

2020-52

# FIVE NINES

Founded in 2006  
107 full time employees,  
4 locations (Kearney, Lincoln, Central City,  
and Omaha)  
Largest independently owned MSP in Nebraska

## RESPONSIVE BY DESIGN

### Tools

- Next-Generation Antivirus
- Encrypted Email
- Real Time Network Mapping

### Partner Success Team

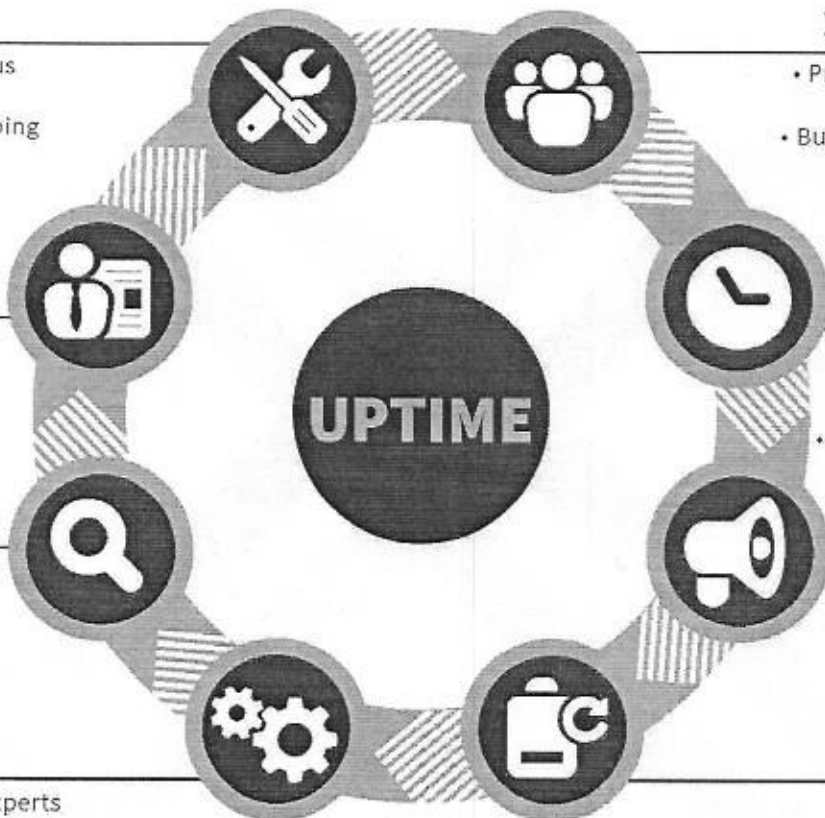
- Order Products
- Billing Questions
- General Inquiries

### R&D Team

- Best in Class Solutions
- Planning for the Future

### Project Team

- UPTIME Infrastructure Experts
- Dedicated Team of Engineers



### Primary Engineer

- Proactive & Reactive Support
- A Member of Your Team
- Budgeting & Business Reviews
- Compliance Assistance

### Support Desk & Central Team

- 24x7x365 Monitoring & Support
- FN Support Application
- 98.1% Happiness Factor YTD

### Escalation Team

- Tier 3 Engineers
- Disaster Recovery
- Goal: 99.999% Uptime

### Backup Team

- Hourly Backups
- Image Based

SOLVE	SECURE	ADVANCE
Fundamentals/Basics	Regulation/Compliance	1-3 Year IT Budget
Ticket Management/SLA's	Internal IT Audit	Strategic Planning
Workstations and Printers	Remediation Schedule	Continuous Improvement
Yearly Budget Planning	Disaster Recovery Plan	Do More (Productivity)
Stack Management	Business Continuity Plan	Get Better (Efficiency)
Tools & Monitoring	User Security Awareness	
Backups & Antivirus	Training	

# Five Nines Partnership Renewal (All Inclusive)

Keith County Nebraska



## Partnership

Maintenance & Support Contract	
24/7 Monitoring Network and Systems with After Hours Response	Included
Ongoing Network Performance Auditing and Tuning	Included
Annual Budget Review	Included
Unlimited Help Desk, Onsite, Remote, Server Infrastructure, Workstations and Mobile Device Support	Included
On-site Health Checks	Included
Data Backups, Offsite Replication and Recovery	Included
Email Anti-spam + Advanced Threat Protection	Included
KnowBe4 Security Awareness Training	Included
Project Labor (excludes office move and Citrix projects)	Included

New Agreement	Price	Qty	Ext'd Price
Managed Users (Full-Time)	\$65.00	70	\$4,550.00
Managed Users (Part Time)	\$33.00	6	\$198.00
<b>Additional Services</b>			
Exchange Online (Plan 1)	\$4.00	85	\$340.00
KnowBe4 Security Awareness Training	\$0.00	76	\$0.00
Managed Server Backups	\$0.00	12	\$0.00
Managed Workstation Backups 1. ASSESSOFC3	\$0.00	1	\$0.00
<b>Subtotal:</b>			<b>\$5,088.00</b>

\*Supported users, backup and cloud services will be reviewed monthly and adjusted accordingly.

## Maintenance & Support

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Five Nines will monitor and maintain all aspects of your IT environment. This includes servers, routers, switches, firewalls, wireless access points, workstations, laptops, tablets, printers, scanners, tablets, mobile phones, and thin clients. Depending on the needs of the client and the urgency of the issues Five Nines will determine the appropriate way to interact on the issue.

