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

UNITED STATES OF AMERICA, Plaintiff, v. MORGAN STANLEY, Defendant.	ECF Case Civil Action No.: 11-civ–6875 WHP Hon. William H. Pauley III

UNITED STATES' MOTION AND SUPPORTING MEMORANDUM TO ENTER FINAL JUDGMENT

Pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) ("APPA" or "Tunney Act"), plaintiff United States of America ("United States") moves for entry of the proposed Final Judgment filed in this civil antitrust proceeding. The proposed Final Judgment (attached as Exhibit A) may be entered at this time without further hearing if the Court determines that entry is in the public interest.

Plaintiff United States and defendant Morgan Stanley ("Morgan") have stipulated to entry of the proposed Final Judgment without further notice to any party or other proceedings. The Competitive Impact Statement ("CIS") and Response to Public Comments, filed by the United States on September 30, 2011 and March 6, 2012, respectively, explain why entry of the proposed Final Judgment is in the public interest. The United States is filing simultaneously with this motion a Certificate of Compliance setting forth the steps taken by the parties to comply with all the applicable provisions of the APPA and certifying that the statutory waiting periods have expired.

I. Background and Compliance with the APPA

The United States brought this lawsuit against defendant Morgan on September 30, 2011 to remedy a violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. On January 18, 2006, Morgan entered into an agreement in the form of a financial derivative ("the Morgan/KeySpan Swap") that essentially transferred to KeySpan Corporation, the largest supplier of electricity generating capacity in the New York City market, the capacity of KeySpan's largest competitor. The Morgan/KeySpan Swap ensured that KeySpan would withhold substantial output from the capacity market, a market that was created to ensure the supply of sufficient generation capacity for the millions of New York City consumers of electricity. As a result of this agreement, Morgan netted $21 million in profits. The likely effect of this agreement was to increase capacity prices for the retail electricity suppliers who must purchase capacity and, in turn, to increase prices consumers pay for electricity.

Simultaneously with the filing of the Complaint, the United States filed the proposed Final Judgment and a Stipulation signed by plaintiff and defendant consenting to the entry of the proposed Final Judgment after compliance with the requirements of the APPA. Pursuant to those requirements, the United States filed a CIS in this Court on September 30, 2011; published the proposed Final Judgment and CIS in the *Federal Register* on October 11, 2011, *see United States v. Morgan Stanley*, 76 Fed. Reg. 62843; and published summaries of the terms of the proposed Final Judgment and CIS, together with directions for the submission of written comments relating to the proposed Final Judgment, in the *New York Post* for seven days beginning on October 25, 2011 and ending on October 31, 2011 and in *The Washington Times* from October 10, 2011 through October 14, 2011 and on October 17 and 18, 2011.

The 60-day period for public comments ended on December 30, 2011. The United States received two public comments on the proposed Final Judgment. Pursuant to 15 U.S.C. § 16(d), the comments received and the Response of Plaintiff United States to Public Comments to the proposed Final Judgments were filed with the Court on March 6, 2012 and, pursuant to 15 U.S.C. § 16(d)(2), published in the *Federal Register* on March 14, 2012, *see* 77 Fed. Reg. 15125.

II. Standard of Judicial Review

Before entering the proposed Final Judgment the Court is to determine whether the judgment "is in the public interest." *See* 15 U.S.C. § 16(e). In making the determination, the Court shall consider:

A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive consideration bearing upon the adequacy of such judgment that the court deems necessary to make a determination of whether the consent judgment is in the public interest; and

B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e)(1).

In its CIS filed on September 30, 2011 and its Response to Public Comments filed on March 6, 2012, the United States set forth the public interest standard under the APPA and incorporates those statements herein. The public has had the opportunity to comment on the proposed Final Judgment as required by law. As explained in the CIS and the Response to Public Comments, the proposed Final Judgment is within the range of settlements consistent with the

public interest,[1] and the United States therefore requests that this Court enter the proposed Final Judgment.

III. Conclusion

For the reasons set forth in this Motion, the CIS, and the Response to Public Comments, the United States respectfully requests that the Court enter the proposed Final Judgment without further hearings.

Dated: March 19, 2012

Respectfully submitted,

FOR THE PLAINTIFF UNITED STATES:

/s/

Jade Alice Eaton
jade.eaton@usdoj.gov

Trial Attorney
U.S. Department of Justice
Antitrust Division
Transportation, Energy &
Agriculture Section
450 Fifth Street, NW,
Suite 8000
Washington, DC 20004
Telephone: (202) 307-6316
Facsimile: (202) 307-2784

[1] The United States noted in its March 6, 2012 Response to Comments that the district court proceedings in *SEC v. Citigroup Global Markets Inc.*, a case cited by the commenters in which the district court had challenged the sufficiency of a settlement that did not include admissions of liability, had been temporarily stayed pending a ruling on a motion to stay pending appeal. Response at 12 n.15. On March 15, 2012, the Court of Appeals for the Second Circuit granted the stay pending resolution of the full appellate proceedings, finding, *inter alia*, that the SEC had a strong likelihood of success on the merits. *Citigroup*, -- F.3d --, 2012 WL 851807 at *4-*6 (2d Cir. 2012) ("We know of no precedent that supports the proposition that a settlement will not be found to be fair, adequate, reasonable or in the public interest unless liability has been conceded or proved and is embodied in the judgment.").