BEFORE THE UNITED STATES
JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

IN RE: AQUEOUS FILM-FORMING PRODUCTS LIABILITY LITIGATION	)	MDL Docket No. 2873
This document relates to:	)	
State of New Mexico v. The United States et al., 6:19-cv-00178	)	

PLAINTIFFS' MOTION TO VACATE CONDITIONAL TRANSFER ORDER NO. 26

Pursuant to Rule 7.1(f) of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation, Plaintiffs, the State of New Mexico, by and through the New Mexico Attorney General Hector H. Balderas, and the New Mexico Environment Department (collectively, "Plaintiffs" or the "State"), file this Motion to Vacate Conditional Transfer Order No. 26, issued on February 20, 2020, with respect to the following matter:

***State of New Mexico v. United States et al.*, 6:19-cv-00178**

This Motion is accompanied by Plaintiffs' supporting memorandum.

Dated: March 13, 2020.

Respectfully submitted:

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MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION TO VACATE CONDITIONAL TRANSFER ORDER NO. 26

Pursuant to Rule 7.1(f) of the Rules of Procedure for the Judicial Panel on Multidistrict Litigation, Plaintiffs, the State of New Mexico, by and through the New Mexico Attorney General Hector H. Balderas, and the New Mexico Environment Department (collectively, "Plaintiffs" or the "State") move to vacate Conditional Transfer Order No. 26 ("CTO 26") issued on February 20, 2020, conditionally transferring this action to MDL No. 2873, *In re: Aqueous Film-Forming Foam Prods. Liab. Litig.* ("AFFF Products Liability MDL").

Three key facts distinguish this action from those actions transferred and consolidated by this Panel in the AFFF Products Liability MDL: (1) Plaintiffs herein have not asserted claims against PFAS and/or AFFF manufacturers or distributors; (2) the claims and defenses asserted are not consistent with the cases consolidated in the MDL; and (3) factual questions specific to the claims and defenses in this matter are different. Due to these differences, there is no threat of significant duplication of discovery, inconsistent rulings, or a waste of the parties' resources. In addition, the applicable criteria have not been satisfied to warrant transfer and consolidation of the State's environmental claims against the United States with the numerous product liability,

personal injury, negligence, and other claims against the AFFF manufacturers comprising the AFFF Products Liability MDL. For all these reasons, CTO 26 should be vacated and this case should be allowed to proceed before the District of New Mexico as originally filed.

FACTS AND PROCEDURAL BACKGROUND

The State brought this civil action against the United States and the United States Department of the Air Force (collectively "Defendants"), pursuant to the New Mexico Hazardous Waste Act, NMSA 1978, §§ 74-4-1 to -14 ("HWA"), and the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901, *et seq.* ("RCRA"), to abate the imminent and substantial endangerment to human health and the environment at two Air Force bases, Cannon and Holloman, resulting from the Defendants' improper and ongoing disposal and failure to contain per and polyfluoroalkyl substances ("PFAS"), hazardous and solid wastes present in "aqueous film-forming foam" ("AFFF") Defendants have and continue to use for firefighting training activities and petroleum fire extinguishment at the Bases. Because of the extremely high levels of PFAS found at and near the Bases, the State's action focuses on injunctive relief needed to sufficiently delineate as well as abate the imminent and substantial endangerment Defendants have created.

On July 24, 2019, soon after commencement of this case, the State filed a Motion for Preliminary Injunction, requesting that the district court enter an order requiring that Defendants take immediate action to address the imminent and substantial endangerment their contamination has caused at and around the Bases. Defendants thereafter filed a Motion to Dismiss the State's Amended[1] Complaint, arguing that the State's claims are barred by the Comprehensive

[1] Concurrently with its Motion for Preliminary Injunction, New Mexico amended its complaint to add the RCRA imminent and substantial endangerment claim to the analogous claim under the

Environmental Response, Compensation, and Liability Act ("CERCLA"), and that the United States has not waived sovereign immunity as to New Mexico's HWA claim. Both the Motion for Preliminary Injunction and the Motion to Dismiss were fully briefed as of October 30, 2019, before the U.S. District Court of New Mexico and the parties are awaiting a hearing on those motions. Neither the State nor Defendants moved to coordinate this action with the ongoing AFFF MDL during the extensive briefing that has occurred in this case, believing it to be distinct from those that have been coordinated in the AFFF Products Liability MDL.

With the issuance CTO 26, the Panel now will consider whether consolidation of this case with the AFFF Products Liability MDL currently pending in the District of South Carolina is appropriate. Because the criteria for transfer of this case to the MDL are not satisfied here, CTO 26 should be vacated.

