THIS MASTER AGREEMENT (“Agreement”) is entered into on _____ (“Effective Date”) between **Thinkgate, LLC (“THINKGATE”)**, of <u>151 W. Main Street, Suite 201, Canton, GA 30114</u> and the **School Board of Sarasota County (CUSTOMER),** of <u>1960 Landings Blvd., Sarasota, FL 34231</u>

WHEREAS:

(A)   **THINKGATE** owns or has the right to distribute or license **the Platform** and **Related Materials** that make up the **Elements™ Product Suite**; and

(B)   **CUSTOMER** desires to obtain a license to use the **Elements™ Product Suite**.

NOW THEREFORE in consideration of the mutual covenants and agreements hereinafter contained and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereby agree as follows:

1.   **GRANT OF LICENSE AND RESERVATION OF OWNERSHIP**.

     THINKGATE hereby grants to **CUSTOMER** a non-exclusive, non-transferable, license to use **the Platform** and **Related Materials** in accordance with the terms and provisions set forth in Exhibit “B” entitled “Terms of License Agreement “, which are incorporated herein by reference. **THINKGATE** retains title and exclusive ownership of any and all copies of **the Platform** and **Related Materials** licensed hereby.

2.   **TERM OF AGREEMENT.**

    a.   This Agreement shall commence on the Effective Date and shall continue in accordance with the terms and provisions set forth in Exhibit “B”, unless terminated.

    b.   This Agreement may be terminated by **CUSTOMER** at any time upon at least 30 days prior written notice to **THINKGATE**. At the time such notice is given, **CUSTOMER** shall pay **THINKGATE** all amounts then payable or past due. In the event of a termination without cause, **THINKGATE** shall not be required to refund to **CUSTOMER** any fees previously paid.

    c.   **CUSTOMER** agrees to pay for any and all products or services accepted or used by **CUSTOMER,** as defined in Exhibits “B” and “C” – Fee Schedule, **in accordance with the Local Government Prompt Payment Act, Section 218.70 et seq., Florida Statutes**.

    d.   For any breach other than invoice nonpayment, this Agreement may be terminated by either party if the other party materially breaches a provision of this Agreement and fails to cure such breach within 45 days after receiving written notice of such breach from the non-breaching party. Failure of either party to cure the breach after this written notice shall be grounds to pursue all available remedies under this Agreement.

    e.   Within ten (10) days of termination of this Agreement, **CUSTOMER** shall either return to **THINKGATE**, at **CUSTOMER’S** expense, all components of **the Platform, Related Materials** and all copies thereof; or will delete and destroy all copies of **the Platform or Related Materials**, and deliver to **THINKGATE** a certification, in writing signed by an administrator of **CUSTOMER**, that **the Platform** has been returned, all copies deleted or destroyed, and its use discontinued. The parties agree that all provisions set out in this agreement for the protection of **THINKGATE** and its **Copyrights** shall remain in force notwithstanding termination of this agreement.

    f.   Once terminated, except for the indemnification provision found in paragraph 8, this Agreement

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shall impose no further obligations or penalties on the part of **THINKGATE** and **THINKGATE** will from the date of termination be free from any current obligations associated with this agreement.

3. **NON-PERMITTED USES OF THE PLATFORM AND RELATED MATERIALS**.

CUSTOMER covenants and agrees that it shall not:

a. Sell, rent, lease, sublease, license, sublicense, lend, time-share, transfer, assign, distribute or provide the use of or access -to **the Platform** and **Related Materials**, in whole or in part, to any other School District, third party or unlicensed persons, except as expressly authorized herein or required by Florida public records law.

b. Assign, mortgage, charge or otherwise encumber either **the Platform** and **Related Materials** or its rights under this Agreement except as **expressly au**thori**zed herein, inclu**ding paragraph 8 entitled "Assignment".

c. Modify, translate, reverse engineer, decompile, disassemble, copy, share or create derivative works based on **the Platform or Related Materials** in any manner including, without limitation, with internal resources or through the collaboration with any third party.

d. Export, directly or indirectly, **the Platform or Related Materials** to any person or entity outside the United States in violation of applicable U.S. export laws.

e. Remove any proprietary notices or labels on **the Platform or Related Materials;** or separate, remove or replace any components of **the Platform or Related Materials** provided by third parties ("Third Party Component Software"); or use any Third Party Component Software independently of **the Platform or Related Materials**; or use **the Platform or Related Materials** without the Third Party Component Software.

f. Except as permitted elsewhere in this Agreement, make additional copies of **the Platform** and **Related Materials** or any portion thereof.

g. Obscure, remove or violate any copyright or trademark notices as described in paragraph 7.

