

## **2014 DUTY TO DEFEND SETTLEMENT AGREEMENT AND PARTIAL RELEASE**

This Duty to Defend Settlement Agreement And Partial Release (the “Defense Agreement”) is entered into by and between the Port of Seattle (“the Port of Seattle”) and Great American Insurance Company and Great American Insurance Company of New York, formerly known as American National Fire Insurance Company (collectively “the Great American Companies”) as of the Effective Date (as defined in Section II.D. of this Defense Agreement).

### **I. RECITALS**

A. Numerous Environmental Actions (as defined in Section II.A. of this Defense Agreement) have been asserted against the Port of Seattle arising out of the alleged contamination of land, groundwater, and sediments at or adjacent to certain sites in Washington.

B. The Port of Seattle alleges that the Great American Companies issued certain insurance policies to the Port providing general liability coverage. The Port contends that the Great American Companies owe a duty to defend the Port of Seattle under these policies. The list of the Great American Companies’ insurance policies, upon which the Port of Seattle currently claims a duty to defend the Environmental Actions (hereafter, the “Policies”), is attached hereto as Exhibit A and incorporated by this reference.

C. The Port of Seattle and the Great American Companies entered into a Duty to Defend Settlement Agreement and Partial Release on or about February 12, 1997 (hereafter, the “1997 Agreement”), resolving certain alleged defense obligations. In the 1997 Agreement, the Great American Companies agreed to defend the Port of Seattle with respect to environmental actions identified in that agreement, subject to a reservation of rights to challenge their ultimate obligation to indemnify the Port of Seattle.

D. In the 1997 Agreement, the Great American Companies agreed to pay certain past incurred defense costs incurred by the Port of Seattle before the 1997 Agreement was reached. In the 1997 Agreement, the Great American Companies also agreed to pay certain defense costs to be incurred after February 12, 1997, with respect to environmental actions listed in that

agreement, subject to a reservation of the right to challenge the reasonableness, necessity, characterization as defense or indemnity costs and relationship to the defense of the environmental actions of all claimed defense costs incurred by the Port.

E. After the 1997 Agreement was reached, the Port of Seattle submitted claims for defense and indemnity with respect to certain of the Environmental Actions that did not exist at the time of the 1997 Agreement, involving claims concerning investigation and potential cleanup relating to the Lower Duwamish Waterway, including Terminal 117. The Great American Companies agreed to defend the Port with respect to such Environmental Actions, subject to a reservation of the right to challenge the reasonableness, necessity, characterization as defense or indemnity costs and relationship to the defense of the Environmental Actions of all claimed defense costs incurred by the Port, and subject to a reservation of rights to challenge their ultimate obligation to indemnify the Port of Seattle.

F. The Port of Seattle has subsequently tendered costs to the Great American Companies, incurred after February 12, 1997, which the Port of Seattle contends were incurred for the defense of the Environmental Actions. The Great American Companies have acknowledged certain defense costs have been incurred and have paid certain of the defense costs claimed by the Port of Seattle with respect to the Environmental Actions, and have disputed or reserved their right to dispute the reasonableness, necessity, characterization as defense or indemnity costs, and relationship to the defense of the Environmental Actions of certain other costs claimed by the Port of Seattle.

G. The Port of Seattle and the Great American Companies desire to amicably resolve and to discontinue their dispute concerning the Great American Companies' duty to defend the Port of Seattle, with respect to certain costs the Port of Seattle claims to have incurred for work performed on or before December 31, 2012 for the defense of the Environmental Actions, defined herein to be "Certain Past Incurred Defense Costs."

H. The Port of Seattle and the Great American Companies by this Defense Agreement are resolving only the claims relating to Certain Past Incurred Defense Costs. The

Parties reserve all their respective rights concerning (i) the Great American Companies' duty to defend the Port of Seattle with respect to certain costs that are not Certain Past Incurred Defense Costs which the Port of Seattle claims to have incurred for work performed before January 1, 2013 for the defense of the Environmental Actions, or (ii) the Great American Companies' duty to defend the Port of Seattle with respect to costs the Port of Seattle claims or will claim to have incurred for work performed after December 31, 2012 for the defense of the Environmental Actions, or (iii) the Port of Seattle's claims for indemnity.

