

SPECIFIC TO MENU CALC USERS:

THIS PROGRAM, KNOWN AS MENU CALC, IS A PRODUCT OF FOODCALC, LLC (HEREINAFTER “FOODCALC” OR “FoodCalc”). ALL USERS OF MENU CALC FIRST AGREE TO BE BOUND BY THE FOLLOWING MenuCalc TERMS AND CONDITIONS.

PLEASE READ THESE TERMS AND CONDITIONS CAREFULLY. IF YOU AGREE TO BE BOUND BY THE TERMS AND CONDITIONS, PLEASE CLICK ON THE BOX AT THE BOTTOM OF THIS PAGE LABELED “AGREE” AT WHICH TIME THE SERVICES WILL BE ACCESSIBLE BY YOUR COMPUTER. IF YOU DO NOT AGREE TO BE BOUND BY THE TERMS AND CONDITIONS, PLEASE CLICK ON THE BOX AT THE BOTTOM OF THIS PAGE LABELED “I DISAGREE”, AT WHICH POINT YOU WILL RETURN TO THE MenuCalc HOME PAGE WITHOUT THE SERVICES BEING ACCESSED.

THE FoodCalc, LLC SERVICES INCLUDE COMPUTER SOFTWARE PROGRAMS, DOCUMENTATION, DATA, DATABASES AND OTHER PROPRIETARY MATERIALS THAT BELONG TO FoodCalc, LLC OR ITS LICENSORS (COLLECTIVELY REFERRED TO HEREINAFTER AS “SERVICES”), AND ARE SUBJECT TO THE FOLLOWING TERMS AND CONDITIONS. THE SERVICES ARE LICENSED ONLY ON THE CONDITION THAT YOU, THE “CUSTOMER”, AGREE TO THE TERMS AND CONDITIONS SET OUT BELOW.

**TERMS AND CONDITIONS**

**1. DEFINITIONS OF “CUSTOMER”, “MASTER”, “USER”; ACCESS TO SERVICES AND SUPPORT**

1.1 The term “Customer” as used in this Agreement and throughout these Terms and Conditions shall mean that single individual person or that single business entity or concept under its own brand name whose name and address are entered by Customer in the Register/Sign Up page (“Sign Up Page”). The term “Customer” expressly excludes any and all of Customer’s divisions, subsidiaries, associates, affiliates, contractors, vendors, manufacturers, processors which do not perform all of their business activity at premises which are owned or leased by Customer.

1.2 The term “Master” as used in this Agreement and throughout these Terms and Conditions shall mean that named individual person who is authorized to accept and does accept on behalf of Customer all the responsibilities and obligations contained within this Agreement. Any “Master” shall also be deemed a “User” for the purposes of this Agreement, and as “User” is defined in 1.3 following.

1.3 The term “User” as used in this Agreement and throughout these Terms and Conditions shall mean any person (including the Master) who is authorized by Master (acting on behalf of Customer) to have access to the Services, provided always that each and every User (including Master) shall be a direct employee of Customer and be on the payroll of Customer and on no other payroll.

1.4 Subject to the terms and conditions of this Agreement, MenuCalc will use reasonable efforts to provide Customer access to the Services. As part of the registration process, Customer agrees to designate and limit its usage of the Services to the responsible Master and to any authorized Users set forth in the Sign Up page at [www.MenuCalc.com](http://www.MenuCalc.com) and also displayed in Customer's "My Account" section. MenuCalc reserves the right to refuse registration of, or cancel, passwords it deems inappropriate.

1.5 Subject to the terms hereof, MenuCalc will use reasonable efforts to provide Customer with support services, through electronic mail or telephone, in accordance with MenuCalc's standard practices.

1.6 MenuCalc shall be entitled to immediately terminate Customer's use of the Services in the event that MenuCalc determines at its sole discretion that Customer is in breach of the "Master" and "User" authorizing provisions of this Section 1, provided that MenuCalc promptly thereafter notifies Customer of such termination. Customer shall not be entitled to any refunds as a result of any such termination.

1.7 MenuCalc reserves the right to mention Customer for marketing purposes which include but limited to: product and company websites, whitepapers, press releases, press kits, media packets, emails and all other marketing collateral that company shall use.

## **2. RESTRICTIONS AND RESPONSIBILITIES**

2.1 Customer will not, directly or indirectly: reverse engineer, decompile, disassemble or otherwise attempt to discover the source code, object code or underlying structure, ideas or algorithms of the Services or any software (including any Free Trial, live Demo, and online Tutorials), documentation or data related to the Services ("Software") in order to (A) build a competitive product or service, (B) build a product or service using similar ideas, features, functions or graphics of the Services, or (C) copy any ideas, features, functions or graphics of the Services; modify, translate, or create derivative works based on the Services or any Software; or license, sub-license, copy, rent, resell, distribute, lease, distribute, pledge, assign, or otherwise transfer or encumber rights to or commercially exploit the Services or any Software; use the Services or any Software for timesharing or service bureau purposes or otherwise for the benefit of a third party; or remove any proprietary notices or labels. Customer shall not create Internet "links" to or from or within the Services (except for links on Customer's web site to MenuCalc's applications for the benefit of MenuCalc), or "frame" or "mirror" any content forming part of the Services, except for Customer's own internal business purposes.

2.2 Customer represents, covenants, and warrants that Customer will use the Services only in compliance with these terms and conditions and only in compliance with all applicable laws (including but not limited to policies and laws related to spamming, privacy, obscenity or defamation). Customer hereby agrees to indemnify and hold harmless MenuCalc against any damages, losses, liabilities, settlements and expenses (including without limitation costs and attorneys' fees) in connection with any claim or action that arises from an alleged violation of the foregoing or any other breach of this Agreement, or otherwise from Customer's use of the Services, or alleging that the Customer data infringes the intellectual property rights of, or has otherwise harmed, a third party. Although MenuCalc has no obligation to monitor the

data or content provided by Customer or Customer's use of the Services, MenuCalc may do so and may remove any such content or immediately prohibit and terminate any use of the Services it believes may be (or alleged to be) in violation of the foregoing. Customer shall have sole responsibility for the accuracy, quality, integrity, legality, reliability, and appropriateness of all Customer data, including Customer data entered into any MenuCalc database, and shall not negligently or intentionally enter incorrect data into any MenuCalc database.

