Baldini Law, LLC
37 Bowers Drive
Hackettstown, New Jersey 07840
973.945.1645
jack@baldinilaw.com
Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

American Financial Resources, Inc., *Plaintiff* v. Valli D. Smouse d/b/a Smouse Appraisal Service and Lexington Insurance Company *Defendant(s)*	**Civil Act. No.: 17 CV- 12019** **COMPLAINT**

American Financial Resources, Inc. ("AFR" and/or "Plaintiff"), by and through its undersigned counsel, as and for its Complaint against Valli D. Smouse d/b/a Smouse Appraisal Service ("Smouse") and Lexington Insurance Company ("Lexington") (collectively, "Defendants") states and alleges as follows:

PARTIES

1. AFR is a New Jersey corporation engaged in the business of originating, brokering, and servicing mortgage loans, with a principal place of business at 9 Sylvan Way, Parsippany, New Jersey 07054. For purposes of diversity jurisdiction, AFR is a citizen of New Jersey.

2. Upon information and belief, Defendant Valli D. Smouse d/b/a Smouse Appraisal Service is a company engaged in providing residential real estate appraisals for use by mortgage loan providers licensed at all relevant times in the state of Utah with a principal place of business at 151 Buchanan Lane, Moab, Utah 84532. For purposes of diversity jurisdiction, Smouse is a resident of Utah.
3. Upon information and belief, Defendant Lexington Insurance Company is a Wilmington Delaware company engaged in providing errors and omissions insurance policies for professional service providers and provided such insurance to Smouse at all relevant time periods and has a principal place of business at 100 Summer Street, Boston, Massachusetts 02110. For purposes of diversity jurisdiction, Lexington is a citizen of Delaware and Massachusetts.
4. This Court has subject matter jurisdiction over AFR's claims under 28 U.S.C. § 1332(a) because the amount in controversy exceeds $75,000, exclusive of interest and costs, and the matter in controversy is between citizens of different states.
5. This Court has personal jurisdiction over each Defendant because: (a) each Defendant performed its services on behalf of AFR in the State of New Jersey; (b) AFR's causes of action arise from and are connected with actionable conduct occurring in or directed to the State of New Jersey and a citizen of the State of New Jersey; and because of (c) each Defendant has significant contacts with New Jersey, has performed acts or omissions directed at or purposely done in the State of New Jersey and/or with or to citizens of the State of New Jersey, and/or has consummated transactions within the State of New Jersey.

6. Venue is proper in this district pursuant to 28 U.S.C. § 1391(a)(2) because a substantial part of the acts and/or omissions giving rise to the claims occurred in this judicial district.

NATURE OF SUIT AND FACTS COMMON TO ALL COUNTS

7. On or about January 30, 2014, Smouse provided a residential real estate appraisal (the "Appraisal") for a property located at 228 Rio Grande Dr., Moab, Utah 84532 (the "Property"). A true and correct copy of the Appraisal is attached hereto as Exhibit A.
8. The Appraisal valued the Property appraised at $287,000.
9. The purpose of the Appraisal was "to provide the lender/client with an accurate and adequately supported opinion of the market value of the [Property]."
10. The Property contained housing of a construction type that is known in the industry as 'manufactured housing'.
11. The Appraisal notes, "Comp 1 is the only comparable sale of a manf home in 12 months. It was necessary to use stick built homes in order to find comparable comps. The market recognizes a $20,000 diff between stick built and manf."
12. A mortgage loan was issued based on the value as stated in the Appraisal in favor of the borrower(s) as stated in the Appraisal, namely, Jessica K and Brian Stotz (the "Borrowers").
13. The Borrowers closed on the Property for a contract sales price of $287,000 (the stated value of the Property in the Appraisal) with a principal amount of a new mortgage backed loan of $272,650 (the "Mortgage Loan").
14. The Mortgage Loan was to be eligible for sale to and/or through Fannie Mae programs.

