

UNITED STATES DISTRICT COURT  
DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA and  
COMMONWEALTH OF PUERTO RICO,

Plaintiffs,

v.

PORT STEWART GmbH&Co. Kg  
OF GERMANY,

Defendant.

Civ. No. 3:17-cv-1742

CONSENT DECREE

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E. The Trustees for the Natural Resources injured by the Incident include NOAA, on behalf of the United States, and DNER, on behalf of the Commonwealth. NOAA is designated as a Trustee pursuant to Section 1006(b)(2) of OPA, 33 U.S.C. § 2706(b)(2), Subpart G of the National Oil and Hazardous Substances Pollution Contingency Plan (NCP) (40 C.F.R. §§ 300.600, *et seq.*) and Executive Order 12580 (3 C.F.R., 1987 Comp. p. 193, 52 Fed. Reg. 2923 (January 23, 1987) as amended by Executive Order 12777 (56 Fed. Reg. 54757 (October 19, 1991))). DNER is designated as a Trustee pursuant to Section 1006(b)(3) of OPA, 33 U.S.C. § 3706(b)(3), and subpart G of the NCP. The United States and the Commonwealth share trusteeship of the Natural Resources alleged in the Complaint to be injured and are coordinating restoration efforts. The Trustees believe the obligations of the Settling Defendant set forth in this Consent Decree, including the obligation to pay a sum as described herein, constitute adequate compensation for Natural Resources Damages arising from the Incident.

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

NOW THEREFORE, with the Consent of the Parties, IT IS HEREBY ADJUDGED, ORDERED AND DECREED as follows:

## **II. JURISDICTION AND VENUE**

1. This Court has jurisdiction over the subject matter of this action pursuant to Section 1017(b) of OPA, 33 U.S.C. § 2717(b), and 28 U.S.C. §§ 1331, 1345, and 1367. Venue lies in this District pursuant to Section 1017(b) of OPA, 33 U.S.C. § 2717(b), and 28 U.S.C. 1391(b), because the Incident occurred in this judicial district. The Court has personal jurisdiction over the Settling Defendant in connection with this action. For the purposes of this

Consent Decree, and the underlying Complaint, the Settling Defendant waives all objections and defenses that they may have to jurisdiction of the Court or to venue in this District. Settling Defendant shall not challenge this Court's jurisdiction to enter and enforce this Consent Decree.

### **III. APPLICABILITY**

2. This Consent Decree applies to and is binding upon the United States, on behalf of NOAA; the Commonwealth, on behalf of DNER; and, the Settling Defendant, including, without limitation, its successors, assigns, or other entities or persons otherwise bound by law. Any change in ownership or corporate status of the Settling Defendant including, but not limited to, any transfer of assets or real or personal property, shall in no way alter the Settling Defendant's rights or responsibilities under this Consent Decree. In any action to enforce this Consent Decree, the Settling Defendant shall not raise as a defense the failure by any of its officers, directors, employees, or agents to take any actions necessary to comply with the provisions of this Consent Decree.

### **IV. DEFINITIONS**

3. Unless otherwise expressed herein, terms used in this Consent Decree which are defined in Section 1001 of OPA, 33 U.S.C. § 2701, and in the regulations promulgated under OPA at 15 C.F.R. § 990.30, shall have the meaning assigned to them in OPA or in such regulations. Whenever the terms set forth below are used in this Consent Decree, the following definitions shall apply:

- a. "Complaint" shall mean the civil complaint filed in this action by the Plaintiffs.
- b. "Consent Decree" shall mean this Consent Decree and any Appendices attached hereto. In the event of a conflict between this Consent Decree and any Appendix, the Consent Decree shall control.

