

## MERCHANT GUIDELINES

The following Merchant Guidelines, which incorporate the General Rules of Conduct, Hours of Operation, and Terms and Conditions (collectively referred to as the “**Agreement**”), are agreed to by the person or entity licensing space (“**Merchant**”) from SWAPSMART®. These policies and rules govern the conduct of each Merchant, and each Merchant’s assistants, employees, associates, agents and contractors on the site, including parking lots, walkways, ticket lines, entrance gates and other exterior area as well as the interior sales area.

### General Rules of Conduct

1. Merchants are required to be open for business during Shopper Hours (set forth below) unless otherwise agreed to in writing by SWAPSMART®. *See Section 2 re Fines.*
2. Merchant spaces must be clean and orderly at all times.
3. Merchant personnel must be clean, well kempt, and always professional.
4. Merchant exchange, return, and warranty policies must be clearly posted.
5. Merchant prices must be clearly posted.
6. No handwritten banners, posters, signs, etc.
7. No loud, obnoxious, obtrusive, or otherwise disruptive behavior and/or business practices.
8. Merchants must keep an updated copy of their appropriate licenses, permits, etc (i.e. city / state sales tax, business license, food licenses, etc).
9. Merchants must maintain individual liability insurance policies with a minimum coverage of \$1,000,000 and name SwapSmart® as a named insured.
10. Soliciting donations from patrons, sellers, or employees is prohibited.
11. No pets permitted within the premises except assistance animals.
12. Merchants must keep all business-related activities within the confines of their licensed space; this includes keeping the aisle and overhead areas clear.

### Hours of Operation

<u>Day of the Week</u>	<u>Shopper Hours</u>	<u>Merchant Hours</u>
Monday	CLOSED	CLOSED
Tuesday	CLOSED	CLOSED
Wednesday	CLOSED	CLOSED
Thursday	CLOSED	09:00am – 05:00pm
Friday	10:00am – 06:00pm	08:00am – 07:00pm
Saturday	10:00am – 06:00pm	08:00am – 07:00pm
Sunday	10:00am – 06:00pm	08:00am – 07:00pm

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## Terms and Conditions

The following Terms and Conditions are hereby incorporated by reference in and to Merchant's License Agreement and the foregoing Merchant Guidelines. The Agreement will be posted on the website at [www.TheSwapSmart.com](http://www.TheSwapSmart.com) and will be available at the on-site management office of each SWAPSMART® location. The Agreement is subject to change without notice.

1. Access to Merchant Space.

- 1.1 Merchant and its employees may use the sales space licensed by the Merchant solely for the purpose of selling Merchant's goods. SWAPSMART® may enter Merchant's sales space at any time for any reason. Merchant may not (i) purport to license, assign, sublet, or rent any part of the licensed space to a third party, (ii) permit any third party to use the licensed space in any way (other than customers), (iii) purchase, borrow, license, rent or otherwise acquire spaces from another Merchant, without the express prior written consent of SWAPSMART®. Upon violation of any of the foregoing SWAPSMART® may immediately terminate Merchant's License Agreement.
- 1.2 Merchant may not move into or out of a licensed space during Shopper Hours. All non-sales related operations of Merchant (e.g. adding or removing furniture, fixtures or equipment, signage, stocking, etc.) must be performed outside of Shopper Hours.
- 1.3 Licensor and Licensor's agents shall have the right to enter and inspect the Merchant Space at any time and to make any alterations and repairs that Licensor may deem necessary or desirable. All such activities shall be without any abatement of license fees or liability to Merchant.

2. Fines for Non Compliance with Shopper Hours. Merchants are required to be open for business from their licensed space during Shopper Hours.

- 2.1 Single Day Closing: If Merchant fails to open their space during a Shopper day, then Merchant will pay SWAPSMART® a \$50.00 per incident non-compliance fee. Failure to open the space within the first four (4) Shopper Hours will be deemed failure to open the space for that Shopper day.
- 2.2 Late Opening; Early Closing: If Merchant fails to open their space prior to the earliest Shopper Hour, or closes their space prior the latest Shopper Hour, Merchant will pay SWAPSMART® a \$25.00 per incident non-compliance fee.
- 2.3 Late Closing. SWAPSMART® officially closes as of the latest time posted for Merchant Hours. All Merchants must be off the property by that time or in addition to other remedies, Merchant will pay Licensor a late departure charge of \$25.00 per incident.
- 2.4 Payment of Non-Compliance Fees. Any fees assessed under this Section are due and payable on the first business day following the day on which they are incurred.

