

# BALANCE INNOVATIONS, LLC

## TERMS OF USE

CUSTOMER'S SUBMISSION OF AN ORDER AND/OR CUSTOMER'S USE OF THE SERVICE, AS DEFINED BELOW, CONSTITUTES CUSTOMER'S CONSENT TO BE BOUND BY THESE TERMS OF USE ("TERMS") WITH BALANCE INNOVATIONS, LLC ("BALANCE INNOVATIONS") AS SET FORTH BELOW. IF YOU ARE ACCESSING THE SERVICE ON BEHALF OF A COMPANY OR CORPORATION, YOU REPRESENT AND AFFIRM THAT YOU HAVE THE AUTHORITY TO DO SO AND HAVE READ THESE TERMS AND AGREE TO BE BOUND BY THESE TERMS ON BEHALF OF SUCH COMPANY; IN SUCH INSTANCE, "CUSTOMER" INCLUDES YOU, YOUR COMPANY, ITS AFFILIATES, AND THE OFFICERS, DIRECTORS, MANAGERS, EMPLOYEES OR AGENTS OF ANY OF THEM. YOU MAY NOT ACCESS THE SERVICE IF YOU ARE A DIRECT COMPETITOR OF BALANCE INNOVATIONS, EXCEPT WITH BALANCE INNOVATIONS' PRIOR WRITTEN CONSENT.

1. **Definitions.** Capitalized terms not otherwise defined herein shall have the meanings set forth in this Section 1.
  - 1.1 **Administrative Credentials.** "Administrative Credentials" means company name, identification number, password, license or security key, security token, PIN, or other security code, method, technology or device, alone or in combination, used to verify Customer's authorization to access and use the Service.
  - 1.2 **Affiliate.** "Affiliate" means any entity controlled by, controlling, or under common control with a party to these Terms.
  - 1.3 **Authorized Users.** "Authorized Users" means Customer and any of its officers directors, managers, employees, or agents that are permitted under these Terms to access and use the Service.
  - 1.4 **Commencement Date.** "Commencement Date" means the date on which an Authorized User of Customer first uses a Credential to access the Service.
  - 1.5 **Computer.** "Computer" means a single-user PC system or other Internet-enabled device that is owned or operated by Customer and through which the Service is accessed by an Authorized User.
  - 1.6 **Customer.** "Customer" means the individual, organization or entity that is the grantee of the license described herein, and any subsidiaries, parent corporations, or Affiliates controlled by or under common control with such grantee and any officers, directors, managers, employees or agents of any of them.
  - 1.7 **Derivative Work.** "Derivative Work" means a work that is based upon the Service, such as a translation, or any other form in which the Service may be recast, transformed or adapted (including, without limitation, adaptations, elaborations, or other Modifications) which, as a whole, represents an original work of authorship, including, but not limited to, any revisions of the Service that use substantially the same or a recognizably similar audio/visual presentation or computer code(s) as used in the Service.
  - 1.8 **Documentation.** "Documentation" means user manuals, release notes, imbedded help, operating instructions and other information and materials provided by Balance Innovations to Customer in written or electronic form relating to the use of and/or operation of the Service.
  - 1.9 **Order.** "Order" means a written order for the Service and/or other services and/or hardware submitted to Balance Innovations by Customer pursuant these Terms.
  - 1.10 **Service.** "Service" includes the following items accessed by Customer, as provided by or on behalf of Balance Innovations: (a) any software and/or web interface provided by Balance Innovations, including all Derivative Works thereof, in whatever form (but excluding the source code version); (b) the Documentation; (c) all enhancements, versions, releases, modifications, updates, additions, translations, compilations, and other related software or documentation; and (d) all software, code, documentation, methods, or other items developed by Balance Innovations pursuant to a Statement of Work between Balance Innovations and Customer ("Professional Services").
  - 1.11 **Support and Maintenance.** "Support" means the Support Services described in Section 14 below, "Maintenance" means services provided by Balance Innovations in hosting, managing, operating, updating, enhancing, and/or modifying the Service.
  - 1.12 **User Credentials.** "User Credentials" means any user name, identification number, password, license or security key, security token, PIN or other security code, method, technology or device, alone or in combination, used by Customer to verify an individual's identity as an Authorized User.
2. **License to Use Service**
  - 2.1 **General License Rights.** Subject to the terms and conditions set forth herein, Balance Innovations hereby grants to Customer, as of the Commencement Date and for the agreed-upon period of time thereafter, a non-exclusive, non-transferable, revocable license to access and use the Service provided under these Terms in any machine-readable form (i.e., not including source code) provided that:
    - a. such access and use of the Service is limited to Authorized Users on Computers owned or controlled by Customer for which Customer has paid the appropriate fees;

- b. the Service is used solely to process the internal data of the Customer for Customer's business purposes for so long as all use of the Service is restricted to the number of licenses for which Customer has paid the appropriate fees;
- c. all use of the Documentation is limited to support of Customer's authorized use of the Service; and
- d. Customer's authorized employees and third-party consultants, accountants and bookkeepers may use the Service in support of Customer's operations so long as Customer ensures that such use of the Service is in accordance with the terms of these Terms.