2.3 Customer shall be responsible for obtaining and maintaining any equipment and ancillary services needed to connect to, access or otherwise use the Services, including, without limitation, modems, hardware, server, software, operating system, networking, web servers, long distance and local telephone service (collectively, "Equipment"). Customer shall be responsible for ensuring that such Equipment is compatible with the Services and complies with all configurations and specifications set forth in MenuCalc 's published policies then in effect. Customer shall also be responsible for maintaining the security of the Equipment, Customer account, passwords (including but not limited to administrative and user passwords) and files, and for all uses of Customer account or the Equipment with or without Customer's knowledge or consent. Customer is responsible for all activities that occur under Customer's user accounts. Customer shall prevent unauthorized access to, or use of, the Services, and notify MenuCalc promptly of any such unauthorized use. In addition to the foregoing, the Customer's "Master" (as defined at the Sign Up Page) has the ability to delete Customer Users and their data and products. If any User ceases to be employed by the Customer, the Master shall have sole responsibility to ensure the security of the Services and any Proprietary Information. In addition, the Master shall be responsible for deleting various account information associated with any such departing/departed User. MenuCalc shall have no responsibility or liability with respect to any actions taken or not taken by Customer Users and Masters. Customer shall use the Services solely for its internal business purposes as contemplated by this Agreement and shall not: (i) send or store material containing software viruses, worms, Trojan horses or other harmful computer code, files, scripts, agents or programs; (ii) interfere with or disrupt the integrity or performance of the Services or the data contained therein; or (iii) attempt to gain unauthorized access to the Services or its related systems or networks.

2.4 Customer acknowledges that in providing the Services, MenuCalc utilizes (i) certain trade-name(s), logo(s), domain name(s), product and service name(s) associated with the Services, and other trademarks and service marks; (ii) certain audio and visual information, documents, software and other works of authorship; and (iii) other technology, software, hardware, products, processes, algorithms, user interfaces, know-how and other trade secrets, techniques, designs, inventions and other tangible or intangible technical material or information (collectively, "MenuCalc Technology") and that the MenuCalc Technology is covered by intellectual property rights owned or licensed by MenuCalc (collectively, "MenuCalc IP Rights"). Other than as expressly set forth in this Agreement, no license or other rights in or to the MenuCalc Technology or MenuCalc IP Rights are granted to Customer, and all such licenses and rights are hereby expressly reserved.

2.5 MenuCalc 's privacy policy and privacy statement is set forth within the application and incorporated herein by this reference. Customer agrees to abide by and be bound by such statement.

2.6 MenuCalc shall have a royalty-free, worldwide, perpetual license to use or incorporate into the Services any suggestions, ideas, enhancement requests, feedback, recommendations or other information provided by Customer or its users relating to the operation of the Services.

2.7 MenuCalc shall be entitled to immediately terminate Customer's use of the Services in the event of Customer's breach of provision of this Section 2, provided that MenuCalc promptly thereafter notifies Customer of such termination. Customer shall not be entitled to any refunds as a result of any such termination.

### **3. CONFIDENTIALITY**

3.1 Each undersigned party (the "Receiving Party") understands that the other party (the "Disclosing Party") has disclosed or may disclose information relating to the Disclosing Party's business (hereinafter referred to as "Proprietary Information" of the Disclosing Party). Notwithstanding the foregoing, nothing will be considered "Proprietary Information" of the Disclosing Party unless either it is or was disclosed in tangible form and is conspicuously marked "Confidential", "Proprietary" or the like.

3.2 The Receiving Party agrees (i) to take reasonable precautions to protect such Proprietary Information, and (ii) not to use or divulge any such Proprietary Information to any third person. The Disclosing Party agrees that the foregoing shall not apply with respect to any information after three years following the disclosure thereof or any information that the Receiving Party can document (i) is or becomes generally available to the public, or (ii) was in its possession or known by it prior to receipt from the Disclosing Party, or (iii) was rightfully disclosed to it by a third party without restriction, or (iv) was independently developed without use of any Proprietary Information of the Disclosing Party.

3.3 Notwithstanding the foregoing, MenuCalc shall be entitled to use and provide access to Customer data (including any food product nutrition composition data supplied by Customer for its own manufactured products) which Client transfers to MenuCalc for inclusion in any MenuCalc database and access by other users; provided that MenuCalc shall not divulge any of Customer's recipes or otherwise identify Customer in connection with such access. MenuCalc may also collect data with respect to and report on the aggregate response rate and other aggregate measures of the Services' performance and use by Customer.

3.4 If the Receiving Party is compelled by law to disclose Proprietary Information of the Disclosing Party, it shall provide the Disclosing Party with prior notice of such compelled disclosure (to the extent legally permitted) and reasonable assistance, at Disclosing Party's cost, if the Disclosing Party wishes to contest the disclosure.

3.5 If the Receiving Party discloses or uses (or threatens to disclose or use) any Proprietary Information of the Disclosing Party in breach of this Section 3, the Disclosing Party shall have the right, in addition to any other remedies available to it, to seek injunctive relief to enjoin such acts, it being specifically acknowledged by the parties that any other available remedies are inadequate.

#### **4. PAYMENT OF FEES**

4.1 Customer will pay MenuCalc the then-applicable fees for the Services (the “Fees”). If Customer use of the Services exceeds the authorized number of users, usage amounts or usage periods referenced in Section 1.1 or at the Sign Up Page, Customer shall be billed for the excess usage in accordance with the Policies, and Customer agrees to pay the additional fees in the manner provided herein. Currently applicable Fees are set forth in the Sign Up Page. MenuCalc reserves the right to change the Fees or applicable charges and to institute new charges and Fees at the end of the initial Service Term or then-current renewal term, upon thirty (30) days prior notice to Customer (which may be sent by email).

4.2 If Customer believes that MenuCalc has billed Customer incorrectly, Customer must contact MenuCalc no later than 60 days after the closing date on the first billing statement in which the error or problem appeared, in order to receive an adjustment or credit. Inquiries should be directed to MenuCalc ‘s Customer Support department. Refunds are on a case-by-case basis and at MenuCalc ‘s sole discretion.

