



## SUBSCRIPTION SERVICE AGREEMENT

This Kinetix Subscription Services Agreement (“Agreement”) is entered into as of the date of the last party to sign below (“Effective Date”) between Kinetix Software LLC, a California Limited Liability Company, with its principal place of business located at 6320 Canoga Ave, Woodland Hills, CA 91367 (“Kinetix”), and NAME OF COMPANY HERE, a TYPE OF COMPANY, with its principal place of business located at ADDRESS OF COMPANY (“Customer”). Kinetix and Customer hereby agree as follows:

### Definitions.

“**Service**” means a customizable workflow tool which allows a manufacturer of air handling equipment (hereinafter the “Customer”) and its outside and inside sales representatives, engineering, purchasing, production management, shipping, accounting and service departments, to collaborate in real time over the life of a project to manage a project (hereinafter the “Service”); access to the Service may be granted and maintained by the Customer based user-specific rolls, permissions, and levels.

“**Customer Data**” means all electronic data or information submitted to the Service by Customer or its Affiliates.

“**Electronic Communications**” means any transfer of signs, signals, text, images, sounds, data or intelligence of any nature transmitted in whole or part electronically received and/or transmitted through the Service.

“**Help Documentation**” means the online help center documentation describing the Service features, including User Guides which may be updated from time to time.

“**Service**” means, Kinetix’s online business application suite, called Kinetix Air, (the “Service”) and modules as described in the applicable Help Documentation that is procured by Customer from Kinetix from time to time, including associated offline components.

“**Users**” means individuals who are authorized by Customer to use the Service, for whom subscriptions to a Service have been procured, and who have been supplied user identifications and passwords by Customer. Users may include but are not limited to Customer’s and Customer’s Affiliates’ employees, consultants, representatives, contractors and agents.

“**User Guide**” means the online user guide for the Service, accessible upon login to the Service “More Actions” menu item, as updated from time to time.

“**URL Terms**” means the terms with which Customer must comply, which are located at a URL and referenced in this Agreement.

**1. Use of the Service.** Subject to the terms and conditions of this Agreement and during the Term, Kinetix shall make the Service available to Customer solely for Customer’s and its Users’ business operations. The terms of this Agreement shall apply to updates, and upgrades subsequently provided by Kinetix to Customer for the Service. Kinetix shall host the Service and may update the functionality,



user interface, usability and other user documentation, training and educational information of, and relating to the Service from time to time in its sole discretion.

1.1 The Service is available to the number of Users specified in Attachment A and for the fees due also specific in Attachment A. A "User" is an individual person (not a company—e.g., 5 people within the same company is 5 users).

**2. Restrictions.** Customer is responsible for all activities conducted under its User logins and for its Users' compliance with this Agreement. Customer shall not rent, resell, sublicense, or otherwise permit concurrent use of a single User login. Customer shall not and shall not permit any User or any third party to: (a) copy, translate, create a derivative work of, reverse engineer, reverse assemble, disassemble, or decompile the Service or any part thereof or otherwise attempt to discover any source code or modify the Service in any manner or form unless expressly permitted by Kinetix; (b) use unauthorized modified versions of the Service, including (without limitation) for the purpose of building a similar or competitive product or service or for the purpose of obtaining unauthorized access to the Service; (c) use the Service in a manner that is contrary to applicable law or in violation of any third party rights of privacy or intellectual property rights; (d) publish, post, upload or otherwise transmit Customer Data that contains any viruses, Trojan horses, worms, time bombs, corrupted files or other computer programming routines that are intended to damage, detrimentally interfere with, surreptitiously intercept or expropriate any systems, data, personal information or property of another; or (e) use or knowingly permit the use of any security testing tools in order to probe, scan or attempt to penetrate or ascertain the security of the Service.

**3. Term of Agreement.** The Agreement shall commence when signed by both parties and the term shall be for twelve (12) months. See Attachment B below for details on when the Subscription Start Date will be set. The Term shall be automatically extended for successive 12 months (a "Renewal Term(s)") (collectively "Term") at the then current Subscription Fee unless either party provides written notice of non-renewal to the other at least thirty (30) days before such expiration.