2.2 Customer acknowledges that the license granted is not a sale and does not convey to Customer any rights of ownership in or related to the Service, software or any other intellectual property. Customer further acknowledges that its license of the Service is not contingent upon delivery of any future feature or function, or public comments or promises of such.

2.3 Customer acknowledges that the Service is subject to change or modification from time to time in Balance Innovations' sole discretion; provided, however that such changes or modifications will not materially diminish the functionality of the Service.

2.4 Restrictions. Customer acknowledges that Customer's breach of any of the following restrictions shall constitute a material breach of these Terms, entitling Balance Innovations to the right of immediate termination of these Terms along with other rights it may have in law or equity. Customer agrees that it shall not and shall not allow third parties to:

- a. Copy or use or display the Service or Documentation except as specified in these Terms;
- b. Use the Service for third-party training, commercial time-sharing or service bureau use;
- c. Cause or permit the reverse engineering, decompilation, alteration, modification, disassembly, or translation of the Service, including creation of Derivative Works or combined works, or otherwise attempt to discover the source code, object code or underlying structure, ideas, or algorithms of the Service;
- d. Request or permit anyone other than Balance Innovations, its authorized contractors or agents to provide any Support, Maintenance or Professional Services with respect to the Service;
- e. Manipulate, alter or contaminate the data processed by the Service in any manner which may adversely affect the operations or results of the Service;
- f. Rent, lease, lend, sell, give, sublicense, assign, pledge, provide access to, or otherwise provide or transfer the Service to others without prior written consent of Balance Innovations; or
- g. Copy or distribute, other than for its own internal use and distribution, the Documentation, without the express prior approval of Balance Innovations.

### 3. Customer Representations and Obligations

3.1 Customer is not a direct competitor of Balance Innovations, and will not utilize the Service to directly or indirectly compete with Balance Innovations and/or on behalf of or for the benefit of one or more of Balance Innovations' direct competitors, except with Balance Innovations' prior written consent.

3.2 Balance Innovations will provide Customer with Administrative Credentials and Customer shall be responsible for establishing the number of users within its organization and managing the User Credentials and rights of such users. Customer shall not provide its Administrative Credentials or User Credentials to anyone other than its employees or agents who agree to the terms of these Terms, and must use commercially reasonable efforts to prevent unauthorized access to or use of the Service. Customer will instruct its Authorized Users to keep their Administrative Credentials and/or User Credentials confidential and to refrain from disclosing them to any other person, in accordance with industry standards. Customer will be responsible for any misuse or unauthorized disclosure of such Administrative Credentials and/or User Credentials by its Authorized Users and will take prompt, affirmative action to mitigate risks associated with such misuse or unauthorized disclosure. Customer will notify Balance Innovations promptly of any unauthorized access or attempted unauthorized access to the Service, and of any misuse or reasonably anticipated risk of misuse of the Service, whether or not associated with any unauthorized disclosure or misuse of Administrative Credentials and/or User Credentials.

3.3 Customer shall be obligated to:

- a. Cooperate fully with Balance Innovations' personnel and authorized contractors and agents in the performance of the Maintenance and Support services;
- b. Secure and protect the Service, Administrative Credentials and User Credentials in a manner consistent with the maintenance of Balance Innovations' rights therein and to take appropriate action by instruction or agreement with its Authorized Users and others who are permitted access to the same to satisfy its obligations hereunder.

3.3 Customer is responsible for the accuracy, quality, and legality of the data entered into the Service, as well as the acquisition thereof. Customer may not use the Service in a way that (a) threatens the security, integrity, or availability of the Service; (b) unreasonably interferes with use by other customers; or (c) violates applicable law or third-party rights. Customer may not use the Service to transmit infringing, libelous or otherwise unlawful or tortious material. Customer's use of the Service may be suspended or terminated immediately (a) in the event that Customer breaches Sections 2.5 or 10 of these Terms or breaches any other provision of these Terms and fails to correct that breach within the applicable cure period; (b) if Customer's use threatens the security, integrity or availability of the Service; or (c) based on Balance Innovations' reasonable belief that

Customer's use of the Service is interfering with use by other customers and users, or violating applicable law or third party rights.

3.4 Any alterations, modifications or enhancements made or suggested for the Service by Customer shall be the exclusive property of Balance Innovations, together with all intellectual property and other rights therein. Customer agrees to execute any documents, and otherwise cooperate with Balance Innovations at Balance Innovations' expense, as necessary to enable Balance Innovations to protect such rights.