4.3 Payment for the Services may only be made as set forth on the Sign Up Page. Unpaid amounts are subject to a finance charge of 1.5% per month on any outstanding balance, or the maximum permitted by law, whichever is lower, plus all expenses of collection. Customer shall be responsible for all taxes associated with Services other than U.S. taxes based on MenuCalc ‘s net income. If MenuCalc has the legal obligation to pay or collect any taxes for which Customer is responsible under this section, the appropriate amount shall be paid by Customer unless Customer provides MenuCalc with a valid tax exemption certificate authorized by the appropriate taxing authority. If Customer’s account is at any time overdue, in addition to any of its other rights or remedies, MenuCalc reserves the right to suspend the Services provided to Customer, without liability to Customer, until such amounts are paid in full.

#### **5. BILLING TERMS AND PAYMENT OF FEES FOR RECUR BILLING**

YOU MUST HAVE A VALID CREDIT CARD FOR PAID ACCOUNTS. ALL SALES ARE FINAL. IF YOUR CREDIT CARD FAILS TO SUCCESSFULLY BE CHARGED YOU WILL BE NOTIFIED BY EMAIL TO PROVIDE AN UPDATED CARD. MenuCalc WILL ATTEMPT TO RE-TRY YOUR CARD FOR SUCCESSFUL DEBIT AND UNTIL THIS TIME YOUR ACCOUNT WILL BE SUSPENDED PENDING GOOD STANDING. YOUR PAID ACCOUNT WILL RENEW AUTOMATICALLY UNLESS A MenuCalc REPRESENTATIVE TERMINATES THE ACCOUNT, OR YOU CANCEL YOUR ACCOUNT. YOU AGREE AND ACKNOWLEDGE THAT IF YOU FAIL TO CANCEL YOUR SUBSCRIPTION BEFORE IT AUTOMATICALLY RENEWS PER THESE TERMS, THE SUBSCRIPTION FEES WILL BE AUTOMATICALLY CHARGED TO YOUR CREDIT CARD ON FILE. YOU ARE SOLELY RESPONSIBLE FOR PROPERLY CANCELING YOUR ACCOUNT. ONCE LOGGED INTO YOUR ACCOUNT, YOU MAY CANCEL YOUR SUBSCRIPTION AT ANY TIME BY CLICKING ON THE ACCOUNT LINK IN THE NAVIGATION BAR OF YOUR ACCOUNT. YOU ACCEPT AND ACKNOWLEDGE THAT A CANCELLED ACCOUNT WILL INCUR IN A REACTIVATION FEE OF MenuCalc ‘S SOLE DISCRETION. IF MenuCalc BELIEVE CUSTOMER IS IN PROBABLE BREACH OF ANY OF THESE TERMS AND CONDITIONS, MenuCalc RESERVES THE RIGHT TO TERMINATE EFFECTIVE IMMEDIATELY. SOME OF THE TERMS CONTAINED IN THIS SECTION DO NOT APPLY IF CUSTOMER IS ON LIFETIME LICENSE MADE BY A SINGLE PAYMENT. VALID CREDIT CARD ON FILE, RENEWING/UPGRADING/DOWNGRADING AND NOT APPLICABLE FOR LIFETIME LICENSE.

## **6. UPGRADE / DOWNGRADES / CREDITS / REFUNDS**

IF CUSTOMER UPGRADES TO A MONTHLY ACCOUNT, CUSTOMER IS CHARGED THE NEW PLAN RATE ON THEIR NEXT SCHEDULED BILLING CYCLE. ALL ANNUAL ACCOUNTS ARE PRE-PAID IN FULL AT TIME OF PURCHASE OR UPGRADE.

NO CREDIT IS GIVEN IF CUSTOMER DOWNGRADES TO A LESSER VALUE PLAN WITHIN SCHEDULED PAYMENT. ALL NEW CHARGES ARE APPLIED TO NEXT BILLING CYCLE. DOWNGRADES OCCUR IMMEDIATELY AT TIME OF DOWNGRADE. CUSTOMER AGREES AND ACKNOWLEDGES THERE IS NO DOWNGRADING OF AN ACCOUNT IN THE SAME BILLING CYCLE AS AN UPGRADE.

IF CUSTOMER CHOOSES TO CANCEL THEIR ACCOUNT THEY MUST CANCEL BEFORE NEXT BILLING CYCLE TO AVOID SCHEDULED CHARGES. REFUNDS ARE ON A CASE-BY-CASE BASIS AND AT MenuCalc 'S SOLE DISCRETION. IN ORDER TO TREAT EVERYONE EQUALLY, NO EXCEPTIONS WILL BE MADE.

## **7. USE OF PROMOTIONAL DISCOUNTS**

7.1 MenuCalc RESERVES THE RIGHT TO MAKE CHANGES TO THE TERMS OF ANY PROMOTION DISCOUNT CODES AT ANY TIME.

7.2 IN THE EVENT THAT A CUSTOMER VIOLATES THE TERMS OF A PROMOTIONAL DISCOUNT CODE, MenuCalc RESERVES THE RIGHT TO SUSPEND OR TERMINATE THE CUSTOMER ACCOUNT.

7.3 FOR CUSTOMERS USING PROMOTION DISCOUNT CODES PROVIDED FOR MenuCalc PARTNERS, THE CUSTOMER HEREBY AGREES AND ACKNOWLEDGES THAT CUSTOMER IS A CURRENT MEMBER OR CLIENT OF THE MenuCalc PARTNER FOR WHICH CUSTOMER IS ENTERING THIS EXCLUSIVE PROMOTION CODE FOR. THE CUSTOMER HEREBY AUTHORIZES MenuCalc TO SUSPEND CUSTOMER ACCOUNT IF MenuCalc AND/OR PARTNER FINDS CUSTOMER STATUS TO BE DIFFERENT, INACTIVE OR UNTRUE DURING PROMOTION CODE ENTRY.

## **8. TERMINATION**

8.1 MenuCalc reserves the right to give notice of termination of Services ("Termination Notice") as follows:

8.1.1 In the event that Customer's payment for Services has expired, MenuCalc may issue a Termination Notice that Services will be terminated and may not be reinstated unless Customer delivers to MenuCalc within ten (10) days of the date of transmission of the termination notice, the full payment due including any back payment.

