IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

JEANYNE JAMES, ROBIN COLBERT, JANE DREVO, SAM DREVO, BROOKE EDGE AND BILL EDGE, SR., LORI FOWLER, IRIS HAMPTON, JAMES HOLLAND, RACHELLE MCMASTER, KRISTINA MONTOYA, NORTHWEST RIVER GUIDES, LLC, SHARIENE STOCKTON AND KEVIN STOCKTON, VICTOR PALFREYMAN, PALFREYMAN FAMILY TRUST, and DUANE BRUNN, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

PACIFICORP, an Oregon corporation; and PACIFIC POWER, an Oregon registered electric utility and assumed business name of PACIFICORP,

Defendants.

Nos. 20CV33885 (Lead)
21CV33595, 20CV37430, 22CV26326, 22CV29976, 22CV30450, 22CV29694, 22CV29187, 22CV13946, 22CV29859, 22CV41640

DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, MOTION FOR A NEW TRIAL, AND RENEWED MOTION FOR DECERTIFICATION

Assigned to: Hon. Steffan Alexander

Trial Date: April 24, 2023
Verdicts Rendered: June 12 and 14, 2023

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UTCR 5.050 STATEMENT

Pursuant to UTCR 5.050, PacifiCorp requests oral argument on this motion, and estimates that 2 hours will be required. Official court reporting services are requested.

MOTIONS

Defendants PacifiCorp and Pacific Power (collectively, "PacifiCorp") bring the following motions which are supported by the following Memorandum of Points and Authorities, the pleadings and papers on file in this case, and the record in this action.

Motion for Judgment Notwithstanding the Verdict: PacifiCorp moves for the entry of judgment in favor of PacifiCorp notwithstanding the verdict under ORCP 63.

Motion for a New Trial: In the alternative, PacifiCorp moves for a new trial under ORCP 63 C and ORCP 64.

Renewed Motion to Decertify: PacifiCorp moves to decertify this class action in whole or in part under ORCP 32.

MEMORANDUM OF LAW

The jury's verdict cannot stand for a host of reasons. The jury awarded a category of damages prohibited by law, based on instructions that relieved Plaintiffs of their burden of proving the class claims. And the litany of individualized questions at issue should have foreclosed class adjudication altogether. Five specific errors most urgently require the Court's attention:

First, the jury should not have been allowed to award noneconomic damages. ORS 477.089 made "economic and property damages" the "exclusive remedies for damages or injury to property caused by a wildfire." All of Plaintiffs' claimed injuries here are injuries to property, so only economic damages should have been awarded. And Oregon law prohibits recovery of noneconomic damages for injuries to property resulting from non-intentional fires. *See Meyer v. 4-D Insulation Co.*, 60 Or App 70, 72, 652 P2d 852, 853 (1982). Despite these twin bars on noneconomic damages under the circumstances, the jury awarded $67.5 million

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in noneconomic damages to Plaintiffs—over 90% of the total damages awarded to Plaintiffs. The Court must enter judgment in favor of PacifiCorp with respect to these noneconomic damages.

Second, Plaintiffs bear the burden of proving liability as to the entire class, and certainly should not have been instructed that it "may ***assume*** that the evidence at the trial applies to all class members." (June 6, 2023, Final Jury Instructions at 16.) Oregon law unequivocally requires that "[t]o prevail in a class action," plaintiffs "must prove" each element of each claim "on the part of *all* class members." *Strawn v. Farmers Ins. Co. of Oregon*, 350 Or 336, 358, 258 P3d 1199, 1213 (2011) (emphasis added). It was undisputed that different class members were affected by different fires with different causes—proof that one class member may have been affected by an alleged utility fire could not be proof that some other class member, located miles away, was affected by the same fire. It was error to allow Plaintiffs to prove only the claims of the class representatives and then ask the jury to "assume" that evidence establishes the claims of all class members. Rather, it was Plaintiffs' burden to prove the claims of every class member. *See Bernard v. First Nat'l Bank of Or.*, 275 Or 145, 159–60, 550 P2d 1203, 1213 (1976) (class certification cannot affect defendant's right to put all individual class members to their proof); *Wal-Mart Stores, Inc. v. Dukes*, 564 US 338, 358 (2011). Plaintiffs' trial presentation glossed over the myriad of individualized issues at play, and the Court's instructions permitted the jury to nonetheless find liability and causation as to the entire class. Because Plaintiffs failed to meet their burden of proving their claims as to the entire class, the Court should grant judgment in favor of PacifiCorp on the class claims; at a minimum, a new trial should be ordered with the jury properly instructed as to Plaintiffs' burden.

Third, the jury's class-wide findings of causation with respect to the Santiam Canyon fire were unsupported by evidence. Plaintiffs were required to prove that PacifiCorp—and not the presence of a separate, lightning-ignited fire—caused the injuries of each individual plaintiff and every class member in the Santiam Canyon. *See, e.g.*, *Chapman v. Mayfield*, 358

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Or 196, 205, 361 P3d 566, 571–72 (2015) (causation is element of negligence claim); *Daniels v. Johnson*, 306 Or App 252, 255, 473 P3d 1133, 1135–36 (2020) (nuisance); *Martin et ux. v. Reynolds Metals Co*., 221 Or 86, 90, 342 P2d 790, 792 (1960) (trespass). Causation must be established by evidence of a "reasonable probability," not a "mere possibility." *See Trees v. Ordonez*, 354 Or 197, 218, 311 P3d 848, 860 (2013); *Horton v. Or. Health & Sci. Univ*., 277 Or App 821, 828, 373 P3d 1158, 1163 (2016); *Griffin v. K.E. McKay's Mkt. of Coos Bay, Inc*., 125 Or App 448, 451–52, 865 P2d 1320, 1322 (1993), *rev den*, 319 Or 80 (1994) (same). And in a class action, causation—like every other element—must be proved across the entire class. *See Pearson v. Philip Morris, Inc.*, 358 Or 88, 110–11, 361 P3d 3, 19 (2015). The Santiam Canyon class boundary was defined to include properties south of a line on a map selected by Plaintiffs' counsel—a line Plaintiffs' counsel tried (unsuccessfully) to change in the middle of trial when it became clear that the Beachie Creek fire, not any utility-caused fire, was the actual cause of injury to properties in the Santiam Canyon. Plaintiffs failed to establish causation as to this vast swath of property, and their own experts and witnesses demonstrated that it would have been *impossible* for any PacifiCorp-caused fire to damage each and every fire-affected property in this area. This failure of proof also undermined the ascertainability of the class because the class definition hinged on establishing who was injured by fire. Judgment for PacifiCorp on the claims of class members in the Santiam Canyon is required, or, in the alternative, decertification of the class.

Fourth, the jury adjudicated *liability* as to the whole class, even though this Court certified only an *issues* class. Not a single issue identified in the Court's class certification order was presented to the jury; instead, the verdict form asked the jury to find liability, which it did. This violated (i) ORCP 32, which requires both a written order certifying the class before the decision on the merits and written notice to the class members, and (ii) the federal constitutional right to due process, which likewise requires that class members receive notice and an opportunity to opt out and that defendants receive notice of the claims brought against

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them and an opportunity to defend against those claims. *See Phillips Petroleum Co. v. Shutts*, 472 US 797, 812 (1985); *Forte v. Schwartz*, 2018 WL 684825, at *1 (ED Cal Feb 2, 2018). The unofficial revision of the scope of the class, made near the end of trial with no analysis as to the propriety of class certification, requires vacatur of the jury's verdict.

Fifth, relieving Plaintiffs of their burden to prove the claims of the absent class members, and instructing the jury to "***assume*** that the evidence at the trial applies to all class members," violated PacifiCorp's federal constitutional right to due process. (June 6, 2023, Final Jury Instructions at 16.) "A defendant in a class action has a due process right to raise individual challenges and defenses to claims, and a class action cannot be certified in a way that eviscerates this right or masks individual issues." *Carrera v. Bayer Corp.*, 727 F3d 300, 307 (3d Cir 2013), *reh'g den en banc*, 2014 WL 3887938 (3d Cir 2014); *Bernard*, 275 Or at 159–60; *Duran v. U.S. Bank Nat'l Ass'n*, 59 Cal4th 1, 35 (2014). Plaintiffs unquestionably did not prove their claims with class-wide evidence, and Plaintiffs' reliance on the class action mechanism and on the assumption that individual evidence could apply to the class made it impossible for PacifiCorp to litigate these claims on an individualized basis. This "rough justice" approach to litigation is inconsistent with the constitution's protection of due process.

These and many additional errors propelled the jury towards its unsupported verdict. For all the reasons set forth below, the Court must enter judgment in favor of PacifiCorp or, in the alternative, order a new trial and decertify the class.

I. MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

A. Legal Standard

A judgment notwithstanding the verdict may be granted when the court "can say affirmatively that there was no evidence to support" the verdict. *Bennett v. Farmers Ins. Co. of Or.*, 332 Or 138, 147–48 (2001). The court views the evidence in the light most favorable to the prevailing party. *Id.* at 142.

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B. Plaintiffs Failed to Introduce Sufficient Evidence on Causation for the Entire Class, and Certainly Failed to Do So for the Santiam Canyon.

Plaintiffs were required to introduce evidence at trial that PacifiCorp caused the injury of each individual plaintiff and every member of the entire class. *See, e.g.*, *Chapman*, 358 Or at 205 (causation is element of negligence claim); *Daniels*, 306 Or App at 255 (nuisance); *Martin et ux.*, 221 Or at 90 (trespass). A plaintiff must present evidence "sufficient to establish that such a causal relationship is reasonably probable" not simply possible. *Feist v. Sears & Roebuck*, 267 Or 402, 407, 517 P2d 675 (1973); *see also Trees*, 354 Or at 218; *Horton*, 277 Or App at 828. Where Plaintiffs' trial evidence only allows for "a mere possibility of * * * causation" or "pure speculation or conjecture," judgment for PacifiCorp is required. Prosser & Keeton on Torts, § 41 at 269 (5th ed. 1984); *Griffin*, 125 Or App at 451–52. Moreover, in a class action, the non-speculative, more-than-possible causation requirement must apply across the entire class. *See Pearson*, 358 Or at 110–11; *see also* ORS 477.092(2) ("A person is not liable in a civil action for injury to or destruction of property arising out of a wildfire, except to the extent evidence demonstrates that: * * * The action or inaction caused or contributed to the cause of the wildfire or caused or contributed to the spreading of the wildfire.").

Plaintiffs failed to establish causation as to the entire class, and certainly failed to do so for the Santiam Canyon portion of the class.

1. Plaintiffs Were Required to, and Failed to, Prove the Claims of the Entire Class.

To prove their class claims, Plaintiffs had to introduce evidence proving that PacifiCorp's conduct caused harm to *every* class member. Because Plaintiffs did not prove that all class members were harmed by PacifiCorp, judgment is required on all the class claims.

It is well-settled that certifying a class cannot impair a defendant's substantive rights. *See Pearson*, 358 Or at 114; *Bernard*, 275 Or at 159–60 ("class action procedures [are] not

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designed to deprive defendants of valuable procedural and substantive rights"). A defendant's most fundamental right is the right to put *each* plaintiff to its proof—to require that *each* plaintiff affirmatively prove that it is entitled to a verdict in its favor. This right persists regardless of whether a class is certified. *See, e.g.*, *Bernard*, 275 Or at 159 (holding that Oregon's class action procedure cannot "deprive the defendants of valuable procedural and substantive rights by preventing them from asserting what appears to be a bona fide defense" to the claims of individual "claimants"); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F3d 154, 192 (3d Cir 2001) ("defendants have the right to raise individual defenses against each class member"); *Cimino v. Raymark Indus., Inc.*, 151 F3d 297, 312 n.30 (5th Cir 1998) ("[T]he fact that a case is proceeding as a class action does not in any way alter the substantive proof required to prove up a claim for relief.").

It is undisputed that there were numerous fires in the class area, many of which Plaintiffs' expert could not attribute to PacifiCorp. (Tr. 4528:19–22 (Railroad Avenue fire); Tr. 4530:5–11 (Gates Hill Road fire).)[1] And it is undisputed that much of the fire damage in the class area could *not* have been caused by PacifiCorp—for instance, Plaintiffs' expert, Dr. Bailey, opined that the Beachie Creek fire, started by lightning, consumed many properties in the class area. *See infra* at 11–12.

Plaintiffs' reliance in closing on purportedly destroyed evidence and the supposed inferences that could be drawn from it, *see infra* at 56–57, underscores their failure to introduce actual evidence of class-wide causation. Plaintiffs' argument to the jury relied largely on the *absence* of evidence (which they improperly attributed to supposed spoliation), rather than affirmative evidence they introduced.

Plaintiffs' evidence was patently insufficient to establish causation, let alone causation on a class-wide basis. The evidence does not support a finding that every member of the class, falling within the boundaries of all four fires, suffered harm as a result of fires caused by

[1] As used herein, "Tr." refers to the trial transcript. "Ex." refers to trial exhibits.

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PacifiCorp. Given that the question of which fire damaged a class member's property necessarily depends on circumstances unique to that property, Plaintiffs could not prove the claims of "the entire class" by merely providing evidence relating to a few class members—they had to establish which fire burned *each* class member's property. Plaintiffs' failure to establish this critical element of their claims as to the entire class requires judgment as to the class claims.

2. The Evidence Foreclosed a Finding of Causation as to Every Class Member in the Santiam Canyon.

The evidence as to the Santiam Canyon forecloses a finding that *every* member of the class within that geographic boundary suffered harm as a result of a PacifiCorp-initiated fire. This requires judgment on all the class claims—but even if the class could be sliced into different sub-classes based on fire area (and it should not be), judgment would be required on the Santiam Canyon class claims.

The Santiam Canyon class boundary includes all fire-affected properties south of a line on a map drawn by Plaintiffs' counsel—an area spanning over 20 miles from east to west and encompassing all properties from the western edge of Detroit Lake to Mehama. (*See* Ex. 2877 at 3; Ex. 2878 at 2; Tr. 3356 ("for the Santiam Canyon Fire I also relied upon the northern boundary that was provided by counsel.").) And to show PacifiCorp was liable to *every* class member in the Santiam Canyon, Plaintiffs had to prove that a PacifiCorp-caused fire damaged *every* property within that area—a dubious proposition given that the class area extended well beyond PacifiCorp's service area and given the undisputed presence of the separate, lightning-caused Beachie Creek fire in the same area. Plaintiffs not only failed to do so, their own experts and witnesses demonstrated that it would have been *impossible* for any PacifiCorp-caused fire to damage each and every fire-affected property in this area.

Plaintiffs acknowledged their inability to prove causation to the entire Santiam Canyon by moving to change the boundary near the end of trial in order to conform the class boundary

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to the evidence presented. (Tr. 8145:16–18.) In connection with their motion, Plaintiffs presented the following map in open court:

The "Xed out" portion of the map indicates the portion of the Santiam Canyon for which Plaintiffs' counsel conceded that they had not established causation. Because that portion of the Santiam Canyon remains within the class boundary, Plaintiffs also conceded that they have not satisfied their evidentiary burden to establish class-wide liability. Thus, judgment must be entered for PacifiCorp.

a. Expert Testimony

Plaintiffs relied on expert testimony from three witnesses: Larry Pelton, for the cause and origin of spot fires in the Santiam Canyon, Dr. John Bailey for the progression of the Beachie Creek fire, and Dr. Mark Buckley to identify parcels reflecting a soil burn severity of "low" or higher. No evidence from these experts, individually or in the aggregate, supports a finding of class-wide causation in the Santiam Canyon.

Dr. John Bailey modeled the progression of the preexisting, lightning-caused Beachie Creek fire from the Opal Creek wilderness to the Santiam Canyon. Bailey's testimony and model did not support Plaintiffs' case—it fatally undermined it.

