CUSTOMER SUPPORT AGREEMENT TERMS AND CONDITIONS

1. Agreement. These Customer Support Agreement Terms and Conditions and the Customer Support Agreement, including all documents, exhibits, schedules, and addendums attached thereto or specifically incorporated by reference, constitute the sole and entire agreement ("Agreement") between Hawthorne Machinery Co., Hawthorne Machinery Co., dba Hawthorne Power Systems, or Hawthorne Pacific Corp. (as specified in the signature line of the Customer Support Agreement) ("Hawthorne") and the purchasing customer ("Customer") of the Agreement ("Party") and any such Party ("Parties") together with Hawthorne, ("Hawthorne"), are collectively referred to as ("Hawthorne") on behalf of Customer. This Agreement supersedes all prior and contemporaneous understandings and agreements, both written and oral regarding the Services. No purchase order issued in connection with the Services shall be binding on Hawthorne unless accepted by Hawthorne in writing. The parties hereby acknowledge that the repair or replacement of the equipment or machinery that will be the subject of the Services, (i) is not warranted or guaranteed and is billed on an "as is" basis, (ii) is subject to the terms and conditions contained in any request for proposal, purchase order, statement of work, or other similar document, nor does it serve to modify or amend this Agreement. Any such document shall create a separate contract consisting of the terms of this Agreement and any additional terms proposed by such document to the extent they do not conflict with the terms of this Agreement. Should the terms of any proposal, purchase order, or statement of work issued by Customer and not accepted by Hawthorne in writing conflict with the terms of this Agreement or any similar document, the terms of this Agreement will control. The Parties agree that the Services will be governed by the following documents in this order of precedence: Customer Support Agreement, Customer Support Agreement Terms and Conditions, other writings signed by the Parties, other documents issued by the Parties relating to the Services. Acceptance of any portion of the Services, providing payment in whole or in part, or acceptance of the Agreement in any form (whomever occurs first) shall constitute acceptance of these Service Authorization Terms and Conditions and any and conditions set forth in the document(s) incorporating them by reference.

2. Timing. Hawthorne shall use reasonable efforts to make any performance dates specified in the Agreement. Customer agrees that any such dates shall be estimates only. If Hawthorne determines that it is unable to perform the Services as scheduled due to workarounds or changes that it has itself enacted and that are not beyond its control, the performance dates shall be revised as necessary and agreed to by Customer. If Hawthorne has quoted the Services relying on representations made by Customer regarding the cleanliness, functionality, operational status, contents, and nature of the equipment or machinery that will be the subject of the Services. Should any of the representations on which Hawthorne relied in preparing or pricing the Services be false or incomplete, or if Hawthorne shall reasonably determine that the Services cannot be performed in a reasonably safe condition and shall notify Hawthorne in advance of matters relating to the Services, and provide such access to Customer’s premises and facilities as shall reasonably be necessary in order to perform the Services as scheduled.

3. Change in Scope of Work. Subject to Section 3 above, if either Party wishes to change the scope or performance of the Services, it shall submit details of the requested change to the other Party in writing. Promptly after receipt of any proposed change, the Parties shall negotiate and agree in writing signed by all parties on the terms of such change. Notwithstanding the above, Hawthorne may from time to time change the Services without the consent of Customer provided that such changes do not materially affect the nature or scope of the Services, the fees, or any performance dates set forth in the Agreement.

5. Customer Warranties. Customer warrants that (i) if an entity, it is duly organized and validly existing in good standing; (ii) it is duly authorized to execute, deliver, and perform its obligations under this Agreement; (iii) when duly executed and delivered by each Party, the Agreement will constitute Customer’s legal, valid, and binding obligation, enforceable against it in accordance with its terms; (iv) it is not insolvent and is paying all of its debts as they become due; (v) any payments made pursuant to the Agreement are intended by it to be a substantially contemporaneous exchange for new value given to it; (vi) each payment made of a debt incurred by it under this Agreement is or was in the ordinary course of its business or financing; (vii) the information and data furnished to Hawthorne by Customer is complete and accurate, and (viii) the performance of the Services does not require Hawthorne to remove, replace, or alter any part of a building or structure.

