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: January 12, 2007 Civil Part I Judge

RESPONSE OF UNITED STATES TO PUBLIC COMMENTS

The United States hereby responds to the comments received from the public regarding the proposed termination of the Final Judgment entered by this Court on March 9, 1960 in the above-captioned matter ("Final Judgment"). The United States now consents to termination of the Final Judgment. None of the comments raised issues that would cause the United States to revoke its tentative consent to terminate the Final Judgment, which it articulated in its memorandum in response to Rolex Watch U.S.A., Inc.'s ("Rolex's") termination motion filed with this Court on February 28, 2006.[1]

[1] *See* Memorandum of 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) (hereinafter "Memorandum of United States Regarding Termination").

I. BACKGROUND

A. Reasons the United States Consents to Termination of the Final Judgment

The United States tentatively consented to termination of the Final Judgment,[2] subject to public notice and an opportunity for public comment, because the 46-year-old Final Judgment is no longer serving the procompetitive purpose it was intended to serve, and its continued existence does not provide a public benefit.[3]

The primary harm that the Final Judgment sought to remedy – cartel behavior by Swiss watch companies through an agreement known as the Collective Convention – no longer exists. The Collective Convention is gone, and there are hundreds of competitors. The ability of these competitors to collude successfully is extremely limited. It is unlikely that these hundreds of competitors could (i) reach agreements on standard terms and conditions, (ii) effectively monitor deviations from those terms, and (iii) be able to inflict punishment for deviations. In addition, recent changes substantially increasing criminal penalties for antitrust violations both in terms of potential jail sentences and amount of fines for such cartel behavior will serve to deter future cartel behavior.

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[2] In a related filing, the United States also tentatively consented, subject to public notice and an opportunity for public comment, to termination of two companion judgments to the Final Judgment – the American Watch Association, Inc. Companion Judgment and the Foote, Cone & Belding, Inc. Companion Judgment. *See* 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., *United States v. The Watchmakers of Switzerland Information Center, Inc.*, Supplemental to Civ. Action No. 96-170 (S.D.N.Y. June 9, 2006).

[3] *See* Memorandum of United States Regarding Termination at 5-10.

Furthermore, as often happens with decrees numerous decades old, several of the Final Judgment's restrictions simply are not consistent with promoting consumer welfare. For example, the Final Judgment prohibits the defendants from imposing certain price and use restrictions on watch distributors or watch repairers. In 1960, these sorts of restraints most likely would have been considered *per se* illegal. Today, however, these types of vertical restraints frequently are known to offer procompetitive benefits to the marketplace and consumers. This decree should not prevent consumers from reaping those benefits.

B. The Comments Received by the United States

Defendant Rolex, successor-in-interest to Defendant The American Rolex Watch Corporation, published a notice in The Wall Street Journal, Modern Jeweler, and Professional Jeweler, and the United States published a notice in the Federal Register, inviting the submission of comments on the termination of the Final Judgment. The 60-day public comment period ended on June 12, 2006. The United States received 148 comments. Copies of these comments are attached hereto as Exhibit 1. Of the 148 comments received, 108 of them were identical form letters submitted by members of the International Watch and Jewelry Guild, a central exchange, with about 4,400 members, used for buying, selling, and trading timepieces and jewelry.

Of the 148 comments that the United States received, the vast majority were submitted by independent (not employed by any watch manufacturer) watchmakers, who make a living by

repairing and servicing watches.[4] These comments generally made one or more of the following claims:

> (1) The Swiss watch manufacturers still dominate the watch industry, particularly in the production and sale of luxury watches, and thus the Final Judgment is needed to counter this alleged dominance;
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> (2) The Swiss watch manufacturers still function like a cartel by operating in "groups," and thus the Final Judgment is still needed to prevent this cartel behavior; and
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> (3) The Final Judgment is still necessary, because its termination would adversely affect the ability of independent watchmakers to obtain repair parts from watch manufacturers.