3. Vacating Merchant Space. The License Agreement does not have a fixed term and is terminable by Licensor on prior written notice to Merchant. Merchant must have all of its personal property removed from the property by close of Merchant Hours on the termination day of the Merchant's license term. If the termination day of the license does not have Merchant Hours, Merchant must have all of its personal property removed on the last day prior to termination of Merchant's license that does have Merchant Hours. If Merchant fails to remove its property, (i) SWAPSMART® may store the Merchant's property on-site or off-site and charge Merchant the greater of \$50.00 per day or SWAPSMART®' actual costs for storage, such costs deemed due and payable on the day they are incurred by SWAPSMART®, and (ii) SWAPSMART® may dispose of Merchant's property in any manner it determines without compensation of any kind to Merchant. **MERCHANT HEREBY RELEASES SWAPSMART® FROM ANY CLAIMS OF ANY KIND ARISING OUT OF THE DISPOSAL OF MERCHANT'S PROPERTY PURSUANT TO THIS SECTION.**

4. Clean Up. SWAPSMART® will provide cleaning personnel to clean the common areas and bathrooms. Merchant is responsible for cleaning their licensed space. All unused or discarded items must be taken off the premises and may not be put in any on-site

trash receptacle. If Merchant's licensed space is left in an unclean state, SWAPSMART® may clean the space and assess a cleaning fee of up to \$100, payable by Merchant upon receipt of an invoice.

5. Electricity. Electricity may only be used by those spaces designated by SWAPSMART® and only if heavy-duty UL approved cords are used. Cords must be safety routed and may not lie on the ground. Unless otherwise agreed to in writing by SWAPSMART®, electricity is included in your monthly license fee. If electricity is not included or provided to the licensed space, then a charge for providing electricity use will be collected and a receipt issued upon payment.
6. **RIGHT OF OFFSET**. Any fees owed by Merchant to SWAPSMART® under the Merchant Guidelines, Terms and Conditions, License Agreement, or otherwise, that are not timely paid will be off set against any amounts paid by Merchant for the licensed space and such offset will reduce the then-current term of the license on a pro-rata basis.
7. Abandonment of Space. If Merchant abandons the licensed space, SWAPSMART® may immediately terminate Merchant's license to the space. Merchant will be deemed to have abandoned its space if: (i) it provides SWAPSMART® with written or verbal notice that it is abandoning, or has abandoned, the space; (ii) Merchant fails to open for business for three (3) consecutive Shopper days without SWAPSMART®' written consent; or (iii) Merchant removes its property from the space, other than in the ordinary course of business, without SWAPSMART®' written consent.
8. Grant security interest. As security against payment of all license and other fees ("secured obligations"), Merchant hereby grants to SWAPSMART® a security interest in and to: (i) all of Merchant's inventory, including raw materials, work-in-process or materials used or consumed in the business of Merchant that are located at the licensed space, whether in the possession of Merchant or any other person or entity; (ii) all of Merchant's furniture, fixtures and equipment located at the licensed space; (iii) products of any of the above-described property; and (iv) all proceeds of any of the above-described property (the "**Collateral**"). If at any time Merchant is in default for failure to pay any amounts due to SWAPSMART®, SWAPSMART® may, without further notice or demand and without legal process, take possession of the Collateral wherever found. Merchant, upon demand by SWAPSMART®, shall assemble the Collateral and deliver it to SWAPSMART® or to a place designated by SWAPSMART® that is reasonably convenient to both parties. SWAPSMART® may pursue any legal or equitable remedy available to collect the secured obligations, to enforce its title in and right to possession of the Collateral and to enforce any and all other rights or remedies available to it. Upon obtaining possession of the Collateral or any part thereof, after written notice to Merchant, SWAPSMART® may sell such Collateral at public or private sale either with or without having such Collateral at the place of sale. The proceeds of such sale, after deducting therefrom all expenses of SWAPSMART® in taking, storing, repairing and selling the Collateral (including reasonable attorneys' fees) shall be applied to the payment of the secured obligations, and any surplus thereafter remaining shall be paid to Merchant or any other person that may be legally entitled thereto. In the event of a deficiency between such net proceeds from the sale of the Collateral and the total amount of the secured obligations, Merchant, upon demand, shall promptly pay the amount of such deficiency to SWAPSMART®.
9. Wavier of Liability for Loss. Merchant hereby acknowledges and agrees that SWAPSMART® will not be held liable or responsible for theft or damage of personal property, or harm or injury to person, and that Merchant's sole remedy for any such loss, harm or injury is via a claim to its own insurance provider or against the third party who actually stole or damaged the property or caused the harm or injury.
10. Acknowledgement of Duty to Licensees and Invitees. Merchant hereby acknowledges its duty to licensees and invitees who are permitted to access Merchant's licensed space, and Merchant represents and warrants that it will at all times maintain its licensed space in good and safe condition free from any latent or patent defects or attractive nuisances. All displays must be safely constructed so as not to constitute a hazard.
11. Reports. Merchant must timely complete and deliver any and all reports requested by SWAPSMART®, including, if applicable, reports required by the City of Phoenix or the Phoenix Police Department.
12. Merchandise. SWAPSMART® reserves the right to prohibit ANY ITEM from being sold. The following is a partial list of prohibited items:
  - firearms;
  - hashish pipes or drug paraphernalia;

