

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

**DEPARTMENT:** Aviation

**AGENDA DATE:** July 5, 2011

**CONTACT PERSON/PHONE:** Monica Lombraña, A.A.E. -780-4793

**DISTRICT(S) AFFECTED:** All

**SUBJECT:**

Resolution authorizing the City Manager to sign a Concession Agreement by and between the City of El Paso (City) and NewZoom, Inc. (Concessionaire). The term of the agreement will be for a period of six (6) months continuing thereafter on a month-to-month basis not to exceed three (3) years.

**BACKGROUND / DISCUSSION:**

The Concession Agreement will allow the Concessionaire the right to operate automated retail stores, ZoomShops, at the Airport. The first location will be a Best Buy concept offering consumer electronics (see attached) located in Concourse B. The Concessionaire may add additional locations and brands upon the approval of the Airport.

Percentage of rentals to be paid to the City:

- Seven percent (7%) of gross revenue derived from consumer electronic concepts.
- Nine and one half percent (9.5%) of gross revenues derived from products other than consumer electronic concepts.

**PRIOR COUNCIL ACTION:**

N/A

**AMOUNT AND SOURCE OF FUNDING:**

N/A Revenue Generating

**BOARD / COMMISSION ACTION:**

N/A

\*\*\*\*\*REQUIRED AUTHORIZATION\*\*\*\*\*

**DEPARTMENT HEAD:**



\_\_\_\_\_  
Monica Lombraña, A.A.E., Director of Aviation

*Information copy to appropriate Deputy City Manager*

## RESOLUTION

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

That the City Manager be authorized to sign a Concession Agreement between the City of El Paso and NewZoom, Inc. dba ZoomSystems to operate automated retail stores, ZoomShop(s), for the sale of consumer electronics in the terminal building of the El Paso International Airport.

ADOPTED this \_\_\_\_ day of \_\_\_\_\_ 2011.

### CITY OF EL PASO:

\_\_\_\_\_  
John F. Cook  
Mayor

### ATTEST:

\_\_\_\_\_  
Richarda Duffy Momsen  
City Clerk

### APPROVED AS TO FORM:



\_\_\_\_\_  
Theresa Cullen  
Deputy City Attorney

### APPROVED AS TO CONTENT:



\_\_\_\_\_  
Monica Lombraña, A. A. E.  
Director of Aviation

# **CONCESSION AGREEMENT**

**El Paso International Airport  
El Paso, Texas**

**NewZoom, Inc.  
Concessionaire**

**July 5, 2011  
Effective Date**

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**ATTACHMENTS:**

**EXHIBIT A** - Brand and Locations

**EXHIBIT B** - Placement Request

**EXHIBIT C** - Design and aesthetics, including signage and the attached monitor, of ZoomShop(s)

# CONCESSION AGREEMENT

NewZoom, Inc.

THIS CONCESSION AGREEMENT, ("Agreement"), entered into this \_\_\_\_\_ day of \_\_\_\_\_, 2011 by and between the CITY OF EL PASO ("the City") and NEWZOOM, INC., a California corporation dba ZoomSystems ("the Concessionaire").

## WITNESSETH;

WHEREAS, the City owns and operates El Paso International Airport ("Airport"); and

WHEREAS, the Concessionaire desires to operate automated retail store(s) ZoomShop(s) at the Airport,

NOW THEREFORE, the City and the Concessionaire, for and in consideration of the covenants, conditions and agreements provided hereinafter, do agree as follows:

## ARTICLE I TERM, CONCESSIONAIRE'S PRIVILEGES, IMPROVEMENTS AND MAINTENANCE

### Section 1.01 Definitions.

1. The term "Airport" means the El Paso International Airport, as shown on the Airport Layout Plan on file at the El Paso International Airport administrative offices and as it may be modified or expanded by the City from time to time.
2. The term "Brand" whenever used herein, means a branded retailer.
3. The term "Consumer Electronics" whenever used herein, means any device containing an electronic circuit board and any ancillary components that are intended for everyday use by individuals.
4. The term "Designated Representative" whenever used herein, means the Director of Aviation of the El Paso International Airport or her designee.
5. The term "Products" whenever used herein, means the assortment of products available for purchase from the ZoomShop.
6. The term "ZoomShop" whenever used herein, means the automated retail store furnished by the Concessionaire during the term of this Agreement and surrounding area as defined on EXHIBIT A.

**Section 1.02 Term.** The term of this Agreement will be for a six (6) month term from the Effective Date, continuing thereafter on a month-to-month basis not to exceed three (3) years, until canceled by either party.

