

THE NORTHWEST SEAPORT ALLIANCE
MEMORANDUM

MANAGING MEMBERS
ACTION ITEM

Item No.	<u>9C</u>
Date of Meeting	<u>June 4, 2024</u>

DATE: May 21, 2024

TO: Managing Members

FROM: John Wolfe, CEO

Sponsor: Tong Zhu, Chief Commercial & Strategy Officer

Project Manager: Dana Henderson, NWSA General Counsel

SUBJECT: Terminal 5 SSAT Lease – 4th Amendment

A. ACTION REQUESTED

Request The Northwest Seaport Alliance (NWSA) Managing Members authorize the NWSA Chief Executive Officer or their delegate to enter into the Fourth Amendment to the Terminal 5 Lease with SSA Terminals (Seattle Terminals), LLC to resolve dispute with Lessee in substantially the same form as presented.

B. SYNOPSIS

Upon NWSA's declaration of Substantial Completion of the Phase 2 Premises at Terminal 5, Lessee SSA raised a dispute regarding whether or not Substantial Completion had been achieved and whether Terminal 5 could be fully used for its intended purpose under the Lease.

Per the dispute resolution provisions in the Lease, the parties exchanged written positions regarding the dispute, then the principals and counsel met to discuss. As a result of those meetings, staff have reached a tentative agreement with SSA, subject to Managing Members' authorization, in the form of the Fourth Amendment to the Terminal 5 Lease as attached and presented. This proposed Fourth Amendment would resolve the pending dispute with SSA.

C. BACKGROUND

On February 14, 2024, (through a Service Agreement with the Port of Seattle for construction and project management and engineering) the NWSA completed the

Project B portion of the Lessor Development work called for in the Terminal 5 Lease with SSA.

Upon receipt of the notice of Substantial Completion, Lessee SSA raised a dispute with NWSA under the dispute resolution provisions in the Lease, claiming that the Lessor Development work had not been completed in accord with Lease requirements, the terminal could not be used as intended in that the work did not conform with the plans and specifications, and that there were 300 feet of the berth not fully useable for the intended purpose. Additionally, SSA raised concerns stemming from a draft pavement assessment report which SSA claims establishes the potential for subsurface conditions which may impact Lessor's operations throughout the Terminal 5 facility.

Though NWSA disagrees with the issues raised in dispute by SSA, and further disputes the underpinnings and conclusions of the pavement assessment report, the parties propose to resolve their dispute through the proposed Fourth Amendment to the Terminal 5 Lease.

The existing Lease provides that NWSA is responsible for maintenance, repairs, restorations, renewals, and replacements with respect to damage caused by "displacement of soils underneath or behind the sea wall caused by a fracture, breach, or other water intrusion over, under, behind and through the sea wall" and if the "Paving System [is] damaged by the settling of soil, other fill, or native soils beneath the Paving System" (together, "Subsidence Issues" herein). The Lease currently prohibits rent abatement during the period of maintenance or repair of damage due to Subsidence Issues.

To resolve the pending dispute, SSA proposed a resolution to amend the Lease to instead provide that should Subsidence Issues occur and cause damage to a contiguous area(s) of the Premises exceeding an acre which also substantially impedes Lessee's operations, NWSA will abate rent on a per acre/per diem basis for those areas where NWSA is performing work due to Subsidence Issues from the time of written notice of the damage until the repairs are completed.

In exchange for such an amendment, and as part of the overall negotiation to resolve remaining concerns regarding the Terminal 5 Phase 2 Commencement Date (and rent commencement), SSA will acknowledge and agree that as of March 21, 2024, Lessor has achieved Substantial Completion of the Project B portion of the Lessor Development as set forth in the Lease (see Third Amendment thereto, dated August 8, 2023) and that the Phase 2 Premises Commencement Date was March 21, 2024. SSA also acknowledges and agrees to the punch list of items which do not prevent the associated portions of Lessor Development from being used fully for its intended purpose. Finally, SSA has agreed to stronger language in Section 1.7 to

confirm acceptance of all of the Terminal 5 Premises in as-is, then-existing condition.

D. FINANCIAL IMPLICATIONS

Currently unknown. The implications of this Fourth Amendment will depend on whether, to what extent, and when rent abatement is triggered. At this time, the need for such abatement is not expected or known, but the proposed lease amendment would create a new contractual obligation for NWSA on rent abatement.

