

**BEFORE THE
FEDERAL MARITIME COMMISSION**

Docket No. 09-08

**SSA TERMINALS, LLC
AND
SSA TERMINALS (OAKLAND), LLC**

COMPLAINANTS

v.

**THE CITY OF OAKLAND, ACTING BY AND THROUGH
ITS BOARD OF PORT COMMISSIONERS**

RESPONDENT

**JOINT RESPONSE TO COMMISSION'S ORDER
TO SUPPLEMENT THE RECORD**

In response to the Commission's Order dated September 3, 2013, Complainant SSA Terminals, LLC and SSA Terminals (Oakland), LLC ("SSAT") and Respondent City of Oakland, acting by and through its Board of Port Commissioners ("City" or "Port"), through their respective attorneys, hereby supplement the record in the above-referenced proceeding.

On July 31, 2013, SSAT and the Port filed a Notice of Voluntary Dismissal with prejudice of this case pursuant to Rule 72 of the Commission's Rules of Practice and Procedure. *See* 46 C.F.R. 502.72(a)(1). Under Rule 72(a), a "complainant may dismiss an action without an order from the presiding officer by filing a...stipulation of dismissal signed by all parties who have appeared."¹

¹ The Commission recently adopted Rule 72 of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.72, which was intended to clarify the process for seeking voluntary and involuntary dismissals

On August 20, 2013, the Secretary issued a Notice of Voluntary Dismissal stating “the above-captioned proceeding is dismissed with prejudice and discontinued.” On the same day, the Secretary issued a Notice of Commission Determination to Review, pursuant to Commission Rule 227, 46 C.F.R. 502.227, which stated the Commission had determined to “review the Notice of Voluntary Dismissal issued and served by the Secretary.”

On September 3, 2013, the Commission issued an Order, pursuant to Commission Rule 227, to Supplement the Record. According to the Commission’s Order, because the parties’ voluntary dismissal in this case was based on a settlement agreement, that settlement agreement must be submitted to the Presiding Officer pursuant to the Commission’s “long-standing history of reviewing settlement agreements,” notwithstanding Rule 72’s express authorization that a complainant may voluntarily dismiss a case “without an order from the presiding officer.”² The Order thus instructed the parties to file a copy of the Settlement Agreement, if any, with the Administrative Law Judge.

by adopting the procedure as set forth in Federal Rule of Civil Procedure 41. This rule became effective on November 12, 2012. *See* 77 Fed. Reg. 61519 (Oct. 10, 2012); 77 Fed. Reg. 64758 (Oct. 23, 2012).

² The filing of this response is without prejudice to the parties’ position that, by virtue of the Secretary’s August 20, 2013 Notice of Voluntary Dismissal, issued pursuant to Commission Rule 72, this case has been dismissed with prejudice, and the Commission lacks jurisdiction to require the parties to further supplement the record. Moreover, Commission Rule 227 (“Exceptions to decisions or orders of dismissal of administrative law judge; replies thereto; review of decisions or orders of dismissal by Commission; and judicial review”), which is the authority the Commission cites for its Notice of Commission Determination to Review and Order to Supplement the Record, pertains to a party’s right to file a memorandum excepting to any conclusions, findings, or statements made in an Administrative Law Judge’s initial decision, as well as the procedures pertaining to the Commission’s review of initial decisions when exceptions are filed. Since the parties in this case filed a Notice of Voluntary Dismissal under Rule 72, there was, of course, no ALJ initial decision nor any exceptions filed thereto. Rule 227 is therefore inapplicable to this case.

Per the Commission's Order, the Parties attach the Settlement Agreement reached (see Appendix A, "Settlement Agreement"),³ along with this joint response to the Commission's Order to Supplement the Record. SSAT and the Port submit that the Settlement Agreement meets the Commission's criteria for approval of settlement agreements and therefore should be approved.⁴

I. BACKGROUND

SSAT commenced this proceeding by filing a complaint on December 16, 2009, alleging that Respondent Port had violated Sections 10(d)(1), 10(d)(3), and 10(d)(4) of the Shipping Act of 1984, 46 U.S.C. § 41102(c), 41106(3), 41106(2). SSAT filed an Amended Complaint on June 7, 2012. SSAT alleged that the Port, by entering into a Concession and Lease Agreement for Berths 20-24 (sometimes referred to as the "Concession") with Ports America Outer Harbor Terminal, LLC ("PAOHT"), violated the foregoing provisions of the Shipping Act by granting and continuing to grant PAOHT unduly and unreasonably more favorable terms for the rental and use of marine terminal facilities at the Port of Oakland than those provided to SSAT.

The Port answered the complaint and asserted a variety of defenses, including but not limited to Eleventh Amendment sovereign immunity. The Port alleged that it was an arm of the State of California for purposes of the Eleventh Amendment of the United

³ The Exhibits to the Settlement Agreement, due to their volume, are being provided on CD-ROM under separate cover.

⁴ Pursuant to 46 C.F.R. 535.10(b), "[a]ll marine terminal facilities agreements as defined in 535.310(a) are exempt from the filing and waiting period requirements of the Act and this part." As noted below, the Settlement Agreement includes the restructuring of the SSAT lease at the Port for berths 57-59 and leases for the adjacent terminals at the Port. Accordingly, SSAT and the Port are not requesting that the Presiding Officer and the Commission to review or approve of the individual lease agreements that are part of the Settlement Agreement, as those individual lease agreements are exempt from the filing and waiting period requirements under the Shipping Act.

States Constitution, and thus the Commission did not have jurisdiction over private party claims. That issue was fully briefed before the Presiding Officer and, by Order of November 8, 2010, the Presiding Officer held that the City when operating through its Port Department is not an arm of the State of California entitled to sovereign immunity. The Port appealed the decision of the Presiding Officer and, by Order of December 13, 2011, the Commission affirmed the decision of the Presiding Officer, holding that the Port is not entitled to Eleventh Amendment sovereign immunity.

The Port filed a Petition for Review of the Commission's decision with the U.S. Court of Appeals for the District of Columbia Circuit on February 9, 2012. The parties fully briefed the issue and oral argument was held before a three-judge panel of the D.C. Circuit on April 9, 2013. On July 26, 2013, the D.C. Circuit upheld the Commission's decision that the Port was not entitled to sovereign immunity.

In addition to this proceeding, there was another related action between the Port and SSAT before the U.S. District Court for the Northern District of California. On February 25, 2011, the Port filed a Declaratory Relief action in the Alameda Superior Court against SSAT. The Declaratory Relief action was filed after SSAT filed a California Government Code Section 910 claim with the Port alleging that it violated the 1911 Tidelands Trust Act when it awarded the Concession to PAOHT. Specifically, SSAT claimed that the Concession gave PAOHT an unfair, disparate competitive advantage in soliciting carriers to Berths 20-26 at the Port who were, are, or may use SSAT's terminals at Berths 57-59, and that this was unlawful discrimination in violation of the 1911 Tidelands Trust Act. SSAT estimated its losses to be up to \$157 million

through 2017, which is the year when the initial terms of its lease with the Port expires, and up to \$300 million if SSAT elected to extend its lease to 2027.

SSAT removed the Port's state court action to Federal District Court and filed a Counterclaim against the Port alleging three causes of action: Breach of Implied Covenant of Good Faith and Fair Dealing under SSAT's lease with the Port; Discriminatory Acts in Violation of the Tidelands Trust Act; and Wrongful Breach of Joint Venture Agreement. SSAT claimed damages that it made in its Government Code claim. The Port filed a motion for summary judgment as to each of the three causes of action alleged in the Counterclaim. The Court granted summary judgment on two of the causes of action in favor of the Port, but denied the Port's motion with regard to SSAT's cause of action for the Discriminatory Acts in Violation of the Tidelands Trust Act.

Although the legal issues and governing laws in this proceeding and the proceeding before the U.S. District Court are distinct, the parties agreed the discovery of factual issues in both proceedings would likely be the same. Therefore, the parties agreed to consolidate discovery in these two proceedings to the extent possible, including depositions of expert and fact witnesses, interrogatories, and production of documents. Discovery was completed at the end of February 2013, and all pretrial documents were filed with the U.S. District Court at the end of April 2013. Monthly status reports were filed with the Presiding Officer.

The parties began initial settlement discussions in this case in 2009, even before the current action was filed. Those discussions terminated in July 2010. Renewed settlement discussions began in September last year. After the parties filed all pre-trial documents in the U.S. District Court case at the end of April, a Pre-Trial Conference was

held on May 10, 2013. During that Pre-Trial Conference, the parties discussed their settlement negotiations with Judge Gonzales Rogers, and noted that the parties had reached tentative agreement on a number of substantive terms, but that some terms remained outstanding. Judge Gonzalez Rogers strongly encouraged the parties to continue their negotiations. The parties had a telephone conference with Judge Gonzalez Rogers on May 29, 2013 to report on the status of their settlement discussions. While the parties continued to make progress on settlement discussions, several items still remained unresolved.

The parties had a follow-up telephone conference with Judge Gonzalez Rogers on June 14, 2013. Following that call, Judge Gonzalez Rogers issued an Order referring the case to U.S. Magistrate Judge Joseph C. Spero for a mandatory settlement conference, which was held on June 18, 2013. Counsel for both parties, along with principal representatives of SSAT and the Port, were all present at the mandatory settlement conference. With the facilitation and mediation by Magistrate Judge Spero, the parties reached a settlement agreement in principle, subject to drafting formal settlement documentation and execution by the parties. The material terms of the parties' agreement included the dismissal of both the U.S. District Court proceeding and the instant proceeding, and also dealt with a wide variety of other commercial matters, such as the restructuring of the SSAT lease and leases for the adjacent terminals at the Port.

On July 31, 2013, the parties filed a Stipulation and Proposed Order of Dismissal with Prejudice of the District Court proceeding, pursuant to Rule 41(a) of the Federal

Rules of Civil Procedure.⁵ Judge Gonzalez Rogers issued an Order on August 1, 2013 granting the Stipulation and dismissing the case with prejudice.

II. SETTLEMENT AGREEMENT

The terms of the settlement agreement are somewhat different from typical commercial settlements in that they do not provide for SSAT to receive a cash payment in return for its agreement to dismiss the pending legal actions against the Port. Rather, the Settlement Agreement reflects the efforts of the parties to structure a comprehensive resolution of the underlying issues in this case, which SSAT and Port staff strongly believe, notwithstanding their differing views regarding the legal merits of the claims and defenses in this and the U.S. District Court proceeding, are beneficial to both parties and the shipping industry at large.

The following is a summary of the key terms of the parties' Settlement Agreement. A map of the Port is attached as Appendix B.

1. **Dismissal of Lawsuits.** In consideration of all the terms and conditions of the settlement agreement, the parties would dismiss the U.S. District Court and seek dismissal of this proceeding, with each party to bear its own costs and attorneys' fees.
2. **Berths 55-56.** Berths 55-56 at the Port are currently under a Non-Exclusive Preferential Assignment Agreement ("NEPAA") dated October 9, 2000, as amended (collectively, the "B55-56 Lease") between the Port and Total Terminals International, LLC. While independent of the settlement agreement, SSAT will assume the B55-56 Lease for the remainder of its initial term, which expires on June 8, 2016. SSAT has the right to extend the B55-56 Lease to no later than June 30, 2022, and must give the Port twelve (12) months' notice of whether it will exercise this option.
3. **Berths 60-63.** Berths 60-63 at the Port are currently under a Non-Exclusive Preferential Assignment Agreement dated August 30, 2005, as amended

⁵ As noted above, the Commission adopted Rule 72 to align its procedures for voluntary dismissals with Federal Rule of Civil Procedure 41. *See* 77 Fed. Reg. at 61523 ("Section 502.72 clarifies the process for seeking voluntary and involuntary dismissals. Without such a rule, parties were not always certain how to present these dismissals. The rule is similar to FRCP 41.").

3. **Berths 60-63.** Berths 60-63 at the Port are currently under a Non-Exclusive Preferential Assignment Agreement dated August 30, 2005, as amended (collectively, the "B60-63 Lease") between the Port and Eagle Marine Services, Ltd. The existing B60-63 Lease will be terminated, effective July 15, 2013. SSAT will enter a new lease to operate the B60-63 Terminal, effective October 1, 2013. The term for the new B60-63 Lease will expire on June 30, 2022, and SSAT has no option to extend that lease.
4. **Berths 57-59.** Berths 57-59 at the Port are currently under the Berths 57-59 Amended and Restated Non-Exclusive Preferential Assignment Agreement dated October 1, 2008 (the "B57-59 Lease") between the Port and SSAT. The initial term of the B57-59 Lease is set to expire on October 18, 2017, with SSAT's holding two options to extend the initial term by an additional five (5) years each. The B57-59 Lease will be amended to extend the expiration of the initial term to June 30, 2022, and SSAT will have no options to extend that lease. In connection with the extension of the B57-59 Lease, the parties reached an agreement regarding the purchase and raising of cranes in the future in order to accommodate larger ships calling at Berths 57-59, as well as some other commercial terms relating to the B57-59 Lease.
5. **Berths 67-68.** Berths 67-68 at the Port are currently under an Amended and Restated Non-Exclusive Preferential Assignment Agreement (Howard Terminal) dated October 1, 2008 (the "Howard Terminal Lease") between the Port and SSAT. The Port agrees to terminate the Howard Terminal Lease effective October 1, 2013, with SSAT agreeing to pay rent to the Port for the Howard Terminal through September 30, 2013.
6. **Port's Marketing Rights.** The Port shall have the right to market all or any portion of Berths 55-56, Berths 57-59, and Berths 60-63 at any time for lease to any other third party that the Port in its sole discretion determines is a potential tenant, and SSAT shall not interfere or object to the Port's exercise of such rights.

