

## Cape Fear REALTORS® MLS, Inc. Subscriber Agreement

**This agreement is a binding contract and includes terms limiting your legal rights and MLSCFR's liability to you.**

This **AGREEMENT** is made and entered into by Multiple Listing Service of the Cape Fear REALTORS®, Inc. (“**MLSCFR**”), with offices at 1826 Sir Tyler Drive, Wilmington, North Carolina 28405; and the person named on this form as the REALTOR® (“**Subscriber**”), with offices which are also noted on this form.

### **DEFINITIONS AND USAGE.**

**1. Definitions.** For purposes of this Agreement, the following terms shall have the meanings set forth below.

- J **MLSCFR Affiliates:** MLSCFR Affiliates means MLSCFR and its officers, directors, employees, agents, representatives, licensors, and shareholders.
- J **MLSCFR Database:** All data available to Subscriber on the MLSCFR System, including the Subscriber Contribution and all other text, binary, and photographic image data, in any form now known or hereafter discovered.
- J **MLSCFR Policies:** MLSCFR's bylaws, rules and regulations, and policies and procedures adopted by MLSCFR's board of directors or authorized delegates, as MLSCFR amends them from time to time.
- J **MLSCFR Service:** The services MLSCFR provides to Subscriber under this Agreement and similar services MLSCFR provides to third parties under similar agreements, including any access or license to the MLSCFR Software, the MLSCFR Database, and the MLSCFR System.
- J **MLSCFR Software:** MLSCFR's proprietary web browser interface(s) to the MLSCFR System.
- J **MLSCFR System:** The aggregate of all hardware and telecommunications systems that MLSCFR maintains in order to make access to the MLSCFR Database available to Subscriber.
- J **Other Participants and Subscribers:** All Participants and Subscribers of MLSCFR not party to this Agreement, including Participants' employees, contractors, salespeople, and assistants (whether licensed or unlicensed as real estate agents or appraisers).
- J **Participant:** The principal broker or appraiser manager that supervises Subscriber's real estate activities and on whose behalf Subscriber conducts those real estate activities.
- J **Saved Information:** Information that Subscriber stores in the MLSCFR System for his own later use that is not intended by him/her to be available to MLSCFR's other participants or subscribers, including client prospect and contact information.
- J **Subscriber Contribution:** All data that the Subscriber submits, contributes, or inputs in the MLSCFR System, including text, binary, and photographic image data, in any form now known or hereafter discovered.

**2. Usage.** The following usages apply to any interpretation or construction of this Agreement, unless the context clearly indicates otherwise. **(a)** Wherever the term “including” is used, it

means “including, but not limited to.” **(b)** The singular and plural numbers and masculine, feminine, and neuter genders of words are interchangeable. **(c)** Wherever the term “law” is used, it means all statutes, regulations, and common law, both state and federal, as they are amended. Without limiting the generality of the foregoing, “law” expressly includes all state and federal fair housing statutes and regulations.

## **MLSCFR’S OBLIGATIONS.**

**3. MLSCFR shall provide one unique user ID and password to Subscriber.** The user ID and password will provide Subscriber access to all data and functions in the MLSCFR Service to which Subscriber is entitled under the MLSCFR Policies. MLSCFR makes no warranties, however, that the MLSCFR Service will be available at all times.

## **SUBSCRIBER ACKNOWLEDGMENTS.**

**4. Modifications to service.** MLSCFR may, but is not required to, modify the MLSCFR Service, including removing information and making additional information available, and adding and removing system functions. Certain products and services made available in conjunction with the MLSCFR Service may be subject to agreements other than this Agreement and may require payment of additional fees.

**5. Editorial control.** MLSCFR is not required to, and assumes no responsibility to, review, edit, or exercise editorial control over the MLSCFR Database or the Subscriber Contribution; use of either is subject to the exclusions of warranties and limitations of liabilities set forth in this Agreement. The foregoing notwithstanding, MLSCFR may take any steps necessary in its judgment, including deleting the Subscriber Contribution or portions thereof, to avoid or remedy any violation of law, breach of the MLSCFR Policies or infringement of intellectual property right.

