

# Kinvey Terms of Service Enterprise

THIS ENTERPRISE EDITION BACKEND AS A SERVICE AGREEMENT TOGETHER WITH ALL EXHIBITS ATTACHED HERETO AND THE ORDER FORM EXECUTED BY CUSTOMER CONSTITUTES THE ENTIRE AGREEMENT (THE “AGREEMENT”) BY AND BETWEEN KINVEY, LLC (“KINVEY”) AND THE CUSTOMER NAMED IN THE ORDER FORM (“CUSTOMER”). BY EXECUTING AN ORDER FORM THAT REFERENCES THIS AGREEMENT, CUSTOMER AGREES TO THE TERMS OF THIS ENTERPRISE EDITION BACKEND AS A SERVICE AGREEMENT AND ALL EXHIBITS ATTACHED HERETO.

## **1. DEFINITIONS.** As used in this Agreement:

**1.1 “Access Credentials”** mean login information, passwords, security protocols, and policies through which Admin Users access and use the Kinvey Platform Services.

**1.2 “Admin User”** means each employee or contractor or third party partners of Customer that Customer identifies to Kinvey by name as being authorized to use the Kinvey Platform Services.

**1.3 “Aggregate Information”** means any aggregate anonymous information or data derived from Customer use of the Kinvey Platform Services that is aggregated with information and data from Kinvey’s other customers and is not specific to a person, does not include personally identifiable information, and cannot be used, alone or in conjunction with other information, to identify any specific person and expressly excludes Customer Content.

**1.4 “App User”** means an employee, independent contractor, consumer or other individual that a Customer authorizes, directly or indirectly, to download and use a Customer Application.

**1.5 “App User License Agreement”** means an agreement between the App User and Customer that: (a) disclaims any and all Kinvey liability to any App User, including for direct, indirect and all other damages; and (b) protects Kinvey’s intellectual property to the same extent as this Agreement protects Kinvey’s intellectual property.

**1.6 “Beta Versions”** means versions of new functionality for the Kinvey Platform Services and/or Updates that are not generally commercially available and which Kinvey may pre-release to all or some of its customers for which customers are expected to report any bugs they encounter or any changes such customers would like to see before the general release.

**1.7 “Customer”** means the entity listed on the Signature Page as the “Customer”.

**1.8 “Customer Application”** means a Customer application developed for use on a smartphone, tablet, web browser, or any other device that utilizes the Kinvey Platform Services as a backend as a service.

**1.9 “Customer Content”** means: software code, integration scripts, web pages, text, videos, images, audio clips, photos, graphics, advertisements, sponsorships and / or other types of content or data posted, provided or uploaded by Customer or Users or otherwise viewed, displayed on or transmitted through any Customer Application or the Kinvey Platform Services.

**1.10 “Documentation”** means text and/or graphical materials, whether in print or electronic form, that describe the features, functions and use of the Kinvey Platform Services and which are made available to Customer at the Kinvey Dev Center or at such other URL as is provided by Kinvey to Customer on an Order Form.

**1.11 “Kinvey Platform Services”** means the version of the Kinvey backend as a service offering made generally commercially available by Kinvey as of the Effective Date, including all Updates provided by Kinvey to Customer after the Effective Date, which is provided to Customer by Kinvey on a hosted software as a service basis using the Kinvey Technology.

**1.12 “Kinvey Dev Center”** means the Kinvey online portal made available by Kinvey to its customers at <https://devcenter.kinvey.com/> as may be updated by Kinvey from time to time.

**1.13 “Kinvey Technology”** means the computer software, computer code, scripts, application programming interfaces, methodologies, templates, tools, algorithms, user interfaces, know-how, trade secrets, techniques, designs, inventions, and other tangible or intangible technical material, information and works of authorship underlying or otherwise used to make available the Kinvey Platform Services, including, without limitation, all Intellectual Property Rights therein and thereto.

**1.14 “Intellectual Property Rights”** mean any and all now known or hereafter existing (a) rights associated with works of authorship, including copyrights, mask work rights, and moral rights; (b) trademark or service mark rights (c) trade secret rights; (d) patents, patent rights, and industrial property rights; (e) layout design rights, design rights, and other proprietary rights of every kind and nature other than trademarks, service marks, trade dress, and similar rights; and (f) registrations, applications, renewals, extensions, or reissues of the foregoing, in each case, in any jurisdiction throughout the world.

**1.15 “Order Form”** means a standard order form or quote issued by Kinvey or its affiliate and signed by an authorized representative of each party.

**1.16 “Updates”** mean all upgrades, enhancements, improvements, maintenance releases, additions, and modifications, of the Kinvey Platform Services made generally commercially available as part of the Kinvey Platform Services during the Term of this Agreement.

**1.17 “User”** means any Admin User or App User.

## **2. KINVEY PLATFORM SERVICES**

**2.1 Kinvey Platform Services.** Subject to and in accordance with this Agreement and the applicable Order Forms, including, without limitation, payment of all applicable fees, Kinvey

will use reasonable commercial efforts to make the Kinvey Platform Services available to Customer. Customer shall have no right to manage or operate the Kinvey Platform Services and Kinvey will be solely responsible for the management and operation of the Kinvey Platform Services. In addition to making available the Kinvey Platform Services to Customer, Kinvey may, from time to time in its sole discretion, make available to Customer Beta Versions. Use of Beta Versions is at Customer's sole risk.

**2.2 Access Credentials.** Kinvey will deliver to Customer one (1) set of Access Credentials and will make the Documentation available at the Kinvey Dev Center. Customer will be responsible to otherwise administer Access Credentials for all Admin Users.

**2.3 Modifications to the Kinvey Platform Services.** Kinvey reserves the right to modify the Kinvey Platform Services from time to time, including without limitation implementing Updates. If any such modification materially and adversely reduces the functionality of the Kinvey Platform Services, Customer may terminate its subscription for the Kinvey Platform Services pursuant to Section 10.2(a). Kinvey may condition the implementation of new features, functionality or other modifications to the Kinvey Platform Services on Customer's payment of additional fees provided that Kinvey generally charges other customers for such modifications.

**2.4 Professional Services.** Customer may request that Kinvey provide certain professional services and/or training related to Customer's use of the Kinvey Platform Services. The terms and conditions governing any such professional services and/or training are attached as [Schedule A](#).

**2.5 Data Security.** Kinvey implements and maintains industry standard data security controls with respect to the Kinvey Platform Services and shall make available to Customer upon request a copy of the SOC2 (or similar) report provided to Kinvey by its third party hosting provider.

### **3. ACCESS GRANT; LICENSES; OWNERSHIP**

**3.1 Access Grant.** Subject to Customer's compliance with the terms and conditions contained in this Agreement, the Documentation, and each Order Form, Kinvey grants to Customer during the Term a non-exclusive, non-transferable, worldwide, revocable, nonsublicensable right to allow: (a) Admin Users to access and use the Kinvey Platform Services solely for purposes of developing the Customer Applications and setting up and maintaining a cloud backend for the Customer Applications, (b) App Users to indirectly, through the use of a Customer Application, access the portion of the Kinvey Platform Services necessary to enable the App User to access and use the Customer Applications, and (c) Admin Users to access and use Beta Versions for the purpose of evaluating the features and functionality of the Beta Versions. The rights set forth in Section 3.1(a) may be exercised by Customer's third party contractors and service providers that are not direct competitors of Kinvey in the mobile development platform or backend as a service markets and which perform services for or on behalf of Customer; provided, that (i) Customer requires such third parties to execute a written agreement with Customer that is at least as protective of the Kinvey Platform Services as this Agreement and which does not grant any greater rights than those granted to Customer in Section 3.1(a) and includes all restrictions set

forth in Section 4 and (ii) Customer shall be responsible for any breach of this Agreement by any such third party.

