

TWELFTH AMENDMENT TO  
PERMIT NO. 733  
FENIX MARINE SERVICES, LTD.

Permit No. 733 (hereinafter "Agreement"), as amended, between the CITY OF LOS ANGELES, a municipal corporation acting by and through its Board of Harbor Commissioners ("City"), and FENIX MARINE SERVICES, LTD. ("Tenant"), is hereby amended a twelfth time as follows:

WHEREAS, the City of Los Angeles Harbor Department ("Harbor Department") intends to construct certain improvements on property utilized by Tenant under Permit No. 733 to be known as the Berths 302-305 On-Dock Rail Yard Expansion Project ("Project"), as further described and set forth herein;

WHEREAS, the Project will increase on-dock rail capacity and enable more cargo to be loaded onto trains via the on-dock railyard within the terminal;

WHEREAS, the City completed environmental review of the Project pursuant to the California Environmental Quality Act, "*Berths 302-306 Container Terminal Project Final Environmental Impact Report*", SCH #2009071031, Addendum #2, considered by the Board of Harbor Commissioners ("Board") at its May 20, 2021, Board Meeting;

WHEREAS, pursuant to the Port Infrastructure Development Program, the United States Department of Transportation Maritime Administration ("MARAD"), awarded the Harbor Department a grant in the amount of \$18,184,743.00 (Funding Agreement FY2019 PIDP Grant No. 693JF72040021) for the Project, which was approved and accepted by the Board at its August 11, 2022, Board meeting;

WHEREAS, pursuant to the conditions and requirements of the MARAD grant, construction of the Project must be completed by September 30, 2027, or the grant funds, or portion thereof, will be forfeited;

WHEREAS, pursuant to the Trade Corridor Enhancement Program ("TCEP"), the California Transportation Commission ("CTC") and California Department of Transportation ("Caltrans"), awarded the Harbor Department a grant in the amount of \$19,194,000.00 (TCEP Baseline Agreement for the Berths 302-305 On-Dock Railyard Project), which was approved and accepted by the Board at its September 23, 2021, Board meeting;

WHEREAS, pursuant to the conditions and requirements of the TCEP grant, construction of the Project must commence by January 1, 2025, or the grant funds will be forfeited;

WHEREAS, with Harbor Department match funding, the Project's current total estimated budget is \$51,190,000.00;

WHEREAS, to comply with certain Caltrans and MARAD grant funding requirements, City and Tenant are entering into this Twelfth Amendment to accommodate City's

construction of the Project as set forth herein so Tenant may maintain operations during construction of the Project; and

WHEREAS, Tenant is currently utilizing approximately 438,950 square feet of land at Berths 305-306 pursuant to Space Assignment No. 23-04 ("Space Assignment 23-04 Area") that Tenant wishes to add to the Premises pursuant to Agreement Section 2(e) set forth in the Tenth Amendment;

NOW, THEREFORE, IT IS MUTUALLY AGREED AS FOLLOWS:

1. Section 2(b). Section 2(b) is hereby amended to add the following provisions:

"2(b)(1) Railyard Expansion Project Delivery. The parties hereby agree that, on and following the Effective Date of this Twelfth Amendment and until the Railyard Expansion Occupancy Date as defined in Section 9(g)(5), Executive Director may, from time to time, without Tenant's objection, and upon written notice to Tenant, add or subtract parcels to accommodate development, construction and completion of Railyard Expansion Project, pursuant to the phasing plan provided in Attachment 1 ("Phasing Plan). All parcels added or returned to the Premises by City shall be in a condition comparable to its condition immediately prior to the Vacate Date, as determined by the Executive Director in his or her reasonable discretion. The parties acknowledge and agree that the Phasing Plan is provisional, and the Executive Director has delegated authority to modify the Phasing Plan in his/her sole reasonable discretion, provided however, the City shall provide continued rail break access and ingress and egress to Parcel 4, in accordance with the Phasing Plan, from the date of the first Vacate Notice through and until Substantial Completion.

City's written notices shall consist of Substitute Premises Occupancy Notices, Vacate Notices, and/or Interim Return Notices as defined in Section 2(l)(1)(a), accompanied by a map that depicts the parcel added or subtracted (with a statement of that parcel's area) and the total acreage in Tenant's possession as a result of such addition or subtraction (with a statement of that total acreage's area). Such maps, subsequently referred to as "Interim Maps," shall be numbered Exhibit "A-[year in which map was generated]-[number of map generated in such year]" such that, for example, the third Interim Map depicting an added or subtracted parcel in the year 2025 would be marked Exhibit "A-2025 -3.

Upon City's transmittal to Tenant, each such Interim Map shall be deemed to: (i) be incorporated into this Agreement without further action of Board or Council ; (ii) supersede any earlier issued Interim Maps depicting additions or subtractions of parcels ; and (iii) depict the total acreage to which this Agreement applies while such map is in effect."

2(b)(2) Post Railyard Expansion Project Delivery. Effective on the Railyard Expansion Occupancy Date, Section 2b, as amended, shall be deleted in its entirety, along with Exhibit A-4, and replaced as follows:

"(b) Description. The premises subject to this Agreement shall consist of parcel numbers 1, 2, 3, 4, 6, 7, 8, and 9, including Berths 302, 303, 304, and 305 (which berths in the aggregate measure four thousand sixteen and thirty-three hundredths (4,016.33) feet in length, and backlands area which measures three hundred two and eight hundredths

(302.08) wharf and backland acres, including rail and other improvements ("Premises"), and consist, for purposes of Section 4, of four areas: a "MAG Area" of two hundred sixty-one and three hundredths (261.03) acres consisting of parcel numbers 1, 2 and 3; a "Non-MAG Area" of thirty and twenty-eight hundredths (30.28) acres consisting of parcel number 4; an "Ancillary Area," consisting of sixty-nine hundredths (.69) acres of land (parcel numbers 6, 7 and 8), and a "Rail Area" of 10.08 acres consisting of Parcel No. 9. Such parcels and areas (including the MAG Area, Non-MAG Area, Ancillary Area, and Rail Area (including parcel numbers 6, 7 and 8, and 9)) are delineated and more particularly described on Drawing No. 1-1993-2, which drawing is on file in the office of the Chief Harbor Engineer of the Harbor Department of City ("Harbor Engineer"), which in turn is attached hereto as Exhibit "A-5." The Premises shall include the City Improvements, and all other structures owned by or under the control of the Board within said parcels which are made available for Tenant's use, whether on or below the surface, and such structures as City may construct for Tenant."

2. Section 2(l). A new Section 2(l) is hereby added as follows:

"(l) Premises Management For Construction of the Railyard Expansion Project. City and Tenant agree to undertake the following steps so that City may accomplish construction of the Berths 302-305 On-Dock Rail Yard Expansion Project ("Railyard Expansion Project" or "Project") as further described in Attachment 2 in an expeditious manner with the least impact to Tenant's on-going operations. City shall have the right to temporarily reduce the Premises and offer substitute premises to Tenant as set forth herein to construct the Project:

(1) Removal and Return of Premises from Parcel 1 for the Railyard Expansion Project.

