



201132

Port Authority Lease No. L-PN-264
Supplement No. 1

FMC Agreement No. 201132-001

SUPPLEMENTAL AGREEMENT

THIS AGREEMENT, made as of August 31, 2001, by and between THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY (hereinafter called "the Port Authority") and PORT NEWARK CONTAINER TERMINAL LLC (hereinafter called "the Lessee"),

WITNESSETH, That:

WHEREAS, heretofore and as of December 1, 2000, the Port Authority and the Lessee entered into an agreement of lease (hereinafter, as the said agreement of lease has been heretofore amended, modified and supplemented, called "the Lease") covering premises at Port Newark, in the City of Newark, County of Essex and State of New Jersey; and

WHEREAS, the Port Authority and the Lessee desire to amend the Lease;

NOW, THEREFORE, for and in consideration of the mutual agreements hereinafter contained the Port Authority and the Lessee hereby agree as follows:

1. In addition to the premises heretofore let to the Lessee under the Lease, the letting as to which shall continue in full force and effect, subject to and in accordance with all the terms, provisions, covenants and conditions of the Lease as amended by this Agreement, the Port Authority hereby lets to the Lessee and the Lessee hires and takes from the Port Authority, at Port Newark aforesaid, the open area shown in diagonal crosshatching on the sketch attached hereto, hereby made a part hereof and marked "Exhibit A-2", together with the structures, fixtures, improvements and other property, if any, of the Port Authority located or to be located therein or thereon, the said open area, and the said structures, fixtures, improvements and other property (all of which is sometimes hereinafter in this Agreement called "the Additional Premises") to be and become a part of the premises under the Lease at 12:01 o'clock A.M. on September 1, 2001 let to the Lessee, subject to and in accordance with all of the terms, covenants and conditions of the Lease as herein amended, for a term expiring at 11:59 o'clock P.M. on August 31, 2005, unless sooner terminated. The parties hereby acknowledge that the Additional Premises constitute non-residential property.

2. The Lessee shall use the Additional Premises solely as a temporary intermodal rail facility in connection with its operations under the Lease.

CONFORMED COPY

FMC Agreement No.: 201132-001 Effective Date: Friday, March 8, 2002

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3. The Port Authority shall deliver the Additional Premises to the Lessee in its presently existing "as is" condition. The Lessee acknowledges that prior to the execution of this Agreement, it has thoroughly examined and inspected the Additional Premises and, subject to the performance of the work set forth in paragraph 9 of this Agreement, has found it in good order and repair and has determined it to be suitable for the Lessee's operations therein under the Lease as herein amended. The Lessee agrees to and shall take the Additional Premises in its "as is" condition and the Port Authority shall have no obligations under the Lease as herein amended for finishing work or preparation of any portion of the Additional Premises for the Lessee's use.

4. The Lessee acknowledges that it has not relied upon any representation or statement of the Port Authority or its Commissioners, officers, employees or agents as to the suitability of the Additional Premises for the operations permitted thereon by the Lease as herein amended. Without limiting any obligation of the Lessee to commence operations under the Lease as herein amended at the time and in the manner stated elsewhere in this Agreement, the Lessee agrees that no portion of the Additional Premises will be used initially or at any time during the letting thereof under the Lease as herein amended which is in a condition unsafe or improper for the conduct of the Lessee's operations therein under the Lease as herein amended so that there is possibility of injury or damage to life or property.

5. The Port Authority shall have no obligation to supply to the Lessee any services or utilities in the Additional Premises.

6. (a) In addition to all other rentals payable under the Lease as herein amended, the Lessee shall pay a basic rental for the Additional Premises at the annual rate of Sixty-eight Thousand Six Hundred Forty-five Dollars and Eighty-five Cents (\$68,645.85), payable in advance in the amount of Five Thousand Seven Hundred Twenty Dollars and Forty-nine Cents (\$5,720.49) on the "Rental Commencement Date", as hereinafter defined, and on the first day of each calendar month thereafter during the term of the letting of the Additional Premises, except that if the Rental Commencement Date shall be a day other than the first day of a calendar month the installment of basic rental payable on the Rental Commencement Date shall be an amount equal to the amount of the installment described in this subparagraph multiplied by a fraction the numerator of which shall be the number of days from the Rental Commencement Date to the last day of the calendar month in which the Rental Commencement Date shall fall and the denominator of which shall be the number of days in that calendar month.

(b) "Rental Commencement Date" shall mean the earliest of the following dates:

(1) November 1, 2001; or

(2) the date as of which the Port Authority shall certify that the Lessee has substantially completed performance of the "Lessee's Construction Work", described in paragraph 9 hereof to such an extent as to permit use and occupancy of the Additional Premises by the Lessee for the purposes stated in paragraph 2 of this Agreement; or

(3) the date on which the Lessee commences in the Additional Premises any of the operations authorized therein by paragraph 2 of this Agreement.

7. Abatement of basic rental, if any, to which the Lessee may be entitled with respect to the Additional Premises shall be computed in accordance with the provisions of Standard Endorsement No. L27.4 attached hereto and hereby made a part hereof.

