

**BEFORE THE UNITED STATES JUDICIAL PANEL
ON MULTIDISTRICT LITIGATION**

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

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MDL Docket No.: 2873

RESPONSE TO MOTIONS TO TRANSFER (DOC. 1 AND DOC. 4)

Plaintiffs Willie King, Tammi Yarbrough, Kristin Winchester, Betty Willhoite, Theresa White, Carrie Warren, Steve Robinson, Sarah Pride, Linda Pride, Mary Mitchell, Gwendolyn Miller, Mike Lampkin, Rita Faye King, Alice Jones, Virgie Hampton, Vanessa Hampton, Samuel Gray, Janet Bradford, Sandra Almon, Sheila Lambert, Reba Alexander, Pamela Kirby, Chloe Rikard, Deanna Arnold and a class of similarly situated individuals (“Respondents”) respectfully submit this Response to the Motions to Transfer filed as Doc. 1 and Doc. 4 before the United States Judicial Panel on Multidistrict Litigation “JPML”, MDL No. 2873, titled “In Re: Aqueous Film-Forming Foams Products Liability Litigation”. Respondents respectfully request that the JPML consolidate all individual cases and all tag along cases included on the Schedule of Actions attached to the Motions to Transfer, to the United States District Court for the Northern District of Alabama, for coordinated and /or consolidated pre-trial proceedings before the Honorable Judge Abdul Kallon. Alternatively, Respondents request that all the same actions be centralized in the Southern District of Ohio before the Honorable Edmund A. Sargus, Chief Judge.

I. ARGUMENT

Title 28, Section 1407 of the United States Code provides: “When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings.” 28 U.S.C. § 1407(a). The presence of common factual questions necessitates transfer under § 1407 in order to prevent duplication of discovery and eliminate the possibility of inconsistent pretrial rulings. *In re Eastern Airlines, Inc. Flight Attendant Weight Program Litig.*, 391 F. Supp. 763, 764 (J.P.M.L. 1975). Transfer under § 1407, however, does not require complete identity or even majority of common factual or legal issues as a prerequisite to transfer. *In re Rembrandt Techs., L.P.*, 493 F. Supp. 2d 1367, 1369 (J.P.M.L. 2007); *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 173 F. Supp. 2d 1377, 1379 (J.P.M.L. 2001).

The criteria used by the Judicial Panel on Multidistrict Litigation in determining the most appropriate transferee forum under 28 U.S.C. § 1407 include the convenience of the parties and witnesses; the relative degree of progress achieved in pending actions; the location of parties, witnesses, and documents; the likelihood that a given district’s location would enhance the prospects for cooperation among the federal and state courts; and, when no clear choice emerges from these factors, the preference of the majority of the parties. *In re Factor VIII or IX Concentrate Blood Prods. Liab. Litig.*, 853 F. Supp. 454, 455 (J.P.M.L. 1993); *In re New Mexico Natural Gas Antitrust Litig.*, 482 F. Supp. 333, 337 (J.P.M.L. 1979). For example, in the phenylpropanolamine (PPA) MDL, the Panel selected a transferee court based in part on the fact that it was “a major metropolitan court that (i) is not currently overtaxed with other multidistrict dockets, and (ii) possesses the necessary resources to be able to devote the substantial time and effort to pretrial

matters that this complex docket is likely to require.” *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 173 F. Supp. 2d 1377, 1379-80 (J.P.M.L. 2001).

Therefore, under the Section 1407 criteria, the Northern District of Alabama is the best location for coordination and centralization of these cases. Alternatively, the Southern District of Ohio would also be a selection congruent with Section 1407 criteria.

A. All Actions Should be Centralized in the Northern District of Alabama before Judge Abdul Kallon

The factors in favor of centralization¹ in the Northern District of Alabama, before Judge Abdul Kallon are that 1) the oldest filed case on the Schedule of Actions is pending before him, 2) multiple individual and class actions are pending in the district, 3) the litigation has progressed significantly such that Judge Kallon and the Eleventh Circuit have made extensive rulings on Motions to Dismiss, Appeals, and discovery, 4) and Judge Kallon and the Northern District have the experience and resources to conduct this MDL in an efficient manner.