8.1.2 Subject to Sections 1.6 and 2.7 (Immediate Termination), if MenuCalc determines at its sole discretion that Customer is in probable breach of any of these Terms and Conditions, MenuCalc may issue a Termination Notice that Services will be terminated and may not be reinstated unless Customer satisfies MenuCalc within thirty (30) days of the date of transmission of the Termination Notice that Customer is then in full compliance with these Terms and Conditions.

8.2 Customer shall not be entitled to any refunds as a result of any such termination.

8.3 Upon any termination, MenuCalc may, but is not obligated to, delete archived data.

8.4 All sections of this Service Agreement which by their nature should survive termination will survive termination, including, without limitation, accrued rights to payment, confidentiality obligations, warranty disclaimers, and limitations of liability.

## **9. WARRANTY AND DISCLAIMERS**

9.1 MenuCalc shall use reasonable commercial efforts consistent with prevailing industry standards to maintain the Services in a manner which minimizes errors and interruptions in the Services. Services may be temporarily unavailable for scheduled maintenance or for unscheduled emergency maintenance, either by MenuCalc or by third-party providers, or because of other causes beyond MenuCalc 's reasonable control, but MenuCalc shall use reasonable efforts to provide advance notice in writing or by e-mail of any scheduled service disruption.

9.2 MenuCalc provides the Services, which includes food ingredient nutrition composition data and food nutrient content claims which is either in the public domain through governmental or official agencies, including the United States Department of Agriculture ("USDA"), Food and Drug Administration ("FDA") or has been provided by third party food product manufacturers. Any Customer who submits their own food product nutrition composition data for their manufactured products to the MenuCalc database accepts that other Customers will rely on the accuracy of same, and such submitting Customer represents and warrants that such composition data is accurate and covenants to only submit accurate data. Customer will indemnify MenuCalc for any claims arising related to a breach of the foregoing representation and covenant. MenuCalc imports or accepts all third party data "as is." MenuCalc takes no responsibility for the accuracy of any composition data included in its database.

9.3 MenuCalc makes the Services available on the understanding that Customers exercise their own skill, care and judgment with respect to its use, and are solely responsible for reviewing the accuracy, completeness and relevance of the results for any and all Customer purposes. Customer shall be solely responsible, and MenuCalc shall not be responsible, for the results derived from Customer's inputs and entries during its use of the Services, including Customer's completion or selection of any and all variable fields (e.g., ingredients, nutrient content claims, quantities, regulatory factors, identification of potential allergens output and export options including labels, fact panels, etc.).

9.4 Customer is expressly advised that MenuCalc makes no representation or warranty that the Services or any component thereof is free of error or that the Services meet any of Customer's specific requirements, including Customer's compliance with any regulatory requirements. MenuCalc does not hold itself out as an expert in any particular circumstance. Advice provided by MenuCalc may not be current and may not be relied upon. Client is expressly advised to obtain appropriate expert advice relevant to Client's particular circumstances.

9.5 MenuCalc makes no warranty that the results generated by the Services will be free from error, or if used will ensure compliance with the relevant requirements of the Food and Drug Administration, the USDA, or any other foreign, federal, state or local agencies. Before relying on the results generated by the Services in any important matter, Customer should carefully evaluate the accuracy, completeness and relevance of the results for its purposes, and should obtain appropriate expert advice relevant to its particular circumstances.

9.6 MenuCalc advises Customer of the inherent limitations in the Services. Food composition data used in the Services contain nutrient data that is an average of nutrients in a particular sample of foods and ingredients, determined at a particular time. The nutrient composition of foods and ingredients can vary substantially over different batches, and between brands because of a number of factors including changes in season, processing practices and ingredient source.

9.7 Customer is advised that given the disclaimers and limitations set forth in this Section 6, the results generated by the Services may be only approximate in nature, rather than exactly reflective of Customer's product's average nutrient composition. Nutrient data derived from analysis of a representative sample of Customer's individual products would generally provide a more exact reflection of the average nutritional composition of such products.

9.8 MenuCalc does not warrant that the Services will be uninterrupted or error free; nor does it make any warranty as to the results that may be obtained from use of the Services. If there is an interruption in Credit Card processing between FoodCalc , LLC and VeriSign, Inc account status may be put on hold until appropriate payment has been confirmed. MenuCalc will notify Customer of any known errors upon discovery of interruption. **THE SERVICES ARE PROVIDED "AS IS" AND MenuCalc DISCLAIMS ALL WARRANTIES, EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE AND NON-INFRINGEMENT.**

9.9 The accuracy of the data supplied to consultant/Foodcalc for conducting nutrition analysis is solely the responsibility of the client. The accuracy of clients formulas, recipes, measures & weights of ingredients, production yields, the additional data pertaining to the other ingredients such as nutrition information for specific ingredients used by client in the recipe, and any other information supplied to consultant/Foodcalc is the responsibility of the client. Nutritional analysis information provided by consultant/Foodcalc is based on the estimated database analysis using available standard usda ingredients



or other brand name ingredients that are obtained by consultant/foodcalc to provide nutritional results. Some nutritional values may vary depending on the exact ingredients, brand name and nutritional results used by client from a 3rd party, therefor client should always review the final accuracy of results provided by consultant/Foodcalc.

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

NOTWITHSTANDING ANYTHING TO THE CONTRARY, EXCEPT FOR BODILY INJURY OF A PERSON, MenuCalc AND ITS LICENSORS, AND ITS OFFICERS, AFFILIATES, REPRESENTATIVES, CONTRACTORS AND EMPLOYEES SHALL NOT BE RESPONSIBLE OR LIABLE TO CUSTOMER OR ANY THIRD PARTY WITH RESPECT TO ANY SUBJECT MATTER OF THIS AGREEMENT OR TERMS AND CONDITIONS RELATED THERETO UNDER ANY CONTRACT, NEGLIGENCE, STRICT LIABILITY OR OTHER THEORY: (A)FOR ERROR OR INTERRUPTION OF USE OR FOR LOSS OR INACCURACY OR CORRUPTION OF DATA OR COST OF PROCUREMENT OF SUBSTITUTE GOODS, SERVICES OR TECHNOLOGY OR LOSS OF BUSINESS; (B) FOR ANY INDIRECT, EXEMPLARY, INCIDENTAL, SPECIAL OR CONSEQUENTIAL DAMAGES; (C) FOR ANY MATTER BEYOND MenuCalc 'S REASONABLE CONTROL, EVEN IF MenuCalc HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH LOSS OR DAMAGE; OR (D) FOR ANY AMOUNTS THAT, TOGETHER WITH AMOUNTS ASSOCIATED WITH ALL OTHER CLAIMS, EXCEED THE FEES PAID BY CUSTOMER TO MenuCalc FOR THE SERVICES UNDER THIS AGREEMENT IN THE 3 MONTHS PRIOR TO THE ACT THAT GAVE RISE TO THE LIABILITY.