### **3.2 Open Source.**

**(a) Additional Terms Apply.** Use of any tools, client libraries and other materials made available via the Kinvey Dev Center is optional and is governed by the terms of the license agreement that accompanies or is otherwise provided on the page on which such materials are made available. Without limiting the foregoing, if no license agreement accompanies such materials, the materials will be governed by this Agreement and the following: Kinvey grants Customer a worldwide, non-transferable, non-sublicensable, revocable, non-exclusive (except for any version specifically modified for Customer pursuant to a separate Statement of Work which shall be exclusive to Customer) license during the Term to use such materials solely with the Kinvey Platform Services and for no other purpose.

**(b) Open Source.** Some software components made available at the Kinvey Dev Center may be subject to an open source license (such as the GNU General Public License, the GNU Lesser General Public License, the Apache License, the Berkeley Software Distribution License, and the Sun Public License). Such software is licensed separately pursuant to the terms and conditions of its respective open-source software licenses. Customer agrees to comply with the terms and conditions of such open-source software license agreements and acknowledges and agrees that Customer will have only such rights and/or licenses, if any, to use and distribute the software subject to an open source license as are set forth in the relevant license agreements applicable to such software.

**3.3 Customer Content.** The Kinvey Platform Services includes the option for the Customer to upload Customer Content. Customer represents, warrants and covenants that the Customer has all rights and licenses necessary to upload the Customer Content and any Customer Content uploaded will not be subject to an Excluded License. For purposes hereof, an “**Excluded License**” means any software license requiring, as a condition of use, modification and/or distribution of the software subject to the license, that the software or other software combined and/or distributed with it be disclosed or distributed in source code form; licensed for the purpose of making derivative works; or redistributable at no charge.

Customer grants to Kinvey a non-exclusive, royalty-free, fully paid, worldwide license, under any and all of Customer’s Intellectual Property Rights, to use, execute, host, store, disseminate, distribute, publicly display, reproduce, sublicense, post, or publish the Customer Content for the sole purposes of enabling Kinvey to provide the Kinvey Platform Services (including without limitation making Apps available to App Users) to Customer hereunder. Further, Customer grants to Kinvey a non-exclusive, royalty-free, fully paid, irrevocable, perpetual, worldwide license, under any and all of Customer’s Intellectual Property Rights, to use, execute, modify and create derivative works of Customer Content that consists of computer code, such as integration scripts and business logic, to inspect such code for compliance and interoperability with the Kinvey Platform Services. In addition, Customer agrees that Kinvey may use its third party contractors and services providers to exercise the licenses granted to Kinvey in this Section to perform services for or on behalf of Kinvey.

**3.4 Service Level Agreement.** The service levels applicable to the Kinvey Platform Services are set forth in [Schedule B](#) (Service Level Agreement). Customer's sole and exclusive remedy, and Kinvey's sole and exclusive obligation, for a breach of any terms contained in [Schedule B](#) (Service Level Agreement) will be as provided therein.

**3.5 Data Backup.** Kinvey will follow its standard archival procedures for storage of Customer Content. In the event of any loss or corruption of Customer Content, Kinvey will use commercially reasonable efforts to restore the lost or corrupted Customer Content from the latest backup of such Customer Content maintained by Kinvey or its third party service provider in accordance with its archival procedures. Kinvey will not be responsible for any loss, corruption, destruction, alteration, or unauthorized disclosure of or access to Customer Content directly or indirectly arising from acts or omissions of Customer, its Users or a third party. KINVEY'S EFFORTS TO RESTORE LOST OR CORRUPTED CUSTOMER CONTENT PURSUANT TO THIS SECTION 3.5 WILL CONSTITUTE KINVEY'S SOLE LIABILITY AND CUSTOMER'S SOLE AND EXCLUSIVE REMEDY IN THE EVENT OF ANY LOSS, CORRUPTION, DESTRUCTION, ALTERATION, OR UNAUTHORIZED DISCLOSURE OF OR ACCESS TO CUSTOMER CONTENT.

**3.6 Feedback.** In the event Customer provides Kinvey any ideas, thoughts, criticisms, suggestions, enhancement requests, techniques, know-how, comments, feedback or other input related to the Services or the Kinvey Platform Services (collectively "**Feedback**"), including in response to any product plans or roadmaps shared with Customer, unless otherwise agreed in writing prior to such disclosure, Customer grants to Kinvey a worldwide, royalty-free, fully paid, perpetual, irrevocable license to use, reproduce, modify, translate, distribute, perform, display, import, sell, license, offer for sale, make, have made and otherwise exploit the Feedback in any form, media, or technology, whether now known or hereafter developed, and to allow others to do the same without restriction or obligation of any kind, on account of confidential information, intellectual property rights or otherwise, and may incorporate into its services any service, product, technology, enhancement, documentation or other development ("**Improvement**") incorporating or derived from any Feedback with no obligation to license or to make available the Improvement to Customer or any other person or entity. Customer will not provide its Confidential Information as Feedback.

**3.7 Ownership.** The Kinvey Platform Services, the Kinvey Technology, the Documentation, and all other intellectual property now or hereinafter developed by Kinvey, and all worldwide Intellectual Property Rights in each of the foregoing and all Updates, upgrades, enhancements, new versions, releases, corrections, and other modifications thereto and derivative works thereof, are the exclusive property of Kinvey and its suppliers. Except for the rights and licenses expressly granted herein, all rights in and to all of the foregoing are reserved by Kinvey and its suppliers. Nothing in this Agreement will be deemed to grant to Customer any right to receive a copy of software platform underlying the Kinvey Platform Services, or any other Kinvey Technology, in either object or source code form. Kinvey shall have the right use Aggregate Data to provide and improve the Kinvey Platform Services and for marketing purposes.

**3.8 Marketing.** Upon mutual written agreement of the parties, the parties agree to issue a joint press release within four (4) weeks of the Effective Date regarding Customer's use of the Kinvey

Platform Services and Kinvey may publicly refer to Customer as a customer of Kinvey, including on Kinvey's website and in sales presentations, and may use Customer's logo for such purposes. Similarly, Customer may publicly refer to itself as a customer of Kinvey's backend as a service, including on Customer's website and in sales presentations. The parties agree to cooperate in the development of a white paper, the content of which will be directed by Kinvey and approved by Customer.

#### **4. CUSTOMER RESPONSIBILITIES.**

**4.1 Access Credentials.** Customer will safeguard, and ensure that all Users safeguard the Access Credentials. Customer will be responsible for all acts and omissions of Users. Customer agrees to: (1) keep its Access Credentials secure and confidential and not to allow any of Customer's Admin Users to provide their Access Credentials to anyone else; and (2) not permit others to use Customer's Access Credentials. Customer will notify Kinvey immediately (but in any event within 72 hours) if it learns of any unauthorized use of any Access Credentials or any other known or suspected breach of security. Kinvey reserves the right, in its sole discretion and with notice to Customer (which may be by email), and without liability to Customer or its Users, to take any action Kinvey deems reasonably necessary to ensure the security of the Kinvey Platform Services and Customer's Access Credentials and account, including terminating Customer's access or the access of any of Customer's Users, changing passwords, or requesting additional information to authorize activities related to Customer's account.