15. As a part of its normal course of business, AFR brokers loans and packages mortgage loans for resale. As a part of such business, when mortgage loans carry with them a significant defect, AFR is required contractually to repurchase the loan.
16. The Mortgage Loan was part of a pool of mortgage loans sold to Seneca Mortgage Servicing, LLC ("Seneca").
17. On or about May 20, 2016, Seneca received a notification from Fannie Mae (a true and correct copy of which is attached hereto as Exhibit B). The Fannie Mae notice determined that repurchase of the subject loan (the Mortgage Loan) as the appropriate remedy. As a result, Seneca required repurchase of the Mortgage Loan by AFR.
18. The reason for repurchase noted by Fannie Mae was as a result of a significant defect, namely, "the origination appraisal did not adequately support the value stated and consequently does not allow us to confirm eligibility with respect to mortgage insurance and/or the maximum loan-to-value ratio for the loan." The notice goes on to state, "selection and use of inappropriate comparable sales and failure to use comparable sales that are the most locationally and physically similar to the subject property are each considered an unacceptable appraisal practice . . . The subject property was a manufactured home. The Fannie Mae Selling Guide required that the appraiser use a minimum of two comparable sales of similar manufactured homes. The appraisal for the subject property did not meet such requirement. Sale one was the only provided sale of a manufactured home as of the effective date of the origination appraisal. In accordance with the Fannie Mae Single-Family Selling and Servicing Guides, we are requesting immediate resolution of the defects cited above."

19. Thereafter, Smouse was given an opportunity to respond to the Fannie Mae notice of May 20, 2016 and on or around July 14, 2016, provided an updated appraisal to justify the use of less than two manufactured housing comparables and the use of a $20,000 adjustment in values of stick built homes versus comparable manufactured home properties. On or around July 19, 2016, this second appraisal was provided to Fannie Mae for review and appealing the requirement of repurchase (the "Fannie Mae Appeal").

20. In response to the Fannie Mae Appeal, Fannie Mae, on or around November 8, 2016, issued a second notice (the "Second Fannie Mae Notice" – a true and correct copy of which is attached hereto as Exhibit C). The Second Fannie Mae Notice maintained the repurchase requirement, noting, "the origination appraisal did not adequately support the value stated and consequently does not allow us to confirm eligibility with respect to mortgage insurance and/or the maximum loan-to-value ratio for the loan . . . The following are considered unacceptable appraisal practices: 1) use of adjustments to comparable sales that do not reflect market reaction to the differences between the subject property and the comparable sales, 2) not supporting adjustments in the sales comparison approach, and 3) the failure to make adjustments when they are clearly indicated . . . The appraiser made a -$20,000 adjustment(s) for difference in construction type for manufactured versus site built(ranch) to sales two, three and four. The adjustment(s) were unsupported based on inadequate support documentation . . . Comparable sale(s) one and seven failed to support the estimated value. The subject was a manufactured home. Sales one and seven were the only two manufactured homes used in the appraisal. The appraiser failed to adequately reconcile the value to the two most similar sales."

21. On or about March 8, 2017, AFR sent notice to Smouse with a copy to Lexington noting the deficiencies in the Appraisal that led to AFR being required to repurchase the Mortgage Loan and damaging AFR.

22. On or about March 27, 2017, SDC CPAs responded on behalf of Smouse and Lexington requesting certain information in order to investigate the claim by AFR. After a series of communications between the parties and in response to an updated request for information, on or about July 17, 2017, AFR through counsel provided all documentation requested by SDC CPAs and same supporting damages to AFR in the amount of $121,251.27.

23. On or about September 7, 2017, SDC CPAs responded on behalf of Smouse and Lexington that "based on [your] analysis, SDC is not able to determine that the appraisal contributed to the loss."

24. On or about September 21, 2017, AFR through counsel replied to SDC CPAs essentially that it was Fannie Mae's determination that, solely because of the deficiencies in the Appraisal, the Mortgage Loan was uninsurable which resulted in the repurchase demand. A final demand was then made which, to date, has gone unresponded.

FIRST COUNT
Breach of Contract

25. Plaintiff repeats and realleges each and every preceding paragraph as if fully set forth at length herein.

26. The Appraisal is a contract between Smouse and its stated Intended User, the named lender/client, namely, Rels Valuation, Primary Residential of Salt Lake City Utah. It is a standard practice in the industry for downstream sales and purchases of of brokered mortgage loans to rely on the original appraisal performed so long as it is in connection

with the same borrower and same transaction. Public policy does not want borrowers incurring costs for multiple appraisals for the same transaction. Moreover, Smouse states in the Appraisal contract that the "lender/client may disclose or distribute this appraisal to: the borrower, another lender at the request of the borrower; the mortgagee or its successors and assigns; mortgage insurers; . . . "

