

## **UPSTREAM PARTICIPANT AGREEMENT**

This Upstream Participant Agreement (hereinafter "Agreement") is entered into by and between UpstreamRE, LLC ("Upstream") and the real estate brokerage company executing this Agreement below ("Participant") as of the date of such execution. Upstream and Participant may be referred to herein as a "Party" or collectively as "the Parties."

### **RECITALS**

**WHEREAS**, Upstream operates a real estate database and provides certain services to Participants including, without limitation, computerized compilations of real estate data and information management tools and related functionality;

**WHEREAS**, the Participant wishes to license and utilize Upstream's web-based technology for the benefit of the real estate brokers, agents and other persons who are affiliated with, or employed by, the Participant.

### **AGREEMENT**

**NOW THEREFORE**, for good and valuable consideration, the sufficiency of which is acknowledged, the Parties agree as follows:

#### **Section 1. Definitions.**

1.1. "Confidential Information" shall mean information provided by one Party (the "Disclosing Party") to the other Party (the "Receiving Party") that relates to the Disclosing Party's financial condition, pricing policies, software code, research and development activities, new product or service offerings, profitability, actual or potential customers or clients, business strategies, or actual or potential merger or acquisition partners, and any other information that the Disclosing Party identifies, either orally or in writing, as confidential or proprietary to the Disclosing Party; provided, however, that the Participant Data shall be considered Confidential Information of Participant. Notwithstanding the foregoing, Confidential Information shall not include (1) information in the public domain, (2) information already in the possession of the Receiving Party; (3) information received by the Receiving Party from a third party without any obligation to maintain its confidentiality; (4) information independently created or deduced by the Receiving Party without reference to the Disclosing Party's Confidential Information; and (5) any information required to be disclosed to a third party by operation of law, subpoena, or court order, subject to the Parties' obligations in Section 15. The terms of this Agreement, but not its existence, shall be considered to be Confidential Information of both Parties.

1.2. "Data Management Process" shall mean the process of adding, editing, and otherwise managing property record data and other real estate or Participant-related content in the Upstream Database and the System.

1.3. "Desktop" shall mean a non-public component of the System accessible only by System Participants that provides access to some or all of the System functionality.

1.4. "Domain(s)" shall mean Uniform Resource Locator(s) (URLs) on the World Wide Web at which the System can be accessed by System Participants.

1.5. "Hardware" shall mean servers, equipment, and telecommunications devices necessary to operate and support the System.

1.6. "Intellectual Property Rights" shall mean any and all patent, trademark, service mark, collective membership mark, trade dress, logos, trade name, copyright, moral, trade secret, publicity, privacy, or confidentiality rights, and any private contractual rights protecting the proprietary nature of data, database compilations, or other intangible property rights.

1.7. "Internet Hosting Services" shall mean a server, and telecommunications services necessary to connect the server to the World Wide Web.

1.8. "MLS Participant" shall mean a person or entity qualified under applicable MLS Rules and Regulations to contribute real property content to an MLS Database.

1.9. "MLS Rules and Regulations" shall mean the rules, regulations and policies adopted by an MLS that regulate access to the database compilation maintained by the MLS, and the input, retrieval, use and dissemination of real estate and property record data maintained in the MLS database.

1.10. "Multiple Listing Service", "MLS", or "MLS Database" shall mean a database compilation of real property information operated for the primary purpose of facilitating the cooperative marketing of real property by licensed real estate brokers and the valuing of real property by MLS Participants and licensed or certified real estate appraisers.

1.11 "Public Records Data" shall mean information in the Upstream Database supplied by a Third Party Licensor about real property parcels maintained by governmental agencies that typically identify the legal and physical characteristics of a property parcel for evaluation, assessment, conveyance and taxation purposes, that will be made available through the System to System Participants. ; provided that

1.12. "Software" shall mean the computer programs and related documentation, Participant manuals, and codes, including any Application Programming Interfaces ("APIs"), source codes and object codes, which provide or describe the functionality for the System, or provide System functionality or operability.

1.13. "System" shall mean the Hardware, Software, Domain, Desktop, and telecommunications and Internet Hosting Services supplied by Upstream or Upstream's

Third Party Licensors that enable Participants to access and utilize the System Services.

1.14. "System Services" shall mean the functionality available at the System to System Users as more fully described in Section 3.

1.15. "System Users" shall mean Participant's employees or persons affiliated with, or authorized by Participant, including Participant's affiliated real estate sales persons or non-principal brokers whether or not such licensees actively utilizes the Upstream Database or its related technology

1.16. "Third Party Licensors" shall mean third parties who provide software, technology, functionality, or content that is entered into the System, or is necessary to the operation of the System.

