

# TERMS AND CONDITIONS

## 1. DEFINITIONS. Certain capitalized terms, not defined above, have the meanings set forth below.

**1.1 "Authorized User"** shall mean any individual who is an employee of Customer or such other entity as may be authorized in the Agreement or by an Order Form, authorized, by virtue of such individual's relationship to, or permissions from, Customer, to access the FIVEBYFIVE Software, Inc. Service pursuant to Customer's rights under this Agreement.

**1.2 "Customer Content"** shall mean the data, media and content provided by Customer through the FIVEBYFIVE Software, Inc. Service.

**1.3 "Order Form"** shall mean a document signed by both Parties identifying a given type of FIVEBYFIVE Software, Inc. Service to be made available by FIVEBYFIVE Software, Inc. pursuant to this Agreement. Each Order Form shall be agreed upon by the Parties as set forth in Section 1.1.

**1.4 "FIVEBYFIVE Software, Inc. Web Sites"** shall mean the Web sites accessible at the URL [www.fx5solutions.com](http://www.fx5solutions.com).

**1.5 "Monthly Service Fee"** shall mean the base fee(s) indicated by and agreed to on the executed Order Form paid by Customer to FIVEBYFIVE Software, Inc. for access to the Service.

**1.6 "Services"** Services include software solutions and installations thereof; consulting on taxing, reporting, options for compliance and industry best practices; other professional services and assistance to be provided by FIVEBYFIVE Software, Inc. to Customer as agreed to by any applicable Order Form or by other mutually executed communication.

**1.7 "Set-Up Fee"** shall mean the fees defined in the Order Form and agreed to by Customer and payable to FIVEBYFIVE Software, Inc. for installation of the Service.

**1.8 "Trade Secret"** shall mean any information whether copyrightable or not, which constitutes a trade secret as defined by applicable law, which is not generally known or available to either Party's competitors but is known only to the Party who owns, controls, licenses or otherwise maintains it and to certain representatives to whom it must be disclosed in order to apply it to the intended uses, such as development, research, operations or systems, customers or prospective customers, marketing methods, business plans, and includes, without limitation, computer programs, software, processes, procedures, strategies, designs, data, reports or formulae.

**1.9 "Proof Gallon(s)"** is defined as a standard unit of measure for measuring the alcoholic volume of distilled spirits. One proof gallon is equal to one liquid gallon of spirit that is 50% alcohol (100.0 proof) at 60.0 degrees F.

**1.10 "Distilled Spirits Plant (DSP)"** is defined by the United States Alcohol and Tobacco Tax and Trade Bureau (TTB) as an establishment where Beverage or Industrial Distilled Spirits are Produced and/or Stored and/or Processed.

## 2. ORDERS, ACCESS AND USE

**2.1 Orders.** The Services to be provided by FIVEBYFIVE Software, Inc. are set forth in this Agreement and/or one or more Order Forms executed by FIVEBYFIVE Software, Inc. and Customer ("the Parties") from time to time during the Term. The Parties shall negotiate and sign a separate Order Form for each instance of DISTILL x 5. Each Order Form shall set out a description of the Services to be performed by FIVEBYFIVE Software, Inc. and the costs associated with such Services. Each Order Form executed by the Parties during the Term is hereby incorporated into and made a part of this Agreement.

**2.2 Provision of Access.** Subject to the terms and conditions contained in this Agreement and the End User License Agreement ("EULA") executed by Authorized Users, both of which are incorporated herein by reference, FIVEBYFIVE Software, Inc. hereby grants to Customer a non-exclusive, non-transferable, revocable right to access the features and functions of the applicable Service(s) ordered as indicated on the respective Order Form(s) incorporating this Agreement. Upon receipt and acceptance of this Agreement along with the Order Form(s) and EULA, and no later than the Start Date as defined by the executed and agreed to Order Form or other mutually executed communication, FIVEBYFIVE Software, Inc. shall provide to Customer the Access Protocols and the passwords, security protocols and policies and network links or connections (the "Access Protocols") to allow Customer to access the Services.

