

## End User License Agreement

This is an agreement ("AGREEMENT") between you, the LICENSEE, and John McNeil & Co., Inc. If you or your agent downloads, installs or uses the software accompanying this Agreement (including its documentation, the "SOFTWARE"), you, on behalf of the entity (a) identified on the purchase order for the SOFTWARE submitted to, and accepted by, John McNeil & Co., Inc., (the "PURCHASE ORDER"), or (b) granted an evaluation license ("EVALUATION LICENSE") for the SOFTWARE by John McNeil & Co., Inc., thereby accept the terms and conditions of this Agreement and become the "LICENSEE". You hereby represent and warrant that you are authorized to bind to this Agreement the entity identified in the PURCHASE ORDER or granted an EVALUATION LICENSE. If you do not agree to these terms and conditions, you are not authorized to use the SOFTWARE, and you are required to return the SOFTWARE, including all copies thereof, to John McNeil & Co., Inc., for a refund. Terms of a PURCHASE ORDER that contradict or add terms to this Agreement or the applicable price quotation setting forth the licenses to the SOFTWARE purchased hereunder ("PRICE QUOTATION") are not binding. In the event of any inconsistency among the applicable PRICE QUOTATION, a PURCHASE ORDER, and this Agreement, the controlling provisions shall be determined by reference to the following order: (1) PRICE QUOTATION, (2) this Agreement, (3) PURCHASE ORDER.

### **1. LICENSE**

1.1 License Grant. Subject to the terms and conditions of this Agreement, and LICENSEE's payment of the applicable license fees, John McNeil & Co., Inc., hereby grants LICENSEE a limited, non-exclusive, internal-use-only, non-transferable, non-assignable, non-sublicensable license to install and use the SOFTWARE, in object code form only, solely (i) during the term identified on the PURCHASE ORDER or, in the case of EVALUATION LICENSES, for such term as John McNeil & Co., Inc., has granted (in each case, subject to earlier termination pursuant to this Agreement, including Section 2 below, the "TERM"), (ii) as installed at the geographical site(s) identified on the PURCHASE ORDER, (iii) for the number of named users specified on the PURCHASE ORDER or, in the case of EVALUATION LICENSES, for such number of named users as John McNeil & Co., Inc., has granted and (iv) for LICENSEE's own internal business purposes. John McNeil & Co., Inc., reserves all rights not expressly granted herein.

1.2 License Management Software. All SOFTWARE shall be installed on LICENSEE's network such that its usage can be measured and managed by the License Management Software provided by John McNeil & Co., Inc., which will prohibit the SOFTWARE from being used beyond the scope of license in this Agreement and will disable the SOFTWARE at the end of the TERM. LICENSEE hereby consents to the incorporation of such mechanisms and hereby waives and releases John McNeil & Co., Inc., from and against any and all claims, actions, causes

of action, damages and judgments that may accrue or arise in connection therewith. LICENSEE shall not tamper or interfere with the License Management Software in any way.

1.3 Restrictions. LICENSEE may make copies of the SOFTWARE only as necessary for bona fide backup or archival purposes and shall ensure all proprietary rights notices on the SOFTWARE are retained on such copies. LICENSEE shall not directly or indirectly: (i) modify, translate, adapt, create derivative works from or decompile the SOFTWARE, or any portion thereof, or create or discern attempt to create or discern, by reverse engineering or otherwise, the source code from the object code supplied hereunder, (ii) rent, lease, loan, sell, transfer, publish, display, distribute, disclose or make the SOFTWARE available to third parties or use the SOFTWARE, or any portion thereof, in a service bureau, time-sharing or outsourcing service or otherwise use the SOFTWARE for the benefit of third parties, (iii) remove or alter any proprietary rights notices on the SOFTWARE or (iv) disclose, without John McNeil & Co., Inc.'s prior written approval, the SOFTWARE or any code, information or materials contained in or related to the SOFTWARE, license keys, analysis or performance information, results of SOFTWARE performance benchmarks or documentation to any entity (except to LICENSEE's employees having a need to know for purposes of authorized use hereunder and who are informed in writing of the obligations of this section) or use any of the foregoing other than as expressly authorized hereunder. LICENSEE shall notify John McNeil & Co., Inc., immediately of any actual or imminent unauthorized access to, or use or disclosure of, any of the foregoing. LICENSEE recognizes that the unauthorized use or disclosure of any of the foregoing will give rise to irreparable injury to John McNeil & Co., Inc., or its licensors or affiliates for which monetary damages may be an inadequate remedy; and LICENSEE agrees that John McNeil & Co., Inc., or its licensors or affiliates may seek and obtain injunctive relief against the breach or threatened breach of LICENSEE's obligations hereunder, in addition to any other legal and equitable remedies which may be available.

