

UNITED STATES JUDICIAL PANEL
on
MULTIDISTRICT LITIGATION

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

MDL No. 2873

TRANSFER ORDER

Before the Panel:* Plaintiffs in the District of Alaska *Gaston* and *Saracco* actions listed on Schedule A, as well as defendant City of Gustavus, move under Panel Rule 7.1 to vacate our order that conditionally transferred these actions to the District of South Carolina for inclusion in MDL No. 2873. Plaintiff the State of Alaska, as well as third-party defendants Tyco Fire Products, LP, and Chemguard, Inc., oppose the motions.

In support of their motions to vacate, movants primarily argue that federal subject matter jurisdiction over these actions is lacking, and that their pending motions 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.”). Although movants insist that removal was improper, “Section 1407 does not empower the MDL Panel to decide questions going to the jurisdiction or the merits of a case, including issues related to a motion to remand.” *In re Ford Motor Co. DPS6 PowerShift Transmission Prods. Liab. Litig.*, 289 F. Supp. 3d 1350, 1352 (J.P.M.L. 2018) (quoting *In re Ivy*, 901 F.2d 7, 9, (2d Cir. 1990)).

Movants also argue that their actions are so distinct from the actions in MDL No. 2873 that transfer is not appropriate. But these actions share common questions of fact with the actions in the MDL. Even setting aside the State’s third-party complaints against manufacturers of aqueous film-forming foams (AFFFs), plaintiffs allege that they were harmed due to groundwater contamination caused by use of AFFFs. That plaintiffs name only the State of Alaska and the City of Gustavus as defendants, and not AFFF manufacturers, is of no moment. We have transferred other actions against governmental entities to MDL No. 2873 where those actions share common

* Judge David C. Norton 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 transferor court here has stayed proceedings in the two actions pending our decision on transfer.

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factual questions with the actions in the MDL. *See, e.g.*, Transfer Order at 1, MDL No. 2873 (J.P.M.L. Jun. 20, 2020), ECF No. 650 (transferring action by State of New Mexico against the United States to MDL). Nor is it significant that these actions involve locations in Alaska—the MDL is comprised of actions alleging various contamination sites across the country. “Section 1407 does not require a complete identity or even majority of common factual issues as a prerequisite to transfer.” *In re Ins. Brokerage Antitrust Litig.*, 360 F. Supp. 2d 1371, 1372 (J.P.M.L. 2005).

Movants in *Saracco* argue that case will involve unique factual questions relating to the City of Gustavus’ use of AFFF to extinguish a brush fire on plaintiffs’ property. Many actions in the MDL, though, entail similarly unique factual questions regarding the underlying groundwater contamination. All will require discovery as to AFFF and per- or polyfluoroalkyl substances (PFAS) because plaintiffs in all these actions allege harm due to groundwater contamination caused by use of AFFF. This discovery will involve questions “concerning the use and storage of AFFFs; the toxicity of PFOA and PFOS and the effects of these substances on human health; and these substances’ chemical properties and propensity to migrate in groundwater supplies. Transfer Order at 3, MDL No. 2873 (J.P.M.L. Jun. 2, 2020), ECF No. 650.

Movants also contend that transfer will cause them inconvenience and delay. The City of Gustavus, in particular, stresses that it is a small community and lacks the resources to defend itself in a large MDL in another part of the country. Transfer of an action, however, 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.”). Moreover, centralization should allow the City of Gustavus to benefit from coordinated and centralized discovery regarding AFFF that otherwise it would have to obtain on its own. Centralization under Section 1407 is for pretrial proceedings only, and there usually is no need for parties or witnesses to travel to the transferee court for depositions or court hearings. *See In re MLR, LLC, Patent Litig.*, 269 F. Supp. 2d 1380, 1381 (J.P.M.L. 2003). The City also expresses concern that it will not be adequately represented by appointed leadership counsel in the MDL. The City should address such concerns to the transferee court.

Accordingly, after considering the argument of counsel, we find that the actions listed on Schedule A involve 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 perfluorooctane sulfonate (PFOS) and/or perfluorooctanoic acid (PFOA, both of which are types of PFAS) into local groundwater and contaminated drinking water 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 Aqueous Film-Forming Foams Prods. Liab. Litig.*, 357 F. Supp. 3d 1391, 1394 (J.P.M.L. 2018). Both *Gaston*

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and *Saracco* will involve similar factual questions relating to the alleged groundwater contamination in those cases.

IT IS THEREFORE ORDERED that the actions listed on Schedule A are 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
Roger T. Benitez
Madeline Cox Arleo

Matthew F. Kennelly
Dale A. Kimball

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SCHEDULE A

District of Alaska

SARACCO, ET AL. v. STATE OF ALASKA, ET AL., C.A. No. 1:21-00015
GASTON v. STATE OF ALASKA, C.A. No. 4:21-00019