ARGUMENT

Three criteria must be satisfied before this Panel may transfer a case: (1) the actions must share common questions of fact; (2) transfer must be convenient for the parties and witnesses; and (3) transfer must "promote the just and efficient conduct of such actions." 28 U.S.C. § 1407(a). *All* of these criteria must be satisfied in order for the Panel to transfer a case to an existing MDL (*In re Highway Acc. Near Rockville, Connecticut, on December 30, 1972*, 388 F. Supp. 574, 575 (J.P.M.L. 1975)); *none* of them is met here.

I. The Actions Do Not Share Common Questions of Fact

There are no relevant common questions of fact between this action and those actions constituting the AFFF Products Liability MDL. One key distinction is that the State has not brought any claims against the AFFF manufacturers and has brought no product liability claims.

NM HWA, after providing a 90 day notice as required under RCRA § 7002(b)(2)(A) (42 U.S.C. § 6972 (b)(2)(a)).

The United States is the sole defendant in this action. Thus, there is no overlap between the State's action and those in the MDL, the majority of which bring claims against the AFFF manufacturers.

In its decision to create the AFFF Products Liability MDL, the Panel found that in the consolidated cases, "plaintiffs allege that AFFF products used at airports, military bases, or certain industrial locations caused the release of PFOA[2] or PFOS[3] into local groundwater and contaminated drinking water supplies. ***With some minor variations, the same group of AFFF manufacturer defendants is named in each action***." *In re AFFF Prods. Liab. Litig.*, 357 F. Supp. 3d 1391, 1394 (J.P.M.L. 2018) (emphasis added); *see also* April 2, 2019 Transfer Order, *In re AFFF Prods. Liab. Litig.*, No. 2873 [Doc. 384] (transferring cases because they involve "many of the same factual questions and discovery of the AFFF manufactures").

Cases that have named the United States as a defendant, such as *City of Newburgh v. United States of America*, which is now pending in the AFFF Products Liability MDL, can easily be distinguished from the State's action here. In the *City of Newburgh* case, discussed by the Panel in its opinion creating the AFFF Products Liability MDL, plaintiffs brought claims against the United States under federal environmental statutes *in addition to* claims against AFFF manufacturer defendants under state common law. It was these common law claims against the AFFF manufacturer defendants that the Panel found to be "substantially similar to those in the other AFFF actions," and which thereby justified consolidation within the MDL. *In re AFFF Prods. Liab. Litig.*, 357 F. Supp. 3d 1391, 1395-96 (J.P.M.L. 2018).

Here, on the other hand, the State's claims asserted against the United States are limited to environmental claims related to the endangerment created by Defendants' previous and

[2] Perfluorooctanoic Acid.
[3] Perfluorooctane Sulfonate.

ongoing activities. Moreover, even if there are some common legal issues, the Panel has held that "[m]erely to avoid two federal courts having to decide the same issue is, by itself, usually not sufficient to justify Section 1407 centralization." *In re Fed. Hous. Fin. Agency, et al., Preferred Stock Purchase Agreements Third Amendment Litig.*, 190 F. Supp. 3d 1356, 1357 (J.P.M.L. 2016).

Not only does the instant case involve different defendants, it also lacks any other relevant factual commonality with the MDL. In its initial order creating the AFFF Products Liability MDL, the Panel identified the following shared factual questions:

> These actions thus share factual questions concerning the toxicity of PFOA and PFOS and their effects on human health; the chemical properties of these substances and their propensity to migrate in groundwater supplies; the knowledge of the AFFF manufacturers regarding the dangers of PFOA and PFOS; their warnings, if any, regarding proper use and storage of AFFFs; and to what extent, if any, defendants conspired or cooperated to conceal the dangers of PFOA and PFOS in their products.

357 F. Supp. 3d at 1394. These issues common to the actions in the AFFF Products Liability MDL are not relevant to this action.