#### **11. U.S. GOVERNMENT MATTERS**

Customer may not remove or export from the United States or allow the export or re-export of the Services or anything related thereto, or any direct product thereof in violation of any restrictions, laws or regulations of the United States Department of Commerce, the United States Department of Treasury Office of Foreign Assets Control, or any other United States or foreign agency or authority. As defined in FAR section 2.101, the software and documentation (if permitted in writing to be installed by MenuCalc on Customer's Equipment) are "commercial items" and according to DFAR section 252.227-7014(a)(1) and (5) are deemed to be "commercial computer software" and "commercial computer software documentation." Consistent with DFAR section 227.7202 and FAR section 12.212, any use modification, reproduction, release, performance, display, or disclosure of such commercial software or commercial software documentation by the U.S. Government will be governed solely by the terms of this Agreement and will be prohibited except to the extent expressly permitted by the terms of this Agreement.

#### **12. MISCELLANEOUS**

If any provision of this Agreement is found to be unenforceable or invalid, that provision will be limited or eliminated to the minimum extent necessary so that this Agreement will otherwise remain in full force and effect and enforceable. This Agreement is not assignable, transferable or sub-licensable by Customer except with MenuCalc 's prior written consent. MenuCalc may transfer and assign any of its rights and obligations under this Agreement without consent. Both parties agree that this Agreement is the complete and exclusive statement of the mutual understanding of the parties and supersedes and cancels all

previous written and oral agreements, communications and other understandings relating to the subject matter of this Agreement, and that all waivers and modifications must be in a writing signed by both parties, except as otherwise provided herein. No agency, partnership, joint venture, or employment is created as a result of this Agreement and Customer does not have any authority of any kind to bind MenuCalc in any respect whatsoever. In any action or proceeding to enforce rights under this Agreement, the prevailing party will be entitled to recover costs and attorneys' fees. All notices under this Agreement will be in writing and will be deemed to have been duly given when received, if personally delivered; when receipt is electronically confirmed, if transmitted by facsimile or e-mail; the day after it is sent, if sent for next day delivery by recognized overnight delivery service; and upon receipt, if sent by certified or registered mail, return receipt requested. This Agreement shall be governed exclusively by, and construed exclusively in accordance with, the laws of the United States and the State of California, without regard to its conflict of laws provisions. The state and federal courts located in or nearest to Santa Barbara County, California shall have exclusive jurisdiction to adjudicate any dispute arising out of or relating to this Agreement. Each party hereby consents to the jurisdiction of such courts and waives any right it may otherwise have to challenge the appropriateness of such forums, whether on the basis of the doctrine of forum non conveniens or otherwise. Each party also hereby waives any right to jury trial in connection with any action or litigation in any way arising out of or related to this Agreement. Except for actions for non-payment or breach of either party's intellectual property rights, no action (regardless of form) arising out of this Agreement may be commenced by either party more than one (1) year after the cause of action has accrued.

**SPECIFIC TO LABELCALC USERS:**

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1.2 The term “Master” as used in this Agreement and throughout these Terms and Conditions shall mean that named individual person who is authorized to accept and does accept on behalf of Customer all the responsibilities and obligations contained within this Agreement. Any “Master” shall also be deemed a “User” for the purposes of this Agreement, and as “User” is defined in 1.3 following.

1.3 The term “User” as used in this Agreement and throughout these Terms and Conditions shall mean any person (including the Master) who is authorized by Master (acting on behalf of Customer) to have access to the Services, provided always that each and every User (including Master) shall be a direct employee of Customer and be on the payroll of Customer and on no other payroll.

1.4 Subject to the terms and conditions of this Agreement, Foodcalc will use reasonable efforts to provide Customer access to the Services. As part of the registration process, Customer agrees to designate and limit its usage of the Services to the responsible Master and to any authorized Users set forth in the Sign Up page at [www.Foodcalc.com](http://www.Foodcalc.com) and also displayed in Customer’s “My Account” section. Foodcalc reserves the right to refuse registration of, or cancel, passwords it deems inappropriate.

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## **2. RESTRICTIONS AND RESPONSIBILITIES**

2.1 Customer will not, directly or indirectly: reverse engineer, decompile, disassemble or otherwise attempt to discover the source code, object code or underlying structure, ideas or algorithms of the Services or any software (including any Free Trial, live Demo, and online Tutorials), documentation or data related to the Services (“Software”) in order to (A) build a competitive product or service, (B) build a product or service using similar ideas, features, functions or graphics of the Services, or (C) copy any ideas, features, functions or graphics of the Services; modify, translate, or create derivative works based on the Services or any Software; or license, sub-license, copy, rent, resell, distribute, lease, distribute, pledge, assign, or otherwise transfer or encumber rights to or commercially exploit the Services or any Software; use the Services or any Software for timesharing or service bureau purposes or otherwise for the benefit of a third party; or remove any proprietary notices or labels. Customer shall not create Internet “links” to or from or within the Services (except for links on Customer’s web site to Foodcalc’s applications for the benefit of Foodcalc), or “frame” or “mirror” any content forming part of the Services, except for Customer’s own internal business purposes.

