statute of limitations defense. Because RADC



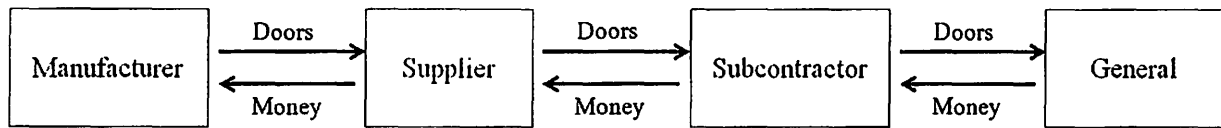
was added as a plaintiff on the same Note and the same causes of action, and because Appellants were on notice throughout the process that only one loan was in default and being enforced against them, the issue of privity of contract does not really apply.

**1. The Cases Cited by Appellants are Distinguishable.**

Nevertheless, Appellants cite several cases holding that privity of contract is insufficient, by itself, to support relation back of an amended complaint adding new parties. These cases are distinguishable from the present case. Each of the cases concerns the addition of defendants rather than plaintiffs, which is different from this case, where Utah First sought to add a co-plaintiff. More importantly, in each case there was no basis to find that notice of the action to the original defendant(s) equated to notice to the late-added defendant(s). Based on these and other distinctions, the cases are of little help to Appellants.

In *Perry v. Pioneer Wholesale Supply Co.*, a general contractor sued a subcontractor, Perry, with respect to defective doors. *Perry*, at 216. Three years after the case was filed, and after the statute of limitations had expired, Perry filed a third-party complaint, naming the supplier and manufacturer of the doors as third party defendants. *Id.* The case was dismissed pursuant to the applicable statute of limitations and Perry appealed. *Id.* Relying upon *Doxey-Layton*, this Court affirmed the dismissal on the grounds that the only relationship between the parties was contractual. *Id.*, at 217. This Court found that the contracts were insufficient to establish an identity of interest such that notice of the suit against the subcontractor was notice to either the supplier or the manufacturer. This stands to reason as the supplier and

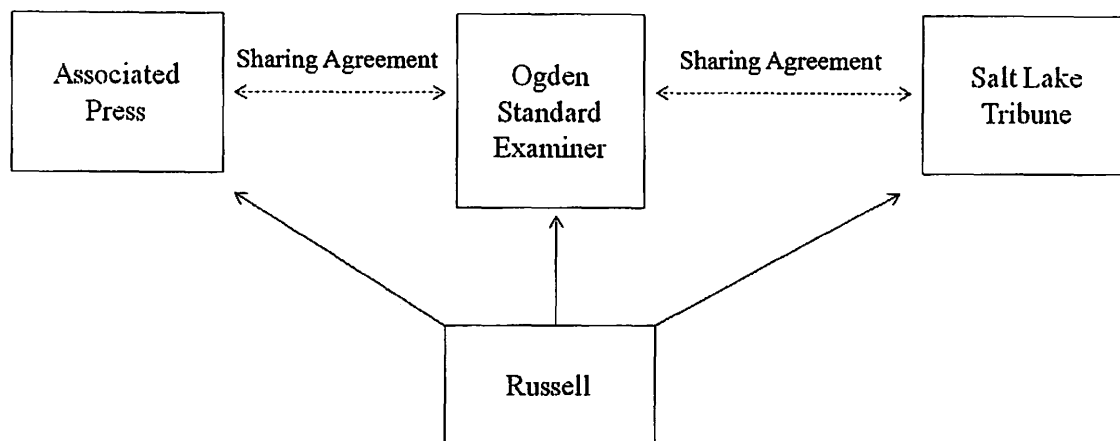
manufacturer were two or three steps removed from the general contractor as shown here:



This diagram is far different from the relationship between Appellants and their participant lenders. Here, there is only one loan agreement evidenced by one Note and one Trust Deed. Either of the participant lenders could have foreclosed and pursued the deficiency. The fact that RADC was added more than three months after the foreclosure sale changed nothing. Appellants were still being sued for the same debt resulting from the same foreclosure.

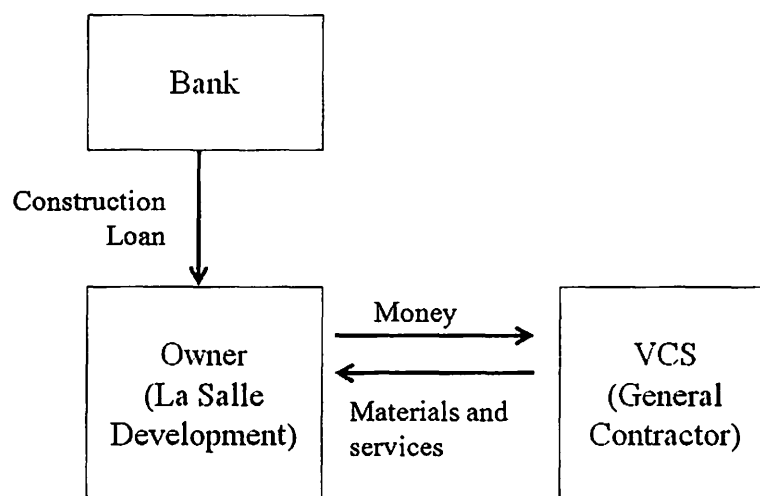
Appellants also cite to *Russell v. Standard Corp.*, 898 P.2d 263 (Utah 1995). In *Russell*, plaintiff filed a libel suit against The Associated Press and The Salt Lake Tribune in response to an article they published which had originated with the Ogden Standard Examiner. *Id.* A few months later, plaintiff amended the complaint to add Standard Corp., as a Defendant based on the fact that the Standard Examiner was the original publisher of the article. *Id.* at 264. The trial court dismissed the amended complaint based on the expiration of the statute of limitations. *Id.* That decision was affirmed by this Court, which again found that the simple contractual relationship between Standard Corp., The Associated Press and The Salt Lake Tribune, allowing each of them to share and publish each other's stories, was not enough to show that service of the complaint on the original defendants was sufficient to notify Standard Corp., of the action. *Id.* at 265. The relationship between Russell and the

publishing companies is illustrated like this:



Three different publishing entities who may or may not publish each others stories does not create an identity of interest. This case at bar is different than *Russell*. Here, Utah First and RADC each have an ownership interest in the same loan. Foreclosure by one constitutes foreclosure by the other, and repayment of the loan to one constitutes repayment of the loan to the other, at least as far as the Appellants are concerned.

The final case cited by Appellants is *VCS, Inc., v. Utah Community Bank*, 2012 UT 89, 293 P.3d 290. In *VCS*, the plaintiff sued to foreclose a mechanic's lien. *Id.*, at ¶ 2. *VCS, Inc.*, initially sued the general contractor but failed to name Utah Community Bank (the "Bank") and also failed to file a lis pendens within 180 days as required by statute. *Id.*, at ¶¶ 2, 29. *VCS* subsequently named the Bank as a defendant in an amended complaint. *Id.* at ¶ 9. The trial court ultimately dismissed the claim against the Bank, holding that the mechanic's lien was void as to the Bank and once again, this Court affirmed that decision. *Id.* It is easy to see why in the following diagram, as the Bank was a step removed from *VCS*.



As in the other cases, VCS argued that Rule 15(c) saved the late addition of new defendants by relating the amendment back to the filing of the original complaint, and just as the other cases, this Court rejected that argument. *Id.*, at ¶¶ 26-29. This Court explained that there was no “identity of interest” between the owner and the Bank based solely on their contractual relationship as borrower and lender. *Id.* at ¶¶ 29. This makes sense. Indeed, it is difficult to imagine how a borrower and lender could ever have an identity of interest for the purposes of relation back under Rule 15(c), as their interests are potentially adverse.