**4.2 App User License Agreements.** Before Customer enables any App User to gain access to any Customer App, Customer will enter into an enforceable App User License Agreement with such App User.

**4.3 Use Guidelines.** Customer shall comply with all applicable laws, rules and regulations in its use of the Kinvey Platform Services and development of the Customer Application, including without limitation applicable privacy and data security regulations. Customer shall, and shall ensure that its Users will, use the Kinvey Platform Services solely for Customer's business purposes as contemplated by this Agreement and shall not: (i) license, sublicense, sell, resell, rent, lease, transfer, assign, distribute, time share or otherwise commercially exploit or make the Kinvey Platform Services available to any third party, other than as expressly permitted by this Agreement; (ii) interfere with or disrupt the integrity or performance of the Kinvey Platform Services, the Kinvey Technology or the data contained therein or disrupt any servers or networks connected to the Kinvey Platform Services, or disobey any requirements, procedures, policies or regulations of networks connected to the Kinvey Platform Services; (iii) attempt to gain unauthorized access to the Kinvey Platform Services or the Kinvey Technology or any related systems or networks; (iv) remove, alter or obscure any proprietary notices associated with the Kinvey Platform Services; (v) access or use Kinvey Platform Services in a United States embargoed country or in violation of any applicable export law or regulation (including any United States export laws and regulations); (vi) use the Kinvey Platform Services in violation of any applicable, law, rule regulation or guideline; (vii) attempt to probe, scan, or test the vulnerability of any system or network associated with the Kinvey Platform Services or breach any security or authentication measures; or (viii) utilize the Kinvey Platform Services in order to (a) send spam or otherwise duplicative or unsolicited messages in violation of applicable laws;

(b) send or store infringing, obscene, threatening, libelous, or otherwise unlawful, unsafe, malicious, abusive or tortious material, including material harmful to children or violative of third party privacy rights; or (c) send or store material containing software viruses, worms, Trojan horses or other harmful computer code, files, scripts, agents or programs or plant malware on Kinvey's computer systems, those systems of Kinvey's third party service providers or vendors, or otherwise use the Kinvey Platform Services to attempt to upload and/or distribute malware. Customer acknowledges that if Customer desires to protect Customer's transmission of data and/or files to Kinvey, it is Customer's responsibility to use a secure encrypted connection to communicate with and/or utilize the Services.

**4.4 Restrictions.** Customer will not: (a) adapt, alter, modify, improve, translate or create derivative works of the Kinvey Platform Services (or any part thereof including the Kinvey Technology); or (b) reverse engineer, decompile, disassemble or otherwise attempt to reconstruct or obtain the source code to all or any portion of the Kinvey Platform Services.

**4.5 Customer Support of App Users.** Customer will be solely responsible for providing technical support services to App Users with respect to the Customer Applications in accordance with Customer's then-current support terms and conditions.

**4.6 Content Restrictions.** Customer is responsible for all Customer Content. Customer is responsible to ensure that it, or the applicable App User, will obtain all third party licenses, consents and / or permissions that may be necessary or appropriate with respect to such Customer Content to enable each party to exercise its rights and perform its obligations under this Agreement. Customer represents, warrants and covenants that the Customer Content:

(a) will not and does not infringe the patent, copyright, trademark, trade secret, or other intellectual property or proprietary right of others;

(b) will not and does not violate the privacy, publicity, or other rights of third parties or any other law, statute, ordinance or regulation;

(c) is not and will not become unlawful, tortious, fraudulent, defamatory or harmful to minors, obscene, pornographic, or offensive as determined by Kinvey in its sole discretion;

(d) will not and does not violate Customer's own privacy policy or collect information from App Users in any manner to which such App Users have not consented;

(e) will not and does not misrepresent the source of the Customer Content;

(f) will not and does not disclose or provide information protected under any law, agreement or fiduciary relationship, including but not limited to, proprietary or confidential information of others;

(g) will not and does not misrepresent Customer's identity in any way;

(h) will not and does not contain any viruses, Trojan horses, spyware, malware, worms, time bombs, cancelbots, or other disabling devices or other harmful component intended to damage, detrimentally interfere with, surreptitiously intercept or expropriate any system, data or personal information; and

(i) will not and does not advocate or encourage any illegal activity; and

(j) will not violate, or encourage any conduct that would violate, any applicable law or regulation or would give rise to civil liability.

## **5. FEES AND PAYMENT.**

**5.1 Fees.** In consideration for the rights granted hereunder, Customer will pay to Kinvey the fees set forth in each Order Form in accordance with the payment schedule set forth in such Order Form. Unless otherwise specified in any Order Form, all invoices issued by Kinvey will be due and payable thirty (30) days after Customer's receipt. All fees are nonrefundable, except as expressly otherwise set forth herein, and will be paid in U.S. dollars (unless another currency is specified in the Order Form) and exclude all applicable sales, use, and other taxes. Any fees that are not paid when due are subject to interest at one and one-half percent (1.5%) per month or the maximum rate permitted by applicable law, whichever is less, from the due date until paid.

**5.2 Taxes.** As between Customer and Kinvey, Customer will be responsible for collecting and remitting all taxes related to the use of the Customer Applications by App Users. Customer will make all payments to Kinvey free and clear of, and without reduction for, any withholding taxes; any such taxes imposed on payments of fees to Kinvey will be Customer's sole responsibility, and Customer will provide Kinvey with official receipts issued by the appropriate taxing authority, or such other evidence as Kinvey may reasonably request, to establish that such taxes have been paid.

## **6. CONFIDENTIALITY**

**6.1 Confidential Information.** Each party (the "**Disclosing Party**") may from time to time during the term of this Agreement disclose to or learn from the other party (the "**Receiving Party**") certain information regarding the Disclosing Party's business, including without limitation, technical, marketing, financial, employee, planning, and other confidential or proprietary information whether disclosed orally, in writing or visually, that is either marked or designated as confidential or is identified in writing as confidential at the time of disclosure or which the Receiving Party knew or should have known, under the circumstances, was considered confidential or proprietary by the Disclosing Party ("**Confidential Information**"). For the avoidance of doubt, the Kinvey Platform Services and the Kinvey Technology constitutes Confidential Information of Kinvey and Customer Content constitutes Confidential Information of Customer.

