

**Terms of Use**  
**Last Revised: 8/30/2019**

**1. INTRODUCTION**

(a) Welcome to the McKee Foods Corporation (“McKee”) wholesale distributor website and applications. This website and the applications, products and services accessible through it and any related Mobile Apps (as defined below) (collectively, the “Service”) are owned by McKee and are made available to wholesale distributorship businesses and their authorized representatives, as described below. The Service is an interface through which Distributor (as defined below) can purchase goods from McKee and otherwise manage its business relationship with McKee.

(b) Access to and use of the Service are subject to the Terms of Use (“TOU”) set forth below. McKee may, in its discretion, update the TOU at any time. You may access and review the most current version of the TOU at the URL for this page or by clicking on the “Terms of Use” link within the Service or as otherwise made available by McKee.

**2. ACCEPTANCE OF TERMS**

(a) PLEASE REVIEW THE TOU CAREFULLY. BY REGISTERING FOR AN ACCOUNT OR OTHERWISE ACCESSING OR USING THE SERVICE, YOU AGREE TO BE BOUND BY THE TOU, INCLUDING ANY UPDATES OR REVISIONS POSTED HERE OR OTHERWISE COMMUNICATED TO YOU. IF YOU DO NOT AGREE TO BE BOUND BY THE TOU, PLEASE DO NOT ACCESS OR USE THE SERVICE.

(b) THE TOU REQUIRES **BINDING ARBITRATION** TO RESOLVE ANY DISPUTE OR CLAIM ARISING OUT OF OR RELATING IN ANY WAY TO THE TOU OR YOUR ACCESS TO OR USE OF THE SERVICE, INCLUDING THE VALIDITY, APPLICABILITY OR INTERPRETATION OF THE TOU (EACH, A “CLAIM”), AND YOU AGREE THAT ANY SUCH CLAIM SHALL BE RESOLVED ONLY ON AN INDIVIDUAL BASIS AND NOT IN A CLASS, COLLECTIVE, CONSOLIDATED OR REPRESENTATIVE ACTION OR ARBITRATION OR OTHER SIMILAR PROCESS. PLEASE REVIEW SECTION 21 CAREFULLY TO UNDERSTAND YOUR RIGHTS AND OBLIGATIONS WITH RESPECT TO THE RESOLUTION OF ANY CLAIM.

(c) You represent and warrant that you are: (i) over eighteen years of age or the age of majority in your jurisdiction, whichever is greater; (ii) of legal age to form a binding contract; (iii) not a person barred from accessing or using the Service under the laws of your country of residence or any other applicable jurisdiction; and (iv) accessing or using the Service on behalf of a Distributor’s wholesale distributorship business.

**3. DISTRIBUTORSHIP AGREEMENT AND OTHER AGREEMENTS**

(a) In order to access or use the Service, the business on behalf of which you are accessing or using the Service (“Distributor”) must have a valid, existing written agreement with McKee pursuant to which McKee has appointed such business as a distributor of certain McKee products (“Distributorship Agreement”). The Distributor may be a sole proprietorship, corporation, limited liability company or other business entity, as provided in the Distributorship Agreement. By accessing or using the Service, you represent and warrant that you are: (i) a Distributor; or (ii) acting on behalf of a Distributor and have been authorized by such Distributor to access and use the Service on the Distributor’s behalf. You shall not by virtue of the TOU, your access to or use of the Service, or otherwise be eligible to participate in any benefit plans that McKee makes available to McKee’s employees.

(b) In addition to the TOU and the Distributorship Agreement, your access to and use of the Service are further subject to the McKee Privacy Policy<sup>1</sup> applicable to the Service and any usage or other policies relating to the Service posted or otherwise made available to you by McKee (collectively, "Additional Terms"). The Additional Terms are part of the TOU and are hereby incorporated by reference, and you agree to be bound by the Additional Terms.