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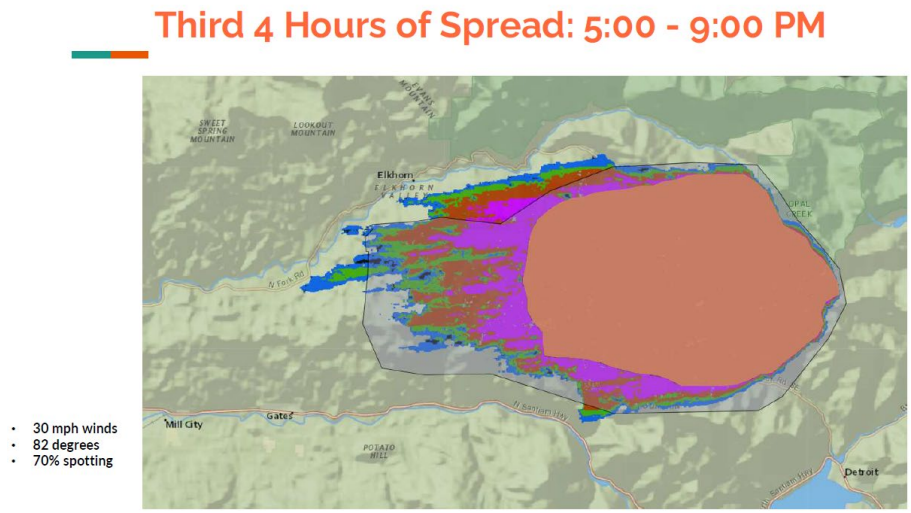
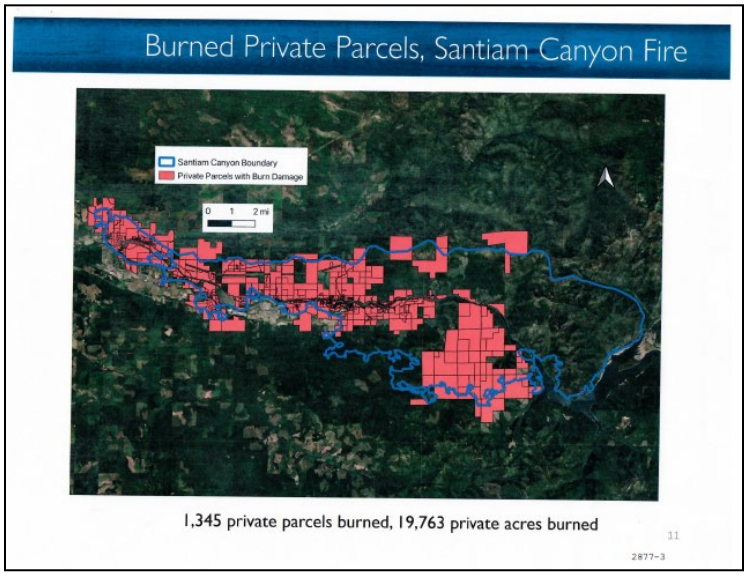
Bailey's model demonstrated that by 8 p.m., before *any* PacifiCorp-caused fire allegedly started, the Beachie Creek fire had *already* consumed property in the class area. One need only compare Bailey's fire progression model with the class area:





According to Bailey's own model, the northeastern section of the Canyon above Niagara had already been damaged by the Beachie Creek fire by 8:00 p.m., yet the earliest PacifiCorp-caused ignition Plaintiffs identified was at 8:37 p.m. (*See* Tr. 4400:13–19.) PacifiCorp cannot be liable for fire damages to *every* class member in the Santiam Canyon

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when, according to Plaintiffs' own expert, some class members' property was burned by the Beachie Creek fire *before* any PacifiCorp fire even started.

Bailey also confirmed that many areas within the class definition were directly in the path of the Beachie Creek fire. In fact, he conceded that the Beachie Creek fire reached Gates and Mill City. (Tr. 3910:01–09.) Bailey also noted that given "the main direction of the wind flow," Lyons "was right in the crosshairs" of the Beachie Creek fire. (*Id.* at 3849:11–14.) Bailey's testimony thus leaves the jury's finding on class-wide causation unsupported.

Larry Pelton was Plaintiffs' origin-and-cause expert, who opined that several fires near Gates and Mill City were started by utility equipment. All the fires he identified were in roughly the middle of the Santiam Canyon class area, in and around Gates and Mill City; none were in the eastern ten miles or western seven miles of the class area.[2] (*See* Ex. 2893; Tr. 7483:08–09.) And Pelton was clear that he had no idea whether any of the spot fires he identified had spread elsewhere, "offering no opinion on the spread of or the direction of spread or the rate of spread of any one spot fire in this case." (Tr. 4452:22–25.) So while Pelton could opine that some fires near Gates were started by utility equipment, he could not testify that any of these fires spread and caused damage elsewhere in the class area.

Pelton's testimony confirmed that a utility fire could *not* be responsible for burning the northeastern portion of the Santiam Canyon because none of the utility fires he identified could possibly have reached that part of the Canyon before it was consumed by the Beachie Creek fire. Of the utility-caused fires Pelton identified, the earliest fire—and the *only* fire that allegedly started before 9 p.m.—was the fire at 51330 Gates Bridge East, which he opined began around 8:37 p.m. (Tr. 4400:13–19.) But as Pelton admitted, the Gates Bridge East fire was extinguished by firefighter Bruce Brunstad, and there was no evidence it restarted. (Tr. 4398:22–4340:04.) The Gates Bridge East fire thus could not have damaged the northeastern part of the Santiam Canyon. And all of the other utility fires that Pelton identified

[2] Indeed, PacifiCorp does not even have electrical equipment east of Niagara. (Tr. 7482:24–7483:02.)

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started *after* 9 p.m.—when the northeastern Santiam Canyon was already aflame because of the Beachie Creek fire. (*See, e.g.*, Tr. 4400:17–19 (Gates Bridge East fire was "before every other fire" Pelton identified); Tr. 4294:19–21 (Gates School fire "ignited between 9:30 and 9:45 p.m."); Tr. 4313:16–18 (Potato Hill fire began "[s]hortly before 9:30 p.m."); Tr. 4325:17–21 (call indicated Kelly Lumber fire started around "11:12 p.m.").)

Pelton also did not opine that any utility fire could have spread east from the middle of the Canyon. (*See* Tr. 4452:22–25.) This was for good reason—as witnesses reiterated throughout trial, this was a significant east wind event, meaning the wind was blowing from east to west. (*See, e.g.*, Tr. 2433:09–12, 2785:22–24, 2834:18–20, 2878:12–14, 3884:15–16, 3952:15–16.) Yet Plaintiffs have not presented any evidence—from Pelton or anyone else—showing how PacifiCorp's equipment could have possibly caused any damage east of Niagara, let alone all the damage necessary for a class-wide causation finding.

In short, Pelton's testimony cannot support the jury's finding that a utility-caused ignition burned *every* property within the Santiam Canyon area.

Mark Buckley did not satisfy Plaintiffs' causation burden either. He relied on publicly available data to identify private and public tax parcels (specifically, class members' properties and state-designated forestlands) that were damaged by a wildfire. With respect to the Santiam Canyon fire, Plaintiffs' counsel furnished him with a fire boundary. (Tr. 3340:7–9, 3356:5–7.) Buckley then applied soil burn survey information generated by the Forest Service to determine whether areas within that Plaintiff-generated fire perimeter were burned. (*See*, *e.g.*, Exs. 2877, 2878.)

But Buckley admitted that his analysis could not determine whether any real or personal property on the parcels he identified was actually damaged. (Tr. 3369:08–18.) He merely considered whether *some* "soil and vegetation" on parcels within the class area had been burned, even if those parcels "cross[ed] the fire boundary" (Tr. 3333:18–23, 3338:17–22)—he

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did not purport to know whether any burn was caused by a utility fire, the Beachie Creek fire, or some other fire (Tr. 3366:20–25.) His testimony could not prove causation.

b. Other Eyewitness Evidence

Plaintiffs also introduced testimony from the following third-party witnesses about seeing one or more fires, flashes, arcs, or some kind of power line activity: Bruce Branstad, Michael Schaer, Leland Ohrt, Dean Warner, Nathan Steele, Steve Nielsen, Shannon Hicks, Craig Stevens, Christian Bigness, and Richard Jensen. All of this eyewitness testimony involved fires in the Gates and Mill City area. No eyewitness testified about any utility fire in the eastern half of the Santiam Canyon area. Nor did any eyewitness testify about any utility fire in the western half of the class area. The eyewitness testimony was thus consistent with Bailey's model, which showed that the eastern part of the class area was burned by the Beachie Creek fire—not a utility fire. The eyewitness testimony cannot support the jury's class-wide causation finding either:

- Brunstad and Schaer saw a power line-caused fire at 51330 Gates Bridge East—which was extinguished. (Tr. 2654:06–23, 4898:05–08).)
- Ohrt testified about a powerline fire near Schroeder Road—which he extinguished. (Tr. 5122:03–05.)
- Warner and Steele testified to seeing flashes and fires at the Gates School. (Tr. 2779:12–20, 3005:18–3006:03). But they offered no testimony about the spread of this fire. Indeed, the only evidence regarding how far the Gates School fire spread came from PacifiCorp's own expert witness, showing it was mostly contained. (Ex. 8533.) This is supported by Warner's testimony that the fire at the front of the school was "contained." (Tr. 3018:12–3019:01.)
- Nielsen, Hicks, and Bigness saw flashes (but not fires) in the area around Potato Hill. (Tr. 2800:20–2801:04, 3075:20–3076:04, 6222:20–6223:05.) Bigness also saw fires

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at the Anderson's home at 28340 N. Santiam Highway, Kelly Lumber, and Fishermen's Bend, but did not see how any of these fires started. (*See, e.g.*, Tr. 2822:18–19.)

- Stevens testified to seeing spot fires near Maples rest area, the Anderson's home, Fishermen's Bend, and at the intersection of 22 and Alder—but he was unaware of what caused any of these fires. (Tr. 2752:16–18.)
- A firefighter told Jensen that a fire started near his trailer at Fishermen's Bend when a tree fell on a powerline. (Tr. 2856:10–2857:06.)

Even combining all these eyewitness' accounts, their testimony does not suffice to show that PacifiCorp-caused fires spread and damaged the entire Santiam Canyon area or the class area miles northwest of Fishermen's Bend.

The same is true for the named Plaintiffs: Jeanyne James, Robin Colbert, Sam Drevo, Jane Drevo, Lori Fowler, Iris Hampton, Kristina Montoya, Bill Edge, and Brooke Edge. None testified to seeing a powerline-caused fire outside of Gates and Mill City. Indeed, none testified to seeing how *any* fire started. And none testified to seeing a utility-caused fire *east* of Gates:

- Neither James nor Colbert saw any fire or powerline activity as they evacuated their home near Lyons. (*See, e.g.*, Tr. 2436:15–17, 3652:11–14.)
- The only fire Sam and Jane Drevo saw was the Potato Hill fire, although neither saw how it started. (*See, e.g.*, 3732:07–11.)
- Hampton only saw Potato Hill on fire. (Tr. 2082:25–2083:02.)
- Montoya was not even in the Santiam Canyon on Labor Day 2020. (Tr. 3220:06–09.)
- Fowler, who was in the Fishermen's Bend Recreation Area near Mill City, did not see how the Fisherman's Bend fire started. (Tr. 4697:17–21.)
- Brooke Edge did not see how any fire started. (Tr. 3830:19–21.)
- And Bill Edge testified to seeing sparks near his home and Kelly Lumber on fire, but did not see how any fire started. (Tr. 4146:04–06.)

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Put simply, no witness testified that *any* utility-caused fire spread across *any* particular area in the Santiam Canyon—much less across the ***entire*** class area. At most, these witnesses provided anecdotal testimony suggesting that some utility fires may have started in the Gates and Mill City area late on the night of September 7—but that was in the middle of the class area. And anecdotal evidence alone—without further evidence to demonstrate that the anecdotes are representative or informative of causation—is insufficient to establish anything other than the speculative possibility of causation. *See Wal-Mart*, 564 US at 358. Because their anecdotal testimony said nothing about what fire burned the eastern half of the class area, their testimony at minimum could not support the jury's conclusion that *every* property in the *whole* Santiam Canyon area was burned by a utility fire.

C. The Court Should Vacate the Noneconomic Damages Award.

1. Noneconomic Damages Are Barred by ORS 477.089.

Ten years ago, the legislature made "economic and property damages" the "exclusive remedies for damages or injury to property caused by a wildfire," foreclosing the recovery of noneconomic damages in wildfire cases that do not involve personal injury. ORS 477.089(2), (4). The parties here stipulated that each fire in this case is a "wildfire" under the statute such that ORS 477.089 applies and governs the recoverable damages. (March 24, 2023, Parties' Factual Stipulations.) Nevertheless, the jury awarded approximately $67.5 million in noneconomic damages. Because all of those noneconomic damages arose from injuries to property, the Court should vacate that award as barred by ORS 477.089. Indeed, Plaintiffs are seeking to double their damages under ORS 477.089. They cannot assert that they should get the benefits of ORS 477.089 (by receiving double economic damages) without having to abide by its restrictions (which prevent the recovery of noneconomic damages). *See Hampton Tree Farms, Inc. v. Jewett*, 320 Or 599, 609–10, 892 P2d 683, 689–90 (1995) (judicial estoppel bars party from taking "inconsistent positions").

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The text of ORS 477.089 is straightforward. The statute states that "in a civil action for property damage caused by a wildfire, the recoverable damages are" (1) "economic and property damages" if a case does not involve grossly negligent, reckless, or willful conduct, or (2) "twice the amount of economic and property damages" if it does. ORS 477.089(2)(a)–(b). Critically, the statute says that these are "the exclusive remedies for damages or injury to property caused by a wildfire." ORS 477.089(4). The statute does not limit remedies for bodily injuries—as one bill supporter testified when explaining the bill's provisions, the statute makes clear that the "damages available * * * are the exclusive remedy for damage to property due to a forest fire," but "this would not preclude bodily injury claims." (Oct. 27, 2022, Chase Decl., Ex. 5 at 3.) By its plain terms, however, the statute does limit remedies "in a civil action for property damage caused by a wildfire." ORS 477.089(2). In those actions (and this case is unquestionably one of them), the recoverable damages are "economic and property damages," not noneconomic damages. *See* ORS 31.705(2) (defining "economic" and "noneconomic" damages); *id.* at 31.705(2)(b) (defining "noneconomic damages" as "subjective, nonmonetary losses, including but not limited to pain, mental suffering, emotional distress, humiliation, injury to reputation, loss of care, comfort, companionship and society, loss of consortium, inconvenience and interference with normal and usual activities apart from gainful employment"). The legislature thus drew a line between claims based on "damages or injury to property," and claims based on bodily harm.

The trial evidence showed that this case is squarely on the "property" side of the line. Plaintiffs did not introduce any evidence of bodily injury. No Plaintiff testified that he or she was physically injured by any of the fires at issue. Some Plaintiffs were not even present at the time of the fire. (*See* Tr. 3195:8-10, 3196:17-24 (Montoya was not at home on Labor Day 2020, and only found out about the fire when a neighbor called the next day).) Plaintiffs' expert took care to define the class to the jury based on whether "soil and vegetation" was burned by the fires—not based on whether any person suffered bodily injury. *Supra* at 12–13.

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And when testifying about their noneconomic damages, Plaintiffs stressed the loss of sentimental *objects* and personal feelings about lost *property*. (*See, e.g.*, Tr. 1443:24–1444:7, 1482:19–1493:17.)

Plaintiffs cannot recover noneconomic damages by characterizing emotional distress from property loss as a standalone bodily injury. The bill that introduced ORS 477.089 was spurred by the 2007 Moonlight Fire, where the United States Department of Justice claimed $791 million for damages to federal timber land valued at only $20 million on the open market. (Oct. 27, 2022, Chase Decl., Ex. 5 at 1.); *see also Oregon AFSCME Council 75 v. Oregon Judicial Dept. - Yamhill Cty.*, 304 Or App 794, 826 n.27, 469 P3d 812, 832 (2020) ("Context, for purposes of statutory interpretation, includes prior versions of the statute and existing case law, together with extant circumstances that give rise to the need for legislation."). The legislature's goal was to "clarif[y] how to calculate damages in the event of a wildfire" in light of criticism that USDOJ's damages claims far exceeded the "market value" of the land. (Oct. 27, 2022, Chase Decl., Exs. 1, 3-5.) As the bill's sponsors recognized, that entailed eliminating any "undue windfalls" that "creative lawyers" might seek. (*Id.*, Ex. 4 at 2, Ex. 5 at 2.) The bill was intended to "better defin[e] the legal exposure for wildfire damages," to ensure that "Oregon's landowners" would not "face legal claims of such massive scale that they are forced to choose between gambling the company and settling for outrageous sums." (*Id.* Ex. 5 at 1.) Put simply, the bill was intended to prevent the very outcome resulting from this trial. Adhering to that interpretation here would render the statute "meaningless," which this Court may not do. *Burt v. Blumenauer*, 84 Or App 144, 147 (1987).

Plaintiffs' attempt to use damage to their property as a basis for seeking millions of dollars in noneconomic damages would completely eviscerate the purpose of ORS 477.089. Any person whose property is damaged by a wildfire can claim "massive" noneconomic damages—as Plaintiffs have—and thus force defendants "to choose between gambling the

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company and settling for outrageous sums." (Oct. 27, 2022, Chase Decl., Ex. 5 at 1). This is directly contrary to both the text of the statute and its history.

The statute embodies legislative compromise: in exchange for making it absolutely clear that the only recoverable damages in a wildfire property damage case would be economic and property damage, the legislature granted the ability to recover double damages in cases of gross negligence or higher degrees of culpability for damage to property. *Cf. Busch v. McInnis Waste Sys., Inc.*, 366 Or 628, 651–52, 468 P3d 419, 433 (2020). Plaintiffs seek to upend that balance and effectively urge the Court to ignore the extensive legislative history focused on limiting damages. The Court should grant judgment to PacifiCorp on the noneconomic damages claims.

2. Noneconomic Damages Are Unavailable Under Oregon Common-Law.

Even setting ORS 477.089 aside, Plaintiffs' demand for millions in noneconomic damages fails as a matter of law because Plaintiffs cannot recover noneconomic damages for unintentional fires that do not cause bodily injury. *See Meyer*, 60 Or App at 72. This rule applies with full force to this case.