**6. Conditions of service.** Subscriber must be affiliated with Participant at all times during the term of this Agreement. Subscriber may enter and retrieve active listing information on the MLSCFR Service only if Participant offers compensation to and accepts compensation from other principal brokers.

**7. Saved Information.** Saved Information may not always be available to Subscriber and may become available to unauthorized persons. MLSCFR is not liable for unauthorized access to or loss of Saved Information.

**8. Disclosure to third parties.** MLSCFR reserves the right to distribute to third parties certain information about Subscriber, including Subscriber’s name and business address, phone number and email address. MLSCFR reserves the right to distribute to third parties aggregated information about MLSCFR participants’ or subscribers’ use of the MLSCFR Service, but not about Subscriber’s use specifically.

**9. Disclosure to government.** Subscriber acknowledges that MLSCFR may provide government agencies access to the MLSCFR Service at any time in MLSCFR’s sole discretion.

**10. Priority of agreements.** Subscriber's access to the MLSCFR Service is subject at all times to the limitations set out in the MLSCFR Policies and the Participant Agreement between MLSCFR and Participant. In the event of an apparent conflict between those documents and this Agreement, Subscriber's obligations and rights shall be determined, in order of precedence, by the MLSCFR Policies, the Participant Agreement between MLSCFR and Participant, and by this Agreement.

**11. IDX and VOW data access subject to separate agreement.** Subscriber acknowledges that access to MLSCFR's IDX or VOW database and data feeds can occur only subject to a separate written agreement between MLSCFR and Participant.

## **SUBSCRIBER'S OBLIGATIONS.**

**12. Use limited.** Subscriber shall use the MLSCFR Service solely for the purpose of selling, listing, leasing, and appraising real estate as provided in the MLSCFR Policies. Except as expressly provided in this Agreement and the MLSCFR Policies, Subscriber shall not copy, create derivative works of, distribute, perform, or display the MLSCFR Service or any part of it.

**13. Confidentiality.** Subscriber shall maintain the confidentiality of its user ID and password and the MLSCFR Database; Subscriber shall not provide its ID and password to any third party. To maintain the confidentiality of all user IDs, passwords, the MLSCFR Database, and the MLSCFR System, Subscriber shall take the greater of reasonable care or the care it takes to protect its own confidential information. Failure to comply with this provision will result in a significant fine, as set forth in the MLSCFR Policies. Subscriber may disclose information confidential under this Agreement if, and to the extent, the order of a court or other tribunal with jurisdiction requires disclosure; provided however, Subscriber first gives reasonable notice to MLSCFR to permit MLSCFR to seek a protective order.

**14. Equipment.** Subscriber shall acquire and maintain all personal computers, modems, telecommunications connections, and computer software, other than the MLSCFR Software, necessary for Subscriber's use of the MLSCFR Service.

**15. Subscriber Contribution.** When making a Subscriber Contribution to the MLSCFR Service, Subscriber warrants that the information submitted complies with the MLSCFR Policies in all respects, including with regard to (a) required data fields; (b) format of submission; (c) permitted and required listing types; and (d) procedures for submission. Subscriber warrants that the Subscriber Contribution does not infringe or violate any patents, copyrights, trademarks, trade secrets or other proprietary rights of any third party; and that there is no claim, litigation, or proceeding pending or threatened with respect to the Subscriber Contribution.

**16. License.** MLSCFR hereby grants Subscriber a license to use the MLSCFR Software and the MLSCFR Database during the term of this Agreement, subject to the permission of Participant and according to the terms of the MLSCFR Policies. All other uses are prohibited.

## FEES AND PAYMENT TERMS.

**17. Applicable fees.** Subscriber shall pay the fees set forth in MLSCFR's official Schedule of Fees which MLSCFR may amend at any time subject to the terms of Paragraph 21.

