

SOUTHWEST MLS, INC. PHOTOGRAPHER MEMBERSHIP AGREEMENT

Photographer Name: \_\_\_\_\_

Company Name: \_\_\_\_\_

Address: \_\_\_\_\_

Telephone: \_\_\_\_\_

Email: \_\_\_\_\_

THIS AGREEMENT (the "Agreement") is entered into as of the date last signed below or electronically by and between Southwest MLS, Inc. ("SWMLS"), with an address of \_\_\_\_\_, and the individual or entity accepting this Agreement ("Photographer").

WHEREAS, SWMLS is a real estate multiple listing service providing a comprehensive listing database for real estate brokers, agents, appraisers, consumers, and others;

WHEREAS, Photographer is a professional service provider in the field of real estate photography;

WHEREAS, Photographer desires to participate in SWMLS's program for photographers for the purpose of providing photographic services to SWMLS members as described in this Agreement;

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

1. DEFINITIONS

- a) "Media" is any material in which data can be stored or represented and includes, but is not limited to, photographs, documents, videos, virtual tours, aerial photos or videos, floor plans, computer-generated images and renders, augmented reality (AR) and virtual reality (VR) experiences, and textual descriptions. The term "Media" includes all the above whether stored, delivered, or presented in digital, print, or any other form now known or hereafter devised. Media may be created by the Photographer or on behalf of the Photographer by a third party, and may be combined with other works or media. Media encompasses all elements, versions, and modifications of the works listed above.
- b) "Member" includes real estate brokers, appraisers, agents, and real estate related business professionals that subscriber to SWMLS.
- c) "MLS System" is the software that SWMLS maintains and uses to make access to its MLS database available to its Members and other authorized users.
- d) "SWMLS Content" or, interchangeably, "SWMLS Compilation", includes all content provided by the SWMLS, including, but not limited to, data and Media related to real estate listings, Members, or their customers.
- e) "SWMLS Policies" are the then current bylaws, rules and regulations, and policies and procedures adopted by SWMLS's board of directors or authorized delegates, as SWMLS amends them from time to time.

2. MEMBERSHIP FEES, RULES, AND POLICIES. Photographer shall comply with SWMLS Policies applicable to photographers and pay the membership fees as set forth in the SWMLS fee schedule, if any, and which may be adjusted from time to time in SWMLS's sole discretion,

3. PHOTOGRAPHER ROSTER AND PROMOTION OPPORTUNITIES. SWMLS will maintain and publish a roster of all Photographer Members and will include Photographer on the roster. Photographer will not use access to the MLS system or SWMLS Content to solicit Members other than as provided in this Agreement. During the term of this Agreement, Photographer may indicate on its own website and marketing materials that they are a participant in the “Southwest MLS Photographer Program” subject to the terms of this Agreement and display the Certified Photography Program logo, as provided by SWMLS. SWMLS retains the right to review any use of SWMLS name or logo and require Photographer to discontinue any use that SWMLS deems inappropriate, in its sole discretion.
4. PHOTOGRAPHER INDEPENDENT SERVICES AGREEMENTS; PRECEDENCE. To the extent Photographer provides services to Members, the terms for such services will be negotiated and agreed to independently by and between Photographer and Member(s), including the pricing, conditions, and other terms of service (“Service Agreements”). SWMLS is not a party to these independent Service Agreements and SWMLS is not responsible for any of the terms, including payment of fees. Moreover, to the extent the license or other terms of the agreements conflict with the rights Photographer grants to SWMLS under this Agreement, Photographer agrees that the terms of this Agreement shall take precedence and any contradictory terms in any Service Agreement shall be null, void, and unenforceable as against the Member or SWMLS.
5. MLS SYSTEM ACCESS AND USE.
  - a. *License.* During the term of this Agreement, SWMLS grants Photographer a license to use the MLS System during the term of this Agreement, subject to the SWMLS Policies, and according to the terms of this Agreement.
  - b. *Credentials.* SWMLS shall provide one unique user ID and password to Photographer. The user ID and password will provide Photographer access to functions in the MLS System as determined in SWMLS’s sole discretion. SWMLS makes no warranties with regard to the MLS System, including but not limited to that the MLS System will be available at all times. Photographer will maintain the confidentiality of such credentials and not share them with others. Photographer also agrees not to use anyone else’s credentials to access the MLS System or other software provided by the SWMLS. Photographer acknowledges that the data and information contained in the MLS System is confidential and shall not disclose any such information to a third party. SWMLS may in its reasonable discretion conduct periodic compliance reviews of Photographer’s use of the MLS System under this Agreement; Photographer will respond within one (1) business day of any compliance inquiry by SWMLS. Should Photographer violate this provision, in addition to any legal or equitable remedies, Photographer may be subject to fines and other disciplinary actions as set forth in the SWMLS rules and regulations.
  - c. *Permission Specific to Members.* Photographer is granted permission to manage Media only for Members with which it has Service Agreements and Photographer will not manage or attempt to manage Media for any other Members. Photographer shall use the MLS System solely for the purpose of uploading Media as permitted by the SWMLS Policies and this Agreement on behalf of or for the benefit of Members. Except as expressly provided in this Agreement and the SWMLS Policies, Photographer shall not copy, create derivative works of, distribute, perform, or display the MLS System or any part of it, except the Media. Photographer shall not remove or delete Media from the MLS System for any sold or other off-marketing property records or otherwise. Photographer shall make no commercial use of the MLS System, except as expressly permitted in this Agreement.
  - d. *Compliance.* Photographer agrees to comply with all SWMLS rules, including the obligations of Members, related to uploading of Media, including, but not limited to, rules regarding the minimum number and type(s) of Media and the timing of Media uploads.

