United States Court of Appeals
For the Eighth Circuit

No. 21-1160

In re: Cotter Corporation, (N.S.L.)

Petitioner

No. 21-1165

Tamia Banks; Ronnie Hooks; Joel Hogan; Kenneth Niebling; Kendall Lacy; Tanja Lacy; Willie Clay; Bobbie Jean Clay; Angela Statum; Missouri Rentals Company, LLC, on behalf of themselves and all others similarly situated

Plaintiffs - Appellees

v.

Cotter Corporation

Defendant - Appellant

Commonwealth Edison Company; DJR Holdings, Inc., formerly known as Futura Coatings, Inc.; St. Louis Airport Authority, a Department of the City

of St. Louis

*Defendant*s

American Nuclear Insurers

Amicus on Behalf of Appellant(s)

Appeal from United States District Court for the Eastern District of Missouri - St. Louis

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Submitted: October 12, 2021
Filed: January 7, 2022

Before LOKEN, COLLOTON, and BENTON, Circuit Judges.

BENTON, Circuit Judge.

Plaintiffs sued Cotter Corporation (N.S.L.) ("Cotter") and other defendants in Missouri state court for allegedly polluting their property with radioactive nuclear material. Cotter eventually brought a third-party action for contribution against other parties, one of whom removed the dispute to federal district court. The district court held that the Price-Anderson Act did not apply to the claims against

Cotter, declined supplemental jurisdiction over those claims, and remanded them. Cotter appeals the remand order. Having jurisdiction under 28 U.S.C. § 1291, this Court reverses and remands.

I.

During World War II, Mallinckrodt LLC contracted with the federal government to produce radioactive material for the Manhattan Project. Mallinckrodt stored waste materials in downtown St. Louis and at the St. Louis Airport. It eventually moved some waste to another site in Hazelwood, Missouri, known as "Latty Avenue." Between 1969 and 1973, Cotter possessed and used nuclear waste at Latty Avenue.

In February 2018, Plaintiffs sued Cotter, the St. Louis Airport Authority, and other entities—but not Mallinckrodt. Plaintiffs allege that nuclear waste materials from the various St. Louis sites leaked into Coldwater Creek and its 100-year floodplain in St. Louis County, damaging their health and property.

In April 2018, Cotter removed the suit to federal court on the basis of the Price-Anderson Act, Pub. L. No. 85-256, 71 Stat. 576 (1957) (amended 1966, 1988) (codified in scattered sections of 42 U.S.C.) ("PAA"). The district court ruled that the PAA did not apply and remanded the case to state court in a March 29, 2019, order. The court reasoned that the PAA applies only to nuclear incidents if the defendant has an applicable indemnity agreement, and Cotter lacked such an agreement, so the PAA did not apply.

After Plaintiffs amended their complaint in state court, Cotter filed a third- party action for contribu-

tion against seven defendants, including Mallinckrodt, which then removed the entire lawsuit under the PAA and other bases. Back in federal court, Plaintiffs moved to sever and remand all claims, except the third-party claim against Mallinckrodt, on the grounds that these were all state-law claims. The district court granted that motion in a December 22, 2020, order. Cotter timely appealed, also filing for a writ of mandamus on the same grounds.

This Court reviews the district court's decision to decline supplemental jurisdiction and remand under 28 U.S.C § 1367 for abuse of discretion. ***Mo. Roundtable for Life v. Carnahan,*** 676 F.3d 665, 678 (8th Cir. 2012)**;** ***Glorvigen v. Cirrus Design Corp.***, 581 F.3d 737, 743 (8th Cir. 2009).

II.

As a preliminary matter, Plaintiffs argue this Court lacks jurisdiction for this appeal. Plaintiffs are incorrect.

First, the remand order is a reviewable final judgment under 28 U.S.C. § 1291 because it effectively put Cotter out of federal court for Plaintiffs' claims. ***See, e.g., Quackenbush v. Allstate Ins. Co.***, 517 U.S. 706, 712-15 (1996) (holding remand order reviewable under § 1291); ***Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.***, 460 U.S. 1, 10 & n.11 (1983) (holding stay order appealable under § 1291 where it put the litigant "effectively out of court," and "surrender[ed] jurisdiction of a federal suit to a state court"); ***Gaming Corp. of Am. v. Dorsey & Whitney***, 88 F.3d 536, 542 (8th Cir. 1996) (holding challenge to § 1367(c) remand order was properly heard on direct appeal, rather than petition

for a writ of mandamus, where remand order was final because defendant "would have no other opportunity to appeal that decision in federal court"); ***Baker v. Kingsley***, 387 F.3d 649, 653-56 (7th Cir. 2004) (concluding § 1291 provided jurisdiction over remand order and § 1447(d) did not bar review).

Second, 28 U.S.C. § 1447(d) does not bar review here. Under 28 U.S.C. § 1441, a defendant may remove a case filed in state court to federal court. The plaintiff then may file "a motion to remand the case on the basis of any defect." **28 U.S.C. § 1447(c)**. Section 1447(d) prohibits appellate review of "[a]n order remanding a case to the State court from which it was removed" unless removal was premised on "section 1442 or 1443." ***Id.* § 1447(d)**. Section 1447(d) "preclude[s] review only of remands for lack of subject-matter jurisdiction and for defects in removal procedure." ***Powerex Corp. v. Reliant Energy Servs., Inc.***, 551 U.S. 224, 229 (2007).

Meanwhile, 28 U.S.C. § 1367 provides that a federal court may exercise supplemental jurisdiction over state-law claims. **28 U.S.C. § 1367**. Section 1367(c)(2), in turn, allows a federal court to "decline to exercise supplemental jurisdiction over a claim" for which it lacks original jurisdiction if "the claim substantially predominates over the claim or claims over which the district court has original jurisdiction." ***Id.***

Here, Plaintiffs filed a "Motion to Sever and Remand All Non-Third-Party Claims" "pursuant to 28 U.S.C. § 1367(c)." **Remand Mot. at 1, Case No. 20-1227, DCD 47**. The district court assessed that Motion in its December 22, 2020, "Memorandum and Order" under a section titled "Exercise of Supple-

mental Discretion," where it applied the standard for declining supplemental jurisdiction "pursuant to 28 U.S.C. § 1367(c)(2)." **Mem. Order at 1, 5-6, Case No. 20-1227, DCD 71 (Dec. 22, 2020)** ("12/22/20 Mem. Order"). The district court (1) concluded that the PAA provided jurisdiction only for Cotter's third-party claim against Mallinckrodt, (2) retained that single claim, (3) declined to exercise supplemental jurisdiction over all other claims in the case, and (4) severed and remanded those claims. ***Id.* at 14**.

Because the district court remanded under § 1367(c), Section 1447(d)'s prohibition on appellate review does not apply. "When a district court remands claims to a state court after declining to exercise supplemental jurisdiction, the remand order is not based on a lack of subject-matter jurisdiction for purposes of §§ 1447(c) and (d)." ***Carlsbad Tech., Inc. v. HIF Bio, Inc.***, 556 U.S. 635, 641 (2009). Thus, § 1447(d) does not bar an appellate court from reviewing a district court's decision to decline supplemental jurisdiction under § 1367. ***Id.* at 636**. ***See also Glorvigen***, 581 F.3d at 742 (concluding "this court has jurisdiction to review the district court's decision to remand the state-law claims back to state court"); ***Gaming Corp. of Am.***, 88 F.3d at 542 ("Because the district court never lacked [federal question] subject matter jurisdiction and remanded under § 1367, neither § 1447(d) nor any other statutory bar exists to our jurisdiction.").

The district court here did not conclude that it lacked subject-matter jurisdiction over the case—indeed, it kept the claim against Mallinckrodt—and did not remand due to a defect in removal. Rather, it declined to exercise supplemental jurisdiction under

§ 1367. Thus, this Court may review its decision. ***See Carlsbad Tech., Inc.***, 556 U.S. at 636; ***Glorvigen***, 581 F.3d at 742.[1]

III.

This Court reviews the district court's decision to decline supplemental jurisdiction and remand under 28 U.S.C. § 1367 for abuse of discretion. ***Mo. Roundtable for Life***, 676 F.3d at 678. A district court "necessarily abuse[s] its discretion if it based its ruling on an erroneous view of the law." ***Cooter & Gell v. Hartmarx Corp.***, 496 U.S. 384, 405 (1990). ***See Innovative Home Health Care, Inc. v. P.T.-O.T. Assocs. of the Black Hills***, 141 F.3d 1284, 1286 (8th Cir. 1998) (stating that abuse of discretion will be found "if the district court's judgment was based on clearly erroneous factual findings or erroneous legal conclusions" (quotation omitted)).

The district court here made an erroneous legal determination that constitutes abuse of discretion: it determined that the PAA does not apply to Plaintiffs' claims against Cotter because Cotter lacked an applicable license or indemnity agreement. **12/20/22**

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[1] Accordingly, this Court denies Plaintiffs' Motion to Dismiss for Lack of Subject Matter Jurisdiction. Separately, because § 1447(d) does not bar review of the § 1367 remand order, this Court need not address the parties' dispute about the applicability of *BP P.L.C. v. Mayor & City Council of Baltimore*, 141 S. Ct. 1532 (2021), which held that an appellate court may review all theories of removal presented when a court remands an entire case under § 1447(c) and at least one theory of removal was premised on §§ 1442 or 1443. ***See BP P.L.C.***, 141 S. Ct. at 1537-38.

Mem. Order at 6 (stating, "Plaintiffs' claims alone do not establish federal jurisdiction," and concluding, "only Cotter's claim for contribution against Mallinkrodt . . . potentially provides federal jurisdiction"); **Mem. Order at 17-18, Case No. 18-0624, DCD 75 (Mar. 29, 2019)** ("3/29/19 Mem. Order"). Based on this determination, the court remanded the claims as state-law claims for which it declined supplemental jurisdiction. **12/20/22 Mem. Order at 14** (concluding claim against Mallinkrodt is "the only potential avenue for federal jurisdiction in this case").

Contrary to the district court's ruling, the PAA provides federal question jurisdiction over all "nuclear incidents," regardless of whether the defendant had an applicable license or indemnity agreement. ***See* 42 U.S.C. §§ 2010(n)(2), 2014(q)**. The text and history of the PAA propel this conclusion.

The PAA's jurisdictional grant provides federal question "original jurisdiction" for "any public liability action arising out of or resulting from a nuclear incident" to the district court located in the district where the incident occurred. **42 U.S.C. § 2210(n)(2);** ***Halbrook v. Mallinckrodt*, LLC**, 888 F.3d 971, 974 (8th Cir. 2018) ("Congress created a federal cause of action for public-liability claims concerning nuclear incidents [and] expressly invoked federal-question jurisdiction in the Article III courts . . . .").

The PAA defines "public liability action" as "any suit asserting public liability." **42 U.S.C. § 2014(hh)**. Excluding exceptions not relevant here, the PAA then defines "public liability" as "any legal liability arising out of or resulting from a nuclear in-

cident or precautionary evacuation . . . ." ***Id.* § 2014(w)**.

A "nuclear incident," in turn, "means any occurrence, including an extraordinary nuclear occurrence, within the United States causing, within or outside the United States, bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property, arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material . . . ." ***Id.* § 2014(q)**.

In addition, the PAA defines "extraordinary nuclear occurrence" ("ENO") as "any event causing a discharge or dispersal of source, special nuclear, or byproduct material from its intended place of confinement in amounts offsite, or causing radiation levels offsite, which the Nuclear Regulatory Commission [("NRC")] . . . determines to be substantial . . . ." ***Id.* § 2014(j)**. "As used in this subsection [defining 'ENO'], 'offsite' means away from 'the location' or 'the contract location' as defined in the applicable [NRC] indemnity agreement . . . ." ***Id.***

However, the PAA does not define "occurrence" as used in the definition of "nuclear incident." ***See id.* § 2014(q)**. A term not defined in a statute is interpreted consistent with its "ordinary meaning" and the court departs from this interpretation only if context requires a different result. ***Sanzone v. Mercy Health***, 954 F.3d 1031, 1040 (8th Cir. 2020). "[O]ccurrence" means "something that takes place." ***Webster's Third New International Dictionary* 1561 (1986).**

Applying this plain meaning, "nuclear incident" means something that takes place within the United

States, causing bodily injury or property damage, and arising out of the "properties of source, special nuclear, or byproduct material," **42 U.S.C. § 2014(q)**. This definition is "facially quite broad" and renders the PAA's jurisdictional grant equally broad as a result. ***Est. of Ware v. Hosp. of the Univ. of Penn.***, 871 F.3d 273, 280 (3d Cir. 2017). ***See Acuna v. Brown & Root Inc.***, 200 F.3d 335, 339 (5th Cir. 2000) (adopting same interpretation); ***Matthews v. Centrus Energy Corp.***, 15 F.4th 714, 722-23 (6th Cir. 2021) (applying plain meaning of "occurrence" to interpret "nuclear incident"). Notably, this definition encompasses even those nuclear disasters where a defendant lacks an applicable indemnity agreement.