**Section 1.03 Operation of the ZoomShop(s).** The Concessionaire will have the right to operate the ZoomShop(s) as herein set forth and for other business purposes necessary and incidental thereto but not for any other purpose.

1. The Concessionaire, on a non-exclusive basis, will offer various products from the ZoomShop(s). Each ZoomShop is merchandised with an assortment of products by or on behalf of a branded retailer located as outlined in EXHIBIT A. The initial Location and Brand for the ZoomShop shall be as set forth in EXHIBIT A. The parties may remove existing ZoomShop(s) or add additional Locations and Brands from time-to-time upon execution of a Placement Request in the form attached as EXHIBIT B. Upon execution of a Placement Request by the Concessionaire and the City's Designated Representative, the City's Designated Representative shall issue a new EXHIBIT A identifying additional Location(s) and Brand(s). The new EXHIBIT A will be dated and attached to this Agreement and made a part hereof.
2. It is understood and agreed by the parties that the product rights to be sold from the ZoomShop(s) are limited and privileged rights of the Concessionaire. If, in the sole judgment of the City's Designated Representative, the Concessionaire is promoting or offering for sale items not included within the scope of the purpose of this Agreement, it will be considered a material breach of this Agreement and written notice will be given by the City's Designated Representative of such breach. The Concessionaire will have twenty-four (24) hours to remedy the breach cited in the written notice. If no action is taken by the Concessionaire, the City will have the right to cancel this Agreement under the terms of Section 3.11 entitled "Cancellation by City".
3. The Concessionaire, or its contractor, will stock the ZoomShop(s) with products. The ZoomShop(s) will be serviced, maintained and cleaned by the Concessionaire.

**Section 1.04 Hours of Operation.** The Concessionaire will offer its services to the public 24 hours daily, seven (7) days per week, including Sundays and holidays, excluding only that time that the ZoomShop(s) is being cleaned, serviced or re-stocked.

**Section 1.05 Control of Personnel.** The Concessionaire will, in and about the ZoomShop(s) and elsewhere upon the Airport, exercise reasonable control over the conduct, demeanor and appearance of its employees, agents, and representatives and the conduct of its contractors and suppliers. Upon objection from the City's Designated Representative to the Concessionaire

concerning the conduct, demeanor or appearance of such persons, the Concessionaire will, within a reasonable time, remedy the cause of the objection.

The Concessionaire agrees that all of its employees, agents, representatives, contractors, and suppliers must be authorized in advance by the City to enter restricted areas. The Concessionaire agrees that no person authorized to enter a restricted area by virtue of this Agreement, shall permit any person, who is not otherwise authorized, to enter a restricted area unless such unauthorized person is, at all times while in the restricted area, in the company of an authorized person, subject to all applicable security requirements.

**Section 1.06 Cleaning and Care of ZoomShop(s).** The Concessionaire agrees to perform maintenance (including cleaning) to the ZoomShop(s) and any improvements placed thereon to such a standard of appearance as is suitable to the City's Designated Representative in order that said ZoomShop(s) will not diminish or in any manner detract from the appearance of the Airport's Terminal Building complex. Should the Concessionaire fail to maintain the ZoomShop(s) and improvements in the manner described above, the City's Designated Representative may, but is not obligated to, effect such maintenance or make repairs thereon and thereto which it feels are necessary, and charge the same as the sole expense of the Concessionaire.

**Section 1.07 Ingress and Egress and Vehicle Parking.**

1. The Concessionaire will have the nonexclusive right, in common with other Airport concessionaires and the general public, for ingress to and egress from the Airport.
2. The Concessionaire will not have the right to free parking of vehicles in the Airport's public parking areas for the Concessionaire, its employees, agents, representative, clients, customers, contractors or subcontractors.
3. The City may provide an employee parking area at the Airport which will be available for use by the Concessionaire's employees, agents, representatives, contractors, and suppliers whose work is at the Airport, subject to the condition that this employee parking area will not be used by the Concessionaire's employees, agents, representatives, contractors, and suppliers who are not performing duties related to the terms and conditions of this Agreement. The use of such employee parking area and the fees to be paid to the City for use thereof by the Concessionaire's employees, agents, representatives, contractors, and suppliers will be paid in a similar manner and at the same cost per month, as paid by other Airport concessionaires. The employee parking area fees may be established and re-established from time to time by the City without liability.

**Section 1.08 Improvements, Facilities and Service to be provided by City.** In the operation of the Concessionaire's activities at the Airport, the City will provide the following:

1. Basic lighting fixtures for general area illumination and the ordinary electric power therefor at the ZoomShop(s).
2. Basic heat and air conditioning to the ZoomShop(s) as such heat and air conditioning are provided for general Airport areas.
3. Systems repair to basic utilities at the ZoomShop(s).
4. All building exterior and structural repairs to the Airport's Terminal Building except those made necessary by negligence or willful misconduct on the part of the Concessionaire or employees, agents, representatives, contractors, and suppliers.