## 2. The Case of *Highlands at Jordanelle* is Also Distinguishable.

Each of the cases cited by Appellants concerns the addition of defendants. RADDC has found only one case in Utah dealing with the addition of a plaintiff under Rule 15(c). The recently-decided case of *Highlands at Jordanelle, LLC v. Wasatch County*, 2015 UT App 173, 355 P.3d 1047, is illustrative of the applicability of Rule 15(c) when adding a plaintiff rather than a defendant. In *Highlands*, a plaintiff, Pigeonhole Development, LLC (“PHD”),

who had purchased causes of action against the defendants, filed suit on one of its claims as successor in interest to the original claim holder, Prime West Jordanelle, LLC (“Prime West”). *Id.*, at ¶ 47. PHD filed its complaint prior to the running of the statute of limitations. *Id.* Later, PHD attempted to amend its complaint to add subsequently purchased claims from a different claim holder, PWJ Holdings, LLC (“PWJ”), once again suing as successor in interest. *Id.* The Plaintiff argued that the amendment, though made after the expiration of the statute of limitations, should relate back to the original complaint. *Id.*, ¶¶ 47-50. The trial court rejected the argument on the basis that the amendment sought to add a plaintiff, PWJ, and that PHD, as successor in interest to Prime West, did not share an identity of interest with PHD as successor in interest to PWJ. *Id.* On appeal, the Court of Appeals affirmed the trial court’s decision, finding there was no “identity of interest”. *Id.* The Court of Appeals applied the two-part test from *Ottens* and determined that the claims of PWJ did not arise from the same transaction or occurrence that gave rise to claims in the original complaint, and therefore, there was no “identity of interest”. *Id.*, at ¶ 51.

Unlike *Highlands*, which involved two separate claims held by two separate creditors, there are two participant lenders on the same debt in this case. Appellants’ claims that they were not on notice that they were facing enforcement of the full debt are without merit. Appellants were party-defendants at the beginning of the action foreclosing one promissory note. When the torch to pursue that deficiency action was tossed from one plaintiff to another, the defendants were never prejudiced.



**II. THERE IS NO ERROR WHERE THERE IS ONLY ONE NOTE AND ONE DEFICIENCY JUDGMENT: APPELLANTS MUST REPAY THE ENTIRE DEBT.**

Appellants concede they have no legal authority for the argument that all the owners of a single note, secured by a single piece property must all appear as party-plaintiffs to collect that obligation and that each owner may only recover his or her respective interest from the debtor. Appellants suggest that allowing one of the owners to sue on a note without all of the others creates a windfall, in this case to RADC. There is no windfall. The Participation Agreement says that if one party receives payment on the loan though a setoff, that party is required to pay to the other participant its pro-rata share of the payment. (R. at 789, *see also* Addendum B.) Thus, although RADC is the recipient of the judgment in this case, RADC is contractually bound to split any amount collected with Utah First.

In reality, Appellants seek a “windfall” through relief from liability to 52% of the debt. In making its ruling, the Court of Appeals noted the dissonance between Appellants’ claim that the district court’s decision “cited no law” and the lack of any legal authority cited by Appellants demonstrating that decision was in error. *2010-1 RADC/CADC Venture, LLC v. Dos Lagos, LLC*, ¶21. The Court of Appeals found that the debt at issue stemmed from a single note, secured by a single piece of property and that following the foreclosure of that property there remained a single deficiency, owed by Appellants. *Id.*, ¶ 13. The issue of to whom and in what amounts that debt is ultimately paid is irrelevant to the issue of whether Appellants owe it.

Appellants attempt to use the fact that RADC and Utah First share a specified percentage interest in the loan as evidence that each may only sue for their respective portions. The argument misconstrues the nature of the Participation Agreement, which provides as follows:

Participant's participation hereunder shall be in the form of an undivided 52% interest in the Loan...provided however the maximum principal amount of Participant's participation hereunder shall in no event be in excess of \$1,300,000. Lead Banks participation hereunder shall be in the form of an undivided 48% interest in the Loan . . . provided however the maximum principal amount of Participant's participation hereunder shall in no event be in excess of \$1,200,000. (R. at 787, emphasis added.)

The percentages are undivided, similar to an undivided interest in land shared by co-tenants. The percentages are used to determine what portion of the loan principal each participant is obligated to provide as well as for calculation of the division of the payments. While each participant may sell its respective interest in the loan to other parties, the underlying loan stays intact as a single obligation to be paid by the Appellants.

Appellants also misinterpret the provision of the agreement which allows a participant to enforce its agreement independently to mean that it may only sue for and receive judgment for its respective interest under the note. In cases where, as here, there is real property securing the note, that property must be foreclosed prior to any suit on the note. *See Utah Code Ann. § 78B-6-901.* The Participation Agreement allows for one participant to enforce the debt rather than having to wait for other participants to get on board, which might be

difficult or impossible if someone cannot be found, or, as happened here, the entity has been closed by the FDIC and its interests are being sold off. In addition, the Loan Agreement says:

**Borrower further . . . unconditionally agrees that either lender or such purchaser may enforce borrower's obligation under the loan irrespective of failure or insolvency of any holder of any interest in the loan. (R. at 771, emphasis added).**

In the event one participant is unable to enforce the loan against a defaulting borrower, the other participant is authorized to do so. That is what happened. Utah First, as the majority interest holder, is also entitled to determine how enforcement of the loan should proceed following default. (R. at 555-559.) Utah First withdrew from the case and RADC is proceeding. Regardless of which participant pursues the deficiency, Appellants still owe the entire debt.

### CONCLUSION

For the above reasons, RADC is entitled to the entire deficiency despite the fact that Utah First holds a participation interest. The ruling of the Court of Appeals should be affirmed.

DATED October 21, 2106.

TERRY JESSOP & BITNER  
Attorneys for Appellee

/s/ Richard C. Terry  
Richard C. Terry  
Douglas A. Oviatt

### CERTIFICATE OF COMPLIANCE

This brief contains approximately 6,218 words in Times New Roman font, size 13.

### CERTIFICATE OF SERVICE

I certify that on October 21, 2016, I caused to be served a true and correct copy of the foregoing BRIEF OF APPELLEE to the following by mailing two hard copies thereof.

Douglas B. Thayer, USB No. 8109  
Andy V. Wright, USB No. 11071  
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*Attorneys for Defendants/Appellants*

TERRY JESSOP & BITNER  
Attorneys for Appellee

/s/ Richard C. Terry  
Richard C. Terry

**ADDENDUM A**

**Loan Agreement**

# BUSINESS LOAN AGREEMENT

Reference in the shaded area are for Lender's use only and do not limit the applicability of this document to any particular loan or term.  
Any item above containing \*\*\*\*\* has been omitted due to text length limitations.

**Borrower:** Dos Lagos, LLC (TIN: 20-2573818)  
Mellon Valley, LLC (TIN: 20-4801823)  
1000 S. Milligan Road  
Idaho Falls, ID 83402

**Lender:** America West Bank  
Layton Office  
478 W. Hedberg Park Blvd., Suite #100  
Layton, UT 84041  
(801) 927-8600

THIS BUSINESS LOAN AGREEMENT dated March 28, 2007, is made and executed between Dos Lagos, LLC and Mellon Valley, LLC ("Borrower") and America West Bank ("Lender") on the following terms and conditions. Borrower has received prior commercial loans from Lender or has applied to Lender for a commercial loan or loans or other financial accommodations, including those which may be described on any exhibit or schedule attached to this Agreement ("Loan"). Borrower understands and agrees that (A) in granting, renewing, or extending any Loan, Lender is relying upon Borrower's representations, warranties, and agreements as set forth in this Agreement; (B) the granting, renewing, or extending of any Loan by Lender at all times shall be subject to Lender's sole judgment and discretion; and (C) all such Loans shall be and remain subject to the terms and conditions of this Agreement.

**TERM.** This Agreement shall be effective as of March 28, 2007, and shall continue in full force and effect until such time as all of Borrower's Loans in favor of Lender have been paid in full, including principal, interest, costs, expenses, attorneys' fees, and other fees and charges, or until April 1, 2008.

