

**CITY OF EL PASO, TEXAS
AGENDA ITEM
DEPARTMENT HEAD'S SUMMARY FORM**

DEPARTMENT: Aviation

AGENDA DATE: November 23, 2021

CONTACT PERSON NAME AND PHONE NUMBER: Sam Rodriguez, PE, (915) 212-7301

DISTRICT(S) AFFECTED: 2

CITY STRATEGIC GOAL 1: Create an Environment Conducive to Strong, Sustainable Economic Development.

SUBJECT:

Resolution to authorize the City Manager to sign an a Concession License Agreement between the City of El Paso ("City") and SWYFT ("Concessionaire") to allow Concessionaire to operate automated retail machines at the El Paso International Airport, with Concessionaire's payment to the City being the greater of an amount based on the square footage of the concession site or a percentage of the revenues derived from the automated retail machines, for a one year term, with an option to renew the Agreement for four additional one-year terms.

Term for this agreement shall be for one (1) year with the option to extend for four additional one-year terms. Total value of the concession site is \$5,450.00 annually at a rate of \$54.50 per square foot. Agreement includes a percentage rent calculated at 12% of gross revenue derived from the ARM on consumer electronics and 9.5% on products other than electronics concepts.

BACKGROUND / DISCUSSION:

The Department of Aviation is requesting approval of this item to allow SWYFT, Inc. to provide automated retail services at the El Paso International. SWYFT, Inc concessions will include an I-Store electronics and Benefits makeup Kiosk located in Concourse B.

PRIOR COUNCIL ACTION:

N/A

AMOUNT AND SOURCE OF FUNDING:

N/A: This is an in-kind item

BOARD / COMMISSION ACTION:

N/A

DEPARTMENT HEAD:



Sam Rodriguez, PE, Director of Aviation

RESOLUTION

BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF EL PASO:

That the City Manager is authorized to sign a Concession License Agreement between the City of El Paso ("City") and SWYFT ("Concessionaire") to allow Concessionaire to operate automated retail machines at the El Paso International Airport, with Concessionaire's payment to the City being the greater of an amount based on the square footage of the concession site or a percentage of the revenues derived from the automated retail machines, for a one year term, with an option to renew the Agreement for four additional one-year terms.

APPROVED this ____ day of _____, 2021.

CITY OF EL PASO

Oscar Leeser
Mayor

ATTEST:

Laura D. Prine
City Clerk

APPROVED AS TO FORM:



Roberta Brito
Assistant City Attorney

APPROVED AS TO CONTENT:



Samuel Rodriguez, P.E.
Director of Aviation

STATE OF TEXAS)
)
COUNTY OF EL PASO) **EL PASO INTERNATIONAL AIRPORT
CONCESSION LICENSE AGREEMENT
(AUTOMATED RETAIL)**

This Concession License Agreement (“Agreement”) is made this 23rd day of November, 2021 (“Effective Date”) between the City of El Paso, a municipal corporation organized and existing under the laws of the State of Texas (“City”) and SWYFT, Inc. (“Concessionaire”). For the convenience of the parties, all defined terms appear in **bold print** when first defined.

WHEREAS, the City owns and operates the El Paso International Airport located in El Paso County, Texas (“Airport”); and

WHEREAS, Chapter 22 of the Texas Transportation Code authorizes municipal airports, as governmental entities, to assess charges, rentals or fees for the privilege of supplying goods, commodities, things, services or facilities at municipal airports; and

WHEREAS, Concessionaire is qualified to provide automated retail services at the Airport; and

WHEREAS, the City deems it advantageous to the City and the Airport to grant a Concession License to Concessionaire, subject to the covenants, promises, and terms contained herein;

NOW, THEREFORE, the parties agree as follows:

For, and in consideration of the mutual promises, covenants and conditions hereinafter set forth, the parties agree as follows:

ARTICLE I – PURPOSE OF LICENSE AGREEMENT

1.01 PURPOSE

The City grants to Concessionaire license and permission to occupy and use the areas described in this Agreement for the following purpose only: to provide automated retail services through placement of Concessionaire’s automated retail machine (“ARM”) in the permitted areas.

ARTICLE II – DESCRIPTION OF AR MACHINE AND LOCATION

2.01. DESCRIPTION OF ARM

Concessionaire’s ARM sells and dispenses the following type of products or services: consumer electronics as an Apple reseller and Benefit Cosmetics from the following branded retailer: LVMH. For purposes of this Agreement, Concessionaire shall only sell products listed on the Products List attached as Exhibit “A”.

2.02 LOCATION AND SIZE OF CONCESSION SITE

- A. ARM shall be located in the following area of the Airport (“Concession Site”), which shall be of the following size:
- 1) Concession Site 1: I-Store is located in Concourse B at gate B1 consisting of 50 square feet.
 - 2) Concession Site 2: Benefit Cosmetics in Concourse B at get B2 consisting of 50 square feet.
- B. The location(s) of the Concession Site is shown on the Airport terminal map, attached hereto as Exhibit “B” (“Concession Site(s)").
- C. The total square footage of all Concession Sites is 100 square feet.

ARTICLE III - PRIVILEGES, USES AND RIGHTS

3.01 DESCRIPTION OF PRIVILEGES, USES AND RIGHTS

The City grants to Concessionaire the following privileges, uses, and rights, all of which shall be subject to the terms, conditions, and covenants set forth in this Agreement:

- A. The non-exclusive right, license and privilege to locate, maintain and operate its ARM in the Airport terminal building for the purpose of providing products for purchase by the public on behalf of a branded retailer, as described in Paragraph 2.01, above. Selling products not specified in this Agreement is a material breach of the Agreement. If Concessionaire offers products not in the scope of this Agreement, the Director of Aviation (“Director”), or designee, will notify Concessionaire in writing, and Concessionaire will have 24 hours to remedy the breach. Failure to remedy will result in the City’s right to terminate this Agreement.
- B. The right, license, and privilege granted pursuant to Paragraph 3.01 (A), above, shall be subject to all applicable laws, ordinances, rules and regulations.
- C. The right of ingress to, and egress from, the Concession Site by Concessionaire, its officers, employees, agents, patrons, and invitees. Said rights shall be subject to such ordinances, rules and regulations relating to the use and operations at the Airport and subject further at all times, to the Director’s approval and control.
- D. Concessionaire’s employees working at the Airport Terminal will be provided vehicular parking facilities, if available, in common with other employees. Such facilities shall be located in an area designated by the Director. The Director reserves the right to assess a reasonable charge to Concessionaire or its employees for such parking facilities.

ARTICLE IV - CONDITIONS AND TERMS

4.01 CONDITIONS AND TERMS

This Agreement is entered into subject to the following conditions and terms:

- A. Concessionaire shall not alter Concession Site in any manner without the Director's prior written approval.
- B. Concessionaire's activities shall be limited to the operation and maintenance of the permitted ARM.
- C. Prior to placement of ARM at the Airport, Concessionaire shall coordinate with the Director, or designee, to ensure placement at the correct Concession Site.
- D. The Director, from time to time, may require Concessionaire to relocate its ARM to another location in or around the Airport terminal building. The Director will determine the location of any temporary Concession Site and provide Concessionaire written notice of any requirement that Concessionaire relocate its ARM. Such written notice from the Director shall include a reasonable deadline by which Concessionaire must complete the relocation. Concessionaire shall be responsible for relocating its ARM by the specified deadline. Should Concessionaire fail to relocate its ARM by the specified deadline, the Airport or a third party contracted by the Airport, may relocate the ARM and the Airport shall bill Concessionaire for the cost of relocating Concessionaire's ARM. The Airport shall not be responsible for any damage to the Concessionaire's ARM or Concessionaire's products that may result from the Airport relocating Concessionaire's ARM pursuant to this Paragraph 4.01 (D).
- E. Concessionaire's right to use public Airport facilities in common with other authorized parties shall be exercised only subject to, and in accordance with, the laws of the United States of America and the State of Texas; the rules and regulations promulgated under their authority with reference to aviation and air navigation; and all applicable rules, regulations and ordinances of City now in force or hereafter prescribed or promulgated by Charter authority or by law.
- F. Concessionaire shall provide a high-quality ARM that has up-to-date technology; is of recent, modern design; and is clean, fully operational, efficient, and user-friendly.
- G. Concessionaire will utilize only the roadways, pathways, routes, or forms of travel City may designate, from time to time, for Concessionaire's operation and movement on or about the Airport.
- H. Other than the ARM, Concessionaire may install or place improvements, decorations, fixtures, equipment, or supplies on the Concession Site only with Director's written approval. Any installation or placement of improvements, decorations, fixtures, equipment, or supplies on the Concession Site without Director's written approval shall be

considered a material breach of this Agreement, and City may terminate this agreement in accordance with the provisions set forth in Article X. Any installation or placement of improvements, decorations, fixtures, equipment, or supplies on the Concession Site shall be removed by Concessionaire within five (5) calendars of the termination of this Agreement. Should Concessionaire fail to remove any improvements, decorations, fixtures, equipment, or supplies on the Concession Site within five (5) calendar days of the termination of this Agreement, the Airport or a third party contracted by the Airport, may remove such items and the Airport shall bill Concessionaire for the cost of removal. The Airport shall not be responsible for any damage to the Concessionaire's property that may result from the Airport removing items pursuant to this Paragraph 4.01 (H).