E. ALTERNATIVES CONSIDERED AND THEIR IMPLICATIONS

- **No Action Alternative:** Make no further changes to the Lease. The terms and conditions of the Terminal 5 Lease would continue as already agreed with the risk of NWSA and SSAT remaining in dispute over whether or not the delivered Terminal 5 Premises has met with Substantial Completion, triggering rent obligations. This dispute would incur significant attorneys' fees, and would carry risk as to the outcome, since any such dispute would be subject to binding arbitration.
- **Recommended Action:** Authorize the Chief Executive Officer or their delegate to enter into the Fourth Amendment to the Terminal 5 Lease with SSA Terminals (Seattle Terminals), LLC to resolve dispute with Lessee in substantially the same form as presented.

F. ATTACHMENTS TO THIS REQUEST

- Fourth Amendment to Terminal 5 Lease Agreement, proposed

G. PREVIOUS ACTIONS OR BRIEFINGS

April 3, 2019, Managing Member Meeting: Managing Members adoption of Terminal 5 Term Lease Agreement with SSA Terminals (Seattle Terminals), LLC as part of the North Harbor Strategy

June 1, 2021, Managing Member Meeting: Managing Members adoption of First Amendment to Terminal 5 Term Lease Agreement

April 6, 2022, Managing Member Meeting: Managing Members adoption of Second Amendment to Terminal 5 Term Lease Agreement

August 2, 2022, Managing Member Meeting: Managing Members' authorization of the Third Amendment to Terminal 5 Term Lease Agreement (later ratified on August 1, 2023)

FOURTH AMENDMENT TO TERMINAL 5 TERM LEASE AGREEMENT

THIS FOURTH AMENDMENT TO TERMINAL 5 TERM LEASE AGREEMENT (“**Amendment**”) dated as of May 24, 2024 (the “**Amendment Date**”), by and between THE NORTHWEST SEAPORT ALLIANCE, a Washington port development authority (“**NWSA**”), as licensee/agent for the PORT OF SEATTLE, a Washington municipal corporation (“**Lessor**”), and SSA TERMINALS (Seattle Terminals), LLC, a Delaware limited liability company (“**Lessee**”).

WITNESSETH:

A. Lessor and Lessee entered into that certain Terminal 5 Term Lease Agreement dated April 3, 2019, as amended by that certain First Amendment to Terminal 5 Term Lease Agreement dated June 1, 2021, as further amended by that certain Second Amendment to Terminal 5 Term Lease Agreement dated April 5, 2022, and as further amended by that certain Third Amendment to Terminal 5 Term Lease Agreement dated August 7, 2023 (collectively, the “**Lease**”), pursuant to which Lessee agreed to lease from Lessor certain premises located in the Port of Seattle, Washington, as more specifically described in the Lease. Any capitalized term used but not defined in this Amendment shall have the meaning assigned to such term in the Lease.

B. Prior to the Amendment Date, Lessor and Lessee were in dispute as to whether Substantial Completion of the Lessor Development work listed on Schedule 1-B to the Third Amendment had occurred (“**Dispute**”).

C. Lessor declared to Lessee in an Amended Certification of Substantial Completion of Terminal 5 Project B dated March 29, 2024, attached hereto as Exhibit A (the “**Amended Certification**”), that the Lessor Development work listed on Schedule 1-B to the Third Amendment achieved Substantial Completion as of March 21, 2024.

D. Lessor and Lessee have agreed to enter into this Amendment to document the negotiated resolution of the Dispute pursuant to the terms and conditions set forth below:

AGREEMENT

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

1. **Confirmation of Substantial Completion of Project B.** Lessor declared in the Amended Certification that Substantial Completion of the Project B portion of the Lessor Development work listed on Schedule 1-B to the Third Amendment occurred on March 21, 2024, subject to the completion of certain remaining punch list work listed on Exhibit B, attached hereto (the “**Project B Punch List Work**”) within a commercially reasonable timeframe.

2. **Confirmation of the Phase 2 Premises Commencement Date.** Lessor declared the Phase 2 Premises Commencement Date to be March 21, 2024. As of the Phase 2 Premises Commencement Date, Lessee agrees to lease the Temporary Phase 2 Premises, commence paying Temporary Phase 2 Premises Rent and accepts the Temporary Phase 2 Premises with the Project B portion of the Lessor Development work in accordance with the Lease and this Amendment,

subject to (a) the completion by Lessor of the Project B Punch List Work within a commercially reasonable timeframe, (b) the certifications and the one (1) year beneficial guaranty contained in the Amended Certification, and (c) all other terms and conditions contained in the Lease (as amended by this Amendment), including, but not limited to, Lessor's obligation to perform the Lessor Maintenance as required under the Lease and the Lessor Subsidence Maintenance (as defined in Section 3 below). Except as expressly provided in the Lease (as amended by this Amendment) and the Amended Certification, Lessor makes no further representations, warranties, certifications and guaranties regarding the Temporary Phase 2 Premises, including but not limited to soil conditions, structural conditions, or the condition of any mechanical, electrical, or other systems.