(a) Vacate Notices for the Project Premises. At any time after the effective date of this Twelfth Amendment, and to allow the City to construct the Railyard Expansion Project while reducing potential operational impacts to Tenant, the parties agree that Executive Director may provide Tenant with multiple written notices to vacate ("Vacate Notice") the area delineated and more particularly described as Removal Area on Attachment 3, measuring twenty-three (23) acres ("Project Premises"), in accordance with the Phasing Plan. At its sole option, City may elect to issue Vacate Notices and Substitute Premises Occupancy Notices on a rolling basis for portions of the Project Premises pursuant to the Phasing Plan in Attachment 1. Individually and collectively, all such premises removal areas shall be referred to as a "Removal Area." At any time an area of the Project Premises is not subject to a Vacate Notice, that area shall be considered part of the Remaining Premises defined in Section 2(l)(1)(d).

(b) Tenant to Vacate Removal Areas. To facilitate the performance by City of the Project work without delay and/or additional expense to City, Tenant shall have i) at least fourteen (14) calendar days to vacate areas delineated in the Phasing Plan measuring five (5) acres or more, in aggregate, and ii) at least seven (7) calendar days to vacate areas delineated in the Phasing Plan measuring less than five (5) acres, in aggregate, starting from the date of the Executive Director's

delivery of each Vacate Notice, at its sole cost and expense, to remove all of Tenant's personal property, materials, trade fixtures, fixtures, and equipment from the subject Removal Area as set forth in each Vacate Notice and do so to the reasonable satisfaction of the Executive Director. Notwithstanding the foregoing, the parties may mutually agree to shorten the number of calendar days in which Tenant must vacate area(s).

For each Vacate Notice City submits to Tenant, Tenant shall provide written notice to the Executive Director that it has vacated the subject Removal Area immediately upon Tenant's vacation of the Removal Area, but no more than one day following the Tenant's vacation of the Removal Area. Upon receipt of Tenant's notice, City shall enter the subject Removal Area and complete an inspection of the premises. After said inspection but in no event more than two (2) business days following notice from Tenant that it has completely vacated the subject Removal Area, the Executive Director shall notify Tenant of any deficiency in Tenant's completion of the vacation process and if timely notice of deficiency is not provided, the subject Removal Area shall be deemed vacated to the Executive Director's satisfaction ("Vacate Date").

(c) Tenant Failure to Vacate a Removal Area. The parties agree that time is of the essence in the completion of the Project. In the event that Tenant fails to perform pursuant to any Vacate Notice within the time period set forth therein (including shortened Vacate Notices with Tenant's consent as set forth in 2(l)(1)(b)), then City may require Tenant to pay City as liquidated damages the amount of Ten Thousand Dollars (\$10,000) per each day, or portion thereof, for such failure to perform, and pay such liquidated damages until Tenant performs pursuant to the Vacate Notice(s) at issue. The maximum amount of liquidated damages payable by Tenant pursuant to this Section 2(l)(1)(c) shall be Nine-Hundred Thousand Dollars (\$900,000).

Notwithstanding the foregoing, Tenant shall not owe liquidated damages pursuant to this Section for (a) any Tenant-caused delay that occurs concurrently on the same day as another delay that is not Tenant-caused, as determined in the reasonable discretion of the Executive Director, or (b) any delay caused by a Force Majeure Event as defined in Paragraph 14 of the 12<sup>th</sup> Amendment. Except as expressly provided for in this Section 2(l)(c) and to the maximum degree allowed by law, Tenant shall have no liability, whether in contract, tort or otherwise, for project delays.

(d) Deletion of Removal Areas from the Premises. Deletion of the Removal Area, or any portion thereof, from the Premises shall become effective on the Vacate Date. Deletion of any Removal Area from the Premises is not intended to, and shall not cancel, waive or otherwise alter any rights, requirements, duties or obligations which may exist between City and Tenant with respect to the remaining premises under the Agreement ("Remaining Premises").

(e) City Access to Removal Area for Project Construction. From the Vacate Date for each Vacate Notice issued by City, and until Tenant receives an Interim Return Notice as set forth in Section 2(l)(1)(f), City and/or its designated agents, shall be

permitted to access the then-current Removal Area and perform work as set forth in Sections 5(d) and 6(o).

(f) Removal Areas Returned to Tenant During Project Construction. Separately from or concurrently with any Vacate Notice set forth in Section 2(l)(1)(a), and prior to the Substantial Completion Notice set forth in Section 9(g)(3), Executive Director may issue to Tenant notices that City no longer needs access to any Removal Area of the Project Premises and Tenant may return to said Removal Area for its operations. Each portion of the Removal Area so returned to Tenant will be considered part of the Remaining Premises available to Tenant for use in its terminal operations from the date of said return notice ("Interim Return Notice"). The parties acknowledge that City may exercise the right to remove and return portions of the Project Premises in accordance with City's Project Phasing Plan, and in so doing, may move portions of the Project Premises multiple times in order to complete the Project. The City shall perform no work in the then-current Remaining Premises. City and its contractors' access to then-current Remaining Premises shall be limited to ingress and egress as define in this Agreement and in the Phasing Plan. City shall maintain perimeter fencing separating the then-current Removal Area from the then-current Remaining Premises.

(2) Substitute Premises.

(a) Substitute Premises Occupancy Notice. Upon the effective date of the 12<sup>th</sup> Amendment, Executive Director shall issue a written notice to Tenant that the Substitute Premises (defined herein), or a portion thereof, are available to Tenant as set forth in this Section 2(l)(2) ("Substitute Premises Occupancy Notice) pursuant to the notice requirements set forth in Section 2(b)(1). Substitute Premises shall be equivalent to the Removal Area, subject to Tenant's completion of the Approved Improvements to certain Substitute Premises as set forth herein, provided however, the Substitute Premises shall not exceed the maximum amount of Substitute Premises available under Parcels Sub A, Sub B, and Sub C. City shall provide such premises to Tenant in their "as is" condition and as delineated and more particularly described on Attachment 3. The parcels set forth and identified as Parcel Sub A, Parcel Sub B and Parcel Sub C in Attachment 3 are referred to herein together as the "Substitute Premises" and are further described in Sections 2(l)(2)(b) and (c) herein, and will be made available to Tenant in whole or in part, equivalent in size to the Removal Area. Following Tenant's receipt of the Substitute Premises Occupancy Notice, Tenant shall have a reasonable opportunity to inspect and accept or reject the Substitute Premises in whole or in part. If Tenant does not accept the Substitute Premises in whole, the Substitute Premises Occupancy Notice shall be amended accordingly, provided however, notwithstanding a rejection of Substitute Premises, Tenant shall comply with all Vacate Notices. City shall provide the Substitute Premises to Tenant in their "as is" condition and as delineated and more particularly described in Attachment 3. The Substitute Premises shall be assigned to Tenant in accordance with the same terms and conditions of the Agreement. The maximum amount of Substitute Premises available shall be comprised of Parcels Sub A, Sub B and Sub C.