This interpretation aligns with the history of revisions to the PAA. Congress enacted the PAA in 1957 to encourage private commercial nuclear research and energy production after it became clear that, without government intervention, the liability risks from nuclear material would stunt private development. ***See El Paso Nat. Gas Co. v. Neztsosie***, 526 U.S. 473, 476 (1999) ("*Neztsosie*"). The PAA provided a "system of private insurance, Government indemnification, and limited liability for claims" for federal nuclear licensees. ***Id.***

Initially, the PAA provided federal jurisdiction and a means of consolidating claims in federal court only for an "extraordinary nuclear occurrence." ***See id.*** As a result, when the 1979 Three Mile Island nuclear accident did not release sufficient nuclear material to constitute an ENO, litigation could not be consolidated in one action under the PAA, and the accident instead spawned more than 150 cases and 3000 claimants in state and federal courts. ***See* S.**

Rep. 100-218, at 13 (1987). In response, Congress passed the 1988 Price-Anderson Act Amendments "to grant district courts original and removal jurisdiction over all 'public liability actions.'" ***Neztsosie***, 526 U.S. at 477. ***See*** **S. Rep. 100-218, at 13** (recognizing the benefits of "consolidation of claims in the event of any nuclear incident, not just an ENO," and stating the amendments "expand[] existing law to allow for the consolidation of claims arising out of any nuclear incident in federal district court").

The 1988 PAA Amendments revised the jurisdictional grant in 42 U.S.C. § 2210(n)(2) to replace "extraordinary nuclear occurrence" with "nuclear incident." **1988 PAA Amendments § 11(a), Pub. L. No. 100-408, 102 Stat. 1066, 1076**. Under the 1988 Amendments, suits arising from an ENO are subject to a statute of limitations and defendants may be required to waive defenses; for a non-ENO "nuclear incident," however, state substantive law and limitations periods apply. ***See Halbrook***, 888 F.3d at 974; ***Est. of Ware***, 871 F.3d at 278-79.

The fact that Congress amended the PAA to expand the scope of original jurisdiction from only ENOs to all "nuclear incidents" reinforces the conclusion that the PAA applies broadly to any event causing bodily or property damage from nuclear material, rather than a narrow category of nuclear catastrophes. ***See Est. of Ware***, 871 F.3d at 283; ***Acuna***, 200 F.3d at 339.

Plaintiffs urge, and the district court concluded, however, that the PAA provides jurisdiction for suits arising from a nuclear incident only when the defendant has an "applicable license or indemnity

agreement." **3/29/19 Mem. Order at 13-14; 12/22/20 Mem. Order at 6, 14** (relying on previous remand order's PAA analysis to conclude claims against Cotter were not subject to PAA). ***See*** **Banks Br. at 39-40**.

This interpretation incorrectly imports limiting concepts from "extraordinary nuclear occurrence" to interpret the word "occurrence" in nuclear incident. ***See*** **3/29/19 Mem. Order at 13-14**. The basic, if tortured, logic is that (1) "nuclear incident" is defined as "any occurrence, including extraordinary nuclear occurrence," **42 U.S.C. § 2014(q)**; (2) "occurrence" is not defined by the PAA but an "extraordinary nuclear occurrence" is limited to only those discharges that happen "offsite"; and (3) "offsite" means "away from 'the location' or 'the contract location' as defined in the applicable . . . indemnity agreement," **42 U.S.C. § 2014(j)**; so (4) "occurrence" in nuclear incident must mean only those nuclear events that happen when a defendant has an applicable indemnity agreement. ***See*** **3/29/19 Mem. Order at 13-14**.

This interpretation suffers from three major flaws. First, it contradicts the first rule of statutory interpretation, that the court interpret a word not defined in a statute according to its plain meaning unless context requires otherwise. ***See Sanzone***, 954 F.3d at 1040. Here, context does not require otherwise. "Occurrence" is adequately defined by its plain meaning, and that meaning does not create absurdity or otherwise run contrary to the statutory framework of the broader PAA.

Second, the interpretation relies entirely on the limits imposed by "offsite," but that term appears nowhere in the definition of "nuclear incident." ***See*** **42 U.S.C. § 2014(q);** ***Carey v. Kerr-McGee Chem.***

Corp., 60 F. Supp. 2d 800, 806 (N.D. Ill. 1999). In fact, Congress expressly confined the definition of "offsite" to the definition of "extraordinary nuclear occurrence" supplied in subsection 2014(j), when Congress provided, "As used in this *subsection*, 'offsite' means . . . ." **42 U.S.C. § 2014(j)** (emphasis added). Thus, the technical definition of "offsite"—including its indemnity agreement element—does not apply beyond the meaning of an ENO. Moreover, the fact that Congress defined "offsite" and limited "extraordinary nuclear occurrence" to a specific set of requirements shows that Congress knew how to impose those requirements, including an applicable indemnity agreement. The absence of those requirements from the express definition of "nuclear incident" reflects an intent to not impose them there.

Third, the interpretation directly conflicts with the clear purpose of the 1988 Amendments, as reflected in the revision of § 2210(n)(2): to broaden federal jurisdiction to encompass lawsuits arising from nuclear accidents that are not ENOs. It makes little sense to reimport limitations for "extraordinary nuclear incident" when Congress amended the PAA to eliminate the jurisdictional limits imposed by that term. ***See Est. of Ware***, 871 F.3d at 283; ***Acuna***, 200 F.3d at 339 (rejecting the requirement of an indemnity agreement for a "nuclear incident" as "faulty statutory interpretation . . . contrary to Congressional intent").

Relatedly, Plaintiffs lean heavily on *Silkwood v. Kerr-McGee Corporation*, 464 U.S. 238 (1984), which they claim supports their interpretation. Plaintiffs are wrong: *Silkwood* was decided in 1984, four years before the 1988 PAA Amendments revised the juris-

dictional grant to apply to "nuclear incident" instead of "extraordinary nuclear occurrence." ***See, e.g., Matthews***, 15 F.4th at 724; ***Kerr- McGee Corp. v. Farley***, 115 F.3d 1498, 1503-04 (10th Cir. 1997).

In light of the plain meaning of "occurrence" and the many problems that arise from Plaintiffs' and the district court's alternative interpretation, "nuclear incident" means something that happens within the United States, causing bodily injury or property damage and arising out of nuclear material. Thus, the PAA provides original federal question jurisdiction for all nuclear incidents regardless of whether the defendant had an applicable indemnity agreement. ***See* 42 U.S.C. 2010(n)(2)**.[2] The only two circuit courts to confront this question have reached the same conclusion. ***Est. of Ware***, 871 F.3d at 283; ***Acuna***, 200 F.3d at 339.

IV.

The district court relied on the fact that Cotter did not have an indemnity agreement applicable to the present nuclear incident when it determined the PAA did not apply to Plaintiffs' claims against Cotter, **3/29/19 Mem. Order at 17-18**, declined supplemental jurisdiction over those claims, and severed and remanded them, **12/22/20 Mem. Order at 6, 14**. However, an indemnity agreement is not a prerequisite for jurisdiction under the PAA's jurisdictional grant for a "nuclear incident." Because the PAA pro-

[2] This Court rejects *Strong v. Republic Services, Inc.*, 283 F. Supp. 3d 759 (E.D. Mo. 2017), upon which Plaintiffs and the district court relied, to the extent that *Strong* and similar cases depart from the reasoning herein.

vides federal question jurisdiction over the claims against Cotter and a "district court has no discretion to remand a claim that states a federal question," ***Gaming Corp. of Am.***, 88 F.3d at 542, the district court abused its discretion. ***See id.*** **at 541-42, 551** (reversing § 1367(c) remand order where district court incorrectly concluded "no federal claims remained"). Thus, this Court reverses and remands.[3]

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This Court denies Plaintiffs' motion to dismiss the appeal, reverses the remand order of the district court, and remands the case for further proceedings consistent with this opinion. The petition for a writ of mandamus is dismissed.

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[3] Cotter also filed a petition for a writ of mandamus seeking the same relief sought in its direct appeal. Because this Court has adjudicated the merits of the direct appeal, the petition is dismissed as moot.

United States District Court, E.D. Missouri,
Eastern Division.

Tamia BANKS, et al., Plaintiffs,

v.

COTTER CORPORATION (N.S.L.), et al., Defendants.

Cotter Corporation (N.S.L.), Third-Party Plaintiff,

v.

Mallinckrodt LLC, et al., Third-Party Defendants.

Case No. 4:20-CV-01227-JAR

Signed 12/22/2020

MEMORANDUM AND ORDER

JOHN A. ROSS, UNITED STATES DISTRICT JUDGE

This matter is before the Court on Plaintiffs' Motion to Sever and Remand All Non-Third-Party Claims. (Doc. 47). Defendant and Third-Party Plaintiff Cotter Corporation (N.S.L.) ("Cotter") responded in opposition (Doc. 58),[1] and Plaintiffs have replied. (Doc. 66). Other Defendants and Third-Party De-

[1] Cotter's response states "ORAL ARGUMENT REQUESTED" in the caption. (Doc. 58 at 1). Pursuant to E.D. Mo. L.R. 4.02(B), a party requesting oral argument "shall file such request with its motion or memorandum briefly setting forth the reasons which warrant the hearing of oral argument." Cotter has not provided any explanation why oral argument is necessary. Given the issues here have been extensively litigated, including before this Court, oral argument is not warranted.

fendants have joined Cotter's opposition either in whole or in part. (Docs. 56, 60, 61, 64-65). For the reasons discussed below, this Court will grant the instant motion and sever and remand all claims except for Cotter's claim for contribution against Defendant Mallinckrodt LLC ("Mallinckrodt").

I. FACTUAL AND PROCEDURAL HISTORY

It's like déjà vu all over again. On April 2, 2018, Plaintiff Tamia Banks filed an amended class action petition in the Circuit Court of St. Louis County, Missouri. *See Banks v. Cotter Corp.*, No. 4:18-CV-624 JAR, 2019 WL 1426259, at *1 (E.D. Mo. Mar. 29, 2019). The relevant underlying facts, as previously described by this Court, are as follows:

> From 1942 to 1957, uranium ore was processed in association with the Manhattan Project to develop nuclear weapons in a facility in downtown St. Louis City known as the St. Louis Downtown Site ("SLDS"). (First Amended Class Action Petition ("FAP")). In the late 1940's, the Manhattan Project acquired a tract of land near Lambert Airport known as the St. Louis Airport Site ("SLAPS") to store radioactive waste from the uranium processing operations at SLDS. In 1957, "approximately sixty truckloads of contaminated scrap metal, several contaminated vehicles, in addition to miscellaneous radioactive wastes were buried on the western portion of SLAPS adjacent to Coldwater Creek," a tributary of the Missouri River which runs throughout North St. Louis County. In the 1960's, some of the radioactive waste that had been stored at SLAPS was moved to a storage site on Latty Avenue in Hazelwood, Missouri (the "Latty Avenue Site"), a part of

> which later became the Hazelwood Interim Storage Site ("HISS"). In the late 1960's, Cotter purchased the radioactive waste stored at both SLAPS and the Latty Avenue Site. Between 1969 and 1973, Cotter stored, processed and transported radioactive waste at the SLAPS and Latty Avenue sites. In 1973, SLAPS was sold to the Airport Authority. The Latty Avenue Site was sold to Futura Coatings, n/k/a DJR. *Id.* (internal citations omitted).

Banks asserted numerous state law claims, generally alleging that "as a result of Defendants' collective conduct over several decades, radioactive wastes were released into the environment in and around Coldwater Creek, resulting in contamination of her home and property, as well as the property of other classes members." *Id.*

Defendants promptly removed the case to this Court claiming that the action arose out of the Price-Anderson Act ("PAA"), thereby establishing federal jurisdiction. *Id.* at *2. The PAA was enacted as an amendment to the Atomic Energy Act of 1954 and sought to "encourage private sector development of atomic energy" by, among other things, "channel[ing] public liability resulting from nuclear incidents to the federal government." *Id.* (citing *El Paso Nat. Gas Co. v. Neztsosie*, 526 U.S. 473 (1999)). On March 29, 2019, this Court remanded on the grounds that "a license or indemnity agreement is a prerequisite for federal subject matter jurisdiction pursuant to the PAA." *Id.* at *6; *see also Kitchin v. Bridgeton Landfill, LLC*, 389 F. Supp. 3d 600 (E.D. Mo. 2019), *appeal filed* (No. 19-2072); *Strong v. Republic Servs., Inc.*, 283 F. Supp. 3d 759 (E.D. Mo. 2017).

Following remand, the case proceeded in state court and Plaintiffs filed a Second Amended Class Action Petition ("SAP"). (Doc. 1-6). On June 30, 2020, Cotter filed a Third-Party Petition seeking contribution from the Third-Party Defendants, including Mallinckrodt. (Doc. 1-7). Cotter argues that any potential damages assessed against it "were caused, in whole or in part, by the conduct, fault, acts, carelessness, omissions, and negligence of Mallinckrodt, thereby barring any such recovery against Cotter." (*Id.* at ¶ 73). Mallinckrodt then filed a Notice of Removal claiming this Court has jurisdiction pursuant to the PAA and because Mallinckrodt acted "under color of" or at the direction of a federal officer per 28 U.S.C. § 1442. (Doc. 1). On October 12, 2020, Mallinckrodt filed for bankruptcy, triggering an automatic stay in this case per 11 U.S.C. § 362. (Doc. 46). Plaintiffs filed the instant motion the next day. (Doc. 47).

