

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

UNITED STATES OF AMERICA)	CIVIL NO. 12-00693 JMS-BMK
and THE STATE OF HAWAII,)	
)	ORDER GRANTING PLAINTIFFS'
Plaintiffs,)	MOTION TO ENTER CONSENT
)	DECREE
vs.)	
)	
CAPE FLATTERY LIMITED and)	
PACIFIC BASIN (HK) LIMITED,)	
)	
Defendants.)	
_____)	

**ORDER GRANTING PLAINTIFFS' MOTION TO ENTER CONSENT
DECREE**

On March 19, 2013, Plaintiffs the United States of America (“United States”) and the State of Hawaii filed a Motion to Enter Consent Decree. Doc. No. 11. The Consent Decree at issue was lodged on December 21, 2012, and is related to the grounding of the M/V Cape Flattery on coral reef habitat outside the entrance channel to Barbers Point Harbor, Oahu, Hawaii.

On March 22, 2013, Defendants Cape Flattery Limited and Pacific Basin (HK) Limited, entered an appearance through counsel. Doc. No. 13. Defendants also filed a Notice of Concurrence in the Entry of the Consent Decree Lodged December 21, 2012. Doc. No. 14.

Pursuant to 28 C.F.R. § 50.7, the United States published notice of the Consent Decree in the Federal Register. *See* 78 Fed. Reg. 1251-02 (January 8, 2013). The thirty day public comment period for the Consent Decree ended on February 7, 2013, without the United States receiving any public comments.

The Court has reviewed Plaintiffs' Motion to Enter Consent Decree, and finds that the Consent Decree is procedurally and substantively fair, and in the public interest. Accordingly, the Motion to Enter Consent Decree is GRANTED. The court has approved and signed the Consent Decree lodged on December 21, 2012. The Clerk of Court shall file the Consent Decree, which shall constitute a final judgment of the court, and close the case file.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, March 27, 2013.



/s/ J. Michael Seabright

J. Michael Seabright
United States District Judge

United States of America v. Cape Flattery Limited, Civ. No. 12-00693 JMS-BMK, Order Granting Plaintiffs' Motion to Enter Consent Decree

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DEC 21 2012

CLERK, U.S. DISTRICT COURT
DISTRICT OF HAWAII

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21 IN THE UNITED STATES DISTRICT COURT
22 DISTRICT OF HAWAII

23 UNITED STATES OF AMERICA and the
the STATE OF HAWAII,

24 Plaintiffs,

25 v.

26 CAPE FLATTERY LIMITED and
27 PACIFIC BASIN (HK) LIMITED,

28 Defendants.

CV 12 00693 JMS BMK
CASE NO.
CONSENT DECREE

United States, et al. v. Cape Flattery Limited, et al. - Consent Decree

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I. PARTIES

This Consent Decree ("Consent Decree" or "Decree") is made and entered into by and among the following parties (hereinafter referred to collectively as "the Parties" and individually as "Party"):

A. Plaintiff United States of America ("the United States"), on behalf of the U.S. Department of the Interior ("DOI"), U.S. Fish and Wildlife Service ("USFWS") and the U.S. Department of Commerce, National Oceanic and Atmospheric Administration ("NOAA"),

B. Plaintiff State of Hawaii ("State"), and

C. Defendants Cape Flattery Limited and Pacific Basin (HK) Limited (together jointly referred to as the "Settling Defendants").

II. INTRODUCTION

D. On February 2, 2005, the 555 foot bulk carrier M/V Cape Flattery ("Flattery") grounded on coral reef habitat outside the entrance channel to Barbers Point Harbor, Oahu, Hawaii. The vessel was owned at that time by Cape Flattery Limited, a Hong Kong corporation, and was operated by Pacific Basin Marine Basin (HK) Limited. The U.S. Coast Guard, the State and the Settling Defendants developed a Salvage Operations Oil Spill Contingency Plan due to a substantial threat of a discharge of oil as the result of the grounding. Over the following days, fuel and cement cargo were offloaded, and various tugs and other vessels

1 attempted to remove the vessel. The Flattery was ultimately towed from the reef
2 on February 11, 2005. Although cement cargo had entered the water during
3 offloading, substantial discharge of oil to the environment had been avoided.
4 However, physical injuries to coral reef habitats and associated resources resulting
5 from stabilization and response activities occurred. All of the foregoing events
6 are referred to as the "Incident."
7

