VERMONT SUPERIOR COURT
Chittenden Unit
175 Main Street, PO Box 187
Burlington VT 05402
802-863-3467
www.vermontjudiciary.org

CIVIL DIVISION
Case No. 21-CV-02985

John Belter, et al v. City of Burlington

DECISION ON MOTION TO DISMISS

Plaintiffs—South Burlington residents and owners of a dairy farm and multiple residences adjacent to and downgradient from the Vermont Air National Guard Base at Burlington International Airport (collectively, "the Belters")—bring this action against the City of Burlington in connection with the release of certain environmental contaminants from the National Guard's firefighting services at the airport and onto Plaintiffs' property. The City moves to dismiss all claims on grounds of failure to join a necessary party under Rules 12(b)(7) and 19. Alternatively, the City moves to dismiss some of the claims as barred by municipal sovereign immunity and for failure to state a claim for vicarious liability. The court neither grants nor denies the motion, but instead orders the joinder of the National Guard.

Alleged Facts

The City of Burlington owns the airport and has, since at least the 1950s, leased part of it to the National Guard. Since 1973, the City has delegated its duty to provide firefighting services at the airport to the National Guard. From 1970 until 2014, the Guard used aqueous film-forming foam ("AFFF"), a water-soluble fire suppressant that contains per- and polyfluoroalkyl substances ("PFAS"), as part of its firefighting activities. PFAS have been classified by the EPA as "Emerging Contaminants of Concern" and are listed by the Vermont Department of Environmental Conservation as "Hazardous Materials" because of their threat to human health and the environment.

From 1970 through 2014, the National Guard routinely released AFFF into the environment to treat fires at the airport during firefighting, firefighting training, equipment maintenance, storage, and other activities. PFAS leached into the soil at and around the airport, polluted the surrounding groundwater, and migrated offsite to the adjacent property owned by the Belters. The soil, water in the barn well, and surface water on the Belters' property are contaminated with PFAS. Testing at the Belters'

property on numerous occasions over the last five years has confirmed PFAS levels well above the enforcement standard.

The Belters allege that the City knew or reasonably should have known that AFFF contained chemical compounds, that AFFF would leach through the soil and into groundwater, and that PFAS would migrate offsite. They bring claims for negligence (based on a non-negligible duty) (Count I), Trespass (Count II), Private Nuisance (Count III), Taking (Count IV), violation of the Vermont Groundwater Protection Act (Count V), Increased Surface Water Drainage (Count VI), and direct negligence (Count VII). They seek damages but, pursuant to their amended complaint, no longer seek injunctive relief.

Discussion

The City requests that the court:

1. dismiss the amended complaint in its entirety pursuant to V.R.C.P. 12(b)(7) for failure to join the United States and the National Guard as indispensable parties (or, alternatively, order joinder of the National Guard so that its ability to be sued in this court can be determined before the case proceeds).
2. Dismiss Counts I–III, V, and VII under Rule 12(b)(1) as barred by municipal sovereign immunity, or limit them to the extent of the City's insurance coverage to the extent they are based on allegations of the City's negligence.
3. Dismiss Count I under Rule 12(b)(6) for failure to state a valid claim that the City is vicariously liable for the National Guard's negligence.

The court addresses the joinder issue first.

The City contends that the Belters' claims are based on a theory that the City should be held vicariously liable for activities carried out entirely by the United States and the National Guard pursuant to federal military regulations, on property leased by the federal government over which the City has no control. Def.'s Mot. to Dismiss at 13. It also argues that the Belters' claims are "fundamentally similar" to claims raised throughout the country against the United States and National Guard installations arising out of the federally-mandated use of AFFF in aircraft rescue and firefighting activities. *Id.* Thus, it contends, both the United States and the National Guard are necessary and indispensable parties under Rule 19, without whom the case cannot be allowed to proceed. *Id.* at 13–14.

Rule 12(b)(7) provides a defense for failure to join a party under Rule 19, which "states pragmatic tests for determining when joinder of parties is necessary in order for the court adequately to dispose of the action and when, where joinder is necessary, the action should be dismissed in the absence of the parties who cannot be joined." Reporter's Note, V.R.C.P. 19. The first step is to decide whether the absent parties are "necessary" under Rule 19(a):

> A person who is subject to service of process shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the person's claimed interest.

V.R.C.P. 19(a). Thus, the rule provides three separate ways in which a non-party may be deemed necessary.

