

AGREEMENT NO. _____

AGREEMENT BETWEEN THE CITY OF LOS ANGELES
AND HARBOR PERFORMANCE ENHANCEMENT CENTER, LLC
FOR PRIVATE CROSSING

THIS AGREEMENT ("Agreement") is made this _____ day _____, _____, between the CITY OF LOS ANGELES, acting by and through its Board of Harbor Commissioners (hereinafter referred to as "City") and HARBOR PERFORMANCE ENHANCEMENT CENTER, LLC (hereinafter referred to as "Licensee").

WHEREAS, City owns certain railroad tracks and rights-of-way on Terminal Island within the Harbor District, as depicted on Exhibit "A" ("Railroad Tracks");

WHEREAS, the Railroad Tracks form part of the facilities operated by Pacific Harbor Lines Railroad ("PHL") pursuant to Operating Agreement No. 1989 between City and PHL;

WHEREAS, Licensee has requested a license to cross at-grade the Railroad Tracks and to use an area surrounding such Railroad Tracks ("Crossing," which, as defined, shall include the Railroad Tracks, both of which are depicted on Exhibit "A"), to facilitate use and occupancy of certain premises adjacent to the Railroad Tracks pursuant to a Revocable Permit No. 17-05 issued by City ("Revocable Permit"); and

WHEREAS, in consideration of the covenants of Licensee herein contained and of the faithful keeping and performance thereof, City hereby grants Licensee, subject to the terms and conditions hereinafter set forth, a license for the use of the Crossing, while expressly reserving the right to construct, maintain and operate additional railroad tracks and such other facilities as it may desire upon and along portions of the Crossing.

NOW, THEREFORE, it is mutually agreed as follows:

1. Recitals. The recitals of this Agreement, above, hereby are incorporated into this Agreement as express terms and conditions.

2. Licensee's Use Subordinate. Licensee's right to use the Crossing shall at all times be subject to subordinate to the use of said Crossing by City, and PHL for any purpose connected with the operations, maintenance or use thereof for railroad purposes. This Agreement is not intended do and does not modify or amend Agreement No. 1989 between City and PHL.

3. Term. The term of this Agreement shall commence upon the effective date of the Revocable Permit and may be revoked by City by giving to Licensee thirty (30) days' notice in writing of such revocation, which notice may be delivered at City's option to Licensee personally or by United States mail at the address set forth in the Revocable

Permit. In no event shall the term of this Agreement extend past the term of the Revocable Permit. Notwithstanding the foregoing, the effectiveness of this Agreement is expressly contingent on the effectiveness of Revocable Permit No. 17-05. Should Revocable Permit No. 17-05 not become effective, this Agreement shall not become effective. Should Revocable Permit No. 17-05 expire or terminate, this Agreement shall terminate automatically, without any further action of City or Licensee.

4. Breach; Cross-Breach. Licensee's failure to perform any obligation under this Agreement if Licensee does not cure the failure within thirty (30) days after delivery of written notice of the failure from City to Tenant, shall constitute a material breach of this Agreement. A material breach of this Agreement shall constitute a material breach of the Revocable Permit. A material breach of the Revocable Permit shall constitute a material breach of this Agreement. Expiration or termination of this Agreement shall terminate the Revocable Permit. Expiration or termination of the Revocable Permit shall terminate this Agreement.

5. Licensee to Provide Infrastructure and Personnel. In consideration of City's issuance of this Agreement, Licensee, at its sole cost and expense, shall furnish: all infrastructure (including, but not limited to, gates, barriers, signage, signals, lighting and/or road surfacing); and, through PHL, labor (including, but not limited to, the labor necessary to install such infrastructure, as well as flagmen or crossing watchmen to manage or monitor conditions or traffic at the Railroad Tracks) necessary to allow vehicle traffic to cross the Railroad Tracks at grade. Licensee's use of the Crossing, and both such infrastructure and labor, shall be provided in a manner compliant with applicable federal, state, county, City or government agency laws, statutes, ordinances, standards, codes (including all building codes) rules, requirements or orders in effect now or hereafter in effect ("Applicable Law") (which Applicable Law includes but is not limited to Public Utilities Commission of the State of California, General Order No. 75-D, "Regulations Governing Standards for Warning Devices for At-Grade Highway-Rail Crossings in the State of California") and the reasonable requests and requirements of PHL. In connection with Licensee's furnishing of such infrastructure, Licensee shall procure from City's Harbor Department and maintain a Harbor Engineer's Permit, application for which shall be supported by drawings and specifications stamped by an engineer licensed in the State of California, and protocols for the operation of the Crossing approved in writing by PHL. Licensee shall ensure that the Crossing shall be designed with lockable gates as to not allow unsupervised use of the Crossing. Licensee shall coordinate construction activity concerning such infrastructure with PHL. Beyond furnishing such infrastructure, as permitted by City pursuant to the Harbor Engineer's Permit and as coordinated with PHL, and maintaining same as required by PHL, Licensee is prohibited from physically altering the Crossing.