The automatic stay further complicates this already convoluted posture. According to 11 U.S.C. § 362(a)(1), Mallinckrodt's voluntary bankruptcy petition stays "the commencement or continuation ... of a judicial, administrative, or other action or proceeding against the debtor that was ... commenced before the commencement of the [bankruptcy petition]." The automatic stay is "fundamental to the reorganization process, and its scope is intended to be broad." *Small Bus. Admin. v. Rinehart*, 887 F.2d 165, 167 (8th Cir. 1989). In accordance with the automatic stay, Plaintiffs' motion "does not seek any relief as to Mallinckrodt" but instead requests that this Court sever and decline to exercise supplemental jurisdiction over Plaintiffs' state law claims

against Defendants. (Doc. 46 at ¶¶ 10-13).[2] For purposes of this motion, Plaintiffs effectively presume that Mallinckrodt has properly invoked this Court's jurisdiction via its Notice of Removal without waiving their right to argue otherwise. (Doc. 48 at 2 n.1). Accordingly, a detailed inquiry into the presence of federal jurisdiction over Mallinckrodt is unnecessary at this moment.[3] The key question on this motion is

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[2] The Court notes that there is substantial precedent supporting the position that remand is permissible even when an automatic stay under 11 U.S.C. § 362 is in place. *See Price v. Chrysler LLC*, No. 4:09-CV-232 ERW, 2009 WL 2208298, at *1 (E.D. Mo. July 23, 2009) ("The Court's decision to remand this action to state court is essentially a lateral move to address a procedural issue, and it does not continue the case in any significant manner. Such a motion in no way affects the rights and duties of either the Defendant as a debtor, or the Plaintiff as a potential creditor."); *see also Dieterly v. Boy Scouts of Am.*, No. 20-902, 2020 WL 3447766, at *2 (E.D. Pa. June 24, 2020) (collecting cases). *But see Liljeberg Enters. Int'l v. Vista Hosp. of Baton Rouge, Inc.*, No. 04-2780, at *1-2 (E.D. La. Nov. 24, 2004) ("[R]emand of a case is not a mere 'ministerial' act that would not violate the automatic stay.").

Plaintiffs, however, seek no relief as to Mallinckrodt in the instant motion and instead request severance and remand. Mallinckrodt has acknowledged that Plaintiffs' motion does not seek any relief as to Mallinckrodt and "notes that it is subject to the Automatic Stay." (Doc. 57 at 2). Accordingly, it is not appropriate at this time to assess whether remand of the Third-Party Petition against Mallinckrodt is merited, regardless whether such a remand would be permissible under 11 U.S.C. § 362.

[3] It is proper in these unique circumstances for this Court to proceed without a detailed inquiry into the presence of jurisdiction under 28 U.S.C. § 1442. This Memorandum and Order presumes such jurisdiction and assesses whether the exercise of supplemental jurisdiction over the state law claims is appropriate. If this Court finds it lacks jurisdiction after the auto-

whether, assuming such jurisdiction exists, this Court should decline to exercise supplemental jurisdiction over Plaintiffs' state law claims.

II. DISCUSSION

A. Existence of Supplemental Jurisdiction

"[I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a). In other words, the claims must "derive from a common nucleus of operative fact." *OnePoint Solutions, LLC v. Borchert*, 486 F.3d 342, 350 (8th Cir. 2007) (quoting *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966)).

This Court can exercise supplemental jurisdiction over Plaintiffs' state law claims because the contribution claim against Mallinckrodt clearly stems from the same underlying facts. Plaintiffs' entire claim, as well as Cotter's claim of contribution, stems from the processing and transporting of hazardous materials in association with the Manhattan Project. *See, e.g.*, *Harbison v. Rich Gullet and Sons, Inc.*, No. 4:13-CV-1138 SPM, 2014 WL 5483569, at *6 (E.D. Mo. Oct. 29, 2014) (claim for contribution / indemnity part of same case or controversy). The parties do not dispute whether this Court *can* exercise supplemental jurisdiction over the state law claims, only whether it *should* exercise such jurisdiction.

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matic stay is lifted, the entire case would be remanded regardless.

B. Exercise of Supplemental Jurisdiction

This Court may decline to exercise its supplemental jurisdiction over a claim if, among other reasons not relevant here, "the claim substantially predominates over the claim or claims over which the district court has original jurisdiction, or ... in exceptional circumstances, there are other compelling reasons for declining jurisdiction." 28 U.S.C. § 1367(c)(2)-(4). If one of these statutory factors is present, the Court must weigh the interests of judicial economy, convenience, fairness, and comity to determine whether to exercise supplemental jurisdiction. *Wilson v. Miller*, 821 F.3d 963, 970 (8th Cir. 2016) (citing *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 (1988)). These are frequently referred to as the *Gibbs* factors. *See Gibbs*, 383 U.S. 715 (1966). The Court must also consider whether either party has attempted to "manipulate the forum." *Cohill*, 484 U.S. at 357. Ultimately, supplemental jurisdiction "is a doctrine of discretion." *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 172 (1997) (quoting *Gibbs*, 383 U.S. at 726). District courts have "broad discretion" when determining whether to exercise supplemental jurisdiction. *Green v. Ameritrade, Inc.*, 279 F.3d 590, 599 (8th Cir. 2002).

It is evident that Plaintiffs' state law claims substantially predominate over Mallinckrodt's PAA and federal contractor defenses, and Cotter does not argue otherwise. As Plaintiffs note, the SAP asserts 11 claims against Defendants, all of which are premised on Missouri law. (Doc. 48 at 3; Doc. 1-6). This Court has already held that Plaintiffs' claims alone do not establish federal jurisdiction. *Banks v. Cotter Corp.*,

No. 4:18-CV-624 JAR, 2019 WL 1426259 (E.D. Mo. Mar. 29, 2019). It is only Cotter's claim for contribution against Mallinckrodt, a Third-Party Defendant, that potentially provides federal jurisdiction via Mallinckrodt's alleged federal defense. Therefore, pursuant to 28 U.S.C. § 1367(c)(2), a careful analysis of the *Gibbs* factors is warranted.

Judicial Economy and Convenience of the Parties

This Court does not believe that there are substantial issues of judicial economy at stake, though such considerations somewhat favor remand. "It is the law in this circuit that 'the substantial investment of judicial time and resources in the case ... justifies the exercise of jurisdiction over the state claim." *Pioneer Hi-Bred Int'l v. Holden Foundation Seeds, Inc.*, 35 F.3d 1226, 1242 (8th Cir. 1994) (quoting *North Dakota v. Merchant Nat'l Bank & Trust Co.*, 634 F.2d 368, 371 (8th Cir. 1980) (en banc)). This Court has not devoted substantial resources to the case; the Notice of Removal was only filed recently, and this Court has yet to rule on any substantive motion. Meanwhile, substantial discovery has occurred in state court, and Judge Walsh has ruled on Cotter's motion to dismiss arguing PAA preemption. (Doc. 48 at 6). Cotter presents the understandable concern that granting severance and remand will result in this litigation proceeding in both state and federal court. (Doc. 58 at 10). The Court does not agree, however, that this will require "re-litigating every step of this putative class action" on the third-party claim against Mallinckrodt. (*Id.*). As the Missouri Supreme Court has explained, a claim for contribution "is really an anticipatory

claim; that is, the claim by a defendant who is held liable to a plaintiff really is not ripe until the defendant has suffered a judgment." *Hemme v. Bharti*, 183 S.W.3d 593, 598 (Mo. banc 2006). If Cotter is held liable to Plaintiffs, it can proceed on its claim for contribution against Mallinckrodt; if Plaintiffs lose, Cotter's claim against Mallinckrodt will become moot.

Cotter cites *Joyner v. A. C. & R. Insulation Co.* for the proposition that a party should not be required to conduct parallel litigation in state and federal court. No. CCB-12-2294, 2013 WL 877125, at *10 (D. Md. Mar. 7, 2013). But Cotter misinterprets *Joyner*. As later explained by the same judge, the concern in *Joyner* was the "potential of bifurcating claims *against one party* between state and federal courts." *Oliver v. Campbell McCormick, Inc.*, No. CCB-16-1057, 2016 WL 3878492, at *3 (D. Md. July 18, 2016) (emphasis added). Requiring a defendant to face similar claims for the same conduct in both federal and state courts is a legitimate concern; but that is not the situation here, where Cotter is a Third-Party Plaintiff in this Court seeking contribution against Mallinckrodt. *Oliver* is particularly comparable here, as the court granted severance and remand after finding that "the state law claims predominate over the federal contractor defense, the only claim over which the court has original jurisdiction." *Id.*

Fairness and Comity

Plaintiffs argue that fairness and comity favor severance and remand because Cotter delayed the naming of Mallinckrodt as a Third-Party Defendant, Mallinckrodt's bankruptcy will substantially delay

this litigation,[4] and Mallinckrodt's federal defenses are essentially irrelevant to Plaintiffs' claims. The Court agrees that Mallinckrodt's bankruptcy is a significant factor in favor of severance and remand given Mallinckrodt's role in this case. As discussed above, Mallinckrodt's relevance to this dispute is entirely contingent on a finding that Cotter is liable to Plaintiffs. Severance and remand appropriately permits Plaintiffs' state law claims to proceed rather than be delayed by the bankruptcy of a potentially irrelevant Third-Party Defendant.

In *Crocker v. Borden, Inc.*, the third-party defendant properly removed a state court action pursuant to the federal contractor defense located at 28 U.S.C. § 1442. 852 F. Supp. 1322 (E.D. La. 1994). The court severed the claim against the third-party defendant and remanded the remaining claims, specifically noting that "[n]one of the approximately 3,000 plaintiffs in the captioned matter has sued [the third-party defendant] as a primary defendant." *Id.* at 1331. The court further recognized that the third-party petitioner "**will not be prejudiced** by the severance ... as it would retain the right to pursue its third-party claim, if any such claim still existed" after disposition of the plaintiffs' primary case. *Id.* (emphasis in

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[4] The parties dispute whether Mallinckrodt's bankruptcy constitutes an "exceptional circumstance" under 28 U.S.C. § 1367(c)(4). Because the Court has determined that an analysis of the *Gibbs* factors is necessary per 28 U.S.C. § 1367(c)(2), it need not decide whether § 1367(c)(4) is also triggered. The effect of the bankruptcy stay can certainly be considered among the *Gibbs* factors, however.

original).[5] In *Crocker* and this case, "federal jurisdiction is [potentially] present for reasons wholly unrelated to the merits of any claim, and vast majority of the claims are based on state law and between non-federal actors." *Brown v. Kentucky Utils. Co.*, No. 3:15-CV-352 GNS, 2015 WL 6476096, at *2 (W.D. Ky. Oct. 26, 2015) (citation omitted). Considerations of comity strongly favor severance and remand.

Cotter's primary argument is that severance and remand are "administratively impossible" because Cotter's potential liability under state law does not translate into liability for Mallinckrodt under the PAA. (Doc. 58 at 12). But this Court has already determined that the PAA does not apply to Plaintiffs' claims against Cotter. *Banks v. Cotter Corp.*, No. 4:18-CV-624 JAR, 2019 WL 1426259, at *5 (E.D. Mo. Mar. 29, 2019). This differentiates the case at hand from the ongoing case of *McGurk v. Mallinckrodt, Inc.*, No. 4:12-CV-00361 AGF (E.D. Mo.).[6] Throughout its briefing, Cotter attempts to re-argue this Court's prior decision and claim that circumstances have changed due to Mallinckrodt's presence in the case. (Doc. 58 at 16-18). Cotter cannot avoid severance and remand on the grounds that this is truly a

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[5] These quotes were technically provided by the third-party defendant, but the court specifically endorsed the arguments as "ably described." *Crocker*, 852 F. Supp. at 1331.

[6] Cotter briefly states, without further explanation, that "this case should be consolidated with *McClurg*." (Doc. 58 at 13). Cotter does not appear to have filed any motion pursuant to Fed. R. Civ. P. 42(a). The Court reminds Cotter that, pursuant to E.D. Mo. L.R. 4.03, motions to consolidate should generally be filed in the first-filed case.

PAA action given this Court's clear holding that the PAA does not preempt Plaintiffs' state law claims.

Manipulation of the Forum

Each party alleges that the other has manipulated the forum. Plaintiffs claim that Defendants have manipulated the forum by naming Mallinckrodt as a Third-Party Defendant late in the game in order to establish federal jurisdiction. (Doc. 48 at 12). Cotter alleges that Plaintiffs have manipulated the forum by changing their position in a manner that should trigger jurisdiction under the PAA. (Doc. 58 at 18). This court is not persuaded that either party has attempted to manipulate the forum in any dispositive sense. Cotter is within its rights to seek contribution from Mallinckrodt, and it is Mallinckrodt who removed this case to federal court. As discussed further below, Cotter has failed to allege any changes in the record since the initial remand which suggest manipulation by Plaintiffs.