**6.2 Protection of Confidential Information.** The Receiving Party will not use any Confidential Information of the Disclosing Party for any purpose not expressly permitted by this Agreement, and will disclose the Confidential Information of the Disclosing Party only to the employees of



the Receiving Party who have a need to know such Confidential Information for purposes of this Agreement and who are under a duty of confidentiality no less restrictive than the Receiving Party's duty hereunder. The Receiving Party will (a) protect the Disclosing Party's Confidential Information from unauthorized use, access, or disclosure in the same manner as the Receiving Party protects its own confidential or proprietary information of a similar nature and with no less than reasonable care; and (b) promptly advise the Disclosing Party upon becoming aware of any loss, disclosure, or duplication of the Confidential Information or of any breach of this Agreement, including, without limitation, the misappropriation of the Confidential Information. Both parties acknowledge and agree that the Disclosing Party may be irreparably harmed by any violation of this Article 6 (Confidentiality) and that the use of the Confidential Information for any purpose other than that stated herein may, among other things, enable the Receiving Party or other third parties receiving such Confidential Information to compete unfairly with the Disclosing Party. Therefore, in the event of a breach or threatened breach, the disclosing party shall be entitled, in addition to all other rights and remedies available at law or in equity, to seek (i) an injunction restraining such breach, without being required to show any actual damage or to post security or other bond; or (ii) a decree for specific performance of the applicable provision of this Agreement. Notwithstanding the termination or expiration of this Agreement, the obligations of the Receiving Party, with respect to the Confidential Information of Disclosing Party, shall be in full force and effect as follows: (A) in the case of any information or materials that constitute a trade secret within the meaning of applicable law, for as long as such information and materials remain as a trade secret, or (B) in the case of any other information or materials, during the term of this Agreement and for a period of three (3) years following the termination or expiration of this Agreement.

**6.3 Exceptions.** The Receiving Party's obligations under this subsection will not apply to any portion of the Disclosing Party's Confidential Information if the Receiving Party can document that such information: (a) was already lawfully known to the Receiving Party at the time of disclosure by the Disclosing Party; (b) is disclosed to the Receiving Party by a third party who had the right to make such disclosure without any confidentiality restrictions; (c) is, or through no fault of the Receiving Party has become, generally available to the public; or (d) was independently developed by the Receiving Party without use of or reference to the Disclosing Party's Confidential Information. In addition, the Receiving Party will be allowed to disclose Confidential Information of the Disclosing Party to the extent that such disclosure is (i) approved in writing by the Disclosing Party, (ii) necessary for the Receiving Party to enforce its rights under this Agreement in connection with a legal proceeding; or (iii) required by law or by the order of a court or similar judicial or administrative body, provided that the Receiving Party notifies the Disclosing Party of such required disclosure promptly and in writing and cooperates with the Disclosing Party, at the Disclosing Party's reasonable request and expense, in any lawful action to contest or limit the scope of such required disclosure.

**6.4 Return of Confidential Information.** The Receiving Party will return to the Disclosing Party all Confidential Information of the Disclosing Party in the Receiving Party's possession or control and permanently erase all electronic copies of such Confidential Information promptly upon the written request of the Disclosing Party or the expiration or termination of this Agreement, whichever comes first. At the Disclosing Party's request, the Receiving Party will

certify in writing signed by an officer of the Receiving Party that it has fully complied with its obligations under this subsection.

**6.5 Confidentiality of Agreement.** Neither party will disclose any terms of this Agreement to anyone other than its attorneys, accountants, and other professional advisors under a duty of confidentiality except (a) as required by law; (b) pursuant to a mutually agreeable press release; or (c) in connection with a proposed merger, financing, or sale of such party's business (provided that any third party to whom the terms of this Agreement are to be disclosed signs a confidentiality agreement reasonably satisfactory to the other party to this Agreement).

## **7. WARRANTIES.**

**7.1 Warranties by Both Parties.** Each party represents and warrants that: (a) it has full power and authority to enter into and perform this Agreement; (b) the person signing this Agreement on such party's behalf has been duly authorized and empowered to enter into this Agreement; and (c) that it will perform its obligations or exercise its rights hereunder in conformance with all applicable laws, rules, regulations and guidelines, including, without limitation, those related to privacy and data security.

**7.2 Customer Warranty.** Customer further represents, warrants and covenants that: (a) each Customer App will contain a privacy policy that accurately discloses Customer's collection, use and disclosure of information about App Users (including any Kinvey use as provided in Sections 3.3 and 6.2 above) and (b) in the event that Customer engages in advertising in connection with the Customer Applications, Customer will comply with all applicable self-regulatory programs, including the Mobile Marketing Association's Code of Conduct and the DAA Self-Regulatory Principles for Online Behavioral Advertising.

**7.3 Kinvey Warranty.** Kinvey represents, warrants and covenants that the Kinvey Platform Services will include the functionality provided in the Documentation.

**7.4 Disclaimer of Warranty.** EXCEPT FOR THE EXPRESS WARRANTIES IN SECTIONS 1.1 OF SCHEDULE A (PROFESSIONAL SERVICES) AND SECTION 7 (WARRANTIES) OF THIS AGREEMENT, KINVEY MAKES NO OTHER REPRESENTATIONS OR WARRANTIES, WHETHER, EXPRESS, IMPLIED, OR STATUTORY, INCLUDING WITHOUT LIMITATION REGARDING THE KINVEY PLATFORM SERVICES, THE DOCUMENTATION, THE KINVEY CLIENT LIBRARIES, THE KINVEY DEV CENTER, THE KINVEY TECHNOLOGY, THE AUTH LINKS, THE DATA LINKS OR THE THIRD PARTY DATA SOURCES, OR OTHERWISE WITH RESPECT TO THE SUBJECT MATTER OF THIS AGREEMENT AND EXPRESSLY DISCLAIMS THE IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE, AND NON INFRINGEMENT OF THIRD PARTY RIGHTS. TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, KINVEY'S LIABILITY UNDER ANY IMPLIED OR STATUTORY WARRANTY, CONDITION, TERM, REPRESENTATION, UNDERTAKING OR GUARANTY WHICH CANNOT BE LEGALLY EXCLUDED IS LIMITED IN RESPECT OF THE SERVICES TO SUPPLYING THE SERVICES AGAIN OR PAYING THE COST OF SUPPLYING THE SERVICES AGAIN.

**NOTWITHSTANDING ANYTHING TO THE CONTRARY CONTAINED HEREIN, AS BETWEEN KINVEY AND CUSTOMER, THE KINVEY DEV CENTER, THE BETA VERSIONS, THE KINVEY CLIENT LIBRARIES AND THE THIRD PARTY DATA SOURCES ARE PROVIDED “AS IS” AND “WITH ALL FAULTS” AND KINVEY SPECIFICALLY DISCLAIMS ANY AND ALL LIABILITY AND WARRANTIES, EXPRESS, IMPLIED OR STATUTORY, ASSOCIATED WITH THE BETA VERSIONS, KINVEY CLIENT LIBRARIES OR THE THIRD PARTY DATA SOURCES INCLUDING WITHOUT LIMITATION THE IMPLIED WARRANTIES OF TITLE, MERCHANTABILITY, NONINFRINGEMENT AND FITNESS FOR A PARTICULAR PURPOSE.**

Kinvey shall not be responsible for ensuring and does not represent or warrant that: (i) the Kinvey Platform Services will meet Customer's business requirements; (ii) the Kinvey Platform Services will be error-free or uninterrupted or that the results obtained from its use will be accurate or reliable; or (iii) all deficiencies in the Kinvey Platform Services can be found or corrected. Kinvey will not be responsible for: (a) any failure to meet the Kinvey Platform Services warranty of Section 7.3 caused by acts within the control of Customer or any User or interoperability of specific Customer Applications or Customer infrastructure with the Kinvey Platform Services; (b) loss of data; (c) the inability of Customer to access or interact with any other service provider through the internet, other networks or users that comprise the internet or the informational or computing resources available through the internet; or (d) services, libraries, or data sources or repositories provided by third parties.