6. Customer Obligations. Customer shall pay or reimburse all prices, fees, expenses, or charges related to the Services when they become due, cooperate with Hawthorne in all matters relating to the Services, and provide such access to Customer’s premises and facilities as may reasonably be requested by Hawthorne for the purposes of performing the Services. Customer shall provide all direction, information, approvals, authorizations, notes, contracts, security agreements, financing statements, decisions or materials requested by Hawthorne to perform the Services. Customer shall maintain the premises on and around which the Services are to be performed in a clean, safe, and workable condition and shall make all reasonable efforts to ensure that no workarounds or changes that are not beyond Customer’s control are necessary to allow Hawthorne to perform the Services. Customer shall prepare or pricing the Services be false or incomplete, or if Hawthorne shall reasonably determine that the Services cannot be performed in a reasonably safe condition and shall notify Hawthorne in advance of matters relating to the Services, and provide such access to Customer’s premises and facilities as shall reasonably be necessary in order to perform the Services as scheduled.

7. Customer’s Acts or Omissions. If Hawthorne’s performance under the Agreement is prevented or delayed by any act or omission of Customer or its agents, subcontractors, consultants, or employees, Hawthorne shall not be deemed in breach of its obligations under the Agreement and shall not be required to perform any of its duties unless and until such act or omission is corrected by Customer to the extent arising directly or indirectly from such prevention or delay. Hawthorne reserves the right to charge for any cancellation by Customer of Scheduled Services. In addition to the items set forth in Section 22, Customer shall pay for partially completed work based on time and materials at prevailing rates. Additional handling and storage fees may apply to partially completed work.

8. Fees and Expenses. Customer shall (i) reimburse Hawthorne for all reasonable costs and expenses incurred in connection with the Services or in collecting any late payments and (ii) pay all other amounts due within thirty (30) days of receipt of an invoice from Hawthorne unless specified otherwise on the Customer Support Agreement, in which case the terms of payment specified on the Customer Support Agreement will control. Failure to notify Hawthorne in writing of any dispute regarding an invoice within sixty (60) days of receipt of said invoice waives Customer’s right to dispute such invoice. Customer’s obligation to pay amounts invoiced shall be absolute and unconditional and shall not be subject to any delay, dispute, or defense, whether general or particular. Customer agrees that it shall pay all costs of transportation, which include but are not limited to government duties, local taxes, customs fees, and shipping costs regardless of whether they arise before, during, or after performance of the Services.

11. Late Payments. All late payments shall bear interest at the lesser of the rate of 1.5% per month or the maximum rate permissible by law, on the unpaid amount from the date the amounts invoiced shall become immediately due and payable. Additional late fees of $50.00 per month will be subject to an additional three percent (3%) charge.

12. Taxes. Customer shall be responsible for all sales, use, and excise taxes, and any other similar taxes, duties, and charges of any kind imposed by any federal, state or local governmental entity, on any amounts payable by Customer hereunder, excluding any taxes imposed on, or with respect to, Hawthorne’s interest, revenues, gross receipts, personnel or real or personal property or other assets unless otherwise specified in writing.

13. Hours of Operation. Unless specified otherwise in writing, the Services shall be performed during Hawthorne’s publicized business hours. Services performed outside of such hours will be billed at applicable overtime or double-time rates.

14. Ancillary Systems. Hawthorne may deactivate or interrupt mechanical and electrical systems (including fire suppression systems) to perform the Services. Customer shall be responsible for reactivating such systems after completion of the Services. Hawthorne shall have no responsibility for reactivating, testing, or operating any such system.

