

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 3M Company moves under 28 U.S.C. § 1407(c) to transfer the *State of Illinois* action listed on Schedule A to the District of South Carolina for inclusion in MDL No. 2873. Plaintiff People of the State of Illinois ex rel. Kwame Raoul, Attorney General, 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’s claims in *State of Illinois* relate to 3M’s alleged production of PFAS at a manufacturing facility in Cordova, Illinois, and 3M’s alleged discharge of PFAS-contaminated wastewater into the Mississippi River. On its face, plaintiffs’ complaint does not involve allegations pertaining to the manufacture, use, or disposal of AFFFs.

In support of its motion to transfer, 3M argues that *State of Illinois*, in fact, is an “AFFF action.” 3M points to investigative reports and other materials purporting to show the use of AFFF at or near a U.S. Army facility in Rock Island, Illinois. 3M argues that AFFF is a potential source of the PFAS contamination alleged in the State’s complaint and, therefore, State of Illinois will involve factual questions relating to PFAS and AFFF that are shared by the actions pending in MDL No. 2873.

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:

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

* Judges David C. Norton and Roger T. Benitez did not participate in the decision of this matter.

- 2 -

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, in which movants 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).

3M has not met the “significant burden” of showing that transfer of *State of Illinois* is appropriate. The State’s complaint is overwhelmingly focused on the operations at 3M’s manufacturing facility in Cordova. 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 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); Order Denying Transfer at 2–3, MDL No. 2873 (J.P.M.L. Apr. 5, 2022), ECF No. 1352 (denying transfer of an action involving PFAS discharges from carpet manufacturers in Dalton, Georgia). The evidence 3M has marshalled to support its removal of this action and its motion to transfer the action to the MDL is similar in kind to the evidence presented by defendants in support of transfer of other non-AFFF cases, and we find it no more persuasive. *See, e.g.,* Order Denying Transfer at 1–2, MDL No. 2873 (J.P.M.L. June 1, 2022), ECF No. 1451. Whether and how AFFF factors into this action remains too uncertain to support transfer.

Accordingly, after considering the parties’ arguments, we find that transfer of the action listed on Schedule A 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. But, 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 *State of Illinois* evolve into a more obvious AFFF action, the parties or the court at that time can re-notice *State of*

- 3 -

Illinois as a potential tag-along in MDL No. 2873. At present, though, we are not persuaded that transfer 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

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

Karen K. Caldwell
Chair

Nathaniel M. Gorton
Dale A. Kimball

Matthew F. Kennelly
Madeline Cox Arleo

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

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SCHEDULE A

Central District of Illinois

PEOPLE OF THE STATE OF ILLINOIS v. 3M COMPANY, C.A. No. 4:22-04075