APPENDIX A

United States Court of Appeals, Eighth Circuit.

John C. KITCHIN; North West Auto Body; Mary Menke, on behalf of themselves and all others similarly situated, Plaintiffs - Appellees

v.

BRIDGETON LANDFILL, LLC; Republic Services, Inc.; Allied Services; Rock Road Industries, Inc., Defendants - Appellants

No. 19-2072

Submitted: January 14, 2021

Filed: July 8, 2021

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

Celeste Brustowicz, Victor T. Cobb, Barry J. Cooper, Jr., Stuart H. Smith, COOPER LAW FIRM, New Orleans, LA, Nathaniel R. Carroll, ARCH CITY DEFENDERS, Saint Louis, MO, Anthony D. Gray, JOHNSON & GRAY, Clayton, MO, Ryan A. Keane, Saint Louis, MO, Ron A. Rustin, Gretna, LA, for Plaintiffs - Appellees.

William Garland Beck, Allyson Elisabeth Cunningham, LATHROP GPM LLP, Kansas City, MO, for Defendants - Appellants.

Before GRUENDER, BENTON, and STRAS, Circuit Judges.

GRUENDER, Circuit Judge.

Bridgeton Landfill, LLC; Republic Services, Inc.; and Allied Services, LLC ("Appellants") challenge the district court's decision to remand this removed

action to state court under the local-controversy exception to the Class Action Fairness Act of 2005 ("CAFA"). *See* 28 U.S.C. § 1332(d)(4)(A). We reverse.

I.

At first in connection with the Manhattan Project during World War II and then for the federal government after the war, a government contractor refined uranium at a facility in downtown St. Louis, Missouri in the 1940s and 1950s.[1] Unsurprisingly, this activity created radioactive waste. Accordingly, the Manhattan Project acquired a tract of land near the present-day St. Louis Lambert International Airport in St. Louis County to store the waste. The Cotter Corporation (which is not a party in this action) later acquired some of this waste, and in 1973 it dumped more than 46,000 tons of a soil-and-radioactive-waste mixture at the West Lake Landfill in Bridgeton, Missouri. That soil-waste mixture was then used as cover for municipal refuse dumped in the landfill. In 1990, the Environmental Protection Agency ("EPA") placed the West Lake Landfill on the Superfund National Priorities List for site investigation and cleanup. *See* 42 U.S.C. § 9605.

Since 1995, John C. Kitchin, Jr., has owned property in Bridgeton, Missouri adjacent to the West Lake Landfill, where his family owns and operates the North West Auto Body Company. Mary Menke also owns property in Bridgeton, Missouri near the landfill. After learning in 2017 and 2018 that their properties were contaminated with radioactive ma-

---

[1] The factual background in the first two paragraphs here is taken from the complaint and, where the complaint is vague, from Appellants' notice of removal.

terial, Kitchin, North West Auto Body Company, and Menke ("Plaintiffs") filed a class-action complaint in Missouri state court against Bridgeton Landfill, LLC; Republic Services, Inc.; Allied Services, LLC; and Rock Road Industries, Inc. ("Defendants"). In their complaint, Plaintiffs alleged that Defendants "owned and/or operated" the West Lake Landfill and were responsible for the contamination of Plaintiffs' property, which Plaintiffs claimed occurred due to Defendants' allegedly improper acceptance and handling of radioactive waste at the landfill. Plaintiffs sought to represent two different subclasses consisting of Missouri citizens who either owned or resided on property within an eleven-square-mile region around the West Lake Landfill. The complaint asserted seven state-law tort claims and sought compensatory damages, punitive damages, and injunctive relief.

It is undisputed here that, of the Defendants, only Rock Road Industries was a citizen of Missouri at the time Plaintiffs filed their complaint. Shortly after Plaintiffs filed their complaint, however, Rock Road Industries merged into Bridgeton Landfill, with Bridgeton Landfill being the surviving entity.

Appellants then removed the action to federal court. As grounds for removal, Appellants claimed that federal-question jurisdiction existed under the Price-Anderson Act ("PAA"), 42 U.S.C. § 2011 *et seq.*, as well as the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601 *et seq.*, and they asserted that diversity jurisdiction existed under CAFA, 28 U.S.C. § 1332(d)(2). Plaintiffs moved to remand, arguing that their complaint did not trigger federal-

question jurisdiction under either the PAA or CERCLA and that the district court had to "decline to exercise [CAFA] jurisdiction" because CAFA's local-controversy exception applied. *See* 28 U.S.C. § 1332(d)(4). The district court agreed, concluding that federal-question jurisdiction did not exist and that the local-controversy exception applied, so it granted Plaintiffs' motion to remand. On appeal, Appellants challenge the district court's application of the local-controversy exception.

II.

Before proceeding to the merits, first we must address Plaintiffs' claim that we lack jurisdiction over this appeal. *See, e.g.*, *Arnold Crossroads, L.L.C. v. Gander Mountain Co.*, 751 F.3d 935, 938 (8th Cir. 2014) ("Our first consideration on review is whether we have appellate jurisdiction over [the defendant's] appeal of the district court's remand order."). Under 28 U.S.C. § 1291, we typically have appellate jurisdiction over final decisions and certain collateral orders of the district courts. *See Dig. Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867, 114 S.Ct. 1992, 128 L.Ed.2d 842 (1994). Apparently presuming that the district court's remand order is not a final decision, Plaintiffs argue that we lack appellate jurisdiction under § 1291 because the remand order is not an appealable collateral order. *See Quackenbush v. Allstate Ins.*, 517 U.S. 706, 712, 116 S.Ct. 1712, 135 L.Ed.2d 1 (1996) (discussing the collateral-order doctrine). Seemingly in the alternative, they also contend that 28 U.S.C. § 1453(c), a CAFA-specific grant of permissive appellate jurisdiction over remand orders, was Appellants' "only ... pathway for

appellate review" of the district court's remand order, which we closed off when we previously denied Appellants permission to appeal under § 1453(c).

Our precedent forecloses these arguments. In *Jacks v. Meridian Resource Co.*, we held that a remand order was both "final and appealable as a collateral order under § 1291" insofar as it was based on the district court's determination that the local-controversy exception applied. 701 F.3d 1224, 1229 (8th Cir. 2012) (citing *Quackenbush*, 517 U.S. at 711-14, 116 S.Ct. 1712). And, after recognizing that we had previously denied the appellants permission to appeal under § 1453(c), we nevertheless proceeded to address their separately filed § 1291 appeal, concluding that we had jurisdiction under § 1291 to review the district court's application of the local-controversy exception. *Id.* at 1128 n.2, 1229; *see also Hunter v. City of Montgomery*, 859 F.3d 1329, 1334 & n.3 (11th Cir. 2017) (explaining that § 1291 provides "an alternative basis for appellate jurisdiction" in addition to § 1453(c) to review remand orders based on CAFA's exceptions). Therefore, *Jacks* provides that we have jurisdiction under § 1291 over this appeal.

Accordingly, we proceed to the merits.

III.

The sole issue on appeal is whether CAFA's local-controversy exception requires remand in this case, as the district court found. We review this issue *de novo*. *Graphic Commc'ns Local 1B Health & Welfare Fund A v. CVS Caremark Corp.*, 636 F.3d 971, 973 (8th Cir. 2011); *Opelousas Gen. Hosp. Auth. v. FairPay Sols., Inc.*, 655 F.3d 358, 360 (5th Cir. 2011).

CAFA gives federal district courts subject-matter jurisdiction over class actions like this one, where the parties are minimally diverse (meaning any class member and any defendant are citizens of different states), all proposed plaintiff classes include at least 100 members in total, and the amount in controversy exceeds $5,000,000. *See Westerfeld v. Indep. Processing, LLC*, 621 F.3d 819, 822 (8th Cir. 2010) (citing 28 U.S.C. § 1332(d)). Under CAFA's local-controversy exception, however, a federal district court "shall decline to exercise jurisdiction":

> (i) over a class action in which—
>
> > (I) greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed;
> >
> > (II) at least 1 defendant is a defendant—
> >
> > > (aa) from whom significant relief is sought by members of the plaintiff class;
> > >
> > > (bb) whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class; and
> > >
> > > (cc) who is a citizen of the State in which the action was originally filed; and
> >
> > (III) principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the State in which the action was originally filed; and
>
> (ii) during the 3-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons ....