In *Meyer*, the Court of Appeals held that unintentional fire damage to property cannot be the basis for noneconomic damages. *Meyer* sued after his house was damaged by a fire allegedly caused by the defendant's faulty installation of attic insulation. *Id.* at 72. Although Meyer argued that the fire damage to his home caused him compensable "mental distress," the Court of Appeals held that his distress could not support noneconomic damages. *Id.* That court observed that "[i]t is difficult to imagine a circumstance in which damage to any property does not directly, naturally and predictably result in some emotional upset," but held that, "as a policy matter," distress resulting from non-intentional fire damage is not compensable. *Id.* at 74. The court acknowledged that a true "nuisance" that constitutes "an ongoing interference with the use and enjoyment of the plaintiffs' residence" can support emotional damages, but explained that such a nuisance must repeatedly occur over a prolonged period of time—and a

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single fire causing "property damage to a house" was not the kind of ongoing "nuisance" required for noneconomic damages. *Id.* at 75–76; *see also id.* at 80 (holding that plaintiff's complaint alleging fire damage to home pleaded "no facts from which it may be inferred that defendant's conduct amounted to a private nuisance").

Meyer's holding applies here. Indeed, less than a year ago, two federal judges—both former Circuit Court judges—held that plaintiffs whose homes were destroyed in a massive 2019 fire in Wilsonville were barred by *Meyer* from recovering noneconomic damages. *See Bailey v. Polygon Nw. Co., LLC*, 2022 WL 17184309, at *7 (D Or Aug. 23, 2022) (You, M.J.), *report and recommendation adopted in relevant part*, 2022 WL 17178268 (D Or Nov. 23, 2022) (Hernandez, D.J.).

In *Bailey*, the plaintiffs sued after their homes were destroyed in "the largest fire in Wilsonville history." *Id.* at *1. The fire started at the defendant's construction site, and then spread "to a residential neighborhood in which all plaintiffs resided." *Id.* "As the fire, fueled by 200-foot flames, spread to nearby properties, neighbors 'watched as their homes, belongings, priceless family heirlooms, memorabilia, and memories were engulfed in flames.'" *Id*. (quoting complaint). Like Plaintiffs here, the *Bailey* homeowners brought claims for negligence and nuisance, and demanded both economic damages and noneconomic damages for "emotional distress." *Id.* But the court held that *Meyer* barred their noneconomic damages claims. *See id.* at *6–8. As Judge You explained, in an analysis that applies fully here, "[t]he similarity between the facts in *Meyer* and those alleged by plaintiffs—negligent conduct that led to a fire, property damage, and emotional damages sought despite the absence of physical injury—militates a similar result: a dismissal of claims that seek mental distress without physical injury." *Id.* at *7.

The same result is required in this case. Like the plaintiffs in *Meyer* and *Bailey*, Plaintiffs have not testified that they were physically injured in the fire. And like the plaintiffs in *Meyer* and *Bailey*, Plaintiffs cannot rely on the destruction of their homes to support

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noneconomic damages. Just as in *Bailey*, some Plaintiffs have said they lost belongings, heirlooms, and memorabilia in the Labor Day fires—but that is not enough as a matter of law. The Court of Appeals has already held, "as a policy matter, neither the quality of a defendant's conduct nor the predictability of distress as a result of property damage alone or together form a basis for an award of compensatory damages for emotional distress." *Meyer*, 60 Or App. at 74. Those policy considerations are binding here. The Court should grant a motion for directed verdict or motion to strike.

3. The Award of Noneconomic Damages to the Palfreyman Family Trust Was Impermissible.

As a legal entity, the Palfreyman Family Trust is not capable of suffering emotional distress. It is thus ineligible for any award of noneconomic damages, and the Court should reduce the jury's award of noneconomic damages to the Palfreyman Family Trust to $0.

Oregon defines noneconomic damages as "subjective, nonmonetary losses," which include "pain, mental suffering, [and] emotional distress," among other mental injuries. ORS 31.705(2)(b). But a legal relationship or entity—like a trust—cannot suffer pain, mental suffering, emotional distress, or *any* emotional harm. *See Mooney v. Johnson Cattle Co.*, 291 Or 709, 718–19 (1981) (recognizing that "mental or emotional distress will not be a characteristic result of interference between corporate enterprises"); *see also Mut. of Enumclaw Ins. Co. v. Gregg Roofing, Inc.*, 178 Wash App 702, 714 n.2 (2013) ("corporations cannot recover emotional distress damages"); *FDIC v. Hulsey*, 22 F3d 1472, 1489 (10th Cir 1994) ("a corporation cannot suffer emotional distress"); *Dynamic Image Tech., Inc. v. United States*, 221 F3d 34, 37 n.2 (1st Cir 2000) ("Because corporations, unlike natural persons, have no emotions, they cannot press claims for intentional infliction of emotional distress."). As a result, the jury should not have been permitted to award any noneconomic damages to the Palfreyman Family Trust, and this portion of the verdict must be vacated.

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D. Plaintiffs Failed to Prove Other Critical Elements of Their Claims.

1. The Individual Plaintiffs in the Santiam Canyon Have Not Presented Sufficient Evidence of Causation.

The evidence did not support a finding that a negligently caused PacifiCorp-utility fire harmed the individual Plaintiffs in the Santiam Canyon. The evidence showed only that some of the Plaintiffs' properties were damaged by *some* fire. Plaintiffs bore the burden of showing that their properties were damaged by a negligently caused PacifiCorp-fire, and that the damage occurred *before* the Beachie Creek fire arrived. Yet all Plaintiffs offered is the possibility that *some* fires *somewhere* within a twenty-mile-long region (including areas serviced by non-PacifiCorp utilities) may have been started by PacifiCorp equipment. This is not enough. It is, at most, proof of a possibility that a PacifiCorp fire—rather than a fire caused by another source—damaged the individual Plaintiffs' properties. But a "mere possibility" is insufficient to support a verdict for the Plaintiffs. *Griffin*, 125 Or App at 452.

a. Expert Testimony

As explained above, Pelton was the only expert who attempted to attribute any fires in the Santiam Canyon to PacifiCorp. *Supra* at 12–13. But Pelton could opine only that he believed some of the spot fires in the middle of the Canyon were started by utility equipment; he could not opine on whether any property was burned by any particular fire. He "offer[ed] no opinion on the spread of or the direction of spread or the rate of spread of any one spot fire in this case." (Tr. 4452:22–25.) Nor did any other expert. He thus could not and did not demonstrate that any individual Plaintiff's property was burned by a fire attributable to PacifiCorp.

b. Jeanyne James and Robin Colbert

Plaintiffs Jeanyne James and Robin Colbert lived at 11431 Rowena Avenue SE, Lyons (west of Mill City). (Tr. 2425:9–13.) Their home was not in PacifiCorp's service area; their utility company was Consumers' Power. (Tr. 2428:24–2429:12.)

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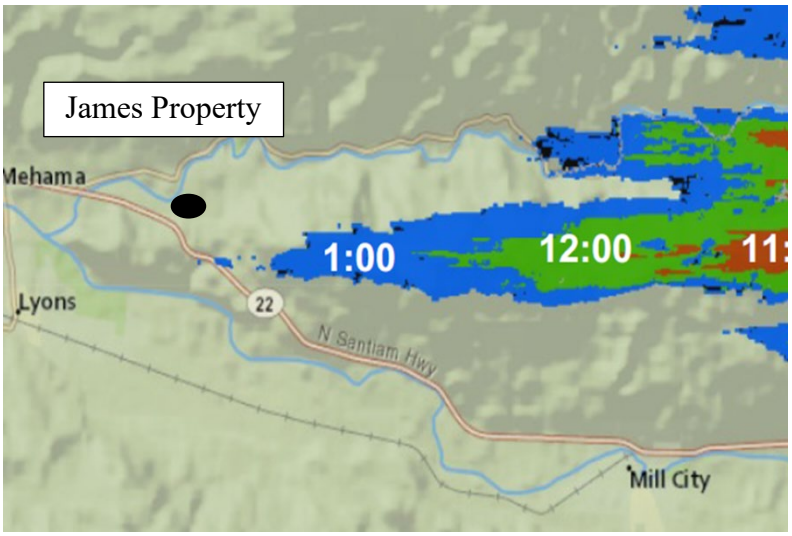
Colbert testified that the first sign of fire on their property came from the Beachie Creek fire by late afternoon when she saw ash falling around their house, which caused her to worry that the Beachie Creek fire would reach their area. (Tr. 3651:22–25.) James and Colbert evacuated their home at approximately 1 a.m. (Tr. 2436:1–7.) James testified that, at that time, there was no visible fire near their property; indeed, no fire was even visible in the "distance." (Tr. 2436:15–21.) She also did not see any utility-caused fire (either near her home or anywhere else). (Tr. 2438:11–20.) However, by 1 a.m. noticeable embers were starting to appear in the air (Tr. 2437:23–2738:4) and, according to Bailey's model, the Beachie Creek fire was around 2 miles away from their home:



There was no evidence that any utility fire burned the James/Colbert home—the only evidence was that the Beachie Creek fire (and its embers) were bearing down on the home at the time James and Colbert evacuated. That is not enough to prove that causation was probable, rather than (at most) merely possible.

c. Iris Hampton

Plaintiff Iris Hampton lived at 13100 Gates Hill Road, just north of Gates. (Ex. 9165; Tr. 2079:25–2080:23.) She testified that she saw smoke in the air throughout the day on September 7—which she believed may have come from the Beachie Creek fire—and that the

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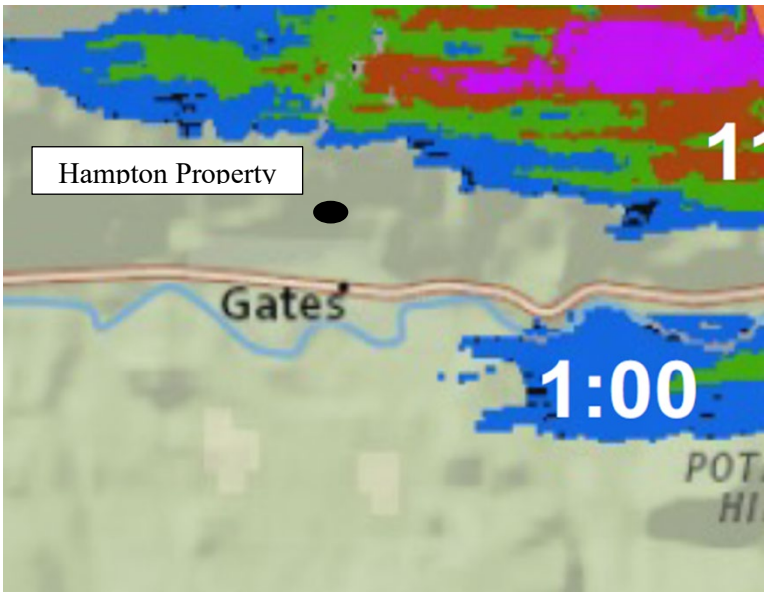
smoke and debris worsened as the afternoon turned to night. (Tr. 2077:22–2078:5, 2082:20–24.) Hampton did not say when she evacuated her home, but she testified that she left after seeing a fire on Potato Hill, which was south of her home and across the Santiam River. (Tr. 2083:22–25.) When she evacuated, Hampton's property was not on fire (Tr. 2085:03–05), and Hampton did not see any utility equipment start a fire on or near her property (Tr. 2085:13–15). She testified that it was impossible to determine where the fire that ultimately burned her home came from, given the chaotic wind conditions. (Tr. 2085:06–10.) And, according to Bailey's model, the Beachie Creek fire was only a mile or two away from her property by 1 a.m.:



As with the other Plaintiffs, there was no evidence that Ms. Hampton's property was burned by a PacifiCorp-caused fire, rather than by the Beachie Creek fire or some other spot fire. Plaintiffs did not prove causation as to Ms. Hampton.

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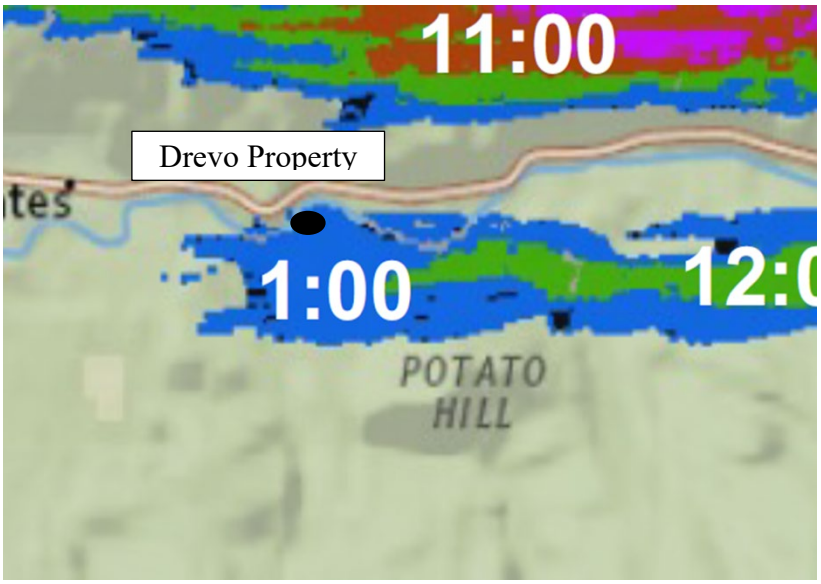
d. Jane and Sam Drevo

The evidence shows that Jane and Sam Drevo's home at 50983 Greenway Drive was damaged by the Beachie Creek fire, not a utility-caused fire. Indeed, neither saw a powerline-caused fire that night. (*See* Tr. 3758:21–3759:02, 1489:01–03.) And when they left their home, no fire had reached the property. (*See, e.g.*, Tr. 1493:16–18.) Nor did they know when any fire burned down their home because they had already left the canyon. (*See, e.g.*, Tr. 3760:02.)

This evidentiary gap dooms their claim, because for PacifiCorp to be liable, there must be proof that a negligently caused PacifiCorp fire burned down their home before the Beachie Creek fire—indisputably—reached Gates. (*See* Tr. 3910:01–09 (recognizing that the Beachie Creek fire reached Gates at maybe "2:00, 3:00 in the morning").) No such evidence exists; indeed, Bailey's model showed that the Drevo's home was consumed by the Beachie Creek fire by 1 a.m. Plaintiffs have thus not proven causation as to Sam and Jane Drevo.



e. Northwest River Guides, LLC

Northwest River Guides ("Northwest River"), located at 108 N. Santiam Highway East in Gates, did not establish causation either. There was no testimony regarding the cause or

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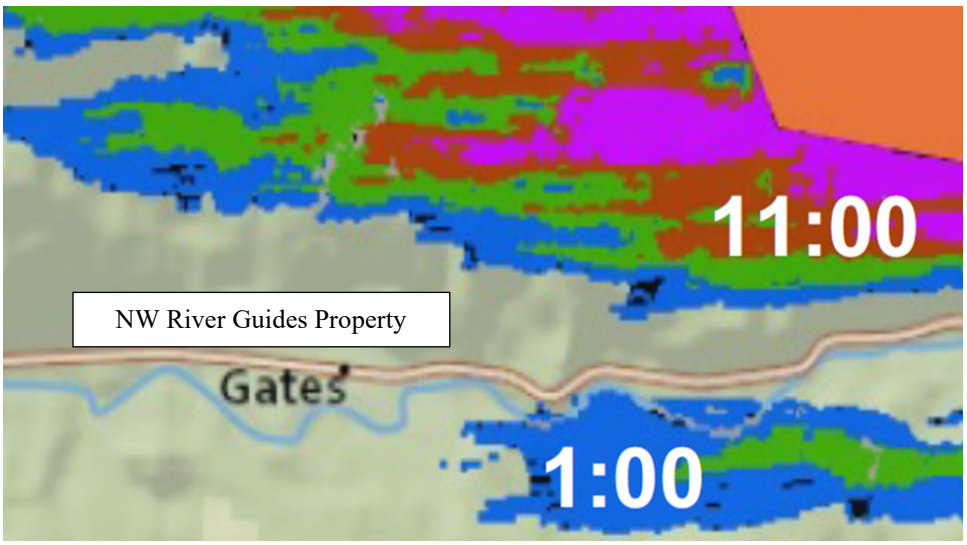
origin of any fire that may have affected Northwest River. In fact, Sam Drevo, Northwest River's owner, admitted that other than seeing the Potato Hill on fire, he "did not observe any other fires igniting at all on September 7th, 2020." (Tr. 3759:22–24.) Thus, the only evidence relevant to causation on this issue is that the Beachie Creek Fire eventually made it to Gates. (*See* Tr. 3910:01–09.)