**CONDITIONS PRECEDENT TO EACH ADVANCE.** Lender's obligation to make the initial Advance and each subsequent Advance under this Agreement shall be subject to the fulfillment to Lender's satisfaction of all of the conditions set forth in this Agreement and in the Related Documents.

**Loan Documents.** Borrower shall provide to Lender the following documents for the Loan: (1) the Note; (2) Security Agreements granting to Lender security interests in the Collateral; (3) financing statements and all other documents perfecting Lender's Security interests; (4) evidence of insurance as required below; (5) assignments of life insurance; (6) guarantees; (7) together with all such Related Documents as Lender may require for the Loan; all in form and substance satisfactory to Lender and Lender's counsel.

**Borrower's Authorization.** Borrower shall have provided in form and substance satisfactory to Lender properly certified resolutions, duly authorizing the execution and delivery of this Agreement, the Note and the Related Documents. In addition, Borrower shall have provided such other resolutions, authorizations, documents and instruments as Lender or its counsel, may require.

**Payment of Fees and Expenses.** Borrower shall have paid to Lender all fees, charges, and other expenses which are then due and payable as specified in this Agreement or any Related Document.

**Representations and Warranties.** The representations and warranties set forth in this Agreement, in the Related Documents, and in any document or certificate delivered to Lender under this Agreement are true and correct.

**No Event of Default.** There shall not exist at the time of any Advance a condition which would constitute an Event of Default under this Agreement or under any Related Document.

**MULTIPLE BORROWERS.** This Agreement has been executed by multiple obligors who are referred to in this Agreement individually, collectively and interchangeably as "Borrower." Unless specifically stated to the contrary, the word "Borrower" as used in this Agreement, including without limitation all representations, warranties and covenants, shall include all Borrowers. Borrower understands and agrees that, with or without notice to any one Borrower, Lender may (A) make one or more additional secured or unsecured loans or otherwise extend additional credit with respect to any other Borrower; (B) with respect to any other Borrower alter, compromise, renew, extend, accelerate, or otherwise change one or more times the time for payment or other terms of any indebtedness, including increases and decreases of the rate of interest on the indebtedness; (C) exchange, enforce, waive, subordinate, fail or decide not to perfect, and release any security, with or without the substitution of new collateral; (D) release, substitute, agree not to sue, or deal with any one or more of Borrower's or any other Borrower's assets, endorses, or other guarantees on any terms or in any manner Lender may choose; (E) determine how, when and what application of payments and credits shall be made on any indebtedness; (F) apply such security and direct the order or manner of sale of any Collateral, including without limitation, any non-judicial sale permitted by the terms of the controlling security agreement or deed of trust, as Lender in its discretion may determine; (G) sell, transfer, assign or grant participations in all or any part of the Loan; (H) exercise or refrain from exercising any rights against Borrower or others, or otherwise act or refrain from acting; (I) settle or compromise any indebtedness; and (J) subordinate the payment of all or any part of any of Borrower's indebtedness to Lender to the payment of any liabilities which may be due Lender or others.

**REPRESENTATIONS AND WARRANTIES.** Borrower represents and warrants to Lender, as of the date of this Agreement, as of the date of each disbursement of loan proceeds, as of the date of any renewal, extension or modification of any Loan, and at all times any indebtedness exists:

**Organization.** Dos Lagos, LLC is a limited liability company which is, and at all times shall be, duly organized, validly existing, and in good standing under and by virtue of the laws of the State of Utah. Dos Lagos, LLC is duly authorized to transact business in all other states in which Dos Lagos, LLC is doing business, having obtained all necessary filings, governmental licenses and approvals for each state in which Dos Lagos, LLC is doing business. Specifically, Dos Lagos, LLC is, and at all times shall be, duly qualified as a foreign limited liability company in all states in which the failure to so qualify would have a material adverse effect on its business or financial condition. Dos Lagos, LLC has the full power and authority to own its properties and to transact the business in which it is presently engaged or presently proposes to engage. Dos Lagos, LLC maintains an office at 1000 S. Milligan Road, Idaho Falls, ID 83402. Unless Dos Lagos, LLC has designated otherwise in writing, the principal office is the office at which Dos Lagos, LLC keeps its books and records including its records concerning the Collateral. Dos Lagos, LLC will notify Lender prior to any change in the location of Dos Lagos, LLC's state of organization or any change in Dos Lagos, LLC's name. Dos Lagos, LLC shall do all things necessary to preserve and to keep in full force and effect its existence, rights and privileges, and shall comply with all regulations, rules, ordinances, statutes, orders and decrees of any governmental or quasi-governmental authority or court applicable to Dos Lagos, LLC and Dos Lagos, LLC's business activities.

**Mellon Valley, LLC** is a limited liability company which is, and at all times shall be, duly organized, validly existing, and in good standing under and by virtue of the laws of the State of Idaho. Mellon Valley, LLC is duly authorized to transact business in all other states in which Mellon Valley, LLC is doing business, having obtained all necessary filings, governmental licenses and approvals for each state in which Mellon Valley, LLC is doing business. Specifically, Mellon Valley, LLC is, and at all times shall be, duly qualified as a foreign limited liability company in all states in which the failure to so qualify would have a material adverse effect on its business or financial condition. Mellon Valley, LLC has the full power and authority to own its properties and to transact the business in which it is presently engaged or presently proposes to engage. Mellon Valley, LLC maintains an office at 8980 South 478 East, South Weber, UT 84408. Unless Mellon Valley, LLC has designated otherwise in writing, the principal office is the office at which Mellon Valley, LLC keeps its books and records including its records concerning the Collateral. Mellon Valley, LLC will notify Lender prior to any change in the location of Mellon Valley, LLC's state of organization or any change in Mellon Valley, LLC's name. Mellon Valley, LLC shall do all things necessary to preserve and to keep in full force and effect its existence, rights and privileges, and shall comply with all regulations, rules, ordinances, statutes, orders and decrees of any governmental or quasi-governmental authority or court applicable to Mellon Valley, LLC and Mellon Valley, LLC's business activities.

**Assumed Business Names.** Borrower has filed or recorded all documents or filings required by law relating to all assumed business names used by Borrower. Excluding the name of Borrower, the following is a complete list of all assumed business names under which Borrower does business: None.

**Authorization.** Borrower's execution, delivery, and performance of this Agreement and all the Related Documents have been duly authorized by all necessary action by Borrower and do not conflict with, result in a violation of, or constitute a default under (1) any provision of (a) Borrower's articles of organization or membership agreements, or (b) any agreement or other instrument binding upon Borrower or (2) any law, governmental regulation, court decree, or order applicable to Borrower or to Borrower's properties.

**Financial Information.** Each of Borrower's financial statements supplied to Lender truly and completely disclosed Borrower's financial condition as of the date of the statement, and there has been no material adverse change in Borrower's financial condition subsequent to the date of the most recent financial statement supplied to Lender. Borrower has no material contingent obligations except as disclosed in such financial statements.

**Legal Effect.** This Agreement constitutes, and any instrument or agreement Borrower is required to give under this Agreement when delivered will constitute legal, valid, and binding obligations of Borrower enforceable against Borrower in accordance with their respective terms.

**Properties.** Except as contemplated by this Agreement or as previously disclosed in Borrower's financial statements or in writing to Lender and as accepted by Lender, and except for property tax liens for taxes not presently due and payable, Borrower owns and has good title to

Exhibit

1



all of Borrower's properties free and clear of all Security Interests, and has not executed any security documents or financing statements relating to such properties. All of Borrower's properties are titled in Borrower's legal name, and Borrower has not used or filed a financing statement under any other name for at least the last five (5) years.