III. TIMING OF SETTLEMENT

Following the mandatory settlement conference, the District Court ordered an aggressive schedule for the preparation, review, and execution of all the documents necessary to effectuate the settlement agreement. In light of this, on June 18, 2013, Magistrate Judge Spero directed the Port to prepare a draft settlement agreement, as well as all of the necessary draft agreements outlined above, and send those drafts to SSAT by the close of business Pacific Coast time on June 20, 2013. SSAT's comments on those

was accomplished by the parties and the matter was submitted to the Port's Board of Commissioners for consideration at a meeting held on June 27, 2013. The Board chose to defer consideration of the settlement at that meeting since all documents has not been fully executed.

The Port's Board had a meeting on July 11, 2013, where the final settlement agreement and lease agreements were approved by all of the Commissioners attending and a first reading of certain of the documents took place. Under the Port's Board procedures, approval of a resolution and an ordinance are required where new or restructured leases are involved. For the approval of a new lease, two readings of an ordinance are required. A copy of the relevant portions of the Board's Agenda and Agenda Report for the July 11, 2013, meeting is attached hereto as Appendix C. As noted in item 6.3 of the Agenda Report for the July 11, 2013, meeting, the Port's staff noted that the transactions referenced above "effectuate the dismissal of the lawsuits, but also achieve important business and financial objectives that provide the Port, its tenants, customers, community and stakeholders with competitive benefits and future opportunities greater than those anticipated in the absence of the requested actions." A second reading of the ordinance before a special Board meeting took place on July 18, 2013, where the Board formally approved of all of the necessary agreements and finalized the settlement.

IV. AUTHORITY FOR SETTLEMENT

The Administrative Procedure Act ("APA"), 5 U.S.C. § 554(c)(1), requires agencies to give interested parties an opportunity, *inter alia*, to submit offers of settlement "when time, the nature of the proceeding, and the public interest permit." As

settlement “when time, the nature of the proceeding, and the public interest permit.” As the legislative history of the APA makes clear, Congress intended this provision to be read broadly so as to encourage the use of settlement in proceedings such as the present one:

... even where formal hearing and decision procedures are available to parties, the agencies and the parties are authorized to undertake the informal settlement of cases in whole or in part before undertaking the more formal hearing procedure. Even courts through pretrial proceedings dispose of much of their business in that fashion. There is much more reason to do so in the administrative process, for informal procedures constitute the vast bulk of administrative adjudication ... The statutory recognition of such informal methods should strengthen the administrative arm and serve to advise private parties that they may legitimately attempt to dispose of cases at least in part through conferences, agreements, or stipulations.

Senate Committee on the Judiciary, Administrative Procedure Act-Legislative History, S. Doc. No. 248, 79th Cong., 2d Sess. 24 (1946).

Courts have endorsed the use of the APA settlement provision “to eliminate the need for often costly and lengthy formal hearings in those cases where parties are able to reach a result of their own which the appropriate agency finds compatible with the public interest.” *Pennsylvania Gas and Water v. Federal Power Commission*, 463 F.2d 1242, 1247 (D.C. Cir. 1972).

It is “well settled that the law and Commission policy encourage settlements and engage in every presumption which favors a finding that they are fair, correct, and valid.” *Old Ben Coal Company v. Sea-Land Service, Inc.*, 21 F.M.C. 506, 512 (1978); *see also APM Terminals North America, Inc. v. Port Authority of New York and New Jersey*, 31 S.R.R. 244, 471-72 (ALJ 2008); *Freeman v. Mediterranean Shipping Co.*, 31 S.R.R. 336, 337 (ALJ 2008); *Del Monte Corp. v. Matson Navigation Co.*, 22 F.M.C. 365 (1979);

United Van Lines, Inc. and United Van Lines International, Inc. v. United Shipping USA, Inc., 27 S.R.R. 769 (ALJ 1996) (administratively final May 29, 1996). The Commission itself has long recognized that the resolution of controversies by means of settlement is faster and cheaper than litigation, and results in savings of time for all parties. *Id.* The Commission also has reaffirmed in its decisions that potential costs and uncertainties of success are valid factors to be considered both in negotiation of settlement and in review of a settlement agreement. *See Investigation of Unfiled Agreements-Yangming Marine Transport, Evergreen Marine Corporation and Orient Overseas Container Line, Inc., Order Adopting Initial Decision*, 24 S.R.R. 910 (FMC 1988). *See also Atlantis Line, Ltd. v. Australia New Zealand Direct Line*, 25 S.R.R. 557 (ALJ 1989) (withdrawal of complaint because of settlement allowed in accordance with general Commission policy of settlement, and the avoidance of undue and unnecessary expenses, and expenditure of working time).

Rule 91 of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.91, codifies the *Old Ben Coal* holding in language borrowed in part from the APA, 5 U.S.C. § 554(c)(1). In accordance with Rule 91 and its policy favoring settlements, the Commission has approved settlement of disputes between private parties. *See, e.g., United Van Lines, supra; Delhi Petroleum Pty. Limited v. U.S. Atlantic & Gulf/Australia-New Zealand Conference and Columbus Line, Inc.*, 24 S.R.R. 1129 (ALJ 1988) (administratively final September 19, 1988).⁶

⁶ Even if dismissal is not automatic per the Commission's adoption of new Rule 72 of the Commission's Rules of Practice and Procedure, that new rule further underscores the Commission's strong policy of dismissing cases where both parties have reached a settlement and desire to dismiss the case.

The Commission will approve a settlement when it does not contravene any law or public policy, is fair, adequate, reasonable, and is not the product of collusion or coercion. *See Delhi Petroleum* at 1134. The Commission also considers whether there is a reasonable basis for the settlement, and whether the settlement reflects the careful consideration of the parties with respect to factors such as the relative strengths of their positions weighed against the risks and costs of continued litigation. *Id.* As discussed below, the Settlement Agreement in this proceeding clearly meets the foregoing criteria.

V. **THE SETTLEMENT AGREEMENT SHOULD BE APPROVED BECAUSE IT IS FAIR AND REASONABLE AND DOES NOT VIOLATE PUBLIC POLICY.**

The Settlement Agreement between SSAT and the Port should be promptly approved. The Settlement Agreement is fair, adequate, and reasonable for both SSAT and the Port, is not the product of collusion or coercion, and does not violate the Shipping Act or public policy. Each party was represented by two law firms.

SSAT alleged that the Port, by entering into a Concession and Lease Agreement for Berths 20-24 at the Port with Ports America Outer Harbor Terminal, LLC (“PAOHT”), violated provisions of the Shipping Act by granting and continuing to grant PAOHT unduly and unreasonably more favorable terms for the rental and use of marine terminal facilities at the Port of Oakland than those provided to SSAT. SSAT claims that it pays a significantly higher rent for its marine terminal at berths 57-59 in the Port pursuant to its 2000 agreement than PAOHT. SSAT contends that the difference in rates paid by PAOHT and SSAT under their respective leases is approximately \$100,000 per acre. SSAT further contends that PAOHT’s more favorable lease terms enable PAOHT to solicit SSAT’s customers with lower rates, and that SSAT has lost and will continue to

lose business and revenue as a result of the Port's Concession with PAOHT. SSAT contends that the condition of the PAOHT terminal and the SSAT terminal does not justify the discrepancy in rents of those terminals. SSAT also contends that PAOHT has been able to attract customers without any significant capital improvements and that PAOHT is not required under its lease to make any improvements. SSAT estimates its losses to be to \$157 million through 2017, which is the year when the initial term of its lease with the Port expires, and up to \$300 million if SSAT elected to extend its lease to 2027. The Port denies these contentions.

The Port raised a number of defenses to SSAT's complaint. The Port contends that SSAT is not entitled to any monetary recovery because the Concession with PAOHT provides reasonably similar value as its agreement with SSAT. The Port further contends that even if the SSAT and PAOHT agreements contain different rents, such difference is reasonably justified under the circumstances, because the PAOHT Concession was entered into during the "Great Recession," PAOHT paid a \$60 million upfront fee and SSAT paid no fee for its lease at berths 57-59, PAOHT's facility is in poorer condition than the SSAT facility and PAOHT took its terminal "as is," PAOHT is responsible for nearly all of its own maintenance, construction, and repair costs, and PAOHT's commitment is for 50 years. SSAT denies these contentions.

While the outcome of this dispute was not certain, it is clear that the Settlement Agreement relieves the Port of the potential for liability on a very substantial claim without having to make any monetary payment to SSAT. The Settlement Agreement also relieves both parties and the Commission of the need for expending further resources in litigating a complex dispute.

The Settlement Agreement is also a reasonable step to take at this juncture. The parties have already expended significant time and resources in discovery and motion practice in both this proceeding and the related District Court proceeding. The parties exchanged thousands of documents in discovery. In all, 25 fact witness depositions were taken in New York, New Jersey, California, and Washington, D.C. Nine expert witness depositions were taken in California and Washington, D.C. SSAT served two expert witness reports on the Port, and the Port served a rebuttal report. SSAT served an initial and supplementary response to the Port's rebuttal report.

Nevertheless, if the litigation were to continue, enormous sums would need to be expended in connection with further pleadings and hearings, and the litigation would continue to subject both parties to other substantial burdens and disruption. The Settlement Agreement eliminates the need for all such further litigation before the Commission on the issues to be settled, at great savings of both the parties' and, for purposes of this proceeding, the Commission's resources.

SSAT and the Port's decision to forgo substantial and complex, if uncertain, litigation in exchange for resolving any potential liability is thus obviously fair, adequate, and reasonable. The parties' decisions to settle were made independently, based upon careful consideration of its merits and the potential litigation costs with counsel, and were not the product of any collusion or coercion. As noted, this settlement was reached only after lengthy negotiations over a period of months, careful consideration by both parties, and the assistance of Magistrate Judge Spero. "Generally, when examining settlements, the Commission looks to see if the settlement has a reasonable basis and reflects the careful consideration by the parties of such factors as the relative strengths of their

positions weighed against the risks and costs of continued litigation.” *Delhi Petroleum*, 24 S.R.R. at 1134. The Presiding Officer in *Delhi Petroleum* went on to note that “if it is the considered judgment of the parties that whatever benefits might result from vindication of their positions would be outweighed by the costs of continued litigation and if the settlement otherwise complies with law the Commission authorizes the settlement.” *Id.* Likewise, there is simply no evidence to demonstrate that the Settlement Agreement was reached as a result of fraud, duress, or mistake. *See Monarch Shipping Lines, Inc., et al.*, 30 S.R.R. 820 (FMC, 2005) (approving settlement where agreement was fair, reasonable and adequate and where there was no evidence of fraud, duress, or mistake).

In addition to being fair, adequate, and reasonable, the parties Settlement Agreement is in the interests of public policy, as it will benefit SSAT, the Port, and the shipping public. For SSAT, the settlement will achieve certain cost savings and make SSAT a more efficient and competitive marine terminal operator at the Port of Oakland. SSAT’s carrier customers, the Port, and the shipping public will benefit from these efficiencies.

The numerous benefits of the Settlement Agreement to the Port are summarized by the Port’s staff in item 6.3 of the Agenda Report for the July 11, 2013, meeting. As stated by the Port staff, “the transactions proposed for approval effectuate the dismissal of the Lawsuits, but also achieve important business and financial objectives that provide the Port, its tenants, customers, community and stakeholders with competitive benefits and future opportunities greater than those anticipated in the absence of the requested actions.” Exhibit C, Agenda Report at 104. Specifically, the Port’s staff identified three

key benefits of the Settlement to the Port and its stakeholders. First, for Berths 57-59 and 60-63, the Settlement provides the Port with lease revenue for an additional five years (through 2022), which provides the Port with revenue stability of mitigation of risk associated with unfavorable lease extension options in the current leases. Second, the Settlement immediately creates a contiguous 350-acre terminal facility under one operation, and allows the Port to market this consolidated 350-acre terminal in the near future. Third, it provides the Port's major ocean carrier customers enhanced facilities that can accommodate the newest generation of ultra-large container vessels. *Id.* at 104-105.

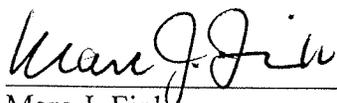
As noted in the Agenda Report, the Port's staff has for some time analyzed the future needs of terminal operators at the Port, most notably the trend toward larger terminals that can service multiple vessels. "As larger vessels rapidly replace smaller vessels, port and terminal operations will be greatly impacted and will require longer berth length and larger terminal area." The limited berth length and scale of operations at the three separate terminals in the Port "will become a significant concern for [the Port's] ocean carrier customers and terminal operators." To address this concern, Berths 55-56, 57-59, and 60-63 together provide the Port with an opportunity to create a consolidated terminal because of their contiguous land facilities. But the current lease agreements (including option language in the leases) prevent achievement of this consolidated terminal in the near-term. As part of the Settlement Agreement, these leases would be restructured in order for the Port to achieve this important objective. Thus, the Settlement Agreement improves the overall competitive position of the Port by increasing its ability to efficiently handle the increasing number of larger vessels, and allows the Port to

competitively market the consolidated 350-acre terminal and other terminal operators the opportunity to propose operations for this facility in the near-term. For all of these reasons, the Settlement Agreement is beneficial to both parties and the shipping industry at large, and therefore consistent with public policy.

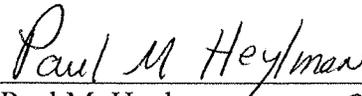
VI. CONCLUSION

The Settlement Agreement between SSAT and the Port meets the Commission's and general administrative law's criteria for approval. The Settlement Agreement is fair and reasonable, particularly when taking into account the costs and disruption that would be associated with continued litigation and the complexity of legal issues remaining, and the tradeoffs in concessions between the parties. Therefore, the parties respectfully request that it be promptly approved and this case be dismissed, with prejudice.