NOW, THEREFORE, in consideration of the mutual covenants contained herein and intending to be legally bound, the Port of Seattle and the Great American Companies agree as follows:

## II. DEFINITIONS

A. "Environmental Actions" shall mean those claims or demands already tendered by the Port of Seattle to the Great American Companies concerning the claims identified in Exhibit B to this Defense Agreement. As to these claims or demands tendered to the Great American Companies, "Environmental Actions" shall further mean any demand, claim, suit, request for relief, action or forbearance of any kind, proceeding, notice of partial or total responsibility made, asserted, or filed against the Port of Seattle by the United States Environmental Protection Agency, any other federal, state, local or other governmental or quasi-governmental agencies and/or private persons, organizations or entities for alleged property damage, cleanup, remediation or any other harm, injury, damage, or violation or need for remedy of any kind, and/or any other claim, demand, or cause of action arising out of the Port of Seattle's alleged, actual, threatened, potential or vicarious acts, omissions, liability or responsibility, including but not limited to alleged liability or responsibility as a generator, disposer, manufacturer, distributor, transporter, or operator, or as a present or former lessee, lessor or owner of real property, whether at law or in equity, and whether sounding in tort, in contract, equity, nuisance, trespass, negligence or strict liability or any statutory, regulatory, equitable or legal theory.

B. The “Port of Seattle” or “the Port” shall mean the Port of Seattle, its agents, servants, employees, attorneys, elected officials, representatives, predecessors, successors, and assigns, but does not include any third parties such as tenants.

C. The “Great American Companies” shall mean Great American Insurance Company and Great American Insurance Company of New York, formerly known as American National Fire Insurance Co., all other Great American affiliates, their parents, affiliates and subsidiaries, and their agents, servants, employees, attorneys, representatives, predecessors, successors and assigns.

D. “Effective Date” shall mean the last date on which this Defense Agreement is executed by any of the parties as reflected on the signature pages of this Defense Agreement.

E. “Certain Past Incurred Defense Costs” shall mean only costs claimed as defense costs by the Port of Seattle and incurred by or on behalf of the Port of Seattle for work performed on or before December 31, 2012 for the defense of the Environmental Actions, which are set forth in detail in Attachments 1(GAIC indeterminate), 2 (Port employees), 3 (Port overhead), 4 (legal(overage)), 5 (other sites), 6 (past due/dupe billing), 7 (Interest), 8 (paid vendor charges), and 9 (Gradient indeterminate), with the categories set out in those attachments being referred to by the Parties generally as GAIC indeterminate, Port employees, overhead, legal(overage), other sites, past due/dupe billings, interest, paid vendor charges, and Gradient indeterminate. Certain Past Defense Costs shall not include any cost which is not set forth in Attachments 1-9 hereto.

III. PAYMENT BY THE GREAT AMERICAN COMPANIES OF PAST INCURRED DEFENSE COSTS AND OTHER COSTS CLAIMED BY THE PORT OF SEATTLE

Within 45 days after the Effective Date, the Great American Companies shall deliver to the Port of Seattle at the address of its counsel, Graham & Dunn PC, a check payable to the Port of Seattle in the amount of one million five hundred thousand dollars (\$1,500,000.00.)