(c) Some components of the Service may be provided with or have incorporated into them third-party components licensed under open source license agreements or other third-party license terms (collectively, "Third-Party Components"). Third-Party Components are subject to separate terms and conditions set forth in the respective license agreements relating to such components.<sup>2</sup>

#### **4. REGISTRATION AND ACCOUNT TYPES**

(a) In registering for the Service, you agree to: (i) provide true, accurate, current and complete information about yourself and the Distributor as prompted by the Service's registration form (the "Registration Data"); and (ii) maintain and promptly update the Registration Data to keep it true, accurate, current and complete. If you provide any information that is untrue, inaccurate, not current or incomplete, or McKee reasonably suspects that you have done so, your access to or use of the Service can be suspended or terminated.

(b) Each Distributor choosing to use the Service is responsible for designating a person to act as its administrator ("Administrator"). If a Distributor has not designated you an Administrator, you will access or use the Service with respect to the Distributor as a basic user ("Basic User"). If you are an Administrator, you are responsible for the setup and management of the Basic User accounts under your Administrator account, including assigning the scope of access available through each Basic User account, and you represent and warrant that you: (i) have the authority to bind the Distributor to the TOU; and (ii) are an owner of the Distributor or a manager whom the Distributor has authorized to register for and access and use the Service as an Administrator. As a Basic User, you acknowledge and agree that your access to and use of the Service, including the suspension or termination of such access or use, is subject to the activities and responsibilities of your Administrator.

(c) You are fully responsible for all activities that occur under your account, and the Distributor is fully responsible for all activities that occur under its Administrator and Basic User accounts. You are responsible for keeping your account or password strictly confidential and not sharing it with anyone. You agree to notify McKee promptly of any unauthorized use of your account or password or any other similar breach of security.

#### **5. GRANT OF RIGHTS**

(a) McKee hereby grants you a limited, non-exclusive, non-transferable, non-sublicensable (subject to Section 5(d)), revocable license to: (i) access and view pages from the Service as necessary for the conduct of business by the Distributor under the applicable Distributorship Agreement; and (ii) print a reasonable number of such pages as necessary for the conduct of business by the Distributor under the applicable Distributorship Agreement.

(b) To the extent that the Service provides access to any online software, applications or other similar components, then McKee hereby grants you a limited, non-exclusive, non-transferable, non-sublicensable (subject to Section 5(d)), revocable license to access and use such components only in executable, machine-readable, object code form within the online platform provided by McKee and only

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<sup>1</sup> Hyperlink to applicable Privacy Policy.

<sup>2</sup> Has McKee tracked its use of open source software (OSS) and prepared an inventory of OSS used in the Service? There could be certain notice and attribution requirements, and McKee should ensure that it has not used copyleft OSS in a way that requires disclosure of McKee's proprietary source code.

as necessary for the conduct of business by the Distributor under the applicable Distributorship Agreement.

(c) McKee may make available mobile apps for access to and use of certain components of the Service (collectively, "Mobile Apps"). To the extent that McKee makes a Mobile App available to you, then McKee hereby grants you a limited, non-exclusive, non-transferable, non-sublicensable (subject to Section 5(d)), revocable license to install, run and operate such Mobile App on a mobile device that you own and control, but only in executable, machine-readable, object code form and only as necessary for the conduct of business by the Distributor under the applicable Distributorship Agreement.

(d) If you are accessing or using the Service as an Administrator, McKee hereby grants you a limited, non-exclusive, non-transferable, non-sublicensable, revocable license to provide Basic Users with access to and use of the Service on behalf of the Distributor. You are responsible for: (i) ensuring that such Basic Users comply with the TOU in all material respects; (ii) any access to or use of the Service by such Basic Users; and (iii) managing such Basic User accounts and determining the parts of the Distributor's data accessible through such accounts.

(e) All rights granted to you under the TOU are subject to your compliance with the TOU in all material respects. Your access to and use of the Service must further comply with all applicable local, state, provincial, federal and international laws and regulations.

## **6. IOS MOBILE APPS<sup>3</sup>**

(a) If any Mobile App is downloaded by you from the Apple Inc. ("Apple") App Store (each, an "iOS Mobile App"), the license in Section 5(c) with respect to such iOS Mobile App is further subject to your compliance in all material respects with the terms and conditions of the Usage Rules set forth in the Apple App Store Terms of Service.