Once again, there was no evidence that the damage to the Northwest property was caused by a negligently caused PacifiCorp fire—indeed, there was no evidence that any specific fire, aside from the Beachie Creek fire, threatened the property.

f. Kristina Montoya

Plaintiff Kristina Montoya lived at 708 Santiam Highway West in Gates, but was not in Gates on September 7. (Tr. 3196:17–21.) Her home suffered smoke damage, but it otherwise survived the fire. Because Montoya was not even home during the relevant time

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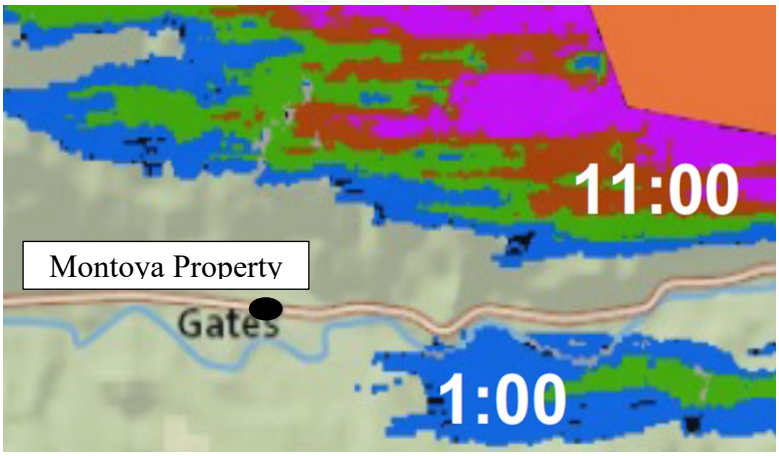
period, she could not offer any testimony regarding the cause of any fire. Based on Bailey's model, the Beachie Creek fire had nearly surrounded Montoya's home by 1 a.m.:



There was no evidence that the smoke that damaged Montoya's home came from a PacifiCorp-caused fire, rather than the Beachie Creek fire or any other fire in the area.

g. Bill and Brooke Edge

Brooke Edge testified that she could see the Beachie Creek fire from her home. (Tr. 3837:18). So could Bill Edge. (Tr. 4139:04–05.) In fact, Mr. Edge was "nervous specifically that the Beachie Creek Fire was getting closer and closer." (Tr. 3835:19–22.) And although Mr. Edge testified to hearing three "explosions" near his home on Labor Day, he didn't "personally see any transformer explosions." (Tr. 4133:18–24.) In fact, there was no fire on their property when they left (Tr. 3839:19–21, 4144:22–24), although the Beachie Creek fire had nearly surrounded the Edge property by 1 a.m.:

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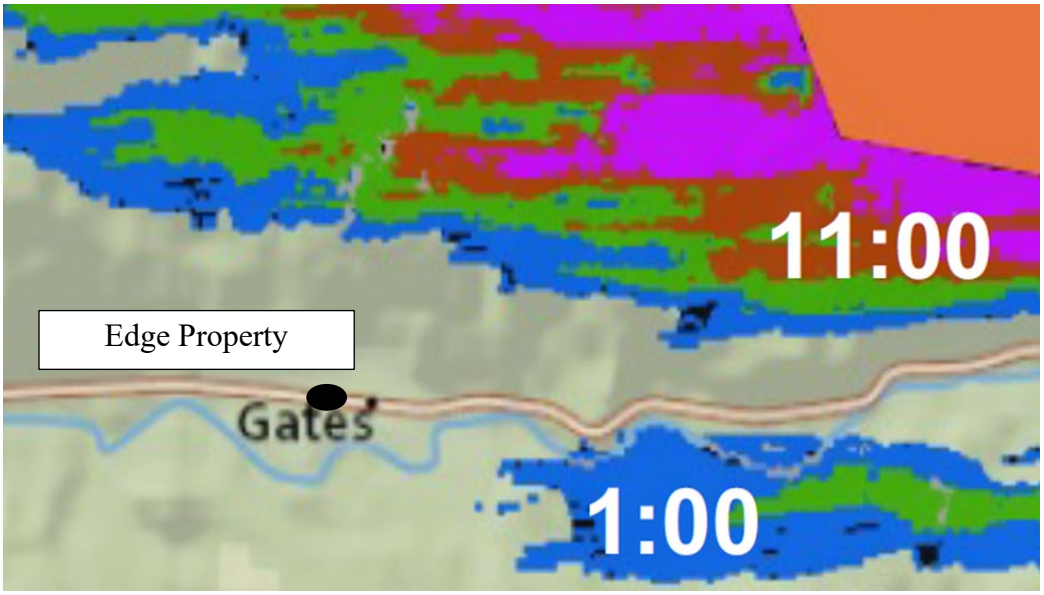

As with the other Plaintiffs, there was no evidence that the Edge property was burned by a specific PacifiCorp-caused fire, rather than the Beachie Creek fire or some other fire.

2. Plaintiffs Failed to Prove Causation as to the Echo Mountain and South Obenchain Fires.

Plaintiffs' experts Michael Schulz and Dr. Bernard Cuzzillo testified that PacifiCorp's distribution lines started the Echo Mountain fire and the South Obenchain fire. Specifically, Schulz and Cuzzillo testified that (1) a branch contacted distribution lines near 750 N. Echo Mountain Road, starting the Echo Mountain fire, and (2) a tree contacted distribution lines near Lick Creek Road, starting the South Obenchain fire. (Tr. 2189:09–11, 2189:18–21, 2552:02–06, 2563:17–23.) But their testimony relied on flawed investigations and unsound science, rendering any conclusion as to causation unfounded. Indeed, as PacifiCorp argued at trial, their testimony was inadmissible as a matter of law. *See* OEC 702.

No witness observed, or could have observed, a fire ignition at the Echo Mountain location. (*See* Tr. 2357:14–16.) Indeed, Plaintiffs' own fire investigator did not visit the Echo Mountain location until a month before trial. (Tr. 2332:08–09). And even when he did, Schulz admitted that he was unable to collect any evidence or examine patterns due to this two-year

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delay. (Tr. 2344:19–21.) Moreover, although Schulz and Cuzzillo speculated that a tree branch had contacted distribution lines, neither located nor identified any such branch. (Tr. 2357:09–12, 2592:16–19.) And oxidation levels revealed that any arc marks associated with a tree branch contacting distribution lines in the Echo Mountain area pre-date Labor Day 2020. (Ex. 8560.)

Plaintiffs' evidence for the South Obenchain fire suffers from the same defects. No witness observed the South Obenchain fire ignition. (Tr. 2361:18–19.) Schulz never examined any evidence in person (Tr. 2362:12–21), did not visit the alleged origin site until a month before trial (Tr. 2357:23–25), and even when he did visit the site, he observed no fire patterns (Tr. 2361:20–23). Cuzzillo's testimony is similarly deficient. He opined that vegetation contact started the South Obenchain fire. (Tr. 2563:17–23.) But there were no arc marks on the distribution lines, no fault was recorded, and the fuse for the line did not blow. (Ex. 8554.)

Nor did the testimony of individual Plaintiffs affected by the Echo Mountain fire (Kevin and Shariene Stockton, James Holland, and Rachel McMaster) or South Obenchain fire (Victor Palfreyman) cure these failures of proof. None of the named Plaintiffs in the Echo Mountain fire area connected their damages to the Echo Mountain fire. Mr. Stockton, Holland, and McMaster did not see the fire start. (*See* Tr. 2946:14–19 (Stockton), Tr. at 2784:16–20 (Holland), Tr. 2044:01–07 (McMaster.) And Ms. Stockton wasn't even in Oregon that day. (Tr. 2981:21-23.) The same is true for Palfreyman's experience with the South Obenchain fire. Palfreyman was "six to eight miles away" from the smoke that he observed (Tr. 1446:02–05) and did not know what started the fire as it was "on the other side of the ridge." (*Id.* at 1451:07–08.)

3. Plaintiffs Did Not Present Sufficient Evidence of Legally Cognizable Harm to the Class.

The jury found that PacifiCorp was liable to the class on every claim except inverse condemnation. Each of these claims (negligence, trespass, and private and public nuisance)

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had an "injury" element, requiring each class member to prove they suffered more than de minimis harm. A negligence claim requires "actual loss" that exceeds "nominal damages." *Paul v. Providence Health Sys.-Oregon*, 351 Or 587, 595, 273 P3d 106, 111 (2012). Trespass requires defendant to have intruded on the plaintiff's property so severely as to be guilty of "substantial interference with their possessory interest." *Frady v. Portland Gen. Elec. Co.*, 55 Or App 344, 350, 637 P2d 1345, 1349 (1981) (ground vibrations insufficient to support trespass claim); *Williams v. Invenergy, LLC*, 2014 WL 7186854, at *18 (D Or Dec. 16, 2014) (same). And nuisance requires "facts showing that defendants unreasonably and *substantially interfered* with the use and enjoyment of plaintiffs' property." *Swanson v. Warner*, 125 Or App 524, 528, 865 P2d 493, 495 (1993) (emphasis added); *Smith v. Wallowa County*, 145 Or App 341, 346, 929 P2d 1100, 1103 (1996) (interference with use and enjoyment of land insufficient unless both substantial and unreasonable). Whether an act has produced damage of the nature and degree sufficient to constitute a trespass or nuisance, or to establish a negligence claim, is a matter of law. *Davis v. Georgia-Pac. Corp*., 251 Or 239, 244, 445 P2d 481, 483 (1968).

Plaintiffs relied on their economist expert, Mark Buckley, to prove this class-wide injury. But Buckley's testimony could not support a class-wide finding. Buckley merely testified that Forest Service data showed that certain property parcels in the class areas had experienced "low soil burn severity" "somewhere in the parcel." (Tr. 3333:24–3334:8, 3337:22–3339:02.) He did not know what "low soil burn severity" is, how it is measured or classified, or whether a parcel that contains soil with "low soil burn severity" has actually suffered some kind of compensable damage. (Tr. 3368:22-3369:6, 3371:20-3372:05.) Indeed, Buckley freely admitted that it is possible that "a home in an area that suffered a low soil burn severity score" may not have been "actually harmed," and that the mere fact that soil on a parcel experienced "low burn severity" does not explain whether any "real property" or "personal property" was damaged. (Tr. 3368:08–18, 3371:20–3372:01.) The jury's finding

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that PacifiCorp caused a compensable injury to every class member is thus not supported by any evidence and is, in fact, undermined by Plaintiffs' expert testimony.

Using "low soil burn severity" as a proxy for proving the entire class suffered a trespass, nuisance, or cognizable harm from negligence is insufficient as a matter of fact and law. Buckley admitted that he included any tax parcel (private or public) that suffered a low soil burn severity on *any portion* of the parcel. (Tr. 3337:22–3338:03.) He did not try to limit himself to class members who suffered cognizable injury under the law of negligence, trespass, or nuisance. *See Paul*, 351 Or at 595 (negligence claim requires "actual loss" that exceeds "nominal damages"); *Frady*, 55 Or App at 350 (trespass requires "substantial interference with their possessory interest"); *Swanson*, 125 Or App at 528 (nuisance requires "unreasonabl[e] and substantial[] interfere[nce] with the use and enjoyment of plaintiffs' property").

Swanson is particularly instructive. There, the court explained that the planting of a tree that blocked plaintiff's view did not constitute a nuisance because it did not "unreasonably and substantially interfere" with the use and enjoyment of plaintiffs' property. *Swanson*, 125 Or App at 528–29. The court also pointed to *Jacobson v. Crown Zellerbach*, 273 Or 15, 22, 539 P2d 641, 645 (1975), which held that vibrations caused by trucks do not constitute a nuisance as a matter of law, even where they allegedly damage a plaintiff's home. The "low soil burn severity" identified by Buckley is on par with the injuries deemed insufficient in *Swanson* and *Jacobson*. There is no evidence that, for every single parcel, "low soil burn" rises to the level of compensable harm. As explained in more detail below, it was Plaintiffs' burden to produce sufficient evidence from which a reasonable juror could conclude that *every* property owner within the class suffered damage that is significant enough to support a legal claim. *See, infra* at 48–51; *see also Wal-Mart*, 564 US at 358; *Ginsburg v. Comcast Cable Commc'ns Mgmt. LLC*, 2013 WL 1661483, at *6 (WD Wash Apr. 17, 2013); *Marlo v. United Parcel Serv., Inc.*, 251 FRD 476, 486–87 (CD Cal 2008). They failed to do so, which requires

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judgment notwithstanding the jury's verdict with respect to the negligence, trespass, and nuisance claims.

4. Plaintiffs Did Not Establish Gross Negligence or Recklessness.

"Gross negligence is the equivalent of reckless disregard and is negligence of a substantially greater degree than that of ordinary negligence." *Fassett v. Santiam Loggers, Inc.*, 267 Or 505, 508, 517 P2d 1059, 1060 (1973); *see also WSB Investments, LLC v. Pronghorn Development Co., LLC*, 269 Or App 342, 360, 344 P3d 548, 560 (2015) (describing gross negligence as negligence characterized by "near total disregard or indifference to the rights of others or the probable consequence of a course of conduct"). Recklessness means that a person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. *See Miller v. Agripac, Inc.*, 322 Or App 202, 217, 221–22, 518 P3d 957, 968 (2022), *rev den*, 370 Or 827 (2023). Both standards incorporate a subjective component (awareness and conscious disregard of a substantial risk), and an objective component (the disregard of the risk grossly deviates from the standard of care that a reasonable person would observe). *See Safeco Ins. Co. of Am. v. Burr*, 551 US 47, 68 (2007); *Wooten v. Dillard*, 286 Or 129, 135, 592 P2d 1021, 1024 (1979).

Gross negligence and recklessness impose high bars. Courts have consistently held that gross negligence and recklessness require proof of an "I don't care what happens" attitude. *Burghardt v. Olson*, 223 Or 155, 170, 349 P2d 792, 799 (1960), *adh'd to on reh'g*, 223 Or 155, 354 P2d 871 (1960); *Burrows v. Nash*, 199 Or 114, 125, 259 P2d 106, 111 (1953). This is well above ordinary negligence. For example, in *McNabb v. DeLaunay*, 223 Or 468, 471–72, 354 P2d 290, 292 (1960), the court affirmed a directed verdict for defendant even though he collided with a parked truck after passing warning signs, failing to observe the flagman, and failing to keep his vehicle under control. Several other cases have granted judgment notwithstanding the verdict under similar circumstances. *See Smith v. Barry*, 37 Or App 319, 323–26, 587 P2d 483, 485–86 (1978) (collecting cases).

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Plaintiffs did not present evidence at trial to establish that PacifiCorp acted recklessly or with gross negligence, much less in a way that injured every Plaintiff and the entire class:

- There is no evidence that PacifiCorp's decision not to implement a Public Safety Power Shutoff (PSPS) around Labor Day 2020 was grossly negligent or reckless. Before Labor Day 2020, no utility had ever performed a PSPS in Oregon. (Tr. 7080:04–07.) And on Labor Day 2020, no utility other than PGE turned off the power, and even PGE did not turn off the power in most of its service territory. (Tr. 7397:16–17, 7395:06–08.) The failure to take an unprecedented action (PSPS) in response to an unprecedented event (Labor Day 2020) does not demonstrate an objective gross deviation from the standard of care or subjective conscious disregard. Indeed, as Plaintiffs' own witnesses admitted, PSPS is "not just a black and white decision," because implementing a PSPS could itself be dangerous to health and safety. (Tr. 654:20–655:2, 5591:16–25; *see also* Tr. 7336:4–9; 7394:14–21; 7337:2–6; 6505:8–20; 7335:15–21). For example, some local governments and law enforcement agents opposed PSPS precisely because of the risks to vulnerable customers. (*See* Tr. 6956:20–23, 6957:1–5, 6957:16–6958:1, 6472:15–24, 6473:8–13, 6473:18–25, 6504:24–6505:7.) And on Labor Day 2020, PacifiCorp received numerous calls from customers expressing concern about power outages, including medically vulnerable customers, customers with medically vulnerable family members, and customers who relied on power for well water. (Ex. 21.) This record does not support a finding of the "I don't care" mental state required for a finding of gross negligence.
- With regard to the Santiam Canyon specifically, Plaintiffs presented no evidence that PacifiCorp's judgment call to keep the power on in the face of an active emergency situation (the lightning-caused Beachie Creek fire) constituted negligence, let alone gross negligence or recklessness. Plaintiffs' own witnesses were concerned with the possible spread of the Beachie Creek fire into the Santiam Canyon on Labor Day 2020.

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(Tr. 645:18–646:11.) In emergency situations, de-energization decisions are uniquely risky and should be made in coordination with on-the-ground emergency responders. (Tr. 6815:21–6816:6; 7386:7–12.) Here, emergency responders in the Santiam Canyon requested that PacifiCorp field employees maintain or restore power for firefighting purposes. (Tr. 6573:3–9; 7538:1–4.) Mill City Fire Chief Leland Ohrt explained that the loss of electricity could have hampered well water access, which would have in turn impeded firefighting efforts. (Tr. 5145:21–5146:1.) PacifiCorp's employees on the ground in the Santiam Canyon cared above all about the safety of residents and first responders—including by ensuring reliable access to power for evacuation and firefighting purposes—which ultimately animated decisions to keep the power on. (Tr. 7527:15–7528:21; 7595:3–16.)