**4. Fees, Taxes, and Payment.**

**4.1 Fees and Payment.** Customer shall pay the Subscription Fee and Additional User Fee (if applicable) specified in Attachment A. The Fees for each Renewal Term shall be the then-current Kinetix pricing, and Attachment A is deemed to be automatically amended on each anniversary date to state the then-current Kinetix pricing. Additional Users, if any, and other items procured during a term will co-terminate with and be prorated through the then current end date.

**4.2. Taxes.** Kinetix Fees specified in Attachment A do not include any local, state, federal or foreign taxes, levies or duties of any nature, including value-added, sales use or withholding taxes ("Taxes"). Customer is responsible for paying all Taxes, excluding only taxes based on Kinetix's net income. If Kinetix has the legal obligation to pay Taxes for which Customer is responsible, Customer shall pay Kinetix the appropriate amount in addition to the Fees, unless Customer provides Kinetix with a valid tax exemption certificate authorized by the appropriate taxing authority.

**4.3. Late Payments.** Any late payments shall be subject to a service charge equal to 1.5% of the amount due (calculated on a monthly basis) or the maximum amount allowed by law, whichever is less.



## 5. Proprietary Rights.

**5.1. Ownership of Customer Data.** As between Kinetix and Customer, all Customer administrator configured data and all project data is owned exclusively by Customer.

(a) Kinetix shall maintain reasonable administrative, physical and technical safeguards for the protection, confidentiality and integrity of Customer Data.

(b) Customer acknowledges and agrees that in connection with Service, Kinetix as part of its standard Service offering makes daily backup copies of the Customer Data in Customer's account and stores and maintains such data for a period of time consistent with Kinetix standard business processes, which period shall not be less than thirty (30) days.

**5.2. Kinetix Intellectual Property Rights.** Customer agrees that all rights, title and interest in and to all intellectual property rights in the Service are owned exclusively by Kinetix or its licensors. Except as provided in this Agreement, the license granted to Customer does not convey any rights in the Service, express or implied, or ownership in the Service or any intellectual property rights thereto. In addition, Kinetix shall have a royalty-free, worldwide, transferable, sub-licensable, irrevocable, and perpetual license to use or incorporate into the Service any suggestions, enhancement requests, recommendations or other feedback provided by Customer, including its Users, relating to the operation of the Service. Any rights not expressly granted herein are reserved by Kinetix. Kinetix service marks, logos and product and service names are marks of Kinetix, respectively (the "Kinetix Marks"). Customer agrees not to display or use the Kinetix Marks in any manner without Kinetix's express prior written permission.

## 6. Terms of Use of the Service. Customer agrees to the following terms:

**6.1. Customer Must Have Internet Access.** DSL, cable or another high-speed Internet connection is required for proper transmission of the Service. Customer is responsible for procuring and maintaining the network connections that connect the Customer network to the Service, including, Windows operating system with Google Chrome software supporting Secure Socket Layer (SSL) protocol used by Kinetix, and to follow logon procedures for services that support such protocols. Kinetix is not responsible for notifying Customer of any upgrades, fixes or enhancements to any such software, or for any compromise of data transmitted across computer networks or telecommunications facilities (including but not limited to the Internet) which are not owned or operated by Kinetix. Kinetix assumes no responsibility for the reliability or performance of any connections as described in this Section.

**6.2. Accuracy of Customer's Contact Information.** Customer shall provide accurate, current and complete information on Customer's legal business name, address, email address and phone number, and maintain and promptly update this information if it should change.

**6.3. Email and Notices.** Customer shall provide an email address for communication and notice purposes relating to this Agreement. Customer agrees to accept emails from Kinetix at the e-mail address specified under Notice section below. Kinetix may provide any and all notices, statements, and other communications to Customer through either e-mail (or other electronic transmission) or by mail or express delivery service. Kinetix recommends that the main and billing contact email addresses be group addresses (such as [accountspayable@customer.com](mailto:accountspayable@customer.com)) so that notices are reviewed promptly and



not delayed due to the absence of one individual. In addition, Kinetix may rely and act on all information and instructions provided to Kinetix from the e-mail address provided by Customer.