1.17. "Third Party Data" shall mean the Public Records Data and any other content supplied by Third Party Licensors, or other third parties, whether or not such Third Party Data is accessible to System Users in the Upstream Database or through the System.

1.18. "Upstream Brand Features" shall mean the name "Upstream", and any trademarks, service marks, color schemes, insignias, or logos associated therewith.

1.19. "Upstream Database" shall mean a database compilation maintained by Upstream or its Third Party Licensors that contains the Participant Data and Third Party Data as deemed appropriate by Upstream from time to time.

1.20. "Participant Brand Features" shall include any trade names through which Participant is acting as a real estate broker.

1.21. "Participant Data" shall mean data, text, images, and other content created or supplied by System Participants, via a data feed from the MLS(s) in which System Participants are MLS Participants, including, but not limited to, the Participant Brand Features and roster information about licensed sales agents affiliated with Participant, that is entered into the Upstream Database and is accessible to Participant on the System, or to such third parties as designated and authorized by Participant. "Participant Data" shall also include any information originating from the Public Records or other third Party sources that a System Participant incorporates into a Participant's Participant Data.

1.22. "Participant Fees" shall mean fees, if any, payable by Participant to Upstream pursuant to Section 12 for use of the System Services.

## **Section 2. License.**

2.1. License Grant. In consideration for Participant's compliance with the terms and conditions of this Agreement, and for so long as this Agreement remains in effect,

Upstream grants Participant and its System Users a non-exclusive, non-transferable, limited license to enter, or cause any MLS(s) in which Participant is an MLS Participant to enter, its Participant Data into the Upstream Database using an Upstream developed API, a Web API developed by the Real Estate Standards Organization (RESO), or a direct data feed from the MLS(s) in which the Participant is an MLS Participant, maintain its Participant Data within the System, and to use the System functionality and Third Party Data as further permitted by this Agreement, and not for any other purpose whatsoever without the express written consent of Upstream. Participant shall upload, or cause to be uploaded, to the Upstream Database all listing content and other Participant Data of all of Participant's System Users in all of Participant's offices for which the Upstream Database is accessible, whether or not such licensee actively utilizes the Upstream Database or its related technology .

## 2.2. Restrictions.

2.2.1. The System, including the Desktop, Third Party Data, and the Software or any APIs may not be copied, modified, reengineered, decompiled, reverse engineered, decrypted, decoded, disassembled, reassembled, supplemented, translated, adapted, or enhanced, except by Upstream, Upstream's Third Party Licensors, or as expressly authorized by Upstream in this Agreement or otherwise in writing.

2.2.2. Participant's System Users shall not remove any notice or other indicia of an Intellectual Property Right, including any Copyright Management Information (CMI) from the System, the Software, the Third Party Data, the Desktop, or any other content supplied by Upstream, Upstream's Third Party Licensors, or any other Upstream Participants in the System, or otherwise attempt to derive or gain access to the source code or documentation of the Software or any part thereof.

2.2.3. Participant's System Users shall not use, lend, sell, assign, copy, create derivative works from, distribute, display, demonstrate, or sub-license, the System, Software, the Third Party Data, or any components thereof, to any third party, except as expressly authorized by Upstream in writing.

2.2.4. Except as expressly authorized by Upstream, Participant and its System Users shall not permit unauthorized third parties, or the general public, to access the System, Software, Third Party Data, or any components thereof.;

## **Section 3. System Services**

In consideration for the Participant's payment of the Participant Fees set forth in Section 12 below, and compliance with the terms of this Agreement, Upstream shall provide to Participant and its System Users the System Services, which.

shall include the Domain, Desktop, Upstream Database, Third Party Data, and the Software and its configuration and design, including, but not limited to, categories of property types, data fields, data field pick lists, data field business rules, System User access levels, report views, search lists, the Data Management Process capability, and data distribution functionality and any revisions, upgrades and modifications to the System Services.

from time to time to maintain the general performance and functionality of the System.

#### **Section 4. Ownership Rights in the System and Software.**

Subject to the License granted to Participant in Section 2, as between Upstream and Participant, all Intellectual Property Rights in and to the System, Software, Third Party Data, Domain, and Upstream Brand Features shall be owned by Upstream, or Upstream's Third Party Licensors. Unless determined otherwise by Upstream and Participant, all works specifically related to, or specifically incorporated into, the System (other than any Participant Data or derivatives thereof) that are created by employees or agents of Participant for use or incorporation into the System shall be deemed to be "works made for hire" as that term is defined under the United States Copyright Law, or alternatively, Participant, or any of Participants' System Users or employees who created such works, shall convey to Upstream all Intellectual Property Rights in and to such works, and shall execute all necessary documents and instruments to effect such conveyance.