(b) Space Assignment 23-04. The parties acknowledge that the Substitute Premises Occupancy Date for Parcel Sub A, or portion thereof, is subject to City's termination of Space Assignment 23-04 pursuant to the terms of Space Assignment 23-04 and in accordance with the Tariff, provided, however, that such termination shall be concurrent with the first Vacate Notice. Upon termination of Space Assignment 23-04, Tenant's use and occupancy of Parcel Sub A would be subject to the terms of this Agreement and Tariff, as applicable. A hypothetical illustrative example of the termination of Space Assignment 23-04 is as follows:

If the first Vacate Notice concerns a Removal Area of 5 acres, the Executive Director will make available 5 acres of Parcel Sub A under a Substitute Premises Occupancy Notice. If Tenant accepts, 5 acres of Parcel Sub A (i.e., a portion thereof) will become Substitute Premises, and the remaining portion of Sub A outside of the then-current Substitute Premises (5.08 acres), would be available to Tenant under a new Space Assignment and subject to the Tariff.

(c) Revocable License and Parcel Sub B and Parcel Sub C. On or shortly after the effective date of the 12<sup>th</sup> Amendment, the Executive Director will offer Tenant, in writing ("Revocable License") and subject to the terms of this Agreement, access Parcels Sub B and Sub C as set forth on Attachment 3 for Tenant to complete the Approved Improvements. Pursuant to said authorization, Tenant shall prepare Parcel Sub B and/or Parcel Sub C for use as Substitute Premises during construction of the Project. Upon written notice from the Executive Director, said Revocable License shall be terminated and Parcels Sub B and Sub C, or portion thereof, may become part of the Substitute Premises.

(d) Substitute Premises Occupancy Date. The date on which the Executive Director issues a written Substitute Premises Occupancy Notice shall be the "Substitute Premises Occupancy Date" and Parcels Sub A, Sub B and Parcel Sub C if accepted by Tenant shall become part of the described premises subject to the terms of the Agreement. Tenant's occupancy of the Substitute Premises shall be in accordance with the terms and conditions of the Agreement, including without limitation, Section 4, as amended. Tenant shall make no alterations to the Substitute Premises, except for those set forth in Section 4(o), without the prior written permission of the Executive Director. Alterations to the Substitute Premises must be completed in accordance with the terms of the Agreement, and in compliance with Applicable Laws as set forth in Section 6(h) of the Agreement."

3. Section 4(n). A new Section 4(n) is hereby added as follows:

"(n) Rent for Removal Area and Substitute Premises. The following compensation structure shall apply to the Removal Area and Substitute Premises:

(1) Removal Area and Substitute Premises. From the Effective Date of this Twelfth Amendment and until the Railroad Expansion Occupancy Date set forth in Section 9(g)(5), there shall be no increase or reduction in the MAG Area of 261.03 acres or MAG compensation owed by Tenant, due to City agreeing to implement the Project

in multiple phases pursuant to the Tenant's request and City providing and Tenant utilizing the Substitute Premises set forth in Section 2(l)(2) of the Agreement."

4. Section 4(o). A new Section 4(o) is hereby added as follows:

"(o) Rent Credits for the Railyard Expansion Project. City and Tenant agree upon the following rent credits for the Railyard Expansion Project, as follows:

(1) Substitute Premises Rent Credits. Tenant shall receive a credit, which shall be applied against compensation due and owing by Tenant to City pursuant to Section 4, calculated pursuant to Section 4 of the Agreement, in an amount equal to Tenant's actual costs, without Tenant markup, directly incurred and paid by Tenant for Approved Improvements to certain Substitute Premises as follows, a) for ten (10) unimproved acres at Parcel Sub B, an amount not to exceed Nine Million Three Hundred Thousand Dollars and Zero Cents (\$9,300,000.00) and b) for Parcel Sub C, an amount not to exceed Nine Hundred Thirty Thousand Dollars and Zero Cents (\$930,000) ("Substitute Premises Rent Credits"). Tenant and City agree that the capital expenditures to be covered by the Substitute Premises Rent Credits shall be limited to Tenant's payments for paving, grading and storm water drainage improvements on the Substitute Premises.

Tenant's request for Rent Credits under this Section 4(o)(1), and City's obligation to grant said Rent Credits, is dependent upon construction being performed by Tenant per the Harbor Department's Engineering Division construction review process ("APP" and Harbor Engineer's General Permit ("HEP")) and reviewed and approved by the City of Los Angeles Department of Building and Safety, as well as any applicable laws and regulations, the costs being verified by the Harbor Department, signed by Tenant's duly authorized officer and proof of payment of those costs accompanied by itemized receipts and such other documentation as may reasonably be required by the Harbor Department to verify that the expenditures were incurred and are eligible for Rent Credits. The Executive Director's approval of Rent Credit amounts shall be subject to Tenant providing, in a form reasonably acceptable to Executive Director: (i) proof of payment for said costs; (ii) specific details or exact work performed in connection with each and every invoice (i.e., description of supplies/products/services provided); (iii) the deliverable; and (iv) copies of all work product (i.e., designs, drawings) generated for each invoice. Tenant's request for costs eligible for rent credits described in this Section 4(o)(1) includes construction (costs for labor, equipment rentals required to undertake the Approved Improvements, and materials), civil engineering, design, and permit fees paid by Tenant toward Approved Tenant Improvements. Eligible costs shall not include Tenant markup, or Tenant's costs to operate on the improved premises such as temporary structures, machines, equipment, submeters, trade fixtures, used for Tenant operations, and similar installations of a type normally removed without structural damage to the Premises.

(2) Prevailing Wage. Construction, alteration, demolition, installation, repair or maintenance work performed by Tenant on City's property for receipt of rent credits set forth in Section 4(o)(1) of this Agreement ("Work") may require Tenant to pay prevailing wages in accordance with federal or state prevailing wage and apprenticeship laws. Tenant shall be bound by and comply with all applicable provisions of the California

Labor Code and federal, state and local laws related to labor and shall be solely obligated to make the determination as to whether prevailing wage laws are applicable to its Work. Tenant shall indemnify and pay or reimburse the City for any damages, penalties or fines (including, but not limited to, attorneys' fees and costs of litigation) that the City incurs, or pays, due to Tenant's failure to comply with applicable prevailing wage laws in connection with any Work performed for receipt of the rent credits set forth in Section 4(o)(1) of this Agreement.

(3) Incremental Increase Operating Cost Rent Credits. Tenant shall be entitled to receive a credit in an amount not to exceed One Million Dollars and Zero Cents (\$1,000,000) which shall be applied against compensation due and owing by Tenant to City pursuant to Section 4 of the Agreement for the documented incremental increase in Tenant's actual Operating Costs, without markup, net of any scheduled increases in labor contract rates, directly incurred and paid by Tenant which are attributable to City execution of the Project from the date of the first Vacate Notice to the Project's Substantial Completion Date ("Incremental Operating Cost Impact Rent Credits").

