

Black Hills Board of REALTORS®, Inc., d/b/a Black Hills Association of REALTORS® Participant Data Access Agreement

This **AGREEMENT** is made and entered into by Black Hills Board of REALTORS®, Inc., d/b/a Black Hills Association of REALTORS® (“**BHAR**”), with offices at 227 Founders Park Drive, Rapid City, South Dakota, 57701; the real estate brokerage firm identified as “Firm” on the signature page, Exhibit A (“**Firm**”); the Agents affiliated with Firm that are identified on the signature page, Exhibit A, if any (collectively, the “**Agent**”); and the individual or business association identified as “Third-party Vendor” on the signature page, Exhibit A, if any (“**Third-party Vendor**”).

DEFINITIONS

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

Confidential Information: “Confidential Information” means information or material proprietary to a party or designated “confidential” by the party and not generally known to the public that the other parties may obtain knowledge of or access to as a result of this Agreement. Confidential Information includes, but is not limited to, the following types of information (whether in oral, visual, audio, written or other form): (a) all BHAR Data, except to the extent to which this Agreement and the BHAR Policies permit its disclosure; (b) IP addresses, access codes and passwords; (c) any information that BHAR obtains from any third-party that BHAR treats as proprietary or designates as Confidential Information, whether or not owned or developed by BHAR; and (d) any information designated as confidential or private by any applicable state, federal, local or other law, regulation or directive. Confidential Information does not include information that is or becomes publicly available by other than unauthorized disclosure by the receiving party; independently developed by the receiving party; received from a third-party who has obtained and disclosed it without breaching any confidentiality agreement; or already possessed by the receiving party at the time of its disclosure.

Data Interface: The transport protocols and data storage formats provided by BHAR for use by Firm, Agent, and Third-party Vendor; BHAR may modify the Data Interface in its sole discretion from time to time.

Firm Internal Use (Broker Back Office): Any use of those portions of the BHAR Data relating to Firm’s own listings; and any use of those portions of the BHAR Data relating to listings of Participants other than Firm that exposes BHAR Data only to Firm-Related Persons and to Agents affiliated with Firm, subject to the BHAR Policies.

Firm-Related Persons: Third-party Vendor, if any, and employees of Firm who are not Agents or broker/managers.

IDX: Use and display of portions of the BHAR Data under the Internet Data Exchange provisions of the BHAR Policies.

BHAR Data: Data relating to real estate for sale, previously sold, or listed for sale, and to BHAR Participants (including text, photographs, and all other data formats now known or hereafter invented) entered into BHAR’s databases by BHAR Participants and BHAR, or on their behalf.

BHAR Policies: BHAR’s Bylaws or MLS Rules and Regulations as amended from time to time, and any other rules, operating policies, or regulations promulgated by BHAR, its Multiple Listing Service, South Dakota Real Estate Commission, or National Association of REALTORS®.

Agent: Any person holding a real estate license in South Dakota who is not a Participant but who is subject to a Participant’s supervision under the laws of South Dakota.

Participant: This term has the meaning given to it in the BHAR Policies. For purposes of this Agreement, “Participant” does not apply to participants of MLSs other than BHAR. Where applied in this Agreement to Participants other than Firm, “Participant” also includes Agents affiliated with those Participants for whom the Participants are responsible under the laws of the State of South Dakota.

Second Level Domain: “Second Level Domain” has the meaning given to it in this paragraph. “URL” means a web address, including the “http://” and any material appearing after a slash in the address. “Domain Name” means a URL, less the “http://” and any material appearing to the right of the next slash (/) in the address. (So for example, in the URL “Http://janesmith.abcrealty.com/homepage.html”, the Domain Name is “JANESMITH.ABCREALTY.COM”.) “Top Level Domain” means the portion of the Domain Name to the right of the right-most period. (In the example, “COM”.) “Second Level Domain” means that portion of a domain name to the left of the right-most period, up to the second period from the right, if any, plus the Top Level Domain. (In the example, “ABCREALTY.COM”.) “Third Level Domain” means that portion of a domain name to the left of the second period from the right, if any, up to the third period from the right, if any, plus the Second Level Domain. (In the example, “JANESMITH.ABCREALTY.COM”).

THIRD-PARTY VENDOR: the individual or business association identified as “Third-party Vendor” herein.

VOW: Use and display of portions of the BHAR Data under the Virtual Office Website (VOW) provisions of the BHAR Policies.

