

## hoopla® Digital Media Agreement

This hoopla Digital Media Agreement ("Agreement") is made as of this 11 day of August, 20   ("Effective Date") by and between The City of Santa Fe (the "Library"), and Midwest Tape, LLC.

WHEREAS, Midwest Tape's hoopla Digital Media Platform ("hoopla," the "Platform," or the "hoopla Platform") allows participating libraries to provide their users with access to digital media content using smart phones, tablets, computers, streaming devices, and web browsers;

WHEREAS, the Platform is designed to be accessible 24/7 and offers various licenses to media content in multiple formats, including, without limitation, movies, television programs, music, audiobooks, eBooks, and comics, subject to circulation limits (if any) and other settings established by the user's library system; and

WHEREAS, the Library wishes to make hoopla available to its authorized users ("Patrons");

NOW THEREFORE, in consideration of the promises and mutual covenants contained in this Agreement, and for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Library and Midwest Tape (each a "Party" and collectively the "Parties") agree as follows:

**1. DEFINITIONS.** The following definitions apply wherever these terms appear in this Agreement, including the Appendices:

**1.1 "Digital Media Platform"** means one or more computer programs or applications owned, maintained, and/or used by Midwest Tape to provide access to Digital Titles and/or to allow the Library to manage its offering and Patron use of Digital Titles, including the hoopla Application, hoopla Website, and Library Administration Website.

**1.2 "Digital Titles"** means any and all digital media content that Midwest Tape makes available to the Library and its Patrons via the Digital Media Platform during the Term of this Agreement.

**1.3 "Flex Borrow" or "Flex Circulation"** means an OCOU Circulation, as defined in Appendix 2 to this Agreement. As set forth in the attached Appendix 2, a Flex Borrow occurs when a Patron uses the hoopla Application or hoopla Website to borrow a Digital Title that is at that time available to that user in the form of a one-copy/one-user ("OCOU") license owned by the Library.

**1.4 "Flex License"** means a one-copy/one user license ("OCOU License"), as set forth in the attached Appendix 2.

**1.5 "hoopla Application"** means one or more computer applications maintained, owned, and/or used by Midwest Tape to provide access for limited periods to Digital Titles (including the ability to browse, borrow, stream, download, and/or return such titles) using certain streaming devices, smart phones, tablets, and/or other mobile devices.

**1.6 "hoopla Website"** means a Midwest Tape website (currently [www.hoopladigital.com](http://www.hoopladigital.com)) that may be used to access, browse, borrow, stream, and/or return Digital Titles.

**1.7 "Instant Borrow" or "Instant Circulation"** means a PPU Circulation, as defined in Appendix 2 to this Agreement. As set forth in the attached Appendix 2, an Instant Borrow occurs

when a Patron uses the hoopla Application or hoopla Website to borrow a Digital Title pursuant to a pay-per-use ("PPU") license that is paid for by the Library.

**1.8 "Instant License"** means a pay-per-use license ("PPU License"), as set forth in the attached Appendix 2.

**1.9 "Intellectual Property Rights"** means all rights in and to patents, trademarks, service marks, trade names, copyrights, trade secrets, technology, software, designs, algorithms, know-how, as well as moral rights and all other intellectual and proprietary rights of any type under the laws of any governmental authority.

**1.10 "Library Administration Website"** means one or more Midwest Tape website(s) (currently available at [www.midwesttapes.com](http://www.midwesttapes.com)) that may be accessed and utilized by the Library to obtain OCOU Licenses, manage content available to Patrons in the Platform, and administer Library policies in regard to Patron use of the Platform.

**1.11 "Library Online Catalog"** means the website(s) owned, maintained, and/or used by or for the Library for the purpose of providing information to Patrons and/or the general public about the Library and its various content offerings, policies, objectives, initiatives, and procedures.

**1.12 "Marks"** means any trademarks, service marks, trade names, logos, designs, icons, characters, cover art, styles, trade dress, or other indicators of source associated with any Digital Titles, including without limitation all translations or transliterations of the foregoing in any language, or any colorable imitations or modified versions thereof.