### Hardware

**Servers** – Five Nines will monitor and maintain all aspects of your physical and virtual server environments. Only operating system versions currently supported by Microsoft are covered. Linux and other similar operating systems are supported on a best-effort basis only if a support contract with the OS vendor is maintained. Hardware vendor support contracts for production-class servers must be maintained to ensure timely hardware service. Support contracts for virtualization platforms such as VMware must also be maintained where applicable.

**Networking** – Five Nines will monitor and maintain all your routers, switches, firewalls, wireless access points, and related devices. Vendor support contracts must be maintained to ensure timely hardware and software service.

**Networked Printers and Scanners** – Five Nines will provide basic support for the network aspects of your networked printers, scanners, and other multi-function devices. Our support ability does not extend past the basic networking of these devices, and support contracts with a third-party printing solution company are highly encouraged.

**Endpoints** – Five Nines will support workstations, laptops, tablets, mobile phones, and thin clients for all Windows based Operating Systems devices. All workstation, laptops, and tablets that have a Windows based operating system must be Active Directory domain compatible, and have an operating system installed that is supported by Microsoft. "Home" editions, typical found on computers bought at retail stores, will need a paid upgrade to a professional version to work on the Windows domain. This agreement includes labor for replacing up to 4 devices per month.

Five Nines adheres and attests to PCI compliance, and implements HIPAA policies and procedures required by Business Associates and implements technical security measures as outlined by The National Institute of Standards and Technology (NIST).

### Software

**Security Patches and Software Updates** – Software/firmware updates on servers, workstations, and networking equipment as long as vendor support is maintained where relevant. Excludes major version or release upgrades that require reconfiguration.

**Third Party Software** – Management and maintenance of other Operating Systems and third-party software, as long as vendor support contracts are maintained.

**Antivirus/Antispam** – Five Nines Email Antispam and Advanced Threat Protection will be provided for all Windows-based servers, workstations, and laptops. Management of the antivirus software and updates to the software will be covered as part of this agreement.

## Five Nines Backup Solution

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### Backup Software and Local Backups

- Five Nines backup software will be installed on all specified servers and workstations at the rate indicated.
- Backups are taken every hour from 8am to 6pm (customizable).
- Five Nines has developed a custom central monitoring solution to obtain granular information about the state of backups, enabling quick identification and remediation of any issues.
- Five Nines will maintain a minimum of the most recent two weeks of data at local repository.
- All maintenance and upgrades are included in this agreement.

### Data Off-siting and Recovery

- Client may elect to replicate local backups and store data offsite at Five Nines' secure location
- Five Nines will maintain a minimum of the most recent two weeks of data at offsite repository

\*Critical data should never be kept solely on a mobile device such as a laptop or smart phone. Mobile devices should only be accessing data being backed up on a server platform.

## Incident Response

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In the event of an outage or cyber incident, the response and resolution of the incident may be invoiced separately from this agreement. In such an event the response will be recorded in Five Nines support ticket system at the rate of \$300/hr. for all work performed.

An outage takes place anytime a system is down that impacts multiple users. An outage is invoiced separately when we need to execute a disaster recovery plan (restoring a server from backup, Five Nines provided loaner equipment - if available - to replace or augment existing systems, etc.) or sudden, unexpected events that can't be controlled or predicted (fire, water, lightning damage, etc.).

A cyber incident is a breach of a system's security policy in order to affect its integrity or availability and/or the unauthorized access or attempted access to a system or systems; in line with the Computer Misuse Act (1990).

In general, types of activity that are commonly recognized as being breaches of typical security policy are:

1. Attempts to gain unauthorized access to a system and/or to data.
2. The unauthorized use of systems for the processing or storing of data.
3. Changes to a systems firmware, software or hardware without the system owner's consent.
4. Malicious disruption and/or denial of service.

# Five Nines Partnership Renewal (All Inclusive)

Keith County Nebraska



## Summary

Maintenance & Support Contract	
24/7 Monitoring Network and Systems with After Hours Response	Included
Ongoing Network Performance Auditing and Tuning	Included
Annual Budget Review	Included
Unlimited Help Desk, Onsite, Remote, Server Infrastructure, Workstations and Mobile Device Support	Included
On-site Health Checks	Included
Data Backups, Offsite Replication and Recovery	Included
Email Anti-spam + Advanced Threat Protection	Included
KnowBe4 Security Awareness Training	Included
Project Labor (excludes office move and Citrix projects)	Included

Description	Amount
New Agreement	\$5,088.00
	Subtotal: \$5,088.00
	Tax: \$0.00
	Total: \$5,088.00

Term Options	Start Date	Amount
3 Year Agreement	7/1/2020	\$5,088.00

By signing below you are agreeing to the terms and conditions contained in the Master Services Agreement

## Agreement & Acceptance

Signature:

Name:

ANTHONY KRAVETSKI

Date:

6-10-2020



## Master Services Agreement

THE TERMS AND CONDITIONS OF PRODUCT SALES AND SERVICE PROJECTS ARE LIMITED TO THOSE CONTAINED HEREIN. ANY ADDITIONAL OR DIFFERENT TERMS OR CONDITIONS IN ANY FORM DELIVERED BY YOU ("CLIENT") ARE HEREBY DEEMED TO BE MATERIAL ALTERATIONS AND NOTICE OF OBJECTION TO THEM AND REJECTION OF THEM IS HEREBY GIVEN.

BY ACCEPTING DELIVERY OF THE PRODUCTS OR BY ENGAGING FIVE NINES ON AN INVOICE, STATEMENT OF WORK OR OTHER FIVE NINES DOCUMENTATION TO PROVIDE PRODUCT OR PERFORM OR PROCURE ANY SERVICES, CLIENT AGREES TO BE BOUND BY AND ACCEPTS THESE TERMS AND CONDITIONS UNLESS CLIENT AND FIVE NINES HAVE SIGNED A SEPARATE AGREEMENT, IN WHICH CASE THE SEPARATE AGREEMENT WILL GOVERN.

