

ADDENDUM TO ECOLANE USA INC MASTER AGREEMENT

This Addendum (herein "Addendum") amends the Ecolane USA Inc., Master Agreement and any and all other terms and conditions as well as attachments, exhibits, any physical or virtual documents or writings, referenced therein, and any click through, clickwrap, shrink-wrap, or other such virtual agreement, *etc.* (all of which are herein "Agreement") between Ecolane USA Inc., a Delaware Corporation its affiliates and subsidiaries (herein "Vendor") and City of Kingsport, Tennessee (herein "City"). In consideration of using Vendor's form agreement, the mutual promises set out herein, and other good and valuable consideration, the sufficiency of which is hereby acknowledged the Agreement is amended as follows:

- 1. Precedence.** Notwithstanding any other provision in the Agreement, the language in this Addendum takes precedence over all other terms, conditions or language to the contrary or in conflict with the language herein, and the Agreement and this Addendum shall not be construed to create any ambiguity, it being the intent of the parties that this Addendum shall control. In the event of a conflict between this Addendum and the provisions of the Agreement, the provisions of this Addendum shall, to the extent of such conflict take precedence unless such document expressly states that it is amending this Addendum.
- 2. Indemnity, Limitation of Liability and Disclaimer of Warranty.** Article II, Section 29 of the Tennessee Constitution prohibits cities from lending their credit to private entities and, therefore, prohibits an agreement by City to indemnify a third party or agree to a limitation of liability provision. Any indemnity or hold harmless provision contained in the Agreement requiring City to indemnify or hold harmless Vendor or any other person or entity and any limitation of liability in favor of Vendor is enforceable only to the extent permitted by Tennessee law, provided City's monetary limits of liability under any such provision is limited to the monetary limits of liability as provided for in the Tennessee Governmental Tort Liability Act, Tenn. Code Ann. § 29-20-101 *et seq.* No provision of this Agreement shall act or be deemed a waiver by City of any immunity, including its rights or privileges or of any provision of the Tennessee Governmental Tort Liability Act, Tenn. Code Ann. § 29-20-101 *et seq.*
- 3. No Liability for Users or Third Parties.** Except as provided in the Tennessee Governmental Tort Liability Act, Tenn. Code Ann. § 29-20-101 *et seq.* City is not responsible for Users of the Service, their acts or data, or any acts or data of a third party.
- 4. No Liability of Officials and Employees.** No official, employee or volunteer, whether disclosed or undisclosed, of City shall be personally liable to Vendor or any other person or entity, including a third party beneficiary, in the event any provision of the Agreement is unenforceable; there is any default or breach by City; for any amount which may become due under the Agreement ;or on any obligations under the terms of the Agreement and Vendor and any other person or entity, including a third party beneficiary, shall to look solely to City for the satisfaction of any liability of City hereunder.
- 5. Warranty.** Vendor warrants that the products purchased herein when used in accordance with the documentation shall operate in all material respects in conformity with the written representations of Vendor. If it does not perform as warranted, Vendor shall use commercially reasonable efforts to correct the products so that it operates in all material respects in conformity with the written representations of Vendor. If it cannot correct the products within a reasonable period of time, Vendor shall refund the purchase price of the products. Additionally, services shall be performed in a professional and workmanlike manner in conformance with the representations of Vendor which induced City to secure Vendor's services. Because Tennessee law may not allow City to agree to the disclaimer of warranties, any such disclaimer of warranties shall be enforceable only to the extent permitted by Tennessee law, and City reserves all rights afforded to local governments under law for all general and implied warranties.
- 6. Purchases.** City, as a governmental entity, can make purchases only pursuant to its procurement requirements, which may require an invitation to bid by vendors and award of the purchase based on competitive bids competitive bids.
- 7. Confidentiality.** The Agreement is a public record, and it, along with all documents or materials, in any format, including, but not limited to, paper, electronic, or virtual, that are public records pursuant to the Tennessee

