IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, v. THE WATCHMAKERS OF SWITZERLAND INFORMATION CENTER, INC., ET AL. Defendants.	Supplemental to Civil Action No. 96-170 Date: June 9, 2006 Civil Part I Judge

MEMORANDUM OF UNITED STATES IN RESPONSE TO JOINT MOTION OF AMERICAN WATCH ASSOCIATION, INC. AND FOOTE, CONE & BELDING, INC. FOR ORDER TERMINATING THE FINAL JUDGMENT ENTERED AGAINST AMERICAN WATCH ASSOCIATION, INC. AND THE FINAL JUDGMENT ENTERED AGAINST FOOTE, CONE & BELDING, INC.

Defendant American Watch Association, Inc. ("AWA") and Defendant Foote, Cone & Belding, Inc. ("Foote") have filed a joint motion to terminate both the Final Judgment entered against the AWA ("the AWA Final Judgment") and the Final Judgment entered against Foote ("the Foote Final Judgment") by this Court on March 9, 1960 in the above-captioned matter (collectively "the AWA and Foote Final Judgments"). The AWA and Foote Final Judgments are companion judgments to the Final Judgment entered in *United States v. The Watchmakers of Switzerland Information Center, Inc.*, Trade Reg. Rep. (CCH) ¶ 69,655 (S.D.N.Y. Mar. 9, 1960) ("the Watchmakers Final Judgment").

On February 28, 2006, one of the defendants to the Watchmakers Final Judgment, Rolex Watch U.S.A., Inc. ("Rolex") (successor in interest to defendant the American Rolex Watch Corporation), filed a motion to terminate the Watchmakers Final Judgment, and the United States filed a responsive memorandum tentatively consenting to such termination subject to public notice and an opportunity for public comment. The United States now also tentatively consents to termination of the AWA and Foote Final Judgments, subject to public notice and an opportunity for public comment. The 46 year-old AWA and Foote Final Judgments no longer serve the procompetitive purposes they were intended to serve, and their continued existence does not provide a public benefit. Termination of the AWA and Foote Final Judgments therefore is in the public interest.

I.
THE COMPLAINT AND RESULTING AWA AND FOOTE FINAL JUDGMENTS

The AWA and Foote Final Judgments (as well as the Watchmakers Final Judgment) arose out of a 1950s investigation of the anticompetitive practices of the Swiss watch industry, including Swiss watch manufacturers, Swiss trade associations, and their United States importers. The primary concern of the United States was the collective, cartel-like behavior of the watch companies, importers, and associations.

In 1954, the United States filed a complaint against more than 20 watch companies and associations, including the AWA and Foote. *United States v. The Watchmakers of Switzerland Information Center, Inc.*, Civil Action No. 96-170 (S.D.N.Y. Complaint filed Oct. 19, 1954).

The AWA is an association that promotes the growth and health of the U.S. watch industry and lobbies to influence regulatory policy. Its members include U.S. watch companies as well as U.S. subsidiaries of foreign watch manufacturers. Foote is an advertising agency that allegedly acted as an agent for some of the defendants.

The United States made several allegations in its complaint. It charged that certain Swiss and U.S. manufacturers and sellers of Swiss watches and watch parts engaged in a conspiracy to restrict, eliminate, and discourage the manufacture of watches and watch parts in the United States, and to restrain United States' imports and exports of watches and watch parts for manufacturing and repair purposes. *Id.* at ¶¶ 25-26. The United States also charged that these companies agreed to fix minimum prices for watches and maximum prices for repair parts, to regulate the use and distribution of watches and repair parts, and to boycott those who violated these restrictions. *Id.* at ¶ 26. The conspiracy came about through the adoption and enforcement of an agreement known as the Collective Convention of the Swiss Watch Industry. "The purpose of the Collective Convention was to protect, develop and stabilize the Swiss watch industry and to impede the growth of competitive watch industries outside of Switzerland." *United States v. The Watchmakers of Switzerland Information Center, Inc.*, 1963-1 Trade Cas. (CCH) ¶ 70,600, at 77,426 (S.D.N.Y. Dec. 20, 1962).

The AWA was named as a defendant in the Complaint because, as a trade association whose members included most of the defendant manufacturers and importers, there was concern that the AWA could aid the alleged conspiracy by policing members' conduct and influencing members to participate in the cartel.