This Court does consider the timing of Cotters' Third-Party Petition relevant, however. Cotter repeatedly alleges that Mallinckrodt is an indispensable party whose centrality to this dispute is obvious, yet Mallinckrodt was not brought into the case for over two years. The Court is influenced by the decision in *City of St. Louis v. Cernicek*, No. 4:00-CV-1895 (CEJ), 2001 WL 34134733 (E.D. Mo. Sept. 25, 2001). In *Cernicek*, the City of St. Louis sued various gun manufacturers seeking damages for firearm-related violence. The district court remanded after an initial removal premised on federal question jurisdiction. Certain defendants subsequently filed a third-party complaint seeking contribution from foreign-owned entities. As here, the third-party defend-

ants removed to federal court. The district court struck the third-party complaint pursuant to Fed. R. Civ. P. 14(a), noting that defendants had joined the foreign entities "nearly one year after the case was initiated, and did so only after this Court remanded the case," and plaintiff had "been prejudiced by the timing of the third-party complaint." *Id.* at *4. Similarly, Plaintiffs are prejudiced by Cotter's delay in seeking contribution from Mallinckrodt.

Having carefully considered: the *Gibbs* factors, this Court finds in its discretion that severance and remand is warranted. Plaintiffs bring state-law claims against Defendants; the only potential jurisdictional hook for this Court is a Third-Party Defendant's federal defense, a defense which is irrelevant if Plaintiffs cannot obtain judgment against Defendants. Given the proceedings which have already occurred in state court, Mallinckrodt's bankruptcy, and the nature of Cotter's claim against Mallinckrodt, considerations of judicial economy, fairness, convenience of the parties, and comity favor severance and remand. This case presents a quintessential example of when it is appropriate for a federal court to decline supplemental jurisdiction and permit a state court to interpret its own laws as applied to its own citizens.

C. Severance and Joinder

The parties have not separately briefed the issue of severance, but it is worth some distinct consideration. Fed. R. Civ. P. 21 generally authorizes severance of parties or claims "on such terms as are just." *See also* Fed. R. Civ. P. 14(a)(4) ("Any party may move to strike the third-party claim, to sever it, or to try it separately."). "Questions of severance are

addressed to the broad discretion of the court." *Chapman v. Hiland Partners GP Holdings*, No. 1:13-CV-052, 2014 WL 12836626, at *1 (D. N.D. Jan. 17, 2014) (citing 7 Wright, Miller & Kane, Federal Practice and Procedure § 1689 (3d ed. 2001)).

There is meaningful precedent for severing third-party claims seeking contribution. *See Oliver v. Campbell McCormick, Inc.*, No. CCB-16-1057, 2016 WL 3878492, at *3 (D. Md. July 18, 2016); *Turner Const. Co. v. Brian Trematore Plumbing & Heating, Inc.*, No. 07-666 (WHW), 2009 WL 3233533 (D. N.J. Oct. 5, 2009) (citing *Gaffney v. River boat Servs. of Indiana, Inc.*, 451 F.3d 424, 444 (7th Cir. 2006)) ("Claims for contribution and indemnification are severable from the underlying primary liability claims."). The Court is cognizant that it "may split claims arising from the same nucleus of operative facts," but "the Court should not split apart claims that are too closely interconnected when remanding part of a case to state court." *Lawler v. Miratek Corp.*, No. EP-09-CV-252-KC, 2010 WL 743925, at *7 (W.D. Tex. Mar. 2, 2010). As discussed above, Mallinckrodt only becomes a relevant party if Plaintiffs are able to succeed in their claims against Defendants. *See Hemme v. Bharti*, 183 S.W.3d 593, 598 (Mo. banc 2006) ("[Contribution] is really an anticipatory claim; that is, the claim by a defendant who is held liable to a plaintiff really is not ripe until the defendant has suffered a judgment."). This Court finds that the third-party claim for contribution against Mallinckrodt falls within a narrow band of claims that should be severed despite arising from a

common nucleus of operative facts as Plaintiffs' state law claims.

Cotter argues, however, that this Court cannot sever the claims because Mallinckrodt is a necessary party to the litigation under Fed. R. Civ. P. 19. (Doc. 58 at 7-10). Cotter claims that Mallinckrodt has "an outsized role in the events" relevant to Plaintiffs' claims. (*Id.* at 9). Plaintiffs respond that Cotter has confused joinder with impleader, and Mallinckrodt was impleaded via Mo. Sup. Ct. R. 52.11, not joined via Mo. Sup. Ct. R. 52.04. (Doc. 66 at 10). Plaintiffs argue in the alternative that "[i]n no event is Mallinckrodt an essential party as contemplated by Fed. R. Civ. P. 19." (*Id.* at 11). At least one court in this circuit has held that the discretion to sever parties pursuant to Rule 21 is "circumscribed ... by Rule 19(b) because the court cannot proceed without indispensable parties." *Moubry v. Kreb*, 58 F. Supp. 2d 1041, 1048 (D. Minn. 1999). Whether a party is indispensable, however, is a "matter left to the district court's discretion." *Id.* (quoting *Navajo Tribe of Indians v. New Mexico*, 809 F.2d 1455, 1471 (10th Cir. 1987)).

Cotter cites multiple cases purporting to hold that joint tortfeasors are necessary parties. *See, e.g.*, *Two Shields v. Wilkinson*, 790 F.3d 791 (8th Cir. 2015). But the court in *Two Shields* recognized the general principle that "it is not necessary for all joint tortfeasors to be named as defendants in a single lawsuit." *Id.* at 797 (quoting *Temple v. Synthes Corp.*, 498 U.S. 5, 7 (1990)). The Advisory Committee Notes to the 1966 Amendments to Rule 19 specifically acknowledge "settled authorities holding that a tortfeasor with the usual 'joint-and-several' liability is

merely a permissive party to an action against another with like liability."

For the same reasons severance is appropriate, this Court finds in its discretion that Mallinckrodt is not an indispensable party. The Court notes that over two years passed before Mallinckrodt was impleaded in state court and no Defendant appears to have filed a motion to dismiss in state court alleging failure to include a necessary party. Such inaction is inconsistent with Cotter's argument here that the case simply cannot proceed without Mallinckrodt's presence.

D. PAA

Cotter finally argues that, despite this Court's previous remand, the PAA now provides for federal jurisdiction over the entire action. (Doc. 58 at 15-20). First, Cotter claims that Mallinckrodt's presence as a Thirds-Party Defendant means there is an applicable license and indemnity agreement. Cotter also cites *Halbrook v. Mallinckrodt, LLC* for the proposition that Eighth Circuit precedent now confirms the application of the PAA to Plaintiffs' claims. 888 F.3d 971 (8th Cir. 2018). This Court has already explained, however, that the posture of the *McClurg* cases is fundamentally different because plaintiffs in *McClurg* brought their claims under the PAA and there was no challenge to jurisdiction. *Banks v. Cotter Corp.*, No. 4:18-CV-624 JAR, 2019 WL 1426259, at *5 n.1 (E.D. Mo. Mar. 29, 2019). A court in this district facing nearly identical circumstances to this case has found, moreover, that a third-party defendant cannot remove a case to federal court based on the PAA as an affirmative defense. *Strong v. Republic Servs., Inc.*, No. 4:18-CV-

2043 JCH, 2019 WL 1436995, at *3 (E.D. Mo. Apr. 1, 2019) (citing *Hurt v. Dow Chemical Co.*, 963 F.2d 1142 (8th Cir. 1992)) ("An affirmative defense is not a claim or cause of action. It is well established that a defense of pre-emption, even if anticipated by the parties does not cause the claim to arise under federal law."). The necessary implication of this holding is that Mallinckrodt's PAA defense does not establish federal jurisdiction over Plaintiffs' state law claims.[7]

Second, Cotter argues that Plaintiffs have "changed their relevant position on radioactive materials" by referencing materials beyond mill tailings in their SAP and making broad discovery requests. (Doc. 58 at 18). It is clear, however, that Plaintiffs' current petition is not materially different from the petition this Court previously remanded. (Doc. 66 at 8-9). Cotter cites no precedent, moreover, for the proposition that discovery requests alone constitute a sufficient change in the record justifying another attempt at removal. Neither the Third-Party Petition against Mallinckrodt nor the alleged changes to Plaintiffs' position merit reconsideration of this Court's prior remand.

III. CONCLUSION

The Plaintiffs in this case are Missouri citizens and property owners who seek damages and injunc-

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[7] Cotter argues that *Strong* "makes no difference" because Mallinckrodt has removed under 28 U.S.C. § 1442 as well. Cotter is correct to note the distinction, but Plaintiffs do not rely on *Strong* in order to challenge Mallinckrodt's removal. Instead, the relevance of *Strong* is that it demonstrates that Mallinckrodt's PAA defense does not provide this Court with original jurisdiction over the entire case.

tive relief under Missouri law based on events which took place entirely in Missouri. (Doc. 1-6). After an earlier remand, Cotter's Third-Party Petition seeking contribution against Mallinckrodt, who has a potential federal defense under the PAA and 28 U.S.C. § 1442, provides the only potential avenue for federal jurisdiction in this case. Mallinckrodt's federal defense is only relevant, however, in the event that Plaintiffs succeed in their claims against Cotter. While the claim against Mallinckrodt stems from a common nucleus of operative fact as Plaintiffs' state law claims, the state law claims substantially predominate, and the *Gibbs* factors favor severance and remand. Mallinckrodt is not an indispensable party to the litigation, and its presence as Third-Party Defendant does not change this Court's prior determination that there is no federal jurisdiction under the PAA.

Accordingly,

IT IS HEREBY ORDERED that Plaintiffs' Motion to Sever and Remand All Non-Third-Party Claims (Doc. 47) is **GRANTED**. Cotter's claim for contribution against Mallinckrodt in its Third-Party Petition (Doc. 1-7 at ¶¶ 68-75) is hereby **SEVERED**, and all other claims in this case are **REMANDED** back to the Circuit Court of St. Louis County for further proceedings. [As requested by Cotter, the Court will wait 30 days before ordering the Clerk of Court to transmit the order to state court so that any party may exercise its right to appeal].

IT IS FURTHER ORDERED that the Landfill Defendants' Motion to Dismiss Cotter's Third-Party Petition (Doc. 21) is **DENIED as moot.**

TWENTY-FIRST JUDICIAL CIRCUIT COURT
ST. LOUIS COUNTY, MISSOURI

TAMIA BANKS, et al., on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

COTTER CORPORATION, COMMONWEALTH EDISON COMPANY, DJR HOLDINGS, INC. f/k/a FUTURA COATINGS, INC., and ST. LOUIS AIRPORT AUTHORITY, A DEPARTMENT OF THE CITY OF ST. LOUIS,

Defendants,

Cause No. 18SL-CC00617-01
Div. 17
4/30/2020

ORDER

Cause called for hearing on the 31st day of March, 2020, on Defendant Commonwealth Edison Company's Motion to Dismiss for Lack of Personal Jurisdiction and on Defendants' Motion to Dismiss Plaintiffs' Second Amended Class-Action Petition. Due to COVID-19 limitations, the Court, along with counsel for Plaintiffs and counsel for Defendants, appeared via Zoom teleconference and videoconference. Based on the briefing and the oral argument presented at the hearing, the Court hereby orders the following:

1. The Court will defer ruling on Defendant Commonwealth Edison Company's Motion to Dismiss for Lack of Personal Jurisdiction until the conclusion of two events. First, Defendant Commonwealth Edison Company ("ComEd") is to submit to the Court, for in camera review, the indemnification agreement that ComEd produced in jurisdictional discovery to Plaintiffs, was referenced in Plaintiffs' Second Amended Class-Action Petition, and was raised before the Court during oral argument. Second, prior to the Court ruling on the motion, Plaintiffs may conduct limited jurisdictional discovery, including discovery related to an alter ego theory between ComEd and Defendant Cotter Corporation (N.S.L.) ("Cotter"). Plaintiffs will have leave to amend to file a Third Amended Petition within 30 days after completion of jurisdictional discovery to allege an alter ego theory, only if there is a good faith basis to do so, and to concurrently file supplemental briefing on why the alleged facts establish personal jurisdiction over ComEd. ComEd shall have 15 days after the filing of a Third Amended Petition and Plaintiffs' supplemental briefing to submit responses to the Third

Amended Petition and brief. The Court will then hold a subsequent hearing to hear argument on the additional materials submitted by the parties before ruling on ComEd's Motion to Dismiss for Lack of Personal Jurisdiction.

2. Plaintiffs are also entitled to proceed with obtaining discovery pertaining to all Defendants other than ComEd in accordance with the Missouri Supreme Court Rules. Plaintiffs' discovery to ComEd as a Defendant shall be limited to the jurisdictional issues outlined in Paragraph 1 until the Court issues an order ruling on ComEd's Motion to Dismiss for Lack of Personal Jurisdiction.