**2.3 Application and Content Hosting.** FIVEBYFIVE Software, Inc. shall provide for the hosting of the Services which are accessible as part of this Agreement, provided that nothing herein shall be construed to require FIVEBYFIVE Software, Inc. to provide for, or bear any responsibility with respect to, the development, installation, or provision of any telecommunications or computer network hardware required by Customer to provide access from the Internet to the Services.

**2.4 Usage Restrictions.** Customer agrees not to and Customer shall not (a) decompile, disassemble, reverse engineer or otherwise attempt to obtain or perceive the source code from which any software component of the Services are compiled or interpreted, and Customer acknowledges that nothing in this Agreement will be construed to grant Customer any right to obtain or use such code; (b) create any derivative product from any of the foregoing; or (c) allow third parties other than Authorized Users to gain access to the Services. Customer will ensure that its use of the Service(s) complies with all applicable State and Federal laws

and with the terms of this Agreement. Customer shall comply with the EULA attached.

**2.5 Services.** If Customer has executed an Order Form for the performance of Services, FIVEBYFIVE Software, Inc. will use commercially reasonable efforts to perform the Services in accordance with this Agreement.

### 3. CUSTOMER RESPONSIBILITIES.

**3.1 Authorized Users Access to Services.** Only Authorized Users shall be permitted to access and use the features and functions of the Service. Customer will not permit or sanction the sharing of User IDs among Authorized Users. Customer shall use commercially reasonable efforts to prevent the unauthorized access to or use of the Service and shall notify FIVEBYFIVE Software, Inc. promptly in writing of any known or suspected unauthorized use or misappropriation of User IDs.

**3.2 Customer Cooperation.** Customer, upon mutual agreement, shall at its own expense provide or make available to FIVEBYFIVE Software, Inc. access to the Customer's premises, systems, and provide all relevant information, documentation and staff reasonably required or requested by FIVEBYFIVE Software, Inc. to enable FIVEBYFIVE Software, Inc. to perform the Services.

**3.3 Customer Responsibility for Data and Security.** Customer and its Authorized Users shall have access to the Customer Content and shall be responsible for all Customer Content and the security of the User IDs assigned to Customer and any passwords and other access protocols required in order to access the Services. Customer shall have the sole responsibility for the accuracy, quality, integrity, legality, reliability, and appropriateness of all Customer Content.

**3.4 Recovery of Compromised Account Data.** FIVEBYFIVE Software, Inc. may make regularly scheduled backups of Customer's data stored within the FIVEBYFIVE Software, Inc.'s database. Archived hourly backups may be retained and stored in a private directory on the server for a period of up to twenty (20) days from the time of creation. Backup files will be permanently removed from FIVEBYFIVE Software, Inc.'s server every twenty (20) days. If Customer becomes aware that its data content has been compromised through a security breach, user-related error or any other means, it shall notify FIVEBYFIVE Software, Inc. in writing as soon as practicable, provide the last known date and time the data was uncompromised, and, if possible, without assuming any liability therefore, FIVEBYFIVE Software, Inc. may be able to restore the data to Customer. Upon written request to restore the database, Customer is deemed to agree to the terms and charges stated in this Agreement. Customer understands and agrees that FIVEBYFIVE Software, Inc. cannot restore data that has been permanently removed from the server or is otherwise unavailable in a usable format.

**3.5 Customer Backup of Document Files.** Customer, may, in its sole discretion, maintain and be solely responsible for a repository of Document Files within the FIVEBYFIVE Software, Inc. system. Document Files include but are not limited to user-generated or scanned documents uploaded to the server and Document Files created by the system. Such file types include but are not limited to Adobe PDF, Microsoft Word, Microsoft Excel, and all image types (JPG, PNG, GIF, TIF, etc.). Customer understands and agrees once Document Files have been removed from the FIVEBYFIVE Software, Inc. system they are not recoverable.

### 4. FEES AND EXPENSES; PAYMENTS.

**4.1 Base Service Fees.** In consideration for the access rights granted to Customer by FIVEBYFIVE Software, Inc. for Services under this Agreement, Customer will pay to FIVEBYFIVE Software, Inc., without right of offset or deduction, all fees required by the Agreement and/or by an applicable executed Order Form. Unless otherwise agreed, all fees will be charged to the Customer's credit card or authorized payment method in advance of the Service being rendered, and automatically upon each renewal of the Term. All fees will be billed in U.S. dollars unless otherwise expressly agreed to in writing by FIVEBYFIVE Software, Inc. Notwithstanding the foregoing, any Set-Up Fees listed on a particular Order Form shall be due and payable upon execution of the applicable Order Form.