8
9 E. The Trustees for the Natural Resources injured by the Incident include
10 the USFWS, NOAA, and the State. The USFWS and NOAA are each designated
11 as a Trustee pursuant to subpart G of the National Oil and Hazardous Substances
12 Pollution Contingency Plan ("NCP") (40 CFR §§ 300.600 *et seq.*) and Executive
13 Order 12580 (3 C.F.R., 1987 Comp. p. 193, 52 Fed. Reg. 2923 (January 23, 1987))
14 as amended by Executive Order 12777 (56 Fed. Reg. 54757 (October 19, 1991)).
15 The State is a designated Trustee pursuant to Section 1006 (b) (3) of the Oil
16 Pollution Act of 1990 ("OPA"), 33 U.S.C. § 2706 and subpart G of the NCP.
17 Additionally, the State has natural resource trustee authority pursuant to Chapter
18 128D HRS and 11-451 Hawaii Administrative Rules.
19

20
21 F. After the Incident, the USFWS, NOAA, and the State, as Trustees for
22 Natural Resources, (hereinafter, the "Trustees") and the Settling Defendants
23 entered into a Cooperative Natural Resource Damage Assessment Agreement,
24 pursuant to which the Trustees and the Settling Defendants gathered and analyzed
25
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28

1 data and other information that the Trustees used to determine and quantify the
2 resource injuries. The Trustees determined that the Incident had caused injury to
3 six habitat zones, which included injury to approximately 19.5 acres of coral. The
4 Trustees intend to publish, and invite comment from the public concerning, a draft
5 Damage Assessment and Restoration Plan. The draft Plan will describe alternative
6 restoration projects under consideration by the Trustees to restore, replace, or
7 acquire the equivalent of the resources and their services injured by the Incident.
8

9
10
11 G. The United States and the State have filed this action to recover
12 claims for natural resource damages.
13

14 H. The Parties agree, and the Court, by entering this Consent Decree,
15 finds, that this Consent Decree has been negotiated by the Parties in good faith,
16 that it is intended to avoid certain litigation among the Parties and that it is fair,
17 reasonable, and in the public interest.
18

19 NOW, THEREFORE, before the taking of any testimony, without the
20 adjudication or admission of any issue of fact or law except as provided in Section
21 III (Jurisdiction), below, and with the consent of the Parties,
22

23 IT IS HEREBY ADJUDGED, ORDERED AND DECREED as follows:
24

25 **III. JURISDICTION AND VENUE**

26 1. This Court has jurisdiction over the subject matter of this action
27 pursuant to, inter alia, 28 U.S.C. §§ 1331, 1345, 1355 & 1367, Sections 1002(a),
28

1 (b)(1)(A) and (b)(2)(A), 1006, and 1017 (b) of OPA, 33 U.S.C. §§ 2702(a),
2 (b)(1)(A) & (b)(2)(A), 2706, 2717(b). Venue is proper in this Court pursuant to 28
3 U.S.C. §§ 1391 and 1395, 33 U.S.C. §2717, because Settling Defendants do
4 business in, and the Incident occurred in, this judicial district. The Court has
5 personal jurisdiction over Settling Defendants for this particular action, and each
6 Party does not contest the Court's jurisdiction and does not contest the propriety of
7 venue in this judicial district for the purposes of this Decree.
8
9
10

11 **IV. APPLICABILITY**

12 2. The obligations of this Consent Decree apply to and are binding upon
13 the Plaintiffs, and each of them, and upon Settling Defendants, and each of them,
14 and any of Plaintiffs' and/or Settling Defendants' successors, assigns, or other
15 entities or persons otherwise bound by law.
16
17

18 **V. DEFINITIONS**

19 3. Terms used in this Consent Decree that are defined in OPA or in the
20 natural resource damage assessment regulations promulgated pursuant to OPA, 15
21 C.F.R. Part 990, shall have the meanings assigned to them in OPA or in such
22 regulations, unless otherwise provided in this Decree. Whenever the terms set
23 forth below are used in this Consent Decree, the following definitions shall apply:
24
25

26 (a) "Complaint" shall mean the civil complaint filed in this action
27 by the Plaintiffs concurrently with the lodging of this Consent Decree.
28

1 (b) "Entry of the Consent Decree" or "Entry" shall occur on the
2 date when this Decree, after signing by the Judge, is entered in the civil docket
3 under Rule 79(a) of the Federal Rules of Civil Procedure.

