THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

HAROLD H. HUGGINS REALTY, INC., P.E. TURNER & COMPANY, INC., and RESIDENTIAL APPRAISAL AND CONSULTING, INC., individually and on behalf of all others similarly situated, Plaintiffs, v. FNC, INC., Defendant.	CASE NO: 8:07-cv-01203-RWT **ORAL ARGUMENT REQUESTED**

MEMORANDUM OF LAW IN SUPPORT OF THE MOTION OF DEFENDANT FNC, INC. TO STAY PROCEEDINGS IN FAVOR OF ARBITRATION

Plaintiffs Harold H. Huggins Realty, Inc., P.E. Turner & Company, Inc., and Residential Appraisal and Consulting, Inc. agreed to the terms of service governing the use of Defendant FNC, Inc.'s ("FNC") AppraisalPort web portal. The terms of service to which each Plaintiff agreed include a broad arbitration agreement covering "[a]ny controversy or claim arising out of or relating to this agreement." Plaintiffs' claims in this case arise out of and relate to their use of AppraisalPort. Accordingly, FNC moves this Court, pursuant to Section 3 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 3, for an order staying these proceedings in favor of arbitration.

STATEMENT OF THE CASE

FNC provides a variety of tools and services to mortgage lenders that allow the lenders to process and analyze mortgages—and, in particular, information about the collateral (*i.e.*, real

property) securing those mortgages—more efficiently. One such product offered by FNC to lenders is AppraisalPort. FNC's AppraisalPort service is a web-based service "that enables a lending institution to order an appraisal of real estate, the appraiser to confirm acceptance of the order, and then the transmission of the completed appraisal in an agreed to electronic-format [sic] from the appraiser to the lending institution." Compl. ¶ 12. Lenders that participate in AppraisalPort order some or all of their appraisals through AppraisalPort. *Id.* ¶ 15. "Typically, a lending institution will select from a number of appraisers registered with Appraisal Port [sic] who are geographically near the property for which the institution seeks the appraisal." *Id.* Thus, if an appraiser wishes to get appraisal business from a lender participating in AppraisalPort, the appraiser generally must register with AppraisalPort. In addition to providing important benefits to lenders, "Appraisal Port [sic] also functions as a means of channeling new business to appraisers who are registered with the service." *Id.*

Appraisers from each of the Plaintiff entities subscribed to and opened accounts with AppraisalPort. Harold Huggins from Plaintiff Harold H. Huggins Realty, Inc. did so on June 25, 2003. Mitchell Decl. ¶ 6. Pat Turner and Jan Martin from Plaintiff P.E. Turner and Company, Ltd. did so on January 8, 2002 and March 4, 2004, respectively. Carl Schneider from Residential Appraisal and Consulting, Inc. did so on July 30, 2001. Plaintiffs concede that they each used the AppraisalPort service, and that no appraiser can use the AppraisalPort service without first subscribing. Compl. ¶¶ 4-6, 14.

When Plaintiffs' appraisers subscribed to AppraisalPort and opened their AppraisalPort accounts, they agreed to the terms of service governing the use of AppraisalPort. Mitchell Decl. ¶¶ 3-11. They could not have subscribed without agreeing to the terms of service in place at that time. *Id.* When they subscribed, Messrs. Turner and Schneider agreed to the terms of service

put into place in 2000 and applicable at the time of their subscriptions ("2000 Agreement"). *Id.* ¶ 3-6. These terms were subsequently amended in 2002. *Id.* ¶ 7. When they subscribed, Messrs. Huggins and Martin agreed to the terms of service put into place in 2002 and applicable at the time of their subscriptions ("2002 Agreement"). *Id.* ¶ 8-10. Thus, each of Plaintiffs' appraisers who subscribed to AppraisalPort agreed to the 2002 Agreement. *Id.* ¶¶ 3-11.[1]

The 2002 Agreement to which each of Plaintiffs' appraisers is bound contained an arbitration agreement. This agreement provides in relevant part:

> **Arbitration** - Any controversy or claim arising out of or relating to this agreement shall be settled by binding arbitration in accordance with the commercial arbitration rules of the American Arbitration Association. Any such controversy or claim shall be arbitrated on an individual basis, and shall not be consolidated in any arbitration with any claim or controversy of any other party. The arbitra[tor] shall be conducted in Oxford, Mississippi, and judgment on the arbitration award may be entered into any court having jurisdiction thereof.

Mitchell Decl. ¶ 11 & Ex. 5.[2]

Plaintiffs filed their Complaint on May 9, 2007. Plaintiffs allege (wrongly) that (1) FNC violated section 43(a) of the Lanham Act in stating that FNC does not collect information from AppraisalPort; (2) FNC misrepresented the terms of the AppraisalPort Service; (3) FNC negligently misrepresented the terms of the AppraisalPort Service; (4) FNC converted and misappropriated Plaintiffs' property; and (5) FNC breached an implied contract with Plaintiffs. Each of these claims arises out of and relates to Plaintiffs' agreement with FNC, and therefore must be resolved in arbitration.