8. (a) The Lessee shall pay to the Port Authority during the period from the Rental Commencement Date through the expiration of the term of the letting of the Additional Premises under the Lease as herein amended a "Rail Facility Container Lift Fee" for each "Rail Container Lift", as such term is defined in this subparagraph, at the following respective rate for each Rail Container Lift: (1) Twenty-three Dollars and Ninety-seven Cents (\$23.97) during the period from the Rental Commencement Date through December 31, 2001; (2) Twenty-four Dollars and Ninety-three Cents (\$24.93) during the period from January 1, 2002 through December 31, 2002; (3) Twenty-five Dollars and Ninety-three Cents (\$25.93) during the period from January 1, 2003 through December 31, 2003; (4) Twenty-six Dollars and Ninety-six Cents (\$26.96) during the period from January 1, 2004 through December 31, 2004; and (5) Twenty-eight Dollars and Four Cents (\$28.04) during the period from January 1, 2005 through August 31, 2005. The term "Rail Container Lift" shall mean each placement of a marine cargo container on a railroad train which subsequently carries such marine cargo container from the Additional Premises and shall also mean each removal of a marine cargo container from a railroad train which carried the marine cargo container to the Additional Premises.

(b) The Lessee shall pay the Rail Facility Container Lift Fee as follows: on the twentieth (20th) day of the month following the month in which the Rental Commencement Date shall occur, and on the twentieth (20th) day of each and every month thereafter occurring during each calendar year (with the first and last partial calendar years to be deemed calendar years for these purposes) to occur during the term of the letting of

the Additional Premises under the Lease as herein amended, including the twentieth (20th) day of the month following the last day of each such calendar year, and within the twentieth (20th) day following the effective date of the expiration or earlier termination of the letting of the Additional Premises, the Lessee shall render to the Port Authority a statement certified by a responsible officer of the Lessee showing the total number of Rail Container Lifts arising out of the operations of the Lessee on the Additional Premises during the preceding month and the cumulative number of Rail Container Lifts arising out of the operations of the Lessee on the Additional Premises from the date of the commencement of the calendar year for which the report is made through the last day of the preceding month of the calendar year for which the report is made; and the Lessee shall pay to the Port Authority at the time of rendering such statement and at the time of rendering each subsequent monthly statement for each such calendar year the amount of the Rail Facility Container Lift Fee payable for the month for which the report is made; provided, however, that if the letting of the Additional Premises shall expire or be earlier terminated effective on a date other than the last day of a calendar month, the final payment of the Rail Facility Container Lift Fee shall be due and payable within twenty (20) days after the effective date of expiration or earlier termination.

(c) The Lessee shall install and use such equipment or devices for recording Rail Container Lifts as may be necessary or desirable to keep accurate counts of Rail Container Lifts.

(d) The provisions of Section 43 of the Lease shall apply to all amounts payable to the Port Authority under this paragraph, except that the required records and books of account shall be maintained by the Lessee during the term of the letting of the Additional Premises and for three years thereafter.

9. (a) The Lessee understands that construction and installation work is required in order to prepare the Additional Premises for its occupancy and operations, and the Lessee agrees to and shall perform the following work to prepare the Additional Premises for the Lessee's operations therein (which work is hereinafter called "the Lessee's Construction Work"): removing obstructions where necessary, installing two (2) switches, removing and replacing railroad ties and tracks where necessary, removing guardrail, adding acceleration and deceleration lanes at ingress and egress points, and such other related site rail and/or traffic improvements (excluding installation, construction or relocation of traffic lights) that shall be agreed to by the parties and approved by the Port Authority. The Lessee's Construction Work shall be paid for by the Port Authority as provided for in subparagraphs (p) and (q) of this paragraph.

(b) With respect to the Lessee's Construction Work the Lessee shall indemnify and save harmless the Port Authority, and its Commissioners, officers, agents and employees against the following distinct and several risks, whether they arise from acts or omissions of the Lessee, any contractors of the Lessee, the Port Authority, third persons, or from acts of God or the public enemy, or otherwise, excepting only risks which result solely from affirmative wilful acts done by the Port Authority subsequent to commencement of the work:

(i) The risk of loss or damage to all such construction prior to the completion thereof. In the event of such loss or damage, the Lessee shall forthwith repair, replace and make good the work without cost to the Port Authority;

(ii) The risk of death, injury or damage, direct or consequential, to the Port Authority, and its Commissioners, officers, agents and employees, and to its or their property, arising out of or in connection with the performance of the work. The Lessee shall indemnify the Port Authority, and its Commissioners, officers, agents and employees, for all such injuries and damages, and for all loss suffered by reason thereof;

(iii) The risk of claims and demands, just or unjust, by third persons against the Port Authority, and its Commissioners, officers, agents and employees, arising or alleged to arise out of the performance of the work. The Lessee shall indemnify the Port Authority, and its Commissioners, officers, agents and employees, against and from all such claims and demands, and for all loss and expense incurred by it and by them in the defense, settlement or satisfaction thereof including without limitation thereto, claims and demands for death, for personal injury or for property damage, direct or consequential.

(c) Prior to the commencement of any of the Lessee's Construction Work, the Lessee shall submit to the Port Authority for its approval a Construction Application in the form supplied by the Port Authority, and containing such terms and conditions as the Port Authority may include, setting forth in detail by appropriate plans and specifications the work the Lessee proposes to perform and the manner of and time periods for performing the same, including without limitation a schedule listing each contract proposed to be entered into for the performance of the work and the estimated cost of the work to be performed under each such contract. The data to be supplied by the Lessee shall identify each of the items constituting the Lessee's Construction Work, and shall describe in detail the