- I. The Director must approve, in writing, any temporary signs or advertising on the Concession Site prior to placement by Concessionaire. Any placement of temporary signs or advertising on the Concession Site made without the Director's approval shall be considered a material breach of this Agreement, and City may terminate this agreement in accordance with the provisions set forth in Article X. Any temporary signs or advertising on the Concession Site shall be removed by Concessionaire within five (5) calendars of the termination of this Agreement. Should Concessionaire fail to remove temporary signs or advertising on the Concession Site within five (5) calendar days of the termination of this Agreement, the Airport or a third party contracted by the Airport, may remove such items and the Airport shall bill Concessionaire for the cost of removal. The Airport shall not be responsible for any damage to the Concessionaire's property that may result from the Airport removing items pursuant to this Paragraph 4.01 (I).

ARTICLE V – CITY AND CONCESSIONAIRE OBLIGATIONS AND WARRANTIES

5.01 CITY'S OBLIGATIONS

- A. The City shall provide:
 - (1) Customer access to the Concession Site, subject to any necessary, temporary interruptions that may occur from time to time.
 - (2) Existing lighting, air conditioning, and electrical service at the Concession Site.
- B. The City warrants:
 - (1) Concession Site complies with the requirements of all applicable governmental authorities in effect as of the Effective Date. During the Term, City shall take appropriate and timely action to maintain the terminal in compliance with all applicable governmental regulations, including without limitation, the Americans with Disabilities Act, hereafter imposed by order of any governmental agency or any other authority, at its sole cost and expense and without reimbursement from Concessionaire; provided, however, that if any requirement is imposed solely as a result of the specific and unique use of the Concession Site by Concessionaire, then Concessionaire shall bear the cost of compliance.

- (2) All systems and equipment that are the responsibility of City are in good operating condition as of the Effective Date. If any of the existing systems or equipment that are the City's responsibility should fail during the Term, the City shall rectify such failure at its sole cost and expense, except for any failures caused by Concessionaire.

5.02 CONCESSIONAIRE'S OBLIGATIONS

A. Concessionaire shall provide:

- (1) Installation, operation, and regular maintenance of the ARM.
- (2) All equipment necessary to properly conduct Concessionaire's business.
- (3) A sufficient amount of merchandise stocked in the ARM to ensure that merchandise is available for customers. Fees or charges to customers must be reasonable, and not unjustly discriminatory, provided that Concessionaire is allowed to make reasonable and nondiscriminatory discounts, rebates, or other similar types of price reductions to volume purchasers.
- (4) Installation of additional outlets or circuits or telecommunications equipment if necessary for proper functioning of the ARM, with the prior written approval of the Director, or designee.

B. Concessionaire warrants:

- (1) Concessionaire understands the restrictions imposed on City by 49 CFR Part 1540 and 1542 as amended and agrees to assume responsibility for compliance with said regulations as they relate to access and identification procedures on the Premises. Concessionaire recognizes that all persons in or on the Concession Site must comply with federal safety and security requirements and agrees that all employees shall, as a condition of being on the Concession Site, be badged by the Airport and that all other persons shall be escorted in accordance with Airport requirements. Concessionaire shall also require that all personnel of any subcontractor shall also be similarly badged and/or escorted.
- (2) Concessionaire understands that all of its agents, employees, or independent contractors must be authorized by City to enter restricted areas as defined in Title 14 of the El Paso City Code as amended. Concessionaire understands that no person authorized to enter a restricted area by virtue of this Agreement may permit any other person who is not otherwise authorized to enter a restricted area unless such person is, at all times while in the restricted area, in the company of an authorized person as required.

ARTICLE VI - SERVICES TO BE PERFORMED BY CONCESSIONAIRE

6.01 HOURS OF OPERATION.

The ARM will be available, operable and continuously open for business to the public seven (7) days a week, 24 hours per day.

6.02 TYPE OF OPERATION.

- A. Concessionaire shall ensure that service is available on a fair, reasonable and non-discriminatory basis to the public. Service shall be prompt, courteous and efficient and shall be adequate to meet the demands for service at the Airport.
- B. Concessionaire shall maintain and operate the ARM in a clean, functional, user-friendly, and up-to-date manner and shall keep the Concession Site in a safe, clean, and orderly condition at all times, satisfactory to the City.
- C. Concessionaire shall maintain any necessary licenses or permits at its sole expense.
- D. Concessionaire shall place a phone number on the ARM for customers to call for assistance should the ARM malfunction.
- E. Concessionaire shall obtain any necessary Airport badges for its employees if such badges are required to access secured areas in the Airport for purposes of installing, maintaining or stocking ARM.

6.03 COMPLIANCE WITH LAWS.

- A. Concessionaire agrees that all activities related to the Concession Site and the ARM shall be, at Concessionaire's sole expense, conducted in accordance with all laws, rules, orders, ordinances, directions, regulations and requirements of federal, state, county and municipal authorities, now in force or which may hereafter be in force, including, but not limited to, those which shall impose any duty upon the City or Concessionaire. By way of example and not in limitation of the foregoing, the execution of this Agreement shall not preclude the requirement that Concessionaire obtain all other approvals necessary for development of Concessionaire's project such as, but not limited to, all permits, franchises, licenses, certificates and other authorizations required by law and shall pay all special fees or charges legally levied or assessed.
- B. Concessionaire agrees to comply with the Americans with Disabilities Act; make or cause to be made all such alterations to the Concession Site, and any improvements thereon, including, without limiting the generality of the requirements of this sentence, removing such barriers and providing such alternative services, as shall be required by the Americans with Disabilities Act of 1990 and any other laws, rules, orders, ordinances, directions, regulations and requirements of federal, state, county and municipal authorities, now in

force or which may hereafter be in force, which relate to use or occupation of the Concession Site.

- C. Concessionaire shall, at Concessionaire's expense, comply with all present and hereinafter enacted Environmental Laws, and any amendments thereto, affecting Concessionaire's use, operation, or occupation of the Concession Site including any improvements thereon.

6.04 SOLICITATION AND CONDUCT.

- A. Concessionaire shall prohibit its agents, attendants, and employees from engaging in the solicitation of its services on or about the Airport in a loud, boisterous, offensive or objectionable manner. In the event of questionable conduct in such solicitation, the Director, or designee, shall be sole judge in determining if said conduct is a violation of this paragraph. Upon receipt of notice from the Director, or designee, the Concessionaire shall immediately take all steps necessary to eliminate the undesirable condition.
- B. Concessionaire, its agents, attendants, and employees shall strive to maintain cooperative relationships with other companies engaged in business at the Airport. Concessionaire shall not engage in open public disputes, disagreements or conflicts that would tend to deteriorate the quality of the ARM service or that would be incompatible with the best interest of the public at the Airport. The Director, or designee, shall have the right, but not the requirement, to resolve all such disputes, disagreements or conflicts; and the Director's (or designee's) determination shall be binding upon Concessionaire.

6.05 TRASH, GARBAGE, REFUSE.

Concessionaire shall provide a complete and proper arrangement for the adequate sanitary handling and disposal, away from the Airport, of all trash, garbage and other refuse caused as a result of the operation of its business. Any cardboard boxes must be removed from the Airport or may be disposed of in the Airport's recycling bin should Airport provide access.

6.06 COST OF CONCESSION.

Concessionaire shall bear, at its sole expense, all costs of operating the ARM at the Concession Site and shall pay, in addition to the rent, all other costs connected with the use of the Concession Site and facilities, including, but not limited to, maintenance, insurance, any and all taxes, and all permits and licenses required by law. Concessionaire shall have the right, however, at the Concessionaire's sole cost and expense, to contest the legality of any tax, levy or assessment but shall not allow disputed amounts to remain unpaid during such contest. Failure to pay any taxes or assessments in a timely manner may result in termination of this Agreement.

6.07 MAINTENANCE AND DAMAGE TO CITY PROPERTY.

- A. Concessionaire shall, at its sole cost and expense, maintain the Concession Site and every part thereof in good order and repair and in good and safe condition; repair all damages caused by its employees, patrons, customers or its operation of said service; and maintain

and repair all equipment on said Concession Site.

- B. Concessionaire understands and agrees that the Director, or designee, shall be the sole judge of the quality of maintenance of the Concession Site. If an ARM fails to operate or provide adequate service to the customers, upon written notice by the Director or designee to Concessionaire, Concessionaire shall be required to repair the ARM to working order. If said repair is not undertaken by Concessionaire within twenty-four (24) hours after receipt of written notice, the City will have the right to perform the necessary repair through an appropriate contractor, the cost of such repairs and maintenance shall be borne by Concessionaire.
- C. Concessionaire understands and agrees that, if Concessionaire, its agents, employees, or contractors causes any damage to Airport or City property, Concessionaire shall, at its own cost, repair all such damage without delay in a diligent and professional manner to the reasonable satisfaction of the Director or designee.