**4.2 Additional Fees.** In consideration for additional Services provided to the Customer by FIVEBYFIVE Software, Inc. (e.g. consulting services, additional or specialized training, and customer or technical support exceeding the definition of such in Section 3.4 and 3.5), Customer will pay to FIVEBYFIVE Software, Inc., without right of offset or deduction, all fees required by any applicable executed Order Forms or other mutually executed communication. Unless otherwise agreed, all fees will be charged to the Customer's credit card or authorized payment method within thirty (30) days of services rendered.

**4.3 Service Fee Adjustments.** The Service Fee shall be the mutually agreed upon base price as identified by all executed Order Forms, less any applied discounts. **Upon annual review, the Service Fee shall be adjusted to reflect the appropriate Service by Customer.**

**4.4 Annual Increase.** FIVEBYFIVE Software, Inc. shall have the right to increase the Service Fee at any time, and any such increases shall be immediately effective. Failure by FIVEBYFIVE Software, Inc. to increase the Service Fee in any fiscal year shall not operate as a waiver of the right of FIVEBYFIVE Software, Inc. to adjust the Service Fee due in any subsequent year.

**4.5 Expenses.** Customer shall reimburse FIVEBYFIVE Software, Inc. for all reasonable and previously approved travel and other expenses as defined in the Order Form executed between the Parties or documented by receipts as incurred by FIVEBYFIVE Software, Inc. in delivery of the Services.

**4.6 Customer Support.** Customer support as defined by the Service Level Agreement is available to client during the hours defined by the aforementioned document.

**4.7 Technical Support.** In the event that a Customer experiences a program bug or error ("Error"), Customer shall contact FIVEBYFIVE Software, Inc. to report the Error. FIVEBYFIVE Software, Inc. shall make reasonable efforts to address the Error in a timely manner.

**4.8 Disputed Fees.** If Customer disputes any fees, taxes, or other charges billed by FIVEBYFIVE Software, Inc., Customer shall notify FIVEBYFIVE Software, Inc. in writing of the disputed amount within twenty (20) business days of date of the invoice and provide all relevant information regarding the basis for the dispute. FIVEBYFIVE Software, Inc. shall acknowledge receipt of the dispute information in writing to Customer. All parties agree to work cooperatively to resolve any such disputes. If the Customer fails to provide FIVEBYFIVE Software, Inc. with a notice of a dispute as provided herein, such amount is deemed undisputed and due and payable to FIVEBYFIVE Software, Inc.

**4.9 Taxes.** Customer is responsible for payment of all applicable sales, use and other taxes and all applicable export and import fees, customs duties and similar charges, and any related penalties and interest for the grant of access rights hereunder, or the delivery of related products or services to the extent such taxes are by law due and payable by Customer ("**Customer Taxes**"). Customer will make all required payments to FIVEBYFIVE Software, Inc. free and clear of and without reduction for any withholding taxes. Any Customer Taxes imposed on payments to FIVEBYFIVE Software, Inc. will be Customer's sole responsibility, and Customer will, upon FIVEBYFIVE Software, Inc.'s request, provide FIVEBYFIVE Software, Inc. with official receipts issued by appropriate taxing authorities, or such other evidence as FIVEBYFIVE Software, Inc. may reasonably request, to establish that such taxes have been paid.