**6.4. Users: Passwords, Access and Notification.** Customer shall authorize access to and assign unique passwords and usernames to each of its the Users. User logins are for Users and cannot be shared or used by more than one User, but any User login may be reassigned to another User as needed. Customer will be responsible for the confidentiality and use of User's passwords and usernames. Customer will also be responsible for all Electronic Communications, including those containing business information, account registration, account holder information, financial information, Customer Data, and all other data of any kind contained within emails or otherwise entered electronically through the Service or under Customer's account. Kinetix will act as though any Electronic Communications it receives under Customer's passwords, username, and/or account number will have been sent by Customer. Customer shall use commercially reasonable efforts to prevent unauthorized access to or use of the Service and shall promptly notify Kinetix of any unauthorized access or use of the Service and any loss or theft or unauthorized use of any User's password or name and/or Service account numbers.

**6.5. Customer's Conduct.** The Service allows Customer to send Electronic Communications directly to Kinetix and to and among third parties. Customer shall comply with all applicable local, state, federal, and foreign laws, treaties, regulations, and conventions in connection with its use of the Service, including without limitation those related to privacy and electronic communications legislation.

(a) Customer shall comply with the export laws and regulations of the United States and other applicable jurisdictions in using the Service and obtain any permits, licenses and authorizations required for such compliance. Without limiting the foregoing, (i) Customer represents that it is not named on any U.S. government list of persons or entities prohibited from receiving exports, (ii) Customer shall not permit Users to access or use the Service in violation of any U.S. export embargo, prohibition or restriction, and (iii) Customer shall comply with all applicable laws regarding the transmission of technical data exported from the United States and the country in which its Users are located.

(b) Except as permitted by this Agreement, no part of the Service may be copied, reproduced, distributed, republished, displayed, posted or transmitted in any form or by any means.

**6.6** Customer agrees not to access the Service by any means other than through the interfaces that are provided by Kinetix. Customer shall not do any "mirroring" or "framing" of any part of the Service or create Internet links to the Service which include log-in information, usernames, passwords, and/or secure cookies. Customer will not in any way express or imply that any opinions contained in Customer's Electronic Communications are endorsed by Kinetix. Customer shall ensure that all access and use of the Service by Users is in accordance with the terms and conditions of this Agreement, including but not limited to those Users that are contractors and agents, and Customer's Affiliates. Any action or breach by any of such contractors, agents or Affiliates shall be deemed an action or breach by Customer and Customer waives all of those defenses that Customer may have as to why Customer should not be liable for Customer's contractors', agents' or Affiliates' acts, omissions and noncompliance with this Agreement.



**6.7. Transmission of Data.** Customer understands that the technical processing and transmission of Customer's Electronic Communications is fundamentally necessary to use of the Service. Customer expressly consents to Kinetix's interception and storage of Electronic Communications and/or Customer Data, and Customer acknowledges and understands that Customer's Electronic Communications will involve transmission over the Internet, and over various networks, only part of which may be owned and/or operated by Kinetix. Customer further acknowledges and understands that Electronic Communications may be accessed by unauthorized parties when communicated across the Internet, network communications facilities, telephone or other electronic means. Kinetix is not responsible for any Electronic Communications and/or Customer Data which are delayed, lost, altered, intercepted or stored during the transmission of any data whatsoever across networks not owned and/or operated by Kinetix, including, but not limited to, the Internet and Customer's local network.

## **7. Modifications; Discontinuation of Service.**

**7.1** To the Service. Kinetix may make modifications to the Service or particular components of the Service from time to time and will use commercially reasonable efforts to notify Customer of any material modifications. Kinetix reserves the right to discontinue offering the Service at the conclusion of Customer's then-current Term. Kinetix shall not be liable to Customer nor to any third party for any modification of the Service as described in this Section.

**7.2** To Applicable Terms. If Kinetix makes a material change to any applicable URL Terms, then Kinetix will notify Customer by either sending an email to the notification email address or posting a notice in the Administrator's instance of Customer's account. If the change has a material adverse impact on Customer and Customer does not agree to the change, Customer must so notify Kinetix within ten (10) days after receiving notice of the change. If Customer notifies Kinetix as required, then Customer will remain governed by the URL Terms in effect immediately prior to the change until the end of the then-current term for the affected Service. If the affected Service is renewed, it will be renewed under Kinetix's then current URL Terms.

## **8. Suspension/Termination.**

**8.1. Suspension for Non-payment.** Kinetix reserves the right to suspend Customer's and Users' access to and/or use of the Service if any payment is due but unpaid, and ten (10) days have passed. The suspension is for the entirety of the Service, and Customer understands that such suspension would, therefore, include no use by all Customer Users. Customer agrees that Kinetix shall not be liable to Customer or to any Customer User or other third party for any suspension of the Service pursuant to this Section.