### Important Information About These Terms and Conditions

These Terms and Conditions constitute a binding contract between CLIENT ("Client") and Five Nines Technology Group, Inc., ("FIVE NINES") and are referred to herein as either "Terms and Conditions" or this "Agreement". Client accepts these Terms and Conditions by making a purchase from or placing an order with FIVE NINES or requesting products (the "Products") or engaging FIVE NINES to perform or procure any Services (as this and all capitalized terms are defined herein). These Terms and Conditions are subject to change without prior notice, except that the Terms and Conditions delivered at the time Client places an order or signs a Statement of Work will govern the order in question, unless otherwise agreed in writing by FIVE NINES and Client.

Client consents to receiving electronic records, which may be provided via a Web browser or email application connected to the Internet; individual consumers may withdraw consent to receiving electronic records or have the record provided in non-electronic form by contacting FIVE NINES. Electronic signatures (or copies of signatures sent via electronic means) are the equivalent of written and signed documents.

No course of prior dealings between the parties and no usage of trade will be relevant to determine the meaning of these Terms and Conditions or any purchase order or invoice, or any document in electronic or written form that is signed and delivered by each of the parties for the performance of Services other than Third Party Services. This Agreement contains the entire understanding of the parties with respect to the matters contained herein and supersedes and replaces in its entirety any and all prior communications and contemporaneous agreements and understandings, whether oral, written, electronic or implied, if any, between the parties with respect to the subject matter hereof.

### 1. Definitions.

- 1.1 **Applicable Laws.** Means collectively, all federal, state or other governmental statutes, codes, ordinances, laws, regulations, rules, guidance, written directives, orders and decrees applicable to the Services.
- 1.2 **Confidential Information.** All nonpublic information revealed by or through the disclosing party to the recipient, including: (a) information marked or disclosed as confidential; (b) any Client customer information furnished or disclosed, in whatever form or medium; (c) information traditionally recognized as proprietary trade secrets; (iii) all forms and types of financial, business, and economic information (including, without limitation, contract terms, financial information, ideas, discoveries, inventions, developments, records, product designs, source codes, product planning, material samples, business records and plans, technical and marketing data, trade information, customer lists and data, supplier information and marketing plans) in whatever form or medium; (iv) any information disclosed orally regarding the parties' business relationship; and (v) PHI, as applicable.
- 1.3 **Protected Health Information ("PHI").** Shall have the meaning set forth in any Business Associate Agreement attached hereto and incorporated herein by reference.
- 1.4 **Services.** Means such information technology related services necessary to operations of Client that FIVE NINES may provide to Client under a mutually agreed upon Statement of Work attached to this Agreement.

### 2. Term and Termination of Agreement

- 2.1 This Agreement is effective upon the date signed. This Agreement shall remain in force for the duration of the term unless either party gives the other prior written notice of its intent to terminate this Agreement. This Agreement may only be terminated by Client upon giving ninety (90) days written notice to FIVE NINES and in addition pay the remaining agreement amount for the remaining term. This Agreement may be terminated by FIVE NINES upon ninety (90) days written notice to Client. If either party terminates this Agreement, FIVE NINES will assist Client in the orderly termination of services, including timely transfer of the services to another designated provider. Client agrees to pay FIVE NINES the actual costs of rendering such assistance.



THE TERM OF THIS AGREEMENT SHALL AUTOMATICALLY RENEW UNLESS EITHER PARTY PROVIDES THE OTHER WRITTEN NOTICE OF INTENT TO ALLOW THIS AGREEMENT TO EXPIRE NO LESS THAN 90 DAYS PRIOR TO THE DATE OF EXPIRATION. DURING ANY RENEWAL TERM, THE PROVISIONS OF THIS AGREEMENT SHALL REMAIN IN FULL FORCE AND EFFECT, EXCEPT, FIVE NINES MAY MODIFY THE TERMS OF THE AGREEMENT GOVERNING ANY RENEWAL TERM BY PROVIDING WRITTEN NOTICE OF SUCH MODIFICATION TO CLIENT NO LATER THAN 120 DAYS PRIOR TO EXPIRATION OF THE THEN CURRENT TERM. For purposes of this Agreement, written notice delivered via email shall constitute written notice. Upon renewal, Five Nines may, in our sole discretion, on a per Client basis, increase our fees up to 5% as a cost adjustment.

22 **Services Transfer Assistance.** It is the intent of the parties that at the expiration or termination of this Agreement or a party's election to cancel the provision of Services, FIVE NINES will cooperate with Client to assist with the orderly transfer of the Services, functions, and operations provided by FIVE NINES hereunder to another system provider or services provider or Client itself ("Services Transfer Assistance"). Prior to expiration or termination of the Agreement, Client may request FIVE NINES to perform and, if so requested, FIVE NINES shall perform Services Transfer Assistance. Service Transfer Assistance shall be provided until the effective date of expiration or termination with respect to the Services and for up to one (1) additional month after the effective date of expiration or termination. If the Services Transfer Assistance requires FIVE NINES to incur expenses in addition to the expenses that FIVE NINES would otherwise incur in performance of this Agreement, then: (a) FIVE NINES shall notify Client of any additional expenses associated with the performance of any additional services pursuant to this Section prior to performing such services; (b) Upon Client's authorization, FIVE NINES shall perform the additional services and invoice Client for such services; and (c) Client shall pay FIVE NINES for such additional expenses within thirty (30) days of the receipt of the invoice.

