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11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA
13 SAN FRANCISCO DIVISION
14

15 IN RE: VOLKSWAGEN “CLEAN DIESEL”) MDL No. 2672 CRB (JSC)
16 MARKETING, SALES PRACTICES, AND)
17 PRODUCTS LIABILITY LITIGATION) **UNITED STATES’ UNOPPOSED MOTION**
18) **REQUESTING APPOINTMENT OF**
19) **TRUSTEE AND MEMORANDUM OF LAW**
20) **IN SUPPORT OF MOTION**

21 This Document Relates to:

22 *United States v. Volkswagen AG et al.*,
23 Case No. 16-cv-295 (N.D. Cal.)

24) Date: To be determined
25) Time: To be determined
26) Courtroom 6, 17th Floor
27) The Honorable Charles R. Breyer
28)

1 **I. INTRODUCTION**

2 In this unopposed motion, the United States respectfully requests the Court to select and appoint
3 Wilmington Trust, N.A. (“Wilmington Trust”) as the trustee of the Environmental Mitigation Trust
4 pursuant to Paragraph 15.e. of the Partial Consent Decree (“Decree”), which was entered by the Court
5 on October 25, 2016. Dkt. No. 2103-1 at 16. Because the motion is unopposed, the United States
6 requests the Court to appoint the trustee without a hearing.

7 In accordance with the Decree, the United States has conferred with the Recommending Parties
8 regarding the nomination of a trustee before requesting the Court to appoint Wilmington Trust.
9 Declaration of Seema Kakade in Support of United States’ Unopposed Motion Requesting Appointment
10 Of Trustee (“Kakade Decl.”), ¶9.¹ The State Recommending Parties recommended Wilmington Trust as
11 the trustee. *Id.*, ¶¶10-12.² The National Tribal Air Authority (“NTAA”), a member-based organization
12 with 115 principal member federally-recognized Indian Tribes, and the Tribal Air Monitoring Support
13 Center (“TAMS”) Steering Committee, abstained from consenting or objecting to the nomination. *Id.*,
14 ¶13. The Settling Defendants did not object to the nomination. *Id.*, ¶14.

15 After the Court appoints a trustee, the United States will provide the trustee the opportunity to
16 request changes to the form of the trust agreement (Appendix D of the Decree), and will then confer
17 with the trustee, the State Recommending Parties, and the Settling Defendants to finalize the trust
18 agreement. Dkt. No. 2103-1 at 16-17. The United States will then file the finalized trust agreement with
19 the Court to establish the trust. *Id.* at 17.

20 **II. BACKGROUND**

21 A. The Nomination Process

22 Paragraph 15.a. of the Decree allowed the “Recommending Parties,” i.e., the State of California,
23 the other States and political entities listed in Appendix D-1, and the Indian Tribes, to each submit to the
24 United States a list of three to five recommended candidates for the position of trustee. *Id.* at 14-15.

26 ¹ The United States will file the Kakade Declaration concurrently with this motion.

27 ² The term “State Recommending Parties” will refer to the State of New York, its Coalition, and
28 the State of California.

1 The States (other than California) and the Indian Tribes were required to submit one consolidated list.
2 Id. On behalf of a coalition of 42 States, Puerto Rico, and the District of Columbia (the “Coalition”), the
3 State of New York submitted a list of five recommended trustee candidates. Kakade Decl., ¶3. New
4 York stated that its candidate list reflected “due diligence to identify entities able to appropriately
5 manage and provide services to the beneficiaries of the Mitigation Trust.” Id., Exh. 1 at 1.³ California
6 chose to support the candidate list submitted by New York, and did not submit its own list of candidates.
7 Id., ¶4. No other States submitted a candidate list. Id.

8 The NTAA and the TAMS Steering Committee chose not to submit a list of candidates. Id., ¶6.
9 However, the Cherokee Nation and the Eastern Band of Cherokee Indians separately submitted the name
10 of an individual to serve as trustee. Id., ¶5.

11 Paragraph 15.b. of the Decree provides: “The United States may also consider additional trustee
12 candidates in its discretion.” Dkt. No. 2103-1 at 15. However, the United States did not consider trustee
13 candidates other than those candidates submitted by New York on behalf of the Coalition, or the
14 candidate submitted by the Cherokee Nation and the Eastern Band of Cherokee Indians.