**8.2. Suspension for Ongoing Harm.** Customer agrees that Kinetix may with reasonably contemporaneous telephonic notice to Customer suspend access to the Service if Kinetix reasonably concludes that Customer's Service is being used to engage in denial-of-service attacks, spamming, or illegal activity, and/or use of Customer's Service is causing immediate, material and ongoing harm to Kinetix or others. Customer agrees that Kinetix shall not be liable to Customer nor to any third party for any suspension of the Service under such circumstances as described in this Section.

**8.3.** Without limiting Kinetix right to suspend as noted above, either party may immediately terminate this Agreement in the event the other party commits a material breach of any provision of



this Agreement which is not cured within thirty (30) days of written notice from the non-breaching party. Such notice by the complaining party shall expressly state all of the reasons for the claimed breach in sufficient detail so as to provide the alleged breaching party a meaningful opportunity to cure such alleged breach. Upon termination or expiration of this Agreement, Customer shall have no rights to continue use of the Service.

**8.4** If this Agreement is terminated by Customer for any reason other than a termination expressly permitted by this Agreement, then Kinetix shall be entitled to all of the fees due under this Agreement for the entire Term. If this Agreement is terminated as a result of Kinetix's breach of this Agreement, then Customer shall be entitled to a refund of the pro rata portion of any subscription fees paid by Customer to Kinetix under this Agreement for the terminated portion of the Term.

**8.5. Handling of Customer Data Upon Termination.** Customer agrees that following termination of Customer's use of the Service, Kinetix may immediately deactivate Customer's account and delete Customer's account ten (10) days after that. If requested by the Customer during these 10 days, Kinetix will grant Customer limited access to the Service during this 10 day period for the sole purpose of permitting Customer to retrieve Customer Data, provided that Customer has paid in full all good faith undisputed amounts owed to Kinetix. Customer further agrees that Kinetix shall not be liable to Customer nor to any third party for any termination of Customer access to the Service or deletion of Customer Data. Note that Customer can export data at any time prior to termination Customer Data. The following exports are possible:

- Submittal Package report (pdf)
- 3D and 2D Models all completed AHU's (in DXF format)
- 3D Render Models of all completed AHU's (in png format)
- Submittal Cover report (pdf)
- Equipment List report (pdf, csv)
- AHU Weight reports (pdf, csv)
- CA Summary report (pdf, csv)
- CA Materials report (pdf, csv)
- CA Activities report (pdf, csv)
- AHU Pricing report (pdf)
- Bill of Materials report (pdf, csv)

**9. Kinetix's Support.** As part of the Service, Kinetix will provide Customer with Help Documentation and other online resources to assist Customer in its use of the Service. Kinetix also offers optional and "for fee" training classes, professional services consultation, and support services. Additionally, Kinetix will provide Customer email and phone call back support when needed for issues not addressed in Help Documentation and during regular business hours exclusive of nationally recognized holidays.

## **10. Confidentiality.**

For purposes of this Agreement, "Confidential Information" shall include the terms of this Agreement, Customer Data, each party's proprietary technology, business processes and technical product information, designs, issues, all communication between the Parties regarding the Service and



any information that is clearly identified in writing at the time of disclosure as confidential. Notwithstanding the foregoing, Confidential Information shall not include information which: (1) is known publicly; (2) is generally known in the industry before disclosure; (3) has become known publicly, without fault of the Receiving Party; (4) the Receiving Party becomes aware of from a third party not bound by non-disclosure obligations to the Disclosing Party and with the lawful right to disclose such information to the Receiving Party; or (5) is aggregate data regarding use of Kinetix's products and services that does not contain any personally identifiable or Customer-specific information.

Each party agrees: (a) to keep confidential all Confidential Information; (b) not to use or disclose Confidential Information except to the extent necessary to perform its obligations or exercise rights under this Agreement or as directed by Customer; (c) to protect the confidentiality thereof in the same manner as it protects the confidentiality of similar information and data of its own and to make Confidential Information available to authorized persons only on a "need to know" basis. Either party may disclose Confidential Information on a need to know basis to its contractors and service providers who have executed written agreements requiring them to maintain such information in strict confidence and use it only to facilitate the performance of their services in connection with the performance of this Agreement. Notwithstanding the foregoing, this Section will not prohibit the disclosure of Confidential Information to the extent that such disclosure is permitted by law or order of a court or other governmental authority or regulation.