23 **Actions Upon Termination.** Except for Service Transfer Assistance, upon termination of this Agreement, FIVE NINES shall immediately cease to have access to and use of Client's network, hardware, and software ("System").

24 **Return or Destruction of Confidential Information.** Upon expiration or termination of this Agreement, the party receiving Confidential Information will cease its use and upon request, within thirty (30) days, use commercially reasonable efforts to either (at the option of receiving party) return or destroy (and certify in a timely manner as to such destruction) all Confidential Information of the other party, including any copies thereof. Notwithstanding the foregoing, each party receiving Confidential Information will be entitled to retain copies of Confidential Information to the extent required by law or regulation; provided, that for so long as a party retains any Confidential Information, it shall employ reasonable security measures and shall exercise reasonable care in protecting the confidentiality of such information as it does in protecting its own information similarly recorded or saved and will continue to be bound by the obligations under this Agreement in regards to all such Confidential Information. The parties' obligations under this Section regarding Confidential Information shall survive the expiration or termination of this Agreement.

### 3. **Statements of Service; Fees and Payments; Taxes**

31 **Invoices.** Statements of Service shall describe in detail the services to be performed by FIVE NINES, and this Agreement hereby incorporates all attached and subsequent Statements of Service that refer specifically to this Agreement by name and date of execution, or the MSA Number. Statements of Service are invoiced and delivered via email at the beginning of the month, and overages are billed at month-end along with all other hourly work.

32 **Payment Terms.** Payment for monthly services is due within thirty (30) days of the invoice date, regardless of the date of receipt. Payment for product is required in advance for orders over \$1,000 unless other arrangements have been made, in which case, thirty (30) day terms and applicable late fees will apply. Product invoices are excluded from any early payment discounts. Project Labor: Payment of at least fifty percent (50%) of project labor is required before a project can begin.

33 **Availability of Service.** FIVE NINES agrees that the Services will be operable and available to materially perform the functions set forth in the Statements of Service twenty-four (24) hours per day, seven (7) days per week, subject to the terms further set forth in this Agreement. FIVE NINES shall provide ninety-nine point nine-nine percent (99.99%) uptime monthly, with the exception of Scheduled Downtime (as defined in the Statements of Service attached hereto and incorporated by reference). FIVE NINES shall provide Client with five (5) days' notice prior to any Scheduled Downtime, and represents that any interruption of Services for Scheduled Downtime shall not exceed the time reasonably necessary to complete such maintenance. In the event of an unplanned interruption, reduction in the quality, or the failure of a configuration item of the Services, FIVE NINES shall use its best efforts to restore Services and follow its IT Incident Management Policy. If FIVE NINES fails to provide ninety-nine point nine-nine percent (99.99%) in the course of any two consecutive months, or fails to achieve such uptime in three (3) months during any twelve (12) month period, FIVE NINES agrees to escalate such failure to its senior management and work in good faith to resolve such service level failures.

34 **Taxes.** It is understood that any applicable federal, state or local taxes shall be added to each invoice for services or materials rendered under this Agreement. Client shall pay all such taxes unless a valid exemption state certificate is furnished to FIVE NINES.

35 **Payment Methods.** FIVE NINES accepts payments made by Check, Visa, MasterCard and ACH. Recurring agreement ACH payments are processed on the 15th of the month. Once ACH authorization forms have been received, payment can be



36 **Fees.** A \$35.00 fee will be assessed on any checks not honored by our bank. A \$20.00 late fee will be assessed against invoices seven (7) days overdue, and finance charges (16% APR) will be imposed on balances thirty (30) days past due and each month thereafter until the past due balance is paid in full.

37 **Credits.** Credit memos will be communicated via email. Credits may be applied using one of the following methods:

1) Reduction of subsequent invoice payments until the full credit balance has been used. 2) Request for full reimbursement by check.

#### 4. Coverage

All contracted services will be provided to Client by FIVE NINES between the hours of 7:00 am and 6:00 pm Monday through Friday, Central Standard Time, excluding holidays. FIVE NINES will make reasonable efforts to respond to emergency requests.

#### 5. Nondisclosure

5.1 **Use of Confidential Information.** FIVE NINES and Client shall only use Confidential Information for the purpose of performing services under this Agreement, and shall make no use of the Confidential Information, in whole or in part, for any other purpose. Both parties agree to refrain from disclosing the Confidential Information to third parties, unless one of the parties has given its prior written authorization to the other. The parties further agree to keep the confidential and safeguard such Confidential Information against unauthorized disclosure to others with at least the same degree of care as it exercises with its own information of a similar nature, but in no event less than reasonable care. However, if the parties are required by subpoena or other court order to disclose any of the Confidential Information, the party shall provide immediate notice of such request to the other party and shall use reasonable efforts to resist disclosure. If, in the absence of a protective order or the receipt of a waiver under this Agreement, the parties are legally required to disclose any Confidential Information, then the parties may disclose such information without liability under this Agreement. In the event that Client provides written consent to FIVE NINES permitting disclosure of Client's Confidential Information to FIVE NINES' subcontractors performing services in connection with this Agreement, FIVE NINES' represents and warrants that (a) the extent of such disclosure is reasonably necessary for such subcontractor to perform such services, and (b) such subcontractors comply with confidentiality, security, and privacy obligations no less protective of Client's Confidential Information than set forth in this Agreement and required by Applicable Law.