15 B. The Evaluation Process

16 Paragraph 15.c. of the Decree requires the Recommending Parties to confer with each other and
17 the United States in a good faith effort to agree on one list of three to five recommended candidates. Id.
18 Even though they did not submit a trustee candidate, NTAA and the TAMS Steering Committee
19 requested that the United States confer with them as Recommending Parties in the selection process.
20 Kakade Decl., ¶6.

21 In an effort to conduct a thorough evaluation of trustee candidates, New York, on behalf of the
22 Coalition, hired outside experts to advise the Coalition on issues relevant to the selection of a trustee.
23 Id., ¶7. The U.S. Environmental Protection Agency (“EPA”) also retained expert support in connection
24 with the review of trustee candidates. Id. EPA, New York, and California reviewed information
25 provided by the identified trustee candidates, conducted multiple interviews of the institutional
26

27 ³ One of New York’s five candidates declined to participate in the selection process. Kakade
Decl., Exh. 1 at 1 n.1.

1 candidates, and evaluated the candidates' qualifications. Id., ¶8. Based on this inquiry, all of the four
2 recommended institutional candidates appeared to be qualified to provide trust services of the magnitude
3 required under the Decree. Id. Nevertheless, the candidate review process identified meaningful
4 differences between the candidates on some important issues such as fee structure, level of service, and
5 willingness to undertake all of the obligations identified in the Decree without identification of a co-
6 trustee for certain functions. Id. In addition, review of information provided by the individual candidate
7 (recommended by the Cherokee Nation and the Eastern Band of Cherokee Indians) revealed that the
8 individual candidate could not provide the level of service of the institutional candidates. Id.

9 The Recommending Parties and the United States then conferred with each other in a good faith
10 effort to reach agreement on a candidate. Id., ¶9. At the conclusion of this process, the State
11 Recommending Parties and the United States agreed that Wilmington Trust should serve as the trustee.
12 Id., ¶¶10-12, 15. NTAA and the TAMS Steering Committee abstained from consenting or objecting to
13 the nomination. Id., ¶13. The Settling Defendants did not object to the nomination. Id., ¶14.

14 **III. DISCUSSION**

15 A. The Trustee Nomination Criteria

16 Paragraph 15.d. of the Decree sets out the "Trustee Nomination Criteria" for trustee candidates.
17 Pursuant to Paragraphs 91 and 92 of the Decree (Dkt. No. 2103-1 at 48), the Parties to the Decree agreed
18 in writing to a non-material modification to Paragraph 15.d. and filed a notification with the Court. See
19 Dkt. No. 2914.

20 For each trustee candidate, Paragraph 15.d. of the Decree, as amended, requires the
21 Recommending Party to submit to the United States:

22 (i) information regarding the candidate's competence and qualifications to serve as
23 trustee;

24 (ii) a description of past, present or future business or financial relationship with Settling
25 Defendants, EPA, the States or any Indian Tribe;

26 (iii) a verification that the candidate has no conflicts of interest or the apparent conflict
27 has been waived by the Recommending Parties and the United States;

1 (iv) after conferring with other Recommending Parties and the United States, a summary
2 of whether other parties consent or object to the candidate.

3 Id. at 4-5 (pages 15-16 of the Partial Consent Decree).

4 The State of New York, on behalf of the Coalition, had originally submitted to the United States
5 a list of five recommended candidates. Kakade Decl., ¶3. After reviewing information provided by
6 candidates and conducting interviews, New York, on behalf of the Coalition, submitted to the United
7 States a letter dated February 8, 2017, together with supporting information nominating one candidate,
8 Wilmington Trust, to serve as the trustee pursuant to Paragraph 15.d. of the Decree. Id., Exh. 1, 2.
9 Before sending its letter, New York also conferred with States outside of its coalition. Id., Exh. 1 at 1.

10 Based on the United States' review of New York's submittal, on behalf of the Coalition, and
11 Wilmington Trust's written responses, and its interviews of principal members of Wilmington Trust's
12 proposed management team, the United States has made the following determinations.