## 6. GRANT OF RIGHTS.

- a. *SWMLS Rights to Media.* Photographer hereby grants to SWMLS a perpetual, worldwide, non-exclusive, royalty-free right to use, reproduce, display, distribute, create derivative works from, and sublicense (including sublicenses to Members and sublicenses through multiple tiers) the Media submitted to SWMLS by (a) Photographer on behalf of a Member or (b) by a Member who procured the Media from Photographer. This provision is intended to be construed as broadly as possible to ensure SWMLS has the right to use the Media as part of the SWMLS Compilation for all current purposes, during the ordinary course of business, including for all purposes contemplated by the SWMLS Policies, and any new purposes adopted in the future, which are consistent with SWMLS's ordinary course of business. Notwithstanding the foregoing, Photographer remains the owner of the copyright of the Media. Photographer acknowledges and understands that no royalty or other consideration will be due to Photographer under this Agreement. Photographer and Members shall separately negotiate any fees due to Photographer under a Service Agreement. Photographer agrees that SWMLS is under no obligation to credit Photographer for the Media. For clarity, some of the purposes for which Media is used in the SWMLS Compilation are the following, which are not intended to limit the foregoing grant of rights but just provided as examples:
  - i. *Marketing Listings.* Members use Media for marketing property listings, which includes distribution and sub-licensing of Media to third party real estate web portals and other broker or agent provided listing sites (commonly referred to as IDX or VOW sites).
  - ii. *Off-Market Uses.* Media is retained in the SWMLS Compilation in perpetuity with off-market listings (those not currently being marketed for sale) for many purposes, including, without limitation, use in property valuation (CMAs, AVMs, etc.) and other market analyses.
  - iii. *Derivative Uses.* Media also is used by the SWMLS for a variety of derivative uses, including to create and use in artificial intelligence and machine learning applications for, among other things, identification of features in the Media to enhance listing entry, search, valuation, and market analyses.
- b. *No Copying by Other Members for Marketing Other Listings.* The above grant of rights does not entitle an SWMLS Member to copy Photographer's Media from another Member's listing for use in marketing their own listing without Photographer's consent. If Photographer believes unauthorized copying has occurred, Photographer agrees to notify SWMLS by providing SWMLS with identification of the listings and Media involved. Upon receipt of such notice, SWMLS will investigate the claim in accordance with the SWMLS rules and regulations, and, if verified, use commercially reasonable efforts to remove the identified Media from the identified listing and may assess a fine or other discipline in accordance with the rules and regulations, unless or until Photographer authorizes the other Member to use the Media for that listing or as otherwise agreed to in writing by Photographer. If SWMLS uses commercially reasonable efforts to remove or disable access to the infringing material (e.g., removal from a data feed; SWMLS does not control Member's website displays), then Photographer agrees not to take any legal action against a Member for an alleged copyright violation. With regard to SWMLS, the process and removal of the identified Media outlined above is the exclusive remedy for any claim against SWMLS.
- c. *Photographer Compilation Contribution.* All selection, coordination, and arrangement by Photographer of the Media or other listing information submitted, contributed, or input in the MLS System, including the choice, classification, categorization, ordering, and grouping of material or data that is included in the MLS System ("PCC"), shall be for the benefit of SWMLS, which shall be deemed the PCC's author for purposes of copyright law. PCC shall not include original text, photographs, or other media. If for any reason the PCC cannot be provided as a work made for hire, Photographer agrees to assign and hereby does assign to SWMLS all right, title and interest in the PCC, including, without any limitation, any copyrights therein under United States and international copyright law.