- “Adult” material which could be objectionable to family clientele;
  - Used goods or products unless Licensor has provided prior written consent;
  - anything prohibited under applicable zoning laws and/or ordinances; and
  - anything not properly licensed through any applicable governing agencies.
- 12.1 Kitchen knives, pocket knives, swords, bayonets, military or hunting knives, axes, hatchets, scissors, and chemical sprays, and any other item that SWAPSMART® deems potentially dangerous must be displayed under glass in a case, as a safety measure.
- 12.2 No food item, candy or beverage (individually packaged and intended for consumption by one person) of any kind can be sold without prior written permission from SWAPSMART®.
- 12.3 Food Merchants and all employees or representatives of a Merchant providing food must have all applicable permits and authorizations required by applicable laws and ordinances.
13. Defamation and Non-disparagement. Merchant acknowledges that its conduct can have an impact on the operations of other Merchants on the property. Merchant agrees to refrain from knowingly or intentionally making any negative or disparaging statement or comment about (i) SWAPSMART®, any other Merchant, or its and their respective affiliates, related persons and entities, or (ii) the policies, procedures, guidelines, rules, or operations of the site on the property, in either case to any other person, entity, or organization, which statement or comment is designed or reasonably likely to damage SWAPSMART®, any other Merchant, or its and their respective affiliates, related persons and entities, regardless of whether or not such statement is true. Upon violation of any of the foregoing SWAPSMART® may immediately terminate Merchant’s License Agreement.
14. Indemnification.
- 14.1 Indemnification. Merchant shall defend, indemnify and hold SWAPSMART® harmless from and against all claims, liabilities, costs and expenses (including, but not limited to, those related to death or personal injury) arising from or connected with (i) acts or omissions of Merchant and/or Merchant’s employees, contractors, guests, customers, agents and representatives; (ii) breach or violation of any provision of the License Agreement, the Merchant Guidelines and General Rules of Conduct, or these Terms and Conditions; (iii) any claim of infringement or misappropriation, or any licensing or royalty fees related thereto arising out of Merchant’s activities at the site, (iv) any breach or violation of any law, rule or regulation; or (iv) any purchaser or other third party claim of any kind arising out of that third party’s purchase of goods or services from Merchant, including without limitation, returns, credits, and warranty claims. The provisions of this Section 14 shall survive termination of this Agreement.
- 14.2 Indemnifiable Loss. An Indemnifiable Loss means the aggregate of Losses and Litigation Expenses where:
- (a) “Losses” means any liability, loss, claim, settlement payment, cost and expense, interest, award, judgment, damages (including punitive damages to the extent permitted by applicable law), diminution in value, fines, fees and penalties or other charge, other than a Litigation Expense; and
  - (b) “Litigation Expense” means any court filing fee, court cost, arbitration fee or cost, witness fee, and each other fee and cost of investigating and defending or asserting any claim for indemnification under this Agreement, including, without limitation, in each case, attorney’s fees, and other professional’s fees, and disbursements.
- 14.3 Claims Procedure.
- (a) In the event that any claim or demand for which Merchant would be liable to SWAPSMART® hereunder is asserted against or sought to be collected from SWAPSMART® by a third party, SWAPSMART® shall promptly notify Merchant in writing of such claim or demand, specifying the nature of such claim or demand and the amount or the estimated amount thereof to the extent then feasible (which estimate shall not be conclusive of the final amount of such claim or demand) (collectively the “**Claim Notice**”). Merchant shall notify SWAPSMART® promptly (A) whether or not Merchant disputes the liability of Merchant to SWAPSMART® hereunder with respect to such