28 U.S.C. § 1332(d)(4)(A).

Although the exception is an abstention doctrine rather than a jurisdictional rule, *Graphic Commc'ns*, 636 F.3d at 973, it is mandatory, *Westerfeld*, 621 F.3d at 822. The party seeking remand on this basis has the burden to establish that the exception applies. *Westerfeld*, 621 F.3d at 822. And, given that the exception's provisions are listed in the conjunctive, *see Erdahl v. Comm'r*, 930 F.2d 585, 591 n.8 (8th Cir. 1991), the proponent of remand must show that each provision is met in order to trigger mandatory abstention, *see, e.g.*, *Atwood v. Peterson*, 936 F.3d 835, 841 & n.5 (8th Cir. 2019) (per curiam); *Opelousas*, 655 F.3d at 361; *Coleman v. Estes Express Lines, Inc.*, 631 F.3d 1010, 1013 (9th Cir. 2011). In considering whether the party seeking remand has met this burden, we must bear in mind that the "language and structure of CAFA" indicate that Congress contemplated broad federal court jurisdiction, *see Westerfeld*, 621 F.3d at 822, and that the local-controversy exception is a "narrow," nonjurisdictional exception to CAFA's grant of jurisdiction, *see Hargett v. RevClaims, LLC*, 854 F.3d 962, 965 (8th Cir. 2017); *Graphic Commc'ns*, 636 F.3d at 973. Thus, "any doubt about the applicability of CAFA's local-controversy exception" must be resolved against the party seeking remand and in favor of retaining jurisdiction over the case. *Westerfeld*, 621 F.3d at 823. After all, "federal courts 'have a strict duty to exercise the jurisdiction that is conferred upon them by Congress,' " abstention is an " 'extraordinary and narrow exception' to that duty," and thus "only the 'clearest of justifications' will justify abstention." *Mason v. Lockwood, Andrews & Newnam,*

P.C., 842 F.3d 383, 397 (6th Cir. 2016) (Kethledge, J., dissenting) (quoting first *Quackenbush*, 517 U.S. at 716, 116 S.Ct. 1712, then *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 813, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976), then *Rouse v. DaimlerChrysler Corp.*, 300 F.3d 711, 715 (6th Cir. 2002)) (discussing the local-controversy exception).

Appellants argue that Plaintiffs failed to show that any subpart of § 1332(d)(4)(A)(i)(II)—the significant-relief requirement (subpart (aa)), the significant-basis requirement (subpart (bb)), or the local-defendant requirement (subpart (cc))—is met in this case. For the following reasons, we agree that Plaintiffs failed to carry their burden to show that the conduct of Rock Road Industries—the only Missouri-citizen defendant and thus the only possible "local defendant" for purposes of these requirements—"forms a significant basis for the claims asserted" in the complaint. *See* § 1332(d)(4)(A)(i)(II)(bb).[2]

A.

Under the significant-basis requirement, the party seeking remand must show that a local defendant's "alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class." § 1332(d)(4)(A)(i)(II)(bb). The district court observed that Plaintiffs alleged in their complaint that Defendants "all engaged in the same conduct" that caused Plaintiffs' claimed injuries, and it concluded

[2] As this conclusion suffices to reverse, we do not address whether Plaintiffs established that they sought significant relief from Rock Road Industries or that the now-nonexistent Rock Road Industries "is" a Missouri citizen for purposes of the exception. *See, e.g.*, *Atwood*, 936 F.3d at 841 & n.5.

that these allegations demonstrated that Rock Road Industries' conduct forms a significant basis for Plaintiffs' claims. We agree that, with rare exception, *see infra* Section III.B., Plaintiffs simply alleged that "Defendants" engaged in conduct causing Plaintiffs' injuries without identifying specific acts of each defendant or otherwise parsing out in any meaningful way Rock Road Industries' particular, injury-causing conduct. But we disagree that these collective allegations against Defendants suffice to show that Rock Road Industries' conduct meets the significant-basis requirement.

"CAFA itself does not describe the type or character of conduct that would form a 'significant basis' of plaintiffs' claims ...." *Woods v. Standard Ins.*, 771 F.3d 1257, 1265 (10th Cir. 2014). That said, in *Westerfeld*, we adopted the Third Circuit's comparative approach to analyzing this issue. 621 F.3d at 825 (following *Kaufman v. Allstate N.J. Ins.*, 561 F.3d 144 (3d Cir. 2009)). In *Kaufman*, the Third Circuit reasoned that, "[i]n relating the local defendant's alleged conduct to all the claims asserted in the action, the significant basis provision effectively calls for comparing the local defendant's alleged conduct to the alleged conduct of all the Defendants." 561 F.3d at 156. Thus, deciding whether the significant-basis requirement is met "requires a substantive analysis comparing the local defendant's alleged conduct to the alleged conduct of all the Defendants." *Id.* Given the plain meaning of "significant," this comparative approach requires that the party seeking remand show that the local defendant's conduct is "an *important* ground for the asserted claims in view of the alleged conduct of all the Defendants."

Id. at 157; *see also* "Significant," *Black's Law Dictionary* (11th ed. 2019) (defining "significant" to mean "[o]f special importance; momentous").

Since the time we followed *Kaufman* in *Westerfeld*, other circuits have done the same. *E.g.*, *Mason*, 842 F.3d at 395-96 (majority opinion); *Benko v. Quality Loan Serv. Corp.*, 789 F.3d 1111, 1118 (9th Cir. 2015); *Woods*, 771 F.3d at 1266; *Opelousas*, 655 F.3d at 361. Even so, courts applying this approach have split regarding what it requires. Some courts, like the district court here, have adopted the view that allegations that the local and nonlocal defendants "all engaged in the same conduct" suffice to show that the local defendant's conduct meets the significant-basis requirement. *See, e.g.*, *City of O'Fallon v. CenturyLink, Inc.*, 930 F. Supp. 2d 1035, 1049-51 (E.D. Mo. 2013) (citing *Coleman*, 631 F.3d at 1020).

In *Atwood*, however, we joined a number of courts taking the opposite view and found that a complaint that did "not allege any substantive distinctions between the conduct" of the local and nonlocal defendants failed to "indicate whether the local defendants' alleged conduct is 'an *important* ground for the asserted claims in view of the alleged conduct of all the Defendants.'" 936 F.3d at 840 (quoting *Westerfeld*, 621 F.3d at 825); *see also Opelousas*, 655 F.3d at 359, 362-63 (finding that the significant-basis requirement was not met where "nothing in the complaint distinguishe[d] the conduct of [the local defendant] from the conduct of the other defendants" and requiring "more detailed allegations or extrinsic evidence detailing the local defendant's conduct in relation to the out-of-state defendants" to meet the requirement); *accord White Knight Diner, LLC v. Arb.*

Forums, Inc., No. 4:17-CV-02406 JAR, 2018 WL 398401, at *5 (E.D. Mo. Jan. 12, 2018); *Johnson v. Courtyard Rehab. & Health Ctr., LLC*, No. 17-CV-01053, 2018 WL 4183246, at *4-5 (W.D. Ark. Jan. 8, 2018); *Green v. Skyline Highland Holdings LLC*, No. 4:17-CV-00534 BSM, 2017 WL 6001498, at *3 (E.D. Ark. Dec. 4, 2017); *cf. Mason*, 842 F.3d at 399-400 (Kethledge, J., dissenting) (asserting that the plaintiffs' allegations, in which the local and nonlocal defendant were referred to jointly by a collective noun that was "the subject of every verb describing conduct allegedly forming the basis of the plaintiffs' claims," did not satisfy the significant-basis requirement); *Evans v. Walter Indus., Inc.*, 449 F.3d 1159, 1167 (11th Cir. 2006) (finding that the significant-basis requirement was not met because the evidence proffered to make this showing gave "no insight" into the local defendant's comparative "role in the alleged contamination"). Under *Atwood*, "CAFA removal is not foreclosed by [a] complaint's conclusory allegations that the local defendants engaged in the same conduct as the [nonlocal] defendant." 936 F.3d at 840-41 (disagreeing with the "rulings to the contrary" in *Coleman*, 631 F.3d 1010).

Thus, following *Atwood*, the district court's reasoning—that Plaintiffs' allegations of how Defendants "all engaged in the same conduct" suffice to satisfy the significant-basis requirement—contravenes the law of this circuit. If "nothing in the complaint distinguishes the conduct of [Rock Road Industries] from the conduct of the other defendants," *Opelousas*, 655 F.3d at 362, then the allegations in the complaint do not satisfy the significant-basis requirement. Such collective allegations leave "doubt"

about the comparative significance of Rock Road Industries' conduct, preventing remand under the local-controversy exception. *See Westerfeld*, 621 F.3d at 823.

B.

Besides defending the district court's reasoning, Plaintiffs also point out that they "*do* make different allegations" about Rock Road Industries' conduct compared to the other defendants' conduct. They call our attention to four sentences in three paragraphs of their 199-paragraph complaint that specifically mention Rock Road Industries, and they contend that these allegations suffice to establish that Rock Road Industries' conduct is "significant" for CAFA purposes. We disagree.