ARTICLE VII - TERM OF AGREEMENT

7.01 TERM AND OPTION TO RENEW.

- A. The term of this Agreement shall be one (1) year, commencing on the Effective Date, and terminating one year from the Effective Date ("Term"), unless terminated earlier in accordance with this Agreement or renewed pursuant to Paragraph 7.01 (B) below.
- B. Provided Concessionaire is not in default hereunder, Concessionaire has the option to renew the Agreement, for four (4) additional terms of one (1) year each, to commence at the end of the prior term of this Agreement. The renewal shall be upon the same terms and conditions as contained in this Agreement. Concessionaire's option to renew this Agreement is expressly conditioned upon 1) Concessionaire delivering to the Airport a written notice, provided by certified mail, return receipt requested, at least ninety (90) days prior to the date fixed for termination of the then existing Agreement term; and 2) the Airport providing written acceptance of Concessionaire's request for renewal of Agreement by the date fixed for the termination of the then existing Agreement term. Under no circumstances is the Airport required to agree to the renewal of the Agreement. Should both parties agree to a renewal of the Agreement for an additional one (1) year term, the MAG for the new term will be adjusted to equal the per square foot terminal rate as charged by the City as approved by City Council for its non-signatory agreements, as amended or revised from time to time. The adjustment to the MAG shall be done administratively, through written notice of Director when agreeing to renewal, and without the necessity of amending this Agreement.

7.02 NATIONAL EMERGENCY.

In the event the rights and privileges hereunder are suspended by reason of change in airport security regulations, war or other national emergency, the parties will negotiate in good faith a reasonable resolution of this Agreement under the circumstances.

**ARTICLE VIII – CONCESSION FEE, MINIMUM ANNUAL GUARANTEE
AND PERCENTAGE FEES**

8.01 CONCESSION FEE.

Concessionaire agrees to pay either \$54.50 per square foot for the Concession Site per annum (the “Minimum Annual Guarantee” or “MAG”) or pay the Gross Revenues Percentage (“Percentage Rent”), whichever is greater. The amount that Concessionaire is required to pay, is the “Concession Fee”).

8.02 MINIMUM ANNUAL GUARANTEE

- A. The parties agree that the Concession Site contains 100 square feet of space. Therefore, the MAG is \$5,450.00 per year (\$54.50 per sq. ft. x 100 sq. ft.).
- B. The MAG shall be paid in equal monthly installments of \$454.17.
- C. Concessionaire shall pay the MAG monthly installment amount of \$454.17 on or before the 1st day of each month, in advance, without invoice. Because the MAG monthly installment amount is due on or before the 1st day of each month, Concessionaire’s initial MAG monthly installment amount is due prior to Concessionaire installing its ARM. Any portion of a month of operation will be pro-rated.
- D. The balance of the Concession Fee, if any, will be due along with the report for the immediately preceding month on the 20th day of each month. Whether there is a balance due, is dependent on the calculation of Percentage Rent for the month.
- E. For the initial month in the Term of this Agreement, Concessionaire shall pay only the MAG monthly installment amount and no report shall be due for the immediately preceding month.

8.03 PERCENTAGE RENT.

- A. Percentage Rent is calculated as follows:
 - Twelve percent (12%) of Gross Revenue derived from the ARM on consumer electronic concepts.
 - Nine and one half percent (9.5%) of Gross Revenue derived from the ARM on products other than consumer electronic concepts.
- B. The term “Gross Revenue” whenever used herein, shall mean the following:
 - 1. Gross Revenue is the total dollar amount derived or received by Concessionaire as the total price of merchandise and service as a result of its operation under this Agreement whether for cash or credit and whether collected or uncollectable.
 - 2. Concessionaire has the right to make credit sales, but solely bears the risk.

3. Gross Revenue excludes retail sales taxes, excise taxes or related direct taxes upon the consumer which are collected by Concessionaire as such and paid to the taxing entity.
- C. On the 20th day of each month, Concessionaire will submit to the City a statement of Gross Revenue derived from its operations at the Airport based on the Concessionaire's Gross Revenue for the previous month. (See Paragraph "E", below.) Such statement will be certified by an officer of Concessionaire as being correct and true. The statement will include a calculation of the Percentage Rent due the City. Concessionaire will remit, at the same time, its balance of Concession Fee due to the City. For example, if the Percentage Rent is greater than the monthly MAG amount, Concessionaire shall submit the difference between the Percentage Rent and the MAG, so that City receives, in total, the Percentage Rent amount for the month. If the Percentage Rent is less than the monthly MAG amount, Concessionaire is not obligated to pay any amount in addition to the MAG amount for that month.
- D. The statements submitted must be submitted on forms which are approved by the City's designated representative. Any late payments of rent shall bear interest at the highest rate allowed by law.
- E. In regards to the statement of Gross Revenue required pursuant to Paragraph "C", above, Concessionaire shall submit to the City a report showing all transactions resulting from the operation of the ARM, the amount of the Concession Fee, the amount owed to the City (the greater of the Rental Fee or one-twelfth of the Concessionaire's Minimum Annual Guarantee), and the amount Concession Fee remitted, from the operation of the ARM for the preceding calendar month. These reports shall be submitted on a form that is acceptable to the Director. The monthly report be submitted electronically, in Excel format or PDF format, to the following email address: ELPreports@elpasotexas.gov. Failure to comply with the reporting requirements as stated above will constitute an Event of Default under this Agreement by the Concessionaire.

8.04 ADMINISTRATIVE ADJUSTMENTS.

- A. If the Concession Site is expanded to include additional locations, the Minimum Annual Guarantee will be adjusted to include the additional square footage. The inclusion of additional locations and square footage to the Concession Site shall be done administratively, without the necessity of amending this Agreement, through written approval of the Director, wherein the adjusted square footage and Minimum Annual Guarantee shall be specified.
- B. The Director has the authority to administratively amend the type of products that Concessionaire is permitted to sell and dispense pursuant to Article II, above.

8.05 RECORDS OF CONCESSIONAIRE.

- A. For purposes of this Section 8.05, the term "**Contract Year**" means the twelve (12) month period during the term of the contract commencing on the Effective Date.

- B** With respect to business done by Concessionaire pursuant to this Agreement, Concessionaire shall keep true and accurate amounts, records, books, and data which shall show all sales made, and services performed for cash, credit, or otherwise, without regard to whether paid or not, and all transactions of Concessionaire.
- C.** Concessionaire agrees to operate its business at the Airport in such a manner that a receipt, if applicable, shall be issued with each transaction, and to deliver these documents to the Airport within twenty (20) days and at no cost to the City after a request for the documents has been made by the Director. Concessionaire agrees to keep books and records, in accordance with generally accepted accounting practices, and such other records as the City may request. The receipts, if applicable, and all other books and records of Concessionaire, in paper form or in electronic form, as referenced in this Agreement, shall be available for inspection or audit by authorized City representatives at all reasonable times during business hours for a minimum of one (1) year after each Contract Year and a minimum of one (1) year after any holdover period, if any. If an audit is required, appropriate records will be maintained legally for a period of sixty (60) days after completion of the audit.
- D.** Within ninety (90) days following the last day of each Contract Year of each Term of the Agreement, a statement showing Gross Revenues for the preceding Contract Year shall be submitted and certified from the Concessionaire's records by an officer of the corporation ("Annual Statement"). The Annual Statement shall be signed and notarized by an officer of the corporation as an accurate report of the Concessionaire's Gross Revenues for the preceding Contract Year. The Annual Statement is to be accompanied by the Concessionaire's payment covering any deficiency between payment made during the preceding Contract Year and the payment due for the Contract Year as identified in the Annual Statement certified by the certified public accountant. If the Annual Statement indicates that the amounts due to the City is less than the payments made for the preceding year, then the City will reimburse to the Concessionaire the excess amount without interest.
- E.** If, after the submission of the Concessionaire's Annual Statement, the City has reasonable questions about the accuracy of the Annual Statement, the City shall have the right, at its sole option, to require Concessionaire to submit at Concessionaire's sole cost, a certified statement of Gross Revenues prepared by an independent certified public accountant acceptable to the City. "Independent" shall mean a certified public accountant who is not affiliated in fact or appearance in any manner with the Concessionaire, its parent company or any subsidiaries. Any failure of the City to request a certified statement of Gross Revenues by an independent certified public accountant in any Contract Year shall not operate to bar or destroy the right of the City to request such a certified statement in any subsequent Contract Year. The submission of such certified statement of Gross Revenues by the Concessionaire shall not be construed to limit the City's right to request audits as set forth in this Agreement. The Concessionaire, at its own expense, shall supply all records in a type, style and form satisfactory to the Director of Aviation. The Concessionaire shall maintain monthly statements of Gross Revenues for a minimum of one (1) year at a place of business accessible to the City in El Paso, Texas. The Concessionaire shall maintain annual statements of Gross Revenues, as required hereunder,

at its principal place of business, for a minimum of five (5) years, and shall forward same to the City during that time, if requested by the City. The Concessionaire shall maintain monthly statements, as required hereunder, for a minimum of one (1) year at a place of business accessible to the City. The Concessionaire shall also maintain annual statements, as required hereunder, for a minimum of five (5) years at a place of business accessible to the City.