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[1] Appraisers who subscribed to AppraisalPort after July 12, 2005, were asked to agree to different terms and conditions of use, which are not applicable to the Plaintiffs, all of whom subscribed before that. Mitchell Decl. ¶ 12.

ARGUMENT

I. PLAINTIFFS ARE PARTIES TO BINDING ARBITRATION AGREEMENTS

Each of Plaintiffs agreed with FNC to arbitrate "[a]ny controversy or claim arising out of or relating to this agreement." Courts routinely enforce similar arbitration agreements. *See, e.g.*, *Adkins v. Labor Ready Inc.*, 303 F.3d 496 (4th Cir. 2002); *Snowden v. Checkpoint Check Cashing*, 290 F.3d 631 (4th Cir. 2002); *Brendsel v. Winchester Constr. Co., Inc.*, 898 A.2d 472 (Md. 2006); *Walther v. Sovereign Bank*, 872 A.2d 735 (Md. 2005). Because Plaintiffs' arbitration agreements are enforceable, and their claims fall squarely within the broad scope of those agreements, this Court should stay this action in favor of arbitration.

A. Federal Law Strongly Favors the Enforcement of Arbitration Agreements

The FAA provides that written agreements to arbitrate disputes "shall be valid, irrevocable, and enforceable." 9 U.S.C. § 2. Congress enacted the FAA for the purpose of "revers[ing] the longstanding judicial hostility to arbitration agreements . . . and to place arbitration agreements upon the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). The Supreme Court has emphasized, moreover, that the FAA embodies a "liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *see also Dockser v. Schwartzberg*, 433 F.3d 421, 423 (4th Cir. 2006) (same).

In light of this federal policy, a district court asked to enforce an arbitration agreement need answer only two questions: "1) did the parties have a valid agreement to arbitrate? if so, 2)

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[2] The 2000 Agreement contained a substantially similar arbitration agreement. Mitchell Decl. ¶ 4 & Ex. 2.

does the arbitration agreement apply to the dispute at hand?" *Gen. Elec. Capital Corp. v. Union Corp. Fin. Group, Inc.*, 2005 WL 1703619, at *2 (4th Cir. July 21, 2005); *accord Alamria v. Telcor Int'l, Inc.*, 920 F. Supp. 658, 662 (D. Md. 1996). The answer here to each question is "yes:" The arbitration agreement is a valid part of the parties' agreement, and the arbitration agreement covers the claims alleged in the Complaint.

B. Plaintiffs Entered Into Valid and Enforceable Arbitration Agreements

Plaintiffs agreed to arbitrate their claims when they agreed to the terms of service governing the use of the AppraisalPort web portal. Before an appraiser can complete a subscription and open an account, the appraiser is required to agree affirmatively to the terms of service governing the use of AppraisalPort. Mitchell Decl. ¶¶ 4, 7, 9. Plaintiffs concede that their appraisers could not use the AppraisalPort service without subscribing to AppraisalPort and establishing an account. Compl. ¶ 14. Therefore, Plaintiffs and their appraisers are bound by the terms of service governing the use of AppraisalPort, including the agreements to arbitrate. It is well-established that an arbitration agreement contained in an on-line agreement is valid and enforceable. *See, e.g., Bar-Ayal v. Time Warner Cable, Inc.*, 2006 WL 2990032, at *13 (S.D.N.Y. Oct. 16, 2006).

Furthermore, the arbitration agreements are valid and enforceable. Courts routinely enforce similar arbitration agreements in commercial contracts. *See, e.g., Senior Mgmt., Inc. v. Capps*, 2007 WL 1800235 (4th Cir. June 19, 2007); *Choice Hotels Int'l, Inc. v. Chewl's Hospitality, Inc.*, 2003 WL 22961190 (4th Cir. Dec. 17, 2003). Indeed, courts also routinely enforce similar arbitration agreements in consumer contracts. *See, e.g., Snowden v. Checkpoint Check Cashing*, 290 F.3d 631 (4th Cir. 2002); *Brendsel v. Winchester Constr. Co., Inc.*, 898 A.2d 472 (Md. 2006); *Walther v. Sovereign Bank*, 872 A.2d 735 (Md. 2005).

C. Plaintiffs' Claims Fall Within the Scope of the Arbitration Agreements

The United States Supreme Court has directed that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985); *accord Dockser*, 433 F.3d at 425; *Am. Gen. Life and Acc. Ins. Co. v. Wood*, 429 F.3d 83, 87 (4th Cir. 2005). "[T]he heavy presumption of arbitrability requires that when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration." *Am. Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 92 (4th Cir. 1996) (internal quotation marks omitted).

This standard requires courts to construe arbitration clauses broadly. *See, e.g., Choice Hotels Int'l, Inc. v. BSR Tropicana Resort, Inc.*, 252 F.3d 707, 711 (4th Cir. 2001) ("[F]ederal policy requires that ambiguities in arbitration clauses be resolved in favor of arbitration."). A court "may not deny a party's request to arbitrate an issue unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *Am. Recovery Corp.* 96 F.3d at 92 (internal quotation marks omitted).