II. LEGAL STANDARD GOVERNING THE COURT'S PUBLIC INTEREST DETERMINATION

This Court has jurisdiction to terminate the Final Judgment. Section XI(A) of the Final Judgment provides for the Court's ongoing jurisdiction "for the amendment or modification of any of the provisions [of the Final Judgment] in the event that the existing business structure or functions of any defendant signatory or the administrative structure of the Swiss watch industry agreement know as the Collective Convention shall substantially change or in the event of any substantial change in economic conditions affecting the horological industry in the United States or Switzerland." Furthermore, "the power of a court of equity to modify an injunction in adaptation to changed conditions" is "inherent in the jurisdiction of the chancery." *United States v. Swift & Co.*, 286 U.S. 106, 114 (1932). Under Rule 60(b)(5) of the Federal Rules of Civil Procedure, "[o]n motion and upon terms as are just, the court may relieve a party . . . from

[4] In addition to repairing and servicing watches, some independent watchmakers also customize watches. This usually involves enhancing the watch by adding gold and/or precious gems, like diamonds, to the watch.

a final judgment . . . [when] it is no longer equitable that the judgment should have prospective application." *See also United States v. International Business Machines Corp.*, 163 F.3d 737 (2d Cir. 1998) ("*IBM*") (affirming grant of joint motion by United States and defendant to terminate antitrust consent decree).

Where, as here, the United States consents to termination of some or all of the provisions of an antitrust judgment, the issue before the court is whether such termination is in the public interest. *IBM*, 163 F.3d at 740; *United States v. Am. Cyanamid Co.*, 719 F.2d 558, 565 (2d Cir. 1983)*; United States v. Loew's Inc.*, 783 F. Supp. 211, 213 (S.D.N.Y. 1992); *United States v. Columbia Artists Mgmt., Inc.*, 662 F. Supp. 865, 869-70 (S.D.N.Y. 1987).[5] Exercising "judicial supervision," *IBM*, 163 F.3d at 740, the court should approve a consensual decree termination where the United States has provided a reasonable explanation to support the conclusion that termination is consistent with the public interest. *Loew's*, 783 F. Supp. at 214. *See also United States v. Western Elec. Co.*, 900 F.2d 283, 307 (D.C. Cir. 1990) (public interest test applies to a termination of decree restrictions with assent of all parties to a decree; district court should approve an uncontested termination "so long as the resulting array of rights and obligations is within the zone of settlements consonant with the public interest today"); *United States v. Western Elec. Co.*, 993 F.2d 1572, 1576-77 (D.C. Cir. 1993) (under the "deferential" public interest test, the court should accept a consensual termination of decree restrictions that the Department of Justice "reasonably regarded as advancing the public interest;" it is "not up to the court to reject an agreed-on change simply because the proposal diverge[s] from *its* view of the

[5] The Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) (the "Tunney Act"), by its terms applies only to the approval of consent decrees.

public interest;" rather, the court "may reject an uncontested modification only if it has exceptional confidence that adverse antitrust consequences will result").

The "public interest" standard takes its meaning from the purposes of the antitrust laws. *IBM*, 163 F.3d at 740; *Am. Cyanamid*, 719 F.2d at 565. As the Court of Appeals has emphasized, "[t]he purpose of the [Sherman] Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market," *IBM*, 163 F.3d at 741-42 (alteration in original) (quoting *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993)). The purpose of an antitrust decree is to remedy and prevent the recurrence of the violation alleged in the complaint. Where the government has consented to termination, the focus is on whether there is a "*likelihood* of potential future violation, rather than the mere *possibility* of a violation." *IBM*, 163 F.3d at 742 (emphasis added). In this context, if the government reasonably explains why there is "no current need for" the constraints imposed by a decree, termination will serve "the public interest in 'free and unfettered competition as the rule of trade,'" *Loew's*, 783 F. Supp. at 213, 214 (S.D.N.Y. 1992) (quoting *N. Pac. Ry. v. United States*, 356 U.S. 1, 4 (1958)). Obsolete decrees are worse than unnecessary; they may themselves have anticompetitive effects, burdening the parties, the courts, and the competitive process. *See, e.g.*, *IBM*, 163 F. 3d at 740; *Loew's*, 783 F. Supp. at 214. Where the United States and the defendants jointly seek termination long after entry of a decree that has no termination date, it is reasonable to presume that the violation has long since ceased and that competitive conditions were adequately restored. Thus, for example, the Second Circuit affirmed termination of the *IBM* decree under the public interest standard because there was no longer any material threat of antitrust violations absent the decree restrictions and because the decree "resulted in artificial restraints . . . which do not further the cause of healthy competition." *IBM*, 163 F.3d at 740.