27. Smouse was paid the consideration for the Appraisal and knew or should have known that such Appraisal would be relied upon by lenders in the normal course for valuation support in rendering their decision to issue credit to a borrower and finance a loan.
28. In fact, AFR did rely upon the Appraisal to issue a credit decision and finance the Mortgage Loan.
29. The services provided by Smouse pursuant to the contract were contractually deficient in that, Smouse certified that, *inter alia*, "I have selected and used comparable sales that are locationally, physically, and functionally the most similar to the subject property" and that the Appraisal was performed, *inter alia*, "in accordance with the requirements of the Uniform Standards of Professional Appraisal Practice . . ."
30. In fact, Fannie Mae determined that the comparable sales that were actually used in connection with the Appraisal were deficient and the Appraisal was not performed in accordance with industry standards resulting in a finding that the stated value was unsupported.
31. The foregoing is a breach of contract.
32. As a direct and proximate cause of the breach of contract, AFR has been damaged.
33. Moreover, Smouse is contractually insured by Lexington for "Real Estate Appraisal Services" rendered.

34. Those who would be harmed by errors and/or omissions in connection with the performance of the real estate appraisal services are intended beneficiaries of the insurance contract between Smouse and Lexington.
35. AFR is such an intended beneficiary.
36. Smouse rendered the Appraisal that is covered under the contract of insurance between Smouse and Lexington.
37. The Appraisal contained significant deficiencies as noted above and should trigger the insurance provisions of the contract of insurance between Smouse and Lexington and provide benefits to AFR.
38. To date, both Smouse and Lexington have failed and refused to provide relief to AFR which has proximately caused AFR damages.

SECOND COUNT
Unjust Enrichment

39. Plaintiff repeats and realleges each and every preceding paragraph as if fully set forth at length herein.
40. Both Smouse and Lexington will have been unjustly enriched if not ordered to indemnify AFR for AFR's damages.
41. Smouse was paid its fee for performing the Appraisal.
42. Smouse ratified the use of the Appraisal in reliance as "part of any mortgage finance transaction that involves" *inter alia,* the borrower.
43. AFR did in fact rely on the Appraisal as having been performed satisfactorily in providing a mortgage finance transaction to the borrower.
44. Lexington was paid its fee for providing insurance for the rendering of real estate appraisal services.

45. Smouse's deficient appraisal services are of a type that Lexington insures against.

46. If Lexington and Smouse are each allowed to be exonerated from their obligations to indemnify AFR for damages sustained, each will have been conferred a benefit at the expense of Plaintiff that would be inequitable for them each to retain. Indeed, Smouse would be incentivized to render appraisal services without any regard for standards and Lexington would be incentivized to write any insurance policy without fear of ever having to pay out on a risk come to fruition.

47. As a result of the foregoing, AFR has to date borne the brunt of the damages it has suffered.

RULE 11.2 CERTIFICATION

48. In accordance with New Jersey Local Civil Rule 11.2, the undersigned hereby certifies that to the best of his knowledge and belief, the matter in controversy is not the subject of any other action pending in any court, or of any pending arbitration or administrative proceeding.

JURY DEMAND

49. AFR respectfully requests that this case be tried before a jury.

PRAYER FOR RELIEF

50. Based upon the foregoing allegations and claims, AFR respectfully prays that the Court grant the following relief:

    a. Awarding Plaintiff all monetary damages equal to all damages proved at trial, an amount believed to be $121,251.27;

    b. Awarding Plaintiff compensatory, consequential and punitive damages;

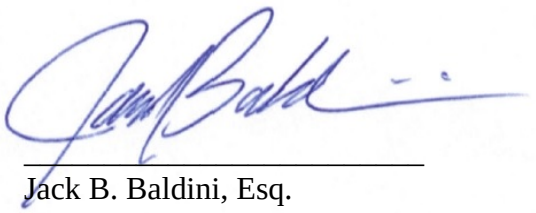
    c. Awarding Plaintiff both pre-judgment and post-judgment interest;

d. Awarding Plaintiff all attorney's fees and costs of suit;

e. Awarding Plaintiff such other and further relief as the Court finds equitable and just.

Respectfully submitted,

Dated: 11/22/2017
Hackettstown, New Jersey



Jack B. Baldini, Esq.
Baldini Law, LLC
37 Bowers Drive
Hackettstown, New Jersey 07840
973.945.1645
jack@baldinilaw.com
Attorney for Plaintiff