6. Flangeways. Licensee shall keep the flangeways free and clear of dirt, gravel and other debris at all times.

7. Interference, Damage. This Agreement provides Licensee with no rights to operate or alter rail facilities or infrastructure in or around the Crossing, or otherwise. Any

such actions by Licensee or its invitees shall constitute a material breach of this Agreement.

8. Indemnity and Hold Harmless. Licensee assumes all risk of injury to or death of its servants, agents and employees while upon or near the Crossing engaged upon any duty in connection with the maintenance, repair, or renewal of same, and all risk of injury to or death of any person or persons, and all risk of loss of or damage to property arising in any manner from all uses, occupations, and operations of the Crossing. Licensee does hereby promise and agree to relieve, indemnify, protect and hold harmless the City and PHL, and each of them, and their boards, officers, agents, employees, successors and assigns, from and against any and all claims, demands, actions, causes of action, proceedings, losses, fines liens, costs and judgments of any kind and nature whatsoever, including expenses incurred in defending against legal actions, growing out of or arising or resulting from any such injury to or death of persons, or loss of or damage to property. Licensee agrees, promptly, to pay to City, and PHL, the full amount which they may pay, or be compelled to pay, in satisfaction of, or in settlement of, such claim, demand, action, cause of action, proceeding costs and judgment, provided, however, that written notice shall be given to Licensee by City, and PHL of any such claim, demand, action or proceeding before any amount is paid or agreed to be paid by reasons thereof, and if, in the opinion of Licensee, any such claim, demand or action is unjust or illegal, City and the PHL agree not to settle or compromise such claim and to cooperate with and to assist Licensee in the defense of any such claim or action, at Licensee's sole cost and expense.

9. Insurance.

A. In addition to and not as a substitute for, or limitation of, any of the indemnity obligations imposed by Section 7, above, Licensee shall procure and maintain at its sole cost and expense and keep in force at all times during the term of this Agreement the following insurance:

(1) Commercial General Liability Insurance

Commercial general liability insurance covering personal and advertising injury, bodily injury, and property damage providing contractual liability, independent contractors, products and completed operations, and premises/operations coverage written by an insurance company authorized to do business in the State of California rated VII, A- or better in Best's Insurance Guide (or an alternate guide acceptable to City if Best's is not available) within Licensee's normal limits of liability but not less than Two Million Dollars (\$2,000,000) combined single limit for injury or claim. Where Licensee provides or dispenses alcoholic beverages, Host Liquor Liability coverage shall be provided as above. Where Licensee provides pyrotechnics, Pyrotechnics Liability shall be provided as above. Said limits shall provide first dollar coverage except that the Executive Director of City's Harbor Department ("Executive Director") may permit a self-insured retention or self-insurance in those cases where, in his or her judgment, such retention or self-insurance is justified by the net worth of Licensee. The retention or self-insurance provided shall provide that any other insurance

maintained by City's Harbor Department shall be excess of Licensee's insurance and shall not contribute to it. In all cases, regardless of any deductible or retention, said insurance shall contain a defense of suits provision and a severability of interest clause. Each policy shall name the City of Los Angeles Harbor Department, its officers, agents and employees as primary additional insureds.

(2) Automobile Liability Insurance

Automobile liability insurance written by an insurance company authorized to do business in the State of California rated VII, A- or better in Best's Insurance Guide (or an alternate guide acceptable to City if Best's is not available) within Licensee's normal limits of liability but not less than One Million Dollars (\$1,000,000) covering damages, injuries or death resulting from each accident or claim arising out of any one claim or accident. Said insurance shall protect against claims arising from actions or operations of the insured, or by its employees. Coverage shall contain a defense of suits provision and a severability of interest clause. Each policy shall name the City of Los Angeles Harbor Department, its officers, agents and employees as primary additional insureds.