- d. *Cooperation.* With respect to Media Photographer provides to SWMLS or Members, Photographer assigns and appoints SWMLS as Photographer's non-exclusive Take Down Notice Agent for purposes of the Digital Millennium Copyright Act of 1998 ("DMCA"). Photographer agrees to cooperate and take all action reasonably requested by SWMLS in connection with any takedown notices provided on behalf of Photographer, including but not limited to, executing and delivering to SWMLS all requested documents, or providing information pertaining to the Media. Photographer agrees to assist in filing copyright applications in the United States or elsewhere if requested by SWMLS.
- e. *Editorial control.* SWMLS is not required to, and assumes no responsibility to, review, edit, or exercise editorial control over the Media or use of the Media in the MLS Service. Notwithstanding the foregoing, SWMLS may take any steps necessary in its judgment, including deleting the Media or portions thereof, to avoid or remedy any violation of law, breach of SWMLS policies, or infringement of any intellectual property right. Additionally, SWMLS shall have the right to (i) alter and/or remove metadata and copyright management information contained in the Media; (ii) place a watermark on the Media; and (iii) remove the Media if they are inappropriate or noncompliant with the SWMLS Policies.

7. **WARRANTIES.** Photographer warrants that (a) the Media does not infringe or violate any patents, copyrights, trademarks, trade secrets or other proprietary rights of any third party; (b) Photographer has the written consent of any party necessary to provide the Media to SWMLS and Members; (c) the Media is not defamatory, offensive, or obscene; (d) that there is no claim, litigation, or proceeding pending or threatened with respect to the Media; (e) that Photographer is the owner of the copyright of the Media; (f) the Media is compliant with the SWMLS Policies, and (g) Photographer has each Member's permission to upload Media to that Member's listings. Photographer further warrants that it shall comply with all applicable laws, statutes, ordinances and regulations in performance of its respective obligations under this Agreement. If Photographer is entering into this Agreement on behalf of an entity, Photographer represents and warrants that it has the legal authority to bind that entity to the terms and conditions contained in this Agreement.

8. **INDEMNIFICATION.** Photographer agrees to indemnify, defend, and hold harmless SWMLS, its employees, directors, agents, successors, assigns, and its members ("Indemnified Parties") from and against any and all claims, liabilities, damages, losses, costs, expenses, or fees (including reasonable attorneys' fees) that arise from or relate to a) any breach or alleged breach of this Agreement or Photographer's warranties herein, and (b) each claim of any third party arising from the Media or Photographer's breach of this Agreement. Photographer shall (i) promptly notify the Indemnified Parties in writing of any claim and give the Indemnified Parties the opportunity to defend or negotiate a settlement of any such claim at Photographer's expense, and (ii) cooperate fully with Indemnified Parties, at Photographer's expense, in defending or settling any such claim. The Indemnified Parties shall be entitled to engage their own local counsel at Photographer's expense.