- c. "Day" shall mean a calendar day. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or Federal holiday, the period shall run until the close of business of the next working day.
- d. "Effective Date" or "Entry" shall be the date upon which this Consent Decree is entered by the Court or motion to enter the Consent Decree is granted, whichever occurs first, as recorded on the Court's docket.
- e. "Interest" shall mean the most recent interest rate determined pursuant to 28 U.S.C. § 1961. Interest shall be simple interest calculated on a daily basis.
- f. "Natural Resources" shall have the meaning provided in Section 1001(20) of OPA, 33 U.S.C. § 2701(20).
- g. "Natural Resource Damages" shall have the meaning provided in Section 1002(b)(2)(A) of OPA, 33 U.S.C. § 2702(b)(2)(A).
- h. "Paragraph" shall mean a portion of this Consent Decree identified by an Arabic numeral.
- i. "*T/V Port Stewart* Grounding NRD Account" shall mean a separate account, which will be funded by the Settling Defendant in accordance with Section V (Payments by Settling Defendant) of this Consent Decree and jointly administered by the Trustees in accordance with Section VII (*T/V Port Stewart* Grounding NRD Account) of this Consent Decree and the Trustee Memorandum of Agreement dated December, 2016 (MOA), attached at Appendix A.
- j. "Restore" or "Restoration" shall mean any action or combination of actions to restore, rehabilitate, replace or acquire the equivalent of any Natural Resource and

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services, including recreational opportunities that were injured, lost, or destroyed as a result of the Incident.

- k. "Section" shall mean a portion of this Consent Decree identified by a roman numeral.
- l. "Trustees" shall mean the designated federal and state officials, and their designees, who act on behalf of the public as trustees for the Natural Resources, as described in Section I., Paragraph E.

**V. PAYMENTS BY SETTLING DEFENDANTS**

4. Within forty-five (45) business days after Entry, Settling Defendant shall cause the sum of \$550,000, to be paid as follows:

- a. \$128,000 shall be paid to NOAA for reimbursement of its Natural Resource Damages assessment costs resulting from the Incident. Payment shall be made to the United States Department of Justice in accordance with Paragraph 5 below.
- b. \$10,000 shall be submitted to DNER for its Natural Resource Damages assessment costs resulting from the Incident. Such payments shall be made by certified or cashier's check and should be made payable to the "Commonwealth of Puerto Rico." The check shall reference "DNER Past Assessment Costs for *T/V Port Stewart* Grounding" and shall be delivered to:

Dr. Craig Lilyestrom  
Director, Marine Resources Division,  
Department of Natural and Environmental Resources  
P.O. Box 366147  
San Juan, Puerto Rico, 00936

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At the time of payment, the Settling Defendant shall send written notice of payment and a copy of any transmittal documentation to the Trustees in accordance with Section XI (Notice).

- c. \$412,000 shall be deposited in the *T/V Port Stewart* Grounding NRD Account, on behalf of the Trustees, for the purposes set forth in Section VII (*T/V Port Stewart* Grounding NRD Account). Payment shall be made to the United States Department of Justice in accordance with Paragraph 5 below.

5. Payments required by 4.a. and 4.c. above shall be made separately by Electronic Funds Transfer (EFT) to the U.S. Department of Justice in accordance with the instructions that the Financial Litigation Unit of the U.S. Attorney's Office for the District of Puerto Rico shall provide to Settling Defendant following Entry of the Consent Decree by this Court. Settling Defendant shall send a transmittal notice, indicating that each EFT has occurred, to the Parties in accordance with Section XI (Notices). For the payment required under 4.a. above, the EFT and transmittal notice shall reflect that the payment is being made for "NOAA Past Assessment Costs for *T/V Port Stewart* Grounding," and shall reference the case name, civil action number, and DOJ case number (#90-5-1-1-11557). For the payment required under 4.c. above, the EFT and transmittal notice shall reflect that the payment is being made to the *T/V Port Stewart* Grounding NRD Account. NOAA will assign these funds to a special project number to allow the funds to be maintained as a segregated account within the NOAA Damage Assessment and Restoration Revolving Fund. The funds paid pursuant to Paragraph 4.c shall be used jointly by the Trustees in accordance with Section VII (*T/V Port Stewart* Grounding NRD Account) of this Consent Decree and the Trustee MOA.