**1.13 "Midwest Tape"** means Midwest Tape, LLC and any of its parents, subsidiaries, or affiliated entities that are engaged in the business of selling and distributing media content in digital form to libraries and library users via the Platform.

**1.14 "Service Partners"** means any third parties that provide digital storage, webhosting, IT services, data analysis and processing, or distribution or other services to Midwest Tape in connection with the Platform.

**1.15 "Title Summary and Promotional Data"** means, with respect to each Digital Title, the following information and data that is made available to Library pursuant to this Agreement: (i) title; (ii) author(s), publisher, illustrator(s), narrator(s), actor(s), director(s), producer(s), studio(s), and similar descriptive information; (iii) if commercially used, the digital object identifier; (iv) narrative description or summary of the work; (v) cover art and image, graphics, and other images; (vi) copyright notice; and (vii) any other identifying information.

**1.16 "Vendor"** means any supplier to Midwest Tape of (i) Digital Title(s); (ii) Title Summary and Promotional Data; and/or (iii) technology or services necessary for Midwest Tape to provide the Platform to the Library.

## **2. Library RIGHTS & OBLIGATIONS.**

**2.1 Rights.** During the Term, and subject to all the terms and limitations set forth in this Agreement, Midwest Tape grants to the Library the non-exclusive and non-transferrable right to display and access the Platform and Title Summary and Promotional Data for the limited purpose of: (a) allowing Patrons to access, view, and borrow Digital Titles through the Platform and pursuant to this Agreement; (b) promoting awareness and authorized use of the Platform,



including via postings on the Library Online Catalog; and (c) establishing and implementing Library-specific policies in regard to use of the Platform by the Library and Patrons, consistent with this Agreement and the requirements of the Platform.

**2.2 Limitations.** Except for the limited, non-exclusive, non-transferrable rights expressly granted to Library under this Agreement, Library shall have no right in or to, or ownership of, the Platform, Digital Titles, hoopla Application, hoopla Website, Library Administration Website, Marks, Title Summary and Promotional Data, or any other artwork or materials delivered by or on behalf of Midwest Tape. The Library shall have no right to access, use, modify, or reproduce any portion of any source code relating to the Platform, or to make, sell, or distribute any variations or derivative works of the Platform. The Library agrees to the support and protection of Intellectual Property Rights (including but not limited to copyright and trademark protections), to discourage copyright or trademark infringement, to use its best efforts to prohibit Patrons or others from engaging in such infringement (including by immediately notifying Midwest Tape of any known or suspected violations of Intellectual Property Rights relating to use of the Platform or the Digital Titles), and to refrain from facilitating such activity. In addition, the Library will comply with all other requirements communicated by Midwest Tape with respect to any Intellectual Property Rights and the Marks.

**2.3 No Public Performance Rights.** The Library shall have no public performance rights in the Digital Titles. Accordingly, the Library may not offer any Digital Titles as a performance in order to entice Patrons or the general public to come to an event, sponsored by the Library or otherwise.

**2.4 General Obligations.** To facilitate the successful introduction of the Platform to Patrons, and the use of the Platform by Patrons, the Library shall: (a) regularly communicate to staff, Patrons, and the general public served that the Platform is available to Patrons; (b) provide suitable training opportunities to appropriate Library staff members, so that they understand the Platform and can assist in the promotion and the use of the Platform by Patrons; (c) regularly feature prominent links and references to popular Digital Titles and the hoopla Website on the Library Online Catalog's homepage; (d) incorporate MARC record data regarding Digital Titles in the Library's catalog to enhance the discoverability of key content available in the Platform; (e) manage all funds designated or appropriated for use of the Platform; (f) participate in the implementation of the Platform at the Library, including without limitation by providing Midwest Tape with sufficient and accurate information to identify Patrons of the Library who are authorized to utilize the Platform; (g) provide Primary Support, as defined below; (h) perform requested linkage between the Platform and the Library Online Catalog, as well as reasonable technical services to support and maintain the Platform during the Term; and (i); notify Midwest Tape at least three (3) business days before any change in any RSS links, ILS configuration, URL updates, or other equipment or technology that could adversely impact the Platform and/or the use of the Platform, including any changes that could impact the process of Patron authentication.