## **8. INDEMNIFICATION.**

**8.1 Kinvey Indemnity.** Kinvey shall defend, indemnify and hold Customer harmless against any third party claims, suits, or proceedings (“**Claims**”) brought against Customer or its officers, directors or employees by a third party contending that Customer’s use of the Kinvey Platform Services in accordance with the Documentation infringes any U.S. patent rights of a third party. In the event that the Kinvey Platform Services or any part thereof is likely to, in Kinvey’s sole opinion, or do become the subject of an infringement related Claim, and Kinvey cannot, at its option and expense, procure for Customer the right to continue using the Kinvey Platform Services, or any part thereof, or modify the Kinvey Platform Services, or any part thereof, to make them non infringing, then Kinvey may terminate this Agreement with notice to Customer and will provide the Customer with a refund of any pre-paid fees for the unexpired portion of the remaining subscription term. Kinvey shall have no liability for any Claim or demand arising from (i) an allegation that does not state with specificity that the Kinvey Platform Services is the basis of the Claims; (ii) the use or combination of the Kinvey Platform Services or any part thereof with software, hardware, or other materials not developed by Kinvey if the Kinvey Platform Services or use thereof would not infringe without such combination; (iii) modification of the Kinvey Platform Services by a party other than Kinvey, if the use of unmodified Kinvey Platform Services would not constitute infringement; (iv) a breach by Customer of any obligation under this Agreement or a use of the Kinvey Platform Services by any Customer or User in a manner outside the scope of any right granted herein or not in accordance with the Documentation if the claim would not have arisen but for such breach or unauthorized use; (v) an allegation made against Customer arising out of or related to the Auth Links, Data Links, Kinvey

Client Libraries, Third Party Data Sources, Beta Versions, Customer Content or Customer Applications; or (vi) an allegation made against Customer prior to the execution of this Agreement or any allegation based upon any action by Customer prior to the execution of this Agreement. **The foregoing states Kinvey's entire liability and Customer's exclusive remedy for intellectual property rights infringement.**

**8.2 Customer Indemnity.** Customer shall defend, indemnify and hold Kinvey, its affiliates, employees, officers, and directors harmless from and against any loss or damage (including reasonable attorneys' fees) incurred in connection with Claims (i) made or brought against Kinvey by a third party alleging that the Customer Content or Customer Applications infringe the intellectual property rights of, or has otherwise harmed, a third party; (ii) based on the offer, marketing, sale design, labeling, advertising or otherwise related to any Customer Applications; (iii) arising out of or related to the Customer Applications, Customer Content, Third Party Data Sources or any other non-Kinvey developed content, data, libraries, software or other materials used by Customer with the Kinvey Platform Services; (iv) based upon any User's use of the Kinvey Platform Services not in accordance with the terms hereof or not in accordance with the Documentation; (v) based on a breach of Sections 4.3, 4.4 or 4.6 of this Agreement; or (vi) based on any failure or alleged failure of the Customer to comply with any applicable law, rule or regulation in connection with its Customer Applications including, without limitation, all federal, state, local and foreign advertising, consumer privacy, and personal data protection laws and regulations.

**8.3 Indemnification Process.** The foregoing indemnification obligations are conditioned on the indemnified party: (a) notifying the indemnifying party promptly in writing of such action, (b) reasonably cooperating and assisting in such defense at the indemnifying party's expense, and (c) giving sole control of the defense and any related settlement negotiations to the indemnifying party with the understanding that the indemnifying party may not settle any claim in a manner that admits guilt or otherwise prejudices the indemnified party, without the indemnified party's prior written consent.

## **9. LIMITATION OF LIABILITY.**

**9.1 Limitation of Liability.** TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, EXCEPT FOR AMOUNTS PAYABLE BY CUSTOMER HEREUNDER, LIABILITY ARISING FROM THE INDEMNIFICATION OBLIGATIONS SET FORTH IN SECTION 8, ANY BREACH BY CUSTOMER OF SECTIONS 3.1, 3.2, 3.3 OR 4, OR MISAPPROPRIATION OF A PARTY'S INTELLECTUAL PROPERTY RIGHTS, IN NO EVENT SHALL EITHER PARTY'S AGGREGATE LIABILITY ARISING OUT OF OR RELATED TO THIS AGREEMENT, WHETHER ARISING UNDER STATUTE, CONTRACT, TORT OR UNDER ANY OTHER THEORY OF LIABILITY, EXCEED THE AMOUNTS ACTUALLY PAID BY CUSTOMER UNDER THE APPLICABLE STATEMENT OF WORK OR THE APPLICABLE ORDER FORM DURING THE TWELVE (12) MONTHS PRIOR TO THE DATE ON WHICH SUCH CLAIM OR CAUSE OF ACTION AROSE. THE FOREGOING LIMITATIONS ARE CUMULATIVE AND NOT PER INCIDENT AND SHALL APPLY EVEN IF THE NON-BREACHING PARTY'S REMEDIES UNDER THIS AGREEMENT FAIL OF THEIR ESSENTIAL PURPOSE.

**9.2 Exclusion of Consequential and Related Damages.** TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, EXCEPT FOR ANY BREACH BY CUSTOMER OF SECTIONS 3.1, 3.2, 3.3 OR 4 OR MISAPPROPRIATION OF A PARTY'S INTELLECTUAL PROPERTY RIGHTS, IN NO EVENT SHALL EITHER PARTY HAVE ANY LIABILITY TO THE OTHER PARTY OR TO ANY THIRD PARTY FOR ANY LOSS OF ACTUAL OR ANTICIPATED PROFITS, LOSS OF BUSINESS, LOSS OF, DAMAGE TO, OR CORRUPTION OF, DATA, LOSS OF USE, COST OF PROCUREMENT OF SUBSTITUTE GOODS OR SERVICES, OR FOR ANY INDIRECT, SPECIAL, EXEMPLARY, INCIDENTAL, PUNITIVE, OR CONSEQUENTIAL DAMAGES HOWEVER CAUSED, WHETHER ARISING UNDER STATUTE, CONTRACT, TORT (INCLUDING NEGLIGENCE) OR UNDER ANY OTHER THEORY OF LIABILITY, WHETHER OR NOT THE PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGE OR WHETHER SUCH DAMAGE WAS FORESEEABLE OR IN THE CONTEMPLATION OF THE PARTIES. SOME JURISDICTIONS DO NOT ALLOW LIMITATIONS ON DURATION OR THE EXCLUSION OF AN IMPLIED WARRANTY, SO THE LIMITATIONS HEREIN MAY NOT APPLY. Neither party shall be responsible or liable for any loss, damage or inconvenience suffered by the other or by any third person, to the extent that such loss, damage or inconvenience is caused by the failure of the other party to comply with its obligations under this Agreement.

**9.3 Limitation of Action.** To the maximum extent permitted by applicable law and except for actions for non-payment or breach of either party's intellectual property rights, no action (regardless of form) arising out of this Agreement may be commenced by either party more than one (1) year after the cause of action has accrued.

**9.4 Allocation of Risk.** Each party acknowledges that the fees set forth in this Agreement reflect the allocation of risk between the parties and that the other party would not enter into this Agreement without these limitations on its liability.

## **10. TERM AND TERMINATION.**

**10.1 Term.** The term of this Agreement will commence on the Effective Date and remain in effect until all Order Forms and Statements of Work have terminated or expired (the “**Term**”).