**4.10 Express Billing Permission.** Unless otherwise provided for in an Order Form, Customer hereby provides FIVEBYFIVE Software, Inc. with express permission to charge all fees to the Credit Card or Authorized Payment Method information provided in the Order Form or otherwise on file with FIVEBYFIVE Software, Inc. on a quarterly basis unless otherwise indicated on the Order Form. It is the Customer's responsibility to provide FIVEBYFIVE Software, Inc. with any updated Credit Card, Authorized Payment Information, and/or mailing address(es). In the event that Customer's Credit Card or Authorized Payment Method cannot be charged or is declined for any reason, FIVEBYFIVE Software, Inc. will contact Customer with an update payment request, either directly or via automated communication from the invoicing solution employed by FIVEBYFIVE Software, Inc. If the Customer fails to respond to the update request within fifteen (15) business days, Customer may be subject to penalties up to and including late fees and suspension of service as described in Sections 4.11 and 4.12 below in addition to the total amounts of Monthly Service Fees or other outstanding fees due and payable. Following the 15 day waiting period, FIVEBYFIVE Software, Inc. may, at its discretion, terminate access to the Service (per Section 3.10, above) until payment has been received and the Credit Card or Authorized Payment information has been successfully updated by Customer.

**4.11 Late Fees.** Late payments by Customer shall be subject to compounding late penalty fees of 5% per month from the due date until the amount is paid in full.

**4.12 Suspension of Service.** If Customer fails to pay undisputed amounts in accordance with the terms and conditions hereof, FIVEBYFIVE Software, Inc. shall have the right, in addition to any of its other rights or remedies, to terminate the Service to Customer, without liability to Customer until such amounts are paid in full.

## 5. TREATMENT OF CONFIDENTIAL INFORMATION.

**5.1 Ownership of Confidential Information.** The Parties acknowledge that during the performance of this Agreement, each Party will have access to certain of the other Party's Confidential Information or Confidential Information of third parties that the disclosing Party is required to maintain as confidential. "**Confidential Information**" means any information disclosed by either party, whether in writing, electronically or orally, to the other Party, whether in tangible or intangible form, marked or unmarked which relates to past, present or future business affairs. By way of example and not limitation, Confidential Information includes: (i) any information concerning a Party's, its agents' or licensors' technology, such as systems, source code, databases, hardware, software, programs, applications, engine protocols, routines, models, displays and manuals, including, without limitation, the selection, coordination, and arrangement of the contents thereof; (ii) any information concerning a Party's, its agents' or licensors' financial or business plans or operations, such as research activities and plans, marketing or sales plans, pricing or pricing strategies, operational techniques, internal controls, compliance policies, methods of operation, security procedures, strategic plans, and unpublished financial information, including information concerning revenues, profits and profit margins; and (iii) items included in the meaning of Trade Secrets as defined in section 9.10, if it is judicially determined that any such items are not Trade Secrets, as defined by applicable law, and such items otherwise meet the definition of Confidential Information above.

Both Parties agree that all items of Confidential Information are proprietary to the disclosing Party or such third party, as applicable, and will remain the sole property of the disclosing Party or such third party.

**5.2 Mutual Confidentiality Obligations.** Each Party agrees as follows: (a) to use Confidential Information disclosed by the other Party only for the purposes described herein; (b) that such Party will not reproduce Confidential Information disclosed by the other Party, and will hold in confidence and protect such Confidential Information from dissemination to, and use by, any third party using the same standard of care as it uses for its own Confidential Information of similar value, but in no case less than a reasonable standard of care; (c) that neither Party will create any derivative work from Confidential Information disclosed to such Party by the

other Party; (d) to restrict access to the Confidential Information disclosed by the other Party to only such of its personnel, agents, and/or consultants who have a need to access and who have been advised of and have agreed in writing to treat such information as Confidential in accordance with the terms of this Agreement; and (e) to the extent practicable, return or destroy, all Confidential Information disclosed by the other Party that is in its possession upon termination or expiration of this Agreement. Notwithstanding the foregoing, Customer agrees that FIVEBYFIVE Software, Inc. may collect de-identified aggregated statistical data regarding Customer's use of the Service. In no event shall FIVEBYFIVE Software, Inc. provide to third parties Customer data that is personally identifying (e.g. personal credit card information, bottling quantities, trade secrets).