4. **THINKGATE SERVICES.**

THINKGATE agrees to provide such maintenance, support and hosting services in accordance with the terms and conditions set forth in Exhibit "C" entitled, "Terms of Maintenance and Support Agreement" and Amendment "A" entitled, "Hosting Services Agreement," which are incorporated herein by reference.

5. **BILLING OF FEES.**

a. Billing for all fees shall be made to the representative identified below. If no representative is identified, then the individual executing this agreement for **CUSTOMER** shall become the billing representative.

Representative:	**Denise Cantalupo**
Address:	**1960 Landings Blvd.**
City, State Zip:	**Sarasota, FL 34231**

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6. **SPECIAL TERMS AND CONDITIONS.**

Additional special terms and conditions between **THINKGATE** and **CUSTOMER** shall be set forth in Exhibit "D", entitled, "Special Terms and Conditions, " which is incorporated herein by reference.

7. **INTELLECTUAL PROPERTY AND COPYRIGHTS**.

The Platform and **Related Materials** are owned by **THINKGATE** and are protected by U.S. copyright laws and applicable international treaties and/or conventions. Without limiting the prohibition on assignment contained elsewhere in this agreement, **CUSTOMER** acknowledges that its rights to use **the Platform** and **Related Materials** are limited to **CUSTOMER**. **CUSTOMER** therefore covenants not to permit the use of **the Platform** and **Related Materials** by unauthorized persons and to use its commercially reasonable efforts to prevent the exportation of **the Platform, Product Modules** and **Related Materials** or any portion thereof into any country, which does not have copyright laws that will protect **THINKGATE Copyrights**. **CUSTOMER** shall not obscure, alter or remove any printed or on-screen proprietary or legal notice contained on or in any copies of **the Platform** and **Related Materials**. Any customizations or modifications to **the Platform**, whether or not paid for by **CUSTOMER**, shall remain the sole and exclusive property **THINKGATE**.

8. **INDEMNIFICATION.**

   a. **THINKGATE**, at its own expense, shall defend and indemnify **CUSTOMER** from all claims (1) that **the Platform** or **Related Materials** infringe a U.S. **Copyright** or any other **Intellectual Property** rights (including any patent or trade secret rights) of any third party, or (2) that **THINKGATE** wrongfully releases confidential student or employee information to any third party, provided that **CUSTOMER** gives **THINKGATE** reasonably prompt written notice of such claims and permits **THINKGATE** to defend or settle the claims and provides **THINKGATE** with all reasonable co-operation and further provided that **THINKGATE** shall not be required to defend and indemnify **CUSTOMER** from infringement claims resulting from unauthorized modifications, enhancements, non-permitted uses as further defined in paragraph 3, and/or additions made by **CUSTOMER**.

   b. To the extent allowable under state law, **CUSTOMER** agrees, at its own expense, to indemnify, hold harmless, and defend **THINKGATE** for all liability, damages and attorney's fees that may be incurred in any legal action connected with infringement as a result of **CUSTOMER** non-permitted use of **the Platform and Related Materials** as further described in paragraph 3.

9. **ASSIGNMENT**.

Neither party may, directly or indirectly, in whole or in part, whether by operation of law or otherwise, assign, delegate, sublicense or transfer this agreement without the other party's prior written consent, which will not be unreasonably withheld. Any attempted assignment, sublicense, transfer or delegation without such prior written consent shall be made void at the sole option of such other party. Notwithstanding the foregoing, each party (or its permitted successor assignees or transferees hereunder) may assign or transfer this agreement as a whole without consent to an entity that succeeds to all or substantially all of the business or assets of such party. Without limiting the foregoing, this agreement will be binding upon and inure to the benefit of the parties and their permitted successors and assigns.