**10.2 Termination.** This Agreement may be terminated:

(a) by Customer (i) in accordance with Section 2.3 by providing written notice to Kinvey within thirty (30) days of any modification to the Kinvey Platform Services which materially and adversely reduces the functionality of the Kinvey Platform Services; or (ii) with respect to specific affected Order Forms, pursuant to the terms of Section 2.4 of [Schedule B](#);

(b) by Kinvey if Customer fails to timely make any payment due hereunder and fails to cure such default within fifteen (15) days after receiving notice in writing from Kinvey of such failure (whether or not Kinvey avails itself of its right to suspend Services pursuant to Section 10.4 hereof); or

(c) by either party (the “**Non-breaching Party**”) effective immediately upon written notice containing an explanation of the alleged breach to the other party (the “**Breaching Party**”), if the Breaching Party breaches any provision of this Agreement and does not cure the breach within thirty (30) days after receiving written notice thereof from the Non-breaching Party.

**10.3 Termination Upon Bankruptcy or Insolvency.** Either party may, at its option, terminate this Agreement immediately upon written notice to the other, in the event (a) that the other party becomes insolvent or unable to pay its debts when due; (b) the other party files a petition in bankruptcy, reorganization or similar proceeding, or, if filed against, such petition is not removed within ninety (90) days after such filing; (c) the other party discontinues its business; or (d) a receiver is appointed or there is an assignment for the benefit of the other party’s creditors. Upon termination of the Agreement by Customer due to Kinvey’s bankruptcy or insolvency, Kinvey shall refund to Customer any pre-paid fees previously paid by Customer for services not performed as of the date of termination.

**10.4 Suspension of Services.** At any time during the Term, Kinvey may, immediately upon notice to Customer, suspend its performance under this Agreement and any Order Form or may suspend any and all Users’ access to the Kinvey Platform Services, in Kinvey’s sole reasonable discretion, including, without limitation, for any of the following reasons: (a) a reasonable threat to the technical security or technical integrity of the Kinvey Platform Services exists as determined by Kinvey in its sole and absolute discretion; provided that Kinvey promptly recommences performance upon the cessation of the threat, or (b) if any amount due under this Agreement is not received by Kinvey within fifteen (15) days after it was due and Kinvey provided written notice of same.

**10.5 Outstanding Fees.** Termination shall not relieve Customer of the obligation to pay any fees accrued or payable to Kinvey prior to the effective date of termination. In the event of termination of this Agreement by Customer pursuant to Section 10.2(a), 10.2(c), or 10.3, promptly after the effective date of such termination, Kinvey shall refund to Customer on a pro-rata basis any prepaid fees paid by Customer for the remainder of the then current subscription term under the terminated Order Forms. In the event of termination of this Agreement by Kinvey pursuant to Section 10.2(b) 10.2(c) or 10.3, all amounts payable by Customer under this Agreement and all Order Forms will become immediately due and payable.

**10.6 Survival.** Sections 1, 3.6, 3.7, 5, 6, 7.4, 8, 9, 10, and 11 shall survive any termination or expiration of this Agreement.

## **11. GENERAL.**

**11.1 Governing Law; Jurisdiction.** This Agreement and any action related thereto will be governed and interpreted by and under the laws of the Commonwealth of Massachusetts, without giving effect to any conflicts of laws principles that require the application of the law of a different state. Each party hereby consents to the personal jurisdiction and venue in the state and federal courts serving the Commonwealth of Massachusetts. The United Nations Convention on Contracts for the International Sale of Goods does not apply to this Agreement.

**11.2 Export; Anti-Corruption.** Each party shall comply with the export laws and regulations of the United States and other applicable jurisdictions in providing and using the Kinvey Platform Services. Without limiting the foregoing, (i) each party represents that it is not named on any U.S. government list of persons or entities prohibited from receiving exports, and (ii) Customer shall not permit Users to access or use Kinvey Platform Services in violation of any U.S. export embargo, prohibition or restriction. Customer represents that it has not received or been offered any illegal or improper bribe, kickback, payment, gift, or thing of value from any of Kinvey's employees or agents in connection with this Agreement. Reasonable gifts and entertainment provided in the ordinary course of business do not violate the above restriction. If Customer learns of any violation of the above restriction, Customer will use reasonable efforts to promptly notify Kinvey.

**11.3 Severability.** If any provision of this Agreement is, for any reason, held to be invalid or unenforceable, the other provisions of this Agreement will remain enforceable and the invalid or unenforceable provision will be deemed modified so that it is valid and enforceable to the maximum extent permitted by law.

**11.4 Waiver; Remedies.** Any waiver or failure to enforce any provision of this Agreement on one occasion will not be deemed a waiver of any other provision or of such provision on any other occasion. Other than as expressly stated herein, the remedies provided herein are in addition to, and not exclusive of, any other remedies of a party at law or in equity.

**11.5 Entire Agreement.** To the maximum extent permitted by applicable law, this Agreement, together with the documents referenced herein and all Order Forms and Statements of Work executed hereunder, constitute the entire agreement between the parties as to its subject matter, and supersede all previous and contemporaneous agreements, proposals or representations, written or oral, concerning the subject matter of this Agreement. No representation, undertaking or promise shall be taken to have been given or be implied from anything said or written in negotiations between the parties prior to this Agreement except as expressly stated in this Agreement. Neither party shall have any remedy in respect of any untrue statement made by the other upon which that party relied in entering into this Agreement (unless such untrue statement was made fraudulently) and that party's only remedy in respect of any untrue statement shall be for breach of contract as provided in this Agreement. No modification, amendment, or waiver of any provision of this Agreement (or any Order Form or Statement of Work) shall be effective unless in writing and signed by the party against whom the modification, amendment, or waiver is to be asserted. Customer acknowledges and agrees that its agreement hereunder is not contingent upon the delivery of any future functionality or features not specified herein or in an Order Form or dependent upon any oral or written, public or private comments made by Kinvey with respect to future functionality or features for the Kinvey Platform Services. In the event of any conflict between the provisions in this Agreement and any Order Form or Statement of Work, the terms of such Order Form or Statement of Work shall prevail. No terms or conditions stated in a Customer purchase order or in any other Customer order documentation shall be incorporated into or form any part of this Agreement, and all such terms or conditions shall be null and void.

**11.6 Attorney's Fees.** Customer shall pay on demand all of Kinvey's reasonable attorney fees and other costs incurred by Kinvey to enforce this Agreement or to collect any fees or charges due Kinvey under this Agreement following Customer's breach of its payment obligations under this Agreement or any Order Form.

**11.7 No Assignment.** Neither party will assign, subcontract, delegate, or otherwise transfer this Agreement, or its rights and obligations herein, without obtaining the prior written consent of the other party, and any attempted assignment, subcontract, delegation, or transfer in violation of the foregoing will be null and void; provided, however, that either party may assign this Agreement in connection with a merger, acquisition, reorganization or sale of all or substantially all of its assets, or other operation of law, without any consent of the other party. The terms of this Agreement will be binding upon the parties and their respective successors and permitted assigns.

**11.8 Force Majeure.** Any delay in the performance of any duties or obligations of either party (except the payment of money owed) will not be considered a breach of this Agreement if such delay is caused by a labor dispute, shortage of materials, fire, earthquake, flood, or any other event beyond the control of such party, provided that such party uses reasonable efforts, under the circumstances, to notify the other party of the cause of such delay and to resume performance as soon as possible.

**11.9 Independent Contractors.** Kinvey's relationship to Customer is that of an independent contractor, and neither party is an agent or partner of the other. Neither party will have, and will not represent to any third party that it has, any authority to act on behalf of the other.