4 (c) "Natural Resource" and "Natural Resources" shall mean land,
5 fish, wildlife, biota, air, water, ground water, drinking water supplies, and other
6 such resources belonging to, managed by, held in trust by, appertaining to, or
7 otherwise controlled by the United States and/or the State, and shall also mean the
8 services provided by such resources to other resources or to humans.

9 (d) "Natural Resource Trustees" or "Trustees" shall mean those
10 federal and state agencies or officials designated or authorized pursuant to the U.S.
11 Clean Water Act (Federal Water Pollution Control Act), 33 U.S.C. §§ 1251, *et seq.*
12 ("CWA"), OPA, and/or applicable state law to act as Trustees for the Natural
13 Resources belonging to, managed by, controlled by, or appertaining to the United
14 States or the State. Specifically, as used in this Consent Decree, the Trustees are
15 the USFWS, NOAA, and the State.

16 (e) "Paragraph" shall mean a portion of this Decree identified by an
17 arabic numeral.

18 (f) "Restore" or "Restoration" shall mean any action or
19 combination of actions to restore, rehabilitate, replace or acquire the equivalent of
20 any Natural Resource or its services injured, lost, or destroyed as a result of the

1 Incident.

2 (g) "Section" shall mean a portion of this Decree identified by a
3 roman numeral.
4

5 (h) "State" shall mean the State of Hawaii,
6

7 (i) "United States" shall mean the United States of America,
8 including its departments, agencies and instrumentalities.
9

10 **VI. SETTLEMENT PAYMENTS**

11 4. Within thirty (30) days after Entry of the Consent Decree, Settling
12 Defendants shall pay to the Trustees the total amount of seven million five hundred
13 thousand dollars (\$7,500,000.00) disbursed as follows:
14

15 (a) The sum of five million, eight hundred eight one thousand one
16 hundred eighty dollars (\$5,881,180.00) shall be paid to DOI, on behalf of the
17 Natural Resource Trustees, for the purposes set forth in Subparagraphs (iii) and
18 (iv) below. Such payment shall be made by Electronic Funds Transfer ("EFT") to
19 the U.S. Department of Justice in accordance with instructions that the Financial
20 Litigation Unit of the U.S. Attorney's Office for the District of Hawaii shall
21 provide to Settling Defendants following Entry of this Decree by this Court.
22 Settling Defendants shall send a transmittal letter, indicating that the EFT has
23 occurred, to the Parties in accordance with Section X ("Notices") of this Decree
24 and to:
25
26
27
28

1 Department of the Interior
2 Natural Resource Damage Assessment and Restoration Program
3 Attention: Restoration Fund Manager
4 1849 "C" Street, N.W., Mail Stop 4449
5 Washington, D.C. 20240

6 The EFT and transmittal letter shall reflect that the payment is being made to the
7 "Natural Resources Damage Assessment and Restoration Fund, Account No.
8 14X5198 -Flattery Grounding." DOI will assign these funds a special project
9 number to allow the funds to be maintained as a segregated account within the
10 Department of Interior Natural Resource Damage Assessment and Restoration
11 Fund, Account No. 14X51980459 (the "Flattery Grounding NRD Account").

12
13 (i) DOI shall, in accordance with law, manage and invest
14 funds in the Flattery Grounding NRD Account and any return on investments or
15 interest accrued on the Account for use by the Natural Resources Trustees in
16 connection with Restoration of Natural Resources affected by the Incident. DOI
17 shall not make any charge against the Flattery Grounding NRD Account for any
18 investment or management services provided.

19
20 (ii) DOI shall hold all funds in the Flattery Grounding NRD
21 Account, including return on investments or accrued interest, subject to the
22 provisions of this Decree.