10. **NON-COMPETITION AND MARKETING ACTIVITIES.**

   a. **Non-competition.** During the term of this agreement **CUSTOMER** shall not, directly or indirectly, assist any other person or entity in developing any service, product or solution that has the same features and/or functions as those of **the Platform** and **Related Materials**.

   b. **Customer Reference. CUSTOMER** authorizes **THINKGATE** to use its name in conversations

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and in any list regarding existing business relationships during the term of this agreement**.** **CUSTOMER** may also provide **THINKGATE,** upon written request**,** written permission to use **CUSTOMER** name, logo, website and other identifying marks in any case studies, white papers, brochures, website, reference listings or client listings used in an effort to promote products or services rendered by **THINKGATE**. **CUSTOMER** may request a copy of any material used by **THINKGATE** that makes reference to **CUSTOMER**. **THINKGATE** will contact **CUSTOMER** for express permission prior to releasing any specific contact information.

11.   **LIMITED WARRANTY.**

    a.   **THINKGATE** warrants that **the Platform** will substantially conform to the **Related Materials** for the term of this agreement and that **the Platform** will perform the functions and have the features described in **THINKGATE'S responses to** RFP #12-0152, Exhibit "B", and any Statement of Work.

    b.   **THINKGATE** warrants that the cd upon which **the Platform** and **Related Materials** is provided will be free from defects in materials and workmanship under normal use and service for a period of ninety (90) days from date of receipt by **CUSTOMER**.

    c.   **EXCEPT FOR THE LIMITED EXPRESS WARRANTY PROVIDED ABOVE, NEITHER THINKGATE NOR ANY OF ITS SUPPLIERS OR RESELLERS MAKES ANY WARRANTY OF ANY KIND, EXPRESS OR IMPLIED, AND THINKGATE AND ITS SUPPLIERS SPECIFICALLY DISCLAIM THE IMPLIED WARRANTIES OF TITLE, NON-INFRINGEMENT, MERCHANTABILITY, AND FITNESS FOR A PARTICULAR PURPOSE, SYSTEM INTEGRATION, AND DATA ACCURACY. SOME STATES DO NOT ALLOW DISCLAIMERS OF IMPLIED WARRANTIES, SO THE ABOVE LIMITATION MAY NOT APPLY. CUSTOMER ACKNOWLEDGES THAT NO REPRESENTATIONS OTHER THAN THOSE CONTAINED IN THIS AGREEMENT AND THINKGATE'S RFP RESPONSES HAVE BEEN MADE RESPECTING THE LICENSED PLATFORM OR SERVICES TO BE PROVIDED HEREUNDER, AND THAT CUSTOMER HAS NOT RELIED ON ANY REPRESENTATION NOT EXPRESSLY SET OUT IN THIS AGREEMENT, OR THINKGATE'S RFP RESPONSES. FURTHER, CUSTOMER ACKNOWLEDGES AND AGREES THAT NEITHER THE INTERNET OR CUSTOMER INTRANET IS ESTABLISHED OR MAINTAINED BY THINKGATE, THAT THINKGATE HAS NO CONTROL OVER THE INTERNET OR THE CUSTOMER INTRANET ENVIRONMENT, AND THAT THINKGATE IS NOT LIABLE FOR THE DISCONTINUANCE OF OPERATION OF ANY PORTION OF THE INTERNET OR THE CUSTOMER INTRANET, OR POSSIBLE REGULATION OF THE INTERNET OR CUSTOMER INTRANET WHICH MIGHT RESTRICT OR PROHIBIT THE OPERATION OF THE LICENSED PLATFORM.**

    d.   During the warranty period, **THINKGATE**'s entire liability and **CUSTOMER**'s exclusive remedy shall be one of the following:

        i.   **THINKGATE** may promptly correct **Errors** or **Bugs** or provide **CUSTOMER** with a work around to the **Errors** or **Bugs**;

        ii.   **THINKGATE** may replace **the Platform** and **Related Materials** with other Platform that performs the same functions and has the same features and performance levels as **the Platform**;

        iii.   Notwithstanding anything to the contrary herein, in the event **THINKGATE** is unable to correct or replace **the Platform** and **Related Materials** or to provide **CUSTOMER** with an acceptable plan for correcting or replacing **the Platform** pursuant to subsections (i) and (ii) within ninety (90) school days after being notified that **the Platform** does not