In New Mexico's case, the United States has not disputed the toxicity of PFAS compounds, including PFOS and PFOA. Further, there are no allegations of personal injury that would require discovery relevant to the toxicity of PFAS for purposes of establishing causation. Instead, the relevant issues here focus solely on the United States' actions and inactions in relation to its firefighting operations at these Bases, and the imminent threat that New Mexico's citizens and environment face as a result.[4]

[4] Although the State's action involves AFFFs, that fact alone is not sufficient to support transfer and consolidation. As discussed herein, unique issues in this case predominate over any common issues with the product liability actions in the AFFF Product Liability MDL. *Cf. In re Eli Lilly & Co. Oraflex Prods. Liab. Litig.*, 578 F. Supp. 422, 423 (J.P.M.L. 1984) (per curiam) ("Although

The remaining common factual issues identified by the Panel in prior transfer orders relate to the various AFFF manufacturers, none of whom are a party to this action. *Id.* (noting common issues such as knowledge of AFFF manufacturers, warnings given by the AFFF manufacturers, potential conspiracy between the AFFF manufacturers, and identical defenses of AFFF manufacturers); *see also id.* at 1395 (noting that the transferred actions "will involve significant and overlapping discovery of the AFFF manufacturers and their products"); *id.* at 1394 n.8 (noting common issues related to general causation for personal injury actions against the AFFF manufacturers). None of these issues arises in the State's case, as the State brings claims solely against the United States limited to injunctive relief.

Further, the legal claims and defenses, and thus the discovery arising therefrom, are not the same as those in the AFFF Products Liability MDL, and thus, there are no efficiencies to be gained by transfer and consolidation, while such transfer and consolidation will severely delay and prejudice the State. As described above, the State has asserted claims under RCRA and the HWA. In its Motion to Dismiss, the United States raised two general issues: a bar to the State's claims under CERCLA, and the argument that the HWA does not provide for a waiver of sovereign immunity. The CERCLA preemption defense will require a fact-specific analysis to determine whether the United States has even begun to consider, let alone selected, any removal or remedial actions to address the PFAS contamination at Cannon and Holloman Bases. *See* 42 U.S.C. § 9613(h). This analysis will be based upon the briefing and declarations already pending before the Court. In addition, the United States' assertion of sovereign immunity applies only to the State's claim brought under the New Mexico HWA. No other plaintiff in the AFFF Products

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we recognize that the actions in this litigation involve some common questions of fact, we are not persuaded that these common questions of fact will . . . predominate over individual questions of fact present in each action.").

Liability MDL has asserted a claim under this state statute. Further, the United States has not, nor could it, assert the federal contractor immunity defense as a bar to liability in the present case. In the AFFF Products Liability MDL, on the other hand, the court has identified the federal contractor's defense as a primary issue that warrants the focus of the initial discovery and motion practices. *See In re AFFF Prods. Liab. Litig.*, Status Conf. Tr. (Dec. 13, 2019 – Judge Gergel), at 55:3-7 ("I've told you before that in terms of -- in my head, the order of things that kind of makes sense is Number 1, we got to deal -- got to get the discovery finished on immunity issues. We need to address governmental immunity, governmental contractor immunity, et cetera.") (attached as Exhibit A). Thus, the United States' defenses relevant here will not be addressed in the MDL and there is no risk of inconsistent rulings should the Panel allow the case to proceed before the District of New Mexico.

The relevant discovery for this case is locality-specific and unique to the circumstances presented, and conversely, the common discovery that will occur in the AFFF Products Liability MDL will not be relevant to this case. The State's HWA and RCRA claims against the United States require only limited additional discovery related to the delineation of the full extent of the contamination; Defendants' actions and inactions with respect to containment and cleanup; and the measures appropriate and necessary to remedy the imminent and substantial endangerment. This discovery will be conducted in New Mexico and will involve documents in the possession of the two Air Force Bases located in New Mexico. The discovery associated with the AFFF manufacturers, which will likely be significant in terms of volume and time, is not necessary or relevant to either the State's claims or the Government's defenses.[5] None of the common issues

[5] Indeed, in response to the State's efforts to hold the United States accountable for its contamination of the State's resources and to work towards cleanup of the same, the United States has sued the State, challenging its hazardous waste permit requiring delineation and

identified by the Panel in its prior transfer orders is relevant. Thus, there is no risk of duplication of discovery. There is, however, a risk of loss of discovery caused by the delay associated with transfer and consolidation of the State's action with numerous actions that do not share the same factual or legal issues. There is also the risk that New Mexico's claim and its preliminary injunction motion will be indefinitely stayed as the MDL works through discovery and legal issues associated with the government contractor defense.

Because of the unique factual issues and the lack of overlap between this action and those in the AFFF Products Liability MDL, at the conclusion of the consolidated common pretrial proceedings in that MDL, this case would be remanded back to the District of New Mexico, likely several years from now, in essentially the same state as it exists now.