**Section 1.09 Improvements, Utilities and Equipment to be Provided by Concessionaire.** In the operation of the Concessionaire's activities under the terms and conditions of this Agreement, the Concessionaire will provide and maintain:

1. All improvements, decorations, equipment and furnishings as approved by the City's Designated Representative required for the concession beyond the basic ZoomShop(s) furnished by the Concessionaire. All improvements will include, but not be limited to, the necessary finishes, electrical, telephone, communication conduit and accessories piping, duct work, equipment and fixtures to complete the appearance and operating characteristics of the ZoomShop(s).
2. Janitorial service (including cleaning) and garbage disposal from the ZoomShop(s). The Concessionaire will be responsible for the removal and disposal of all garbage, debris, contaminants and any other waste material from the ZoomShop(s) resulting from its operation. Such removal will conform to all governmental requirements and regulations.
3. Connection of additional utilities and recurring periodical charges to operate the ZoomShop(s) which are over and above the basic utilities provided by the City.
4. Any additional or decorative lighting, including replacement of light bulbs and tubes for the ZoomShop(s) as approved by the City's Designated Representative.

**Section 1.10 Construction Standards, Rules and Regulations.**

1. Any improvements to the Airport Terminal, if allowed by the City's Designated Representative, performed by the Concessionaire will be subject to the City's Airport Rules and Regulations. Design and construction specifications and

documents must be reviewed and approved by the City's Designated Representative prior to commencement of construction of any improvements.

2. Any changes to the ZoomShop(s) will be subject to any statute, ordinance, rule or regulation of any applicable governmental agency, department or authority whether federal, state, or municipal.

**Section 1.11 Security.** The Concessionaire shall comply with all the City's and Transportation Security Administration (TSA) security directives, rules and regulations, in effect as of the Effective Date or as may be modified or enacted from time to time throughout the Term. The Concessionaire agrees that fines and/or penalties may be assessed by the TSA for the Concessionaire's noncompliance with the provisions of 49 CFR Parts 1540 and 1542 entitled "Airport Security" or by other agencies for noncompliance with regulations applicable to the Concessionaire's operations. In the event the TSA or any other agency assesses a civil penalty against the City for any violation of any rule, regulation or standard as a result of any act or failure to act on the part of the Concessionaire, its employees, agents, representatives, contractors, and suppliers, the Concessionaire shall, upon demand of the City, immediately pay the City the amount of the civil penalty assessed.

**Section 1.12 Signs and/or Works of Art.**

1. The Concessionaire will not erect, install, operate, or cause or permit to be erected, installed or operated in or upon any Airport premises any signs or other similar advertising devices for its own business.
2. Any identifying signs attached to the ZoomShop(s) will require the prior written approval of the City's Designated Representative. Such written consent may consider factors including, but not limited to, size, type, content and method of installation and will not be unreasonably withheld. Notwithstanding the foregoing, the Concessionaire's design and aesthetics, including signage and the attached monitor as identified and shown on EXHIBIT C attached hereto and made a part hereof, are approved. The City's Designated Representative shall determine the acceptable volume for the attached monitor.
3. The Concessionaire will not commission, install or display any work of art on the ZoomShop(s) without the prior written approval of the City's Designated Representative.

## ARTICLE II CONCESSION FEES

**Section 2.01 Concession Fees.** Commencing upon the effective date of this Agreement, the Concessionaire will pay the City as follows:

- Seven percent (7%) of gross revenue derived from this Concession on consumer electronic concepts.
- Nine and one half percent (9.5%) of gross revenues derived from this Concession on products other than consumer electronic concepts.

**Section 2.02 Gross Revenue.** The term “Gross Revenue” whenever used herein, will mean the following:

1. Gross revenue will be defined as the total dollar amount derived or received by the Concessionaire as the total price of merchandise and service as a result of its operation under this Agreement at the Airport whether for cash or credit and whether collected or uncollectable.
2. The Concessionaire will have the right to make credit sales, but will solely bear the attendant risk.
3. Gross revenue will exclude retail sales taxes, excise taxes or related direct taxes upon the consumer which are collected by the Concessionaire as such and paid to the taxing entity.

**Section 2.03 Method of Payment.**

1. All payments required by the Concessionaire shall be paid to the City at the following address:

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

or to such other place as designated by written notice to the Concessionaire by the City.

