

Posted/Revised: June 1, 2017

## TERMS OF SERVICE

**PLEASE READ THESE TERMS OF SERVICE CAREFULLY. BY CLICKING “ACCEPTED AND AGREED TO,” CUSTOMER AGREES TO THESE TERMS AND CONDITIONS.**

These Terms of Service along with and including the Policies identified in Section 1 (*Definitions*) below constitute an agreement (this “Agreement”) by and between Business BrainScience LLC, a Limited Liability Company and its members and shareholders as individuals, whose principal place of business is Fresno, California (“Vendor”) and the corporation, LLC, partnership, sole proprietorship, individual, or other entity executing this Agreement (“Customer”). The Vendor and Customer are sometimes referred to individually as a “Party” and collectively as the “Parties”.

This Agreement is effective as of the date Customer clicks “Accepted and Agreed To” (the “Effective Date”). Customer’s use of and Vendor’s provision of the *ThruThink<sup>SM</sup>* website and the *ThruThink<sup>SM</sup>* business analysis platform (Vendor’s System as defined below in Section 1.16 (*System*)) are governed by this Agreement, as are Customer’s authorizations to grant its own customers use of the System.

EACH PARTY ACKNOWLEDGES THAT IT HAS READ THIS AGREEMENT, UNDERSTANDS IT, AND AGREES TO BE BOUND BY ITS TERMS, AND THAT THE PERSON ACCEPTING ON ITS BEHALF HAS BEEN AUTHORIZED TO DO SO. THE PERSON ACCEPTING THIS AGREEMENT ON CUSTOMER’S BEHALF REPRESENTS THAT HE OR SHE HAS THE AUTHORITY TO BIND CUSTOMER TO THESE TERMS AND CONDITIONS.

**1. DEFINITIONS.** The following terms shall have the following meanings whenever used in this Agreement.

- 1.1. “Acceptable Use Policy” (AUP) means Vendor’s acceptable use policy incorporated in this Agreement and currently posted at ThruThink.com. [Acceptable Use Policy \(AUP\)](#)
- 1.2. “Browser” means the software application used for retrieving, presenting and traversing information resources on the internet used by the User.
- 1.3. “Customer Data” means data, in electronic form, entered, inputted or collected into or through the System by or from Customer, including without limitation by Customer’s Sub Users or by other Users.
- 1.4. “Documentation” means Vendor’s help dialog, customer service responses and Chat Responses related to use of the System.
- 1.5. “Fees” mean the Subscription Fee, the Quick Deal Fee and any other fees charged by Vendor.
- 1.6. “Master Account” means an account that permits sub users (Sub Users)
- 1.7. “Privacy Policy” means Vendor’s privacy policy, currently posted at ThruThink.com. [Privacy Policy](#)
- 1.8. “Quick Deal” means a one-time only use of the Quick Deal portion of the System.
- 1.9. “Quick Deal Fee” means the fee charged for the Quick Deal.
- 1.10. “Service” means Customers or Sub Users use of the System
- 1.11. “Service Level Agreement” (SLA) means Vendor’s standard service level agreement incorporated in this Agreement and posted at ThruThink.com. [Service Level Agreement \(SLA\)](#)

- 1.12. "Sub User" means any of Customer's employees, clients or customers or other third parties Customer gives access to the System, including without limitation such companies' agents and employees.
- 1.13. "Sub User Agreement" means such terms of service as Vendor may require for users of the System who are not signed up as Customers incorporated in this Agreement and posted at ThruThink.com. [Sub User Agreement](#)
- 1.14. "Subscription" means the permission the Vendor provides the Customer to access the System during the Term or in the case of the Quick Deal, the one-time only access.
- 1.15. "Subscription Fee" means the fee charged by the Vendor for the Subscription.
- 1.16. "System" The System means the website ThruThink.com and the *ThruThink*<sup>SM</sup> business analysis platform including its Documentation, components, design, software code, user interface, architecture, methodology, features, functions, formulas, calculations, charts, schematics and methods of analysis, business logic and reports generated by the System.
- 1.17. "Term" is defined in Section 11.1 (*Term*) below and includes any renewal periods.
- 1.18. "Third Party Websites" refers to links in the Vendors website that lead to a third party website and the compensation thereof, see Sections 8.7 and 8.8 (*Third Party Websites and Compensation*).
- 1.19. "User" means the Customer and/or any company or individual who uses the System through Customer's Subscription or passwords or on Customer's behalf or, whether authorized or not, including without limitation Customer's Sub Users.