II. Transfer is Not Convenient for the Parties and Witnesses

Transfer would be extremely inconvenient to the State and its witnesses, all of whom are located in New Mexico and have first-hand familiarity with the Bases. Further, as noted, the relevant discovery for the State's claims is located at the two Air Force Bases at issue, both of which are located in New Mexico. Several New Mexico State employees are likely to be witnesses.[6]

III. Transfer Does Not Promote the Just and Efficient Conduct of the State's Action

The State has an important interest in protecting its citizens and in protecting human health and the environment of New Mexico. New Mexico Const., Art. XX, § 21. Transfer of this action will impede the State's efforts in this regard and cause significant delay.

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cleanup at Cannon Air Force Base. This suit is also pending before the District of New Mexico. It makes no sense for the State's claims against the Government for cleanup and damages to be transferred to the AFFF Products Liability MDL while the Government's related action against the State proceeds in New Mexico.

[6] These State employees are also presently barred from any out-of-state travel.

The State has filed and fully briefed a motion for preliminary injunction to avoid irreparable harm to the public health and environment, seeking expedited but limited discovery regarding the current delineation of contamination conducted by the Air Force at the two Bases and the interim measures already employed to prevent exposure to humans and the environment; further work to delineate the extent of the PFAS contamination, including water sampling and wildlife surveys; and interim measures to protect public health, such as voluntary blood testing for residents and providing alternative drinking water sources to those with affected water supplies. Transfer of this action to the AFFF Products Liability MDL imposes a significant risk that the important environmental issues and related locality-specific discovery will be subordinated to and delayed by the common discovery related to the AFFF manufacturers, which has nothing to do with the State's case. There are no other actions in the AFFF Products Liability MDL that involve the claims at issue in the State's action and no other actions involve the same allegations or have advanced a request for injunctive relief as the State has pursued here. *Cf. In re AFFF Prods. Liab. Litig.*, 357 F. Supp. 3d at 1395-96 (transferring the City of Newburgh's action despite the City's argument of its time-sensitive injunctive relief concerning its water supply where there were six other actions that involved the same allegations of contamination of the City's water supply that would result in duplication of efforts if there was no transfer).

Here, the unique nature of the State's role counsels in favor of allowing the claims proceed where they were filed. The Supreme Court has long recognized, the importance of state authority to protect its citizens and state resources, that "if the health and comfort of the inhabitants of a state are threatened, the state is the proper party to represent and defend them." *Missouri v. Illinois*, 180 U.S. 208, 241 (1901). The federal government should not

exercise power in a fashion that limits a State's integrity or their authority to function effectively in a federal system on behalf of its citizens. In this instance, a transfer of New Mexico's claims would run afoul of the State's interests.

As discussed above, given the lack of common questions of fact, transfer and consolidation of the State's action does nothing to achieve efficiency, and on the other hand, results in injustice. The goals supporting the MDL process are not achieved by transfer and consolidation of this action.

CONCLUSION

For the reasons set forth above, the State respectfully requests that the Panel vacate CTO 26.

Dated: March 13, 2020

Respectfully submitted:

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CERTIFICATE OF SERVICE

I CERTIFY that, on March 13, 2020, I filed the foregoing using CM/ECF which cause the parties of record to be served by electronic means as more fully reflected on the Notice of Electronic Filing and a courtesy copy by overnight delivery to the Clerk of the Panel.

/s/ Allan Kanner
Allan Kanner

EXHIBIT “A”

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH CAROLINA

* *	
IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION	MDL No. 2:18-mn-2873
	December 13, 2019
* *	

REPORTER'S OFFICIAL TRANSCRIPT OF THE
STATUS CONFERENCE HELD BEFORE THE
HONORABLE RICHARD M. GERGEL
UNITED STATES DISTRICT JUDGE
DECEMBER 13, 2019

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and we're in the process of doing that.

THE COURT: Good. I think she could be of help.

I've told you before that in terms of -- in my head, the order of things that kind of makes sense is Number 1, we got to deal -- got to get the discovery finished on immunity issues. We need to address governmental immunity, governmental contractor immunity, et cetera. And then, you know, I think the water districts are the first place we should focus, because to the extent that the water districts cannot make out a case, I think it's going to be very hard for anybody to make out a case because of the nature of what they would have to prove. And to the extent they -- there is the potential -- a basis for claim there, then we can build on that to look at some of these other claims. So I don't want to spend a lot of time early on chasing, you know, does -- the 1290 people with the personal injury claims chasing, "We want liver reports. We want --" I mean, I just -- I think that that's probably not the best productive use of our time right now. I think what we need to find is, you know, some of these issues that go to whether, in fact, the plaintiffs' claims have some scientific merit that there is a toxic effect that has an adverse effect and the extent of it and what levels are potentially toxic, and how do we go about establishing that level? What level is out there in these particular water districts? Some of them may go away because the levels aren't high enough or whatever.