The court concludes that the National Guard is a "necessary" party pursuant to Rule 19(a)(2)(i). The United States and the National Guard plainly have interests in this dispute that would be impaired by their absence in this litigation.[1] First, this litigation would practically impair the United States' interests by circumventing and interfering with the AFFF multi-district litigation (MDL), which has consolidated numerous lawsuits arising from the military's use of AFFF in firefighting activities at military installations across the country. As the United States explained in a filing in one of those cases, "all of these . . . lawsuits challenge policies that the military intentionally standardized nationwide," and will involve "broad inquiries into the military's policy decisions with regard to the use of AFFF and any mandatory and specific directives that may be asserted by plaintiffs." United States of America's Resp. in Opp. to the Mot. to Vacate Cond'l Transf. Order (CTO-8) at 2–3, *In re Aqueous Film-Forming Foams (AFFF) Prods. Liab. Lit.*, MDL Docket No. 2873 (J.P.M.L. filed May 21, 2019).

Thus, as the City contends, allowing this litigation without the involvement of the United States or National Guard would "circumvent that orderly process and could result in the adjudication of issues common to the AFFF claims raised against the United States across the country, without any input from the federal government." Def.'s Reply at 8; *Glades Pharms., LLC v. Call, Inc.*, No. CIV.A. 04-4259, 2005 WL 563726, at *3 (E.D. Pa. Mar. 9, 2005) (absent party was a necessary party in that his interests would be adversely affected if plaintiff prevailed in litigation "because a favorable decision must be based on the legal conclusion that [absent party] misappropriated [plaintiffs'] property,

[1] Neither in their briefing nor at oral argument have the parties provided any reason to treat the United States and the National Guard separately for this analysis. Thus, in its Rule 19(a) analysis, the court refers to them interchangeably, except where it discusses amenability to suit in state court.

infringed on [plaintiffs'] copyrighted material, and diverted [plaintiffs'] business opportunities" and would likely impair the absent party's ability to protect his interests in pending litigation elsewhere).[2]

The Belters argue that the consolidated MDL cases are distinguishable because they are limited to products liability claims against manufacturers, and that the United States is included in the MDL only because certain plaintiffs opted to sue both manufacturers and the federal government. Not so. The Judicial Panel on Multidistrict Litigation's consolidation order contains no such limitation, and the District of South Carolina has already consolidated multiple cases against the United States that do not include products liability claims against manufacturers. *See* Def.'s Reply at 7 n.4; *see also* Ex. A (consolidating copies of complaints); *In re Aqueous Film-Forming Foams Prod. Liab. Litig.*, No. MDL 2873, 2021 WL 755083, at *3 (U.S. Jud. Pan. Mult. Lit. Feb. 4, 2021) ("Many actions in the MDL . . . assert state-law claims for trespass and nuisance, as well as claims under environmental protection statutes. . . . This litigation is not limited to actions asserting products liability claims."); *In re Aqueous Film-Forming Foams Prods. Liab. Litig.*, 357 F. Supp. 3d 1391, 1395 (J.P.M.L. 2018) (initial consolidation order; noting that "[t]o the extent the actions entail unique factual or legal issues, the transferee court has the discretion to address those issues through the use of appropriate pretrial devices, such as separate tracks for discovery and motion practice").

Furthermore, the National Guard's interests would be impaired because it was an "active participant" in the firefighting activities. As stated by the Eleventh Circuit, "a joint tortfeasor will be considered a necessary party when the absent party 'emerges as an active participant' in the allegations made in the complaint that are 'critical to the disposition of the important issues in the litigation.' " *Laker Airways, Inc. v. Brit. Airways, PLC*, 182 F.3d 843, 848 (11th Cir. 1999) (quoting *Haas v. Jefferson Nat. Bank of Miami Beach*, 442 F.2d 394, 398 (5th Cir. 1971)).

Laker Airways involved an antitrust action brought by an airline against a rival alleging that the rival conspired to restrain and monopolize a particular air service route. The Eleventh Circuit held that the "slot manipulation" claim was properly dismissed for failure to join a corporation appointed by the British government to coordinate requests for landing and take-off slots at airports where the plaintiff alleged that the rival conspired with the coordinating corporation to favor the rival. The court acknowledged that the plaintiff now sought only monetary damages and that there would be no "order directed at" the coordinator, but it held that the claims required that a court evaluate the coordinator's