**2.5 Network Connectivity.** The Library is responsible for providing a suitable network and Internet system for integration of the Platform into the Library Online Catalog or other systems.

**2.6 Use of the Library Administration Website.** The Library agrees that it is solely responsible for managing its use of the Library Administration Website and using that website as designed and in accordance with the Terms and Conditions posted on that website, including by establishing, verifying, and maintaining any settings and controls regarding use of the Platform by Patrons (e.g., limitations on circulations, content restrictions, reporting preferences, etc.).

**2.7 Library Systems.** The Library is solely responsible for all aspects of catalog integration, operation, training, support, and/or maintenance necessary for the operation of their systems. This may include direct integration of the Platform with the Library's own systems such as the Library Online Catalog or Library Management System. The Library shall keep its hoopla account information current with Midwest Tape and promptly alert Midwest Tape to any significant changes relating to the systems, including but not limited to changes of personnel that could impact the support, functionality, and/or performance of the Platform.

**2.8 Primary Support.** The Library is responsible for providing its Patrons with "Primary Support," which includes assisting Patrons with the use of the Platform, responding to Patron questions regarding the functionality and technical requirements of the hoopla Website and the hoopla Application, and helping Patrons with the process of communicating with Midwest Tape where necessary and appropriate to obtain additional support and technical assistance.

**2.9 No Warranties or Representations to Others.** The Library represents and agrees that, except for the representations, warranties, and promises made to Midwest Tape in this Agreement or under the Terms and Conditions applicable to the Library Administration Website, neither the Library nor any of its employees, agents, or others acting under its direction has made or will make any representations or warranties, expressed or implied, to anyone concerning the Platform, Digital Titles, hoopla Application, hoopla Website, and/or Library Administration Website.

**2.10 Compliance with Applicable Laws and Regulations.** The Library will, at its own expense, comply with all applicable laws, ordinances, rules, regulations, and other legal requirements in connection with the Library's performance under this Agreement.

**2.11 Costs and Expenses.** The Library is responsible for all of its own expenses and costs related to its performance under this Agreement. Midwest Tape has no obligation to reimburse the Library for any expenses or costs incurred by the Library related to this Agreement or to the performance of the Library's obligations, including but not limited to any expenses and costs incurred in the preparation, systems integration, or use of the Digital Media Platform, Library Administration Website, hoopla Website, and hoopla Application.

### **3. FEES, PAYMENTS & REPORTING.**

**3.1 Payments.** The amount appropriated by the Library under the terms of this Agreement is \$150,000 (One Hundred Fifty Thousand Dollars). The amount appropriated by the Library under the terms of this Agreement is \$150,000 (One Hundred Fifty Thousand Dollars). These funds will be applied toward payment of future invoices for transactions, described below, unless the Library notifies Midwest Tape on or before the Effective Date that the library instead prefers to use such funds to pay Midwest Tape for hoopla promotional materials, events, or communication efforts in connection with the introduction of the Service to Library Patrons. Upon written notice to Midwest Tape, the Library may choose to send additional funds to Midwest Tape to reestablish or replenish the balance.

**3.2 Invoicing and Payment.** Except for purchases of Flex Licenses (which will be invoiced after each purchase by the Library), Midwest Tape will invoice the Library by Invoice Period. "Invoice Period" means a calendar monthly period in which transactional activity occurs. Payment of each invoice will be due within thirty (30) days from the date of the invoice. During any period in which Midwest Tape is holding an Advance from the Library, Midwest Tape will apply the



Advance funds toward payment of the invoice upon issuance. If the Library has any remaining Advance funds on account upon expiration or termination of this Agreement, Midwest Tape will notify the Library and refund any unencumbered and unapplied monies upon the Library's written request.