23
24 (iii) The Natural Resources Trustees commit to the
25 expenditure of the funds set forth in this Subparagraph (a) for the design,
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1 implementation, permitting (as necessary), monitoring, and oversight of
2 Restoration projects and for the costs of complying with the requirements of the
3 law to conduct a restoration planning and implementation process. The Natural
4 Resource Trustees plan to use the funds for restoration, enhancement, and
5 protection of coral reef habitat and associated resources and for oversight of these
6 Restoration projects.
7

8
9 (iv) The allocation of funds for specific projects will be
10 contained in a Damage Assessment and Restoration Plan prepared and
11 implemented jointly by the Trustees, for which public notice, opportunity for
12 public input, and consideration of public comment will be provided. The Trustees
13 jointly retain the ultimate authority and responsibility to use the funds in the
14 Flattery Grounding NRD Account to Restore Natural Resources in accordance
15 with applicable law, this Consent Decree, and any Memorandum of Understanding
16 among them.
17

18
19 (b) Fifty six thousand six hundred seventy nine dollars
20 (\$56,679.00) to DOI, Natural Resource Damage Assessment and Restoration Fund,
21 Account No. 14X51980459 - Flattery Grounding NRD Account, for
22 reimbursement of its Natural Resource Damage Assessment costs associated with
23 the Incident. Payment shall be made by EFT to the U.S. Department of Justice in
24 accordance with instructions that the Financial Litigation Unit of the U.S.
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1 Attorney's Office for the District of Hawaii shall provide to Settling Defendants
2 following Entry of this Consent Decree by this Court. At the time of payment,
3
4 Settling Defendants shall simultaneously send written notice of payment and a
5 copy of any transmittal documentation (which shall reference DOJ case number
6 90-5-1-1-10600) to the Parties in accordance with Section X ("Notices") of this
7
8 Decree.

9
10 (c) One million five hundred twenty four thousand one hundred
11 thirty seven dollars (\$1,524,137.00) to NOAA for reimbursement of its Natural
12 Resource Damage Assessment costs associated with the Incident. Payment shall
13
14 be made by EFT to the U.S. Department of Justice in accordance with instructions
15 that the Financial Litigation Unit of the U.S. Attorney's Office for the District of
16 Hawaii shall provide to Settling Defendants following Entry of this Consent
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18 Decree by this Court. At the time of payment, Settling Defendants shall
19
20 simultaneously send written notice of payment and a copy of any transmittal
21
22 documentation (which shall reference DOJ case number 90-5-1-1-10600) to the
23
24 Parties in accordance with Section X ("Notices") of this Decree.

25 (d) Thirty Eight thousand four dollars (\$38,004.00) to the State for
26
27 reimbursement of its Natural Resource Damage Assessment costs associated with
28
the Incident.

1 **VII. STIPULATED PENALTIES**

2 5. If Settling Defendants fail to cause any payment to be made when due
3 as required by Section VI (Settlement Payments), above, Settling Defendants shall
4 pay to the United States and to the State, respectively, a stipulated penalty of
5 \$1,000 per day each, for each day that any such payment is late.
6

7
8 6. Any stipulated penalties, as described above, owing to the United
9 States shall be paid by EFT in accordance with instructions to be provided by the
10 Financial Litigation Unit of the U.S. Attorney's Office for the District of Hawaii,
11 or by certified or cashier's check in the amount due, payable to the "U.S.
12 Department of Justice," referencing DOJ No. 90-5-1-1-10600, and delivered to the
13 office of the United States Attorney, Financial Litigation Unit, District of Hawaii.
14 Payment of stipulated penalties shall be accompanied by transmittal
15 correspondence stating that any such payment is for late payment of amount(s) due
16 under this Decree and shall reference DOJ No. 90-5-1-1-10600 and the case name
17 and number.
18

19 7. Any stipulated penalties, as described above, owing to the State shall
20 be accompanied by transmittal correspondence stating that any such payment is for
21 late payment of amount(s) due under this Decree.
22

23 8. Settling Defendants shall not deduct any stipulated penalties paid
24 under this Section in calculating their federal or state income taxes.
25
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1 9. If Settling Defendants fail to pay stipulated penalties according to the
2 terms of this Decree, Settling Defendants shall be liable for interest on such
3 penalties, as provided for in 28 U.S.C. § 1961, accruing as of the date payment
4 became due.
5

