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 UNITED STATES OF AMERICA

**LODGED**

MAR 28 2013

CLERK DISTRICT COURT  
 DISTRICT OF HAWAII

**UNITED STATES DISTRICT COURT  
 FOR THE DISTRICT OF HAWAII**

UNITED STATES OF AMERICA and )  
 the STATE OF HAWAII, )  
 )  
 Plaintiffs, )  
 )  
 v. )  
 )  
 MARISCO, LTD. )  
 )  
 Defendant. )  
 \_\_\_\_\_ )

**CV13 00146**

Case No.

**LEK RLP**

**CONSENT DECREE**

Plaintiff United States of America, on behalf of the United States Environmental Protection Agency (“EPA”), and the State of Hawaii, on behalf of the Hawaii Department of Health (“HDOH”), have filed a complaint in this action concurrently with this Consent Decree (“Decree”), alleging that Defendant Marisco, Inc. (“Marisco”), violated Sections 301, 308, and 402 of the Clean Water Act (“Act”), 33 U.S.C. §§ 1311, 1318, 1342, and Hawaii Revised Statutes §§ 342D-50, 342D-55, and 342E-2.

The Complaint alleges, among other things, that Marisco violated the Act and its implementing regulations, and permits issued thereunder, by discharging pollutants in excess of

the effluent limitations contained in its permits, by discharging washwater in violation of the terms and conditions of its permits, by failing to conduct water sampling as required by its permits and applicable regulations, by failing to keep records and submit discharge monitoring reports as required by its permits and applicable regulations, by failing to comply with best management practices as required by its permits, by failing to apply for permit coverage in a timely manner as required by its permits, and by discharging pollutants without first obtaining a permit authorizing such discharges.

By entering into this Consent Decree, Marisco does not admit any liability to the United States or Hawaii arising out of the transactions or occurrences alleged in the Complaint.

The Parties recognize, and the Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith and will avoid litigation among the Parties and that this Consent Decree is fair, reasonable, and in the public interest.

NOW, THEREFORE, before the taking of any testimony, without the adjudication or admission of any issue of fact or law except as provided in Section II, and with the consent of the Parties, IT IS HEREBY ADJUDGED, ORDERED, AND DECREED as follows:

#### **I. JURISDICTION AND VENUE**

1. This Court has jurisdiction over the Parties and the subject matter of this action pursuant to 28 U.S.C. §§ 1331, 1345, and 1355, and Section 309(b) of the Act, 33 U.S.C. § 1319(b). Venue lies in this District pursuant to 28 U.S.C. §§ 1391(b) and (c), 1395(a), and Section 309(b) of the Act, 33 U.S.C. § 1319(b), because Marisco resides and conducts business in this judicial district and the violations alleged in the Complaint are alleged to have occurred in this judicial district. For purposes of this Decree, or any action to enforce this Decree, Marisco

consents to the Court's jurisdiction over this Decree and consents to venue in this judicial district.

2. The United States has notified the State of Hawaii of the commencement of this action, pursuant to Section 309(b) of the Act, 33 U.S.C. § 1319(b).

## **II. DEFINITIONS**

3. Except as specifically provided in this Decree, the terms used in this Decree shall be defined in accordance with definitions in the Clean Water Act and the regulations promulgated pursuant to the Act.

4. Whenever the terms listed below are used in this Decree, the following definitions apply:

a. "Best Management Practices" or "BMPs" shall have the meaning as defined in 40 C.F.R. § 122.2, in its current form or as it may be amended in the future.

b. "Business Day" shall mean any day other than a Saturday, Sunday, or state or federal legal holiday.

c. "Clean Water Act" or "Act" shall mean the Federal Water Pollution Control Act, as amended, 33 U.S.C. §§ 1251-1387.

d. "Complaint" shall mean the complaint filed by the United States and the State in this action;

e. "Consent Decree" or "Decree" shall mean this Consent Decree and any Appendices attached hereto;

f. "Contractor" shall mean any contractor that has a contract with Marisco to perform work on the Site.

- g. "Cycling Event" shall mean lowering the Lil' Perris Dry Dock anytime after activities have been conducted on the dry dock, regardless of whether or not a ship is docked or undocked.
- h. Unless otherwise indicated, the term "Day" or "Days" as used herein shall mean a calendar day or days.
- i. "HDOH" shall mean the Hawaii Department of Health.
- j. "Effective Date" shall have the meaning set forth in Section XV of this Decree.
- k. "EPA" shall mean the U.S. Environmental Protection Agency.
- l. "Facility" shall mean the dry docks and all ancillary equipment and real estate owned by Marisco at Kalaeloa Barbers Point Harbor on the Island of Oahu, Hawaii.
- m. "Hawaii" or "State" shall mean the State of Hawaii.
- n. "Marisco" or "Defendant" shall mean Marisco, Ltd.
- o. "Paragraph" shall mean a portion of this Decree identified by an arabic numeral.
- p. "Parties" shall mean the United States of America, the State of Hawaii, and Marisco, Ltd.
- q. "Permit" shall mean the NPDES permit issued to Marisco by HDOH on April 6, 2011, permit number HI0021786, and any subsequent NPDES permits issued to Marisco by HDOH.
- r. "Section" shall mean a portion of this Decree identified by a roman numeral.
- s. "United States" or "Federal Plaintiff" shall mean the United States of America.