Foote was named as a defendant in the Complaint, because as an advertising agency and an agent for some of the defendants, there was concern that Foote, similar to the AWA, was policing the alleged conspiracy and thus aiding the defendants in the enforcement of the cartel.

On March 9, 1960, prior to trial, the United States and the defendant importers named in the complaint agreed to enter into the Watchmakers Final Judgment in lieu of going to trial. *United States v. The Watchmakers of Switzerland Information Center, Inc.*, Trade Reg. Rep. (CCH) ¶ 69,655 (S.D.N.Y. Mar. 9, 1960). Also on March 9, 1960, the United States and Defendants AWA and Foote agreed to enter into the AWA Final Judgment and the Foote Final Judgment, respectively, in lieu of going to trial. *Id.* Most of the restrictions in the AWA and Foote Final Judgments prohibit conduct that each company, respectively, could have taken to facilitate the conspiracy.

II.
LEGAL STANDARDS APPLICABLE TO THE TERMINATION OF ANTITRUST FINAL JUDGMENTS WITH THE CONSENT OF THE UNITED STATES

This Court has jurisdiction to modify or terminate the AWA and Foote Final Judgments pursuant to Rule 60(b)(5) of the Federal Rules of Civil Procedure and the "principles inherent in the jurisdiction of the chancery." *United States v. Swift & Co.*, 286 U.S. 106, 114 (1932); *see also In re Grand Jury Proceedings*, 827 F.2d 868, 873 (2d Cir. 1987).

In addition, Section XII.C of the AWA Final Judgment and Section IX.B of the Foote Final Judgment provide that "[i]n any proceeding brought under [these Sections], the Court shall consider this Final Judgment [*i.e.*, the Watchmakers Final Judgment] in conjunction with the [AWA and Foote Final Judgments]; and any order entered in such proceeding may, in the

discretion of the Court, be applied also to such other Companion Final Judgments. . . ." Therefore, given that a motion to terminate the Watchmakers Final Judgment and a responsive memorandum consenting to such termination have already been filed with this Court,[1] it has jurisdiction, under Section XII.C of the AWA Final Judgment and Section IX.B of the Foote Final Judgment, to terminate the AWA and Foote Final Judgments.

Where, as here, the United States tentatively has consented to a proposed termination of a judgment, the issue before the Court is whether termination is in the public interest. *See, e.g.*, *United States v. Western Elec. Co.*, 993 F. 2d 1572, 1576 (D.C. Cir. 1993) ("*Western Elec. I*"), *cert. denied*, 510 U.S. 984 (1993); *United States v. Western Elec. Co.*, 900 F. 2d 283, 305 (D.C. Cir. 1990) ("*Western Elec. II*"), *cert. denied*, 498 U.S. 911 (1990); *United States v. Loew's, Inc.*, 783 F. Supp. 211, 213 (S.D.N.Y. 1992); *United States v. Columbia Artists Management, Inc.*, 662 F. Supp. 865, 869-70 (S.D.N.Y. 1987) (citing *United States v. Swift & Co.*, 1975-1 Trade Cas. (CCH) ¶60,201, at 65,702-03, 65,706 (N.D. Ill. 1975)); *cf. United States v. American Cyanamid Co.*, 556 F. Supp. 361, 367 (S.D.N.Y. 1983), *rev'd on other grounds*, 719 F.2d 558 (2d Cir. 1983). A District Court applies the same public interest standard in reviewing an initial consent judgment in a government antitrust case. *See* 15 U.S. C. § 16(e); *Western Elec. I*, 900 F.2d at 295; *United States v. AT&T*, 552 F. Supp. 131, 147 n.67 (D.D.C. 1982), *aff'd sub nom.*, *Maryland v. United States*, 406 U.S. 1001 (1983); *United States v. Radio Corp. of Am.*, 46 F. Supp. 654, 656 (D. Del. 1942), *appeal dismissed*, 318 U.S. 796 (1943).

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[1] *See* Rolex Watch U.S.A., Inc.'s Notice of Motion to Terminate Consent Decree and Memorandum in Support of Its Motion to Terminate Consent Decree, *United States v. The Watchmakers of Switzerland Information Center, Inc.*, Civ. Action No. 96-170 (S.D.N.Y. Feb. 28, 2006); *see also* Memorandum of the United States in Response to Motion of Rolex Watch U.S.A., Inc. for Order Terminating Final Judgment, *United States v. The Watchmakers of Switzerland Information Center, Inc.*, Supplemental to Civ. Action No. 96-170 (S.D.N.Y. Feb. 28, 2006).