## **2. THE SYSTEM.**

- 2.1. Use of the System. During the Term, Customer may access and use the System and Service pursuant to: (a) the terms of any outstanding Subscription, including such features and functions as the Subscription allows or requires; and (b) Vendor's policies posted on its Website at ThruThink.com, as such policies may be updated from time to time.
- 2.2. Browser. The System is best accessed using the Google Chrome browser.
- 2.3. Service Levels. Vendor shall provide the remedies listed in the SLA for any failure of the System listed in the SLA. Such remedies are Customer's sole remedy for any failure of the System, and Customer recognizes and agrees that if the SLA does not list a remedy for a given failure, it has no remedy. Credits issued pursuant to the SLA apply to outstanding or future invoices only and are forfeit upon termination of this Agreement. Vendor is not required to issue refunds or to make payments against such credits under any circumstances, including without limitation after termination of this Agreement.
- 2.4. Documentation. The Documentation is solely for the use by the Customer as necessary to support Users' use of the System. Any suggestions or advice contained in the Documentation is for the Customers convenience and does not constitute advice or recommendations as to the outcome of the Customers or Sub Users business.
- 2.5. Chat Responses. The system may provide a Chat response system. If such a feature is provided, all Chat dialog responses from *ThruThink*<sup>SM</sup> are for the Users convenience and do not constitute advice or recommendations as to the outcome of the Customers or Sub Users business.

- 2.6. System Revisions. Vendor may revise System features and functions or the SLA at any time, including without limitation by removing such features and functions or reducing service levels. If any such revision to the System materially reduces features or functionality provided pursuant to a Subscription, Customer may within 30 days of notice of the revision terminate such Subscription, without cause, or terminate this Agreement without cause.
- 2.7. Customer's Employees and/or Clients (Sub Users). Subject to the provisions below of this Section 2.7 (*The System-Sub Users*), Customer may authorize Sub Users to access and use the System in such numbers and according to such restrictions as are set forth in the applicable Subscription. Customer shall: (a) provide access to the System through the Customers Master Account and; (b) each Sub User will be required to read and accept the Sub Users Terms and Conditions which will incorporate the Customers Terms and Conditions and; (c) each Sub User will be required to provide complete name and contact information. Customer shall make no representations or warranties regarding the System or any other matter, to Sub User or any other third party, from or on behalf of Vendor, and Customer shall not create or purport to create any obligations or liabilities for Vendor. Vendor may reject any proposed Customer's Sub Users for any reason that does not violate applicable law, in its sole discretion. Customer shall be jointly and severally liable to Vendor for Customer's Sub Users compliance with this Agreement as well as the Sub User Agreement. Vendor shall have no obligation to provide support or other services, SLA remedies, or other remedies to each of Customers individual Sub Users.
- 3. SYSTEM FEES.** Customer shall pay Vendor the Subscription Fee or the Quick Deal Fee set forth in each Subscription or Quick Deal for the applicable Term. With a Subscription, prior to the expiration of the Term, Vendor will provide the Customer a 30 day notice of renewal for another Term. Unless the Customer notifies Vendor that it does not desire to renew within that 30 day period, the Subscription will automatically renew and the Subscription Fee will be billed using the same payment information on file with the Vendor. If the payment information is not current at the time of renewal, Customer will be notified and will have 10 days to pay until the Subscription will be subject to Termination. Vendor will not be required to refund the Subscription Fee under any circumstances. With the Quick Deal, it is a one-time only use of the System with no automatic renewal provisions.
- 3.1. Credit Card payments. Credit card payments will be accepted as payment of the Fees using an outside payment service. Vendor will not have access to or knowledge of the Customers credit card or payment information. The Vendor will use a service that is commonly accepted in the industry for processing such payments, however Vendor makes no warranties or guarantees regarding the security of the outside payment service. The Customer may request at the time of initiating a Subscription the name of the credit card processing service being used by the Vendor.
- 3.2. Taxes. All Fees charged by Vendor exclude any sales, use, value added fees or other taxes or fees imposed by any City, County, State, Province, Region or Country (Government Authorities) on the use of the System or Service provided by the Vendor to the Customer. If any such fees or taxes are assessed or become due either by the Vendor's Government Authorities or by the Customers Government Authorities, the Customer will be responsible for paying those applicable fees or taxes that apply to the Subscription or Quick Deal or the provision of the Vendors Service to the Customer. If applicable, Vendor may invoice Customer for any such fees or taxes and will be due and payable within 10 days of notice by e-mail from Vendor. Nonpayment of such fees will be cause for Termination of this Agreement for Cause by the Vendor.