### **III. APPLICABILITY**

5. The obligations of this Decree apply to and are binding upon the United States and the State of Hawaii, and upon Marisco and any successors, assigns, or other entities or parties otherwise bound by law.

6. Marisco shall provide a copy of this Consent Decree to all officers, employees, and agents whose duties might reasonably include compliance with any provision of this Decree. In any action to enforce this Decree, Marisco shall not assert as a defense the failure by any officer, director, trustee, servant, successor, assign, employee, agent, contractor, or sub-contractor to comply with the terms of this Decree.

7. Unless otherwise agreed to by the parties, no transfer of ownership or operation of the Facility, whether in compliance with the procedures of this Paragraph or otherwise, shall relieve Marisco of its obligation to ensure that the terms of the Decree are implemented. At least 30 Days prior to such transfer, Marisco shall provide a copy of this Consent Decree to the proposed transferee and shall simultaneously provide written notice of the prospective transfer, together with a copy of the written agreement, to the United States and the State in accordance with Section XIII of this Decree (Notices). Any attempt to transfer ownership or operation of the Facility without complying with this Paragraph constitutes a violation of this Decree.

### **IV. CIVIL PENALTY**

8. Marisco shall pay to the United States and the State the aggregate sum of \$710,000.00 as a civil penalty, together with interest accruing from the date on which the Consent Decree is lodged with the Court, at the rate specified in 28 U.S.C. § 1961 as of the date of lodging, as set forth in this Section and pursuant to the following payment deadlines:

- a. Within 30 Days after the Effective Date of this Consent Decree, Marisco shall pay to the United States the sum of \$50,000, plus accrued interest.
- b. Within 30 Days after the Effective Date of this Consent Decree, Marisco shall pay to the State the sum of \$50,000, plus accrued interest.
- c. Within 180 Days after the Effective Date of this Consent Decree, Marisco shall pay to the United States the sum of \$152,500, plus accrued interest.
- d. Within 180 Days after the Effective Date of this Consent Decree, Marisco shall pay to the State the sum of \$152,500, plus accrued interest.
- e. Within 365 Days after the Effective Date of this Consent Decree, Marisco shall pay to the United States the sum of \$152,500, plus accrued interest.
- f. Within 365 Days after the Effective Date of this Consent Decree, Marisco shall pay to the State the sum of \$152,500, plus accrued interest.

9. All payments to be made to the United States pursuant to the previous paragraph shall be made by FedWire Electronic Funds Transfer (“EFT”) to the U.S. Department of Justice in accordance with written instructions to be provided to Marisco by the Financial Litigation Unit of the U.S. Attorney’s Office for the District of Hawaii following lodging of the Consent Decree. At the time of payment, Marisco shall send a copy of the EFT authorization form and the EFT transaction record, together with a transmittal letter, which shall state that the payment is for the civil penalty owed pursuant to the Consent Decree in United States and the State of Hawaii v. Marisco, Ltd., and shall reference the civil action number and DOJ case number 90-5-1-1-09870, to the United States in accordance with Section XIII of this Decree (Notices); by email to acctsreceivable.CINWD@epa.gov; and by mail to:

United States Environmental Protection Agency  
Fines and Penalties  
Cincinnati Finance Center  
PO Box 979077  
St. Louis, MO 63197-9000

and

United States Environmental Protection Agency  
Region IX  
Office of Regional Counsel  
75 Hawthorne Street  
San Francisco, CA 94105

10. All payments to be made to the State of Hawaii pursuant to paragraph 8 of this

Consent Decree shall be made certified check, sent to:

Clean Water Branch  
Environmental Management Division  
Department of Health  
Ala Moana Boulevard, Room 301  
Honolulu, HI 96814-4920

11. Marisco shall not deduct any penalties paid under this Decree pursuant to this Section or Section VII (Stipulated Penalties) in calculating its federal, state or local income tax.

#### **V. INJUNCTIVE RELIEF**

12. Marisco shall comply with all applicable NPDES requirements, including all permit conditions, at the Facility.

13. Sampling and Analysis Plan: No later than 30 days after the Effective Date of this Consent Decree, Marisco shall submit for review and approval a proposed sampling and analysis plan ("SAP") to EPA and HDOH in accordance with Section XIII of the Consent Decree (Notices). The proposed SAP shall be designed to determine the sources of the parameters listed in the Permit (Parts A.1 and 2) in discharges from the Facility. The proposed SAP shall include

sampling locations, sampling and testing methods, and all relevant details and assumptions that support the proposed SAP. The proposed SAP shall also require Marisco to make detailed records of all dry dock activities, including:

- a. the type of vessel in the dry dock,
- b. the type of work being done on the vessel,
- c. the type of paint and/or other anti-fouling agent removed from the vessel,
- d. the method used to remove such material from the vessel,
- e. the type of paint and/or other anti-fouling agent applied to the vessel,
- f. the specific Best Management Practices (BMPs) used to prepare the vessel and

dry dock for undocking and/or cycling, and

- g. a brief narrative explaining how the dry dock activities associated with the type of vessel in the dry dock influenced Marisco's choice of BMPs implemented prior to dry dock cycling.