The first allegation is that "Rock Road Industries, Inc. ... owned or owns the West Lake Landfill." But in corresponding allegations about the other defendants, Plaintiffs alleged that Bridgeton Landfill also owns the West Lake Landfill; that Allied Services "operates ... [the] West Lake Landfill[ ]"; and that Republic Services "owns, oversees, and directs the environmental decisions and conduct" of the other three defendants "and operates the ... West Lake Landfill[ ]." Particularly because Plaintiffs' claims largely are predicated on how Defendants have managed and operated the landfill, we fail to see how this allegation shows that Rock Road Industries' conduct is "an *important* ground for the asserted claims in view of the alleged conduct of all the Defendants." *See Westerfeld*, 621 F.3d at 825. If anything, the allegation that Republic Services "owns, oversees, and directs the environmental decisions

and conduct" of Rock Road Industries as well as the other two defendants suggests the opposite. *See Atwood*, 936 F.3d at 838, 840-41 (concluding that a local defendant's conduct was not "significant" because extrinsic evidence showed that the local defendant's injury-causing conduct was mandated by the non-local defendant); *Mason*, 842 F.3d at 400 (Kethledge, J., dissenting) (concluding the same in light of similar allegations in the complaint at issue there).

The second allegation is that "[t]his lawsuit arises out of damages that resulted from Rock Road Industries, Inc.'s acts and omissions within the State of Missouri." But the complaint contains verbatim allegations about the other three defendants. Nothing about this allegation "distinguishes the conduct of [Rock Road Industries] from the conduct of the other defendants." *See Opelousas*, 655 F.3d at 362. To the contrary, this cut-and-paste approach illustrates how Plaintiffs' complaint fails to differentiate meaningfully between Rock Road Industries' conduct and the other defendants' conduct.

The third allegation is that "Rock Road Industries has maintained daily operational and managerial control over the management and environmental decisions of the West Lake Landfill, decisions which gave rise to the violations of law and damage to property alleged in this [complaint]." But in corresponding allegations about the other three defendants, the complaint includes materially identical allegations about their conduct. To the extent these parallel allegations differ, they do so because Plaintiffs alleged more about the other defendants' conduct than they did about Rock Road Industries' conduct. Thus, any "substantive distinctions" revealed

by these allegations undermine rather than support the conclusion that Rock Road Industries' conduct "forms a significant basis for [Plaintiffs'] claim[s]." *See Atwood*, 936 F.3d at 840.

The fourth allegation is that Rock Road Industries is a Missouri citizen "whose conduct forms a significant basis" for Plaintiffs' claims. This allegation, parroting the language of the significant-basis requirement, is a legal conclusion. *See* § 1332(d)(4)(A)(i)(II)(bb). Ordinarily, in determining the sufficiency of a pleading, "we need not accept as true a plaintiff's conclusory allegations or legal conclusions drawn from the facts." *Glick v. W. Power Sports, Inc.*, 944 F.3d 714, 717 (8th Cir. 2019). We see no reason to depart from that rule in this context, particularly because we already have rejected the idea that "conclusory allegations" can suffice to satisfy the significant-basis requirement, *Atwood*, 936 F.3d at 841, and because the Supreme Court has admonished against adopting rules in the CAFA context that would "exalt form over substance," *Standard Fire Ins. v. Knowles*, 568 U.S. 588, 595, 133 S.Ct. 1345, 185 L.Ed.2d 439 (2013); *cf. Woods*, 771 F.3d at 1265 ("[W]e interpret the significant local defendant requirement strictly so that plaintiffs and their attorneys may not defeat CAFA jurisdiction by routinely naming at least one state citizen as a defendant, irrespective of whether that defendant is actually a primary focus of the litigation."). Thus, this pleaded legal conclusion does not establish that Rock Road Industries' conduct forms a significant basis for Plaintiffs' claims. *See Atwood*, 936 F.3d at 840.

C.

Finally, going beyond the allegations in their complaint, Plaintiffs invite us to take judicial notice of the EPA's 2018 Amended Record of Decision concerning the West Lake Landfill and a 1993 Consent Order referred to in that document. They argue that these materials, showing that the EPA deemed Rock Road Industries (along with three other entities) a "potentially responsible party" ("PRP") for cleaning up the landfill under CERCLA, demonstrate that Rock Road Industries' conduct meets the significant-basis requirement. *See Atwood*, 936 F.3d at 840 (holding that extrinsic evidence may be considered in determining whether the significant-basis requirement is met). Even assuming that we may take judicial notice of and consider this factual material seemingly presented for the first time on appeal, *but see Kohley v. United States*, 784 F.2d 332, 334 (8th Cir. 1986) (per curiam), we do not find that these materials carry Plaintiffs' burden.

Under CERCLA, "even parties not responsible for contamination may fall within the broad definitions of PRPs" in 42 U.S.C. § 9607(a)(1)-(4), *United States v. Atl. Rsch. Corp.*, 551 U.S. 128, 136, 127 S.Ct. 2331, 168 L.Ed.2d 28 (2007), and "a party that falls within any of the four PRP categories of [§ 9607(a)] may be held jointly and severally liable by the government for the entire cost of a cleanup, even if the party is 'innocent' in the sense that it did not contribute to the pollution at the site," *Solutia, Inc. v. McWane, Inc.*, 726 F. Supp. 2d 1316, 1331 (N.D. Ala. 2010). The four PRP categories in § 9607(a) are (1) current owners or operators of a waste facility, (2) any previous owner or operator of a waste facility during any

time in which hazardous substances were disposed of at the waste facility, (3) any person who arranged for disposal or treatment of hazardous substances at a waste facility, and (4) any person who transported hazardous substances to a waste facility.

The 2018 Amended Record of Decision simply indicates that Rock Road Industries was designated a PRP; it does not explain why. In light of the fact that even an "innocent" party can be designated a PRP, *Solutia*, 726 F. Supp. 2d at 1331, this designation without more does not demonstrate, and certainly not beyond "doubt," that Rock Road Industries' conduct forms a significant basis for Plaintiffs' claims, *see Westerfeld*, 621 F.3d at 823.

In contrast, the 1993 Consent Order does suggest why the EPA designated Rock Road Industries a PRP, but the information it contains on this point does not carry Plaintiffs' burden. In that order, the EPA designated four entities as PRPs: Rock Road Industries; Laidlaw Waste Systems (Bridgeton), Inc., which later merged into Bridgeton Landfill; Cotter Corporation; and the Department of Energy. Notably, while the EPA indicated that Cotter Corporation and the Department of Energy were designated PRPs because they arranged for the disposal of the radioactive waste at the landfill, *see* § 9607(a)(3), and it indicated that Bridgeton Landfill's predecessor was designated a PRP because it was an owner or operator of the landfill at the time of the disposal, *see* § 9607(a)(2), all it said about Rock Road Industries' PRP designation was that Rock Road Industries was "a current owner" of the landfill, *see* § 9607(a)(1). But a "current owner" can be designated a PRP under § 9607(a)(1) "without regard to causa-

tion." *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1044 (2d Cir. 1985); *see also Canadyne-Ga. Corp. v. NationsBank, N.A. (S.)*, 183 F.3d 1269, 1275 (11th Cir. 1999) ("[T]he owner of land is directly liable under CERCLA, regardless of whether he or she caused or contributed to the release of hazardous substances there."). Thus, the reason for Rock Road Industries' designation as a PRP leaves open the possibility, particularly when contrasted with the reasons provided for the other entities' designations as PRPs, that the EPA deemed Rock Road Industries a PRP even though its conduct ostensibly giving rise to Plaintiffs' claims was not "significant" for purposes of the local-controversy exception. Thus, the 1993 Consent Order also does not demonstrate, and again certainly not beyond "doubt," that Rock Road Industries' conduct forms a significant basis for Plaintiffs' claims. *See Westerfeld*, 621 F.3d at 823.

* * *

In sum, Plaintiffs' allegations that Defendants all engaged in the same conduct giving rise to Plaintiffs' claims do not satisfy the significant-basis requirement. The few allegations in Plaintiffs' complaint that refer specifically to Rock Road Industries and its conduct also fail to satisfy this requirement. And the extrinsic evidence Plaintiffs call our attention to does not carry their burden to show this requirement is satisfied. Accordingly, the local-controversy exception does not apply in this case, and the district court erred in concluding otherwise.

IV.

For the foregoing reasons, we reverse the district

court's order remanding this action back to state court, and we remand for further proceedings.

STRAS, Circuit Judge, concurring in the judgment.