8.06 AUDIT.

- A. For the purpose of determining accuracy of reporting Gross Revenues, the City may make a spot test audit and base its findings for the entire period upon such spot test; provided however, that such a spot test shall include at least twenty-five percent (25%) of the total time of the period being audited.
- B. Concessionaire further grants to the City or its designee the right, upon ten (10) days' written notice to Concessionaire, to examine, audit, or inspect books, records, and accounts of Concessionaire pertinent to the purpose of verifying the accuracy of the reports and statements furnished to the City, and for checking the amount of rental or other payments lawfully due the City under the terms of this Agreement. Upon receipt of the written notice, Concessionaire shall bring to a place in El Paso which has been selected by the City all books and records, together with all appropriate backup documentation, necessary for the City to effectively monitor the appropriateness of all rental and other fees paid or to-be-paid by Concessionaire under this Agreement. If, following any such audit, any element of rental or fees changes by more than five percent (5%), all costs of such audit, including counsel, accounting or expert fees, shall be paid by Concessionaire to the City within thirty (30) days of the City submitting a bill to Concessionaire. Otherwise, the cost of the audit will be borne by the City.
- C. Failure of the City to exercise its right to audit Concessionaire, as set forth herein, shall in no way be construed as a waiver of any right to payment by the City of any rental or fees due the City under the terms of this Agreement, and the City hereby expressly reserves its rights under common or statutory law, or otherwise, to enforce all terms of this Agreement, including any right to payment hereunder.

8.07 INTEREST.

Without waiving any other right of action available to the City, any installment of rent, fees, or other monies accruing under the provisions of this Agreement that are not paid by the due date, shall bear interest at the maximum rate allowed by law from the date when same was due by the terms hereof, until the same has been paid by Concessionaire.

8.08 PLACE OF PAYMENT.

All rent payments required herein shall be paid to the City at the following address:

Accounting Division
El Paso International Airport
P.O. Box 971278
El Paso, Texas 79997-1278

Payment via electronic funds transfer is encouraged provided that it is made through a system approved by the Director.

8.09 DEFAULT FOR FAILURE TO PAY RENT, FEES OR CHARGES.

Concessionaire's failure to pay any part of the rental, fees, or charges agreed upon hereunder within thirty (30) days after the due date set forth herein shall be considered an event of default. If Concessionaire is in default for failure to pay amounts due in a timely manner, the City shall have the right to proceed with a contractual lien pursuant to Paragraph 8.10, below, without further notice to Concessionaire or opportunity to cure.

8.10 CONTRACTUAL LIEN.

- A. It is expressly agreed that in the event of default for failure to pay rent or any other sum due from Concessionaire to City under the terms of this Agreement, City shall have the right to resume possession of the Concession Site and to remove Concessionaire's ARM, without being guilty of any manner of trespass or conversion and without prejudice to any other remedies, which might be used by the City.
- B. It is expressly agreed that in the event of default in the payment of rent or any other sum due from Concessionaire to City under the terms of this Agreement, City shall have a lien upon all goods, chattels, personal property or equipment, save and except delivery vehicles or rolling stock belonging to Concessionaire which are placed in, or become a part of, the Concession Site, as security for rent due and to become due for the remainder of the Agreement term, which lien shall not be in lieu of or in any way affect the statutory landlord's lien given by law, but shall be in addition to that lien, and Concessionaire grants to City a security interest in all of Concessionaire's personal property placed in or on the Concession Site for purposes of this contractual lien. Provided, however, that the terms of this provision shall have effect only to the extent they are not inconsistent with the rules and regulations of the Interstate Commerce Commission or its successor agency, and any other laws pertaining thereto and the Railroad Commission of the State of Texas. City agrees that it will not levy a landlord's lien against any delivery vehicle or rolling stock or any of the goods or personal property of third parties in the possession of Concessionaire, or any assignee of the Concessionaire. In the event City exercises the option to terminate the leasehold as provided herein, the City, after providing reasonable notice to Concessionaire of its intent to take possession and giving an opportunity to cure the default, may take possession of all of Concessionaire's property on the Premises and sell it at public or private sale after giving Concessionaire reasonable notice of time and place of any public sale or of the time after that any private sale is to be made, for cash or credit, for such prices and terms as City deems best. The proceeds of the sale shall be applied first to the necessary proper expense of removing, storing and selling such property, then to the

payment of any rent due or to become due under this Agreement, with the balance, if any, to be paid to Concessionaire.

ARTICLE IX - INSURANCE AND INDEMNIFICATION

9.01 LIABILITY INSURANCE.

- A. Concessionaire, and any contractor or subcontractor that performs any service on behalf of Concessionaire under the terms of this Agreement, shall obtain, provide proof of, and maintain for the Term of this Agreement, the following:
1. Commercial General Liability Insurance for the benefit of City and Concessionaire, as their respective interests may appear, including all the usual coverage known as: (a) Premises/operations liability, (b) Products/completed operations, and (c) Personal/advertising injury for minimum limits of Two Million Dollars (\$2,000,000.00) for bodily injury to one person for each occurrence, and One Million Dollars for property damage arising out of each occurrence, or in amounts equal to the maximum liability for damages for municipalities for claims arising under governmental functions, provided for under the Texas Tort Claims Act, whichever is greater.
 2. Commercial Automobile Liability with Minimum Limits of \$1,000,000 Bodily Injury/\$500,000 Property Damage Liability per occurrence.
 3. Statutory Workers' Compensation Insurance and Employers Liability Insurance with Minimum Limits of \$1,000,000 per occurrence.
- B. City, its officials, employees, agents and contractors shall be named as an Additional Insured on all insurance policies, either in the policy itself and shall be reflected on the certificate of insurance or through an endorsement attached to the policy and the policies must contain a "blanket waiver of subrogation" clause in favor of the City.
- C. Concessionaire and their subcontractors' insurance coverage shall be primary insurance with respect to the City, its officials, employees, agents and contractors. Any insurance or self-insurance maintained by the City, its officials, employees, agents and contractors shall be in excess of the Concessionaire's or Concessionaire's subcontractors' insurance and shall not contribute to the Concessionaire's or Concessionaire's subcontractor's insurance.
- D. All policies shall provide either in the policy itself and have reflected on the certificate of insurance or through an endorsement attached to the policy, that the insurance cannot be canceled or the amount of coverage changed without fifteen (15) calendar days prior written notice to the City or ten (10) calendar days prior written notice for non-payment of insurance policy premiums. All such policies of insurance shall be written by insurance companies authorized to do business in the State of Texas and shall be written by companies approved by City.

- E. Prior to undertaking any work under this Agreement, the Concessionaire, at no expense to the City, shall furnish to the City a certificate of insurance with original endorsements affecting coverage for each of the insurance policies provided in this Agreement. Any deductibles or self-insured retentions shall be declared to, and approved by the City.

9.02 INDEMNIFICATION.

WITHOUT LIMITING THE GENERALITY OF ANY OTHER INDEMNITY CONTAINED IN THIS AGREEMENT, CONCESSIONAIRE AGREES TO INDEMNIFY AND HOLD CITY AND ITS OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES HARMLESS AGAINST ANY AND ALL CLAIMS, DEMANDS, DAMAGES, COSTS, LIABILITIES AND EXPENSES, INCLUDING INVESTIGATION EXPENSES AND REASONABLE ATTORNEY'S FEES FOR THE DEFENSE OF SUCH CLAIMS AND DEMANDS, ARISING OUT OF OR ATTRIBUTED DIRECTLY OR INDIRECTLY TO THE OPERATION, CONDUCT OR MANAGEMENT OF CONCESSIONAIRE'S ACTIVITIES ON THE CONCESSION SITE, ITS USE OF THE CONCESSION SITE, OR FROM ANY BREACH ON THE PART OF CONCESSIONAIRE OF ANY TERMS OF THIS AGREEMENT, OR FROM ANY ACT OR NEGLIGENCE OF CONCESSIONAIRE, ITS AGENTS, CONTRACTORS, EMPLOYEES, CONCESSIONAIRES, OR LICENSEES IN OR ABOUT THE PREMISES INCLUDING CLAIMS AND DAMAGES ARISING IN WHOLE, OR IN PART, FROM THE NEGLIGENCE OF CITY. IN CASE OF ANY ACTION OR PROCEEDING BROUGHT AGAINST CITY BY REASON OF ANY SUCH CLAIM, CONCESSIONAIRE, UPON RECEIPT OF WRITTEN NOTICE FROM CITY, AGREES TO DEFEND THE ACTION OR PROCEEDING BY COUNSEL ACCEPTABLE TO CITY. THE OBLIGATIONS OF CONCESSIONAIRE UNDER THIS SECTION SHALL SURVIVE THE EXPIRATION OR SOONER TERMINATION OF THE AGREEMENT.

ARTICLE X - TERMINATION OF AGREEMENT, CANCELLATION, ASSIGNMENT AND TRANSFER

10.01 TERMINATION.

- A. This Agreement shall terminate at the expiration of the Term, or sooner as provided in this Agreement, and Concessionaire shall thereafter have no further interest or right in the Concession Site.