#### 4. **Orders**

These Terms shall apply to all Orders submitted to Balance Innovations and supersede any different or additional terms on Customer's purchase orders. Customer shall identify the Service and requested unit quantities, unit descriptions, and other similar information. All Orders are subject to acceptance by Balance Innovations.

#### 5. **Charges, Payment and Taxes**

5.1 **License and Use Fees.** For each license granted hereunder, Customer shall pay the agreed upon price as stated in the Order. No credit on any fees shall be given Customer licenses that are not used temporarily or permanently; however, licenses may be transferred to different Authorized Users within Customer's organization with written notice to Balance Innovations.

5.2 **Payment Terms.** The pricing of all components and payment terms are set forth in the Order.

5.3 **Taxes.** Unless otherwise expressly specified by Balance Innovations, all prices hereunder are exclusive of local excise, sales, use, ad valorem, and similar taxes or duties, including taxes that may be required to be paid by the Customer. Customer shall be liable for all such taxes and duties, regardless of whether or not the same are separately stated by Balance Innovations. No withholding taxes levied by any taxing authority for the acquisition of the Licensed Software or services rendered pursuant to these Terms shall be deducted from any payment due to Balance Innovations. Such taxes shall be paid by Customer. This Section shall not apply to taxes paid by Balance Innovations based on Balance Innovations' income. Customer agrees to furnish Balance Innovations with all tax-related documents required by Balance Innovations to meet federal and state tax requirements and rules, including but not limited to, certification of payment by Customer of applicable taxes. Failure to provide such documents may result in taxes and related charges being added to annual invoices.

5.4 **Support and Maintenance Fees.** Provided that Licensee has paid all applicable Fees, as set forth in the Order, Licensee shall not be invoiced any additional amount for Support and Maintenance Services, as set forth in Sections 1.11 and 14 herein, unless Customer orders additional levels of Support in the Order Form.

#### 5.5 **Failure to Pay**

a. Customer understands that, in the event payments are not made when due, access to the Service may be suspended or discontinued. If Customer subsequently requests reinstatement of such services, Balance Innovations may require that Customer must first pay all past due amounts, including any fees, charges or expenses incurred on Customer's behalf by Balance Innovations, whether previously invoiced or not, together with interest thereon as provided below, before services are reinstated.

b. Should Customer fail to make any payment when due, Customer shall indemnify Balance Innovations for expenses incurred in enforcing its rights of payment hereunder, including without limitation, costs of collection and reasonable attorney's fees, plus default interest equal to the maximum statutory interest permitted by law, until the amounts are finally paid, computed on a daily basis.

#### 6. **Verification and Reporting**

6.1 Customer authorizes Balance Innovations, upon reasonable notice to Customer, to inspect Customer's use of the Service -- including the right, upon reasonable notice to Customer, to audit Customer's Computers, computer systems, the Service, and any other equipment or records of Customer relating to Customer's use of the Service -- to determine Customer's compliance with the terms and conditions of these Terms. Any such inspection and/or audit shall be conducted during regular business hours and shall not unreasonably interfere with Customer's business activities. If an inspection/audit reveals that Customer has underpaid fees to Balance Innovations, Customer shall be invoiced for such underpaid fees. Audits shall be conducted no more than once in each 12-month period. This audit right will survive the termination of these Terms for three (3) years following such termination.

#### 7. **Ownership**

7.1 **Ownership.** Notwithstanding anything herein to the contrary, Customer acknowledges and agrees that, as between Customer and Balance Innovations, all right, title and interest in and to the Service, including without limitation all copyright, patent, and trade secret rights in the Service, is and shall remain in and with Balance Innovations.

#### 8. **Limited Warranty; Disclaimer of Warranty**

8.1 Balance Innovations warrants that during the Term, and so long as Customer is current on all required Fees ("Warranty Period"), the Service will operate substantially in accordance with the Documentation ("Service Warranty").

a. Exclusive Remedy. For failure under the Service Warranty in Section 8.1, Customer's exclusive remedy, and Balance Innovations' entire liability, shall be as follows:

(ii) Balance Innovations will, during its normal business hours, use reasonable diligence to confirm the existence of such error at Balance Innovations' place of business and correct actual errors discovered, to the extent such errors prevent the accomplishment of the principal functions of the Service in a material respect in accordance with the Documentation and provided that:

1. such errors were not caused by uses of the Service not in accordance with these Terms;
2. Customer notifies Balance Innovations in writing within the Warranty Period of any errors, or alleged errors, in sufficient detail to allow for the efficient assessment, and, if necessary and feasible, resolution of such errors or alleged errors; and
3. Customer fully cooperates with Balance Innovations in the determination of solutions to suspected errors, including, but not limited to, supplying data requested by Balance Innovations, access to premises and computers, and implementation of Balance Innovations-supplied updates and any diagnostic requests and that Customer shall, at Balance Innovations' reasonable request, allow remote access to Customer's system via Internet or dial-up modem to allow remote testing, diagnosis and correction.