15. Exclusions from Limited Warranty. Hawthorne may not be liable for, either (1) defects, error, or damage to Customer’s equipment due to accident, abuse, misuse, negligent use, failure to follow proper maintenance procedures, and any other use than in a normal and customary manner, (ii) defects, errors, or nonconformities due to modifications, alterations, additions or changes to Customer’s equipment not made or authorized by Hawthorne, (iii) normal wear and tear, or (iv) damage caused by force of nature or by an act of any third party. Hawthorne’s warranty shall be null and void and have no legal effect in the event Customer has failed to pay for the service or parts at issue or failed to bring its account current. All remedies under Hawthorne’s warranty are expressly limited to replacing parts or making repairs as specified in this section in the applicable warranty period. Claims for losses arising out of any failure of repaired equipment to operate for the warranty period shall be limited to the warranty provided by the manufacturer of said products and equipment. Hawthorne does not provide a warranty in addition to that provided by the manufacturer of a product. Customer understands that warranties for equipment and parts are limited in time and scope and can vary according to the source from which they were obtained.

16. Exclusions from Limited Warranty. Any limited warranty offered by Hawthorne does not cover (i) defects, error, or damage to Customer’s equipment due to accident, abuse, misuse, negligent use, failure to follow proper maintenance procedures, and any other use than in a normal and customary manner, (ii) defects, errors, or nonconformities due to modifications, alterations, additions or changes to Customer’s equipment not made or authorized by Hawthorne, (iii) normal wear and tear, or (iv) damage caused by force of nature or by an act of any third party. Hawthorne’s warranty shall be null and void and have no legal effect in the event Customer has failed to pay for the service or parts at issue or failed to bring its account current. All remedies under Hawthorne’s warranty are expressly limited to replacing parts or making repairs as specified in this section in the applicable warranty period. Claims for losses arising out of any failure of repaired equipment to operate for the warranty period shall be limited to the warranty provided by the manufacturer of said products and equipment. Customer shall be responsible for all sales, use, and excise taxes, and any other similar taxes, duties, and charges of any kind imposed by any federal, state or local governmental entity, on any amounts payable by Customer hereunder, excluding any taxes imposed on, or with respect to, Hawthorne’s interest, revenues, gross receipts, personnel or real or personal property or other assets unless otherwise specified in writing.

17. Limited Warranty Procedure. Hawthorne’s warranty obligations set forth above do not arise unless Customer gives written notice that reasonably describes any defective Services to Hawthorne within thirty (30) days of discovery of the alleged defect and any applicable warranty period has not expired. If, in its sole discretion, Hawthorne determines there to be a defect in service or materials provided, which defect is directly attributable to Hawthorne, Hawthorne may, in its sole discretion, either (i) use commercially reasonable efforts to cure any defect, or (ii) repair or replace the price of any defective Services, less a deduction equal to the depreciated value of the Services due to normal wear and tear, normal usage, and any other causes beyond Hawthorne’s control. The REMEDIES SET FORTH ABOVE SHALL BE CUSTOMER’S SOLE AND EXCLUSIVE REMEDY FOR ANY BREACH OF THE LIMITED WARRANTY ABOVE. 

18. Disclaimer of Warranties. EXCEPT FOR THE LIMITED WARRANTY ABOVE, HAWTHORNE MAKES NO WARRANTY WHATSOEVER WITH RESPECT TO THE SERVICES OR THE MANUFACTURER’S WARRANTY: (i) WARRANTY OF MERCHANTABILITY; (ii) WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE; (iii) WARRANTY OF TITLE; OR (iv) WARRANTY AGAINST INFRINGEMENT OF INTELLECTUAL PROPERTY RIGHTS OF A THIRD PARTY. WHETHER EXPRESS OR IMPLIED BY LAW, COURSE OF DEALING, COURSE OF PERFORMANCE, USAGE OF TRADE OR ANY OTHER METHOD. THE REMEDIES SET FORTH ABOVE SHALL BE CUSTOMER’S SOLE AND EXCLUSIVE REMEDY FOR ANY BREACH OF THE LIMITED WARRANTY ABOVE. 