Respectfully submitted,



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acting by and through
Its Board of Port Commissioners*

Dated: September 10, 2013

SETTLEMENT AGREEMENT

THIS SETTLEMENT AGREEMENT ("Agreement") is dated for reference purposes only as of July 1, 2013 and is entered into as of July 18, 2013, (the "Execution Date") by and between the City of Oakland, a municipal corporation, acting by and through its Board of Port Commissioners ("Port"), on the one hand, and SSA Terminals, LLC ("SSAT") and SSA Terminals (Oakland), LLC ("SSAT Oakland") on the other hand. The Port, SSAT and SSAT Oakland are hereinafter collectively referred to as the "Parties" and singularly as "Party."

RECITALS

A. The Port, SSAT and SSAT Oakland are parties to the following actions: (1) SSA Terminals, LLC and SSA Terminals (Oakland), LLC v. the City of Oakland, acting by and through its Board of Port Commissioners, Federal Maritime Commission Docket No. 09-08 ("FMC Action"); and (2) City of Oakland, acting by and through its Board of Port Commissioners, Plaintiff v. SSA Terminals, LLC, SSA Terminals (Oakland), LLC, et al., Defendants and SSA Terminals, LLC, SSA Terminals (Oakland), LLC, et al., Counterclaimants v. City of Oakland, acting by and through its Board of Port Commissioners, Counter-Defendants, United States District Court for the Northern District of California Case No. C11-01446 YGR ("Court Action") (the FMC Action and the Court Action are collectively referred to as the "Lawsuits").

B. Parties have engaged in confidential negotiations for the settlement of the Lawsuits and reached a tentative agreement on many substantive terms, and then agreed, subject to approval by the Board of Port Commissioners, to the remaining outstanding terms of Agreement at a settlement conference presided by U.S. Magistrate Judge Joseph C. Spero held on June 18, 2013 pursuant to a Notice of Settlement Conference and Settlement Conference Order issued on June 17, 2013.

C. Independent of the settlement negotiations referenced in the preceding recital, SSAT has entered into an Assignment Agreement with Total Terminals International, LLC ("TTI") effective as of 11:59 p.m. (Pacific Daylight Time) on July 18, 2013 (the "Assignment Agreement") pursuant to which TTI has requested that the Port consent to TTI's assignment of certain of TTI's rights and obligations to use and operate the marine terminal at Berths 55-56 (the "B55-56 Terminal") in the Port's Maritime Area (as referenced in Section 2.1 below). As an added inducement to the Port's consent to such assignment, TTI has executed that certain Consent to Assignment entered into as of July 18, 2013 (the "Consent") setting forth certain terms and conditions of the Port's consent to such assignment.

D. The Parties desire to settle and resolve all disputes, disagreements, claims, and causes of action arising out of or related to the Lawsuits, and the alleged expenses and damages allegedly caused by the Lawsuits. Without admitting liability or fault, and pursuant to the terms expressed herein, the Parties, individually and on behalf of their companies, partners, officers, directors, heirs, successors, administrators, agents, principals, tenants, subtenants, and employees hereby enter this Agreement upon the facts, terms and conditions stated herein.

AGREEMENT AND RELEASE

1. **Dismissal of Lawsuits.** For and in consideration of all the terms and conditions of this Agreement, the Parties shall each dismiss the Court Action with prejudice, each Party to bear its own costs and attorneys' fees, within ten (10) business days following the Effective Date as defined in Section 23 hereinbelow) of this Agreement. As for the FMC Action pending before the Federal Maritime Commission (the "FMC"), the Parties agree to submit a joint motion for approval of this Agreement and dismissal of the FMC Action with prejudice, each Party to bear its own costs and attorneys' fees, to Administrative Law Judge Wirth as soon as possible after the Effective Date but no later than ten (10) business days following the Effective Date. In the event that any third party seeks to intervene to oppose the FMC's approval of the Agreement and the settlement described herein, or otherwise appears before the FMC to oppose the Agreement or the settlement described herein, the Parties shall cooperate to jointly seek a ruling by the FMC that the terms of the Agreement and the settlement described herein do not constitute an unfair prejudice or other prohibited burden on the intervening or opposing party or other party opposing the settlement on Shipping Act grounds.

2. **Berths 60-63.**

2.1 **Existing Non-Exclusive Preferential Assignment Agreement.** Berth 60-63 and approximately 80 acres of maritime container terminal area (collectively, the "B60-63 Terminal") within the Port's Maritime Area (as depicted in **Exhibit A**, attached hereto) is currently under a Non-Exclusive Preferential Assignment Agreement dated August 30, 2005, as amended (collectively, the "B60-63 Lease") between the Port and Eagle Marine Services, Ltd., a Delaware corporation ("EMS"). The initial term of the B60-63 Lease will expire on August 1, 2016, and provides for two options to extend the initial term by an additional five (5) years each, each option exercisable upon written notice of exercise given by EMS at least six (6) months prior to the expiration of the then current term.

2.2 **EMS's Initial Request that the B60-63 Lease Be Terminated.** EMS has requested that the B60-63 Lease be terminated.

2.3 **B60-63 Terminal Operations.** As part of the consideration for this Agreement, the Parties agree that SSAT shall enter a new Non-Exclusive Preferential Assignment Agreement to operate the B60-63 Terminal to include certain terms and conditions, as set forth in Subsection 2.4 below (the "SSAT B60-63 Lease"). The entering into of the SSAT B60-63 Lease is conditioned upon EMS entering into a termination agreement with the Port terminating the existing B60-63 Lease (the "EMS Termination Agreement"). Upon the satisfaction of all conditions precedent set forth in Section 7.1 below and pursuant to Section 7.3 below, and the execution of the EMS Termination Agreement, effective July 7, 2013, EMS shall not owe the Port any rent pursuant to the B60-63 Lease.

2.4 **New Non-Exclusive Preferential Assignment Agreement.** The Port and SSAT have agreed upon the form of the SSAT B60-63 Lease, a copy of which is attached hereto as **Exhibit B**. The SSAT B60-63 Lease contains substantially the same economic terms and conditions as the existing B60-63 Lease with the following material modifications: (i) the term of the SSAT B60-63 Lease will commence on October 1, 2013 and expire on June 30, 2022; (ii)

eliminate any and all options to extend; (iii) the "Contract Year" (as defined in the B60-63 Lease) shall be a calendar year beginning on January 1 of any calendar year and ending on December 31 of that same calendar year and shall be a prorata portion of such calendar year for any year during the term of the SSAT B60-63 Lease that does not cover a full calendar year; and (iv) the "All-Inclusive Throughput Rate" per twenty foot equivalent unit ("TEU") for each TEU in excess of the Minimum Annual Guaranty ("MAG") (as the All-Inclusive Throughput Rate, TEU, and MAG are each defined in the B60-63 Lease) shall be amended to be no less than \$48.69 per loaded TEU. The Break Point Level (the "BPL" and also as defined in the B60-63 Lease) shall be based upon cargo handled for ships berthed at the B60-63 Terminal after the effective date of the SSAT B60-63 Lease. SSAT has executed the SSAT B60-63 Lease and delivered a copy to the Port by July 4, 2013. SSAT has caused SSA Marine, Inc. a Washington corporation ("SSA Marine") to submit to the Port an original performance and payment guaranty for the SSAT B60-63 Lease (the "B60-63 Guaranty") in the amount of three million five hundred thousand dollars (\$3,500,000.00), and in substantially the form attached hereto as **Exhibit C**, signed by the duly authorized representative(s) of SSA Marine and delivered a copy of same to the Port by July 1, 2013 in accordance with and as one of the conditions precedent set forth in Section 7.1 below.

3. **Berths 55-56.**

3.1 **Existing Non-Exclusive Preferential Assignment Agreement.** Berths 55-56 and approximately 120 acres of maritime container terminal area (collectively, the "B55-56 Terminal") within the Port's Maritime Area is currently under a Non-Exclusive Preferential Assignment Agreement dated October 9, 2000, as amended (collectively, the "B55-56 Lease") between the Port and TTI. The initial term of the B55-56 Lease will expire on June 8, 2016, and provides for two options to extend the initial term by an additional five (5) years each, each option exercisable upon written notice of exercise given at least three (3) months prior to the expiration of the then current term. Separate and apart from the consideration for the dismissal with prejudice of the Lawsuits, TTI has submitted a written request to the Port (the "TTI Assignment Request"), a copy of which is attached hereto as **Exhibit D** pursuant to Section 18.1 of the B55-56 Lease, requesting the Port's consent to TTI's assignment of the B55-56 Lease to SSAT together with a signed original of the proposed assignment agreement from TTI to SSAT, and TTI has executed the Port's Consent to such TTI Assignment Request, a copy of which is attached as **Exhibit E**.

3.2 **Assumption of and Amendments to B55-56 Lease.** SSAT, SSAT Oakland and the Port have agreed that SSAT will initially assume the B55-56 Lease and then subassign that Lease to SSAT Oakland provided that: (a) SSAT and SSAT Oakland agree to execute an amendment to the B55-56 Lease (the "B55-56 Amendment") in substantially the form of the B55-56 Amendment attached hereto as **Exhibit F** and (b) SSAT and SSAT Oakland has caused SSA Marine to deliver to the Port an original performance and payment guaranty for the B55-56 Amendment (the "B55-56 Guaranty") in the amount of ten million dollars (\$10,000,000.00) and in substantially the form attached hereto as **Exhibit G**, signed by the duly authorized representative(s) of SSA Marine and delivered a copy of same to the Port by July 4, 2013 in accordance with and as one of the conditions precedent set forth in Section 7.1 below. The material provisions of the B55-56 Amendment (i) acknowledges SSAT as the new assignee and SSAT Oakland as the subassignee of the B55-56 Lease; (ii) modify Section 2.3 of the B55-56

Lease to provide that the first option to extend the term of the B55-56 Lease will be for approximately six (6) years ending on June 30, 2022 and must be exercised if at all on or before June 30, 2015, and eliminates any further option to extend the term of the B55-56 Lease; (iii) amends the definition of a "Contract Year" under the B55-56 Lease to be a twelve (12) month period beginning on January 1 and ending on December 31; (iv) provide that the Port agrees that the Contract Year 2011 Fair Market Value adjustment authorized and set forth in Section 4.5 of the B55-56 Lease shall be zero percent, and (v) that the MAG/BPL for B55-56 Lease will be the current MAG/BPL of 288,000 loaded TEUs. SSAT and SSAT Oakland shall deliver a copy of the B55-56 Amendment signed by the duly authorized representative(s) of SSAT and SSAT Oakland) and deliver to the Port by no later than 0900 July 11, 2013.

3.3 Consent to Assignment. Upon the satisfaction of all conditions precedent set forth in Section 7.1 below, the Port shall execute the Consent.

4. Berths 57-59.

4.1 Existing Non-Exclusive Preferential Assignment Agreement. Berths 57-59 and approximately 150 acres of maritime container terminal area (collectively, the "B57-59 Terminal") within the Port's Maritime Area are currently under that certain Berths 57-59 Amended and Restated Non-Exclusive Preferential Assignment Agreement dated for reference purposes as of October 1, 2008 (the "B57-59 Lease") between the Port and SSAT Oakland. The initial term of the B57-59 Lease will expire on October 18, 2017, and the B57-59 Lease provides for two options to extend the initial term by an additional five (5) years each, each option exercisable upon written notice of exercise given at least six (6) months prior to the expiration of the then current term.

4.2 Amendment to B57-59 Lease. As a further inducement to the Port to enter into this Agreement, SSAT, SSAT Oakland and the Port have agreed to amend the B57-59 Lease (the "B57-59 Amendment") in material terms to: (i) extend the term of the B57-59 Lease to June 30, 2022; (ii) eliminate any and all options to extend; (iii) set the 2013 Fair Market Value adjustment authorized and set forth in Section 4.5 of the B57-59 Lease at zero percent; and (iv) provide new terms and conditions for SSAT and SSAT Oakland to raise and/or replace cranes at the B57-59 Terminal as further described in **Exhibit H**, attached hereto. A copy of the form of the B57-59 Amendment is attached hereto as **Exhibit H**. All other terms and conditions of the B57-59 Lease would remain in full force and effect. SSAT and SSAT Oakland shall execute and deliver to the Port a copy of the B57-59 Amendment by 0900 July 11, 2013.

5. Berths 67-68.

5.1 Existing Non-Preferential Assignment Agreement. Berths 67-68 and approximately 50 acres of maritime container terminal area within the Port's Maritime Area is currently under that certain Amended and Restated Non-Exclusive Preferential Assignment Agreement (Howard Terminal) dated October 1, 2008, (the "Howard Terminal Lease") between the Port and SSAT. The initial term of the Howard Terminal Lease will expire on October 18, 2017.

5.2 Termination of the Howard Terminal Lease. In consideration of all the terms and conditions of this Agreement, the Port will agree to terminate the Howard Terminal Lease on the later of the following: (i) October 1, 2013; or (ii) the date that all of the following have occurred: (a) the SSAT B60-63 Lease as set forth in Section 2 above becomes effective; (b) the B55-56 Lease has been amended as set forth in Section 3 above; (c) the B57-59 Amendment has been fully executed and delivered as set forth in Section 7 below; and (d) the APL Termination Agreement has been fully signed as set forth in Section 2 above. SSAT has executed and delivered to the Port a copy of the termination agreement for the existing Howard Terminal Lease (the "Howard Terminal Termination Agreement"), in the form attached hereto as **Exhibit I**. Upon the satisfaction of all conditions precedent set forth in Section 7.1 and pursuant to Section 7.3 below, the Port shall execute the Howard Terminal Termination Agreement.

6. Port's Right to Market Terminals. Upon the execution of the SSAT B60-63 Lease, the B55-56 Amendment, and the B57-59 Amendment, the Port may exercise its rights as owner to market any or all of the B60-63 Terminal, the B55-56 Terminal, and/or the B57-59 Terminal for lease to any other third party that the Port in its sole discretion determines, subject only to the terms of each of the agreements stated in this Section 6. The Port shall have the right to market such terminals in any combination. SSAT and SSAT Oakland shall not interfere or object to the Port's exercise of such rights.