5.2 **Remedies for Breach of Confidentiality.** The Confidential Information protected by this Agreement is of a special character, such that money damages, although available, would not be sufficient to award or compensate for any unauthorized use or disclosure of the Confidential Information. The parties agree that injunctive and other equitable relief would be appropriate to prevent any such actual or threatened unauthorized use or disclosure.

#### 6. Ownership of Work Product

6.1 **General.** All intellectual property rights associated with any ideas, concepts, techniques, processes or other work product created by FIVE NINES during the course of performing the services shall belong exclusively to FIVE NINES, and Client shall have no right or interest therein.

6.2 **Managed Services Tools.** Notwithstanding anything to the contrary in this Agreement, FIVE NINES will retain all right, title and interest in and to all software development tools, know-how, methodologies, processes, technologies or algorithms used in providing the managed services which are based on trade secrets or proprietary information of FIVE NINES or are otherwise owned or licensed by FIVE NINES. Licenses will not be deemed to have been granted by either party to any of its patents, trade secrets, trademarks or copyrights except as otherwise expressly provided in this Agreement. Nothing in this Agreement will require FIVE NINES or Client to violate the proprietary rights of any third party in any software or otherwise.

#### 7. Data Security

7.1 **Security.** Vendor represents and warrants that its policies, business practices and methodologies are, to the extent required, or foreseeably required, in compliance with any and all relevant portions of Applicable Law. Vendor will also comply with any additional procedures and processes respecting Client's Confidential Information that the Client believes to be reasonably necessary for the Client to comply with any of the Applicable Laws.

7.2 **Unauthorized Disclosure of Confidential Information.** Any actual loss, theft, unauthorized disclosure or other compromise to the confidentiality, security, or integrity of any Client Confidential Information, shall be deemed a "business interruption" as defined in FIVE NINES' Business Continuity Management Policy and triggers said policy. FIVE NINES shall notify Client of any actual loss, theft, unauthorized disclosure or other compromise to the confidentiality, security, or integrity of any Client Confidential Information, as soon as possible after FIVE NINES' discovery thereof with complete information regarding the incident and measures taken to control or reduce the harm occasioned thereby and, at FIVE NINES' cost and expense (except only to the extent the unauthorized disclosure results solely from a security breach on Client's internal data systems, in which case it shall be at Client's cost and expense) shall take such actions required under Applicable Law in response to such incident which may include notifying the Client, law enforcement officials, other regulatory authorities, or affected Client Customers or other affected individuals or entities, submitting to forensic examinations, and issuing press releases.





73 **Information Security; Access Rights.** FIVE NINES' shall maintain reasonable and appropriate security policies, procedures, and systems to protect PHI or Confidential Information that FIVE NINES manages, processes, stores, or transmits (the "Security Program"). The Services will conform to the provisions of Applicable Law related to the privacy, security, and data protection and destruction of PHI and will include administrative, technical, and physical safeguards that are commensurate with the scope of FIVE NINES' activities and the sensitivity of Client's Confidential Information that FIVE NINES receives. FIVE NINES will ensure that the Services are designed to (i) protect the security, confidentiality and integrity of PHI and Client's Confidential Information, (ii) protect against any anticipated threats or hazards to the security and integrity of PHI and Client's Confidential Information, and (iii) protect against unauthorized access to such information or associated records which could result in substantial harm or inconvenience to any consumer. FIVE NINES shall regularly review all of the key controls, processes and procedures of the Security Program and update the Security Program to best protect against new threats and risks.

As a part of its Security Program, FIVE NINES shall provide for the following access controls: (i) access rights and privileges to information resources containing Confidential Information or PHI shall be granted only on a need-to-know basis and consistent with the level of access required, and (ii) immediately terminate access rights and privileges of FIVE NINES personnel when such personnel no longer provide services to Client, or otherwise do not require access rights and privileges.

74 **Security Practices; Audit.** FIVE NINES represents and warrants that it has up-to-date policies and procedures with respect to its internal controls, including proper controls to maintain in compliance with Applicable Laws and Industry Standards, and shall provide Client a copy of a summary of such policies and procedures as requested. To the extent such policies and procedures are materially amended thereafter, FIVE NINES will provide Client a copy of a summary of such amendment if such policy has, prior to the amendment, been requested by Client.

Annually during the term of this Agreement, FIVE NINES shall conduct a review of its internal controls related to the Security Program. The review shall assess compliance with the Security Program, where the findings and recommendations of which shall be set forth in a report (the "Report"). If requested, FIVE NINES shall deliver a copy of the Report to the Client promptly upon completion of each Report. If the Report contains any recommendations, FIVE NINES shall, at its sole cost and expense, promptly take all actions necessary to comply with such recommendations. If, at any time during the term of this Agreement, the Client has reasonable material concerns regarding FIVE NINES' operational controls and such concerns are not addressed in the Report or in FIVE NINES' response to any recommendations therein, to the Client's reasonable satisfaction, the Client shall so notify FIVE NINES and the parties shall promptly meet in an effort to resolve the stated concerns.

75 **Warranty.** FIVE NINES represents and warrants that it has policies and procedures with respect to its internal controls, including proper controls to maintain in compliance with Applicable Laws and Industry Standards, and shall provide Client a copy of a summary of such policies and procedures as requested. To the extent such policies and procedures are materially amended thereafter, FIVE NINES will provide Client a copy of a summary of such amendment if requested by Client.

76 **Cooperation.** FIVE NINES agrees to, within ten (10) days of Client's written request, make available all records, books, agreements, policies and procedures relating to Client's Confidential Information for the purpose of allowing Client or its agents or auditors to determine FIVE NINES' compliance with this Agreement. FIVE NINES further agrees to use its best efforts in any examination which may be requested by any governmental authority with audit and examination over Client, and provide any information that may be reasonably requested by any governmental authority in connection with their examination or review of Client.