systems, improvements, fixtures and equipment to be installed by the Lessee. The Lessee shall be responsible at its sole expense for retaining all architectural, engineering and other technical consultants and services as may be directed by the Port Authority and for developing, completing and submitting detailed plans and specifications for the work. The plans and specifications to be submitted by the Lessee shall be in sufficient detail for a contractor to perform the work and shall bear the seal of a qualified architect or professional engineer who shall be responsible for the administration of the work in accordance with the Port Authority's requirements. In connection with review by the Port Authority of the Lessee's submissions under this paragraph, the Lessee shall submit to the Port Authority, at the Port Authority's request, such data, detail or information as the Port Authority may find necessary. Following the Port Authority's receipt of the Lessee's Construction Application and complete plans and specifications, the Port Authority shall give its written approval or rejection thereof, or shall request such revisions or modifications thereto as the Port Authority may find necessary. The Port Authority shall endeavor to complete plan review within ten (10) days of receipt thereof. The Lessee shall not engage any contractor or permit the use of any subcontractor unless and until each such contractor or subcontractor, and the contract such contractor is operating under, have been approved by the Port Authority. The Lessee shall include in any such contract or subcontract such provisions as are required in accordance with the provisions of this Agreement and the Construction Application approved by the Port Authority. The Lessee shall obtain and maintain or cause each contractor to obtain and maintain in force such insurance coverage as is described in subparagraphs (j) and (k) of this paragraph and such performance bonds as the Port Authority may specify. All of the Lessee's Construction Work shall be performed by the Lessee in accordance with the Construction Application and final plans and specifications approved by the Port Authority, shall be subject to inspection by the Port Authority during the progress of the work and after the completion thereof, and the Lessee shall redo or replace at its own expense any work not done in accordance therewith. Upon final completion of all of the Lessee's Construction Work the Lessee shall deliver to the Port Authority a certificate to such effect signed by a responsible officer of the Lessee and by the architect or engineer who sealed the Lessee's plans pursuant to the provisions of this subparagraph certifying that all of the work has been performed in accordance with the approved plans and specifications and the provisions of this Agreement, and the Lessee shall supply the Port Authority with as-built drawings of the Lessee's Construction Work in such form and number requested by the Port Authority. The Lessee shall keep said drawings current during the term of the letting under the Lease as herein amended. No changes or modifications to such work shall be made without prior Port Authority consent. Following its receipt of the Lessee's certificate, the Port

Authority shall inspect the work and, unless such certification is not correct, or the Port Authority determines that the Additional Premises are unsuitable for occupancy and use by the Lessee, a certificate of final completion shall be delivered to the Lessee by the Port Authority.

(d) Except as set forth in subparagraph (e) of this paragraph, the Lessee shall not commence any portion of the Lessee's Construction Work until the Construction Application and plans and specifications covering such work, referred to in subparagraph (c) of this paragraph, have been finally approved by the Port Authority.

(e) If the Lessee desires to commence construction of portions of the Lessee's Construction Work prior to the approval by the Port Authority of the complete Construction Application and plans and specifications covering all of such work pursuant to subparagraph (c) of this paragraph, the Lessee shall submit to the Port Authority a separate Construction Application for each portion of the Lessee's Construction Work the Lessee so desires to commence (each such portion of the Lessee's Construction Work being hereinafter designated as "Partial Approval Work") which shall be executed by an authorized officer of the Lessee and shall be accompanied by final and complete plans, specifications, drawings, and data with respect to such portion of the Lessee's Construction Work (the final and complete plans, specifications, drawings, and data covering each such portion of the Lessee's Construction Work are hereinafter referred to as "the Partial Approval Work Plans" with respect to such portion of the Lessee's Construction Work) setting forth in detail the work to be performed in connection with each such portion of the Lessee's Construction Work. The Port Authority shall have full and complete discretion as to whether to permit the Lessee to proceed with the performance of any Partial Approval Work. If the Port Authority consents to the performance of any Partial Approval Work, the Port Authority shall review the Construction Application covering such work and shall give its written approval or rejection of the Partial Approval Work Plans with respect thereto or shall request such revisions or modifications thereto as the Port Authority may find necessary. Upon the Port Authority's approval of the Construction Application covering an item of Partial Approval Work and its approval of the Partial Approval Work Plans with respect thereto, the Lessee may proceed to perform such item of Partial Approval Work subject to and in accordance with the following terms and conditions:

(1) The performance by the Lessee of any item of Partial Approval Work in accordance with the Port Authority's approval will be at its sole risk and if for any reason the plans and specifications for the balance of the Lessee's Construction Work or, any part thereof, are not approved by the Port Authority

or if the approval thereof calls for modifications or changes in any item of Partial Approval Work undertaken by the Lessee under any approval granted by the Port Authority pursuant to this subparagraph, the Lessee will, as directed by the Port Authority, and at the Lessee's sole cost and expense, either restore the area affected to the condition existing prior to the commencement of such item of Partial Approval Work or make such modifications and changes to such work as may be required by the Port Authority.

(2) Nothing contained in any approval given pursuant to this subparagraph shall constitute a determination or indication by the Port Authority that the Lessee has complied with any laws, rules, orders, ordinances, enactments, resolutions, regulations, statutes, requirements, codes, directions, and executive orders, including but not limited to those of the City of Newark, which may pertain to the Partial Approval Work to be performed and which the Lessee is required to comply with pursuant to the Lease as herein amended.

(3) Each item of Partial Approval Work shall be performed in accordance with and subject to the terms and provisions of this Agreement covering the Lessee's Construction Work and in accordance with the approved Construction Application covering such item of Partial Approval Work and in accordance with the approved Partial Approval Work Plans constituting a part of such Construction Application, and subject to any requirements, stipulations, and provisions which the Port Authority may impose in its approval of the performance of such item of Partial Approval Work.