**Hazardous Substances.** Except as disclosed to and acknowledged by Lender in writing, Borrower represents and warrants that: (1) During the period of Borrower's ownership of the Collateral, there has been no use, generation, manufacture, storage, treatment, disposal, release or threatened release of any Hazardous Substances by any person on, under, about or from any of the Collateral; (2) Borrower has no knowledge of, or reason to believe that there has been (a) any breach or violation of any Environmental Laws; (b) any use, generation, manufacture, storage, treatment, disposal, release or threatened release of any Hazardous Substance on, under, about or from the Collateral by any prior owners or occupants of any of the Collateral; or (c) any actual or threatened litigation or claims of any kind by any person relating to such matters; (3) Neither Borrower nor any tenant, contractor, agent or other authorized user of any of the Collateral shall use, generate, manufacture, store, treat, dispose of or release any Hazardous Substance on, under, about or from any of the Collateral and any such activity shall be conducted in compliance with all applicable federal, state, and local laws, regulations, and ordinances, including without limitation all Environmental Laws. Borrower authorizes Lender and its agents to enter upon the Collateral to make such inspections and tests as Lender may deem appropriate to determine compliance of the Collateral with this section of the Agreement. Any inspections or tests made by Lender shall be at Borrower's expense and for Lender's purposes only and shall not be construed to create any responsibility or liability on the part of Lender to Borrower or to any other person. The representations and warranties contained herein are based on Borrower's due diligence in investigating the Collateral for hazardous waste and Hazardous Substances. Borrower hereby (1) releases and waives any future claims against Lender for indemnity or contribution in the event Borrower becomes liable for cleanup or other costs under any such laws, and (2) agrees to indemnify, defend, and hold harmless Lender against any and all claims, losses, liabilities, damages, penalties, and expenses which Lender may directly or indirectly sustain or suffer resulting from a breach of this section of the Agreement or as a consequence of any use, generation, manufacture, storage, disposal, release or threatened release of a hazardous waste or substance on the Collateral. The provisions of this section of the Agreement, including the obligation to indemnify and defend, shall survive the payment of the indebtedness and the termination, expiration or satisfaction of this Agreement and shall not be affected by Lender's acquisition of any interest in any of the Collateral, whether by foreclosure or otherwise.

**Litigation and Claims.** No litigation, claim, investigation, administrative proceeding or similar action (including those for unpaid taxes) against Borrower is pending or threatened, and no other event has occurred which may materially adversely affect Borrower's financial condition or properties, other than litigation, claims, or other events, if any, that have been disclosed to and acknowledged by Lender in writing.

**Taxes.** To the best of Borrower's knowledge, all of Borrower's tax returns and reports that are or were required to be filed, have been filed, and all taxes, assessments and other governmental charges have been paid in full, except those presently being or to be contested by Borrower in good faith in the ordinary course of business and for which adequate reserves have been provided.

**Loan Priority.** Unless otherwise previously disclosed to Lender in writing, Borrower has not entered into or granted any Security Agreements, or permitted the filing or attachment of any Security Interests on or affecting any of the Collateral directly or indirectly securing repayment of Borrower's Loan and Note, that would be prior or that may in any way be superior to Lender's Security Interests and rights in and to such Collateral.

**Binding Effect.** This Agreement, the Note, all Security Agreements (if any), and all Related Documents are binding upon the signers thereof, as well as upon their successors, representatives and assigns, and are legally enforceable in accordance with their respective terms.

**AFFIRMATIVE COVENANTS.** Borrower covenants and agrees with Lender that, so long as this Agreement remains in effect, Borrower will:

**Notices of Claims and Litigation.** Promptly inform Lender in writing of (1) all material adverse changes in Borrower's financial condition, and (2) all existing and all threatened litigation, claims, investigations, administrative proceedings or similar actions affecting Borrower or any Guarantor which could materially affect the financial condition of Borrower or the financial condition of any Guarantor.

**Financial Records.** Maintain its books and records in accordance with GAAP, applied on a consistent basis, and permit Lender to examine and audit Borrower's books and records at all reasonable times.

**Financial Statements.** Furnish Lender with the following:

**Annual Statements.** As soon as available after the end of each fiscal year, Borrower's balance sheet and income statement for the year ended, prepared by Borrower in form satisfactory to Lender.

**Tax Returns.** As soon as available after the applicable filing date for the tax reporting period ended, Federal and other governmental tax returns, prepared by a tax professional satisfactory to Lender.

All financial reports required to be provided under this Agreement shall be prepared in accordance with GAAP, applied on a consistent basis, and certified by Borrower as being true and correct.

**Additional Information.** Furnish such additional information and statements, as Lender may request from time to time.

**Insurance.** Maintain fire and other risk insurance, public liability insurance, and such other insurance as Lender may require with respect to Borrower's properties and operations, in form, amounts, coverages and with insurance companies acceptable to Lender. Borrower, upon request of Lender, will deliver to Lender from time to time the policies or certificates of insurance in form satisfactory to Lender, including stipulations that coverages will not be cancelled or diminished without at least ten (10) days prior written notice to Lender. Each insurance policy also shall include an endorsement providing that coverage in favor of Lender will not be impaired in any way by any act, omission or default of Borrower or any other person. In connection with all policies covering assets in which Lender holds or is offered a security interest for the Loans, Borrower will provide Lender with such lender's loss payable or other endorsements as Lender may require.

**Insurance Reports.** Furnish to Lender, upon request of Lender, reports on each existing insurance policy showing such information as Lender may reasonably request, including without limitation the following: (1) the name of the insurer; (2) the risks insured; (3) the amount of the policy; (4) the properties insured; (5) the then current property values on the basis of which insurance has been obtained, and the manner of determining those values; and (6) the expiration date of this policy. In addition, upon request of Lender (however not more often than annually), Borrower will have an independent appraiser satisfactory to Lender determine, as applicable, the actual cash value or replacement cost of any Collateral. The cost of such appraisal shall be paid by Borrower.

**Guarantees.** Prior to disbursement of any Loan proceeds, furnish executed guarantees of the Loans in favor of Lender, executed by the guarantors named below, on Lender's forms, and in the amounts and under the conditions set forth in those guarantees.

<u>Names of Guarantors</u>	<u>Amounts</u>
Roland Neal Family Limited Partnership	Unlimited
Roland N. Walker	Unlimited
Sally Walker	Unlimited

**Other Agreements.** Comply with all terms and conditions of all other agreements, whether now or hereafter existing, between Borrower and any other party and notify Lender immediately in writing of any default in connection with any other such agreements.

**Loan Proceeds.** Use all Loan proceeds solely for Borrower's business operations, unless specifically consented to the contrary by Lender in writing.

**Taxes, Charges and Liens.** Pay and discharge when due all of its indebtedness and obligations, including without limitation all assessments, taxes, governmental charges, levies and liens, of every kind and nature, imposed upon Borrower or its properties, income, or profits, prior to the date on which penalties would attach, and all lawful claims that, if unpaid, might become a lien or charge upon any of Borrower's properties, income, or profits.

**Performance.** Perform and comply, in a timely manner, with all terms, conditions, and provisions set forth in this Agreement, in the Related Documents, and in all other instruments and agreements between Borrower and Lender. Borrower shall notify Lender immediately in writing of any default in connection with any agreement.

**Operations.** Maintain executive and management personnel with substantially the same qualifications and experience as the present executive and management personnel; provide written notice to Lender of any change in executive and management personnel; conduct its business affairs in a reasonable and prudent manner.

**Environmental Studies.** Promptly conduct and complete, at Borrower's expense, all such investigations, studies, samplings and testings as may be requested by Lender or any governmental authority relative to any substance, or any waste or by-product of any substance defined as toxic or a hazardous substance under applicable federal, state, or local law, rule, regulation, order or directive, or affecting any property or any facility owned, leased or used by Borrower.

**Compliance with Governmental Requirements.** Comply with all laws, ordinances, and regulations, now or hereafter in effect, of all governmental authorities applicable to the conduct of Borrower's properties, businesses and operations, and to the use or occupancy of the Collateral, including without limitation, the Americans With Disabilities Act. Borrower may contest in good faith any such law, ordinance, or regulation and withhold compliance during any proceeding, including appropriate appeals, so long as Borrower has notified Lender in writing prior to doing so and so long as, in Lender's sole opinion, Lender's interests in the Collateral are not jeopardized. Lender may require Borrower to post adequate security or a surety bond, reasonably satisfactory to Lender, to protect Lender's interest.