#### **4. CUSTOMER DATA & PRIVACY.**

- 4.1. Customer Data. "Customer Data" means all information entered or provided by the User to be processed and calculated by Vendors System and the resulting calculation results, all saved and stored by User, Customer or on Customer's behalf on Vendors server, computers or other electronic media or provided to Vendor for such processing or storage, as well as any information derived from such information. Customer Data includes, without limitation: (a) information provided to, entered or inputted into Vendors System by the Customer, information on paper or other non-electronic media provided to Vendor for computer processing or storage, or information formerly on electronic media; (b) information and data inputs provided to Vendor by Customers Sub Users or other users or by other third parties; and (c) personally identifiable information from Customers, Sub Users, or other third parties.
- 4.2. Use of Customer Data. Unless it receives Customer's prior written consent, Vendor: (a) shall not access, process, or otherwise use Customer Data other than as necessary to facilitate the System; and (b) shall not intentionally grant any third party access to Customer Data, including without limitation Vendor's other customers, except subcontractors that are subject to a reasonable nondisclosure agreement. Notwithstanding the foregoing, Vendor may disclose Customer Data as required by applicable law or by proper legal or governmental authority. Vendor shall give Customer prompt notice of any such legal or governmental demand and reasonably cooperate with Customer in any effort to seek a protective order or otherwise to contest such required disclosure, at Customer's expense.
- 4.3. Privacy Policy. The Privacy Policy applies only to the System and does not apply to any third party website or service linked to the System or recommended or referred to through the System or by Vendor's staff. The Privacy Policy is incorporated in this Agreement and posted at [ThruThinink.com](http://ThruThinink.com) [Privacy Policy](#)
- 4.4. Risk of Exposure. Customer recognizes and agrees that hosting data online involves risks of unauthorized disclosure or exposure and that, in accessing and using the System, Customer assumes such risks. Vendor offers no representation, warranty, or guarantee that Customer Data will not be exposed or disclosed through errors or the actions of third parties.
- 4.5. Data Accuracy. Vendor shall have no responsibility or liability for the accuracy of data entered, inputted or uploaded to the System by Users, including without limitation Customer Data and any other data uploaded by Users.
- 4.6. Data Deletion. Vendor may permanently erase Customer Data if Customer's Subscription is delinquent, suspended, or terminated for 30 days or more.
- 4.7. Excluded Data. Customer represents and warrants that Customer Data does not and will not include, and Customer has not and shall not enter, input, upload or transmit to Vendor's computers or other media, any data that is fraudulent or illegal ("Excluded Data") regulated pursuant to any law, rule, order or regulation of any governmental entity having jurisdiction over such data (the "Excluded Data Laws"). CUSTOMER RECOGNIZES AND AGREES THAT: (a) VENDOR HAS NO LIABILITY FOR ANY FAILURE TO PROVIDE PROTECTIONS SET FORTH IN THE EXCLUDED DATA LAWS OR OTHERWISE TO PROTECT EXCLUDED DATA; AND (b) VENDOR'S SYSTEMS ARE NOT INTENDED FOR MANAGEMENT OR PROTECTION OF EXCLUDED DATA AND MAY NOT PROVIDE ADEQUATE OR LEGALLY REQUIRED SECURITY FOR EXCLUDED DATA.
- 4.8. Aggregate & Anonymized Data. Notwithstanding the provisions of this Section 4 (*Customer Data*

and Privacy), Vendor may use, reproduce, sell, publicize, or otherwise exploit Aggregate Data in any way, in its sole discretion. ("Aggregate Data" refers to Customer Data with the following removed: personally identifiable information and the names and addresses of Customer and any of its Users.)

- 4.9. Vendor Audit. Vendor may audit Customers use of the System and may suspend Customer's access to the System if Vendor finds in its sole discretion that Customer is violating any provision of this Agreement and or any accompanying agreements.

## **5. CUSTOMER'S RESPONSIBILITIES & RESTRICTIONS.**

- 5.1. Acceptable Use. Customer shall comply with the AUP. Customer shall not: (a) use the System for service bureau or time-sharing purposes or in any other way allow third parties to exploit the System, except Customer's Sub Users as specifically authorized by this Agreement and the provisions of the Subscription; (b) provide System passwords or other log-in information to any third party, except Customer's Sub Users as specifically authorized by this Agreement and ; (c) share non-public System features or content with any third party; or (d) access the System in order to build a competitive product or service, to build a product using similar ideas, features, functions or graphics of the System, or to copy any ideas, features, functions, calculations or graphics of the System. In the event that it suspects any breach of the requirements of this Section 5.1 (*Acceptable Use*), including without limitation by Users, Vendor may suspend User's access to the System without advanced notice, in addition to such other remedies as Vendor may have. Neither this Agreement nor the AUP requires that Vendor take any action against Customer or any User or other third party for violating the AUP, this Section 5.1 (*Acceptable Use*), or this Agreement, but Vendor is free to take any such action it sees fit.
- 5.2. Unauthorized Access. Customer shall take reasonable steps to prevent unauthorized access to the System, including without limitation by protecting its passwords and other log-in information. Customer shall notify Vendor immediately of any known or suspected unauthorized use of the System or breach of its security and shall use best efforts to stop said breach.
- 5.3. Compliance with Laws. In its use of the System, Customer shall comply with all applicable laws, including without limitation laws governing the protection of personally identifiable information and other laws applicable to the protection of Customer Data.
- 5.4. Sub Users; System Access. Customer is responsible and liable for: (a) Customer's Sub Users and other Users use of the System, including without limitation unauthorized User conduct and any User conduct that would violate the AUP or the requirements of this Agreement applicable to Customer; (b) any use of the System through Customer's Subscription, whether authorized or unauthorized; and (c) protecting access to the Customer's Subscription.