2. Any amounts due the City from the Concessionaire whether for utility or maintenance or other charges as provided herein, will be paid by the Concessionaire within fifteen (15) days of the invoice therefor.

3. On the twentieth (20th) day of each month, the 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. Such statement will be certified by an officer of the Concessionaire as being correct and true. The statement will include a calculation of the percentage due the City. The Concessionaire will remit, at the same time, its check for the amount due the City as a concession fee. The statements submitted must be submitted on forms which are approved by the City's Designated Representative.
4. The Concessionaire agrees to pay interest in an amount equal to the highest rate allowed by applicable law for any payment of fees or other charges accruing hereunder and not paid within ten (10) days from the time payment is due.
5. Within three hundred ninety-five (395) days after the Effective Date of this Agreement or upon thirty (30) days written notice from the City's Designated Representative, the Concessionaire will provide the City with a detailed statement of Gross Revenue for the previous twelve (12) months' business operations prepared in accordance with generally accepted accounting principles. Such statements are to be prepared by an independent Certified Public Accountant or the Accounting Department of the Concessionaire, at the sole discretion of City's Designated Representative, and certified by an officer of the Concessionaire as to being correct and true and will include a written opinion as to whether these Gross Revenues and monthly payments have been made in accordance with the provisions of this Agreement. Should such statements show that the amount paid during the period of review was less than that which was due, the Concessionaire will immediately remit the additional amount to the City. Should such statement show that the Concessionaire paid the City more than was due, after review and verification by the City's Designated Representative a credit memo will be issued to be applied against future concession fees, except that if such should be the case at the end of the last month of this Agreement, the City will refund the overpayment to the Concessionaire.

**Section 2.04 Records and Audit.**

1. The Concessionaire agrees to produce within seven (7) working days any requested accurate books, records, and accounts of all revenues received from the Concessionaire's business authorized under this Agreement to the City's Designated Representative for inspection of such representative, agents, employees or accountants as he/she may designate.
2. The City will, at any time, have the right to cause an audit of the business of the Concessionaire to be made by a Certified Public Accountant of the City's selection and if the financial statements previously made to the City by

Concessionaire will be found to be intentionally understated in any respect or to be understated (either intentionally or unintentionally) by a greater margin of three percent (3%) of the Concessionaire's Gross Revenue for the period of review, then the Concessionaire will immediately pay to the City the costs of such audit, as well as the additional payments shown to be payable to the City by the Concessionaire. Otherwise, the cost of the audit will be paid by the City.

If such audit discloses any willful and intentional inaccuracies, this Agreement, at the option of the City and as a cumulative remedy, may be thereupon canceled and terminated.

### **ARTICLE III ASSIGNMENT, INDEMNIFICATION, INSURANCE AND CANCELLATION**

**Section 3.01 Assignment.** The Concessionaire will not assign its rights or duties hereunder or any estate created hereunder, in whole or in part.

**Section 3.02 Subleasing.** The Concessionaire will not sublease, rent or permit any persons, firms or corporations to occupy or otherwise utilize any part of the ZoomShop(s).

**Section 3.03 Financing.** The City acknowledges it will have no security or other interest in the equipment, trade fixtures, inventory and personal property improvements belonging to the Concessionaire ("ZoomShop(s) Hardware"). The City acknowledges that ZoomShop(s) Hardware may be owned by a third party financier ("the Financer") and leased to the Concessionaire. The Concessionaire will notify the City of the name and address of any financiers. With ten (10) days written notice to the City from the Financer, the Financer may enter the Airport and remove ZoomShop Hardware. The Concessionaire shall be responsible for all costs, expenses and damages incurred by the City because of any actions of a Financer, its employees, agents, representatives, contractors, or agents in connection with the entry on Airport premises and removal of ZoomShop(s) Hardware. Should any ZoomShop(s) Hardware be removed from the Airport during the term of this Agreement, the Concessionaire shall continue to be responsible for its responsibilities under this Agreement.

**Section 3.04 Liens.** The Concessionaire will cause to be removed any and all liens of any nature including, but not limited to, tax liens and liens arising out of or because of any installation performed by or on behalf of the Concessionaire or any of its contractors or subcontractors upon the Concessionaire's ZoomShop(s) or arising out of or because of the performance of any work or labor to it or them at said ZoomShop(s) or the furnishing of any materials to it or them for use at said ZoomShop(s). Should any such lien be made or filed, Concessionaire will bond against or discharge the same within thirty (30) days after written request by the City's Designated Representative.