(b) With respect to any iOS Mobile App, you and McKee acknowledge and agree that the TOU is concluded between you and McKee only, and not with Apple, and Apple is not responsible for iOS Mobile Apps and the contents thereof. Apple has no obligation whatsoever to furnish any maintenance and support services with respect to iOS Mobile Apps. McKee, not Apple, is responsible for addressing any claims from you or any third party relating to iOS Mobile Apps or your possession and/or use of iOS Mobile Apps, including product liability claims, any claim that iOS Mobile Apps fail to conform to any applicable legal or regulatory requirement, and claims arising under consumer protection or similar legislation. Apple and Apple's subsidiaries are third-party beneficiaries of the TOU with respect to iOS Mobile Apps, and Apple shall have the right (and will be deemed to have accepted the right) to enforce the TOU against you as a third-party beneficiary hereof with respect to iOS Mobile Apps. Subject to Section 16, McKee, not Apple, shall be solely responsible for the investigation, defense, settlement and discharge of any intellectual property infringement claim attributable to iOS Mobile Apps

## **7. RESPONSIBILITY FOR CONTENT**

(a) You acknowledge and agree that all information, data, data records, databases, text, software, music, sounds, photographs, images, graphics, videos, messages, scripts, tags and other materials accessible through the Service, whether publicly posted or privately transmitted ("Content"), are the sole responsibility of the person from whom such Content originated. This means that you, and not McKee, are entirely responsible for all Content that you upload, post, email, transmit or otherwise make available through the Service ("Your Content"), and other users of the Service, and not McKee, are similarly responsible for all Content they upload, post, email, transmit or otherwise make available through the Service ("User Content").

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<sup>3</sup> These provisions are required by Apple.

(b) You acknowledge and agree that McKee has no obligation to pre-screen Content (including Your Content and User Content), although McKee reserves the right in its sole discretion to pre-screen, refuse or remove any Content. Without limiting the generality of the foregoing sentence, McKee shall have the right to remove any Content that violates the TOU or that it deems objectionable.

(c) To the extent that you submit any Content, you represent and warrant that: (i) you have all necessary right and authority to grant the rights set forth in the TOU with respect to Your Content; and (ii) Your Content does not violate any copyright, trademark, right of privacy, right of publicity or any other right of any other party.

## **8. RIGHTS TO CONTENT**

(a) McKee does not claim ownership of Your Content. However, you grant McKee and its service providers a perpetual, irrevocable, worldwide, royalty-free, fully-paid-up, non-exclusive, sublicensable, transferable license to use, reproduce, modify, adapt, create derivative works from, publicly perform, publicly display, distribute, make and have made Your Content (in any form and any medium, whether now known or later developed) in connection with the Service. You acknowledge and agree that the technical processing and transmission of data associated with the Service, including Your Content, may require: (i) transmissions over various networks; and (ii) changes to conform and adapt to technical requirements of connecting networks or devices.

(b) Except with respect to Your Content, you acknowledge and agree that McKee and its licensors own all rights, title and interest (including all intellectual property rights) in the Service and all Content and other materials within the Service. The Service is protected by U.S. and international copyright and other intellectual property laws and treaties. McKee reserves all rights not expressly granted to you.

(c) Except with respect to Your Content, you may not: (i) use, reproduce, modify, adapt, create derivative works from, publicly perform, publicly display, distribute, make, have made, assign, pledge, transfer or otherwise grant rights to the Service, except as expressly permitted under the TOU; (ii) reverse engineer, disassemble, decompile or translate, or otherwise attempt to derive the source code, architectural framework or data records of, any software within or associated with the Service; (iii) frame or utilize any framing technique to enclose any Content; (iv) rent, lease, lend, sell or sublicense the Service or otherwise provide access to the Service as part of a service bureau or similar fee-for-service purpose; or (v) remove or obscure any proprietary notice that appears within the Service.

## **9. CONFIDENTIALITY**

(a) As used herein, "Confidential Information" means information disclosed or made available by McKee through the Service that McKee identifies in good faith as confidential or proprietary or, given the nature of the information or the circumstances surrounding its disclosure, should reasonably be understood to be confidential or proprietary. Confidential Information shall include non-public information relating to McKee's: intellectual property; technology; know-how; prototypes; current and future products and services; processes; customers; vendors; employees; contractors; business plans and methods; research and development; promotional and marketing activities; finances; contracts and business arrangements; and other business affairs.

