

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH CAROLINA  
CHARLESTON DIVISION**

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IN RE: AQUEOUS FILM-FORMING  
FOAMS PRODUCTS LIABILITY  
LITIGATION

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MDL No. 2:18-mn-2873-RMG

**CASE MANAGEMENT ORDER NO. 5**

**This Order Relates to All Actions.**

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**Applicability and Scope of Order**

1. The Court hereby issues the following Case Management Order (“CMO”) to govern the form, procedure, and schedule for the completion and service of Plaintiff Fact Sheets (“PFS”) and Defense Fact Sheets (“DFS”) and the execution of authorizations for the release of certain records in the specified cases set forth below.

2. This Order applies to (a) all actions transferred to In Re: Aqueous Film-Forming Foams (AFFF) Products Liability Litigation (“MDL 2873”) by the Judicial Panel on Multidistrict Litigation (“JPML”) pursuant to its Order of December 7, 2018; (b) all related actions originally filed in or removed to this Court; and (c) any “tag-along” actions transferred to this Court by the JPML pursuant to Rules 6.2 and 7.1 of the Rules of Procedure of the Panel, subsequent to the filing of the final transfer order by the Clerk of this Court (collectively, “Member Actions”).

3. All information disclosed on any PFS, the PFS itself, and all related documents (including health care records and information) produced therewith or pursuant to an executed authorization or any supplements shall be treated as responses to Interrogatories under Fed. R. Civ. P. 33 and can be used for any purpose and in any manner that answers to interrogatories can be used pursuant to the Federal Rules of Civil Procedure, subject to the confidentiality provisions of

Paragraph 4. A Defendant's responses to questions in the DFS or any supplements shall be treated as responses to Interrogatories under Fed. R. Civ. P 33 and can be used for any purpose and in any manner that answers to interrogatories can be used pursuant to the Federal Rules of Civil Procedure, subject to the confidentiality provisions of Paragraph 4.

4. All information disclosed on a DFS or PFS, the DFS and PFS itself, and all related documents (including health care records and information) produced therewith or pursuant to an executed authorization shall be treated as marked confidential and treated as "Confidential Information" pursuant to the terms of the Protective Order, except that any documents specifically designated as "Highly Confidential Information" shall be treated as such pursuant to the Protective Order.

5. Unless otherwise agreed by the parties, there shall be no additional discovery propounded on plaintiffs required to respond to a PFS, including depositions of plaintiffs, until cases have been selected for further proceedings by further Order of this Court. This limitation on discovery does not limit the requirement that Plaintiffs supplement PFS responses and does not limit or restrict requests for supplemental or additional authorizations consistent with this Order. Defendants are still assessing the discovery that they intend to serve on State or sovereign plaintiffs who have brought suit, and Defendants may elect to utilize a form of Fact Sheet or traditional discovery (interrogatories and document demands under Fed. R. Civ. P. 33 and 34, respectively). The parties will continue to meet and confer on this issue with the State or sovereign Plaintiffs reserving all rights to oppose. The State/Sovereign Plaintiffs are still assessing the discovery that they intend to serve on Defendants, and the State/Sovereign Plaintiffs may elect to utilize a form of Fact Sheet or traditional discovery (interrogatories and document demands under Fed. R. Civ. P. 33 and 34, respectively). The parties will continue to meet and confer on this issue with the

Defendants reserving all rights to oppose. In addition, the PEC has determined to address discovery of the federal government entities/agencies separately from the DFS process set forth herein and thus the federal government entities are not required to respond to DFS set forth in this Order. Further, this paragraph does not otherwise apply to the federal government entities/agencies.

**Plaintiff Fact Sheets**

6. The form PFSs that shall be used in MDL 2873 and all Member Actions (except for those in paragraph 5, above) are attached hereto as Exhibits 1, 2, 3, and 8.