## 8. Indemnity

8.1 **Indemnification of Client.** FIVE NINES agrees to indemnify, defend, and hold harmless Client and its Affiliates, directors, officers, employees, and agents against any and all judgments, settlements, penalties, costs and expenses (including reasonable attorney's fees) paid or incurred in connection with any third-party claim(s) relating to: (a) the Services as provided to Client or the use thereof as permitted in this Agreement infringing or misappropriating any valid third-party intellectual property rights; or (b) FIVE NINES improper or unauthorized use or disclosure of PHI or Confidential information. FIVE NINES shall have the right to modify the Services to make them non-infringing, provided that such modified Services provide substantially similar functionality and otherwise comply with the terms of this Agreement. Provided, however, FIVE NINES shall have no obligation with respect to any claims of infringement that arise from: (i) modifications to the Services (other than by or on behalf of FIVE NINES); (ii) combinations of the Services with other software or products not provided or authorized by FIVE NINES; (iii) any modifications to the Services made at Client's request if such claim would not have occurred but for the requested modification; (iv) any unauthorized use of the Services by Client or otherwise under Client's account; or (v) Client's breach of its representations and warranties under Section 8. To the extent a third-party claim of infringement arises from the activities set forth in the preceding sentence, Client agrees to indemnify, defend and hold harmless FIVE NINES and its Affiliates, directors, officers, employees and agents, against any and all judgments, settlements, penalties, costs and expenses (including reasonable attorney's fees) paid or incurred in connection therewith.

8.2 **Indemnification of FIVE NINES.** Client acknowledges that by entering into and performing its obligations under this Agreement, FIVE NINES will not assume and shall not be exposed to the business and operational risks associated with Client's business, and Client therefore agrees to indemnify, defend and hold FIVE NINES harmless from any and all claims, actions, damages, liabilities, costs and expenses (including attorneys' fees and expenses) arising out of or related to the conduct of Client's business except as a result of FIVE NINES' failure of its obligations hereunder.



8.3 **Procedures.** The indemnities in this Section 8 are contingent upon: (i) the indemnified party promptly notifying the indemnifying party in writing of any claim which may give rise to a claim for indemnification (provided, however, that failure to provide such prompt notice to the indemnifying party shall not affect indemnification obligations thereunder in the absence of actual prejudice to the indemnifying party); (ii) the indemnified party shall permit the indemnifying party to assume and control the defense of any action upon the indemnifying party's written acknowledgment of the obligation to indemnify (unless, in the opinion of counsel of the indemnified party, such assumption would result in a material conflict of interest); and (iii) the indemnifying party shall not enter into any settlement or compromise of any claim without the indemnified party's prior written consent, which shall not be unreasonably withheld. In addition, the indemnified party may, at its own expense, participate in its defense of any claim. In the event that the indemnifying party assumes the defense of any such claim, the indemnifying party is not liable for attorney's fees and costs incurred by the indemnified party.

## 9. Representation and Warranties

9.1 FIVE NINES represents and warrants that it (a) has the right, power and authority to enter into the Agreement and to fully perform all of the obligations hereunder, (b) will use commercially reasonable efforts to provide all services required of it under the Agreement in accordance with all Applicable Laws and prevailing industry standards (c) owns or has acquired the requisite rights from third parties to the FIVE NINES property; (d) shall not knowingly or negligently introduce undisclosed operational limiting routines, viruses, malicious code (a.k.a. "Trojans"), date bugs or copy protection devices, administrative interfaces (a.k.a. "Backdoors"), keystroke or data capture/transmission facilities (a.k.a. "Spyware") embedded in the Systems FIVE NINES uses to perform the Services and that it makes available to Client and its customers.

9.2 FIVE NINES does not manufacture hardware or commercial off-the-shelf (COTS) software covered under this Agreement. Any warranty provisions are passed through from the manufacturer and are subject to the manufacturer's limitations. Any labor supplied by FIVE NINES is not covered under the terms of the manufacturer's warranty.

9.3 FIVE NINES may provide equipment owned by FIVE NINES and housed at Client's premises. Such equipment may include, but is not limited to routers, desktops, servers, software, and remote backup devices. Such equipment shall be treated with the same care and security as similar equipment owned by Client. Client shall be held liable for any damage or loss not covered by the manufacturer's warranty. If such loss or damage occurs, Client will be invoiced the current replacement cost of the equipment plus shipping and handling and related installation charges.

9.4 FIVE NINES shall maintain and pay all premiums on the following insurance coverages. The insurance shall be written in accordance with the limits of liability specified as part of this Agreement and shall be written on an occurrence basis only. FIVE NINES shall ensure that all insurance policies required pursuant to this Agreement are issued by insurance companies with an A.M. Best's rating of no less than A-.

- Commercial General Liability: \$1,000,000.00
- Cyber Liability Insurance: \$2,000,000.00
- Crime Insurance: \$250,000.00
- Professional Liability/Errors and Omissions Insurance: \$2,000,000.00
- Umbrella or Excess Liability Insurance: \$5,000,000.00

## 10. Disclaimer of Warranties; Limitation of Damages

10.1 THE EXPRESS, BUT LIMITED, WARRANTY ABOVE IS IN LIEU OF ALL OTHER WARRANTIES, EXPRESS, IMPLIED OR STATUTORY, REGARDING FIVE NINES SERVICES. FIVE NINES AND ITS AFFILIATES SPECIFICALLY DISCLAIM ALL WARRANTIES OF ANY KIND, WHETHER EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO ALL WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE AND NON-INFRINGEMENT AND ANY WARRANTIES ARISING FROM COURSE OF DEALING, COURSE OF PERFORMANCE OR TRADE USAGE.