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**VI. INTEREST AND STIPULATED PENALTIES**

6. The Settling Defendant shall pay Interest if payment of the amounts specified in Paragraph 4 are not made when due. The Settling Defendant shall also pay a stipulated penalty to the United States and/or the Commonwealth for failure to make a payment in Paragraph 4 when due. The stipulated penalty shall accrue at the rate of five thousand dollars (\$5,000) per day for each day of non-compliance up to the first thirty (30) days of non-compliance. After thirty (30) days of failure to make a payment as required by Paragraph 4, the Settling Defendant shall pay a stipulated penalty to the United States and/or the Commonwealth at the rate of ten thousand dollars (\$10,000) per day for each day of non-compliance after the first thirty (30) days of non-compliance.

- a. Stipulated penalties shall begin to accrue on the day after payment is due and continue to accrue until the date of payment.
- b. Any stipulated penalty payments related to non-payment under Paragraph 4.c. shall be divided equally between the United States and the Commonwealth. Any stipulated penalty payments related to non-payment of past assessment costs under Paragraphs 4.a. or 4.b. will be paid to the Trustee to whom such payment was due.
- c. The United States and/or the Commonwealth may give the Settling Defendant written notification that it has failed to make a payment as required by Paragraph 4. Such notice shall describe the noncompliance and make a demand for the payment of the stipulated penalties. However, stipulated penalties shall accrue as provided in Paragraph 6.a. regardless of whether the Settling Defendant has been notified of a violation. The Settling Defendant shall pay stipulated penalties

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within thirty (30) days of receipt of written demand for such stipulated penalties by certified mail, as determined by the date of the required signature by the Settling Defendant's authorized representative or agent acknowledging receipt of the written demand.

- d. If the Settling Defendant fails to pay stipulated penalties when due, the United States and/or the Commonwealth may institute proceedings to collect the stipulated penalties, as well as Interest as provided in Paragraph 6.f. below.
- e. Interest on Stipulated Penalties. The Settling Defendant shall pay Interest on the unpaid balance of any stipulated penalties due, which shall begin to accrue on the date thirty (30) days past the demand therefor. The Interest on the unpaid balance of stipulated penalties due pursuant to Paragraph 6.b. shall be divided as specified therein.
- f. Notwithstanding any other provision of this Section, the United States and/or the Commonwealth may, in their unreviewable discretion, waive any portion of its share of the stipulated penalties that have accrued pursuant to this Consent Decree.
- g. Settling Defendant shall not deduct any stipulated penalties paid under this Section in calculating its federal or Commonwealth income taxes.
- h. Nothing in this Consent Decree shall be construed as prohibiting, altering, or in any way limiting the ability of the United States and/or the Commonwealth to seek any other remedies or sanctions available by virtue of Settling Defendant's violation of this Consent Decree or of the statutes and regulations upon which it is based.

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7. Payment Instructions for Stipulated Penalties. Any stipulated penalty payment shall be accompanied by a reference to this Consent Decree, be identified as "Stipulated Penalties," and reference "the *T/V Port Stewart Grounding Incident*." Notice of payment of a stipulated penalty shall be made to the Trustees in the manner specified in Section XI (Notices).

a. Stipulated penalty payments to the United States shall be made by EFT to the U.S. Department of Justice in accordance with written instructions to be provided to Settling Defendant by the Financial Litigation Unit of the U.S. Attorney's Office for the District of Puerto Rico. At the time of payment, Settling Defendant 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 stipulated penalties owed pursuant to the Consent Decree, and shall reference the case name, civil action number, DOJ Case Number (#90-5-1-1-11557), and the violations for which the stipulated penalties are being paid to the United States, in accordance with Section XI of this Decree (Notices).

b. Stipulated penalty payments to the Commonwealth shall be made by certified or cashier's check and should be made payable to the "Commonwealth of Puerto Rico." The check shall reference "Stipulated Penalties - *T/V Port Stewart Grounding Incident*" and shall be delivered to:

Dr. Craig Lilyestrom  
Director, Marine Resources Division  
Department of Natural and Environmental Resources  
P.O. Box 366147  
San Juan, Puerto Rico, 00936