- a. Exhibit 1 is a Plaintiff Fact Sheet intended for individual Plaintiffs asserting personal injury claims;
- b. Exhibit 2 is a Plaintiff Fact Sheet intended for individual Plaintiffs asserting property damage claims;
- c. Exhibit 3 is a Plaintiff Fact Sheet intended for individual Plaintiffs asserting medical monitoring claims only; and
- d. Exhibit 8 is a Plaintiff Fact Sheet intended for Plaintiff water authorities, districts, or other water suppliers and for any municipality or other local or county government pursuing claims related to alleged contamination of water supplies within or impacting their jurisdictions, as well as for other Plaintiffs, but only to the extent they represent the interests of such entities in Member Actions.

7. In accordance with the schedule set forth below, every Plaintiff, except as provided in Paragraph 5, shall:

- a. Complete and sign the appropriate PFS;

- b. Serve the completed PFS upon Liaison Counsel for Defendants and the PEC designee in the manner described in the “Service” Section below;
- c. Produce to Liaison Counsel for Defendants all responsive, non-privileged documents in his, her, or its possession, custody, or control that are requested in the PFS; and
- d. For individual Plaintiffs, provide duly executed Records Authorizations referenced below.

8. **Additional PFS For New or Amended Claims:** If an Individual Plaintiff seeks to add a new personal injury claim, a new property damage claim, or a new medical monitoring claim or seeks to amend his or her Complaint in such a manner that would otherwise make an additional PFS applicable, that Plaintiff must complete the applicable PFS as otherwise required by this Order.

9. **Substantial Completion of PFS:** In completing the PFS, every Plaintiff is required to provide Defendants with a PFS that is substantially complete in all respects. For a PFS to be “substantially complete in all respects,” the responding Plaintiff shall endeavor to answer every question contained in the PFS to the best of his, her, or its ability and leave no blanks, even if the Plaintiff can only answer the question in good faith by indicating “not applicable,” “N/A,” or “I don’t know” or similar words.

10. **Continuing Duty to Supplement:** Each Plaintiff shall remain under a continuing duty to supplement the information provided in his, her, or its PFS throughout the litigation, in a manner consistent with the provisions of Fed. R. Civ. P. 26(e).

11. The questions in the PFS shall be answered without objection.

**Plaintiff Fact Sheet Deficiency Dispute Resolution Process**

**Deficient PFS**

**12. Phase I: Deficiency Letter**

- a. If a Defendant deems a PFS deficient, Defendants' Liaison Counsel shall notify Plaintiff's attorney of record (identified in the PFS) of the purported deficiencies in writing via email and allow such Plaintiff twenty-eight (28) days to respond to the alleged deficiency, and to the extent Plaintiff disagrees and/or objects to any alleged deficiency, Plaintiff shall so advise Defendants no later than the expiration of the 28 day period to respond to any alleged deficiencies.
- b. Defendants' Liaison Counsel's email communication shall identify the case name, docket number, and the deadline for a response and include sufficient detail regarding the alleged deficiency(ies), and a courtesy copy of the email shall be sent via email to the PEC's designee at [AFFF-MDL.PFS.deficiency@DouglasAndLondon.com](mailto:AFFF-MDL.PFS.deficiency@DouglasAndLondon.com).
- c. To the extent Defendants seek further clarification of Plaintiff's response to any alleged deficiency, Defendants shall seek a meet and confer, and Plaintiff and Defendants shall meet and confer within the fourteen (14) days of Plaintiff's communication of any disputes with respect to any alleged deficiencies.