A LARGER FONT COPY OF THESE TERMS AND CONDITIONS IS AVAILABLE UPON REQUEST.
29. **Force Majeure.** Hawthorne shall not be liable, nor be deemed to have defaulted or breached this Agreement, for any failure or delay caused by or resulting from acts of God or other circumstances beyond Hawthorne’s reasonable control including, without limitation, acts of war, riots, strikes, lockouts, acts or omissions of others, embargoes, acts of terrorism, civil or military authority, acts of God, fires, floods, earthquakes, or other similar restrictions. Except as otherwise specified in these Customer Support Agreement Terms and Conditions Receiving Party shall (x) exercise its rights or perform its obligations under this Agreement, and (y) cooperate with all reasonable requests of the Receiving Party to the extent necessary to enable Customer to make reasonable use of the Deliverables and the Services.
deemed received (i) if given by facsimile or e-mail, on the date of transmission if sent prior to 3:00 p.m. (PST) on a business day and otherwise on the following business day, (ii) if by counter or personal delivery, on the date of delivery, and (iii) if by mail, two (2) days after the date of mailing.

31. Applicable Law/Venue. This Agreement (and all matters arising out of or relating to it) will be governed in all respects by the laws of the State of California without regard to any choice of law or conflict of law provisions. Wherever provided by applicable law, service of process may be had upon the respective successor or assigns to the exclusive jurisdiction of the courts situated in San Diego County in the State of California or Honolulu County in the State of Hawaii and waives all claims that such courts lie in an inconvenient forum.

32. Waiver of Jury Trial. EACH PARTY KNOWINGLY, VOLUNTARILY, AND WITHOUT INDUCEMENT OR DURESS, UNCONDITIONALLY WAIVES ITS RIGHT TO A JURY TRIAL OF ANY CLAIM OR CAUSE OF ACTION BASED ON OR ARISING OUT OF THIS AGREEMENT OR THE SUBJECT MATTER THEREOF (INCLUDING, WITHOUT LIMITATION, CONTRACT, TORT, BREACH OF DUTY, AND ALL OTHER COMMON LAW AND STATUTORY CLAIMS), AND WILL NOT BE SUBJECT TO ANY EXCEPTIONS. EACH PARTY (i) UNDERSTANDS THAT THIS IS A WAIVER OF HIS, HER OR ITS OWN RIGHT TO A JURY TRIAL, AND (ii) AGREES AND ACKNOWLEDGES HAVING HAD A REASONABLE OPPORTUNITY TO DISCUSS THIS WAIVER AND ITS EFFECTS WITH LEGAL COUNSEL.

33. Dispute Resolution. Any dispute or controversy arising under or in connection with this Agreement shall first be resolved by informal discussion between senior management of the Parties. If informal discussion fails to produce a resolution, the Parties must then attend non-binding mediation in the San Diego County, California with a mutually agreed mediator. If mediation fails to produce a resolution, or if the Parties cannot agree on a mediator, any dispute or controversy arising out of or relating to this Agreement shall be settled by binding arbitration. Either Party may initiate arbitration, which shall be conducted in San Diego, California in accordance with the American Arbitration Association’s Commercial Arbitration Rules. Each Party shall share equally the cost of the arbitration and shall bear its own attorneys’ fees, unless the arbitrator awards such fees and costs to a Party. The arbitrator shall not have the power to award any punitive damages.

34. Enforcement. Subject to Section 33, Customer shall pay all costs Hawthorne may incur in enforcing or exercising its rights under this Agreement, whether or not suit is filed.

35. Severability. If any provision of this Agreement shall be deemed invalid, illegal, or unenforceable by any court of competent jurisdiction, such provision shall be automatically modified to the maximum extent necessary to render the same valid and enforceable, giving due consideration to the purpose and economic substance of this Agreement, or if no such modification shall be possible, deleted, and the remainder of this Agreement will remain valid and enforceable.