## **11. Warranties.**

**11.1. Warranty of Functionality.** Kinetix warrants that: (i) the Service will achieve in all material respects the functionality described in the Help Documentation applicable to the Service, and (ii) such functionality of the Service will not be materially decreased during the Term. Customer's sole and exclusive remedy for Kinetix's breach of this warranty shall be that Kinetix shall use commercially reasonable efforts to modify the Service to achieve in all material respects the functionality described in the Help Documentation and if Kinetix is unable to restore such functionality, Customer shall be entitled to terminate the Agreement and receive a pro-rata refund of the subscription fees paid under the Agreement for its use of the Service for the terminated portion of the Term. Kinetix shall have no obligation with respect to a warranty claim unless notified of such claim within seven (7) days of the first instance of any material functionality problem. The warranties set forth in this Section are made to and for the benefit of Customer only. Such warranties shall only apply if the applicable Service has been utilized in accordance with the Help Documentation, this Agreement and applicable law.

**11.2. Disclaimer of Warranties.** EXCEPT AS STATED IN WARRANTY SECTION, KINETIX DOES NOT REPRESENT THAT CUSTOMER'S USE OF THE SERVICE WILL BE TIMELY, UNINTERRUPTED OR ERROR-FREE OR THAT THE SERVICE WILL MEET CUSTOMER'S REQUIREMENTS OR THAT ALL ERRORS IN THE SERVICE AND/OR DOCUMENTATION WILL BE CORRECTED OR THAT THE OVERALL SYSTEM THAT MAKES THE SERVICE AVAILABLE (INCLUDING BUT NOT LIMITED TO THE INTERNET, OTHER TRANSMISSION NETWORKS, AND CUSTOMER'S LOCAL NETWORK AND EQUIPMENT) WILL BE FREE OF VIRUSES OR OTHER HARMFUL COMPONENTS. THE WARRANTIES STATED IN WARRANTY SECTION ABOVE ARE THE SOLE AND EXCLUSIVE WARRANTIES OFFERED BY KINETIX. THERE ARE NO OTHER WARRANTIES OR CONDITIONS, EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION, THOSE OF MERCHANTABILITY, SATISFACTORY QUALITY, FITNESS FOR A PARTICULAR PURPOSE OR NON-INFRINGEMENT OF THIRD-PARTY RIGHTS. EXCEPT AS STATED IN TERM OF SERVICE AND WARRANTY SECTIONS ABOVE, THE SERVICE



IS PROVIDED TO CUSTOMER ON AN “AS IS” AND “AS AVAILABLE” BASIS AND IS FOR COMMERCIAL USE ONLY. CUSTOMER ASSUMES ALL RESPONSIBILITY FOR DETERMINING WHETHER THE SERVICE OR THE INFORMATION GENERATED THEREBY IS ACCURATE OR SUFFICIENT FOR CUSTOMER’S PURPOSES.

## **12 Limitations of Liability.**

**12.1. Exclusion of Consequential Damages.** CUSTOMER AGREES THAT THE CONSIDERATION WHICH KINETIX IS CHARGING HEREUNDER DOES NOT INCLUDE CONSIDERATION FOR ASSUMPTION BY KINETIX OF THE RISK OF CUSTOMER’S INCIDENTAL OR CONSEQUENTIAL DAMAGES. IN NO EVENT SHALL EITHER PARTY BE LIABLE TO ANYONE FOR LOST PROFITS OR REVENUE OR FOR INCIDENTAL, CONSEQUENTIAL, PUNITIVE, COVER, SPECIAL, RELIANCE OR EXEMPLARY DAMAGES, OR INDIRECT DAMAGES OF ANY TYPE OR KIND HOWEVER CAUSED, WHETHER FROM BREACH OF WARRANTY, BREACH OR REPUDIATION OF CONTRACT, NEGLIGENCE, OR ANY OTHER LEGAL CAUSE OF ACTION FROM OR IN CONNECTION WITH THIS AGREEMENT (AND WHETHER OR NOT THE PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES TO THE MAXIMUM EXTENT PERMITTED BY LAW), OR OTHERWISE SHALL IN NO EVENT EXCEED THE DIRECT DAMAGE LIMITATIONS AS SET FORTH IN LIMITATION OF LIABILITY SECTION BELOW.