[2] To the extent the Belters suggest that the absent party must affirmatively claim a legal interest in the case, *see* Pls.' Opp'n at 18, that is not a requirement. *See City of Montpelier v. Barnett*, 2012 VT 32, ¶ 15, 191 Vt. 441 (holding that it was proper for trial court to join State in action where State had interest that "might" be impaired by its absence, and subsequently dismiss State from action after State expressly disavowed any such interest that would be jeopardized by its absence from the litigation).

conduct in relation to plaintiff-airline, "thereby substantially implicating [the coordinator's] interests. *Id.* at 847–48. This was particularly true, the court observed, because British legislation required the withdrawal of approval of an appointed coordinator for non-neutral behavior, and the resolution of the slot-manipulation claim would "inevitably comment upon the neutrality and independence of the process." *Id.* at 848; *see also Boles v. Greeneville Hous. Auth.*, 468 F.2d 476 (6th Cir. 1972) (holding that where property owners' attack on plan for urban renewal project—proposed by defendant housing authority and approved by Department of Housing and Urban Development—indirectly attacked HUD's administrative decision approving plan and granting relief sought by plaintiffs would amount to holding that HUD "misconceived its function and prerogatives," HUD was at least arguably an indispensable party); *Two Shields v. Wilkinson*, 790 F.3d 791 (8th Cir. 2015) (United States was necessary and indispensable party where Native Americans, who were allotted interests in land by United States that United States held in trust, sued companies that leased oil and gas mining rights on their allotments, alleging that companies aided, abetted, and induced United States to breach its fiduciary duty by approving leases).

The Belters assert that the *Laker Airways* test does not accurately state the rule under Rule 19(a)(2)(i), and that the United States is an "irrelevant non-participant" or at most a "joint tortfeasor" whose joinder is not necessary. They explain:

> Plaintiffs expect through discovery to establish that the City knew or should have known the water it was collecting through its stormwater and other water runoff systems was contaminated with PFAS, yet it continued to release that water onto the Belters' property. As such, Plaintiffs' legal claims against the City, sounding in negligence, trespass, nuisance, the Groundwater Protection Act, takings, and increased surface water, need not implicate any conduct attributable to the United States.

Pls.' Opp'n at 13. They also rely on *Am. Trucking Ass'n, Inc. v. New York State Thruway Auth.*, 795 F.3d 351 (2d Cir. 2015) (New York State was not necessary party in commercial trucking companies' suit against New York State Thruway Authority alleging that Thruway Authority unduly burdened interstate commerce by collecting excessive tolls to fund canal-related development projects, rather than to maintain Thruway) and *Micek v. Mayo Clinic*, No. 21-CV-0436 (PJS/ECW), 2021 WL 5282755, at *1 (D. Minn. Nov. 12, 2021) (doctor was not necessary party in medical malpractice suit alleging vicarious liability against doctor's employer's parent company).

The Belters' assertions here are not persuasive, and appear to stem from a misplaced reliance on and overly expansive interpretation of the unremarkable "general rule [] that joinder of all joint tortfeasors is not necessary." *Micek*, No. 21-CV-0436 (PJS/ECW), 2021 WL 5282755, at *5. This

uncontroversial general rule does not somehow bar joinder of all joint tortfeasors. *See Two Shields*, 790 F.3d 791, 797 (rejecting idea "that Rule 19 lacks application to all who are alleged to share liability for a wrong"). Rather, it means only that typical joint-and-several liability alone does not make one a necessary party under Rule 19(a).

American Trucking and *Micek* do not compel a different conclusion. *American Trucking* is distinguishable in that it was not a joint tortfeasor case like *Laker Airways*, *Two Shields*, and the present case, and the absent party in *American Trucking* (New York State) was not alleged to have played a central role in the conduct giving rise to the plaintiffs' claims. Further, the Thruway Authority did not dispute that its interests were "aligned in all respects" with those of the state, and it was represented by the New York Attorney General. *American Trucking*, 795 F.3d at 360. The *Micek* court distinguished *Laker Airways* and *Two Shields*, but not in a way that supports the Belters' argument here. *See Micek*, No. 21-CV-0436 (PJS/ECW), 2021 WL 5282755, at *4. Indeed, the discussion of those two cases in *Micek* demonstrates that they are closer to the present case than to the fact pattern in *Micek*. *See id*. (noting that neither *Laker Airways* nor *Two Shields* involved an employment or parent-subsidiary relationship, that in both cases the present party and absent party were alleged to be joint tortfeasors, and that in both cases the absent party's interests "were more significant than those of a routine joint tortfeasor") (quotation omitted). Significantly, the court observed that in *Two Shields*, "[t]he interests of the United States were therefore quite different from those of a typical third party which claims no interest beyond contesting allegations about its own improper conduct." *Id*. (quotations omitted).