2.2 Customer represents, covenants, and warrants that Customer will use the Services only in compliance with these terms and conditions and only in compliance with all applicable laws (including but not limited to policies and laws related to spamming, privacy, obscenity or defamation). Customer hereby agrees to indemnify and hold harmless Foodcalc against any damages, losses, liabilities, settlements and expenses (including without limitation costs and attorneys’ fees) in connection with any claim or action that arises from an alleged violation of the foregoing or any other breach of this Agreement, or otherwise from Customer’s use of the Services, or alleging that the Customer data infringes the intellectual property rights of, or has otherwise harmed, a third party. Although Foodcalc has no obligation to monitor the data or content provided by Customer or Customer’s use of the Services, Foodcalc may do so and may remove any such content or immediately prohibit and terminate any use of the Services it believes may be (or alleged to be) in violation of the foregoing. Customer shall have sole responsibility for the accuracy, quality, integrity, legality, reliability, and appropriateness of all Customer data, including Customer data entered into any Foodcalc database, and shall not negligently or intentionally enter incorrect data into any Foodcalc database.

2.3 Customer shall be responsible for obtaining and maintaining any equipment and ancillary services needed to connect to, access or otherwise use the Services, including, without limitation, modems, hardware, server, software, operating system, networking, web servers, long distance and local telephone service (collectively, “Equipment”). Customer shall be responsible for ensuring that such Equipment is compatible with the Services and complies with all configurations and specifications set forth in Foodcalc’s published policies then in effect. Customer shall also be responsible for maintaining the security of the Equipment, Customer account, passwords (including but not limited to administrative and

user passwords) and files, and for all uses of Customer account or the Equipment with or without Customer's knowledge or consent. Customer is responsible for all activities that occur under Customer's user accounts. Customer shall prevent unauthorized access to, or use of, the Services, and notify Foodcalc promptly of any such unauthorized use. In addition to the foregoing, the Customer's "Master" (as defined at the Sign Up Page) has the ability to delete Customer Users and their data and products. If any User ceases to be employed by the Customer, the Master shall have sole responsibility to ensure the security of the Services and any Proprietary Information. In addition, the Master shall be responsible for deleting various account information associated with any such departing/departed User. Foodcalc shall have no responsibility or liability with respect to any actions taken or not taken by Customer Users and Masters. Customer shall use the Services solely for its internal business purposes as contemplated by this Agreement and shall not: (i) send or store material containing software viruses, worms, Trojan horses or other harmful computer code, files, scripts, agents or programs; (ii) interfere with or disrupt the integrity or performance of the Services or the data contained therein; or (iii) attempt to gain unauthorized access to the Services or its related systems or networks.

2.4 Customer acknowledges that in providing the Services, Foodcalc utilizes (i) certain trade-name(s), logo(s), domain name(s), product and service name(s) associated with the Services, and other trademarks and service marks; (ii) certain audio and visual information, documents, software and other works of authorship; and (iii) other technology, software, hardware, products, processes, algorithms, user interfaces, know-how and other trade secrets, techniques, designs, inventions and other tangible or intangible technical material or information (collectively, "Foodcalc Technology") and that the Foodcalc Technology is covered by intellectual property rights owned or licensed by Foodcalc (collectively, "Foodcalc IP Rights"). Other than as expressly set forth in this Agreement, no license or other rights in or to the Foodcalc Technology or Foodcalc IP Rights are granted to Customer, and all such licenses and rights are hereby expressly reserved.

2.5 Foodcalc's privacy policy and privacy statement is set forth within the application and incorporated herein by this reference. Customer agrees to abide by and be bound by such statement.

2.6 Foodcalc shall have a royalty-free, worldwide, perpetual license to use or incorporate into the Services any suggestions, ideas, enhancement requests, feedback, recommendations or other information provided by Customer or its users relating to the operation of the Services.

2.7 Foodcalc shall be entitled to immediately terminate Customer's use of the Services in the event of Customer's breach of provision of this Section 2, provided that Foodcalc promptly thereafter notifies Customer of such termination. Customer shall not be entitled to any refunds as a result of any such termination.

### **3. CONFIDENTIALITY**

3.1 Each undersigned party (the “Receiving Party”) understands that the other party (the “Disclosing Party”) has disclosed or may disclose information relating to the Disclosing Party’s business (hereinafter referred to as “Proprietary Information” of the Disclosing Party). Notwithstanding the foregoing, nothing will be considered “Proprietary Information” of the Disclosing Party unless either it is or was disclosed in tangible form and is conspicuously marked “Confidential”, “Proprietary” or the like.

3.2 The Receiving Party agrees (i) to take reasonable precautions to protect such Proprietary Information, and (ii) not to use or divulge any such Proprietary Information to any third person. The Disclosing Party agrees that the foregoing shall not apply with respect to any information after three years following the disclosure thereof or any information that the Receiving Party can document (i) is or becomes generally available to the public, or (ii) was in its possession or known by it prior to receipt from the Disclosing Party, or (iii) was rightfully disclosed to it by a third party without restriction, or (iv) was independently developed without use of any Proprietary Information of the Disclosing Party.

3.3 Notwithstanding the foregoing, Foodcalc shall be entitled to use and provide access to Customer data (including any food product nutrition composition data supplied by Customer for its own manufactured products) which Client transfers to Foodcalc for inclusion in any Foodcalc database and access by other users; provided that Foodcalc shall not divulge any of Customer’s recipes or otherwise identify Customer in connection with such access. Foodcalc may also collect data with respect to and report on the aggregate response rate and other aggregate measures of the Services’ performance and use by Customer.

3.4 If the Receiving Party is compelled by law to disclose Proprietary Information of the Disclosing Party, it shall provide the Disclosing Party with prior notice of such compelled disclosure (to the extent legally permitted) and reasonable assistance, at Disclosing Party’s cost, if the Disclosing Party wishes to contest the disclosure.

3.5 If the Receiving Party discloses or uses (or threatens to disclose or use) any Proprietary Information of the Disclosing Party in breach of this Section 3, the Disclosing Party shall have the right, in addition to any other remedies available to it, to seek injunctive relief to enjoin such acts, it being specifically acknowledged by the parties that any other available remedies are inadequate.

#### **4. PAYMENT OF FEES**

4.1 Customer will pay Foodcalc the then-applicable fees for the Services (the “Fees”). If Customer use of the Services exceeds the authorized number of users, usage amounts or usage periods referenced in Section 1.1 or at the Sign Up Page, Customer shall be billed for the excess usage in accordance with the Policies, and Customer agrees to pay the additional fees in the manner provided herein. Currently applicable Fees are set forth in the Sign Up Page. Foodcalc reserves the right to change the Fees or applicable charges and to institute new charges and Fees at the end of the initial Service Term or then-current renewal term, upon thirty (30) days prior notice to Customer (which may be sent by email).