- Nor did PacifiCorp's operational plan support a finding of gross negligence or recklessness. PacifiCorp established its Emergency Operations Center at the same time as, and in some cases earlier than, other government and private actors. (Tr. 6787:25–6788:2, 6799:13–6800:1, 6243:4–12.) PacifiCorp increased operational staffing. (Tr. 6491:10–17.) PacifiCorp deployed field resources and altered recloser settings in pre-identified areas of highest wildfire risk. (Tr. 7378:3–9, 6802:21–25.) Other utilities like PGE also took such actions only in their highest risk areas. (Tr. 7378:12–20.) PacifiCorp carefully monitored its detailed PSPS thresholds in those same highest-risk areas and also attempted to gather more detailed weather data in its entire service territory to inform its PSPS considerations. (Tr. 6806:23–6807:4, 7199:3–6, 7099:3–12.) More broadly, there was no evidence that PacifiCorp's weather forecasting practices rose to the level of gross negligence. Plaintiffs' own meteorology expert acknowledged that forecasting is "tough" and "definitely inexact" (Tr. 593:2–10, 597:23–598:10), opining that "there's always little data void areas or something out there that you don't have access to or you don't see. And it's not that you're blind or

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you're negligent, it's just weather." (Tr. 599:9–18.) In a fast-moving situation, PacifiCorp responded appropriately, including through extensive efforts by front-line workers to meet unprecedented challenges throughout PacifiCorp's service territory.

- Plaintiffs presented no evidence that PacifiCorp's decision to focus both its short-term and long-term wildfire mitigation efforts—including contracting for granular weather forecasts, installing hyperlocal weather stations, altering recloser settings, and deploying field observers—in pre-identified areas of highest fire risk deviated from any standard of care or constituted conscious disregard. (Tr. 5444:25–5445:14.) It is undisputed that the four fire areas at issue in this case were not in pre-identified highest-risk areas, but beyond that, Plaintiffs presented no evidence challenging the reasonableness or accuracy of PacifiCorp's efforts to map and identify the geographical areas of highest wildfire risk in the first place. To the contrary, the evidence showed that PacifiCorp pioneered the practice of wildfire risk mapping in Oregon (Tr. 5518:16–18), relying on experts to analyze a plethora of data inputs using time-intensive methods (Ex. 2818; Tr. 7027:10–12.) And there was no indication that it was unreasonable for PacifiCorp to direct its resources to areas that are at the greatest risk of wildfire—that approach was agreed upon by experts on both sides (Tr. 1758:18–22, 5483:10–5485:18), by other utilities (Tr. 5582:4–24, 5483:19–24), and even by PacifiCorp's own regulators (Tr. 7212:9–16).
- There is no evidence that PacifiCorp's decision to begin developing a formal wildfire mitigation plan in 2018—as opposed to earlier—was grossly negligent or reckless. Instead, the evidence showed that PacifiCorp's regulators did not require any utility in Oregon to create a wildfire mitigation plan prior to Labor Day 2020. (Tr. 6620:12–15.) Nonetheless, PacifiCorp invested in those efforts anyway, becoming the first utility in Oregon to develop a wildfire mitigation plan and effectually introducing the concept of PSPS to the state. (Tr. 4074:15–18, 5342:5–14.)

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- Plaintiffs presented no evidence that PacifiCorp's infrastructure was defective, deficient, or hazardous, certainly not as compared to other utilities or in a manner that would reflect near-total disregard or indifference to the rights of others.
- PacifiCorp's vegetation management program does not support Plaintiffs' gross negligence or recklessness theories. Plaintiffs cannot rely on generalized criticisms across the company from different periods of time; Plaintiffs must show gross negligence or recklessness as to them. The witness who testified on this issue—Vincent Oatis—made no comparative judgment between PacifiCorp and other Oregon utilities, used an apples-to-oranges comparison between PacifiCorp and Southern California Edison, and admitted that he only reviewed information provided to him by Plaintiffs' counsel. And as to the two identified trees at issue in the 242 and South Obenchain fires, Plaintiffs' expert David Braun did not opine that failure to identify those trees was grossly negligent or reckless (as opposed to unreasonable or negligent). Further, there was no evidence that every fire was caused by deficient vegetation management or could have been avoided with a non-negligent vegetation management program.

In sum, the evidence presented by Plaintiffs here does not establish the requisite mental state for gross negligence or reckless. No evidence supports the conclusion that PacifiCorp "did not care what happens." *See McNabb*, 223 Or at 472. To the contrary, PacifiCorp actively attempted to manage the fast-moving and highly unusual circumstances present on Labor Day 2020, rendering any finding of gross negligence or reckless unsupported.

5. Plaintiffs Failed to Prove Negligent Conduct or Foreseeability.

Plaintiffs' evidence does not demonstrate a deviation from the applicable standard of care, for the reasons stated above. *See Fazzolari ex rel. Fazzolari v. Portland Sch. Dist. No. 1J*, 303 Or 1, 5, 734 P2d 1326, 1328 (1987) (listing "a standard of care not observed" as an element of a negligence claim); *Dubry v. Safeway Stores, Inc.*, 70 Or App 183, 189, 689 P2d

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319, 322 (1984), *rev den*, 298 Or 470 (1985) (agreeing summary judgment was appropriate where there was no evidence indicating that, "in the exercise of reasonable diligence," defendant should have removed dangerous condition). Plaintiffs' various negligence theories are general criticisms informed by hindsight. Plaintiffs cite a number of ways in which PacifiCorp could have done more—installing covered conductors, cutting more trees, instituting a PSPS, or having more weather stations installed. Plaintiffs have merely shown that others could have done things differently, but they have not shown that PacifiCorp acted negligently with respect to the operation of its utility infrastructure. This is particularly true in light of PacifiCorp's actions that went over and above what other utilities were doing, such as the implementation of a PSPS plan years before any regulation requiring one (*see* Tr. 7023:23–7024:01, 7080:04–07).

PacifiCorp is also entitled to judgment notwithstanding the verdict on the separate ground of foreseeability. "[T]he issue of liability for harm actually resulting from defendant's conduct properly depends on whether that conduct unreasonably created a foreseeable risk to a protected interest of the kind of harm that befell the plaintiff." *Fazzolari*, 303 Or at 17. Where no reasonable juror could find that the kind of harm that befell the plaintiff was the foreseeable result of the defendant's negligent act, the harm is unforeseeable as a matter of law. *Buchler v. Oregon Corrections Div.*, 316 Or 499, 509, 853 P2d 798, 803 (1993).

Plaintiffs failed to prove foreseeability as to each fire. Instead, they have relied on the generalized assertion that energized power lines have the potential to spark and to ignite a fire. That observation is not enough to establish foreseeability. If it were, every power line fire—no matter the size, cause, or impact—would be a foreseeable event. Indeed, the evidence here underscores why the Labor Day fires were not foreseeable: A combination of incredibly strong winds, unusually dry conditions, lightning, and other factors combined to create an unforeseeable event—a conflagration in the Santiam Canyon that had rarely, if ever, occurred. Similarly, even assuming that vegetation contact with power lines caused the Echo Mountain

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Complex, South Obenchain, and 242 fires, the foreseeable risk was, at most, a localized and contained fire, not fires of the size and scope that a perfect storm of conditions created.

6. Plaintiffs Failed to Prove Their Claim for Trespass.

Plaintiffs likewise failed to prove an essential element of their trespass claim. To prevail on an unintentional trespass claim, Plaintiffs must prove PacifiCorp acted negligently or recklessly in causing an unauthorized entry onto land in the exclusive possession of another. *See Carvalho v. Wolfe*, 207 Or App 175, 181, 140 P3d 1161, 1164 (2006). As noted above, Plaintiffs have failed to prove that PacifiCorp acted negligently or recklessly, let alone intentionally, or that its actions caused fire and smoke to enter Plaintiffs' property. *See Gibson v. Morris*, 270 Or App 608, 614, 348 P3d 1180, 1183 (2015) (upholding finding that defendants did not know and acted reasonably in not discovering that they had caused an intrusion into a neighbor's property even when the neighbor had complained of the intrusion); *Hudson v. Peavey Oil Co.*, 279 Or 3, 7, 566 P2d 175, 177 (1977) (finding that the evidence did not justify a ruling that defendant knew or should have known of the unauthorized entry); *Lunda v. Matthews*, 46 Or App 701, 705, 613 P2d 63, 66 (1980) (Intentional trespass requires "acts setting in motion the invasion were done with knowledge that a trespass would result."). Plaintiffs have not provided any evidence that PacifiCorp acted or failed to act with the knowledge that wildfires would result.

Even if the individual Plaintiffs had established the requisite mental state, the class trespass claims would still fail. For the reasons outlined above, Plaintiffs have not shown that PacifiCorp's conduct caused an unauthorized entry to every single parcel of property within the entire fire perimeter boundaries.

7. Plaintiffs Failed to Prove Their Claim for Private Nuisance.

Plaintiffs' theory that PacifiCorp caused fires that burned some Plaintiffs' property cannot support a private nuisance claim. A private nuisance, by definition, is not a trespass. *See Mark v. State Dep't of Fish & Wildlife*, 158 Or App 355, 360, 974 P2d 716, 719 (1999),

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rev den, 329 Or 479 (1999) (private nuisance "is an unreasonable *non-trespassory* interference with another's private use and enjoyment of land." (emphasis added)); *see also State ex rel. Rudd v. Ringold*, 102 Or 401, 404–05, 202 P 734, 735 (1921) ("A private nuisance is anything done to the hurt, annoyance, or detriment of the lands or hereditaments of another, and *not amounting to a trespass*." (emphasis added)). Plaintiffs presented evidence of only trespassory interferences, namely fires burning their property. *See Martin v. Union Pac. R. Co.*, 256 Or 563, 565, 474 P2d 739, 740 (1970) ("the spread of fire * * * [is] an intrusion of a character sufficient to constitute a trespass"). That is not enough, as a nuisance claim requires something more than a single event causing trespassory property damage in a matter of hours, if not minutes. As the Court of Appeals explained in *Meyer*, one-time fires are not nuisances. *See Meyer*, 60 Or App at 75–76, 80. Thus, Plaintiffs' evidence cannot support a claim for private nuisance. With little evidence of trespassory interference caused by PacifiCorp, Plaintiffs' private nuisance claim fails.

8. No Evidence Supports Plaintiffs' Public Nuisance Claims.

To recover for public nuisance, Plaintiffs were required to show (1) that PacifiCorp's conduct unreasonably interfered with a right that is common to all members of the public, (2) PacifiCorp's conduct was negligent, reckless, or intentional, and (3) the conduct caused an injury to each plaintiff "of a special character distinct and different from that suffered by the public generally." *Smejkal v. Empire Lite-Rock, Inc.*, 274 Or 571, 574, 657 P2d 1363, 1365 (1975); *see also Raymond v. S. Pac. Co.*, 259 Or 629, 634, 488 P2d 460, 463–63 (1971). As explained above, Plaintiffs have not established any type of nuisance claim (private or public), nor have Plaintiffs established the second of these three elements. Their public nuisance claim fails for this reason alone.

It also fails because "[p]ublic nuisances must be vindicated by the state unless an individual can show that he has suffered a special damage over and above the ordinary damage caused to the public at large." *Raymond*, 259 Or at 634. It is "not enough that [a plaintiff]

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suffers the same" injury as "everyone else." *Id.* Here, neither Buckley's testimony nor any other record evidence shows that the class as a whole suffered an injury "distinct and different from that suffered by the public generally." *Smejkal*, 274 Or at 574. Indeed, because the class effectively is the public within four large geographic areas, no evidence could satisfy this showing as to the entire class and each of its members.

Nor did Plaintiffs establish an "unreasonable interference with a right which is common to members of the public." *Raymond*, 259 Or at 634. Plaintiffs relied on ORS 477.064 to satisfy this evidentiary requirement. That statute states that any "fire on any forestland in Oregon burning uncontrolled or without proper action being taken to prevent its spread, notwithstanding its origin, is declared a public nuisance." ORS 477.064. The "spread of fire in forestland across an ownership boundary is prima facie evidence of fire burning uncontrolled." *Id.* Yet Plaintiffs have not offered any testimony, by either an expert or an eyewitness, that any fire spread across any ownership boundary. (*See, e.g.*, Tr. 3350:22–23.)

9. Plaintiffs Put Forward No Objectively Verifiable Evidence of Personal Property Damages.

There is no evidence in the record to permit the jury to reach an "objectively verifiable" measure of Plaintiffs' personal property damages. ORS 477.089(1)(a)(B). Plaintiffs "simply failed in their burden of proof" to show either ownership of or damage to personal property, let alone in the amounts claimed. *Lanz v. Douglas Tool & Eng'g, Inc.*, 138 Or App 89, 93, 907 P2d 1128, 1130 (1995). During the testimony of the only witnesses with personal knowledge of Plaintiffs' personal property—i.e., the testimony of named Plaintiffs themselves—Plaintiffs made no effort to introduce an inventory or summary of personal property records. Instead, most Plaintiffs testified to at most a handful of sentimental items, and some declined to testify about any specific possessions lost. (*See, e.g.*, Tr. 2075:12–2075:22.)

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Plaintiffs primarily relied on testimony from two personal property appraisers who reviewed various inventories—which are themselves not in the record[3]—and testified as to their opinions of the value of those inventories. (*See* Tr. 3519:20–3615:25.) But the appraisers "don't have personal knowledge" that any named Plaintiff owned any of the particular property that they appraised; rather, the appraisal values were "based on the assumption that Plaintiffs actually owned all of the properties listed in inventories." (Tr. 3553:8–17.) Nor could the appraisers provide any measure of the value of the property in its condition *before* the relevant events—as is required to show personal property damages in Oregon. *See Cutsforth v. Kinzua Corp.*, 267 Or 423, 439, 517 P2d 640, 647 (1973). As a result, the appraisers could not and did not provide the missing evidentiary link—that is, they failed to testify to Plaintiffs' ownership of the property appraised or the pre-damage value of that property. *Bowns v. Bowns*, 184 Or 603, 621, 200 P2d 586, 593 (1948). Thus, there was insufficient evidence of property damage.

Alternatively, Plaintiffs seek personal property damages under two theories: a "retail replacement" theory and a "fair market" value theory. Under Oregon law, the measure of damages for destroyed or damaged personal property is "the difference between its value at the place immediately before and immediately after the injury." *Mock v. Terry*, 251 Or 511, 512, 446 P2d 514, 515 (1968). Market value is not equivalent to retail value, and indeed, "[u]sing retail value as market value would grant the plaintiff recovery for his cost of doing business and a profit." *Id*. Recovering retail value is only permissible if a plaintiff can "prove that [retail value] would have been realized if defendant had not damaged his property." *Id*. "[I]n the absence of such proof, such items of damage are not recoverable." *Id*. Because Plaintiffs have offered no proof that they would be entitled to retail value for any item of

[3] As the Court of Appeals recently concluded, personal property inventories are inadmissible hearsay even when the witness who compiled the inventory "had personal knowledge of the price of the items." *Morgan v. Valley Prop. and Cas. Ins. Co.*, 289 Or App 454, 463, 410 P3d 327, 333 (2017).

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personal property, the Court should strike Plaintiffs' request for retail replacement value for personal property damages.

E. Plaintiffs Failed to Produce Sufficient Evidence for Punitive Damages.

The record does not contain sufficient evidence for the jury's conclusion that Plaintiffs should be entitled to punitive damages, individually or on a class-wide basis.

First, PacifiCorp complied with—and, indeed, exceeded—relevant industry standards and regulatory guidance. Punitive damages are only recoverable when "it is proven by clear and convincing evidence that the party against whom punitive damages are sought * * * has shown a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to the health, safety and welfare of others." ORS 31.730(1). But here, PacifiCorp complied with all Oregon Public Utility Commission regulations and industry standards. (Tr. 8356:15–8357:6.) Not only was PacifiCorp in compliance with those standards, but it was an industry leader in preparedness: PacifiCorp was the first to develop a formal wildfire mitigation plan, the first to develop a formal public safety power shutoff plan, and the first to install micro weather stations to better understand developing situations. (Tr. 8356:15–8357:6.) An "outrageous[ly] indifferen[t]" defendant is not one that goes out of its way to ensure compliance with public regulations and industry standards. "Compliance with industry standard and custom serves to * * * show that [the defendant] acted with a nonculpable state of mind." *Drabik v. Stanley-Bostitch, Inc.*, 997 F2d 496, 510 (8th Cir 1993). And Plaintiffs presented no evidence suggesting that PacifiCorp's infrastructure was deficient or hazardous such as to present the "highly unreasonable risk of harm" required by the statute. ORS 31.730(1). Plaintiffs plainly failed to meet their burden on that score, and so the jury could not validly conclude that PacifiCorp acted with the *mens rea* required for an award of punitive damages.

Second, PacifiCorp's conduct was objectively reasonable, and therefore not consistent with the sort of "reckless and outrageous indifference" necessary to warrant a finding of

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punitive damages under Oregon law and in accordance with the strictures of due process. *See* ORS 31.730(1); *Safeco*, 551 US at 68–69. The Due Process Clause of the Fourteenth Amendment to the United States Constitution "imposes substantive limits" on the state's discretion to impose punitive damages, *Cooper Indus., Inc. v. Leatherman*, 532 US 424, 433 (2001), including a prohibition on "arbitrary punishments." *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 US 408, 416–17 (2003). To that end, Plaintiffs were required to establish that PacifiCorp acted recklessly to secure punitive damages. *See Safeco*, 551 US at 69. The evidence at trial did not support such a finding. To the contrary, its conduct was objectively reasonable such that imposing punitive damages amounts to arbitrary punishment. PacifiCorp acted in accordance with a reasonable understanding of what applicable standards and regulations required; this is not objectively unreasonable. *See id.* at 69–70. Both Oregon and federal punitive damages law requires unreasonable conduct—which Plaintiffs here failed to show.