#### **Section 5. Acquisition and Control of Third Party Data on the System.**

##### **5.1. Acquisition and Maintenance of Third Party Data.**

Upstream shall be responsible for acquiring Third Party Data and other content from Third Party Licensors that will be accessible on the System to Participant's System Users. Participant shall cooperate with Upstream and its Third Party Licensors on reasonable terms and conditions as may be necessary to comply with the material terms and conditions of any license agreements to which Upstream or Upstream's Third Party Licensors are parties that apply to the permitted uses of the Third Party Data.

##### **5.2. Control of Third Party Data.**

The display of Third Party Data in the Upstream Database and on the System shall at all times be subject to Upstream's or the relevant Third Party Licensor's control to the extent required by the applicable licenses to which Upstream or the Third Party Licensor may be subject. Upstream does not make any warranty or representation that any Third Party Licensor will continue to allow its Third Party Data to be included in the Upstream Database or be accessible to System Users through the System throughout the Term of this Agreement.

## **Section 6. Ownership and License of the Participant Brand Features, and Participant Data.**

As the between Upstream and the Participant, the Participant Brand Features and the Participant Data or any derivatives thereof shall be the Intellectual Property of the Participant. Participant grants to Upstream a limited, non-exclusive and royalty free license during the term of this Agreement to display the Participant Brand Features and host the Participant Data within the Upstream Database on the System. Upon Participant's express authorization, Participant further grants to Upstream the right to sub-license use of, or access to, the Participant Data, or any derivative works created by Upstream into which the Participant Data is incorporated or utilized, in whole or in part, in conjunction with Upstream's license of access to, or use of, the content maintained on the System or any portion or component thereof, on terms and conditions deemed appropriate by the Board of Managers, subject to Participant's right to withhold some or all of its Participant Data from any particular license or sub-license granted by Upstream.

## **Section 7. System Performance Standards.**

Upstream does not make any representations concerning the System response times via the Internet. Subject to the foregoing, Upstream through a Third Party Licensor shall maintain server response times within commercially reasonable tolerances. Except for regularly scheduled System maintenance, or for events beyond the control of Upstream or its Third Party Licensors, Upstream, through a Third Party Licensor, shall use commercially reasonable efforts to provide System accessibility twenty-four (24) hours a Day, seven (7) Days a week.

## **Section 8. System Support.**

An Upstream Third Party Licensor shall provide support to System Participants, which shall be available twenty-four (24) hours a Day via a toll free number.

## **Section 9. Participant's Responsibilities and Obligations.**

Participant shall be responsible, at its cost and expense, for performance by it and its System Users of the following duties and obligations:

(a). If Participant participates in one or more MLSs into which MLS Database compilations Participant's Participant Data is to be included, Participant may elect from the following options: (1) Participant's System Users shall initially upload its Participant Data to the Upstream Database and thereafter direct through the Desktop, or otherwise, that some or all of its Participant Data be provided to the MLS(s) in which Participant is an MLS Participant through the Upstream API, or when available to the MLS(s) a RESO Web API; or (2) Participant's System Users shall initially upload its Participant Data into the MLS Database(s) in which Participant is an MLS Participant and then direct or authorize such MLS(s) to deliver a feed of the Participant's Participant Data to the Upstream Database, which feed shall include at least three (3) years of Participant's

“sold” data and Participant’s MLS roster information as maintained by the MLS; provided that in either case, Participant or Participant’s System Participants shall be solely responsible for compliance with all MLS Rules and Regulations applicable to the timely entry and updating of all data fields and other content of a property record required by the MLS’ Rules and Regulations to be entered into the MLS’ database compilation and regularly updated.

(b). Acquisition and maintenance of any and all licenses, copyright or trademark assignments, or other necessary rights or permissions to include any Participant Brand Features or Participant Data in the Upstream Database or the System.

(c). Compliance with any and all federal, state or local laws, rules, regulations that govern the Participant’s or its System Users’ use of the System, including, but not limited to, any applicable state real estate license laws or rules or regulations, any state or federal antitrust, unfair competition, or fair housing laws, laws regulating the use of personally identifiable information about consumers, or the payment of referral fees by or to, or the division of fees by, "settlement service providers" as defined by the federal Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. 2601 et seq., or any regulations or interpretative guidance promulgated thereunder.

(d). Maintenance of MLS Participant or subscriber status, or other MLS Data access privileges, in each MLS in which Participant’s Participant Data is maintained.

(e). Maintenance of all necessary real estate brokerage or salesperson licenses required to engage in real estate brokerage using the Participant Data entered into the System.

(f). Prompt notification to Upstream if any of its System Users who have the right to access the System cease to be affiliated with the Participant, or if the Participant or any of its System Users ceases to be eligible to utilize any MLS Database compilation in which Participant’s Participant Data is maintained.

