

**UNITED STATES JUDICIAL PANEL
on
MULTIDISTRICT LITIGATION**

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

MDL No. 2873

TRANSFER ORDER

Before the Panel:* Plaintiff in the Eastern District of Pennsylvania *Aqua Pennsylvania* action listed on Schedule A moves under Panel Rule 7.1 to vacate our order that conditionally transferred *Aqua Pennsylvania* to the District of South Carolina for inclusion in MDL No. 2873. Defendants Kidde Fenwal, Inc., and Carrier Global Corporation oppose the motion.

In support of its motion to vacate, plaintiff argues that federal subject matter jurisdiction over *Aqua Pennsylvania* is lacking, and that its pending motion for remand to state court should be decided before transfer. We are not persuaded by these arguments. The Panel has held that such jurisdictional objections generally do not present an impediment to transfer.¹ *See, e.g., In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 170 F. Supp. 2d 1346, 1347–48 (J.P.M.L. 2001) (“[R]emand motions can be presented to and decided by the transferee judge.”).

Plaintiff also argues that transfer of *Aqua Pennsylvania* is inappropriate because it is not an “AFFF” action that falls within the scope of MDL No. 2873. This litigation 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. (In re AFFF)*, 357 F. Supp. 3d 1391, 1394 (J.P.M.L. 2018).² We excluded from the MDL actions that do not contain any allegations relating to AFFFs. *See id.* at 1392 & 1396. Plaintiff contends that its claims solely concern

* Judge Catherine D. Perry did not participate in the decision of this matter.

¹ Panel Rule 2.1(d) expressly provides that the pendency of a conditional transfer order does not limit the pretrial jurisdiction of the court in which the subject action is pending. Between the date a remand motion is filed and the date that transfer of the action to the MDL is finalized, a court generally has adequate time to rule on a remand motion if it chooses to do so. The court in *Aqua Pennsylvania* has stayed briefing on plaintiff’s remand motion pending our decision on transfer.

² This MDL also encompasses actions by firefighters and other individuals who used AFFF products and were directly exposed to the PFOS and PFOA. *See* Transfer Order at 2–3, *In re AFFF*, MDL No. 2873 (J.P.M.L. Feb. 4, 2021), ECF No. 866.

- 2 -

contamination of drinking water caused by defendants' improper handling and disposal of per- or polyfluoroalkyl substances (PFAS, which includes PFOA and PFOS) at two manufacturing facilities located in West Chester, Pennsylvania.

Plaintiff's attempt to characterize its action as a non-AFFF action fails once we look at the specific manufacturing sites at issue. One of these (the "Union Street facility") is alleged to have been used in the manufacture of AFFFs and was owned or operated by defendants National Foam, Inc., Angus International Safety Group, Ltd., Kidde Fenwal, Inc., and Carrier Global Corporation. *See* Am. Compl. ¶ 6, *Aqua Pennsylvania*, C.A. No. 2:21-00056 (E.D. Pa. filed Jan. 27, 2021), ECF No. 7. National Foam is one of the primary AFFF manufacturer defendants in MDL No. 2873. In their opposition to the motion to vacate, defendants state that National Foam manufactured all of its AFFF products at the Union Street facility until 2015, that AFFFs were the only products manufactured at the Union Street facility, and that this was the only location National Foam ever used to manufacture AFFF products containing PFOA. Defendants further argue that these AFFF products were tested at this facility. Given these allegations by plaintiff and defendants, we are satisfied that *Aqua Pennsylvania* constitutes an AFFF action. *Aqua Pennsylvania* will raise numerous common questions of fact with the actions already in MDL No. 2873. That this action also involves allegations relating to a non-AFFF manufacturing facility is no obstacle to transfer. *See* Transfer Order at 2, *In re AFFF*, MDL No. 2873 (J.P.M.L. July 31, 2019), ECF No. 483 ("That plaintiff alleges additional sources of contamination does not convert *Ridgewood Water* into a 'non-AFFF' case of the type we excluded from the MDL in the initial centralization order.").

Plaintiff also argues that transfer will not result in the efficient conduct of this action, but instead will lead to delay of case-specific discovery. This argument is not persuasive. Transfer of an action is appropriate if it furthers the expeditious resolution of the litigation taken as a whole, even if some parties to the action might experience inconvenience or delay. *See In re Watson Fentanyl Patch Prods. Liab. Litig.*, 883 F. Supp. 2d 1350, 1351–52 (J.P.M.L. 2012) ("[W]e look to the overall convenience of the parties and witnesses, not just those of a single plaintiff or defendant in isolation."). Plaintiff in *Aqua Pennsylvania* and plaintiffs in the MDL will benefit from coordinated discovery of common factual questions.

Finally, plaintiff argues that transfer is not appropriate because it does not assert product liability claims, but rather claims for negligence, nuisance, and violation of Pennsylvania environmental protection laws. Many actions in the MDL, however, assert state-law claims for negligence and nuisance, as well as claims under environmental protection statutes. This litigation is not limited to actions asserting products liability claims.

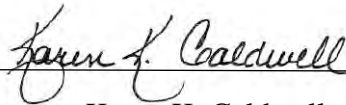
Accordingly, after considering the argument of counsel, we find that the action listed on Schedule A involves common questions of fact with the actions transferred to MDL No. 2873, and that transfer under 28 U.S.C. § 1407 will serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation. In our order centralizing this litigation, we held that the District of South Carolina was an appropriate Section 1407 forum for actions in which plaintiffs allege that AFFF products used at airports, military bases, or certain industrial locations caused the release of PFOS and/or PFOA into local groundwater and contaminated drinking water

- 3 -

supplies. The actions in the MDL share factual questions concerning the use and storage of AFFFs; the toxicity of PFAS and the effects of these substances on human health; and these substances' chemical properties and propensity to migrate in groundwater supplies. *See In re AFFF*, 357 F. Supp. 3d at 1394. *Aqua Pennsylvania* will involve similar factual questions.

IT IS THEREFORE ORDERED that the action listed on Schedule A is transferred to the District of South Carolina and, with the consent of that court, assigned to the Honorable Richard M. Gergel for coordinated or consolidated pretrial proceedings.

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

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

MDL No. 2873

SCHEDULE A

Eastern District of Pennsylvania

AQUA PENNSYLVANIA, INC. v. NATIONAL FOAM, INC., ET AL.,
C.A. No. 2:21-00056