

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 Maryland* action listed on Schedule A to the District of South Carolina for inclusion in MDL No. 2873. Plaintiff opposes this 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. *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 Maryland* asserts claims against 3M Company and other defendants relating to their manufacture of PFAS and the alleged contamination of ground and surface waters within Maryland. Plaintiff 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 id.* 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.

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

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

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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).

The parties do not dispute that the complaint in *State of Maryland* does not include AFFF claims on its face. 3M argues that transfer is warranted because: (1) the complaints in this case, a separate case brought by the State of Maryland directed solely to AFFF claims and pending in the MDL, and in other MDL cases filed by Maryland counties, municipalities, and residents all expressly seek to recover costs related to PFAS contamination of the Chesapeake Bay; (2) some of the purportedly contaminated drinking water supplies invoked by the complaint in this case (through a Maryland Department of Environment (MDE) report cited in the complaint) are at issue in the MDL in cases brought by Maryland municipalities and individuals to recover damages for those same drinking water supplies; and (3) the parties’ allegations in this litigation and other publicly available information show that there will be numerous locations across Maryland where the putative “non-AFFF” contamination at issue in this case will be commingled with PFAS contamination from AFFF sources.

Our resolution of this motion depends on how we view this case in comparison to those of other states that have sought to split their AFFF and non-AFFF claims. For instance, we transferred a putative “non-AFFF” complaint filed by the State of Illinois that identified three community water supplies (CWS) that were the subject of complaints filed by the municipal water providers for those CWS directly in the MDL. *See* Transfer Order (*Illinois*) at 2–4, MDL No. 2873 (J.P.M.L. Jun. 5, 2023), ECF No. 1927 (“It is sufficient that multiple CWS complaints in the MDL involve the same water sources as the State of Illinois complaint.”). In contrast, we declined to transfer a non-AFFF complaint filed by the State of New Hampshire that lacked such overlap. *See* Order Vacating CTO (*New Hampshire*) at 2, MDL No. 2873 (J.P.M.L. Aug. 3, 2022), ECF No. 1511 (“The State has identified different contamination sites in each action.”). The critical determination is whether there is a clear overlap between the putative non-AFFF complaint and complaints in the MDL with respect to alleged contamination sites, such that the plaintiff’s attempt to maintain separate non-AFFF and AFFF complaints is untenable. *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. Further, the overlapping AFFF claims must be sufficiently “substantial and concrete,” such that transfer to the MDL will enhance efficiency and convenience. *See New Hampshire* at 2–3.

We conclude that the complaint in *State of Maryland* is more akin to the complaint in *New Hampshire* than *Illinois*, and that plaintiff’s maintenance of separate AFFF and non-AFFF actions here is not clearly untenable. The complaint, on its face, does not identify a contamination site at issue in the MDL. Instead, plaintiff alleges PFAS contamination of the state’s natural resources generally stemming from non-AFFF sources such as industrial facilities, landfills, and wastewater treatment facilities. 3M focuses on the complaint’s references to the Chesapeake Bay as a potential overlapping site, but these references primarily derive from quotations from the Maryland statute establishing the State’s right and obligation to protect its natural resources. *See, e.g.*, Compl. ¶ 99 (“It is the policy of the State of Maryland to: . . . (3) Protect the State’s natural resources, including the fish and wildlife of the Potomac River, the Chesapeake Bay, and all other waters and waterways of the State.”). As we stated in *New Hampshire*, the overlap of AFFF claims must be substantial

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and concrete. The general references to the Chesapeake Bay in plaintiff's complaint here are not sufficient.¹

3M's arguments based on the MDE report have marginally more merit. The complaint discusses this report in some depth, *see* Compl. ¶¶ 139–52, and the report identifies several contamination sites (Hampstead, Westminster, Thurmont, Poolesville, and Elkton) for which the corresponding municipalities have filed AFFF actions directly in the MDL. 3M stresses that the complaint in *Illinois* also referenced an investigation by that state's environmental protection agency. *Illinois*, though, proceeded to single out—in its putative non-AFFF complaint—specific contamination sites identified in the EPA report as subject to the complaint. *See Illinois* at 2 (“[T]he complaint identifies the Evanston, Fox Lake, and Hawthorn Estates CWS as allegedly contaminated PFAS sites at issue in this action.”). Plaintiff here, in contrast, does not discuss any individual contamination site, much less one identified in the MDE report. Rather, plaintiff cites the MDE's investigation as establishing that PFAS contamination in Maryland is widespread and impacting the State's drinking water sources. This seems to us an important distinction. Nothing in plaintiff's complaint clearly incorporates the contamination sites identified in the MDE report into plaintiff's claims against defendants.

Finally, 3M's arguments that there has been commingling of PFAS contamination from AFFF and non-AFFF sources are, ultimately, too speculative to support transfer. For instance, 3M argues that sites such as the Middle River Complex and Poolesville were contaminated by both AFFF and non-AFFF sources. The basis for this argument, though, is not the complaint (which references neither site), but third-party sources such as a Lockheed Martin PFAS fact sheet. *See* Ex. 37 to 3M's Mot. to Transfer, MDL No. 2873 (J.P.M.L. filed July 31, 2023), ECF No. 2009-40. As we held in *New Hampshire*, such evidence of the mere *potential* for commingling is insufficient to warrant transfer of an otherwise non-AFFF complaint:

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.

¹ We also note that the Chesapeake Bay arguably might be considered too broad a body of water to identify as a contamination site (as opposed to a particular location within the Bay) for purposes of determining the appropriateness of transfer to MDL No. 2873. *Cf.* Order Denying Transfer at 2 n.3, MDL No. 2873 (J.P.M.L. Mar. 27, 2020), ECF No. 620 (“DuPont's contention that PFOA or PFOS contamination of some portion of the Long Island aquifer system due to use of AFFFs necessarily means that any contamination of groundwater on Long Island stems from AFFF use remains uncertain at this point in the litigation.”).

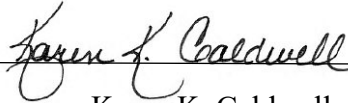
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New Hampshire at 2.

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. Indeed, 3M's arguments are not wholly unpersuasive, and it would not be surprising if plaintiff's attempt to separate its AFFF and non-AFFF claims becomes untenable. But, based upon consideration of the pleadings and the record before us, 3M has not established a clear overlap between *State of Maryland* and the claims pending in the MDL, much less that the putative AFFF claims in this complaint are substantial and concrete, such that transfer to the MDL will enhance efficiency and convenience. Should *State of Maryland* evolve into a more obvious AFFF action, or if it becomes clearer that plaintiff'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 Maryland* 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



Karen K. Caldwell
Chair

Nathaniel M. Gorton
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**IN RE: AQUEOUS FILM-FORMING FOAMS
PRODUCTS LIABILITY LITIGATION**

MDL No. 2873

SCHEDULE A

District of Maryland

STATE OF MARYLAND v. 3M COMPANY, ET AL., C.A. No. 1:23-01836