(g). Protection of the confidentiality of the Participant names and passwords used by Participant’s System Users to access the System from unauthorized access by third parties, and provide immediate notification to Upstream if Participant or any of its System Users have reason to believe that the confidentiality of any such System Users’ names or passwords has been compromised.

(h). Use of the Upstream System and Upstream Database by Participant and Participant’s System Users licensed as real estate sales agents or non-principal brokers in all offices or branch offices owned or operated by Participant.

## **Section 10. Training.**

An Upstream Third Party Licensor shall provide training to Participant personnel on the operation and functionality of the System in a manner and under such terms and conditions as further defined in any training materials provided by the Third Party Licensor.

## **Section 11. Term and Termination.**

### 11.1. Term.

The initial term of this Agreement shall commence on its Effective Date and shall continue until terminated by a Party hereto.

### 11.2. Termination.

#### 11.2.1. By Either Party for Cause.

Either Party may terminate this Agreement for cause upon written notice to the other Party if the other Party materially breaches any of its obligations, representations or warranties under this Agreement, and such breach is not cured within thirty (30) Days of the other Party's receipt of written notice of such breach and the steps to be taken, if any, to cure the breach. Notwithstanding the foregoing, either Party may terminate this Agreement immediately upon written notice to the other Party if the other Party (1) files a petition in bankruptcy; (2) is the object of an involuntary petition for bankruptcy that is not dismissed within forty-five (45) Days of filing; or (3) is declared insolvent, or otherwise seeks protection from its obligations to its creditors.

#### 11.2.2. By Participant.

Participant may terminate this Agreement upon thirty (30) Days prior written notice to Upstream.

#### 11.2.3. By Upstream.

Upstream may terminate this Agreement immediately upon written notice to the Participant in the event (1) Participant is no longer licensed to engage in real estate brokerage, (2) Participant is delinquent in any Participant Fee obligations under Section 12 below for more than sixty (60) Days; or (3) the Participant violates any of the Restrictions in Sections 2.2.4 or 2.2.5 applicable to the Upstream Database or the System. In addition to the foregoing, Upstream may suspend or deny any of Participant's System Users' access to, or use of, the System if a Participant's System User (1) is no longer affiliated with the Participant or (2) engages in any conduct that, if engaged in by the Participant, would be a violation of this Agreement.

#### 11.2.4. Effects of Termination and Duties of the Parties.



Termination of this Agreement for any reason shall automatically result in termination of all of the Participant's System Users' rights to utilize the System; provided, however, if one or more of the Participant's System Users engages in conduct that would constitute grounds for Upstream to terminate this Agreement had Participant engaged in such conduct, Upstream may in its discretion suspend or deny such System User's access to and use of the System; provided, further, that such suspension or denial of rights to one of the Participant's System Users shall not necessarily result in a suspension or denial of rights to any other of the Participant's System Users. In the event of termination of this Agreement for any reason, (1) the license granted in Section 2 shall immediately terminate and Participant and its System Users shall not have any further rights to include the Participant's Participant Data within the Upstream Database or use the System to provide or authorize the provision or accessibility of its Participant Data to any third party, (2) the Receiving Party shall return to the Disclosing Party (as those terms are defined in Section 14 below), or at the Disclosing Party's option, destroy the Disclosing Party's Confidential Information and Brand Features in the Receiving Party's possession or control and (3) Participant shall be responsible for notifying any third party, including any MLS, to which Participant had authorized or directed that the Participant Data be delivered or made accessible through the System that such third party or MLS will no longer be provided, or able to access or deliver the Participant Data to, or through, the System. Upstream and Participant shall reasonably cooperate in complying with any applicable legal or contractual requirements that apply to the removal of the Participant Data from the Upstream Database and the System or the discontinuance of the delivery the Participant Data to or from, or its receipt by, third parties, including any MLS(s), at the direction of the Participant. If Participant is obligated to pay any fees to Upstream as consideration for use of the System pursuant to Section 12 below, Participant shall remain responsible for payment of any unpaid fees due and owing as of the date of termination of this Agreement.

## **Section 12. Participant Fees and Payment Terms.**

Participant shall pay to Upstream a flat monthly Participant Fee based upon the number of real estate brokers or agents affiliated with Participant. Participant's flat monthly Participant Fee shall be determined pursuant to the schedule set forth in Exhibit A based upon the total number of Participant's System Users affiliated with Participant in Participant's office(s) that have "live" access to the Upstream Database, whether or not such System Users actually access and use the System. Upstream or an Upstream Third Party Licensor shall invoice Participant during the first week of every month for the Participant Fee owed by Participant based upon the number of active System Users affiliated with Participant as of the last day of the prior month pursuant to the schedule set forth on Exhibit A. Such Participant Fee shall be due and payable by Participant upon receipt of Upstream's invoice and shall be considered to be past due if not paid within thirty (30) days from the date such invoice was issued to Participant. If Participant fails to pay its Participant Fee as provided herein, Upstream may terminate this Agreement pursuant to Section 11.2.3.