Termination of an antitrust decree, of course, leaves the parties "fully subject to the antitrust laws of general application." *Loew's*, 783 F. Supp at 214.

III. SUMMARY OF PUBLIC COMMENTS AND THE UNITED STATES' RESPONSE

Termination of the Final Judgment is plainly in the public interest. The United States' extensive experience with the enforcement of the antitrust laws has shown that, as a general matter, industries evolve and change over time in response to competitive and technological forces. In most situations, the passage of many decades results in significant industry change that renders the rigid prohibitions placed many years before in consent decrees either irrelevant to the parties' ongoing compliance with the antitrust laws, or an affirmative impediment to the kind of adaptation to change that is a hallmark of the competitive process.

These considerations, among others, led the Antitrust Division in 1979 to establish a policy of including in every consent decree a so-called "sunset provision" that, except in exceptional cases, would result in the decree's automatic termination after no more than ten years.[6] As a result of the Division's consistent adherence to this policy, the only antitrust consent decrees to which the United States is a party that remain in effect are those entered within the past ten years, or before 1979 when the "sunset" policy was adopted. The Division has encouraged parties to old decrees to seek the Division's consent to their termination, especially where they contain provisions that may be restricting competition. *See* U.S.

[6] *Antitrust Division Manual*, § IV.E.d.2. (1998 ed.). This change in policy followed Congress' 1974 amendment of the Sherman Act to make violations a felony, punishable by substantial fines and jail sentences. With these enhanced penalties for *per se* violations of the antitrust laws, the Division concluded that antitrust recidivists could be deterred more effectively by a successful criminal prosecution under the Sherman Act than by a criminal contempt proceeding under provisions of an old consent decree aimed at preventing a recurrence of price-fixing and other hard-core antitrust violations. *United States v. Columbia Artists Mgmt., Inc.*, 662 F. Supp. 865, 867 (S.D.N.Y. 1987).

Department of Justice, Antitrust Division, DOJ Bull. No. 1984-04, *Statement of Policy by the Antitrust Division Regarding Enforcement of Permanent Injunctions Entered in Government Antitrust Cases* (hereinafter, "DOJ Policy Regarding Decree Enforcement"); and U.S. Department of Justice Press Release, *New Protocol to Expedite Review Process for Terminating or Modifying Older Antitrust Decrees* (Apr. 13, 1999) (hereinafter, "New DOJ Decree Termination Protocol").[7]

After further investigation and analysis, the United States has determined that the concerns expressed in the comments do not warrant revoking the United States' tentative consent to terminate the Final Judgment.

A. Watchmakers' Concerns about Alleged Continued Dominance of Swiss Watch Manufacturers

The main concern expressed in the public comments was that termination of the decree is not appropriate because the watch market or a segment of that market is "dominated" by the parties to the decree.

Some representative comments expressing this notion stated:

> In 1960 the Swiss watch industry controlled 54% of the watches sold in the United States which represented 99% of the luxury watch market. . . . While today, the Swiss watch industry only controls 6% of the watches sold in the Unites States, that figure continues to **represent 99% of the luxury watch market**. . . . [T]he need for anti-trust legislation to protect both American consumers and American watchmakers is equally important today as it was in 1960 since the Swiss watch industry dominates the luxury market.

[7] In addition, in the early 1980s, the Division conducted its own review of over 1,200 old consent decrees then in effect to ensure that none "hinder[ed] . . . competition" or "reflect[ed] erroneous economic analysis and thus produce[d] continuing anticompetitive effects." The Honorable William French Smith, Attorney General of the United States, *Remarks at the Annual Meeting of the District of Columbia Bar* (June 24, 1981), at 11. Although that effort was necessarily constrained by the Division's limited resources and other enforcement priorities, it did lead to the termination of several decrees that at the time appeared most problematic. *See Department of Justice Authorization for Fiscal Year 1984 Before the Subcommittee on Monopolies & Commercial Law Committee on the Judiciary*, 98th Cong. 16 (1983) (statement of William F. Baxter, Assistant Attorney General, Antitrust Division).

Comment submitted by 108 members of the International Watch and Jewelry Guild dated May 30, 2006 (emphasis in original).