## **6. Intellectual Property (IP) & FEEDBACK.**

- 6.1. IP Rights to the System. Vendor retains all right, title, and interest in and to the System and this site, including without limitation all software used in this site and Vendor retains all right, title, and interest to provide the use of the System and all graphics, user interfaces, logos, and trademarks reproduced through the System and the site. This Agreement does not grant Customer any intellectual property license or rights in or to the System or any of its components. Customer recognizes that the System and its components are protected by United States of America and International copyright, trademark, service mark, patent, trade secret and other intellectual or proprietary rights laws.

- 6.2. Questions regarding the IP. Any questions regarding the IP rights to the System or any component or content of this site should be addressed to the *ThruThink*<sup>SM</sup> email: [support@thruthink.com](mailto:support@thruthink.com).
- 6.3. Feedback. Vendor has not agreed to and does not agree to treat as confidential any Feedback that the User, Customer, Customer's Clients, or other Users provide to Vendor, and nothing in this Agreement or in the Parties' dealings arising out of or related to this Agreement will restrict Vendor's right to use, profit from, disclose, publish, keep secret, or otherwise exploit Feedback. Vendors use of Feedback will be without compensating or crediting Customer or the Customer's Client or other User in question. ("Feedback" refers to any recommendation of System by the User or suggestion or idea for improving or otherwise modifying any of Vendor's products or services.)

**7. CONFIDENTIAL INFORMATION.** "Confidential Information" refers to the following items Vendor discloses to Customer or the Customer becomes aware of while using the System: (a) any document Vendor marks "Confidential"; (b) any information Vendor orally designates as "Confidential" at the time of disclosure, provided Vendor confirms such designation in writing within 30 business days; (c) the design, software code, user interface, architecture, methodology, features, functions, formulas, calculations, schematics and methods of analysis of the System, whether or not marked or designated confidential; (d) the Documentation; and (f) any other nonpublic, sensitive information disclosed by Vendor, whether or not marked or designated "Confidential." Notwithstanding the foregoing, Confidential Information does not include information that: (i) is in Customer's possession at the time of disclosure; (ii) is independently developed by Customer without use of or reference to Confidential Information; (iii) becomes known publicly, before or after disclosure, other than as a result of Customer's improper action or inaction; or (iv) is approved for release in writing by Customer.

- 7.1. Nondisclosure. Customer shall not use Confidential Information for any purpose other than its intended purpose within the System (the "Purpose"). If the Customer learns of or becomes aware of any Confidential Information, the Customer: (a) shall not disclose, copy or distribute any Confidential Information in any manner; including to any employee or contractor of Customer or to any other third party without Vendor's prior written consent. Without limiting the generality of the foregoing, Customer shall protect Confidential Information with the same degree of care it uses to protect its own confidential information of similar nature and importance, but with no less than reasonable care. Customer shall promptly notify Vendor of any misuse or misappropriation of Confidential Information that comes to Customer's attention. Notwithstanding the foregoing, Customer may disclose Confidential Information as required by applicable law or by proper legal or governmental authority. Customer shall give Vendor prompt notice of any such legal or governmental demand and reasonably cooperate with Vendor in any effort to seek a protective order or otherwise to contest such required disclosure, at Vendor's expense.
- 7.2. Injunction. Customer agrees that breach of this Section 7 (*Confidential Information*) would cause Vendor irreparable injury, for which monetary damages would not provide adequate compensation, and that in addition to any other remedy, Vendor will be entitled to injunctive relief against such breach, threatened breach or interference, without proving actual damage or posting a bond or other security.
- 7.3. Termination & Return. With respect to each item of Confidential Information, even upon expiration of the Subscription or termination of the Customers use of the System by the Vendor, the obligations of Section 7.1 (*Nondisclosure*) above shall continue, including but not limited to

noninterference and remedies for breach in perpetuity after the termination of this Agreement. Upon termination of this Agreement, Customer shall disclose to Vendor any Confidential Information in Customers possession and certify, in writing, the destruction thereof.

- 7.4. Retention of Rights. This Agreement does not transfer any interest or ownership of the System or any Confidential Information or grant a license thereto. Vendor will retain all right, title, and interest in and to all Confidential Information.