10.02 CANCELLATION BY CITY.

- A. This Agreement shall be subject to cancellation by the City in the event Concessionaire:
1. Is in arrears in the payment of the whole or any part of the amounts agreed upon hereunder for a period of thirty (30) days from the date said payments are due.
 2. Files a petition in bankruptcy or insolvency.

3. Makes an assignment of any interest in this Agreement for the benefit of creditors.
4. Is adjudged as bankrupt in involuntary bankruptcy proceedings.
5. Is made a party to a receivership proceeding in which a receiver or trustee is appointed for the property or affairs of the Concessionaire.
6. Abandons the Concession Site for ten (10) days.
7. Fails to perform or keep any term, covenant, or condition required of Concessionaire pursuant to this Agreement (except rental payments); and such failure continues for a period of twenty (20) calendar days after receipt of written notice from the City of said failure.
8. Violates any applicable laws, statutes or ordinances.

B. In any of the aforesaid events, the City may immediately cancel this Agreement and take immediate possession of the Concession Site and remove Concessionaire's effects forcibly, if necessary, without being deemed guilty of trespassing and Concessionaire shall cease all operation at the Airport immediately.

C. The City's failure to declare this Agreement terminated pursuant to this Paragraph 10.02 shall not operate to bar or destroy the right of City to cancel this Agreement for any subsequent violation of the terms of this Agreement.

10.03 ASSIGNMENT AND TRANSFER.

Concessionaire shall not transfer, or sublease its rights granted hereunder without the prior written approval of the City. No sub-concession agreements shall be permitted.

ARTICLE XI - REDELIVERY

11.01 REDELIVERY

Concessionaire shall make no unlawful or offensive use of the Concession Site and will at the expiration of the Term or upon any sooner termination, without notice, quit and deliver up said Concession Site to the City peaceably, quietly and in as good order and condition, reasonable use and wear excepted, as the same now are or may hereafter be improved by Concessionaire or the City.

ARTICLE XII - GENERAL PROVISIONS

12.01 TIME IS OF THE ESSENCE.

Time is and shall be deemed of the essence in respect to the performance of each provision of this Agreement.

12.02 NOTICES.

All notices required to be given under this Agreement shall be given by certified or registered mail, return receipt requested, postage fully prepaid, or by overnight or express carrier with proof of delivery, addressed to the proper party at the following addresses:

CITY:	City Clerk City of El Paso P.O. Box 1890 El Paso, Texas 79950-1890
COPY TO:	El Paso International Airport Attn: Director of Aviation 6701 Convair Road El Paso, Texas 79925-1099
CONCESSIONAIRE:	SWYFT, Inc. 140 Geary St., 7 th Floor San Francisco, CA 94108

Any notice so given shall be deemed properly delivered, given, served, or received on the date shown for delivery or rejection on the return receipt. Any party may change the address to which notices shall thereafter be given upon five (5) days prior written notice to all other parties in the manner set forth in this Section.

12.03 ATTORNEY'S FEES.

If either party brings any action or proceedings to enforce, protect or establish any right or remedy under the terms and conditions of this Agreement, the prevailing party shall be entitled to recover reasonable attorney's fees, as determined by a court of competent jurisdiction, in addition to any other relief awarded.

12.04 AGREEMENT MADE IN TEXAS.

The laws of the State of Texas shall govern the validity, interpretation, performance and enforcement of this Agreement. Venue shall be in the courts in El Paso County, Texas.

12.05 GENERAL CIVIL RIGHTS PROVISION.

Concessionaire agrees to comply with pertinent statutes, Executive Orders and such rules as are promulgated to ensure that no person shall, on the grounds of race, creed, color, national origin, sex, age, or disability be excluded from participating in any activity conducted with or benefiting from Federal assistance. If Concessionaire transfers its obligation to another, the transferee is obligated in the same manner as the transferor. This provision obligates the Concessionaire for the period during which the property is used or possessed by the Concessionaire and the Airport

remains obligated to the Federal Aviation Administration. This provision is in addition to that required by Title VI of the Civil Rights Act of 1964.

12.06 COMPLIANCE WITH NONDISCRIMINATION REQUIREMENTS.

During the performance of this contract, Concessionaire, for itself, its assignees, and successors in interest (for purposes of this Section 12.06 hereinafter referred to as the "Contractor"), agrees as follows:

1. **Compliance with Regulations:** The Contractor (hereinafter includes consultants) will comply with the Title VI List of Pertinent Nondiscrimination Acts and Authorities, as they may be amended from time to time, which are herein incorporated by reference and made a part of this contract.
2. **Nondiscrimination:** The Contractor, with regard to the work performed by it during the contract, will not discriminate on the grounds of race, color, or national origin in the selection and retention of subcontractors, including procurements of materials and leases of equipment. The Contractor will not participate directly or indirectly in the discrimination prohibited by the Nondiscrimination Acts and Authorities, including employment practices when the contract covers any activity, project, or program set forth in Appendix B of 49 CFR part 21.
3. **Solicitations for Subcontracts, including Procurements of Materials and Equipment:** In all solicitations, either by competitive bidding or negotiation made by the Contractor for work to be performed under a subcontract, including procurements of materials, or leases of equipment, each potential subcontractor or supplier will be notified by the Contractor of the contractor's obligations under this contract and the Nondiscrimination Acts and Authorities on the grounds of race, color, or national origin.
4. **Information and Reports:** The Contractor will provide all information and reports required by the Acts, the Regulations, and directives issued pursuant thereto and will permit access to its books, records, accounts, other sources of information, and its facilities as may be determined by the City or the Federal Aviation Administration to be pertinent to ascertain compliance with such Nondiscrimination Acts and Authorities and instructions. Where any information required of a contractor is in the exclusive possession of another who fails or refuses to furnish the information, the Contractor will so certify to the sponsor or the Federal Aviation Administration, as appropriate, and will set forth what efforts it has made to obtain the information.
5. **Sanctions for Noncompliance:** In the event of a Contractor's noncompliance with the non-discrimination provisions of this contract, the sponsor will impose such contract sanctions as it or the Federal Aviation Administration may determine to be appropriate, including, but not limited to:
 - a. Withholding payments to the Contractor under the contract until the Contractor complies; and/or

- b. Cancelling, terminating, or suspending a contract, in whole or in part.
6. **Incorporation of Provisions:** The Contractor will include the provisions of paragraphs one through six in every subcontract, including procurements of materials and leases of equipment, unless exempt by the Acts, the Regulations, and directives issued pursuant thereto. The Contractor will take action with respect to any subcontract or procurement as the sponsor or the Federal Aviation Administration may direct as a means of enforcing such provisions including sanctions for noncompliance. Provided, that if the Contractor becomes involved in, or is threatened with litigation by a subcontractor, or supplier because of such direction, the Contractor may request the sponsor to enter into any litigation to protect the interests of the sponsor. In addition, the Contractor may request the United States to enter into the litigation to protect the interests of the United States.

12.07 AFFIRMATIVE ACTION.

Concessionaire assures that it will undertake an affirmative action program as required by 14 CFR Part 152, Subpart E, and any amendments thereto, and any other federal statutes or regulations applicable to the receipt of federal assistance from the Department of Transportation by local governments for Airport use, or otherwise applicable to persons leasing premises from the City of El Paso, to insure that no person shall, on the grounds of race, color, sex, age, disability or national origin be excluded from participating in or receiving the services or benefits of any program of activity covered by this Subpart. Concessionaire assures that it will require that its covered sub-organizations (subconcessionaires) provide assurances to City, as set forth herein, that they similarly will undertake affirmative action programs, and that they will require assurance from their sub-organizations (subconcessionaires) to the same effect.

12.08 FAA ORDER 1400.11.

Pursuant to Federal Aviation Administration Order 1400.11, effective August 27, 2013, and because the described premises are located at the El Paso International Airport which is subject to regulation by, among others, the U.S. Federal Aviation Administration, the parties specifically agree to the following (except as Concessionaire is mandated by security requirements imposed by Concessionaire's federal government customers):

1. A. Concessionaire for itself, its successors in interest and assigns, as a part of the consideration hereof, does hereby covenant and agree, as a covenant running with the land, that in the event facilities are constructed, maintained, or otherwise operated on the property described in this License for a purpose for which a Federal Aviation Administration activity, facility, or program is extended or for another purpose involving the provision of similar services or benefits, Concessionaire will maintain and operate such facilities and services in compliance with all requirements imposed by the Acts and Regulations set out in Federal Aviation Administration Order 1400.11, Appendix 4, as same may be amended from time to time (the "Acts and Regulations") such that no person on the grounds of race, color, or national origin, will be excluded from participation in, denied the benefits of, or be otherwise subjected to discrimination in the use of said facilities.