36. Amendments. This Agreement shall only be modified or amended by an instrument in writing signed by the Parties. Any changes, additions, stipulations or deletions, by Customer, shall not be deemed to be agreed to or binding upon Hawthorne unless agreed to in writing in the form of an amendment signed by Hawthorne and Customer.

37. No Waiver. No exercise, nor any failure or delay by either Party in the exercise of, any right or remedy available hereunder, at law or in equity will be deemed an election of remedies or a waiver of any of such rights or remedies. Remedies hereunder shall not be exclusive, but shall be cumulative and in addition to all other remedies existing at law or in equity. The receipt, acceptance and/or negotiation of, or any endorsement on, any check or draft received from one Party will not operate to waive or release, in whole or in part, any claim of the other Party arising hereunder or in connection herewith (except as to the portion thereof actually received by the other Party in cash or other good funds).

38. Assignment. Hawthorne may assign any of its rights or obligations under the Agreement without the prior written consent of Customer. If an assignee agrees to assume the obligations of Hawthorne, this Agreement and Section 39 shall remain in effect as to such assignee.

39. No Third Party Beneficiaries. This Agreement benefits solely the Parties and their respective permitted successors and assigns. Nothing in this Agreement, whether express or implied, confers on any other person any legal or equitable right, benefit or remedy of any nature whatsoever under or by reason of this Agreement.

40. Headings. Headings are for reference and do not affect the interpretation of the Agreement.

41. Time to Bring Claim. No claim which concerns a dispute arising under this Agreement may be commenced by Customer more than one year after the Services are performed.

42. Equipment Management Electronic Data Sharing Product Link™ and VisionLink® User Agreement/Privacy Notice. For machines equipped with Product Link™ and VisionLink® a separate Equipment Management Electronic Data Sharing Product Link™ and VisionLink® User Agreement/Privacy Notice shall be provided. Customer agrees to be bound by such agreements.

43. Parts Core Agreements. That the purchase price of all parts cores ("Cores") not paid in full at the time of delivery is provided to Customer on credit, which purchase price may be redeemed in part or in full by Customer by returning Cores in a condition that meets Hawthorne’s inspection criteria. Customer agrees that it will be liable for and shall pay the full purchase price of any Cores not returned to Hawthorne. Customer also agrees that the portion of the purchase price that Customer may redeem is dependent on the condition of the Cores returned to Hawthorne, which will be determined by Hawthorne in its sole discretion.

44. Title to Goods. Hawthorne retains title to goods until Customer performs all of its obligations under the Agreement. In order to secure payment and performance of the obligations, Customer hereby grants to Hawthorne a security interest in the purchased goods and property (collectively, the “Goods”) and all proceeds from the sale or disposition of the Goods. In the event that Customer fails to fully perform its obligations described in this Agreement to secure the performance of all of Customer’s obligations under this Agreement.

45. Equipment. Should the Agreement include the purchase of machines or equipment from Hawthorne, when the machines necessary for the Agreement have been identified and appropriated, Customer agrees on demand to execute and deliver to Hawthorne all notes, assignments, deeds, conveyances, and other instruments necessary to create in favor of Hawthorne a valid and enforceable security interest in the equipment and property described in the transaction. In the event Customer fails to execute and deliver said notes, contracts, security agreements and financing statements to Hawthorne, the entire balance of the purchase price of the equipment shall, at Hawthorne’s option, become immediately due and payable.

46. Transportation. Customer understands and consents to Hawthorne’s use of third party vendors to provide transportation services (“Transportation Company”). Customer also agrees that Hawthorne’s responsibility for shipment of any goods ceases upon delivery of said goods to a Transportation Company, and any claims for shortages, delays or damages occurring thereafter shall be made timely by Customer directly to the Transportation Company.