claim or demand and (B) whether or not Merchant desires, at the sole cost and expense of Merchant, to defend SWAPSMART® against such claim or demand. Subject to Section 14.3(b) below, in the event that Merchant notifies SWAPSMART® that Merchant will defend SWAPSMART® against such claim or demand, Merchant shall have the right to defend by appropriate proceedings, provided that Merchant and its counsel (which counsel must be approved by SWAPSMART®, such approval not to be unreasonably withheld) shall proceed with diligence and good faith with respect thereto. If SWAPSMART® desires to participate in, but not control, any such defense or settlement, SWAPSMART® may do so at its sole cost and expense. Merchant shall not settle such claim or demand without prior reasonable consultation with SWAPSMART® and without the prior written consent of SWAPSMART® (which consent shall not be unreasonably withheld).

- (b) If, in the reasonable opinion of SWAPSMART®, notice of which shall be given in writing to Merchant, (A) any such claim or demand described in Section 14.3(a) above seeks material prospective relief which could have a material adverse effect on the assets, liabilities, financial condition, results of operations, public image, business or business prospects of SWAPSMART®, or (B) SWAPSMART® reasonably determines in good faith that its interests with respect to such claim or demand cannot appropriately be represented by Merchant, then SWAPSMART® shall have the right to assume control of the defense of such claim or demand and the amount of any judgment or settlement together with the reasonable costs and expenses of defense shall be included as part of the indemnification obligations of Merchant hereunder; provided, however, that no settlement of such claim or demand may be made without prior reasonable consultation with Merchant and without the prior written consent of Merchant (which consent shall not be unreasonably withheld). If SWAPSMART® should elect to exercise the right under this Section, Merchant shall have the right to participate in, but not control, the defense of such claim or demand at the sole cost and expense of Merchant.
- (c) Regardless of which party is controlling the defense of any claim, (A) both Merchant and SWAPSMART® shall act in good faith, (B) the controlling party shall deliver, or cause to be delivered, to the other party, copies of all correspondence, studies, reports, pleadings, motions, briefs, appeals or other written statements relating to or submitted in connection with the third-party claim or demand and with the defense of any such claim or demand, and timely notices of, and the right to participate in (as an observer), any hearing or other court proceeding relating to such claim or demand, and (C) the other party shall cooperate fully with the controlling party with respect to access to individuals, books, records, or other documentation within such other party's direct or indirect control, if deemed necessary or appropriate by the controlling party in the defense of any claim or demand.
- (d) If Merchant does not elect under Section 14.3(a) above to defend SWAPSMART®, or if Merchant elects to defend SWAPSMART® but does not proceed with diligence and in good faith, then SWAPSMART® shall have the right to take over control of any defense and settlement of such claim or demand (and shall, so long as any legal rights are not jeopardized, notify Merchant not less than ten (10) days in advance of the reasons for the defense being taken over), and the reasonable costs and expenses of defense shall be included as part of the indemnification obligations of Merchant hereunder.