**Section 3.05 Taxes, Licenses and Permits.** The Concessionaire shall be responsible for payment of any and all payroll taxes or other assessments attributable to the operation of the Concessionaire's business, improvements or personal property pursuant or allowed under this Agreement regardless of ownership or title to same. In addition, the Concessionaire shall pay all taxes and governmental charges of any kind whatsoever that may be assessed against the Concessionaire or the City with respect to any improvements, Equipment, personal property or inventory thereon or Concessionaire's activities under this Agreement. Upon ten (10) days notice from the City's Designated Representative and no cost to the City, the Concessionaire shall provide written proof satisfactory to the City that all taxes and governmental charges of any kind.

The Concessionaire may elect, however, at its own cost and expense to contest any such tax, excise, levy or assessment. **The Concessionaire further indemnifies the City from all tax liability including but not limited to ad valorem real property taxes and personal property taxes that may arise in relation to the Concessionaire's activities in furtherance of this Agreement.**

The Concessionaire will keep current Federal, State or local licenses or permits required for the conduct of its business.

**Section 3.06 Indemnity.** The Concessionaire agrees to indemnify and hold the City harmless against any and all claims, demands, damages, costs, 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 Concessionaire's privilege, operation, or conduct at the location(s) identified on EXHIBIT A including claims and damages arising in whole, or in part, from the negligence of the City. In case of any action or proceeding brought against the City by reason of any such claim, the Concessionaire, upon notice from the City, agrees to defend the action or proceeding by counsel acceptable to the City.

**Section 3.07 Insurance.** The Concessionaire, at its sole cost and expense, shall throughout the term of this Agreement, keep or cause to be kept on all improvements now or hereafter located upon the premises insurance for the mutual benefit of the City and the Concessionaire against loss or damage by fire and against loss or damage by other risks embraced by "extended coverage" and against civil commotions, riots, vandalism and malicious mischief in an amount equal to the actual replacement cost of such improvements without deduction for depreciation (hereinafter called "Full Insurable Value").

**Section 3.08 Liability Insurance.** The Concessionaire, at its sole cost and expense, shall throughout the term of this Agreement, provide and keep in force for the benefit of the City and the Concessionaire, as their respective interests may appear, comprehensive general liability insurance in an amount not less than Two Hundred Fifty Thousand Dollars (\$250,000.00) for bodily injury to one person for each occurrence, Five Hundred Thousand Dollars (\$500,000.00) for bodily injuries to more than one person arising out of each occurrence and One Hundred Thousand Dollars (\$100,000.00) for property damage growing out of each occurrence and 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.

**Section 3.09 Authorized Insurance Companies.** 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 the City, such approval not to be unreasonably withheld. Such policy shall be delivered to the City at least ten (10) days prior to the effective date of the insurance policy. Each policy shall contain:

- A. A statement of the coverage;
- B. A statement certifying the City is listed as an additional insured;
- C. A statement of the period during which the policy is in effect;
- D. A statement that annual premium or the advance deposit premium for such policy has been paid in advance; and
- E. An agreement by the insurance company issuing such policy that the policy shall not be canceled or reduced in any amount for any reason whatsoever without at least fifteen (15) days' prior written notice to the City.

**Section 3.10 Termination.** This Agreement shall terminate at the expiration of the term hereof, or sooner as provided in this Agreement, and Concessionaire shall thereafter have no further interest or right in the premises.

**Section 3.11 Cancellation by City.** This Agreement shall be subject to cancellation by the City in the event the Concessionaire shall:

1. Be in arrears in the payment of whole or any part of the amounts agreed upon hereunder for a period of ten (10) days from the date said payments are due.
2. File in any court a petition in bankruptcy or insolvency or for the appointment of a receiver or trustee of all or a portion of the Concessionaire's property.
3. Make an assignment of any interest in this Agreement for the benefit of creditors.
4. Be adjudged bankrupt in involuntary bankruptcy proceedings.
5. Be made party to a receivership proceeding in which a receiver is appointed for the property of affairs of the Concessionaire.
6. Abandon the premises for ten (10) days.

7. Default in the performance of any of the covenants and conditions (except rental payments required herein to be kept and performed by the Concessionaire, and such default continues for a period of ten (10) days after receipt of written notice from the City of said default.
8. Be determined by the City that Concessionaire had an intent to deprive the City of rental payments due and payable under this Agreement.

In any of the aforesaid events, the City may immediately cancel this Agreement and take immediate possession of the premises and remove the Concessionaire's effects forcibly, if necessary, without being deemed guilty of trespassing and without incurring liability to the Concessionaire for damages.

The failure of the City to declare this Agreement terminated upon the default of the Concessionaire for any of the reasons shall not operate to bar or destroy the right of the City to cancel this Agreement for any subsequent violation of the terms of this Agreement.