**3.3 Reporting.** Through the Library Administration Website, the Library will have access to certain reports summarizing Patron usage, circulation data, and purchase activity for the Digital Titles.

**3.4 Taxes.** The Library is required to provide a sales tax exemption certificate, if applicable, to Midwest Tape as part of the on-boarding process. If the Library is not exempt or does not do so, Midwest Tape will add (and collect) sales taxes to any purchases made pursuant to this Agreement.

#### **4. TERM AND TERMINATION.**

**4.1 Term.** The term of this Agreement (the "Term") begins on the Effective Date and continues for a period of 12 months thereafter.

**4.2 Termination.** This Agreement may be terminated in either of the following ways:

**By Notice.** Either Party may terminate this Agreement, with or without cause, at the end of the Term by providing the other Party with sixty (60) days' advance written notice prior to the end of the Term.

**Due to Breach.** Either Party may suspend its performance or, at that Party's sole option, terminate this Agreement by providing the other Party with written notice of such action in the event of (i) the other Party's material breach of this Agreement, which breach continues uncured for a period of thirty (30) days after written notice of such breach; or (ii) the Library's failure to perform its payment obligations under this Agreement for a period of at least thirty (30) days.

Upon termination of this Agreement, the Library shall immediately (i) cease distribution and use of the Platform, hoopla Application, hoopla Website, Digital Titles, Marks, Metadata, and Promotional Postings; and (ii) pay all amounts due to Midwest Tape. Once the Library satisfies these obligations, any unapplied portion of an Advance payment will be refunded within thirty (30) days.

#### **5. MIDWEST TAPE RIGHTS & OBLIGATIONS.**

**5.1 The hoopla Platform.** Midwest Tape and/or its Service Partners will: (a) host and support the Platform as provided in this Agreement; (b) designate an implementation specialist ("hoopla Coordinator") to be available for customer support to the Library in connection with the launch and implementation of the Platform; and (c) provide the Library with access to the Library Administration Website, which offers tools to enable the Library to manage use of the Platform, including in regard to its inventory, Patron borrowing limits, lending policies, title blocking, ratings, and user-advisory settings, usage dashboard, and reporting.

**5.2 Ownership of Vendors' Intellectual Property.** Subject to the provisions of this Agreement, hoopla vendors retain all of their Intellectual Property Rights in and to their Digital

Titles, Metadata, Marks, and Promotional Postings, artwork, and other property that may be utilized or accessed in connection with the Platform.

**5.3 Ownership of Midwest Tape's Intellectual Property.** As between the Parties, Midwest Tape owns and retains all Intellectual Property Rights in and to the Digital Media Platform, hoopla Application, hoopla Website, Library Administration Website, Midwest Tape and hoopla and hoopla digital trademarks, and all other Midwest Tape intellectual property, including but not limited to all modifications, updates, or improvements made thereto. The Library acknowledges Midwest Tape's ownership of such Intellectual Property Rights.

**5.4 Modifications to Digital Media Platform.** Midwest Tape has the right to modify, at any time, the Platform, hoopla Application, hoopla Website, Library Administration Website, and other aspects and features of hoopla in Midwest Tape's sole discretion, including, without limitation, in order to develop, modify, or improve operations, performance, or functionality.

**5.5 Addition, Removal, and Modifications of Digital Titles.** Midwest Tape has the right to take any or all of the following actions with respect to any Digital Title(s) at any time and in its sole discretion: (a) add or remove Digital Titles to or from the Platform; (b) set or adjust the applicable fees and charges, including, without limitation, PPU Circulation Fee(s), OCOU License Fees, and/or other charges relating to the Platform and/or the media content available on the Platform; (c) replace content files, Metadata, and/or Promotional Postings; and (d) edit or modify editorial content or designs. The Library will be notified by email, the Library Administration Website, or other means of major modifications to the functionality of the Platform.