> [O]f the 47 top watch brands in the US market, 45 of the companies are of Swiss origin. I equate this to TOTAL MARKET DOMINATION of the Luxury Watch Market.

Comment of Gerald A. Wilson dated June 5, 2006 (emphasis in original).

These allegations are not supported by the facts and do not present a basis for reconsidering the recommendation to terminate the Final Judgment. The United States first notes that these concerns are not relevant to termination of the decree. The main purpose of the decree was to prevent cartel behavior, not to address concerns regarding dominance of a particular nationality in an industry. Even more importantly, the antitrust laws do not and should not treat independent competitors, even if from one particular geographic area of the globe, as a single entity. Antitrust analysis looks to single-firm behavior and cartel behavior among groups of firms, not nationality groupings, as the basis of analysis.

Furthermore, even if one granted such misguided notions of nationality groupings for purposes of analysis, the comments are not well-founded.

1. There Is Significant Competition in the Overall Watch Industry.

Contrary to what these comments might suggest, Swiss watch manufacturers do not currently dominate the overall watch industry. During the last 46 years, significant technological changes in the watch industry have led to dramatic improvements in watches manufactured all over the world. These technological improvements, in turn, have led to an expansion in the number of watch manufacturers in the United States.[8] Over the same time period, Swiss watch

[8] Contrary to the suggestion of some comments, there are several U.S. headquartered watch manufacturers, including Timex Corp., Bulova Corp., Austern & Paul, Inc., Yurman Design, Inc., The Bozeman Watch Co., LLC., and Fossil, Inc. *See* Directory of Corporate Affiliations and Incorporation Library, Lexis/Nexis, at www.lexis.com; *see also* Comment of Charles Peck dated May 12, 2006 ("And there is no longer any domestic competition in the

manufacturers typically produced more cumbersome and expensive mechanical watches that were less accurate. As a result, Swiss watch imports into the United States have decreased dramatically over the last 46 years.[9]

Today, there is significant competition across the entire spectrum of the U.S. watch market. In fact, a recent article submitted along with one of the comments supports this notion:

> With relatively small investment required to enter the U.S. watch market, more than 300 brands. . . . compete for retail real estate and consumer recognition. The challenge of breaking out of the pack is considerable. . . . In order to remain competitive, brand managers must stay on top of which products are selling, and figure out ways to achieve product differentiation in an increasingly crowded market.

2006 Category Analysis: Luxury Watches, *U.S. Fine Watch Market Tilts Toward High End in 2005* at 14 (submitted with Comment of Gerald A. Wilson dated June 5, 2006).

2. There Is Significant Competition Even in the Luxury[10] Watch Segment.

In spite of this evidence of competition in today's U.S. watch industry, some of the comments asserted that the Final Judgment should remain in effect because the Swiss parties still "dominate" some segment of the market, since most of the higher-priced watches sold in the United States are Swiss. Such comments have little merit, however, because they mistakenly ignore the numerous non-Swiss luxury watch producers.

U.S."); Comment of David Quackenbush dated May 15, 2006 ("As you might be aware there ha[ve] not been any watches manufactured in the United States since Bulova and Timex moved their manufacturing facilities to the Philippines and Japan. This was done in the 60s and 70s"). This latter comment does not actually state that there are no U.S.-based watch manufacturers, but rather that some U.S. companies manufacture their watches abroad. However, many U.S. companies out-source their manufacturing, and doing so does not make them any less of a U.S. entity.

[9] *See* Memorandum of United States Regarding Termination at 6-8 (citing *Time Marches On: The Worldwide Watch Industry*, 42 Thunderbird International Business Review 349-72 (2000)).

[10] The United States refers to such a segment of the watch industry only because it was mentioned in several comments, but in doing so makes no representation that this luxury segment of the industry constitutes a relevant product market for antitrust purposes.

Numerous luxury watch manufacturers exist outside of Switzerland, in countries like Germany, Italy, France, Japan, the Netherlands, and the United States. In Exhibit 2, attached hereto, we have provided a list of 30 non-Swiss firms that produce luxury watches.[11] Such a large number of non-Swiss luxury watch producers makes it extremely unlikely that all, or any group of, Swiss luxury watch producers could act collectively to stifle competition, as any attempt to do so would most likely be thwarted by the competitive response of non-Swiss producers.