**Section 3.12 Waivers and Acceptance of Fees.**

1. No waiver of default by either party hereto of any of the terms, covenants or conditions hereof to be performed, kept or observed will be construed to be or act as a waiver of any subsequent default of any of the terms, covenants, conditions herein contain to be performed, kept and observed.
2. No acceptance of fees or other money payments in whole or in part for any period or periods during or after default of any of the terms, conditions or covenants to be performed, kept or observed by the Concessionaire will be deemed a waiver on the part of the City of its right to terminate this Agreement on account of such default.

**Section 3.13 Disposal of Improvements at Termination.** Upon termination of this Agreement howsoever caused, the City will require the Concessionaire to remove the ZoomShop(s) Hardware. In the event that the Concessionaire fails to remove the ZoomShop(s) Hardware within thirty (30) days following termination of this Agreement, the ZoomShop(s) Hardware shall be deemed the property of the City, and the City shall dispose of the ZoomShop(s) Hardware at its discretion and without further liability to the Concessionaire.

For purposes of this Section, the words "equipment, trade fixtures and personal property" will include, but not be limited to, signs (electrical or otherwise) used to advertise or identify the Concessionaire's business, all equipment used in connection with the conduct of its business or any other mechanical device; and all other miscellaneous equipment, furnishings and fixtures used by the Concessionaire in connection with the Concessionaire's business thereon.

**Section 3.14 Suspension and Abatement.** In the event that the City's operation of the Airport or the Concessionaire's operation from the ZoomShop(s) should be restricted substantially by action of the Federal Government or agency thereof or the actions of any other governmental entity or agency thereof or by any judicial or legislative body, then either party hereto will have the right, upon written notice to the other, to a suspension of this Agreement and an abatement of an equitable proportion of the payments to become due hereunder, from the time of such notice until such restrictions will have been remedied and normal operations restored.

**Section 3.15 Recovery of ZoomShop(s) Location.** The City may, in its unlimited discretion, at any time during the term of this Agreement or any extensions thereof, recover all or any part of the ZoomShop(s) location for other Airport or public uses. Prior to the exercise of this power of recovery, the City agrees to give the Concessionaire thirty (30) days prior written notice of its intention to exercise this power. In the event of such taking, the City will use best efforts to find a suitable location for the placement of the ZoomShop(s). The Concessionaire will retain the right to terminate this Agreement if such replacement location is considered unsuitable in its judgment.

#### **ARTICLE IV GENERAL PROVISIONS**

**Section 4.01 Conflicts Between Concessions.** In the event of a conflict between the Concessionaire and any other concessionaire on Airport premises as to the services to be offered or sold by respective concessionaires or City's Designated Representative shall decide which services may be offered or sold by each concessionaire and the Concessionaire agrees to be bound by such decision.

**Section 4.02 Inspection.** The Concessionaire, by its officers, employees, agents and representatives, shall have the right, at all reasonable times, to inspect the ZoomShop(s) and to observe the performance by the Concessionaire of its obligations hereunder, and for the doing of any act which the Concessionaire may be obligated to perform, or have the right to do, under this Agreement.

**Section 4.03 Taxes and Other Charges.** The Concessionaire shall be responsible for payment of any and all payroll taxes or other assessments attributable to the operation of the Concessionaire's business, improvements or personal property located on the location(s) identified on EXHIBIT A regardless of ownership or title to same. In addition, the Concessionaire shall pay all taxes and governmental charges of any kind whatsoever that may be assessed against the Concessionaire or the City with respect to any ZoomShop(s) Hardware improvements, Equipment, personal property or inventory thereon or Concessionaire's activities under this Agreement. Upon ten (10) days notice from the Director and no cost to the City, the Concessionaire shall provide written proof satisfactory to the City that all taxes and governmental charges of any kind. **The Concessionaire further indemnifies the City from all tax liability including but not limited to ad valorem real property taxes and personal**

**property taxes that may arise in relation to the Concessionaire's activities in furtherance of this Agreement.**

**Section 4.04 Intention of Parties.** This Agreement is intended solely for the benefit of the City and the Concessionaire and is not intended to benefit, either directly or indirectly, any third party or member(s) of the public at large. Any work done or inspection of the ZoomShop(s) by the City is solely for the benefit of the City and the Concessionaire

**Section 4.05 Attorney's Fees.** If either the City or the Concessionaire brings any action or proceeding to enforce, protect or establish any right or remedy hereunder, the prevailing party shall be entitled to recover reasonable attorney's fees and court costs, as determined by a court of competent jurisdiction, in addition to any other relief awarded.

**Section 4.06. Non-Waiver.** No waiver of any breach of default hereunder shall constitute a waiver of any other breach or default, whether of the same or any other covenant or condition. No waiver, benefit, privilege or service voluntarily given or performed by either party shall give the other party any contractual right by custom, estoppel or otherwise.