The court's conclusion is the right one, but I would follow a simpler route to get there. Under the local-controversy exception, "[a] district court shall decline to exercise jurisdiction" if, among other requirements, "at least 1 defendant is a defendant ... who is a citizen of the State in which the action was originally filed." 28 U.S.C. § 1332(d)(4)(A)(i)(II)(cc). The only Missouri citizen that has ever been a defendant is Rock Road Industries, Inc. But between the time this case was filed and when it was removed to federal court, Rock Road merged with another company and ceased to exist as a separate entity. This unusual set of facts leads to a straightforward question: when must there be a local defendant, at the time of initial filing or at the time of removal?

The text provides the answer. It twice uses the present-tense verb "is," *id.*, and "the present tense generally does not include the past," *Carr v. United States*, 560 U.S. 438, 448, 130 S.Ct. 2229, 176 L.Ed.2d 1152 (2010). So what matters is whether a local defendant exists when the district court "exercise[s] jurisdiction," which happens at the time of removal in cases like this one, not at initial filing. 28 U.S.C. § 1332(d)(4)(A); *see Kaufman v. Allstate N.J. Ins.*, 561 F.3d 144, 153 (3d Cir. 2009) ("[T]he local controversy exception requires consideration of the defendants presently in the action."). Indeed, when

filing is the focus, the statute drives that point home, either explicitly or by using the past tense. *See, e.g.*, 28 U.S.C. § 1332(d)(4)(A)(i)(II)(cc), (4)(A)(ii), (7) (referring to "the State in which the action *was* originally filed," requiring that no overlapping class actions have been filed "during the 3-year period *preceding the filing* of th[is] class action," and specifying that plaintiffs' citizenship generally "shall be determined ... *as of the date of filing* of the complaint or amended complaint" (emphasis added)).

All signs, in other words, point to evaluating the defendants' citizenship under the local-controversy exception at the time of removal. *Cf. Mansfield, Coldwater & Lake Mich. Ry. v. Swan*, 111 U.S. 379, 381–82, 4 S.Ct. 510, 28 L.Ed. 462 (1884) (stating that "the difference of citizenship on which the right of removal depends must have existed ... *at the time of the removal*" (emphasis added)). By then, Rock Road was gone and there was no one left to fill the role of "a defendant ... who is a citizen of the State in which the action was originally filed." 28 U.S.C. § 1332(d)(4)(A)(i)(II)(cc). Without a local defendant, there is no local controversy, so I agree that this case must remain in federal court.

APPENDIX B

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

John C. KITCHIN, Jr., North West Auto Body Company, and Mary Menke, on behalf of themselves and all others similarly situated, Plaintiffs,

v.

BRIDGETON LANDFILL, LLC, et al., Defendants.

No. 4:18 CV 672 CDP

Signed 05/08/2019

Anthony D. Gray, Johnson Gray LLC, Kimberly Starr Morr, The Driscoll Firm, P.C., Nathaniel Richard Carroll, Ryan A. Keane, Keane Law LLC, Alexander L. Braitberg, Schlichter and Bogard, LLP, St. Louis, MO, Barry James Cooper, Jr., Celeste Brustowicz, Victor T. Cobb, The Cooper Law Firm, LLC, New Orleans, LA, Ron A. Rustin, Gretna, LA, for Plaintiffs.

Allyson Elisabeth Cunningham, Peter F. Daniel, William Garland Beck, Lathrop and Gage, LLP, Kansas City, MO, Patricia L. Silva, Lathrop and Gage, LLP, Clayton, MO, for Defendants.

MEMORANDUM AND ORDER OF REMAND

CATHERINE D. PERRY, UNITED STATES DISTRICT JUDGE

Plaintiffs John C. Kitchin, Jr., North West Auto Body Company, and Mary Menke are property owners seeking damages and injunctive relief for radioactive contamination of their respective properties allegedly caused by neighboring West Lake Landfill, located in North St. Louis County, Missouri. Plain-

tiffs assert that their property has been damaged by soil, dust, and air contamination from improper generation, handling, storage, and disposal of radioactive materials by four corporate defendants who are landfill owners and operators.

Plaintiffs originally filed this suit in St. Louis County Circuit Court on behalf of themselves and all other others similarly situated, pleading various state-law tort theories. Defendants removed the action to this Court arguing that the allegations arise under federal law – specifically the Price-Anderson Act (PAA) as amended in 1988, 42 U.S.C. §§ 2011, et seq., which provides a federal compensation regime for damages resulting from a nuclear incident; and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601, et seq., which established a federal "Superfund" to clean up uncontrolled or abandoned hazardous-waste sites, and provides for liability of persons responsible for releases of hazardous waste at these sites. In their removal petition, defendants also invoked the Class Action Fairness Act (CAFA), 28 U.S.C. §§ 1332(d), 1453, which permits federal courts to preside over certain class actions in diversity jurisdiction where the aggregate amount in controversy exceeds $5 million; where the class comprises at least 100 plaintiffs; and where there is at least "minimal diversity" between the parties, i.e., at least one plaintiff class member is diverse from at least one defendant.

Plaintiffs move to remand this case to state court. I will grant the motion.

Background

From 1942 to 1957, uranium ore was processed into various uranium compounds at a facility located in downtown St. Louis, Missouri, as part of the Manhattan Project – a United States research project designed to develop the first nuclear weapons. In the late 1940's, the Manhattan Project acquired an additional tract of land near Lambert Airport – the St. Louis Airport Site ("SLAPS") – for storage of radioactive wastes from the uranium processing occurring at the downtown site. Contaminated scrap was also stored at the SLAPS site.

In the 1960's, some of the radioactive wastes were moved from SLAPS to a storage site on Latty Avenue in Hazelwood, Missouri ("Latty Site"). In 1973, the defendant landfill owners and operators accepted over 46,000 tons of these radioactive wastes mixed with contaminated soil and used this mixture as daily cover for the West Lake Landfill located in Bridgeton, Missouri ("Landfill").[1] The Landfill is not a licensed nuclear facility. According to the plaintiffs, despite knowing that the Landfill was not permitted to accept radioactive material and was never an adequate storage or disposal site for radioactive wastes, the defendants nevertheless dumped the wastes into the Landfill and spread them over a large area. Plaintiffs claim that about 15 acres of the Landfill are filled with radioactive wastes at a depth of up to

---

[1] In their amended petition, plaintiffs define their use of the term "Landfill" as referring to "several inactive landfills including West Lake and Bridgeton" Landfills. Amd. Petn., ECF No. 13 at ¶ 4. However, because their specific allegations name West Lake Landfill alone, it appears that that landfill is the only relevant landfill at issue in this case.

20 feet. Plaintiffs contend that because of defendants' spread and improper storage of these wastes, radioactive material has contaminated soil, water, and air, resulting in the contamination of surrounding communities where their properties are located.

A subsurface fire currently exists at the Landfill and emits noxious and offensive odors. Plaintiffs claim that defendants are permitting the fire to spread uncontrolled, which could affect the radioactively-contaminated areas of the Landfill and cause increased risk of radioactive exposure to persons in the surrounding area.

As of December 31, 2004, the Landfill stopped accepting waste and is now used only as a transfer station. The Landfill is currently a Superfund site under the regulation of the Environmental Protection Agency (EPA) pursuant to CERCLA.

None of the defendants have entered into indemnification agreements with the United States government with respect to the complained-of activities.

Plaintiffs' Properties

In 1995, plaintiff Kitchin purchased real property in Bridgeton, Missouri, adjacent to the Landfill. His family-owned-and-operated business, North West Auto Body Company, is located on the property. Kitchin first learned in 2017 that the property and the building housing the business were contaminated with radioactive material. Kitchin and his company contend that the auto body shop has lost significant business, revenue, and customers as a result of the contamination, and will lose future business and incur relocation costs.

Plaintiff Menke owns real property in Bridgeton, Missouri. She learned in 2018 that her property and the structure on it were contaminated with radioactive material.

Plaintiffs frequently experience offensive odors emanating from the Landfill. Samples taken on and around plaintiffs' properties confirm a highly-elevated presence of radioactive particles matching the fingerprint of the radioactive wastes dumped at the Landfill. Trees in the vicinity of the North West Auto Body property contain radiological and organic contamination. Plaintiffs claim that the radioactive contamination of their property migrated from the Landfill and was caused by defendants' improper handling, storage, and disposal of radioactive materials. They claim that such contamination and offensive odors render their properties unfit for normal use and enjoyment, and have destroyed the fair market value of the properties.

The Amended Petition

Plaintiffs filed their original petition in state court on February 20, 2018, and an amended petition on April 2, 2018. The case was removed to this Court on April 27, 2018. The amended petition remains the operative petition in this action.

