BEFORE THE UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

IN RE: PFAS Products Liability and Environmental Liability Litigation	MDL No. 2873

3M COMPANY'S MEMORANDUM IN SUPPORT OF SECOND MOTION FOR TRANSFER OF ACTIONS PURSUANT TO 28 U.S.C. § 1407 FOR COORDINATED PRETRIAL PROCEEDINGS AND JOINDER IN THE TYCO/CHEMGUARD DEFENDANTS' MOTION FOR TRANSFER

On September 25, 2018, Tyco Fire Products LP and Chemguard, Inc. (collectively, "the Tyco/Chemguard Defendants"), pursuant to 28 U.S.C. § 1407 and Judicial Panel on Multi-District Litigation ("JPML") Rule 6.2, filed a motion (the "Tyco/Chemguard Motion") (Dkt. 1) with the Panel seeking transfer of 75 currently-filed cases (the "AFFF Cases"),[1] as well as any cases subsequently filed involving similar facts or claims ("tag-along cases"), to the United States District Court for the District of Massachusetts or, in the alternative, to the Southern District of New York. 3M Company ("3M") joins in the Tyco/Chemguard Motion, but also moves to transfer additional actions involving 3M and sale of per- or polyfluoroalkyl substances ("PFAS") or other PFAS-containing products to third-parties or 3M's manufacture, management, or disposal of PFAS in connection with its manufacturing facilities.[2]

The AFFF Cases are cases pending in eight District Courts, alleging that aqueous film-forming foams ("AFFFs") containing PFAS, including the chemicals perfluorooctane sulfonate

[1] The 75 currently-filed cases are listed in the corrected Schedule of Actions submitted with the Tyco/Chemguard Motion. Dkt. 2.

[2] The Tyco/Chemguard Motion proposes that the MDL be captioned "In re: Aqueous Film-Forming Foams (AFFF) Products Liability Litigation." In light of the additional cases that are encompassed by this Motion, 3M respectfully submits that a more appropriate caption for the MDL would be "In re: PFAS Products Liability and Environmental Liability Litigation."

("PFOS") and/or perfluorooctanoic acid ("PFOA"), contaminated groundwater at sites where the foams were used, eventually causing a purported need for medical monitoring or resulting in various personal injuries, property damage, and/or other economic losses. The products at issue in the AFFF Cases allegedly were manufactured by one or more of a number of defendants (the "Manufacturing Defendants"), including 3M and the Tyco/Chemguard Defendants. 3M agrees with the Tyco/Chemguard Defendants that the Panel should transfer the AFFF Cases to a single district court for coordinated proceedings under 28 U.S.C. § 1407, and joins in the Tyco/Chemguard Defendants' Motion For Transfer and supporting Memorandum.

3M has also filed a separate Motion For Transfer and this supporting Memorandum, however, to urge the Panel to include as well nine additional currently-filed cases (the "non-AFFF Cases")—as well as any subsequently-filed cases involving similar facts or claims—in which plaintiffs assert similar tort or statutory claims against 3M based on its sale of PFAS or other PFAS-containing products to third-parties or its manufacture, management, or disposal of PFAS in connection with its manufacturing facilities. The currently-filed non-AFFF Cases, which are pending in four additional district courts, are listed in the attached Supplemental Schedule of Actions.[3]

Each of the AFFF Cases and the non-AFFF Cases involves several common questions of alleged scientific and historical facts, as well as common mixed questions of fact and law, including, for example: (1) whether PFAS-containing products (including PFAS-containing AFFF) were defective; (2) whether the Tyco/Chemguard Defendants and 3M (collectively, the "Moving Defendants") had knowledge regarding the existence of a defect in their respective PFAS-containing products; (3) whether the Moving Defendants breached a duty of care to

[3] Plaintiffs also assert similar non-AFFF claims against 3M in over one hundred cases pending in state court in Alabama and Michigan.

plaintiffs; (4) whether the Moving Defendants conducted adequate testing of their respective PFAS-containing products; (5) whether a feasible alternative design for PFAS-containing AFFF (or other consumer products at issue) existed at the time of the sales at issue; (6) the content and adequacy of the warnings the Moving Defendants provided to their customers; (7) whether plaintiffs can show that there is scientifically reliable evidence that could support a causal connection between PFAS-containing products or PFAS purportedly discharged into the environment at various sites and any alleged human health conditions (*i.e.*, general causation); (8) whether the Manufacturing Defendants in the AFFF Cases are entitled to a government contractor defense through supply of AFFF to the government per military/federal specifications; (9) the historical knowledge of plaintiffs, the federal or state government entities, alleged customers or users of PFAS or PFAS-containing products, and the Manufacturing Defendants about any risks and benefits associated with PFAS-containing AFFFs; and (10) the use, handling and disposal practices of the military and others parties and third-parties over time.