**18. Payment terms.** Subscriber shall pay the fees according to the terms set out in the MLSCFR Policies.

**19. No refunds.** MLSCFR need not refund or pro-rate fees in the event of termination or suspension of this Agreement unless the MLSCFR Policies provide otherwise. Initiation fees, if any, are not refundable.

**20. Taxes.** All fees for the MLSCFR Service are exclusive of federal, state, municipal or other governmental excise, sales, value-added, use, personal property and occupational taxes, excises, withholding obligations and other levies now in force or enacted in the future and, accordingly, Subscriber shall pay all such taxes and levies other than any tax or levy on the net income of MLSCFR.

**21. Fee increases.** MLSCFR may amend the Schedule of Fees at any time at its sole discretion. MLSCFR shall provide written notice to Subscriber at least thirty days in advance of the effective date of any fee increase. If Subscriber objects to the increase, Subscriber may terminate this Agreement by written notice to MLSCFR at any time before the effective date of the increase.

**22. Fines.** MLSCFR may collect fines from Subscriber and from Participant on Subscriber's behalf for violation of the MLSCFR Policies. Payment terms for fines are set out in the MLSCFR Policies. MLSCFR may amend its schedule of fines and terms for collecting them at its sole discretion at any time.

## TERM AND TERMINATION.

**23. Term.** This Agreement shall commence upon the Effective Date set forth below and shall continue thereafter on a month-to-month basis until terminated.

**24. Termination for breach.** MLSCFR may terminate this Agreement with notice if Subscriber fails to comply with the terms of this Agreement or of the MLSCFR Policies.

**25. Termination of Participant.** This Agreement shall terminate immediately and without notice if the Participant License and Access Agreement between MLSCFR and Participant is terminated for any reason.

**26. Termination for failure to pay.** In the event Subscriber fails to pay any fees required under this Agreement, MLSCFR may terminate service without being subject to arbitration, and MLSCFR may bring any claims for fees to small claims court. In its sole discretion, MLSCFR may suspend its performance under this Agreement rather than terminating it, in the event that Subscriber fails to pay fees required under this Agreement.

**27. Termination without fault.** Either party may terminate this Agreement upon 30 days' written notice to the other party. Subscriber may not terminate this Agreement so long as Subscriber remains affiliated with a broker/appraiser manager that is subject to a Participant Agreement with MLSCFR.

**28. Events upon termination.** Promptly upon any termination of this Agreement, (a) MLSCFR shall deactivate Subscriber's user ID and password, and Subscriber shall have no further access to the MLSCFR Service; (b) Subscriber shall purge all copies of the MLSCFR Software and the MLSCFR Database from Subscriber's personal computers; (c) all licenses granted hereunder shall immediately terminate; and (d) Subscriber will not be permitted to be affiliated with Participant or any other participant of MLSCFR unless a new subscriber agreement between Subscriber and MLSCFR is executed.

### **DISCLAIMER, LIMITATION OF LIABILITY, AND INDEMNIFICATION.**

**29. DISCLAIMER OF WARRANTIES.** MLSCFR PROVIDES THE MLSCFR SERVICE AND ALL COMPONENTS OF IT ON AN "AS IS," "AS AVAILABLE" BASIS. USE OF THE MLSCFR SERVICE AND THE INFORMATION AVAILABLE THROUGH THE MLSCFR SERVICE ARE AT THE SOLE RISK OF SUBSCRIBER. THE MLSCFR AFFILIATES DO NOT WARRANT THAT THE MLSCFR SERVICE WILL BE UNINTERRUPTED OR ERROR FREE, AND THE MLSCFR AFFILIATES MAKE NO WARRANTY AS TO THE ACCURACY, COMPLETENESS, CURRENCY, OR RELIABILITY OF ANY INFORMATION AVAILABLE THROUGH THE MLSCFR SERVICE. THE MLSCFR AFFILIATES EXPRESSLY DISCLAIM ANY AND ALL WARRANTIES WITH RESPECT TO THE MLSCFR SERVICE AND THE INFORMATION AVAILABLE THROUGH THE MLSCFR SERVICE, INCLUDING THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. The MLSCFR Service may contain hyperlinks to web sites operated by parties other than MLSCFR; MLSCFR does not control such web sites, is not responsible for their contents, does not endorse the sites or contents, and may have no relationship with the sites' operators.