(b) You will keep confidential all Confidential Information. You will not disclose Confidential Information to any third parties, and you may only use Confidential Information as necessary for the conduct of business by the Distributor under the applicable Distributorship Agreement.

(c) The duties of confidentiality imposed by Section 9(c) do not apply to any information that: (i) is known or becomes known to the public in general (other than as a result of a breach of this Section 9); (ii) was known by you or the Distributor or in your lawful possession or that of the Distributor prior to receipt from McKee; (iii) is or has been independently developed or conceived by you or the Distributor

without use of or reference to Confidential Information; or (iv) is or has been made known or disclosed to you or the Distributor by a third party without a breach of any obligation of confidentiality.

## **10. USER ACTIVITY**

(a) In connection with your access to or use of the Service, you shall not:

(i) upload, post, email, transmit or otherwise make available any Content that: (1) is illegal, harmful, threatening, abusive, harassing, tortious, defamatory, vulgar, obscene, libelous, invasive of another's privacy, hateful or otherwise objectionable; (2) may not be made available under any law or under contractual or fiduciary relationships (such as confidential or proprietary information learned as part of an employment relationship or under a non-disclosure agreement); (3) infringes any patent, trademark, trade secret, copyright or other proprietary right of any party; (4) consists of unsolicited or unauthorized advertising, promotional materials, junk mail, spam, chain letters, pyramid schemes, commercial electronic messages or any other form of solicitation; (5) contains software viruses or any other code, files or programs designed to interrupt, destroy or limit the functionality of any software or hardware; or (6) consists of information that you know or have reason to know is false or inaccurate;

(ii) engage in actions or conduct which could reasonably be expected to cause damage to the established reputation and goodwill of McKee products in the marketplace;

(iii) impersonate any person or entity, including McKee personnel, or falsely state or otherwise misrepresent your affiliation with any person or entity;

(iv) forge headers or otherwise manipulate identifiers in order to disguise the origin of any Content transmitted through the Service;

(v) act in a manner that negatively affects the ability of other users to access or use the Service;

(vi) take any action that imposes an unreasonable or disproportionately heavy load on the Service or its infrastructure;

(vii) interfere with or disrupt the Service or servers or networks connected to the Service, or violate any requirements, procedures, policies or regulations of networks connected to the Service;

(viii) use spiders, crawlers, robots, scrapers, automated tools or any other similar means to access the Service or substantially download, reproduce or archive any portion of the Service;

(ix) sell, share, transfer, trade, loan or exploit for any commercial purpose any portion of the Service, including your user account and password; or

(x) violate any applicable local, state, provincial, federal or international law or regulation.

(b) You are responsible for using the Services under conditions that insure personal safety. You should not interact with the Services while operating a vehicle or other large equipment.

## **11. PRODUCT DESCRIPTIONS AND PRICING INFORMATION**

McKee strives to be as accurate as possible in listing product descriptions and pricing information. However, product descriptions and pricing information may be inaccurate due to typographical, data entry or other errors. McKee reserves the right to cancel any transactions affected by inaccurate product descriptions or pricing information, and fulfillment of any transactions by McKee is subject to McKee's confirmation of accurate product descriptions and pricing information.

## **12. SUGGESTIONS**

If you elect to provide or make available to McKee any suggestions, comments, ideas, improvements or other feedback relating to the Service ("Suggestions"), you hereby grant McKee a perpetual, irrevocable, worldwide, royalty-free, fully-paid-up, non-exclusive, sublicensable, transferable license to use, reproduce, modify, adapt, create derivative works from, publicly perform, publicly display, distribute, make, have made or otherwise grant rights in your Suggestions in any form and any medium (whether now known or later developed), without credit or compensation to you.