(4) No Partial Approval Work performed by the Lessee pursuant to the provisions of this subparagraph shall affect or limit the obligations of the Lessee under any prior approvals it may have obtained with respect to the Lessee's Construction Work.

(5) The fact that the Lessee has performed any item of Partial Approval Work and that the Port Authority has consented to the performance thereof shall not affect or limit the obligations of the Lessee under this Agreement with respect to the Lessee's Construction Work. The Lessee specifically understands that neither the Port Authority's approval of any Construction Application and Partial Approval Work Plans covering any item of Partial Approval Work nor the performance by the Lessee of any item of Partial Approval Work pursuant to such approval shall obligate the Port Authority to approve the Construction Application and plans and specifications submitted by the Lessee for the balance of the Lessee's Construction Work or shall create or be deemed to create any obligation on the part of the Port Authority to permit subsequent Partial Approval Work to be performed. Without limiting the generality of the

provisions of this subparagraph, it is specifically understood that the Port Authority may withhold its approval of a Construction Application and Partial Approval Work Plans covering any item of Partial Approval Work if the Port Authority determines that review of subsequent items of Partial Approval Work is required before the Port Authority can approve, reject, or comment upon such Partial Approval Work Plans.

(6) In the event that in the opinion of the Port Authority the Lessee at any time during the performance of any portion of any item of Partial Approval Work under the approval granted by the Port Authority pursuant to this subparagraph shall fail to comply with all of the provisions of this Agreement with respect to such work or shall fail to comply with the provisions of the Construction Application covering such work and the plans and specifications forming a part thereof, or shall fail to comply with any requirements, stipulations, or provisions imposed by the Port Authority in its approval of the performance of such item of Partial Approval Work, or if in the Port Authority's opinion the Lessee shall be in breach of any of the provisions of this Agreement covering such work or shall be in breach of any of the provisions of the Construction Application and plans and specifications covering the performance of such work, or shall be in breach of any requirements, stipulations, or provisions imposed by the Port Authority in its approval of the work, the Port Authority shall have the right to cause the Lessee to cease all or such part of such item of the Partial Approval Work as is being performed in violation of this Agreement, the Construction Application and plans and specifications, or the conditions of the Port Authority's approval. Upon written direction from the Port Authority, the Lessee shall promptly cease performance of the portion of the Partial Approval Work specified. The Lessee shall thereupon submit to the Port Authority for its written approval the Lessee's proposal for making modifications, corrections or changes in or to the item of Partial Approval Work that has been or is to be performed so that the same will comply with the provisions of this Agreement, the Construction Application and plans and specifications, or the conditions of the Port Authority's approval covering such work. The Lessee shall not commence construction of the portion of the Partial Approval Work that has been halted until it has received written approval of the proposed modifications, corrections or changes.

(7) It is hereby expressly understood and agreed that the Port Authority has no duty or obligation of any kind whatsoever to inspect or police the performance of any Partial Approval Work by the Lessee and the rights granted to the Port Authority hereunder shall not create or be deemed to create such a duty or obligation. Accordingly, the fact that the Port Authority has not exercised its right to require the Lessee to cease performance of all or any part of the Partial Approval Work shall not be or be deemed to be an agreement or acknowledgment on

the part of the Port Authority that the Lessee has in fact performed such work in accordance with the terms of this Agreement, the Construction Application and plans and specifications covering such work, or the conditions of the Port Authority's approval of such work, nor shall such fact be or be deemed to be a waiver by the Port Authority of any of the requirements of this Agreement with respect to such work, or any of the requirements of the Construction Application and plans and specifications covering such work, or any of the conditions of the Port Authority's approval of such work.

(f) Without limiting the generality of any of the provisions of this Agreement, the Lessee's Construction Work (including any Partial Approval Work performed by the Lessee) shall be performed in such a manner that there will be at all times during construction a minimum of air pollution, water pollution or any other type of pollution, and a minimum of noise emanating from, arising out of, or resulting from construction. Subject to the provisions of this Agreement, the Lessee shall construct such reasonable structures, fences, equipment, devices and other facilities as may be necessary or appropriate to accomplish the objectives set forth in this subparagraph, and, without limiting the generality of the foregoing, such construction shall be subject to the Port Authority's review and approval in accordance with the provisions of this paragraph.

(g) Without limiting the generality of subparagraph (c) of this paragraph the Lessee shall be solely responsible for the plans and specifications used by it and for the adequacy or sufficiency of such plans, specifications and all the improvements, fixtures, and equipment depicted thereon or covered thereby, regardless of the consent thereto or approval thereof by the Port Authority or the incorporation therein of any Port Authority requirements or recommendations. The Port Authority shall have no obligation or liability in connection with the performance of any of the Lessee's Construction Work or for the contracts for the performance thereof entered into by the Lessee. Any warranties extended or available to the Lessee in connection with the aforesaid work shall be for the benefit of the Port Authority as well as the Lessee. The Lessee shall conduct no public operations in the Additional Premises with respect to any improvements, fixtures or equipment constituting the Lessee's Construction Work until the Port Authority shall have notified the Lessee in writing that the Lessee's Construction Work has been completed or substantially completed to its satisfaction. In the event of any inconsistency between the provisions of this Agreement and those of the Construction Application referred to in subparagraph (c) of this paragraph the provisions of this Agreement shall control.