Third, PacifiCorp had no fair notice that not de-energizing would subject it to punishment, depriving it of due process. In addition to its prohibition on arbitrary punishment, the Due Process Clause of the Fourteenth Amendment to the United States Constitution also guarantees that civil defendants have the right to be put on notice about what conduct could result in punishment. *See, e.g.*, *Chalmers v. City of Los Angeles*, 762 F2d 753, 757 (9th Cir 1985) (due process requires that "ordinary people" must "understand what conduct is being prohibited."); *Grayned v. City of Rockford*, 408 US 104, 108 (1972) ("[W]e insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited."). Since PacifiCorp acted within the range of industry standards and public regulations—and Plaintiffs failed to meet their burden to produce evidence to the contrary—PacifiCorp had no reason to believe its conduct was putting it at risk of punitive damages.

Fourth, Plaintiffs also failed to prove class-wide punitive damages liability. When a factfinder assesses damages, it is required to consider "the disparity between the harm or

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potential harm suffered *by [the claimant]* and his punitive damages." *BMW of N. Am., Inc. v. Gore*, 517 US 559, 575 (1996) (emphasis added). In other words, punitive damages require a nexus between the defendant's conduct and the plaintiff's alleged harm. But here, jurors had no information about the individualized harms suffered by unnamed, absent class members, because the class questions were limited to PacifiCorp's role, if any, in causing the fires as a whole, not whether it harmed individual Plaintiffs' properties. The jury was therefore deprived of the ability to calculate the harms, if any, suffered by those Plaintiffs. Because Plaintiffs failed to show evidence of individualized harms or to provide the jury with necessary information about the alleged harms to the absent Plaintiffs, this court should grant judgment notwithstanding the verdict on the issue of punitive damages.

F. The Oregon Public Utility Commission Has Exclusive and Primary Jurisdiction Over Specific Portions of This Case.

Judgment must be entered for PacifiCorp with respect to Plaintiffs' (1) request for an order enjoining PacifiCorp from leaving power lines energized in certain areas of Oregon during extremely critical fire conditions and (2) liability claims to the extent they are based on the company's decision to institute or not institute a PSPS in connection with the Labor Day 2020 fires. "[W]here the law vests in an administrative agency the power to decide a controversy or treat an issue, the courts will refrain from entertaining the case until the agency has fulfilled its statutory obligation." *Boise Cascade Corp. v. Bd. of Forestry*, 325 Or 185, 191 n.8, 935 P2d 411, 416 (1997) (cleaned up). To determine whether an agency has primary jurisdiction over an issue, "courts consider several factors, including (1) the extent to which the agency's specialized expertise makes it a preferable forum for resolving the issue, (2) the need for uniform resolution of the issue, and (3) the potential that judicial resolution of the issue will have an adverse impact on the agency's performance of its regulatory responsibilities." *Id.* at 192 (cleaned up). Here, the Oregon Public Utility Commission (OPUC) is uniquely qualified to develop and enforce a comprehensive regulatory framework

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governing the PSPS practices of Oregon utilities—including, but not limited to, the circumstances warranting a PSPS and liability arising out of PSPS decisions. All three factors squarely support keeping the propriety of PacifiCorp's PSPS decisions out of the purview of the factfinder.

First, the OPUC has the comparative advantage when it comes to specialized expertise related to the implementation of PSPS. It has promulgated rules defining PSPS and regulations governing PSPS. *See* OAR 860-300-0010(8); OAR 860-300-0050. The OPUC has applied those rules and regulations to real-life fact patterns and, in doing so, has developed an extensive understanding of the factors that affect utility assessment of fire risk.

Second, there is a need for uniform resolution of this issue because PacifiCorp's service territory stretches across several counties throughout the state. If various circuit courts or juries craft injunctive relief or liability determinations differently from one another, the standards to trigger PSPS events will fragment along county lines or from jury to jury, even though transmission and distribution circuits frequently cross county lines, and weather events do too. The same is true for statewide regulatory tariffs, which are one of the OPUC's most powerful policy tools to prevent piecemeal judicial determinations. PacifiCorp provides service in its disparate service areas consistent with the terms of its statewide, OPUC-approved tariffs. And here, Oregon Tariff Rule 14(c) gives PacifiCorp "sole judgment" to take actions that are "necessary or prudent to protect the performance, integrity, reliability or stability of the Company's electrical system or any electrical system with which it is interconnected." PacifiCorp's duties under the tariff cannot vary based on where the plaintiff resides as a result of piecemeal judicial adjudications.

Third, the OPUC is reviewing the decisions leading up to the Labor Day fires, *see* OAR 860-024-1061(2) (requiring utilities to "file reports on de-energization lessons learned") and has already indicated that it may impose more detailed standards for PSPS decisions in the

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wake of these fires.[4] Judicial resolution of this issue could undermine the OPUC's regulatory scheme.

II. MOTION FOR NEW TRIAL

A. Legal Standard

ORCP 64 B provides that a court may grant a new trial on several grounds, including: "(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having fair trial; * * * (5) Insufficiency of the evidence to justify the verdict or other decision, or that it is against law; or (6) Error in law occurring at the trial and objected to or excepted to by the party making the application." ORCP 64 B(1), (5), (6). ORCP 64 B further requires that the grounds for new trial "materially affect[] the substantial rights" of the movant. Erroneous jury instructions warrant a new trial under either ORCP 64 B(1) or (6). *See State v. Ramoz*, 367 Or 670, 698, 690, 483 P3d 615 (2021). It qualifies as an "[i]rregularity in the proceedings of the court" under ORCP 64 B(1) when there is a deviation from "any common or established rule[,] * * * method, or order" that prevented the movant from having a fair trial. *Ramoz,* 376 Or at 672, 687–92. ORCP 64 B(6) does not require that the error prevented the movant from receiving a fair trial, requiring instead an error in law at trial that was the subject of a contemporaneous objection by the movant. *Id.* at 690. In any event, the error must prejudice the movant. *See Ossanna v. Nike, Inc.*, 365 Or 196, 219, 445 P3d 281 (2019).

B. Each of the Grounds for Judgment Notwithstanding the Verdict Support, in the Alternative, a New Trial

ORCP 63 C provides in relevant part that "[a] motion in the alternative for a new trial may be joined with a motion for judgment notwithstanding the verdict." Consistent with ORCP 63 C, to the extent that any of the grounds asserted above do not merit judgment in PacifiCorp's favor, PacifiCorp seeks, in the alternative, a new trial on the same grounds under

[4] *See* Timeline for Regulations, https://www.oregon.gov/puc/safety/Documents/AR638-Timeline.pdf.

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ORCP 64 B. For example, and not by way of limitation, the evidence of causation to the class and causation to the individual plaintiffs was insufficient to justify the verdict, ORCP 64 B(5), and the Court's submission of noneconomic damages to the jury was an error of law for the reasons outlined above, ORCP 64 B(6). A new trial would be appropriate as an alternative remedy for each of the reasons in Part I (Motion for Judgment Notwithstanding the Verdict), as well as the reasons outlined below in this Part II.

C. The Court's Instructions to the Jury on Plaintiffs' Burden to Prove the Claims of the Absent Class Members Were Legally Erroneous

As set forth above, Plaintiffs did not even attempt to prove causation and other critical elements of their claims as to the absent class members. Yet the jury still found for Plaintiffs on almost every claim. The reason is the jury was erroneously instructed—the Court failed to tell the jury it was required to find liability for each class member, and even instructed the jury that the opposite was true—*i.e.* that it "may ***assume*** that the evidence at the trial applies to all class members." (June 6, 2023, Final Jury Instructions at 16.) This was prejudicial, reversible legal error that requires a new trial.

1. The Court Erred by Failing to Instruct the Jury that Plaintiffs Must Prove Their Claim as to the Entire Class and Each of its Members.

The law is as clear in Oregon as it is in every jurisdiction: "To prevail in a class action," the plaintiff "must prove" each element of each claim "on the part of *all* class members." *Strawn v. Farmers Ins. Co. of Oregon*, 350 Or 336, 358, 258 P3d 1199 (2011); *see also Bowerman v. Field Asset Servs.*, 60 F4th 459, 479 (9th Cir 2023) (a defendant "cannot be liable to an entire class" unless it is liable to "each of" the class's members). Defendants requested the jury be told that it "must determine whether plaintiffs have proved the answer to the entire class and each of its members by a preponderance of the evidence" (May 6, 2023 Draft Combined Jury Instructions at 18), but the Court failed to give that instruction, instead giving Plaintiffs' proposed language that "you can answer the class questions based on evidence that

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applies to the class as a whole * * * You may assume that the evidence at the trial applies to all class members" (June 6, 2023 Final Jury Instructions at 15-16). That was error.

"The parties to any jury case are entitled to have the jury instructed in the law which governs the case in plain, clear, simple language." *Estate of Schwarz ex rel Schwarz v. Philip Morris Inc.*, 348 Or. 442, 454, 235 P3d 668 (2010) (citation omitted). Failing to instruct the jury that in order to support their claims as to the absent class members, Plaintiffs bore the burden of showing causation, negligence, and every other class-wide question as to the *entire* class—not just some, a plurality, or a majority—was error as a matter of law. A defendant is "entitled to have the jury informed with respect to [the] burden of proof imposed upon plaintiff"; the "failure to give" a legally correct instruction on the Plaintiffs' burden "constitutes reversible error." *Sinclair v. Barker*, 236 Or 599, 609, 612, 390 P2d 321 (1964). While *Strawn* held that class action plaintiffs may sometimes prove class claims by inference, *see* 350 Or at 357, that does not obviate Plaintiffs' obligation to actually *prove* their claims on a class-wide basis. A class action plaintiff must still prove its claims as to "***all*** class members." *Id.* at 358 (emphasis added).

2. The Court Erroneously Instructed the Jury to Assume the Evidence at Trial Applied to All Class Members.

The Court's instructions not only failed to require Plaintiffs to prove the claims of every absent class member to establish liability as to the class, they affirmatively told the jury it "may assume that the evidence at the trial applies to all class members." (Tr. 8071:15–16.) In doing so, the Court relieved Plaintiffs of their burden, committing clear, prejudicial legal error and violating PacifiCorp's due process rights.

Plaintiffs had to prove their claims as to *every* class member. And it is undisputed that different class members were affected by different fires—including the Beachie Creek fire, which burned a wide swath of the class area and had nothing to do with PacifiCorp. The jury could not "assume" that evidence about fires in, for instance, the west part of the Santiam

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Canyon "applie[d]" to class members east of Niagara, miles away, whose property was burned by the Beachie Creek fire. (Tr. 8071:15–16.) It certainly could not "assume" that evidence about fires in the Santiam Canyon "applie[d]" to class members in completely different fire areas. (*Id.*) The instruction was erroneous and prejudicial, and allowed Plaintiffs to evade their evidentiary burden of actually proving their claims on a class-wide basis. It also deprived PacifiCorp of its due process right "to present every individual defense." *Lindsey v. Normet*, 405 US 56, 66 (1972).

The law is well settled that the class action device cannot be used to undermine a defendant's substantive rights, including its right to require each class member to prove its claims. *See, e.g.*, *Bernard*, 275 Or at 159–60 (holding that Oregon's class action procedure cannot "deprive the defendants of valuable procedural and substantive rights by preventing them from asserting what appears to be a bona fide defense" to the claims of individual "claimants"); *Cimino*, 151 F3d at 312 n.30 ("[T]he fact that a case is proceeding as a class action does not in any way alter the substantive proof required to prove up a claim for relief."). Indeed, using class actions in this way violates due process. *See Carrera v. Bayer Corp.*, 727 F3d 300, 307 (3d Cir 2013), *reh'g den en banc*, 2014 WL 3887938 (3d Cir 2014) ("A defendant in a class action has a due process right to raise individual challenges and defenses to claims, and a class action cannot be certified in a way that eviscerates this right or masks individual issues."); *Bernard*, 275 Or at 159–60.

And this is *not* a case where the claims of the entire class could be proven with the same class-wide proof—this case involves numerous different fires (including fires which could not have been started by PacifiCorp's equipment) burning thousands of different class-member properties. The jury could not "assume" that evidence about one fire in one area necessarily "applie[d]" to class members located somewhere else. (Tr. 8071:15–16.) For example, testimony that some spot fires near Mill City may have been caused by utility equipment (*see supra* at 14–16), could not prove that property miles away in Niagara was

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burned by a utility fire—particularly when Plaintiffs' own expert opined that the Niagara area was burned by the Beachie Creek fire before any utility fire could have reached it. *Supra* at 12. Whether any particular property was burned by a utility fire—much less a utility fire caused by unlawful conduct by PacifiCorp—is an inquiry that requires a "property-by-property assessment." *Ebert v. Gen. Mills, Inc*., 823 F3d 472, 479 (8th Cir 2016) (claims by class of property owners that they were damaged by discharge from an industrial facility could not be proven through class-wide proof, since the question of whether "each individual property" was contaminated and whether the contamination was " attributable to [the defendant] in each instance" had to be evaluated individually). While a jury may, in some circumstances, infer that individual evidence applies to the whole class, "for that inference to arise," the same conduct "must have [occurred] without material variation to the members of the class." *Strawn*, 350 Or at 358–59. That is indisputably not the case here.

The Court's erroneous instruction was prejudicial. When an "incorrect instruction permits the jury to reach a legally erroneous result, a party has established that the instructional error substantially affected its rights." *Wallach v. Allstate Ins. Co*., 344 Or 314, 329, 180 P3d 19 (2008). Here, the Court's instruction allowed the jury to erroneously "assume" that the evidence presented at trial necessarily "applies to all class members." (Tr. 8071:15–16.) That allowed the jury to forego any consideration of whether Plaintiffs had actually proven the claims of all the absent class members: Pursuant to the Court's instruction, if the jury believed that the evidence supported the individual plaintiffs' claims, then it could assume that *every* class member's claim was proven as well. Indeed, this is exactly what the jury did. Plaintiffs did not even *attempt* to prove that every class member's property was burned by a fire attributable to PacifiCorp—again, their own expert opined that many class properties were burned by a fire that PacifiCorp indisputably did not start. *Supra* at 11–12. Yet the jury found that every class member's claims were proven, apparently because it believed that it should do so if it found for the individual plaintiffs. This is impermissible. A new trial must be granted

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and the jury properly instructed that it may not assume that individual evidence applies on a class-wide basis.

D. The Court's Instruction on Spoliation Was Not Warranted and the Prejudice from Plaintiffs' Incessant Focus on Missing Evidence in Virtually Every Aspect of the Case Requires a New Trial.

After Labor Day, PacifiCorp sought to swiftly restore power in the areas affected by the fires. Accomplishing this task required large-scale removal and replacement of damaged equipment. Plaintiffs alleged that these actions resulted in the destruction of some "evidence" and thus requested an adverse inference instruction on spoliation, which the Court granted. That was error.

The facts here did not warrant a spoliation instruction. Nor was the instruction permissible under Oregon law. Oregon recognizes no prelitigation duty to preserve evidence. And even if it did, an adverse inference instruction requires willful spoliation. No evidence of willfulness exists because PacifiCorp did not know that any equipment it replaced was potential evidence—particularly when PacifiCorp had no way of knowing what equipment Plaintiffs might allege, years later, had caused a utility fire. Nor have Plaintiffs shown that any of the replaced evidence was material. Granting Plaintiffs' request for an adverse inference instruction was error and warrants a new trial.

1. Under Oregon Law, There Is No Prelitigation Duty to Preserve Evidence.

While preservation of evidence is "a matter of prudent *practice*, [it is] not a mandate expressed in law like a statute, administrative regulation, or Oregon court rule." *Kerr v. Bd. of Psych. Examiners*, 304 Or App 95, 111, 467 P3d 754 (2020) (emphasis in original). There is no dispute that Plaintiffs identified spoliation that took place only before litigation commenced. Plaintiffs did not file their complaint until September 30—weeks after PacifiCorp's restoration efforts had already begun. (*See* Tr. 7588:8–9 ("Crews arrived * * * a few days [after Labor Day] to begin repairs"); Tr. 4468:25–4469:1 (acknowledging that the repairs were "done before September 16").)

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Plaintiffs' repeated reference to a declaration from PacifiCorp's Chief Legal Officer does not change this analysis. His declaration stated that the company had started its privileged investigation of the Labor Day fires on September 8, 2020. (Ex. 2765 at ¶ 2.) According to Plaintiffs, this shows that PacifiCorp should have preserved all evidence starting from that date. It does not. Before Plaintiffs filed their complaint, PacifiCorp had no duty to preserve any evidence under Oregon law—whether or not its counsel recognized that litigation was possible. *Kerr*, 304 Or App at 111.

2. No Evidence Showed a Willful Destruction of Evidence.

Even if PacifiCorp were required to preserve any equipment (let alone evidence), the adverse inference instruction was still impermissible because nothing suggests that PacifiCorp acted willfully. OEC 311(1)(c) permits an adverse inference instruction only if there was willful destruction of evidence. OEC 311(1)(c) ("Evidence willfully suppressed would be adverse to the party suppressing it."); *State v. Copeland*, 324 Or App 816, 823, 527 P3d 771 (2023) ("Oregon law attaches a presumption to the willful and intentional destruction of evidence."). But even Plaintiffs' experts acknowledged that there was not "any evidence" of willful spoliation. (Tr. 4470:19–23.) Thus, issuing a spoliation instruction was improper as a matter of law.