Named as defendants in the amended petition are the owners of the Landfill – Bridgeton Landfill, LLC and Rock Road Industries, Inc.; and the operators of the Landfill – Republic Services, Inc. and Allied Services, LLC. Defendant Bridgeton Landfill removed the action from state court with the consent of defendants Republic Services and Allied Services. In the notice of removal, Bridgeton Landfill averred

that named defendant Rock Road Industries merged into Bridgeton Landfill on April 9, 2018, after the amended petition was filed.

In their amended petition, plaintiffs assert the following state-law claims against all defendants: (1) trespass, (2) permanent nuisance, (3) temporary nuisance, (4) negligence, (5) negligence per se, (6) strict liability/absolute liability, (7) injunctive relief seeking scientific and medical monitoring, (8) civil conspiracy, and (9) punitive damages. As relief, plaintiffs seek damages resulting from the loss of use and enjoyment of their property, for annoyance and discomfort, for damage to personal property, and for diminution in the market value of their property. Plaintiffs also seek recovery of costs and expenses incurred as a result of their exposure to radioactive emissions, including the cost of remediation and relocation. They also seek statutory damages under Missouri law, punitive and exemplary damages, costs and attorneys' fees, and interest on all of the requested monetary relief. Finally, plaintiffs seek injunctive relief enjoining defendants from continuing in the unlawful conduct, directing defendants to identify members of the class for compensation, and compelling defendants to clean up all contamination and to provide medical monitoring.

For the following reasons, I do not have jurisdiction over plaintiffs' claims or over this action. I will therefore remand this case to state court.

Legal Standard

Federal courts are courts of limited jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994). "It

is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Id.* (citations omitted).

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)). The party seeking removal and opposing remand carries the burden of establishing federal subject-matter jurisdiction by a preponderance of the evidence. *Kokkonen*, 511 U.S. at 377, 114 S.Ct. 1673; *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 remand to state court. *In re Prempro*, 591 F.3d at 620.

Federal-Question Jurisdiction

"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 Sec. Servs., LLC*, 123 F. Supp. 3d 1152, 1155 (E.D. Mo. 2015) (quoting *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987)). *See also Gaming Corp. of Am. 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.") (quot-

ing *Caterpillar*, 482 U.S. at 392, 107 S.Ct. 2425). 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, 107 S.Ct. 2425.

In cases 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 nevertheless apply in circumstances where "the preemptive force of a statute is so extraordinary that it converts an ordinary state common-law complaint into one stating a federal claim." *Caterpillar*, 482 U.S. at 393, 107 S.Ct. 2425. *See, e.g., Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 107 S.Ct. 1542, 95 L.Ed.2d 55 (1987) (former employee's claims alleging breach of contract, retaliatory discharge, and wrongful termination of disability benefits in state-court complaint were preempted by ERISA and necessarily federal in character; removal under 28 U.S.C. § 1441(a) was therefore proper). "Where a complaint raises issues to which federal law applies with complete preemptive force, the Court must look beyond the face of the complaint in determining whether remand is proper." *Green v. Arizona Cardinals Football Club, LLC*, 21 F. Supp. 3d 1020, 1025 (E.D. Mo. 2014). *See also Strong v. Republic Servs., Inc.*, 283 F. Supp. 3d 759, 763 (E.D. Mo. 2017). If upon such examination I find that 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," I may conclude that plaintiffs have "simply brought a mislabeled federal claim" that could be asserted under some federal statute. *Johnson v. MFA Petroleum Co.*, 701 F.3d 243, 247-48

(8th Cir. 2012) (internal quotation marks and citations omitted).

In addition, federal-question jurisdiction exists where state law claims implicate significant federal issues. *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312, 125 S.Ct. 2363, 162 L.Ed.2d 257 (2005). "The doctrine captures the commonsense notion that a federal court ought to be able to hear claims recognized under state law that nonetheless turn on substantial questions of federal law[.]"*Id.* While there is no single test for jurisdiction over federal issues rooted in state-law claims between non-diverse parties, the relevant question is "does a state-law claim necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities." *Id.* at 314, 125 S.Ct. 2363; *see also Baker v. Martin Marietta Materials, Inc.*, 745 F.3d 919, 924 (8th Cir. 2014).

Against this backdrop, I turn to defendants' contention that the claims raised in plaintiffs' amended petition, although couched in terms of state-law violations, are completely preempted by the PAA and, further, raise claims and/or significant federal issues under CERCLA.

A. Price-Anderson Act

Defendants contend that the PAA confers exclusive federal jurisdiction over this action and completely preempts plaintiffs' state-law claims. For the following reasons, plaintiffs' claims do not arise under the PAA.

1. *Understanding the Background and Purpose of the PAA*[2]

The 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. 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. In short, 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 suppliers) might be liable under conventional tort principles.

The PAA was enacted in 1957 as an amendment to the Atomic Energy Act (AEA) of 1954. The purpose of the AEA was to open up nuclear development to civilian industry. But because of the risk of extensive liability potentially facing entities in the event of a nuclear accident, civilian response to the AEA was limited. Accordingly, to remove this deterrent to private participation in the development of nuclear energy, Congress passed the PAA to 1) assure adequate public compensation in case of a nuclear accident, and 2) set a limit on the liability of private industry. As enacted, the PAA established liability limits for commercial power plants licensed by the

---

[2] The following background and summary is largely taken from Senate Report No. 100-70 addressing the Price-Anderson Amendments Act of 1988. S. Rep. No. 100-70, 1988 U.S.C.C.A.N. 1424, 1988 WL 169872.

Atomic Energy Commission (AEC) (now licensed by the NRC) through a combination of private insurance and indemnification by the federal government. For contractor-operated activities of the AEC (now contractor activities of the DOE), liability limits were established by federal indemnification alone.[3]

When enacted in 1957, the PAA provided federal-question jurisdiction over "extraordinary nuclear occurrences" only. An "extraordinary nuclear occurrence" was defined in the AEA as "an occurrence '[t]hat has resulted or probably will result in substantial damages to persons offsite or property offsite.'" S. Rep. No. 100-70, 15, 1988 U.S.C.C.A.N. 1424, 1427. Therefore, unless diversity jurisdiction existed, most nuclear-exposure claims were litigated in state court. *See* Nathan White, *Arguments Not Raised: How the Plaintiffs' Missed Opportunity Led to the Tenth Circuit's Decision in June v. Union Carbide Corp.*, 2011 B.Y.U. L. Rev. 245, 248 (2011). With the renewal of the PAA in 1966, Congress required licensees and contractors to waive traditional defenses of state tort law against claims of an extraordinary nuclear occurrence in order to facilitate

---

[3] With the Energy Reorganization Act of 1974 (ERA), Congress abolished the AEC and created the NRC, to which some of the AEC's duties were transferred, including all of the AEC's licensing functions. All licenses previously issued by the AEC and in effect upon ERA's passage remained in effect. Pub. L. No. 93-438, 88 Stat. 1233 (1974). The ERA also created the Energy Research and Development Administration (ERDA), which assumed the AEC's research and development responsibilities. *Id.* In 1977, the ERDA was terminated and its responsibilities were transferred to the newly-created DOE. *See* Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 565 (1977).

recovery by plaintiffs. S. Rep. No. 100-70, 15, 1988 U.S.C.C.A.N. 1424, 1427.

In 1975, Congress added a provision to the PAA to phase out federal indemnity for NRC licensees and replace it with a self-insurance pool-type arrangement. Under this arrangement, in the event that damages from a commercial nuclear power plant accident were likely to exceed the coverage available from private insurance, each NRC reactor licensee would be assessed up to a capped amount to pay a pro-rated share of the damages in excess of private insurance available.[4] For such accidents, therefore, the limited liability plan consisted of a combination of the maximum amount of private insurance and contributions made by each of the reactor licensees. The federal-indemnification plan remained in place for DOE contractors for DOE-contractor-related accidents. S. Rep. No. 100-70, 15, 1988 U.S.C.C.A.N. 1424, 1428. However, whether to enter into indemnification agreements with such contractors was at the Energy Secretary's discretion, based on the Secretary's determination as to whether the contractor's activities involved the risk of public liability for a "substantial" nuclear incident.[5]

In 1988, Congress passed the Price-Anderson Amendments Act ("1988 PAA"), which, among other things, removed the Energy Secretary's discretion to indemnify DOE contractors. Under the 1988 PAA,

---

[4] Licensees were required to provide proof to the NRC that they had the maximum amount of private nuclear liability insurance. S. Rep. No. 100-70, 43, 1988 U.S.C.C.A.N. 1424, 1452.