7. Port Approvals; Port's Execution and Delivery of Documents.

7.1 Conditions Precedent to the Port's Approvals. The Port's receipt of each of the following duly executed and delivered documents shall be a condition precedent to the Port's obligations under Section 7.2 and 7.3 hereinbelow.

(a) A copy of the EMS Termination Agreement duly signed by the authorized representative(s) of EMS;

(b) A copy of the SSAT B60-63 Lease duly signed by the authorized representative(s) of SSAT;

(c) A copy of the B60-63 Guaranty in the amount of \$3,500,000 and duly signed by the authorized representative(s) of SSA Marine;

(d) A copy of the B55-56 Amendment duly signed by the authorized representative(s) of SSAT;

(e) A copy of the B55-56 Guaranty in the amount of \$10,000,000 and duly signed by the authorized representative(s) of SSA Marine;

(f) A copy of the B57-59 Amendment duly signed by the authorized representative(s) of SSAT and SSAT Oakland; and

(i) A copy of the Howard Terminal Termination Agreement duly signed by the authorized representative(s) of SSAT.

Each of the foregoing conditions precedent is solely for the benefit of the Port and can be waived

only by a resolution of the Board of Port Commissioners (“Board”) expressly waiving any such condition precedent. Three original signatures on all of the above-referenced documents must be delivered to the Port no later than July 16, 2013.

7.2 Approval by the Board of Port Commissioners. Within thirty (30) days after the satisfaction of each of the conditions precedent set forth in Section 7.1 above, the Board will consider the approval of each of the agreements by ordinance or resolution as required by law as set forth in Section 7.1 above.

7.3 Port’s Execution and Delivery of Agreements. Within ten (10) business days following the Board’s approval of each agreement set forth in Section 7.1 above, the Port shall perform the following:

(a) **Execution of EMS Termination Agreement.** The Port’s duly authorized representatives will counter sign each original of the EMS Termination Agreement and deliver one fully executed original of the EMS Termination Agreement to EMS.

(b) **Execution of SSAT B60-63 Lease.** The Port’s duly authorized representatives will counter sign each original of the SSAT B60-63 Lease and deliver one fully executed original of the SSAT B60-63 Lease to SSAT.

(c) **Execution of Consent.** The Port’s duly authorized representatives will counter sign the original of the Consent and deliver one fully signed copy of the Consent to TTI.

(d) **Execution of B55-56 Amendment.** The Port’s duly authorized representatives will approve and counter sign each original of the B55-56 Amendment and deliver one fully executed original of the B55-56 Amendment to SSAT.

(e) **Execution of B57-59 Amendment.** The Port’s duly authorized representatives will counter sign each original of the B57-59 Amendment and deliver one fully signed original of the B57-59 Amendment to SSAT and SSAT Oakland.

(f) **Execution of Howard Terminal Termination Agreement.** The Port’s duly authorized representatives will counter sign each original of the Howard Terminal Termination Agreement and deliver one fully executed original of the Howard Terminal Termination Agreement to SSAT.

8. Releases and Cooperation.

8.1 Definitions.

(a) As used in this Agreement, the capitalized term “Claim(s)” shall mean any and all actions, causes of action, suits, claims, rights, liabilities, contracts, duties, obligations, losses, debts, damages, costs, expenses, attorneys’ fees, controversies, agreements, trespasses, judgments, executions, demands and claims of any kind, nature, character or description whatsoever, whether in law or equity, whether known or unknown, whether anticipated or unanticipated, whether direct or indirect, whether fixed or contingent, whether primary or

secondary, and any and all rights, duties, liabilities and obligations, whether presently enforceable or enforceable in the future, including but not limited to any and all claims arising out of any violation of either the Federal Shipping Act of 1984, 46 U.S.C §§ 40101 et seq., or the provisions of Statutes 1911, ch. 657 (the "Tideland Trust Grant"), as a result of the Port's entering into the 50-year Lease and Concession Agreement Berths 20-24 in the Port's Maritime Area with Ports America Outer Harbor Terminals, LLC (as amended through August 2, 2010, the "B20-24 Lease").

(b) For purposes of this Agreement, the term "Related Parties" shall mean spouses, heirs, beneficiaries, executors, administrators, personal representatives, settlors, trustees, affiliated corporations, partnerships, limited liability companies or other entities, attorneys, accountants, officers, directors, managers, members, partners, shareholders, officers, directors, tenants and subtenants, employees, contractors, agents, predecessors, successors and assigns, and any and all persons or entities who may claim through or on behalf of any of them.

8.2 Releases By Port, SSAT and SSAT Oakland. As of the Effective Date of this Agreement, for good and valuable consideration, the sufficiency of which is hereby acknowledged, SSAT and SSAT Oakland, on behalf of themselves, and their Related Parties, on the one hand, and Port, on behalf of itself, and its Related Parties on the other hand, hereby fully and forever and completely, absolutely and unconditionally relieve, release, remise, acquit and discharge the other and their/its Related Parties, from any and all Claims, including costs and attorneys' fees, which SSAT and SSAT Oakland on the one hand and Port on the other hand, now have, or in the future may have against the other or their/its Related Parties that arise out of, or are in any manner or way connected with, the Port's entering into the B20-24 Lease or any cause of action or matter that is within or related to the scope of the Lawsuits.

8.3 Release of Unknown Claims. It is intended that this Agreement shall be effective as a bar to each and every Claim that SSAT and SSAT Oakland, on the one hand, and Port, on the other hand, may have against the other with respect to the Port's entering into the B20-24 Lease or any cause of action or matter that is within or related to the scope of the Lawsuits, and that SSAT, SSAT Oakland and the Port expressly waive any and all rights under Section 1542 of the California Civil Code, which provides:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.

8.4 Cooperation to Implement. The Parties shall reasonably and in good faith cooperate with each other to fulfill the terms and conditions of this Agreement. The Parties shall cooperate to defend the validity of this Agreement against any third party action or legal proceedings whether in court or by administrative action to challenge the validity or the enforcement of this Agreement and shall each bear its own cost of legal actions to defend or validate this Agreement, including attorneys' fees and costs.

9. **Covenant Not to Sue and Against Further Action.** The Parties covenant and agree that they will forever refrain from instituting, prosecuting or maintaining any lawsuit, action and/or administrative or governmental proceeding against the other with respect to the Port's entering into the B20-24 Lease or any cause of action or matter that is within or related to the scope of the Lawsuits, or to invalidate this Settlement Agreement. In the event of a breach of this covenant, the breaching party shall indemnify the other party for all damages, and attorney's fees.
10. **No Admission of Liability.** The Port denies liability for all of SSAT's and SSAT Oakland's potential Claims, and this final compromise and settlement shall never be treated as an admission of liability or responsibility at any time for any purpose.
11. **No Other Representations or Warranties.** The Parties have entered into this Agreement based solely upon the representations, covenants and warranties contained and referred to herein. No Party has placed any reliance on any representation not expressed or referred to in this Agreement.
12. **Differences in Known Facts.** Each of the Parties understands and acknowledges that the facts under which this Agreement is made may later be determined to be inaccurate, incomplete or misleading. Each of the Parties accepts the risk that the facts now believed to be true may later be determined to be inaccurate, incomplete or misleading and agrees that this Agreement shall nonetheless be and remain in all respects binding and effective on the Parties and not subject to termination or rescission.
13. **No Coercion.** The Parties have freely and voluntarily executed this Agreement and are not acting under coercion, duress, menace, economic compulsion, or because of any supposed disparity of bargaining power, rather, the parties hereto are freely and voluntarily signing this Agreement for their own benefit.
14. **Consultation with Counsel.** The Parties acknowledge that they have been represented in the negotiations for, and in the preparation of, this Agreement by counsel of their own choosing; that they have read this Agreement or have had it read to them by their counsel; and that they are fully aware of and understand its contents and its legal effect. Accordingly, this Agreement shall not be construed against any Party, as neither Party shall be deemed to be the drafter of this Agreement or any of the Exhibits, and the rule of construction that an agreement is construed against the party which drafted it shall not apply.
15. **Successors in Interest.** This Agreement shall be binding upon and inure to the benefit of each of the Parties and their respective successors, assigns and related agencies and entities.
16. **Choice of Law; Jurisdiction and Venue.** This Agreement is made and entered into in the State of California and shall be interpreted and enforced under and pursuant to the laws of said jurisdiction as if made and performed in California by California residents and without application of rules favoring the non-drafting party and without regard to conflict of laws principles. Jurisdiction and venue for any and all actions arising from this Agreement shall be in the Superior Court of the State of California for the County of Alameda.

17. **Modification.** It is expressly understood by each of the Parties that this Agreement may not be altered, amended, modified or otherwise changed in any respect whatsoever, except by a writing executed by the Parties.

18. **No Assignment.** Each Party hereby warrants, represents and agrees that it owns the Claims released, and has not previously assigned or transferred or purported or attempted to assign or transfer to any person or entity, any Claims or other matters herein released or assigned and that it has the ability to perform its promises and obligations herein. Each releasing Party shall indemnify and hold harmless all of the other released Parties against, and defend and hold them and each of them harmless from, any Claims arising out of or relating to such assignment or transfer or any such purported or attempted assignment or transfer, of any Claims or other matters released or assigned herein.

19. **Authority.** The persons executing this Agreement have full power and authority to execute this Agreement and to bind the Parties to the terms, conditions, covenants, agreements, undertakings and obligations under this Agreement.

20. **Counterparts.** This Agreement may be executed in as many counterparts as may be necessary or convenient, and by the different Parties on separate counterparts, each of which, when so executed, shall be deemed an original, and all such counterparts shall constitute one and the same instrument.

21. **Severability.** If any term, condition or provision of this Agreement is declared illegal or invalid for any reason by a court of competent jurisdiction, the remaining terms, conditions and provisions shall nevertheless remain in full force and effect.

22. **Attorneys' Fees.** In the event any action or proceeding is brought to enforce any of the terms or provisions of this Agreement, the prevailing party in any such action or proceeding shall be entitled to recover all of the attorneys' fees and costs actually incurred by the prevailing party.

23. **Effective Date.** This Agreement shall be effective as of the later date upon which the Port and the Port Attorney execute and deliver the documents in Section 7.3(a) through (f) above (the "Effective Date").

24. **No Presumption Against Drafter.** This Agreement has been negotiated at arm's length and between Parties sophisticated and knowledgeable in the matters dealt with herein. In addition, each Party has been represented by experienced and knowledgeable legal counsel. Accordingly, this Agreement shall be interpreted to achieve the intents and purposes of the Parties, without any presumption against the Party responsible for drafting any part of this Agreement (including, without limitation, California Civil Code Section 1654).

[Signatures on following page]

IN WITNESS WHEREOF, the Parties have caused this Agreement to be executed and delivered by their respective representatives thereunto duly authorized as of the date first above written.

SSA TERMINALS, LLC

BY: SSA Ventures, Inc., its Member

Dated: _____

By _____
Title: _____

BY: Matson Ventures, Inc., its Member

Dated: _____

By  _____
Title: VICE PRESIDENT

SSA TERMINALS (OAKLAND), LLC

BY: SSA Terminals, LLC, its Member
BY: SSA Ventures, Inc., its Member

Dated: _____

By _____
Title: _____

BY: Matson Ventures, Inc., its Member

Dated: _____

By  _____
Title: VICE PRESIDENT

BY: NYK Terminal Oakland, Inc., its Member

Dated: _____

By _____
Title: _____

IN WITNESS WHEREOF, the Parties have caused this Agreement to be executed and delivered by their respective representatives thereunto duly authorized as of the date first above written.

SSA TERMINALS, LLC

BY: SSA Ventures, Inc., its Member

Dated: July 10, 2013

By 
Title: EVF

BY: Matson Ventures, Inc., its Member

Dated: _____

By _____
Title: _____

SSA TERMINALS (OAKLAND), LLC

BY: SSA Terminals, LLC, its Member
BY: SSA Ventures, Inc., its Member

Dated: July 10, 2013

By 
Title: EVF

BY: Matson Ventures, Inc., its Member

Dated: _____

By _____
Title: _____

BY: NYK Terminal Oakland, Inc., its Member

Dated: _____

By _____
Title: _____

IN WITNESS WHEREOF, the Parties have caused this Agreement to be executed and delivered by their respective representatives thereunto duly authorized as of the date first above written.

SSA TERMINALS, LLC

BY: SSA Ventures, Inc., its Member

Dated: _____

By _____
Title: _____

BY: Matson Ventures, Inc., its Member

Dated: _____

By _____
Title: _____

SSA TERMINALS (OAKLAND), LLC

BY: SSA Terminals, LLC, its Member
BY: SSA Ventures, Inc., its Member

Dated: _____

By _____
Title: _____

BY: Matson Ventures, Inc., its Member

Dated: _____

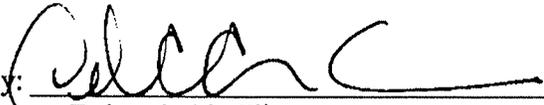
By _____
Title: _____

BY: NYK Terminal Oakland, Inc., its Member

Dated: _____

By W. Patrick Burgess
Title: PRESIDENT

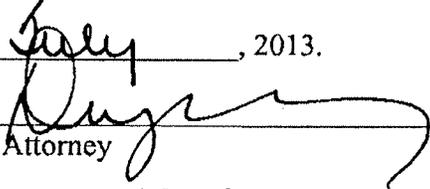
**CITY OF OAKLAND, a municipal corporation,
acting by and through its
Board of Port Commissioners**

By: 
Deborah Ale Flint,
Acting Executive Director

Date Signed 1/18/2013

Approved as to form and legality this 18th day of

July, 2013.