**VII. T/V PORT STEWART GROUNDING NRD ACCOUNT**

8. All funds deposited in the *T/V Port Stewart* Grounding NRD Account in accordance with this Paragraph and Paragraph 4.c. shall, in accordance with law, be managed by NOAA for use by the Natural Resource Trustees in connection with Restoration of Natural Resources affected by the Incident. NOAA shall not make any charge against the *T/V Port Stewart* Grounding NRD Account for any management services provided. NOAA shall hold all funds in the *T/V Port Stewart* Grounding NRD Account subject to the provisions of this Consent Decree.

9. The Trustees commit to the expenditure of the funds set forth in this Section VII for the design, implementation, permitting (as necessary), monitoring, and oversight of Restoration projects and for the costs of complying with the requirements of the law to conduct the restoration planning and implementation process. The Trustees plan to use the funds for restoration, enhancement, and/or protection of coral reef habitat and associated resources; for oversight of these Restoration projects; and, for monitoring of emergency restoration.

10. The allocation of funds for specific projects or categories of projects will be contained in the Damage Assessment and Restoration Plan prepared and implemented jointly by the Trustees, for which public notice, opportunity for public input, and consideration of public comment will be provided. The Trustees will use the funds in the *T/V Port Stewart* Grounding NRD Account to Restore Natural Resources in accordance with applicable law, this Consent Decree, and the Damage Assessment and Restoration Plan to be prepared jointly by the Trustees.

**VIII. COVENANTS BY PLAINTIFFS**

11. In consideration of the payments and actions that have been and will be made by the Settling Defendant under this Consent Decree, the United States and the Commonwealth

covenant not to sue or take administrative action against the Settling Defendant pursuant to Section 1002(a) and (b) of OPA, 33 U.S.C. § 2702(a) and (b), for damages for injury to, destruction of, loss of, or loss of use of Natural Resources resulting from the Incident. This covenant not to sue is conditioned upon receipt by the United States of all payments required by Section V (Payments by Settling Defendant) and, as applicable, Section VI (Stipulated Penalties) of this Consent Decree.

12. Reservations of rights. Notwithstanding any other provision of this Consent Decree, the United States and the Commonwealth reserve, and this Consent Decree is without prejudice to, all rights against the Settling Defendant with respect to all matters other than those expressly specified in the covenants not to sue set forth in Paragraph 11 of this Section, including, but not limited to:

- a. Claims against the Settling Defendant for their failure to meet a requirement of this Consent Decree;
- b. Claims against the Settling Defendant for damages, including assessment costs, under OPA and any other applicable law, for injury to, destruction of, loss of, or loss of use of, Natural Resources that are not a result of the Incident;
- c. Claims brought against Settling Defendant for criminal liability associated with the Incident;
- d. Claims, other than claims for Natural Resource Damages related to the Incident, against the Settling Defendant that the Commonwealth, or the United States on behalf of the United States Environmental Protection Agency, and/or the United States Coast Guard, may have under any applicable law.

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13. Special Reservations Regarding Natural Resource Damages. Notwithstanding any other provision of this Consent Decree, the United States and the Commonwealth reserve the right to institute proceedings against the Settling Defendant in this action or in a new action seeking recovery of Natural Resource Damages based on:

- a. conditions caused by the Incident, unknown by the Trustees as of the date of the lodging of this Consent Decree, that cause new or additional injury to, destruction of, loss of, or loss of use of such Natural Resources; or
- b. information received by the Trustees after the date of lodging of this Consent Decree indicating that the Incident has resulted in new or significant additional injury to, destruction of, loss of, or loss of use of, such Natural Resources which injury is of a type that was unknown or a magnitude greater than was known by the Trustees as of the date of lodging of this Consent Decree.