14. After consultation with HDOH, EPA shall approve, approve after modification, or disapprove the proposed SAP. If EPA disapproves the proposed SAP, Marisco shall submit to EPA and HDOH for review and approval a revised proposed SAP not later than 45 days after receipt of notice of such disapproval.

15. Marisco shall implement the SAP upon its approval by EPA.

16. Dry Dock Washing: Marisco shall wash the dry dock prior to each cycling event.

On each such occasion, Marisco shall wash the dry dock as many times as necessary to ensure that harbor water flowing off the dry dock during each cycling event meets the Permit effluent



limits for copper and zinc. Marisco shall use the sampling methodology set forth in the SAP approved by EPA pursuant to the Consent Decree.

17. The water used for washing the dry dock shall be collected and treated and/or disposed of consistent with federal, state and local laws and ordinances.

18. Marisco shall submit monthly reports to EPA and HDOH, which shall include all analytical results and dry dock activities for the preceding calendar month. If no sampling or dry dock activities occurred in the preceding month, the monthly report shall state that no activity took place. These monthly reports shall be submitted in accordance with Section XIII of the Consent Decree (Notices) with the Discharge Monitoring Report required by the Permit. The monthly reports shall be due on the 28th day of each month, beginning with the first full month following EPA's approval of the SAP and continuing until the Consent Decree terminates.

19. The reports to be submitted by Marisco under this Section shall be signed by an official of the submitting party and include the following certification:

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

## **VI. REPORTING REQUIREMENTS**

20. Reports of Permit Violations. As required under its Permit, if Marisco violates any requirement of the Permit, Marisco shall notify the United States and HDOH of such violation in accordance with Section XIII of this Consent Decree (Notices). Nothing in this

Paragraph or the following Paragraph relieves Marisco of its obligation to provide the notice required by Section VIII of this Consent Decree (Force Majeure).

21. Whenever any violation of this Consent Decree or the Permit, or any other event affecting Marisco's performance under this Consent Decree, poses an immediate threat to the public health or welfare or the environment, Marisco shall notify EPA and HDOH orally or by electronic or facsimile transmission as soon as possible, but no later than 24 hours after Marisco first knew of the violation or event. This procedure is in addition to the requirements set forth in the preceding Paragraph.

22. All reports shall be submitted to the persons designated in Section XIII of this Consent Decree (Notices).

23. The reporting requirements of this Consent Decree do not relieve Marisco of any reporting obligations required by the Act or implementing regulations, or by any other federal, state, or local law, regulation, permit, or other requirement. Any information provided pursuant to this Consent Decree may be used by the United States or the State in any proceeding to enforce the provisions of this Consent Decree and as otherwise permitted by law.

## **VII. STIPULATED PENALTIES**

24. Marisco shall be liable for stipulated penalties to the United States and the State for violations as specified below, unless excused under Section VIII (Force Majeure). A violation includes failing to perform any obligation required by the terms of this Decree, including any work plan or schedule approved under this Decree, according to all applicable requirements of this Decree and within the specified time schedules established by or approved under this Decree.

25. Stipulated penalties under this section shall begin to accrue on the day after performance is due or on the day a violation occurs, whichever is applicable, and shall continue to accrue until performance is satisfactorily completed or until the violation ceases. Stipulated penalties shall accrue simultaneously for separate violations of this Consent Decree.

26. Either Plaintiff, in the unreviewable exercise of its discretion, may reduce or waive stipulated penalties otherwise owed to it under this Consent Decree.

27. Stipulated penalties shall continue to accrue as provided in Paragraph 25 during any dispute resolution process initiated pursuant to Section IX of this Consent Decree (Dispute Resolution), but need not be paid until the following:

a. If the dispute is resolved by agreement or by a decision of EPA or the State that is not appealed to the Court, Marisco shall pay accrued penalties determined to be owed, together with interest, to the United States and the State within 30 days of the effective date of the agreement or the receipt of EPA's or the State's decision or order.

b. If the dispute is appealed to the Court and the United States or the State prevails in whole or in part, Marisco shall pay all accrued penalties determined by the Court to be owed, together with interest, to the United States and the State within 60 days of receiving the Court's decision or order, except as provided in subparagraph (c), below.

c. If any Party appeals the Court's decision, Marisco shall pay all accrued penalties determined to be owed, together with interest, within 15 days of receiving the final appellate court decision.

28. If Marisco fails to pay stipulated penalties according to the terms of this Consent Decree, Marisco shall be liable for interest on such penalties, as provided for in 28 U.S.C. §

1961, accruing as of the date payment became due. Nothing in this Paragraph shall be construed to limit the United States or the State from seeking any remedy otherwise provided by law for Marisco's failure to pay any stipulated penalties.

29. Subject to the provisions of Section XI of this Consent Decree (Effect of Settlement/Reservation of Rights), the stipulated penalties provided for in this Consent Decree shall be in addition to any other rights, remedies, or sanctions available to the United States or the State for Marisco's violation of this Consent Decree or applicable law. Where a violation of this Consent Decree is also a violation of relevant statutory or regulatory requirements, Marisco shall be allowed a credit, for any stipulated penalties paid, against any statutory penalties imposed for such violation.