10.2 EXCEPT FOR THE INDEMNIFICATION OBLIGATIONS IN SECTION 8, FIVE NINES AND ITS AFFILIATES SHALL NOT BE LIABLE FOR ANY DIRECT, INDIRECT, INCIDENTAL, SPECIAL, EXEMPLARY, PUNITIVE OR CONSEQUENTIAL DAMAGES, OR FOR ANY LOST DATA, INCLUDING BUT NOT LIMITED TO DAMAGES FOR LOST PROFITS, COSTS OF PROCUREMENT OF SUBSTITUTE GOODS OR SERVICES, BUSINESS INTERRUPTION ARISING FROM OR RELATING TO THIS AGREEMENT OR ARISING FROM OR RELATING TO THE USE OF THE SOFTWARE WHICH HAS BEEN MODIFIED BY ANYONE OTHER THAN FIVE NINES, LOSS OF PROGRAMS, AND THE LIKE, THAT RESULT FROM THE USE OR INABILITY TO USE THE SERVICES OR FROM MISTAKES, OMISSIONS, INTERRUPTIONS, DELETION OF FILES OR DIRECTORIES, LOSS OF DATA, ERRORS, DEFECTS, DELAYS IN OPERATION, OR TRANSMISSION, OR ANY FAILURE OF PERFORMANCE, HOWEVER CAUSED AND UNDER ANY THEORY OF LIABILITY (INCLUDING NEGLIGENCE OR OTHER TORTS), TO THE EXTENT ALLOWED BY LAW, EVEN IF FIVE NINES HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.



103 Client agrees that the total liability of FIVE NINES and its affiliates and the sole remedy of Client and any End User for any claims regarding FIVE NINES services is limited to the amounts paid under this Agreement, or the maximum allowed under FIVE NINES' insurance policy, whichever is greater. Notwithstanding the foregoing, FIVE NINES total liability for a breach of Section 8 (Indemnification) and Section 7 (Data Security) shall not exceed one million dollars (\$1,000,000.00).

104 Except as expressly provided in the Agreement, Client acknowledges that (a) FIVE NINES is in no manner responsible for any action or inaction of any third party not engaged by it or under its control; (b) FIVE NINES has not represented that the services shall be uninterrupted, error-free, or without delay; and (c) FIVE NINES does not and cannot control the flow of data through the Internet, and such flow depends in large part on the performance of third parties whose actions or inactions can, at times, produce situations in which connections to the Internet (or portions thereof) may be impaired or disrupted. ACCORDINGLY, CLIENT ACKNOWLEDGES THAT FIVE NINES DISCLAIMS ALL LIABILITY RELATED TO EVENTS OUTSIDE OF ITS CONTROL AND/OR IN THE CONTROL OF THIRD PARTIES, AND CLIENT SHALL HAVE NO RIGHT TO RELY UPON ANY REPRESENTATION OR WARRANTY OF ANY THIRD PARTY IN RESPECT TO THE SERVICES. Further, Client acknowledges that, in providing the services, FIVE NINES shall necessarily rely upon information, instructions, and services from Client, its administrator, employees and agents, and other third parties providing computer and communications hardware, software, and Internet services. Except as expressly provided in the Agreement, Client fully assumes the risk associated with errors in such information, instructions, and services.

11. **Non Solicitation of Employees.** Client acknowledges that FIVE NINES has a substantial investment in its employees that provide services to Client under this Agreement and that such employees are subject to FIVE NINES's control and supervision. In consideration of this investment, Client agrees not to solicit, hire, employ, retain, or contract with any employee of FIVE NINES, without first receiving FIVE NINES's written consent. If any employee involved with the delivering of these services terminates his or her employment with FIVE NINES (regardless of the reason for termination), and is employed by Client (or any affiliate or subsidiary of Client) in any capacity either during the term of this agreement or within a 12 month period thereafter, Client shall immediately pay FIVE NINES an amount equal to 200% of the then current yearly salary or wage paid by FIVE NINES to such employee. This amount is intended by the parties to be a reasonable calculation of the projected costs FIVE NINES would incur to identify, recruit, hire and train suitable replacement personnel.

## 12. General Provisions

121 **Equipment & Facilities.** Client agrees that FIVE NINES may utilize certain items of Client's equipment and may gain access to Client facilities. Client retains title and ownership in all of Client's equipment owned by Client and utilized by FIVE NINES. Facility access may be denied for any reason at any time, however if access to facilities is denied, Client understands that FIVE NINES may be unable to perform their duties adequately and if such a situation should exist, FIVE NINES will be held harmless.

122 **Passwords.** Client acknowledges that FIVE NINES may need access to any and all systems and resources to perform their duties under this contract. As such, FIVE NINES must have access to any and all passwords necessary to perform duties under this agreement.

123 **Waiver.** The failure or forbearance of FIVE NINES or Client to enforce any right or claim against the other party shall not be deemed to be a waiver by FIVE NINES or Client of such right or claim or any other right or claim hereunder. The waiver by FIVE NINES or Client of a breach hereof shall not operate or be construed as a waiver of any subsequent breaches of the same or any other provision.

124 **Entire Agreement.** This Agreement constitutes the entire agreement between the parties with respect to the subject hereof and supersedes all prior proposals, agreements, negotiations, correspondence, demonstrations, and other communications, whether written or oral, between FIVE NINES and Client. No modification or waiver of any provision hereof shall be effective unless made in writing signed by both FIVE NINES and Client.