B. With respect to the License, in the event of breach of any of the above nondiscrimination covenants, City will have the right to terminate the License and to enter or re-enter and repossess said premises and the facilities thereon, and hold the same as if said easement had never been made or issued. [FAA Order 1400.11, Appendix C]

2. A. Concessionaire for itself, its successors in interest and assigns, as a part of the consideration hereof, does hereby covenant and agree, as a covenant running with the land, that (1) no person on the ground of race, color, or national origin, will be excluded from participation in, denied the benefits of, or be otherwise subjected to discrimination in the use of said facilities, (2) that in the construction of any improvements on, over, or under such land, and the furnishing of services thereon, no person on the ground of race, color, or national origin, will be excluded from participation in, denied the benefits of, or otherwise be subjected to discrimination, (3) that the Concessionaire will use the premises in compliance with all other requirements imposed by or pursuant to the Acts and Regulations.

B. With respect to the License, in the event of breach of any of the above nondiscrimination covenants, City will have the right to terminate the Agreement and to enter or re-enter and repossess said Premises and the facilities thereon, and hold the same as if said easement had never been made or issued. [FAA Order 1400.11, Appendix D]

3. A. During the Term of this License, Concessionaire for itself, its successors in interest, and assigns, as a part of the consideration hereof, agrees to comply with the following non-discrimination statutes and authorities; including but not limited to:

- Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d et seq., 78 stat. 252), (prohibits discrimination on the basis of race, color, national origin);
- 49 CFR part 21 (Non-discrimination In Federally-Assisted Programs of The Department of Transportation—Effectuation of Title VI of The Civil Rights Act of 1964);
- The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, (42 U.S.C. § 4601), (prohibits unfair treatment of persons displaced or whose property has been acquired because of Federal or Federal-aid programs and projects);
- Section 504 of the Rehabilitation Act of 1973, (29 U.S.C. § 794 et seq.), as amended, (prohibits discrimination on the basis of disability); and 49 CFR part 27;
- The Age Discrimination Act of 1975, as amended, (42 U.S.C. § 6101 et seq.), (prohibits discrimination on the basis of age);
- Airport and Airway Improvement Act of 1982, (49 USC § 471, Section 47123), as amended, (prohibits discrimination based on race, creed, color, national origin, or sex);

- The Civil Rights Restoration Act of 1987, (PL 100-209), (Broadened the scope, coverage and applicability of Title VI of the Civil Rights Act of 1964, The Age Discrimination Act of 1975 and Section 504 of the Rehabilitation Act of 1973, by expanding the definition of the terms “programs or activities” to include all of the programs or activities of the Federal-aid recipients, sub-recipients and contractors, whether such programs or activities are Federally funded or not);
- Titles II and III of the Americans with Disabilities Act of 1990, which prohibit discrimination on the basis of disability in the operation of public entities, public and private transportation systems, places of public accommodation, and certain testing entities (42 U.S.C. §§ 12131 – 12189) as implemented by Department of Transportation regulations at 49 CFR parts 37 and 38;
- The Federal Aviation Administration’s Non-discrimination statute (49 U.S.C. § 47123) (prohibits discrimination on the basis of race, color, national origin, and sex);
- Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, which ensures nondiscrimination against minority populations by discouraging programs, policies, and activities with disproportionately high and adverse human health or environmental effects on minority and low-income populations;
- Executive Order 13166, Improving Access to Services for Persons with Limited English Proficiency, and resulting agency guidance, national origin discrimination includes discrimination because of limited English proficiency (LEP). Grantee shall take reasonable steps to ensure that LEP persons have meaningful access to its programs (70 Fed. Reg. at 74087 to 74100);
- Title IX of the Education Amendments of 1972, as amended, which prohibits discrimination because of sex in education programs or activities (20 U.S.C. 1681 et seq).

B. In the event of breach of any of the covenants in this section 3, City shall have the rights and remedies set forth in sections 1 and 2 above, in addition to all other rights and remedies available to it under applicable law. [FAA Order 1400.11, Appendix E]

12.09 CUMULATIVE RIGHTS AND REMEDIES.

All rights and remedies of City here enumerated shall be cumulative and none shall exclude any other right or remedy allowed by law. Likewise, the exercise by City of any remedy provided for herein or allowed by law shall not be to the exclusion of any other remedy.

12.10 INTERPRETATION.

A. City and Concessionaire agree that this License has been freely negotiated by both parties and that in any controversy, dispute, or contest over the meaning, interpretation, validity, or enforceability of this License or any of its terms or conclusion there shall be no inference,

presumption, or conclusion drawn whatsoever against either party by virtue of that party having drafted this License or any portion thereof.

B. Words of gender used in this Agreement shall be held and construed to include any other gender.

C. Words in the singular shall be held to include the plural and vice versa unless the context otherwise requires.

12.11 AGREEMENT MADE IN WRITING.

This Agreement contains all of the agreements and conditions made between the parties hereto and may not be modified orally or in any manner other than by agreement in writing signed by the parties hereto or their respective successors in interest.

12.12 PARAGRAPH HEADINGS.

The captions of the various articles and sections of this Agreement are for convenience and reference only, and do not define, limit, augment or describe the scope, context or intent of this Agreement or any part or parts of this Agreement.

12.13 SEVERABILITY.

If any provision of this Agreement is found by a court of competent jurisdiction to be illegal, invalid, or unenforceable, the remainder of this Agreement will not be affected, and in lieu of each provision which is found to be illegal, invalid, or unenforceable, there will be added as part of this Agreement a provision as similar to such illegal, invalid, or unenforceable provision as may be possible and be legal, valid, and enforceable.

12.14 SUCCESSORS AND ASSIGNS.

All of the terms, provisions, covenants and conditions of this Agreement shall inure to the benefit of and be binding upon City and Concessionaire and their successors, assigns, legal representatives, heirs, executors and administrators.

12.15 TAXES AND OTHER CHARGES.

Concessionaire shall pay any and all taxes and governmental charges of any kind whatsoever that may be lawfully assessed against Concessionaire or City, with respect to the Concession Site, any improvements, equipment, personal property or inventory thereon or Concessionaire's use and/or occupancy of the Concession Site, during the term of this Agreement including any extensions or option periods granted thereto. City is a tax-exempt governmental entity and shall not be responsible for any taxes or assessments arising from Concessionaire's use of the property or possession of the Concession Site. Concessionaire in good faith may contest any tax or governmental charge; provided that Concessionaire may not permit such tax or governmental charge to remain unpaid during the period of such contest and any appeal therefrom.

12.16 WAIVER OF WARRANTY OF SUITABILITY.

CITY DISCLAIMS ANY WARRANTY OF SUITABILITY THAT MAY ARISE BY OPERATION OF LAW. EXCEPT AS OTHERWISE PROVIDED IN THIS LICENSE, CONCESSIONAIRE LICENSES THE CONCESSION SITE "AS-IS" AND CITY DOES NOT WARRANT THAT THERE ARE NO LATENT DEFECTS THAT ARE VITAL TO CONCESSIONAIRE'S USE OF THE CONCESSION SITE FOR THEIR INTENDED COMMERCIAL PURPOSE.

12.17 SURVIVAL OF CERTAIN PROVISIONS.

All provisions of this Agreement which expressly or impliedly contemplate or require performance after the expiration or termination of this Agreement hereunder shall survive such expiration or termination of this Agreement.

12.18 SUBORDINATION OF AGREEMENT.

All rights granted in this Agreement shall be subordinate to the rights in any deed from the United States to the City of El Paso. This License shall further be subordinate to the provisions of any existing or future agreements between City and the United States relative to the operation and maintenance of the Airport, the execution of which has been or may be required as a condition precedent to the expenditure of federal funds for the development of the Airport. Should the effect of such agreement with the United States Government be to substantially destroy the commercial value of the Concession Site, Concessionaire may cancel this Agreement in its entirety.

12.19 FORCE MAJEURE.

Neither party to this Agreement is responsible to the other party for non-performance or delay in performance of the terms and conditions herein due to acts of God, acts of government, wars, riots, strikes, accidents in transportation, fuel or materials shortages, or other causes beyond the control of the parties.

12.20 AUTHORIZATION TO ENTER AGREEMENT.

If Concessionaire signs this Agreement as a corporation, Concessionaire warrants to City that Concessionaire is a duly authorized and existing corporation, that Concessionaire is qualified to do business in the State of Texas, that Concessionaire has full right and authority to enter into this Agreement, and that each and every person signing on behalf of Concessionaire is authorized to do so. Upon City's request, Concessionaire will provide evidence satisfactory to City confirming these representations.

(Signatures begin on the following page)

CITY'S SIGNATURE PAGE

IN WITNESS WHEREOF, the parties have hereunto set their hands as of this ____ day
of _____, 2021.

CITY OF EL PASO:

Tomás González
City Manager

APPROVED AS TO FORM:

Leslie B. Jean-Pierre
Assistant City Attorney

APPROVED AS TO CONTENT:

Samuel Rodriguez, P.E.
Director of Aviation

(Signatures continue on the following page)

CONCESSIONAIRE'S SIGNATURE AND ACKNOWLEDGMENT

SWYFT, INC.

Signature: [Handwritten Signature]
Printed Name: LINCOLN SMITH
Title: PRESIDENT

ACKNOWLEDGMENT

THE STATE OF Arizona)
)
COUNTY OF Coconino)

This instrument was acknowledged before me on this 10th day of NOVEMBER, 2021
by LINCOLN SMITH, as PRESIDENT
of SWYFT, Inc. (Concessionaire).