## **13. DEALINGS WITH ADVERTISERS AND OTHER THIRD PARTIES**

(a) Your dealings with advertisers and other third parties who market, sell, buy or offer to sell or buy any goods or services on the Service, including payment for or delivery of such goods or services and any other terms, conditions, warranties or representations associated with such dealings, are solely between you and the advertiser or other third-party. You agree that McKee shall not be liable for any damage or loss of any kind incurred as a result of any such dealings.

(b) Use of the Service may require you to obtain and use hardware and services provided by third parties. McKee is not responsible for any such items, and your use of such items is subject to terms and conditions set forth by applicable vendors. You are solely responsible for obtaining all such items and any damage or loss arising from use thereof.

## **14. LINKS AND EXTERNAL MATERIALS**

The Service or users of the Service may provide links to other websites or resources. You acknowledge and agree that McKee does not endorse and is not responsible for any content, advertising, products, services or other materials on or available through such sites or resources ("External Materials"). These sites are subject to different terms of use and privacy policies, which you are responsible for reviewing. You further acknowledge and agree that McKee shall not be liable for any damage or loss resulting from or arising out of use of or reliance on any External Materials.

## **15. MODIFICATIONS TO THE SERVICE AND UPDATES**

McKee reserves the right at any time to modify, suspend or discontinue the Service (or any portion thereof) with or without notice, and McKee shall not be liable to you or to any third party for any such modification, suspension or discontinuance. McKee may, in its sole discretion, from time to time develop patches, bug fixes, updates, upgrades and other modifications to improve the performance of the Service or related products or services (collectively, "Updates"). McKee may develop Updates that require installation by you before you continue to access or use the Service. Updates may also be automatically installed without providing any additional notice to you or receiving any additional consent from you. The manner in which Updates may be automatically downloaded and installed is determined by settings on your device and its operating system.

## **16. INDEMNIFICATION**

(a) You shall indemnify and hold McKee and its affiliates, and each of their officers, directors, shareholders, employees, agents, partners, members, licensors and suppliers (collectively, "McKee Parties") harmless from and against any claim, demand, loss, damage, cost, liability and expense, including reasonable attorneys' fees, resulting from or arising out of your: (i) access to or use of the Service; (ii) violation of the TOU or any law or regulation; or (iii) violation of any rights of another party.

(b) If you are an Administrator, you agree on behalf of the Distributor that the Distributor will indemnify and hold the McKee Parties harmless from and against any claim, demand, loss, damage, cost, liability and expense, including reasonable attorneys' fees, resulting from or arising out of: (i) access to or use of the Service by the Distributor's users; (ii) violation of the TOU or any law or regulation by the Distributor's users; or (iii) violation of any rights of another party by the Distributor's users.

## **17. DISCLAIMER OF WARRANTIES**

(a) YOUR USE OF THE SERVICE IS AT YOUR AND THE DISTRIBUTOR'S SOLE RISK. THE SERVICE IS PROVIDED ON AN "AS IS" AND "AS AVAILABLE" BASIS, WITH ALL FAULTS. TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, THE MCKEE PARTIES EXPRESSLY DISCLAIM ALL WARRANTIES AND CONDITIONS OF ANY KIND, WHETHER EXPRESS OR IMPLIED OR ARISING FROM STATUTE, COURSE OF DEALING, USAGE OF TRADE OR OTHERWISE, INCLUDING THE IMPLIED WARRANTIES OR CONDITIONS OF MERCHANTABILITY, MERCHANTABILITY QUALITY, QUALITY OR FITNESS FOR A PARTICULAR PURPOSE AND NON-INFRINGEMENT.

(b) THE MCKEE PARTIES MAKE NO WARRANTY THAT: (i) THE SERVICE WILL MEET YOUR REQUIREMENTS; (ii) ACCESS TO THE SERVICE WILL BE UNINTERRUPTED, TIMELY, SECURE OR ERROR-FREE; OR (iii) THE INFORMATION AND ANY RESULTS THAT MAY BE OBTAINED FROM ACCESS TO OR USE OF THE SERVICE WILL BE ACCURATE, RELIABLE, CURRENT OR COMPLETE. YOU ARE SOLELY RESPONSIBLE FOR CONFIRMING THE ACCURACY AND COMPLETENESS OF ANY INFORMATION YOU SUBMIT TO OR RECEIVE FROM THE SERVICE AND ANY OF YOUR ACTS OR OMISSIONS BASED UPON SUCH INFORMATION.