**13. Phase II: Motion to Compel**

- a. Following the meet and confer period, should the Plaintiff: (i) fail to cure the alleged stated deficiency(ies); (ii) fail to assert objections to same; (iii) fail to respond to or participate in the meet and confer process; or (iv) otherwise fail to provide responses (including the requested documents and/or signatures), and absent agreement of the parties to further extend the period for meeting and conferring, at any time following expiration of the fourteen (14) day



meet and confer period, Defendant may then file a Motion to Compel the allegedly deficient discovery information.

b. Any such Motion to Compel filing shall be via ECF, with a courtesy copy via email to Plaintiff's attorney of record and via email to the PEC's designee at AFFF-MDL.PFS.MotionCompel@DouglasAndLondon.com.

c. Any motion to compel pursuant to this CMO need not be noticed for presentment as required by Local Rule 7.1.

d. Any response to such a motion shall be filed and served within fourteen (14) days following the date of service. Reply Briefs are discouraged per Local Rule 7.07, but any reply shall be filed and served within seven (7) days following the date of service of the response.

e. Absent an Order from the Court granting a request by either or both parties for oral argument, the Court will rule on such motions without hearing argument.

#### **Failure to Serve an Executed PFS**

14. Each Plaintiff may request one extension of twenty-one (21) days to serve a completed PFS, which Defendants shall not unreasonably withhold. Such requests must be made in writing via email to Defendants' Liaison Counsel before the expiration of the deadline, with a courtesy copy the PEC's designee at AFFF-MDL.PFS.extension@DouglasAndLondon.com.

15. **Phase I: Notice of Non-Compliance.** Should any Plaintiff fail to serve an executed PFS within the time required in this CMO or any extension that was granted, Defendant(s) shall send a Notice of Non-Compliance letter via email to that Plaintiff's attorney of record, with a courtesy copy via email the PEC's designee at AFFF-MDL.PFS.noncompliance@DouglasAndLondon.com. The Notice of Non-Compliance shall specify a fourteen (14) day period in which Plaintiff shall (1) tender an executed and completed

PFS, (2) if he or she has in fact tendered an executed fact sheet, inform the Defendant of the date on which it was served, or (3) meet and confer with Defendants regarding any claimed good cause for failure to do so within the time required.

**16. Phase II: Motion for Dismissal**

a. Following delivery of the Notice of Non-Compliance and expiration of the fourteen (14) day period identified in Paragraph 15, Defendant(s) may immediately move the Court to dismiss the cases on the list without prejudice subject to reinstatement if the Plaintiff serves a completed PFS as further described in Paragraphs 22-26 below or on such terms as the Court may otherwise impose, with a courtesy copy via email to Plaintiff's attorney of record and via email to the PEC's designee at AFFF-MDL.PFS.noncompliance.motion@DouglasAndLondon.com. Defendant shall have the right, but not the obligation, to group multiple delinquent PFS recipients in a single motion to dismiss grouped by the pertinent Plaintiff's law firm.

b. Any motion to dismiss pursuant to this CMO need not be noticed for presentment as required by Local Rule 7.1.

c. Any response to such a motion shall be filed and served within fourteen (14) days following the date of service. Failure to tender a completed PFS as required by this Order within the time provided for the response shall result in dismissal of the Plaintiff's complaint without prejudice absent further Order of the Court. On good cause shown, and with completed PFS tendered with a motion, a plaintiff may move to reinstate a dismissed claim within fourteen (14) days of a dismissal.

d. Absent an Order from the Court granting a request by either or both parties for oral argument, the Court will rule on such motions without hearing argument.

**Records Authorizations for Individual Plaintiffs**

17. **Medical Authorizations - Non-Mental Health:** Each Plaintiff who completes an Individual Plaintiff Personal Injury Fact Sheet in accordance with the preceding paragraphs of this Order shall also serve an original signed Authorization to Release Health Information for each (non-mental health) medical provider (including insurers and pharmacies) listed in the PFS. The Health Information Authorization that shall be used is attached hereto as Exhibit 4 and shall be served on Defendants' Liaison Counsel in accordance with the provisions of this Order.