3. The Court reviews Defendants' Motion to Dismiss Plaintiffs' Second Amended Class-Action Petition under Missouri Supreme Court Rule 55.27(a)(6), and not as a summary judgment motion, and will not consider the affidavits submitted by Plaintiffs in their Response brief. Defendants' Motion to Dismiss Plaintiffs' Second Amended Class-Action Petition is granted in part and denied in part, as follows:

a. Defendants' Motion to Dismiss based on arguments that the Price-Anderson Act preempts Plaintiffs' state law claims is denied as moot;

b. Defendants' Motion to Dismiss for failure to state a claim under Counts II and III for Temporary Nuisance and Permanent Nuisance is granted, and Plaintiffs are hereby granted leave to amend Counts II and III;

c. Defendants' Motion to Dismiss for failure to state a claim under Count IV for Negligence and Count V for Negligence *Per Se* is denied;

d. Defendants' Motion to Dismiss for failure to state a claim under Count VII for "Injunctive Relief" is granted, in part, and Plaintiffs are hereby granted leave to amend Count VII;

e. Defendants' Motion to Dismiss for failure to state a claim under Count VIII for "Punitive Damages" is denied;

f. Defendants' Motion to Dismiss for failure to state a claim under Count IX for Civil Conspiracy is denied without prejudice; and

g. Defendants' Motion to Dismiss with regard to Plaintiffs' request for the remedy of medical monitoring is denied.

4. Defendants' motion to dismiss Plaintiffs' property damage class allegations and Plaintiffs' medical monitoring class allegations is denied.

5. Defendant City of St. Louis' Unopposed Motion for Leave to File a Responsive Pleading Out of Time is granted, but is now moot.

SO ORDERED

The Hon. Joseph Walsh III

United States District Court, E.D. Missouri,
Eastern Division.

Tamia BANKS, on behalf of herself and all others similarly situated, Plaintiff,

v.

COTTER CORPORATION, et al., Defendants.

No. 4:18-CV-00624 JAR

Signed 03/29/2019

MEMORANDUM AND ORDER

JOHN A. ROSS, UNITED STATES DISTRICT JUDGE

This matter is before the Court on Plaintiffs' Motion To Remand. (Doc. No. 38). Defendants Cotter Corporation (N.S.L.) ("Cotter"), Commonwealth Edison Company ("ComEd"), and Exelon Corporation and Exelon Generation Company, LLC (collectively "Exelon") responded. (Doc. No. 52). Defendants DJR Holdings, Inc. ("DJR"), f/k/a Futura Coatings, Inc., and St. Louis Airport Authority ("Airport Authority") joined in the brief in opposition to Plaintiff's motion filed by Cotter, ComEd and Exelon. (Doc. No. 53). Plaintiff replied (Doc. No. 59) and Defendants, with leave of Court, filed a surreply in further opposition to remand (Doc. No. 65). The Court held a hearing and heard oral argument on the motion to remand. The motion is now ready for disposition.

I. Background

From 1942 to 1957, uranium ore was processed in association with the Manhattan Project to develop nuclear weapons in a facility in downtown St. Louis City known as the St. Louis Downtown Site ("SLDS"). (First Amended Class Action Petition ("FAP"), Doc. No. 6, at ¶¶ 56, 57). In the late 1940's, the Manhattan Project acquired a tract of land near Lambert Airport known as the St. Louis Airport Site ("SLAPS") to store radioactive waste from the uranium processing operations at SLDS. (Id. at ¶¶ 58, 79). In 1957, "approximately sixty truckloads of contaminated scrap metal, several contaminated vehicles, in addition to miscellaneous radioactive wastes were buried on the western portion of SLAPS adjacent to Coldwater Creek," a tributary of the Missouri River which runs throughout North St. Louis County (Id. at ¶¶ 2, 60). In the 1960's, some of the radioactive waste that had been stored at SLAPS was moved to a storage site on Latty Avenue in Hazelwood, Missouri (the "Latty Avenue Site"), a part of which later became the Hazelwood Interim Storage Site ("HISS"). (Id. at ¶¶ 61, 75). In the late 1960's, Cotter purchased the radioactive waste stored at both SLAPS and the Latty Avenue Site. (Id. at ¶¶ 63, 81). Between 1969 and 1973, Cotter stored, processed and transported radioactive waste at the SLAPS and Latty Avenue sites. (Id. at ¶ 66). In 1973, SLAPS was sold to the Airport Authority. (Id. at ¶ 73). The Latty Avenue Site was sold to Futura Coatings, n/k/a DJR. (Id. at ¶ 76).

Plaintiff Tamia Banks owns property located within the one hundred year flood plain of Coldwater Creek. (Id. at ¶ 8). On April 2, 2018, Plaintiff filed her amended class action petition in the Circuit

Court of St. Louis County, Missouri. She alleges that, as a result of the Defendants' collective conduct over several decades, radioactive wastes were released into the environment in and around Coldwater Creek, resulting in the contamination of her home and property, as well as the property of other class members, and leading to various forms of property damage.

Plaintiff asserts state-law claims against Cotter, ComEd, Exelon, DJR, and the Airport Authority for: (1) trespass; (2) permanent nuisance; (3) temporary nuisance; (4) negligence; (5) negligence per se; (6) strict liability/absolute liability; (7) injunctive relief seeking medical monitoring; (8) punitive damages; and (9) civil conspiracy; and against the Airport Authority only for (10) inverse condemnation; (11) violation of the Missouri State Constitution's due process guarantee; and (12) violation of the Missouri State Constitution's takings and just compensation clause. Plaintiff seeks damages resulting from the loss of use and enjoyment of her property; annoyance and discomfort; damage to her personal property; diminution in the market value of her property; costs and expenses incurred as a result of her exposure to radioactive emissions, including the cost of remediation and relocation; statutory damages under Missouri state law; punitive and exemplary damages; costs and attorneys' fees; and interest on the above amounts. Plaintiff also seeks injunctive relief in the form of medical and scientific monitoring of her home and property, as well as environmental testing, clean-up, and continued medical testing.

On April 18, 2018, Defendants removed the action to this Court on the grounds that Plaintiff's action

arises out of the Price-Anderson Act ("PAA"), 42 U.S.C. § 2011 *et seq*., and that, therefore, the Court has subject matter jurisdiction. (Doc. No. 1). On May 25, 2018, Defendants moved to dismiss Plaintiff's claims. (Doc. Nos. 27, 29, 36, 37).

Plaintiff filed her motion to remand on May 29, 2018, asserting that she has pled only state law causes of action and that her original and amended petitions raise no claims under federal law. (Doc. No. 38). Plaintiff specifically alleges that her claims do not fall within the scope of the PAA because (i) Coldwater Creek is not and never has been a licensed nuclear facility; (ii) Defendants have never received a license to possess, transport, or dispose of any radioactive waste on or in Coldwater Creek; (iii) Defendants did not have a license to dispose of radioactive wastes in Coldwater Creek; (iv) Defendants did not have a license to handle the particular materials they handled as alleged herein, including enriched thorium; and (v) Defendants have never entered into an indemnification agreement with the United States government under 42 U.S.C. § 2210 with respect to the complained activities. (FAP at ¶¶ 14 A-E).

On June 14, 2018, the Court granted Plaintiff's motion to stay Defendants' motions to dismiss pending resolution of her motion to remand and stayed proceedings for sixty days. (Doc. Nos. 51). Following a hearing on Plaintiff's motion to remand on August 8, 2018, the Court extended the stay until further order of the Court. (Doc. No. 71).

II. Legal standard

Federal courts are courts of limited jurisdiction. Ark. Blue Cross & Blue Shield v. Little Rock

Cardiology Clinic, P.A., 551 F.3d 812, 816 (8th Cir. 2009). A federal district court may exercise removal jurisdiction only where the court would have had original subject-matter jurisdiction had the action initially been filed there. Krispin v. May Dep't Stores Co., 218 F.3d 919, 922 (8th Cir. 2000) (citing 28 U.S.C. § 1441(b)). A party seeking removal and opposing remand carries the burden of establishing federal subject-matter jurisdiction by a preponderance of the evidence. In re Prempro Prods. Liab. Litig., 591 F.3d 613, 620 (8th Cir. 2010). Generally, a court must resolve all doubts about federal jurisdiction in favor of remanding the case to state court. In re Prempro, 591 F.3d at 620.

"The presence or absence of federal-question jurisdiction is governed by the 'well-pleaded complaint rule,' which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." Bowler v. Alliedbarton Security Services, LLC, 123 F. Supp.3d 1152, 1155 (E.D. Mo. 2015) (quoting Caterpillar Inc. v. Williams, 482 U.S. 386, 392 (1987). See also Gaming Corp. of America v. Dorsey & Whitney, 88 F.3d 536, 542 (8th Cir. 1996) ("The 'well-pleaded complaint rule' requires that a federal cause of action must be stated on the face of the complaint before the defendant may remove the action based on federal question jurisdiction.") (quoting Caterpillar, 482 U.S. at 392). Because federal law provides that plaintiffs are the "masters" of their claims, plaintiffs "may avoid federal jurisdiction by exclusive reliance on state law." Caterpillar, 482 U.S. at 392.

Even in situations where a cause of action based on a federal statute does not appear on the face of the complaint, preemption based on a federal statutory scheme may apply in circumstances where "the pre-emptive force of a statute is so extraordinary that it converts an ordinary state common-law complaint into one stating a federal claim." Bowler, 123 F. Supp.3d at 1155 (quoting Caterpillar, 482 U.S. at 393). See, e.g., Metro. Life Ins. Co. v. Taylor, 481 U.S. 58 (1987) (where a former employee alleged breach of contract, retaliatory discharge, and wrongful termination of disability benefits in state court complaint, the court held that the former employee's claims were preempted by ERISA; plaintiff's claims were necessarily federal in character; and, therefore, removal under 28 U.S.C. § 1441(a) was proper). "Where a complaint raises issues to which federal law applies with complete preemptive force, the [c]ourt must look beyond the face of the complaint in determining whether remand is proper." *Bowler*, 123 F. Supp.3d at 1155 (quoting *Green v. Arizona Cardinals Football Club, LLC*, 21 F. Supp.3d 1020, 1025 (E.D. Mo. 2014)).

As further explained by the Eighth Circuit, the exception to the well-pleaded complaint rule applies where a federal statute provides "an exclusive cause of action for the claim asserted and also set[s] forth procedures and remedies governing that cause of action." Id. (quoting Johnson v. MFA Petroleum Co., 701 F.3d 243, 248 (8th Cir. 2012). Thus, although a plaintiff has only filed state law claims, a court may conclude that the plaintiff has "simply brought a mislabeled federal claim, which may be asserted under some federal statute." Id. (quoting Johnson, 701

F.3d at 247 (internal quotation marks and citation omitted).

III. Price-Anderson Act

A. History

In 1954, Congress enacted the Atomic Energy Act of 1954 ("AEA"), 42 U.S.C. §§ 2011– 2281, to encourage private sector development of atomic energy for peaceful purposes under a program of federal regulation and licensing. The Act alone failed to spur private sector entry into the field of nuclear energy due in part to a fear of potentially bankrupting liability absent some limiting legislation. Carey v. Kerr-McGee Chemical Corp., 60 F. Supp.2d 800, 803 (N.D. Ill. 1999) (citing Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 64 (1978)). Thus, in 1957, Congress amended the AEA with the Price-Anderson Act ("PAA"), 42 U.S.C. § 2011 et seq., for the express purpose of "protecting the public and ... encouraging the development of the atomic energy industry." Id. (quoting El Paso Natural Gas Co. v. Neztsosie, 526 U.S. 473 (1999)). The PAA had three main features: (i) it established a limit on the aggregate liability of those who undertake activity involving the handling or use of radioactive materials; (ii) it channeled public liability resulting from nuclear incidents to the federal government; and (iii) it established that all public liability claims above the amount of required private insurance protection would be indemnified by the federal government up to the aggregate limit on liability. Id.

Congress continues to build on the PAA's foundation, expanding its scope and functions. Estate of Ware v. Hosp. of the Univ. of Pa., 871 F.3d 273, 278

(3d Cir. 2017) (citing In re TMI Litig. Cases Consol. II, 940 F.2d 832, 852 (3d Cir. 1991)). The Act initially relied on state courts and state law to rule on and govern liability for nuclear accidents. Id. However, amendments to the PAA in 1966 "provided for the transfer, to a federal district court, of all claims arising out of an extraordinary nuclear occurrence" and brought about greater uniformity of liability determinations while retaining state-law causes of action. Id. The amendments required indemnified entities "to waive the defenses of negligence, contributory negligence, charitable or governmental immunity, and assumption of the risk in the event of an action arising as the result of an extraordinary nuclear occurrence." Id. These provisions were premised on "congressional concern that state tort law dealing with liability for nuclear incidents was generally unsettled and that some way of insuring a common standard of responsibility of all jurisdictions – strict liability – was needed. A waiver of defenses was thought to be the preferable approach since it entailed less interference with state tort law than would the enactment of a federal statute prescribing strict liability." Carey, 60 F. Supp. 2d at 803 (quoting O'Conner v. Commonwealth Edison Co., 13 F.3d 1090, 1095 (7th Cir. 1994)).