Public Records Act, set out in Tenn. Code Ann. §10-7-503 *et seq.*, are not confidential and are subject to disclosure in whole or in part, without regard to any provision contained in the Agreement declaring information confidential. Additionally, City must, upon proper request, release public documents and records as defined by Tenn. Code Ann. §10-7-503 *et seq.*, including, but not limited to, the Agreement and all records created and maintained related to the Agreement, without any requirement to disclose such request to Vendor or provide Vendor with notice or the time to obtain a protective order. City does not have the burden of establishing that information is not confidential information or that its release is authorized to release the records. This Section 7 serves to meet such burden and authorization of disclosure.

8. **Accessibility.** Vendor warrants that the software conforms to the accessibility guidelines, including, but not limited to, supporting assistive software or devices such as large-print interfaces, text-to-speech output, refreshable braille displays, voice-activated input, and alternate keyboard or pointer interfaces, etc., established by the World Wide Web Consortium's Web Content Accessibility Guidelines 2.2 (WCAG 2.2), and the accessibility guidelines established by Section 508 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794d), and implementing regulations set forth in 36 C.F.R. Part 1194. Vendor further agrees to indemnify and hold harmless City from any claims arising out of Vendor's failure to comply with the aforesaid requirements. Failure to comply with these requirements shall constitute a material breach of the Agreement. Notwithstanding the foregoing, City acknowledges and understands the legal and practical distinction between 'software' and 'content,' and further agrees that City, not Vendor, shall have sole responsibility for WCAG 2.2 and Section 508 compliance as it relates to content.
9. **Term.** City or Vendor may terminate the Agreement and use of the service at any time for any reason. However, termination shall not take effect until ninety (90) days after written notice is delivered by the party terminating the agreement to the other party. City's access to any data in possession of Vendor shall not be restricted or denied until the effective date of the termination. Upon termination, the City shall make payment for any services provided prior to the date of termination. Notices to the City shall be sent to:

Kingsport Area Transit Service
900 East Main Street
Kingsport, TN 37660

Office of the City Attorney
City of Kingsport
415 Broad Street, Ste. 333
Kingsport, TN 37660

10. **Name and Logo.** Vendor shall not use City's name, its marks, or any of City logos, including Kingsport City Schools, in marketing or publicity materials or for marketing or publicity purposes without prior written authorization from City.
11. **Governing Law.** The Agreement and the rights and obligations of the parties are governed by the laws of the state of Tennessee, without regard to its conflict of laws principles.
12. **City's Refusal to Arbitrate, Selection of Jurisdiction, Waiver of Jury Trial, Venue, Service of Process.** Pursuant to the Constitution and Laws of the State of Tennessee, City is a sovereign entity subject only to those courts with jurisdiction over City. Therefore, any reference to the resolution of disputes through arbitration is expressly stricken from the Agreement and City expressly refuses to arbitrate any dispute. If a dispute arises between the parties concerning any aspect of the Agreement, and it cannot be resolved by mutual agreement, any party may resort to resolution of the dispute by litigation in the state courts in Kingsport, Tennessee or the Federal court for the Eastern District of Tennessee, Northeastern Division. However, neither party shall be obligated to provide any type of pre-suit notice before initiating a cause of action. The parties waive their right to a jury trial. The parties hereby consent to the mandatory and exclusive venue and jurisdiction of the state court located in Kingsport, Tennessee or the Federal court for the Eastern District of Tennessee. The parties stipulate and agree that submission of this agreement shall constitute conclusive proof of their consent to the jurisdiction and venue of the courts named herein. Service of process shall comply with the Tennessee Rules of Civil Procedure or applicable federal rules, and City does not agree to any other service of process procedure.
13. **Responsibility for Litigation Costs, Expenses and Payment of Attorney's Fees.** Article II, Section 29 of the Tennessee Constitution prohibits cities from lending their credit to private entities and, therefore, prohibits an agreement by City to indemnify a third party or agree to a limitation of liability provision. This prohibition

extends to contractual provisions for the payment of attorney's fees. In the event of litigation between City and Vendor each party shall be solely and exclusively responsible for the payment of litigation costs, expenses and attorney's fees excepting those costs which may be awarded by a court of competent jurisdiction as specified by Tennessee law or applicable rules of civil procedure. Discretionary cost may be awarded by a court as permitted by Tennessee law, provided City does not waive its governmental immunity.