Port Attorney

Resolution No.: 13-72

P.A. No.: 2013-250

List of Exhibits

Exhibit A -----Map of Port's Maritime Area
Exhibit B -----Form of SSAT B60-63 Lease
Exhibit C ----- Form of B60-63 Guaranty
Exhibit D ----- TTI Assignment Request
Exhibit E----- TTI Signed Consent
Exhibit F ----- Form of B55-56 Amendment
Exhibit G ----- Form of B55-56 Guaranty
Exhibit H----- Form of B57-59 Amendment
Exhibit I ----- Form of Howard Terminal Termination Agreement

Port of Oakland Maritime Facilities

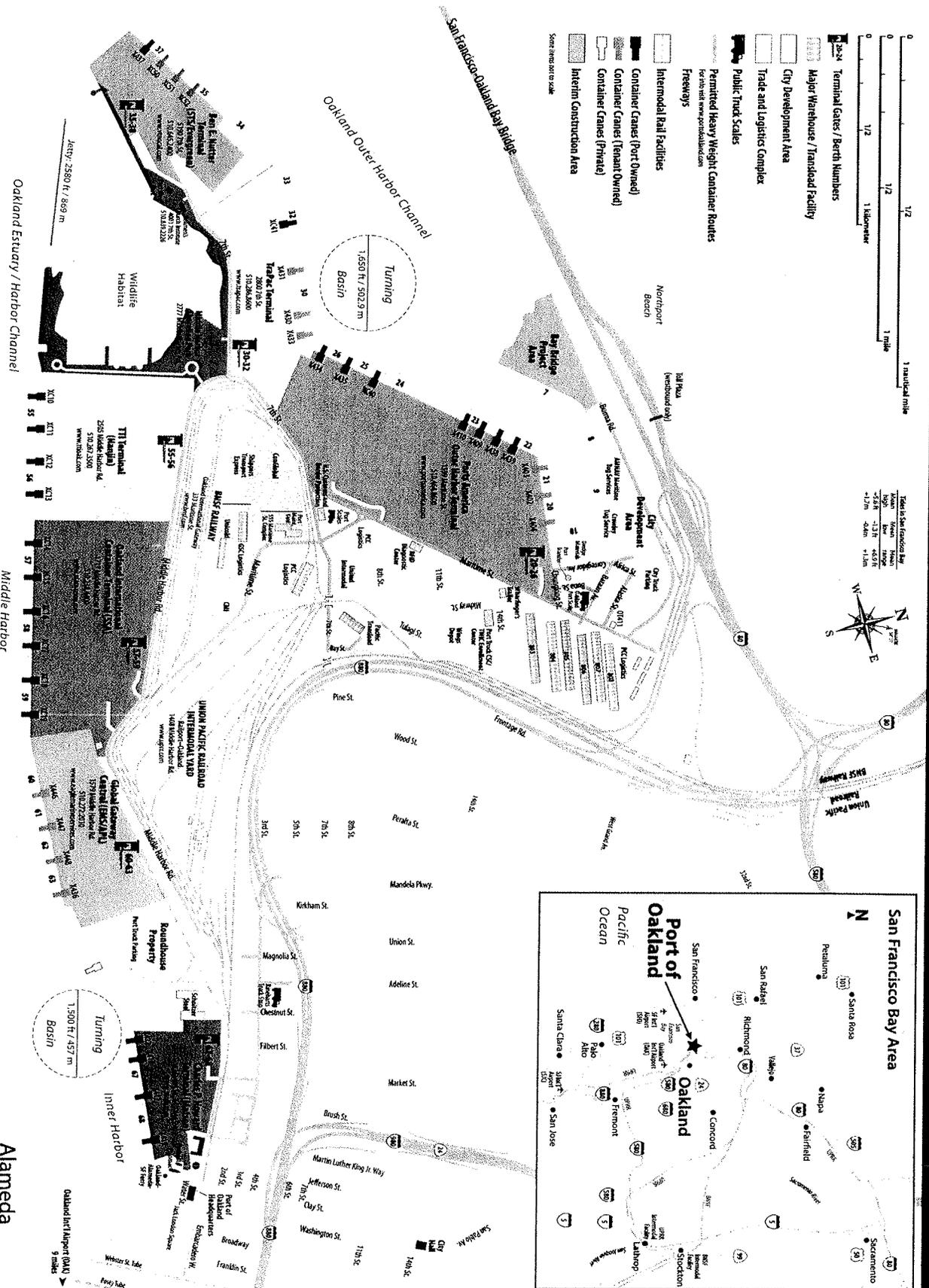
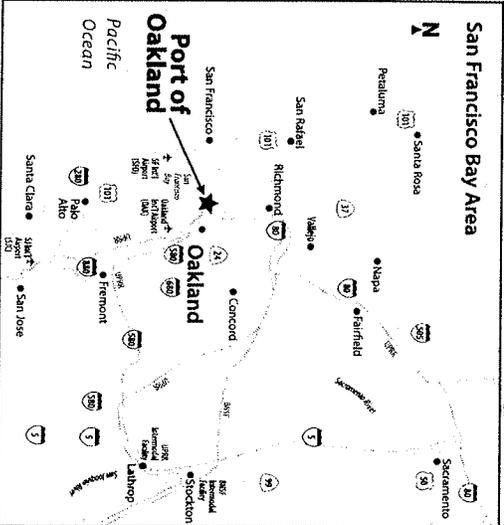


Table of Sea Level Elevations

Point	Mean High Water	Mean Low Water	Mean Higher High Water	Mean Lower Low Water	Mean Sea Level
	13.28	-1.28	17.18	-1.78	0



Berths - Terminal/Operator

20-26 Port America
Duke Harbor Terminal/
Yard America

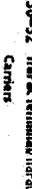
35-38 San E. Miller Terminal
(STS/Transpac)
Special Transportation Services
Carriers
(Equipment)

30-32 TraPac Terminal/TraPac Inc.
Carriers
MOL
APL
PIL

55-56 TTI Terminal (Hanjin)/
Total Terminals International
Carriers
Hanjin
K-Line
Wan Hai

60-63 Global Gateway Central
(BNSF/ANY/Espe) Marine Services
Carriers
APL
Hyundai

Port of Oakland
Headquarters
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Oakland, CA 94607 USA
510.677.1000
www.portofoakland.com



San Francisco Bay Area

Peninsula

San Rafael

Richmond

Vallejo

Fairfield

Stockton

Sacramento

San Jose

San Francisco

Oakland

Concord

Fremont

Palo Alto

San Jose

AGENDA

DEBORAH ALE FLINT
Acting Executive Director

DANNY WAN
Port Attorney

ARNEL ATIENZA
Port Auditor

JOHN T. BETTERTON
Secretary of the Board

PORT OF OAKLAND

BOARD OF PORT COMMISSIONERS

530 Water Street • Oakland, California 94607
(510) 627-1696(w) • (510) 839-5104(f) • TDD/TTY 711

E-Mail: board@portoakland.com
Website: www.portofoakland.com

GILDA GONZALES
President

JAMES W. HEAD
First Vice-President

ALAN S. YEE
Second Vice-President

CESTRA BUTNER
Commissioner

EARL HAMLIN
Commissioner

BRYAN R. PARKER
Commissioner

VICTOR UNO
Commissioner

SUPPLEMENTAL AGENDA

Regular Meeting of the Board of Port Commissioners

Thursday July 11, 2013 – 1:00 p.m.

Board Room – 2nd Floor

ROLL CALL

Commissioner **Butner**, Commissioner **Hamlin**, Commissioner **Parker**, Commissioner **Uno**, 2nd Vice-President **Yee**, 1st Vice President **Head** and President **Gonzales**.

1. CLOSED SESSION

Closed Session discussions and materials may not be disclosed to a person not entitled to receive it, unless the Board authorizes disclosure of that confidential information.

1.1 CONFERENCE WITH LEGAL COUNSEL - EXISTING LITIGATION. Pursuant to Subdivision (a) of California Government Code Section 54956.9.

SSA Terminals, LLC and SSA Terminals (Oakland), LLC v. the City of Oakland, Acting by and Through its Board of Port Commissioners Docket No. 09-08

CMC Food Services LLC and NNF Grewal, Inc., v. Port of Oakland, et al.; Alameda County Superior Court Case No.: RG13685134

Kheven LaGrone, v. City of Oakland, Port of Oakland, City of Oakland Civil Service Board; Alameda County Superior Court Case No.: RG13684664

1.2 CONFERENCE WITH REAL PROPERTY NEGOTIATOR - As provided under California Government Code Section 54956.8:

Property: Oakland Army Base
Negotiating Parties: Port of Oakland and Various Parties
Agency Negotiator: Acting Director of Maritime, Jean Banker
Under Negotiation: Price and Terms of Tenancy

ROLL CALL/OPEN SESSION (Approximately 3:00 p.m.)

Commissioner **Butner**, Commissioner **Hamlin**, Commissioner **Parker**, Commissioner **Uno**, 2nd Vice-President **Yee**, 1st Vice President **Head** and President **Gonzales**.

CLOSED SESSION REPORT

The Port Attorney or Board Secretary will report on any final actions taken in Closed Session.

2. CONSENT ITEMS

Action by the Board under "Consent Items" means that all matters listed below have been summarized and will be adopted by one motion and appropriate vote. Consent Items may be removed for further discussion by the Board at the request of any member of the Board.

- 2.1 **Ordinance:** Amendment to Temporary Rental Agreement with Chevron Environmental Management Company (**Environmental**)
- 2.2 **Ordinance:** Ratification of a Space/Use Permit with Alameda County Mosquito Abatement District (**Aviation**)
- 2.3 Authorize the Executive Director to negotiate and execute a one year lease extension with a four year option with GSC Logistics, Inc. at Building D-512. (**Maritime**)
- 2.4 **Ordinance No. 4239**, 2nd Reading of an Ordinance Amending Port Ordinance No. 3634, As Amended, Relating To Landing And Tenant Terminal Space Rental Fees At Metropolitan Oakland International Airport.
- 2.5 **Ordinance No. 4240**, 2nd Reading of an Ordinance Updating Port Ordinance 3859, The Engineering And Environmental Division Master Fee Schedule To Include The Administrative Appeal Fee Approved By The Board In 2012.
- 2.6 **PULLED Ordinance No. _____**, 2nd Reading of an Ordinance that will be considered at the special meeting of July 2, 2013.

~~Ordinance To Authorize The Executive Director To Execute Certain Lease Agreements And Amendments Relating To Berths 55-56 And Berths 57-59 And Berths 60-63 Necessary To Effectuate A Settlement Agreement In The Matter Of (1) SSA Terminals, LLC And SSA Terminals (Oakland), LLC V. The City Of Oakland, Acting By And Through Its Board Of Port Commissioners, Federal Maritime Commission Docket No. 00-08; And (2) City Of Oakland, Acting By And Through Its Board Of Port Commissioners, Plaintiff V. SSA Terminals, LLC, SSA Terminals (Oakland), Llc, Et Al., Defendants And SSA Terminals, LLC, SSC Terminals (Oakland), LLC Et Al., Counterclaimants V. City Of Oakland, Acting By And Through Its Board Of Port Commissioners, Counter-Defendants, United States District Court For The Northern District Of California Case No. C11-01446.~~

- 2.7 Approval of the Minutes of the Regular Meeting of June 13, 2013. (**Board Secretary**)

3. MAJOR PROJECTS

This segment of the meeting is reserved for action and discussions regarding the status of Major Projects and issues of special importance.

4. BUDGET & FINANCE

This segment of the meeting is reserved for action or discussion regarding the status of Budget and Finance issues.

5. STRATEGY & POLICY

This segment of the meeting is reserved for action or discussion on Strategy and Policy Issues.

6. REMAINING ACTION ITEMS

Remaining Action Items are items not previously addressed in this Agenda that may require staff presentation and/or discussion and information prior to action by the Board.

- 6.1 **Ordinance:** Lease with the City of Oakland for 5 acres of land on the former Oakland Army Base for City truck parking operations. **(Maritime)**
- 6.2 **Motion: Resolution:** Request for Direction to Executive Director on Jack London Improvement District Ballot **(CRE)**
- 6.3 **Urgency Item**

In accordance with the Port's Rules for Public Participation, the following agendized item has been modified and may be considered by the Board of Port Commissioners upon a determination by a two-thirds vote of Commissioners present at the meeting, or, if less than two-thirds of the members are present, a unanimous vote of those present, that there is a need to take immediate action which came to the attention of the Port after the original agenda was posted, and that the need to take immediate action is required to avoid a substantial adverse impact that would occur if the action were deferred to a subsequent special or regular meeting:

An Ordinance to authorize the Executive Director to execute certain lease agreements and amendments relating to Berths 55-56 and Berths 57-59 and Berths 60-63 necessary to effectuate a settlement agreement in the matter of (1) SSA Terminals, LLC and SSA Terminals (Oakland), LLC v. the City of Oakland, acting by and through its Board of Port Commissioners, Federal Maritime Commission Docket No. 09-08; and (2) City of Oakland, acting by and through its Board of Port Commissioners, Plaintiff v. SSA Terminals, LLC, SSA Terminals (Oakland), LLC, et al., Defendants and SSA Terminals, LLC, SSA Terminals (Oakland), LLC, et al., Counterclaimants v. City of Oakland, acting by and through its Board of Port Commissioners, Counter-Defendants, United States District Court for the Northern District of California Case No. C11-01446 should such settlement be approved after the required posting of the agenda.

A resolution to authorize the Executive Director to execute certain assignment, and termination agreements relating Berths 55-56 and Berths 60-63 necessary to effectuate a settlement agreement in the matter of (1) SSA Terminals, LLC and SSA Terminals (Oakland), LLC v. the City of Oakland, acting by and through its Board of Port Commissioners, Federal Maritime Commission Docket No. 09-08; and (2) City of Oakland, acting by and through its Board of Port Commissioners, Plaintiff v. SSA Terminals, LLC, SSA Terminals (Oakland), LLC, et al., Defendants and SSA Terminals, LLC, SSA Terminals (Oakland), LLC, et al., Counterclaimants v. City of Oakland, acting by and through its Board of Port Commissioners, Counter-Defendants, United States District Court for the Northern District of California Case No. C11-01446 should such settlement be approved after the required posting of the agenda.