**5.3 Confidentiality Exceptions.** Notwithstanding the foregoing, the provisions of Sections 4.1 and 4.2 will not apply to Confidential Information that (a) is publicly available or in the public domain at the time disclosed; (b) is or becomes publicly available or enters the public domain through no fault of the recipient; (c) is rightfully communicated to the recipient by persons not bound by confidentiality obligations with respect thereto; (d) is already in the recipient's possession free of any confidentiality obligations with respect thereto at the time of disclosure; (e) is independently developed by the recipient without reference to a Party's Confidential Information; or (f) is approved for release or disclosure by the disclosing Party without restriction. Notwithstanding the foregoing, each Party may disclose Confidential Information to the limited extent required in order to comply with the order of a court or other governmental body, or as otherwise necessary to comply with applicable law, provided that the Party making the disclosure pursuant to the order shall first have given written notice to the other Party and made a reasonable effort to obtain a protective order; or to establish a Party's rights under this Agreement, including to make required court filings.

**5.4 Limitation Period.** The obligations set forth in Section 4 shall survive the termination or expiration of this Agreement.

## **6. REPRESENTATIONS AND WARRANTIES.**

Each Party hereby represents and warrants (a) that it is duly organized, validly existing and in good standing under the laws of its jurisdiction of incorporation or organization; (b) that the execution and performance of this Agreement will not conflict with or violate any applicable laws; and (c) that this Agreement, when executed and delivered, will constitute a valid and binding obligation on each Party and will be enforceable against a Party in accordance with its terms.

## **7. DISCLAIMERS, EXCLUSIONS AND LIMITATIONS OF LIABILITY.**

**7.1 Disclaimer.** ALL SERVICES PROVIDED BY FIVEBYFIVE SOFTWARE, INC. ARE PROVIDED ON AN "AS IS" BASIS. NO WARRANTY OR ASSURANCE, EXPRESS, IMPLIED, OR STATUTORY, IS GIVEN BY FIVEBYFIVE SOFTWARE, INC. WITH RESPECT TO THE SERVICES OR ANY OTHER MATTER, INCLUDING, WITHOUT LIMITATION (AND FIVEBYFIVE SOFTWARE, INC. EXPRESSLY DISCLAIMS) ALL WARRANTIES OF TITLE, MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, NON-INFRINGEMENT, OR LACK OF VIRUS, ON THE PART OF FIVEBYFIVE SOFTWARE, INC.. FIVEBYFIVE SOFTWARE, INC. DOES NOT WARRANT THAT ANY SERVICES PROVIDED BY FIVEBYFIVE SOFTWARE, INC. WILL MEET CUSTOMER'S REQUIREMENTS OR THAT THE SERVICE WILL BE UNINTERRUPTED OR ERROR-FREE, OR THAT ALL ERRORS WILL BE CORRECTED.

**7.2 Internet Delays.** FIVEBYFIVE SOFTWARE, INC. IS NOT RESPONSIBLE FOR ANY DELAYS, DELIVERY FAILURES, OR OTHER DAMAGE, WHETHER DIRECT, INDIRECT OR CONSEQUENTIAL, OR IMMEDIATELY KNOWN OR UNKNOWN, RESULTING FROM INTERNET OR SYSTEM DELAYS OR LIMITATIONS.

**7.3 Exclusions of Remedies; Limitation of Liability.** TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, IN NO EVENT WILL FIVEBYFIVE SOFTWARE, INC. BE LIABLE, WHETHER IN CONTRACT, IN TORT, OR UNDER ANY OTHER LEGAL THEORY (INCLUDING, BUT NOT LIMITED TO STRICT LIABILITY AND NEGLIGENCE), TO CUSTOMER FOR ANY INCIDENTAL, INDIRECT, SPECIAL, CONSEQUENTIAL, OR SIMILAR DAMAGES, OR PUNITIVE DAMAGES, REGARDLESS OF THE NATURE OF THE CLAIM, INCLUDING, WITHOUT LIMITATION, LOST PROFITS OR REVENUES, COSTS OF DELAY, LOSS OR INTERRUPTION OF USE, ANY FAILURE OF DELIVERY, BUSINESS INTERRUPTION, COSTS OF LOST OR DAMAGED DATA OR DOCUMENTATION OR SECURITY, OR SIMILAR ECONOMIC LOSS, LOSS OF PRIVACY, OR LIABILITIES TO THIRD PARTIES ARISING FROM ANY SOURCE, EVEN IF FIVEBYFIVE SOFTWARE, INC. HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES, ARISING OUT OF OR IN CONNECTION WITH THE PERFORMANCE OR NON- PERFORMANCE OF THIS AGREEMENT.