**12.2. Limitations on Liability.** Except with regard to amounts due under this Agreement, and a party’s breach of Confidentiality Section, the maximum liability of either party to any person, firm or corporation whatsoever arising out of or in the connection with any license, use or other employment of the Service, whether such liability arises from any claim based on breach or repudiation of contract, breach of warranty, negligence, tort, statutory duty, or otherwise, shall in no case exceed the equivalent of 12 months of subscription fees applicable at the time of the event, and in the event of a breach of Confidentiality Section of this Agreement, such maximum liability of either party shall be an amount equal to three (3) times the equivalent of 12 months of subscription fees applicable at the time of the event. Notwithstanding the previous sentence, neither party shall be liable to the other party to the extent such liability would not have occurred but for the other party’s failure to comply with the terms of this Agreement. The essential purpose of this provision is to limit the potential liability of the parties arising from this Agreement. The parties acknowledge that the limitations set forth in this Section are integral to the amount of fees charged in connection with making the Service available to Customer and that, were Kinetix to assume any further liability other than as set forth herein, such fees would be set substantially higher.

**12.3. Exceptions.** THE LIMITATIONS OF LIABILITY SET FORTH IN THIS ENTIRE LIMITATION OF LIABILITY SECTION SHALL NOT APPLY TO EITHER PARTY’S INDEMNITY OBLIGATIONS EXCEPT AS SET FORTH IN INDEMNIFICATION SECTION BELOW. Certain states and/or jurisdictions do not allow the exclusion of implied warranties or limitations of liability for incidental or consequential damages, so the exclusions set forth above may not apply to Customer.

## **13. Indemnification.**

**13.1. Infringement.** Kinetix shall, at its own expense and subject to the limitations set forth in this Section, defend Customer from and against any and all allegations, threats, claims, suits, and proceedings brought by third parties (collectively “Claims”) alleging that the Service, as used in



accordance with this Agreement, infringes third party copyrights, trade secrets or trademarks and shall hold Customer harmless from and against liability, damages, and costs finally awarded or entered into in settlement (including, without limitation, reasonable attorneys' fees) (collectively, "Losses") to the extent based upon such a Claim.

Excluded from the above indemnification obligations are Claims to the extent arising from (a) use of the Service in violation of this Agreement or applicable law, (b) use of the Service after Kinetix notifies Customer to discontinue use because of an infringement claim, (c) modifications to the Service not made by Kinetix, or (d) use of the Service in combination with any software, application or service made or provided other than by Kinetix.

If a Claim of infringement as set forth above is brought or threatened, Kinetix shall, at its sole option and expense, use commercially reasonable efforts either (a) to procure a license that will protect Customer against such Claim without cost to Customer; (b) to modify or replace all or portions of the Service as needed to avoid infringement, such update or replacement having substantially similar or better capabilities; or (c) if (a) and (b) are not commercially feasible, terminate the Agreement and refund to the Customer a pro-rata refund of the subscription fees paid for under the Agreement for the terminated portion of the Term. The rights and remedies granted Customer under this Section state Kinetix's entire liability, and Customer's exclusive remedy, with respect to any claim of infringement of the intellectual property rights of a third party.

**13.2. Disclosure of Customer Data.** Kinetix shall, at its own expense and subject to the limitations set forth in this Indemnification Section, defend Customer from and against any Claims that arise out of or result directly from Kinetix's gross negligence or willful misconduct in preventing unauthorized access to confidential Customer Data, as determined by a court of competent jurisdiction in connection with a Claim alleging a breach of confidentiality, and shall hold Customer harmless from and against liability for any Losses to the extent based upon such Claims.

When Kinetix is at fault but such fault does not rise to the level of gross negligence or willful misconduct, Kinetix shall, at its own expense and subject to the limitations set forth in this Indemnification Section and the amount of liability set forth in Limitations on Liability Section applicable in the event of a breach of Confidentiality Section, defend Customer from and against any Claims, and shall hold Customer harmless from and against liability for any Losses to the extent based upon Claims, arising out of or relating to Kinetix's breach of Confidentiality Section of this Agreement. Provided that Kinetix complies with this Indemnification Section, Customer shall be entitled as its sole and exclusive remedy to terminate the Agreement and receive a pro-rata refund of the subscription fees paid for under the Agreement for the terminated portion of the Term.