30. Late Payment of Civil Penalty. If Marisco fails to pay the civil penalty imposed under Section IV of this Decree (Civil Penalty) when due, Marisco shall pay a stipulated penalty of \$1,500 per day for each day that the payment is late.

31. Non-Compliance with Injunctive Relief. The following stipulated penalties shall accrue per violation per day for each violation of any requirement imposed under Section V of this Consent Decree (Injunctive Relief):

A. Non-compliance with Permit conditions, as required pursuant to Paragraph 12 of this Consent Decree:

i. Prohibited Discharges

A \$5,000 stipulated penalty shall accrue per each prohibited discharge that occurs in violation of Part B.1 of the Permit.

ii. Pollution Prevention Measures

A \$3,000 stipulated penalty shall accrue per day per violation of the pollution prevention measures set forth in Part B.2 and required by Part B.5 of the Permit.

iii. Inspections

A \$3,000 stipulated penalty shall accrue per day per violation of the inspection requirements set forth in Part B.3 of the Permit.

iv. Record-keeping

The following stipulated penalties shall accrue day per violation of the record-keeping requirements set forth in Part B.4 of the Permit:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$500 per day or portion thereof	1st through 14th day
\$750 per day or portion thereof	15th through 30th day
\$1,000 per day or portion thereof	31st day and beyond

B. Failure to submit for review and approval a proposed SAP to EPA and HDOH in accordance with Paragraph 13 of this Consent Decree:

<u>Penalty Per Day of Violation</u>	<u>Period of Noncompliance</u>
\$1,000 per day or portion thereof	1st through 14th day
\$2,500 per day or portion thereof	15th through 30th day
\$4,500 per day or portion thereof	31st day and beyond

C. Failure to implement the SAP as required by Paragraph 15 of this Consent Decree:

A \$3,000 stipulated penalty shall accrue per day per violation.

D. Failure to wash the dry dock prior to each cycling event as required pursuant to Paragraph 16 of this Consent Decree:

<u>Penalty Per Violation</u>	<u>Period of Noncompliance</u>
\$1,000 per day or portion thereof	first 12 months after the Effective Date

\$3,000 per day or portion thereof	13 <sup>th</sup> through 24 <sup>th</sup> month after the Effective Date
\$5,000 per day or portion thereof	25 <sup>th</sup> month after the Effective Date and beyond

E. Failure to submit monthly reports to EPA and HDOH in accordance with Paragraph 18 of this Consent Decree:

<u>Penalty Per Day of Violation</u>	<u>Period of Noncompliance</u>
\$1,000 per day or portion thereof	1st through 14th day
\$2,500 per day or portion thereof	15th through 30th day
\$4,500 per day or portion thereof	31st day and beyond

32. In the event that ambient water quality monitoring of harbor water immediately prior to a cycling event shows ambient levels of copper and zinc above the Permit effluent limits, the imposition of stipulated penalties shall be waived for any non-compliance with Paragraphs 12 and 16 of this Consent Decree that is based solely on exceedences of Permit effluent limits for copper and zinc in harbor water flowing off the dry dock during such cycling event, provided that Marisco has washed the dry dock as many times as necessary to ensure that harbor water flowing off the dry dock during such cycling event does not exceed the ambient levels of copper and zinc in ambient harbor water.

33. Non-Compliance with all Other Requirements of this Consent Decree. The following stipulated penalties shall accrue per violation per day for non-compliance with any other requirement of this Consent Decree not specified in the preceding Paragraph:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$500 per day or portion thereof	1st through 14th day
\$750 per day or portion thereof	15th through 30th day
\$1,000 per day or portion thereof	31st day and beyond

34. Marisco shall pay any stipulated penalty arising under this Section to the United States and the State within 30 days of receiving a written demand by either Plaintiff. The Plaintiff making a demand for payment of a stipulated penalty shall simultaneously send a copy of the demand to the other Plaintiff.

35. Marisco shall pay fifty percent of the total stipulated penalty amount to the United States and fifty percent to the State, unless a Plaintiff reduces or waives the amount owed to it pursuant to Paragraph 26 of this Consent Decree. Marisco shall pay stipulated penalties owed to the United States pursuant to this Section in the manner set forth in Paragraph 9, and with the confirmation notices and transmittal letter information required by Paragraph 9, except that the transmittal letter shall state that the payment is for stipulated penalties and shall state for which violation(s) the penalties are being paid. Marisco shall pay stipulated penalties owed to the State pursuant to this Section in the manner set forth in Paragraph 10 along with a notice that shall state that the payment is for stipulated penalties and shall state for which violation(s) the penalties are being paid.

#### **VIII. FORCE MAJEURE**

36. "Force Majeure," for purposes of this Consent Decree, is defined as any event arising from causes beyond the control of Marisco, of any entity controlled by Marisco, or of Marisco's contractors, that delays or prevents the performance of any obligation under this Consent Decree despite Marisco's best efforts to fulfill the obligation. The requirement that Marisco exercise "best efforts to fulfill the obligation" includes using best efforts to anticipate any potential Force Majeure event and best efforts to address the effects of any such event (a) as it is occurring and (b) after it has occurred to prevent or minimize any resulting delay to the

greatest extent possible. "Force Majeure" does not include Marisco's financial inability to perform any obligation under this Consent Decree.