IV. NOTICE TO OTHER INSURERS AND RIGHT OF CONTRIBUTION

The Great American Companies assert that certain other insurers may be obligated to defend the Port of Seattle in the Environmental Actions. The Port of Seattle has previously

given notice to successors of United Pacific Insurance Co., American Employers Insurance Co., and Industrial Indemnity Company. In addition, the Port of Seattle shall promptly provide notice and tender, including a notice of lost policy claim under WAC 284-30-920 when applicable, to other insurers or their successors that the Great American Companies assert have a potential obligation to defend the Port of Seattle with respect to the Environmental Actions, which include but are not limited to the following, which may provide coverage to the Port as an additional insured:

A. American Home Insurance Company, certain Underwriters at Lloyd's, London, and Stuyvesant Insurance Company, under policies issued to Wilbur-Ellis Company;

B. General Insurance Company of America, under a policy issued to Olympic Steamship Co.;

C. certain Underwriters at Lloyd's, London and certain London Market insurance companies, under policies issued to American Mail Line, Ltd.;

D. certain Underwriters at Lloyd's, London and certain London Market insurance companies, under policies issued to Lockheed Shipbuilding Corp.; and

E. Travelers Indemnity Company, Aetna Casualty and Surety Company, and Insurance Company of North America, under policies issued to Shell Oil Corp.

Upon request by the Great American Companies, the Port of Seattle agrees to cooperate and use reasonable, good faith efforts to provide notice, including notice of lost policy claim, to any other insurers that are later discovered to have a potential obligation to defend the Port of Seattle with respect to the Environmental Actions. The Great American Companies reserve their right to seek contribution from other insurers for payment of any of the Port of Seattle's defense costs. The Port of Seattle agrees to cooperate with the Great American Companies in their attempt to seek contribution from other insurers to the extent consistent with applicable law and as required under the Policies. The Port of Seattle reserves the right to seek recovery from the Great American Companies under policy provisions for costs incurred in cooperation with the Great American Companies' effort to seek contribution from other insurers for payment of the

Port of Seattle's defense costs, with the exception of costs incurred by the Port of Seattle to provide notice and notice of the lost policy claims to such other insurers. The Great American Companies also reserve the right to pay such costs as required by policy provisions, or to decline payment of such costs based upon the policy provisions.

V. THE GREAT AMERICAN COMPANIES' CONTINUED ACCEPTANCE OF THE DUTY TO DEFEND THE PORT OF SEATTLE IN THE ENVIRONMENTAL ACTIONS

The Great American Companies shall continue to provide a defense to the Port of Seattle with respect to the Environmental Actions under the general liability coverages of the Great American Policies at issue, under a reservation of rights. The defense provided pursuant to this Paragraph V is made without reservation of any right to recoup such defense costs from the Port of Seattle. The Great American Companies' acceptance of their duty to defend is made with all previously asserted reservations of rights to challenge their ultimate obligation to indemnify the Port of Seattle. The Port of Seattle's appointed defense counsel shall continue to defend the Port of Seattle in the Environmental Actions. The Great American Companies reserve the right to challenge the reasonableness, necessity, characterization as defense or indemnity costs and relationship to the defense of the Environmental Actions of all defense costs not resolved by this Defense Agreement, including those incurred by or on behalf of the Port of Seattle for work performed after December 31, 2012 and those incurred by or on behalf of the Port of Seattle for work performed before January 1, 2013 which are for other than Certain Past Incurred Defense Costs. The Great American Companies shall also be provided with reasonable documentation of future claimed defense costs, including a listing of future defense costs, proof of payment, unredacted legal fee invoices, invoices from consultants and other reasonable documentation requested by the Great American Companies.

The Port of Seattle has posted materials on a website accessible to the Great American Companies (hereafter, the "Website") in support of its claims for defense costs incurred for work performed during 2013. Subject to its reservation of rights and other rights specified in this

Defense Agreement, the Great American Companies shall complete their review of the Port's claim for costs incurred for work performed during 2013, and shall make appropriate payments directly to the vendors or the Port of Seattle, by July 31, 2014.

