

**THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF MARYLAND**

Harold H. Huggins Realty, Inc.,)
15308-101 Spencerville Court,)
Burtonsville, Maryland 20866,)
located in Montgomery County, Maryland,)
P.E. Turner & Company, Ltd.,)
1129 Gaskins Road, Suite 207,)
Richmond, Virginia 23238,)
and)
Residential Appraisal and Consulting, Inc.,)
6737 South Peoria, Suite B 114,)
Tulsa, Oklahoma 74136,)
individually and on behalf of)
all others similarly situated,)
Plaintiffs,)
v.)
FNC, INC.,)
1214 Office Park Drive,)
Oxford, Mississippi 38655,)
Defendant.)

CASE NO:

JURY DEMAND

COMPLAINT FOR DAMAGES

Plaintiffs Harold H. Huggins Realty, Inc., P.E. Turner & Company, Ltd., and Residential Appraisal and Consulting, Inc., individually and on behalf of all others similarly situated (the “Class” and collectively, “Plaintiffs”), file this action against Defendant FNC, Inc. (“FNC”) seeking damages for

breach of the Lanham Act, 15 U.S.C. § 1125(a), intentional misrepresentation, negligent misrepresentation, conversion, misappropriation, breach of bailment and breach of implied contract.

SUMMARY OF THE ACTION

1. This is a federal class action on behalf of residential real estate appraisers, including both individuals and entities performing residential real estate appraisals, who have used defendant FNC's AppraisalPort service. Plaintiffs assert federal law claims against FNC under the Lanham Act, 15 U.S.C. § 1051 et seq., and claims under state law for intentional misrepresentation, negligent misrepresentation, conversion, misappropriation, breach of bailment and breach of implied contract.

JURISDICTION AND VENUE

2. This Court has federal jurisdiction under (i) 28 U.S.C. § 1331 because the claim asserted for false advertising arises under and pursuant to Section 1125(a) of the Lanham Act, Title 15 of the U.S. Code; and (ii) 28 U.S.C. § 1332 because the amount of the class action claim exceeds \$5,000,000 and Plaintiff Harold H. Huggins Realty, Inc., a member of the Class, is a citizen of a state different from Defendant FNC. The Court also has pendent and ancillary jurisdiction over the state law claims.

3. FNC is subject to the exercise of jurisdiction of this Court and venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(b) because FNC may be found in and does business in this district, and many acts and practices complained of herein occurred in substantial part in this District.

THE PARTIES

4. Plaintiff Harold H. Huggins Realty, Inc., with its principal place of business at 15308-101 Spencerville Court, Burtonsville, Maryland 20866, is an appraisal firm. Harold H. Huggins Realty, Inc. has used the AppraisalPort service of Defendant numerous times and has suffered commercial loss and damages as a result thereof.

5. Plaintiff P.E. Turner & Company, Ltd., with its principal place of business at 1129 Gaskins Road, Suite 207, Richmond, Virginia 23238, is an appraisal firm. P.E. Turner & Company, Ltd. has used the AppraisalPort service of Defendant numerous times and has suffered commercial loss and damages as a result thereof.

6. Plaintiff Residential Appraisal and Consulting, Inc., with its principal place of business at 6737 South Peoria, Suite B 114, Tulsa, Oklahoma 74136, is an appraisal firm. Residential Appraisal and Consulting, Inc. has used the AppraisalPort service of Defendant numerous times and has suffered commercial loss and damages as a result thereof.

7. Defendant FNC is a Mississippi corporation with its principal place of business in Oxford, Mississippi. FNC provides services, primarily to banks and lending institutions, related to obtaining, processing and analyzing information about residential and commercial real estate that is the security for real estate mortgages. FNC also provides services to appraisers through “AppraisalPort,” a web-based service that allows appraisers to transmit information, including the data, conclusions, and judgments contained in their appraisal reports, to lending institutions electronically and in a pre-defined format. On information and belief, AppraisalPort is a wholly owned division of FNC with no separate corporate existence.