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substantially conform to the **Related Materials**, then **CUSTOMER** may terminate this agreement and pursue any appropriate remedies. Further, **THINKGATE** shall not be eligible to collect any outstanding payments due.

12. **LIMITATION AS TO LIABILITY AND DAMAGES**

a. Except for indemnification as specified in Paragraph 8, **THINKGATE** shall not be liable to **CUSTOMER** for any indirect or non-contractual damages resulting from **CUSTOMER'S** use or inability to use **the Platform**, arising from any cause of action.

b. **THINKGATE** shall not be liable for non-contractual, indirect, special, incidental, consequential, punitive or exemplary damages related to **CUSTOMER's** use of **the Platform** and **Related Materials**, even if **THINKGATE** is advised of the possibility of such damage.

c. Separate and apart from the duty of indemnification in paragraph 8, under no circumstances shall the liability of THINKGATE to CUSTOMER exceed the total amount of fees paid to THINKGATE by CUSTOMER as set forth in Exhibit B hereto.

13. **CONFIDENTIALITY**

a. During the course of this agreement, information that a party (the "Disclosing Party") considers confidential or proprietary may be disclosed to the other party (the "Receiving Party"), including, but not limited to, Platform, technical processes and formulas, source and object codes, product designs, product and business plans, and student record information (the "Confidential Information"). Except as otherwise permitted under this agreement, the Receiving Party shall not use or make any disclosure of any of the Confidential Information provided to it by the Disclosing Party to anyone other than its employees and representatives who have a need to know in connection with this agreement. In addition, each party shall use the same degree of care (but in any event, no less than a reasonable level of care) in protecting the Confidential Information of the other party as it uses to protect its own Confidential Information. Confidential Information shall not include information that the Receiving Party can demonstrate (i) is, as of the time of its disclosure, or thereafter becomes, part of the public domain through a source other than the Receiving Party, (ii) was known to the Receiving Party as of the time of its disclosure, (iii) is independently developed by the Receiving Party without the use of the Disclosing Party's Confidential Information, or (iv) is subsequently learned from a third-party not under a confidentiality obligation to the Disclosing Party. Upon the termination of this agreement, the Receiving Party shall turn over and return to the Disclosing Party all of the Disclosing Party's Confidential Information in any form (including all copies and reproductions thereof) and all other property whatsoever of the Disclosing Party in or under the Receiving Party's possession or control. Any compensation due either party at the time of such termination may be withheld pending receipt of such items.

b. **CUSTOMER** agrees to use its commercially reasonable efforts to protect **the Platform** and **Related Materials** from unauthorized use, reproduction, distribution or publication.

c. **THINKGATE** agrees to use its commercially reasonable efforts to protect **CUSTOMER** confidential assets including school and student data, test results and otherwise confidential information from unauthorized use, reproduction, distribution or publication.

d. **Open Records Law** may require certain materials to be provided during an open records request. **CUSTOMER** is authorized to release information only to the extent that is required by law, and **CUSTOMER** will take all reasonable efforts to protect all Trade Secrets and Confidential information marked as such to the full allowance of the individual law under which the open records request has been made. **CUSTOMER** further agrees to notify **THINKGATE** in writing within one (1) week of any and all open records request associated with this agreement and will

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include a listing of all materials released and to whom the material was sent.

14. **NO IMPLIED WAIVER.**

No failure or delay by either party hereunder in enforcing any right or remedy in this agreement shall be construed as a waiver of any future exercise of such right or **remedy** by such party.