BHAR’S OBLIGATIONS

2. BHAR grants to Firm and Agent a non-exclusive, worldwide license to make copies of, display, perform, and make derivative works of the BHAR Data, during the term of this Agreement, only to the extent expressly permitted by and subject at all times to the terms and restrictions of this Agreement; any other use of the BHAR Data is hereby prohibited. All licenses hereunder shall terminate upon the termination of this Agreement. This Agreement is a non-exclusive license, and not a sale, assignment, or exclusive license. BHAR retains all rights not expressly granted herein. This license does not permit Firm, Agent, or Third-party Vendor to store, download, frame, or “scrape” any of the BHAR Data except as expressly provided in this Agreement.

3. BHAR agrees to provide to Firm, Agent, and Third-party Vendor, during the term of this Agreement, (a) access to the BHAR Data via the Data Interface under the same terms and conditions BHAR offers to other BHAR Participants; BHAR does not undertake to provide technical support for the Data Interface or the BHAR Data. The Data Interface, together with access to the BHAR Data, may from time-to-time be unavailable, whether because of technical failures or interruptions, intentional downtime for service or changes to the Data Interface, or otherwise. Any interruption of access to the Data Interface or BHAR Data shall not constitute a default by BHAR under this Agreement.

FIRM’S OBLIGATIONS

4. Firm and Agent shall comply with the BHAR Policies at all times. In the event of any perceived conflict between the BHAR Policies and this Agreement, the BHAR Policies shall govern.

5. Firm shall use the BHAR Data obtained under this Agreement for Firm Internal Use (Broker Back Office), IDX, and VOW use only. Agent shall use the BHAR Data obtained under this Agreement for IDX and VOW use only. Any other use is strictly prohibited. Firm and Agent shall not make the BHAR Data or the Confidential Information available to any third-party unless expressly authorized to do so under this Agreement. Firm and Agent may display the BHAR Data on web sites only to the extent permitted by the BHAR Policies and then only on a site or sites resident at the second level and third-level domain(s) indicated on the signature page, Exhibit A of this Agreement. The provisions of this paragraph shall survive the expiration or other termination of this Agreement in perpetuity.

6. Firm and Agent acknowledge that ownership and use rights relating to copyrights in the BHAR Data are defined in the BHAR Policies or in the terms of the participant and subscriber agreements between BHAR Firm and Agent, or both. Firm and Agent shall not challenge or take any action inconsistent with BHAR’s ownership of or rights in the BHAR Data. The provisions of this paragraph shall survive the expiration or other termination of this Agreement in perpetuity.

7. If BHAR notifies Firm or Agent of a breach of the BHAR Policies or this Agreement and Firm or Agent does not immediately cure the breach, Firm and Agent shall hold Third-party Vendor harmless from any liability arising from Third-party Vendor’s cooperation with BHAR under Paragraph 10.

8. Firm and Agent shall pay the fees, if any, that BHAR customarily charges other BHAR Participants for data access. By signing this Agreement, Firm and Agent acknowledge receipt of this responsibility. Firm and Agent acknowledge receipt of BHAR's current schedule of such fees, if any. BHAR may in its sole discretion establish or modify its schedule of fees upon written notice to Firm and Agent. Firm and Agent shall be liable for all costs, including reasonable attorney fees, associated with collecting amounts due under this Agreement.

9. Firm is surety for Agent's and Third-party Vendor's obligations or duties under this Agreement and shall hold harmless and indemnify BHAR for any and all claims, damages, costs and expenses, including attorneys' fees, related to any misuse of the subject data or breach of this Agreement or BHAR's policies by Firm, Agent or Third-party Vendor.

THIRD-PARTY VENDOR'S OBLIGATIONS

10. Third-party Vendor shall immediately correct any breach of this Agreement or violation of the BHAR Policies within its control, whether committed by Firm, Agent, or Third-party Vendor, upon notice from BHAR.

11. Third-party Vendor acknowledges that (as among the parties to this Agreement) Firm and BHAR possess all right, title, and interest in all copyrights in the BHAR Data. Third-party Vendor shall not challenge or take any action inconsistent with BHAR's and Firm's ownership of or rights in the BHAR Data. The provisions of this paragraph shall survive the expiration or other termination of this Agreement in perpetuity.