7. UPDATES/ANNOUNCEMENTS

The President, Members of the Board and the Executive Director will report on noteworthy events occurring since the last Board Meeting.

7.1 Port Summer Interns' Introduction to Port Board of Commissioners (SRD)

8. SCHEDULING

This segment of the meeting is reserved for scheduling items for future Agendas and/or scheduling Special Meetings

9. ELECTION OF OFFICERS

The President, First Vice President and Second Vice President (Officers) shall be elected by the Board, from among the Board members, at the first regular meeting in July of each year. Ratification of the election will take place at the next Board Meeting and the results shall be expressed by Resolution. Officers will serve until their successors are elected by the Board.

OPEN FORUM

The Board will receive public comment on non-agenda items during this time. Please fill out a speaker card and present it to the Secretary of the Board.

ADJOURNMENT

The next Regular Meeting of the Board will be held on July 25, 2013 at 1:00 PM

BOARD MTG. DATE: 7/11/13

AGENDA REPORT

TITLE:	Authorizing the Executive Director to execute a certain consent to assignment, termination agreements, lease and lease amendments related to Berths 55-56, Berths 57-59, Berths 60-63, and Berths 67-68 in order to effectuate a settlement in the matter of (1) <u>SSA Terminals, LLC and SSA Terminals (Oakland), LLC v. the City of Oakland, acting by and through its Board of Port Commissioners</u> , Federal Maritime Commission Docket No. 09-08; and (2) <u>City of Oakland, acting by and through its Board of Port Commissioners, Plaintiff v. SSA Terminals, LLC, SSA Terminals (Oakland), LLC, et al., Defendants and SSA Terminals, LLC, SSA Terminals (Oakland), LLC, et al., Counterclaimants v. City of Oakland, acting by and through its Board of Port Commissioners, Counter-Defendants</u> , United States District Court for the Northern District of California Case No. C11-01446 (collectively, the "Lawsuits")														
AMOUNT:	n/a														
PARTIES INVOLVED:	<table border="1"> <thead> <tr> <th>Corporate Name/Principal</th> <th>Location</th> </tr> </thead> <tbody> <tr> <td>SSA Terminals, LLC</td> <td>Seattle, WA</td> </tr> <tr> <td>SSA Terminals (Oakland), LLC</td> <td>Oakland, CA</td> </tr> <tr> <td>Matson Navigation</td> <td>Oakland, CA</td> </tr> <tr> <td>Eagle Marine Services</td> <td>Scottsdale, AZ</td> </tr> <tr> <td>APL Ltd.</td> <td>Singapore</td> </tr> <tr> <td>Total Terminals Inc.</td> <td>Long Beach, CA</td> </tr> </tbody> </table>	Corporate Name/Principal	Location	SSA Terminals, LLC	Seattle, WA	SSA Terminals (Oakland), LLC	Oakland, CA	Matson Navigation	Oakland, CA	Eagle Marine Services	Scottsdale, AZ	APL Ltd.	Singapore	Total Terminals Inc.	Long Beach, CA
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Matson Navigation	Oakland, CA														
Eagle Marine Services	Scottsdale, AZ														
APL Ltd.	Singapore														
Total Terminals Inc.	Long Beach, CA														
TYPE OF ACTION:	Resolution and Ordinance														
SUBMITTED BY:	Jean Banker, Deputy Executive Director and Acting Director of Maritime														
APPROVED BY:	Deborah Ale Flint, Acting Executive Director														

STAFF RECOMMENDATION:

If the Board has approved and authorized the execution of the proposed Settlement Agreement reached during the June 18, 2013 mandatory settlement conference for the dismissal of the Lawsuits, staff recommends that the Board approve the Resolution and Ordinance in order to effectuate and terms and conditions of the Settlement Agreement.

REMAINING ACTION ITEMS Tab 6.3

BOARD MTG. DATE: 7/11/13

SUMMARY

Port staff recommends and seeks authorization from the Board to enter into a lease agreement, two lease amendments (documents that require an Ordinance for approval), as well as a consent to assignment, and two termination agreements (documents that may be approved by resolution) (collectively, the "Terminal Agreements"), for marine terminals in the Middle and Inner Harbor areas of the seaport, namely:

- Howard Terminal (Berths 67-68) ("Howard")
- Global Gateway Central (Berths 60-63) ("GGC")
- Oakland International Container Terminal (Berths 57-59) ("OICT")
- TTI Terminal (Berths 55-56) ("TTI")

(See Attachment A for map)

Staff's request is for the purpose of settling the Lawsuits.

On Tuesday, June 18, 2013, the parties appeared before Federal Magistrate Joseph Spero for a mandatory settlement conference ordered by the Federal District Court Judge in the SSAT federal lawsuit. With the facilitation and mediation by the Judge, the parties reached a tentative agreement.

Pursuant to a noticed closed session item discussion, the Board considered the Settlement Agreement. If the Board approved the Settlement Agreement, the Ordinance and Resolution that is the subject of this Staff Report are necessary to effectuate the terms and conditions of the Settlement Agreement.

The transactions proposed for approval effectuate the dismissal of the Lawsuits, but also achieve important business and financial objectives that provide the Port, its tenants, customers, community and stakeholders with competitive benefits and future opportunities greater than those anticipated in the absence of the requested actions. The requested actions provide the Port and its stakeholders with three key benefits:

- Secures OICT and GGC lease revenue for an additional five years (through 2022), providing the Port with revenue stability and significant mitigation of down-side risk associated with unfavorable unilateral lease extension options in the current leases that may extend to 2027;
- Immediately creates a contiguous 350-acre terminal facility under one operation, mitigates the immediate need for wharf replacement at GGC, and allows the Port the opportunity to market this consolidated 350-acre terminal in the near future;
- Provides Port's major ocean carrier customers enhanced facilities that can, among other advantages, with minimal constraints accommodate the newest generation of ultra-large container vessels.

BOARD MTG. DATE: 7/11/13

FACTUAL BACKGROUND

In late 2009, SSA Terminals, LLC and SSA Terminals (Oakland), LLC (collectively, "SSAT") filed a complaint with the Federal Maritime Commission ("FMC") claiming that the Port violated the Federal Shipping Act of 1984 (the "Shipping Act") by entering into a 50-year lease and concession agreement with Ports America Outer Harbor Terminals, LLC ("PAOHT") on January 1, 2010. SSAT also later filed a claim against the Port pursuant to the California Tort Claims Act alleging, among other things, that the Port violated the terms of the original 1911 Legislative grant of tidelands to the City of Oakland by entering into the lease with PAOHT.

In March 2012, Eagle Marine Services ("EMS"), a subsidiary of APL and the current tenant operator of the GGC terminal, notified the Port of their desire to suspend operations at GGC in advance of its lease expiration in 2016. They further advised that they would issue a Request for Proposal (RFP) to select a successor operator to take over operations at GGC to existing Oakland marine terminal operators. In the latter part of 2012, EMS announced that they had selected SSAT as the winning proposer and requested the Port to promptly enter into discussions with SSAT and APL regarding the transfer of operations at GGC from EMS to SSAT.

Independent from APL's request to the Port, the Port and SSAT have engaged in various rounds of settlement negotiations between 2009 and the present in a good-faith attempt to resolve the Lawsuits. APL's RFP process together with the most recent round of settlement negotiations has led to the proposed package of Terminal Agreements. These agreements require both a resolution and an ordinance to be approved by the Board.

ANALYSIS

The proposed actions, as outlined above, offer the Port and its stakeholders certain business and financial advantages as compared to maintaining lease agreements unchanged from their current status (i.e., "status quo"). In particular, the proposed actions enable the Port to (a) secure lease revenues to 2022 for the subject terminals, (b) mitigate significant risks associated with current lease extension language that provides tenants with unilateral rights under very short notice periods to possibly extend to 2027, (c) positions the Port to immediately serve larger container vessels more effectively and to market enhanced facilities for customers in the future, and (d) minimizes expenditures associated with legal defense of lawsuits filed against the Port by SSAT in 2009.

Desire for Consolidated Optimized Terminal in the Future

Port staff has for some time analyzed the future needs of terminal operations at the Port, notably the trend toward larger terminals that can service multiple carriers. As larger vessels rapidly replace smaller vessels, port and terminal operations will be greatly impacted and will require longer berth length and larger terminal area. U.S. west coast ports have been investing heavily for many years in the infrastructure necessary to accommodate the rapid deployment of mega-sized vessels. The limited berth length and scale of operations at the three separate terminals in the Middle Harbor, and the shallow water depth at GGC in particular, will become a significant concern for our ocean carrier customers and terminal operators. One of APL's primary reasons

REMAINING ACTION ITEMS Tab 6.3

BOARD MTG. DATE: 7/11/13

for their decision to cease operations at GGC is the inability of that terminal to accommodate new mega-ships.

The TTI Terminal (Berths 55-56) ("TTI"), OICT, and GGC ("Middle Harbor Terminals") together provide an opportunity to create such a consolidated terminal ("mega terminal") because of their contiguous land facilities. However, the current expiration dates and the option language in the leases for the Middle Harbor Terminals will likely prevent achievement, or minimally preclude the possibility of, a consolidated terminal in the near-term future, as further discussed below under Status Quo.

Status Quo – Analysis of lease prospects for Middle and Inner Harbor terminals

By the end of 2017, the Middle Harbor and Inner terminal leases are scheduled to expire, unless options are exercised by the tenants. These leases collectively represent approximately 58% of the Maritime Division's annual operating revenues as of fiscal year 2012. These terminals and their lease expirations offer several concerns for the Port: business continuity of ocean carrier services and terminal operations as vessel size increases, unilateral options, very short exercise notice periods, staggered expiration dates, and lower projected lease renewal rates due to sub-optimum acreage/infrastructure.

- Although all of these leases contain two unilateral 5-year options to extend the lease term, there are no assurances that the existing tenant will exercise their option. As noted previously in this report, EMS (the current tenant operator of GGC) notified the Port in 2012 of their intention to suspend operations at GGC in advance of the 2016 expiration.
- Concern over lease rates in the near future is exacerbated by the option language in the leases that gives the Port unreasonably short notification for the tenant's unilateral exercise of the 5-year options. The notification period ranges from 3 to 6 months, which does not allow the Port enough time to properly market the premises to an alternative tenant. This circumstance could result in no revenue from these terminals for a period of time as a result of vacancy, or pressure to conclude a new lease at lower rates.
- TTI, OICT, and GGC terminals are contiguous with each other so that they could be consolidated into one optimized terminal capable of handling the larger next-generation containerships in an economical manner. As separate stand-alone terminals, each terminal is constrained.
 - For example, GGC is currently not able to accommodate vessels requiring 50 ft of water depth, and the wharf and embankment would have to be replaced at an approximate cost of \$130 million to keep the marine terminal viable with a depth of 50 ft. If GGC were consolidated with Berths 57-59, then this capital improvement could be postponed for quite some time because an operator of the combined facility would put smaller vessels at GGC and larger ones at Berths 57-59.
 - GGC only has 80 acres of land-side area, sub-optimum for continued operation as a marine container terminal. Considering this and the shallow berth depth, maintaining and growing revenue at GGC will be extremely challenging after the lease expires in 2016. The Port would most likely have to pursue alternative uses

REMAINING ACTION ITEMS Tab 6.3

BOARD MTG. DATE: 7/11/13

such as bulk, break bulk, automobiles, or other ancillary maritime uses which traditionally command lower lease rates compared to marine container terminals.

Therefore, one of the most critical strategic priorities in Maritime has been to find a way to renew or exercise the options of these leases earlier, well before the 3 to 6-month notice period, or change the option language to allow the Port more time to market the terminals, thereby offering a better chance to preserve and maximize revenues in the Middle Harbor area going forward. The proposed actions achieve this objective.

Highlights of Settlement and Requested Actions

Below is a brief summary of the terms encompassed by the proposed agreements:

- Terminate the GGC lease with EMS. EMS would pay an early termination fee of \$2.5 million
- SSAT, as the operator selected by EMS, will operate GGC terminal under new lease
- Extend both OICT and GGC leases to 2022 with no further options to extend
- SSAT to assume the current TTI lease and effectively operate an optimized terminal through June 2016 under three separate leases for TTI, OICT, and GGC
- Agree to a 1-year notice period for exercise of a single option through 2022 at TTI
- As consideration for the above, SSAT will be permitted to terminate the Howard Terminal lease in 2013

The early termination of the Howard lease is included in consideration for the above favorable changes to the existing GGC, TTI, and OICT terminal leases. This termination will accommodate the transfer of Matson cargo to GGC. Matson operates only smaller vessels as they serve the niche domestic market and will not require deep water berths (-50 ft) for the foreseeable future. Therefore, they can operate at either Howard or GGC without significant constraints; however, there are more operational efficiencies to be achieved by operating at GGC, adjacent to their joint venture partner, SSAT, at OICT. Matson and SSAT can share berth space, equipment, labor, gates, etc.

Evaluating current circumstances of terminal operators and ocean carriers, and future infrastructure requirements for viable marine container facilities, Port staff expects that in the near future, container operations will discontinue at either Howard or GGC (neither have 50ft depth or capacity to handle mega carrier ships). Given a choice between early termination of the Howard terminal lease or the GGC lease (and an associated change in operations at those facilities), the Port's strong preference is for the early termination of Howard. Howard and GGC terminals are similar in their infrastructure constraints. However, they are very different in one respect: Howard terminal is isolated in the Inner Harbor while GGC is contiguous to OICT, as discussed above. For this reason, GGC is more viable as a marine container terminal in the long run. Under the status quo, it is anticipated that Matson will stay at Howard through 2027 and GGC will become a bulk terminal. This would diminish the value of the larger optimized terminal that is in demand as larger vessels are deployed in the trans-Pacific trade. Regardless of which terminal will discontinue marine container operations, it is anticipated that the lease rate for a bulk-type facility will be 60% to 85% lower than the current marine container terminal lease rates.