(h) Without limiting or affecting any other term or provision of this Agreement, the Lessee shall be solely

responsible for the design, adequacy and operation of all utility, mechanical, electrical, communications and other systems installed in the Additional Premises by the Lessee and all other improvements, additions, fixtures, finishes, decorations and equipment made or installed by the Lessee in the Additional Premises and shall do all preventive maintenance and make all repairs, replacements, rebuilding (ordinary or extraordinary, structural or non-structural) and painting necessary to keep such systems, improvements, additions, fixtures, finishes, decorations and equipment (whether the same involves structural or non-structural work) in the condition they were in when made or installed except for reasonable wear which does not adversely affect the efficient or proper utilization of any part of the Additional Premises.

(i) The Lessee shall pay all claims lawfully made against it by its contractors, subcontractors, materialmen and workmen, and all claims lawfully made against it by other third persons arising out of or in connection with or because of the performance of the work, and shall cause its contractors and subcontractors to pay all such claims lawfully made against them. Nothing herein contained shall be deemed to constitute consent to the creation of any lien or claim against the Additional Premises or any part thereof, nor to prevent the Lessee from contesting claims in good faith.

(j) In addition to all policies of insurance otherwise required by the Lease as herein amended, the Lessee shall procure and maintain or cause to be procured and maintained in effect during the performance of the Lessee's Construction Work:

(i) Comprehensive General Liability Insurance including but not limited to coverage for Products Liability-Completed Operations and for Broad Form Property Damage and Independent Contractor coverage, with a contractual liability endorsement covering the obligations assumed by the Lessee under subparagraph (b) of this paragraph, which coverage shall not exclude claims arising out of or in connection with work performed within fifty feet of railroad property, and which are customarily insured under such a policy, with a minimum combined single limit coverage for bodily injury and property damage of \$25 million. Said insurance shall also include coverage for explosion, collapse and underground property damage hazards.

(ii) Comprehensive Automobile Liability Insurance covering all owned, non-owned or hired vehicles used in connection with said construction with a minimum combined single limit coverage for bodily injury and property damage of \$3 million.

(iii) Workers' Compensation and Employers' Liability Insurance in accordance with the requirements of law. The Workers' Compensation Policy shall be specially endorsed to include Coverage - B under the Federal Employers' Liability Act.

(k) In addition to the insurance required pursuant to the provisions of subparagraph (j) of this paragraph, the Lessee shall procure or cause to be procured prior to the commencement of any work Builder's Risk Insurance (All Risk) covering loss or damage (including any loss or damage resulting from flood or earthquake) to any structures, improvements, fixtures and equipment and furnishing and materials on the Additional Premises during said construction, whether or not attached to the land, in an amount equal to the full replacement cost. Such insurance shall name the Port Authority as an insured and such policy shall provide that the loss shall be adjusted with the Port Authority, and that the proceeds thereof shall be paid to the Port Authority and shall be made available to the Lessee for and applied strictly and solely to the payment of the cost of the repair, replacement, rebuilding or other performance of the Lessee's Construction Work.

(l) With the exception of the Workers' Compensation and Employers' Liability Insurance policy each policy of insurance described in subparagraph (j) of this paragraph shall include the Port Authority as an additional insured, and no such policy shall contain any care, custody or control exclusions, or any exclusion for bodily injury to or sickness, disease or death of any employee of the Lessee or of any of its contractors which would conflict with or in any way impair the coverages resulting from the Port Authority's status as an additional insured or the coverage under the contractual liability endorsement described in subdivision (i) of subparagraph (j) of this paragraph. Such insurance shall also contain an endorsement providing that the protection afforded the Lessee thereunder with respect to any claim or action against the Lessee by a third party shall pertain and apply with like effect with respect to any claim or action against the Lessee by the Port Authority and against the Port Authority by the Lessee, but said endorsement shall not limit, vary, change or affect the protections afforded the Port Authority as an additional insured. Such insurance shall contain a provision that the insurer shall not, without obtaining express advance permission from the General Counsel of the Port Authority, raise any defense involving in any way the jurisdiction of the tribunal over the person of the Port Authority, the immunity of the Port Authority, its Commissioners, officers, agents or employees, the governmental nature of the Port Authority or the provisions of any statutes respecting suits against the Port Authority.

(m) Unless otherwise set forth herein, each policy of insurance described in subparagraphs (j) and (k) of this paragraph shall be subject to the applicable provisions of Section 15(e) of the Lease.

(n) Title to and property in all improvements and fixtures placed, constructed or installed in or on the Additional Premises, including all such improvements and fixtures as shall constitute the Lessee's Construction Work, shall vest in the Port Authority upon placement, construction or installation thereof and title to and property in any and all equipment and trade fixtures removable without substantial injury to the Additional Premises placed in or installed upon the Additional Premises shall vest in the Lessee upon the installation thereof. No equipment or trade fixtures shall be removed by the Lessee prior to the expiration date of the letting under the Lease as herein amended unless replaced with substantially similar property of equal or greater value. Without limiting any other term of the Lease as herein amended, and notwithstanding the foregoing provisions, upon notice given by the Port Authority either prior to or within sixty (60) days after expiration or earlier termination of the letting of the Additional Premises under the Lease as herein amended the Lessee shall remove from the Additional Premises any improvements, fixtures, trade fixtures, or equipment as the Port Authority may specify in its notice, and shall repair any damage to the Additional Premises caused by such removal.