The PAA was amended again in 1988 to provide for the removal to federal court of any "public liability action arising out of or resulting from a nuclear incident." 42 U.S.C. § 2210(n). Courts that have considered generally the scope of jurisdiction following these amendments have found that Congress intended to create an exclusive federal cause of action for torts arising out of a "nuclear incident," as de-

fined in the Act. See, e.g., In re Berg Litig., 293 F.3d 1127, 1132 (9th Cir. 2002) (public liability action as "exclusive means" of pursuing a nuclear incident claim); Roberts v. Florida Power & Light Co., 146 F.3d 1305, 1306 (11th Cir. 1998) (PAA creates "exclusive" federal cause of action); Nieman v. NLO, Inc., 108 F.3d 1546, 1553 (6th Cir. 1997) (PAA preempts state law claims and they "cannot stand as separate causes of action"); Kerr- McGee Corp. v. Farley, 115 F.3d 1498, 1504 (10th Cir. 1997) (PAA as the "sole remedy" for claims involving atomic energy production); O'Conner v. Commonwealth Edison Co., 13 F.3d 1090, 1099–1100 (7th Cir. 1994) (noting that "a state cause of action is not merely transferred to federal court; instead, a new federal cause of action supplants the prior state cause of action."); TMI II, 940 F.2d at 854 (noting that "Congress clearly intended to supplant all possible state causes of action when the factual prerequisite of the statute are met."). Although the 1988 amendments to the Act clearly created a "federal cause of action," Day v. NLO, Inc., 3 F.3d 153, 154 n. 3 (6th Cir. 1993), it is a federal cause of action of a "peculiar nature," Heinrich ex rel. Heinrich v. Sweet, 62 F. Supp. 2d 282, 296–97 (D. Mass. 1999). The Act incorporates state law as the substantive rule of decision to govern the federal cause of action, so long as the state law is not inconsistent with the purposes of the Act. Id. (citing 42 U.S.C. § 2014(hh)).

B. Key provisions

Notably, the structure of the PAA, as set forth in the following provisions, has been described as "complicated," "interlocking," and "us[ing] words in unintuitive ways." Estate of Ware, 871 F.3d at 280.

The PAA's jurisdictional provision, 42 U.S.C. § 2210(n)(2), provides in relevant part:

> With respect to any public liability action arising out of or resulting from a nuclear incident, the United States district court in the district where the nuclear incident takes place, ... shall have original jurisdiction without regard to citizenship of any party or the amount in controversy ...

A "public liability action" is "any suit asserting public liability." Id. § 2014(hh). "Public liability" means (apart from certain exceptions not relevant here) "any legal liability arising out of or resulting from a nuclear incident." Id. § 2014(w).

A "nuclear incident" is defined as:

> any occurrence, including an extraordinary nuclear occurrence, ... bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property, arising out of or resulting from the radioactive, toxic, explosive or other hazardous properties of source, special nuclear, or byproduct material[.]

Id. § 2014(q). The PAA does not define the term "occurrence." An "extraordinary nuclear occurrence" is defined as:

> any event causing a discharge or dispersal of source, special nuclear, or byproduct material from its intended place of confinement in amounts offsite, or causing radiation levels offsite, which the Nuclear Regulatory Commission or the Secretary of Energy, as appropriate, determines to be substantial, and which the Nuclear Regulatory Commission or the Secretary of Energy, as appropriate, determines has resulted or will probably result in substantial

> damages to persons offsite or property offsite ... The Nuclear Regulatory Commission or the Secretary of Energy, as appropriate, shall establish criteria in writing setting forth the basis upon which such determination shall be made. As used in this subsection, "offsite" means away from "the location" or "the contract location" as defined in the applicable Nuclear Regulatory Commission or the Secretary of Energy, as appropriate, indemnity agreement, entered into pursuant to section 2210 of this title.

Id. § 2014(j).

The term "byproduct material" is defined in relevant part as "the tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content." Id. § 2014(e)(2). The term "source material" means "(1) uranium, thorium, or any other material which is determined by the Commission pursuant to the provisions of section 2091 of this title to be source material; or (2) ores containing one or more of the foregoing materials, in such concentration as the Commission may by regulation determine from time to time." Id. § 2014 (z)(1), (2).

IV. Parties' arguments

Relying on a recent opinion from this District, Strong v. Republic Services, Inc., 283 F. Supp.3d 759 (E.D. Mo. 2017), Plaintiff argues that the PAA does not apply to her claims in the absence of an appropriate license or indemnity agreement covering the activities complained of. Without a license or indemnity agreement, there can be no "occurrence," that is, no event at the site of "licensed activity," that would constitute a "nuclear incident."

Without a "nuclear incident," Plaintiff's action is not a "public liability action" and is thus not preempted by § 2210(n)(2). (Doc. No. 39 at 1, 7-12). Plaintiff acknowledges that Cotter was issued a license by the Atomic Energy Commission (AEC) to possess "source material," i.e., uranium, in 1969; however, she contends that this license could not have covered uranium mill tailings because at that time, the definition of "byproduct material" did not include uranium or thorium mill tailings. Plaintiff argues that none of the Defendants herein had an indemnity agreement or license to handle, store or transport hazardous byproducts, such as uranium mill tailings, which Plaintiff alleges were the source of the contamination at issue. (Id. at 12). Plaintiff also argues that applying PAA preemption to her state law claims would violate her constitutional right to Due Process by depriving her of her common law property rights without providing a reasonable alternative remedy. (Doc. No. 39 at 15).

Defendants respond that neither the plain language of the PAA nor its legislative history supports Plaintiff's contention that a license or indemnity agreement is required for federal jurisdiction[1] and that numerous courts have criticized and rejected the same arguments she advances here. (Doc. No. 52 at 1-12). In any event, Defendants contend that Cot-

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[1] During oral argument, Defendants noted this matter is related to similar lawsuits in this Court, including McClurg v. Mallinckrodt, Inc., No. 4:12-CV-00361-AGF (E.D. Mo. 2012). In McClurg, however, no motion to remand was filed and the parties have not challenged the Court's jurisdiction under the PAA. Thus, McClurg provides no guidance on the issues raised herein.

ter had such a license.[2] (Id. at 9-11). Defendants further respond that PAA preemption of Plaintiff's state law claims would not violate her due process rights. Citing Duke Power Co. v. Carolina Envtl. Study Grp., 438 U.S. 59, 88 (1978), Defendants assert that rather than abolishing any rights, the PAA "transforms" actions based on state law claims that seek to impose public liability into federal actions and provides a reasonable substitute remedy for the common law or state tort law remedies it replaced. (Doc. No. 52 at 13-14).

In reply, Plaintiff does not dispute that the 1988 amendments to the PAA expanded federal jurisdiction to nuclear incidents not considered "substantial;" rather, she contends that the amendments did not eliminate the Act's licensing/indemnity scheme. Plaintiff asserts that the PAA does not afford protections to private entities and persons engaged in activities without authorization, license or permission contemplated under the Act. (Doc. No. 59 at 4-5).

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[2] A copy of the license was submitted as an exhibit to Defendants' opposition to Plaintiff's motion to remand. (See Doc. No. 52-7). Plaintiff agrees the exhibit is a public record that the Court can consider on remand. The License issued in 1969 authorized Cotter "to receive, possess and import the [designated] source material [ ], to use such material for the purpose(s) and at the place(s) designated [ ], and to deliver or transfer such material to persons authorized to receive it in accordance with the regulations" of Title 10 of the Code of Federal Regulations, Chapter 1, Part 40. The License states that the "[a]uthorized place of use" was Cotter's facility located at 9200 Latty Avenue; that the "[m]aximum quantity of source material which [Cotter] [could] possess at any one time under [the] license [was] unlimited"; and that the License would expire on December 31, 1974.

Moreover, the legislative history of the PAA suggests that Congress did not intend to preempt all state law actions involving nuclear energy – just those rising to the level of a "nuclear incident."

Plaintiff submits declarations from Richard Stewart, an "environmental and administrative law expert" (Doc. No. 59-1), and Dr. Marvin Resnikoff, an "expert in nuclear waste transportation, storage and disposal" (Doc. No. 59-2). Stewart opines that the PAA does not apply in this case; Resnikoff opines that the radioactive wastes at issue were mill tailings which by definition were not byproduct material until the passage of the Uranium Mill Tailings Act ("UMTRCA") in 1978. In addition, Plaintiff cites to Envirocare of Utah & Snake River Alliance, 56 N.R.C. 53 (Dec. 13, 2000), to support her contention that the NRC has already determined that the radioactive wastes at issue are not subject to federal regulation. (Doc. No. 59 at 9-10).

In their surreply, Defendants urge the Court to disregard the declarations of Plaintiff's "experts" because they improperly opine on matters of law and are based on unsupported factual assumptions.[3] (Doc. No. 65 at 2-7). Defendants also argue

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[3] While it is generally improper to raise a new argument in a reply brief, courts may consider such an argument where, as here, the nonmoving party has been given leave to file a surreply to address the new argument, and did so. Etrailer Corp. v. Onyx Enterprises, Int'l Corp., No. 4:17-CV-01284-AGF, 2017 WL 3021496, at *3 (E.D. Mo. July 17, 2017) (citations omitted). As for the declarations, significant portions of Stewart's declaration are legal conclusions that the Court has not considered for purposes of this motion. As for Resnikoff's opinion, assuming the radioactive waste at issue in this case was mill tailings, consistent with the analysis in Strong, it would not be covered

that Plaintiff's reliance on an NRC staff director decision is misplaced. (Id. at 8-9) Envirocare explicitly pertains to mill tailings, which Plaintiff assumes are at issue, but which Defendants dispute. Further, Plaintiff has not alleged that any part of the process that generated the material at issue in this case involved a uranium mill or that any of the sites at issue contained a uranium mill. (Id. at 9).

V. Discussion

There are numerous conflicting opinions as to whether a license or an indemnity agreement is required for federal subject matter jurisdiction pursuant to the PAA. Several courts, including one in this District, have reasoned that in the absence of a license or indemnification agreement covering the activities which giving rise to the liability alleged, there can be no "occurrence," that is, no event at the site of licensed activity, that would constitute a "nuclear incident." See Gilberg v. Stepan Co., 24 F. Supp.2d 325, 343 (D. N.J. 1998); Heinrich ex rel. Heinrich v. Sweet, 62 F. Supp. 2d 282, 297 (D. Mass. 1999); Joseph v. Sweet, 125 F. Supp.2d 573, 576 (D. Mass. 2000); Samples v. Conoco, Inc., 165 F. Supp.2d 1303, 1321-22 (N.D. Fl. 2001); Irwin v. CSX Transp., Inc., No. 3:10-CV-300, 2011 WL 976376, at *2 (E.D. Tenn. Mar. 16, 2011); Strong, 283 F. Supp.3d 759. Rejecting the contention that the PAA is now so broad as to cover *any* claim of property damage allegedly caused by certain nuclear material, these courts focus on the original purpose of the PAA, i.e.,

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under Cotter's license because at the time the license was issued, the definition of "byproduct material" did not include uranium mill tailings.

to protect the public and encourage development of the atomic energy industry by providing certain licensees with a system of private insurance, government indemnification, and limited liability for certain nuclear tort claims. The courts further support their holdings by emphasizing that the word "occurrence" as used in the definition of "nuclear incident" means "that event at the site of the *licensed activity, or activity for which the Commission has entered into a contract,* which may cause damage."

Other courts have concluded that such an interpretation runs counter to the plain language of the PAA as well as the Congressional intent behind the 1988 amendments. See Estate of Ware, 871 F.3d at 283; Acuna v. Brown & Root Inc., 200 F. 3d 335, 339 (5th Cir. 2000); O'Conner v. Commonwealth Edison Co., 807 F. Supp. 1376, 1378 (C.D. Ill. 1992); Carey v. Kerr-McGee Chem. Co., 60 F. Supp.2d 800, 806 (N.D. Ill. 1999); Cotromano v. United Technologies Corp., 7 F. Supp. 3d 1253 (S.D. Fla. 2014). This Court recently addressed the issue in Strong, 283 F. Supp.3d 759, a case involving the same facts, one of the same defendants (Cotter), and addressing virtually identical arguments from both sides. The Court finds the Strong court's reasoning persuasive and agrees that "whether as a matter of statutory construction or the structure and history of the PAA," a license or indemnity agreement is a prerequisite for federal subject matter jurisdiction pursuant to the PAA. Id. at 772.

In Strong, it was alleged that defendants accepted radioactive waste consisting of uranium mill tailings without a license to do so and that the waste had spread to the plaintiffs' family farm. The court held

there was no federal subject matter jurisdiction under the PAA without a license or an indemnity agreement. Although the waste originated from the facility of a nonparty (Cotter) that had a license to receive, possess, and import the "source material," Strong held that such a source material license could not be the basis for federal subject matter jurisdiction, because it did not cover uranium mill tailings. Accordingly, the case was remanded to state court. Id. at 772-74.

In reaching its conclusion that there cannot be a nuclear incident without an applicable license or indemnity agreement, the Strong court was persuaded by the analysis of the PAA and its history in Gilberg, 24 F. Supp.2d 325. Noting that case law did not clarify whether the PAA's jurisdictional provisions operate independently form its indemnification provisions, the court in Gilberg looked to the language of the Act itself. The court found it significant that the PAA's definition of nuclear incident uses "occurrence" together with the clause "including an extraordinary nuclear occurrence," so as to read, "[t]he term 'nuclear incident' means any occurrence, including an extraordinary nuclear occurrence." Id. at 332. The court then reviewed the express definition of an "extraordinary nuclear occurrence," i.e., "any event causing a discharge … from its intended place of confinement in amounts off-site, or causing radiation levels off-site …", and noted that as used in this subsection the term "off-site" means "away from the location or the contract location as defined in the applicable ... indemnity agreement entered into pursuant to § 2210 of this Title." Id. Because of what it termed "the proximity to and interrelationship be-

tween the word 'occurrence' and the phrase 'extraordinary nuclear occurrence,' Gilberg concluded, as a matter of statutory construction, that "the occurrence which underlies a 'nuclear incident,' can only be an event at 'the location' or 'the contract location' as that term is defined in an indemnity agreement entered into under § 2210." Id.

