

**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 *Aqua Pennsylvania II* action listed on Schedule A moves under Panel Rule 7.1 to vacate our order that conditionally transferred *Aqua Pennsylvania II* to the District of South Carolina for inclusion in MDL No. 2873. Defendant Arkema Inc. opposes this 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 *Aqua Pennsylvania II* alleges that Arkema used PFAS at a chemical plant in West Chester, Pennsylvania (the "Bolmar Street facility") and allowed releases of PFAS from that facility to contaminate plaintiff's "Main System," which supplies drinking water to several municipalities in Delaware County, Pennsylvania.

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, and we have endeavored to maintain the distinction between AFFF and non-AFFF actions. "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." Order Denying Transfer at 2, MDL No. 2873 (J.P.M.L. Dec. 18, 2019), ECF No. 541. On its face, *Aqua Pennsylvania II* does not allege injury due to AFFF manufacture, use, or disposal.

In support of transfer, Arkema points not only to the complaint in *Aqua Pennsylvania II* but also to a separate action that plaintiff filed against Arkema that also involves the Bolmar Street facility and alleged PFAS contamination of the Goose Creek watershed. *See* Transfer Order, MDL

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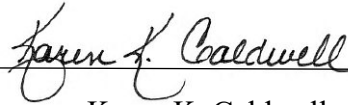
No. 2873 (J.P.M.L. Apr. 1, 2021), ECF No. 960 (transferring *Aqua Pennsylvania I*). To be sure, we have transferred actions that, on the face of the complaint, do not involve AFFF claims where the plaintiff seeks recovery for contamination of the same water source in an MDL AFFF action. *See, e.g.*, Transfer Order at 2, MDL No. 2873 (J.P.M.L. Oct. 5, 2020), ECF No. 691 (transferring putative non-AFFF action by New Jersey-American Water Company because plaintiff was “seeking (or potentially seeking) recovery for PFAS contamination of *the same water supply*”) (emphasis in original). We are not convinced that *Aqua Pennsylvania II* presents the same scenario. Plaintiffs two actions seek recovery for PFAS contamination of two different water systems. Whereas *Aqua Pennsylvania II* involves plaintiff’s “Main System” providing water to Delaware County, Pennsylvania, *Aqua Pennsylvania I* involves plaintiff’s “West Chester System” and provides water to municipalities in Chester County, Pennsylvania. While both actions allege contamination of the Goose Creek watershed, the water systems otherwise draw from different sources. The actions also allege different sources of PFAS contamination. Of particular note, whereas *Aqua Pennsylvania II* is directed solely to Arkema’s Bolmar Street facility, *Aqua Pennsylvania I* involves allegations of contamination stemming from National Foam’s “Union Street facility,” where it manufactured AFFF products. *See* Transfer Order at 2, MDL No. 2873 (J.P.M.L. Apr. 1, 2021), ECF No. 960.

On balance, we are not persuaded that the overlap between plaintiff’s two actions justifies transfer of *Aqua Pennsylvania II*. The mere “potential for commingling” of PFAS from AFFF and non-AFFF sources is not sufficient to justify transfer of an otherwise non-AFFF action. *See* Order Vacating CTO at 2–3, MDL No. 2873 (J.P.M.L. Aug. 3, 2022), ECF No. 1511 (“[B]ased 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 and convenience.”). The only common alleged contamination source between the two *Aqua Pennsylvania* actions is a non-AFFF industrial facility, Arkema’s Bolmar Street facility. “We generally have excluded actions involving non-AFFF discharges of PFAS from specific industrial locations.” Order Denying Transfer at 2, MDL No. 2873 (J.P.M.L. Apr. 5, 2022), ECF No. 1352 (denying transfer of *Johnson*, which primarily focused on the carpet industry in Dalton, Georgia). Arkema’s arguments that the Union Street facility will be implicated in *Aqua Pennsylvania II* remains, at this point, too speculative to justify transfer. *See* Order Denying Transfer at 2, MDL No. 2873 (J.P.M.L. Feb. 12, 2025), ECF No. 3260 (“At most, 3M shows only that it is ‘plausible’ that PFAS contamination stemming from AFFF use . . . may have contributed to the plaintiffs’ alleged injuries.”). Should *Aqua Pennsylvania II* evolve into a more obvious AFFF action, the parties or the court at that time can re-notice *Aqua Pennsylvania II* as a potential tag-along in MDL No. 2873. At present, however, transfer is not appropriate.

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IT IS THEREFORE ORDERED that the Panel's conditional transfer order designated as "CTO-246" is vacated as to the action listed on Schedule A.

PANEL ON MULTIDISTRICT LITIGATION

A handwritten signature in cursive script, reading "Karen K. Caldwell", is positioned above a horizontal line.

Karen K. Caldwell
Chair

Nathaniel M. Gorton
David C. Norton
Dale A. Kimball

Matthew F. Kennelly
Roger T. Benitez
Madeline Cox Arleo

**IN RE: AQUEOUS FILM-FORMING FOAMS
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SCHEDULE A

Eastern District of Pennsylvania

AQUA PENNSYLVANIA, INC. v. ARKEMA INC., C.A. No. 2:25-01101