3. **Subsidence Rent Abatement.** Notwithstanding anything to the contrary in Section 9.2 of the Lease, in the event that Lessor is required to perform any of its maintenance, repair, restoration, renewal or replacement obligations under Section 9.2(c) or Section 9.2(e) of the Lease (collectively, the "**Lessor Subsidence Maintenance**"), which: (a) is to be performed in any portion of the Premises which is greater than one (1) contiguous Billable Acre at any given time ("**Impacted Acreage**"), and (b) as a result of such Lessor Subsidence Maintenance in the Impacted Acreage, Lessee's operations at the Premises are materially impacted, then Lessee may elect as its remedy a day-for-day proportional abatement of Temporary Base MAG Rent or the Base MAG Rent, as applicable, calculated by removing the Impacted Acreage from the Billable Acres used to calculate the applicable MAG Rent under Section 3.3 or Section 3.4 of the Lease (the "**Subsidence Rent Abatement**"). Any Subsidence Rent Abatement shall only be for such period of time commencing two (2) business days after Lessor receives written notice from Lessee requiring Lessor to perform the Lessor Subsidence Maintenance in such Impacted Acreage until such time as Lessor has completed such Lessor Subsidence Maintenance, as certified by Lessor's engineer (the "**Subsidence Abatement Period**"). For the avoidance of doubt, nothing in this Section 3 shall permit any abatement or reduction of Rent or any other amounts, arising by reason of Lessor performing any other item of Lessor Maintenance under Section 9.2 of the Lease (other than the Lessor Subsidence Maintenance), and Lessor shall not be responsible for any loss or damages to Lessee's business, arising by reason of Lessor's performance of the Lessor Maintenance or the Lessor Subsidence Maintenance under Section 9.2 of the Lease or this Section 3 (except in connection with Lessee's right to receive the Subsidence Rent Abatement as described above).

4. **Amended Section 9.2; "Maintenance and Repair by Lessor."** Section 9.2 of the Lease is hereby amended (*to correct minor scrivener's errors*) as follows:

- (a) The second clause (e) in Section 9.2 is hereby replaced with "(f)."
- (b) The "or" after clause (d) is hereby deleted.

5. **Amended Section 1.2.1; Phase 2 Leasehold Area.** The second sentence of Section 1.2.1 of the Lease is hereby deleted in its entirety (*to correct a scrivener's error*) and replaced with the following: "Commencing on the Container Yard Expansion Completion Date, Lessor leases to Lessee approximately one hundred fifty-three and four tenths (153.4) acres of land as legally described and shown on Exhibit A-2B, attached hereto, together with the Improvements and the Lessor Development work described on Schedule 1-E attached hereto ("**Phase 2 Leasehold Area**")."

6. **Ratification.** Except as modified in this Amendment, the Lease is hereby ratified and affirmed. Any references to the “Lease” in the Lease shall mean the Lease as modified by this Amendment.

7. **Entire Agreement.** This Amendment constitutes the sole and only agreement of the parties hereto with respect to the subject matter hereof (other than the Lease, as amended hereby) and supersedes any prior understandings or written or oral agreements between the parties respecting the subject matter hereof and cannot be changed except by their written consent.

8. **Counterparts.** This Amendment may be executed in one or more counterparts, each of which shall be deemed to constitute an original, but all of which, when taken together, shall constitute one and the same instrument.

9. **Rule of Construction.** The parties hereto acknowledge that the parties and their respective counsel have each reviewed and revised this Amendment, and that the normal rule of construction to the effect that any ambiguities are to be resolved against the drafting party shall not be employed in the interpretation of this Amendment or any exhibits hereto.

[SIGNATURE AND ACKNOWLEDGEMENT PAGES FOLLOWS]

IN WITNESS WHEREOF, the parties have executed this Amendment as of the Amendment Date.