### **Section 13. Representations and Warranties.**

#### **13.1. By Upstream and Participant to Each Other.**

Upstream and Participant represent and warrant to each other that:

- (a). Each Party has all right, power and authority to enter into and perform its obligations under this Agreement, and such performance will not result in a Party breaching any other agreement or contract to which it is a party, violating any law, regulation, or governmental decree or order to which it is bound, or violating any duty of confidentiality owed to any third party;
- (b). Each Party has not entered into any contracts or other obligations that will interfere with the Party's ability to perform its obligations under this Agreement;

#### **13.2. By Participant to Upstream.**

Participant represents and warrants to Upstream that:

- (a). Participant and its System Users that provide real estate brokerage services to customers or clients are each duly qualified and licensed to engage in the real estate brokerage business in all jurisdictions in which it and they do business.
- (b). The Participant Data that Participant directs be provided through the System to any third party, including to or from any MLS(s), shall not violate the business rules of such third party, including the MLS Rules and Regulations of the MLS(s), to which the Participant Data is made accessible, or the real estate license laws of any state in which the Participant or any of its System Users is licensed;
- (c). Participant owns all Intellectual Property Rights in, or has secured appropriate licenses to use, the Participant Brand Features and Participant Data that Participant, its System Users, or authorized MLS(s) enter into the Upstream Database, or cause to be disseminated to third parties through the System;

#### **13.3. By Upstream to Company.**

Upstream represents and warrants to Participant that:

- (a). To the best of Upstream's actual knowledge, the System and the Software do not contain any viruses, Trojan horses, trap doors, back doors, Easter eggs, worms, time bombs, cancel bots or other computer programming routines that are intended to

damage, detrimentally interfere with, surreptitiously intercept or expropriate any Participant Data or any person's personally identifiable information.

(b). Upstream shall use commercially reasonable efforts not to mix or co-mingle any of the Participant's Brand Features or Participant Data with any similar data, content, or information received from any other entity that is a party to a Participant Agreement with Upstream.

#### 13.4. Remedies.

Participant's sole remedy for Upstream's non-compliance with any warranty in Section 13.3 shall be to cause Upstream to cure such non-compliance.

### **Section 14. Confidential Information.**

The Parties acknowledge and agree that during the course of their performance of their obligations under this Agreement, one Party (the "Disclosing Party") may disclose Confidential Information (as defined in Section 1 above) to the other Party (the "Receiving Party"). The Receiving Party agrees that it shall use the Disclosing Party's Confidential only to perform its obligations under this Agreement, and to share the Disclosing Party's Confidential Information only with such of its employees, consultants, attorneys, accountants or other representatives as are necessary to enable the Receiving Party to perform its obligations under this Agreement, and only if such persons or entities agree in writing to comply with the terms of this Section 14. The Receiving Party shall protect the confidentiality of the Disclosing Party's Confidential Information using no less than the same degree of care that the Receiving Party uses to protect its own Confidential Information, but in no case less than reasonable care. In the event a Receiving Party is the recipient of any subpoena, litigation discovery request, or other legal demand for disclosure of the Disclosing Party's Confidential Information, the Receiving Party shall notify the Disclosing Party of the receipt of such a demand at the earliest possible time and shall cooperate with the Disclosing Party on reasonable terms and conditions in any effort by the Disclosing Party to quash any such demand, or seek an appropriate protective order from a court of competent jurisdiction.

### **Section 15. Indemnification.**

#### 15.1. By Upstream.

Upstream agrees, to defend, indemnify, and hold harmless Participant and its System Users (the "Participant Indemnified Parties") from any losses, expenses, damages, judgments, or penalties, including reasonable attorney's fees and litigation expenses incurred at all levels of litigation, whether at trial or on appeal, arising from any allegations by a third party (a "Claim") that, if proven to be true, would constitute an infringement by the System or Software upon the third party's Intellectual Property Rights; provided that this duty shall not apply to any Claim in which the alleged infringement is based upon the content or derivatives of the Participant Data, including