Tenant's "Operating Costs" shall generally be defined as Tenant's Baseline Average Operating Cost in labor and overhead expenses (e.g., equipment, office staff, and utilities) specific to the processing of on-dock rail intermodal containers on the Premises. The "Operating Cost" differential resulting from the Project shall be measured using a container's Twenty-Foot Equivalent Unit ("TEU"). Tenant's "Baseline Average Operating Cost" shall be defined as Tenant's Operating Costs during the two year period from January 1, 2023 to December 31, 2024 (or such other period as mutually agreed upon by Tenant and the Executive Director), and net of scheduled labor contract rate increases. "Net of scheduled labor contract rate increases" as used in the foregoing sentence, shall mean that the Operating Cost differential will be normalized to account for labor cost increases caused solely by negotiated labor contract rate increases. Notwithstanding the foregoing, the Operating Cost differential will take into account the impact of higher negotiated labor rates on incremental increases in labor hours between the baseline number of labor hours per TEU for the period of January 1, 2023 to December 31, 2024 (or such other period as mutually agreed upon by Tenant and the Executive Director), and Tenant's actual number of labor hours per TEU for each six (6) month period during the time between the first Vacate Notice issued through to the Substantial Completion Date of the Project. Tenant's "Incremental Increase in Operating Costs" shall be the difference between Tenant's Baseline Average Operating Cost and Tenant's Operating Costs for each six (6) month period during the time between the first Vacate Notice issued through to the Substantial Completion Date of the Project. The determination of what is considered acceptable evidence and the calculation thereof for Tenant's Operating Costs shall be at the reasonable discretion of the Executive Director.

For the avoidance of doubt, an illustrative example of calculating the Operating Cost differential is as follows:

If:           • the baseline cost per TEU is \$100 and

- the cost after accounting for the negotiated labor cost increase per TEU at 5% is \$105 and
- the Incremental Operating cost per TEU is \$110.25.

Then: • the City provides rent credit in the amount of \$5.25 per TEU.

Effective from the Substitute Premises Occupancy Date, Tenant shall make available to the Executive Director for review at the Premises, in six (6) month intervals, Incremental Operating Cost Impact Rent Credit requests which shall include evidence in a form reasonably acceptable to the Executive Director showing the amount of Incremental Increase in Operational Costs paid by Tenant for the prior six month period. Prior to, or concurrent with, the submittal of the first six (6) month Incremental Operating Cost Impact Rent Credit request, Tenant shall make available evidence in a form reasonably acceptable to the Executive Director, Tenant's Baseline Average Operating Cost. Tenant shall submit its final Incremental Operating Cost impact Rent Credit request no later than three (3) months after Substantial Completion described in Section 9(g)(1).

(4) Limitations and Conditions for Rent Credits. Within sixty (60) business days of Executive Director's approval of a rent credit request pursuant to Section 4(o)(1) and/or 4(o)(3), which such approval shall not be unreasonably withheld or delayed, City shall apply the applicable Rent Credit against compensation due and owing by Tenant to City pursuant to Section 4 of the Agreement. Should this Agreement terminate prior to the exhaustion of the full Rent Credits set forth in Sections 4(o)(1) and 4(o)(3) for any reason other than City's default, the Rent Credits shall expire, and the City shall have no obligation to reimburse Tenant for any unused Rent Credit.

The Rent Credits granted herein shall be allowed only for the actual costs incurred by Tenant, without Tenant markup, as set forth in Sections 4(o)(1) and (3), and for no other personal improvement to the Premises."

5. Section 4(p). A new Section 4(p) is hereby added as follows:

"4(p) Rail Area Compensation. Tenant shall pay separate compensation, in advance and in twelve (12) equal monthly installments, for the 10.076 acres of Parcel 9 described in Section 2(b) and shown on Exhibit A-5, for use by Tenant to operate an intermodal rail facility ("Rail Area Compensation"). Tenant's obligation to pay Rail Area Compensation shall commence upon the date of the Project's Substantial Completion as set forth in Section 9(g) of this Agreement, which for the avoidance of doubt, is also the date of the Railyard Expansion Occupancy Date as defined in Section 9(g)(5). For the first compensation year during which Tenant is required to pay Rail Area Compensation, the amount payable shall be Eight Hundred Seven Thousand Dollars and Zero Cents (\$807,000.00), which amount shall be prorated for any period of less than a full calendar year. The Rail Area Compensation shall be readjusted annually according to the CPI Adjustment Factor set forth in Section 4 of this Agreement, as amended in the Tenth Amendment."

6. Section 5(d). A new Section 5(d) is hereby added as follows:

“(d) Railyard Expansion Project Constructed by City. City shall, at its sole cost and expense, design and construct the Railyard Expansion Project on the Project Premises as defined in Section 2(l)(1)(a). The Project shall conform in all respects to applicable federal, state and local statutes, ordinances, rules and regulations. The Project shall consist of all improvements listed and described in Attachment 2 (“New Improvements”) which is attached hereto and incorporated herein by reference. Upon completion of the Railyard Expansion Project, and Tenant’s return to the Project Premises, the Railyard Expansion Project shall be considered a City Improvement and subject all terms and conditions of the Agreement.”

7. Section 6(o). A new Section 6(o) is hereby added as follows:

“(o) Construction of Railyard Expansion Project. The following conditions shall apply during Construction of the Railyard Expansion Project:

(1) City Access to Premises. City shall be permitted to access the Project Premises as defined in Section 2(l)(1)(a) by crossing Tenant’s Remaining Premises (as defined by Section 2(l)(1)(d)) using the ingress and egress routes depicted in Attachment 1, attached hereto and made a part of this Agreement and City shall be permitted to use such access to bring all materials and equipment into the Project Premises that may be required to complete the Project. City, and/or its agents, shall perform the Project work in reasonable coordination with Tenant.

(2) Construction Project Coordination. Tenant and City shall conduct construction meetings at reasonable intervals to coordinate construction schedules, construction activities that may impact Tenant operations, City’s ingress and egress to the Project Premises, changes to Project design, City’s phasing of Project work and Tenant’s use of rail within the Project Premises during construction, staging and laydown areas, and the construction plan. City shall provide Tenant with a reasonable amount of time to review and provide comments to the City relating to any material changes to the Project design and/or Phasing Plan and the Parties agree to discuss and coordinate in good faith regarding any such material changes to the Project design and/or Phasing Plan.

(3) Construction Project Rights and Obligations. City shall not unreasonably interfere with Tenant operations during construction of the Project. Tenant shall not unreasonably interfere with City’s construction of the Project by failing to fulfill its obligations under the 12<sup>th</sup> Amendment. As between City and Tenant, City shall possess sole and absolute control over the design of the New Improvements set forth in Attachment 1, award of the contract, and shall be responsible for the supervision of the contractor and subcontractors (of every tier) during construction of the Rail Yard Expansion Project, Tenant shall give no orders to any contractors constructing the Rail Yard Expansion Project. Tenant shall cooperate fully with contractors in providing necessary ingress and egress to the Removal Area in accordance with this Agreement and all laws. Nothing provided for herein shall prevent Teant from limiting access to the Premises, or issuing directives, to any person or entity for reasons of safety, security or as otherwise required by law. Tenant agrees to cooperate with City’s reasonable requests regarding construction of the Project and shall assist the City as City may

reasonably request from time to time to comply with any grant award requirements, including construction schedule obligations.