LESSOR

THE NORTHWEST SEAPORT ALLIANCE
as licensee/agent for the Port of Seattle

By: _____

Name: _____

Its: _____

LESSEE

SSA TERMINALS (SEATTLE TERMINALS),
LLC

By:  _____

Name: _____

Its: _____

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

I certify that I know or have satisfactory evidence that _____ is the person who appeared before me, and said person acknowledged that he/she signed this instrument, on oath stated that he/she was authorized to execute the instrument and acknowledged it as the _____ of THE NORTHWEST SEAPORT ALLIANCE, a Washington port development authority, as licensee/agent for the Port of Seattle, a Washington municipal corporation, to be the free and voluntary act of such party for the uses and purposes mentioned in the instrument.

DATED: _____, 2024.

[PRINT NAME] _____

NOTARY PUBLIC for the State of Washington,
residing at _____.

My appointment expires: _____.

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

I certify that I know or have satisfactory evidence that _____ is the person who appeared before me, and said person acknowledged that he/she signed this instrument, on oath stated that he/she was authorized to execute the instrument and acknowledged it as the _____ of SSA TERMINALS (SEATTLE TERMINALS), LLC, a Delaware limited liability company, to be the free and voluntary act of such party for the uses and purposes mentioned in the instrument.

DATED: _____, 2024.

[PRINT NAME] _____

NOTARY PUBLIC for the State of Washington,
residing at _____.

My appointment expires: _____.

Exhibit A

Amended Certification of Substantial Completion of Terminal 5 Project B

[Attached]



VIA EMAIL: matthew.mccardell@SSAmarine.com

March 29, 2024

SSA Terminals (Seattle Terminals) LLC
Attn: Matthew McCardell, General Counsel
1131 SW Klickitat Way
Seattle, WA 98134

RE: AMENDED CERTIFICATION OF SUBSTANTIAL COMPLETION OF TERMINAL 5 PROJECT B

Dear Mr. McCardell:

Reference is made to that certain Terminal 5 Term Lease Agreement dated April 3, 2019, as amended by that certain First Amendment to Terminal 5 Term Lease Agreement dated June 1, 2021, as further amended by that certain Second Amendment to Terminal 5 Term Lease Agreement dated April 5, 2022, and as further amended by that certain Third Amendment to Terminal 5 Term Lease Agreement dated August 7, 2023 (collectively, the “**Lease**”) by and between THE NORTHWEST SEAPORT ALLIANCE, a Washington port development authority (“**NWSA**”), as licensee/agent for the PORT OF SEATTLE, a Washington municipal corporation (“**Lessor**”), and SSA TERMINALS (Seattle Terminals), LLC, a Delaware limited liability company (“**Lessee**”). Any capitalized term used but not defined in this Lessor Certification shall have the meaning assigned to such term in the Lease.

Port of Seattle has been the Lessor’s engineer for the Terminal 5 Modernization project. After sending a letter to you on March 11, 2024 regarding completion of the Project B portion of the Lessor Development work, we were disappointed to learn that on March 20, 2024, the first shorepower plug-in attempt at the Terminal 5 Phase 2 Premises was unsuccessful. The following day, March 21, 2024, the contractor completed the fix necessary to render the Project B shorepower system functional, which was then successfully tested during the next shorepower-capable vessel call on March 28, 2024. As such, the Substantial Completion date for the Project B portion of Lessor Development work is amended and modified from March 11, 2024 to March 21, 2024.


On behalf of NWSA, we hereby certify to Lessee that: (a) the Project B portion of the Lessor Development work listed on Schedule 1-B to the Third Amendment has achieved Substantial Completion as of March 21, 2024; (b) to the best of our knowledge, information, and belief, the

Project B portion of the Lessor Development work listed on Schedule 1-B to the Third Amendment was constructed in strict conformance with the Bid Plans and the Premises is fully usable for Lessee's intended purpose, except for the Project B Punch List Work shown on the attached **Schedule 1**.

Pursuant to Section 1.3 of Exhibit D to the Lease (the Work Letter), we guarantee to Lessor for the benefit of Lessee that the Project B portion of the Lessor Development work listed on Schedule 1-B to the Third Amendment completed as of March 21, 2024 shall be free from any defects in workmanship and materials for a period of one (1) year from Substantial Completion.