47. Nonconforming Goods. Should the Agreement include Customer purchasing machines or equipment from Hawthorne, Customer shall have the right to reject nonconforming goods, or a nonconforming tender only if such nonconformity impairs the value of the goods by more than ten (10%) percent of the contract price. Customer’s failure to give notice of any claim within ten (10) days from the date of delivery shall constitute an unqualified acceptance of the goods and a waiver by Customer of all claims with respect to the goods. Hawthorne shall have no duty to inspect the goods for defects in workmanship or materials. Customer shall give notice to Hawthorne within ten (10) days of the discovery of the nonconformity of its intent to cure. Any such cure must occur within fourteen (14) days of the notification of the nonconformity.

48. Used Goods. Subject to Section 33 (Dispute Resolution), Section 34 (Enforcement), Section 35 ( Severability), Section 36 (Amendments), and Section 37 (No Waiver), if Customer is purchasing used machinery, parts, or equipment, all such used machinery, parts, and equipment are sold “AS IS”, WITH ALL FAULTS”. HAWTHORNE MAKES NO WARRANTY RELATED TO THE TITLE OF THE GOODS FOR SALE UNDER THIS AGREEMENT, NOR TO THE RIGHTFUL TRANSFER OF THE GOODS, NOR TO THE EXISTENCE OF SECURITY INTEREST, LIENS, OR OTHER ENCUMBRANCES AGAINST THE GOODS. HOWEVER, if Hawthorne’s failure to notify Customer within ten (10) days of the discovery of the nonconformity of its intent to cure. Any such cure must occur within fourteen (14) days of the notification of the nonconformity.

49. Assumption of Risk. Customer hereby acknowledges and understands that there are risks associated with the service and testing of its equipment, which include but are not limited to damage to Customer’s equipment during routine testing. Customer agrees to assume these risks and waives any and all rights to seek compensation, restitution, or indemnification for any injuries, claims, or damages that might arise from said damage. Customer also agrees and understands that during the testing and/or servicing of Customer’s equipment, the equipment will not be available for use. Customer hereby agrees to assume this risk and waives any and all rights to seek compensation, restitution, or indemnification for any injuries, claims, or damages that might arise from these circumstances. Hawthorne and Customer agree that Hawthorne will not be liable for any damage caused to Customer’s equipment during the rendering of any part of the Services that requires Hawthorne to test the Customer’s equipment.

50. Storage. Should Hawthorne be in possession of equipment, parts, or merchandise related to the Services prior to the expected date of delivery contemplated by the Agreement, Customer agrees to pay Hawthorne a monthly storage fee in an amount to be determined by Hawthorne taking into account the size and nature of the equipment or merchandise stored on Customer’s behalf. Customer is entitled to possession of said equipment at any time upon giving Hawthorne reasonable notice of not less than five (5) business days. Customer agrees that Customer bears all risk of loss or damage to its equipment while stored by Hawthorne. Customer agrees to cover its equipment under its own property damage insurance policy and to name Hawthorne as an additional insured. If Customer fails to pay in full for the Services or take possession of its property following thirty (30) days’ written notice, Hawthorne may sell or otherwise dispose of Customer’s property as it sees fit and apply any proceeds to then outstanding balance.

51. Survival. Provisions of this Agreement that by their nature should apply beyond their terms will remain in force after any termination or expiration of this Agreement including, but not limited to, Section 18 (Disclaimer of Warranties), Section 19 (Limitation of Liability), Section 20 (Mutual Indemnification), Section 21 (Indemnification Procedure), Section 22 (Insurance), Section 23 (Injunction), Section 24 (Confidentiality), Section 31 (Applicable Law/Venue), Section 32 (Waiver of Jury Trial), Section 33 (Dispute Resolution), Section 34 (Enforcement), and Section 51 (Survival).

52. Consent to Share Customer Data. By accepting the Agreement, Customer consents to Hawthorne sharing information relating to or generated pursuant to this Agreement, or the services provided hereunder, with its subsidiaries, sister companies, or vendors. Customer acknowledges and agrees that it is directing Hawthorne to intentionally disclose such information, including Customer’s personal information, if any, to Caterpillar Inc. and its affiliates, subsidiaries, sister companies, or vendors and agrees that such disclosure is not a sale received for valuable consideration.