B. Watchmakers' Concerns about Alleged Cartel Behavior of Swiss Watch Manufacturers

Some of the public comments expressed concern that the Swiss watch manufacturers still function like a cartel by operating as "groups" that can restrict output. For example:

> We have a very hard time as it is getting spare parts for luxury brands. The Swiss have formed "Groups" instead of the former "Cartels".

Comment of Jon Horton dated May 12, 2006.

> The "Swiss Cartel," as it was known, may not exist today in name only. The common business practices of today's Swiss Watch Groups, who work together, produces the same result of the illegal Cartel from earlier decades. The companies may have changed their names to "Groups," but what was against the law in 1960 is still illegal today.

Comment of Anthony Ambruso dated May 26, 2006.

> While the Swiss Cartel would have you believe that the situation regarding the distribution of spare parts has changed dramatically in the last 40 years I truly believe that the exact opposite is true. There were many <u>independent</u> watch companies back then and more competition. Today many of the old companies are held together as part of a "group." This arrangement gives them more control over the spare parts that are of the utmost importance to the independent watchmaker.

[11] The list in Exhibit 2 is not provided as an exhaustive list, but rather to demonstrate the significant number of non-Swiss luxury watch (*i.e.*, watches costing at least $1,000) producers that exist today.

Comment of Richard Rogers dated June 5, 2006.

Statements like these, opposing termination of the Final Judgment because the Swiss watch manufacturers can still coordinate their conduct by forming "groups" that mimic the cartel behavior that once existed, are not supported. Most significantly, in considering whether to support termination of this consent decree, the United States concluded that cartel activity, whether in the form of "groups" or otherwise, was not occurring in this industry. The United States would not consent to decree termination if the provisions of the decree prohibiting cartel activity were being violated.

First, the Collective Convention, which was the agreement that spawned and facilitated the cartel behavior within the Swiss watch industry in the 1950s and 1960s, has been dissolved. Since 1960, the Swiss government promulgated regulations that superseded much of the regulatory framework guiding the actions of the Swiss watch cartel and ultimately led to the dissolution of the Collective Convention.[12] Second, there are now at least 100 Swiss watch manufacturers.[13] Such a large number of competitors in Switzerland alone makes it virtually impossible to form and maintain the kind of agreement that the comments allege. A review of an article submitted along with one of the comments reveals that, even in the category of watches priced over $1,500, there are at least 13 Swiss companies that compete. *See* 2006 Category Analysis: Luxury Watches, *U.S. Fine Watch Market Tilts Toward High End in 2005* at 14

[12] *See* Memorandum of United States Regarding Termination at 2-3, 6.

[13] *See* http://www.fhs.ch/en/addresses.php?list=39. The list on this website actually indicates that there are about 200 Swiss watch producers. However, further research indicated that some of the companies listed on this website have the same parent entity. Nonetheless, there are still at least 100 independent Swiss watch producers. *See The U.S. Market for Watches and Clocks*, Packaged Facts, Feb. 2004, at 82–9.

(submitted with Comment of Gerald A. Wilson dated June 5, 2006).[14] Even in a hypothetical luxury segment of the watch industry, the large number of competitors makes it very unlikely that such companies could maintain (without government support) a stable, effective, and dominant cartel, which is the primary conduct that the Final Judgment was intended to prevent. The very large number of Swiss watch manufacturers that operate today, as well as the termination of the Collective Convention, which ended the cartel that once existed, have made it extraordinarily unlikely that any type of anticompetitive, coordinated conduct would now occur in Switzerland, notwithstanding the bald assertions of the formation of anticompetitive "groups" as stated in some of the comments.

C. Watchmakers' Concerns about Their Ability To Obtain Watch Parts

Another concern expressed by independent watchmakers in the public comments was that termination of the Final Judgment would adversely affect their ability to obtain repair parts from Swiss watch manufacturers.[15]

For example, some comments provided:

> By rescinding the 1960 decree the Swiss watch factories would be under no obligation to supply parts to local American craftsman to service [Swiss-made] watches and the consumer would be forced to ship their watches to a few factory service centers set up across the country.

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[14] This article indicates that there are 17 Swiss companies that compete in the category of watches priced over $1,500. However, because several of them are owned by the same entities, the actual number of independently owned Swiss companies in this category is 13.