Sincerely,

The Port of Seattle, a Washington municipal corporation

By: 

Name: Janice Zahn

Director of Engineering for the Port of Seattle

CC:

John Wolfe, CEO, NWSA

Tong Zhu, Chief Commercial and Strategy Officer, NWSA

Thais Howard, Director of Engineering, NWSA

Dana Henderson, General Counsel, NWSA

Stephanie Jones-Stebbins, Managing Director Maritime Division, Port of Seattle

Karen Goon, Deputy Executive Director, Port of Seattle

Tin Nguyen, Director, Waterfront Project Management, Port of Seattle

Schedule 1

Project B Punch List Work

South Berth

1. Asphalt grinding at landside crane rail (high spots)
2. Evaluation of grades & repairs as needed 20' west of landside crane rail
3. Grading and repaving of the north end of the south berth to address drainage
4. Warranty item replace switch motor in the substation for shore power vault #1
5. Adjust deck drains above and below wharf
6. Repair/replace two existing damaged vault lids

South Marine Building

1. Adjust position of K rails

Exhibit B

Project B Punch List Work

South Berth

1. Asphalt grinding at landside crane rail (high spots)
2. Evaluation of grades & repairs as needed 20' west of landside crane rail
3. Touch-up painting, power vault lids, bollards
4. Grading and repaving of the north end of the south berth to address drainage
5. Warranty item replace switch motor in the substation for shore power vault #1
6. Install new Kirk keys in shore power vaults 1S, 3S and 3N

South Marine Building

1. Adjust position of K rails

Fourth Amendment: Terminal 5 Term Lease Agreement Between NWSA and SSA Terminals (Seattle Terminals), LLC



**THE NORTHWEST
SEAPORT ALLIANCE**

SEATTLE + TACOMA

Presenter: Dana Henderson, General Counsel

1

Action Requested

Request the Managing Members of the Northwest Seaport Alliance authorize the Chief Executive Officer or their delegate to enter into the Fourth Amendment to the Terminal 5 Lease with SSA Terminals (Seattle Terminals), LLC to resolve dispute with Lessee in substantially the same form as presented.



**THE NORTHWEST
SEAPORT ALLIANCE**
SEATTLE + TACOMA

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Background

- NWSA declared Subst. Completion of Ph. 2 at T5 on February 14, 2024.
- Lessee immediately raised a dispute re: whether or not Substantial Completion had been achieved and whether the Terminal 5 could be fully used for its intended purpose under the Lease. Also raised concerns regarding subsurface conditions.
- NWSA disagrees with and disputes SSA's claims.
- Parties commenced dispute resolution steps per the Lease.
- Staff have reached a tentative agreement, subject to MM authorization, in the form of the 4th Amendment, which would resolve the pending dispute with SSA.

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Existing Lease Language

- Lease provides that NWSA is responsible for maintenance, repairs, restorations, renewals, and replacements with respect to damage caused by “displacement of soils underneath or behind the sea wall caused by a fracture, breach, or other water intrusion over, under, behind and through the sea wall” and if the “Paving System [is] damaged by the settling of soil, other fill, or native soils beneath the Paving System” (together, “Subsidence Issues” herein).
- The Lease currently prohibits rent abatement during the period of NWSA’s repair and maintenance.

4



4

Proposed Amendment

- Should Subsidence Issues occur and cause damage to a contiguous area(s) of the Premises exceeding an acre which also substantially impedes Lessee's operations, NWSA will abate rent on a per acre/per diem basis from the time of written notice of the damage until the repairs are completed.
- As of March 21, 2024, Lessor has achieved Substantial Completion of the Project B portion of the Lessor Development and Phase 2 Premises Commencement Date (rent) was March 21, 2024, 2024.
- Agreed punch list of items (and they do not prevent Lessor Development from being used fully for its intended purpose).
- Stronger language in section 1.7 to confirm acceptance of T5 Premises in as-is, then-existing condition.

5



5

Financial Implications

- Currently unknown.
- Implications will depend on whether, to what extent, and when rent abatement is triggered.
- At this time, the need for such abatement is not expected or known, but the 4th Amendment would create a new contractual obligation for NWSA on rent abatement.

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Alternatives Considered

- **No Action Alternative:** Make no further change to the Lease.
 - Risk of NWSA and SSAT remaining in dispute over whether or not the delivered Terminal 5 Premises has met with Substantial Completion, triggering rent obligations.
 - This dispute would incur significant attorneys' fees, and would carry risk as to the outcome, since any such dispute would be subject to binding arbitration.
- **Recommended Action:** Authorize the Fourth Amendment to the T5 Lease in substantially the same form as presented.

7



7

Action Requested

Request the Managing Members of the Northwest Seaport Alliance authorize the Chief Executive Officer or their delegate to enter into the Fourth Amendment to the Terminal 5 Lease with SSA Terminals (Seattle Terminals), LLC to resolve dispute with Lessee in substantially the same form as presented.

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