As long as the Port of Seattle continues to claim defense costs from the Great American Companies with respect to the Environmental Actions, the Port shall post on the Website (whether it is on Livelink or some other software program) summaries of claimed costs, and invoices and other documentation supporting its claimed defense costs. The Port of Seattle shall promptly advise the Great American Companies when it has completed the posting of such costs for each six month calendar period (i.e., January through June and July through December). Following such notification by the Port, and subject to its reservation of rights and other rights specified in this Defense Agreement, the Great American Companies shall commence an initial review of the Port of Seattle's claim for costs incurred for work performed during each such six-month period. The Great American Companies shall complete an initial review within three months after receiving notification from the Port that the Port has completed the posting of such costs for a six month period and shall make appropriate payment directly to the vendors or the Port of Seattle, within that three month period.

If, at any time subsequent to notifying the Great American Companies that it has completed the posting of claimed defense costs for each six month calendar period on the Website, the Port of Seattle modifies, adds, or subtracts information or sums relative to the claimed costs, it must promptly notify the Great American Companies that it has made a change and provide details regarding each such change.

## VI. RELEASE

A. In consideration of the payment by the Great American Companies of \$1,500,000.00 for Certain Past Incurred Defense Costs and the Great American Companies' agreement to provide the Port of Seattle with a defense of the Environmental Actions, the Port of

Seattle hereby fully and forever releases and discharges the Great American Companies and their employees, officers, directors, agents, and attorneys from the following:

1. All claims under the Policies and any other insurance policies issued to the Port by the Great American Insurance Companies, known or unknown, including policies providing property coverages, for Certain Past Incurred Defense Costs and any claims arising out of the Great American Companies' previous alleged refusal to accept and to pay for Certain Past Incurred Defense Costs, including all such claims for:

- a. breach of contract;
- b. declaratory relief pursuant to the Declaratory Judgment Act;
- c. breach of fiduciary duty;
- d. bad faith;
- e. violations of the Consumer Protection Act, Insurance Fair Conduct Act, or of any regulations or statutes pertaining to insurance and handling of claims under insurance contracts;
- f. negligence, compensatory, punitive, or statutory damages and claims for attorney fees pursuant to Olympic Steamship Co. v. Centennial Ins. Co., under policy provisions or otherwise, which concern exclusively Great American Companies' previous refusal to accept and to pay for Certain Past Incurred Defense Costs; and
- g. prejudgment interest on the Certain Past Incurred Defense Costs.

B. In furtherance of the Port's release in this Defense Agreement of the Great American Companies relating to Certain Past Incurred Defense Costs, and notwithstanding the Port's reservation to make certain claims in the future to the Great American Companies for costs other than Certain Past Incurred Defense Costs, the Port agrees not to submit any item which is identified in Attachments 1-9 as an indemnity claim to the Great American Companies.

C. This release extends only to the Great American Companies' conduct prior to the Effective Date of this Defense Agreement, and only to claims arising from the Great American Companies' alleged duty to defend with respect to Certain Past Incurred Defense Costs. The Port of Seattle is not hereby releasing any possible claims, including possible claims for costs other than Certain Past Incurred Defense Costs, possible claims for indemnity under the policies, breach of contract, declaratory relief, breach of fiduciary duty, bad faith, violations of the Consumer Protection Act, prejudgment interest, or attorney fees that may arise after the Effective Date of this Defense Agreement.

D. The parties specifically agree that nothing in this Defense Agreement shall impair, release, or effect in any way the claims that the Port of Seattle has asserted against the Great American Companies for costs other than Certain Past Incurred Defense Costs, indemnity with respect to the Environmental Actions, including claims for associated relief such as claims for attorneys' fees. However, in its indemnity claims, the Port of Seattle releases and agrees not to assert claims for attorneys' fees incurred in claiming a defense from the Great American Companies, and agrees to permit court review of legal fee invoices for apportionment of legal fees incurred solely in connection with its defense cost claims and with this Agreement, which have been waived and released hereunder. Nothing in this Defense Agreement shall impair the Port of Seattle's right to claim any and all attorneys' fees in connection with its pursuit of indemnification claims or otherwise, except as provided herein.