8.2 EXCEPT FOR THE LIMITED WARRANTY CONTAINED IN SECTION 8.1, CUSTOMER ACCEPTS THE SERVICE "AS IS," AND "AS AVAILABLE," WITH ANY ERRORS AND DEFECTS. BALANCE INNOVATIONS MAKES NO EXPRESS OR IMPLIED WARRANTY OF ANY KIND WITH RESPECT TO THE SERVICE, AND SPECIFICALLY DISCLAIMS ALL WARRANTIES, EXPRESS OR IMPLIED, STATUTORY OR OTHERWISE, INCLUDING WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, OR NONINFRINGEMENT. BALANCE INNOVATIONS MAKES NO WARRANTY THAT THE SERVICE WILL BE ERROR-FREE OR UNINTERRUPTED, OR THAT BALANCE INNOVATIONS WILL CORRECT ALL SERVICE ERRORS AND/OR INTERRUPTIONS. CUSTOMER ACKNOWLEDGES THAT BALANCE INNOVATIONS DOES NOT CONTROL THE TRANSFER OF DATA OVER COMMUNICATIONS FACILITIES, INCLUDING THE INTERNET, AND THAT THE SERVICE MAY BE SUBJECT TO LIMITATIONS, DELAYS AND OTHER PROBLEMS INHERENT IN THE USE OF SUCH COMMUNICATIONS FACILITIES. BALANCE INNOVATIONS IS NOT RESPONSIBLE FOR ANY DELAYS, DELIVERY FAILURES OR OTHER DAMAGES RESULTING FROM SUCH PROBLEMS.

## 9. Limitation of Liability

9.1 IN NO EVENT SHALL BALANCE INNOVATIONS BE LIABLE FOR PAYMENT OF ANY SPECIAL, INCIDENTAL, DIRECT, INDIRECT, PUNITIVE, OR CONSEQUENTIAL DAMAGES OR FOR THE LOSS OF PROFITS, GOODWILL, BUSINESS OPPORTUNITIES, USE OR REVENUE, WHETHER IN CONTRACT, IN TORT (INCLUDING NEGLIGENCE) IN WARRANTY OR OTHERWISE, RESULTING FROM ITS PERFORMANCE UNDER THESE TERMS, OR THE USE OF THE SERVICE, INCLUDING, BUT NOT LIMITED TO DAMAGES ARISING FROM LOSS OF DATA OR PROGRAMMING, FAILURE TO REALIZE SAVINGS OR OTHER BENEFITS, AND DAMAGES TO EQUIPMENT, EVEN IF BALANCE INNOVATIONS HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. BALANCE INNOVATIONS' TOTAL AGGREGATE LIABILITY RELATED TO THE SERVICE FOR ANY REASON, WHETHER IN TORT, CONTRACT, WARRANTY OR OTHERWISE, SHALL BE LIMITED TO ACTUAL DAMAGES NOT TO EXCEED TO THE AMOUNT ACTUALLY PAID BY CUSTOMER TO BALANCE INNOVATIONS DURING THE 12-MONTH PERIOD IMMEDIATELY PRECEDING THE OCCURRENCE OF THE EVENT FIRST GIVING RISE TO THE LIABILITY. NOTWITHSTANDING THE FOREGOING, IF SUCH LIABILITY ARISES AS THE RESULT OF THE FAILURE OR MALFUNCTION OF THE SERVICE WITH RESPECT TO A PARTICULAR LICENSE, BALANCE INNOVATIONS' LIABILITY SHALL BE LIMITED TO AMOUNTS PAID TO BALANCE INNOVATIONS IN RESPECT OF THAT SPECIFIC LICENSE FOR THE 12-MONTH PERIOD IMMEDIATELY PRECEDING THE OCCURRENCE OF THE EVENT FIRST GIVING RISE TO THE LIABILITY, AND SHALL NOT INCLUDE OTHER AMOUNTS PAID BY CUSTOMER TO BALANCE INNOVATIONS DURING THAT PERIOD.

9.2 CUSTOMER ACKNOWLEDGES THAT THE CUSTOMER HAS THE FINAL RESPONSIBILITY TO REVIEW THE FUNCTIONING AND SUITABILITY FOR CUSTOMER'S PURPOSES OF THE SERVICE SUPPLIED BY BALANCE INNOVATIONS. BALANCE INNOVATIONS WILL NOT BE LIABLE FOR DAMAGES FOR CONFIGURATION ERRORS FOR HARDWARE OR SOFTWARE OTHER THAN THE SERVICE. CUSTOMER IS RESPONSIBLE FOR THE COMPLETE CONFIGURATION OF COMPUTER HARDWARE AND NON-BALANCE INNOVATIONS SOFTWARE NECESSARY TO PERFORM CUSTOMER'S FUNCTIONS, AND CUSTOMER IS RESPONSIBLE TO ENSURE CORRECTNESS OF DATA ENTRY AND THAT PROPER SECURITY PROCEDURES ARE IN PLACE FOR CUSTOMER'S OPERATIONS.