**11.10 Notices.** All notices under this Agreement shall be in writing. All notices shall be given (i) by delivery in person (ii) by a nationally recognized next day courier service, (iii) by first class, registered or certified mail, postage prepaid, (iv) by facsimile or (v) by electronic mail to the address of the party specified in this Agreement or an Order Form. All notices shall be effective upon (i) receipt by the party to which notice is given, (ii) the second (2nd) day following sending by electronic mail or facsimile, or (iii) on the fifth (5th) day following mailing, whichever occurs first. Each party may change its address for receipt of notice by giving notice of such change to the other party.

**11.11 Counterparts; Electronic Signatures.** This Agreement may be executed in one or more counterparts, each of which will be deemed an original and all of which will be taken together and deemed to be one instrument. A manually or electronically signed copy of this Agreement, any Order Form or any Statement of Work delivered by facsimile, e-mail or other means of electronic transmission shall be deemed to have the same legal effect as delivery of an original signed copy of the Agreement, the Order Form or Statement of Work.

**11.12 Federal Government End Use Provisions.** Kinvey provides the Kinvey Platform Services, including related software and technology, for ultimate federal government end use solely in accordance with the following: Government technical data and software rights related to the Services include only those rights customarily provided to the public as defined in this Agreement. This customary commercial license is provided in accordance with FAR 12.211



(Technical Data) and FAR 12.212 (Software) and, for Department of Defense transactions, DFAR 252.227-7015 (Technical Data – Commercial Items) and DFAR 227.7202-3 (Rights in Commercial Computer Software or Computer Software Documentation). If a government agency has a need for rights not conveyed under these terms, it must negotiate with Kinvey to determine if there are acceptable terms for transferring such rights, and a mutually acceptable written addendum specifically conveying such rights must be included in any applicable contract or agreement.

**11.13 Construction.** The titles of the sections of this Agreement are for convenience of reference only and are not to be considered in construing this Agreement. Unless the context of this Agreement clearly requires otherwise: (i) references to the plural include the singular, the singular the plural, and the part the whole, (ii) “or” has the inclusive meaning frequently identified with the phrase “and/or,” (iii) “including” has the inclusive meaning frequently identified with the phrase “including but not limited to” or “including without limitation,” and (iv) references to “hereunder,” “herein” or “hereof” relate to this Agreement as a whole. Any reference in this Agreement to any statute, rule, regulation or agreement, including this Agreement, shall be deemed to include such statute, rule, regulation or agreement as it may be modified, varied, amended or supplemented from time to time. The parties agree that this Agreement shall be fairly interpreted in accordance with its terms without any strict construction in favor of or against either party and that ambiguities shall not be interpreted against the drafting party.

## **Schedule A**

### **Professional Services Addendum**

## **1. PROFESSIONAL SERVICES**

**1.1 Professional Services.** Subject to the terms and conditions set forth in this Addendum, Kinvey will use commercially reasonable efforts to perform the services set forth in all Order Forms and Statements of Work (as defined below) subsequently executed by the Parties (the “*Professional Services*”). Kinvey represents and warrants to Customer that Kinvey has the skills, resources, and expertise to provide the Professional Services. Without limiting the generality of the foregoing, Kinvey represents and warrants to Customer that Kinvey will perform the Professional Services in a professional and workmanlike manner in accordance with professional industry standards of quality and integrity. As Customer’s sole remedy and Kinvey’s sole liability for any breach of the foregoing warranty, Kinvey will reperform any nonconforming Professional Services without charge. Other than the applicable fees set forth in the Order Form and/or Statement of Work, as applicable, and any applicable Change Order or amendment to the Order Form and/or Statement of Work, as applicable, no additional cost or expense shall be required of Customer in order for Kinvey to be able to provide the Professional Services as required under the Order Form and/or Statement of Work, as applicable.

**1.2 Issuance of Statements of Work.** Customer may request and propose in writing that Kinvey perform certain Professional Services, and one or both Parties, as determined by Kinvey, in its sole discretion, will prepare either (a) an Order Form or (b) a draft work statement in response thereto (each, a “*Statement of Work*”). All Order Forms and Statements of Work for

Professional Services will set forth: (i) the scope of the Professional Services, and to the extent possible, the applicable deliverables to be provided by Kinvey thereunder; (ii) any applicable timeline and (iii) the applicable fees payable by Customer to Kinvey for the Professional Services to be provided by Kinvey thereunder. No Order Form or Statements of Work, regardless of whether it relates to the same subject matter as any previously executed Order Forms or Statements of Work, will become effective, and Kinvey will have no obligation to perform any Professional Services proposed thereunder, until executed by authorized representatives of both Parties.

**1.3 Change Orders.** Customer may at any time request a modification to the Professional Services to be performed pursuant to any particular Order Form or Statement of Work by delivering a written request to Kinvey signed by a Customer representative, specifying the desired modifications (a ***“Change Request”***). Kinvey will, within a reasonable time following receipt of a signed Change Request, submit to Customer a written: (i) detailed description of the requested modifications agreed to by Kinvey; (ii) estimate of the fees for the requested modifications agreed to by Kinvey; and (iii) revised estimate of the time for performance of the Professional Services pursuant to the Order Form or Statements of Work (collectively, a ***“Change Order”***). No Change Order will become effective, and Kinvey will have no obligation to perform the Professional Services as modified by the Change Order, until executed by authorized representatives of both Parties.

**1.4 Delays.** If either Party is aware, or becomes aware, of a delay that will prevent Kinvey from meeting any scheduled milestone, such Party will promptly inform the other in writing of the delay and the reason therefore. If such delay is caused by Customer, the project schedule will automatically be deemed extended for the applicable service or deliverable and all subsequent services or deliverables, if and to the extent necessitated by the original delay. If such delay is caused by Kinvey, Kinvey will use proactive and reasonable efforts to complete the delayed service or deliverable.

## **2. PERSONNEL**

**2.1 Suitability.** Kinvey will assign employees and subcontractors with qualifications suitable for the work described in the relevant Order Form or Statement of Work, as applicable. Kinvey may replace or change employees and subcontractors in its sole discretion with other suitably qualified employees or subcontractors. Should Customer be reasonably dissatisfied with the performance of a Kinvey employee or subcontractor, Customer may request the replacement of that person; provided, however, before Kinvey shall be required to remove such individual, Kinvey shall have a reasonable opportunity to remedy such situation to the reasonable satisfaction with the Customer.

**2.2 Customer Responsibilities.** Customer will make available in a timely manner, at no charge to Kinvey, all technical data, computer facilities, programs, files, documentation, test data, sample output, or other information and resources required by Kinvey, as well as all office space, services and equipment (such as copiers and broadband Internet access) as Kinvey reasonably requires to perform the Professional Services. Customer will be responsible for, and assumes the

risk of, any problems resulting from the content, accuracy, completeness, consistency, facilitation, or provision thereof to Kinvey by Customer.

**3. FEES AND PAYMENTS.** In consideration of the Professional Services, Customer will pay, and Kinvey will be compensated at, the rates outlined in the applicable Order Form or Statement of Work. Customer will also reimburse Kinvey for: (i) all reasonable travel and living expenses incurred by Kinvey's employees and contractors for travel from Kinvey's offices; and (ii) any other expenses agreed to as part of the applicable Order Form or Statement of Work. Except as provided above, each Party will be responsible for its own expenses incurred in rendering performance under each Order Form and Statement of Work, including without limitation the cost of infrastructure, facilities, work space, computers and computer time, development tools and platforms, utilities management, personnel, supplies and the like.

