

**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 Michigan *Marathon Petroleum* action listed on Schedule A moves under Panel Rule 7.1 to vacate our order that conditionally transferred *Marathon Petroleum* to the District of South Carolina for inclusion in MDL No. 2873. Defendants 3M Company; Tyco Fire Products, LP; Chemguard, Inc.; and Hayden & Company oppose the motion.

In support of its motion to vacate, plaintiff argues that federal subject matter jurisdiction over *Marathon Petroleum* 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.<sup>1</sup> *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 plaintiff insists 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)).

Plaintiff also argues that *Marathon Petroleum* is so distinct from the actions in MDL No. 2873 that transfer is not appropriate. But this action shares common questions of fact with the actions in the MDL. Plaintiff alleges that it was harmed due to groundwater contamination caused by use of aqueous film-forming foams (AFFFs) to extinguish fires and for safety training at its Detroit refinery. Plaintiff names some of the principal defendants in the MDL as defendants in *Marathon Petroleum*. That the action involves an oil refinery is of no moment. We have transferred other actions involving the use of AFFFs at refineries. *See, e.g., Condition Transfer*

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

<sup>1</sup> 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 *Marathon Petroleum* pending our decision on transfer.

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Order (CTO-15), MDL No. 2873 (J.P.M.L. July 15, 2019), ECF No. 473 (transferring *Valero Refining Co. v. 3M Co.*). See also Transfer Order at 2–3, MDL No. 2873 (J.P.M.L. Jun. 7, 2021), ECF No. 1020 (transferring action involving allegations of AFFF exposure by first responders to a fire at a petrochemical plant). *Marathon Petroleum* may involve unique factual questions—such as defendants’ alleged promotion of AFFFs targeted to the refining industry. But this does not weigh significantly against transfer. “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).

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 perfluorooctane sulfonate and/or perfluorooctanoic acid (collectively, these and other per- or polyfluoroalkyl substances are referred to as 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). *Marathon Petroleum* will involve similar factual questions relating to the alleged groundwater contamination at plaintiff’s Detroit refinery.

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



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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**

Eastern District of Michigan

MARATHON PETROLEUM COMPANY LP v. 3M COMPANY, ET AL.,  
C.A. No. 2:22-10117