

THE NORTHWEST SEAPORT ALLIANCE
MEMORANDUM

MANAGING MEMBERS
ACTION ITEM

| | |
|------------------------|-------------------------|
| Item No. | <u>4A</u> |
| Date of Meeting | <u>October 28, 2021</u> |

DATE: October 21, 2021

TO: Managing Members

FROM: John Wolfe, CEO

Sponsor: John Wolfe, Chief Executive Officer

Project Managers: Tong Zhu, Chief Commercial and Strategy Officer

Dana Henderson, General Counsel

David Morrison, Chief Financial Officer

SUBJECT: APL Modification Agreement

A. ACTION REQUESTED

Request Managing Members of The Northwest Seaport Alliance (NWSA) authorization for the NWSA Chief Executive Officer (CEO) or their delegate to execute the Modification Agreement with American President Lines, LTD. (APL) and CMA CGM S.A., and CMA CGM (AMERICA) LLC, in substantially the same form as presented.

B. BACKGROUND

On July 22, 2014, The Port of Seattle Commission authorized a Lease Termination Agreement with EMS and its parent company, APL, for their Terminal 5 Lease ("Termination Agreement"). Subsequently, APL failed to meet several of the requirements of the Termination Agreement, primarily due to lift or vessel call shortfalls. Based on negotiations between the NWSA and APL, the First Amendment to the Lease Termination Agreement was approved by the NWSA Managing Members on May 5, 2020, which resolved outstanding issues and set volume requirements for the future into 2026. There are currently sums owed to NWSA by APL under the Termination Agreement, as amended by the First Amendment, regarding Guaranteed Lifts and Shortfall Lift Fee payments, including

interest accruals associated with those payments. The total payments due by October 31, 2021, will be \$3,911,825.

Additionally, the Port of Seattle as Lessor, and SSA Terminals, LLC and Stevedoring Services of America, Inc. as Lessee (SSA), entered into a Terminal 18 Lease dated as of October 28, 1999, which has been amended from time to time. The Port, SSA, and APL entered into a Conditional Consent To Subleases dated September 19, 2014 (the "Consent To Subleases"), regarding a sublease of part of Terminal 18 between SSA as sublessor, APL as sublessee (the "T18 Sublease Agreement"). The T18 Sublease Agreement imposed certain obligations as conditions to the Port's consent to the sublease, including an annual payment to the Port of Seattle of US\$9,000,000.00 on August 1 of each year for 10 years (the "Sublease Consent Fee"). The 2021 Sublease Consent Fee payment has not yet been paid.

On April 16, 2021, APL/CMA CGM paid \$2,000,000 and on July 13, 2021, APL/CMA CGM paid \$7,958,232 which represented with interest the \$9M Sublease Consent Fee due August 1, 2020. The 2020 vessel shortfall due remains unpaid and is accruing interest. Additional payments including the 2021 annual Sublease Consent Fee of \$9 million due August 1, 2021 and \$3,411,825 in lift shortfall and \$500,000 in vessel shortfall are due October 31, 2021.

As per direction from the Managing Members, staff has been negotiating a Modification Agreement to fully address past due and future Sublease Consent Fees and shortfall payments against CMA CGM's expressed interest in a continued and expanded presence in the NWSA Gateway.

Key terms of the draft Modification Agreement are as follows:

- 1) **Term:** Sets Guaranteed Lift requirements through June 30, 2031
- 2) **Parties:** EMS, APL, and CMA CGM S.A. the parent company of APL, is now a party
- 3) **Amounts Currently Past Due:** APL to make a one-time payment of \$10,041,677¹ by December 1, 2021. The NWSA waives payments of all future and remaining amounts of the APL Sublease Consent Fee and of all outstanding balance due.
- 4) **Annual Guaranteed Lift Requirement:** Containers of APL, ANL, CMA CGM and other entities majority-owned/controlled by CMA CGM count towards annual Guaranteed Lift Requirement (MAG).