Moreover, for the same reasons set forth in the Tyco/Chemguard Defendants' Memorandum, centralization of the non-AFFF Cases along with the AFFF Cases would serve the interests of the parties, the witnesses, and the District Courts, and promote the just and efficient conduct of all of the cases. Without the coordination that would be provided by a single MDL court, the parties and the courts would waste time and resources engaging in repetitive pretrial discovery and motion practice. Coordination of further pretrial proceedings and discovery in a single district court would also make it possible for key fact and expert witnesses to be deposed

only once rather than numerous times, as they might be if each case were to proceed independently.[4]

Finally, for the reasons set forth more fully in the Tyco/Chemguard Defendants' Memorandum, 3M likewise respectfully requests the Panel to transfer these cases to the District of Massachusetts or, in the alternative, to the Southern District of New York.

BACKGROUND

In addition to the 75 AFFF Cases discussed in the Tyco/Chemguard Defendants' Memorandum—which allegedly arise out of the manufacture and sale of PFAS-containing AFFF—there are currently nine PFAS-related actions, including putative class actions and individual claims, pending against 3M in four separate district courts. In most of these cases, there are additional defendants. In all of these cases, plaintiffs allege present or latent personal injuries and/or property damage, and/or seek recovery for remediation costs.

Four of these cases (one in the Western District of Michigan and three in the Northern District of New York) assert factual allegations and legal theories against 3M based on its sale of PFAS or PFAS-containing products to third-parties. In the three cases pending in the Northern District of New York, plaintiffs allege that they are residents of Hoosick Falls, New York, and have been injured by their use of water contaminated with PFOA, and their inhalation of particulate matter containing PFOA, that was sold to third-parties in connection with the third-parties' own manufacturing and other operations in the area. In the case pending in the Western

[4] The filing of this motion for transfer and coordination under 28 U.S.C. § 1407 should not be understood as suggesting (or acknowledging) that any of the putative classes alleged in the various complaints should eventually be certified under Fed. R. Civ. P. 23. The standard for transfer under § 1407 differs greatly from the standard for class certification—and class certification in these cases would be inappropriate for a host of reasons, not the least being the individualized issues of exposure, causation, and injury that would arise for each individual putative class member.

District of Michigan, plaintiffs likewise allege that they were injured by their use of water contaminated with PFAS, and assert claims based on 3M's sale of PFAS-containing products to a third-party manufacturer in connection with that third-party's operations in Michigan.

The remaining five cases (four in the Northern District of Alabama and one in the District of Minnesota) assert claims against 3M that allegedly arise out of its manufacture, management, or disposal of PFAS in connection with its manufacturing facilities in Alabama and Minnesota.

The Plaintiffs in the non-AFFF Cases are, at present, represented by at least 15 different law firms with, it appears, only one (or at most two) of those firms also representing plaintiffs in any of the AFFF Cases. The undersigned represent 3M in the non-AFFF Cases as well as in the AFFF Cases, and other named defendants are represented by different counsel and local counsel. The number of different jurisdictions, different judges, different schedules, and different counsel for the parties make informal coordination of even the nine non-AFFF Cases highly impracticable and burdensome on the parties, third-parties, and the various courts.

ARGUMENT

I. The Panel Should Order Centralization.

Transfer under 28 U.S.C. § 1407 is designed to "provide centralized management under court supervision of pretrial proceedings of multidistrict litigation to assure the 'just and efficient' conduct of such actions." *In re New York City Mun. Sec. Litig.*, 572 F.2d 49, 51 (2d Cir. 1978) (citation and internal quotations omitted). Section 1407 authorizes transfer where (1) one or more cases raising common questions of fact are pending in different districts, (2) transfer would serve the convenience of the parties and witnesses, and (3) transfer would promote the just and efficient conduct of the actions.