- 14. Non-appropriation.** Vendor acknowledges that City is a governmental entity, and the validity of the Agreement is based upon the availability of public funding under its authority. In the event Client fails to appropriate funds or make monies available for any fiscal year covered by the term of this Agreement for the services to be provided, this Agreement shall be terminated on the last day of the fiscal year for which funds were appropriated or monies made available for such purposes without liability to City, such termination shall not be a breach of this Agreement, and any unused payment made to Vendor shall be returned to City. Furthermore, this provision shall extend to any and all obligations imposed upon City to reimburse Vendor for any reimbursements, refunds, chargebacks, penalties, fees, or other financial obligations which exceed the funds tendered to Vendor, FPPs, or Payment Processing Partners in relation to any event.
- 15. Audit and Liability Associated Therewith.** City as a governmental entity is only permitted to expend those public funds under its authority which have been properly appropriated. Additionally, pursuant to the Constitution of the State of Tennessee is prohibited from assuming risks that otherwise fall on another party or from assuming unknown liabilities. Therefore any requirement that City bear the cost of any audit or any fees associated therewith is hereby stricken from the agreement and of no force or effect. Any use of Vendor's system inconsistent with the provisions of the agreement shall only constitute grounds for termination of the agreement and then only upon City's failure to cure a breach of the agreement. Additionally, Vendor shall indemnify and hold city harmless from any loss or damage that may result from Vendor's audit of City's use of the Licensed Software.
- 16. No Taxes.** As a tax-exempt entity, City shall not be responsible for sales or use taxes incurred for products or services. City shall supply Vendor with its Sales and Use Tax Exemption Certificate upon Vendor's request. Vendor shall bear the burden of providing its suppliers with a copy of City's tax exemption certificate and Vendor shall assume liability for such applicable Sales and Use Taxes, if any, that should be incurred.
- 17. Amendment.** Unilateral modification or amendment of the Agreement by Vendor is prohibited and any provision permitting such by Vendor is not applicable to City. Any amendment or modification of the Agreement or this Addendum is binding only if it is in writing and properly executed by the signatures of authorized representatives of the parties hereto, including attestation by City's city recorder and approved as to form by City's city attorney.
- 18. Assignment.** Any assignment or transfer of a right or interest under this agreement shall only be made pursuant to a written agreement between City and Vendor.
- 19. Survival.** This Addendum shall survive the completion of or any termination of the Agreement or other document which may accompany the Agreement or be incorporated by reference.
- 20. No Presumption Against Drafter.** This Addendum shall not be construed for or against any party because that party or that party's legal representative drafted any of its provisions. Accordingly, this Addendum shall be construed without regard to the rule that ambiguities in a document are to be construed against the draftsman. No inferences shall be drawn from the fact that the final, duly executed Addendum differs in any respect from any previous draft hereof.
- 21. Counterparts.** This Addendum may be executed in one or more counterparts by City and Vendor. If so executed, the signer shall deliver an original to the other party and the collective counterparts shall be treated as the fully executed document.
- 22. Effective Date.** This Addendum shall be effective immediately after the Agreement is effective.

The persons whose signatures appear below certify that they are authorized to sign on behalf of the respective Party.

Ecolane USA, Inc.

City of Kingsport, Tennessee

Signature

Patrick W. Shull, Mayor

Date

Date

Printed Name

Attest:

Title

Angela Marshall, Deputy City Recorder

Approved as to form:

Rodney B. Rowlett, III, City Attorney