[5] *See Dep't of Energy Rep. to Congress on the Price-Anderson Act* (March 1999), *available at* https://www.energy.gov/sites/prod/files/gcprod/documents/paa-rep.pdf.

federal indemnification to DOE contractors was now required for all nuclear activities, regardless of whether the risk of a nuclear incident was "substantial" or not. The purpose of this amendment was to guarantee to the public that the Price-Anderson system would be available to provide compensation in the event of a nuclear incident. Accordingly, the DOE was now mandated to "enter into agreements of indemnification...with any person who may conduct activities under a contract with the Department of Energy that involve the risk of public liability[.]"42 U.S.C. § 2210(d)(1)(A). *See also* 48 C.F.R. §§ 950.7006, 952.250-70. With these mandated agreements, the DOE was charged with providing indemnification to such persons on claims for public liability that "arise[ ] out of or in connection with the activities under [the DOE] contract" *and* "arise[ ] out of or result[ ] from a nuclear incident[.]"). 48 C.F.R. § 952.250-70(d)(2).

The 1988 PAA amendments also broadened federal jurisdiction beyond just "extraordinary nuclear occurrences" – that is, those occurrences involving "substantial" damages – and created a federal cause of action for "any public liability action arising out of or resulting from a nuclear incident." 42 U.S.C. § 2210(n)(2). The amendments also provided that such public liability actions filed in state court were to be removed to federal court. *Id.*

2. *Claims Arising Under the PAA*

"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 juris-

diction without regard to the citizenship of any party or the amount in controversy." 42 U.S.C. § 2210(n)(2). A "public liability action" is "any suit asserting public liability." 42 U.S.C. § 2014(hh). And "public liability" means "any legal liability arising out of or resulting from a nuclear incident[.]"42 U.S.C. § 2014(w). Accordingly, only suits that involve "nuclear incidents" as defined by the PAA are subject to PAA federal-question jurisdiction. *See Cook v. Rockwell Int'l Corp.*, 790 F.3d 1088 (10th Cir. 2015); *Cotroneo v. Shaw Env't & Infrastructure, Inc.*, 639 F.3d 186 (5th Cir. 2011); *Strong v. Republic Servs., Inc.*, 283 F. Supp. 3d 759 (E.D. Mo. 2017); *McClurg v. MI Holdings, Inc.*, 933 F. Supp. 2d 1179 (E.D. Mo. 2013); *Banks v. Cotter Corp.*, No. 4:18-CV-00624 JAR, 2019 WL 1426259 (E.D. Mo. Mar. 29, 2019).

Recently, this district court has had the opportunity to squarely address the question of whether a "nuclear incident" under the PAA requires the alleged unlawful conduct to have arisen from NRC-licensed activities or under a DOE contract with agreements of indemnification. *See Strong v. Republic Servs., Inc.*, 283 F. Supp. 3d 759 (E.D. Mo. 2017); *Banks v. Cotter Corp.*, No. 4:18-CV-00624 JAR, 2019 WL 1426259 (E.D. Mo. Mar. 29, 2019). In both cases, the court held that there cannot be a nuclear incident under the PAA without such an applicable license or indemnity agreement. *Strong*, 283 F. Supp. 3d at 772; *Banks*, 2019 WL 1426259, at *6. For the following reasons, I agree with this conclusion.

As defined in the 1988 PAA, a "nuclear incident" is

> 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....

42 U.S.C. § 2014(q). In further defining "nuclear incident," § 2014(q) refers to the term's use in 42 U.S.C. § 2210(c) and (d), which, significantly, governs the PAA indemnification plan for NRC licensees and DOE contractors.[6] Specifically, § 2210(c) requires the NRC, "*with respect to licenses issued* between August 30, 1954, and December 31, 2025," to "agree to indemnify and hold harmless *the licensee* and other persons indemnified ... from public liability arising from nuclear incidents[.] ... *Such a contract of indemnification shall cover public liability*

---

[6] *And provided further,* That as the term [nuclear incident] 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(q).

arising out of or in connection with the licensed activity." 42 U.S.C. § 2210(c) (emphasis added). Section 2210(d) requires the DOE to enter into indemnification agreements with "any person who may conduct activities *under a contract* with the Department of Energy that involve the risk of public liability[.]"42 U.S.C. § 2210(d)(1)(A) (emphasis added). Section 2210(d) further requires these indemnification agreements to be "the exclusive means of indemnification for public liability arising from activities" conducted under DOE contracts. 42 U.S.C. § 2210(d)(1)(B)(i)(I).[7]

Accordingly, when the definition is read *in toto* and in conjunction with § 2210, "nuclear incidents" are those occurrences within and outside the United States that arise from activities conducted under DOE contracts or in connection with NRC-licensed activity. When considered with the plain text of § 2210(c) and (d) – that public liability actions can arise only from activities under a contract with the DOE or in connection with NRC-licensed activity – I must agree with the court's observation in *Strong* that "the terms 'nuclear incident' and 'occurrence' are inextricably intertwined with 'licenses' and 'indemnification agreements,' thus suggesting licenses and indemnification agreements are an integral part of the PAA's statutory scheme[.]"*Strong*, 283 F. Supp. 3d at 771. In light of this, I also agree with the

[7] To the extent defendants argue that "*other* persons indemnified" shows Congress's consideration that PAA coverage would extend to non-NRC-licensees and/or non-DOE- contractors, the PAA clearly states that any statutory indemnification – to whomever – is for only those liabilities that arise out of or are connected with activities conducted under NRC licenses or DOE contracts. 42 U.S.C. § 2210(c), (d).

Strong court's conclusion that, therefore, "there cannot be a nuclear incident without an applicable license or indemnity agreement." *Id.*

My review of the legislative history of the PAA supports this conclusion. Nothing in the PAA – either originally enacted or through its evolution – provides that it is, or was intended to be, the exclusive remedy for all claims involving nuclear radiation. Instead, as defined by Congress itself, "The Price-Anderson system is a comprehensive, compensation-oriented system of liability insurance *for Department of Energy contractors and Nuclear Regulatory Commission licensees* operating nuclear facilities." S. Rep. No. 100-70, 14, 1988 U.S.C.C.A.N. 1424, 1426 (emphasis added). The stated purpose of the 1988 PAA amendments was "to modify and extend the portions of the Price-Anderson Act that provide for public liability coverage for contractors of the Department of Energy," S. Rep. No. 100-70, 12, 1988 U.S.C.C.A.N. 1424, 1425, and the amendments achieved this in part by mandating federal indemnification to DOE contractors (and subcontractors) for all risks of nuclear incidents arising out of their DOE-contracted activities instead of only risks determined at the discretion of the Secretary of Energy to be substantial. The amendments further achieved the intended purpose by removing the requirement that incidents be "substantial" in order to fall within the federal court's subject-matter jurisdiction. However, nothing in the 1988 amendments altered the purpose of the PAA, which is to provide a compensation plan and liability assessment for nuclear incidents arising out of DOE-contracted activity and

NRC-licensed activity. *See Banks*, 2019 WL 1426259, at *8.

> [I]n 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.

Id.

The statutory construction and legislative history of the PAA shows it to apply only to public liability claims arising out of NRC-licensed activity or DOE-contracted activity operating under indemnification agreements. *See Strong* 283 F. Supp. 3d at 772; *Banks*, 2019 WL 1426259, at *6. The amended petition here does not allege any such activity. The PAA does not apply to plaintiffs' claims.

3. *Cotter Corporation's Source Material License*

In their notice of removal, defendants aver that Cotter Corporation was the entity that handled, processed, and moved the radioactive wastes from the Latty Site to the Landfill.[8] Defendants further aver that Cotter Corporation engaged in this activity pursuant to a Source Material License issued to it (Cotter) by the AEC in 1969. Defendants argue, therefore, that to the extent a license is required for federal jurisdiction under the PAA, plaintiffs' claims in-

[8] Cotter Corporation is not a defendant in this action.

volve radioactive materials that were handled and disposed of by an AEC licensee, making the licensed activity inextricably part of the claims and thus within the PAA.

Plaintiffs argue that the radioactive wastes at issue in this action are uranium mill tailings made from the uranium processing in downtown St. Louis. Plaintiffs urge me to adopt the *Strong* court's reasoning that Cotter's 1969 license could not have covered the radioactive material delivered by Cotter to the Landfill in 1973 because Congress did not include uranium mill tailings within the definition of covered "byproduct materials" until 1978. *See Strong*, 283 F. Supp. 3d at 773. In their amended petition, however, plaintiffs do not specifically allege that the material at issue was uranium mill tailings. Instead, plaintiffs claim that the off-site radioactive waste found on their properties "has the fingerprint" of the uranium ore processed in St. Louis that generated the "hazardous, toxic, carcinogenic, radioactive wastes" that were dumped into the Landfill. (ECF 13 at ¶¶ 4, 98 B., 112.)[9]

Regardless of whether uranium mill tailings are the radioactive wastes at issue in this case or whether plaintiffs properly pled that they are, Cotter's license nevertheless does not affect my determination that the PAA does not apply to plaintiffs' claims.