City, and/or its agents, shall perform the Project work with reasonable dispatch, subject to delay by causes beyond City's control or by the action or inaction of Tenant; provided however, Tenant acknowledges and agrees that City's Project work will be performed while Tenant remains in occupancy of all Remaining Premises and Substitute Premises, and City's work shall not be grounds for any abatement of Compensation for any Remaining Premises or Substitute Premises, except as provided for in the 12<sup>th</sup> Amendment.

During construction of the Project, City shall ensure that Tenant has continued access to the Project Premises other than those areas that are subject to a Vacate Notice for a Removal Area pursuant to Section 2(l) of the Agreement.

(4) City Construction Contract Terms. City shall include sufficient terms and conditions in its construction contract for the Project so that (1) City's contractor will provide traffic control in accordance with applicable laws and in such manner as to avoid unduly impeding traffic flow in and out of the terminal during Project construction, and (2) City's contractor is required to reimburse Tenant for additional actual security costs incurred without markup above Tenant's costs that would otherwise be incurred absent the Project in an amount not to exceed Six Hundred Thousand Dollars and Zero Cents (\$600,000.00). The reimbursement amounts requested by Tenant pursuant to this Section shall be evidenced by Tenant through documentation reasonably acceptable to the Executive Director and subject to the terms in City's construction contract for the Project. Tenant acknowledges that all reimbursements owed to Tenant pursuant to this Section shall be made through, and according to, the City's construction contract for the Project and City shall not make any reimbursement payments directly to Tenant pursuant to this Agreement.

City shall ensure that its agents, contractors (of all tiers), and invitees comply with Tenant's posted safety signs and instructions while traversing the Premises to access the Removal Area. City shall obtain copies of certificates of insurance for City's contractor(s), which shall be provided to Tenant upon request, demonstrating the placement and maintenance of commercial general liability insurance with limits of at least One Million Dollars (\$1,000,000) combined single limit per occurrence and Two Million Dollars (\$2,000,000) in aggregate, and auto liability insurance with limits of at least One Million Dollars (\$1,000,000) per occurrence, naming Tenant as an additional insured on each policy and providing a waiver of subrogation in favor of Tenant."

8. Section 9(g). A new Section 9(g) is hereby added as follows:

"(g) Completion of the Railyard Expansion Project. The following provisions shall apply solely to the Railyard Expansion Project as defined in Section 5(d);

(1) Substantial Completion. The term "Substantial Completion" for the Railyard Expansion Project shall mean that stage of nearly complete construction of the Railyard Expansion Project in accordance with the plans described in Section 5(d) and

Attachment 2 which permits occupancy and use of the Project by Tenant without material interference with Tenant's operations by reason of, and without substantial economic penalty due to, unfinished City work or construction (minor deficiency items commonly referred to as "punch list" items need not be completed so long as completion does not materially interfere with Tenant's use of the Project). The term "Substantially Complete" shall mean that the Project has achieved Substantial Completion. The Substantial completion date shall be determined by the Executive Director in his or her reasonable discretion following consultation with the Tenant, pursuant to the inspection process set forth in Section 9(g)(4). City shall cause Substantial Completion to occur no later than twenty-four (24) months after the date of the first Vacate Date issued as set forth in Section 2(l)(1) ("Substantial Completion Deadline"). The Substantial Completion Deadline may be extended due to any Project delays caused by Tenant's failure to comply with its obligations under this Twelfth Amendment. City shall provide Tenant with notice of any extension to the Substantial Completion Deadline within thirty (30) days of the occurrence of any event giving rise to such extension ("Extension Notice"). Upon Substantial Completion, City shall provide Tenant with notice of Substantial Completion of the Railyard Expansion Project ("Notice of Substantial Completion").

(2) Liquidated Damages. The parties agree that time is of the essence in the completion of the Project. In the event that the Project is not Substantially Complete by the Substantial Completion Deadline (or as the Substantial Completion Deadline may be extended pursuant to Section 9(g)(1)), the amount of Twenty Thousand Dollars and Zero Cents (\$20,000.00) rent credit which shall be applied against compensation due and owing by Tenant to City pursuant to Section 4 for each day of delay so caused by City, shall be given to Tenant as liquidated damages until the Project is Substantially Complete. The maximum amount of liquidated damages credited against rent by City shall not exceed One Million Eight Hundred Thousand Dollars and Zero Cents (\$1,800,000.00). No liquidated damages shall be paid during the time the Substantial Completion Deadline is extended as a result of i) a Force Majeure Event as defined in Paragraph 14 of this 12<sup>th</sup> Amendment and/or, ii) Tenant's failure to comply with its obligations under the Twelfth Amendment or the Agreement. Within sixty (60) business days of the Executive Director's approval of a rent credit request pursuant to this Section 9(g)(2), which approval shall not be unreasonably withheld or delayed, City shall apply the applicable rent credit against compensation due and owing by Tenant to City pursuant to Section 4 of the Agreement. Except as expressly provided for in this Section 9(g)(2) and to the maximum degree allowed by law, City shall have no liability, whether in contract, tort or otherwise, for project delays.

(3) Delivery of the Railyard Expansion Project. Upon Substantial Completion of the Railyard Expansion Project, the Executive Director shall provide by written notification to Tenant the date of the Project's Substantial Completion (as that term is defined in Section 9(g)(1) of the Agreement) ("Substantial Completion Notice").

(4) Inspection and Acceptance of Railyard Expansion Project. Within ten (10) calendar days of a written inspection notice from City, City and Tenant shall conduct an inspection of the Project. Within ten (10) calendar days of the inspection, Tenant may accept the Project as Substantially Complete or notify the City of any defective or incomplete Project scope of work, as described in Attachment 2, that would prevent

Tenant from occupying or using the Project without material interference with Tenant's operations and without substantial economic penalty by Tenant, provided however, Tenant's rights under this section shall not preclude the City from deeming the Project Substantially Complete. Tenant shall promptly notify City in writing of any construction defects observed and shall continue to notify City of any construction defects discovered thereafter for a period of one (1) year. For notifications made by Tenant within one (1) year of Substantial Completion of the Project for defective workmanship, material, construction and/or labor, City shall timely correct or cause its contractors to correct any defects (which shall not include any damages caused by Tenant or arising from Tenant's failure to maintain) in the Project with respect to workmanship or materials in the engineering, design and construction of the improvements and with respect to the construction and operation of the operating equipment provided by City, if any. City makes no representations, warranties, or covenants other than those expressly set forth in this Agreement.

