

**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:* Defendants E.I. DuPont de Nemours and Company and The Chemours Company move under 28 U.S.C. § 1407(c) to transfer the Eastern District of New York *Town of Huntington* action listed on Schedule A to the District of South Carolina for inclusion in MDL No. 2873. Plaintiffs Town of Huntington and Dix Hills Water District oppose 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. Plaintiffs in *Town of Huntington* assert claims against moving defendants and the 3M Company relating to their manufacture of PFAS. Plaintiffs allege that defendants are responsible for PFAS contamination identified in the water supply for the Dix Hills Water District. On its face, plaintiffs’ complaint does not involve allegations pertaining to the manufacture, use, or disposal of AFFFs.

In support of their motion to transfer, movants argue that *Town of Huntington*, in fact, is an “AFFF action.” Movants point to a water quality report by the plaintiff water district that mentions AFFF as a potential source of PFAS contamination in a footnote, as well as various news and other reports of aviation and commercial accidents on Long Island in which AFFFs may have been used to extinguish fires. Movants also have each filed a third-party complaint against numerous AFFF manufacturers and users, albeit by pseudonym (*i.e.*, against John Doe defendants), which, movants argue, explicitly place AFFF use at issue in *Town of Huntington*.

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, management, disposal, and sale of PFAS. *See In re Aqueous Film-Forming Foams Prods. Liab. Litig.*, 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:

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

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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 eight Eastern District of New York actions brought by water authorities seeking damages arising from alleged PFAS contamination of groundwater. Moving defendants (the same as here) similarly argued that the actions were properly construed as AFFF actions. *See* Order Denying Transfer, MDL No. 2873 (J.P.M.L. Mar. 27, 2020), ECF No. 620. In denying the motion to transfer, we stated:

[W]e 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. at 2 (quoting Order Denying Transfer at 2, MDL No. 2873 (J.P.M.L. Dec. 18, 2019), ECF No. 541) (emphasis in original).

Were it not for movants’ third-party complaints, the motion to transfer *Town of Huntington* would differ little from movants’ past attempt to transfer actions involving alleged PFAS contamination from the Eastern District of New York. The news and accident reports upon which movants rely are substantially, if not entirely, identical to those movants relied upon in their prior motion and which we found too speculative to support transfer. *See id.* at 1–2. The water quality report upon which movants rely, which mentions AFFF only in a footnote discussing general sources of PFAS in groundwater, likewise does not transform this action into an AFFF action.

The third-party complaints, however, render this motion a closer question. Those pleadings on their face, appear to raise AFFF claims. Even so, we are not persuaded that transfer is appropriate. Movants compare their third-party complaints to the crossclaim that was the basis for a motion to transfer that we considered at our last hearing session. *See* Order Denying Transfer (*Johnson*), MDL No. 2873 (J.P.M.L. Apr. 5, 2022), ECF No. 1352. This comparison, however, is not as favorable as movants suggest. The crossclaim in *Johnson* was based upon deposition testimony regarding the use of AFFF by the local fire department. In other words, it was based upon discovery obtained *in that case* and directly pertaining to the alleged groundwater contamination. *Id.* at 1–2. We declined to transfer because, among other issues, the action in total was “overwhelmingly focused on the carpet industry in Dalton, Georgia, and that municipality’s wastewater disposal methods.” *Id.* at 2.

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Movants' third-party complaints are more general with respect to allegations that AFFF use caused the contamination alleged in plaintiffs' complaint.¹ They are not based upon discovery taken in the action, but on various news reports and other evidence that may suggest that foam was used at certain locations on Long Island. The third-party complaints also are directed exclusively at fictitious defendants. And plaintiffs' claims remain entirely focused on defendants' manufacture and sale of PFAS. In these circumstances, movants have not met their "significant burden" to show that transfer of *Town of Huntington* is appropriate. Whether and how AFFF factors into this action remains too uncertain to support transfer.

Perhaps anticipating this response, movants also argue that transfer is necessary so that they can have access to discovery in the MDL that will allow them to identify with more specificity the third-party defendants responsible for the alleged groundwater contamination in *Town of Huntington*. It seems to us, though, that the discovery necessary to identify specific third-party defendants and potential discharges of AFFF that may have caused the alleged PFAS contamination will be obtained, as in *Johnson*, in the underlying action, not in the MDL. Nothing prevents movants from seeking this discovery in the Eastern District of New York.

Accordingly, after considering the parties' arguments, we find that transfer of *Town of Huntington* 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. Nor do we suggest, as plaintiffs argue, that a movant must have "admissible evidence of source investigation, contribution, and Long Island hydrogeology to justify transfer." *See* Pls.' Resp. to Mot. to Transfer at 9, MDL No. 2873 (J.P.M.L. filed Apr. 29, 2022), ECF No. 1390. Rather, based upon consideration of the pleadings and the record, it must appear that AFFF claims are substantial and concrete, and that transfer to the MDL will enhance efficiency and convenience, both in the individual action and in the MDL overall. Should *Town of Huntington* evolve into a more obvious AFFF action, the parties or the court at that time can re-notice *Town of Huntington* as a potential tag-along in MDL No. 2873. At present, though, we are not persuaded that transfer is appropriate.

¹ We do not address the legal or substantive merit of the third-party complaints, which is not before us. Rather, we consider only whether the third-party complaints support transfer to the MDL.

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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

A handwritten signature in cursive script, reading "Karen K. Caldwell", is positioned above a horizontal line.

Karen K. Caldwell
Chair

Nathaniel M. Gorton
Roger T. Benitez
Madeline Cox Arleo

Matthew F. Kennelly
Dale A. Kimball

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

MDL No. 2873

SCHEDULE A

Eastern District of New York

TOWN OF HUNTINGTON, ET AL. v. THE 3M COMPANY, ET AL.,
C.A. No. 2:21-06076