**13.3. Customer's Indemnity.** Customer shall, at its own expense and subject to the limitations set forth in this Indemnification Section, defend Kinetix from and against any and all Claims (i) alleging that the Customer Data or any trademarks or service marks other than Kinetix Marks, or any use thereof, infringes the intellectual property rights or other rights, or has caused harm to a third party, or (ii) arising out of Customer's breach of Customer's Lawful Conduct or Confidentiality Section and shall hold Kinetix harmless from and against liability for any Losses to the extent based upon such Claims.

**13.4. Indemnification Procedures and Survival.** In the event of a potential indemnity obligation under this Indemnification Section, the indemnified party shall: (i) promptly notify the



indemnifying party in writing of such Claim; (ii) allow the indemnifying party to have sole control of its defense and settlement; and (iii) upon request of the indemnifying party, cooperate in all reasonable respects, at the indemnifying party's cost and expense, with the indemnifying party in the investigation, trial, and defense of such Claim and any appeal arising therefrom. The indemnification obligations under this Indemnification Section are expressly conditioned upon the indemnified party's compliance with this Indemnification Section except that failure to notify the indemnifying party of such Claim shall not relieve that party of its obligations under this Indemnification Section but such Claim shall be reduced to the extent of any damages attributable to such failure. The indemnification obligations contained in this Indemnification Section shall survive termination of this Agreement for one year.

#### **14. Governing Law and Arbitration.**

**14.1** This Agreement, and all matters arising out of or relating to this Agreement, shall be governed by the substantive laws of the State of California.

**14.2** Any dispute, claim or controversy arising out of or relating to this Contract or the breach, termination, enforcement, interpretation or validity thereof, including the determination of the scope or applicability of this agreement to arbitrate, shall be determined by binding arbitration in the JAMS offices in Los Angeles, California, before three arbitrators, all of whom shall be retired judges. Unless the parties agree on the arbitrators, each party shall select one arbitrator from the JAMS panel of neutrals and the third arbitrator shall be selected jointly by the parties or if the parties do not agree then designated at random by JAMS. The arbitration shall be conducted according to the JAMS Comprehensive Arbitration Rules and Procedures, or, if the amount in controversy is less than \$250,000.00, the JAMS Streamlined Arbitration Rules and Procedures. Judgment on the Award may be entered in any court having jurisdiction. This clause shall not preclude parties from seeking provisional remedies in aid of arbitration from a court of appropriate jurisdiction. The initial filing fee and any interim fees shall be borne equally by the parties. The cost of the arbitration for contract claims, excluding legal fees and costs, shall be borne by the losing party or in such proportion as the arbitrator shall decide. Each party shall bear their own legal fees and costs.

**15. General Provisions.** This Agreement shall inure to benefit and bind the parties hereto, their successors and assigns, but neither party may assign this Agreement without written consent of the other, except that Kinetix may assign without consent to a related entity or the successor of all or substantially all of the assignor's business or assets to which this Agreement relates. There are no third-party beneficiaries to this Agreement. This Agreement does not create any joint venture, partnership, agency, or employment relationship between the parties, although Kinetix reserves the right to name Customer as a user of the Service. This Agreement, including all exhibits and/or Order Forms, shall constitute the entire understanding between Customer and Kinetix and is intended to be the final and entire expression of their agreement. The parties expressly disclaim any reliance on any and all prior discussions, emails, RFP's and/or agreements between the parties. There are no other verbal agreements, representations, warranties undertakings or other agreements between the parties. Under no circumstances will the terms, conditions or provisions of any purchase order, invoice or other administrative document issued by Customer in connection to this Agreement be deemed to modify, alter or expand the rights, duties or obligations of the parties under, or otherwise modify, this Agreement, regardless of any failure of Kinetix to object to such terms, provisions, or conditions. The Agreement shall not be modified, or amended, except as expressly set forth herein, or in writing and