## **8. REPRESENTATIONS & WARRANTIES.**

- 8.1. From Vendor. Vendor represents and warrants that it is the owner of the System and of each and every component, or where the component is supplied by another vendor, is believed to be the recipient of a valid license thereto, including but not limited to the Confidential Information described in Section 7 (*Confidential Information*), and that it has and will maintain the full power and authority to grant the rights granted in this Agreement without the further consent of any third party. Vendor's representations and warranties in the preceding sentence do not apply to use of the System in combination with hardware or software not provided by Vendor. In the event of a breach of the warranty in this Section 8.1 (*Representations and Warranties from Vendor*), Vendor, at its own expense, will promptly take one of the following actions: (a) secure for Customer the right to continue using the System; (b) replace or modify the System to make it non-infringing; (c) terminate the infringing features of the System and refund to Customer any prepaid Fees for use of the System that depend on such features, in proportion to the portion of the Term left after such termination; or (d) terminate the use of the System. In conjunction with Customer's right to terminate for breach where applicable, the preceding sentence states Vendor's sole obligation and liability, and Customer's sole remedy, for breach of the warranty in this Section 8.1 (*Representations and Warranties from Vendor*) and for potential or actual intellectual property infringement by the System.

8.2. From Customer.

- (a) *Re Customer Itself*. Customer represents and warrants that: (i) it has the full right and authority to enter into, execute, and perform its obligations under this Agreement and that no pending or threatened claim or litigation known to it would have a material adverse impact on its ability to perform as required by this Agreement; (ii) it has accurately identified itself and it has not provided any inaccurate information about itself to or through the System; (iii) it is a corporation, individual 18 years or older or the sole proprietorship of an individual 18 years or older except for Class Room Accounts, see Subscription Accounts at Vendors website; and (iv) (for Classroom Accounts that are under the supervision of an accredited school (as defined in its general educational category), the age requirement is 16 years or older, or (v) another entity authorized to do business pursuant to applicable law.
- (b) *Re Customer's Sub Users*. Customer represents and warrants that Customer will allow Sub User access only after purchasing the appropriate Subscription that includes a Master Account that allows multiple people within the account and to the best of its knowledge: (i) each Customer's Sub Users will have the full right and authority to enter into, execute, and perform its obligations as required under this Agreement and the Sub User Agreement, with no pending or threatened claim or litigation that would have a material adverse impact on its ability so to perform; (ii) Customer will insure that each of Customer's Sub Users will sign up to use the System under the Customers Master Account and will not provide any inaccurate information about a Customer's Sub User or other User to or through the System; (iii) each

Customer's Sub User will be an individual 18 years or older; and (iv) (for Classroom Accounts that are under the supervision of an accredited school (as defined in its general educational category)).

- 8.3. Warranty Disclaimers. Except to the extent set forth in the SLA and in Section 8.1 (*Representations & Warranties from Vendor*) above, CUSTOMER ACCEPTS THE SYSTEM "AS IS" AND AS AVAILABLE, WITH NO REPRESENTATION OR WARRANTY OF ANY KIND, EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, ACCURACY OR APPLICABILITY OF THE DOCUMENTATION, OUTCOME OF CUSTOMERS OR USERS BUSINESS OR DEAL, OR ANY IMPLIED WARRANTY ARISING FROM STATUTE, COURSE OF DEALING, COURSE OF PERFORMANCE, OR USAGE OF TRADE. WITHOUT LIMITING THE GENERALITY OF THE FOREGOING: (a) VENDOR HAS NO OBLIGATION TO INDEMNIFY OR DEFEND CUSTOMER OR USERS AGAINST CLAIMS RELATED TO INFRINGEMENT OF INTELLECTUAL PROPERTY; (b) VENDOR DOES NOT REPRESENT OR WARRANT THAT THE SYSTEM WILL PERFORM WITHOUT INTERRUPTION OR ERROR; AND (c) VENDOR DOES NOT REPRESENT OR WARRANT THAT THE SYSTEM IS SECURE FROM HACKING OR OTHER UNAUTHORIZED INTRUSION OR THAT CUSTOMER DATA WILL REMAIN PRIVATE OR SECURE.
- 8.4. Forward Looking Projections. The System uses Customer Data and presents calculations and resulting information in a forward looking manner for up to a 20 year period including but not limited to reports such as balance sheets, income statements, cash flows and other financial information (Forward Looking Projections). Forward Looking Projections are based on the Customer Data as entered by the User and are neither historical facts nor assurances of future performance. There are inherent risks in any business venture and the System only makes calculations using the Customer Data and does not attempt to reflect the inherent uncertainties and risks of the future. The Forward Looking Projections are estimates and approximations and do not constitute accounting services or advice. User accepts full responsibility for the Forward Looking Projections and Vendor makes no representation, warranties or guarantees about the outcome of Users business.
- 8.5. ThruThink Evaluation<sup>SM</sup> and ThruThink Deal Score<sup>SM</sup>. The System incorporates a *ThruThink Evaluation<sup>SM</sup>* and *ThruThink Deal Score<sup>SM</sup>*. The evaluation and deal score involve proprietary formulas, algorithms and concepts. They are based on the Customer Data and: (a) incorporate the Forward Looking Projections described in Section 8.4 (*Forward Looking Projections*); (b) do not constitute investment advice or opinions by the Vendor in any manner; and (c) do not provide or make any representation, warranties or guarantees about the outcome or suitability of Users business.
- 8.6. Calculation Errors and Glitches. The System has thousands of potential User Inputs. While the Vendor has performed extensive testing, there is an infinite amount of combinations that could be made with the User Inputs and there is a risk that there may be calculation errors or glitches within the System. The User acknowledges and assumes this risk by agreeing to this Agreement and the Vendors liability for any calculation error or glitch is limited by the provisions in Section 10.1 (*Dollar Cap*) below.
- 8.7. Third Party Web Sites; Third Party Services; No Endorsement Implied. Vendor's site may contain links to other web sites owned by third parties (Third Party Sites). The Customer should understand that clicking on these sites will take the Customer to the Third party Sites over which the Vendor has no control or responsibility. The vendor is not responsible for any activity