**5.6 Promotion of the Platform.** Midwest Tape may, at its own expense and in its own discretion, publicize the Platform and communicate with the general public and Patrons regarding the availability, features, and use of the Digital Titles, Digital Media Platform, hoopla Application, and hoopla Website.

**5.7 Support.** Midwest Tape will support the Platform by maintaining help files, information, and other appropriate documentation and training materials. Midwest Tape will undertake reasonable efforts to help the Library perform the Library's obligation to provide Primary Support to Patrons, including by offering periodic training opportunities to Library staff, updating the Library regarding system changes, and providing the Library with answers to "frequently asked questions" related to the Platform.

Midwest Tape will supply activation support, including assisting with the implementation of any software, and reasonable levels of continuing support to assist the Library in its use of the Platform. Midwest Tape will make technical support personnel available for feedback, problem solving, and/or general questions. Technical support services to the Library include: (i) reasonable efforts to identify, correct, and/or circumvent errors in the Platform, hoopla Application, hoopla Website, and Library Administration Website; and (ii) supplying updates, enhancements, and new versions of the Platform as they become available (the "Secondary Support"). Midwest Tape has no obligation to provide Primary Support to Patrons and any support provided by Midwest Tape to Patrons will be in Midwest Tape's sole discretion.

Midwest Tape will use reasonable efforts to provide continuous service. Permissible down time includes periodic unavailability due to matters such as: maintenance of the server(s); installation or testing of software, public or private telecommunications services, or internet nodes or facilities; and failure of equipment or services outside the control of Midwest Tape. Scheduled down time



will occur periodically and at times designed, in Midwest Tape's sole discretion, to minimize inconvenience to hoopla users.

## **6. MISCELLANEOUS.**

**6.1 DISCLAIMER OF WARRANTIES.** MIDWEST TAPE MAKES NO WARRANTIES OF ANY KIND, WHETHER EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO ANY IMPLIED WARRANTY OF MERCHANTABILITY, NON-INFRINGEMENT, OR FITNESS FOR A PARTICULAR PURPOSE.

**6.2 LIMITATION OF LIABILITY.** EXCEPT AS EXPRESSLY PROVIDED OTHERWISE IN THIS AGREEMENT, IN NO EVENT WILL EITHER PARTY BE LIABLE FOR ANY INDIRECT, INCIDENTAL, CONSEQUENTIAL, SPECIAL, EXEMPLARY OR PUNITIVE DAMAGES, INCLUDING BUT NOT LIMITED TO LOST PROFITS OR LOST BUSINESS OPPORTUNITY, ARISING OUT OF OR RELATING TO THIS AGREEMENT, EVEN IF SUCH DAMAGES ARE FORESEEABLE AND REGARDLESS OF WHETHER SUCH PARTY HAS BEEN ADVISED OF THE POSSIBILITY THEREOF. WITHOUT RESTRICTION OF THE FOREGOING, MIDWEST TAPE'S TOTAL LIABILITY UNDER THIS AGREEMENT SHALL NOT EXCEED THE TOTAL FEES PAID BY LIBRARY TO MIDWEST TAPE DURING THE TWELVE MONTHS PRIOR TO THE DATE THAT ANY CLAIM ALLEGEDLY AROSE.