6
7 **VIII. EFFECT OF SETTLEMENT**

8 10. Effective upon Settling Defendants' performance of their payment
9 obligations as set forth in Section VI (Settlement Payments) of this Decree, this
10 Decree shall resolve any and all civil claims of Plaintiffs, and any of them, for
11 damages for injury to, destruction of, loss of, or loss of use of Natural Resources
12 arising from the Incident, including natural resource damage assessment and
13 restoration monitoring costs associated with the Incident, as provided for by
14 Section 1002(b) of OPA, 33 U.S.C. §2702(b),
15
16
17

18 11. Notwithstanding any other provision of this Decree, the United States
19 and the State reserve the right to institute proceedings against the Settling
20 Defendants in this action or in a new action seeking recovery of Natural Resource
21 Damages: (1) based on injury to, destruction of, or loss of natural resources as a
22 result of the Incident which resulted from conditions that were unknown to the
23 Trustees as of the date when this Decree is lodged with this Court; or (2) based on
24 information received by the Trustees after the date when this Decree is lodged with
25 this Court which indicates that there was injury to, destruction of, or loss of natural
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1 resources as a result of the Incident which was of a type or magnitude unknown to
2 the Trustees as of the said date.

3
4 12. Settling Defendants hereby covenant not to sue and agree not to assert
5 any claims or causes of action of any nature against the United States or the State
6 under federal, state, or local law, arising out of or relating to this Decree or to the
7 Incident.
8

9
10 13. This Decree does not limit or affect the rights of Settling Defendants
11 or of the Plaintiffs against any third parties, not party to this Decree, nor does it
12 limit the rights of third parties, not party to this Decree, against Settling
13 Defendants, except as otherwise provided by law.
14

15 14. This Decree shall not be construed to create rights in, or grant any
16 cause of action to, any third party not party to this Decree.
17

18 **IX. COSTS**

19 15. Plaintiffs shall be entitled to collect the costs (including reasonable
20 attorneys' fees) incurred in any action necessary to collect any portion of the
21 amounts due under Section VI (Settlement Payments) or any stipulated penalties
22 due but not paid under Section VII (Stipulated Penalties), above.
23
24

25 **X. NOTICES**

26 16. Unless otherwise specified herein, whenever notifications,
27 submissions, or communications are required by this Consent Decree, they shall be
28

1 made in writing and addressed as follows:

2 To the United States:

3
4 Chief, Environmental Enforcement Section
5 Environment and Natural Resources Division
6 U.S. Department of Justice
7 Box 7611 Ben Franklin Station
8 Washington, DC 20044-7611
9 Re: DOJ No. 90-5-1-1-07061

10 To DOI:

11 Charles McKinley
12 Assistant Field Solicitor
13 333 Bush Street
14 Suite 775
15 San Francisco, California 94104

16 To NOAA:

17 Katherine Pease
18 Deputy Section Chief
19 Natural Resources Section
20 Office of General Counsel
21 501 W. Ocean Boulevard, Suite 4470
22 Long Beach, California 90802-4213

23 To State:

24 Kathleen Ho
25 Deputy Attorney General
26 Department of the Attorney General
27 State of Hawaii
28 465 S. King Street, Room 200
Honolulu, Hawaii 96813

1 To Settling Defendants:

2 Eugene J. O'Connor
3 Chalos O'Connor, LLP
4 366 Main Street
5 Port Washington, New York 11050
6

7 17. Any Party may, by written notice to the other Parties, change its
8 designated notice recipient or notice address provided above.

9 18. Notices submitted pursuant to this Section shall be deemed submitted
10 upon mailing, unless otherwise provided in this Decree or by mutual agreement of
11 the Parties in writing.
12

13
14 **XI. EFFECTIVE DATE**

15 19. The Effective Date of this Decree shall be the date of the Entry of this
16 Decree by the Court.
17

18 **XII. RETENTION OF JURISDICTION**

19 20. The Court shall retain jurisdiction over this case until termination of
20 this Decree, for the purpose of effectuating or enforcing compliance with the terms
21 of this Decree.
22

23
24 **XIII. MODIFICATION**

25 21. The terms of this Decree may be modified only by a subsequent
26 written agreement signed by all Parties. Where the modification constitutes a
27 material change to any term of this Decree, it shall be effective only upon approval
28

1 by the Court.