## 15. Miscellaneous.

15.1 **EXCLUSION OF CERTAIN DAMAGES.** NOTWITHSTANDING ANY PROVISION IN THIS AGREEMENT TO THE CONTRARY, IN NO EVENT SHALL SWAPSMART®, ITS AFFILIATES OR ANY OF THEIR RESPECTIVE DIRECTORS, OFFICERS, MANAGERS, MEMBERS, SHAREHOLDERS, EMPLOYEES, AGENTS OR SUBCONTRACTORS BE LIABLE TO MERCHANT OR ANY THIRD PARTY FOR LOST PROFITS, SPECIAL, CONSEQUENTIAL, INCIDENTAL, OR PUNITIVE DAMAGES, REGARDLESS OF THE BASIS OF THE CLAIM, WHETHER IN CONTRACT, TORT, STRICT LIABILITY, OR OTHER LEGAL OR EQUITABLE THEORY, WHETHER OR NOT SWAPSMART® HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. THE MAXIMUM AMOUNT SWAPSMART® SHALL BE LIABLE TO MERCHANT FOR UNDER ANY CIRCUMSTANCES IS \$1,000.

15.2 **Further Assurances.** Each of the parties shall execute such documents and perform such further acts as may reasonably be required or desirable to carry out or perform the provisions of this Agreement.

- 15.3 Authority. Each party, and the person or persons executing this Agreement on behalf of the parties, have the power and authority to execute, deliver and perform this Agreement and to consummate the transactions contemplated hereby. The execution, delivery and performance of this Agreement and the consummation of the transactions contemplated hereby have been duly authorized by all required company action of each party. This Agreement, and each of the other agreements, instruments and documents to be executed and delivered by the parties pursuant hereto, have been duly executed and delivered on behalf of, and constitute the legal, valid and binding obligation of, the parties, enforceable against the parties in accordance with their terms, subject to bankruptcy, insolvency and other laws affecting creditors' rights generally.
- 15.4 Independent Contractor. The parties to this Agreement are independent contractors, and have no other legal relationship under or in connection with this Agreement. Neither party shall be deemed to be the partner or joint venturer of the other, and, except as specifically provided herein, neither party shall have or shall hold itself out as having, any right, power or authority to create any contract or obligation, either express or implied, on behalf of, in the name of, or binding upon the other
- 15.5 Binding Effect. Subject to Section 15.6 below, this Agreement is binding on the parties and their respective successors and permitted assigns.
- 15.6 Assignment; Delegation. Merchant may not assign any of its rights under this Agreement, or delegate any performance under this Agreement, in whole or in part, whether it is voluntary, involuntary, by merger, consolidation, dissolution, operation of law, or any other manner, except with the prior written consent of SWAPSMART®, which consent may be withheld for any reason or no reason. For purpose of this Section: (i) a change of control or a change of ownership is deemed an assignment of rights; and (ii) "merger" refers to any merger in which a party participates, regardless of whether it is the surviving or disappearing corporation. Any purported assignment of rights or delegation of performance in violation of this Section is null and void.
- 15.7 Hazardous Materials. Hazardous Materials. Merchant may not bring onto the premises of the subject property or cause any contamination with respect to any hazardous materials or toxic substances, as defined by applicable federal, state and local laws, regulations and ordinances, except as to (a) small quantities of cleaners and other commonly used office products and (b) petroleum products contained in goods and products for sale, and then in the case of clauses (a) and (b) in compliance with all applicable environmental laws and regulations. All goods and products for sale that contain petroleum products shall have the prior written consent of Licensor for sale on the subject property.
- 15.8 Third Parties. No term or provision of this Agreement is for the benefit of any person who is not a party hereto, and no such party will have any right or cause of action hereunder.
- 15.9 Headings. The headings in this Agreement are used only for convenience of reference and do not affect the meaning or interpretation of any provision.
- 15.10 Waivers, Amendments or Modifications. No waiver, amendment or modification, including those by custom, usage of trade, or course of dealing, of any provision of this Agreement will be effective unless in writing and signed by the party against whom such waiver, amendment or modification is sought to be enforced. No waiver by any party of any default in performance by the other party under this Agreement or of any breach or series of breaches by the other party of any of the terms or conditions of this Agreement shall constitute a waiver of any subsequent default in performance under this Agreement or any subsequent breach of any terms or conditions of that Agreement.
- 15.11 Force Majeure. Neither party will be deemed in default of this Agreement to the extent that performance of its obligations, or attempts to cure any breach, are delayed or prevented by reason of circumstance beyond its reasonable control, including without limitation fire, natural disaster, earthquake, or accident or other acts of nature ("**Force Majeure**"), provided that the party seeking to delay its performance gives the other written notice of any such Force Majeure within 15 days after the discovery of the Force Majeure, and further provided that such party uses its good faith efforts to cure the Force Majeure. If there is a Force Majeure, the time for performance or cure will be extended for a period equal to the duration of the Force Majeure. This provision shall not be applicable to any payment obligations of either party.

