

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 *Leptien* action listed on Schedule A moves under Panel Rule 7.1 to vacate our order that conditionally transferred *Leptien* from the District of New Jersey to the District of South Carolina for inclusion in MDL No. 2873. Defendant 3M Company 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. *See In re Aqueous Film-Forming Foams Prods. Liab. Litig.*, 357 F. Supp. 3d 1391, 1394 (J.P.M.L. 2018). Plaintiff in *Leptien*, however, alleges that she developed breast cancer caused by exposure to various substances, including PFAS, halogenated hydrocarbons, heavy metals, freons, industrial alcohols and solvents, dioxin, and unspecified particulate matter and airborne waste. These substances allegedly were released from various industrial sites, including DuPont’s “Chambers Works,” where PFAS was used in the manufacture of non-AFFF products. In short, this is a “non-AFFF” action of the type the Panel has excluded from the MDL. *See id.* at 1396 (excluding actions involving discharges of PFAS directly into the Tennessee River by various industrial concerns in Decatur, Alabama; PFAS contamination originating from a shoe manufacturer’s industrial waste; and airborne PFAS discharges from factories in Hoosick Falls, New York).

A conditional transfer order was issued for *Leptien* because plaintiff had filed a second action in the MDL alleging that her breast cancer was caused by exposure to drinking water allegedly contaminated by the use of PFAS-containing AFFF in the vicinity of New Castle County, Delaware, including at the New Castle-Wilmington Airport and Delaware Air National Guard Base. *See Leptien v. 3M Co.*, C.A. No. 2:22-03635 (D.S.C. filed Oct. 20, 2022). After the present action was noticed as a potential tag-along action, however, plaintiff voluntarily dismissed the action that was filed in the MDL. Plaintiff argues that the MDL complaint was filed in error, by different counsel than those who represent her in New Jersey, and that the MDL complaint

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

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contained significant factual mistakes—namely, alleging that plaintiff had lived in Delaware for years when in fact, according to plaintiff, she has lived her entire life in New Jersey.

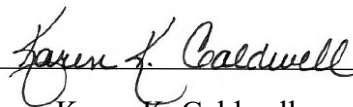
Defendant 3M Company argues that the dismissal of plaintiff’s MDL action does not change the connection between *Leptien* and the MDL. To the contrary, *Leptien* is, on the face of the complaint, a non-AFFF action that lacks the critical common questions of fact regarding AFFFs with the actions in the MDL. The only connection between *Leptien* and the MDL was plaintiff’s now-dismissed MDL action. 3M suggests that plaintiff’s allegations in the MDL complaint will create fact issues regarding the source of plaintiff’s alleged PFAS exposure. Perhaps so, but those fact questions can and should be answered in New Jersey, not the MDL. In any event, at present it appears unlikely that *Leptien* will entail significant overlap in discovery or pretrial proceedings with the actions in the MDL.

Furthermore, *Leptien* is already being coordinated with other actions in the District of New Jersey that pertain to the same alleged non-AFFF sources of PFAS contamination. Indeed, plaintiffs in *Leptien* and four other actions in that district have filed a joint motion for remand to state court. Thus, both the MDL and *Leptien* will proceed more efficiently if *Leptien* 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 *Leptien* 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 *Leptien* 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-115” is vacated as to the action listed on Schedule A.

PANEL ON MULTIDISTRICT LITIGATION



Karen K. Caldwell
Chair

Nathaniel M. Gorton
Roger T. Benitez
Madeline Cox Arleo

Matthew F. Kennelly
Dale A. Kimball

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

MDL No. 2873

SCHEDULE A

District of New Jersey

LEPTIEN v. A CLEMENTE, INC., ET AL., C.A. No. 1:22-04609