[15] While virtually all of the comments submitted came from watchmakers voicing their opposition to the proposed termination of the Final Judgment, many watchmakers do not oppose termination. For example, the Board of Directors for the American Watchmakers and Clockmakers Institute ("AWCI"), a trade organization representing over 3,000 watchmakers and clockmakers, does not oppose termination of the Final Judgment. In a letter on its website, the AWCI Board of Directors correctly indicates that the current limitations that exist with respect to the availability of watch parts from watch manufacturers will not be exacerbated if the Final Judgment is terminated and that "changes in antitrust law, and. . . . changes in the actual market share the Swiss manufacturers control. . . . give the DOJ solid legal grounds for termination of the [Final Judgment]." Letter from AWCI Board of Directors on AWCI website at http://www.awci.com/documents/AWCIBOARDRESPONSEDOJandROLEX.pdf.

Comment submitted by 108 members of the International Watch and Jewelry Guild dated May 30, 2006.

> If the decree is rescinded the Rolex Watch Company will pay a small insignificant fine but the American consumer and the American Watchmaker will pay a much higher price. Once you release them from their obligations to supply replacement parts to service watches they will gradually stop supplying them.

Comment of Christina LeDoux dated May 30, 2006.[16]

> It's important that this decree be retained intact and without compromise. . . . American watchmakers rely on the repair and restoration of finer timepieces as a staple to their business. Denying access to parts for these repairs will begin a quickly declining spiral down, until the point where no American watchmaker can remain in business at all.

Comment of Barbara D. Williams dated May 25, 2006.

In addition, some of the comments simply expressed concerns about the inability to obtain watch parts, but did not clearly articulate how these concerns were related to termination of the Final Judgment.[17] For example:

> I am in the secondary watch market and find that the Swiss companies as a whole are not willing to sell the parts necessary to repair the watches, that they sell here in the US, to anyone but Authorized Service Centers.

Comment of David Fetz dated June 1, 2006.

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[16] Ms. LeDoux's comment was submitted as a cover letter to the comments submitted by members of the International Watch and Jewelry Guild.

[17] Other comments discussed issues that were not only unrelated to termination of the Final Judgment, but involved issues that are beyond the control of the Antitrust Division. For example, some of the comments expressed concern about the United States entering into a free trade agreement with Switzerland and requested that if the United States were to enter into such an agreement that, in return, independent watchmakers in the United States should be given unrestricted access to Swiss watch parts. *See, e.g.*, Comment of Sig Shonholtz dated June 1, 2006 ("I respectfully request that [t]he United States Department of Justice seriously consider the impact of a Swiss Free Trade Agreement. . . . [S]uch a free trade agreement would result in the United States losing. . . . significant revenue and import taxation on [a] myriad [of] other Swiss products. I strongly recommend that if the United States is prepared to offer Switzerland a free trade agreement then independent watchmakers should have, in return unrestricted access to all Swiss factory replacement parts"); Comment of Leah Setka dated June 5, 2006 ("Economic interests in Switzerland are lobbying the United States Government for a free trade agreement. . . . I strongly recommend that if the United States is prepared to offer Switzerland a free trade agreement then independent watchmakers should have in return unrestricted access to all Swiss factory replacement parts").

> The action of the Swiss Watch [c]ompanies in refusing to sell me or my suppliers parts takes business away from me. These companies want the watch owners to send their watches to their chosen repair shops. . . .

Comment of Winford Rawls dated May 26, 2006.

While these two comments are not directly related to termination of the Final Judgment, they raise a concern that was prevalent throughout most of the comments – that some watch manufacturers may refuse to supply parts to independent watchmakers.

The vertical restraints in the Final Judgment may have been justified in 1960 to limit coordinated conduct, but they now serve to restrict unduly the manufacturers' ability to distribute repair parts as they see fit, so long as they comply with the antitrust laws. These restrictions may have the unintended consequence of limiting defendants' ability to engage in procompetitive activities that benefit consumers. In the more than forty years since the entry of the Final Judgment, courts analyzing manufacturer-imposed use restrictions (including those similar to the vertical non-price and maximum resale price restraints prohibited by the Final Judgment) have found those restrictions on balance procompetitive. In general, vertical use restrictions, while potentially restricting intrabrand competition, are nonetheless typically procompetitive because of the greater enhancement that they provide to interbrand competition among all manufacturers; and it is interbrand competition that is the primary concern of the antitrust laws.[18]

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[18] *See, e.g., Continental T.V., Inc. v. GTE Sylvania Inc*., 433 U.S. 36, 51-52 (1977) (indicating that vertical restrictions have the potential "for a simultaneous reduction in intrabrand competition and stimulation of interbrand competition. Interbrand competition is the competition among manufacturers of the same generic product. . . . and is the primary concern of antitrust law. . . . In contrast, intrabrand competition is the competition between the distributors – wholesale or retail – of the product of a particular manufacturer. . . . [W]hen interbrand competition exists, ... it provides a significant check on the exploitation of intrabrand market power because of the ability of consumers to substitute a different brand of the same product"); *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 725 (1988) (indicating that any adverse competitive effects of vertical non-price restraints on intrabrand competition are generally outweighed by the "market freeing" benefits that such restraints might provide to interbrand competition); *K.M.B. Warehouse Distribs. v. Walker Mfg. Co.*, 61 F.3d 123, 127-28 (2d Cir. 1995)

Several of the comments seem to suggest that such unilateral refusals to deal on the part of watch manufacturers should be deemed *per se* illegal.[19] However, U.S. antitrust law analyzes unilateral refusals to deal under the rule of reason. The reason for this is that there are valid business justifications for a unilateral refusal to deal, such as a manufacturer's desire (1) to maintain its image by associating only with repairers of a certain quality; (2) to select only those retailers willing to make certain economic investments in advertising, point-of-purchase displays, and promotions to stimulate sales growth; and (3) to better identify and combat counterfeit goods. *Trans Sport, Inc., v. Starter Sportswear, Inc.*, 964 F.2d 186, 190 (2d Cir. 1992) ("A business may properly seek to maintain the image of its products by controlling where those products are sold. . . . It is also legitimate for [a manufacturer] to select only those retailers willing to make an economic investment in [the manufacturer's] products. . . . Moreover, because a good's value 'is a joint product of the manufacturer who makes it and the elite dealer who stamps it with fashionability,' 8 P. Areeda, ANTITRUST LAW ¶ 1613d, pp. 184-185 (1989), intrabrand restrictions also help to convey to consumers a message of quality; consumers with little knowledge of [a manufacturer's] products may find a surrogate for information 'in the very fact that a dealer with a reputation for handling quality merchandise stocks a particular brand.'

("restrictions on intrabrand competition can actually enhance market-wide competition by fostering vertical efficiency and maintaining the desired quality of a product").

[19] To the extent any comments were also (or separately) expressing concern about concerted refusals to deal (also known as group boycotts) on the part of watch manufacturers and that such concerted refusals to deal should also be deemed *per se* illegal, current antitrust law is not in agreement. Today, while many group boycotts are condemned as *per se* illegal, some are not and are analyzed under the rule of reason. In determining whether a group boycott should be considered *per se* illegal or analyzed under the rule of reason, courts typically look at several factors, including: (1) whether the purpose of the boycott is to disadvantage competitors; (2) whether the boycotting firms possess "market power or exclusive access to an element essential to effective competition;" (3) whether the alleged boycott is being used to enforce price-fixing or other agreements that are themselves *per se* illegal; and (4) whether the boycott can be justified by plausible arguments that it was "intended to enhance overall efficiency and make markets more competitive." *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*, 472 U.S. 284, 294, 298 (1985); *see also FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 433 (1990).

Id. . . . By limiting the retailers that may sell its products, [a manufacturer] can identify when putative. . . . goods appear at unauthorized locations, and thereby better identify the presence and source of counterfeit goods").[20] Of course, if a Swiss watch manufacturer's refusal to deal violates the antitrust laws, those who suffer antitrust injury can still bring a private action under the antitrust laws. Terminating the Final Judgment, however, allows the manufacturers to put restrictions on the use of their parts that are on balance procompetitive.[21]

Furthermore, continuing the Final Judgment will not alleviate watchmakers' fears about access to parts. Termination of the Final Judgment will not affect individual watch manufacturers' decisions to supply (or not supply) watch parts to independent watchmakers.[22]

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[20] Courts have generally permitted manufacturers unilaterally to refuse to sell parts, or restrict the sale of parts, to retailers. *See, e.g., United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919) ("In the absence of any purpose to create or maintain a monopoly, the [Sherman] [A]ct does not restrict the long recognized right of a trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal."); *Bowen v. New York News, Inc.*, 522 F.2d 1242, 1254 (2d Cir. 1975), *cert. denied*, 425 U.S. 936 (1977) ("manufacturer has the right unilaterally to choose the customers with whom he may deal") (citing *Colgate*, 250 U.S. at 307); *Trans Sport, Inc., v. Starter Sportswear, Inc.*, 964 F.2d 186, 190-91 (2d Cir. 1992) (no § 2 liability for manufacturer that stopped selling to retailer that violated its "no-transshipment policy" given legitimate business reasons for such policy); *American Can Co. v. A.B. Dick Co.*, 1983-2 Trade Cas. (CCH) ¶ 65,751, at 69,833 (S.D.N.Y. 1983) (termination of distributor based primarily on belief that distributor would not actively promote manufacturer's products was for legitimate business reasons and was not unlawful exercise of monopoly power). *See also Verizon Communications v. Law Offices of Curtis v. Trinko, LLP*, 540 U.S. 398, 410-11 (2004) ("Compelling [monopolists] to share the source of their advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities.").

[21] Some comments indicate that if the Final Judgment is terminated, then certain illegal practices would become legal. For example, the undated comment of Debra Warren states: "Don't abandon the 1960 Consent decree between the government and Swiss Watch Companies. To do so would legalize [the] restrictive practices of price control, spare parts control and restrictive franchise agreements in this country." This statement is inaccurate to the extent that it suggests that termination of the Final Judgment would legalize otherwise illegal activities. To the extent any restrictive practices (including those relating to price, spare part control, and franchise agreements) are on balance anticompetitive, the antitrust laws can be enforced to prohibit such restrictions.

[22] Jon Goldfarb's comment suggests that if the Final Judgment is terminated (1) U.S. independent watchmakers will be forced out of business because they will be unable to obtain parts from manufacturers; and (2) U.S. consumers will pay higher prices for watch repairs and such repairs will take longer to complete because consumers will be forced to send their watches directly to a manufacturer's factory or service center for repair, which is typically more costly and timely than having a watch repaired by an independent watchmaker. Comment of Jon Goldfarb dated June 4, 2006. This comment misses the mark, however, and assumes that the Final Judgment provides an absolute obligation on the part of watch manufacturers to supply parts to watchmakers. Because the Final Judgment provides no such absolute obligation, manufacturers today, with the Final Judgment still in effect, could stop supplying parts

While the Final Judgment imposes a *limited* prohibition on the defendants' engaging in refusals to deal, it imposes no *absolute* obligation on watch manufacturers or suppliers to supply parts to watchmakers. Sections V.D and VI.F of the Final Judgment prohibit the defendants from, respectively, acting in concert or unilaterally refusing "to sell or induc[ing] any other person to refuse to sell watches, watch parts or watchmaking machines to any customer in the United States solely by reason of such customer's pricing or sales policies." Because these sections do not prohibit all refusals to deal, but only those refusals to deal based on a "customer's pricing or sales policies," they consequently do not impose an absolute obligation on the defendants to supply watch parts to any customer, including watchmakers. Thus, even if the Final Judgment remains in effect, Rolex (or any of the defendants) could still unilaterally refuse to deal with watchmakers for any reason except a "customer's pricing or sales policies."

to watchmakers (so long as such a refusal to deal was not based on a customer's pricing or sales policies) and force customers to have their watches repaired only at the manufacturer's factory or service center. Thus, termination of the Final Judgment will not affect manufacturers' decisions to supply (or not supply) parts to watchmakers.

IV. CONCLUSION

After careful consideration of the comments from the public, the United States concludes that termination of the Final Judgment is in the public interest. The United States will move the Court, jointly with defendant Rolex, for an order terminating the Final Judgment.

Respectfully submitted,

FOR PLAINTIFF
UNITED STATES OF AMERICA

_____/s/_____
MICHAEL G. DASHEFSKY (MD-6191)
U.S. Department of Justice
Antitrust Division
325 7th Street, N.W., Suite 300
Washington, DC 20530
Telephone: (202) 353-3062
Facsimile: (202) 514-1517

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