18. **Medical Authorizations - Mental Health:** Each Plaintiff who completes an Individual Plaintiff Personal Injury Fact Sheet PFS in accordance with the preceding paragraphs of this Order and who (a) also asserts or alleges a psychiatric injury, condition, or other type of mental health damage, and (b) has undergone specific medical treatment or counseling related to such injury or a similar injury, condition, or damage shall, in addition to the above-referenced Medical Authorization–Non-Mental Health, serve an original signed Mental Health Records Authorization from each mental health care provider identified in the PFS related to such claimed condition, treatment, and/or damage. The Mental Health Records Authorizations that Plaintiffs shall complete in such cases is attached as Exhibit 5 and shall be served on Defendants' Liaison Counsel in accordance with the provisions of this Order.

19. **Water Company/Utility Records Authorizations:** Each Plaintiff who completes any PFS identified in Exhibits 1, 2, or 3 hereto (i.e., Individual Personal Injury, Individual Property Damage, or Individual Medical Monitoring) shall also serve an Authorization for Release of Customer Records as to each water provider listed in the PFS. The Water Company/Utility Records Authorization to be used is attached hereto as Exhibit 6 and shall be served on Defendants' Liaison Counsel in accordance with the provisions of this Order.



**Additional Records Authorizations**

20. **“Special” Authorizations:** If any health care provider or other custodian of records: (a) requires a specific form of authorization that is different than the authorizations referenced in and attached to this Order; (b) requires an updated or more recently-executed authorization than those already provided by a Plaintiff; (c) requires a notarized authorization; or (d) requires an original signature, then Defendants’ Liaison Counsel shall notify Plaintiff’s counsel of record of such requirement(s) by email, and the referenced Plaintiff shall, within twenty one (21) days of such notice having been given, either serve an executed authorization or object in writing. In the event of an objection, the general reasons must be stated in writing, and the parties shall meet and confer in a good faith effort to resolve such objection(s). Following such efforts, any remaining disputed issues may be brought before the Court for resolution in accordance with Paragraphs 12-13, above regarding Motions to Compel as to deficiencies in PFS responses or as the Court may otherwise direct for resolution of such disputes.

21. **Requests for Additional Authorizations:** In the event that any Defendant seeks any additional authorization(s) from any Plaintiff, either (a) as a result of such Defendant having discovered specific medical providers, mental health providers (if applicable), water providers, or other custodians of relevant records that were not previously identified by such Plaintiff; or (b) in order to obtain documents in addition to those for which production is expressly provided in the above-referenced authorizations, Defendants’ Liaison Counsel shall submit such additional authorization request(s) to Plaintiff’s counsel after which the referenced Plaintiff shall, within twenty one (21) days, either serve an executed authorization or object to the same. In the event of an objection, the general reasons must be stated in writing, and the parties shall meet and confer in a good faith effort to resolve such objection(s). Following such efforts, any remaining disputed

issues may be brought before the Court for resolution in accordance with Paragraphs 12-13, above regarding Motions to Compel as to deficiencies in PFS responses or as the Court may otherwise direct for resolution of such disputes.

### **Service of PFS**

22. Each Plaintiff in the actions pending in this MDL as of the entry of this Order shall have ninety-eight (98) days from the date of this Order to serve and produce to Defendants' Liaison Counsel a completed PFS, signed and dated authorizations, and all responsive, non-privileged documents requested in the PFS that are in his, her, or its possession, custody, or control.

23. Each Plaintiff in actions filed in or transferred to this MDL after the entry of this Order shall, within ninety-eight (98) days of the filing or transfer of the case to the MDL, serve and produce to Defendants' Liaison Counsel a completed PFS, signed and dated authorizations, and all responsive, non-privileged documents requested in the PFS that are in his, her, or its possession, custody, or control.

24. Each Plaintiff who is required to complete an additional PFS pursuant to Paragraph 8 shall, within sixty-three (63) days of the amendment or assertion of a new claim necessitating the additional PFS, serve and produce to Defendants' Liaison Counsel the completed PFS which shall then be subject to the provisions for deficiencies and motions as set forth in this CMO.