125 **Severability.** If any provision hereof is determined in any proceeding binding upon the parties hereto to be invalid or unenforceable, that provision shall be deemed severed from the remainder of the Agreement, and the remaining provisions of the Agreement shall continue in full force and effect.

126 **Force Majeure.** Neither party shall be liable hereunder by reason of any failure or delay in the performance of its obligations hereunder (except for the obligation for the payment of money) on account of any cause that is beyond the reasonable control of such party.

127 **Applicable Law and Venue.** This Agreement shall be governed and construed in all respects in accordance with the laws of the State of Nebraska.

128 **Notices.** Except where provided otherwise, notices hereunder shall be in writing and shall be deemed to have been fully given and received when mailed by registered or certified mail, return receipt requested, postage prepaid, and properly addressed to the offices of the respective parties as specified in the first paragraph of this Agreement, or at such address as the parties may later specify in writing for such purposes. The foregoing shall apply regardless of whether such mail is accepted or



129 **Assignment.** This Agreement shall inure to the benefit of, and be binding upon, any successor to or purchaser of FIVE NINES whether by contract, merger or operation of law. Except for this limited right of assignment, neither party shall assign this Agreement or any right or interest under this Agreement, nor delegate any work or obligation to be performed under this Agreement, without the other party's prior written consent. Any attempted assignment or delegation in contravention of this provision shall be void and ineffective.

1210 **Pricing Information; Availability Disclaimer.** FIVE NINES reserves the right to make adjustments to pricing, Products and Service offerings for reasons including, but not limited to, changing market conditions, Product discontinuation, Product unavailability, manufacturer price changes, supplier price changes and errors in advertisements. FIVE NINES shall establish a price of services per Full Time Equivalent employee of Client (FTE Price) which shall be charged to client for each Full Time Equivalent employee of client. FTE Price established under this Agreement shall remain fixed during the initial term; thereafter the FTE Price may only increase annually, and such increases shall not exceed the lesser of three percent (3%) or the percentage change in the Consumer Price Index for the U.S. City average as compiled and calculated by the Bureau of Labor Statistics of the United States Department of Labor, in "Consumer Price Index, All Urban Consumers" (or its appropriate successor Index) for the year immediately preceding the effective date of such increase. Therefore, though the total amount owed by Client will increase with any increase in Client's full time equivalent employees, the FTE Price per full time equivalent employee shall remain fixed as stated above. FIVE NINES reserves the right to adjust the FTE Price should Client reduce, limit or eliminate Client technology support resources and/or employee positions existing the time of execution of this Agreement. All orders are subject to Product availability and the availability of Personnel to perform the Services. Once an order is accepted, FIVE NINES must perform the Services in accord with the order. If Services are performed on a time and materials basis, any estimates provided by FIVE NINES are for planning purposes only, however, if FIVE NINES shall receive prior written consent from Client prior to exceeding such estimate.

1211 **Dispute Resolution.** Except for the right of either party to apply to a court of competent jurisdiction for a Temporary Restraining Order, Preliminary Injunction, or other equitable relief to preserve the status quo or prevent irreparable harm FIVE NINES and Client understand and agree that the implementation of this Agreement will be enhanced by the timely and open resolution of any disputes or disagreements between such parties. Each party hereto agrees to use its best efforts to cause any disputes or disagreements between such parties to be considered, negotiated in good faith, and resolved as soon as possible.

In the event that any dispute or disagreement between the parties cannot be resolved to the satisfaction of FIVE NINES' project manager and the Client's project manager within ten (10) days after either such project manager has notified the other in writing of the need to resolve the specific dispute or disagreement within such ten (10) day period, then the dispute or disagreement shall be immediately referred in writing to the President of FIVE NINES and the \_\_\_\_\_ of Client (or their respective successors) for consideration. In the event that such officers of FIVE NINES and Client cannot resolve such dispute or disagreement to their mutual satisfaction within ten (10) days after the latter person has received written notice of the need to resolve the specific dispute or disagreement within such ten (10) day period, then the dispute or disagreement shall be immediately referred to in writing to the CEO of FIVE NINES and the \_\_\_\_\_ of Client (or their respective successors) for consideration.

No resolution or attempted resolution of any dispute or disagreement pursuant to this Section shall be deemed to be a waiver of any term or provision of this Agreement or consent to any breach or default unless such waiver or consent shall be in writing and signed by the party claimed to have waived or consented.

1212 **Arbitration.** Except for the right of either party to apply to a court of competent jurisdiction for a Temporary Restraining Order, Preliminary Injunction, or other equitable relief to preserve the status quo or prevent irreparable harm pending the selection and confirmation of the arbitrator, any and all disputes, controversies, or claims arising out of or relating to this Agreement or a breach thereof which the parties are unable to resolve pursuant to the Dispute Resolution process contained in paragraph 12.11 of this Agreement shall be submitted to and finally resolved by arbitration under the rules of the American Arbitration Association (AAA) then in effect. There shall be one arbitrator, and such arbitrator shall be chosen by mutual agreement of the parties or in accordance with AAA rules. The findings of the arbitrator shall be final and binding on the parties, and may be entered in any court of competent jurisdiction for enforcement. Legal fees shall be awarded to the prevailing party in the arbitration.

13. **Title; Transfer of Ownership.** In performance of the Services FIVE NINES will purchase personal property including but not limited to hardware, software and software licenses from third parties and act as reseller providing identified personal property to client. Client agrees that ownership of this personal property will pass from FIVE NINES to Client upon receipt of goods and identification (set aside, marked and labeled) by FIVE NINES.