(3) Workers' Compensation and Employer's Liability

Licensee shall certify that it is aware of the provisions of Section 3700 of the California Labor code which requires every employer to be insured against liability for Workers' Compensation or to undertake self-insurance in accordance with the provisions of that Code, and that Licensee shall comply with such provisions before commencing the performance of the tasks under this Agreement. Coverage for claims under U.S. Longshore and Harbor Workers' Compensation Act, if required under applicable law, shall be included. Licensee shall submit Workers' Compensation policies whether underwritten by the state insurance fund or private carrier, which provide that the public or private carrier waives its right of subrogation against the City in any circumstance in which it is alleged that actions or omissions of the City contributed to the accident. Such Worker's Compensation and occupational disease requirements shall include coverage for all employees of Licensee, and for all employees of any subcontractor or other vendor retained by Licensee.

(4) Railroad Protective Liability Insurance

Licensee shall provide a policy of Railroad Protective Liability insurance in which PHL acting for itself and its railroad users are named insureds and the City of Los Angeles, its boards, officers, agents and employees are included as additional insureds with Licensee. The minimum limits of Railroad Protective Liability insurance shall be the limits normally carried by Licensee but not less than Two Million Dollars (\$2,000,000) combined single limit for property damage and bodily injury including death. If the submitted policies contain aggregate limits, Licensee shall provide evidence of insurance protection for such limits so that the required coverage is not diminished in the event that the aggregate limits become exhausted. Said limit shall be without deduction,

provided that the Executive Director or designee may permit a deductible amount when it is justified by the financial capacity of Licensee. Any deductible amount permitted by the Executive Director shall be paid solely by Licensee.

Licensee's Comprehensive General Liability coverage shall also have the railroad exclusion deleted.

B. Insurance Procured by Licensee on Behalf of City

In addition to and not as a substitute for, or limitation of, any of the indemnity obligations imposed by Section 7, and where Licensee is required to name the City of Los Angeles Harbor Department, its officers, agents and employees as primary additional insureds on any insurance policy required by this Agreement, Licensee shall cause City to be named as an additional insured on all policies it procures in connection with this Section 8. Licensee shall cause such additional insured status to be reflected in the original policy or by additional insured endorsement (CG 2010 or equivalent) substantially as follows:

"Notwithstanding any inconsistent statement in the policy to which this endorsement is attached, or any endorsement or certificate now or hereafter attached hereto, it is agreed that City, Board, their officers, agents and employees, are additional insureds hereunder, and that coverage is provided for all contractual obligations, operations, uses, occupations, acts and activities of the insured under Agreement No. ____, and under any amendments, modifications, extensions or renewals of said Agreement regardless of where such contractual obligations, operations, uses, occupations, acts and activities occur.

"The policy to which this endorsement is attached shall provide a 10-days notice of cancellation for nonpayment of premium, and a 30-days notice of cancellation for any other reasons to the Risk Manager.

"The coverage provided by the policy to which this endorsement is attached is primary coverage and any other insurance carried by City is excess coverage;

"In the event of one of the named insured's incurring liability to any other of the named insureds, this policy shall provide protection for each named insured against whom claim is or may be made, including claims by other named insureds, in the same manner as if separate policies had been issued to each named insured. Nothing contained herein shall operate to increase the company's limit of liability; and

"Notice of occurrences or claims under the policy shall be made to the Risk Manager of City's Harbor Department with copies to the City Attorney's Office."

C. Required Features of Coverages

Insurance procured by Licensee in connection with this Section 8 shall include the following features:

(1) Acceptable Evidence and Approval of Insurance

Electronic submission is the required method of submitting Licensee's insurance documents. Licensee's insurance broker or agent shall register with the City's online insurance compliance system **Track4LA**™ at <http://track4la.lacity.org/> and submit the appropriate proof of insurance on Licensee's behalf.

Upon request by City, Licensee shall furnish full copies of certified policies of any insurance policy required herein. This obligation is intended to, and shall, survive the expiration or earlier termination of this Agreement.

(2) Carrier Requirements

All insurance which Licensee is required to provide pursuant to this Agreement shall be placed with insurance carriers authorized to do business in the State of California and which are rated A-, VII or better in Best's Insurance Guide. Carriers without a Best's rating shall meet comparable standards in another rating service acceptable to City.