signed or accepted electronically by the party against whom the modification, amendment or waiver is to be asserted, or by a properly executed Order Form. Notwithstanding the above, after execution of this Agreement, and during the electronic provisioning of Customer's account, Customer will be presented with the requirement to "agree" to a click through agreement pertaining to "Terms of Service for Kinetix Applications" before Customer's account can be successfully provisioned. Kinetix hereby expressly agrees that upon execution of this Agreement such "Terms of Service for Kinetix Applications" shall be considered null and void and shall not apply in any manner to this Agreement. This Agreement shall be governed in accordance with the laws of the State of California and any controlling U.S. federal law and excluding the Uniform Computer Information Transactions Act (UCITA). Any disputes, actions, claims or causes of action arising out of or in connection with this Agreement (or the Service) shall be subject to the exclusive jurisdiction of the state and federal courts located in California and must be brought in state or federal courts located in Los Angeles County, California, as permitted by law. In the event of any litigation of any controversy or dispute arising out of or in connection with this Agreement, its interpretations, its performance, or the like, the prevailing party shall be awarded reasonable attorneys' fees and/or costs. Customer shall compensate Kinetix (including reimbursement of costs) for responding to any request from a third party for records relating to Customer or a User's use of the Service. Such requests can be a lawful search warrant, court order, subpoena, other valid legal order, or written consent from the User permitting the disclosure. If any provision is held by a court of competent jurisdiction to be contrary to law, such provision shall be eliminated or limited to the minimum extent necessary so that this Agreement shall otherwise remain in full force and effect. A waiver of any breach under this Agreement should not constitute a waiver of any other breach or future breach. Neither party shall be liable for any loss or delay (including failure to meet the service level commitment) resulting from any force majeure event, including, but not limited to, acts of God, fire, natural disaster, terrorism, labor stoppage (other than those involving Kinetix employees), internet service provider failures or delays, civil unrest, war or military hostilities, criminal acts of third parties, and any payment date or delivery of Service date shall be extended to the extent of any delay resulting from any force majeure event. Sections 4.1, 4.2, 4.3, 5, 8.5, 8, 11.2, 12, 13, 14, and 15 shall survive the termination or expiration of this Agreement. This Agreement may be executed in counterparts and/or by facsimile or electronic signature and if so, executed shall be equally binding as an original copy of this Agreement executed in ink by both parties.

This Agreement may be signed in counterpart. An electronic signature shall have the same effect as a manual signature.

## **16. Notice**

Notice for any matter under this agreement shall be sent by email, by mail, or by courier delivery service (such as FedEx or UPS, or the like). Each party agrees and accepts delivery by any common electronic means. If sent electronically the sending party shall maintain proof of transmission. Notice sent electronically are deemed received 1 hour from transmission; if sent by mail are deemed received three days after the last pick up time from deposit in a post box; notice sent by courier service is deemed received on the date the service delivers the notice.

- 16.1** To Kinetix shall be delivered to:  
Kinetix Software, 6320 Canoga Ave, 15<sup>th</sup> Floor, Woodland Hills, CA 91367, Attn: Legal Counsel



email: legal@kinetixahu.com

**16.2** To Customer shall be delivered to:  
NAME OF CUSTOMER HERE  
email: EMAIL OF CUSTOMER HERE

**16.3** To Customer for accounts payable:  
NAME OF ACCOUNTS PAYABLE PERSON HERE  
email: EMAIL OF ACCOUNTS PAYABLE HERE



THE PARTIES ACKNOWLEDGE THAT THEY HAVE READ THIS AGREEMENT, UNDERSTAND IT AND AGREE TO BE BOUND BY ITS TERMS. THE PERSON WHOSE SIGNATURE APPEARS ON BEHALF OF EACH HAS BEEN AUTHORIZED TO SIGN. IF THE PERSON SIGNING BELOW AS CUSTOMER IS ENTERING INTO THIS AGREEMENT ON BEHALF OF A COMPANY OR OTHER LEGAL ENTITY, SUCH PERSON REPRESENTS THAT HE OR SHE HAS THE AUTHORITY TO BIND SUCH ENTITY TO THESE TERMS AND CONDITIONS.

NAME OF COMPANY HERE

KINETIX SOFTWARE, LLC

By:

By:

Print Name: NAME OF CUSTOMER HERE

Print Name: Sevag Ajemian

Title: TITLE OF CUSTOMER HERE

Title: President

Date:

Date:

Attachments: