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: February 28, 2006 Civil Part I Judge

MEMORANDUM OF UNITED STATES IN RESPONSE TO MOTION OF ROLEX WATCH U.S.A., INC. FOR ORDER TERMINATING FINAL JUDGMENT

Defendant Rolex Watch U.S.A., Inc. ("Rolex"), successor in interest to Defendant the American Rolex Watch Corporation, has filed a motion to terminate the Final Judgment entered by this Court on March 9, 1960 in the above-captioned matter ("Final Judgment"). The United States has tentatively consented to termination of the Final Judgment, subject to public notice and an opportunity for public comment, because the forty-five-year-old Final Judgment no longer serves the procompetitive purpose it was intended to serve, and its continued existence does not provide a public benefit. Termination of the Final Judgment, as to all defendants, therefore is in the public interest.

I.
THE COMPLAINT AND RESULTING FINAL JUDGMENT

The 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 United States was the collective, cartel-like behavior of the watch companies, importers, and associations.

The United States filed a complaint against more than twenty watch companies and trade associations in 1954, including the American Rolex Watch Corporation (now known as Rolex). *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 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, regulate the use and distribution of watches and repair parts, and 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).

On March 9, 1960, prior to trial, the United States and the defendant importers named in the complaint, including Rolex,[1] agreed to enter into the Final Judgment in lieu of going to trial.[2] *United States v. The Watchmakers of Switzerland Information Center, Inc.*, Trade Reg. Rep. (CCH) ¶ 69,655 (S.D.N.Y. Mar. 9, 1960).

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

This Court has jurisdiction to modify or terminate the Final Judgment pursuant to Section XI.A of the Final Judgment, Rule 60(b)(5) of the Federal Rules of Civil Procedure, and "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).

[1] Rolex is the United States importer for Montres Rolex, S.A. ("Montres Rolex"), which also was named as a defendant in the complaint. Montres Rolex was dismissed voluntarily by the government and was not a party to the Final Judgment or the trial that followed for the remaining defendants.

[2] Several other defendants opted to proceed to trial rather than enter into the Final Judgment. These defendants consisted of watch/watch parts manufacturers and trade associations, many of which, but not all, were Swiss companies or organizations. In its findings of fact, issued in 1962 against the defendants that went to trial, this Court held that many of the practices authorized by the Collective Convention amounted to a combination and conspiracy to unreasonably restrain the importation, exportation, manufacture, and sale of watches and watch parts in the United States in violation of Section 1 of the Sherman Act. *Id.* at 77,456. The parties were ordered to enter into a decree embodying the court's findings of fact and conclusions of law. *Id.* at 77,457. This final judgment was signed by the court on February 4, 1965 and enjoined the defendant manufacturers and associations (not Rolex, because it was a party to the Final Judgment) from performing contracts in furtherance of the Collective Convention or from restricting another's importation, exportation, sale, or use of watches and watch parts in the United States.

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).

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 FINAL JUDGMENT

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, and/or the antitrust laws have changed such that conduct that was deemed *per se* illegal at the time these final judgments were entered, and was prohibited under these final judgments, is now analyzed under the rule of reason. *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). Both these circumstances exist here.

A. Changes in the Watch Industry

The Final Judgment has been in effect for about forty-five years. These 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 Final Judgment sought to remedy.

The primary harm that the Final Judgment sought to remedy was cartel behavior led by Swiss industry organizations that utilized an agreement known as the Collective Convention. However, since entry of the Final Judgment 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 forty-five years. These technological changes started in 1947 with the development of the pin-lever movement, which was an inexpensive and longer-lasting alternative to the jeweled movements used in Swiss watches. The development of the pin-lever movement ultimately led to the mass production of inexpensive American watches, such as

Timex. These American watches increased in popularity, and by 1970, Timex was reputed to be the world's largest watch producer in terms of unit volume. *See Time Marches On: The Worldwide Watch Industry*, 42 Thunderbird International Business Review 349-72 (2000).

Another technological development occurred in 1971 when Bulova introduced the first American-made quartz crystal movement wristwatch. The introduction of quartz movements to the market was significant, because such movements were much more accurate than the movements in Swiss watches. *Id.*

Quartz technology was also used by Japanese firms. By 1968, Seiko began selling quartz watches, and shortly thereafter, led the Japanese entry into the United States. Additional entry into the United States by other Asian watch manufacturers followed, and by the early 1980s, Hong Kong had become the number one watch producer, by volume, in the world. *See id.*

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, during the 1970s, Swiss watch imports into the United States decreased by 40%. By the early 1980s, Swiss watch production hit an all-time low and, in 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.* In addition, some of the defendants named in the Final Judgment no longer exist.[3]

B. The Final Judgment Is No Longer Necessary

Most of the provisions in the Final Judgment are aimed at eliminating the cartel behavior of the Collective Convention and restoring and maintaining competition. These provisions generally prohibit agreements among defendant-importers and watch or watch part manufacturers (1) to limit watch or watch part production; (2) to fix prices or other terms or conditions of sale; or (3) to refuse to deal. Such provisions, however, duplicate existing antitrust laws that deem such agreements *per se* illegal, and are no longer necessary to prevent anticompetitive conduct since the watch industry is no longer prone to the type of collusive conduct that the Final Judgment sought to remedy.[4]

Some of the other provisions in the Final Judgment prohibit certain vertical restraints. This prohibition on vertical restraints may have been justified in 1960 as a means of preventing restrictions on watch part distribution, which, at the time, may have facilitated coordinated conduct by limiting the availability of watch parts for use in the manufacture and repair of rival watches. However, prohibitions on such restraints are unnecessary today since the watch industry is no longer dominated by a Swiss cartel. Moreover, these prohibitions on vertical restraints may have the unintended anticompetitive effect of raising distribution costs for watches and watch parts, and impede defendants' ability to enforce intellectual property rights.

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[3] It appears that four of the defendants subject to the Final Judgment – Eterna Watch Co. of America, Inc., Jean R. Graef, Inc., Wyler Watch Corporation, and Rodana Watch Company, Inc. – are now inactive in the United States.

[4] 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. Changes in the Antitrust Laws

The antitrust laws have changed significantly since entry of the Final Judgment. As previously indicated, the Final Judgment prohibits certain defendants from imposing price and use restrictions on watch distributors or watch repairers. In 1960, these sorts of restraints most likely would not have been analyzed under the rule of reason, and were more likely to be considered *per se* illegal. Today, however, these types of vertical restraints would be analyzed under the rule of reason, because they can offer some procompetitive benefit to the marketplace. For example, since the entry of the Final Judgment, the Supreme Court, in *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 51-52 (1977), refused to extend the *per se* rule, which was applied to vertical price restraints, to vertical non-price restraints, holding that they should be subject to the rule of reason. In *State Oil Co. v. Khan*, 522 U.S. 3, 15-18 (1997), the Supreme Court held that maximum resale price controls were not to be treated as *per se* illegal, but rather were to be analyzed under the rule of reason.

D. Conclusion

The Final Judgment was 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 is no longer prone to the type of collusive conduct that was addressed by the Final Judgment. These industry changes, together with significant changes in the application of the antitrust laws over the last forty-five years, suggest that the Final Judgment is no longer serving the procompetitive purpose that it was initially designed to serve, and its continued

existence does not provide a public benefit.[5] Therefore, the United States believes that termination of the Final Judgment 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 Rolex has agreed to, the following:

1. The United States will publish in the Federal Register a notice announcing the motion of Rolex to terminate the Final Judgment and the United States' tentative consent to it,

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[5] Nonetheless, until the Final Judgment is terminated, Rolex is required to abide by its terms. After an investigation of Rolex's repair parts policies, the United States concluded that Rolex was not abiding by the terms of the Final Judgment, and thus was in civil contempt, since about 1996. Accordingly, in a related filing, the United States petitioned this Court for an Order to Show Cause Why Defendant Rolex Watch U.S.A., Inc. Should Not be Found in Civil Contempt and for entry of a Settlement Agreement and Order requiring Rolex to pay $750,000 to the United States.

summarizing the Complaint and Final Judgment, describing the procedures for inspecting and obtaining copies of relevant papers, and inviting the submission of comments.

2. Rolex will publish, at its own expense, notice of its motion in two consecutive issues of The Wall Street Journal and simultaneous publication in Modern Jeweler and Professional Jeweler – both of which are monthly journals. These periodicals are likely to be read by persons interested in the markets affected by the Final Judgment. The published notices will provide for public comment during the sixty (60) days following publication of the last notice.

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

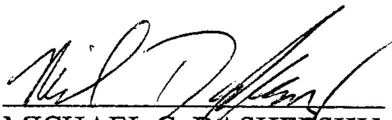
4. The parties request that the Court not rule upon the Motion to Terminate for at least seventy (70) days after the last publication of the notices described above, *i.e.*, for at least ten (10) days after the close of the period for public comment, and the United States reserves the right to withdraw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

This procedure is designed to notify all potentially interested persons that a motion to terminate the Final Judgment is pending and provide them adequate opportunity to comment thereon. Rolex has agreed to follow this procedure, including publication of the appropriate notices. 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 Final Judgment.

Respectfully submitted,



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