## **18. LIMITATION OF LIABILITY**

(a) YOU ACKNOWLEDGE AND AGREE THAT THE MCKEE PARTIES SHALL NOT BE LIABLE FOR ANY LOST PROFITS OR INDIRECT, INCIDENTAL, SPECIAL, EXEMPLARY, PUNITIVE OR CONSEQUENTIAL DAMAGES, INCLUDING DAMAGES ARISING FROM ANY TYPE OR MANNER OF COMMERCIAL, BUSINESS OR FINANCIAL LOSS, EVEN IF MCKEE PARTIES HAD ACTUAL OR CONSTRUCTIVE KNOWLEDGE OF THE POSSIBILITY OF SUCH DAMAGES OR LOSS AND REGARDLESS OF WHETHER SUCH DAMAGES OR LOSS WERE FORESEEABLE. IN NO EVENT SHALL THE MCKEE PARTIES BE LIABLE FOR ANY DAMAGES OR LOSS ARISING OUT OF OR RELATING IN ANY WAY TO ANY: (i) FAILURE OF THE SERVICE TO MEET YOUR REQUIREMENTS; (ii) INTERRUPTED OR UNTIMELY TRANSMISSIONS OR OTHER FAILURES IN TRANSMISSION OF DATA; OR (iii) INACCURATE, UNRELIABLE, OUT-OF-DATE OR INCOMPLETE DATA.

(b) CERTAIN STATE LAWS DO NOT ALLOW LIMITATIONS ON IMPLIED WARRANTIES OR THE EXCLUSION OR LIMITATION OF CERTAIN DAMAGES. IF NOTWITHSTANDING THE PROVISIONS OF SECTION 20 BELOW THESE LAWS APPLY TO YOU, SOME OR ALL OF THE ABOVE DISCLAIMERS, EXCLUSIONS, OR LIMITATIONS MAY NOT APPLY TO YOU, AND YOU MAY HAVE ADDITIONAL RIGHTS.

## **19. TERMINATION AND SURVIVAL**

In the event that you violate the TOU or the Distributorship Agreement for any reason terminates: (a) all rights granted to you under the TOU shall terminate immediately, with or without notice; (b) you must immediately cease using the Service; and (c) McKee, in its sole discretion, may remove and discard Your Content. Upon termination of the TOU, all rights granted to you under the TOU shall immediately terminate, but all other provisions shall survive termination.

## **20. GOVERNING LAW**

The TOU shall be governed by and construed and enforced in accordance with the laws of the State of Tennessee, without regard to conflict of laws principles, and the United States Federal Arbitration Act and other applicable federal laws. The United Nations Convention on Contracts for the International Sale of Goods is specifically excluded from application to the TOU.

## **21. BINDING ARBITRATION AND CLASS ACTION WAIVER**

(a) ALL CLAIMS AS DEFINED IN SECTION 2(b) ABOVE SHALL BE RESOLVED BY BINDING ARBITRATION RATHER THAN IN COURT, EXCEPT THAT YOU OR MCKEE MAY ELECT TO HAVE CLAIMS RESOLVED IN A SMALL CLAIMS COURT (DEFINED FOR PURPOSES OF THE TOU AS A COURT WITH LIMITED JURISDICTION TO HEAR CLAIMS NOT EXCEEDING \$5,000) IF THE CLAIMS ARE WITHIN THE COURT'S JURISDICTION. THERE IS NO JUDGE OR JURY IN ARBITRATION, AND COURT REVIEW OF AN ARBITRATION AWARD IS LIMITED.

(b) The arbitration will be conducted by the American Arbitration Association (AAA) under its then-applicable Commercial Arbitration Rules which will likewise determine the jurisdiction of the arbitrator. The arbitrator will, among other things, have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any Claim. The AAA's rules are available at <http://www.adr.org/>. Payment of all filing, administration and arbitrator fees will be governed by the AAA's rules; provided, however, that if your Claim is for an amount not exceeding \$2,500, McKee will advance your share of the filing, administration and arbitrator fees assessed by AAA and will remain responsible for the payment of those fees if your Claim is not determined by the arbitrator to be frivolous. The arbitration shall be conducted in the English language by a single independent and neutral arbitrator. For any hearing conducted in person as part of the arbitration, you agree that the hearing will be conducted in Chattanooga, Tennessee. The decision of the arbitrator shall be final and binding. Judgment on the arbitral award may be entered in any court of competent jurisdiction.