12. Third-party Vendor shall not make the BHAR Data or the Confidential Information available to any third-party, except on behalf of Firm and Agent and in a manner consistent with Firm's and Agent's obligations under Paragraphs 4 through 9 of this Agreement; nor shall it make any other use of the BHAR Data, whether commercial or personal. **In the event that Vendor provides services to Participants other than Firm (or to Agents affiliated with Firm other than the Agent) Vendor must enter separate Agreements with BHAR. Third-party Vendor must ascertain, using the Data Interface on a daily basis, that each Participant to which Vendor provides services remains an eligible Participant; and in the case of Agents, that each Agent remains affiliated with Firm. Failure to comply with the provisions of this paragraph will result in BHAR terminating all of the Third-party Vendor's access to the BHAR Data under this Agreement and all similar Agreements. By signing this Agreement, THIRD-PARTY VENDOR acknowledges that it shall be responsible to secure an executed version of this Agreement with BHAR, the Firm and Agent and each additional Participant to add additional Agents affiliated with Firm as Agent Parties. The failure of the THIRD-PARTY VENDOR to secure this new additional Agreement shall constitute a material breach of the terms hereof and entitle BHAR to immediately terminate access to the data feed.** The provisions of this paragraph shall survive the expiration or other termination of this Agreement in perpetuity.

13. Third-party Vendor is surety for Firm's and Agent's obligations to pay fees under Paragraph 8. The provisions of the preceding sentence shall survive the expiration or other termination of this Agreement in perpetuity. Third-party Vendor shall notify BHAR within five business days of any change to the information relating to it in this Agreement, including change of its corporate name or address.

AUDITS OF COMPLIANCE

14. BHAR may conduct an Audit upon any notice reasonable under the circumstances. Audit activities may include, without limitation, obtaining full access to Firm's, Agent's, and Third-party Vendor's web sites and systems to ensure that BHAR Data is displayed in accordance with the BHAR Policies; using all features available to end-users of Firm's, Agent's, and Third-party Vendor's systems that employ the BHAR Data; and posing as consumers to register and test services Firm, Agent, and Third-party Vendor make available to consumers using the BHAR Data. The provisions of this paragraph shall survive the expiration or other termination of this Agreement for one year.

CONFIDENTIAL INFORMATION

15. The parties shall protect the Confidential Information with the same degree of care they take to protect their own sensitive business information of like kind, but in no event less than reasonable care. A party may disclose

Confidential Information if such disclosure is required by law or court order; provided, however, that such party makes commercially reasonable efforts to notify the others in writing in advance of disclosure. Within five days after termination of this Agreement, the receiving party shall return to the disclosing party all Confidential Information of the disclosing party. The receiving party shall also erase or destroy Confidential Information stored on magnetic media or other computer storage. An officer of the receiving party shall certify in writing that all materials have been returned or destroyed.

TERM AND TERMINATION

16. The term of this Agreement begins on the date that BHAR signs it. This Agreement shall terminate upon the occurrence of any of the following events: (a) immediately upon termination of Firm's privileges as a Participant in BHAR; (b) 5 days after any party's notice to the others of its intent to terminate, with or without cause; (c) immediately upon any party's notice to another that the other has breached this Agreement, provided the breach is not susceptible to cure, is one of a pattern of repeated breaches, or has caused the party giving notice irreparable harm; (d) immediately upon Firm's notice to a Third-party Vendor that Third-party Vendor is no longer designated to provide IDX or VOW services to it; (e) with regard to any Agent, immediately upon any event that results in the Agent no longer being affiliated with Firm; (f) as provided in Paragraphs 25 and 28.

17. In the event Firm's privileges as a Participant (or Agent's privileges of affiliation with Firm) are terminated while this Agreement is in effect, and BHAR subsequently reinstates those privileges, this Agreement shall automatically be reinstated if BHAR resumes its obligations under Paragraphs 2 and 3. In the event Firm, Agent, or Third-party Vendor breaches this Agreement and entitles BHAR to terminate under Paragraph 16, BHAR may in its sole discretion suspend its performance instead of terminating this Agreement. BHAR may make this election by notice to the other parties within three days after the initiation of the suspension. Firm's, Agent's, and Third-party Vendor's obligations hereunder continue during any period of suspension. In the event of any suspension or termination of this Agreement, Firm, Agent, and Third-party Vendor shall make no further use of the BHAR Data or any derivative works based on it (except the portions of it relating to Firm's own listings) until and unless Firm's or Agent's rights under this Agreement are restored.

GENERAL PROVISIONS

18. **Applicable law.** This Agreement shall be governed by and interpreted according to the laws of the State of South Dakota, without regard to its conflicts and choice of law provisions.