NOTWITHSTANDING ANY OTHER TERM CONTAINED IN THIS AGREEMENT, THE CUMULATIVE LIABILITY OF FIVEBYFIVE SOFTWARE, INC. TO CUSTOMER FOR ALL CLAIMS ARISING FROM OR RELATING TO THIS AGREEMENT, SHALL NOT EXCEED THE TOTAL AMOUNT OF THE SERVICE FEES PAID TO FIVEBYFIVE SOFTWARE, INC. DURING THE SIX (6) MONTHS IMMEDIATELY PRECEDING THE DATE ON WHICH THE ALLEGED ACT, OMISSION OR OCCURRENCE GIVING RISE TO SUCH LIABILITY OCCURRED.

THIS LIMITATION OF LIABILITY IS INTENDED TO APPLY WITHOUT REGARD TO WHETHER OTHER PROVISIONS OF THIS AGREEMENT HAVE BEEN BREACHED OR PROVEN INEFFECTIVE.

## 8. TERMS AND TERMINATION.

**8.1 Term.** The term of this Agreement will commence on the Effective Date and will continue for the period agreed to by both parties on the Order Form (or if not specified on the Order Form, a period of one [1] year), and **will automatically renew for successive one (1) year terms at the Service Fee appropriate for the current level of Service as provided in Section 4.3 and 4.4, unless a Party provides written notice of its intent not to renew at least thirty (30) days prior to the expiration of the then-current term** (the initial term, together with any renewal terms, collectively, the "**Term**"), or unless terminated in accordance with this Section 8. In the event this Agreement is terminated, pursuant to Section 8.5, due to breach, the breaching Party will have a right to cure any alleged breach within thirty (30) days of receipt of such notice, and this Agreement will terminate in the event that such cure is not made within such cure period.

**8.2 Effect of Termination.** Upon any termination of this Agreement, Customer will (a) immediately discontinue all use of the Service and any FIVEBYFIVE Software, Inc. Confidential Information; and (b) promptly pay to FIVEBYFIVE Software, Inc. all amounts due and payable under this Agreement. Within thirty (30) days after the effective date of any termination of this Agreement, FIVEBYFIVE Software, Inc. shall make available to Customer upon request all Customer Content in a computer-readable file format or delete all Customer data at Customer's option. After such thirty (30) day period, FIVEBYFIVE Software, Inc. shall have no obligation to maintain or provide any Customer Content to Customer.

**8.3 Survival.** All applicable provisions will survive the termination of this Agreement.

### 8.4 Early Termination of Agreement.

If Customer determines that for any reason they wish to terminate the Services prior to the end of the then-current term Customer shall pay to FIVEBYFIVE Software, Inc. the difference between the full price for the Services received to the date of termination and any discount provided. In addition, Customer agrees to and shall pay an early termination fee in an amount equal to 50% of the remaining contract term at the undiscounted base rate. In the event of prepayment for a term of Service exceeding one year, FIVEBYFIVE Software, Inc. shall refund to the Customer an amount equal to 50% of the remaining contract term in excess of one [1] year at the undiscounted base rate.

- A. Customer must provide FIVEBYFIVE Software, Inc. with 45 days written notice of its intent to terminate.
- B. Customer shall cease use of the System upon the termination date and understands and agrees it will be blocked from all access to Services.
- C. All amounts payable or accrued through the date of termination, plus any Early Termination Fees shall become immediately due and charged to Customer's credit card or authorized payment method upon receipt of termination notice.
- D. As of the date Services are terminated all rights and licenses granted to Customer under this Agreement shall immediately terminate.
- E. In the event of termination, Customer shall not disclose any Confidential Information. Both Customer and FIVEBYFIVE Software, Inc. shall not disclose any information about the agreement and relationship to any third party (except for that required by law) without prior written approval of the other Party. All information exchanged during the Term shall be held to be Confidential Information.
- F. Tortious Interference. Each party agree not to tortiously interfere with the contracts and relationships of the other party.