Moreover, in the context of civil sanctions, "willfully" means "intentionally and with knowledge" that the act or omission "was forbidden conduct." *L&A Designs, LLC v. Navarro*, 285 Or App 167, 176, 396 P3d 931 (2017); *see also Black's Law Dictionary* (11th ed 2019) (defining "willful" as: "Voluntary and intentional, but not necessarily malicious."). Likewise, in the context of OEC 311(1)(c), an adverse inference instruction is proper only when a party intended—or acted "with the aim of carrying out the act"—to suppress evidence. *Black's Law Dictionary* (11th ed 2019) (defining "intentional"). At minimum, this requires that the spoliating party *know* that it was destroying evidence. But PacifiCorp did not even know which purported ignition points would be relevant until Plaintiffs' fire investigation expert Larry

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Pelton testified on May 15, 2023, years after PacifiCorp began working to restore service to areas affected by the wildfire. (Tr. 4245:9–19.) Rather, the evidence demonstrated that PacifiCorp was focused on cleaning up in the aftermath of devastating wildfires, not that it contemplated that the damaged equipment might be evidence. The ruling here raises the specter that utilities will have to delay cleanup and repair efforts in the wake of major wildfires, out of fear of being blamed (and, ultimately, found liable) because they supposedly destroyed evidence.

No evidence suggests that PacifiCorp willfully or intentionally destroyed evidence. In fact, regarding the Echo Mountain and Kimberling fires, there is no direct evidence that *any* evidence was destroyed. As Fire Chief Robert Dahlman of Lincoln City acknowledged: "I don't know that [PacifiCorp] had destroyed *any evidence at all*." (Tr. 1632:21–22 (emphasis added).) Nor was he aware of any equipment or material that PacifiCorp removed. (*Id.* at 1639:13–17.)[5]

Nor is there any evidence that PacifiCorp deliberately destroyed evidence in Santiam Canyon. Plaintiffs allege that PacifiCorp failed to preserve evidence across multiple ignition sites throughout the area. But when asked whether he had "any reason to think that PacifiCorp made these repairs deliberately to destroy evidence," Pelton acknowledged that he did not "have any evidence of that effect." (Tr. 4470:19–23, 4471:10–13.) And Pelton's conclusion accords with other evidence at trial: Government investigators normally control the scene. (*See* Tr. 7706:12–13.) That is what happened at the 242, Obenchain, Echo Mountain, and Kimberling fire sites. (*See* Ex. 535.) But, other than the Gates School, that is not what happened in Santiam Canyon—as Pelton agreed. (Tr. 4471:14–23.) The absence of government investigation explains why PacifiCorp did not know that it had to preserve equipment or materials in Santiam Canyon. (*See, e.g.*, Tr. 6598:22–6599:02.) That lack of

[5] At most, Chief Dahlman accused PacifiCorp of entering restricted investigation areas. But even he concedes that the company's crews were granted permission to be in those areas by an ODF investigator. (Dahlman, Tr. 1638:19–22 ("Q: Okay. And he invited PacifiCorp in or he gave PacifiCorp permission, was your understanding, to enter some areas? A: He did.").)

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knowledge precludes any finding of willful suppression of evidence. Furthermore, PacifiCorp's employees believed most of damage in the canyon was caused by the Beachie Creek fire, not electrical equipment. (*See* Tr. 7588:19–21; Tr. 6594:19–21.)

The unrebutted evidence was that PacifiCorp replaced its equipment as part of its general efforts to restore power—not to destroy evidence. And when evidence is incidentally destroyed as part of a general practice, courts reject requests for adverse inference instructions. *See Stevenson v. Union Pac. R.R. Co.*, 354 F3d 739, 748–49 (8th Cir 2004). The lack of willful intent means that no adverse inference instruction should have been given.

3. Any Evidence (Purportedly) Destroyed Was Not Material.

Plaintiffs have offered no evidence that any of the replaced equipment would have been relevant to their case, let alone material. "The bare fact that evidence has been altered or destroyed 'does not necessarily mean that the party has engaged in sanction-worthy spoliation.'" *Reinsdorf v. Skechers U.S.A., Inc.*, 296 FRD 604, 626 (CD Cal 2013) (citation omitted). Generally, to obtain an adverse inference instruction based on the spoliation of evidence, courts require the party seeking the instruction to show that the destroyed evidence was "'relevant' to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense." *Zubulake v. UBS Warburg LLC*, 220 FRD 212, 220 (SDNY 2003); *see also Reinsdorf*, 296 FRD at 626; *Automated Solutions Corp. v. Paragon Data Sys., Inc.*, 756 F3d 504, 513–14 (6th Cir 2014); *Bull v. United Parcel Serv., Inc.*, 665 F3d 68, 73 (3d Cir 2012); *Coastal Bridge Co., v. Heatec, Inc.*, 833 F App'x 565, 574 (5th Cir 2020). In the spoliation context, relevance requires a showing of prejudice because "for the court to issue sanctions, the absence of the evidence must be prejudicial to the party alleging spoliation of evidence." *Reinsdorf*, 296 FRD at 627 (citation and internal quotations omitted). To determine prejudice, "courts look to whether the spoliation has impaired the non-spoliating party's 'ability to go to trial or threatened to interfere with the rightful decision of the case.'"

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Brodle v. Lochmead Farms, Inc., No. 10–6386–AA, 2011 WL 4913657 at *3 (D Or Oct. 13, 2011) (quoting *Leon v. IDX Sys. Corp*., 464 F3d 951, 959 (9th Cir 2006)).

Here, no evidence or testimony established the relevance of any of the material or equipment purportedly removed from the Echo Mountain or Santiam Canyon areas, the only two areas where Plaintiffs alleged spoliation. No direct evidence shows that any relevant equipment or material was removed for the Echo Mountain and Kimberling fires. (*See* Tr. 1632:21–22.) The same is true for Santiam Canyon, as demonstrated by Pelton's testimony, discussed above. Without testimony establishing the relevance of any purported destruction of evidence, no adverse inference instruction was permissible. Indeed, "[a] party's destruction of evidence qualifies as willful spoliation" only "if the party has some notice that the documents were potentially relevant to the litigation before they were destroyed." *Leon*, 464 F3d at 959 (quotation marks and italics omitted). Plaintiffs have offered nothing of the sort: They have only asserted generally that evidence was destroyed that might have been relevant, without identifying what was destroyed or how it was relevant.[6] This is insufficient.

4. Plaintiffs Abused the Alleged Spoliation to Evade Their Evidentiary Burden.

Because the spoliation inference fundamentally relieved Plaintiffs of their burden of proof, the Court should order a new trial. A class action plaintiff may rely on inference to establish the elements of their claim only in narrow circumstances. *See Strawn*, 350 Or at 358–59. Purported spoliation, to the extent Plaintiffs did here, is not one of those circumstances. Even viewing the supposedly destroyed evidence in the light most favorable to Plaintiffs, there is an inadequate basis to infer that the missing evidence actually supported Plaintiffs' claims. *See Alexander v. Falk*, 828 F App'x 350, 354 (9th Cir 2020). As noted above, the purportedly

[6] The same is true with respect to any purportedly spoliated Skype messages. There is no evidence that any relevant messages were, in fact, lost given the steps PacifiCorp took to preserve this data. (See Tr. 3971:24–3976:10.) And even if some messages were not preserved, PacifiCorp did not willfully destroy any evidence. As part of its general practice, the Skype server only retained messages for 14 days. (Tr. 3964:16–24.) No adverse-inference instruction is warranted. *See Stevenson*, 354 F3d at 749.

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spoliated evidence was not material. Nevertheless, Plaintiffs relied heavily on that evidence to fill the gaps in their own lack of proof. During closing, Plaintiffs' counsel referenced "destroyed" evidence dozens of times, including misrepresenting that PacifiCorp "destroyed" a server without any basis in the trial evidence. (*See, e.g.*, Tr. 8188:15, 8188:17–18, 8189:18–19, 8235:9–10, 8236:10–15, 8257:5–7, 8264:21–22, 8323:18–20, 8324:3–5, 8324:20–21, 8325:3–5, 8325:17–18.) And Plaintiffs' counsel repeatedly urged the jury to find that certain elements of their case were satisfied *because* of that spoliation. For example, Plaintiffs specifically argued that the destroyed evidence "would have shown * * * [t]hat PacifiCorp was a cause of the harm in the [Santiam] canyon that night." (Tr. 8325:7–13.)

There was no basis for Plaintiffs' counsel to argue that the destroyed evidence would have filled these evidentiary gaps, nor did Plaintiffs offer any basis upon which to conclude that the missing "evidence" would have established causation. Indeed, PacifiCorp indisputably did not service the eastern part of the Santiam Canyon, so it would have been impossible for PacifiCorp to have destroyed "evidence" in that area. Nevertheless, Plaintiffs were troublingly general in their assertions of what the supposedly destroyed evidence might have shown. Plaintiffs asserted that the jury could infer, from the mere fact of spoliation, that PacifiCorp was liable to the entire class. (*See* Tr. 8325:1–18.) In short, Plaintiffs' repeated arguments regarding spoliation were false, improper, and unduly prejudiced the jury, requiring a new trial.

E. Several Erroneous Evidentiary Rulings Merit a New Trial, Both on Their Own and Collectively.

1. The OPUC Reports About Unrelated, Unproven Conduct Should Have Been Excluded as Hearsay and Under OEC 403.

Plaintiffs' central evidence of negligence were two OPUC audit reports issued in 2019 and 2020 that found "probable" violations of Oregon vegetation clearance requirements in several areas throughout the state. (See Ex. 185, 421.) The word "audit" appears hundreds of

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times in the trial record, and several witnesses either opined on or were questioned about the OPUC's findings. (*See, e.g.*, Tr. 1686:22–1697:7.)

Both OPUC audits were hearsay not subject to any exception, and should not have been admitted. They are "statements" by persons (OPUC staff members) not "made by the declarant while testifying" (no OPUC staff members testified or drafted the reports under oath) which Plaintiffs offered to "prove the truth of the matter asserted" (whether PacifiCorp's vegetation management program was inadequate or otherwise negligent). OEC 801. PacifiCorp accordingly moved *in limine* to exclude the OPUC audits as hearsay and under OEC 403. (*See* Feb. 24, 2023, PacifiCorp motions *in limine* at 4.)

The Court erred by admitting the OPUC audits under the public records exception to hearsay. (*See* Apr. 10 Order on motions *in limine* at 2.) OEC 803(8)(c) permits introducing "reports" of "public offices or agencies," including "factual findings, resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness." But the term "factual findings" is "to be strictly construed to allow as evidence only those reports, otherwise in accord with the rule, which are based on firsthand observation by the public official making the report." *Sleigh v. Jenny Craig Weight Loss Ctrs., Inc.*, 161 Or App 262, 266 984 P2d 891 (1999), *mod on recons*, 163 Or App 20 (1999) (quotation marks and citation omitted). Like the report at issue in *Sleigh*, the OPUC audits were not based on the authoring investigator's firsthand knowledge, and indeed the report does not even identify a single OPUC staff member author. As the OPUC audits themselves acknowledge, the reports reflect interim conclusions, not final findings of fact. (Exs. 185, 421 (requesting follow-up information from PacifiCorp).)

Even if the OPUC audits were not hearsay, they should have been excluded under OEC 403. The "general rule" is that "evidence of negligence at some other time and place is inadmissible to prove negligence on the occasion in question." *Carter v. Moberly*, 263 Or 193, 198, 501 P2d 1276 (1972). The OPUC audit reports do not focus on the fire areas in question

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in this case. (Exs. 185, 421.) Instead, they focused on urban areas, including Portland—over 50 miles away—and took place months before Labor Day 2020. (Tr. 1748:12–1749:3; *see also* Exs. 185, 421.) Such a tenuous connection renders the reports inadmissible. Even a closer connection is insufficient to make prejudicial evidence sufficiently probative for purposes of balancing the factors under OEC 403. *See Marshall v. Martinson*, 268 Or 46, 52, 518 P2d 1312 (1974) (weather records taken "four miles" away and "four hours prior to the time of the accident" were appropriately excluded). Indeed, the Court's ruling reflects no balancing of the requisite factors at all—let alone consideration of whether the OPUC audits bore any nexus to the negligence alleged in this case, geographically or otherwise. *State v. Mazziotti*, 276 Or App 773, 779, 369 P3d 1200 (2016) (trial court errs if it fails to make a record showing that it considered all factors identified in *Mayfield*); *see also State v. Mayfield*, 302 Or 631, 645, 733 P2d 438 (1987) (a trial court is required to (1) "assess the proponent's need" for the proffered evidence; (2) "determine how prejudicial the evidence is"; (3) balance the proponent's need for the evidence against the danger of unfair prejudice; and (4) make a ruling to admit all, part, or none of the proffered evidence).

The OPUC reports were not the only government reports that should have been excluded as hearsay and under OEC 403. Plaintiffs' Trial Exhibit 164 is an OPUC letter regarding National Electric Safety Code ("NESC") violations, such as bird damage to electric poles. (*See* Ex. 164 at 3.) Like the OPUC audits relating to vegetation management, the OPUC's NESC report was erroneously admitted under the public records exception. But the OEC 403 issues run deeper. No expert and no witness testified—at any point—that any fire in this case resulted from bird damage to poles, any violation of NESC standards, or anything actually discussed in either exhibit. Instead, Plaintiffs repeatedly misrepresented these reports by portraying them as pertaining to vegetation management. (*See, e.g.*, Tr. 1003:1–1005:22 (Holmquist expert testimony discussing Ex. 164, and stating "I would think they would take care of that and to augment their vegetation management program"), Tr. 8247:18–8248:17

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(Berne closing argument, misrepresenting Ex. 164 as discussing "vegetation management").) The Court's failure to sustain PacifiCorp's objections under OEC 403 prejudiced PacifiCorp's defense.

2. Evidence of Other Fires—Not at Issue in This Case—Should Not Have Been Admitted in Either the Liability or Punitive Damages Phase.

Before trial, PacifiCorp moved *in limine* to preclude Plaintiffs from arguing that PacifiCorp caused other fires not at issue in this trial. Plaintiffs agreed not to do so. As the Court itself noted, at the pretrial conference, "Plaintiffs represented that they do not intend to argue at trial that defendants caused other fires that are not at issue in this case." (Apr. 10 Order on Motions *in limine* at 4.) That promise was illusory, and the Court permitted Plaintiffs to do so. That was error.

Oregon law is clear: "Evidence of similar prior conduct, events, accidents, or negligence is generally held not admissible to prove negligence or lack of negligence in the case being litigated." Laird C. Kirkpatrick, *Oregon Evidence* § 401.10 (7th ed 2021) . Allowing evidence on prior conduct creates a "potential for a series of mini-trials" on collateral issues. *State v. Cox*, 337 Or 477, 487, 98 P3d 1103 (2004). PacifiCorp has not been held liable for any of the other fires that Plaintiffs referred to throughout trial. Nor are the facts the same for any of those fires. And when prior "incidents, their causes and their similarity to the incident in question" are "sketchy and speculative," and "each incident could [] become the subject of a prolonged and confusing diversion of the trial," such evidence should be excluded. *James v. Gen. Motors of Canada, Ltd.*, 101 Or App 138, 145, 790 P2d 8 (1990).

Plaintiffs referred to other fires repeatedly throughout trial, and there is little doubt that this prejudiced PacifiCorp's defense. For example, Plaintiffs referred to a single email more than 30 times during trial. (*See, e.g.*, Tr. 432:4–6; 537:19–540:9; 1048:18–1052:14.) That email, from PacifiCorp employee Pablo Arronte, identified approximately a dozen fires and notified employees that the Oregon Department of Justice or other government investigators

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had requested information about the possible origin locations of those fires. (Ex. 49.)[7] Even if it were established that these fires were started by PacifiCorp's equipment (and no witness testified that they were), they are not probative of notice, intent, or any other basis for which Plaintiffs ostensibly offered them—*because the fires ignited at the same time as the fires at issue in this case*. (*See, e.g.*, Tr. 538:8–40:9.)

Nor did Plaintiffs make any showing of similarity when introducing evidence of other past fires. For example, Plaintiffs asked witnesses about the 2009 Williams Creek fire, which they attributed to PacifiCorp. (Tr. 7133:10–17.) No witness opined on or explained whether the facts of the Williams Creek fire were similar to the fires in question—let alone how that fire started. Nor did any witness opine on or explain whether or how the Williams Creek fire (or any other previous fires) put PacifiCorp on notice of anything. This was classic—and classically inadmissible—character evidence used to show propensity. OEC 403, 404(3).

The Oregon Supreme Court has long recognized that it is "unfair to require an accused to be prepared not only to defend against the immediate charge, but also to defend or explain away unrelated acts from the past." *State v. Pinnell*, 311 Or 98, 106, 806 P2d 110 (1991), *superseded by statute as stated in State v. Williams*, 357 Or 1, 346 P3d 455 (2015). That is exactly the situation PacifiCorp faced in this trial. Either option—spending days or weeks of trial time rebutting other fires not at issue, or failing to respond to repeated insinuations and risk being incorrectly thought a serial wildfire igniter—severely prejudiced PacifiCorp's ability to defend the case, and in effect denied it a fair trial.