(o) In the performance of the Lessee's Construction Work the Lessee shall not permit any situation or condition to continue that may cause or be conducive to any labor troubles at the Facility which interferes with the progress of other Construction Work at the Facility. The determinations of the Port Authority shall be conclusive on the Lessee and, upon notice from the Port Authority, the Lessee shall or shall cause its contractor to immediately rectify any condition specified in the notice. In the event of failure by the Lessee or any of its contractors to immediately comply with the requirements of this subparagraph (whether or not such failure is due to the Lessee's fault) the Port Authority by notice shall have the right to suspend the Port Authority's permission to the Lessee to proceed with any portion of the Lessee's Construction Work being performed by or on behalf of the Lessee, and the Lessee shall thereupon immediately cease the same. When labor troubles shall be so settled that such interference or the danger thereof no longer exists, the Port Authority by notice to the Lessee shall reinstate the permission to the Lessee to perform the work on all the same terms and conditions as before the suspension. "Labor troubles" shall mean and include strikes, boycotts, picketing, work-stoppages, slowdowns, complaints, disputes, controversies or any other type of labor trouble, regardless of the employer of the person involved or their employment status, if any.

(p) In consideration of the performance by the Lessee of the Lessee's Construction Work in accordance with the provisions of this Agreement, the Port Authority will pay to the Lessee a sum (which sum is hereinafter called "the Construction Work reimbursement Amount") equal to the lesser of: (1) the reasonable cost, as hereinafter defined, of the Lessee's Construction Work, or (2) Five Hundred Thousand Dollars and No Cents (\$500,000.00). To the extent permitted by sound accounting practice, and subject to the terms and conditions of subparagraph (q) of this paragraph, the sum of the following items of cost incurred by the Lessee in performing the Lessee's Construction Work shall constitute the cost thereof for the purposes of this Agreement:

- (1) The Lessee's payments to contractors;
- (2) The Lessee's payments for supplies and materials;
- (3) The Lessee's payments to persons, firms or corporations other than construction contractors or suppliers of materials, for services rendered or rights granted in connection with construction, not including services of the types mentioned in items (4), (5) and (6) of this subparagraph;
- (4) The Lessee's payments of premiums for performance bonds and for the insurance the Lessee is required to maintain in effect in accordance with the provisions of subparagraphs (j) and (k) of this paragraph during the period of construction only;
- (5) The Lessee's payments for engineering services in connection with the Lessee's Construction Work, and during the period of the construction only;
- (6) The Lessee's payments for architectural, planning and design services in connection with the Lessee's Construction Work;
- (7) The sum of the costs approved under items (4), (5) and (6) of this subparagraph shall not exceed 20% of the sum of the costs approved under items (1), (2) and (3) of this subparagraph; if in fact there is any such excess, such excess shall not be a part of the cost incurred by the Lessee in the performance of the Lessee's Construction Work for the purposes of this paragraph.

No payment or payments on account of administrative or other overhead costs and no payment to employees of the Lessee shall be included in the cost of the Lessee's Construction Work whether or not allocated to the cost of the Lessee's Construction Work by

the Lessee's own accounting practices. No payment to a firm or corporation wholly or partially owned by or in common ownership with the Lessee shall be included in the cost of the Lessee's Construction Work.

(q) Upon final completion of all of the Lessee's Construction Work to be performed by the Lessee as set forth in this paragraph, the Lessee shall submit to the Port Authority a certificate signed by a responsible officer of the Lessee certifying: (1) that all of the Lessee's Construction Work has been completed and was performed in accordance with the approved plans and specifications referred to in subparagraph (c) of this paragraph and the provisions of this Agreement; (2) the final cost of the Lessee's Construction Work and the total payments made by the Lessee on account of such cost; and (3) that except for the amount, if any, stated in such certificate to be due for services and materials, there is no outstanding indebtedness known to the person signing such certificate, after due inquiry, then due on account of the purchase of any equipment or fixtures described in the certificate or for labor, wages, materials, supplies or services in connection with any work described therein which, if unpaid, might become the basis of a vendor's, mechanic's, laborer's or materialmen statutory or similar lien or alleged lien upon such work or upon the Additional Premises or any part thereof, or upon the Lessee's leasehold interest therein, nor are any of the equipment or fixtures described in such certificate secured by any liens, mortgages, security interests or other encumbrances. Nothing contained herein shall be deemed or construed as a submission by the Port Authority to the application to itself of any such lien. Such certificate shall also contain a certification by the architect or engineer who sealed the Lessee's plans and specifications pursuant to the provisions of subparagraph (c) of this paragraph certifying that all of the Lessee's Construction Work has been performed in accordance with the approved plans and specifications. The Lessee shall also supply to the Port Authority such supporting documents and records as the Port Authority shall deem necessary to substantiate the matters set forth in the Lessee's certificate. If all of the work has been completed in accordance with said approved plans and specifications and the provisions of this Agreement and the Lessee's certificate is fully satisfactory to the Port Authority, the Port Authority shall pay to the Lessee on account of the cost of the Lessee's Construction Work the Construction Work Reimbursement Amount. No payment made by the Port Authority to the Lessee pursuant to this subparagraph shall be deemed final until the cost of the Lessee's Construction Work has been finally determined by the Port Authority, nor shall any such payment be deemed a final determination by the Port Authority of the cost of the Lessee's Construction Work. Such final determination shall occur only after the Port Authority has examined and approved the Lessee's certificate of cost and such records and other documentation of the Lessee as the Port