(c) YOU AND MCKEE EACH AGREE THAT ALL CLAIMS AS DEFINED IN SECTION 2(b) ABOVE WILL BE RESOLVED ONLY ON AN INDIVIDUAL BASIS AND NOT IN A CLASS, COLLECTIVE, CONSOLIDATED OR REPRESENTATIVE ACTION OR ARBITRATION AND EXPRESSLY WAIVE ANY RIGHT TO HAVE A CLAIM DETERMINED OR RESOLVED ON A CLASS, COLLECTIVE, CONSOLIDATED OR REPRESENTATIVE BASIS. IF FOR ANY REASON THE PROVISIONS OF THE PRECEDING SENTENCE ARE HELD TO BE INVALID OR UNENFORCEABLE IN A CASE IN WHICH CLASS, COLLECTIVE, CONSOLIDATED OR REPRESENTATIVE CLAIMS HAVE BEEN ASSERTED, THE PROVISIONS OF THIS SECTION 21 REQUIRING BINDING ARBITRATION SHALL LIKEWISE BE UNENFORCEABLE AND NULL AND VOID. IF FOR ANY REASON A CLAIM PROCEEDS IN COURT RATHER THAN IN ARBITRATION, YOU AND MCKEE EACH WAIVE ANY RIGHT TO A JURY TRIAL AND AGREE THAT SUCH CLAIM SHALL BE BROUGHT AND DETERMINED ONLY IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE (SOUTHERN DIVISION) OR, IF FEDERAL JURISDICTION IS NOT AVAILABLE, IN A COURT OF COMPETENT JURISDICTION IN CHATTANOOGA, HAMILTON COUNTY, TENNESSEE. YOU HEREBY SUBMIT TO THE PERSONAL JURISDICTION AND VENUE OF SUCH COURTS AND WAIVE ANY OBJECTION OR DEFENSE ON THE GROUNDS OF JURISDICTION, VENUE, *FORUM NON CONVENIENS* OR ANY SIMILAR GROUNDS WITH RESPECT TO ANY SUCH CLAIM.

(d) Notwithstanding anything to the contrary, you and McKee may seek injunctive relief and any other equitable remedies from any court of competent jurisdiction to protect our intellectual property rights, whether in aid of, pending or independently of the resolution of any dispute pursuant to the arbitration procedures set forth above.

(e) If McKee implements any material change to this Section 21, such change will not apply to any Claim for which you provided written notice to McKee before the implementation of the change.

## **22. LEGAL COMPLIANCE**

You represent and warrant that you are not: (a) located in a country that is subject to a U.S. Government embargo, listed in the Area Control List under Canada's Export and Import Permits Act, or designated by the U.S. Government as a "terrorist supporting" country; and (b) listed on any U.S. Government list of prohibited or restricted parties, including the Specially Designated Nationals List.



## **23. U.S. GOVERNMENT ENTITIES**

This section applies to access to or use of the Service by a branch or agency of the United States Government. The Service includes “commercial computer software” and “commercial computer software documentation” as such terms are used in 48 C.F.R. 12.212 and qualifies as “commercial items” as defined in 48 C.F.R. 2.101. Such items are provided to the United States Government: (a) for acquisition by or on behalf of civilian agencies, consistent with the policy set forth in 48 C.F.R. 12.212; or (b) for acquisition by or on behalf of units of the Department of Defense, consistent with the policies set forth in 48 C.F.R. 227.7202-1 and 227.7202-3. The United States Government shall acquire only those rights set forth in the TOU with respect to the such items, and any access to or use of the Service by the United States Government constitutes: (i) agreement by the United States Government that that such items are “commercial computer software” and “commercial computer software documentation” as defined in this section; and (ii) acceptance of the rights and obligations herein.