## 10. **Confidentiality**

10.1 “Confidential Information” includes (a) the Service, Administrative Credentials, and User Credentials; (b) the terms, conditions and pricing under these Terms; (c) any information disclosed in oral form, if identified as confidential at the time of disclosure; (d) any information of either party regarding: (i) computer software; (ii) computer hardware or systems; (iii) product or service information, product development plans, product strategy and product delivery systems; (iv) marketing information, including, without limitation, lists of potential or existing customers or suppliers, marketing plans and surveys; (v) financial and sales information; and (vi) business plans, policies, procedures and information; (e) information that the recipient knows or should know is confidential; (f) Trade Secrets of either party; and (g) all information clearly identified as confidential. This Confidentiality clause supersedes and replaces any previous Non-Disclosure Agreements between the parties hereto.

10.2 **Obligations.** Each party agrees: (i) to maintain Confidential Information confidential and not to disclose any of it to any third party without prior written permission of the disclosing party; (ii) to exercise the same degree of care and precautions that it employs with respect to its own confidential information, but in any event no less than a reasonable degree of care, to prevent unauthorized disclosure of the Confidential Information; (iii) to instruct its employees or other persons allowed such access to comply with these Terms; (iv) not to use Confidential Information for the benefit of anyone other than the disclosing party; and (v) that the Confidential Information remains the property of the disclosing party.

10.3 **Exclusions.** Neither party shall be obligated or required to maintain in confidence any information that: (i) was in the receiving party’s lawful possession prior to the disclosure and had not been obtained by the receiving party either directly or indirectly from the disclosing party; (ii) is independently developed by the receiving party without use of Confidential Information of the disclosing party; (iii) is required by law to be disclosed; provided, however, that the receiving party shall inform the disclosing party of such disclosure order and allow the disclosing party to object to such disclosure, or (iv) is generally known or becomes generally known through no fault of the receiving party, provided that, if disclosing party’s use of or reliance on such information is not generally known, such fact(s) will be held in confidence by the receiving party. Nothing in these Terms precludes Balance Innovations from using any ideas, concepts, know-how, or techniques related to Customer’s technology that are retained in the unaided memories of Balance Innovations’ employees with access to Customer’s Confidential Information, provided that the employee has not intentionally memorized the Confidential Information for the purpose of retaining and subsequently using or disclosing it, but subject to any valid patents and copyrights of Customer.

10.4 **Service.** Except as provided for in these Terms, Customer, its employees, or agents will not permit access to any Service including but not limited to Service listings, object code, manuals, Documentation or source code, in any form, without prior written consent from Balance Innovations, and then only under the following conditions: i) such access must be limited to Customer’s employees who have a need to know, who are aware of and agree to these Terms, and to contractors or agents of Customer who have entered into confidentiality and non-disclosure agreements with Customer that are at least as protective as the Confidentiality provisions contained herein; and ii) such access may only be granted for purposes specifically related to Customer’s authorized use of the Service. Balance Innovations may include security modules in the Service to protect its license rights; and Customer will not, and will not allow others to, modify, disable or remove such security modules.

## 11. **Term and Termination**

### 11.1 **Term**

a. Unless otherwise specified in the Order, Customer will have a thirty-day trial period (“Trial Period”) in which to test the Service subject to these Terms of Use. If Customer does not provide Balance Innovations with written notice of cancellation prior to the end of the Trial Period, the Term specified in the Order will commence on the thirty-first day. Unless terminated earlier pursuant to this Section 11, these Terms shall continue for the period set forth in the Order (“Initial Term”) so long as Customer is current in payment of all applicable fees. These Terms will automatically renew for subsequent terms (“Renewal Terms”) as set forth in the Order, unless either party gives written notice of cancellation at least 90 days prior to the end of the Initial Term or a Renewal Term.