or actions that result from the Customer clicking on the link to the Third Party Site. In addition, the Customer may also have the ability to log in to third party services (Third Party Services) through the Vendors site to Customer accounts provided by the third parties. The Vendor is not responsible for any activity or events that happens in the Third Party Sites or with the Third Party Services even if Customer is logged in thru Vendors site. It is the Customer's responsibility to review and comply with the Third Party's Terms of Service and approve all activity and occurrences that happens with the Third Party Site and Third Party Services.

- 8.8. Third Party Compensation. In most instances, the Vendor is compensated by the third party for including a link to or advertising for the Third Party Sites contained in the Vendors website. Acceptance of compensation or including a third party link on the Vendors site should not be construed as an endorsement or approval by the Vendor of the Third Party Site or its products or services.

**9. INDEMNIFICATION.** Customer shall defend, indemnify, and hold harmless Vendor and the Vendor Associates (as defined below) against any "Indemnified Claim," meaning any claim, suit, or proceeding arising out of or related to User's alleged or actual use of, misuse of, or failure to use the System, including without limitation: (a) any claims by User, Customer, Customer's Sub Users or other Users (b) any claims related to Errors or Glitches in the System (Section 8.6-*Calculation Errors and Glitches*) (c) claims related to unauthorized disclosure or exposure of personally identifiable information or other private information, including Customer Data; (d) claims related to infringement or violation of a copyright, trademark, trade secret, or privacy or confidentiality right by written material, images, logos or other content uploaded to the System through Customer's Subscription, including without limitation the Customer Data; and (e) claims that use of the System through Customer's Subscription, including by Customer's Sub Users or other Users, harasses, defames, or defrauds a third party or violates the CAN-Spam Act of 2003 or any other law or restriction on electronic advertising. Indemnified Claims include, without limitation, claims arising out of or related to Vendor's negligence. Customer's obligations set forth in this Section 9 (*Indemnification*) include retention and payment of attorneys and payment of court costs, as well as settlement at Customer's expense and payment of judgments. Vendor will have the right, not to be exercised unreasonably, to reject any settlement or compromise that requires that it admit wrongdoing or liability or subjects it to any ongoing affirmative obligations. (The "Vendor Associates" are Vendor's officers, directors, members, shareholders, parents, subsidiaries, agents, successors, and assigns.)

#### **10. LIMITATION OF LIABILITY.**

- 10.1. Dollar Cap. TO THE FULLEST EXTENT PERMITTED BY LAW, IN NO EVENT WILL THE VENDOR'S LIABILITY ARISING OUT OF OR RELATED TO THIS AGREEMENT EXCEED THE REMAINING AMOUNT OF THE CURRENT SUBSCRIPTION FEE PAID BY THE CUSTOMER PRORATED BY THE REMAINING AMOUNT OF THE SUBSCRIPTION PERIOD. IF THERE IS NO REMAINING SUBSCRIPTION PERIOD OR IN THE CASE OF THE QUICK DEAL, THE DOLLAR CAP IS ZERO.
- 10.2. Exclusion of Consequential Damages. IN NO EVENT WILL VENDOR BE LIABLE TO CUSTOMER FOR ANY CONSEQUENTIAL, INDIRECT, SPECIAL, INCIDENTAL, OR PUNITIVE DAMAGES ARISING OUT OF THE USE OF THE SYSTEM OR RELATED TO THIS AGREEMENT.
- 10.3. Clarifications & Disclaimers. THE LIABILITIES LIMITED BY THIS SECTION 10 (*Limitations of Liability*) APPLY: (a) TO LIABILITY FOR VENDORS NEGLIGENCE; (b) REGARDLESS OF THE FORM OF ACTION, WHETHER IN CONTRACT, WARRANTY, TORT, STRICT PRODUCT LIABILITY, OR OTHERWISE; (c) EVEN IF VENDOR IS ADVISED IN ADVANCE OF THE POSSIBILITY OF THE DAMAGES IN QUESTION