PLAINTIFFS’ CLASS ACTION ALLEGATIONS

8. Plaintiffs bring this action as a class action pursuant to Federal Rules of Civil Procedure 23(a) and 23 (b)(3) on behalf of the Class. The Class consists of all appraisers, including both individuals and entities engaged in performing appraisals, who have used the AppraisalPort web service of FNC since its inception through at least April 2007 (the “Class Period”), and who were damaged thereby. Excluded from the Class are FNC, the officers and directors of FNC, at all relevant times, members of their

immediate families and their legal representatives, heirs, successors or assigns and any corporations in which FNC has or has had a controlling interest.

9. The members of the Class are so numerous that joinder of all members is impracticable. While the exact number of Class members is unknown to Plaintiffs at this time and can only be ascertained through appropriate discovery, Plaintiffs believe there are thousands of members of the proposed class. The members of the Class may be identified from records maintained by FNC and may be notified of the pendency of this action using one or more forms of notice similar to those customarily used in class actions.

9. By reason of FNC's wrongful conduct, Plaintiffs have been harmed, injured and damaged in an amount greater than \$5,000,000.

10. The resolution of this action involves questions of law and fact common to the Class. Plaintiffs' claims are typical of the claims of the other members of the Class because all members of the Class are similarly affected by FNC's wrongful conduct alleged in this Complaint.

THE FACTS

A. The AppraisalPort Service

12. AppraisalPort is a web-based service operated by FNC 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 from the appraiser to the lending institution.

13. The URL (Uniform Resource Locator)—or web site address—for the AppraisalPort web site is www.appraisalport.com.

14. Using the electronic forms on the AppraisalPort web site, appraisers may register to use the AppraisalPort service. No appraiser may use the service without first registering.

15. The AppraisalPort service allows a participating lending institution to order an appraisal from an appraiser. Once an appraiser is registered with AppraisalPort, a lending institution using AppraisalPort may select an appraiser and issue an order for an appraisal report on specified real estate. Typically, a lending institution will select from a number of appraisers registered with Appraisal Port who are geographically near the property for which the institution seeks the appraisal. Thus, Appraisal Port also functions as a means of channeling new business to appraisers who are registered with the service.

16. Upon acceptance of the order, the appraiser will perform the appraisal of the designated real estate and then enter information constituting the appraisal report into an electronic form that supports the Residential Data Storage Standard. This data format standard, which was developed in part by FNC in or about 1998 and has been endorsed by an association of appraisers known as the “Appraisal Institute,” is referred to as the “Appraisal Institute Ready” standard, or “AI Ready.”

17. Using the AppraisalPort electronic transmission service, the appraiser then transmits the appraisal report data for a property in the AI Ready data format to the lending institution that ordered the appraisal. AppraisalPort charges and collects from the appraiser a fixed fee—presently six dollars (\$6.00)—for each appraisal report transmitted to the requesting lending institution.

18. In addition to the AppraisalPort service, FNC markets and provides to lending institutions a service and software product known as the “Collateral Management System” or “CMS”. FNC’s Collateral Management System allows lending institutions to manage the process of ordering, obtaining, storing, reviewing, and analyzing information about the collateral securing real estate mortgages, i.e.,

primarily the information from property appraisals. This system also stores and uses appraisal report data in the AI Ready data format.

19. Appraisal data submitted to a lending institution by an appraiser using the AppraisalPort service becomes part of the data in that particular lender's Collateral Management System.

B. Representations Made by FNC

20. FNC has promoted and advertised in interstate commerce the electronic transmission service offered by AppraisalPort only as secure "pipes" for data transmission. FNC has repeatedly assured and represented to appraisers who use its AppraisalPort service that FNC does not have access to the appraisal report data transmitted from the appraiser to a lending institution via the AppraisalPort service. Furthermore, FNC has represented that it is not building a database using the transmitted appraisal report data. These statements and representations have appeared on the AppraisalPort website and elsewhere.

21. In promoting and describing the AppraisalPort service to appraisers, FNC stated that it allows only the lending institution (the appraiser's "client") and the appraiser to have access to the transmitted information in the appraisal report. The "About" page on the AppraisalPort web site stated:

At FNC, our paramount concern is the integrity of your reports. We facilitate a completely secure connection between you and your clients, allowing only the client institution and yourself to have access to your report. We provide the secure "pipes" to link you to your clients, but the data that travels those pipes is unseen and untouchable by anyone but your client and you.