25. Plaintiffs shall serve the completed PFS and authorizations upon Defendants by submitting them via email to [afffmdlpfsservice@nelsonmullins.com](mailto:afffmdlpfsservice@nelsonmullins.com). This shall constitute effective service of the PFS upon Defendant(s). A copy of the completed PFS shall be submitted to the PEC via email at [AFFF-MDL.PFS@DouglasAndLondon.com](mailto:AFFF-MDL.PFS@DouglasAndLondon.com).

26. The Lead and/or Liaison Counsel for Plaintiffs and Defendants or their respective designees shall meet and confer in a good faith effort to resolve any other disputes not specifically

addressed above regarding the production of documents and/or the completion or service of a PFS and/or authorization(s) or completion and service of any DFS. After such meet-and-confer efforts have been attempted in good faith, counsel for a party may bring any remaining dispute(s) before the Court via motion practice as set forth in Paragraphs 12-13.

### **Defense Fact Sheet**

27. **The Defense Fact Sheet (“DFS”) Form:** The form DFS that shall be used in MDL 2873 and all Member Actions (except for those in paragraph 5, above) is attached hereto as Exhibit 9.

28. In accordance with the schedule set forth in Paragraph 30, below, every Defendant except federal government entities/agencies shall:

- a. Complete and sign a DFS;
- b. Serve the completed DFS as described in Paragraph 32; and
- c. Produce to the designee of the Plaintiffs’ Executive Committee all responsive, non-privileged documents in its possession, custody, or control that are requested in the DFS.

29. The questions in the DFS shall be answered without objection.

30. Each Defendant in the actions pending in this MDL as of the entry of this Order shall have ninety-eight (98) days from the date of entry of this Order to serve a DFS applicable to the Sites currently at issue in this MDL as defined and identified pursuant to the Court’s Order of July 29, 2019, Dkt. #161 and Exhibit 9. For any Sites so identified after the date of entry of this Order, each Defendant shall have ninety-eight (98) days from the date of the PEC’s identification of a new Site alleged in a Complaint to serve a DFS applicable to that Site.

31. Any Defendant may request one extension of twenty-one (21) days to serve a completed DFS, which the Plaintiff shall not unreasonably withhold. Such requests must be made in writing via email to the Plaintiff's counsel before the expiration of the deadline.

32. All completed DFS and responsive records and materials will be (a) served directly on the designee of the Plaintiffs' Executive Committee at AFFF-MDL.DFS@DouglasAndLondon.com and (b) served upon Liaison Counsel for Defendants at DFScourtesy@duffyandyoung.com. Service of the DFS and responsive records and materials is complete upon service on the designee of the Plaintiffs' Executive Committee at AFFF-MDL.DFS@DouglasAndLondon.com. Production of a completed DFS and responsive records and materials of a specific Site may be requested by a given plaintiff or his/her/its counsel upon written request to the Defense Liaison Counsel for production of same after having first requested a copy from the designee of the Plaintiffs' Executive Committee.

33. **Deficient DFS**

a. If a Plaintiff deems a DFS deficient, the PEC's designee shall notify Defendant's attorney of record (identified in the DFS) of the purported deficiencies in writing via email and allow such Defendant an additional twenty-eight (28) days to respond to the alleged deficiency, and to the extent Defendant disagrees and/or objects to any alleged deficiency, Defendant shall promptly so advise Plaintiffs no later than the expiration of the 28 day period to respond to any alleged deficiencies.

b. The PEC's designee's email communication shall identify the case name, docket number, and the deadline for a response and include sufficient detail regarding the alleged deficiency(ies), and a courtesy copy of the email shall be sent via email to the Defendants' Liaison Counsel at DFSdeficiency@duffyandyoung.com.

c. To the extent Plaintiffs seek further clarification of Defendant's response to any alleged deficiency, Plaintiffs shall seek a meet and confer, and Defendant and Plaintiffs shall meet and confer within the fourteen (14) days of Defendant's communication of any disputes with respect to any alleged deficiencies.