37. If any event occurs or has occurred that may delay the performance of any obligation under this Consent Decree, whether or not caused by a Force Majeure event, Marisco shall provide notice orally or by electronic or facsimile transmission to EPA and the State within 72 hours of when Marisco first knew that the event might cause a delay. Within seven days thereafter, Marisco shall provide in writing to EPA and the State an explanation and description of the reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; Marisco's rationale for attributing such delay to a Force Majeure event if it intends to assert such a claim; and a statement as to whether, in the opinion of Marisco, such event may cause or contribute to an endangerment to public health, welfare or the environment. Marisco shall include with any notice all available documentation supporting the claim that the delay was attributable to a Force Majeure. Failure to comply with the above requirements shall preclude Marisco from asserting any claim of Force Majeure for that event for the period of time of such failure to comply, and for any additional delay caused by such failure. Marisco shall be deemed to know of any circumstance of which Marisco, any entity controlled by Marisco, or Marisco's contractors knew or should have known.

38. If EPA, after a reasonable opportunity for review and comment by the State, agrees that the delay or anticipated delay is attributable to a Force Majeure event, the time for performance of the obligations under this Consent Decree that are affected by the Force Majeure event will be extended by EPA, after a reasonable opportunity for review and comment by the



State, for such time as is necessary to complete those obligations. An extension of the time for performance of the obligations affected by the Force Majeure event shall not, of itself, extend the time for performance of any other obligation. EPA will notify Marisco in writing of the length of the extension, if any, for performance of the obligations affected by the Force Majeure event.

39. If EPA, after a reasonable opportunity for review and comment by the State, does not agree that the delay or anticipated delay has been or will be caused by a Force Majeure event, EPA will notify Marisco in writing of its decision.

40. If Marisco elects to invoke the dispute resolution procedures set forth in Section IX (Dispute Resolution) in the event of a Force Majeure denial under the preceding Paragraph, it shall do so no later than 15 days after receipt of EPA's notice of such decision under the preceding Paragraph. In any such proceeding, Marisco shall have the burden of demonstrating by a preponderance of the evidence that the delay or anticipated delay has been or will be caused by a Force Majeure event, that the duration of the delay or the extension sought was or will be warranted under the circumstances, that best efforts were exercised to avoid and mitigate the effects of the delay, and that Marisco complied with the requirements of Paragraph 37, above. If Marisco carries this burden, the delay at issue shall be deemed not to be a violation by Marisco of the affected obligation of this Consent Decree identified to EPA and the Court.

#### **IX. DISPUTE RESOLUTION**

41. Unless otherwise expressly provided for in this Consent Decree, the Dispute Resolution procedures of this Section shall be the exclusive mechanism to resolve disputes arising under or with respect to this Consent Decree. Marisco's failure to seek resolution of a dispute under this Section shall preclude Marisco from raising any such issue as a defense to an

action by the United States or the State to enforce any obligation of Marisco arising under this Decree.

42. Informal Dispute Resolution. Any dispute subject to Dispute Resolution under this Consent Decree shall first be the subject of informal negotiations. The dispute shall be considered to have arisen on the date that Marisco sends the United States and the State a written Notice of Dispute. The Notice of Dispute shall state clearly the matter in dispute. The period of informal negotiations shall not exceed 45 days from the date the dispute arises, unless that period is modified by written agreement. If the Parties cannot resolve a dispute by informal negotiations, then the position advanced by the United States, after consultation with the State, shall be considered binding unless, within 30 days after the conclusion of the informal negotiation period, Marisco invokes formal dispute resolution procedures as set forth below.

43. Formal Dispute Resolution. Marisco shall invoke formal dispute resolution procedures, within the time period provided in the preceding Paragraph, by serving on the United States and the State, pursuant to Section XIII (Notices), a written Statement of Position regarding the matter in dispute. Marisco's Statement of Position shall include, but need not be limited to, any factual data, analysis, or opinion supporting Marisco's position and any supporting documentation relied upon by Marisco.

44. The United States shall serve on Marisco, pursuant to Section XIII (Notices), its Statement of Position within 45 days of receipt of Marisco's Statement of Position. The United States' Statement of Position shall include, but need not be limited to, any factual data, analysis, or opinion supporting that position and any supporting documentation relied upon by the United States, and shall be developed in consultation with the State. The United States' Statement of

Position shall be binding on Marisco, unless Marisco files a motion for judicial review of the dispute in accordance with Paragraph 46.

45. An administrative record of the dispute shall be maintained by EPA and shall contain all Statements of Position, including supporting documentation, submitted pursuant to this Section.

46. Marisco may seek judicial review of the dispute after receipt of the United States' Statement of Position by filing with the Court and serving on the United States and the State, in accordance with Section XIII of this Consent Decree (Notices), a motion requesting judicial resolution of the dispute. The motion must be filed within 45 days of receipt of the United States' Statement of Position pursuant to Paragraph 44. The motion shall contain a written statement of Marisco's position on the matter in dispute, including any supporting factual data, analysis, opinion, or documentation, and shall set forth the relief requested and any schedule within which the dispute must be resolved for orderly implementation of this Consent Decree.