**6.3 Confidential Information.** "Confidential Information" means any non-public information of either Party that is disclosed to the other Party in connection with this Agreement either directly or indirectly, in writing, orally, electronically, or by inspection of tangible objects, and that is either: (a) designated in writing as "Confidential" at the time of disclosure or within five (5) days thereafter; or (b) confidential by its very nature or that the receiving Party reasonably should know to be confidential. Confidential Information includes, without limitation, the terms of this Agreement, any and all non-public business plans, customer information, pricing, contract terms, available content and sales, marketing and/or finances of the disclosing Party. Each Party agrees to hold the Confidential Information of the other Party in confidence and to refrain from disclosing such Confidential Information to any third party, except: (i) to the extent required to be disclosed pursuant to governmental or judicial process, provided that notice of such process is promptly provided to the disclosing Party in order that it may have every opportunity to intercede in such process to contest such disclosure or seek an appropriate protective order; or (ii) to the receiving Party's professional advisors and contractors on a need to know basis, provided that such advisors and contractors are under an obligation to maintain the confidentiality of the Confidential Information. Confidential Information is the property of the disclosing Party, and the receiving Party will not be deemed by virtue of its access to Confidential Information to have acquired any right or interest in or to any such Confidential Information. Confidential does not affect either Party's right to use or disclose information that is not Confidential Information, including information that is in the public domain or that the receiving Party can show was known to it without any confidentiality obligation prior to the disclosure by the disclosing Party.

**6.4 Assignment.** Except as provided herein, neither Party may, by operation of law or otherwise, assign, sublicense, or otherwise transfer any of its rights or obligations under this Agreement without the prior written consent of the other Party, which may not be unreasonably withheld or delayed. Either Party may assign, transfer, or otherwise delegate any or all of its rights and obligations under this Agreement to any parent or subsidiary entity, any successor carrying on that part of the business to which this Agreement relates, or any purchaser of all or substantially all of the assets or stock of such Party. Each Party may appoint contractors to

perform part of its obligations hereunder, provided that the Party remains fully responsible for such contractor's performance. This Agreement binds, benefits, and is enforceable by and against both Parties and their respective successors and permitted assigns.

**6.5 Notices.** Notices required by this Agreement must be sent by United States mail, as well as by electronic mail (or by facsimile), directed as follows:

To Midwest Tape:

Midwest Tape, LLC:  
1417 Timberwolf Dr.  
Holland, Ohio 43528  
info@midwesttapes.com  
1 (800) 875-2785

To Library:

City of Santa Fe Library  
145 Washington Avenue  
Santa Fe, NM 87501  
glvigil@Santafenm.gov  
505-955-6787

**6.6 Amendment.** No amendment, modification, addendum, or revision to this Agreement is valid unless it is in writing and signed by all Parties to this Agreement.

**6.7 Arms-Length Negotiations.** This Agreement was negotiated at arm's length with each Party receiving advice from independent legal counsel, and has been executed and delivered in good faith. It is the intent of the Parties that no part of this Agreement should be construed against any Party because of the identity of the drafter.

**6.8 Counterparts.** This Agreement may be executed in counterparts, each of which taken together constitutes one single Agreement between the Parties.

**6.9 Entire Agreement/Non-Reliance.** This Agreement constitutes the sole and entire agreement between the Parties and supersedes and merges all prior agreements, proposals, negotiations, discussions, and understandings between the Parties relating to the subject matter of this Agreement. No Party has relied or can rely on any statement or representation that is not expressly contained in this Agreement as an inducement to enter into this Agreement.

**6.10 Force Majeure.** No Party may be considered in default or to have incurred any liability hereunder due to any failure to perform this Agreement should such failure arise out of causes beyond its reasonable control, including, without limitation, work stoppages, fires, riots, accidents, floods, storms, unavailability of utilities or fuel, Internet or other communication failures, or other similar failures or occurrences. The time for performance will be extended for a period equal to the duration of such conditions.

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be executed by their duly authorized representatives as of the Effective Date first written above.

ACCEPTED AND AGREED

(City of Santa Fe)

By: \_\_\_\_\_

Print Name: \_\_\_\_\_

Print Title: \_\_\_\_\_

Date Signed: \_\_\_\_\_

ACCEPTED AND AGREED

MIDWEST TAPE, LLC

By: Susan Bascuk

Print Name: Susan Bascuk

Print Title: Vice President

Date Signed: June 21, 2022



## Appendix 2

### hoopla® Licenses and Distribution Models

The chart below describes the distribution models included in Midwest Tape's hoopla offering as of the Effective Date, including the digital media licenses that are available via the Digital Media Platform.