**Inspection.** Permit employees or agents of Lender at any reasonable time to inspect any and all Collateral for the loan or loans and Borrower's other properties and to examine or audit Borrower's books, accounts, and records and to make copies and memoranda of Borrower's books, accounts, and records. If Borrower now or at any time hereafter maintains any records (including without limitation computer generated records and computer software programs for the generation of such records) in the possession of a third party, Borrower, upon request of Lender, shall notify such party to permit Lender free access to such records at all reasonable times and to provide Lender with copies of any records it may request, all at Borrower's expense.

**Compliance Certificates.** Unless waived in writing by Lender, provide Lender at least annually, with a certificate executed by Borrower's chief financial officer, or other officer or person acceptable to Lender, certifying that the representations and warranties set forth in this Agreement are true and correct as of the date of the certificate and further certifying that, as of the date of the certificate, no Event of Default exists under this Agreement.

**Environmental Compliance and Reports.** Borrower shall comply in all respects with any and all Environmental Laws; not cause or permit to exist, as a result of an intentional or unintentional action or omission on Borrower's part or on the part of any third party, on property owned and/or occupied by Borrower, any environmental activity where damage may result to the environment, unless such environmental activity is pursuant to and in compliance with the conditions of a permit issued by the appropriate federal, state or local governmental authorities; shall furnish to Lender promptly and in any event within thirty (30) days after receipt thereof a copy of any notices, summons, lien, citation, directive, letter or other communication from any governmental agency or instrumentality concerning any intentional or unintentional action or omission on Borrower's part in connection with any environmental activity whether or not there is damage to the environment and/or other natural resources.

**Additional Assurances.** Make, execute and deliver to Lender such promissory notes, mortgages, deeds of trust, security agreements, assignments, financing statements, instruments, documents and other agreements as Lender or its attorneys may reasonably request to evidence and secure the Loans and to perfect all Security Interests.

**LENDER'S EXPENDITURES.** If any action or proceeding is commenced that would materially affect Lender's interest in the Collateral or if Borrower fails to comply with any provision of this Agreement or any Related Documents, including but not limited to Borrower's failure to discharge or pay when due any amounts Borrower is required to discharge or pay under this Agreement or any Related Documents, Lender on Borrower's behalf may (but shall not be obligated to) take any action that Lender deems appropriate, (including but not limited to discharging or paying all taxes, liens, security interests, encumbrances and other claims, at any time levied or placed on any Collateral and paying all costs for insuring, maintaining and preserving any Collateral. All such expenditures incurred or paid by Lender for such purposes will then bear interest at the rate charged under the Note from the date incurred or paid by Lender to the date of repayment by Borrower. All such expenses will become a part of the indebtedness and, at Lender's option, will (A) be payable on demand; (B) be added to the balance of the Note and be apportioned among and be payable with any installment payments to become due during either (1) the term of any applicable insurance policy; or (2) the remaining term of the Note; or (C) be treated as a balloon payment which will be due and payable at the Note's maturity.

**NEGATIVE COVENANTS.** Borrower covenants and agrees with Lender that while this Agreement is in effect, Borrower shall not, without the prior written consent of Lender:

**Indebtedness and Liens.** (1) Except for trade debt incurred in the normal course of business and indebtedness to Lender contemplated by this Agreement, create, incur or assume indebtedness for borrowed money, including capital leases, (2) sell, transfer, mortgage, assign, pledge, lease, grant a security interest in, or encumber any of Borrower's assets (except as allowed as Permitted Liens), or (3) sell with recourse any of Borrower's accounts, except to Lender.

**Conduct of Operations.** (1) Engage in any business activities substantially different than those in which Borrower is presently engaged, (2) cease operations, liquidate, merge, transfer, acquire or consolidate with any other entity, change its name, dissolve or transfer or sell Collateral out of the ordinary course of business, or (3) make any distribution with respect to any capital account, whether by reduction of capital or otherwise.

**Loans, Acquisitions and Guaranties.** (1) Loan, invest in or advance money or assets to any other person, enterprise or entity, (2) purchase, create or acquire any interest in any other enterprise or entity, or (3) incur any obligation as surety or guarantor other than in the ordinary course of business.

**Agreements.** Borrower will not enter into any agreement containing any provisions which would be violated or breached by the performance of Borrower's obligations under this Agreement or in connection herewith.

**CESSATION OF ADVANCES.** If Lender has made any commitment to make any Loan to Borrower, whether under this Agreement or under any other agreement, Lender shall have no obligation to make Loan Advances or to disburse Loan proceeds if: (A) Borrower or any Guarantor is in default under the terms of this Agreement or any of the Related Documents or any other agreement that Borrower or any Guarantor has with Lender; (B) Borrower or any Guarantor dies, becomes incompetent or becomes insolvent, files a petition in bankruptcy or similar proceedings, or is adjudged a bankrupt; (C) there occurs a material adverse change in Borrower's financial condition, in the financial condition of any Guarantor, or in the value of any Collateral securing any Loan; or (D) any Guarantor seeks, claims or otherwise attempts to limit, modify or revoke such Guarantor's guaranty of the Loan or any other loan with Lender; or (E) Lender in good faith deems itself insecure, even though no Event of Default shall have occurred.

**RIGHT OF SETOFF.** To the extent permitted by applicable law, Lender reserves a right of setoff in all Borrower's accounts with Lender (whether checking, savings, or some other account). This includes all accounts Borrower holds jointly with someone else and all accounts Borrower may open in the future. However, this does not include any IRA or Keogh accounts, or any trust accounts for which setoff would be prohibited by law. Borrower authorizes Lender, to the extent permitted by applicable law, to charge or setoff all sums owing on the indebtedness against any and all such accounts, and, at Lender's option, to administratively freeze all such accounts to allow Lender to protect Lender's charge and setoff rights provided in this paragraph.

**DEFAULT.** Each of the following shall constitute an Event of Default under this Agreement:

**Payment Default.** Borrower fails to make any payment when due under the Loan.

**Other Defaults.** Borrower fails to comply with or to perform any other term, obligation, covenant or condition contained in this Agreement or in any of the Related Documents or to comply with or to perform any term, obligation, covenant or condition contained in any other agreement between Lender and Borrower.

**False Statements.** Any warranty, representation or statement made or furnished to Lender by Borrower or on Borrower's behalf under this Agreement or the Related Documents is false or misleading in any material respect, either now or at the time made or furnished or becomes false or misleading at any time thereafter.

**Death or Insolvency.** The dissolution of Borrower (regardless of whether election to continue is made), any member withdraws from Borrower, or any other termination of Borrower's existence as a going business or the death of any member, the insolvency of Borrower, the appointment of a receiver for any part of Borrower's property, any assignment for the benefit of creditors, any type of creditor workout, or the commencement of any proceeding under any bankruptcy or insolvency laws by or against Borrower.

**Defective Collateralization.** This Agreement or any of the Related Documents ceases to be in full force and effect (including failure of any collateral document to create a valid and perfected security interest or lien) at any time and for any reason.

**Creditor or Forfeiture Proceedings.** Commencement of foreclosure or forfeiture proceedings, whether by judicial proceeding, self-help, repossession or any other method, by any creditor of Borrower or by any governmental agency against any collateral securing the Loan. This includes a garnishment of any of Borrower's accounts, including deposit accounts, with Lender. However, this Event of Default shall not apply if there is a good faith dispute by Borrower as to the validity or reasonableness of the claim which is the basis of the creditor or forfeiture proceeding and if Borrower gives Lender written notice of the creditor or forfeiture proceeding and deposits with Lender monies or a surety bond for the creditor or forfeiture proceeding, in an amount determined by Lender, in its sole discretion, as being an adequate reserve or bond for the dispute.

**Events Affecting Guarantor.** Any of the preceding events occurs with respect to any Guarantor of any of the indebtedness and any Guarantor dies or becomes incompetent, or revokes or disputes the validity of, or liability under, any Guaranty of the indebtedness. In the event of a death, Lender, at its option, may, but shall not be required to, permit the Guarantor's estate to assume unconditionally the obligations arising under the guaranty in a manner satisfactory to Lender, and, in doing so, cure any Event of Default.