13 1. Wilmington Trust, a wholly-owned subsidiary of M&T Bank Corporation, has extensive
14 experience providing trust, custody, escrow, and investment management services to public entities
15 including both States and Indian Tribes. Id., ¶15; Exh. 2 at Att. 2.⁴ In addition, Wilmington Trust has
16 significant experience acting as a trustee for environmental mitigation trusts designed to clean up and
17 restore sites contaminated by toxic wastes or chemical spills. Id., ¶15.

18 2. Wilmington Trust has identified a highly qualified management team to appropriately
19 manage the trust and provide needed services to the beneficiaries of the trust. Id., Exh. 2, Table 1.

20 3. Wilmington Trust does not have a business or financial relationship with the Settling
21 Defendants in this case. Id., Exh. 2 at 1. Its parent corporation, M&T Bank Corporation, has provided
22 some limited services to entities related to Volkswagen. Id. Wilmington Trust stated that these limited
23 services will not inhibit or affect its ability to serve as trustee of the Environmental Mitigation Trust. Id.

24
25 ⁴ In its presentation, New York stated that the Wilmington Trust's parent, M&T Bank, maintains
26 investment grade ratings with two of the largest rating organizations. Kakade Decl., Exh. 2 at 1.
27 Moreover, in stress testing by the Board of Governors of the Federal Reserve System, M&T Bank
28 maintained post-stress regulatory capital ratios above minimum requirements in the adverse and severely
adverse scenarios. Id.

1 4. Wilmington Trust listed trustee, escrow agent, and custodial services that it provides to a
2 number of States and Indian Tribes that are potential beneficiaries to the Trust. Id., Exh. 2 at Att. 2.
3 Wilmington Trust stated that none of these business relationships present a conflict or preclude it from
4 serving as trustee. Id., Exh. 2 at 1.

5 5. New York, on behalf of the Coalition, conducted a due diligence review of Wilmington
6 Trust's potential conflicts of interest. Id., Exh. 1 at 2. Based on this due diligence review and
7 Wilmington Trust's representations, New York did not find that Wilmington Trust had any actual or
8 potential conflicts with regard to this matter. Id.

9 B. The Nomination of Wilmington Trust

10 Paragraph 15.e. of the Decree authorizes the United States to file a motion requesting the
11 selection of a trustee. Dkt. No. 2103-1 at 16. According to Paragraph 15.e., the United States, after
12 receiving candidate lists and supporting information, "will file a motion with the Court requesting that
13 the Court select and appoint a trustee from among the candidates." Id. The United States has reviewed
14 all supporting information and conducted interviews of the candidates. Kakade Decl., ¶8. Based on this
15 independent review, the United States has not found any information that would preclude Wilmington
16 Trust from service as a trustee. Id. Furthermore, the United States has determined that Wilmington
17 Trust is the most qualified candidate to serve as the trustee.

18 In accordance with Paragraph 15.c. of the Decree, the United States has conferred with the
19 Recommending Parties regarding the trustee candidates. Id., ¶9. On behalf of the Coalition, New York
20 nominated one candidate, Wilmington Trust, to serve as the trustee. Id., ¶11; Exh. 2. Based on its
21 consultation with other States outside of the Coalition, New York stated that those States did not object
22 to the nomination. Id., Exh. 1 at 1. California indicated that it intends to file a joinder in the United
23 States' motion requesting appointment of Wilmington Trust. Id., ¶12. NTAA and the TAMS Steering
24 Committee abstained from providing any comment regarding the selection of the trustee. Id., ¶13. The
25 Settling Defendants did not object to the nomination. Id., ¶14. Accordingly, pursuant to Paragraph 15.e.
26 of the Decree, the United States requests the Court to select and appoint Wilmington Trust as the trustee
27 of the Environmental Mitigation Trust.

1 **IV. CONCLUSION**

2 The United States has satisfied all of the procedural requirements for the selection of a trustee
3 pursuant to Paragraph 15 of the Decree as amended. For the reasons stated in this memorandum, the
4 United States requests the Court to appoint Wilmington Trust as the trustee. A proposed Order has been
5 submitted to the Court concurrently with this motion.

6 Dated: February 23, 2017

Respectfully submitted,

7 For the United States of America

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