

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
SPARTANBURG DIVISION**

**Nexity Bank, as successor in
interest and assignee of Banc
Capital & Financial Services, Inc**

PLAINTIFF,

v.

Richard A. Rodriguez,

DEFENDANT.

**Civil Action No.: 7:09-cv-____-____
7:09-2142-HFF**

VERIFIED COMPLAINT

Plaintiff, complaining of Defendants, alleges that:

1. Plaintiff Nexity Bank (Plaintiff) is an Alabama corporation having its principal place of business in Birmingham, Alabama, and with offices in South Carolina.

2. Plaintiff is the funding bank and real party in interest for the loan transaction and Guaranty put at issue in this action. Plaintiff is assignee of all rights of Banc Capital & Financial Services, Inc. ("Banc Capital") with respect to the loan and Guaranty put at issue in this action. Banc Capital is a South Carolina Corporation having its principal place of business and offices in Spartanburg County, South Carolina.

3. The Defendant, Richard A. Rodriguez ("Rodriguez" or "Defendant" or "Guarantor"), is upon information and belief, a citizen and resident of the State of Michigan, County of Washtenaw.

4. On information and belief, the contracts and agreements that are

the subject of this action were negotiated, executed, and performed, at least in part, in Spartanburg County, South Carolina. Payments on the loan at issue were mailed to Banc Capital in Spartanburg, South Carolina. Banc Capital was the originating lender for the loans at issue in this action. At all times relevant to this action, Banc Capital maintained its offices and operations in the state of South Carolina, County of Spartanburg. On information and belief, Rodriguez owns all or part of entities that are incorporated in South Carolina and do business in South Carolina. Accordingly, Defendant has had numerous contacts within the state of South Carolina and is subject to jurisdiction in this state.

5. Plaintiff and Defendant are citizens of different states. Accordingly, jurisdiction and venue are proper in this court as provided for under 28 U.S.C. §§'s 1391 and 1332.

6. On or about September 21, 2007, The Legends of Blacksburg, LLC ("Legends") executed a Construction Loan Promissory Note to Banc Capital in the amount of Twenty Six Million One Hundred Thousand and No/100 (\$26,100,000.00) Dollars ("Promissory Note"). The Promissory Note was modified on September 19, 2008, by that Construction Loan Promissory Note and Construction Deed of Trust, Assignment of Rents and Security Agreement Modification Agreement ("Modification") reducing the principal balance due under the Promissory Note to \$3,631,425.17. The modified Promissory Note was renewed on March 10, 2009, by that certain Construction Loan Promissory Note – Renewal, in the amount of \$3,631,425.17 ("Renewal Note"). A copy of the Promissory Note, Modification, and Renewal Note are attached hereto as **Exhibit A** and incorporated herein. The Promissory Note, Modification and

Renewal may hereinafter collectively be referred to as the "Note".

7. According to the terms and provisions of the Note, Legends is obligated to pay a Default Rate of interest as set forth in Paragraph 8 of the Renewal Note. This Default Rate is owed on the entire principal balance as set forth in the Renewal Note. Legends has been in default since at least as early as May 10, 2009 when the loan at issued matured. Accordingly, Legends and Rodriguez as Guarantor are obligated to pay interest on the Note at the Default Rate.

8. As further consideration for the Note, on or about September 21, 2007, Defendant and Guarantor Richard A. Rodriguez executed a Guaranty Agreement ("Guaranty") to Banc Capital in the amount of Twenty Six Million One Hundred Thousand and No/100 (\$26,100,000.00) Dollars. A copy of the Guaranty is attached hereto as **Exhibit B** and incorporated herein.

9. Defendant Richard A. Rodriguez signed the Guaranty.

10. As a Guarantor under the Guaranty, Rodriguez agreed to:

"absolutely, unconditionally and irrevocably guarantee to Lender the full and prompt payment when due, whether at maturity or earlier, by reason of acceleration or otherwise, and at all times thereafter, and the full and prompt performance when due, of all of the following: (a) The entire Indebtedness; (b) The payment and performance of all of Borrower's obligations under the Environmental Indemnity; and (3) All costs and expenses, including reasonable fees and out of pocket expenses of attorneys and expert witnesses, incurred by Lender in enforcing its rights under this Guaranty."

11. Pursuant to the terms and conditions of the Guaranty, Defendant Rodriguez absolutely and unconditionally guaranteed prompt payment by Legends on the Note, and Defendant Rodriguez is liable to Plaintiff for all

amounts due under the Note by Legends.

12. Legends is in default on its obligations as set forth in the Note for failure to make payments as required by same.

13. On or about May 29, 2009, a demand letter was sent to Legends and all Guarantors including Defendant, notifying all of the default and demanding payment on the obligations. A copy of this letter is attached hereto as **Exhibit C** and incorporated herein.

14. As of the date of the filing of this action, no payment has been forthcoming from Legends or from Defendant, the Note remains in default, and Plaintiff is, therefore, entitled to payment from Rodriguez under the terms and conditions of the Guaranty.

15. As of August 13, 2009, the amount due from Richard A. Rodriguez under the Note and Guaranty at issue in this action is \$3,930,103.59, not including attorneys' fees and costs of collection. This includes principal in the amount of \$3,631,425.17, a late fee in an amount of \$182,926.74, and accumulated interest as of August 13, 2009 in the amount of \$115,751.68. The interest amount due represents the interest due before maturity on May 10, 2009, in an amount of \$27,109.60, and interest at the Default Rate from May 10, 2009 to August 13, 2009, in an amount of \$88,642.08. Presently, interest is accruing on the principal balance amount at the Default Rate as set forth in the Renewal Note in an amount of \$933.07 per day.

For a First Cause of Action
(Collection on Guaranty – Richard A. Rodriguez)

16. Plaintiff herein incorporates each and every allegation set forth above as if set forth herein verbatim.

17. Legends is in default on its obligations as set forth in the Note for failure to pay the Note at maturity as set forth in the demand letter provided to Guarantor.

18. As a result of Legend's default, the amount due from Guarantors under the Guaranty from Defendant is due and owed to Plaintiff.

19. Plaintiff is entitled to a judgment against Defendant Richard A. Rodriguez in the amount due under the Guaranty as set forth herein.

20. Plaintiff is additionally entitled to an award of its reasonable attorneys' fees and costs in bringing this action and collecting these debts.

WHEREFORE, Plaintiff prays for judgment against Defendant for all amounts due under the Guaranty, as set forth herein in an amount of \$3,930,103.59, plus its attorney fees and costs of this action, and such other relief as this Court may deem just and proper under the circumstances.

SIGNATURE ON NEXT PAGE

ELLIS, LAWHORNE & SIMS, P.A.

s/ Wesley D. Few

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August 13, 2009
Columbia, South Carolina