¹ A total of \$20M will be received in 2021, which includes \$9,958,323 from Sublease Consent Fee due August of 2020 plus interest and \$10,041,677 for the \$9M payment due August 2021.

- APL commits to an expanded and extended MAG to the gateway:

| Contract year | 2021-22 | 2022-23 | 2023-24 | 2024-25 | 2025-26 | 2026-27 | 2027-28 | 2028-29 | 2029-30 | 2030-31 |
|-------------------|----------------|----------------|----------------|----------------|----------------|----------------|----------------|----------------|----------------|----------------|
| Seattle | 200,000 | 200,000 | 200,000 | 200,000 | 200,000 | 200,000 | 200,000 | 200,000 | 200,000 | 200,000 |
| Tacoma or Seattle | 25,000 | 30,000 | 35,000 | 40,000 | 45,000 | 47,450 | 49,925 | 52,424 | 54,948 | 57,497 |
| TOTAL | 225,000 | 230,000 | 235,000 | 240,000 | 245,000 | 247,450 | 249,925 | 252,424 | 254,948 | 257,497 |

Note: 2026 through 2031 volumes are incremental, not part of the First Amendment volume commitment.

- Shortfall fee of \$75/lift through 2025-2026; \$50 per lift through 2030-2031.
- If APL fails to meet the MAG in any Contract Year, assessed a Shortfall Lift Fee for such year.
 - Shortfall Lift Fee paid at the end of the shortfall year.
 - But, a 2-year cycle such that if APL exceeds the MAG in the following year, the number of lifts above the MAG in the same harbor for the following year are credited to the Shortfall Year and APL reimbursed any overpayment.
 - No carry-forward. No double counting.
 - Seattle Harbor lift shortfall can only be made up with Seattle Harbor Lifts.
- Dispute resolution provision for disputed shortfall lift fee provides for 120 day binding, non-appealable arbitration cycle.

5) Liquidated Damages

- If APL is late on its \$10,041,677 payment in December of 2021, APL will be obligated to pay \$32,641,257, which includes total amount due as of October 31, 2021 plus the 2022 and 2023 Sublease Consent Fees of \$9M/yr. APL would not be released from its lift commitments through 2026 under the First Amendment.
- If APL defaults in paying any MAG shortfall fee or otherwise breaches its obligations to NWSA prior to July 1, 2026, NWSA may elect to terminate this agreement by seeking, in addition to amounts due, a Breach Damages Penalty in the amount of \$22,600,000. APL would not be released from its lift commitments through 2026 under the First Amendment.
- If APL defaults in paying any MAG shortfall fee or otherwise breaches its obligations to NWSA post July 1, 2026, NWSA may elect to terminate this agreement by seeking, in addition to amounts due, a Breach Damages Penalty in the amount of \$22,600,000. APL would then be released from any further Guaranteed Lifts requirement under this Modification Agreement. On

July 1, 2027 and on each July 1st thereafter, the amount of Breach Damages Penalty will be reduced by \$4,520,000.

- 6) **Security:** The Late Shortfall Lift Fee penalty of \$2,260,000/year will be secured through an annual (Jan 1st through Dec. 31st) Letter of Credit (non-refundable, non-returnable and issued by a credited US bank). Please note that LOC/Penalty equals 10% of remaining cash value of Sublease Consent Fees that would otherwise be due after \$10.1M payment by Dec. 2021.
 - NWSA immediately calls the LOC if APL is late in paying any obligation shortfall lift fee payment when due under this Agreement.
- 7) **Extension of T18 Sublease Consent:** NWSA will give its consent to the extension of the term of the T18 Sublease Agreement to June 30, 2031 subject to APL and SSAT agreeing on the same.
- 8) **Force Majeure (FM):** Provides relief proportionately and pro rata for number of days that a NWSA terminal is unavailable. Language further tightens and clarifies existing FM clause, confirming that FM does not apply for there are congestion or labor issues due to CMA CGM employees only or due to acts of employers deemed unfair by arbitrator.
- 9) **Alternate Service Provider:** Carry-through concept but modified to provide that the NWSA would help APL find alternative if APL is given short notice of terminal operator's inability to provide service, but not if due to APL delay in payment.
- 10) **Limited Release:** This agreement replaces all remaining commitments under T5 Termination Agreement (vessel call and lift requirements) under T18 Sublease Consent (\$9M annual payment through 2023) and the NWSA waives all claims it may have under these existing agreements except for the commitments carried through into this Modification Agreement.
- 11) **Governing Law, Venue, Attorney's Fees:** Washington law to apply, and confirms litigation in state or federal court in Washington as an option for disputes arising out of this agreement. Substantially prevailing party may recover attorney's fees and costs.

