

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 in the Southern District of New York *Kovach* action listed on Schedule A moves under Panel Rule 7.1 to vacate our order that conditionally transferred *Kovach* to the District of South Carolina for inclusion in MDL No. 2873. The United States defendants¹ take no position on the motion. The other defendants named in *Kovach* did not respond to the motion and therefore are deemed to have acquiesced to the motion. See Panel Rule 6.1(c) (“Failure to respond to a motion shall be treated as that party’s acquiescence to it.”).

After considering the parties’ arguments, we find that *Kovach* shares questions of fact with the actions previously transferred to MDL No. 2873, but 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) into local groundwater and contaminated drinking water supplies. See *In re Aqueous Film-Forming Foams Prods. Liab. Litig.*, 357 F. Supp. 3d 1391, 1396 (J.P.M.L. 2018). Plaintiff in *Kovach* asserts environmental claims stemming from an alleged incident of intentional dumping of AFFFs at Stewart Air National Guard Base in August 1990. *Kovach* thus will share certain factual questions with the other actions centralized in MDL No. 2873.

Even so, the differences between *Kovach* and the actions in the MDL are significant. Plaintiff’s allegations pertain to a decades-old intentional dumping incident that does not appear to have been raised in the MDL. His claims regarding this incident are unique, as plaintiff alleges that he witnessed the dumping and suffered retaliation because he reported it to a state environmental regulator. Plaintiff, who is proceeding *pro se*, also seeks unique relief, including retroactive military promotion and retirement benefits. *Kovach*, therefore, is likely to present idiosyncratic case management issues that can be handled more efficiently outside the MDL. Significantly, no party asks that *Kovach* be litigated as part of MDL No. 2873. Transfer of *Kovach* to MDL No. 2873 thus is not warranted.

* Judges Karen K. Caldwell and David C. Norton took no part in the decision of this matter.

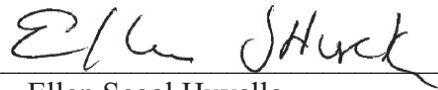
¹ These defendants include the United States of America, the United States Department of Defense, and the United States Air Force.

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Should the need arise, we encourage the parties to employ available alternatives to transfer to minimize the potential for duplicative discovery and inconsistent pretrial rulings. *See, e.g., In re Eli Lilly & Co. (Cephalexin Monohydrate) Patent Litig.*, 446 F. Supp. 242, 244 (J.P.M.L. 1978); *see also* Manual for Complex Litigation, Fourth, § 20.14 (2004). And, if *Kovach* evolves into a more typical AFFF action in which the common discovery and motion practice would be more efficiently and conveniently litigated within MDL No. 2873, the parties may again notice *Kovach* as a potential tag-along action.

IT IS THEREFORE ORDERED that the Panel's conditional transfer order designated as "CTO-23" is vacated.

PANEL ON MULTIDISTRICT LITIGATION

A handwritten signature in black ink, appearing to read "Ellen Segal Huvelle", is written over a horizontal line.

Ellen Segal Huvelle
Acting Chair

R. David Proctor
Nathaniel M. Gorton

Catherine D. Perry
Matthew F. Kennelly

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SCHEDULE A

Southern District of New York

KOVACH v. UNITED STATES OF AMERICA, ET AL., C.A. No. 7:19-07065