---

[9] With their reply in support of remand, plaintiffs submitted declarations from experts declaring, *inter alia*, that the wastes at issue here are in fact mill tailings and, further, that the PAA does not apply to plaintiffs' claims. Defendants ask me to strike these declarations. Because I have not considered these declarations in making my determination here, I will deny defendants' motion to strike as moot.

Cotter Corporation's 1969 Source Material License authorized it to "receive, possess and import the source material [uranium]; to use such material for the purpose(s) and at the place(s) designated [Latty Site]; and to deliver or transfer such material to persons authorized to receive it[.]" (ECF 1-5, Feingold Decl., Exh. D.) As alleged by plaintiffs in their amended petition, their damages do not arise from the use of the radioactive material *at the Latty Site*, but rather from the defendants' unauthorized receipt of the material and their unauthorized use of the material at an unauthorized site, the Landfill. Cotter's Source Material License did not cover its delivery or transfer of the material to such unauthorized entities. Nor did it cover defendants' activities at the Landfill. Cotter's license therefore does not provide a basis for federal subject-matter jurisdiction under the PAA. *See Banks*, 2019 WL 1426259, at *9.

None of the defendants here is an indemnitee or licensee as contemplated under the PAA, and their alleged conduct does not arise from NRC-licensed activity or under a DOE contract with indemnification. The PAA therefore does not apply to plaintiffs' claims, and defendants have failed to meet their burden of establishing federal-question jurisdiction under the PAA.

B. CERCLA

Defendants claim that the injunctive relief sought in plaintiffs' amended petition – specifically, for complete clean-up of the contamination, to prevent further contamination, and to decrease contamination risks to plaintiffs' property – constitutes a CERCLA challenge because such relief would inter-

fere with the EPA's remediation plans at the federal Superfund site. They further contend that because plaintiffs allege that the Landfill is the source of the radioactive contamination found on their properties, and the Landfill is a federal Superfund site over which the EPA has exclusive jurisdiction, then the EPA likewise has exclusive jurisdiction over their properties under CERCLA. I reject both arguments.

1. *CERCLA Challenge*

Nothing in plaintiffs' amended petition shows that they are requesting relief that would interfere with the EPA's remediation plans. Although plaintiffs make reference to the Landfill being a Superfund site, their claims do not expressly challenge the effectiveness of the Landfill remedy, request modification of the remedial plan, or seek specific action that could conflict with the remediation process.[10] And defendants offer no explanation as to how plaintiffs' requested relief would alter EPA's plans in a way

---

[10] I disagree with defendants that plaintiffs' counsel's remarks made at a press conference regarding site clean-up constitute "other paper" under 28 U.S.C. § 1446(b)(3) sufficient to confer federal jurisdiction over this action. (*See* ECF 39 at pp. 21-22.) Regardless of the later transcription of the remarks, nothing before the Court shows that the press conference at issue here approached the level of authenticity or reliability afforded court-recognized "other paper" designations, such as deposition transcripts, discovery responses, settlement offers, or other official communications between parties. *See Huffman v. Saul Holdings Ltd. P'ship*, 194 F.3d 1072, 1078 (10th Cir. 1999) ("[T]he circumstances permitting removal must normally come about as a result of a voluntary act on the part of the plaintiff.") (citing *DeBry v. Transamerica Corp.*, 601 F.2d 480, 486-88 (10th Cir. 1979)). *See also S.W.S. Erectors, Inc. v. Infax, Inc.*, 72 F.3d 489, 494 (5th Cir. 1996).

that is somehow inconsistent with any particular federal obligation or requirement.

Plaintiffs seek relief only under common law theories that have long been recognized by Missouri courts as a basis for recovery from parties found to be responsible for personal injury and property damage occurring as a result of the release of toxic chemical wastes or other hazardous substances into the environment. *E.g.*, *Elam v. Alcolac, Inc.*, 765 S.W.2d 42 (Mo. Ct. App. 1988) (nuisance, negligence); *Kansas City v. W.R. Grace & Co.*, 778 S.W.2d 264 (Mo. Ct. App. 1989) (negligence, strict liability, civil conspiracy), *abrogated on other grounds by Ellison v. Fry*, 437 S.W.3d 762 (Mo. banc 2014). Plaintiffs do not cite CERCLA as a basis for their claims; nor do they seek reimbursement of response costs or any other form of relief available under its provisions.

Moreover, CERCLA does not completely preempt plaintiffs' claims or otherwise foreclose plaintiffs from relying on common law theories for the relief they seek. In the absence of complete preemption, defendants' contentions regarding the potential effect of injunctive relief on the existing remedial program can only be regarded as federal defenses to properly raised state law claims, which state courts are competent to adjudicate. *See In re Pfohl Bros. Landfill Litig.,* 67 F. Supp. 2d 177, 184-85 (W.D.N.Y. 1999) (CERCLA neither preempts state law toxic tort claims nor creates a federal cause of action for personal injury or property damage caused by release of hazardous substances; defendants' interjection of issues relating to applicability of CERCLA found insufficient to confer federal-question jurisdiction) (citing *Merrell Dow Pharm., Inc. v. Thompson,*

478 U.S. 804, 808, 106 S.Ct. 3229, 92 L.Ed.2d 650 (1986) ("A defense that raises a federal question is inadequate to confer federal jurisdiction.")).

2. *Exclusive EPA Jurisdiction*

There is no dispute that the EPA has exclusive jurisdiction over the Landfill Superfund site. Defendants argue that this jurisdiction also includes plaintiffs' contaminated properties because a "facility" over which the EPA has exclusive jurisdiction under CERCLA is defined as "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, *or otherwise come to be located*[.]"42 U.S.C. § 9601(9) (emphasis added). Accordingly, defendants argue, because hazardous materials allegedly came to be located on plaintiffs' properties, those properties are necessarily within the EPA's exclusive jurisdiction under CERCLA. To take defendants' argument to its logical conclusion, then, even with a properly-pled claim under 42 U.S.C. § 9607, private property owners could themselves be liable under CERCLA because their contaminated property, for which they otherwise would seek to recover reimbursement for response costs, would itself be a "facility" even without release of hazardous material from their property. This is not a logical reading of CERCLA, nor does it further CERCLA's intended purpose.

As to defendants' argument that the EPA nevertheless has exclusive jurisdiction over the Landfill Superfund site, nothing in the amended petition shows that plaintiffs seek relief that would require defendants to take action that would overlap with, alter, or contradict any EPA remedy that is being re-

viewed and/or or taken at the site under CERCLA. Indeed, nothing in the amended petition takes away from the EPA's jurisdiction over the Superfund site. CERCLA does not completely preempt state tort liability for damages caused by the release of hazardous substances, *See Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*, 596 F.3d 112, 138 (2d Cir. 2010), and the causes of action set forth in the amended petition do not necessarily depend on resolution of substantial questions regarding response-cost liabilities or other obligations imposed by CERCLA. Nor have defendants demonstrated that plaintiffs are making a CERCLA challenge by requesting relief that would interfere with the EPA's remediation plans. "[T]he mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction." *Merrell Dow Pharm.*, 478 U.S. at 813, 106 S.Ct. 3229; *see also MSOF Corp. v. Exxon Corp.*, 295 F.3d 485, 491-92 (5th Cir. 2002) (finding that neither CERCLA nor a federal consent decree created federal "arising under" jurisdiction over plaintiffs' state law claim).

Accordingly, resolving all doubts against removal, I find that defendants have failed to meet their burden of establishing that the amended petition raises any actually disputed and/or substantial issues arising under CERCLA. *Grable & Sons*, 545 U.S. at 314, 125 S.Ct. 2363.

Class-Action Jurisdiction Under CAFA

CAFA "confers federal jurisdiction over class actions where, among other things, 1) there is minimal diversity; 2) the proposed class contains at least 100 members; and 3) the amount in controversy is at

least $5 million in the aggregate." *Plubell v. Merck & Co.*, 434 F.3d 1070, 1071 (8th Cir. 2006) (citing 28 U.S.C. § 1332(d)); *see also Raskas v. Johnson & Johnson*, 719 F.3d 884, 886-87 (8th Cir. 2013). "Although CAFA expanded federal jurisdiction over class actions, it did not alter the general rule that the party seeking to remove a case to federal court bears the burden of establishing federal jurisdiction." *Westerfeld v. Independent Processing, LLC*, 621 F.3d 819, 822 (8th Cir. 2010).

Plaintiffs do not dispute that defendants met their burden of establishing federal jurisdiction under CAFA. They claim, however, that the "local controversy" exception to CAFA applies to the circumstances of this case, requiring me to decline to exercise jurisdiction and remand the matter to state court. I agree.