1.4 Export Controls. The SOFTWARE, and the source code and technology related thereto, are subject to the U.S. Export Administration Regulations ("EAR"), U.S. sanctions administered by the Office of Foreign Assets Control ("OFAC") and, to the extent used in performance of military or defense services, the International Traffic in Arms Regulations ("ITAR"). LICENSEE represents and warrants that LICENSEE is not a national or resident of any country subject to U.S. export restrictions, including but not limited to Cuba, Iran, North Korea, Syria, and Sudan. LICENSEE agrees to comply with all applicable laws, rules or regulations (except to the extent inconsistent with the laws of the United States) and will not directly or indirectly sell, provide, transfer, export, reexport, divert, loan, lease, consign, release to a foreign national, or otherwise dispose of (x) the SOFTWARE, (y) any source code or technology related thereto and/or (z) any technical data used in connection with or generated by the SOFTWARE in violation of the EAR, U.S. sanctions laws administered by OFAC, ITAR regulations or any other applicable law, rule or regulation of any jurisdiction.

## **2. TERMINATION**

John McNeil & Co., Inc., shall have the right to immediately terminate this Agreement with no refund: (a) for a material breach of this Agreement by LICENSEE (including, without limitation, LICENSEE's failure to meet its payment obligations under the PURCHASE ORDER), or (b) if LICENSEE becomes insolvent or is unable to pay its debts as due, enters into or files (or has filed or commenced against it) a petition, arrangement, action or other proceeding seeking relief or protection under the bankruptcy laws of the United States or similar laws of any other jurisdiction or transfers all of its assets to another person or entity. John McNeil & Co., Inc., shall have the right to terminate this Agreement upon written notice to LICENSEE in the event of the termination of a third party license to code that is included in the SOFTWARE, provided that, in the event of any such termination of this Agreement, John McNeil & Co., Inc., shall refund any license fees paid by LICENSEE hereunder on a pro rata basis depending on the portion of the TERM that has passed as of the date of termination of this Agreement, or, if the TERM is perpetual, depending on the portion of a five-year period that has passed as of the date of termination of this Agreement. In the event of termination or expiration of this Agreement for any reason, LICENSEE shall promptly return the SOFTWARE, and all copies thereof, to John McNeil & Co., Inc., and shall discontinue all use thereof. Notwithstanding the foregoing, Sections 1.3(iv), 2, 3, 5, 6 and 7 shall survive the expiration or termination hereof for any reason.

## **3. OWNERSHIP RIGHTS**

LICENSEE acknowledges that the SOFTWARE and supporting documentation and materials are the sole and exclusive property of, and are valuable, confidential and proprietary to, John McNeil & Co., Inc., or its licensors or suppliers, including, without limitation, all worldwide rights to patents, copyrights, trademarks, trade secrets and any other intellectual property and proprietary rights inherent therein or appurtenant thereto, in all media now known or hereinafter developed, and LICENSEE shall protect the foregoing to at least the same extent that it protects its own confidential information. LICENSEE is not purchasing title to the SOFTWARE or copies thereof, but rather is being granted only a license to use the SOFTWARE. LICENSEE shall not use John McNeil & Co., Inc.'s or its licensors' names or marks or employee names, or adaptations thereof, in any advertising, promotional or sales literature without John McNeil & Co., Inc.'s, or its licensor's, as applicable, prior written consent. If the SOFTWARE is used by LICENSEE to obtain results that are published in a scientific or research publication, LICENSEE shall acknowledge its use of the SOFTWARE with an appropriate citation referencing John McNeil & Co., Inc. LICENSEE agrees that John McNeil & Co., Inc., may use LICENSEE's name to identify LICENSEE as a customer of John McNeil & Co., Inc., as part of a general list of John McNeil & Co., Inc., customers for use and reference in John McNeil & Co., Inc., corporate, promotional and marketing literature. LICENSEE shall inform John McNeil & Co., Inc., promptly in writing of any alleged infringement of John McNeil & Co., Inc.'s or its licensors' rights and of any available evidence thereof.