any text, data, or images contained therein, or the Participant Brand Features, or any modification of the System or Software by Participant or any of its System Users, without the express written permission of Upstream or its Third Party Licensor who provides the System or Software that is the object of the Claim. In the event of any Claim subject to this Section 15.1, a Participant Indemnified Party shall provide Upstream with prompt written notice of such a Claim, and shall cooperate fully in Upstream's defense or settlement of any such Claim. Upstream shall have the right to select legal counsel to defend any such Claim, provided that a Participant Indemnified Party shall have the right, at its sole cost and expense, to engage independent legal counsel solely for the purpose of monitoring the progress of the defense or settlement of any Claim. Upstream shall have the sole right to settle or compromise any Claim, provided that a Participant Indemnified Party shall have the right to consent to any such settlement or compromise that will materially diminish the System Services to be provided to the Participant Indemnified Party under this Agreement, or will impose and any additional affirmative obligations upon the Participant Indemnified Party, which consent the Participant Indemnified Party shall not unreasonably withhold, condition or delay. In the event of any Claim, Upstream shall have the right at its sole option and expense to either (1) procure for the Participant and its System Users the right to continue to use the System and the Software as contemplated under this Agreement; (2) modify the System or the Software to eliminate any basis for the Claim, or (3) replace the System or the Software with an equally suitable, compatible, functional, and non-infringing System and Software at no cost to the Participant or its System Users. If none of these options are reasonably available to Upstream, this Agreement may be terminated at the option of either Party without further obligation or liability on the part of either Party. The rights set forth in this Section 15.1 shall be the Participant's and its System Users' sole and exclusive remedy for any Claim based upon an alleged infringement by the System or Software of a third party's Intellectual Property Rights.

#### 15.2. By Participant.

Participant shall defend, indemnify and hold harmless Upstream, or any of its employees, officers, managers, subsidiaries, affiliates, members, or agents (the "Upstream Indemnified Parties") from any losses, expenses, damages, judgments, or penalties, including reasonable attorney's fees and litigation expenses incurred at all levels of litigation, whether at trial or on appeal, arising from any allegations by a third party (a "Claim") that, if proven to be true, would constitute a breach of the Participant's representations, warranties or other obligations under this Agreement. A Claim subject to this Section 15.2 shall also include any allegations made by a third party or a governmental agency against an Upstream Indemnified Party arising from the Participant's or any of its System User's rendering of brokerage services to any customer or client, or alleged use of the Upstream Software, System, or Database in course of a violation any law, rule or regulation. In the event of any Claim, the Upstream Indemnified Party shall provide the Participant with prompt written notice of such a Claim, and shall cooperate fully in the Participant's defense of any such Claim. Participant shall have the right to select legal counsel to defend any Claim, provided that any Upstream Indemnified Party shall have the right to engage independent legal

counsel at its expense solely for the purpose of monitoring the progress of the defense or settlement of any Claim. Participant shall have the right to settle or compromise any Claim, provided that an Upstream Indemnified Party shall have the right to consent to any such settlement or compromise that will impose any additional obligations upon the Indemnified Party other than those imposed under this Agreement, which consent the Upstream Indemnified Party shall not unreasonably withhold, condition or delay.

#### **Section 16. Limitation of Liability.**

EXCEPT FOR EACH PARTY'S OBLIGATIONS UNDER SECTION 15, ANY INFRINGEMENT BY PARTICIPANT OR ANY OF ITS SYSTEM USERS OF UPSTREAM'S OR ANY OF ITS THIRD PARTY LICENSORS' INTELLECTUAL PROPERTY RIGHTS, OR ANY USE OF THE SYSTEM BY THE PARTICIPANT OR ANY OF ITS SYSTEM USERS NOT AUTHORIZED, OR PROHIBITED, BY SECTIONS 2 OR 9, NEITHER PARTY, NOR ITS SUBSIDIARIES, AFFILIATES OR AGENTS, WILL BE LIABLE TO THE OTHER PARTY FOR ANY INDIRECT, INCIDENTAL, CONSEQUENTIAL, SPECIAL, PUNITIVE OR EXEMPLARY DAMAGES, COSTS, OR LIABILITIES ARISING FROM THE SUBJECT MATTER OF THIS AGREEMENT, REGARDLESS OF THE TYPE OF CLAIM, OR WHETHER A PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. EXCEPT FOR UPSTREAM'S DUTIES UNDER SECTION 15, UPSTREAM'S SOLE LIABILITY TO PARTICIPANT OR ANY OF ITS SYSTEM PARTICIPANTS FOR ANY BREACH OF THIS AGREEMENT SHALL BE LIMITED TO THE AMOUNTS PAID BY PARTICIPANT TO UPSTREAM DURING THE TWELVE (12) MONTH PERIOD PRIOR TO THE OCCURRENCE GIVING RISE TO THE BREACH.