47. The United States and/or the State shall respond to Marisco's motion within the time period allowed by the Local Rules of this Court. Marisco may file a reply memorandum, to the extent permitted by the Local Rules.

48. Standard of Review

a. Disputes Concerning Matters Accorded Record Review. Except as otherwise provided in this Consent Decree, in any dispute brought under Paragraph 46 pertaining to the adequacy or appropriateness of plans, procedures to implement plans, schedules or any other items requiring approval by EPA under this Consent Decree; the adequacy of the performance of work undertaken pursuant to this Consent Decree; and all

other disputes that are accorded review on the administrative record under applicable principles of administrative law, Marisco shall have the burden of demonstrating, based on the administrative record, that the position of the United States is arbitrary and capricious or otherwise not in accordance with law.

b. Other Disputes. Except as otherwise provided in this Consent Decree, in any other dispute brought under Paragraph 46, Marisco shall bear the burden of demonstrating that its position fulfills the terms, conditions, requirements, and objectives of this Consent Decree.

49. The invocation of Dispute Resolution procedures under this Section shall not, by itself, extend, postpone, or affect in any way any obligation of Marisco under this Consent Decree, unless and until final resolution of the dispute so provides. Stipulated penalties with respect to the disputed matter shall continue to accrue as provided in Paragraph 25, but payment shall be stayed pending resolution of the dispute as provided in Paragraph 27. If Marisco does not prevail on the disputed issue, stipulated penalties shall be assessed and paid as provided in Section VII (Stipulated Penalties).

#### **X. INFORMATION COLLECTION AND RETENTION**

50. The United States, the State, and their representatives, including attorneys, contractors, and consultants, shall have the right of entry onto any property under the ownership or control of the Marisco, at all reasonable times, upon presentation of credentials, to:

- a. monitor the progress of activities required under this Consent Decree;
- b. verify any data or information submitted to the United States in accordance with the terms of this Consent Decree;

- c. obtain samples and, upon request, splits of any samples taken by Marisco or its representatives, contractors, or consultants;
- d. obtain documentary evidence, including photographs and similar data; and
- e. assess Marisco's compliance with this Consent Decree.

51. Upon request, Marisco shall provide EPA and the State or their authorized representatives splits of any samples taken by Marisco. Upon request, EPA and the State shall provide Marisco splits of any samples taken by EPA or the State.

52. Until five years after the termination of this Consent Decree, Marisco shall retain all non-identical copies of all documents, records, or other information (including documents, records, or other information in electronic form) in its possession or control, or that come into its possession or control, and that relate in any manner to Marisco's performance of its obligations under this Consent Decree. In addition, Marisco shall instruct its contractors and agents to preserve all non-identical copies of all documents, records, or other information (including documents, records, or other information in electronic form) in such contractors' or agents' possession or control, or that come into such contractors' or agents' possession or control, and that relate in any manner to Marisco's performance of its obligations under this Consent Decree. This information-retention requirement shall apply regardless of any contrary corporate or institutional policies or procedures. At any time during this information-retention period, upon request by the United States or the State, Marisco shall provide copies of any documents, records, or other information required to be maintained under this Paragraph.

53. At the conclusion of the information-retention period provided in the preceding Paragraph, Marisco shall notify the United States and the State at least 90 days prior to the

destruction of any documents, records, or other information subject to the requirements of the preceding Paragraph and, upon request by the United States or the State, Marisco shall deliver any such documents, records, or other information to EPA or the State. Marisco may assert that certain documents, records, or other information is privileged under the attorney-client privilege or any other privilege recognized by federal law. If Marisco asserts such a privilege, they shall provide the following: (a) the title of the document, record, or information; (b) the date of the document, record, or information; (c) the name and title of each author of the document, record, or information; (d) the name and title of each addressee and recipient; (e) a description of the subject of the document, record, or information; and (f) the privilege asserted by Marisco. However, no documents, records, or other information created or generated pursuant to the requirements of this Consent Decree shall be withheld on grounds of privilege.

54. Marisco may also assert that information required to be provided under this Section is protected as Confidential Business Information (“CBI”) under 40 C.F.R. Part 2. As to any information that Marisco seeks to protect as CBI, Marisco shall follow the procedures set forth in 40 C.F.R. Part 2.

55. This Consent Decree in no way limits or affects any right of entry and inspection, or any right to obtain information, held by the United States or the State pursuant to applicable federal or state laws, regulations, or permits, nor does it limit or affect any duty or obligation of Marisco to maintain documents, records, or other information imposed by applicable federal or state laws, regulations, or permits.

## **XI. EFFECT OF SETTLEMENT/RESERVATION OF RIGHTS**

56. This Consent Decree resolves the civil claims of the United States and the State for the violations alleged in the Complaint filed in this action through the date of lodging of this Consent Decree.