The court also examined the legislative history of the PAA, S. Rep. No. 85–296, 1957 WL 5103, at *1817–18 (May 9, 1957), and found implicit in its language[4] that the terms "nuclear incident" and "occurrence" are "inextricably intertwined" with "licenses" and "indemnification agreements," suggest-

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[4] IT WAS NOT THOUGHT THAT AN INCIDENT WOULD NECESSARILY HAVE TO OCCUR WITHIN ANY RELATIVELY SHORT PERIOD OF TIME .... THE ***OCCURRENCE*** WHICH IS THE SUBJECT OF THIS DEFINITION ***IS THAT EVENT AT THE SITE OF THE LICENSED ACTIVITY***, ***OR ACTIVITY FOR WHICH THE COMMISSION HAS ENTERED INTO A CONTRACT***, WHICH MAY CAUSE DAMAGE, RATHER THAN THE SITE WHERE THE DAMAGE MAY PERHAPS BE CAUSED. THE SITE MUST BE WITHIN THE UNITED STATES.... ***IT DOES NOT MATTER WHAT LICENSE MAY BE APPLICABLE*** IF THE OCCURENCE IS WITHIN THE UNITED STATES.... THE INDEMNIFICATION AGREEMENTS ARE INTENDED TO COVER DAMAGES CAUSED BY NUCLEAR INCIDENTS FOR WHICH THERE MAY BE LIABILITY NO MATTER WHEN THE DAMAGE IS DISCOVERED, I.E., EVEN AFTER THE END OF THE LICENSE. THAT IS WHY THE DEFINITION OF 'NUCLEAR INCIDENT' HAS THE PHRASE 'ANY OCCURENCE * * * CAUSING BODILY INJURY, SICKNESS, DISEASE, OR DEATH' AND WHY THE DEFINITION OF 'PUBLIC LIABILITY' IS TIED TO ANY LEGAL LIABILITY ARISING OUT OF, OR RESULTING FROM, A NUCLEAR INCIDENT.

Strong, 283 F. Supp. 3d at 770–71.

ing that licenses and indemnification agreements are an integral part of the PAA's statutory scheme. Strong, 283 F. Supp. 3d at 770–71.

The Strong court went on to reject the defendants' argument that Cotter's 1969 Source Material License – the same license at issue in the instant case – applied to the plaintiff's claims. Id. at 772. The court reasoned that in 1969 when Cotter received the license, and in 1973 when the defendants allegedly accepted the material at issue, the definition of "byproduct material" did not include uranium or thorium mill tailings. It was not until 1978 that Congress amended the definition of "byproduct material" to include uranium and thorium mill tailings. Id. at 772-73 (citing 42 U.S.C. § 2014(e)(2)). Moreover, the Uranium Mill Tailing Radiation Control Act of 1978 ("UMTRCA"), which first included uranium mill tailings in the definition of byproduct material, states that the amendments "shall take effect on the date of the enactment of the Act." PL 95–604 (HR 13650), Nov. 8, 1978, 92 Stat. 3021, Title II - Uranium Mill Tailings Licensing and Regulation Definition, Sec. 208. Based on this analysis, the Strong court concluded that "Cotter's 1969 Source Material License could not have covered uranium mill tailings." Id. at 773.

Here, Defendants argue that Plaintiff's restrictive reading of the definition of "nuclear incident" as an event at "the location or the contract location" as that term is defined in the applicable indemnity agreement entered into pursuant to 42 U.S.C. § 2210 narrows what Congress obviously intended to be a broader term - and effectively nullifies the 1988 amendments. In ascertaining the plain meaning of a

statute, the Court relies on established rules of statutory interpretation, looking not only to the particular statutory language at issue, but also the design of the statute as a whole. DeBough v. Shulman, 799 F.3d 1210, 1212 (8th Cir. 2015); United States v. I.L., 614 F.3d 817, 820-21 (8th Cir. 2010) (citations omitted).

According to a Senate report, "[t]he Price–Anderson system is a comprehensive, compensation-oriented system of liability insurance for Department of Energy ("DOE") contractors and Nuclear Regulatory Commission ("NRC") licensees operating nuclear facilities.[5] Under the Price–Anderson system, there is a ready source of funds available to compensate the public after an accident, and the channeling of liability to a single entity and waiver of defenses insures that protracted litigation will be avoided. That is, the [PAA] provides a type of "no fault" insurance, by which all liability after an accident is assumed to rest with the facility operator, even though other parties (such as subcontractors or

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[5] The coverage for NRC licensees encompasses activities of commercial nuclear power plants, certain fuel fabrication facilities, and non-DOE reactors used for educational and research purposes. Activities of DOE contractors are covered if they involve "the risk of public liability for a substantial nuclear incident." These contractor activities include nuclear weapons research, development and testing, nuclear energy research and development, and nuclear waste activities. The Act specifies the procedures for determining the amount and sources of compensation available to compensate persons injured as a result of a nuclear incident arising from these activities. Dan M. Berkovitz, Price–Anderson Act: Model Compensation Legislation? - The Sixty–Three Million Dollar Question, 13 Harv. Envt'l. L. Rev. 1, 1–2 (1989) (footnotes omitted).

suppliers) might be liable under conventional tort principles. This "omnibus" feature permits a more unified and efficient approach to processing and settlement of claims, thus allowing quick compensation to the public from the pool of funds set up by the Price–Anderson system." S. Rep. No. 100-70 (1988), U.S. Code Cong. & Admin. News 1988, 1424, 1426-27.

It is clear that the 1988 amendments were enacted to expand the scope of federal jurisdiction to a broader class of nuclear liability cases than those arising just from extraordinary nuclear occurrences as well as to provide for consolidation of those claims in federal court. However, in light of the PAA's concerns related to liability limitation and indemnification, the Court is not convinced that the 1988 amendments were meant to extend the reach of the PAA to activities not covered by applicable licenses or indemnity agreements. Defendants' construction overlooks the original purposes and framework of the AEA and the PAA - to require those involved in the nuclear industry to obtain licenses and maintain financial protections. When faced with "competing preemption narratives," the Court has the "duty to accept the reading that disfavors preemption." Cook v. Rockwell Int'l Corp., 790 F.3d 1088, 1094 (10th Cir. 2015).

Defendants further argue that Strong did not conclude that Cotter's 1969 source material license could not support jurisdiction under the PAA. Rather, the court merely found that Cotter's license did not cover uranium mill tailings. Here, Plaintiff asserts that Cotter's license authorizing it "to receive, possess and import" uranium did not apply to the

uranium mill tailings at issue.[6] Defendants dispute that the material at issue was mill tailings. Like in Strong, the Court cannot conclude, based on the record before it, that the material was in fact mill tailings. If, as Plaintiff contends, the material is uranium mill tailings, then consistent with the analysis in Strong, Cotter's 1969 Source Material License could not have covered it because at the time the license was issued, the term "byproduct material" did not include uranium mill tailings. 283 F. Supp. 3d at 772-73. Moreover, Defendants have not established that Cotter's 1969 Source Material License authorizing it "to receive, possess and import" uranium covered their activities at the sites involved in this case. Thus, Cotter's license does not provide a basis for federal subject matter jurisdiction.

VI. Conclusion

For all of these reasons, the Court finds that Defendants have failed to meet their burden of establishing federal subject matter jurisdiction for purposes of the PAA and that this matter should be remanded to state court. Given this finding, the Court need not address the merits of Plaintiff's due process argument. Strong, 283 F. Supp. 3d at 774. Finally, because the Court lacks subject matter jurisdiction over this action, Defendants' pending motions to dismiss will be denied without prejudice.

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[6] The Court notes that Plaintiff's amended complaint does not specifically allege the material at issue was uranium mill tailings. (See FAP at ¶ 89) ("[t]he radioactive contamination that has polluted [Plaintiff's property] and continues to threaten to further pollute [Plaintiff's property] match the waste fingerprint (or profile) of the radioactive wastes generated in the processing of uranium ores in the St. Louis area.").

Accordingly,

IT IS HEREBY ORDERED that Plaintiffs' Motion for Remand [38] is **GRANTED** and this matter is **REMANDED** to the Circuit Court of St. Louis County under 28 U.S.C. § 1447(c).

IT IS FURTHER ORDERED that Defendants' motions to dismiss [27, 29, 36, 37] are

DENIED without prejudice to refiling in state court.

Dated this 29th day of March, 2019

John A. Ross
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 19-2072

Tamia Banks, et al.

Appellees

v.

Cotter Corporation

Appellant

Commonwealth Edison Company, et al.

American Nuclear Insurers

Amicus on Behalf of
Appellant(s)

Appeal from U.S. District Court for the Eastern
District of Missouri - St. Louis.
(4:18-cv-00672-CDP)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

February 11, 2022

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.
/s/ Michael E. Gans

42 U.S.C. § 2210 (a)

Requirement of financial protection for licensees

Each license issued under section 2133 or 2134 of this title and each construction permit issued under section 2235 of this title shall, and each license issued under section 2073, 2093, or 2111 of this title may, for the public purposes cited in section 2012(i) of this title, have as a condition of the license a requirement that the licensee have and maintain financial protection of such type and in such amounts as the Nuclear Regulatory Commission (in this section referred to as the "Commission") in the exercise of its licensing and regulatory authority and responsibility shall require in accordance with subsection (b) to cover public liability claims. Whenever such financial protection is required, it may be a further condition of the license that the licensee execute and maintain an indemnification agreement in accordance with subsection (c). The Commission may require, as a further condition of issuing a license, that an applicant waive any immunity from public liability conferred by Federal or State law.

42 U.S.C. § 2210(c)

Indemnification of licensees by Nuclear Regulatory Commission

The Commission shall, with respect to licenses issued between August 30, 1954, and December 31, 2025, for which it requires financial protection of less than $560,000,000, agree to indemnify and hold harmless the licensee and other persons indemnified, as their interest may appear, from public liability arising from nuclear incidents which is in excess of the level of financial protection required of the licensee. The aggregate indemnity for all persons indemnified in connection with each nuclear incident shall not exceed $500,000,000 excluding costs of investigating and settling claims and defending suits for damage: *Provided, however,* That this amount of indemnity shall be reduced by the amount that the financial protection required shall exceed $60,000,000. Such a contract of indemnification shall cover public liability arising out of or in connection with the licensed activity. With respect to any production or utilization facility for which a construction permit is issued between August 30, 1954, and December 31, 2025, the requirements of this subsection shall apply to any license issued for such facility subsequent to December 31, 2025.

42 U.S.C. § 2210 (d)

Indemnification of contractors by Department of Energy

(1)(A) In addition to any other authority the Secretary of Energy (in this section referred to as the "Secretary") may have, the Secretary shall, until December 31, 2025, enter into agreements of indemnification under this subsection with any person who may conduct activities under a contract with the Department of Energy that involve the risk of public liability and that are not subject to financial protection requirements under subsection (b) or agreements of indemnification under subsection (c) or (k).

(B)(i)(I) Beginning 60 days after August 20, 1988, agreements of indemnification under subparagraph (A) shall be the exclusive means of indemnification for public liability arising from activities described in such subparagraph, including activities conducted under a contract that contains an indemnification clause under Public Law 85-804 entered into between August 1, 1987, and August 20, 1988.

> **(II)** The Secretary may incorporate in agreements of indemnification under subparagraph (A) the provisions relating to the waiver of any issue or defense as to charitable or governmental immunity authorized in subsection (n)(1) to be incorporated in agreements of indemnification. Any such provisions incorporated under this subclause shall apply to any

nuclear incident arising out of nuclear waste activities subject to an agreement of indemnification under subparagraph (A).

(ii) Public liability arising out of nuclear waste activities subject to an agreement of indemnification under subparagraph (A) that are funded by the Nuclear Waste Fund established in section 10222 of this title shall be compensated from the Nuclear Waste Fund in an amount not to exceed the maximum amount of financial protection required of licensees under subsection (b).

(2) In an agreement of indemnification entered into under paragraph (1), the Secretary--

(A) may require the contractor to provide and maintain financial protection of such a type and in such amounts as the Secretary shall determine to be appropriate to cover public liability arising out of or in connection with the contractual activity; and

(B) shall indemnify the persons indemnified against such liability above the amount of the financial protection required, in the amount of $10,000,000,000 (subject to adjustment for inflation under subsection (t)), in the aggregate, for all persons indemnified in connection with the contract and for each nuclear incident, including such legal costs of the contractor as are approved by the Secretary.

(3) All agreements of indemnification under which the Department of Energy (or its predecessor agencies) may be required to indemnify any person under this section shall be deemed to be amended, on Au-

gust 8, 2005, to reflect the amount of indemnity for public liability and any applicable financial protection required of the contractor under this subsection.