(5) Railyard Expansion Occupancy Date. The date of the Substantial Completion Notice shall serve as the date of Tenant's occupancy of the Railyard Expansion Project shall be deemed to commence ("Railyard Expansion Occupancy Date"); provided however, Tenant shall not be precluded from pursuing its inspection rights under Section 9(g)(4) or remedies under Section 9(g)(6). From and after the Railyard Expansion Occupancy Date, Tenant shall pay compensation for the Project premises in accordance with the terms of Section 4 of this Agreement. Delivery of the Rail Expansion Project by City to Tenant shall not be deemed to waive any right of Tenant or City against any designer or contractor for failure to comply with the requirements of their contracts, for negligence or for latent defects in construction.

(6) Dispute Resolution for Project Completion. The parties shall attempt in good faith to resolve any disputes arising out of or relating to this Section 9(g) promptly by negotiation prior to initiation of any legal proceedings to resolve the dispute. Notwithstanding the foregoing, nothing in this section precludes the City from deeming the Project Substantially Complete or complying with requirements of the TCEP or MARAD grants."

9. Section 10(d). A new Section 10(d) is hereby added as follows:

"(d) Maintenance and Restoration Obligations for the Railyard Expansion Project. The following provisions shall apply for the maintenance and restoration of the Substitute Premises, if any, and the Project Premises:

(1) Substitute Premises. For any premises used by Tenant as Substitute Premises pursuant to Section 2(l)(2), the maintenance provisions set forth in Section 10 shall apply. Tenant shall vacate and restore Parcel Sub B and Parcel Sub C, subject to the restoration obligations set forth in the Agreement, on or before the Railyard Expansion Occupancy Date.

(2) Project Premises. Upon the Railyard Expansion Occupancy Date set forth in Section 9(g)(5), Section 10 of the Agreement, maintenance and restoration obligations, shall apply to the Project Premises."

10. Section 11(f). A new section 11(f) is hereby added as follows:

“11(f). Railyard Expansion Project. Tenant’s obligations set forth in Section 11, Indemnity and Insurance, shall remain in full force and effect for the Premises and Substitute Premises, except as provided in this Section 11(f). Tenant shall have no obligations under Section 11, Indemnity and Insurance, for the Removal Areas, which as more fully set forth in this Agreement, shall not be part of the Premises. During the Project construction from the time of the first Vacate Notice issued pursuant to Section 2(l)(1)(a) and up to the Railyard Expansion Occupancy Date, City shall indemnify, defend and hold Tenant harmless from and against any liabilities, damages, claims, fines, complaints, losses, penalties, or fees (including reasonable attorneys’ fees) (“Claims”) arising from or relating to any act or omission of City, or its agents, contractors (of every tier) or invitees in the Removal Area or any area of the Premises utilized to access the Removal Area. Without limiting the foregoing, City’s responsibility under this Section 11(f) shall include Claims relating to or arising from damage to property (including property of Tenant), injury to or death of persons, the release or threatened release of contamination or toxic materials, and any other environmental liabilities.”

11. Section 17(m). Section 17(m) is hereby deleted in its entirety and replaced with the following:

“All notices or other communication necessary in cases where written notice, including the service of legal pleadings, shall be given in writing by personal service, or express mail, Federal Express, DHL, UPS or any other similar form of airborne/overnight delivery, service, or mailing (if said notice is deposited in the United States mail, postage prepaid, certified and return receipt requested in a sealed envelope), addressed to the Parties at the addresses as set forth below, with postage thereon fully prepaid. When so given, such notice shall be effective as provided below. Unless changed by notice in writing from the respective parties, notice to the parties shall be as follows:

If to City (or its Harbor Department):

City of Los Angeles, Harbor Department  
P.O. Box 151  
San Pedro, CA 90733-0151  
Attn: Executive Director

with copies to:

City of Los Angeles, Harbor Department  
Los Angeles City Attorney's Office  
P.O. Box 151  
San Pedro, CA 90733-0151  
Attn: General Counsel

and to:

City of Los Angeles, Harbor Department  
Real Estate Division  
P.O. Box 151  
San Pedro, CA 90733-0151  
Attention: Director of Real Estate  
Email: REDClerical@portla.org

If to Tenant:

Fenix Marine Services, Ltd  
614 Terminal Way  
San Pedro, CA 90731  
Attn: Chief Executive Officer and Chief Operating Officer  
Email:

Any such notice shall be deemed to have been given upon delivery or two business days after deposit in the mail as set forth herein. Either Party may change the address at which it desires to receive notice upon giving written notice of such request to the other Party.

Notwithstanding the foregoing, all notices required pursuant to the Berths 302-305 On-Dock Rail Yard Expansion Project set forth in the Twelfth Amendment shall be in writing and deemed to have been given and received upon one of the following occurring; (a) when personally delivered, or delivered by same-day courier; or (b) on the second business day after mailing by registered or certified mail, postage prepaid, return receipt requested; or (c) upon delivery when sent by prepaid overnight express delivery service (e.g., FedEx, UPS); or (d) when notice is sent by email or facsimile, upon receipt by the sending party of a written confirmation of receipt by the receiving party."

12. No Changes Except as Stated Herein. Except as expressly amended herein, all remaining terms and conditions of Permit No. 733, as amended, shall remain unchanged.

13. Effective Date. The effective date of this Twelfth Amendment shall be upon execution by the Executive Director and Secretary of City's Board of Harbor Commissioners after approval by the City Council of the Resolution approving this Twelfth Amendment.

14. Force Majeure. If Tenant is unable to perform its obligations under Section 2(l)(b) or Section 9(g)(2) of the 12<sup>th</sup> Amendment due to a Force Majeure Event, Tenant shall immediately notify City, and shall not be liable in whole or in part, for any act or omission expressly caused by the Force Majeure Event. A "Force Majeure Event" shall mean acts of God or government authorities, natural disasters, labor disruptions, or other events that are outside the control of Tenant.

IN WITNESS WHEREOF, the parties hereto have executed this Twelfth Amendment to Permit No. 733 on the date to the left of their signatures.

THE CITY OF LOS ANGELES, by its Board of Harbor Commissioners

Dated: \_\_\_\_\_

By: \_\_\_\_\_  
Executive Director

Attest: \_\_\_\_\_  
Board Secretary

FENIX MARINE SERVICES, LTD.

Dated: \_\_\_\_\_

Signed by:  
*Steven Trombley*  
By: \_\_\_\_\_  
Steven Trombley, Chief Executive Officer  
(Print/Type Name and Title)

Attest: *Christian Olson*  
\_\_\_\_\_  
Christian Olson, Secretary  
(Print/Type Name and Title)

APPROVED AS TO FORM AND LEGALITY  
8 - 30, 2024  
HYDEE FELDSTEIN SOTO, City Attorney  
STEVEN Y. OTERA, General Counsel

By: \_\_\_\_\_  
for Heather M. McCloskey, Deputy



# BERTHS 302-305 ON-DOCK RAILYARD EXPANSION (NEW) EXHIBIT

## Proposed Improvements

The proposed Berths 302-305 On-Dock Railyard Expansion project expands the existing railyard to add five new loading tracks, a tail track, departure track, and connecting track for total 17,000 track feet. The project includes improvements to existing tracks, grading and paving, drainage, fire protection, electrical improvements, striping and signage, powered turnouts, manual derails, new track bumpers, expansion of the train-in-motion system, removal of contaminated soil, and additional storm drain design elements for Low Impact Development compliance.