#### **Section 17. Disclaimers.**

EXCEPT FOR UPSTREAM'S EXPRESS WARRANTIES SET FORTH IN SECTION 13.3, THE SYSTEM, SYSTEM SERVICES, AND THIRD PARTY DATA PROVIDED HEREUNDER ARE PROVIDED "AS IS" WITHOUT ANY WARRANTY OF ANY KIND AND UPSTREAM DISCLAIMS ANY LIABILITY TO PARTICIPANT OR ANY OF ITS SYSTEM PARTICIPANTS ARISING FROM (1) ANY WARRANTIES OF MERCHANTABILITY, TITLE, OR NON-INFRINGEMENT OF THE SYSTEM, SOFTWARE, OR THIRD PARTY DATA, (2) THAT THE SYSTEM, SOFTWARE OR THIRD PARTY DATA ARE FIT FOR ANY PARTICULAR PURPOSE, (3) THAT PARTICIPANT OR THE SYSTEM PARTICIPANTS WILL DERIVE ANY SALES, COMMISSIONS, OR OTHER REVENUES BY REASON OF THE USE OF THE SYSTEM OR SOFTWARE, (4) THAT ANY OF THE THIRD PARTY DATA OR OTHER CONTENT PROVIDED BY UPSTREAM OR ANY THIRD PARTY LICENSOR AND DISPLAYED OR ACCESSIBLE ON THE SYSTEM IS ACCURATE, COMPLETE, TIMELY, OR NON-INFRINGEMENT, OR (5) THAT THE SYSTEM OR THE SOFTWARE WILL BE CONTINUOUSLY AVAILABLE OR ERROR FREE.

#### **Section 18. Dispute Resolution.**

18.1. Other than any claim or petition by Upstream for injunctive relief, the following process shall apply:

18.1.1. Good Faith Negotiations. In the event of a dispute between Participant and Upstream, the disputants shall first attempt in good faith to negotiate a mutually agreeable resolution to the dispute within fifteen (15) days after one Party notifies the other Party, in writing, that a dispute exists.

18.1.2. Mediation. If the dispute cannot be resolved through negotiation within fifteen (15) days after notice of the dispute, then the Parties agree to submit the dispute to non-binding mediation before a mutually agreeable mediator, or if agreement on a mediator cannot be reached, then a mediator supplied by the American Arbitration Association. The complaining Party shall initiate the mediation, which shall commence within sixty (60) days after notice of the dispute was first given, unless extended by mutual agreement of the disputing Parties. The disputing Parties shall share equally in the costs of the mediation, including the mediator's fees and expenses, with each Party bearing its own legal fees and costs, if any, associated with the mediation. The mediation shall occur in a location upon which the disputing Parties mutually agree, or at a location determined by the mediator.

18.1.3. Binding Arbitration. If the dispute cannot be resolved through mediation, the disputing Parties agree to submit the dispute to binding arbitration before a mutually agreeable arbitrator or arbitration panel, or if agreement on an arbitrator or panel cannot be reached, the arbitration shall be conducted by a commercial arbitrator from the American Arbitration Association. The complaining Party shall initiate the arbitration, which shall commence within ninety (90) days after the conclusion of the mediation, unless the disputing Parties mutually agree to a different commencement date, or the rules of the arbitration services provider, or an order of the arbitrator, provide a different date. The arbitration shall occur in Chicago, Illinois, or such other location upon which the disputing Parties shall agree. The arbitrator or arbitration panel shall have the power and discretion to assess the costs of the arbitration to the non-prevailing Party, as well as enter an additional award of reasonable attorney's fees and expenses to the prevailing party. The non-prevailing Party consents to jurisdiction of the courts of the state in which the prevailing Party is headquartered for the purpose of enforcing any arbitration award in favor of the prevailing Party.

18.2. Injunctive Relief. In the event of a dispute between Upstream and the Participant for which the Upstream does not believe money damages would be a sufficient remedy, Upstream shall be entitled to seek a temporary, preliminary or permanent injunction, without the requirement of posting a bond or surety, in any court of competent jurisdiction, in addition to any other remedy to which it is entitled at law or in equity.

## **Section 19. General Provisions.**

19.1. Choice of Law. This Agreement shall be governed by the laws of the State of Delaware applicable to agreements made and performed wholly with that State, and without regard to choice of law rules.

19.2. Venue. Except with respect to Section 18.2, each Party hereto agrees that it shall bring any action or proceeding in respect of any claim arising out of, or related to, this Agreement exclusively in the United States District Court for the Northern District of Illinois or any Illinois state court sitting in Cook County, Illinois, and solely in connection with claims arising under this Agreement (a) irrevocably submits to the exclusive jurisdiction of such courts, (b) waives any objection to laying venue in any such action or proceeding in such courts, (c) waives any objection that such courts are an inconvenient forum or do not have jurisdiction over any Party hereto. THE PARTIES HERETO AGREE THAT NEITHER PARTY SHALL BRING ANY ACTION AGAINST THE OTHER PARTY AS A CLASS ACTION, AND FURTHER WAIVE ANY RIGHT TO A TRIAL BY JURY IN ANY ACTION, PROCEEDING OR COUNTERCLAIM BROUGHT BY ANY PARTY HERETO ON ANY MATTERS ARISING OUT OF OR IN ANY WAY CONNECTED TO THIS AGREEMENT, UPSTREAM OR ITS BUSINESS.