It has long been recognized that the United States has broad discretion in settling antitrust litigation on terms that will best serve the public interest in competition. *See Sam Fox Publ'g Co. v. United States*, 366 U.S. 683, 689 (1961). The Court's role in determining whether the initial entry of a consent decree is in the public interest, absent a showing of abuse of discretion or a failure to discharge its duty on the part of the United States, is to determine whether the United States' explanation is reasoned, and not to substitute its own opinion. *United States v. Mid-America Dairymen, Inc.*, 1977-1 Trade Cas. (CCH) ¶ 61,508 at 71,980 (W.D. Mo. 1977); *see also United States v. Microsoft Corp.*, 56 F.3d 1448, 1461-62 (D.C. Cir. 1995); *United States v. Bechtel Corp.*, 648 F. 2d 660, 666 (9th Cir. 1981) (citing *United States v. National Broad. Co.*, 449 F. Supp. 1127, 1143 (C.D. Cal. 1978)); *United States v. Medical Mutual of Ohio*, 1999-1 Trade Cas. ¶ 72, 465 at 84,271 (N.D. Ohio 1999). The United States may reach any of a range of settlements that are consistent with the public interest. *See, e.g.*, *Microsoft*, 56 F.3d at 1461; *Western Elec. I*, 900 F.2d at 307-09; *Bechtel*, 648 F.2d at 665-66; *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975). The Court's role is to conduct a limited review to "insur[e] that the government has not breached its duty to the public in consenting to the decree," through malfeasance or by acting irrationally. *Bechtel*, 648 F.2d at 666; *see also Microsoft*, 56 F.3d at 1461 (examining whether "the remedies [obtained in the decree] were not so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest'").

Where the United States has offered a reasoned and reasonable explanation of why the termination vindicates the public interest in free and unfettered competition, and there is no showing of abuse of discretion or corruption affecting the United States' recommendation, the Court should accept the United States' conclusion concerning the appropriateness of termination.

III.
REASONS THE UNITED STATES TENTATIVELY CONSENTS TO TERMINATION OF THE AWA AND FOOTE FINAL JUDGMENTS

Under certain circumstances, termination of final judgments may be appropriate. The Second Circuit, in *United States v. Eastman Kodak Co.*, 63 F.3d 95 (2d Cir. 1995), recognized that significant changes in the factual or legal climate may justify consent decree termination. *Id.* at 102. The United States has consented to termination of final judgments where there have been significant changes in the industry such that the provisions of these final judgments were no longer necessary to maintain competition. *See, e.g., Eastman Kodak Co.*, 63 F.3d 95, 102 (2d Cir. 1995); *United States v. United Shoe Mach. Corp.*, 391 U.S. 244, 248 (1968). Such industry changes exist here.

A. Changes in the Watch Industry

The AWA and Foote Final Judgments have been in effect for 46 years. These five decades have seen tremendous changes in the watch industry, including regulatory changes affecting the Swiss watch industry, as well as significant technological changes that have dramatically changed the structure of the world-wide watch industry. These industry changes have led to a market that is no longer prone to the type of collusive conduct that the AWA and Foote Final Judgments sought to remedy.

The primary harm that the AWA and Foote Final Judgments sought to remedy was conduct by the AWA and Foote that could facilitate the collusive behavior of the Collective Convention. However, since entry of the AWA and Foote Final Judgments in 1960, the Swiss government promulgated regulations that changed the structure of the Swiss watch industry.

These regulations superseded much of the regulatory framework that guided the actions of the Swiss watch cartel and ultimately led to the dissolution of the Collective Convention.

In addition to these regulatory changes, there have been significant technological changes in the watch industry over the last 46 years. These technological changes included: (1) the development of the pin-lever movement, which was an inexpensive and longer-lasting alternative to the jeweled movements used in Swiss watches, and ultimately led to the mass production of inexpensive American watches; and (2) the development of quartz movements, which were much more accurate than the movements in Swiss watches, and ultimately led to significant entry by Asian firms into the United States. *See Time Marches On: The Worldwide Watch Industry*, 42 Thunderbird International Business Review 349-72 (2000).