14. The United States expressly reserves, and the Settling Defendant expressly acknowledges, the right of the United States to institute proceedings, to take judgment thereon, and collect such judgment(s) thereon against the Settling Defendant in this action, to seek and recover costs and/or damages resulting from the Incident based on claims submitted to or filed against the United States pursuant to 33 U.S.C. § 2715(c), including claims against the Oil Spill Liability Trust Fund, after the date when this Decree is lodged with this Court. Settling Defendant reserves all defenses as to substantive claims pursued in any such proceeding.

15. This Consent Decree shall not preclude the United States or the Commonwealth from instituting a separate or ancillary action to enforce the terms of this Consent Decree.

16. Nothing in this Consent Decree shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Consent Decree. In addition, nothing in this

Consent Decree shall limit, enlarge, or otherwise affect, the private rights or claims of any person not a Party to this Consent Decree, except as may be determined otherwise by a court of competent jurisdiction.

**IX. COVENANTS BY THE SETTLING DEFENDANT**

17. The Settling Defendant hereby covenant not to sue and agree not to assert any claims or causes of action against the United States or the Commonwealth, and their employees, agents, contractors, departments, agencies, administrations and bureaus, related to Natural Resource Damages arising from the Incident, including, without limitation, any potential or pending claims against the OPA Fund relating to the Incident. Settling Defendant reserves, and this Consent Decree is without prejudice to, all rights with respect to all matters not expressly included within this Covenant Not to Sue, including all rights with respect to all matters reserved in Section VIII.

**X. COSTS**

18. Plaintiffs shall be entitled to collect from Settling Defendant the costs (including reasonable attorneys' fees) incurred in any action necessary to collect any portion of the amounts due under Section V (Payment By Settling Defendants), any stipulated penalties due but not paid under Section VI (Stipulated Penalties), and any unpaid Interest.

**XI. NOTICES**

19. Unless otherwise specified herein, whenever notifications, submissions, or communications are required by this Consent Decree, they shall be made in writing and addressed to those listed below. All notices under this Section are effective upon receipt, unless otherwise specified. Except as otherwise provided, notice to a Party by email (if that option is

*Handwritten initials/signature*

provided below) or by regular mail in accordance with this Section satisfies any notice requirement of this Consent Decree regarding such Party.

To the United States:

EES Case Management Unit  
Environment and Natural Resources Division  
United States Department of Justice  
P.O. Box 7611  
Washington, DC 20044-7611  
[eesdcopy.enrd@usdoj.gov](mailto:eesdcopy.enrd@usdoj.gov)  
Re: DOJ Number 90-5-1-1-11218

To NOAA

Katherine Pease  
Senior Counselor for Natural Resources  
Natural Resources Section  
Office of General Counsel  
501 W. Ocean Boulevard, Suite 4470  
Long Beach, California 90802-4213

To the Commonwealth:

Craig Lilyestrom  
Marine Resources Division  
Department of Natural and Environmental Resources  
P.O. Box 366147  
San Juan, PR 00936  
[craig.lilyestrom@drna.gobierno.pr](mailto:craig.lilyestrom@drna.gobierno.pr)

To the Settling Defendant:

Eugene O'Connor  
Montgomery McCracken Walker & Rhoads LLP  
437 Madison Avenue, 29th Floor  
New York, New York 10022  
[eoconnor@mmwr.com](mailto:eoconnor@mmwr.com)

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

21. Settling Defendant 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 Rule 4 of the Federal Rules of Civil Procedure and any applicable Local Rules of this Court including, but not limited to, service of a summons. The Settling Defendant need not file an answer to the Complaint in this action unless or until the Court expressly declines to enter this Consent Decree.

22. 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.

**XII. RETENTION OF JURISDICTION**

23. This Court shall retain jurisdiction over both the subject matter of this Consent Decree and the Parties until termination of this Consent Decree, for the purposes of effectuating or enforcing compliance with its terms.

**XIII. MODIFICATION**

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

**XIV. PUBLIC PARTICIPATION**

25. This Consent Decree shall be lodged with the Court for at least thirty (30) days for public notice and comment in accordance with Section 1006(c)(5) of OPA, 33 U.S.C. § 2706(c)(5), and 28 C.F.R. § 50.7.