Authority shall deem necessary to substantiate such cost. The Lessee shall permit the Port Authority by its agents, employees and representatives at all reasonable times prior to a final determination of the cost of the Lessee's Construction Work to examine and audit the records and other documentation of the Lessee which pertain to and will substantiate such cost. In no event whatsoever shall the cost of any portion of the Lessee's Construction Work as finally determined and computed in accordance with the provisions of subparagraph (p) of this paragraph and in accordance with the provisions of this subparagraph include any expenses, outlays or charges whatsoever by or for the account of the Lessee for or in connection with any improvements, equipment or fixtures or the performance of any work unless such are actually and completely installed in and/or made to the Additional Premises nor shall cost include the costs of any equipment, fixture or improvements which are secured by liens, mortgages, other encumbrances or conditional bills of sale. If the cost of the Lessee's Construction Work as finally determined shall be less than the amount of the payment previously made by the Port Authority to the Lessee on account of the cost the Lessee's Construction Work pursuant to this paragraph, the Lessee shall pay the difference to the Port Authority within ten (10) days after notification to the Lessee stating the amount thereof; and if such cost shall be greater than the amount of such payment, the Lessee shall be entitled to a credit against the basic rental payable hereunder for the difference. No amount paid by the Port Authority to the Lessee pursuant to the provisions of this paragraph shall or shall be deemed to imply that the Lessee's Construction Work has been completed in accordance with law or the provisions of this Agreement.

(r) The Port Authority's entire obligation under the Lease as herein amended to make any payment to the Lessee on account of the Lessee's Construction Work shall be limited in amount to the Construction Work Reimbursement Amount. No contractor or third party shall or shall be deemed to have acquired any rights against the Port Authority by virtue of the execution of this Agreement and nothing contained herein shall operate or give to any such contractor or third party any claim or right of action against the Port Authority and its Commissioners, officers, agents and employees.

(s) Without limiting any of the terms and conditions hereof, the Lessee understands and agrees that it shall put into effect prior to the commencement of the Lessee's Construction Work an affirmative action program and Minority Business Enterprise (MBE) program and Women-owned Business Enterprise (WBE) program in accordance with the provisions of Schedule E, attached hereto and hereby made a part hereof. The provisions of Schedule E shall be applicable to the Lessee's contractor or contractors and subcontractors at any tier of

construction as well as to the Lessee, and the Lessee agrees to include the provisions of Schedule E in all of its construction contracts so as to make the provisions and undertakings set forth in Schedule E the direct obligation of the construction contractor or contractors and subcontractors at any tier of construction. The Lessee agrees to and shall require its contractors and subcontractors to furnish to the Port Authority such data, including but not limited to compliance reports, relating to the operation and implementation of the affirmative action, MBE, and WBE programs of the Lessee and its contractor, contractors, and subcontractors at any tier of construction called for under the provisions of this paragraph and Schedule E annexed hereto as the Port Authority may request at any time and from time to time and the Lessee agrees to and shall also require that its contractors and subcontractors at any tier of construction make and put into effect such modifications and additions thereto as may be directed by the Port Authority pursuant to the provisions of this paragraph and Schedule E annexed hereto to effectuate the goals of affirmative action, MBE, and WBE programs. The obligations imposed on the Lessee under this paragraph and Schedule E annexed hereto shall not be construed to impose any greater requirements on the Lessee than those which may be imposed on the Lessee under applicable law.

(t) In addition to and without limiting any terms and provisions hereof, the Lessee shall provide in all of its contracts and subcontracts covering the Lessee's Construction Work, or any portion thereof, that:

(1) The contractor shall not discriminate against employees or applicants for employment because of race, creed, color, national origin, sex, age, disability or marital status, and shall undertake or continue existing programs of affirmative action to ensure that minority group persons are afforded equal employment opportunity without discrimination. Such programs shall include, but not be limited to, recruitment, employment, job assignment, promotion, upgrading, demotion, transfer, layoff, termination, rates of pay or other forms of compensation, and selections for training or retraining, including apprenticeships and on-the-job training;

(2) At the request of either the Port Authority or the Lessee, the contractor shall request such employment agency, labor union, or authorized representative of workers with which it has a collective bargaining or other agreement or understanding and which is involved in the performance of the contract with the Lessee to furnish a written statement that such employment agency, labor union or representative shall not discriminate because of race, creed, color, national origin, sex, age, disability or marital status and that such union or representative will cooperate in the implementation of the contractor's obligations hereunder;

(3) The contractor will state, in all solicitations or advertisements for employees placed by or on behalf of the contractor in the performance of the contract, that all qualified applicants will be afforded equal employment opportunity without discrimination because of race, creed, color, national origin, sex, age, disability or marital status;

(4) The contractor will include the provisions of subdivisions (1) through (3) of this paragraph in every subcontract or purchase order in such a manner that such provisions will be binding upon each subcontractor or vendor as to its work in connection with the contract;

(5) "Contractor" as used in paragraph (s) and in this paragraph shall include each contractor and subcontractor at any tier of construction.

10. In addition to all other rights under the Lease, the Port Authority and the Lessee shall each have the right to terminate the letting of the Additional Premises on sixty (60) days' prior written notice to the other party in the event that the Lessee's permanent intermodal rail facility shall become operational; provided, however, that any notice given by the Lessee in accordance with the provisions of this paragraph shall not be effective if the Lessee is under notice of default as to which any applicable period to cure has passed, or is under notice of termination, from the Port Authority, either on the date of the giving of said notice or on the intended effective date thereof. Termination under the provisions of this paragraph shall have the same effect as if the effective date of termination stated in the notice were the date of expiration of the term of the letting of the Additional Premises under the Lease as herein amended.