### 11.2 **Termination for Breach**

a. Balance Innovations may terminate these Terms or any license hereunder effective upon thirty (30) days’ written notice to Customer if Customer commits any material breach of these Terms that remains uncured during such notice period.

b. In the event of a threatened or actual breach by Customer of Sections 2, 3 or 10 of these Terms, Customer acknowledges that monetary damages alone will not be an adequate remedy, and that Balance Innovations will be entitled to injunctive, equitable, and other legal relief against such breach as may be awarded by a court of competent jurisdiction plus reasonable expenses (including attorneys’ fees and costs).

c. Customer may terminate these Terms or any license granted hereunder effective upon thirty (30) days’ written notice to Balance Innovations if Balance Innovations commits any material breach of these Terms and fails to correct the breach or take reasonable action toward correcting the material breach within sixty (60) days of receipt of notice thereof. In the event of early termination permitted by this Section 11.2(c), Customer shall be entitled to a refund of a pro-rata portion of the fee paid by Customer for the year of such termination applicable to the time from the date of termination until the end of the period covered by the fee.

11.3 **Early Termination by Customer.** Except pursuant to Section 11.2(c), early termination by Customer is not permitted.

11.4 **Termination of Support and/or Maintenance Services**

- a. Balance Innovations reserves the right, upon ninety (90) days' prior written notice, to terminate Support Services and/or Maintenance Services provided by Balance Innovations for Service under these Terms if:
  - (i) Balance Innovations ceases to make the Service commercially available;
  - (ii) Balance Innovations ceases generally to support the Service;
  - (iii) Customer dissolves, or by order of a court of competent jurisdiction is directed to be dissolved;
  - (iv) Customer becomes bankrupt or has a receiver or manager appointed over any or all of its assets and such action either: i) results in the nonpayment of post-petition applicable fees or other properly invoiced amounts; or ii) results in a change of control of Customer.
- b. In the event Balance Innovations ceases to provide Support for the Service in any year these Terms are in effect, Balance Innovations will refund to Customer, on a pro rata basis, the fee paid by Customer for such Support for that year applicable to the time period during which such Support is no longer available.

#### 11.5 Effect of Termination

- a. Except as noted herein, the Customer shall not be entitled to a refund of any fees paid or a credit for any amounts due and payable under these Terms.
- b. Except for termination pursuant to Section 11.2(c), termination of these Terms or any license granted under these Terms shall not discharge Customer from liability to Balance Innovations for payments due or otherwise owed or accumulating late fees. Customer shall remain liable for the payment of all fees for the full Initial Term and/or full current Renewal Term(s), as applicable.
- c. Upon termination of these Terms or any license granted hereunder, Customer agrees to promptly cease using the Service, and provide Balance Innovations with a written certificate signed by an officer of Customer certifying that all copies of all Documentation have been returned to Balance Innovations, or destroyed, at Balance Innovations' option.
- d. Termination of these Terms or any license granted under these Terms shall not discharge Customer from liability for the protection of Balance Innovations' proprietary rights or Confidential Information; nor shall termination limit either party from pursuing other remedies available to it, including injunctive relief. The parties' rights and obligations under Sections 2.5, 5 -- 7, 9 – 11, , 12 – 13, and 15 shall survive and continue after termination or expiration of these Terms and shall bind the parties and their legal representatives, successors and permitted assigns.
- e. If Customer requests in writing within 30 days after termination of these Terms, and pays the applicable fee, Balance Innovations will provide a copy of Customer's data in a format to be determined by Balance Innovations. Thereafter, Balance Innovations will have no obligation to maintain Customer data and will delete and/or destroy all copies of Customer's data.

11.6 No election of any remedy shall be construed as a waiver of or prohibition against any other remedy in the event of a breach hereunder.

#### 12. Transfer and Assignment

12.1 These Terms and any rights or obligations under these Terms may not be assigned or otherwise transferred by Customer without written consent of Balance Innovations. Notwithstanding the foregoing, Balance Innovations may transfer these Terms, upon written notice to Customer, pursuant to an acquisition, merger or other transfer of all or substantially all of the assets or operations of Balance Innovations. Further, Balance Innovations shall have the right to subcontract its duties hereunder. The rights and obligations of these Terms shall bind and benefit any successors or assigns of the parties.

12.2 Any permitted transfer of rights by Customer shall not relieve Customer of its obligations under these Terms, and Customer shall cause the transferee to assume in writing all obligations of Customer under these Terms.

12.3 Transfer of any rights and obligations under these Terms due to a change in control shall not affect payments due or otherwise owed by either party to the other.

#### 13. Miscellaneous

13.1 Governing Law. These Terms shall be governed by, and construed and enforced in accordance with, the laws of the State of Kansas, without regard to conflict of laws principles. All disputes arising out of these Terms will be subject to the exclusive jurisdiction and venue of the state and federal courts of Kansas and the parties hereby consent to the personal jurisdiction of these courts. In the event of any adjudication of any dispute under these Terms, the prevailing party in such action will be entitled to reimbursement by the other party of its reasonable attorneys' fees and reasonable related costs.