AND EVEN IF SUCH DAMAGES WERE FORESEEABLE; AND (d) EVEN IF CUSTOMER'S REMEDIES FAIL OF THEIR ESSENTIAL PURPOSE. If applicable law limits the application of the provisions of this Section 10 (*Limitations of Liability*), Vendor's liability will be limited to the maximum extent permissible. For the avoidance of doubt, Vendor's liability limits and other rights set forth in this Section 10 (*Limitations of Liability*) apply likewise to Vendor's affiliates, licensors, suppliers, advertisers, agents, sponsors, directors, officers, employees, consultants, and other representatives.

## **11. Term & Termination.**

- 11.1. Term. The term of this Agreement (the "Term") shall commence on the Effective Date and continue for the period set forth in the Subscription. Thereafter, the Term will renew for successive periods, unless either party refuses such renewal for any reason by written notice within 30 or more days before the renewal date or unless either party terminates this Agreement for cause as set forth in this Agreement.
- 11.2. Termination for Cause. Either party may terminate this Agreement for the other's material breach by written notice, effective in 10 days unless the other party first cures such breach. Without limiting Vendor's other rights and remedies, Vendor may suspend or terminate a Customer's, Sub Users or other User's access to the System at any time, without advanced notice, if the Customer has any past due invoices from Vendor or if Vendor, in its sole discretion, reasonably concludes such Customer or Customer's Sub User or other User has conducted itself in a way that is not consistent with the requirements of this Agreement or the AUP or in a way that subjects Vendor to potential liability.
- 11.3. Termination for Convenience. The Vendor may terminate this Agreement for any reason or no reason at its convenience. If this Agreement is terminated by the Vendor as set forth in this Section 11.3 (*Termination for Convenience*), the Vendor will refund to the Customer, the amount of Subscription less the prorated portion for the period of the Term used.
- 11.4. Effects of Termination. Upon termination of this Agreement, Customer access to the System will be terminated. In the event access is not terminated, Customer shall cease all use of the System. The following provisions will survive termination or expiration of this Agreement: (a) any obligation of Customer to pay Fees incurred before termination; (b) Sections 6 (*IP & Feedback*), 7 (*Confidential Information*), 8.3 (*Warranty Disclaimers*), 9 (*Indemnification*), and 10 (*Limitation of Liability*); and (c) any other provision of this Agreement that must survive to fulfill its essential purpose. Upon Termination of this Agreement, Customer Data will be subject to Data Deletion under Section 4.6 (*Data Deletion*).

## **12. MISCELLANEOUS.**

- 12.1. Independent Relationship. The Parties are independent of each other and will so represent themselves in all regards. Neither party is the agent of the other and cannot make commitments on the other's behalf. The Parties agree that no Vendor employee or contractor will be an employee of Customer without written approval by both Parties.
- 12.2. Notices. Vendor may send notices pursuant to this Agreement to Customer's email contact points provided by Customer, and such notices will be deemed received 24 hours after they are sent. Customer may send notices pursuant to this Agreement to the email [support@thruthink.com](mailto:support@thruthink.com), and such notices will be deemed received 72 hours after they are sent.