E. The parties specifically agree that nothing in this Defense Agreement shall impair, release, or affect in any way:

1. the 1997 Agreement, except as modified by Sections III, IV, V, and VI of this Agreement and the February 27, 1998 Confidential Settlement, Release, and Hold Harmless Agreement;

2. the Port of Seattle’s right to claim any and all costs incurred for work performed after December 31, 2012 for the defense of Environmental Actions or for costs which are not Certain Past Incurred Defense Costs before January 1, 2013 for the defense of Environmental Actions;

3. with respect to the Port of Seattle’s claims for costs incurred for work performed after December 31, 2012 for the defense of Environmental Actions or before January 1, 2013 for costs other than Certain Past Incurred Defense Costs, the interim agreement between the Port of Seattle and the Great American Companies regarding offsets for certain reimbursements from other potentially responses parties, dated October 1, 2012;

4. the agreement between the Port of Seattle and the Great American Companies regarding funding of fees, costs, and expenses (hereafter, “PRP Recovery Costs”) incurred by or on behalf of the Port of Seattle in seeking recovery from potentially responsible parties (“PRPs”) for investigation and remediation costs with respect to Terminal 91, dated December 14, 2012, and the Great American Companies’ reservation of the right to contend that it and the Port of Seattle entered into a prior, longstanding agreement with respect to the Great American Companies’ payment of PRP Recovery Costs and the benefit the Great American Companies receive for recoveries from PRPs, with respect to each of the Environmental Actions, and the Port of Seattle’s reservation of the right to contend that the Great American Companies and the Port of Seattle did not enter into such a prior agreement;

5. the agreement between the Port of Seattle and the Great American Companies regarding funding of PRP Recovery Costs with respect to the Lower Duwamish Waterway, dated April 30, 2013, and the Great American Companies’ reservation of the right to contend that it and the Port of Seattle entered into a prior, longstanding agreement with respect to the Great American Companies’ payment of PRP Recovery Costs and the benefit the Great American Companies receive for recoveries from PRPs, with respect to each of the Environmental Actions, and the Port of Seattle’s reservation of the right to contend that the Great American Companies and the Port of Seattle did not enter into such a prior agreement;

6. with respect to the Port of Seattle's claims for costs incurred for work performed after December 31, 2012 for defense of Environmental Actions, or costs incurred before January 1, 2013 which are not Certain Past Incurred Defense Costs for defense of Environmental Actions, and with respect to the Port of Seattle's claims for indemnity, the Great American Companies' reservations of rights with respect to the Environmental Actions.

VII. NO CONSTRUCTION AGAINST EITHER PARTY

The wording of this Defense Agreement was reviewed and accepted by legal counsel for the Port of Seattle and the Great American Companies prior to its being signed by them, and neither the Port of Seattle nor the Great American Companies shall be entitled to have any wording of this Defense Agreement construed against the other party in the event of any dispute arising between them in connection with it.

VIII. NO ASSIGNMENT

Neither party hereto shall assign this Defense Agreement without first obtaining the written consent of the other party hereto; provided, however, that this Section shall not prohibit any assignment by a party hereto by merger, consolidation, operation of law or to a party who succeeds to any of such party's assets. Subject to the foregoing, this Defense Agreement shall extend to and be binding upon the parties hereto and their successors and assigns.

IX. INADMISSIBILITY OF AGREEMENT

Any evidence of the existence, terms or negotiation of this Defense Agreement shall be inadmissible in any litigation, provided, however, that such evidence may be offered in an action seeking solely to enforce the terms of this Defense Agreement, or in an action by the Great American Companies to recover contribution or other amounts from the Port of Seattle's other insurers. This Defense Agreement has been entered into in reliance upon the provisions of Rule 408 of the Federal Rules of Evidence and similar state law provisions which preclude the introduction of evidence regarding settlement negotiations or agreements. The parties shall,

however, be permitted to disclose the fact that the Great American Companies have agreed to defend the Port of Seattle in the Environmental Actions, under reservation of rights.