26. The United States reserves the right to withdraw or withhold its consent to the Consent Decree if comments received regarding the Consent Decree disclose facts or considerations that indicate the Consent Decree is inappropriate, improper or inadequate.

27. The Settling Defendant consents to the entry of this Consent Decree without further notice, and agree not to withdraw or oppose entry of the Consent Decree or to challenge any provision of the Consent Decree.

28. If for any reason the Court should decline to approve this Consent Decree in the form presented, this agreement is voidable at the sole discretion of any Party and the terms of the agreement may not be used as evidence in any litigation between the Parties.

#### **XV. FINAL JUDGMENT**

29. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute a final judgment between and among the Parties for the Natural Resource Damages settled herein. The Court finds that there is no just reason for delay and therefore enters this as a final judgment under Fed. R. Civ. P. 54 and 58.

#### **XVI. TERMINATION**


30. This Consent Decree shall be terminated upon granting of a motion, filed by Settling Defendant, demonstrating that Settling Defendant has paid the amounts required under Section V (Payments by Settling Defendant) and Section VI (Stipulated Penalties).

31. Settling Defendant shall initiate termination of this Consent Decree by providing written notice to Trustees as required by Section XI (Notice), that all conditions necessary for termination pursuant to Paragraph 30 have been satisfied. Settling Defendant shall confer with the Trustees to ensure that all Parties agree that Settling Defendant have satisfied their


THE UNDERSIGNED PARTY enters into this consent decree in the matter of United States and Commonwealth of Puerto Rico v. Port Stewart GmbH&Co. Kg of Germany

FOR THE UNITED STATES:

5/17/17  
Dated

  
ELLEN MAHAN  
Deputy Chief  
Environmental Enforcement Section  
U.S. Department of Justice

5/25/17  
Dated

  
BRIAN G. DONOHUE  
Senior Attorney  
Environmental Enforcement Section  
U.S. Department of Justice  
P.O. Box 7611  
Washington, D.C. 20044-7611


ROSA EMILIA RODRIGUEZ-VELEZ  
United States Attorney  
District of Puerto Rico

CARMEN MARQUEZ  
Assistant United States Attorney  
District of Puerto Rico  
Federal Office Building, Room 101  
Carlos E. Chardon Avenue  
Hato Rey, Puerto Rico 00918

THE UNDERSIGNED PARTY enters into this consent decree in the matter of United States and Commonwealth of Puerto Rico v. Port Stewart GmbH&Co. Kg of Germany

FOR THE COMMONWEALTH OF PUERTO RICO

May 12, 2017  
Dated

  
ANIBELLE PETERSON  
Legal Director  
Puerto Rico Department of Natural and  
Environmental Resources

WANDA VÁZQUEZ-GARCED  
Secretary of Justice

WANDYMAR BURGOS-VARGAS  
Acting Deputy Secretary in Charge of Litigation

SUSANA PEÑAGARICANO-BROWN  
Acting Director of Federal Litigation and  
Bankruptcy

May 16, 2017  
Dated

  
KARLA SANTIAGO-RODRIGUEZ  
USDC-PR No. 231214  
Department of Justice  
P.O. Box 9020192  
San Juan, Puerto Rico 00902-0192  
Office (787) 721-2900 x2647  
Fax (787) 723-9188  
Email: ksantiago@justicia.pr.gov

THE UNDERSIGNED PARTY enters into this consent decree in the matter of United States and Commonwealth of Puerto Rico v. Port Stewart GmbH&Co. Kg of Germany

FOR PORT STEWART GmbH&Co. Kg of GERMANY:

April 13, 2017  
Dated

Eugene J. O'Connor  
Name: Eugene J. O'Connor  
Title: Attorney in fact  
Address: 437 Madison Ave., NY, NY 10022

Agent authorized to accept service on behalf of Port Stewart GmbH+Co. Kg of Germany

Name: Eugene J. O'Connor  
Address: 437 Madison Ave, NY, NY 10022  
Telephone number: 212 867-9500  
Facsimile Number: 212-599-1759