19.3. Attorney's Fees. In any proceeding brought to interpret or enforce this Agreement, the court or arbitrator(s) shall have the authority to enter appropriate relief for the prevailing Party and against the non-prevailing Party, including an award of the prevailing Party's reasonable attorney's fees, costs and litigation expenses incurred in prosecuting or defending any such proceeding.

19.4. Survival. In the event of the termination of this Agreement for any reason, the following Sections of this Agreement shall survive such termination: 1, 2.2, 4, 6, 9, 11.2.4, 13, 14, 15, 16, 17, 18, and 19.

19.5. Assignment. This Agreement shall not be assignable by either Party without the written consent of the other Party, which consent shall not be unreasonably withheld, conditioned, or delayed; provided, however, that Upstream shall have the right to assign this Agreement in its entirety, without Participant's prior consent, to any entity that is a subsidiary or affiliate of Upstream, or as part of any merger or combination of Upstream with another entity, or the sale of all, or substantially all, of Upstream's assets to another entity. Any Party's purported assignment of this Agreement in contravention of this Section 19.5 shall be null and void and without any legal force or effect.

19.6. Amendment. This Agreement may not be amended, except by a written instrument signed by both parties.

19.7. Entire Agreement. This Agreement constitutes the entire Agreement between the Parties concerning the subject matter thereof, and all prior

agreements, representations, and warranties made between the Parties related thereto, whether written or oral, are hereby superseded by this Agreement.

19.8. Force Majeure. Neither Party shall be liable for failure to perform or delay in performing any obligation under this Agreement (other than the payment of money), if such failure or delay is due to fire, flood, earthquake, hurricane, strike, war, acts of terrorism, embargoes, blockades, riot, insurrection, failure of telecommunications systems or Internet-mediated transmissions, or any other cause beyond a Party's control; provided that (1) the putative force majeure was not reasonably avoidable by the defaulting Party, and (2) the other Party may terminate this Agreement if the period of non-performance or delay in performance exceeds thirty (30) Days.

19.9. Notices. All notices, requests, or other communications required or permitted under this Agreement will be deemed to have been given immediately if made by facsimile or electronic mail (confirmed by concurrent written notice sent via overnight courier for delivery the next business day). Notices shall be given to Participant pursuant to the contact information entered by Participant at the time of registration at the Upstream Domain. Notices to Upstream shall be delivered to the address and contact person identified on the Upstream Domain for such purposes.

19.10. Severability. If any provision of this Agreement is held to be invalid, illegal or unenforceable for any reason, such invalidity, illegality, or unenforceability shall not affect any other provisions of this Agreement, and this Agreement shall be construed as if the invalid, illegal or unenforceable provisions have never been included in the Agreement.

UPSTREAMRE, LLC

NAME OF BROKERAGE COMPANY

By: \_\_\_\_\_

By: \_\_\_\_\_

[Signature]

[Signature]

Name: Alex Lange

Name:

Title: President & CEO

Title:

Date:

Date:



## EXHIBIT A

	Office Pricing/Month	
# Agents "Live"		Price
1-24	\$	50
25-49	\$	100
50-99	\$	200
100-149	\$	300
150-199	\$	375
200-299	\$	525
300-399	\$	650
400-499	\$	775
500-649	\$	975
650-799	\$	1,125
800-999	\$	1,350
1000-1199	\$	1,525
1200-1499	\$	1,825
1500-1999	\$	2,325
2000-2999	\$	3,300
3K-10K		Agent Multiple
>10K		Agent Multiple

Participant shall pay to Upstream a flat monthly Participant Fee based upon the number of real estate agents affiliated with Participant who are active or "live" Eligible System Users on or after October 1, 2019.

**Examples:**

- Broker 1: 150 agents in five offices across two MLSs. MLS (1) and three offices totaling 90 agents are "live" Oct 2019. MLS (2) with the remaining offices/agents are "live" Feb 2020
- Broker 2: 100 agents in one office, but MLS isn't "live" until Feb 2020
- Broker 3: 3,100 agents in one MLS with all offices "live" in Dec 2019

	Oct-19	Nov-19	Dec-19	Jan-20	Feb-20	Mar-20
<b>Broker 1</b>	\$ 200	\$ 200	\$ 200	\$ 200	\$ 200	\$ 200
<b>Broker 2</b>	\$ -	\$ -	\$ -	\$ -	\$ 300	\$ 300
<b>Broker 3</b>	\$ -	\$ -	\$ 2,790	\$ 2,790	\$ 2,790	\$ 2,790