## **24. NO THIRD-PARTY BENEFICIARIES; INDEPENDENT PARTIES**

You agree that, except as otherwise expressly provided in the TOU, there shall be no third-party beneficiaries to the TOU. You acknowledge and agree that you and McKee are independent parties, that you provide services on your own behalf or on behalf of the Distributor and not on behalf of McKee, that you are not authorized to create or assume any obligations or liabilities on behalf of McKee, and that you shall not by virtue of the TOU, your access to or use of the Service, or otherwise be deemed an employee or agent of McKee.

## **25. PROCEDURE FOR MAKING CLAIMS OF COPYRIGHT INFRINGEMENT<sup>4</sup>**

If you believe that your work has been made available through the Service in a way that constitutes copyright infringement, please provide McKee’s Agent for Notice of Copyright Claims the following information: (a) a physical or electronic signature of a person authorized to act on behalf of the owner of an exclusive right that is allegedly infringed; (b) a description of the copyrighted work claimed to have been infringed, or, if multiple copyrighted works are covered by a single notification, a representative list of such works; (c) a description of the material that you claim is infringing and where that material may be accessed within the Service; (d) your address, telephone number and email address; (e) a statement by you that you have a good-faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent or the law; and (f) a statement from you that the information in the notification is accurate and, under penalty of perjury, that you are authorized to act on behalf of the owner of an exclusive right that is allegedly infringed. McKee’s Agent for Notice of Copyright Claims can be reached as follows:

Agent for Notice of Copyright Claims  
10260 McKee Road  
Collegedale, TN 37315  
Attn: Vice President and General Counsel  
Phone: 423.238.7111  
Email: [copyright@mckee.com](mailto:copyright@mckee.com)

## **26. CALIFORNIA RESIDENTS**

In accordance with California Civil Code §1789.3, you may report complaints to the Complaint Assistance Unit of the Division of Consumer Services of the California Department of Consumer Affairs by

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<sup>4</sup> This is in here to take advantage of the “safe harbor” offered by the Digital Millennium Copyright Act (DMCA). Under the DMCA, the operator of a website is not liable for any infringing materials posted by its users if: (a) it registers an agent for receipt of copyright claims with the Copyright Office at <https://dmca.copyright.gov/osp/p1.html>; and (b) acts expeditiously to remove allegedly infringing materials upon receipt of notice. McKee previously registered with the Copyright Office. But because of a recent change in the Copyright Office’s procedures, McKee will need to re-register. Fortunately, it’s a pretty straightforward process. If you have any questions about completing the form, please let us know.

contacting such unit in writing at 1625 North Market Blvd., Suite N 112, Sacramento, CA 95834, or by telephone at (800) 952-5210.

## **27. GENERAL PROVISIONS**

The TOU (together with any Additional Terms) constitutes the entire agreement between you and McKee concerning your access to and use of the Service. It supersedes all prior or contemporaneous oral or written negotiations and agreements between you and McKee with respect to such subject matter but does not supersede any provision of the Distributorship Agreement, which shall continue to govern Distributor's relationship with McKee. In the event of any conflict between or among the TOU and any Additional Terms, each will take precedence and govern in the following order of priority: the Distributorship Agreement, the TOU, and any other Additional Terms. The TOU may not be amended by you except in a writing executed by you and an authorized representative of McKee. For the purposes of the TOU, the words "such as," "include," "includes" and "including" shall be deemed to be followed by the words "without limitation." You may not assign or delegate any right or obligation under the TOU without the prior written consent of McKee. The failure of McKee to exercise or enforce any right or provision of the TOU shall not constitute a waiver of such right or provision. If any provision of the TOU is held to be invalid or unenforceable under applicable law, then such provision shall be construed, limited, modified or, if necessary, severed to the extent necessary to eliminate its invalidity or unenforceability, without in any way affecting the remaining parts of the TOU. Any prevention of or delay in performance by McKee hereunder due to labor disputes, acts of god, governmental restrictions, enemy or hostile governmental action, fire or other casualty or other causes beyond its reasonable control shall excuse the performance of its obligations for a period equal to the duration of any such prevention or delay.