REMAINING ACTION ITEMS Tab 6.3

BOARD MTG. DATE: 7/11/13

In addition to the benefits of maximizing the acreage for a larger terminal in the Middle Harbor, studies of Howard Terminal provide other reasons why this terminal is the best candidate for alternative uses, as compared to GGC. Port staff commissioned a study in 2012 with transportation consultant, Transystems, to look at various sites within the seaport area that would be conducive to bulk terminal operations. Among all of the sites evaluated, Howard Terminal was identified as the most suitable location for bulk operations and conceptual plans for a bulk terminal at Howard were drafted accordingly.

Implementing the Terminal Agreements outlined above will require the Board's approval of the following resolution and ordinance:

Proposed Resolution

1. An agreement terminating the NEPAA and Guaranty between the Port and EMS in connection with EMS' use and operation of the GGC terminal.
2. An agreement consenting to the proposed assignment of the Berths 55-56 terminal from its current operator, TTI, to SSAT, and a subsequent sub-assignment from SSAT to SSAT (Oakland).
3. An agreement between the Port and SSAT that terminates SSAT's and SSA Marine's (SSAT's parent company and guarantor under the lease) obligations under the current lease of the terminal at Howard Terminal.

Proposed Ordinance

1. A new Lease for the GGC Terminal. The current lease with EMS for Berths 60-63 will be terminated effective July 15, 2013. SSAT will execute a new lease for GGC commencing on October 1, 2013 under substantially the same economic terms and conditions of the current GGC lease with the following material modifications (i) the term of the lease shall be extended to a period of approximately 14 years, to terminate on June 30, 2022, the date when the amended OICT lease will expire, (ii) eliminate any and all options to extend, and (iii) the "All-Inclusive Throughput Rate" per twenty foot equivalent unit ("TEU") for each TEU in excess of the MAG shall be amended to match the current over-the-MAG rate in the OICT lease at no less than \$48.69 per loaded TEU.
2. An amendment to the lease for the B55-56 Terminal (after it is assigned to SSAT and hereafter referred to as the "B55-56 Amendment"). The B55-56 Amendment will (i) acknowledge SSAT as the new assignee of the B55-56 Terminal, (ii) modify the option provisions for the B55-56 Terminal to provide that SSAT will have only one option to extend the term to June 30, 2022 and which option must be exercised if at all on or before June 30, 2015 (there will be no further option to extend the term beyond June 30, 2022), (iii) amends the definition of a "Contract Year" under the B55-56 Lease to be a 12 month period beginning on January 1 and ending on December 31, and (iv) provides that the Port agrees that the Contract Year 2011 Fair Market Value adjustment authorized and set forth in Section 4.5 of the existing lease shall be zero percent.

REMAINING ACTION ITEMS Tab 6.3

BOARD MTG. DATE: 7/11/13

3. An amendment to the current lease for the terminal at OICT. The amendment (the "B57-59 Amendment") will (i) extend the term of the B57-59 Lease to June 30, 2022, (ii) eliminate any and all options to extend, (iii) set the 2013 Fair Market Value adjustment authorized as of January 2013 at zero percent, and (iv) provide new terms and conditions for SSAT to raise and/or replace cranes at OICT.

Comparative Analysis: Status Quo vs Settlement

Advantages of the Status Quo

- Howard Terminal continues to be used for container activities until 2027, which yields higher revenue compared to alternative uses, assuming both 5-year options are exercised.

Disadvantages of the Status Quo

- Uncertainty of revenue at the Middle Harbor Terminals beyond 2016-2017.
- 5-year option lease language could lead to complete loss of revenue from these terminal(s) for a period of time as a result of vacancy, or pressure to quickly conclude a new lease, if the current tenants do not exercise their options.
- Timing of lease expirations and options does not give the Port the ability to effectively market the larger optimized terminal concept.
- If the larger optimized terminal concept cannot be realized, marketing each terminal alone is suboptimal.
- Legal actions related to SSAT's lawsuits against the Port continue.

Advantages of the Settlement

- Provides more revenue stability for OICT and GGC terminals through 2022. This mitigates the risk associated with the first of two 5-yr options at OICT, and marketing risk for GGC.
- Related to the bullet above, the proposed settlement postpones capital investment to address infrastructure constraints at the GGC Terminal.
- Improves the overall competitive position of the Port by increasing its ability to efficiently handle the increasing number of larger vessels. This efficiency is achieved by allowing SSAT to position vessels more freely across seven, instead of three berths, in the near term (through June 2016) and across five berths if the TTI option is not exercised in 2016.
- Allows the Port to competitively market this consolidated 350-acre terminal and other terminal operators the opportunity to propose operations for the facility sooner than under status quo.
- SSAT lawsuits dismissed.

REMAINING ACTION ITEMS Tab 6.3

BOARD MTG. DATE: 7/11/13

Disadvantages of the Settlement

- Potentially isolates the TTI Terminal in 2016 for a period of approximately six years if SSAT does not exercise the single option to extend the TTI lease through June 2022.
- Loss of revenue at Howard (about \$10m/yr) for four years; however, this loss may be potentially and partially offset by revenue from other activities (as described previously).
- The Port may no longer be eligible for \$2.5 million in shore power grants related to Howard Terminal.

BUDGET & FINANCIAL IMPACT

Port staff believes the Terminal Agreements provide a more favorable lease renewal situation for the Middle Harbor terminals in comparison to status quo (no change to current lease provisions). However, in order to realize higher revenues beginning in FY 2017, the Terminal Agreements will result in significant revenue loss over the next approximate four years as a result of the early termination of the Howard Terminal lease.

The Port's financial analysis for the Terminal Agreements in comparison to status quo takes into consideration a number of assumptions, including but not limited to:

- Projected cargo growth
- Anticipated increases in the Port's tariff, which can affect all or certain lease rates
- Projected lease rates given market conditions for container cargo and alternative uses
- Cargo movement between terminals, which affects revenue
- Impact of certain lease terms, such as the most favored nations clause, which may also affect lease rates at certain terminals during the term of the lease
- Loss of potential shore power grant funds
- Assumptions about raising the height of existing cranes

Further, Port staff has analyzed the financial impact of the Terminal Agreements under a range of "sensitivity" scenarios (i.e., mid, high, low). Mid-case is meant to be reflective of the expected revenues in FY 2014-27 based on the knowledge Port staff have today. The High Case is meant to reflect a more robust economic environment and more success with marketing the Port terminal facilities, resulting in higher terminal lease rates, higher cargo growth and less adverse shifts in cargo movement among Port terminals. The Low Case is meant to reflect a more subdued economic environment and less success with marketing the Port terminal facilities, resulting in lower terminal lease rates and less cargo growth. In all scenarios, the revenue projections are based on numerous assumptions as stated above that may or may not materialize.

The table below summarizes the comparison of projected revenues between the Settlement and status quo.

REMAINING ACTION ITEMS Tab 6.3

BOARD MTG. DATE: 7/11/13

Comparison of Projected Middle and Inner Harbor Terminal Revenues Settlement vs Status Quo (\$ millions)

	Difference in Revenues Comparing Settlement to Status Quo [Range Low to High Scenarios]
FY 2014-16	(40.3) – (37.2)
FY 2017-27	20.5 – 93.4
FY 2014-27 Total	(18.7) – 56.2
FY 2014-27 PV of Total	(23.7) – 25.3

Based on Port staff's analysis, under most scenarios the Port would financially recover the loss of Howard Terminal revenues, not taking into account the value of settling the outstanding lawsuits or use of Howard terminal as non-maritime facility. That is, the loss of revenues from Howard terminal in the short-term is offset by higher projected revenues in the long-term. The breakeven (on a gross basis), however, does not occur until FY 2022-25 timeframe. In all scenarios, the financial analysis of the Terminal Agreements is highly dependent on long-term revenue assumptions, which cannot be predicted with certainty and may or may not materialize.

The financial impact of the Settlement has been reflected in the FY 2014 Budget.

STRATEGIC PLAN

The action described herein would help the Port achieve the following goal and objective of the Port's Strategic Plan:

STRATEGIC PRIORITY AREAS	GOAL	OBJECTIVE	HOW THIS PROJECT IMPLEMENTS + WHEN
Sustainable Economic and Business Development	Goal A: Create sustainable economic growth for the Port and beyond	Maximize the use of existing assets	Utilizes the existing infrastructure and capabilities at GGC terminal for marine container terminal operations by combining with the operations at the adjacent Berths 57-59. Provides the Port's major ocean carrier customers enhanced facilities that can, among other advantages, accommodate the newest generation of ultra-large container vessels. Allows the Port to competitively market this consolidated 350-acre
	Goal B: Maintain and Aggressively Grow Core Businesses	Retain existing customers and tenants Market strategically and aggressively to attract new customers and tenants.	

REMAINING ACTION ITEMS Tab 6.3

BOARD MTG. DATE: 7/11/13

STRATEGIC PRIORITY AREAS	GOAL	OBJECTIVE	HOW THIS PROJECT IMPLEMENTS + WHEN
			terminal in the Middle Harbor sooner than under the current lease agreements.

STAFFING IMPACT

There is not impact on staffing as a result of this proposed action.

SUSTAINABILITY

There are no obvious environmental impacts or enhancement opportunities identified in the proposed agreements, consent to assignment, lease and lease amendments.

ENVIRONMENTAL

The proposals to execute a settlement and to approve a new lease, lease extensions, assumptions and terminations and related actions with existing tenants were reviewed in accordance with the requirements of the California Environmental Quality Act ("CEQA"), and the Port CEQA Guidelines. The general rule in Section 15061(b)(3) of the CEQA Guidelines states that CEQA applies only to activities that have a potential for causing a significant effect on the environment. It can be seen with certainty that there is no possibility that approving a settlement and taking those actions related to leases with existing tenants and for continuing marine terminal uses will result in a physical change in the environment, and therefore they are not subject to CEQA and no further environmental review is required.

Furthermore, the environmental impacts of ongoing marine terminal uses that will continue under the lease actions were previously reviewed under CEQA. In July 2002, the City of Oakland ("City"), as the lead agency under CEQA, certified an Environmental Impact Report ("EIR") for reuse of the Oakland Army Base ("OAB") and redevelopment of the seaport area. On September 17, 2002, the Board, acting on behalf of the Port as a responsible agency under CEQA, adopted findings and a mitigation program in reliance on the City's EIR (Resolution No. 02317). In addition to improvement projects on the former OAB, such as rail yards and maritime support facilities, the OAB EIR described and analyzed cargo throughput increases throughout the seaport that would be supported in part by operational efficiencies and Port terminal realignments, as described in this agenda report.

Any facility modernization or improvement projects planned for the terminals will require a Port Development Permit and additional environmental review prior to undertaking the improvements.

REMAINING ACTION ITEMS Tab 6.3

BOARD MTG. DATE: 7/11/13

MARITIME AND AVIATION PROJECT LABOR AGREEMENT (MAPLA)

Authorization to enter into lease agreements and to terminate others are actions that do not fall within the scope of the Port of Oakland Maritime and Aviation Project Labor Agreement (MAPLA) and the provisions of the MAPLA do not apply. However, if future tenant construction work under these agreements exceeds the thresholds required for coverage under the MAPLA, the provisions of MAPLA will apply when Port Permits are requested for said future construction work.

OWNER CONTROLLED INSURANCE PROGRAM (OCIP)

The Owner Controlled Insurance Program (OCIP) coverage does not apply to the proposed agreements, consent to assignments, lease and lease amendments.

GENERAL PLAN

The proposed agreements, consent to assignments, lease and lease amendments do not change the use of any existing facility or create a new facility; therefore, a General Plan conformity determination pursuant to Section 727 of the City of Oakland Charter is not required.

LIVING WAGE

Living wage requirements, in accordance with the Port's Rules and Regulations for the Implementation and Enforcement of the Port of Oakland Living Wage Requirements (the "Living Wage Regulations"), do not apply to the termination of agreements. However, for all new lease agreements, living wage requirements will apply if the tenants employ 21 or more employees working on Port-related work and the tenancy agreement is greater than \$50,000.

OPTIONS

Staff has identified the following options for the Board's consideration:

1. Approve resolution and ordinance associated with and outlined in this report.
2. Do not approve resolution and ordinance associated with and outlined in this report and direct staff to plan for status quo.

REMAINING ACTION ITEMS Tab 6.3

BOARD MTG. DATE: 7/11/13

RECOMMENDATION

Staff recommends that the Board:

1. Approve resolution and ordinance associated with and outlined in this report.

7/11/13
6.3 (Urgency Item)
DC/KK
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**BOARD OF PORT COMMISSIONERS
CITY OF OAKLAND**

RESOLUTION APPROVING AND AUTHORIZING THE EXECUTIVE DIRECTOR TO EXECUTE CERTAIN IMPLEMENTING AGREEMENTS NECESSARY TO EFFECTUATE THE SETTLEMENT AGREEMENT CONCERNING : (1) SSA TERMINALS, LLC AND SSA TERMINALS (OAKLAND), LLC V. THE CITY OF OAKLAND, ACTING BY AND THROUGH ITS BOARD OF PORT COMMISSIONERS, FEDERAL MARITIME COMMISSION DOCKET NO. 09-08; AND (2) CITY OF OAKLAND, ACTING BY AND THROUGH ITS BOARD OF PORT COMMISSIONERS, PLAINTIFF V. SSA TERMINALS, LLC, SSA TERMINALS (OAKLAND), LLC, ET AL., DEFENDANTS AND SSA TERMINALS, LLC, SSA TERMINALS (OAKLAND), LLC, ET AL., COUNTERCLAIMANTS V. CITY OF OAKLAND, ACTING BY AND THROUGH ITS BOARD OF PORT COMMISSIONERS, COUNTER-DEFENDANTS, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA CASE NO. C11-01446.