15. **EQUITABLE RELIEF.**

The parties acknowledge that any breach by either of them of any of the terms of this agreement is likely to result in irreparable harm or damage to the other party and that, in the event of such breach, in addition to any and all remedies at law, the party against whom the breach is committed shall have the right to obtain an injunction, specific performance or other equitable relief to prevent the continuous violation of the terms of this agreement.

16. **DISPUTE RESOLUTION.**

The Parties agree that it is in their mutual interest to resolve disputes informally. A claim by **THINKGATE** shall be submitted in writing to the **CUSTOMER** for decision. A claim by the **CUSTOMER** shall be submitted in writing to **THINKGATE** for decision. The Parties shall negotiate in good faith and use all reasonable efforts to resolve such dispute(s). During the time the Parties are attempting to resolve any dispute, each shall proceed diligently to perform their respective duties and responsibilities under this agreement. If a dispute cannot be resolved between the Parties within fifteen (15) days after delivery of notice, either Party may elect to exercise any other remedies available under this agreement, or at law. This term shall not constitute an agreement by either Party to mediate or arbitrate any dispute.

17. **ENFORCEMENT OF AGREEMENT.**

In the event either party must enforce any term or condition of this agreement against the other, the prevailing Party shall be entitled to recover costs and expenses associated with such enforcement action, including reasonable attorney's fees. Further, the Parties acknowledge and agree that the sole and exclusive jurisdiction for any action arising out of this agreement shall be in the Twelfth Judicial Circuit Court in and for Sarasota County, Florida.

18. **GOVERNING LAW.**

This agreement shall be construed in accordance with the laws of the State of Florida.

19. **ENTIRE AGREEMENT.**

This Agreement, the Exhibits attached hereto, as well as any duly executed amendments and/or Exhibits thereto, including the **CUSTOMER** RFP #12-0153 and **THINKGATE'S** RFP responses constitute the sole and entire agreement between the parties, and supersede any previous agreements, understandings and arrangements between the parties. Any amendments hereto are enforceable only if in writing, dated and signed by each of the parties.

20. **SEVERABILITY.**

If any portion of this agreement is deemed by any court of competent jurisdiction to be illegal or unenforceable, then the remaining provisions of this agreement shall remain in full force and effect notwithstanding.

21. **DEFINITIONS OF CAPITALIZED AND BOLDED TERMS.**

Unless otherwise defined herein, all capitalized and bolded terms shall have the meanings ascribed to them

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in Exhibit "A" entitled, "Definitions."

22.   **NOTIFICATION.**

All notices, demands, or other writings in this Agreement provided to be given, or made or sent, or which may be given, or made or sent, by any party hereto to the other, shall be deemed to have been fully given when (a) made in writing, (b) personally delivered, sent or delivered using registered or certified mail, in each case, return receipt requested and postage prepaid, and (c) addressed as follows:

If to **THINKGATE**:	If to **CUSTOMER**:
Thinkgate, LLC Attention: VP Sales P.O. Box 597 Woodstock, GA 30188	The School Board of Sarasota County, Florida Attention: Denise Cantalupo 1960 Landings Blvd. Sarasota, FL 34231
With a copy to:	**With a copy to:**
Thinkgate, LLC Attention: CEO P.O. Box 597 Woodstock, GA 30188	Customer Name: _____ Attention: Thinkgate Point of Contact Address: _____ Address 2: _____ City, State, Zip _____

23.   **EXECUTION**.

An authorized signatory duly entitled to bind the party on behalf of which he or she has executed this agreement.

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SIGNATURES:

IN WITNESS WHEREOF the parties hereto have executed this agreement as of the first date below.

THINKGATE, LLC   **The School Board of Sarasota County, Florida**
Partner: **School System:**

_____   _____
Signature: **Signature:**

Eric Waynick, President/CEO   **Caroline Zucker, Board Chair**
Printed Name and Title: **Printed Name and Title:**

_____   _____
Date: **Date:**

Approved for Legal Content
May 23, 2012, by Matthews, Eastmoore,
Hardy, Crauwels & Garcia, Attorneys for
The School Board of Sarasota County, Florida
Signed: ____ASH_

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