13.2 Export Laws and Regulations. Customer shall not export outside the United States, directly or indirectly, any products or related information without prior written consent of Balance Innovations. Customer agrees to comply with any and all applicable export control laws and regulations, including, but not limited to, "deemed export" and "deemed re-export" regulations, and further agrees that no data, information, software programs and/or other materials resulting from the Service (or direct product thereof) will be exported, directly or indirectly, in violation of such export control laws and regulations.

13.3 **Force Majeure.** Balance Innovations shall not be liable hereunder by reason of any failure or delay in the performance of its obligations hereunder on account of strikes, shortages, riots, insurrection, fires, flood, earthquake, storm, explosions, acts of God, war, terrorism, governmental action, labor conditions, material shortages, failure or delay of an Internet Service Provider, denial of service attack, or any other cause beyond the reasonable control of Balance Innovations. Neither party shall be liable hereunder for failure or delay in performance in the event of the occurrence (certified by the United States Centers for Disease Control or successor body) of a widespread viral infection transmitted via bites or contact with bodily fluids that causes human corpses to reanimate and seek to consume living human flesh, blood, brain or nerve tissue, provided that it is likely to result in the fall of organized civilization.

13.4 **Modifications to Terms.** Modifications and amendments to these Terms shall be enforceable only if they are in writing and are signed by authorized representatives of both parties.

13.5 **Waiver.** No term or provision of these Terms shall be deemed waived and no breach excused unless such waiver or consent is in writing and signed by the party claimed to have waived or consented. A waiver by either of the parties of any of the covenants, conditions or agreements to be performed by the other hereunder shall not be construed to be a waiver of any succeeding breach thereof.

13.6 **No Agency.** Nothing contained in these Terms will be construed as creating any agency, partnership, joint venture or other form of joint enterprise between the parties.

13.7 **Headings.** The headings in these Terms are for reference purposes only and shall not be construed as a part of these Terms.

13.8 **Counterparts.** A facsimile, imaged, or electronic copy of these Terms (including the electronic, facsimile or imaged signatures of the parties' representatives thereon) shall for all purposes be deemed equivalent to an original (including the original signatures of the parties' representatives thereon).

13.9 **Notices.** All notices, demands or consents required or permitted hereunder shall be in writing and shall be delivered by overnight delivery, facsimile (with confirmation copy by mail), or mailed by certified mail, return receipt requested, to the respective parties. Notice to Balance Innovations shall be sent to 11011 Eicher Drive, Lenexa, KS 66219. Notice to Customer shall be sent to the address contained in the Order, or at Customer's principal place of business. Notice to either party shall be made at such other address as a party may from time to time specify. Such notices and other communications shall be deemed effective upon the earliest to occur of (i) five days after mailing, addressed and postage prepaid, return receipt requested, as aforesaid, (ii) one (1) business day after transmission by overnight delivery, or (iii) the day of receipt where receipt has been confirmed.

13.10 **Severability.** If any term or provision of these Terms shall be held to be invalid, illegal or unenforceable in any respect or in any jurisdiction, such provision shall be limited and construed in such jurisdiction as if such invalid, illegal or unenforceable term or provision were not contained herein.

13.11 **No Third Party Beneficiaries.** Nothing in these Terms, express or implied, is intended to and shall not be construed to confer upon or create in any person (other than the parties hereto and their respective successors and assigns) any rights or remedies under or by reason of these Terms.

13.12 **Publicity.** Customer agrees to cooperate with Balance Innovations, at Balance Innovations' request, to issue a press release upon completion of implementation of the Service, as well to develop of a case study within six (6) months after completion of implementation, which case study may be placed on Balance Innovations' website and used for other marketing purposes. During the Term, Customer grants Balance Innovations the right to use Customer's name and/or logo, worldwide, to identify Customer as such on Balance innovations' website or other marketing or advertising materials.

13.13 **Entire Agreement.** These Terms, and any additional written Addenda subsequently executed by both parties, and any and all documents incorporated by reference herein, constitute the complete, final and exclusive understanding between parties with respect to the subject matter hereof and supersedes and cancels any prior agreements or understandings between the parties relating to the subject matter hereof.

14. **Support Coverage.** Support will be provided by Balance Innovations' Customer Care Team to Customer on a 24/7 basis. Normal support hours are Monday through Friday (except holidays), 6:00 AM to 5:00 PM CST/CDT. Support is provided outside of normal support hours on a call-back basis. An escalation procedure is also provided to the Customer for issues requiring escalation. Balance Innovations' support is provided from Lenexa, KS and does not include travel or on-site support. On-site support and travel can be negotiated on a case-by-case basis, with travel and other related charges paid by Customer.

14.1 **Problem Identification.** Problems and questions should be routed from Customer to Balance Innovations with the following information for problem resolution:

- a. Contact person to help recreate/work the problem (including phone number).
- b. Approximate date and time the problem occurred.
- c. Store number.
- d. Software Version and Release number.
- e. Customer's internal tracking number (if one exists).
- f. Problem severity per the description below.
- g. Detailed circumstances and problem behavior.
- h. Exact re-creation steps or scenarios.