WHEREAS, the Port of Oakland ("Port") on the one hand and SSA Terminals, LLC ("SSA") and SSA Terminals (Oakland), LLC ("SSA (Oakland)") on the other hand are parties to the above reference lawsuits (collectively referred to herein as the "Lawsuits"). SSA and SSA (Oakland) are collectively referred to herein as "SSAT"; and

WHEREAS, the Port and SSAT, after a mandatory settlement conference before Judge Magistrate Joseph Spero (the "Court") held on June 18, 2013, have reached a tentative agreement which is documented in a proposed Settlement Agreement between the Port and SSAT (the "Settlement Agreement") that will result in, among other matters, the dismissal with prejudice of all claims and cross-claims in the Lawsuits; and

WHEREAS, the Board of Port Commissioners ("Board") previously held three publicly-noticed meetings and heard from numerous speakers concerning the Board's proposed approval of the Settlement Agreement and certain additional agreements necessary to effectuate the Settlement Agreement (the "Implementing

REMAINING ACTION ITEMS Tab 6.3

Agreements"), first at its regular meeting of June 27, 2013 (during which certain public members urged further meetings) and then again at special meetings held on July 2, 2013 and July 5, 2013 during which meetings the Board did not take action on the items; and

WHEREAS, having heard public comments at the aforementioned meetings and at this meeting and having received final forms of the Settlement Agreement and Implementing Agreements, the Board must now act to either approve or disapprove the Settlement Agreement and hold its first reading of an accompanying ordinance (approving certain of the Implementing Agreements) at this time to avoid interruptions in the operation of the terminals that are the subject of the Settlement Agreement and Implementing Agreements; and

WHEREAS, the Board, by a motion approved by at least a two-thirds majority of the Board members present, determined that there is a need to take immediate action which came to the attention of the Port after the agenda was to be posted under the Port's Rules for Public Participation, and that the need to take immediate action is required to avoid a substantial impact that would occur if the action was deferred to a subsequent special or regular meeting, namely that (a) the forms of the Settlement Agreement and the Implementing Agreements have become final, and (bc) interruption to Port terminal operations would occur, resulting in loss of revenues and significant disruptions to Port operations, if the action is delayed; and

WHEREAS, copies of each of the agreements that are the subject of this Resolution are available for inspection at the Board Secretary's Office; now, therefore be it

RESOLVED, that for the reasons stated in Agenda Report Item No. 6.3 dated July 11, 2013 for this Resolution and, in order to give authority to the Executive Director to effectuate the Settlement Agreement, the Board hereby finds, determines, and declares that it is in the best interest of the Port to approve and enter into certain of the Implementing Agreements set forth in this Resolution below; and be it

FURTHER RESOLVED, that the Board hereby approves each of the following Implementing Agreements in the order set forth herein below, each of which is on file and available for inspection in the Board Secretary's Office:

1. That certain Termination of Non-Exclusive Preferential Assignment Agreement and Guaranty between the Port and Eagle Marine Services, Ltd ("EMS"), including the Temporary Rental Agreement between the Port and EMS attached as Exhibit B to the EMS Termination Agreement concerning EMS's use and operation of the maritime

REMAINING ACTION ITEMS Tab 6.3

terminal at Berths 60-63 (the "Berths 60-63 Terminal");

2. That certain Consent to Assignment between the Port and Total Terminals International, LLC ("TTI") in connection with the Port's consent to TTI's assignment and SSA Terminals LLC's ("SSA") assumption of rights and certain obligations under that Non-Exclusive Preferential Assignment Agreement between the Port and TTI for the maritime terminal at Berths 55-56 and hereby consents to the subassignment from SSA to SSA (Oakland); and
3. That certain Termination of Non-Exclusive Preferential Assignment Agreement and Guaranty between the Port and SSA in connection with the use and operation of the maritime terminal at Berths 67-68 ("Howard Terminal"); and be it

FURTHER RESOLVED, that the Board further authorizes the Executive Director to execute each of the above-referenced Implementing Agreements in the form on file with the Office of the Board Secretary and to, in consultation the Port Attorney, make alteration and minor amendments as may be necessary to carry out and implement the intent of the above-referenced Settlement Agreement provided that such alterations or amendments do not materially alter the terms and conditions of any of the form of agreements on file with the Board Secretary and are consistent with the intent of the Settlement Agreement and the Implementing Agreements; and be it

FURTHER RESOLVED, that the Board finds as follows:

1. The proposals to approve and execute the Settlement Agreement and the Implementing Agreements described herein (although the Settlement Agreement is not approved herein as it is being approved by a separate Board resolution) were reviewed in accordance with the requirements of the California Environmental Quality Act ("CEQA"), and the Port CEQA Guidelines.

The general rule in Section 15061(b)(3) of the CEQA Guidelines states that CEQA applies only to activities that have a potential for causing a significant effect on the environment. It can be seen with certainty that there is no possibility that approving a settlement agreement and taking those actions related to leases with existing tenants and for continuing marine terminal uses will result in a physical change in the environment, and therefore they are not subject to CEQA and no further environmental review is required; and

2. The environmental impacts of ongoing marine terminal uses that will continue under the lease actions were previously reviewed under CEQA. In July 2002, the City of Oakland

("City"), as the lead agency under CEQA, certified an Environmental Impact Report ("EIR") for reuse of the Oakland Army Base ("OAB") and redevelopment of the seaport area. On September 17, 2002, the Board, acting on behalf of the Port as a responsible agency under CEQA, adopted findings and a mitigation program in reliance on the City's EIR (Resolution No. 02317). In addition to improvement projects on the former OAB, such as railyards and maritime support facilities, the OAB EIR described and analyzed cargo throughput increases throughout the seaport that would be supported in part by operational efficiencies and Port terminal realignments, as described in this agenda report; and be it

FURTHER RESOLVED, that this resolution is not evidence of and does not create or constitute (a) a contract, or the grant of any right, title or property interest, or (b) any obligation or liability on the part of the Board or any officer or employee of the Board. This resolution approves and authorizes the execution of agreements in accordance with the terms of this resolution. Unless and until agreements are duly executed on behalf of the Board as authorized by this resolution, are signed and approved as to form and legality by the Port Attorney, and are delivered to the other contracting party, there shall be no valid or effective agreements; and be it

FURTHER RESOLVED, that this Resolution shall be effective upon the latter to occur of: 1) the resolution of the Board approving the Settlement Agreement; and 2) the final adoption after the second reading of an ordinance of the Board approving certain of the Implementing Agreements.

6.3
DC/KC
July 11, 2013
M.H. Deed

**BOARD OF PORT COMMISSIONERS
CITY OF OAKLAND**

PORT ORDINANCE NO.

ORDINANCE APPROVING AND AUTHORIZING THE EXECUTIVE DIRECTOR TO EXECUTE CERTAIN IMPLEMENTING AGREEMENTS CONCERNING: (1) SSA TERMINALS, LLC AND SSA TERMINALS (OAKLAND), LLC V. THE CITY OF OAKLAND, ACTING BY AND THROUGH ITS BOARD OF PORT COMMISSIONERS, FEDERAL MARITIME COMMISSION DOCKET NO. 09-08; AND (2) CITY OF OAKLAND, ACTING BY AND THROUGH ITS BOARD OF PORT COMMISSIONERS, PLAINTIFF V. SSA TERMINALS, LLC, SSA TERMINALS (OAKLAND), LLC, ET AL., DEFENDANTS AND SSA TERMINALS, LLC, SSA TERMINALS (OAKLAND), LLC, ET AL., COUNTERCLAIMANTS V. CITY OF OAKLAND, ACTING BY AND THROUGH ITS BOARD OF PORT COMMISSIONERS, COUNTER-DEFENDANTS, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA CASE NO. C11-01446.

WHEREAS, the Port of Oakland ("Port"), on the one hand, and SSA Terminals, LLC ("SSA") and SSA Terminals (Oakland), LLC ("SSA (Oakland)"), on the other hand, are parties to the above reference lawsuits (collectively referred to herein as the "Lawsuits"). SSA and SSA (Oakland) are collectively referred to herein as "SSAT"; and

WHEREAS, the Port and SSAT, after a mandatory settlement conference before Judge Magistrate Joseph Spero (the "Court") held on June 18, 2013, have reached a tentative agreement which is documented in a proposed Settlement Agreement between the Port and SSAT (the "Settlement Agreement") that will result in, among other matters, the dismissal with prejudice of all claims and cross-claims in the Lawsuits; and

WHEREAS, the Board of Port Commissioners ("Board") previously held three publicly-noticed meetings and heard from numerous speakers concerning the Board's proposed approval of the Settlement Agreement and certain additional agreements necessary to effectuate the Settlement Agreement (the "Implementing Agreements"), first at its regular meeting of June 27, 2013 (during which certain public members urged further meetings) and then again at special meetings held on July 2,

2013 and July 5, 2013 during which meetings the Board did not take action on the items; and

WHEREAS, having heard public comments at the aforementioned meetings and at this meeting and having received final forms of the Settlement Agreement and Implementing Agreements, the Board must now act to either approve or disapprove the Implementing Agreements by holding its first reading of the Ordinance at this time to avoid interruptions in the operation of the terminals that are the subject of the Settlement Agreement and Implementing Agreements; and

WHEREAS, the Board, by a motion approved by at least a two-thirds majority of the Board members present, determined that there is a need to take immediate action which came to the attention of the Port after the agenda was to be posted under the Port's Rules for Public Participation, and that the need to take immediate action is required to avoid a substantial impact that would occur if the action was deferred to a subsequent special or regular meeting, namely that (a) the forms of Settlement Agreement and Implementing Agreements have become final, and (b) interruption to Port terminal operations would occur, resulting in loss of revenues and significant disruptions to Port operations, if the action is delayed; and

WHEREAS, copies of each of the agreements referred to in this ordinance are available for inspection at the Board Secretary's Office; now, therefore

BE IT ORDAINED by the Board of Port Commissioners of the City of Oakland as follows:

Section 1. That for the reasons stated in Agenda Report No. 6.3 dated July 11, 2013, for this Ordinance and, in order to give authority to the Executive Director to effectuate the Settlement Agreement, the Board hereby finds, determines, and declares that it is in the best interest of the Port to approve and enter into the Implementing Agreements set forth in this Ordinance below.

Section 2. That the Board hereby approves each of the following Implementing Agreements in the order set forth herein below, each of which is on file and available for inspection in the Board Secretary's Office:

a. That certain Non-Exclusive Preferential Assignment Agreement between the Port and SSA covering the maritime terminal at Berths 60-63 (the "Berths 60-63 Terminal") as referenced and defined in the Settlement Agreement as the SSAT B60-63 Lease;

b. That certain Guaranty executed by SSA Marine, Inc. providing a guaranty for certain obligations of SSA in the above-referenced SSAT B60-63 Lease;

c. That certain Fifth Supplemental Agreement between the Port and SSA covering the maritime terminal at Berths 55-56 ("Berths 55-56 Terminal") as referenced and defined in the Settlement Agreement as the B55-56 Amendment;

d. That certain Guaranty executed by SSA Marine, Inc. providing a guaranty for certain obligations of SSA in the above-referenced B55-56 Amendment; and

e. That certain First Amendment to Berths 57-59 Amended and Restated Non-Exclusive Preferential Assignment Agreement between the Port and SSA (with SSAT (Oakland), LLC approving the agreement) as referenced and defined in the Settlement Agreement as the B57-59 Amendment.

Section 3. The Board further authorizes the Executive Director to execute each of the above-referenced Implementing Agreements in the form on file with the Office of the Board Secretary and, in consultation with the Port Attorney, to make alteration and minor amendments as may be necessary to carry out and implement the intent of the above-referenced Settlement Agreement provided that such alterations or amendments do not materially alter the terms and conditions of any of the form of agreements on file with the Board Secretary and are consistent with the intent of the Settlement Agreement and the Implementing Agreements.

Section 4. That the Board finds, as follows:

a. The proposals to approve and execute the Settlement Agreement and the Implementing Agreements described herein (although the Settlement Agreement is not approved herein as it is being approved by separate Board resolution) were reviewed in accordance with the requirements of the California Environmental Quality Act ("CEQA"), and the Port CEQA Guidelines. The general rule in Section 15061(b)(3) of the CEQA Guidelines states that CEQA applies only to activities that have a potential for causing a significant effect on the environment. It can be seen with certainty that there is no possibility that approving a settlement agreement and taking those actions related to leases with existing tenants and for continuing marine terminal uses will result in a physical change in the environment, and therefore they are not subject to CEQA and no further environmental review is required.

b. The environmental impacts of ongoing marine terminal uses that will continue under the lease actions were previously reviewed under CEQA. In July 2002, the City of Oakland ("City"), as the lead agency under CEQA, certified an Environmental Impact Report ("EIR") for reuse of the Oakland Army Base ("OAB") and redevelopment of the seaport area. On September

REMAINING ACTION ITEMS Tab 6.3

17, 2002, the Board, acting on behalf of the Port as a responsible agency under CEQA, adopted findings and a mitigation program in reliance on the City's EIR (Resolution No. 02317). In addition to improvement projects on the former OAB, such as railyards and maritime support facilities, the OAB EIR described and analyzed cargo throughput increases throughout the seaport that would be supported in part by operational efficiencies and Port terminal realignments, as described in this agenda report.

Section 5. That this ordinance is not evidence of and does not create or constitute (a) a contract, or the grant of any right, title or property interest, or (b) any obligation or liability on the part of the Board or any officer or employee of the Board. This ordinance approves and authorizes the execution of agreements in accordance with the terms of this ordinance. Unless and until agreements are duly executed on behalf of the Board as authorized by this ordinance, are signed and approved as to form and legality by the Port Attorney, and are delivered to the other contracting party, there shall be no valid or effective agreements.

Section 6. That this Ordinance shall be effective immediately upon the final adoption.

DRAFT

President.

Attest: _____
Secretary.

Approved as to form and legality:

Port Attorney