[Handwritten Signature]
Notary Public, State of Arizona

My Commission Expires:

November 11, 2024

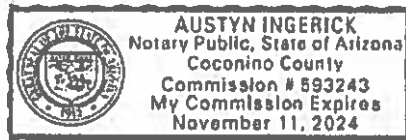


EXHIBIT A
PERMITTED PRODUCTS LIST

EXHIBIT "A"

Price List For Benefit

SKU	UPC	Product Name	List Price (\$) Default
BM104	6 02004E+11	2018 Goof Proof Brow Pencil Mini Shade 01	\$14.00
BM112	6 02004E+11	Precisely, My Brow Pencil Mini Shade 2	\$14.00
BM121	6 02004E+11	2018 Ka Brow Mini Shade Extensions - Shade 05	\$14.00
BM13	6 02004E+11	Goof Proof 2	\$24.00
BM14	6 02004E+11	Goof Proof 3	\$24.00
BM15	6 02004E+11	Goof Proof 4	\$24.00
BM154	6 02004E+11	Gimme Brow + Shade 01 Mini	\$14.00
BM155	6 02004E+11	Gimme Brow + Shade 03 Mini	\$14.00
BM156	6 02004E+11	Gimme Brow + Shade 05 Mini	\$14.00
BM16	6 02004E+11	Goof Proof 5	\$24.00
BM21	6 02004E+11	Precisely, My Brow 3	\$24.00
BM22	6 02004E+11	Precisely Full Size - Shade 4	\$24.00
BM23	6 02004E+11	Precisely, My Brow 5	\$24.00
BM58	6 02004E+11	Goof Proof 3 Mini	\$14.00
BM63	6 02004E+11	Ka-Brow Mini for Sale - Shade 03	\$14.00
BM65	6 02004E+11	Precisely, My Brow Pencil Mini for Sale - Shade 03	\$14.00
BM66	6 02004E+11	24 hour brow setter	\$24.00
BM76	6 02004E+11	Precisely, My Brow Pencil Mini Shade 5	\$14.00
BM77	6 02004E+11	2018 Goof Proof Brow Pencil Mini Shade 05	\$14.00
BM93	6 02004E+11	Precisely Full Size - Shade 3 5	\$24.00
EC12	6 02004E+11	Gimme Brow Plus 4	\$24.00
EC15	6 02004E+11	Gimme Brow Plus 1	\$24.00
EC16	6 02004E+11	Gimme Brow Plus 3	\$24.00
EC17	6 02004E+11	Gimme Brow Plus 5	\$24.00
EM01	6 02004E+11	Roller Lash	\$26.00
EM02	6 02004E+11	Roller Lash Mini EM MASC	\$13.00
EM09	6 02004E+11	They're Real! Liner Mini	\$12.00
EM26	6 02004E+11	They're Real Tinted Primer MINI	\$13.00
EM43	6 02004E+11	Badgal Bang! Mascara	\$26.00
EM44	6 02004E+11	Badgal Bang! Mini	\$13.00
EM46	6 02004E+11	Roller Liner Mini - Black	\$12.00
EM47	6 02004E+11	Roller Liner - Black	\$22.00
EM53	6 02004E+11	BADgal BANG Pencil - Black	\$22.00
FM04	6 02004E+11	the POREfessional deluxe mini	\$13.00
FM108	6 02004E+11	Dandelion Twinkle Mini for Sale	\$17.00
FM122	6 02004E+11	California BOP Mini - NEW	\$17.00
FM123	6 02004E+11	3 piece b right	\$15.00
FM158	6 02004E+11	Hello Happy Velvet Powder Foundation - Shade 02	\$30.00
FM159	6 02004E+11	Hello Happy Velvet Powder Foundation - Shade 03	\$30.00
FM161	6 02004E+11	Hello Happy Velvet Powder Foundation - Shade 05	\$30.00
FM173	6 02004E+11	Benetint Repackaged	\$18.00
FM176US	6 02004E+11	Hello Happy Flawless Liquid Foundation Mini - 3	\$15.00
FM177US	6 02004E+11	Hello Happy Flawless Liquid Foundation Mini - 4	\$15.00
FM179US	6 02004E+11	Hello Happy Flawless Liquid Foundation Mini - 6	\$15.00
FM215	6 02004E+11	Boi-ing Cakeless Concealer Shade 02 Mini	\$13.00
FM216	6 02004E+11	Boi-ing Cakeless Concealer Shade 05 Mini	\$13.00
FM217	6 02004E+11	Boi-ing Cakeless Concealer Shade 06 Mini	\$13.00
FM32	6 02004E+11	Hoola BOP Mini For Sale	\$17.00
FM33	6 02004E+11	Dandelion Mini	\$17.00
FM45	6 02004E+11	Matte Rescue Mini	\$13.00
FM59	6 02004E+11	Boi-ing Industrial Strength Concealer - Light	\$22.00
FM60	6 02004E+11	Boi-ing Industrial Strength Concealer - Medium	\$22.00
FM87	6 02004E+11	BOP Gold Rush Mini	\$17.00
FM88	6 02004E+11	POREfessional Plus (Pearl Primer) Mini for Sale	\$13.00
GU103		Feathered Brow - Med	\$38.00
GU104		Feathered Brow - Deep	\$38.00
GU131		Natural Med	\$38.00
GU132		Natural Light	\$38.00
GU133		Natural Light/Med	\$38.00
GU134		Natural Deep	\$38.00
GU136		Natural and Full Brow - Medium	\$38.00
GU137		Natural and Full Brow - Deep	\$38.00
GU139		Natural and Full Brow - Deep Brown	\$38.00
GU140		Feathered Brow - Medium Brown	\$38.00
GU141		Feathered Brow - Deep Brown	\$38.00
GU142		Glam Up & Away Kit	\$32.00
IB132	6 02004E+11	BadGal Mascara Mini	\$11.00
IB184	6 02004E+11	the POREfessional	\$12.00
IB202	6 02004E+11	They're Real	\$26.00
IB203	6 02004E+11	watt's up!	\$30.00
IB222	6 02004E+11	they're real! mascara deluxe mini	\$13.00
IB74	6 02004E+11	hoola	\$30.00
IB92	6 02004E+11	BadGal_Mascara	\$26.00
LM611	6 02004E+11	Benebalm	\$18.00
LM636	6 02004E+11	They're Real Big Sexy Lip Kit	\$29.00
LM641	6 02004E+11	Punch Pop Liquid Lip Color Bubblegum LM	\$18.00
TOA176	6 02004E+11	Varsity Bag	\$13.00
TOA190	6 02004E+11	NEW Luggage Tag	\$13.00
TR44	6 02004E+11	TR Mini Cheek Palette	\$36.00
TT574	6 02004E+11	2018 Porefessional Starter Set	\$19.00
TT577	6 02004E+11	Grab & Go Highlight & Contour Set	\$11.00
TT588	6 02004E+11	Tint Faves & Craves	\$26.00
TT619	6 02004E+11	2018 Brow Starter Set - Shade 03	\$24.00
TT622	6 02004E+11	Pretty Times Roll Palette	\$24.00
TT636	6 02004E+11	Brow-Raising Lineup! (Mini set)	\$24.00
TT658	6 02004E+11	2019 Tint Starter Set	\$20.00
TT671	6 02004E+11	Lash Leaders	\$22.00
TT672	6 02004E+11	The Cheekettes - Mini Bronze Squad	\$30.00
TT673	6 02004E+11	2019 Bad Gal Bang Mascara Binoster set	\$25.00
TT682	6 02004E+11	West Coast Wonders 2019 Take Me Away to Paradise \$	\$27.00

EXHIBIT "A"