### 1 RAIL (NEW)

- A 5 new loading tracks (each track with 7 cars @ 309', approximately 12,000 LF)
- B 136 lb continuously welded rail trackage
- C 12 new turnouts, 1 new crossover
- D 1 departure track
- E 1 tail track
- F Compressed air system
- G Powered switches
- H Manual derails
- I Train-In-Motion System (TIMs)
- J Remote and wireless rail signal system for loading and storage railyards
- K OCR electrical with communication conduit stubouts for new tracks

### 2 PAVEMENT (NEW)

- A Intermodal railyard pavement: asphalt concrete over crushed miscellaneous base and compacted subgrade at design slopes between 0.5% and 1.0%. Pavement is designed for loading for two wheels of 125,000 pounds spaced at 13 feet on center with a wheel print of 4.95 square feet to support Caterpillar V925 type top-pick container handling equipment operating with a 40 long ton (LT) load and four high stacking of normally loaded containers. Maintenance aisle pavement is fiber reinforced concrete over crushed miscellaneous base designed for forklift wheel changing equipment.

B302-305 On-Dock Railyard Expansion  
Exhibit  
8/27/2024

### **3 UTILITIES (NEW)**

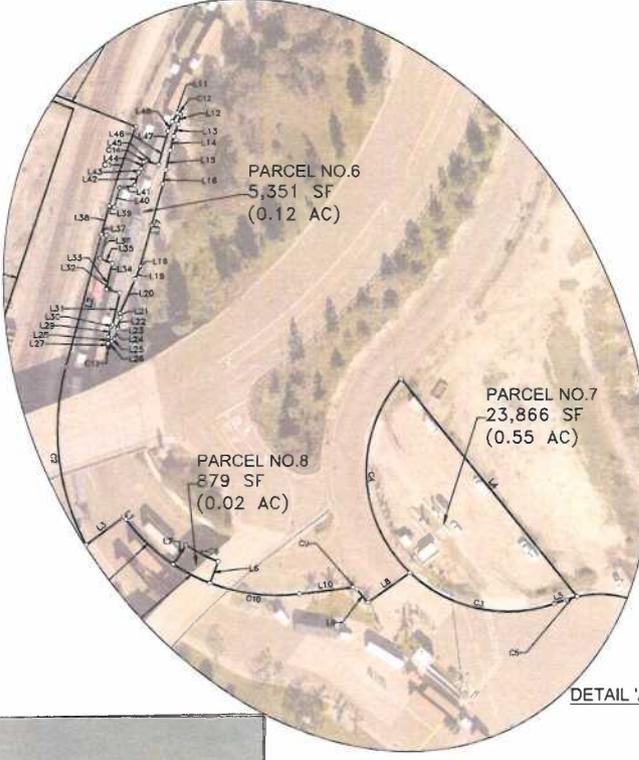
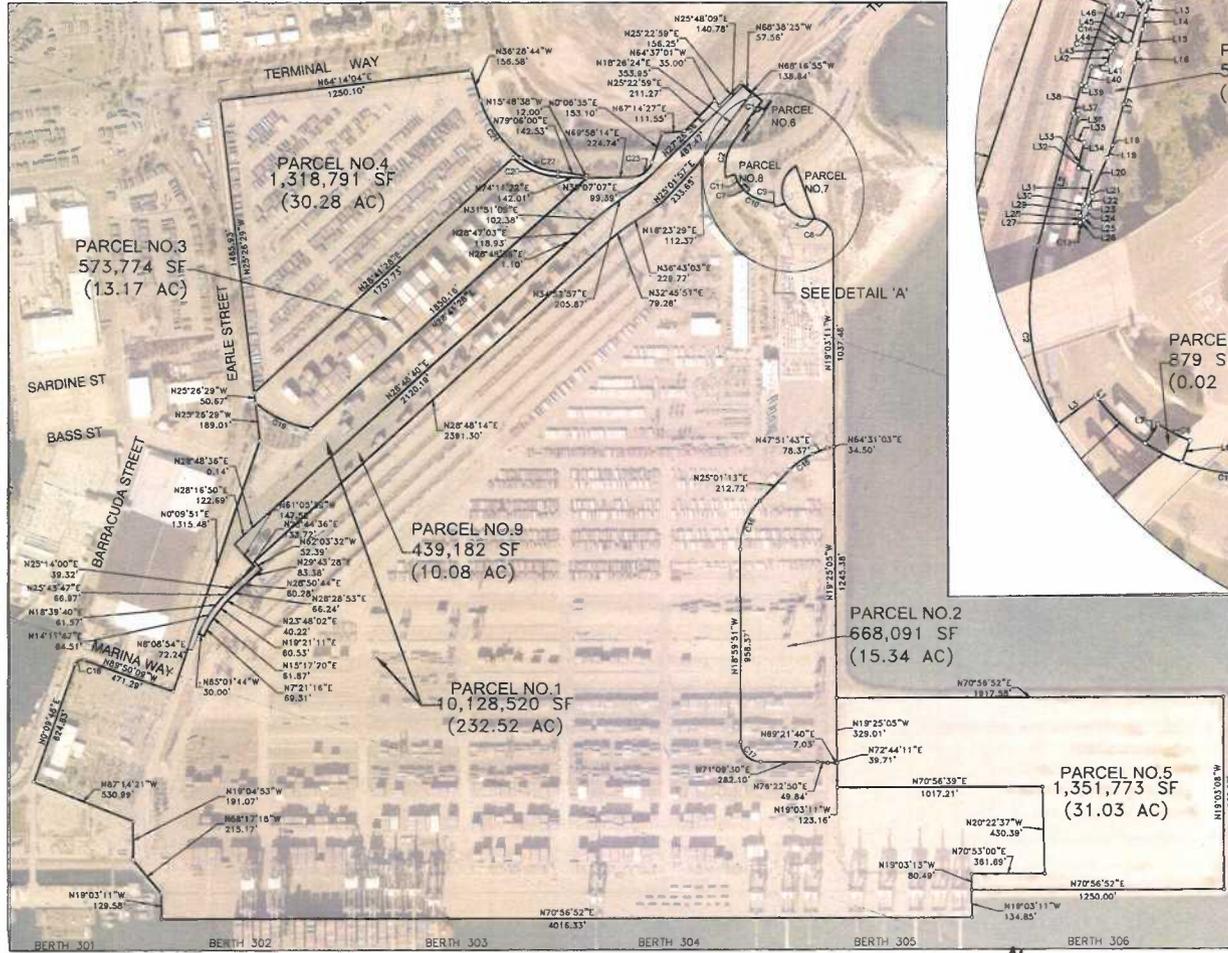
- A Drainage system: Infrastructure shall comply with the most current requirements set by the City of Los Angeles Bureau of Sanitation Watershed Protection Division.
- B Fire protection system: designed in compliance with latest editions of the Los Angeles City Plumbing Code and Los Angeles City Fire Code.
- C Water System: existing water line and fire hydrants to be protected in place or relocated as required and shall comply with City of Los Angeles code.
- D Electrical Systems:
  - 1) Lighting designed to AREMA and OSHA railyard lighting standards of average minimum 5 foot candle
  - 2) Relocate existing rail yard Lighting (100 foot high mast poles) as required for new railyard expansion
  - 3) Railyard infrastructure shall be powered by existing 4160V terminal infrastructure
  - 4) Communication conduit
  - 5) Steel casing for future electrical ductbank