X. INTEGRATION/SEVERABILITY

Except as set forth in this Paragraph VI.C. and D., this Defense Agreement constitutes a single integrated contract expressing the entire agreement of the parties hereto. Except as set forth in this Paragraph VI.C. and D., there have been no other representations or agreements, whether oral or written, in regard to this Defense Agreement or its subject matter. If any provision of this Defense Agreement is held invalid, it shall be considered severable from the remainder, and the remaining provisions shall be given full force and effect.

XI. EXECUTION OF COUNTERPARTS

This Defense Agreement may be executed in counterparts and each executed counterpart shall have the same force and effect as an original instrument, as if all parties to all the counterparts had signed the same instrument.

XII. NO APPLICATION TO THIRD PARTIES

This Defense Agreement is the product of informed negotiations and involves compromises of the Parties' previously stated legal positions. Except as expressly set forth herein, this Defense Agreement is without prejudice to positions taken by the Port of Seattle or the Great American Companies with regard to other persons or entities. All actions taken and statements made by the parties to this Defense Agreement, or by their respective representatives, relating to this Defense Agreement or participation in this Defense Agreement, including its development and implementation, shall be without prejudice or value as precedent, and shall not be used as a standard by which other matters may be judged, except as to a breach, alleged breach, and/or enforcement of the provisions of this Defense Agreement.

XIII. SIMC CREDIT

The Great American Companies agree not to seek any further credit for the Seattle Iron and Metals Corporation's ("SIMC") payment of \$1,391,994.73 in resolving the Port of Seattle's claims with respect to the Environmental Actions, except that the Great American Companies reserves the right to claim a credit of \$299,996.03 of the SIMC payment in resolving the Environmental Actions with the Port of Seattle. The Port of Seattle reserves all rights with respect to the \$299,996.03 SIMC credit, including the right to contend that taking such a credit is not permissible under the law.

PORT OF SEATTLE

GREAT AMERICAN INSURANCE  
COMPANY

By \_\_\_\_\_  
\_\_\_\_\_

By \_\_\_\_\_  
\_\_\_\_\_

GREAT AMERICAN INSURANCE  
COMPANY OF NEW YORK, formerly  
known as AMERICAN NATIONAL FIRE  
INSURANCE COMPANY

By \_\_\_\_\_  
\_\_\_\_\_

STATE OF WASHINGTON



\_\_\_\_\_  
(Signature)

\_\_\_\_\_  
(Name legibly printed or stamped)

Notary Public in and for the State of \_\_\_\_\_, residing at \_\_\_\_\_.  
My appointment expires \_\_\_\_\_.

EXHIBIT A

<u>Policy Period</u>	<u>Insurer</u>	<u>Policy No.</u>
1/1/64 - 1/1/65	Great American	LX84870
1/1/65 - 1/1/66	Great American	LX89900
1/1/66 - 1/1/67	Great American	LX6267450
1/1/67 - 1/1/70	Great American	UAP 3888524
1/1/70 - 1/1/74	Great American	UAP 1153908
1/1/74 - 1/1/77	Great American	UAP 2646000
1/1/78 - 1/1/80	Great American	SLP 9456178
1/1/80 - 1/1/81	American National Fire	SLP 9461168
1/1/81 - 1/1/82	American National Fire	SLP 9465924
1/1/82 - 1/1/83	Great American	SLP 9472449
1/1/83 - 1/1/84	American National Fire	SLP 9438815
1/1/84 - 1/1/85	American National Fire	SLP 6255023
1/1/85 - 1/1/86	American National Fire	SLP 6255023

EXHIBIT B

CLAIM LIST

1. East Waterway and West Waterway environmental claims  
Seattle, Washington
2. Terminal 91 environmental claims  
Seattle, Washington
3. National Resource Damage claims, Elliott Bay/Duwamish River  
Seattle, Washington
4. Lower Duwamish Waterway environmental claims  
Seattle, Washington
5. Terminal 117 environmental claims  
Seattle, Washington