### 8.5 Termination upon Default.

Either party may terminate this Agreement upon the default by the other part of any term of this Agreement. To affect such termination, the non-breaching party shall provide notice of the breach to the other party, and the breaching party shall have thirty (30) days from the receipt of such notice to cure the breach. If the breach is not cured within such thirty (30)-day cure period, the Agreement shall be terminated unless otherwise agreed in writing by the parties prior to the date of termination.

## 9. MISCELLANEOUS.

**9.1 Entire Agreement.** This Agreement sets forth the understanding between the Parties with respect to the subject matter of this Agreement and supersedes all prior oral and written agreements, discussions and understandings between the Parties and neither Party will be bound by any conditions, inducements or representations other than as expressly stated in this Agreement.

**9.2 Independent Contractors.** In making and performing this Agreement, Customer and FIVEBYFIVE Software, Inc. will at all times act as independent contractors, and, except as expressly set forth herein, nothing contained in this Agreement will be construed or implied to create an agency, partnership or employer and employee relationship between them. Except as expressly set forth herein, at no time will either Party make commitments or incur any charges or expenses for, or in the name of the other Party.

**9.3 Remedies.** The parties acknowledge that a breach of certain of the provisions of this Agreement may result in irreparable and continuing damage to the non-breaching Party for which there may be no adequate remedy at law, and that in such a case, the non-breaching party shall be entitled to seek injunctive relief, without limitation to its other available remedies.

**9.4 Notices.** Any notice required to be given pursuant to this Agreement shall be in writing and emailed, mailed via priority or express service, or personally delivered, any of which must show proof of delivery; and such notice shall be effective upon delivery to the addressee.

**9.5 Attorneys' Fees.** In the event of any action, proceeding or lawsuit is brought by FIVEBYFIVE Software, Inc. or Customer in connection with this Agreement, the prevailing party in such proceeding shall be entitled to receive its costs, expert witness fees and reasonable attorneys' fees, including costs and fees on appeal.

**9.6 Amendments; Modifications.** This Agreement may not be amended or modified except in a writing duly executed by authorized representatives of both Parties.

**9.7 Assignment.** Customer shall not assign any of its rights or delegate any of its duties under this Agreement without the express, prior written consent of FIVEBYFIVE Software, Inc.

**9.8 No Third-Party Beneficiaries.** The Parties acknowledge that the covenants set forth in this Agreement are intended solely for the benefit of the Parties, their successors and permitted assigns. Nothing herein, whether express or implied, will confer upon any person or entity, other than the Parties, their successors and permitted assigns, any legal or equitable right whatsoever to enforce any provision of this Agreement.

**9.9 Severability.** If any provision of this Agreement is invalid or unenforceable for any reason in any jurisdiction, such provision will be construed to have been adjusted to the minimum extent necessary to cure such invalidity or unenforceability. The invalidity or unenforceability of one or more of the provisions contained in this Agreement will not affect or render unenforceable any other provisions of this Agreement.

**9.10 Waiver.** No waiver under this Agreement will be valid or binding unless set forth in writing and duly executed by the Party against whom enforcement of such waiver is sought. Any acknowledged waiver will constitute a waiver only with respect to the specific matter described therein and will in no way impair the rights of the Party granting such waiver in any other respect or at any other time. The failure or delay of a Party to enforce at any time or for any period of time the provisions of this Agreement will not be construed a waiver of such provisions or of the right of such party thereafter to enforce each and every such provision.

**9.11 Force Majeure.** Except with respect to payment obligations hereunder, if a Party is prevented or delayed in performance of its obligations hereunder as a result of circumstances beyond such Party's reasonable control, including, by way of example, war, acts of terrorism, riot, fires, floods, epidemics, or failure of public utilities or public transportation systems, such failure or delay will not be deemed to constitute a material breach of this Agreement, but such obligation will remain in full force and effect, and will be performed or satisfied as soon as reasonably practicable after the termination of the relevant circumstances causing such failure or delay, provided that if such Party is prevented or delayed from performing for more than ninety (90) days, the other Party may terminate this Agreement upon thirty (30) days' written notice.