**30. LIMITATIONS AND EXCLUSIONS OF LIABILITY.** NONE OF THE MLSCFR AFFILIATES SHALL BE LIABLE TO SUBSCRIBER OR ANYONE ELSE FOR ANY INDIRECT, INCIDENTAL, SPECIAL, OR CONSEQUENTIAL DAMAGES THAT RESULT FROM THE USE OF, OR INABILITY TO USE, THE MLSCFR SERVICE, INCLUDING RELIANCE BY SUBSCRIBER ON ANY INFORMATION OBTAINED THROUGH USE OF THE MLSCFR SERVICE; MISTAKES, OMISSIONS, DELETIONS OR DELAYS IN TRANSMISSION OF SUCH INFORMATION; INTERRUPTIONS IN TELECOMMUNICATIONS CONNECTIONS TO THE MLSCFR SERVICE; AND VIRUSES OR FAILURES OF PERFORMANCE; WHETHER CAUSED IN WHOLE OR PART BY NEGLIGENCE, ACTS OF GOD, TELECOMMUNICATIONS FAILURE, OR THEFT OF, DESTRUCTION OF, OR UNAUTHORIZED ACCESS TO THE MLSCFR SERVICE AND RELATED INFORMATION, RECORDS AND PROGRAMS.

**31. MAXIMUM AGGREGATE LIABILITY.** IN NO EVENT SHALL MLSCFR BE LIABLE TO PARTICIPANT FOR ANY AMOUNT IN EXCESS OF THE GREATER OF (A) THE

FEES PARTICIPANT HAS PAID MLSCFR, IF ANY, IN THE YEAR IMMEDIATELY PRECEDING THE FIRST EVENT GIVING RISE TO ANY CLAIM FOR DAMAGES; OR (B) \$100.

**32. Indemnification.** Subscriber shall defend, indemnify and hold the MLSCFR Affiliates and Other Participants and Subscribers harmless from and against any and all liability, damages, loss or expense (including reasonable fees of attorneys and other professionals) in any claim, demand, action or proceeding initiated by any third-party against the MLSCFR Affiliates or Other Participants and Subscribers arising from any acts of Subscriber, including (a) putting inaccurate information into the MLSCFR Service; (b) making unauthorized use of Subscriber's password; (c) making unauthorized use of the MLSCFR Database; (d) infringing any proprietary or contract right of any third party; (e) breaching any warranty under this Agreement; and (f) violating this or any other Agreement or any law.

**33. Acknowledgment.** Subscriber acknowledges that MLSCFR has set its fees and other charges in reliance on the disclaimers of warranty and limitations and exclusions of liability set forth in this Agreement and that the same form an essential basis of the bargain between the parties.

## **DISPUTES AND REMEDIES.**

**34. Injunctive relief.** Subscriber acknowledges and agrees that the MLSCFR Software and MLSCFR Database are confidential and proprietary products of MLSCFR and that in the event there is an unauthorized disclosure of them by Subscriber, no remedy at law will be adequate. Subscriber therefore agrees that in the event of such unauthorized disclosure of MLSCFR Software or MLSCFR Database, MLSCFR may obtain injunctive relief or other equitable remedies against Subscriber in addition to all available remedies at law, without any showing of actual damages or posting any bond or security of any kind.