- i. Associated documentation (Screen Prints, print-outs, error messages, etc.)

14.2 **Problem Severity.** To facilitate the process of resolving the problems, the problems are assigned a severity number. Severity numbers are defined as follows:

- a. **Severity 1.** Renders the Service inoperable and/or unavailable with no available work-around. Balance Innovations works continuously with Customer to resolve these issues or to produce a viable work-around to restore the operation and/or availability of the Service.
- b. **Severity 2.** Severely impacts the performance and/or availability of the Service, but a work-around is available to reduce the impact. Balance Innovations works to resolve these issues within 48 hours.
- c. **Severity 3.** Does not severely impact the operability and/or availability of the Service; however, is recognized as a defect that must be resolved. Balance Innovations works to resolve the issue by the next maintenance release.
- d. **Severity 4.** Enhancement; addressed based upon need. No specific time commitments are made to address these issues.

14.3 **Support Requirements.** In the event Customer requires Balance Innovations to use hardware and/or software that Balance Innovations does not already own or license, Customer agrees to pay the costs of such required hardware and/or software, along with additional time and expense charges associated with installing, configuring, learning and utilizing the required hardware/software.

15. **Indemnification.**

15.1 **Indemnification by Balance Innovations.**

- a. Balance Innovations shall indemnify and hold Customer, its Affiliates and their respective officers, directors, agents and employees (the "Customer Indemnitee(s)") harmless for any losses, claims, damages, awards, penalties, or injuries incurred, including reasonable attorney's fees, which arise from any claim by any third party of an alleged infringement of copyright or any other intellectual property right arising out of the use of the Service by Customer in accordance with the terms of these Terms. In order to be indemnified, Customer must give prompt written notice to Balance Innovations of any such claim or liability, and must furnish all information and assistance reasonably necessary to such defense. Balance Innovations will assume the defense of such claim or action at its sole discretion. Should the Service furnished under these Terms become or, in Balance Innovations' sole opinion, be likely to become the subject of a claim for infringement, Balance Innovations may authorize the continued use, replacement, removal, or modification of such material to make it non-infringing, or, if none of the foregoing are commercially reasonable in the sole opinion of Balance Innovations, then Balance Innovations may terminate license associated with the Service and refund to Customer a pro-rata portion of the Annual Use Fee paid by Customer for the year of such termination applicable to the time from the date of termination until the end of the period covered by the Annual Use Fee. Balance Innovations shall have no liability for any claims of infringement that result from any event, action or omission covered by Customer's indemnity under Section 15.2 hereof or where Customer is in breach of these Terms. In addition, Balance Innovations will have no liability to the extent that any third party allegations described herein are based on (i) use of the Service in combination with any third party products or services or in a manner that violates these Terms or the Documentation given to Customer by Balance Innovations; (ii) Balance Innovations honoring Customer's detailed specifications for custom modifications; (iii) modifications to that Service by others; or (iv) claims by Customer's other licensors, vendors or suppliers to whose material Customer provides Balance Innovations access for purposes of performing custom modifications (unless Balance Innovations knowingly exceeded the scope of such authorization). Balance Innovations' obligations and Customer's remedies provided under this Section shall constitute Balance Innovations' sole and exclusive liability to Customer and Customer's sole and exclusive remedies for the claims referred to in this Section.
- b. This indemnity shall survive the termination of these Terms. ANY CUSTOMER MODIFICATIONS TO THE SERVICE SHALL VOID ALL INDEMNITIES IN SECTION 15.1 HEREOF, TO THE EXTENT THAT THE INFRINGEMENT IS CAUSED BY SUCH CUSTOMER MODIFICATIONS.

15.2 **Indemnification by Customer.**

- a. **Acts or Omissions.** Customer shall indemnify, defend, and hold Balance Innovations and its subsidiaries, or Affiliates, and the officers, directors, employees or agents of any of them ("BI Indemnitees"), harmless from any claims, demands, liabilities, or expenses, including reasonable attorneys' fees, incurred by BI Indemnitees as a result of any claim or proceeding against BI Indemnitees arising out of or based upon any event, action or omission described in Section 15.1(a)(i – iv), including the combination, operation, or use of the Service with any hardware, software, or data not supplied or approved in writing by Balance Innovations, if such infringement would have been avoided but for such combination, operation, or use.
- b. **Unauthorized Use.** Customer shall indemnify and hold BI Indemnitees harmless from and against any all claims, actions, proceedings, damages, losses and expenses (including reasonable attorneys' fees) arising from any reproduction or other use of the Service by Customer not authorized by these Terms and any breach by the Customer of any of the provisions of these Terms.