The court concludes that the United States and the National Guard are also necessary parties under Rule 19(a)(2)(ii), which requires that a party's absence "leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the [absent party's] claimed interest." True, the Belters' withdrawal of all requests for injunctive relief in their amended complaint largely mitigates the City's risk of incurring inconsistent obligations. And while the City maintains that it could be subject to inconsistent obligations if it pursues and is denied indemnity against the United States, the case law does not support that assertion. *See Rochester Methodist Hosp. v. Travelers Ins. Co.*, 728 F.2d 1006, 1016 (8th Cir. 1984) (possible indemnification did not make non-party required); Equal Emp. Opportunity Comm'n v. Cummins Power Generation Inc., 313 F.R.D. 93, 101–02 (D. Minn. 2015) ("Simply because a party may later bring a claim for indemnification or contribution against a non-party, does not make the non-party necessary."); *AEI Income & Growth Fund 24, LLC v. Parrish*, No. 04-CV-2655 (JRT/FLN), 2005 WL

713629, at *2 (D. Minn. Mar. 30, 2005) (resolving issue of indemnification of absent party was not "necessary to [the] resolution of this case"), *aff'd*, 200 F. App'x 621 (8th Cir. 2006) (per curiam); *but see Dreamweaver Andalusians, LLC v. Prudential Ins. Co. of Am.*, 234 Cal. App. 4th 1168, 1176 (2015) (potential for federal indemnity action against United States could lead to inconsistent obligations because federal court "might proportion liability differently or make contradictory findings of fact").

Nevertheless, the City continues to be at substantial risk of incurring *multiple* obligations if the United States does not sufficiently remediate ongoing harm, because it is powerless to change the Guard's practices. The Belters contend that the doctrine of *res judicata* protects the City from such hypothetical multiple lawsuits. Pls.' Sur-Reply at 5. But *res judicata* would not necessarily bar subsequent claims for future damages should the United States and the National Guard continue to release contaminants onto the Belters' property. *See generally In re Shelburne Supermarket, Inc.*, 2010 VT 30, ¶ 19, 187 Vt. 514 (res judicata "bars litigation of claims or causes of action which were or might properly have been litigated in a previous action"); Wright & Miller, 18 Fed. Prac. & Proc. Juris. § 4409 ("The impact of a completed wrong may extend into the future, requiring often uncertain forecast of the extent of the injury. . . . Even with respect to completed conduct, it may be completely unsatisfactory to require that all possible future damages be sought in one action. . . . There is no satisfactory answer. . . . Predicting future environmental clean-up costs in a first action may be nearly impossible; definition of the claim in a way that permits successive actions may be desirable.").[3] The Belters could potentially bring new claims every year for damages incurred during the preceding year, and the cycle would continue with no end in sight. The court concludes that here, joinder of the United States or the National Guard "is necessary in order for the court adequately to dispose of the action." Reporter's Note, V.R.C.P. 19.

Conclusion

The United States and the National Guard are necessary parties whose joinder is required under Rule 19(a). The Belters concede that the United States cannot be made a party to this matter pursuant to 28 U.S.C. § 1346(b)(1) and 28 U.S.C. § 1491(a)(1). *See* Pls.' Opp'n at 18 n.6. As for the National Guard, that is not clear. *See* Def.'s Mot. to Dismiss at 2 n.1; *id*. at 14. The court will order joinder of the National Guard for the limited purpose of determining its capacity to be sued in state court.

[3] The National Guard has apparently stopped releasing AFFF into the environment, as the Amended Complaint alleges that the Guard used AFFF until 2014. Again, however, the sole defendant in this case right now (the City) is powerless to prevent the Guard from doing so again or to make the Guard take any action to stop existing contaminants from continuing to leach onto the Belters' property.

Depending on that determination, the court then will consider the Rule 19(b) arguments and/or the arguments concerning sovereign immunity and vicarious liability.

ORDER

The court neither grants nor denies the City's motion to dismiss at this juncture. Instead, the court orders the joinder of the Vermont Air National Guard for the limited purpose of determining its capacity to be sued in state court in this action.

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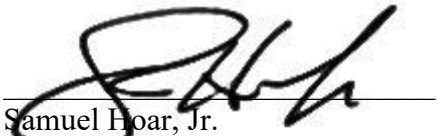

Samuel Hoar, Jr.
Superior Court Judge