	Instant Borrows	Flex Borrows
License type	PPU (Pay-Per Use)	OCOU (One-Copy/One-User)
Circulations / Borrows	An <b>Instant Title</b> is a work that is available for simultaneous access by multiple users. Instant Titles may be accessed via <b>PPU Circulations</b> , otherwise referred to as <b>Instant Borrows</b> , each of which allows a user to stream, download, and/or access the chosen title for a limited time that terminates upon the expiration of a fixed period or earlier "return" by the user. Instant Borrows are available regardless of whether another user has borrowed the same title for use at the same time. For each Instant Borrow, the Library purchases one <b>Instant License</b> to authorize that particular borrow.	A <b>Flex Title</b> is only available to one user at a time, via a digital <b>OCOU Circulation</b> , otherwise referred to as a <b>Flex Borrow</b> . If the Library has an available <b>Flex License</b> to a Flex Title, a Library user may activate a Flex Borrow and that license is digitally checked out and considered "in use." Other users cannot access that title during that borrow unless (i) the Library has purchased additional Flex Licenses to the same title, one of which is available at that time, or (ii) the same title also is available as an Instant Title. A Flex Borrow allows a user to stream, download, and/or access the title for a limited time that terminates upon the expiration of a fixed period or earlier "return" by the user.
Available formats	All formats (audiobooks, eBooks, comics, movies, television, and music).	Currently available only for audiobooks and eBooks.
Payment obligations	A <b>PPU-Circulation Fee</b> is charged for each Instant Borrow. The fees, which are listed on the Library Administration Website, vary by title and format, and are subject to change from time to time. The fee is charged regardless of whether the borrowed title is actually accessed, viewed, streamed, or downloaded by the user. Fees for Instant Borrows are invoiced monthly.	Flex Licenses are available for purchase via the hoopla Library Administration Website. The costs of these licenses vary by title and format. Fees for Flex Licenses are invoiced after each purchase (typically daily).

	Instant Borrows	Flex Borrows
<b>Borrow priority</b>	To optimize Libraries' media purchases, Flex Borrows are prioritized over Instant Borrows when possible. Therefore, if a user requests an Instant Borrow, and at that time a Flex License to that title is available, the borrow will be fulfilled as a Flex Borrow and no PPU-Circulation Fee will apply.	Same. To optimize Libraries' purchases, Flex Borrows are prioritized over Instant Borrows when possible.
<b>Metering restrictions</b>	N/A	A Flex License may be either perpetual, or "metered." Some publishers do not offer perpetual licenses, but instead offer metered licenses. Metered licenses are limited by time period and/or number of permitted borrows, as described in the Library Administration Website.
<b>Pre-Owned Content</b>	N/A	If the Library has acquired OCOU Licenses from another source ( <b>Pre-Owned Content</b> ), Midwest Tape may be able to include them as Flex Licenses on hoopla for the Library's users. The Library is responsible for providing Midwest Tape with an accurate list of Pre-Owned Content, to enable Midwest Tape to determine whether any or all of it may be included on hoopla for the Library's users. The format to be used for listing the Library's Pre-Owned Content, including the required certification, is set forth on Schedule 1 to Appendix 3.



## **City of Santa Fe (City/Library) and Midwest Tape (Midwest Tape) ADDENDUM**

**This agreement incorporates the additional terms and conditions in the addendum between MIDWEST TAPE (MIDWEST) and the CITY OF SANTA FE (CITY/LIBRARY).**

### **INDEMNIFICATION**

MIDWEST TAPE shall indemnify, hold harmless and defend the LIBRARY from all losses, damages, claims or judgments, including payments of all attorneys' fees and costs on account of any suit, judgment, execution, claim, action or demand whatsoever arising from MIDWEST TAPE's performance under this Agreement as well as the performance of MIDWEST TAPE's employees, agents, representatives and subcontractor.