During these years of significant technological development, the Swiss manufacturers typically produced more cumbersome and expensive mechanical watches that were less accurate time keeping devices. As a result, Swiss watch production decreased dramatically; and by the early 1990s, Switzerland produced just 6% of the worldwide supply of watches. *See id.* Accordingly, Switzerland is no longer considered to be the most dominant supplier of watches, as it was in 1954 when the United States filed its complaint. This, coupled with the dissolution of the Collective Convention, shows that watch manufacturing is no longer dominated by a Swiss cartel. United States watch consumers can buy a wide range of products from manufacturers across the globe – not just in Switzerland. *See id.*

B. The AWA Final Judgment Is No Longer Necessary

The restrictive provisions of the AWA Final Judgment were designed to prevent the AWA from engaging in conduct that could facilitate the collusive behavior of the Collective Convention. These provisions generally enjoin the AWA from:

> (1) aiding any agreement that would limit the exportation from or importation into the U.S. of watches or watch parts;
>
> (2) entering into any agreement that (a) limits the production, sale, or exportation from or importation into the U.S. of watches or watch parts; (b) fixes prices of watches or watch parts; and (c) has a refusal to deal with any person in the purchase or sale of watches or watch parts for shipment to, within, or from the U.S.;
>
> (3) (a) prohibiting any U.S. person from engaging in the production of watches or watch parts; and (b) preventing any person from dealing with any other person in the purchase, sale, or distribution of watches or watch parts;
>
> (4) (a) advising or seeking to induce any person to refrain from the production in, or export from or import into the U.S. of watches or watch parts; and (b) participating in any meeting for the purpose of furthering any activities inconsistent with any provision of the Watchmakers Final Judgment or the AWA Final Judgment;
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> (5) publishing or disseminating any information regarding sales in the U.S. of Swiss watches or retail prices of watches sold in the U.S; and
>
> (6) furthering or supporting any association which the AWA knows or should have known to be engaging in or furthering any activities contrary to any provision of the Watchmakers Final Judgment or the AWA Final Judgment.

These provisions, however, are no longer necessary to prevent anticompetitive conduct since the watch industry is no longer prone to the type of collusive conduct that the AWA Final Judgment sought to remedy. In addition, some of the provisions that restrict certain agreements duplicate existing antitrust laws that deem such agreements *per se* illegal.[2]

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[2] The presence of provisions in final judgments that duplicate existing antitrust laws is another factor that the United States examines in determining whether to consent to the termination of a final judgment.

C. The Foote Final Judgment Is No Longer Necessary

The restrictive provisions of the Foote Final Judgment, similar to the provisions of the AWA Final Judgment, were designed to prevent Foote, as an advertising agency and an agent of some of the defendants, from engaging in conduct that could facilitate the collusive behavior of the Collective Convention. These provisions generally enjoin Foote from:

> (1) entering into any agreement that (a) limits the production, sale, or exportation from or importation into the U.S. of watches or watch parts; (b) fixes prices of watches or watch parts; and (c) has a refusal to deal with any person in the purchase or sale of watches or watch parts;
>
> (2) (a) advertising on behalf of any association of Swiss manufacturers of watches which is designed to influence persons in the U.S. to purchase Swiss watches only through retail jewelers; and (b) furnishing on behalf of any association of Swiss manufacturers of watches advertising or promotional material to U.S. retail watch dealers on a basis which discriminates against any type or class of such dealers;
>
> (3) discriminating or retaliating against any defendant or any U.S. person because such person engaged in conduct specifically required under the Watchmakers Final Judgment or the Foote Final Judgment; and
>
> (4) disseminating (a) the type and volume of watches or watch parts manufactured, purchased, sold, or distributed by any specifically designated person in the U.S.; and (b) costs or prices for specific watches or watch parts sold in the U.S.

These provisions, like those in the AWA Final Judgment, are no longer necessary to prevent anticompetitive conduct since the watch industry is no longer prone to the type of collusive conduct that the Foote Final Judgment sought to remedy. In addition, some of the provisions that restrict certain agreements duplicate existing antitrust laws that deem such agreements *per se* illegal. *See supra* note 2.

D. Termination of the Watchmakers Final Judgment Compels Termination of the AWA and Foote Final Judgments

As previously indicated, Rolex has already filed a motion to terminate the Watchmakers Final Judgment, and the United States has filed a responsive memorandum consenting to such termination. *See supra* note 1. The Watchmakers Final Judgment restricts the conduct of some of the defendants who were thought to be the primary conspirators; however, there is no evidence that these primary conspirators are still part of an anticompetitive cartel engaging in coordinated activity, and they operate in an industry that is no longer prone to collusive conduct. The AWA and Foote Final Judgments restrict only the conduct of the AWA and Foote, which in 1960 were thought to be able to aid the primary conspirators by policing members' conduct and, at least with respect to the AWA, influence members to participate in the cartel. Accordingly, given that the United States supports termination of the Watchmakers Final Judgment, which restricts the conduct of the then-primary conspirators, it is reasonable for the United States to also support termination of the AWA and Foote Final Judgments which only restrict the conduct of two companies thought to be "aiders and abettors" to those primary conspirators.