- 15.12 **Severability.** In the event any term or provision of this Agreement is declared to be invalid or illegal for any reason, this Agreement will remain in full force and effect and will be interpreted as though such invalid or illegal provision were not a part of this Agreement. The remaining provisions will be construed to preserve the intent and purpose of this Agreement and the parties will negotiate in good faith to modify any invalidated provisions to preserve each party's anticipated benefits.
- 15.13 **Enforcement Costs.** If either party institutes an action or proceeding to enforce any rights arising under this Agreement, the party prevailing in such action or proceeding will be paid all reasonable attorneys' fees and costs to enforce such rights by the other party, such fees and costs to be set by the court, not by a jury, and to be included in the judgment entered in such proceeding.
- 15.14 **Governing Law.** This Agreement must be governed by and construed in accordance with the laws of the State of Arizona, without regard to applicable conflict of law rules.
- 15.15 **Venue.** The parties hereby submit to the exclusive jurisdiction of the state and federal courts located in Phoenix, Arizona. The parties hereby waive, and agree not to claim or bring, any motion or request to move venue for *forum non conveniens*.
- 15.16 **Counterparts.** This Agreement may be executed in several counterparts, all of which taken together constitute a single agreement between the parties.
- 15.17 **Facsimile and Electronic Signatures.** Signatures received via facsimile or other electronic means, including in a digitally produced format (.tif, .pdf, .doc, .gif, etc.), will be deemed originals, unless otherwise expressly set forth in a clear and conspicuous manner elsewhere on the page or file that contains the facsimile or electronic signature.
- 15.18 **Dispute Resolution.** The Parties agree that in the event of a dispute arising from this Agreement, the aggrieved party shall give written notice of the dispute to the non-complying party. Upon receipt of such notice, the parties will negotiate in good faith to resolve the dispute for at least a seven-day period following notice to the non-complying party. If such discussions fail to produce a resolution to the dispute, the parties will submit the dispute to expedited mediation, the filing cost and mediator fees to be borne equally by both parties unless otherwise determined by the mediator. If the mediation process fails to produce a resolution of the dispute, the dispute shall be settled by binding arbitration under the commercial expedited arbitration rules of the American Arbitration Association by one arbitrator appointed in accordance with such rules then prevailing. The arbitration shall be held in Phoenix, Arizona. The filing cost and arbitrator fees will be borne equally by the parties unless otherwise determined by the arbitrator. All other costs and fees incurred by either party in preparation for, investigation of, or prosecution of, mediation or arbitration, will be the responsibility of the party incurring the cost or fee unless otherwise determined by the mediator or arbitrator.
- 15.19 **Waiver of Trial by Jury.** THE PARTIES HEREBY KNOWINGLY AND VOLUNTARILY WITH THE BENEFIT OF COUNSEL WAIVE TRIAL BY JURY IN ANY ACTIONS, PROCEEDINGS, CLAIMS OR COUNTER-CLAIMS, WHETHER IN CONTRACT OR TORT OR OTHERWISE, AT LAW OR IN EQUITY, ARISING OUT OF OR IN ANY WAY RELATING TO THIS AGREEMENT.
- 15.20 **Entire Agreement.** The parties acknowledge that there have been no warranties, representations, covenants or understandings made by either party to the other except such as are expressly set forth in this Section. This Agreement (including exhibits, schedules, attachments, or any addendum to this Agreement) constitutes the entire understanding and obligation of the parties with respect to the subject matter of this Agreement and supersedes any prior agreements, writings, or understandings, whether oral or written.