### **NEW MEXICO TORT CLAIMS ACT**

Any liability incurred by the LIBRARY in connection with this Agreement is subject to the immunities and limitations of the New Mexico Tort Claims Act, Section 41-4-1, et. seq. NMSA 1978, as amended. The LIBRARY and its "public employees" as defined in the New Mexico Tort Claims Act, do not waive sovereign immunity, do not waive any defense and do not waive any limitation of liability pursuant to law. No provision in this Agreement modifies or waives any provision of the New Mexico Tort Claims Act.

### **APPLICABLE LAW; CHOICE OF LAW; VENUE**

MIDWEST TAPE shall abide by all applicable federal and state laws and regulations, and all ordinances, rules and regulations of the LIBRARY of Santa Fe. In any action, suit or legal dispute arising from this Agreement, the MIDWEST TAPE agrees that the laws of the State of New Mexico shall govern. The parties agree that any action or suit arising from this Agreement shall be commenced in a federal or state court of competent jurisdiction in New Mexico. Any action or suit commenced in the courts of the State of New Mexico shall be brought in the First Judicial District Court.

### **APPROPRIATIONS**

The terms of this Agreement are contingent upon sufficient appropriations and authorization being made by the LIBRARY for the performance of this Agreement. If sufficient appropriations and authorization are not made by the LIBRARY, this Agreement shall terminate upon written notice being given by the LIBRARY to MIDWEST TAPE. The LIBRARY's decision as to whether sufficient appropriations are available shall be accepted by MIDWEST TAPE and shall be final.

### **RELEASE**

MIDWEST TAPE, upon acceptance of final payment of the amount due under this Agreement, releases the LIBRARY, its officers and employees, from all liabilities, claims and

obligations whatsoever arising from or under this Agreement. MIDWEST TAPE agrees not to purport to bind the LIBRARY to any obligation not assumed herein by the LIBRARY unless MIDWEST TAPE has express written authority to do so, and then only within the strict limits of that authority.

### **INSURANCE**

MIDWEST TAPE shall maintain professional liability insurance throughout the term of this Agreement providing a minimum coverage in the amount required under the New Mexico Tort Claims Act. MIDWEST TAPE shall furnish the LIBRARY with proof of insurance of MIDWEST TAPE's compliance with the provisions of this section as a condition prior to performing services under this Agreement.

### **THIRD PARTY BENEFICIARIES**

By entering into this Agreement, the parties do not intend to create any right, title or interest in or for the benefit of any person other than the LIBRARY and the

MIDWEST TAPE. No person shall claim any right, title or interest under this Agreement or seek to enforce this Agreement as a third party beneficiary of this Agreement.

### **SEVERABILITY**

In case any one or more of the provisions contained in this Agreement or any application thereof shall be invalid, illegal or unenforceable in any respect, the validity, legality, and enforceability of the remaining provisions contained herein and any other application thereof shall not in any way be affected or impaired thereby.

### **AMENDMENT**

This Agreement shall not be altered, changed or modified except by an amendment in writing executed by the parties hereto.

This agreement incorporates the additional terms and conditions in the addendum between MIDWEST TAPE and the City of Santa Fe.



**Signature Lines required:**

CITY OF SANTA FE:

*John Blair*  
John Blair (Aug 11, 2022 17:04 MDT)

JOHN BLAIR, CITY MANAGER

DATE: Aug 11, 2022

MIDWEST TAPE "HOOPLA":

*Susan Bascuk, Vice President*

NAME & TITLE

DATE: June 21, 2022

ATTEST:

*Kristine Mihelcic* XIV  
KRISTINE BUSTOS-MIHELICIC, CITY CLERK

CITY ATTORNEY'S OFFICE:

*Marcos Martinez*  
Marcos Martinez (Jul 6, 2022 08:54 MDT)

SENIOR ASSISTANT CITY ATTORNEY

APPROVED FOR FINANCES:

*Alexis Lotero*  
Alexis Lotero (Aug 8, 2022 16:11 MDT)

ALEXIS LOTERO, INTERIM FINANCE DIRECTOR