**Adverse Change.** A material adverse change occurs in Borrower's financial condition, or Lender believes the prospect of payment or

performance of the Loan is impaired.

Insolvency. Lender in good faith believes itself insecure.

Right to Cure. If any default, other than a default on indebtedness, is curable and if Borrower or Grantor, as the case may be, has not been given a notice of a similar default within the preceding twelve (12) months, it may be cured if Borrower or Grantor, as the case may be, after receiving written notice from Lender demanding cure of such default: (1) cure the default within fifteen (15) days; or (2) if the cure requires more than fifteen (15) days, immediately initiate steps which Lender deems in Lender's sole discretion to be sufficient to cure the default and thereafter continue and complete all reasonable and necessary steps sufficient to produce compliance as soon as reasonably practicable.

EFFECT OF AN EVENT OF DEFAULT. If any Event of Default shall occur, except where otherwise provided in this Agreement or the Related Documents, all commitments and obligations of Lender under this Agreement or the Related Documents or any other agreement immediately will terminate (including any obligation to make further Loan Advances or disbursements), and, at Lender's option, all indebtedness immediately will become due and payable, all without notice of any kind to Borrower, except that in the case of an Event of Default of the type described in the "Insolvency" subsection above, such acceleration shall be automatic and not optional. In addition, Lender shall have all the rights and remedies provided in the Related Documents or available at law, in equity, or otherwise. Except as may be prohibited by applicable law, all of Lender's rights and remedies shall be cumulative and may be exercised singularly or concurrently. Election by Lender to pursue any remedy shall not exclude pursuit of any other remedy, and an election to make expenditures or to take action to perform an obligation of Borrower or of any Grantor shall not affect Lender's right to declare a default and to exercise its rights and remedies.

MISCELLANEOUS PROVISIONS. The following miscellaneous provisions are a part of this Agreement:

Amendments. This Agreement, together with any Related Documents, constitutes the entire understanding and agreement of the parties as to the matters set forth in this Agreement. No alteration of or amendment to this Agreement shall be effective unless given in writing and signed by the party or parties sought to be charged or bound by the alteration or amendment.

Attorneys' Fees; Expenses. Borrower agrees to pay upon demand all of Lender's costs and expenses, including Lender's reasonable attorneys' fees and Lender's legal expenses, incurred in connection with the enforcement of this Agreement. Lender may hire or pay someone else to help enforce this Agreement, and Borrower shall pay the costs and expenses of such enforcement. Costs and expenses include Lender's reasonable attorneys' fees and legal expenses whether or not Lender's salaried employees and whether or not there is a lawsuit, including reasonable attorneys' fees and legal expenses for bankruptcy proceedings (including efforts to modify or vacate any automatic stay or injunction), appeals, and any anticipated post-judgment collection services. Borrower also shall pay all court costs and such additional fees as may be directed by the court.

Caption Headings. Caption headings in this Agreement are for convenience purposes only and are not to be used to interpret or define the provisions of this Agreement.

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 purchasers, 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 additionally waives any and all notices of sale of participation interests, as well as all notices of any repurchase of such participation interests. Borrower also agrees that the purchasers of any such participation interests will be considered as the absolute owners of such interests 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 interest may enforce its interests irrespective of any personal claims or defenses that Borrower may have against Lender.

Governing Law. This Agreement will be governed by federal law applicable to Lender and, to the extent not preempted by federal law, the laws of the State of Utah without regard to its conflicts of law provisions. This Agreement has been accepted by Lender in the State of Utah.

Choice of Venue. If there is a lawsuit, Borrower agrees upon Lender's request to submit to the jurisdiction of the courts of Davis County, State of Utah.

Joint and Several Liability. All obligations of Borrower under this Agreement shall be joint and several, and all references to Borrower shall mean each and every Borrower. This means that each Borrower signing below is responsible for all obligations in this Agreement. Where any one or more of the parties is a corporation, partnership, limited liability company or similar entity, it is not necessary for Lender to inquire into the powers of any of the officers, directors, partners, members, or other agents acting or purporting to act on the entity's behalf, and any obligations made or created in reliance upon the professed exercise of such powers shall be guaranteed under this Agreement.

No Waiver by Lender. Lender shall not be deemed to have waived any rights under this Agreement unless such waiver is given in writing and signed by Lender. No delay or omission on the part of Lender in exercising any right shall operate as a waiver of such right or any other right. A waiver by Lender of a provision of this Agreement shall not prejudice or constitute a waiver of Lender's right otherwise to demand strict compliance with that provision or any other provision of this Agreement. No prior waiver by Lender, nor any course of dealing between Lender and Borrower, or between Lender and any Grantor, shall constitute a waiver of any of Lender's rights or of any of Borrower's or any Grantor's obligations as to any future transactions. Whenever the consent of Lender is required under this Agreement, the granting of such consent by Lender in any instance shall not constitute continuing consent to subsequent instances where such consent is required and in all cases such consent may be granted or withheld in the sole discretion of Lender.

Notices. Unless otherwise provided by applicable law, any notice required to be given under this Agreement or required by law shall be given in writing, and shall be effective when actually delivered in accordance with the law or with this Agreement, when actually received by telefacsimile (unless otherwise required by law), when deposited with a nationally recognized overnight courier, or, if mailed, when deposited in the United States mail, as first class, certified or registered mail postage prepaid, directed to the addresses shown near the beginning of this Agreement. Any party may change its address for notices under this Agreement by giving formal written notice to the other parties, specifying that the purpose of the notice is to change the party's address. For notice purposes, Borrower agrees to keep Lender informed at all times of Borrower's current address. Unless otherwise provided by applicable law, if there is more than one Borrower, any notice given by Lender to any Borrower is deemed to be notice given to all Borrowers.

Severability. If a court of competent jurisdiction finds any provision of this Agreement to be illegal, invalid, or unenforceable as to any person or circumstance, that finding shall not make the offending provision illegal, invalid, or unenforceable as to any other person or circumstance. If feasible, the offending provision shall be considered modified so that it becomes legal, valid and enforceable. If the offending provision cannot be so modified, it shall be considered deleted from this Agreement. Unless otherwise required by law, the illegality, invalidity, or unenforceability of any provision of this Agreement shall not affect the legality, validity or enforceability of any other provision of this Agreement.

Subsidiaries and Affiliates of Borrower. To the extent the context of any provisions of this Agreement makes it appropriate, including without limitation any representation, warranty or covenant, the word "Borrower" as used in this Agreement shall include all of Borrower's subsidiaries and affiliates. Notwithstanding the foregoing however, under no circumstances shall this Agreement be construed to require Lender to make any loan or other financial accommodation to any of Borrower's subsidiaries or affiliates.

Successors and Assigns. All covenants and agreements by or on behalf of Borrower contained in this Agreement or any Related Documents shall bind Borrower's successors and assigns and shall inure to the benefit of Lender and its successors and assigns. Borrower shall not, however, have the right to assign Borrower's rights under this Agreement or any interest therein, without the prior written consent of Lender.

Survival of Representations and Warranties. Borrower understands and agrees that in extending Loan Advances, Lender is relying on all representations, warranties, and covenants made by Borrower in this Agreement or in any certificate or other instrument delivered by Borrower to Lender under this Agreement or the Related Documents. Borrower further agrees that regardless of any investigation made by Lender, all such representations, warranties and covenants will survive the extension of Loan Advances and delivery to Lender of the Related Documents, shall be continuing in nature, shall be deemed made and redated by Borrower at the time each Loan Advance is made, and shall remain in full force and effect until such time as Borrower's indebtedness shall be paid in full, or until this Agreement shall be terminated in the manner provided above, whichever is the last to occur.

Time is of the Essence. Time is of the essence in the performance of this Agreement.