E. Conclusion

The AWA and Foote Final Judgments (along with the Watchmakers Final Judgment) were designed to restore and maintain competition in an industry that, at the time, was prone to collusion. However, as a result of the above-described changes in the watch industry, including the dissolution of the Collective Convention and significant technological changes that have led to the entry of many more watch manufacturers, the United States watch industry no longer is prone to the type of collusive conduct that was addressed by the AWA and Foote Final Judgments. These industry changes suggest that the AWA and Foote Final Judgments are no

longer serving the procompetitive purposes that they were initially designed to serve, and their continued existence does not provide a public benefit. Therefore, the United States believes that termination of the AWA and Foote Final Judgments would be in the public interest and tentatively consents to such termination.

IV.
PROPOSED PROCEDURES FOR GIVING PUBLIC NOTICE OF THE PENDING MOTION AND INVITING COMMENT THEREON

The opinion in *United States v. Swift & Co.* articulated a court's responsibility to implement procedures that will give non-parties notice of, and an opportunity to comment upon, antitrust judgment modifications proposed by consent of the parties:

> Cognizant . . . of the public interest in competitive economic activity, established chancery powers and duties, and the occasional fallibility of the Government, the court is, at the very least, obligated to ensure that the public, and all interested parties, have received adequate notice of the proposed modification. . . .

1975-1 Trade Cas. (CCH) ¶ 60,201, at 65,703 (N.D. Ill. 1975) (footnote omitted).

It is the policy of the United States to consent to motions to terminate judgments in antitrust actions only on condition that an appropriate effort be undertaken to notify potentially interested persons of the pendency of the motion. In this case, the United States has proposed, and the AWA and Foote have agreed to, the following:

1. The United States will publish in the Federal Register a notice announcing the joint motion of the AWA and Foote to terminate the AWA and Foote Final Judgments and the United States' tentative consent to it, summarizing the Complaint and the AWA and Foote Final Judgments, describing the procedures for inspecting and obtaining copies of relevant papers, and

inviting the submission of comments. This published notice will provide for public comment during the sixty (60) days following its publication.

2. Given that the AWA and Foote Final Judgments are companion judgments to the Watchmakers Final Judgment, the notice published by Rolex in The Wall Street Journal on April 6 and 7, 2006 and in the April 2006 issues of Modern Jeweler and Professional Jeweler in connection with the proposed termination of the Watchmakers Final Judgment serves as notice that the United States usually requires a defendant to publish, because such notice was recently published and was sufficiently broad to notify interested parties of the termination of both the Watchmakers Final Judgment and the AWA and Foote Final Judgments.

3. Within a reasonable period of time after the conclusion of the sixty-day period following publication of notice in the Federal Register, the United States will file with the Court copies of any comments that it receives and its response to those comments.

4. The parties request that the Court not rule upon the Motion to Terminate for at least seventy (70) days after the publication of the notice described above, *i.e.*, for at least ten (10) days after the close of the period for public comment, and the United States reserves the right to withdraw its consent to the motion at any time prior to entry of an order terminating the AWA and Foote Final Judgments.

This procedure is designed to notify all potentially interested persons that a motion to terminate the AWA and Foote Final Judgments is pending and provide them adequate opportunity to comment thereon. Both the AWA and Foote have agreed to this procedure. The parties therefore submit herewith to the Court a separate order establishing this procedural approach and request that the Court enter this order promptly.

V.
CONCLUSION

For all the foregoing reasons, the United States tentatively consents to the termination of the AWA and Foote Final Judgments.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of June, 2006, I caused a copy of the foregoing Memorandum of United States in Response to Joint Motion of American Watch Association, Inc. ("AWA") and Foote, Cone & Belding, Inc. ("Foote") for Order Terminating the Final Judgment Entered Against AWA and the Final Judgment Entered Against Foote as well as the foregoing Stipulation to be served on Defendants AWA and Foote at the addresses given below:

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