4.2 If Customer believes that Foodcalc has billed Customer incorrectly, Customer must contact Foodcalc no later than 60 days after the closing date on the first billing statement in which the error or problem appeared, in order to receive an adjustment or credit. Inquiries should be directed to Foodcalc's Customer Support department. Customer may be considered for a Refund if no usage of any step within LabelCalc's analysis process has been activated. If client has used all or part of the software, a refund cannot be approved. All refunds are on a case-by-case basis and at Foodcalc's sole discretion.

4.3 Payment for the Services may only be made as set forth on the Sign Up Page. Unpaid amounts are subject to a finance charge of 1.5% per month on any outstanding balance, or the maximum permitted by law, whichever is lower, plus all expenses of collection. Customer shall be responsible for all taxes associated with Services other than U.S. taxes based on Foodcalc's net income. If Foodcalc has the legal obligation to pay or collect any taxes for which Customer is responsible under this section, the appropriate amount shall be paid by Customer unless Customer provides Foodcalc with a valid tax exemption certificate authorized by the appropriate taxing authority. If Customer's account is at any time overdue, in addition to any of its other rights or remedies, Foodcalc reserves the right to suspend the Services provided to Customer, without liability to Customer, until such amounts are paid in full.

4.4 Once you have completed your product, and confirmed completion by checking the 'I agree' box at point of Nutrition Facts Label download, your recipe is locked. Modification credits allow you to modify your finished products at a rate of \$60 per modification.

## **5. TERMINATION**

5.1 Foodcalc reserves the right to give notice of termination of Services ("Termination Notice") as follows:

5.1.1 In the event that Customer's payment for Services has expired, Foodcalc may issue a Termination Notice that Services will be terminated and may not be reinstated unless Customer delivers to Foodcalc within ten (10) days of the date of transmission of the termination notice, the full payment due including any back payment.

5.1.2 Subject to Sections 1.6 and 2.7 (Immediate Termination), if Foodcalc determines at its sole discretion that Customer is in probable breach of any of these Terms and Conditions, Foodcalc may issue a Termination Notice that Services will be terminated and may not be reinstated unless Customer satisfies Foodcalc within thirty (30) days of the date of transmission of the Termination Notice that Customer is then in full compliance with these Terms and Conditions.

5.2 Customer shall not be entitled to any refunds as a result of any such termination.

5.3 Upon any termination, Foodcalc may, but is not obligated to, delete archived data.

5.4 All sections of this Service Agreement which by their nature should survive termination will survive termination, including, without limitation, accrued rights to payment, confidentiality obligations, warranty disclaimers, and limitations of liability.

## **6. WARRANTY AND DISCLAIMERS**

6.1 Foodcalc shall use reasonable commercial efforts consistent with prevailing industry standards to maintain the Services in a manner which minimizes errors and interruptions in the Services. Services may be temporarily unavailable for scheduled maintenance or for unscheduled emergency maintenance, either by Foodcalc or by third-party providers, or because of other causes beyond Foodcalc's reasonable control, but Foodcalc shall use reasonable efforts to provide advance notice in writing or by e-mail of any scheduled service disruption.

6.2 Foodcalc provides the Services, which includes food ingredient nutrition composition data and food nutrient content claims which is either in the public domain through governmental or official agencies, including the United States Department of Agriculture ("USDA"), Food and Drug Administration ("FDA") or has been provided by third party food product manufacturers. Any Customer who submits their own food product nutrition composition data for their manufactured products to the Foodcalc database accepts that other Customers will rely on the accuracy of same, and such submitting Customer represents and warrants that such composition data is accurate and covenants to only submit accurate data. Customer will indemnify Foodcalc for any claims arising related to a breach of the foregoing representation and covenant. Foodcalc imports or accepts all third party data "as is." Foodcalc takes no responsibility for the accuracy of any composition data included in its database.

6.3 Foodcalc makes the Services available on the understanding that Customers exercise their own skill, care and judgment with respect to its use, and are solely responsible for reviewing the accuracy, completeness and relevance of the results for any and all Customer purposes. Customer shall be solely responsible, and Foodcalc shall not be responsible, for the results derived from Customer's inputs and entries during its use of the Services, including Customer's completion or selection of any and all variable fields (e.g., ingredients, nutrient content claims, quantities, regulatory factors, identification of potential allergens output and export options including labels, fact panels, etc.).

6.4 Customer is expressly advised that Foodcalc makes no representation or warranty that the Services or any component thereof is free of error or that the Services meet any of Customer's specific requirements, including Customer's compliance with any regulatory requirements. Foodcalc does not hold itself out as an expert in any particular circumstance. Advice provided by Foodcalc may not be current and may not be relied upon. Client is expressly advised to obtain appropriate expert advice relevant to Client's particular circumstances.

6.5 Foodcalc makes no warranty that the results generated by the Services will be free from error, or if used will ensure compliance with the relevant requirements of the Food and Drug Administration, the



USDA, or any other foreign, federal, state or local agencies. Before relying on the results generated by the Services in any important matter, Customer should carefully evaluate the accuracy, completeness and relevance of the results for its purposes, and should obtain appropriate expert advice relevant to its particular circumstances.

6.6 Foodcalc advises Customer of the inherent limitations in the Services. Food composition data used in the Services contain nutrient data that is an average of nutrients in a particular sample of foods and ingredients, determined at a particular time. The nutrient composition of foods and ingredients can vary substantially over different batches, and between brands because of a number of factors including changes in season, processing practices and ingredient source.

6.7 Customer is advised that given the disclaimers and limitations set forth in this Section 6, the results generated by the Services may be only approximate in nature, rather than exactly reflective of Customer's product's average nutrient composition. Nutrient data derived from analysis of a representative sample of Customer's individual products would generally provide a more exact reflection of the average nutritional composition of such products.