d. Following the meet and confer period, should the Defendant: (i) fail to cure the stated deficiency(ies); (ii) fail to assert objections to same; (iii) fail to respond to or participate in the meet and confer process; or (iv) otherwise fail to provide responses (including the requested documents and/or signatures), and absent agreement of the parties to further extend the period for meeting and conferring, at any time following expiration of the fourteen (14) day meet and confer period, Plaintiff may then file a Motion to Compel the allegedly deficient discovery information.

e. Any such filing shall be via ECF, with a courtesy copy via email to Defendant's attorney of record and via email to the Defendants' Liaison Counsel at DFSdeficiency@duffyandyoung.com.

f. Any motion to compel pursuant to this CMO need not be noticed for presentment as required by Local Rule 7.1.

g. Any response to such a motion shall be filed and served within fourteen (14) days following the date of service. Reply Briefs are discouraged per Local Rule 7.07, but any reply shall be filed and served within seven (7) days following the date of service of the response.

h. Absent an Order from the Court granting a request by either or both parties for oral argument, the Court will rule on such motions without hearing argument.

#### **34. Failure to Serve a DFS**

a. Should any Defendant fail to serve an executed DFS within the time required in this CMO or any extension that was granted, Plaintiff(s) shall send a Notice of Non-



Compliance letter via email to that Defendant's attorney of record, with a courtesy copy via email the Defendants' Liaison Counsel at DFSdeficiency@duffyandyoung.com. The Notice of Non-Compliance shall specify a fourteen (14) day period in which Defendant shall (1) tender an executed and completed DFS, (2) if Defendant has in fact tendered an executed fact sheet, inform the Plaintiff of the date on which it was served, or (3) meet and confer with Plaintiff regarding any claimed good cause for failure to do so within the time required.

b. Following delivery of the Notice of Non-Compliance and expiration of the fourteen (14) day period identified in Paragraph 34, Plaintiff(s) may immediately move the Court to compel service of the DFS, with a courtesy copy via email to Defendant's attorney of record and via email to the Defendants' Liaison Counsel at DFSdeficiency@duffyandyoung.com. Plaintiffs shall have the right, but not the obligation, to group multiple delinquent DFS recipients in a single Motion to Compel grouped by the pertinent Defense law firm.

c. Any motion to compel pursuant to this CMO need not be noticed for presentment as required by Local Rule 7.1.

d. Any response to such a motion shall be filed and served within fourteen (14) days following the date of service. Failure to tender a completed DFS as required by this Order within the time provided for the response shall result in the motion being granted against the Defendant.

e. Absent an Order from the Court granting a request by either or both parties for oral argument, the Court will rule on such motions without hearing argument.

35. **Substantial Completion of DFS:** In completing the DFS, every Defendant is required to provide Plaintiffs with a DFS that is substantially complete in all respects. For a DFS to be "substantially complete in all respects," the responding Defendant shall endeavor to answer

every question contained in the DFS to the best of its ability and leave no blanks, even if the Defendant can only answer the question in good faith by indicating “not applicable,” “N/A,” or “I don’t know” or similar words.

36. **Continuing Duty to Supplement:** Each Defendant shall remain under a continuing duty to supplement the information provided in its DFS throughout the litigation, in a manner consistent with the provisions of Fed. R. Civ. P. 26(e).

**Notice in Future Cases**

37. In any action that is (a) filed in or transferred to this Court after this Order is entered and (b) consolidated with this action for pretrial purposes, the Clerk shall include a statement in the initial notice to counsel that Case Management Orders No. 1, No. 2, No. 3, No. 4 and this Order, as well as any amendments to those Orders, govern all cases in the MDL proceedings and can be viewed on the Court’s MDL website.

**AND IT IS SO ORDERED.**

  
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Richard Mark Gergel  
United States District Court Judge

August 7, 2019  
Charleston, South Carolina