

**UNITED STATES JUDICIAL PANEL
on
MULTIDISTRICT LITIGATION**

**IN RE: AQUEOUS FILM-FORMING FOAMS
PRODUCTS LIABILITY LITIGATION**

MDL No. 2873

ORDER DENYING TRANSFER

Before the Panel:* Defendant Daikin America, Inc. (Daikin), moves under 28 U.S.C. § 1407(c) to transfer the Northern District of Georgia *Johnson* action listed on Schedule A to the District of South Carolina for inclusion in MDL No. 2873. Plaintiff Jarrod Johnson opposes the motion.

MDL No. 2873 involves allegations that aqueous film-forming foams (AFFFs) used at airports, military bases, or other locations to extinguish liquid fuel fires caused the release of perfluorooctane sulfonate (PFOS) and/or perfluorooctanoic acid (PFOA; collectively, these and other per- or polyfluoroalkyl substances are referred to as PFAS) into local groundwater and contaminated drinking water supplies. Plaintiff in *Johnson* seeks to represent a class of all customers of the Rome Water and Sewer Division and the Floyd County Water Department. He alleges that the water supply for the City of Rome and Floyd County has been polluted by various defendants—primarily by the Dalton, Georgia carpet industry and their chemical suppliers—who use PFAS in their manufacturing processes. These defendants allegedly discharge their industrial wastewater to conventional wastewater treatment plants in Dalton and dispose of other waste products in area landfills. PFAS from these waste products allegedly flows into the Conasauga River and downstream waters, including the City of Rome’s drinking water intake on the Oostanaula River. On its face, the *Johnson* complaint does not involve allegations pertaining to the manufacture, use, or disposal of AFFFs.

In support of its motion to transfer, Daikin argues that recent deposition testimony by the Floyd County fire chief relating to the use of AFFF by the fire department demonstrates that AFFF is a potential source of the PFAS contamination for which plaintiff in *Johnson* seeks recompense. Daikin further argues that its recently amended answer, which asserts a crossclaim for apportionment under Georgia law and is based on the information obtained from the fire chief’s deposition, explicitly places AFFF use at issue in *Johnson*.

When we centralized this docket, we denied a motion by 3M to extend the scope of the MDL to encompass not just cases involving AFFFs, but all cases relating to 3M’s manufacture,

* Judge David C. Norton did not participate in the decision of this matter.

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management, disposal, and sale of PFAS. See *In re Aqueous Film-Forming Foams Prods. Liab. Litig. (In re AFFF)*, 357 F. Supp. 3d 1391, 1396 (J.P.M.L. 2018). We drew this line between “AFFF” and “non-AFFF” cases because of concerns for the manageability of this litigation:

While a non-AFFF MDL would allow for common discovery and motion practice with respect to 3M—the main producer of PFOA and PFOS—it also would include far more site-specific issues, different modes of PFAS contamination, and different PFAS chemicals (whereas the AFFF actions are limited to PFOA and PFOS contamination). Such an MDL could quickly become unwieldy.

Id. Since then, we have endeavored to maintain this distinction. For instance, we denied a motion to transfer an action from the Eastern District of New York (*Middlesex Water*) where the moving defendant proffered an expert declaration identifying various sources of potential PFAS contamination that may have stemmed from AFFF use. See Order Denying Transfer at 2, MDL No. 2873 (J.P.M.L. Dec. 18, 2019), ECF No. 541. In denying the motion to transfer, we stated:

This concern [that a PFAS MDL could become unwieldy] has not disappeared, and we have no desire to unnecessarily complicate the transferee judge’s task in efficiently managing this litigation, which already involves a wide range of claims and parties. Given our continued concern about the manageability of this litigation, *a party seeking transfer of an action that does not on its face raise AFFF claims bears a significant burden to persuade us that transfer is appropriate and will not undermine the efficient progress of the AFFF MDL.*

Id. (emphasis added). We have denied subsequent motions to transfer actions that do not raise AFFF claims on their face on similar grounds. See, e.g., Order Denying Transfer (*Hardwick*), MDL No. 2873 (J.P.M.L. Feb. 5, 2020), ECF No. 585; Order Denying Transfer (eight New York actions), MDL No. 2873 (J.P.M.L. Mar. 27, 2020), ECF No. 620.

Daikin’s motion presents a close question. The complaint in *Johnson* does not on its face raise AFFF claims, but Daikin’s crossclaim arguably does. It is based on and cites deposition testimony regarding the use of AFFF by the fire department in Floyd County.¹ Even so, we conclude that Daikin has not met the “significant burden” of showing that transfer of *Johnson* is appropriate. Even with Daikin’s crossclaim, *Johnson* seems more akin to the non-AFFF actions the Panel has excluded from the MDL than more typical AFFF actions. Plaintiff’s complaint is overwhelmingly focused on the carpet industry in Dalton, Georgia, and that municipality’s wastewater disposal methods. We generally have excluded actions involving non-AFFF discharges of PFAS from specific industrial locations. See, e.g., *In re AFFF*, 357 F. Supp. 3d at

¹ The parties dispute how to characterize this deposition testimony. Plaintiff, for instance, reads the testimony as failing to demonstrate that AFFF use contributed in any way to the alleged PFAS contamination in the City of Rome, whereas Daikin argues that the testimony indicates that AFFF use may have played a significant role in the alleged contamination. Ultimately, that is a question for the fact-finder in the presiding court, not this Panel.

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1396 (excluding non-AFFF actions involving alleged industrial discharges into the Tennessee River, alleged contamination originating from a shoe manufacturer's industrial waste, and alleged PFAS discharges from factories in Hoosick Falls, New York).

Transfer also could disrupt the progress of *Johnson*. Fact discovery in that case has been ongoing since mid-2020 and is due to close on April 29, 2022. The presiding judge has been coordinating with a Georgia state court action brought by the City of Rome asserting essentially the same claims against the same defendants. Transferring *Johnson* to the MDL at this stage could interfere with this coordination. Any discovery or other overlap with the MDL can be minimized through coordination between the parties and the involved courts.

Accordingly, after considering the parties' arguments, we find that transfer of *Johnson* under 28 U.S.C. § 1407 will not serve the convenience of the parties and witnesses or promote the just and efficient conduct of the litigation. To be clear, we do not foreclose the possibility that discovery and pleading practice could demonstrate that an ostensibly non-AFFF action is, in fact, more properly treated as an AFFF case for which transfer to MDL No. 2873 is warranted. Indeed, should *Johnson* evolve into a more obvious AFFF action, the parties or the court at that time can re-notice *Johnson* as a potential tag-along in MDL No. 2873. At present, though, we are not persuaded that transfer of *Johnson* is appropriate.

IT IS THEREFORE ORDERED that the motion to transfer the action listed on Schedule A to MDL No. 2873 is denied.

PANEL ON MULTIDISTRICT LITIGATION



Karen K. Caldwell
Chair

Nathaniel M. Gorton
Roger T. Benitez
Madeline Cox Arleo

Matthew F. Kennelly
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**IN RE: AQUEOUS FILM-FORMING FOAMS
PRODUCTS LIABILITY LITIGATION**

MDL No. 2873

SCHEDULE A

Northern District of Georgia

JOHNSON v. 3M COMPANY, ET AL., C.A. No. 4:20-00008