In addition to this policy in favor of arbitrability, this case involves a broad, inclusive arbitration agreement. *See, e.g., Crown Oil & Wax Co. of Del., Inc. v. Glen Constr. Co. of Va., Inc.*, 578 A.2d 1184, 1188-89 (Md. 1990) (characterizing as a "broad arbitration agreement" an agreement that required arbitration of "[a]ll claims, disputes and other matters in question . . . arising out of, or relating to, the Contract Documents or the breach thereof"). The arbitration provision extends to "[a]ny controversy or claim arising out of or relating to this agreement." Mitchell Decl. ¶ 11 & Ex. 5. "The Supreme Court has urged a broad reading of arbitration provisions in contracts, creating a presumption in favor of arbitrability for merits-based disputes . . ." *Gregory v. Interstate/Johnson Lane Corp.*, 1999 WL 674765, *4 (Aug. 31, 1999). "In the

absence of any express provision excluding a particular grievance from arbitration, . . . only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, particularly where, as here, . . . the arbitration clause [is] quite broad." *Washington Square Securities, Inc. v. Aune*, 385 F.3d 432, 436 (4th Cir. 2004) (quoting *AT&T Techs., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 650 (1986)); *accord Diesselhorst v. Munsey Building, L.L.L.P.*, 2005 WL 327532, *5 (D. Md. Feb. 9, 2005) (noting that "where the parties use a broad, all encompassing clause, it is presumed they intended all matters to be arbitrated" (quoting *Crown Oil*, 578 A.2d at 1189)); *Brendsel*, 898 A.2d at 484 ("[W]here the parties use a broad, all encompassing clause, it is presumed they intended all matters to be arbitrated.").

Plaintiffs' claims plainly arise out of and relate to the terms of service and use of AppraisalPort—and therefore fall squarely within the broad arbitration agreement. Plaintiffs' first cause of action alleges violation of the false advertising provision of the Lanham Act. Compl. ¶¶ 38-45. Plaintiffs' Complaint makes clear that this claim is rooted in an alleged misrepresentation of the "terms on which [FNC] invited Plaintiffs to use FNC's AppraisalPort service." *Id.* ¶ 47. Thus, this claim falls squarely within those arising out of or relating to the terms of service governing the use of AppraisalPort. Indeed, when the parties' business relationship gives rise to Lanham Act claims, the Fourth Circuit has held that such claims arise from and are related to the parties' agreement. *See Chewl's Hospitality*, 2003 WL 22961190, at *5.

Plaintiffs' second and third causes of action allege intentional misrepresentation and negligent misrepresentation. Both claims directly relate to "the terms on which [FNC] invited Plaintiffs to use FNC's AppraisalPort service." Compl. ¶¶ 47, 53. These claims fall squarely within the scope of the arbitration agreements. Indeed, tort claims that arise out of or are related

to the parties' agreement are routinely held to be arbitrable. *See, e.g.*, *Nowak v. NAHB Research Center, Inc.*, 848 A.2d 705, 713 (Md. App. 2004).

Plaintiffs' fourth cause of action alleges conversion, misappropriation, and breach of bailment. Specifically, Plaintiffs allege that FNC converted and misappropriated Plaintiffs' property which Plaintiffs had "entrusted to FNC's AppraisalPort" for transmission. *Id.* ¶ 59. Because this claim is based directly on Plaintiffs' use of AppraisalPort, it plainly arises out of and relates to the terms of service that govern Plaintiffs' use of AppraisalPort. *See, e.g.*, *Nowak*, 848 A.2d at 713.

Plaintiffs' fifth cause of action alleges a breach of an implied contract. Plaintiffs allege that they were fraudulently induced into entering into written contracts with FNC and that these contracts are voidable. Compl. ¶ 67. Plaintiffs also allege that FNC's representations created an implied contract between FNC and each Plaintiff. *Id.* ¶ 69. This claim also plainly arises out of and relates to the terms of service governing AppraisalPort.

II. PLAINTIFF'S CLAIM SHOULD BE STAYED PENDING ARBITRATION

Section 3 of the FAA provides that a court, upon determining that an action before it is subject to an enforceable arbitration provision, "shall . . . stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement." 9 U.S.C. § 3. Because each of Plaintiffs' claims is subject to an enforceable arbitration agreement, this Court should stay the entire case in favor of arbitration.

CONCLUSION

Because Plaintiffs' claims are within the broad scope of valid arbitration agreements, Defendant FNC respectfully requests that the Court enter an order, pursuant to 9 U.S.C. § 3, staying these proceedings pending arbitration.

Respectfully submitted,

Dated: June 29, 2007

/s/

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 29, 2007, a copy of the above and foregoing was electronically filed in this case and was duly served upon counsel of record by operation of the Court's ECF system to the following:

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