57. The United States and the State reserve all legal and equitable remedies available to enforce the provisions of this Consent Decree, except as expressly provided in Paragraph 56 or elsewhere herein. This Consent Decree shall not be construed to limit the rights of the United States or the State to obtain penalties or injunctive relief under the Act or implementing regulations, or under other federal or state laws, regulations, or permit conditions, except as expressly specified in Paragraph 56 or elsewhere herein. The United States and the State further reserve all legal and equitable remedies to address any imminent and substantial endangerment to the public health or welfare or the environment arising at, or posed by, Marisco, whether related to the violations addressed in this Consent Decree or otherwise.

58. In any subsequent administrative or judicial proceeding initiated by the United States or the State for injunctive relief, civil penalties, or other appropriate relief relating to Marisco's violations, Marisco shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States or the State in the subsequent proceeding were or should have been brought in the instant case, except with respect to claims that have been specifically resolved pursuant to Paragraph 56 of this Section.

59. This Consent Decree is not a permit, or a modification of any permit, under any federal, state, or local laws or regulations. Marisco is responsible for achieving and maintaining complete compliance with all applicable federal, state, and local laws, regulations, and permits; and Marisco's compliance with this Consent Decree shall be no defense to any action commenced pursuant to any such laws, regulations, or permits. The United States and the State do not, by their consent to the entry of this Consent Decree, warrant or aver in any manner that Marisco's compliance with any aspect of this Consent Decree will result in compliance with provisions of the Act, or with any other provisions of federal, state, or local laws, regulations, or permits.

60. This Consent Decree does not limit or affect the rights of Marisco or of the United States and the State against any third parties, not party to this Consent Decree, nor does it limit the rights of third parties, not party to this Consent Decree, against Marisco, except as otherwise provided by law.

61. This Consent Decree shall not be construed to create rights in, or grant any cause of action to, any third party not party to this Consent Decree.

## **XII. COSTS**

62. The Parties shall bear their own costs of this action, including attorneys' fees, except that the United States and the State shall be entitled to collect the costs (including attorneys' fees) incurred in any action necessary to collect any portion of the civil penalty or any stipulated penalties due but not paid by Marisco.



### XIII. NOTICES

63. Unless otherwise specified herein, whenever notifications, submissions, or communications are required by this Consent Decree, they shall be made in writing and addressed as follows:

To the United States:

Chief, Environmental Enforcement Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
Box 7611 Ben Franklin Station  
Washington, D.C. 20044-7611  
Re: DOJ No. 90-5-1-1-09870

and to:

Regional Counsel  
U.S. Environmental Protection Agency  
Region IX  
75 Hawthorne St.  
San Francisco, CA

To the State of Hawaii:

Hawaii Department of Health  
Chief, Clean Water Branch  
919 Ala Moana Blvd. Rm. 301  
Honolulu, Hawaii, 96814-4920

To Marisco, Ltd.:

Fred Anawati  
Stephen Hinton  
91-607 Malokolo Rd.  
Kapolei, Hawaii 96707

Kyong-su Im  
1608 Laukahi St.  
Honolulu, Hawaii 96821

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

65. Notices submitted pursuant to this Section shall be deemed submitted upon mailing, unless otherwise provided in this Consent Decree or by mutual agreement of the Parties in writing.

#### **XIV. COMPUTATION OF TIME**

66. In the event that the time period prescribed under this Consent Decree within which a requirement of this Consent Decree must be performed or complied with falls on a weekend or federal or state holiday, such time period shall be extended to the first business day following such weekend or federal or state holiday.

#### **XV. EFFECTIVE DATE**

67. The Effective Date of this Consent Decree shall be the date upon which this Consent Decree is entered by the Court or upon which a motion to enter the Consent Decree is granted, whichever occurs first, as recorded on the Court's docket.

#### **XVI. RETENTION OF JURISDICTION**

68. The Court shall retain jurisdiction over this case until termination of this Consent Decree, for the purpose of resolving disputes arising under this Decree or entering orders modifying this Decree, pursuant to Sections IX and XVII, or effectuating or enforcing compliance with the terms of this Decree.

#### **XVII. MODIFICATION**

69. Except as otherwise set forth in this Paragraph, the terms of this Consent Decree, including any attached appendices, may be modified only by a subsequent written agreement

signed by all the Parties. The terms of this Consent Decree shall be modified to conform to any changes to the requirements and conditions of the permit(s) issued pursuant to the Act, or to the requirements and conditions of any new permit(s) issued pursuant to the Act, in accordance with the provisions of this Paragraph. Any modification which constitutes a material change to the terms of the Consent Decree shall be effective only upon approval by the Court. Any disputes concerning modification of this Decree shall be resolved pursuant to Section IX of this Decree (Dispute Resolution), provided, however, that, instead of the burden of proof provided by Paragraph 48, Marisco bears the burden of demonstrating that it is entitled to the requested modification in accordance with Federal Rule of Civil Procedure 60(b).

#### **XVIII. TERMINATION**

70. No sooner than five years after the Effective Date of this Consent Decree, Marisco may submit to the United States and the State a Request for Termination of this Consent Decree, certifying that:

- A. Marisco has paid all monies, civil penalties, interest, and stipulated penalties due under this Decree;
- B. There are no unresolved matters subject to dispute resolution pursuant to Section IX (Dispute Resolution);
- C. No enforcement action under this Decree is pending; and
- D. Marisco is in compliance with the requirements set forth in Section V of this Consent Decree (Injunctive Relief).