#### **4. WARRANTIES**

John McNeil & Co., Inc., warrants that the SOFTWARE will perform substantially in accordance with the accompanying documentation for a period of thirty (30) days from the date of John McNeil & Co., Inc.'s provision of the SOFTWARE to LICENSEE (the "Warranty Period"). John McNeil & Co., Inc.'s sole and exclusive obligation and liability for any breach of the foregoing warranty shall be, in John McNeil & Co., Inc.'s sole discretion: (i) to use commercially reasonable efforts to repair or replace the SOFTWARE; or (ii) to refund any license fees paid by LICENSEE for the SOFTWARE. John McNeil & Co., Inc.'s aforementioned obligation and liability is conditioned upon receipt of written notice from LICENSEE of non-performance within the Warranty Period. In no event shall the warranty herein apply: (i) to SOFTWARE that has been modified from its standard form as provided by John McNeil & Co., Inc., or that is not up to date with all updates, enhancements and new releases/new versions released by John McNeil & Co., Inc., (ii) to difficulties or defects that are not reproducible or that are due to LICENSEE's computer hardware, third party software, environment, operating system or other causes external to the SOFTWARE or (iii) to use of the SOFTWARE in a manner or purpose for which it was not intended. John McNeil & Co., Inc., does not warrant that the SOFTWARE will operate uninterrupted or error-free or meet LICENSEE's particular requirements. EXCEPT AS SET FORTH ABOVE, TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, JOHN McNEIL & CO., INC., AND ITS AFFILIATES AND LICENSORS DISCLAIM ALL WARRANTIES, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO ANY WARRANTIES OF ACCURACY, CORRECTNESS, USE OR APPLICATION, ADEQUACY AND SUITABILITY, AND ANY IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE, AND NON-INFRINGEMENT.

LICENSEE warrants that (a) it is a corporate entity duly organized and validly existing under the laws of its organizing jurisdiction and has all requisite power and authority to enter into this Agreement and (b) this Agreement is enforceable against and binding upon LICENSEE. Any breach of the foregoing warranties may constitute grounds for termination of the license.

#### **5. INDEMNITY**

LICENSEE will, at its own expense, indemnify, defend and hold harmless John McNeil & Co., Inc., its affiliates and licensors, and their respective directors, officers, trustees, students, employees and agents, from and against any action, damages, suits, claims, liabilities, costs and expenses (including reasonable attorneys' fees) based on a claim arising from or relating to this Agreement or LICENSEE's use of the SOFTWARE. The indemnified party shall have the exclusive right to control such defense. In no event shall LICENSEE settle any such claim, lawsuit or proceeding in any manner that materially prejudices the indemnified party's rights without the indemnified party's prior written approval.

#### **6. LIMITATION OF LIABILITY**

TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, IN NO EVENT SHALL JOHN McNEIL & CO., INC., OR ITS AFFILIATES OR LICENSORS BE LIABLE FOR ANY SPECIAL, INCIDENTAL, INDIRECT, CONSEQUENTIAL, PUNITIVE OR EXEMPLARY DAMAGES, INCLUDING WITHOUT LIMITATION DAMAGES FOR LOST BUSINESS OR PROFITS, LOSS OF GOODWILL, LOSS OF DATA OR COSTS OF PROCUREMENT OF SUBSTITUTE GOODS OR SERVICES, ARISING OUT OF THE USE OF OR INABILITY TO USE THE SOFTWARE, THE PROVISION OF OR FAILURE TO PROVIDE ANY SERVICES IN CONNECTION WITH THE SOFTWARE OR THE PROVISION OF OR FAILURE TO PROVIDE MAINTENANCE, EVEN IF ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. JOHN McNEIL & CO., INC.'S AND ITS AFFILIATES' ENTIRE AGGREGATE LIABILITY UNDER OR RELATING TO THIS AGREEMENT, FOR ANY REASON(S) AND UPON ANY CAUSE(S) OF ACTION WHATSOEVER, SHALL NOT EXCEED THE PRICE ACTUALLY PAID BY LICENSEE FOR THE USE OF THE SOFTWARE. NO LICENSOR OF JOHN McNEIL & CO., INC., SHALL HAVE ANY LIABILITY TO LICENSEE FOR LOSS OR DAMAGES ARISING OUT OF THIS AGREEMENT OR THE SOFTWARE.