(Emphasis added.) FNC's web-based marketing and promotional material emphasized and highlighted that appraisal report electronic data transmitted via FNC's AppraisalPort service from an appraiser to a lending institution was "secure," "unseen," and "untouchable by anyone but your client and you."

22. In addition, the FAQ (Frequently Asked Questions) page of the AppraisalPort web site stated:

Does AppraisalPort view, manipulate or store any of the appraisal data sent to my clients?

Never. AppraisalPort is simply the pipe that gives you a secure and direct connection to your client. It never has access to your data, nor is it building a database with your appraisal data.

(Emphasis added.)

23. On or about April 2007, these representations noted at paragraphs 21 and 22 above were removed from FNC's website, apparently because FNC obtained information that appraisers were planning a lawsuit based on these representations. Nonetheless, until March 2007, FNC repeatedly and unambiguously represented to appraisers that it would not access the appraisal report data transmitted using the AppraisalPort service and that it was not building a database with the appraisal report data transmitted by the appraiser.

C. The National Collateral Database

24. Contrary to the representations made by FNC to appraisers, FNC has and is continuing to copy, store and use the appraisal report electronic data transmitted via the AppraisalPort service. In fact, it has built a national database of information about properties using the appraisers' information transmitted on AppraisalPort.

25. A marketing brochure prepared by FNC admitted:

FNC plans to take the informal and small-scale collateral data sharing that now exists a revolutionary step further by establishing a national database of residential properties.

26. In an interview published October 13, 2005, Bill Rayburn, the Chief Executive Officer of FNC, further explained the "National Collateral Database." First, Mr. Rayburn described FNC's services for lenders:

We invented a process that allows lenders to turn these collateral documents into data and images, and we have systems in big lenders that allow them to process mortgages a lot

more efficiently. What we do is extract data during the process for collateral. That's our first line of business.

27. AppraisalPort is a significant element of this "first line of business" of FNC that Mr. Rayburn refers to—for the benefit of lending institutions, the automated ordering and transmission of appraisal report electronic data. The lending institutions then use this data as part of FNC's Collateral Management System to process mortgage applications.

28. In the October 2005 interview, Mr. Rayburn described a second part of FNC's business:

Our second line of business is, we take that data and we warehouse that data. So, just like the credit bureaus collect credit data, we have developed a national collateral database where lenders and other market participants share this collateral data[.] building this national collateral warehouse, if you will.

(Emphasis added.)

29. As CEO of FNC, Mr. Rayburn thus acknowledged that, contrary to FNC's advertising on its website, FNC "take[s] that data," and "warehouse[s] that data." On information and belief, this "data" primarily encompasses the appraisal report electronic data transmitted by appraisers to lending institutions via the AppraisalPort service.

30. "Warehousing of data" is a phrase used in the information technology industry to refer to the development of systems to extract and collect data from various sources to present an integrated, accessible and searchable set of data for the purpose of supporting management and business decision making.

31. In the October 2005 interview, Mr. Rayburn acknowledged not only that FNC copies and stores the appraisal report electronic data transmitted by the AppraisalPort service, but also that FNC "[has] developed a national collateral database where lenders and other market participants share this collateral data." Mr. Rayburn further admitted that the data transmitted through the AppraisalPort

service became part of FNC's "National Collateral Database" and thereupon was "shared" and made available to lending institutions and "other market participants."

32. On information and belief, the appraisal report electronic data in FNC's National Collateral Database in large part originates from the appraisal reports that appraisers electronically submit to lending institutions using FNC's AppraisalPort web site. Mr. Rayburn explained in the October 2005 interview how the "AI Ready" technology allowed FNC to do this:

We have invented a data standard [the AI Ready standard data format]. We worked with the appraisal entity [the Appraisal Institute], which is the largest appraisal organization back in '98, and we developed an XML standard for appraisal. And that has made us very unique in the marketplace. So, when an appraisal is transmitted to the lender, we are able to pop it open and suck all the data out, and do that in a formatted way.

(Emphasis added.)

**D. The National Collateral Database
Appraisal Data Sharing Agreement**

33. On information and belief, FNC has entered into an agreement, called the "National Collateral Database Appraisal Data Sharing Agreement" (the "Data Sharing Agreement"), with numerous lending institutions. This agreement obligates the lending institution to "share your data promptly after the date (or receipt) of the appraisal or other collateral evaluation." If the lending institution uses FNC's product known as the "FNC Collateral Management System" or "CMS", "you [the lending institution] authorize FNC to transfer the appraisal data in the CMS to FNC on a routine basis at FNC's convenience."