DEFINITIONS. The following capitalized words and terms shall have the following meanings when used in this Agreement. Unless specifically stated to the contrary, all references to dollar amounts shall mean amounts in lawful money of the United States of America. Words and terms



used in the singular shall include the plural, and the plural shall include the singular, as the context may require. Words and terms not otherwise defined in this Agreement shall have the meanings attributed to such terms in the Uniform Commercial Code. Accounting words and terms not otherwise defined in this Agreement shall have the meanings assigned to them in accordance with generally accepted accounting principles as in effect on the date of this Agreement.

**Advances.** The word "Advances" means a disbursement of Loan funds made, or to be made, to Borrower or on Borrower's behalf on a line of credit or multiple advance basis under the terms and conditions of this Agreement.

**Agreement.** The word "Agreement" means this Business Loan Agreement, as this Business Loan Agreement may be amended or modified from time to time, together with all exhibits and schedules attached to this Business Loan Agreement from time to time.

**Borrower.** The word "Borrower" means Dos Lagos, LLC; and Mellon Valley, LLC and includes all co-signers and co-makers signing the Note and all their successors and assigns.

**Collateral.** The word "Collateral" means all property and assets granted as collateral security for a Loan, whether real or personal property, whether granted directly or indirectly, whether granted now or in the future, and whether granted in the form of a security interest, mortgage, collateral mortgage, deed of trust, assignment, pledge, crop pledge, chattel mortgage, collateral chattel mortgage, chattel trust, factor's lien, equipment trust, conditional sale, trust receipt, lien, charge, lien or title retention contract, lease or consignment intended as a security device, or any other security or lien interest whatsoever, whether created by law, contract, or otherwise.

**Environmental Laws.** The words "Environmental Laws" mean any and all state, federal and local statutes, regulations and ordinances relating to the protection of human health or the environment, including without limitation the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. Section 9601, et seq. ("CERCLA"), the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499 ("SARA"), the Hazardous Materials Transportation Act, 49 U.S.C. Section 1801, et seq., the Resource Conservation and Recovery Act, 42 U.S.C. Section 9601, et seq., or other applicable state or federal laws, rules, or regulations adopted pursuant thereto.

**Event of Default.** The words "Event of Default" mean any of the events of default set forth in this Agreement in the default section of this Agreement.

**GAAP.** The word "GAAP" means generally accepted accounting principles.

**Grantor.** The word "Grantor" means each and all of the persons or entities granting a Security Interest in any Collateral for the Loan, including without limitation all Borrowers granting such a Security Interest.

**Guarantor.** The word "Guarantor" means any guarantor, surety, or accommodation party of any or all of the Loan.

**Guaranty.** The word "Guaranty" means the guaranty from Guarantor to Lender, including without limitation a guaranty of all or part of the Note.

**Hazardous Substances.** The words "Hazardous Substances" mean materials that, because of their quantity, concentration or physical, chemical or infectious characteristics, may cause or pose a present or potential hazard to human health or the environment when improperly used, treated, stored, disposed of, generated, manufactured, transported or otherwise handled. The words "Hazardous Substances" are used in their very broadest sense and include without limitation any and all hazardous or toxic substances, materials or waste as defined by or listed under the Environmental Laws. The term "Hazardous Substances" also includes, without limitation, petroleum and petroleum by-products or any fraction thereof and asbestos.

**Indebtedness.** The word "Indebtedness" means the indebtedness evidenced by the Note or Related Documents, including all principal and interest together with all other indebtedness and costs and expenses for which Borrower is responsible under this Agreement or under any of the Related Documents.

**Lender.** The word "Lender" means America West Bank, its successors and assigns.

**Loan.** The word "Loan" means any and all loans and financial accommodations from Lender to Borrower whether now or hereafter existing, and however evidenced, including without limitation those loans and financial accommodations described herein or described on any exhibit or schedule attached to this Agreement from time to time.

**Note.** The word "Note" means the Note executed by Dos Lagos, LLC; and Mellon Valley, LLC in the principal amount of \$2,500,000.00 dated March 29, 2007, together with all renewals of, extensions of, modifications of, refinancings of, consolidations of, and substitutions for the note or credit agreement.

**Permitted Liens.** The words "Permitted Liens" mean (1) liens and security interests securing indebtedness owed by Borrower to Lender; (2) liens for taxes, assessments, or similar charges either not yet due or being contested in good faith; (3) liens of mechanics, mechanics, warehousemen, or carriers, or other like liens arising in the ordinary course of business and securing obligations which are not yet delinquent; (4) purchase money liens or purchase money security interests upon or in any property acquired or held by Borrower in the ordinary course of business to secure indebtedness outstanding on the date of this Agreement or permitted to be incurred under the paragraph of this Agreement titled "Indebtedness and Liens"; (5) liens and security interests which, as of the date of this Agreement, have been disclosed to and approved by the Lender in writing; and (6) those liens and security interests which in the aggregate constitute an immaterial and insignificant monetary amount with respect to the net value of Borrower's assets.

**Related Documents.** The words "Related Documents" mean all promissory notes, credit agreements, loan agreements, environmental agreements, guaranties, security agreements, mortgages, deeds of trust, security deeds, collateral mortgages, and all other instruments, agreements and documents, whether now or hereafter existing, executed in connection with the Loan.

**Security Agreement.** The words "Security Agreement" mean and include without limitation any agreements, promises, covenants, arrangements, understandings or other agreements, whether created by law, contract, or otherwise, evidencing, governing, representing, or creating a Security Interest.

**Security Interest.** The words "Security Interest" mean, without limitation, any and all types of collateral security, present and future, whether in the form of a lien, charge, encumbrance, mortgage, deed of trust, security deed, assignment, pledge, crop pledge, chattel mortgage, collateral chattel mortgage, chattel trust, factor's lien, equipment trust, conditional sale, trust receipt, lien or title retention contract, lease or consignment intended as a security device, or any other security or lien interest whatsoever whether created by law, contract, or otherwise.

**FINAL AGREEMENT.** Borrower understands that this Agreement and the related loan documents are the final expression of the agreement between Lender and Borrower and may not be contradicted by evidence of any alleged oral agreement.


**BORROWER ACKNOWLEDGES HAVING READ ALL THE PROVISIONS OF THIS BUSINESS LOAN AGREEMENT AND BORROWER AGREES TO ITS TERMS.** THIS BUSINESS LOAN AGREEMENT IS DATED MARCH 29, 2007.

**BORROWER:**

**DOS LAGOS, LLC**

By   
Roland N. Walker, Manager of Dos Lagos, LLC

**MELLON VALLEY, LLC**

By   
Roland N. Walker, Co-Trustee of the R. Family Trust w/d April 4, 2008, General Partner of the Roland Neal Family Limited Partnership, Manager.

**LENDER:**

AMERICA WEST BANK,

By\_

**Authorized Signer**

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**ADDENDUM B**

**Participation Agreement**



## PARTICIPATION AGREEMENT

This Participation Agreement ("Agreement") is entered into this 6th day of December, 2007 by and between **America West Bank** (Lead Bank) located at 476 W. Heritage Park Blvd., Suite 100, Layton, UT. 84041 and **Utah First Federal Credit Union** (participant) located at 208 East 800 South, Salt Lake City, Utah, 84111 upon the terms and conditions set forth below. Participant agrees to purchase from Lead Bank and Lead Bank agrees to sell to Participant and participation in the following credit facility (the Loan), as well as in such notes as evidenced in the Loan and in such collateral as is now held or hereafter taken to secure the Loan, on all the terms and conditions set forth herein.

### RECITALS

1. Lead Bank has extended, or will extend concurrently herewith a term Loan in the maximum principal amount of \$2,500,000.00 to Dos Lagos, LLC & Mellon Valley, LLC (Borrower).
2. The Construction Loan is governed by a Construction Loan Agreement of even date herewith and is evidence by a Secured Promissory Note of even date herewith, and is secured by, among other things, a Construction Deed of Trust.
3. Executed copies of all the Loan Documents have been delivered to Participant by Lead Bank, and Participant has reviewed such Documents.