19. **Survival of Obligations.** The "Definitions," "Confidential Information," and "General" provisions of this Agreement shall survive its termination or expiration in perpetuity. Other provisions shall survive according to their terms.

20. **BHAR's Remedies.** (a) Injunctive relief: Because of the unique nature of the BHAR Data and Confidential Information, Firm, Agent, and Third-party Vendor acknowledge and agree that BHAR would suffer irreparable harm in the event that any of them breaches or threatens to breach its obligations under this Agreement, and that monetary damages would be inadequate to compensate BHAR for a breach. BHAR is therefore entitled, in addition to all other forms of relief, to injunctive relief to restrain any threatened, continuing or further breach by Firm, Agent, or Third-party Vendor, or any one of them, without showing or proving any actual damages sustained by BHAR, and without posting any bond. (b) Liquidated damages: Firm, Agent, and Third-party Vendor acknowledge that damages suffered by BHAR from access to the BHAR Data by an unauthorized third-party as a result of disclosure of any passwords or an unauthorized disclosure of the BHAR Data to a third-party would be speculative and difficult to quantify. Accordingly, as a material inducement to BHAR to enter into this Agreement, Firm, Agent, and Third-party Vendor agree that in the event Firm, Agent, Firm-Related Persons, or Third-party Vendor, or its employees, agents, or contractors, disclose any password to access the BHAR Data or disclose the BHAR Data itself to any unauthorized third-party, regardless of whether such disclosure is intentional or negligent, Firm, Agent, and Third-party Vendor shall be liable to BHAR for liquidated damages in the amount of \$15,000 for each such disclosure and termination of this Agreement. Liability of Firm, Agent, and Third-Party Vendor under this paragraph is joint and several.

21. **Limitation of liability/exclusion of warranties. IN NO EVENT SHALL BHAR BE LIABLE TO FIRM, AGENT, OR THIRD-PARTY VENDOR FOR ANY INDIRECT, INCIDENTAL, CONSEQUENTIAL,**

SPECIAL, OR PUNITIVE DAMAGES (EVEN IF BHAR HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES), OR LOST PROFITS ARISING FROM THIS AGREEMENT OR ANY BREACH OF IT. IN NO EVENT SHALL BHAR BE LIABLE TO FIRM, AGENT, OR THIRD-PARTY VENDOR FOR ANY AMOUNT IN EXCESS OF THE GREATER OF (A) THE FEES FIRM, AGENT, AND THIRD-PARTY VENDOR HAVE PAID BHAR, IF ANY, IN THE YEAR IMMEDIATELY PRECEDING THE FIRST EVENT GIVING RISE TO ANY CLAIM FOR DAMAGES; OR (B) \$100. FIRM, AGENT, AND THIRD-PARTY VENDOR ACKNOWLEDGE THAT BHAR PROVIDES THE BHAR DATA ON AN “AS-IS,” “AS-AVAILABLE” BASIS, WITHOUT REPRESENTATIONS OR WARRANTIES OF ANY KIND, EITHER EXPRESS OR IMPLIED, INCLUDING WARRANTY OF TITLE, NONINFRINGEMENT, AND ACCURACY. BHAR SHALL NOT BE LIABLE TO FIRM, AGENT, OR THIRD-PARTY VENDOR FOR ANY CLAIM ARISING FROM INACCURACIES IN THE BHAR DATA, ANY FAILURE TO UPDATE THE BHAR DATA PROMPTLY, OR THE BHAR DATA’S INADEQUACY FOR ANY PARTICULAR USE, WHETHER PERSONAL OR COMMERCIAL. BHAR makes no warranty, including those regarding title, availability, or non-infringement, regarding trademarks licensed under this Agreement, if any.

22. Dispute resolution; Attorney’s fees. In the event BHAR claims that Firm, Agent, or Third-Party Vendor has violated the BHAR Policies, BHAR may, at its option, resolve such a claim according to the disciplinary procedures set out in the BHAR Policies. Except as set forth in the preceding sentence, any controversy or claim shall have venue before the state or federal courts in Pennington County South Dakota. The parties irrevocably agree, consent, and submit themselves to personal jurisdiction in the courts of the State of South Dakota located in the Seventh Judicial Circuit, Pennington County, which shall have sole and exclusive jurisdiction over any action under this Agreement not subject to BHAR’s disciplinary procedures. If BHAR substantially prevails in an action or proceeding to enforce or interpret this Agreement or any provision hereof, it shall be entitled to reasonable attorney’s fees and costs for the legal action.