**Section 4.07. Independence of Agreement.** It is understood and agreed that nothing herein contained is intended or should be construed as in any way creating or establishing a partnership relationship between the parties hereto, or as constituting the Concessionaire as the agent, representative or employee of the Concessionaire for any purpose or in any manner whatsoever. The Concessionaire is to be, and shall remain, an independent contractor with respect to all services performed hereunder.

**Section 4.08 Enjoyment.** The Concessionaire agrees that the Concessionaire, upon payment of rent and all other charges and upon observation of the terms of this Agreement, shall lawfully and quietly hold, occupy, and enjoy the location(s) identified on EXHIBIT A during the full term of this Agreement without hindrance or interference from the Concessionaire or anyone claiming by, through, or under the Concessionaire. The Concessionaire's agreement is subject, however, to the Concessionaire holding and enjoying the location(s) identified on EXHIBIT A under conditions which may reasonably be anticipated in connection with the operation of aircraft or an airport or construction activities associated with the renovation, repair or expansion of any Airport Premises.

**Section 4.09 Section Headings.** The section headings contained herein are for the convenience in reference and are not intended to define or limit the scope of any provision of this Agreement.

**Section 4.10 Notices.** Notices to the Concessionaire provided for herein shall be sufficient if sent by registered mail, postage prepaid, addressed to:

CITY: Director of Aviation  
El Paso International Airport  
6701 Convair Road  
El Paso, Texas 79925-1091

CONCESSIONAIRE: NewZoom, Inc., dba ZoomSystems  
22 Fourth Street, Floor 16  
San Francisco, California 94103

or to such other addresses as the parties may designate to each other in writing from time to time.

**Section 4.11 Successor and Assigns.** All of the terms, covenants, and agreements herein contained shall be binding upon and shall inure to the benefit of successors and assigns of the respective parties hereto.

**Section 4.12 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.

**Section 4.13 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.

**Section 4.14 Non-Discrimination Covenant.** The Concessionaire, for itself, its personal representatives, successors in interest and assigns, as part of the consideration hereof, does hereby covenant and agree as follows:

1. That no person on the grounds of race, creed, color, sex, age, disability or national origin shall be excluded from participation in, denied the benefits of, or be otherwise subjected to discrimination.
2. That in the construction of any improvements on, over, or under the location(s) identified on EXHIBIT A and the furnishing of services thereon, no person on the grounds of race, creed, color, sex, age, disability or national origin shall be excluded from participation in, denied the benefits of, or otherwise subjected to discrimination.
3. That the Concessionaire shall use the location(s) identified on EXHIBIT A in compliance with all requirements imposed by, or pursuant to, Title 49, Code of Federal Regulations, Department of Transportation, Subtitle A., Part 21, Nondiscrimination in federally-assisted programs of the Department of Transportation-Effectuation of Title VI of the Civil Rights Act of 1964, and as

said Regulation may be amended. The Concessionaire shall also comply with the applicable provisions of Section 504 of the Rehabilitation Act of 1973 (P.L. 93-112) and 49 CFR Part 27.

4. That the Concessionaire shall file the assurances required under City Ordinance 9779 to prohibit discrimination against disabled persons.

Failure of the Concessionaire to comply with the above requirements shall subject the Concessionaire to those sanctions specified in the above rules, regulations and laws and shall constitute a breach of this Agreement.

**Section 4.15 Affirmative Action.** The 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, creed, color, sex, age, disability or national origin be excluded from participating in or receiving the services or benefits of any program or activity covered by this Agreement. The Concessionaire assures that it will require that any covered suborganizations provide assurances to the Concessionaire, as set forth herein, that they similarly will undertake affirmative action programs, and that they will require assurance from their suborganizations to the same effect.

**Section 4.16 Authorization to Enter Agreement.** If the Concessionaire signs this Agreement as a corporation, each of the persons executing this Agreement on behalf of the Concessionaire warrants to the City that the Concessionaire is qualified to do business in the State of Texas, that the Concessionaire has full right and authority to enter into this Agreement, and that each and every person signing on behalf of the Concessionaire is authorized to do so. Upon the City's request, the Concessionaire will provide evidence satisfactory to the City's Designated Representative confirming these representations.

**Section 4.17 Effective Date.** Regardless of the date signed, this Agreement shall be effective as of July 5, 2011.

IN WITNESS WHEREOF, the City and the Concessionaire have executed these presents the day and year first above written.

