UNITED STATES JUDICIAL PANEL
on
MULTIDISTRICT LITIGATION

IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION MDL No. 2873

ORDER DENYING TRANSFER

Before the Panel:* Defendant 3M Company moves under 28 U.S.C. § 1407(c) to transfer the *Deese* and *Hardwick II* actions listed on Schedule A to the District of South Carolina for inclusion in MDL No. 2873. Defendants EIDP, Inc., and The Chemours Company support the motion to transfer *Hardwick II*. Plaintiffs in each action oppose the motion to transfer their respective action.

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). Plaintiffs in *Deese* allege that they were injured by exposure to PFAS emitted from two industrial facilities—DuPont's Chambers Works facility and Arkema/Solvay's Thorofare facility—neither of which manufactured AFFFs. On its face, the *Deese* complaint does not involve allegations pertaining to the manufacture, use, or disposal of AFFFs.

In support of its motion to transfer, 3M argues that *Deese* involves contamination sites already at issue in the MDL. Specifically, 3M contends that plaintiffs identified the Borough of Paulsboro as a potential exposure site in written discovery responses and that the Borough of Paulsboro has filed a lawsuit in the MDL seeking to recover for alleged PFAS contamination of its water supply stemming from AFFF use or disposal. Plaintiffs, in opposition, dispute 3M's characterization of their discovery responses and insist they do not allege AFFF exposure.

We need not wade into the parties' discovery dispute because the procedural posture of *Deese* weighs heavily against transfer. Specifically, *Deese* is part of a consolidated litigation in the District of New Jersey relating to alleged injuries caused by PFAS discharged from the Chambers Works facility. *Deese* has been consolidated for discovery purposes with several other Chambers Works cases. Except for certain depositions of healthcare providers, fact discovery in

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* Judges Karen K. Caldwell and David C. Norton did not participate in the decision of this matter.

these actions has closed. Thus, *Deese* is already being litigated in an efficient manner with other actions sharing common factual questions regarding the Chambers Works and the Thorofare facility. Transfer at this juncture could disrupt the consolidated New Jersey litigation. Because *Deese* on its face does not encompass AFFF claims and has already advanced to expert discovery, transfer is not warranted in this instance.

We next turn to 3M's motion to transfer *Hardwick II*. Plaintiff originally filed suit in the Southern District of Ohio against numerous PFAS-manufacturer defendants in 2018. He asserted claims on behalf of a putative nationwide class of all individuals with a detectable level of PFAS in their blood and primarily sought injunctive relief, including the creation of an independent panel of scientists to study the health effects of PFAS exposure. We denied a motion to transfer *Hardwick I*, which was focused "entirely on PFAS" and sought a unique form of relief not sought by plaintiffs in the MDL. *See* Order Denying Transfer at 2, MDL No. 2873 (J.P.M.L. Feb. 5, 2020), ECF No. 585. Following that decision, discovery in *Hardwick I* commenced. Ultimately, the Ohio court partially granted class certification. The Sixth Circuit, however, vacated the certification ruling and directed that *Hardwick I* be dismissed because, *inter alia*, plaintiff could not identify which companies manufactured the products to which he was allegedly exposed and could not trace the specific types of PFAS found in his blood to the products that he allegedly used. *See In re E. I. du Pont de Nemours & Co. C-8 Personal Injury Litig.*, 87 F.4th 315, 320–21 (6th Cir. 2023). Plaintiff has now filed *Hardwick II*, which he asserts remedies the deficiencies identified by the Sixth Circuit.

3M argues that transfer of *Hardwick II* is appropriate because plaintiff has limited his claims to PFOA and PFOS—the two PFAS chemicals at issue in the AFFF litigation. 3M further argues that discovery in *Hardwick I* revealed that plaintiff was a firefighter, that he was exposed to AFFF in the course of his employment, and that many such "direct exposure" cases are pending in the MDL. Finally, 3M contends that the relief plaintiff seeks is substantially similar to the medical monitoring sought by numerous plaintiffs in the MDL.

These arguments echo those advanced by defendants in support of transferring *Hardwick I*, and they are no more persuasive now. As with *Hardwick I*, the focus of *Hardwick II* remains exclusively on PFAS. There are no claims directed to AFFF products or AFFF manufacturers. The relief sought also remains unique—indeed, in our decision denying transfer of *Hardwick I*, we rejected defendants' characterization of the relief sought as "traditional medical monitoring." *See* Order Denying Transfer at 2–3, MDL No. 2873 (J.P.M.L. Feb. 5, 2020), ECF No. 585. Further, the Panel was aware of "plaintiff's background as a firefighter" when we denied transfer of *Hardwick I*. *See id.* at 2. While plaintiff's limitation of his claims to PFOA and PFOS arguably bring *Hardwick II* closer to the subject matter of the AFFF MDL, it remains a unique action, transfer of which would unnecessarily complicate management of the MDL.

An additional consideration weighs against transfer of *Hardwick II*. The Sixth Circuit has already opined on the merits of plaintiff's claims in *Hardwick I*, and the complaint in *Hardwick II* purportedly was drafted to address the court's concerns. Transfer of *Hardwick II* potentially invites pretrial rulings that may conflict with the Sixth Circuit's decision. Allowing *Hardwick II* to proceed in the Southern District of Ohio, before the court that oversaw *Hardwick I* and the

circuit court that already has issued a decision regarding plaintiff's claims, appears to be the most efficient and prudent course of action.

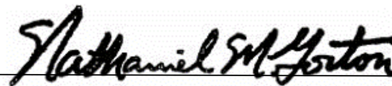
Accordingly, after considering the parties' arguments, we find that transfer of the actions listed on Schedule A under 28 U.S.C. § 1407 will not serve the convenience of the parties and witnesses or promote the just and efficient conduct of the litigation. When we centralized this docket, we denied a 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 In re AFFF*, 357 F. Supp. 3d at 1396. We drew this line between "AFFF" and "non-AFFF" cases because of concerns for the manageability of this litigation:

> While a non-AFFF MDL would allow for common discovery and motion practice with respect to 3M—the main producer of PFOA and PFOS—it also would include far more site-specific issues, different modes of PFAS contamination, and different PFAS chemicals (whereas the AFFF actions are limited to PFOA and PFOS contamination). Such an MDL could quickly become unwieldy.

Id. Since then, we have endeavored to maintain this distinction. *See, e.g.*, Order Denying Transfer at 2, MDL No. 2873 (J.P.M.L. Dec. 18, 2019), ECF No. 541 ("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."). For the reasons explained above, 3M has not met its "significant burden" of showing that transfer of *Deese* or *Hardwick II* is appropriate.

IT IS THEREFORE ORDERED that the motions to transfer the actions listed on Schedule A to MDL No. 2873 are denied.

PANEL ON MULTIDISTRICT LITIGATION



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IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION MDL No. 2873

SCHEDULE A

District of New Jersey

DEESE, ET AL. v. SOLVAY SPECIALTY POLYMERS, USA, LLC, ET AL., C.A. No. 1:21−00217

Southern District of Ohio

HARDWICK v. 3M COMPANY, ET AL., C.A. No. 2:24−03121