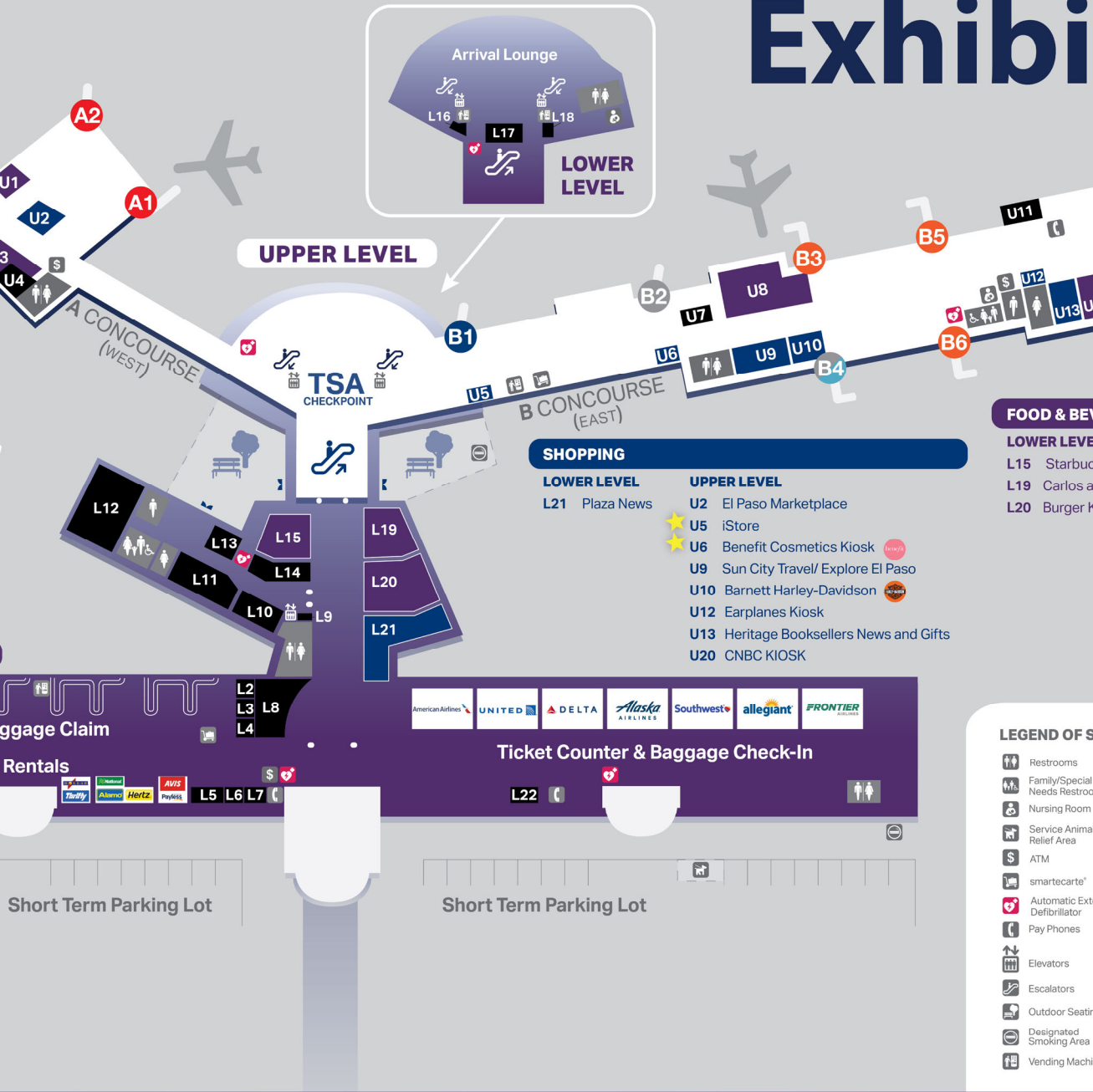
Price List For IStore Swfit		Effective Date :	2021-08-24 13:58:00.0
SKU	UPC	Product Name	List Price (\$) Default
Products :		Store R1 2.1.1 - Apple	
13849	633755138492	Naztech Elite USB-C Charge & Sync Cable, Black	29.99
14592	633755145926	HyperGear Pocket Boost 5200mAh Portable Battery	29.99
14668	633755146688	HyperGear ChargePad Pro Wireless Fast Charger 15W	39.99
15167	633755151675	HyperGear 10000mAh Dual USB+USB-C Power Bank LED	49.99
15178	633755151781	Naztech Braided 3-in-1 Hybrid USB Cable, Silver	34.99
1661	811613033572	Happy Plugs Air1 Plus In-Ear Headphones, Black	99.99
1663	811613033596	Happy Plugs Air1 Plus In-Ear Headphones, Pink Gold	99.99
70034/Bl	822279016595	My Tagalongs Earbud Case, Black	11.99
70038/Rose	822279005551	My Tagalongs Earbud Case, Vixen Pink	11.99
800470	842978135083	PopSockets PopGrip Phone Stand, Black	12.99
801914	842978157993	PopSockets PopGrip Mirror, Pink Blossom	19.99
801938 PW+	842978158082	PopSockets PopWallet+, Blush Pink	24.99
99MO022146	810648018554	Moshi Progeo USB-C Laptop Charger 65 W (US), White	74.99
99MO035246	888112000817	Moshi Mythro C USB Type-C In-Ear, Gunmetal Grey	49.99
99MO084214	810648018547	Moshi USB-C to Dual USB-A Adapter, Space Grey	24.99
99MO084249	888112001661	Moshi USB-C Digital Audio Adapter with Charging	39.99
99MO123031	888112003436	Moshi Pebbo AirPods Case, Black	29.99
99MO123032	888112003443	Moshi Pebbo Case AirPods Pro, Black	29.99
99MO123161	888112003481	Moshi Pebbo AirPods Case, Beige	29.99
BEATSPRONAVY	1901999066998	Beats Powerbeats Pro Totally Wireless In-ear Navy	249.99
BTT-Sp	0339991076617	Scosche FlyTunes Wireless Audio Transmitter, Black	39.99
EBJBUUSAIREXECR	812887018623	Lab Jbuds Air Executive True Wireless, Black	79.99
EBJBUUSAIRCONR	812887018647	Lab ICON True Wireless Earbuds + Charging Case	59.99
EBJBUUSAIRSPRTR	812887018630	Lab Jbuds Air Sport True Wireless, Black	69.99
GS-2IN1666XU3V3	804272752533	Gigastone 128GB Memory Card	32.99
IST-20006	776704098918	Store ClassicFit Earbuds w/Mic 3.5mm, Matte White	21.99
IST-20007	776704098864	Store ClassicFit Earbuds w/Mic 3.5mm, Matte Black	21.99
IST-20014	776704098987	Store Power Cube Duo 24W 2 Ports, Foldable Prongs	24.99

IST-20017	776704099007	Store Headphones Splitter, Black	17.99
IST-20104	633755143656	Store Metallic Earbuds, Silver	21.99
IST-20106	633755143670	Store Metallic Earbuds, Rose Gold	21.99
IST-20114	776704099113	Store Lightning Charge Cable, (1.6 ft.), White	21.99
IST-20115	776704099120	Store Lightning Charge Cable, (3.3 ft.), White	24.99
IST-20116	776704099137	Store Lightning Charge Cable, (6.6 ft.), White	29.99
IST-20118	776704099168	Store Charge Set SW Cube & Twin USB-C & Micro-USB	29.99
IST-20124	633755149931	Store Lightning Audio Adapter MFi Rugged, Silver	19.99
IST-20142	776704099397	Store Classic Fit Lightning Earbuds w/Mic, Matte	39.99
IST-20143	776704099403	Store Classic Fit Lightning Earbuds w/Mic, Dusty	39.99
IST-20145	776704099427	Store USB-C to Lightning Cable 1m, White	29.99
MDRX110NC/B	027242879362	Sony ZX110NC Noise-Canceling Over-Ear Headphones	49.99
MMTN2AM/A	190198001696	Apple EarPods Lightning, White	38.99
MMXX62AM/A	190198001757	Apple Lightning to 3.5 mm Headphone Jack Adapter	14.99
MR162LL/A	190198723352	Beats Solo Pro Wireless On-Ear ANC, Black	299.99
MUF72AM/A	190198914460	Apple USB-C Charge Cable, (3.3 ft.) (1 m)	29.99
MV7N2AM/A	190199098428	Apple AirPods (2nd Gen), White	179.99
MWNV2LL/A	190199246225	Beats Powerbeats 2020 Wireless In-ear, Black	149.99
MWVP22AM/A	190199246850	Apple AirPods Pro, Wireless Case, White	299.99
MX2E2AM/A	1901999291027	Apple Watch Magnetic Charging Cable, (3.3 ft.)	38.99
MXLY2AM/A	1901995534827	Apple Lightning to USB Cable, (3.3 ft.) (1 m)	29.99
MY582LL/A	190199096950	Beats Powerbeats Pro Totally Wireless In-ear Black	249.99
WH1000XM4/B	027242919419	Sony 1000XM4 Wireless Noise Cancelling OverEar (B)	349.99
WH1000XM4/S	027242919426	Sony 1000XM4 Wireless Noise Cancelling OverEar (S)	349.99
WHCH510/B	027242916692	Sony CH510 Wireless Headphones On-Ear, Black	59.99
WHCH710N/B	027242918948	Sony CH710N Wireless Noise Canceling Over Ear	199.99
WIXB400/B	027242916630	Sony WIXB400 Wireless In-Ear Headphones, Black	59.99

EXHIBIT B

CONCESSION SITE(S)

Exhibi



SHOPPING

LOWER LEVEL

L21 Plaza News

UPPER LEVEL

- U2 El Paso Marketplace
- ★ U5 iStore
- ★ U6 Benefit Cosmetics Kiosk
- U9 Sun City Travel/ Explore El Paso
- U10 Barnett Harley-Davidson
- U12 Earplanes Kiosk
- U13 Heritage Booksellers News and Gifts
- U20 CNBC KIOSK

FOOD & BEV

LOWER LEVEL

- L15 Starbuck
- L19 Carlos a
- L20 Burger K

LEGEND OF S

- Restrooms
- Family/Special Needs Restroom
- Nursing Room
- Service Animal Relief Area
- ATM
- smartcarte*
- Automatic Exte Defibrillator
- Pay Phones
- Elevators
- Escalators
- Outdoor Seatin
- Designated Smoking Area
- Vending Machir



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