23. Notice. All notices to be given under this Agreement shall be mailed or electronically mailed to the parties at their respective addresses set forth herein or such other address of which any party may advise the others in writing during the term of this Agreement; and shall be effective the earlier of the date of receipt or three days after mailing or other transmission.

24. No Waiver. No waiver or modification of this Agreement or any of its terms is valid or enforceable unless reduced to writing and signed by the party who is alleged to have waived its rights or to have agreed to a modification.

25. No Assignment. No party may assign or otherwise transfer any of its rights or obligations under this Agreement to any other party without the prior written consent of all other parties to this Agreement. Any purported assignment or delegation in contravention of this paragraph is null and void, and shall immediately cause this Agreement to terminate.

26. Entire Agreement. Subject to BHAR Policies, this Agreement contains the full and complete understanding of the parties regarding the subject matter of this Agreement and supersedes all prior representations and understandings, whether oral or written, relating to the same.

27. Relationship of the Parties. The parties hereunder are independent contractors. No party shall be deemed to be the agent, partner, joint venturer, franchisor or franchisee, or employee of BHAR or have any authority to make any agreements or representations on the behalf of BHAR. Each party shall be solely responsible for the payment of compensation, insurance, and taxes of its own employees.

28. Severability. 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. In the event that any provision of this Agreement is held invalid or unenforceable by a court having jurisdiction over the parties, the invalid or unenforceable provision shall be replaced, if possible, with a valid provision which most closely approximates the intent and economic effect of the invalid provision. In the event any provision of the limitation of liability, exclusion of warranties, or indemnification is held invalid or unenforceable, this Agreement shall immediately terminate.

**Black Hills Board of REALTORS®, Inc., d/b/a Black Hills Association of REALTORS®
Participant Data Access Agreement – Exhibit A**

Under this Agreement, FIRM AND AGENT ARE PERMITTED TO WORK ONLY WITH THE THIRD-PARTY VENDOR NAMED HERE _____. If Firm or Agent chooses to engage a different Third-party Vendor or additional Third-party Vendors, Firm hereby agrees to execute a new version of this Agreement with BHAR and each such Third-party Vendor. Under this Agreement, **THIRD-PARTY VENDOR IS PERMITTED TO WORK ONLY WITH THE FIRM AND AGENT** whose signatures through authorized representatives are affixed herein below. Third-party Vendor may not use data obtained under this Agreement to provide any services to Participants other than Firm, or with Agents affiliated with Firm, except the Agent. By signing this Agreement, THIRD-PARTY VENDOR acknowledges that it shall be responsible to secure an executed version of this Agreement with BHAR, the Firm and Agent and each additional Participant to add additional Agents affiliated with Firm as Agent Parties. The failure of the THIRD-PARTY VENDOR to secure this new additional Agreement shall constitute a material breach of the terms hereof and entitle BHAR to immediately terminate access to the data feed.

If Firm or Agent will perform its own technical work and there is no Third-party Vendor to this Agreement, Firm should cross out the Third-party Vendor signature box. If this Agreement is for the services to Firm only, and there is no Agent, Firm should cross out the Agent signature box.

This Agreement is for the following uses (check only one):

☐ **IDX - Website URL** _____ ☐ **VOW - Website URL** _____

☐ **IDX Broker Only – Website URL** _____

☐ **Firm Internal Use (Broker Back Office) – (specify vendor and use)**

FIRM Firm Name _____ MLS ID _____ Signature of Principal Broker _____ Date _____ Name of Principal Broker _____ Contact for Notices: Name: _____ Phone: _____ *Email: _____ <small>(*Required– Email is the principal means for BHAR to communicate with firm.)</small>	AGENT Agent Name _____ MLS ID _____ Signature of Agent _____ Date _____ Contact for Notices: Name: _____ Phone: _____ *Email: _____ <small>(*Required – Email is the principal means for BHAR to communicate with Agent.)</small>
BHAR: Black Hills Association of REALTORS®, Inc. _____ Amy Bochman, Chief Executive Officer Date: _____ <small>(Effective date of this Agreement)</small> Contact For Notices: Amy J. Bochman, CEO Phone: 605.341.2580 Email: _____	THIRD-PARTY VENDOR Name of Corporation _____ Mailing Address _____ _____ By (Signature) _____ Date _____ Phone _____ Printed Name _____ Title _____ Contact e-mail _____