34. The Data Sharing Agreement obligates lending institutions to make available to FNC all appraisal report electronic data, including such data transmitted by appraisers to lenders using FNC's AppraisalPort service.

E. Wrongful Conduct of FNC

35. On the FNC web site for the AppraisalPort service, FNC advertised and represented that FNC does not access or store the appraisal report electronic data transmitted by appraisers to lending institutions using the AppraisalPort service, that this data is “secure,” that this data is “unseen” and “untouchable” by FNC and third parties, and that this data is not used to build a database. Based on these representations, FNC charged appraisers up to \$6 each time they transmitted data using its service. These statements and representations made by FNC are not true. In fact, FNC downloads this data into FNC’s National Collateral Database and then markets access to this data to lending institutions and other third parties. Thus, not only does FNC collect fees from appraisers based on misrepresenting the service it is providing, it collects additional profits from others based on the very same data and the work of the appraisers it dupes into using its service.

36. FNC’s conduct fraudulently induced appraisers to subscribe to and use the AppraisalPort service.

37. FNC’s National Collateral Database offering reduces the need for new or additional appraisals for real estate within its database. FNC’s scheme of collecting data while assuring its customers, the appraisers, that the data collected will be merely transmitted and not used in any other way, harms those appraisers who use its services because they are duped into providing wider dissemination of the information and judgments they work to compile than they otherwise would, thereby unjustly enriching FNC at their expense. FNC competes with and harms the commercial interests of appraisers who use FNC’s AppraisalPort Service.

CAUSES OF ACTION

First Cause of Action – False Advertising under the Lanham Act

38. Plaintiffs incorporate by reference paragraphs 1 through 37 as if fully restated herein.

39. FNC has made false and misleading statements in advertising and promoting its AppraisalPort service on the world wide web and in interstate commerce.

40. The false and misleading statements made by FNC in advertising and promoting its AppraisalPort service have actually deceived or have the capacity to deceive appraisers who used the AppraisalPort service.

41. The false and misleading statements and representations made by FNC were material and likely to influence the purchasing decisions of appraisers that used the AppraisalPort service.

42. The false and misleading statements and representations made by FNC enabled FNC to create the National Collateral Database.

43. FNC caused its National Collateral Database to be marketed and promoted in interstate commerce, and caused third parties to use the National Collateral Database, oftentimes in lieu of residential appraisal services offered by Plaintiffs.

44. Plaintiffs have suffered commercial harm and damages, and have been injured by FNC's representations, misrepresentations, false advertising, actions, and conduct.

45. WHEREFORE, FNC violated Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), by its acts alleged in this Complaint. As a direct and proximate result of FNC's wrongful conduct, Plaintiffs suffered commercial harm and damages, and FNC was unjustly enriched. FNC also reaped profits and benefits directly and indirectly from its false advertising. Plaintiffs, therefore, request that the Court award them damages and/or recoupment of profits in an amount greater than \$5,000,000 to be

determined at trial, and also request award of the costs of this litigation, including reasonable attorneys' fees.

Second Cause of Action – Intentional Misrepresentation (Fraud)

46. Plaintiffs incorporate by reference paragraphs 1 through 45 as if fully restated here.

47. Defendant FNC intentionally and knowingly misrepresented the terms on which it invited Plaintiffs to use FNC's AppraisalPort service, falsely assuring Plaintiffs that the data and information they submitted would be secure and would not be accessed or used by FNC or any third party.

48. Plaintiffs justifiably relied on those misrepresentations, to their detriment.

49. As a direct and proximate result of FNC's wrongful conduct, Plaintiffs suffered commercial harm and damages.

50. WHEREFORE, FNC is liable to Plaintiffs for compensatory damages, for unjust enrichment, for recoupment of profits, and for punitive damages, and Plaintiffs request an award be entered against FNC and in their favor in an amount greater than \$5,000,000 to be determined at trial.