## **7. GENERAL**

This Agreement and its enforcement shall be governed by, and construed in accordance with, the laws of the State of California, without regard to conflicts-of-law principles. The exclusive venue for any action relating to this Agreement shall be the state and federal courts situated in the State of California, County of San Diego, and each party expressly consents to the jurisdiction of such courts. Neither party shall be liable for failure to perform an obligation under this Agreement where such failure is due to fire, flood, labor dispute, natural calamity, acts of the government or other causes beyond its reasonable control. The parties are independent contractors. No agency, partnership or joint venture is created by this Agreement. LICENSEE may not assign or transfer this Agreement in whole or in part, including by operation of law, change of control, asset sale or merger without prior written consent of John McNeil & Co., Inc. Any assignment or transfer or attempt to assign or transfer this Agreement in violation of this provision is null and void and may constitute grounds for termination of the license. This Agreement constitutes the entire agreement between the parties and supersedes all prior agreements, written or oral, relating to the subject matter hereof. This Agreement may not be modified or altered except by written instrument duly executed by both parties. If any provision of this Agreement is deemed to be unenforceable, that provision shall be enforced to the maximum extent permitted to effect the parties' intentions hereunder, and the remainder of this Agreement shall continue in full force and effect. The failure of either party to exercise any right provided for herein shall not be deemed a waiver of any right hereunder. Any notices hereunder shall be in writing to the receiving party's address set forth on the PURCHASE ORDER or, if no address is set forth on the PURCHASE ORDER, to the receiving party's headquarters as identified on its Web site. Notices shall be deemed given (i) if by hand delivery, upon receipt thereof; (ii) if mailed, three (3) days after deposit in the U.S. mails, postage prepaid, certified mail, return receipt requested; (iii) if by fax,

upon receipt thereof as evidenced by fax confirmation; or (iv) if by next day delivery service, upon such delivery. Either party may change its address by giving written notice to the other party.

## **8. MAINTENANCE RIDER**

Provided that LICENSEE is subscribed to, and paid-up for, John McNeil & Co., Inc.'s maintenance services program, and is in compliance with the terms and conditions of the Agreement, John McNeil & Co., Inc., shall provide Maintenance (as defined below), subject to the terms and conditions of the Agreement. Maintenance shall mean: (a) technical support by telephone and e-mail (during regular business hours, with no guaranteed response time), and (b) bug fixes and new releases/new versions (when and if they are made generally available to John McNeil & Co., Inc.'s other similarly situated customers, and which are hereby deemed part of the SOFTWARE); provided, however, that if the TERM is perpetual, new releases/new versions shall be at an additional charge. Notwithstanding anything to the contrary, John McNeil & Co., Inc., shall have no obligation hereunder to provide Maintenance for corrections of difficulties or defects that are not reproducible or that are due to LICENSEE's computer hardware, third party software, environment, operating system or other causes external to the SOFTWARE, and John McNeil & Co., Inc., shall have no obligation to provide Maintenance for SOFTWARE that has been modified from its standard form as provided by John McNeil & Co., Inc. Maintenance under this Agreement shall continue: (i) only so long as the hardware and software environment in which the SOFTWARE is installed is configured as specified in the SOFTWARE's documentation; and (ii) until termination or expiration of the Agreement for any reason or John McNeil & Co., Inc.'s discontinuation of Maintenance for the SOFTWARE or LICENSEE's installed version of the SOFTWARE, at John McNeil & Co., Inc.'s sole discretion. Notwithstanding anything to the contrary herein, LICENSEE shall be solely responsible for backing up the SOFTWARE and performing other basic maintenance as set forth in the SOFTWARE's documentation or instructions which may be provided by John McNeil & Co., Inc., from time to time. John McNeil & Co., Inc., does not represent or warrant that Maintenance will remedy any problem with the SOFTWARE. Services provided by John McNeil & Co., Inc., beyond the Maintenance provided hereunder shall be subject to additional fees. In no event shall John McNeil & Co., Inc.'s licensors be obligated to provide any maintenance, installation or support services of any kind.