(3) Notice of Cancellation

Each insurance policy described above shall provide that it shall not be canceled or reduced in coverage until after the Board of Harbor Commissioners, Attention: Risk Manager and the City Attorney of City have each been given a 10-days' notice of cancellation for nonpayment of premium and a 30-days' notice of cancellation for any other reason by written notice by registered mail addressed to 425 S. Palos Verdes Street, San Pedro, California 90731.

(4) Modification of Coverage

Executive Director, at his or her sole reasonable discretion, based upon recommendation of independent insurance consultants to City, may increase or decrease amounts and types of insurance coverage required hereunder at any time during the term hereof by giving ninety (90) days' prior written notice to Licensee.

(5) Renewal of Policies

At least thirty (30) days prior to the expiration of any policy required by this Agreement, Licensee shall renew or extend such policy in accordance with the requirements of this Agreement and direct their insurance broker or agent to submit to the City's online insurance compliance system **Track4LA**™ at <http://track4la.lacity.org/> a

renewal endorsement or renewal certificate or, if new insurance has been obtained, evidence of insurance as specified above. If Licensee neglects or fails to secure or maintain the insurance required above, Executive Director may, at his or her own option but without any obligation, obtain such insurance to protect City's interests. The cost of such insurance shall be deducted from the next payment due Licensee.

(6) Limits of Coverage

If Licensee maintains higher limits than the minimums required by this Agreement, City requires and shall be entitled to coverage for the higher limits maintained by Licensee. Any available insurance proceeds in excess of the specified minimum limits of insurance and coverage shall be available to City.

D. Accident Reports

Licensee shall report in writing to Executive Director within fifteen (15) calendar days after it, its officers or managing agents have knowledge of any accident or occurrence involving death of or injury to any person or persons, or damage in excess of Five Hundred Dollars (\$500.00) to property, occurring upon the premises, or elsewhere within the Harbor District if Licensee's officers, agents or employees are involved in such an accident or occurrence. Such report shall contain to the extent available (1) the name and address of the persons involved, (2) a general statement as to the nature and extent of injury or damage, (3) the date and hour of occurrence, (4) the names and addresses of known witnesses, and (5) such other information as may be known to Licensee, its officers or managing agents.

10. Assignments and Transfers. Licensee shall not assign or transfer this Agreement in whole or in part without the written consent of City first had and obtained.

11. Applicable Law. Licensee shall at all times comply with Applicable Law, and with the reasonable requests and directions of Executive Director with respect to the Crossing.

12. Governing Law; Venue. This Agreement shall be governed by and construed in accordance with the laws of the State of California, without reference to the conflicts of law, rules, and principles of such State. The parties agree that all actions or proceedings arising in connection with this Agreement shall be tried and litigated exclusively in the State or Federal courts located in the County of Los Angeles, State of California, in the judicial district required by court rules.

13. Modification. This Agreement may be modified only by written agreement of all parties. Any such modifications are subject to all applicable approval processes required by, without limitation, City's Charter and City's Administrative Code.

14. Counterparts. This Agreement may be executed in any number of counterparts, each of which shall be deemed an original and all of which shall constitute together one and the same instrument.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement on the dates to the left of their signatures.

THE CITY OF LOS ANGELES
HARBOR DEPARTMENT

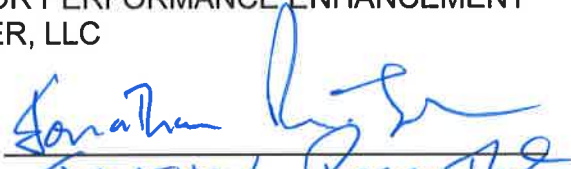
Dated: _____

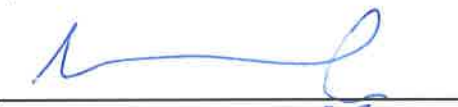
By: _____
EUGENE D. SEROKA
Executive Director

Attest: _____
AMBER M. KLESGES
Board Secretary

HARBOR PERFORMANCE ENHANCEMENT
CENTER, LLC


Dated: Aug 25, 2017

By: 
Jonathan Rosen
(Print/Type Name and Title)

Attest: 
DAN DIMONTA, CFO
(Print/Type Name and Title)

APPROVED AS TO FORM AND LEGALITY
_____, 2017

MICHAEL N. FEUER, City Attorney
JANNA B. SIDLEY, General Counsel

By 
STEVEN Y. OTERA, Deputy