Third Cause of Action – Negligent Misrepresentation

51. Plaintiffs incorporate by reference paragraphs 1 through 50 as if fully restated here.

52. Defendant FNC owed a duty of care to its customers, the appraisers who used the AppraisalPort service.

53. FNC breached its duty of care to plaintiffs by negligently misrepresenting the terms on which it invited appraisers to use FNC's AppraisalPort service, falsely assuring them that the data and

information they submitted would be secure and would not be accessed or used by AppraisalPort or any third party.

54. Plaintiffs justifiably relied on those misrepresentations, to their detriment.

55. As a direct and proximate result of FNC's negligent misrepresentations, Plaintiffs suffered commercial harm and damages.

56. WHEREFORE, FNC is liable to Plaintiffs for compensatory damages, for unjust enrichment, and for recoupment of profits, and Plaintiffs request an award be entered against FNC and in their favor in an amount greater than \$5,000,000 to be determined at trial.

Fourth Cause of Action – Conversion, Misappropriation, and Breach of Bailment

57. Plaintiffs incorporate by reference paragraphs 1 through 56 as if fully restated here.

58. Plaintiffs had a property interest in the data they collected and the judgments that they made in formulating residential real estate appraisals. This data and the judgments based on them were protected and proprietary commercial information with substantial value to lenders and other users of appraisal services.

59. Plaintiffs entrusted that property to FNC's AppraisalPort for the limited purpose of transmission to the lending institution which had commissioned the appraisal.

60. FNC converted and misappropriated that property to its own use by disseminating it to those, including itself, who had not paid Plaintiffs for it and who had given no consideration to Plaintiffs for its use.

61. Plaintiffs also entrusted their property to FNC under the terms of a constructive bailment that restricted the use FNC could make of that property.

62. FNC breached the terms of that constructive bailment.

63. WHEREFORE, because FNC took Plaintiffs' property and converted and misappropriated it to its own use, and because FNC breached the terms of its constructive bailment of that property, Plaintiffs suffered harm to their commercial interests and damages. Plaintiffs, therefore, request that the Court award them damages in an amount greater than \$5,000,000 to be determined at trial.

Fifth Cause of Action – Breach of Implied Contract

64. Plaintiffs incorporate by reference paragraphs 1 through 63 as if fully restated here.

65. FNC's advertising specifically stated that Plaintiffs' data submitted to the AppraisalPort service is "secure" and that this data is "unseen" and "untouchable" by FNC and third parties.

66. FNC knowingly and intentionally accessed and used Plaintiffs' data, contrary to the statements and representations made by FNC.

67. FNC's misrepresentations fraudulently induced Plaintiffs to enter into written contracts with FNC. As a consequence of this fraudulent inducement, the written contracts between FNC and Plaintiffs are voidable.

68. FNC advertised and offered to provide to Plaintiffs a service transmitting data and information to lending institutions without accessing or using that data itself.

69. Plaintiffs accepted that offer, paid FNC a fee for services, submitted data to the AppraisalPort service, and used the AppraisalPort service to transmit data to lending institutions. FNC partially performed in that it transmitted Plaintiffs' data to designated lending institutions. By reason of this conduct, FNC and each Plaintiff entered into an implied contract.

70. FNC breached the implied contract by accessing and using the data it had offered to transmit without using or accessing.

71. Plaintiffs suffered damages as a direct and proximate result of that breach.

72. WHEREFORE, Plaintiffs request an award of contract damages in an amount greater than \$5,000,000 to be determined at trial.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully pray that this Court grant the following relief:

- A. Determining that this action is a proper class action, designating the named Plaintiffs as Lead Plaintiffs and certifying the named Plaintiffs as class representatives under Rule 23 of the Federal Rules of Civil Procedure and Plaintiffs' counsel as Lead Counsel;
- B. Awarding compensatory damages in favor of Plaintiffs against Defendant FNC, Inc. for all damages sustained as a result of Defendant's wrongdoing, in an amount to be proven at trial, including interest thereon;
- C. Awarding punitive damages in favor of Plaintiffs against Defendant for Defendant's intentional misrepresentation, in an amount to be proven at trial, including interest thereon;
- D. Awarding Plaintiffs and the Class their reasonable costs and expenses incurred in this action, including counsel fees and expert fees; and
- E. Granting such other and further relief as the Court shall find just and proper.

JURY TRIAL DEMAND

Plaintiffs hereby demand trial by jury.

Respectfully submitted,

Dated: May 9, 2007

/s/

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