#### **4. TERMINATION.**

**4.1** Unless otherwise stated in the applicable Order Form or Statement of Work or Change Order, each term thereof will last until performance thereunder is completed. Upon such termination: (i) Kinvey will wind up and preserve their work in a commercially reasonable manner; (ii) subject to Customer's payment of all fees due and payable for the Professional Services, Kinvey will collect and deliver all work in progress, provided that Kinvey will have no obligation to transfer to Customer, unless otherwise expressly agreed to in writing by the Parties, any Confidential Information or Intellectual Property Rights of Kinvey related to the Professional Services provided hereunder; and (iii) Kinvey inform Customer of the extent to which performance hereunder has been completed through the date of termination. Customer will pay Kinvey all amounts due and payable for Professional Services performed through the date of termination.

**4.2 Survival.** The provisions of Section 2.3 and 3 through 5 will survive the expiration or termination of the Agreement.

#### **5. PROPRIETARY RIGHTS.**

**5.1 Work Product.** The term "**Work Product**" means any original software, documentation, reports, designs, specifications, works of authorship and data that are created by Kinvey personnel in the course of Kinvey's performance of the Professional Services, including original computer software, algorithms and related documentation created under and to be delivered pursuant to an Order Form or Statement of Work. Unless otherwise set forth in a Statement of Work, all Work Product, and all Intellectual Property Rights in the Work Product, will be owned by Kinvey. Subject to Customer's payment of all applicable fees for the Professional Services, Kinvey grants Customer a royalty-free, non-exclusive, nontransferable, revocable, limited license for the Term of the Agreement to use the Work Product solely with the Kinvey Platform Services.

#### **Schedule B**

Kinvey Service Level Agreement

This Kinvey Service Level Agreement (“Service Level Agreement”) outlines the service level performance targets applicable to the Kinvey Platform Services. For the avoidance of doubt, this Schedule B does not apply to Beta Versions.

1. Definitions

1.1 “Downtime” means that the Kinvey Platform Services is offline and unavailable for the Customer’s use. Downtime excludes downtime and unavailability resulting directly or indirectly from any Service Level Exclusion (defined below).

1.2 “Monthly Uptime Percentage” means the total number of minutes in a calendar month minus the number of minutes of Downtime suffered in such calendar month, divided by the total number of minutes in the calendar month. The applicable formula is:

Monthly Uptime  
Percentage

=

(Total Minutes in Month) – (Total Minutes of  
Downtime)

(Total Minutes In Month)

X 100

For any partial calendar month during which the applicable Customer has access to the Kinvey Platform Services, the Monthly Uptime Percentage shall be calculated based on the entire calendar month, not just the portion for which the Customer has access to the Kinvey Platform Services. The determination of whether the Kinvey Platform Services is available will be made in good faith by Kinvey based on monitoring performed by Kinvey where the Kinvey Platform Services is pinged no less than once every five minutes and the Kinvey Platform Services is determined to be unavailable if two consecutive pings are not answered.

1.3 “Service Level Credit” means the credit provided by Kinvey in accordance with Section 2 (Subscription Service Availability and Credits) below.

2. Subscription Service Availability and Credits

2.1 **Service Levels.** Kinvey will use commercially reasonable efforts to make the Kinvey Platform Services available with a Monthly Uptime Percentage of at least 99.5% during any calendar month (the “Availability Service Level”). In the event Kinvey does not meet the Standard Availability Service Level (a “Service Level Failure”), Customer will be eligible to receive a Service Level Credit as described below.

Standard Service Levels	
Monthly Uptime Percentage	Service Level Credit Percentage

Less than 99.5% but equal to or greater than 99.0%	5%
Less than 99.0% but equal to or greater than 95.0%	10%
Less than 95% but equal to greater than 90%	15%
Less than 90%	30%

**2.2 Calculation of the Credit.** Service Level Credits are calculated by multiplying (x) the applicable Service Level Credit Percentage by (y) the product of the total annual Subscription Fees (as defined in an Order Form) actually paid by Customer to Kinvey for the Kinvey Platform Services under an affected Order Form divided by twelve (12) months.

**2.3 Maximum Service Level Credit.** The Service Level Credits awarded in any month shall not, under any circumstance, exceed thirty percent (30%) of the total Subscription Fees actually paid by Customer to Kinvey for access to the Kinvey Platform Services under the affected Order Form for the affected month.

**2.4 Termination For Repeated Service Level Failures.** Customer may terminate the affected Order Form in the event the Monthly Uptime Percentage is less than ninety five percent (95%) in any two (2) consecutive month period or in any three (3) months during any twelve (12) month period.

### **3. Service Level Credit Request and Payment Procedures**

**3.1 Requesting a Service Level Credit.** To receive a Service Level Credit, Customer must submit a claim by email to [Enterprise-support@Kinvey.com](mailto:Enterprise-support@Kinvey.com) (a “Service Level Credit Request”). To be eligible, the Service Level Credit Request must be received by Kinvey within thirty (30) days of the occurrence of the Service Level Failure and must include: (a) the words “Service Level Credit Request” in the subject line; and (b) the dates and times of each Service Level Failure that Customer is claiming, including the dates and times of the Downtime that caused the Service Level Failure.

**3.2 Issuance of Service Level Credits.** If the Monthly Uptime Percentage of such request is confirmed by Kinvey and is less than the applicable Availability Service Level, then Kinvey will issue the Service Level Credit to Customer within thirty (30) days following the month in which Customer’s request is confirmed by Kinvey. Customer’s failure to provide the request and other information as required above will disqualify Customer from receiving a Service Level Credit. Kinvey will notify Customer of the amount of any Service Level Credit, which shall be applied against future amounts owed by Customer. Service Level Credits will not entitle Customer to any refund or other payment from Kinvey. Service Level Credits are not payable in cash and will only be applied against future amounts owed by Customer to Kinvey.

**3.3 Sole and Exclusive Remedy.** Unless otherwise provided in the Agreement, the Service Level Credit is Customer's sole and exclusive remedy and Kinvey's sole and exclusive liability for any Service Level Failure, Downtime, unavailability, non-performance, or other failure by Kinvey to provide the Kinvey Platform Services.

#### **4. Exclusions**

Downtime does not include unavailability, suspension or termination of the Kinvey Platform Services that result from: (a) termination or suspension of the Kinvey Platform Services described in Section 10.4 (Suspension of Services) of the Agreement; (b) factors outside of Kinvey's reasonable control, including force majeure events, denial of service attacks, or Internet access or related problems beyond the demarcation point of Kinvey and its third party hosting providers; (c) any actions or inactions of Customer or any third party; (d) Customer infrastructure, equipment, software or other technology and/or third party equipment, software or other technology (other than third party equipment within Kinvey's direct control), or Customer's use of the Kinvey Platform Services in a manner inconsistent with the Documentation; (e) any scheduled maintenance of the Subscription Services; (f) Kinvey's suspension and termination of a Customer's right to use the Subscription Services in accordance with the Agreement; or (g) license restrictions or other limitations as set forth in each Order Form (collectively, "**Service Level Exclusions**").

LAST UPDATED: June 20, 2018