Judge Kallon has presided over the oldest series of actions involving PFAS or AFFF that have been listed in the Schedule of Actions. Particularly, *West Morgan-East Lawrence Water and Sewer Authority, et al., v. 3M Company, et al.*, in the United States District Court for the Northern District of Alabama, Case No. 5:15-cv-01750-AKK, is the oldest case listed on 3M Company’s Supplemental Schedule of Actions. MDL No. 2873, Doc. 4-2. This case is a class action filed on behalf of the local water authority and various residents who have suffered from contaminated water. The case has been heavily litigated for the past three years, and involved significant discovery such as corporate representative depositions. Judge Kallon has already ruled on motions

¹ Respondents agree with the underlying rationale for centralization present in Doc. 1 and Doc. 4 and will not repeat said arguments. Respondents, however, do not agree with the requested locations for centralization as proposed in Doc. 1 and Doc. 4.

to dismiss², and shown a significant and detailed grasp of the intricate claims and science at issue, via his rulings at multiple stages in the litigation. The Eleventh Circuit Court of Appeals has even addressed various appellate issues. See *W. Morgan-East Lawrence Water & Sewer Auth. v. 3M Co.*, No. 17-12381, 2018 U.S. App. LEXIS 15268, at *12 (11th Cir. June 4, 2018).

Additionally, there are multiple other class and individual cases filed in the Northern District of Alabama. *Tennessee Riverkeeper Inc. v. 3M Company, et al.*, in the United States District Court for the Northern District of Alabama, Case No. 5:16-cv-01029 (also before Judge Kallon), *King, et al. v. West Morgan-East Lawrence Water and Sewer Authority, 3M Company, et al.*, in the United States District Court for the Northern District of Alabama, Case No. 5:17-cv-01833³, and *Arnold v. 3M Company, et al.*, in the United States District Court for the Northern District of Alabama, Case No. 5:18-cv-01441⁴, were all filed in the Northern District of Alabama involving similar products, claims, and Defendants. The majority of these cases were filed long before any of the other actions listed in the Supplemental Schedule of Actions. Most involve multiple plaintiffs, class action allegations, and have progressed individually in various ways despite the parties' attempts to formally and informally coordinate some parts of the proceedings⁵.

Finally, it is important to highlight that Judge Kallon and the Northern District of Alabama are specifically suitable and desirable for the centralization of this action. Judge Kallon's reputation and credentials are impeccable and he has repeatedly handled complex litigation like

² *W. Morgan-East Lawrence Water & Sewer Auth. v. 3M Co.*, 208 F. Supp. 3d 1227, 1230 (N.D. Ala. 2016).

³ Filed by the undersigned law firm.

⁴ Filed by the undersigned law firm.

⁵ Pursuant to the JPML's instruction in Doc. 6, various parties involved have requested stays, transfer, and consolidation at multiple points in the litigation in the Northern District of Alabama but to this date, no such activity has significantly altered the efficiency of the litigation nationwide. There have also not been any § 1404 requests to counsel's knowledge.

the cases involved here. He is not currently tasked with another MDL, so he will not be overburdened. Currently there are only two other MDLs pending in the entire Northern District, so the same is true for the Northern District as a whole.

And the Northern District of Alabama has already been deemed a suitable, reliable, and accessible location to conduct nationwide litigation such as this. See MDL No. 2406, Doc. 128 (selecting the Northern District of Alabama and Judge Proctor as the transferee district and judge for the *In Re: Blue Cross Blue Shield Antitrust Litigation*). It is also a central geographic location, considering many cases are pending in the western, eastern, and southern states, and proximately located to an easily accessible international airport in Birmingham, Alabama.