Congress established two mandatory exceptions to CAFA's broad expansion of federal jurisdiction over class actions. Under the local-controversy exception invoked by the plaintiffs here, a district court must decline to exercise jurisdiction over a class action in which 1) more than two-thirds of the class members in the aggregate are citizens of the state in which the action was originally filed, 2) at least one defendant "from whom significant relief is sought by members of the plaintiff class" and "whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class" is a citizen of the state in which the class action was originally filed, 3) the principal injuries were incurred in the state in which the action was filed, and 4) no other class action alleging similar facts was filed in the three years prior to the commencement of the current class action. 28

U.S.C. § 1332(d)(4)(A); *Westerfeld*, 621 F.3d at 822. "[T]he purpose of each of these criteria is to identify a truly local controversy – a controversy that uniquely affects a particular locality to the exclusion of all others." S. Rep. No. 109-14, 39, 2005 U.S.C.C.A.N. 3, 38. "[C]lass actions with a truly local focus should not be moved to federal court ... because state courts have a strong interest in adjudicating such disputes." *Id.* Accordingly, where the controversy "at its core" is a local one, and the state court where it was brought has a strong interest in resolving the dispute, the case should remain in state court. S. Rep. No. 109-14, 41, 2005 U.S.C.C.A.N. 3, 39.

In seeking remand on the basis of the local-controversy exception, plaintiffs bear the burden of establishing that the exception applies. *Westerfeld*, 621 F.3d at 822-23. I may look only to the removed petition in deciding whether the local controversy criteria are met. *Coleman v. Estes Express Lines*, 631 F.3d 1010, 1017 (9th Cir. 2011), *quoted approvingly in City of O'Fallon, Mo. v. CenturyLink, Inc.*, 930 F. Supp. 2d 1035, 1049-50 (E.D. Mo. 2013); *Moore v. Scroll Compressors, LLC*, No. 14-03109-CV-S-GAF, 2014 WL 12597511, at *8 (W.D. Mo. July 8, 2014).

Defendants argue that plaintiffs cannot meet the first two elements of the local-controversy exception, namely, the two-thirds requirement and the local "significant" defendant requirement. Their argument as to the two-thirds requirement can be disposed of easily. In the amended petition, plaintiffs seek relief on behalf of themselves and of the putative class. The named plaintiffs in this action are Missouri citizens. As for the putative class, plaintiffs identify two subclasses whose members are limited to "Missouri

citizens." Although defendants argue that this class definition runs counter to plaintiffs' intention to seek relief for all individuals and businesses in the vicinity of the Landfill, it is well understood that plaintiffs are the masters of their complaint. *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 33 S.Ct. 410, 57 L.Ed. 716 (1913). I will not read into the amended petition the existence of non-Missouri-citizen class members where they are expressly excluded. Since the only class members in this action are Missouri citizens, plaintiffs have met the two-thirds requirement of the local-controversy exception.

I also conclude that plaintiffs have met the local significant defendant requirement. When plaintiffs filed this action and at the time they amended their petition, named defendant Rock Road Industries was a Missouri citizen, having been incorporated in the State of Missouri and having its principal place of business in Missouri. Although defendants aver that Rock Road Industries has since been merged into Bridgeton Landfill, an LLC whose membership structure shows it to be a citizen of Delaware and Arizona, I look only to the removed petition to determine whether the local controversy criteria are met. Accordingly, because there is no dispute that Rock Road Industries was properly identified as a citizen of Missouri in the amended petition that was removed to this Court, and this class action was originally filed in Missouri, Rock Road Industries satisfies the "local" defendant element of the analysis.

It likewise satisfies the "significant" element. The first criterion is whether "significant relief is sought" from the local defendant. The second criterion is

whether the defendant's "alleged conduct forms a significant basis for the claims" asserted by the proposed class. Again, I look only to the removed petition in deciding whether both criteria are met. *Coleman*, 631 F.3d at 1017.

As to the "significant relief" provision, I look to the relief plaintiffs seek from the local defendant, and not the relief that may be obtained from that defendant. *Coffey v. Freeport McMoran Copper & Gold*, 581 F.3d 1240, 1244 (10th Cir. 2009), *quoted approvingly in CenturyLink*, 930 F. Supp. 2d at 1049. A plaintiff-class seeks significant relief from a local defendant where all the class members have claims against the defendant and all class members want to hold the local defendant jointly and severally liable for their claims. *Id.* We have that, and more, here. The amended petition in this case seeks damages equally from all defendants. There is nothing in the amended petition to indicate that Rock Road Industries is a nominal defendant or that its subsidiary status undercuts the substantial monetary relief sought by plaintiffs. In addition, the amended petition seeks injunctive relief from all defendants, and nothing in the petition indicates that the injunctive relief sought is in and of itself insignificant or that Rock Road Industries would be incapable of complying with an injunction. Plaintiffs have thus satisfied the "significant relief" requirement of the local-controversy exception. *See CenturyLink*, 930 F. Supp. 2d at 1051.

With the "significant basis" provision, there is no "absolute quantitative requirement." *Kaufman v. Allstate N.J. Ins. Co.*, 561 F.3d 144, 156 (3d Cir. 2009), *quoted approvingly in CenturyLink*, 930 F.

Supp. 2d at 1047. Instead, I must compare the alleged conduct of the local defendant to the alleged conduct of all the defendants against the backdrop of all of the claims of the action. *Id.*; *see also Westerfeld*, 621 F.3d at 825. "The local defendant's alleged conduct must be an *important* ground for the asserted claims in view of the alleged conduct of all the Defendants." *Kaufman*, 561 F.3d at 157 (emphasis in *Kaufman*).

Here, plaintiffs' amended petition alleges the same claims against all defendants. It claims that the defendants all engaged in the same conduct, including knowingly and improperly accepting radioactive wastes; improperly dumping and spreading such wastes over several acres of the Landfill; and causing radioactive contaminants to be dispersed, resulting in damage to neighboring properties and communities. Plaintiffs also claim that all defendants maintained daily control over the management, operation, and environmental decisions of the Landfill, thereby making them all responsible for the damages alleged. The conduct of Rock Road Industries is the same conduct alleged against the other defendants. There is no need or requirement for me to conduct a "mini-trial" to adduce evidence as to the specific conduct of each of the defendants. *Coffey*, 581 F.3d at 1245; *CenturyLink*, 930 F. Supp. 2d at 1051. Rock Road Industries' status as a subsidiary is irrelevant since the conduct alleged is the same for all defendants. The amended petition's allegations indicate that Rock Road Industries' conduct forms a significant basis of all claims asserted.

Finally, contrary to defendants' assertion, plaintiffs' filing of their motion to remand less than two

months after removal was reasonable. *See Graphic Commc'ns Local 1B Health & Welfare Fund A v. CVS Caremark Corp.*, 636 F.3d 971, 975-76 (8th Cir. 2011) (§ 1447(c)'s 30-day requirement to file motion to remand does not apply to CAFA's local-controversy exception; instead, remand motion must be filed within a "reasonable" time). At the time plaintiffs sought remand, the case was still in its infancy. The three removing defendants had filed their answers, and an order scheduling the Rule 16 conference had been entered. Discovery had not yet begun. Other than a within-district transfer between judges, nothing else of note happened in the case. Further, CAFA was not the only basis upon which the defendants removed this case from state court. Given that additional complex issues regarding subject-matter jurisdiction were present, it was not unreasonable for plaintiffs to address all of these issues in one motion to remand instead of piecemeal. Filing such a comprehensive motion 56 days after removal was not unreasonable in the circumstances of this case.

Conclusion

Defendants have failed to meet their burden of establishing federal subject-matter jurisdiction for purposes of the PAA and CERCLA. Further, plaintiffs have met their burden of establishing that the local-controversy exception to CAFA jurisdiction applies in this case. Accordingly, this action must be remanded to state court. In light of this determination, I need not address plaintiffs' argument that applying the PAA to their claims would deprive them of due process.

Accordingly, for all of the foregoing reasons,

IT IS HEREBY ORDERED that plaintiffs' Motion for Remand [27] is granted. Their alternative Motion for Leave to Amend and Remand is denied as moot.

IT IS FURTHER ORDERED that defendants' Motion to Strike Plaintiffs' Experts or, in the Alternative, for Leave to File Sur-Reply [45]; and Motion for Oral Argument [47] are denied as moot.

IT IS FURTHER ORDERED that this case is remanded to the Circuit Court of St. Louis County, Missouri, from which it was removed.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 19-2072

John C. Kitchin, et al.

Appellees

v.

Bridgeton Landfill, LLC, et al.

Appellants

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.

August 12, 2021

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