The presence of individual issues does not foreclose MDL treatment, and the Panel has made clear that "centralization under Section 1407 does not require a complete identity or even a

majority of common factual or legal issues as a prerequisite to transfer." *In re Zimmer Nexgen Knee Implant Prods. Liab. Litig.*, 802 F. Supp. 2d 1374, 1376-77 (J.P.M.L. 2011). *Accord, e.g., In re Xarelto (Rivaroxaban) Prods. Liab. Litig.*, 65 F. Supp. 3d 1402, 1404 (J.P.M.L. 2014) ("While we agree that these actions present a number of individualized factual issues, the existence of such issues does not negate the common ones."); *In re Katz Interactive Call Processing Patent Litig.*, 481 F. Supp. 2d 1353, 1355 (J.P.M.L. 2007) ("Transfer under Section 1407 does not require a complete identity or even a majority of common factual or legal issues as a prerequisite to transfer.").

Although the AFFF Cases and the non-AFFF Cases do not present identical circumstances, they nevertheless plainly involve many common questions of fact, including the state of defendants' knowledge concerning the alleged dangers of PFAS or PFAS-containing products, the adequacy of the defendants' warnings, and the risks, if any, of harm caused by exposure to PFAS at particular levels. The existence of such common questions strongly supports the motions for MDL treatment and the transfer of both the AFFF and non-AFFF Cases to the MDL court for coordinated proceedings. *See, e.g., In re Proton-Pump Inhibitor Prods. Liab. Litig. (No. II)*, 261 F. Supp. 3d 1351, 1354 (J.P.M.L. 2017) (granting MDL treatment where constituent cases presented common questions of fact, even though they involved multiple defendants and multiple products and all cases did not involve all defendants)[5]; *In re Xarelto (Rivaroxaban) Prods. Liab. Litig.*, 65 F. Supp. 3d at 1404 (finding that common issues of fact warranting MDL treatment "include, in particular, the adequacy of Xarelto's warning label with

[5] In *In re Proton-Pump*, the Panel acknowledged "the case management-related difficulties that a multi-product and multi-defendant MDL … may entail," but noted that "a transferee judge can employ any number of techniques, such as establishing separate discovery and motion tracks, to manage pretrial proceedings efficiently." 261 F. Supp. 3d at 1354 (citing *In re: AndroGel Prods. Liab. Litig.*, 24 F. Supp. 3d 1378, 1379–80 (J.P.M.L. 2014)).

respect to the risk of severe bleeding and other injuries, the results of certain clinical studies, and the alleged need for blood monitoring"); *In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.*, 2000 U.S. Dist. LEXIS 14901, at *2 (J.P.M.L. Oct. 10, 2000) ("the Panel finds that the actions in this litigation involve common questions of fact concerning i) whether defendants knew about and misrepresented the nature of MTBE and conspired to market MTBE without disclosing its risks to downstream users, the federal government or the public, and ii) whether plaintiffs sustained drinking water contamination as a result of MTBE contamination").

Indeed, the Panel has already granted MDL treatment in other PFAS litigation that presented similar issues. *See In re: E.I. du Pont de Nemours And Co. C-8 Pers. Injury Litig.*, 939 F. Supp. 2d 1374, 1374 (J.P.M.L. 2013) (granting MDL treatment where all of the constituent cases arose "out of plaintiffs' alleged ingestion of drinking water contaminated with a chemical, C–8 (also known as perfluorooctoanoic acid (PFOA) or ammonium perfluorooctanoate (APFO))" and "[a]ll of the plaintiffs in this litigation allege that they suffer or suffered from one or more of six diseases identified as potentially linked to C–8 exposure").