### **4 SIGNAGE AND STRIPING (NEW)**

- A Signage: Standard terminal signage as needed
- B Striping: Standard striping as needed for rail safety and terminal operations in Caltrans standard traffic paint

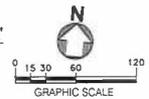
B302-305 On-Dock Railyard Expansion  
Exhibit  
8/27/2024





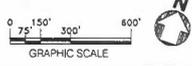
CURVE TABLE				
NO.	RADIUS(FT)	DELTA (D-44-S)	LENGTH(FT)	TANGENT(FT)
C1	807.07	5°56'13"	83.63	41.85
C2	244.02	42°58'53"	183.06	96.08
C3	140.01	62°48'53"	153.40	85.42
C4	140.01	87°18'47"	213.36	133.60
C5	100.01	81°17'14"	10.97	5.48
C6	100.01	87°42'46"	146.12	89.59
C7	186.02	12°33'34"	40.77	20.47
C8	163.02	12°33'39"	35.74	17.94
C9	5.00	50°25'13"	4.40	2.35
C10	186.02	27°45'54"	90.20	46.00
C11	186.02	20°06'45"	65.30	33.99
C12	1.50	180°00'00"	4.71	INFINITY
C13	1.50	180°00'00"	4.71	INFINITY
C14	1.53	88°38'03"	2.37	1.50
C15	350.03	22°50'30"	139.54	70.71
C16	350.03	44°01'04"	268.91	141.48
C17	100.01	89°50'59"	156.82	99.74
C18	35.00	90°00'03"	54.58	35.00
C19	558.01	31°20'58"	305.31	156.56
C20	354.02	39°33'44"	244.45	127.32
C21	581.05	35°04'05"	355.63	183.58
C22	329.83	34°15'48"	197.24	101.67
C23	110.01	69°51'38"	134.13	76.83

PARCEL 1 232.52 AC (MAG)  
 PARCEL 2 15.34 AC (MAG)  
 PARCEL 3 13.17 AC (MAG)  
 PARCEL 4 30.28 AC (NON-MAG)  
 PARCEL 5 31.03 AC (NOT A PART)  
 PARCEL 6 .12 AC (NON-MAG)  
 PARCEL 7 .55 AC (NON-MAG)  
 PARCEL 8 .02 AC (NON-MAG)  
 PARCEL 9 10.08 AC (NON-MAG RAIL RATE)  
 TOTAL 302.08 AC



LINE TABLE											
NO.	BEARING	DISTANCE(FT)									
L1	N30°31'33"W	3.14	L16	N12°28'04"E	8.34	L31	N13°15'33"E	32.56	L46	N15°35'36"E	22.72
L2	N15°03'19"E	135.36	L17	N15°16'42"E	84.69	L32	N74°43'18"W	13.81	L47	N16°10'01"E	12.22
L3	N65°13'42"E	46.85	L18	N18°41'09"E	3.24	L33	N74°48'01"E	11.75	L48	N22°38'15"E	7.00
L4	N38°42'30"W	278.18	L19	N22°54'56"E	10.00	L34	N15°24'34"E	14.45			
L5	N70°56'49"E	12.80	L20	N24°29'54"E	37.10	L35	N67°55'18"W	13.08			
L6	N20°51'47"E	22.95	L21	N6°07'11"W	4.23	L36	N15°16'42"E	23.23			
L7	N33°25'26"E	23.00	L22	N16°07'04"E	10.00	L37	N76°12'52"W	5.99			
L8	N54°36'29"E	51.26	L23	N1°04'28"E	1.73	L38	N15°07'09"E	29.39			
L9	N39°15'42"W	17.10	L24	N17°22'38"E	10.39	L39	N74°16'11"W	5.17			
L10	N43°01'15"E	53.40	L25	N47°32'16"E	3.50	L40	N15°16'42"E	19.97			
L11	N32°15'10"E	10.18	L26	N17°57'17"E	6.98	L41	N60°01'34"E	15.48			
L12	N12°37'23"E	10.06	L27	N17°36'11"E	3.50	L42	N16°06'40"E	12.73			
L13	N21°26'39"E	12.89	L28	N2°19'58"E	6.64	L43	N13°31'44"E	5.11			
L14	N12°28'40"E	14.44	L29	N17°36'11"E	10.50	L44	N23°14'35"E	6.88			
L15	N12°28'53"E	26.11	L30	N31°57'05"E	1.70	L45	N74°43'18"W	13.27			

NOTES:  
 1) NO SUBSTRUCTURES ARE SHOWN ON THIS DRAWING. ACCURATE SUBSTRUCTURE INFORMATION MUST BE OBTAINED FROM LESSEES AND LAH-B ENGINEERING RECORDS.  
 2) HORIZONTAL DATUM IS BASED ON THE NORTH AMERICAN DATUM OF 1983 (NAD 83), CALIFORNIA COORDINATE SYSTEM, ZONE 5, FEET.  
 3) ALL DISTANCES SHOWN ON THIS DRAWING ARE GRID DISTANCES. TO OBTAIN A REASONABLE REPRESENTATION OF THE GROUND DISTANCE, DIVIDE THE DISTANCE HEREBY BY THE AVERAGE SCALE FACTOR OF 1.000716.



NO.	DATE	DRAWN	REVISIONS -	APP'D	NO.	DATE	DRAWN	REVISIONS -	APP'D	SCALE:	1"=300'	PERMIT MAP - AUTHORITY NO. P733 <b>FENIX MARINE SERVICES, LTD.</b> THE PORT OF LOS ANGELES ENGINEERING DIVISION, P.O. BOX 1311, SAN PEDRO, CA 90723-0131
1	10/16	DER	REVISED PARCEL NOS. 1 & 4	<i>[Signature]</i>								
2	01/17	DER	ADDED PARCEL NO. 5	<i>[Signature]</i>								
3	01/21	SR	ADDED PARCELS NOS. 6, 7 & 8 AND CHANGED THE TENANT NAME	<i>[Signature]</i>								
4	08/14	SR	ADDED PARCELS NO. 9, & REVISED PARCEL NOS 1 & 5.	<i>[Signature]</i>								