6.8 Foodcalc does not warrant that the Services will be uninterrupted or error free; nor does it make any warranty as to the results that may be obtained from use of the Services. If there is an interruption in Credit Card processing between FoodCalc, LLC and VeriSign, Inc account status may be put on hold until appropriate payment has been confirmed. Foodcalc will notify Customer of any known errors upon discovery of interruption. **THE SERVICES ARE PROVIDED "AS IS" AND Foodcalc DISCLAIMS ALL WARRANTIES, EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE AND NON-INFRINGEMENT.**

6.9 The accuracy of the data supplied to consultant/Foodcalc for conducting nutrition analysis is solely the responsibility of the client. The accuracy of clients formulas, recipes, measures & weights of ingredients, production yields, the additional data pertaining to the other ingredients such as nutrition information for specific ingredients used by client in the recipe, and any other information supplied to consultant/Foodcalc is the responsibility of the client. Nutritional analysis information provided by consultant/Foodcalc is based on the estimated database analysis using available standard usda ingredients or other brand name ingredients that are obtained by consultant/foodcalc to provide nutritional results. Some nutritional values may vary depending on the exact ingredients, brand name and nutritional results used by client from a 3rd party, therefor client should always review the final accuracy of results provided by consultant/Foodcalc.

6.10 FoodCalc uses its best efforts to ensure the platform conforms to all current regulations and changes in regulations. At times, FoodCalc may add helpful features to provide support and calculations to customer in effort to meet all current regulations. Examples of these support features include, but not limited to: flagging ingredients for known Allergens, calculation of USDA ingredients to meet Added

Sugars nutrient claims and calculations of %DV, rounding rules, and nutrient values placement on Nutrition Facts Panel. We recommend that customer stays abreast of all regulations, and customer is advised that current regulations may change throughout the year.

## **7. LIMITATION OF LIABILITY**

NOTWITHSTANDING ANYTHING TO THE CONTRARY, EXCEPT FOR BODILY INJURY OF A PERSON, Foodcalc AND ITS LICENSORS, AND ITS OFFICERS, AFFILIATES, REPRESENTATIVES, CONTRACTORS AND EMPLOYEES SHALL NOT BE RESPONSIBLE OR LIABLE TO CUSTOMER OR ANY THIRD PARTY WITH RESPECT TO ANY SUBJECT MATTER OF THIS AGREEMENT OR TERMS AND CONDITIONS RELATED THERETO UNDER ANY CONTRACT, NEGLIGENCE, STRICT LIABILITY OR OTHER THEORY: (A) FOR ERROR OR INTERRUPTION OF USE OR FOR LOSS OR INACCURACY OR CORRUPTION OF DATA OR COST OF PROCUREMENT OF SUBSTITUTE GOODS, SERVICES OR TECHNOLOGY OR LOSS OF BUSINESS; (B) FOR ANY INDIRECT, EXEMPLARY, INCIDENTAL, SPECIAL OR CONSEQUENTIAL DAMAGES; (C) FOR ANY MATTER BEYOND Foodcalc'S REASONABLE CONTROL, EVEN IF Foodcalc HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH LOSS OR DAMAGE; OR (D) FOR ANY AMOUNTS THAT, TOGETHER WITH AMOUNTS ASSOCIATED WITH ALL OTHER CLAIMS, EXCEED THE FEES PAID BY CUSTOMER TO Foodcalc FOR THE SERVICES UNDER THIS AGREEMENT IN THE 3 MONTHS PRIOR TO THE ACT THAT GAVE RISE TO THE LIABILITY.

## **8. U.S. GOVERNMENT MATTERS**

Customer may not remove or export from the United States or allow the export or re-export of the Services or anything related thereto, or any direct product thereof in violation of any restrictions, laws or regulations of the United States Department of Commerce, the United States Department of Treasury Office of Foreign Assets Control, or any other United States or foreign agency or authority. As defined in FAR section 2.101, the software and documentation (if permitted in writing to be installed by Foodcalc on Customer's Equipment) are "commercial items" and according to DFAR section 252.227-7014(a)(1) and (5) are deemed to be "commercial computer software" and "commercial computer software documentation." Consistent with DFAR section 227.7202 and FAR section 12.212, any use modification, reproduction, release, performance, display, or disclosure of such commercial software or commercial software documentation by the U.S. Government will be governed solely by the terms of this Agreement and will be prohibited except to the extent expressly permitted by the terms of this Agreement.

## **9. MISCELLANEOUS**

If any provision of this Agreement is found to be unenforceable or invalid, that provision will be limited or eliminated to the minimum extent necessary so that this Agreement will otherwise remain in full force and effect and enforceable. This Agreement is not assignable, transferable or sub-licensable by Customer

except with Foodcalc's prior written consent. Foodcalc may transfer and assign any of its rights and obligations under this Agreement without consent. Both parties agree that this Agreement is the complete and exclusive statement of the mutual understanding of the parties and supersedes and cancels all previous written and oral agreements, communications and other understandings relating to the subject matter of this Agreement, and that all waivers and modifications must be in a writing signed by both parties, except as otherwise provided herein. No agency, partnership, joint venture, or employment is created as a result of this Agreement and Customer does not have any authority of any kind to bind Foodcalc in any respect whatsoever. In any action or proceeding to enforce rights under this Agreement, the prevailing party will be entitled to recover costs and attorneys' fees. All notices under this Agreement will be in writing and will be deemed to have been duly given when received, if personally delivered; when receipt is electronically confirmed, if transmitted by facsimile or e-mail; the day after it is sent, if sent for next day delivery by recognized overnight delivery service; and upon receipt, if sent by certified or registered mail, return receipt requested. This Agreement shall be governed exclusively by, and construed exclusively in accordance with, the laws of the United States and the State of California, without regard to its conflict of laws provisions. The state and federal courts located in or nearest to Santa Barbara County, California shall have exclusive jurisdiction to adjudicate any dispute arising out of or relating to this Agreement. Each party hereby consents to the jurisdiction of such courts and waives any right it may otherwise have to challenge the appropriateness of such forums, whether on the basis of the doctrine of forum non conveniens or otherwise. Each party also hereby waives any right to jury trial in connection with any action or litigation in any way arising out of or related to this Agreement. Except for actions for non-payment or breach of either party's intellectual property rights, no action (regardless of form) arising out of this Agreement may be commenced by either party more than one (1) year after the cause of action has accrued.