2
3 **XIV. TERMINATION**

4 22. This Decree shall be terminated when the Plaintiffs determine that
5 Settling Defendants have satisfactorily completed performance of their obligations
6 required by this Decree, including payment of the amounts required under Section
7 VI (Settlement Payments) and any outstanding stipulated penalties under Section
8 VII (Stipulated Penalties). Upon such termination, the Parties shall file with the
9 Court an appropriate stipulation reciting that the requirements of the Decree have
10 been met.
11
12

13
14 **XV. PUBLIC PARTICIPATION**

15 23. This Decree shall be lodged with this Court for a period of not less
16 than thirty (30) days to allow the opportunity for public notice and comment. The
17 Plaintiffs reserve the right to withdraw from or withhold their consent to this
18 Decree if the comments from the public regarding the Decree disclose facts or
19 considerations indicating that the Decree is inappropriate, improper, or inadequate.
20
21 The Settling Defendants consent to Entry of this Decree without further notice.
22

23
24 **XVI. SIGNATORIES/SERVICE**

25 24. Each undersigned representative of Settling Defendants, the State, and
26 the United States, certifies that he or she is fully authorized to enter into the terms
27 and conditions of this Decree and to execute and legally bind the Party or Parties
28

1 he or she represents to this document.

2 25. This Decree may be signed in counterparts, and its validity shall not
3
4 be challenged on that basis.

5 26. Settling Defendants agree not to oppose the Entry of this Decree by
6
7 the Court or to challenge any provision of the Decree, unless the consent of
8
9 Plaintiffs, or any of them, has been withdrawn or withheld under the circumstances
10
11 set forth in Paragraph 24, above, or Plaintiffs, or any of them have notified Settling
12
13 Defendants in writing that such Plaintiff no longer supports or agrees to the Entry
14
15 of this Decree.

14 **XVII. INTEGRATION**

15 27. This Decree constitutes the final, complete, and exclusive agreement
16
17 and understanding among the Parties with respect to the settlement embodied in
18
19 the Decree and supersedes all prior agreements and understandings, whether oral
20
21 or written, concerning the settlement embodied herein. No other document, nor
22
23 any representation, inducement, agreement, understanding, or promise, constitutes
24
25 any part of this Decree or the settlement it represents, nor shall it be used in
26
27 construing the terms of this Decree.

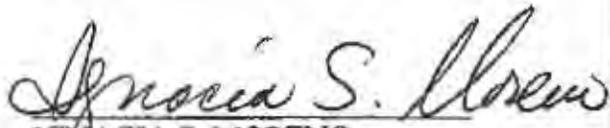
25 **XVIII. FINAL JUDGMENT**

26 28. Upon approval and Entry of this Decree by the Court, this Decree
27
28 shall constitute a final judgment of the Court, in accordance with Rules 54 and 58

1 We hereby consent to the Entry of the foregoing Consent Decree, subject to the
2 Notice and Comment provisions of Section XV (Public Participation) of this
3 Decree:
4

5 FOR THE UNITED STATES:
6
7
8

9 DATED: 11/16/12



IGNACIA S. MORENO
Assistant Attorney General
Environment and Natural Resources
Division
United States Department of Justice

10
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14
15 DATED: 12/18/12



BRADLEY R. O'BRIEN
Senior Attorney
Environment and Natural Resources
Division
Environmental Enforcement Section
United States Department of Justice

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FOR THE STATE OF HAWAII:

DATED: 12/17/12



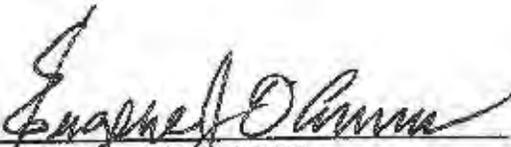
KATHLEEN HO
Deputy Attorney General
Department of the Attorney General

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The undersigned hereby consents to Entry of the foregoing Consent Decree:

FOR SETTLING DEFENDANTS Cape Flattery Limited and Pacific Basin (HK)
Limited:

DATED: Sept. 13, 2012


EUGENE J. O'CONNOR
Chalos O'Connor, LLP
366 Main Street
Port Washington, New York 11050-3120