**35. Dispute resolution.** In the event MLSCFR claims that Subscriber has violated the MLSCFR Policies, MLSCFR may, at its option, resolve such a claim according to the disciplinary procedures set out in the MLSCFR Policies, provided MLS does not also base a claim that Subscriber has breached this Agreement on the same facts. Except as provided in this paragraph and in Paragraph 28, any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association ("AAA") under its Commercial Arbitration Rules, including the Expedited Procedures where applicable, the Optional Procedures for Large Complex Commercial Disputes where applicable, and the Optional Rules for Emergency Measures of Protection (collectively, the "Arbitration Rules"). Judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction over the parties. Unless all parties to the dispute agree otherwise, any arbitration hearing or proceeding hereunder shall be held in New Hanover County, North Carolina, except that it may be held by telephone where the Arbitration Rules expressly so permit. Subscriber agrees to submit any disputes or claims under this Agreement not subject to arbitration to the jurisdiction and venue of the state and federal courts sitting in New Hanover County, North Carolina.

**36. Liquidated damages.** Subscriber acknowledges that damages suffered by MLSCFR from access to the MLSCFR Service by an unauthorized third party as a result of disclosure of Subscriber's password or an unauthorized disclosure by Subscriber of the MLSCFR Database to a third party would be speculative and difficult to quantify. Accordingly, as a material inducement to MLSCFR to enter into this Agreement with Subscriber, Subscriber agrees that (a) in the event that any disclosure of Subscriber's password results in access to the MLSCFR Service by an unauthorized third party, regardless of whether such disclosure is intentional, negligent or inadvertent, Subscriber shall be liable to MLSCFR for liquidated damages in the amount of \$5,000 (or the amount established in the MLSCFR Policies, whichever is greater) and termination of this Agreement; and (b) in the event that Subscriber makes unauthorized disclosure of any portion of the MLSCFR Database to any third party, Subscriber shall be liable for liquidated damages in the amount of \$5,000 (or the amount established in the MLSCFR Policies, whichever is greater) for each real estate listing disclosed and termination of this Agreement.

**37. Legal fees.** In the event of legal action or arbitration between MLSCFR and Subscriber, on account of or in respect to this Agreement, the prevailing party in such action or arbitration shall be entitled to recover its reasonable attorneys' fees, costs and expenses incurred in such action or arbitration.

#### **MISCELLANEOUS.**

**38. No third-party beneficiaries.** This Agreement is entered into solely between, and may be enforced only by, MLSCFR and Subscriber, and this Agreement shall not create or be construed to create any rights in any home owner, home seller, home purchaser, board or association, or other third party.

**39. Interpretation and amendment.** Subscriber expressly consents to the execution of amendments by electronic means (such as web site "click through" agreements). MLSCFR may amend this agreement by providing 30 days' advance notice of the amendment to Subscriber. If Subscriber continues to use the MLSCFR Service or MLSCFR Database after the expiration of the 30-day notice period, Subscriber will be deemed to have agreed to the terms as amended. Except as provided in this paragraph, this Agreement may not be amended except by written instrument executed by both parties.

**40. Assignment.** Neither this Agreement nor any obligations or duties hereunder may be assigned or delegated by Subscriber. Any purported assignment or delegation in contravention of this section is null and void.

**41. Integration and severability.** This Agreement contains the entire understanding of the parties and supersedes all previous oral and written agreements on the subject hereof. Each provision of this Agreement is severable from the whole, and if one provision is declared invalid, the other provisions shall remain in full force and effect. The foregoing notwithstanding, if any provision of Section 8 is declared invalid or unenforceable by any court of competent jurisdiction, this Agreement and Subscriber's access to the MLSCFR Service shall immediately terminate.

**42. Governing law.** This Agreement shall be governed by, and construed in accordance with, the laws of the State of North Carolina applicable to contacts made and performed in North Carolina, without regard to its conflicts of law and choice of law provisions.

**43. Notice.** Any notice required or permitted to be given under this Agreement shall be in writing and delivered via electronic mail. All notices are effective on the date of receipt or three days after transmission, whichever is earlier.