

**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 Circle K Terminal Alabama, LLC, moves under Panel Rule 7.1 to vacate our order that conditionally transferred the *Circle K Terminal* action listed on Schedule A to the District of South Carolina for inclusion in MDL No. 2873. Defendant Johnson Controls, Inc. (JCI), and non-parties Tyco Fire Products LC and Chemguard, Inc., oppose the motion.<sup>1</sup>

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 *Circle K Terminal*, however, alleges that a JCI employee, either negligently or recklessly, activated the fire suppression system at plaintiff's fuel terminal while conducting a routine inspection of the system. Plaintiff alleges that it had to engage an environmental services company to contain the spread of the foam, which caused a suspension of terminal operations. Plaintiff seeks, *inter alia*, to recover damages to the terminal, the costs of the clean-up, and lost sales. Unlike other actions transferred to the MDL and involving a single release of AFFF, plaintiff does not allege that groundwater at or near the site was contaminated, nor does it allege that first responders were injured by exposure to AFFF. In short, this action appears primarily to be about the alleged negligence of JCI in its operation of the fire suppression at the terminal, not the potential environmental or individual harm posed by the AFFF itself. *Cf., e.g.*, Transfer Order at 1–2, MDL No. 2873 (J.P.M.L. Aug. 3, 2022), ECF No. 1509 (transferring action involving multi-vehicle fire where plaintiff alleged that groundwater on property had been contaminated); Transfer Order at 2–3, MDL No. 2873 (J.P.M.L. Jun. 7, 2021); ECF No. 1020 (transferring action involving AFFF use during a petrochemical fire where first responders sought medical monitoring due to exposure to AFFF).

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\* Judges Nathaniel M. Gorton, David C. Norton, and Roger T. Benitez did not participate in the decision of this matter.

<sup>1</sup> Tyco and Chemguard, who are defendants in most of the actions pending in the MDL, state that they are corporate affiliates of JCI.

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The opposing parties argue that *Circle K Terminal* will share common questions of fact with the cases in the MDL, such as questions relating to the toxicity, health effects, and chemical properties of PFAS. It is true that the complaint makes passing mention of plaintiff's potential liability if the AFFF release is later found to have caused groundwater contamination. But the complaint, as currently presented, is overwhelmingly directed at JCI's allegedly negligent or reckless actions that caused the release of the foam and the immediate damages this caused to the operation of the fuel terminal. There is no allegation that the toxicity of the foam is the cause of plaintiff's damages, except to the extent that it made the clean-up more expensive. It thus appears unlikely that *Circle K Terminal* will entail significant overlap in discovery or pretrial proceedings with the actions in the MDL. Both the MDL and *Circle K Terminal* will proceed more efficiently if *Circle K Terminal* remains outside 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 in *Circle K Terminal* may demonstrate that transfer of this action to the MDL ultimately is warranted. But, based upon consideration of the pleadings, it must appear that transfer to the MDL will enhance efficiency and convenience of the litigation. Should *Circle K Terminal* evolve into a more typical AFFF action, the parties or the court at that time can re-notice the action for transfer to MDL No. 2873 as a potential tag-along. 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-97" is vacated as to the action listed on Schedule A.

PANEL ON MULTIDISTRICT LITIGATION



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Karen K. Caldwell  
Chair

Matthew F. Kennelly  
Madeline Cox Arleo

Dale A. Kimball

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**SCHEDULE A**

Northern District of Alabama

CIRCLE K TERMINAL ALABAMA LLC v. JOHNSON CONTROLS, INC.,  
C.A. No. 2:22-00583