**The above are highlights of the key terms and do not correspond to the Modification Agreement*

C. FINANCIAL IMPLICATIONS

In lieu of collecting approximately \$32.4 million between now and July 2023, The NWSA will receive an incremental \$10.1 million in 2021 in exchange for future

volume guarantees through 2031 in the gateway. Performance of APL/CMA CGM will be guaranteed by the letter of credit and the risk of penalty payments (liquidated damages) that will allow the NWSA to impose the \$22.4M as a penalty through June 2027. The penalty payment then decreases by straight line amortization of approximately \$4.5M starting July 2027 until the agreement terminates in June 2031. Failure by APL/CMA CGM to pay any shortfall or penalty will result in the collection of the Letter of Credit of \$2.28M. This agreement encourages high volume in the gateway by implementing a high penalty for failure to pay any shortfall payments due.

The proposed Modification Agreement results in \$11M more revenue from APL in 2021 than was included in the original budget and \$9M less in revenue for 2022 and 2023, and \$5.75M less in 2024 than was included in the 2021 -2025 budget presented last year. 2020 had \$3.75M lower revenue due to delay in payment from APL. The 2022 draft budget and 2023-2026 draft operating forecast includes these changes.

D. STAFF RECOMMENDATION

- **Recommended Action:** Authorize the Modification Agreement to incentivize and encourage APL/CMA CGM to direct additional volume to the Gateway.

E. ATTACHMENTS TO THIS REQUEST

- Draft APL Modification Agreement
- Managing Member memo concerning the First Amendment dated May 5, 2020

G. PRIOR ACTIONS/BRIEFINGS

- 2014 Sublease Agreement, American President Lines (APL)
 - Effective August 1, 2014
- 2014 EMS Lease Termination Agreement
 - Early Lease Termination, effective September 19, 2014
 - POS Commissioner approval 7/22/14
- 2014 Conditional Consent to Sublease American President Lines (APL)
 - Conditional Consent to Sublease to APL
 - Dated September 19, 2014
 - See Termination Agreement
- 2014 SSAT Absolute Assignment Sublease Rents Assignment Sublease

- Dated September 19, 2014
- See Termination Agreement
- SSA Control Account EMS Sublease Payment Agreement
 - effective October 24, 2014
 - Deposit Account Control Agreement
 - POS Commissioners approved
- 2020 Lease Termination Agreement Amendment 1
 - Effective May 5 , 2020 through July 31, 2026
 - MM meeting: April 7, 2020
- Consideration of litigation for collection, in public session:
 - January 5, 2021, motion passed to commence litigation by March 31, 2021
 - March 2, 2021, motion passed to extend deadline for counsel to commence litigation to April 16, 2021
 - April 16, 2021, motion passed to extend deadline for counsel to commence litigation to June 30, 2021
 - June 29, 2021, motion passed to extend deadline for counsel to commence litigation to July 15, 2021 unless CMA paid past-due \$7M sublease consent fee plus interest prior to that date.
- July 14, 2021 Managing Members' Special Meeting, motion was passed to direct staff to pursue and negotiate an agreement with CMA CGM regarding its activities in the NWSA gateway and to return to the Managing Members for authorization of any such agreement or amendment to existing agreements.

- 2020 IPI Rail Incentive Program Agreements:
 - Original Agreement dated August 18, 2020
 - First Amendment dated March 18, 2021