

UNITED STATES JUDICIAL PANEL
on
MULTIDISTRICT LITIGATION

IN RE: AQUEOUS FILM-FORMING FOAMS
PRODUCTS LIABILITY LITIGATION

MDL No. 2873

ORDER VACATING CONDITIONAL TRANSFER ORDER

Before the Panel:* Plaintiff State of New Hampshire moves under Panel Rule 7.1 to vacate our order that conditionally transferred the *State of New Hampshire* action listed on Schedule A to the District of South Carolina for inclusion in MDL No. 2873. Defendant 3M Company opposes the motion.

After considering the parties' arguments, we find that transfer 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. 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. *See In re Aqueous Film-Forming Foams Prods. Liab. Litig.*, 357 F. Supp. 3d 1391, 1394 (J.P.M.L. 2018). Plaintiff in *State of New Hampshire* asserts claims against 3M Company and other defendants relating to their manufacture of PFAS and the alleged contamination of ground and surface waters within the State of New Hampshire. The State explicitly excludes claims relating to PFAS contamination stemming from the manufacture, use, or disposal of AFFFs.

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 AFFF*, 357 F. Supp. 3d at 1396. 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.

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

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Id. Since then, we have endeavored to maintain this distinction. *See, e.g.*, Order Denying Transfer at 2, MDL No. 2873 (J.P.M.L. Mar. 27, 2020), ECF No. 620 (“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.*”) (quoting Order Denying Transfer at 2, MDL No. 2873 (J.P.M.L. Dec. 18, 2019), ECF No. 541) (emphasis in original).

State of New Hampshire does not include AFFF claims on its face. 3M argues that, regardless, the State’s claims are duplicative of those in an action brought by the State that is pending in the MDL and which explicitly seeks compensation for contamination caused by PFAS in (and only in) AFFF products. In the past, where a plaintiff’s attempt to separate their non-AFFF and AFFF claims was untenable, we have transferred putative non-AFFF actions to avoid duplicative discovery and pretrial proceedings. *See, e.g.*, Transfer Order (*Nessel*) at 3–4, MDL No. 2873 (J.P.M.L. Jun. 7, 2021), ECF No. 1020; Transfer Order (*New Jersey-American Water Co.*) at 1–2, MDL No. 2873 (J.P.M.L. Oct. 5, 2020), ECF No. 691. We are not persuaded, however, that the State’s maintenance of separate AFFF and non-AFFF actions here is clearly untenable. The State has identified different contamination sites in each action, whereas in *Nessel* there was overlap in the contamination sites identified by the plaintiff in its discovery responses in both actions, and plaintiff explicitly identified multiple locations where PFAS contamination was alleged to stem from both AFFF and non-AFFF sources. *See Nessel* at 3–4. In short, there was little question that the *Nessel* actions involved the same contaminated groundwater. *See also New Jersey-American Water Co.* at 2 (“[I]n two separate actions, plaintiff is seeking (or potentially seeking) recovery for PFAS contamination of *the same water supply*; in one action from PFAS discharged by the Chambers Works; in the other from PFAS incorporated into AFFF products.”).

In an attempt to show sufficient overlap between the State’s AFFF and non-AFFF claims, 3M points to statements by the State’s counsel during a discovery scheduling conference to the effect that the alleged PFAS contamination is statewide in nature. 3M also submits evidence purporting to show the potential for commingling of PFAS from AFFF and non-AFFF sources. The State’s averments, though, are not necessarily inconsistent with maintaining separate actions—PFAS contamination may be statewide, but contamination from AFFF and non-AFFF sources may still be discrete. And 3M’s evidence—which is of a kind with evidence of AFFF use that we have found insufficient for transfer of other non-AFFF actions, *see, e.g.*, Order Denying Transfer at 1–2, MDL No. 2873 (J.P.M.L. Jun. 1, 2022), ECF No. 1451—shows only the potential for commingling. A more obvious overlap between the State’s AFFF and non-AFFF actions is necessary to warrant transfer of the State’s non-AFFF action to the MDL.

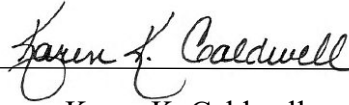
Accordingly, after considering the parties’ arguments, we find that transfer of the action listed on Schedule A under 28 U.S.C. § 1407 will not serve the convenience of the parties and witnesses or promote the just and efficient conduct of the litigation. To be clear, we do not foreclose the possibility 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

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and convenience, both in the individual action and in the MDL overall. Should *State of New Hampshire* evolve into a more obvious AFFF action, or if it becomes clearer that the State's AFFF and non-AFFF actions involve the same contaminated ground or surface waters, the parties or the court at that time can re-notice *State of New Hampshire* 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 Panel's conditional transfer order designated as "CTO-90" is vacated as to the action listed on Schedule A.

PANEL ON MULTIDISTRICT LITIGATION



Karen K. Caldwell
Chair

Nathaniel M. Gorton
Dale A. Kimball

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

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SCHEDULE A

District of New Hampshire

STATE OF NEW HAMPSHIRE v. 3M COMPANY, ET AL., C.A. No. 1:22-00145