9. **LIMITATION OF LIABILITY/EXCLUSION OF WARRANTIES** IN NO EVENT SHALL SWMLS BE LIABLE TO PHOTOGRAPHER FOR ANY COSTS OR INDIRECT, SPECIAL, INCIDENTAL, CONSEQUENTIAL OR PUNITIVE DAMAGES OF ANY KIND WHATSOEVER ARISING FROM ANY BREACH OF THIS AGREEMENT, EVEN IF SWMLS HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES; PHOTOGRAPHER'S SOLE REMEDIES AGAINST SWMLS HEREUNDER SHALL BE TERMINATION OF THIS AGREEMENT AND DIRECT DAMAGES NOT IN EXCESS OF \$1,000, OR THE LOWEST LEGAL LIMIT, WHICHEVER IS LESS. THIS PARAGRAPH SETS OUT PHOTOGRAPHER'S EXCLUSIVE REMEDIES, AND UNDER NO CIRCUMSTANCES SHALL PHOTOGRAPHER BE ENTITLED TO EQUITABLE REMEDIES. SWMLS DISCLAIMS ALL REPRESENTATIONS AND WARRANTIES EXCEPT THOSE

EXPRESSLY SET FORTH IN THIS AGREEMENT. WITHOUT LIMITING THE GENERALITY OF THE PREVIOUS SENTENCE, SWMLS DISCLAIMS ANY WARRANTY OF NON-INFRINGEMENT, MERCHANTABILITY, AND FITNESS FOR A PARTICULAR USE.

10. TERM AND TERMINATION. This Agreement will commence on the date last signed below or electronically and will continue until either a) terminated by either party with 30 days' written notice; b) 10 days after SWMLS's notice to Photographer that Photographer has breached this Agreement or any representations or warranties contained herein, provided the breach remains uncured; or (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. Upon termination, Photographer's access to the SWMLS software will cease and the grant of rights in Media will remain in perpetuity.

11. REMEDIES.

- a. *Injunctive Relief.* Because of the unique nature of the MLS System, Photographer acknowledges and agrees that SWMLS would suffer irreparable harm in the event that it breaches or threatens to breach its obligations under this Agreement, and that monetary damages would be inadequate to compensate SWMLS for a breach. SWMLS is therefore entitled, in addition to all other forms of relief, to seek injunctive relief to restrain any threatened, continuing or further breach by Photographer, without showing or proving any actual damages sustained by SWMLS, and without posting any bond.
- b. *Liquidated damages.* Photographer acknowledges that damages suffered by SWMLS from access to the MLS System by an unauthorized third party as a result of disclosure of Photographer's password to a third party would be speculative and difficult to quantify. Accordingly, as a material inducement to SWMLS to enter into this Agreement with Photographer, Photographer agrees that (a) in the event that any disclosure of Photographer's password results in access to the MLS System by an unauthorized third party, regardless of whether such disclosure is intentional, negligent or inadvertent, Photographer shall be liable to SWMLS for liquidated damages in the amount of \$5,000 (or the amount established in the SWMLS Policies, whichever is greater) and termination of this Agreement; and (b) in the event that Photographer makes unauthorized disclosure of any portion of the MLS Content (including the data to any third party), Photographer shall be liable for liquidated damages in the amount of \$5,000 (or the amount established in the SWMLS Policies, whichever is greater) for each real estate listing disclosed and termination of this Agreement.

12. MISCELLANEOUS.

- a. *Force Majeure.* Neither Party will be deemed to be in default or in breach of this Agreement if a party fails to perform or delays in performing any obligation herein ("Delayed Party") (other than the obligation to make payment) if such failure or delay results from circumstances beyond the Delayed Party's direct control, including, without limitation, disruption or slow speed of the Internet; security breaches, DNS attacks, or introduction of viruses, worms, ransomware, spyware or other similar malware or malicious code by third parties; labor disputes; civil unrest; pandemics, acts of terror; acts of government; floods, fires, earthquakes or other Acts of God. However, the Delayed Party must provide notice of any force majeure delay to the other party within ten (10) business days of the occurrence of such delay or such party waives its right to claim a force majeure delay. At all times, the Delayed Party will diligently attempt to remove, resolve, or otherwise eliminate the conditions causing such force majeure delay, keep the other party advised with respect thereto, and commence performance of its obligations hereunder immediately upon such removal, resolution, or elimination.
- b. *Non-Waiver.* The failure by either Party at any time to enforce any of the provisions of this Agreement or any right or remedy available hereunder or at law or in equity, or to exercise any

option herein provided, shall not constitute a waiver of such provision, right, remedy or option or in any way affect the validity of this Agreement. The waiver of any default by either Party shall not be deemed a continuing waiver, but shall apply solely to the instance to which such waiver is directed.