- 12.3. Force Majeure. No delay, failure, or default, other than a failure to pay Fees when due, will constitute a breach of this Agreement to the extent caused by acts of war, terrorism, hurricanes, earthquakes, other acts of God or of nature, strikes or other labor disputes, riots or other acts of civil disorder, embargoes, or other causes beyond the performing party's reasonable control.
- 12.4. Assignment & Successors. Customer may not assign this Agreement or any of its rights or obligations hereunder without Vendor's express written consent. Except to the extent forbidden in this Section 12.4 (*Assignment & Successors*), this Agreement will be binding upon and inure to the benefit of the Parties' respective successors and assigns.
- 12.5. Severability. To the extent permitted by applicable law, the Parties hereby waive any provision of law that would render any clause of this Agreement invalid or otherwise unenforceable in any respect. In the event that a provision of this Agreement is held to be invalid or otherwise unenforceable, such provision will be interpreted to fulfill its intended purpose to the maximum extent permitted by applicable law, and the remaining provisions of this Agreement will continue in full force and effect.
- 12.6. No Waiver. Neither party will be deemed to have waived any of its rights under this Agreement by lapse of time or by any statement or representation other than by an authorized representative in an explicit written waiver. No waiver of a breach of this Agreement will constitute a waiver of any other breach of this Agreement.
- 12.7. Dispute Resolution. Before filing a claim against the Vendor, the Customer agrees to contact the Vendor at [support@thruthink.com](mailto:support@thruthink.com) and attempt to resolve any issues informally first through direct discussions with the Vendor. If the Customer and Vendor cannot resolve a dispute or claim arising out of or related to the use of the System or this Agreement, all formal disputes must be resolved through mediation or arbitration as described in Section 12.8 (*Mediation and Arbitration*) below.
- 12.8. Mediation and Arbitration. The Customer agrees to resolve any issues or claims with the Vendor, the use of the System or this Agreement that cannot be informally resolved, through mediation and if it still cannot be resolved, through final and binding arbitration and the Customer expressly waives trial by jury, except as set forth below. The Parties agree to first try and settle the dispute or claim by mediation administered by the American Arbitration Association under its Commercial Mediation Procedures, with the Parties sharing equally the costs of mediation, before resorting to arbitration. The Parties further agree that any unresolved controversy or claim arising out of use of the System or relating to this Agreement, or breach thereof, shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial Arbitration Rules and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof. Any arbitration must be commenced by filing a demand for arbitration within 90 days after the date the Customer knows of or reasonably should have known of the cause of the claim or dispute.

The arbitrator(s) must follow the provisions and intent of this Agreement and shall have substantial experience in intellectual property and cloud based software service. The place of arbitration shall be Fresno, California. The arbitration shall be conducted in English and governed by the laws of the State of California. Hearings will take place pursuant to the standard procedures of the Commercial Arbitration Rules that contemplate in person hearings. Time is of the essence for any arbitration under this agreement and arbitration hearings shall take place within 90 days of filing a demand and awards rendered within 120 days. Arbitrator(s) shall agree

to these limits prior to accepting appointment. Each party shall bear its own costs and expenses and an equal share of the arbitrators' and administrative fees of arbitration. The award of the arbitrators shall be accompanied by a reasoned opinion. Except as may be required by law, neither a party nor an arbitrator may disclose the existence, content, or results of any arbitration hereunder without the prior written consent of both Parties.

If for any reason this Section 12.8 (*Mediation and Arbitration*) does not or cannot apply to a dispute or claim, any judicial proceeding must be brought in accordance to Section 12.9 (*Choice of Law & Jurisdiction*).

- 12.9. Choice of Law & Jurisdiction. This Agreement will be governed solely by the internal laws of the State of California, United States of America, without reference to: (a) any conflicts of law principle that would apply the substantive laws of another jurisdiction to the Parties' rights or duties; (b) the 1980 United Nations Convention on Contracts for the International Sale of Goods; or (c) other international laws. The Parties consent to the personal and exclusive jurisdiction of the federal and state courts of Fresno, California, United States of America.
- 12.10. Conflicts. In the event of any conflict between this Agreement and any Vendor policy posted online, including without limitation the Sub Users Agreement, Privacy Policy, the Acceptable Use Policy or the Service Level Agreement, the terms of this Agreement will govern.
- 12.11. Construction. The Parties agree that the terms of this Agreement result from negotiations between them. This Agreement will not be construed in favor of or against either party by reason of authorship.
- 12.12. Technology Export. Customer shall not: (a) access or use the System or permit any third party to access or use the System in violation of any U.S. law or regulation; or (b) export any software provided by Vendor or otherwise remove it from the Vendors server. Without limiting the generality of the foregoing, Customer shall not permit any third party to access or use the System except in compliance with this Agreement and all applicable U.S. laws and regulations and maintain compliance with all U. S. laws and regulations regarding the export or use of software or sale of subscriptions for software in a country subject to a United States embargo or sanction.
- 12.13. Entire Agreement. This Agreement sets forth the entire agreement of the Parties and supersedes all prior or contemporaneous writings, negotiations, and discussions with respect to its subject matter. Neither party has relied upon any such prior or contemporaneous communications.
- 12.14. Amendment. Vendor may amend this Agreement from time to time by posting an amended version at its Website (Amendment Date). Such amendment will be deemed accepted upon the Users continued use of the System after the Amendment Date unless Customer first gives Vendor written notice of rejection of the amendment. In the event of such rejection, the Customer may terminate this Agreement pursuant to Section 11 (*Term & Termination*). User's continued use of the System following the Amendment Date of an amendment, will confirm Customer's consent thereto. This Agreement may not be amended in any other way except through a written agreement by authorized representatives of each party. Notwithstanding the foregoing provisions of this Section 12.14 (*Amendment*), Vendor may revise the Sub User Agreement, Privacy Policy, the Acceptable Use Policy and the Service Level Agreement at any time by posting a new version of either at the Website, and such new version will become effective on the date it is posted.