11. (a) Attached hereto as Exhibit Y is a form of election pursuant to Section 142(b) of the Internal Revenue Code of 1986, as amended. The Lessee acknowledges that two counterparts of said form of election have been delivered to it by the Port Authority. Upon the execution of this Agreement by the Lessee and its delivery to the Port Authority, the Lessee shall execute the said two counterparts and deliver one fully executed counterpart to the Port Authority with its delivery of this Agreement, and the Lessee shall keep the second executed counterpart with its records for the balance of the entire term of the letting under the Lease as herein amended.

(b) The Lessee is not acquiring an ownership interest in the premises under the Lease as herein amended (which premises, as therein defined, are hereinafter in this paragraph referred to as "the Property"). The Lessee hereby irrevocably elects not to claim for purposes of federal, state or local taxation of income any depreciation deductions or investment tax

credits, for which it may be eligible with respect to the Property, including without limitation the Lessee's Construction Work identified in subparagraph (a) of paragraph 9 hereof. The Lessee further agrees that this irrevocable election shall be binding upon its successors in interest, if any, under the Lease as herein amended, and as a condition of any permitted sale or assignment of the interest of the Lessee under the Lease as herein amended, every successor in interest shall furnish an executed irrevocable election in the form of the immediately preceding sentence to the Port Authority. The foregoing shall not grant or be deemed to grant to the Lessee the right to sell or assign, in any manner, its interests under the Lease as herein amended.

(c) In the event the Lessee records any documents in lieu of recording the Lease or this Agreement, such documents shall incorporate the substance of subparagraph (b) of this paragraph.

(d) It is understood that the election set forth in subparagraph (b) of this paragraph shall not apply to any personal property of the Lessee (including equipment and trade fixtures) removable without material damage to the premises leased to the Lessee pursuant to the Lease as herein amended which are installed by the Lessee in or on the premises leased to the Lessee pursuant to the Lease as herein amended and which shall be deemed to be and remain the property of the Lessee.

12. If the Port Authority shall not give possession of the Additional Premises on the date fixed in paragraph 1 hereof for the commencement of the term thereof, by reason of the fact that the Additional Premises or any part thereof are in the course of construction, repair, alteration or improvement or by reason of the fact that any occupant thereof failed or refused to deliver possession to the Port Authority, or by reason of any cause or condition beyond the control of the Port Authority, the Port Authority shall not be subject to any liability for the failure to give possession on said date. No such failure to give possession on the date of commencement of the term of the letting of the Additional Premises shall in any wise affect the validity of this Agreement or the Lease or the obligations of the Lessee hereunder or thereunder, nor shall the same be construed in any wise to extend the term of the letting of the Additional Premises beyond the date stated in paragraph 1 hereof for the expiration thereof. However, the Rental Commencement Date of November 1, 2001 set forth in paragraph 6(b)(1) hereof shall not commence until possession of the Additional Premises is tendered by the Port Authority to the Lessee and said Rental Commencement Date shall be postponed one day for each day past September 1, 2001 that the delivery of possession of the Additional Premises is delayed; the tender shall be made by notice given at least five (5) days prior to the effective date of the tender and in the

event that such notice of tender is not given for possession to commence on or before one hundred eighty-five (185) days after the date stated in paragraph 1 for the commencement of the term of the letting of the Additional Premises, then the contemplated letting of the Additional Premises shall be and be deemed cancelled, except that each party shall and does hereby release the other party of and from any and all claims or demands based on the contemplated letting of the Additional Premises, or a breach or alleged breach of any provision of this Agreement regarding the Additional Premises. Nothing contained in this paragraph shall affect in any way the letting under the Lease as herein amended of the premises other than the Additional Premises, the letting as to which shall continue in full force and effect notwithstanding any cancellation of the letting of the Additional Premises under this paragraph.

13. As hereby amended, all the terms, provisions, covenants and conditions of the Lease shall continue in full force and effect.

14. The Lessee represents and warrants that no broker has been concerned in the negotiation of this Agreement and that there is no broker who is or may be entitled to be paid a commission in connection therewith. The Lessee shall indemnify and save harmless the Port Authority of and from all claims for commission or brokerage made by any and all persons, firms or corporations whatsoever for services in connection with the negotiation or execution of this Agreement.

15. Neither the Commissioners of the Port Authority nor any of them, nor any officer, agent or employee thereof, shall be charged personally by the Lessee with any liability, or held liable to the Lessee under any term or provision of this Agreement, or because of its execution or attempted execution, or because of any breach, or attempted or alleged breach thereof.

16. This Agreement, together with the Lease (to which it is supplementary) constitutes the entire agreement between the Port Authority and the Lessee on the subject matter, and may not be changed, modified, discharged or extended except by instrument in writing duly executed on behalf of both the Port Authority and

the Lessee. The Lessee agrees that no representations or warranties shall be binding upon the Port Authority unless expressed in writing in the Lease or in this Agreement.

IN WITNESS WHEREOF, the Port Authority and the Lessee have executed these presents as of the date first above written.

ATTEST:

Kenn Eastman
ACTING SECRETARY

THE PORT AUTHORITY OF NEW YORK
AND NEW JERSEY

By *[Signature]*
RICHARD M. LARRABEE
(Title) **DIRECTOR, PORT COMMERCE DEPT.**
(Seal)

WITNESS:

R.D.L.

PORT NEWARK CONTAINER TERMINAL LLC

By *[Signature]*
THOMAS J. FIMMERS
(Title) **Manager**

APPROVED:

FORM <i>[Signature]</i>	TERMS <i>[Signature]</i>
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[Signature]