**9.12 Governing Law.** THIS AGREEMENT WILL BE GOVERNED BY AND INTERPRETED IN ACCORDANCE WITH THE LAWS OF THE STATE OF COLORADO, WITHOUT REGARD TO CONFLICTS OF LAW PRINCIPLES THEREOF OR TO THE UNITED NATIONS CONVENTION ON THE INTERNATIONAL SALE OF GOODS. ANY LEGAL PROCEEDINGS RELATING TO THIS AGREEMENT SHALL BE BROUGHT IN ANY COURT OF COMPETENT JURISDICTION LOCATED IN DENVER, COLORADO. THE PARTIES CONSENT TO THE JURISDICTION OF SUCH COURTS, AGREE TO ACCEPT SERVICE OF PROCESS BY MAIL, AND WAIVE ANY JURISDICTIONAL OR VENUE DEFENSES OTHERWISE AVAILABLE.

**9.13 Arbitration.** The Parties agree that any and all claims or controversies arising from or related to this Agreement, shall be settled by binding arbitration according to the procedures of Judicial Arbitrator Group, Inc. (JAG) dispute resolution located in Denver, Colorado. The Parties also agree that any award tendered by the arbitrator may be entered as a judgment in the United States court in and for the district within which such award was made and enforceable as an order of said court and the Parties hereby submit to the venue and jurisdiction of that court for purposes of enforcement of any arbitration award.

**9.14 Counterparts.** This Agreement may be executed in any number of counterparts, each of which when so executed will be deemed to be an original and all of which when taken together will constitute one Agreement.

**9.15 Contract Modifications.** Customer acknowledges that no changes were made to the original, executed written contract agreement received electronically or in hard copy. Any modifications noted herein must be accompanied by the initials and dates of both authorized representatives of the Customer and FIVEBYFIVE Software, Inc. Any changes made to the contract agreement without the expressed written consent of FIVEBYFIVE Software, Inc. shall be considered void and the terms as defined in the original contract agreement shall take precedence.

## 10. ATTACHMENTS

The following Attachments are incorporated herein:

End User License Agreement



# DISTILL X 5 END USER LICENSE AGREEMENT (EULA)

**IMPORTANT -- READ CAREFULLY:** This End User License Agreement ("License") is a legal contract between you (either an individual or a single business entity) and FIVEBYFIVE Software, Inc., Inc. ("Vendor") for the Vendor software product(s), which may include a portion or combination of Software as a Service (SaaS) offering, certain computer software and, as applicable, associated media, printed materials, and "online" or electronic documentation (the "Software Solution"). Any capitalized terms that are not defined in this License shall have the meanings assigned in the applicable Terms and Conditions and/or Service Agreement.

BY USING THE SOFTWARE SOLUTION, YOU AGREE TO BE BOUND BY THE TERMS AND CONDITIONS OF THIS LICENSE, **INCLUDING THE WARRANTY DISCLAIMERS, LIMITATIONS OF LIABILITY, AND TERMINATION PROVISIONS DEFINED BELOW.** IF YOU DO NOT AGREE TO THE TERMS OF THIS LICENSE, DO NOT USE THE SOFTWARE SOLUTION, AND EXIT NOW.

## LICENSE TERMS

This License permits you, an individual end user to access and use the features and functions of the Software Solution in accordance with the applicable Terms and Conditions and Service Agreement pursuant to which you or the entity for which you work purchased such rights. The Vendor offers an online SaaS, which is designed to run in single-user and/or multi-user environments.

You understand and agree that the success and efficiency of the end result of the Software Solution is dependent on the quality and correctness of the data that you input into the Software Solution and your authorized use of the Software Solution.

## OTHER LIMITATIONS

You may not use, rent, lease, or lend access to the Software Solution in any manner not expressly provided in this License or in the applicable Terms and Conditions or Service Agreement.

Vendor may provide you with support services related to the Software Solution ("Support Services"). Use of Support Services is governed by Vendor policies and programs described in the Service Level Agreement. Any code provided or delivered to you as part of the Support Services shall be considered part of the Software Solution and subject to the Terms and Conditions of this License as well as the applicable Services Agreement.

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