CITY: CITY OF EL PASO

\_\_\_\_\_  
Joyce A. Wilson  
City Manager

APPROVED AS TO FORM:

  
\_\_\_\_\_  
Theresa Cullen  
Deputy City Attorney

APPROVED AS TO CONTENT:

  
\_\_\_\_\_  
Monica Lombraña, A. A. E.  
Director of Aviation

ACKNOWLEDGMENT

THE STATE OF TEXAS    )  
  )  
COUNTY OF EL PASO    )

This instrument was acknowledged before me on this \_\_\_\_ day of \_\_\_\_\_, 2011, by \_\_\_\_\_ Joyce A. Wilson Manager of the City of El Paso, Texas.

\_\_\_\_\_  
Notary Public, State of Texas

My Commission Expires:  
\_\_\_\_\_

(SIGNATURES CONTINUE ON THE FOLLOWING PAGE)

CONCESSIONAIRE: NewZoom, Inc.

By: [Signature]  
Printed Name: Russ Yoshinaka  
Title: SVP Corporate Development

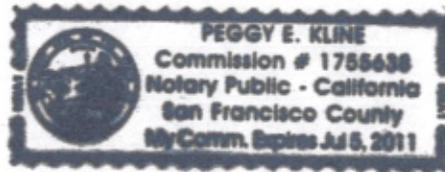
THE STATE OF California  
COUNTY OF San Francisco

This instrument was acknowledged before me on this 16<sup>th</sup> day of June  
2011, by Russ Yoshinaka as SVP Corp Development of NewZoom, Inc.

[Signature]  
Notary Public, State of California

My Commission Expires:

7-5-11



**EXHIBIT A**

**BRAND AND LOCATIONS**

The Parties hereby agree as follows:

1. The initial Location for the ZoomShops shall be as set forth below. The parties may delete existing Locations or add additional Locations from time-to-time upon execution of a Placement Request in the form attached to the Concession Agreement as EXHIBIT B.

<b>Location Name</b>	<b>Location Address</b>	<b>Brand</b>
Location #1	Concourse B Across from Gate 1.	Best Buy

**EXHIBIT B**

**PLACEMENT REQUEST**

This Placement Request # \_\_\_\_\_ is issued under and subject to the terms and conditions of the Concession Agreement by and between NewZoom, Inc. and the City of El Paso dated as of \_\_\_\_\_.

1. Location name and description:
2. Estimated removal or installation date:
3. Brand:
4. Fees: As set forth in Section 2.01 of the Concession Agreement
5. Location improvements (if any): [None][As follows: ]

**NewZoom, Inc.**

**El Paso International Airport**

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

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

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

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

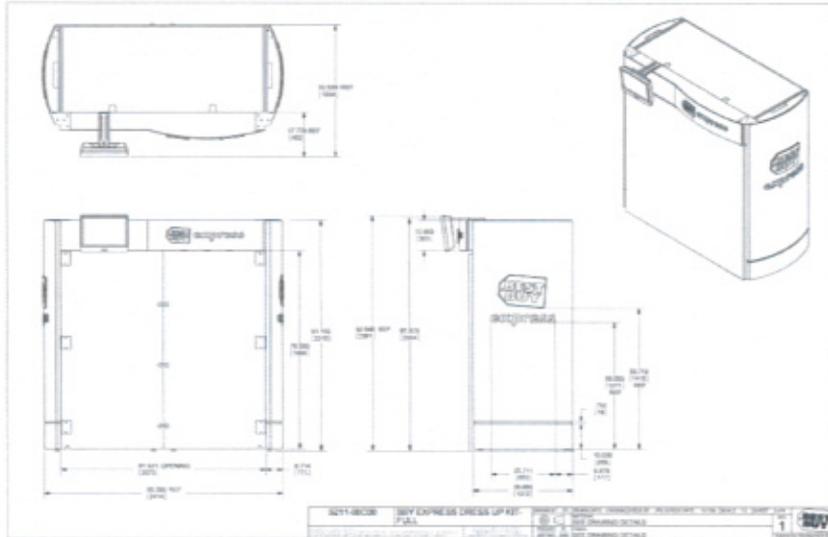
Title: \_\_\_\_\_

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

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

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

## Exhibit C



### Materials Specific to the Best Buy Express Aesthetic

- Blue Laminate (Indigo Blue SB006)
- White Lettering (.236 White Acrylic)
- Hardwood (Poplar)
- White Foil
- Brushed aluminum lamination



**BEST BUY** express

on the go gear

A large vending machine with two glass doors. The left door displays various electronic accessories like headphones and cables. The right door displays mobile phone cases and other small electronics. To the right of the doors is a control panel with a touch screen, a coin slot, and a card reader. Below the control panel is a dispensing area.