The Northern District of Alabama is the best choice to centralize this litigation because the lawsuits subject to the JPML's consideration have been pending the longest there. Furthermore, Judge Kallon and the Eleventh Circuit Court of Appeals are familiar with the litigation, and are best prepared to handle the complex issues involved in these cases.

B. Alternatively, All Actions Should be Centralized in the Southern District of Ohio before Chief Judge Edmund A. Sargus

Should the JPML decide to look elsewhere, the factors in favor of centralization before Chief Judge Edmund A. Sargus in the United States District Court for the Southern District of Ohio are that 1) he has extensive involvement with the underlying science and contaminants central to all cases listed on the Schedule of Actions, 2) cases are currently pending before him, and 3) the Southern District of Ohio is geographically proximate to all cases currently listed on the Schedule of Actions.

Currently, Judge Sargus is still in charge of the *In re: E.I. du Pont de Nemours and Company C-8 Personal Injury Litigation*, MDL-2433. This is the same MDL that resulted in the

C8 Science Panel in which an eight (8) year exposure and health study was performed regarding the release of the same type of contaminants at issue in the cases at issue before the JPML. Judge Sargus clearly has an underlying familiarity with the subject matter in this litigation, and would be prepared to adjudicate these cases efficiently. Recently, another case that will likely be included on the Schedule of Actions was recently filed and Judge Sargus is now presiding over it as well. See *Hardwick v. 3M Company*, et al., in the United States District Court for the Southern District of Ohio Eastern Division, Case No. 2:18-cv-1185.

And similar to the argument for the Northern District of Alabama, the Southern District of Ohio is centrally located, particularly when considering the locations of the cases filed on the Schedule of Actions. It is easily accessible, and would provide a central venue for all parties to easily attend hearings and conduct discovery and trials as part of the centralization.

II. Conclusion

Respondents respectfully request that this Panel, pursuant to 28 U.S.C. § 1407 Rule 6.1 and Rule 6.2 of the Rules of Procedure of the United States Judicial Panel on Multidistrict Litigation, for an order transferring all related PFAS and AFFF cases listed on the Supplemental Schedule of Actions to the Northern District of Alabama for coordinated and/or consolidated proceedings before the Honorable Judge Abdul Kallon. Alternatively, Respondents respectfully request the same centralization and transfer to the Southern District of Ohio before the Honorable Edmund A. Sargus, Chief Judge.

A Proof of Service will be filed simultaneously herewith.

Respectfully submitted,

DATED: October 12, 2018

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PROOF OF SERVICE

In compliance with Rule 4.1(a) of the Rules of Procedure for the United States Judicial Panel on Multidistrict Litigation, I hereby certify that on October 12, 2018, a copy of the foregoing Response to Motion to Transfer was filed electronically with the Clerk of the Panel using the Judicial Panel on Multidistrict Litigation's CM/ECF system, and copies were served by Email or First Class Mail on October 12, 2018 to the following:

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2:18-cv-02038-PBT

2:18-cv-02040-PBT

2:18-cv-02037-PBT

2:16-cv-05380-PBT

2:17-cv-00573-PBT

1:17-cv-40002-DJC

1:18-cv-10747-DJC

1:16-cv-12351-DJC

2:18-cv-00373-JS-AYS

2:17-cv-02566-JS-AYS

2:18-cv-01996-JS-AYS

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2:18-cv-02496-JS-AYS

2:17-cv-06962-JS-AYS

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3:18-cv-30027-DJC

1:16-cv-12351-DJC

2:18-cv-00373-JS-AYS

2:17-cv-02566-JS-AYS

2:18-cv-01996-JS-AYS

2:18-cv-03225-JS-AYS

2:17-cv-06962-JS-AYS

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1:16-cv-03452-RBJ

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2:18-cv-02040-PBT
2:18-cv-02037-PBT
2:18-cv-02041-PBT
1:17-cv-40002-DJC
3:18-cv-30027-DJC
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2:17-cv-00573-PBT

1:17-cv-40002-DJC

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