- c. *Binding Effect.* This Agreement shall be binding upon and inure to the benefit of the Parties hereto and their respective successors and permitted assigns.
- d. *Relationship of the Parties.* Photographer and SWMLS are independent contractors. Nothing in this Agreement shall be construed to create a partnership, joint venture, employer-employee, or agency relationship between Photographer and SWMLS.
- e. *Governing Law.* This Agreement shall in all respects be governed by and interpreted, construed and enforced in accordance with the laws of the State of New Mexico.
- f. *Attorneys' fees.* If SWMLS prevails in any action to enforce or interpret this Agreement or any provision hereof, it shall be entitled to its reasonable attorneys' fees and costs for such legal action.
- g. *No third-party beneficiaries.* This Agreement is entered into solely between, and may be enforced only by SWMLS and Photographer, and this Agreement shall not create or be construed to create any rights in any third party.
- h. *Construction.* Every provision of this Agreement shall be construed, to the extent possible, so as to be valid and enforceable. If any provision of this Agreement so construed is held by a court of competent jurisdiction to be invalid, illegal or otherwise unenforceable, such provision shall be deemed severed from this Agreement, and all other provisions shall remain in full force and effect.
- i. *Dispute Resolution.* In the event of any dispute or claim arising out of or relating to this Agreement, the parties agree to attempt to resolve such dispute through good-faith negotiations. If the dispute cannot be resolved through negotiation, the parties agree to submit the dispute to binding arbitration administered by a nationally recognized arbitration organization in the State of New Mexico. The arbitration shall be conducted in accordance with the then-current rules of the selected organization, and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof. Each party shall be responsible for its own arbitration fees and costs unless otherwise determined by the arbitrator.
- j. *Assignment.* Neither this Agreement nor any obligations or duties hereunder may be assigned or delegated by Photographer. Any purported assignment or delegation in contravention of this section is null and void.
- k. *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.
- l. *Jurisdiction and Venue.* In the event claims are made in any court action arising out of or relating to this Agreement, its performance, enforcement or breach, such claims will be venued in a state or federal court situated within the State of New Mexico; Photographer hereby irrevocably consents and submits itself to the personal jurisdiction of said courts for all such purposes.
- m. *Entire Agreement.* This Agreement, including any Exhibits, Schedules or other attachments to which express reference is made herein, sets forth the entire agreement and understanding of the Parties regarding the subject matter hereof and supersedes all prior representations, statements, proposals, negotiations, discussions, understandings and/or agreements regarding the same subject matter. This Agreement may not be modified or amended except by a writing signed by both Parties. Notwithstanding the foregoing, Photographer expressly consents to the execution of amendments by electronic means (such as web site "click through" agreements).
- n. *Counterparts.* This Agreement may be executed in two or more counterparts, each of which shall be deemed to be an original, but all of which shall constitute one and the same agreement. Following execution, a Party may deliver this Agreement to the other Party by facsimile or by a process of scanning and delivering by electronic mail.

- o. *Survival of Terms.* Those provisions of this Agreement that, by their sense and context, are intended by the Parties to survive the completion of performance and the termination of this Agreement shall so survive.
- p. *Relationship of the Parties.* The relationship of SWMLS and Photographer is that of independent contractors. No party shall be deemed to be the agent, partner, joint venturer, franchisor or franchisee, or employee of SWMLS or have any authority to make any agreements or representations on the behalf of SWMLS. Each party shall be solely responsible for the payment of compensation, insurance, and taxes of its own employees.

13. ELECTRONIC ACCEPTANCE. Photographer's electronic acceptance of this Agreement or use of the MLS System or other SWMLS provided software shall have the same force and effect as if Photographer had actually signed this Agreement.

14. AFFILIATE MEMBER. Photographer represents and warrants that Photographer is eligible for MLS System access because Photographer is an affiliate member of Greater Albuquerque Association of Realtors® in good standing.

IN WITNESS WHEREOF, the Parties have entered into this Agreement as of the date last signed below or electronically.

Southwest MLS, Inc.

Photographer

\_\_\_\_\_  
[Name] [Position]

\_\_\_\_\_  
[Name] [Position]

\_\_\_\_\_  
Date

\_\_\_\_\_  
Date