### AGREEMENT

1. NOW, THEREFORE, for good and valuable consideration, including the covenants and agreements contained herein, the parties agree as follows:
2. **Recitals:** Lead Bank and Participant each acknowledge the accuracy of the Recitals, which are incorporated herein by this reference.
3. Participation:

#### II: PRINCIPAL TERMS:

Borrower:	<b>Dos Lagos, LLC &amp; Mellon Valley, LLC</b>
Amount of Loan:	<u><b>\$2,500,000.00</b></u>
Participation Equal to:	<u><b>\$1,300,000.00</b></u> <u><b>Utah First Federal Credit Union</b></u> (participant)
Interest Rate on Loan:	Variable Rate Prime plus <u><b>1.25%</b></u> per annum
Interest Rate on Participant:	Variable Rate Prime plus <u><b>1.25%</b></u> per annum
Servicing Fee:	Variable Rate Prime plus <u><b>0 %</b></u> per annum

Maturity Date of Loan: 12/05/2008

Maturity Date on Participation: 12/05/2008

Loan Fee at \$31,250.00

Participant's Portion Loan Fee: \$16,250.00

Lead Bank's Portion Loan Fee: \$15,000.00

## II. LOAN DOCUMENTATION

Lead Bank represents and warrants that the Documents delivered to Participant in connection herewith are true and complete copies of all agreements, instruments and other relevant Documents (collectively the "Documents") with respect to the Loan. The Documents which relate to any pledge, lien security interest or guarantee are collectively referred to herein as the "Security Documents". Lead Bank certifies it has good unencumbered title to the Loan, is the sole owner thereof and has the requisite power and authority to sell participation therein to Participant.

## III. AMOUNT OF PARTICIPATION

Participant's participation hereunder shall be in the form of an undivided 52% interest in the Loan ("Participants Percentage Share") provided however the maximum principal amount of Participants participation hereunder shall in no event be in excess of \$1,300,000.00. Lead Banks participation hereunder shall be in form of an undivided 48% interest in the Loan ("Lead Banks percentage Share"); provided, however, that the maximum principal amount of Lead Banks participation there under shall in no event be excess of \$1,200,000.00.

## IV. ADVANCES BY LEAD BANK

Lead Bank and Participant agree to fund their proportionate share of the Loan, in the percentage of participation set forth below, in each disbursement made to Borrower pursuant to the Documents and up to the maximum dollar amount of their names, to wit:

<u>Name</u>	<u>Percentage</u>
America West Bank	<u>48%</u>
Utah First Federal Credit Union	<u>52%</u>

- V. Lead Bank shall have the right, but not the obligation to disburse portions of the Loan to the Borrower prior to the Lead Bank receiving the percentage share of the disbursement from the Participant. Payment for said collateral; such obligation shall be held by Lead Bank for the benefit of itself and Participant and subject to the terms of this agreement.**

#### **VI. CONSENT REQUIREMENTS**

The party holding a majority interest in the Loan shall determine what acts or action should be taken in the event of default by the Borrower in the making of required payments or any other defaults under the terms, covenants and conditions of the Deed of trust or any of the Loan Documents.

#### **VII. SHARING SETOFFS**

If either Lead Bank or Participant shall, by enforcement of any right of setoff, obtain a payment on the Loan, the party receiving such payment shall share the same ratably with the other party. In case any payment received by way of such setoff is subsequently recovered by the Borrower in whole or in part, each party shall make a refund of the amount which was received by the sharing of the funds obtained by setoff.

#### **VIII. AMENDMENT**

Lead Bank and Participant each agree that, without the prior written consent of the other party, they will make no amendments, modifications or supplements to the Documents or increase the amount of the Loan or change the repayment terms of the Loan or release, waive or discharge Borrower, or any of the collateral or release or discharge any guarantor.

#### **IX. ADMINISTRATION**

Lead Bank agrees:

- i. To hold and deal with all Documents in its name and on behalf of itself and on behalf of Participant.
- ii. To disburse the proceeds of the Loan in accordance with the Documents.
- iii. To service and manage the Loan and the collateral in the ordinary course of business and in accordance with its usual practices.
- iv. To examine the collateral from time to time as it shall deem necessary.
- v. To submit to Participant for its approval all waivers of defaults prior to acceptance by Lead Bank.

#### **X. STANDARD OF CARE**

In making advances to Borrower, servicing, administering, and enforcing the Loan, and in exercising any other right or duty hereunder, Lead Bank shall not be liable to Participant for any action taken or omitted or for any error in judgment, except for its gross negligence or willful misconduct.

#### **XI. EXPENSES.**

All expenses reasonably incurred by Lead Bank or incurred in the enforcement or the protection of the Loan and/or the collateral shall be shared by Lead Bank and Participant in proportion to their respective shares of the principal of the Loan. Any expenses recovered from the Borrower shall be shared by the Lead Bank and Participant in the same proportion as if such expenses were advanced by Lead Bank and Participant.

#### **XII. LIABILITY AND REPRESENTATIONS**

Neither party hereto makes any express or implied warranty of any kind with respect to the Loan and neither party shall be liable to the other for any loss not due to its own negligence or willful misconduct. All loss or losses shall be borne by Lead Bank and Participant in accordance with their respective percentage interest in the Loan.

It is agreed that Lead Bank shall have no responsibility or liability expressed or implied for the collect ability of the Loan, the value of the collateral or the financial condition of the Borrower and guarantors. Participant has independently for itself determined the collect ability of the Loan, the value of the collateral and the creditworthiness of the Borrower, and the guarantors based upon the Documents attached hereto and in reliance upon the representations and warranties contained in Paragraph II hereof.

#### **XIII. ASSIGNMENTS**

It is agreed that Participant shall not sell, pledge, assign, sub-participate or otherwise transfer its right under this agreement the collateral or any portion of the Loan without procuring in advance the written consent of Lead Bank, which will not be unreasonably withheld. Further, each of the parties hereto agree that during the term of the Loan it will not, without the prior written consent of the other, Loan or otherwise extend additional credit to the Borrower, which Loan or additional credit is to be secured with secondary liens or encumbrances against all or any portion of the collateral.

#### **XIV. PARTICIPATION CERTIFICATION**

Upon receipt by Lead Bank of Participant's percentage share of the disbursement, which has been made or is to be made to Borrower, Lead Bank shall deliver to Participant a Participation Certificate in the form attached hereto as Exhibit "A".

#### **XV. MISCELLANEOUS**

Lead Bank agrees that it will always retain a minimum of 48% interest in the Loan and will remain responsible at all time for servicing the Loan.

This Agreement shall be governed by the laws of the State of Utah and may not be amended except by written document executed by each of the parties hereto.

This Agreement shall bind the respective successors of the parties hereto.

Lead Bank shall at all times keep proper books of account and records reflecting the interest of each Participant in the Loan, and such records shall be accessible for inspection by each Participant at all times during business hours of Lead Bank.


This Agreement may be signed in any number of counterparts, and signatures to all counterparts hereof, when assembled together, shall constitute signatures to the entire agreement with the same effect as if signatures were on the same document.

#### XVI. LOAN DOCUMENTS AND THEIR APPROVAL

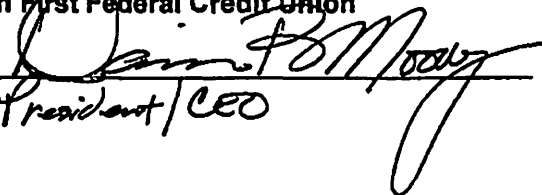
Prior to any disbursement, copies of the Documents will be executed and delivered to Participant, and Participant acknowledges approval of the content of said Documents. Lead Bank will not request funding from Participant of its proportionate share of the Loan until Lead Bank has in its possession all Documents duly executed in substantially the form as exhibited and delivered to Participant.

In Witness Whereof, the parties have caused this Agreement to be executed as of the day and year and first above written.

**America West Bank**

By:   
Its CLO

**Utah First Federal Credit Union**

By:   
Its President/CEO