(4) Financial protection under paragraph (2) and indemnification under paragraph (1) shall be the exclusive means of financial protection and indemnification under this section for any Department of Energy demonstration reactor licensed by the Commission under section 5842 of this title.

(5) In the case of nuclear incidents occurring outside the United States, the amount of the indemnity provided by the Secretary under this subsection shall not exceed $500,000,000.

(6) The provisions of this subsection may be applicable to lump sum as well as cost type contracts and to contracts and projects financed in whole or in part by the Secretary.

(7) A contractor with whom an agreement of indemnification has been executed under paragraph (1)(A) and who is engaged in activities connected with the underground detonation of a nuclear explosive device shall be liable, to the extent so indemnified under this subsection, for injuries or damage sustained as a result of such detonation in the same manner and to the same extent as would a private person acting as principal, and no immunity or defense founded in the Federal, State, or municipal character of the contractor or of the work to be performed under the contract shall be effective to bar such liability.

42 U.S.C. § 2210(e)

Limitation on aggregate public liability

(1) The aggregate public liability for a single nuclear incident of persons indemnified, including such legal costs as are authorized to be paid under subsection (o)(1)(D), shall not exceed--

(A) in the case of facilities designed for producing substantial amounts of electricity and having a rated capacity of 100,000 electrical kilowatts or more, the maximum amount of financial protection required of such facilities under subsection (b) (plus any surcharge assessed under subsection (o)(1)(E));

(B) in the case of contractors with whom the Secretary has entered into an agreement of indemnification under subsection (d), the amount of indemnity and financial protection that may be required under paragraph (2) of subsection (d); and

(C) in the case of all other licensees of the Commission required to maintain financial protection under this section--

(i) $500,000,000, together with the amount of financial protection required of the licensee; or

(ii) if the amount of financial protection required of the licensee exceeds $60,000,000, $560,000,000 or the amount of financial protection required of the licensee, whichever amount is more.

(2) In the event of a nuclear incident involving damages in excess of the amount of aggregate public liability under paragraph (1), the Congress will thoroughly review the particular incident in accordance with the procedures set forth in subsection (i) and will in accordance with such procedures, take whatever action is determined to be necessary (including approval of appropriate compensation plans and appropriation of funds) to provide full and prompt compensation to the public for all public liability claims resulting from a disaster of such magnitude.

(3) No provision of paragraph (1) may be construed to preclude the Congress from enacting a revenue measure, applicable to licensees of the Commission required to maintain financial protection pursuant to subsection (b), to fund any action undertaken pursuant to paragraph (2).

(4) With respect to any nuclear incident occurring outside of the United States to which an agreement of indemnification entered into under the provisions of subsection (d) is applicable, such aggregate public liability shall not exceed the amount of $500,000,000, together with the amount of financial protection required of the contractor.

42 U.S.C. § 2210(k)

Exemption from financial protection requirement for nonprofit educational institutions

With respect to any license issued pursuant to section 2073, 2093, 2111, 2134(a), or 2134(c) of this title, for the conduct of educational activities to a person found by the Commission to be a nonprofit educational institution, the Commission shall exempt such licensee from the financial protection requirement of subsection (a). With respect to licenses issued between August 30, 1954, and December 31, 2025, for which the Commission grants such exemption:

(1) the Commission shall agree to indemnify and hold harmless the licensee and other persons indemnified, as their interests may appear, from public liability in excess of $250,000 arising from nuclear incidents. The aggregate indemnity for all persons indemnified in connection with each nuclear incident shall not exceed $500,000,000, including such legal costs of the licensee as are approved by the Commission;

(2) such contracts of indemnification shall cover public liability arising out of or in connection with the licensed activity; and shall include damage to property of persons indemnified, except property which is located at the site of and used in connection with the activity where the nuclear incident occurs; and

(3) such contracts of indemnification, when entered into with a licensee having immunity from public liability because it is a State agency, shall provide also that the Commission shall make payments under the contract on account of activities of the licensee in the same manner and to the same extent as the Commission would be required to do if the licensee were not such a State agency.

Any licensee may waive an exemption to which it is entitled under this subsection. With respect to any production or utilization facility for which a construction permit is issued between August 30, 1954, and December 31, 2025, the requirements of this subsection shall apply to any license issued for such facility subsequent to December 31, 2025.

42 U.S.C. § 2210(n)

Waiver of defenses and judicial procedures

(1) With respect to any extraordinary nuclear occurrence to which an insurance policy or contract furnished as proof of financial protection or an indemnity agreement applies and which--

(A) arises out of or results from or occurs in the course of the construction, possession, or operation of a production or utilization facility,

(B) arises out of or results from or occurs in the course of transportation of source material, byproduct material, or special nuclear material to or from a production or utilization facility,

(C) during the course of the contract activity arises out of or results from the possession, operation, or use by a Department of Energy contractor or subcontractor of a device utilizing special nuclear material or byproduct material,

(D) arises out of, results from, or occurs in the course of, the construction, possession, or operation of any facility licensed under section 2073, 2093, or 2111 of this title, for which the Commission has imposed as a condition of the license a requirement that the licensee have and maintain financial protection under subsection (a),

(E) arises out of, results from, or occurs in the course of, transportation of source material, byprod-

uct material, or special nuclear material to or from any facility licensed under section 2073, 2093, or 2111 of this title, for which the Commission has imposed as a condition of the license a requirement that the licensee have and maintain financial protection under subsection (a), or

(F) arises out of, results from, or occurs in the course of nuclear waste activities.

the Commission or the Secretary, as appropriate, may incorporate provisions in indemnity agreements with licensees and contractors under this section, and may require provisions to be incorporated in insurance policies or contracts furnished as proof of financial protection, which waive (i) any issue or defense as to conduct of the claimant or fault of persons indemnified, (ii) any issue or defense as to charitable or governmental immunity, and (iii) any issue or defense based on any statute of limitations if suit is instituted within three years from the date on which the claimant first knew, or reasonably could have known, of his injury or damage and the cause thereof. The waiver of any such issue or defense shall be effective regardless of whether such issue or defense may otherwise be deemed jurisdictional or relating to an element in the cause of action. When so incorporated, such waivers shall be judicially enforcible in accordance with their terms by the claimant against the person indemnified. Such waivers shall not preclude a defense based upon a failure to take reasonable steps to mitigate damages, nor shall such waivers apply to injury or damage to a claimant or to a claimant's property which is intentionally sustained by the claimant or which results from a

nuclear incident intentionally and wrongfully caused by the claimant. The waivers authorized in this subsection shall, as to indemnitors, be effective only with respect to those obligations set forth in the insurance policies or the contracts furnished as proof of financial protection and in the indemnity agreements. Such waivers shall not apply to, or prejudice the prosecution or defense of, any claim or portion of claim which is not within the protection afforded under (i) the terms of insurance policies or contracts furnished as proof of financial protection, or indemnity agreements, and (ii) the limit of liability provisions of subsection (e).

(2) With respect to any public liability action arising out of or resulting from a nuclear incident, the United States district court in the district where the nuclear incident takes place, or in the case of a nuclear incident taking place outside the United States, the United States District Court for the District of Columbia, shall have original jurisdiction without regard to the citizenship of any party or the amount in controversy. Upon motion of the defendant or of the Commission or the Secretary, as appropriate, any such action pending in any State court (including any such action pending on August 20, 1988) or United States district court shall be removed or transferred to the United States district court having venue under this subsection. Process of such district court shall be effective throughout the United States. In any action that is or becomes removable pursuant to this paragraph, a petition for removal shall be filed within the period provided in section 1446 of Title 28 or within the 30-day peri-

od beginning on August 20, 1988, whichever occurs later.

(3)(A) Following any nuclear incident, the chief judge of the United States district court having jurisdiction under paragraph (2) with respect to public liability actions (or the judicial council of the judicial circuit in which the nuclear incident occurs) may appoint a special caseload management panel (in this paragraph referred to as the "management panel") to coordinate and assign (but not necessarily hear themselves) cases arising out of the nuclear incident, if--

> **(i)** a court, acting pursuant to subsection (o), determines that the aggregate amount of public liability is likely to exceed the amount of primary financial protection available under subsection (b) (or an equivalent amount in the case of a contractor indemnified under subsection (d)); or
>
> **(ii)** the chief judge of the United States district court (or the judicial council of the judicial circuit) determines that cases arising out of the nuclear incident will have an unusual impact on the work of the court.

(B)(i) Each management panel shall consist only of members who are United States district judges or circuit judges.

> **(ii)** Members of a management panel may include any United States district judge or circuit judge of another district court or court of appeals,

if the chief judge of such other district court or court of appeals consents to such assignment.

(C) It shall be the function of each management panel--

(i) to consolidate related or similar claims for hearing or trial;

(ii) to establish priorities for the handling of different classes of cases;

(iii) to assign cases to a particular judge or special master;

(iv) to appoint special masters to hear particular types of cases, or particular elements or procedural steps of cases;

(v) to promulgate special rules of court, not inconsistent with the Federal Rules of Civil Procedure, to expedite cases or allow more equitable consideration of claims;

(vi) to implement such other measures, consistent with existing law and the Federal Rules of Civil Procedure, as will encourage the equitable, prompt, and efficient resolution of cases arising out of the nuclear incident; and

(vii) to assemble and submit to the President such data, available to the court, as may be useful in estimating the aggregate damages from the nuclear incident.

42 U.S.C. § 2210(p)

Reports to Congress

The Commission and the Secretary shall submit to the Congress by December 31, 2021, detailed reports concerning the need for continuation or modification of the provisions of this section, taking into account the condition of the nuclear industry, availability of private insurance, and the state of knowledge concerning nuclear safety at that time, among other relevant factors, and shall include recommendations as to the repeal or modification of any of the provisions of this section.

42 U.S.C. § 2014(j)

The term "extraordinary nuclear occurrence" means any event causing a discharge or dispersal of source, special nuclear, or byproduct material from its intended place of confinement in amounts offsite, or causing radiation levels offsite, which the Nuclear Regulatory Commission or the Secretary of Energy, as appropriate, determines to be substantial, and which the Nuclear Regulatory Commission or the Secretary of Energy, as appropriate, determines has resulted or will probably result in substantial damages to persons offsite or property offsite. Any determination by the Nuclear Regulatory Commission or the Secretary of Energy, as appropriate, that such an event has, or has not, occurred shall be final and conclusive, and no other official or any court shall have power or jurisdiction to review any such determination. The Nuclear Regulatory Commission or the Secretary of Energy, as appropriate, shall establish criteria in writing setting forth the basis upon which such determination shall be made. As used in this subsection, "offsite" means away from "the location" or "the contract location" as defined in the applicable Nuclear Regulatory Commission or the Secretary of Energy, as appropriate, indemnity agreement, entered into pursuant to section 2210 of this title.

42 U.S.C. § 2014(k)

The term "financial protection" means the ability to respond in damages for public liability and to meet the costs of investigating and defending claims and settling suits for such damages.

42 U.S.C. § 2014(p)

The term "licensed activity" means an activity licensed pursuant to this chapter and covered by the provisions of section 2210(a) of this title.

42 U.S.C. § 2014(q)

The term "nuclear incident" means any occurrence, including an extraordinary nuclear occurrence, within the United States causing, within or outside the United States, bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property, arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material: *Provided, however,* That as the term is used in section 2210(l) of this title, it shall include any such occurrence outside the United States: *And provided further,* That as the term is used in section 2210(d) of this title, it shall include any such occurrence outside the United States if such occurrence involves source, special nuclear, or byproduct material owned by, and used by or under contract with, the United States: *And provided further,* That as the term is used in section 2210(c) of this title, it shall include any such occurrence outside both the United States and any other nation if such occurrence arises out of or results from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material licensed pursuant to subchapters V, VI, VII, and IX of this division, which is used in connection with the operation of a licensed stationary production or utilization facility or which moves outside the territorial limits of the United States in transit from one person licensed by the Nuclear Regulatory Commission to another person licensed by the Nuclear Regulatory Commission.

42 U.S.C. § 2014(w)

The term "public liability" means any legal liability arising out of or resulting from a nuclear incident or precautionary evacuation (including all reasonable additional costs incurred by a State, or a political subdivision of a State, in the course of responding to a nuclear incident or a precautionary evacuation), except: (i) claims under State or Federal workmen's compensation acts of employees of persons indemnified who are employed at the site of and in connection with the activity where the nuclear incident occurs; (ii) claims arising out of an act of war; and (iii) whenever used in subsections (a), (c), and (k) of section 2210 of this title, claims for loss of, or damage to, or loss of use of property which is located at the site of and used in connection with the licensed activity where the nuclear incident occurs. "Public liability" also includes damage to property of persons indemnified: *Provided,* That such property is covered under the terms of the financial protection required, except property which is located at the site of and used in connection with the activity where the nuclear incident occurs.

42 U.S.C. § 2014(hh)

The term "public liability action", as used in section 2210 of this title, means any suit asserting public liability. A public liability action shall be deemed to be an action arising under section 2210 of this title, and the substantive rules for decision in such action shall be derived from the law of the State in which the nuclear incident involved occurs, unless such law is inconsistent with the provisions of such section.