Moreover, transfer for coordinated proceedings would serve the convenience of the parties and witnesses and promote the efficient conduct of these cases. Without such coordination, the parties and the courts would waste time and resources engaging in repetitive pretrial discovery and motion practice concerning, *e.g.*, personal jurisdiction, class certification, primary jurisdiction, *Daubert* issues, and medical monitoring issues, as well as the viability of other legal theories asserted in many of the AFFF and non-AFFF Cases. This would not only be inefficient, but would subject the parties to the risk of conflicting rulings issued by different district courts. Coordination, by contrast, would allow the parties to ask a single judge applying consistent standards to decide certain issues following coordinated briefing. Coordination would

also make it possible for key fact and expert witnesses to be deposed only once rather than numerous times, as they might be if each case were to proceed independently. Thus, just as in *In re EI du Pont de Nemours and Co. C-8 Personal Injury Litigation*, "[c]entralization will eliminate duplicative discovery; prevent inconsistent pretrial rulings; and conserve the resources of the parties, their counsel and the judiciary." 939 F. Supp. 2d at 1374. *Accord, e.g.*, *In re Proton-Pump Inhibitor Products Liability Litigation (No. II)*, 261 F. Supp. at 1354 ("Centralization will facilitate a uniform and efficient pretrial approach to this litigation, eliminate duplicative discovery, prevent inconsistent rulings on *Daubert* and other pretrial issues, and conserve the resources of the parties, their counsel, and the judiciary."); *In re: Lipitor (Atorvastatin Calcium) Mktg., Sales Practices & Prods. Liab. Litig. (No. II)*, 997 F. Supp. 2d 1354, 1357 (J.P.M.L. 2014) ("Centralization will eliminate duplicative discovery, prevent inconsistent pretrial rulings (in particular with respect to class certification and *Daubert* issues), and conserve the resources of the parties, their counsel and the judiciary.").

Finally, as noted above, there are currently over one hundred non-AFFF Cases pending against 3M in state court raising similar issues. Transfer would also facilitate coordination between the federal and state court PFAS-related litigation. *See In re: Lipitor (Atorvastatin Calcium) Mktg., Sales Practices & Prods. Liab. Litig. (No. II)*, 997 F. Supp. 2d at 1356 (noting that "Lipitor diabetes lawsuits are pending in at least three state courts" and that "[c]reation of an MDL likely will make it easier to coordinate, as needed, pretrial proceedings in both the state and federal cases, because there will now be just one judge handling the latter") (citing *In re: Plavix Mktg., Sales Practices & Prods. Liab. Litig. (No. II)*, 923 F. Supp. 2d 1376, 1378–79 (J.P.M.L. 2013) (noting that related litigation was pending in state courts in at least four states and concluding that "creation of a Plavix MDL will not only result in the usual Section 1407

efficiencies, it also likely will facilitate coordination among all courts with Plavix cases, simply because there will now be only one federal judge handling most or all federal Plavix litigation.").

II. The Panel Should Order Centralization in the District of Massachusetts or, In the Alternative, the Southern District of New York.

For the reasons set forth in the Tyco/Chemguard Defendants' Memorandum, 3M respectfully submits that the Panel should transfer the non-AFFF Cases as well as the AFFF Cases to the District of Massachusetts or, in the alternative, to the Southern District of New York, for coordinated treatment.

As more fully described in the Tyco/Chemguard Defendants' Memorandum, the District of Massachusetts has extensive experience handling MDLs, and the four constituent cases currently pending in that District, all before Judge Denise J. Casper, are well into the litigation process. Moreover, Judge Casper has demonstrated experience managing a multi-district litigation, recently presiding over *In re Solodyn (Minocycline Hydrochloride) Antitrust Litigation*, No. 14-md-02503-DJC (D. Mass.).

Alternatively, the Panel should transfer the AFFF and non-AFFF Cases to the Southern District of New York, which also has extensive MDL experience. Judge Kenneth M. Karas of that District is overseeing four active cases that present a representative snapshot of the overall AFFF litigation as well as the issues that may cut across all of the AFFF and non-AFFF Cases, and soon is likely to have before him three additional multi-plaintiff personal injury actions. Moreover, Judge Karas, like Judge Casper, has demonstrated MDL experience.

CONCLUSION

For the reasons set forth above and in the Tyco/Chemguard Defendants' Memorandum, 3M respectfully submits that the Panel should transfer the AFFF Cases and the non-AFFF Cases

to the District of Massachusetts or, in the alternative, the Southern District of New York, for coordinated proceedings.

Respectfully submitted,

3M Company

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