Any Request for Termination submitted pursuant to this Section shall be signed by an official of the submitting party and include the following certification:

I certify under penalty of law that this Request for Termination is based on information that is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting a false certification, including the possibility of fine and imprisonment for knowing violations.

71. Following receipt by the United States and the State of Marisco's Request for Termination, the Parties shall confer informally concerning the Request and any disagreement that the Parties may have as to whether Marisco has satisfactorily complied with the requirements for termination of this Consent Decree. If, after consultation, the United States and the State agree that the Decree may be terminated, the Parties shall submit, for the Court's approval, a joint stipulation terminating the Decree.

72. If, after consultation, the United States and the State do not agree that the Decree may be terminated, Marisco may invoke formal dispute resolution under Paragraphs 43-49 of this Decree, but may not do so until at least 60 days after service of its Request for Termination.

#### **XIX. PUBLIC PARTICIPATION**

73. This Consent Decree shall be lodged with the Court for a period of not less than 30 days for public notice and comment in accordance with 28 C.F.R. § 50.7. The United States reserves the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations indicating that the Consent Decree is inappropriate, improper, or inadequate. Marisco consents to entry of this Consent Decree without further notice and agrees not to withdraw from or oppose entry of this Consent Decree by the Court or to challenge any provision of the Decree, unless the United States has notified Marisco in writing that it no longer supports entry of the Decree.

## **XX. SIGNATORIES/SERVICE**

74. Each undersigned representative of Marisco, the United States, and the State of Hawaii certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind the Party he or she represents to this document.

75. This Consent Decree may be signed in counterparts, and its validity shall not be challenged on that basis. Marisco agrees to accept service of process by mail with respect to all matters arising under or relating to this Consent Decree and to waive the formal service requirements set forth in Rules 4 and 5 of the Federal Rules of Civil Procedure and any applicable Local Rules of this Court including, but not limited to, service of a summons.

## **XXI. INTEGRATION**

76. This Consent Decree constitutes the final, complete, and exclusive agreement and understanding among the Parties with respect to the settlement embodied in the Decree and supersedes all prior agreements and understandings, whether oral or written, concerning the settlement embodied herein. Other than any appendices or exhibits, which are attached to and incorporated in this Decree, and deliverables that are subsequently submitted and approved pursuant to this Decree, no other document, nor any representation, inducement, agreement, understanding, or promise, constitutes any part of this Decree or the settlement it represents, nor shall it be used in construing the terms of this Decree.

## **XXII. FINAL JUDGMENT**

77. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute a final judgment of the Court as to the United States, the State, and

Marisco. The Court finds that there is no just reason for delay and therefore enters this judgment as a final judgment under Fed. R. Civ. P. 54 and 58.

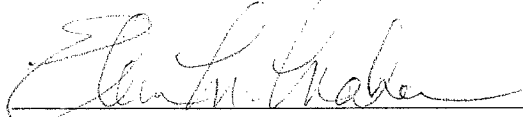
Dated and entered this \_\_\_\_ day of \_\_\_\_\_, 2013.

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UNITED STATES DISTRICT JUDGE  
District of Hawaii

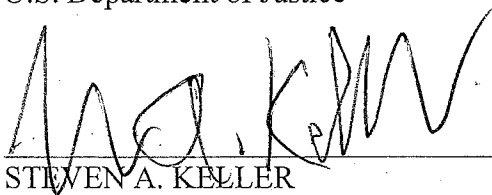
**FOR THE UNITED STATES OF AMERICA:**

**For the U.S. Department of Justice:**



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ELLEN M. MAHAN  
Deputy Section Chief  
Environmental Enforcement Section  
Environment and Natural Resources Division  
U.S. Department of Justice



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STEVEN A. KELLER  
Trial Attorney  
Environmental Enforcement Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
P.O. Box 7611  
Ben Franklin Station  
Washington, D.C. 20044-7611  
202-514-5465

**For the U.S. Environmental Protection Agency:**



A handwritten signature in black ink, appearing to read "Jared Blumenfeld", is written over a horizontal line.

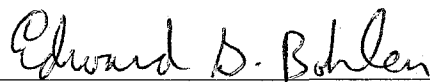
JARED BLUMENFELD  
Regional Administrator  
U.S. Environmental Protection Agency, Region 9

Of Counsel:

RICHARD T. CAMPBELL  
Assistant Regional Counsel  
U.S. Environmental Protection Agency, Region 9  
75 Hawthorne Street  
San Francisco, California 94105



**FOR THE STATE OF HAWAII:**

Handwritten signature of Edward G. Bohlen in cursive script, positioned above a horizontal line.

EDWARD G. BOHLEN

Deputy Attorney General


465 South King Street, Room 200

Honolulu, HI 96813

(808) 587-3050

Fax: (808) 587-3077

FOR MARISCO:



Alfred Anawati  
President of Marisco, Ltd.  
91-607 Malakole St. Kapolei, HI, 96707  
*[NAME, TITLE & ADDRESS]*