[7] Ex. 49 should have also been excluded on hearsay grounds. Plaintiffs represented to the Court that Mr. Arronte's statements were admissions of a party opponent. But they were not. Mr. Arronte was relaying areas of interest to the Oregon Department of Justice, whether or not ODOJ ultimately investigated those fires. A PacifiCorp employee relaying a request from ODOJ is not an adoptive admission of ODOJ's own (hearsay) statements, and the Court's admission of Ex. 49 was error on that ground as well.

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3. Admitting Evidence of PacifiCorp's Financial Condition in the Liability Phase Was Error Because That Evidence Is Relevant Only to Punitive Damages.

Courts routinely exclude evidence of a defendant's financial condition. *Fahmy v. Jay Z*, 2015 WL 5680299 at *16 (CD Cal Sept. 24, 2015); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 237 (1940) ("[A]ny reference to the wealth of any of the defendants is entirely immaterial.") (citation and quotation marks omitted); *Friedman v. Medjet Assistance, LLC*, 2010 WL 9081271 at *11 (CD Cal Nov. 8, 2010). Allowing financial condition evidence—especially in a liability phase—is typically prejudicial. *See State v. O'Key*, 321 Or 285, 321, 899 P2d 663 (1995) (prejudicial evidence has an "undue tendency to suggest a decision on an improper basis, commonly although not always, an emotional one").

The Court's evidentiary rulings allowed Plaintiffs to suggest to the jury that PacifiCorp's profits were reason to find them liable. In the liability phase of the trial, over strenuous objection, Plaintiffs were permitted to introduce evidence and elicit testimony of PacifiCorp's corporate profits spanning multiple years. (Exs. 215, 216; Tr. 2611:5–2628:16.) The word "dividend" appears more than 60 times in the trial transcript. (*See, e.g.*, Tr. 2627:12–24; 2628:11–15; 2636:1, 7–11.) Representative statements and arguments include Mr. Berne asking third-party witnesses "why money that PacifiCorp paid its owners couldn't have been used to make Oregon safe from the risk of fire" (Tr. 7113:15–17) and arguing in closing that "you all can do that math" to figure out that PacifiCorp "paid out $3 billion to their investors" that they "didn't spend to take basic safety measures" (Tr. 8248:18–23).

That wildfire mitigation costs money does not open the door to evidence of corporate profits. Even if it is necessary to establish that additional money could have been spent on safety measures, that can be done in a less prejudicial way by "cross-examin[ing] witnesses on cost feasibility by focusing on the transactional-level economics" without "resort[ing] to evidence" of "financial condition on a grand scale." *Gilley v. C.H. Robinson Worldwide, Inc.*, 2022 WL 828941 at *6 (SD W Va Mar. 18, 2022); *see also May v. BHP Billiton Petroleum*

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(Fayetteville) LLC, 2015 WL 4592684 at *6 (ED Ark July 29, 2015); *Schuster v. Shepard Chevrolet, Inc.*, 2002 WL 507130 at *10 (ND Ill Apr 3, 2002). Plaintiffs could have done the same here. The Court's failure to balance the prejudice of introducing corporate profit evidence versus Plaintiffs' need for the evidence—especially in light of alternative ways of showing cost feasibility—was prejudicial error. And, as discussed above, the trial record does not reflect sufficient effort to balance the requisite factors under OEC 403 and *Mayfield*. *See Mazziotti*, 276 Or App at 779 (trial court errs if it fails to make a record showing that it engaged in the four-step *Mayfield* analysis to admit evidence under OEC 403).

4. Repeated References to Wrongful Deaths—Which Continued Despite the Court's Warnings—Required a Mistrial.

This case did not include claims for wrongful death. There is no allegation in this case that PacifiCorp did anything to cause any deaths. That did not stop Plaintiffs, who repeatedly referenced wrongful deaths and fatalities:

- Plaintiff Robin Colbert testified about a "family that lost a child" and how "haunting and devastating" that was to her. (Tr. 3647:2–5.) Plaintiffs' counsel then elicited that the family "live[d] just about three miles away." (Tr. 3647:6–8.) PacifiCorp objected and the Court granted a limiting instruction. (Tr. 3664:7–3666:4.)
- Plaintiff Sam Drevo testified that he was "surprised" that "PacifiCorp didn't learn from the Paradise Fire, which burned thousands of homes" and "killed a lot more people." (Tr. 3778:22–3779:1.) The Court interrupted Mr. Drevo's testimony while PacifiCorp's counsel was standing up to object. (Tr. 3779:2.)
- Plaintiff Lori Fowler testified that if she "hadn't stayed" to help nearby campers evacuate, it "would have been a lot more than nine fatalities." (Tr. 4655:4–7.)

After the third reference to wrongful deaths in six days, PacifiCorp sought a mistrial. The clear (but false) implication was that there were fatalities associated with these fires that the jury was not being allowed to hear about. That "bell, once rung, cannot be unrung." *State*

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v. Jones, 279 Or 55, 62–63, 566 P2d 867 (1977). PacifiCorp accordingly renews its motion for a mistrial based on repeated references to wrongful deaths not at issue in this case.

5. Precluding PacifiCorp from Rebutting Plaintiffs' Evidence of Post-Fire Conduct Was Error.

During Plaintiffs' liability case in chief, Plaintiffs elicited testimony from both experts and lay witnesses that PacifiCorp took insufficient steps to mitigate the risk of fire *following* Labor Day 2020. Plaintiffs then moved *in limine* to prevent PacifiCorp from introducing any post-fire evidence of remedial measures. Relying on OEC 403 and 407, the Court granted Plaintiffs' motion. That was error on several grounds.

Excluding evidence of remedial measures from the liability phase unfairly precluded PacifiCorp from rebutting evidence Plaintiffs relied on to show negligence. One of Plaintiffs' frequent criticisms of PacifiCorp was the lack of an in-house meteorologist; the term "in-house" appears 50 times in the trial transcript, and Plaintiffs referred many other times to PacifiCorp not having its "own" meteorologist as an unreasonable practice. (*See, e.g.*, Tr. 986, 987, 1081, 5436.) PacifiCorp had rebuttal evidence to each of these points. PacifiCorp built out its meteorology department, developed new risk models, and otherwise looked to learn from the wind event, as it explained during the punitive damages phase. (*See, e.g.*, Tr. 9275:14–9314:25.) But the prejudice that results from permitting Plaintiffs to develop evidence of post-fire conduct while precluding PacifiCorp from rebutting that evidence during the liability phase is patent: It leaves the jury with the (mistaken) impression that PacifiCorp took no lessons from the Labor Day storm or was indifferent to the potential risks of power lines ignitions. That very well "may have affected the outcome of the case," *Faro v. Highway Div., Dep't of Transp.*, 326 Or 317, 323, 951 P2d 716 (1998)—particularly with respect to the jury's findings on willfulness and gross negligence.

Three interlocking errors led the Court to this incorrect ruling. First, the Court did not balance the necessary factors under OEC 403 to exclude the evidence. (Tr. 4721.) Second,

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the Court appeared to rely on the fact that PacifiCorp initially brought a motion *in limine* to exclude subsequent remedial measures under OEC 407, before withdrawing it—but withdrawing an objection to *Plaintiffs* introducing evidence of subsequent remedial measures is entirely consistent with *PacifiCorp* wanting to introduce some of that same evidence. (*Id*.) Third, the Court relied on OEC 407 to exclude PacifiCorp's use of subsequent remedial measures—but that section only limits "evidence of the subsequent measures" if used to "prove negligence or culpable conduct." OEC 407. It expressly "does not require the exclusion of evidence of subsequent measures when offered for another purpose," and there is no dispute that PacifiCorp was offering this evidence for "another purpose": not to prove its own "negligence or culpable conduct," which would make no sense, but to rebut Plaintiffs' trial story and use of post-fire internal evaluations to show indifference and recklessness. *Id*.

6. Not Permitting PacifiCorp to Show Impeachment Exhibits to the Jury Allowed Plaintiffs' Experts to Mislead the Jury.

Throughout trial, the Court did not permit PacifiCorp to show impeachment material to the jury, even if it did not seek to admit the impeachment into the record. That uniquely prejudiced PacifiCorp, because Plaintiffs' experts relied heavily on opinions that they saw "no evidence" of various safety measures, actions, or other conduct relevant to negligence. PacifiCorp repeatedly impeached Plaintiffs' experts by offering documents and deposition testimony showing that there *was* evidence of PacifiCorp having taken the precise measures that Plaintiffs' experts claimed it did not.

For example, Plaintiffs' expert Howard Levin claimed that he saw no evidence that PacifiCorp considered "initiating a public safety power shutoff anywhere outside of its proactive deenergization zones." (Tr. 4087:7–10.) PacifiCorp sought to impeach Levin with a *document within his own expert file* that stated that, on an Emergency Operations Center call between PacifiCorp executives, "PSPS was mentioned as a preventative measure *in areas not designated as PSPS area[s]*." (Ex. 6657 (emphasis added).) PacifiCorp did not seek to admit

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the document, but only sought to show it on the screen to the jury to show that Levin was incorrect based on the documents he claimed he had reviewed. The Court ruled that Ex. 6657 was "hearsay without an exception" and could not be shown to the jury. (Tr. 4095:13–18.)

That was error. Impeachment evidence is "not hearsay" because it is "not offered for the truth of the matter asserted but to cast doubt on the credibility of the witness." *Wilson v. Laney*, 317 Or App 324, 329, 504 P3d 666 (2022); *Ledbetter v. Complete Abrasive Blasting Sys.*, 76 Or App 10, 12, 707 P2d 1292 (1985). PacifiCorp did not offer Ex. 6657 to prove whether it considered conducting a PSPS outside of the designated PSPS areas; other witnesses testified to that fact directly. (*See, e.g.*, Tr. 6810:4–6811:17.) It offered the document to show that Levin had reviewed documents showing his testimony was false. Allowing Levin's testimony to go unchallenged was particularly prejudicial because of how central implementing a PSPS was to Plaintiffs' theory of the case.

7. The Cumulative Effect of These Errors Requires a New Trial.

When deciding whether evidentiary error merits a new trial, the "general test" is "whether the trial court's erroneous ruling substantially affected a right of the party claiming the error." *Faro*, 326 Or at 323; *see also* ORE 103. An evidentiary error affects a party's substantial rights if it "may have affected the outcome of the case." *Faro*, 326 Or at 323 As the foregoing statements demonstrate, over and over, the Court permitted Plaintiffs to introduce inadmissible testimony or documents while denying PacifiCorp the right to introduce admissible and relevant evidence. Indeed, throughout their closing, Plaintiffs referenced much of the same impermissibly admitted evidence described above. (*See*, *e.g.*, Tr. 8191:9–10 (discussing PacifiCorp's "choice not to have weather stations" or its "own meteorologist"); 8248:13–17 (discussing PacifiCorp's dividends and financial condition); 8267:1–22 (playing audio from trial referring to audits).) The end result was a referendum on PacifiCorp's entire history and financial structure, not a trial on discrete factual issues and legal claims. There's little doubt the effect of these rulings "may have affected the outcome of the case." *Faro*, 326

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Or at 323. If nothing else, the evidence Plaintiffs were permitted to introduce likely impacted the jury's findings on gross negligence, recklessness, and willfulness, but considering the slim majority on several other liability questions, it is likely this evidence affected other findings as well. The Court should thus order a new trial.

F. The Jury Should Not Have Received a "Substantial Factor" Causation Instruction as to the Santiam Canyon Fire.

The trial evidence about the Santiam Canyon fire did not support a "substantial factor" causation instruction. The "substantial factor" test applies in only "exceptional circumstances" where "two causes concur to bring about an event, and either one of them, *operating alone*, would have been *sufficient* to cause the identical result[.]" *Haas v. Estate of Carter*, 370 Or 742, 749, 757, 525 P3d 451 (2023). This rare circumstance requires the presence of two concurrent events that combined to cause a result—i.e., two fires that *combined* and *then* burned down a plaintiff's barn—*and* evidence that either fire alone would have led to the exact same result. *Id.* at 749–50. But, here, as "in most cases, a but-for instruction correctly describe[d] the necessary cause-in-fact relationship," *Haas*, 370 Or at 757, and was thus the only "appropriate instruction to be given." *Sodaro v. Boyd*, 325 Or App 511, 521, 529 P3d 961 (2023).

No party presented a "substantial factor" theory—*i.e.*, a theory that (1) multiple fires combined to burn property in Santiam Canyon, but (2) each fire, on its own, would have caused the same damage. The "substantial factor" instruction that the Court provided confused the jury into believing that it did not actually need to find that PacifiCorp's conduct would have caused the harm. On one hand, PacifiCorp presented ample evidence to the jury that the Beachie Creek fire only, not a combination of fires, burned at least a substantial portion of the class area. On the other hand, Plaintiffs theorized that the property in Santiam Canyon was destroyed by fires (caused by PacifiCorp), which preceded the arrival of the Beachie Creek fire. Plaintiffs even elicited testimony about the Beachie Creek fire's distance from Santiam

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Canyon during the Beachie Creek fire's spread through witnesses who testified to not seeing any "glow" to the north or east of Highway 22 or any embers or firebrands in the sky. (Tr. 8302:17–8303:1.) Plaintiffs thus argued to the jury that utility-caused fires, on their own, damaged property in the Santiam Canyon—not that some fire combined with the Beachie Creek fire to then cause the resulting damage.

Plaintiffs also did not present evidence that small utility-caused spot fires could have, on their own, caused the damage to the entire class area that resulted from the Beachie Creak fire. Plaintiffs did not identify where these utility-caused fires merged with the Beachie Creek fire or what properties were affected after the concurrence of both fires. (Tr. 8364:2–24.) Accordingly, Plaintiffs could not have shown for the entire class area that both a utility-caused fire and the Beachie Creek fire merged to burn property and that either fire, operating alone, would have been sufficient to cause that result. *See Haas*, 370 Or at 750. (*See also* Tr. 8319:3–8320:20.)

Because the evidence at trial supported only a singular cause-in-fact of the damage in Santiam Canyon, the "substantial factor" instruction was erroneous. The instruction told the jury that "If you find that the defendant's act or omission was a substantial factor in causing the harm to the plaintiffs, you may find that the defendant's conduct caused the harm even though it was not the only cause. A substantial factor is an important factor and not one that is insignificant." (June 6, 2023, Final Jury Instructions.) Yet there was no evidence that there were multiple concurrent causes of the damage in the Canyon—the properties were either burned by one fire or another. And the instruction erroneously allowed the jury to find liability if it merely thought PacifiCorp caused an "important" fire without explaining that the jury needed to find that PacifiCorp-caused fires would have burned every class member's property. *Haas*, 370 Or at 749, 757 (a substantial factor must "have been sufficient to cause the identical result," "operating alone"). This allowed the jury to find liability—both individually and class-wide—without any evidence that PacifiCorp's actions caused the damage at issue,

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especially throughout the vast class area. Indeed, Plaintiffs' counsel referred to the substantial causation instruction in its closing argument, urging the jury to find in Plaintiffs' favor "even though [defendant's conduct] was not the only cause"—which the jury did. (Tr. 8273:18–24.) Accordingly, this Court's decision to provide this instruction materially prejudiced PacifiCorp, requiring a new trial.

G. Multiple Errors Require a New Trial on Punitive Damages

1. The Court Erred by Not Instructing on Critical Limits on the Jury's Ability to Award Punitive Damages.

Ample trial evidence showed that PacifiCorp complied with industry standards and regulatory guidance as to each fire, and was objectively reasonable in its conduct overall. PacifiCorp demonstrated, for example, that it was the first Oregon utility to develop a PSPS plan, several years ahead of any regulation requiring one. (Tr. 7023:3–7025:6, 7080:8–15.) This "[c]ompliance with industry standard and custom serves to negate conscious disregard and to show that the defendant acted with a nonculpable state of mind" for purposes of the heightened *mens rea* required for punitive damages under Oregon law. *Drabik v. Stanley-Bostitch, Inc.*, 997 F2d 496, 510 (8th Cir 1993). But the Court rejected PacifiCorp's proposed jury instruction on this critical legal issue. This error compels vacatur of the jury's punitive damages award.

Oregon law requires a "party against whom punitive damages are sought" to have "shown a reckless and outrageous indifference to a highly unreasonable risk of harm" *and* "acted with a conscious indifference to the health, safety, and welfare of others." ORS 31.730(1). This heightened *mens rea* requirement in Oregon's punitive damages statute requires as a "prerequisite for imposition of punitive damages * * * a degree of culpability greater than inattention or simple negligence." *Badger v. Paulson Inv. Co., Inc.*, 311 Or. 14, 28, 803 P2d 1178 (1991). Plaintiffs must show instead by "clear and convincing evidence" that a defendant engaged in "an extraordinary violation of social norms or recklessly

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substandard methods of operation" to justify punitive damages under Oregon law. *Butters v. Travelers Indem. Co.*, 2023 WL 3559472 at *6 (D Or May 18, 2023); *see also Weigel v. Ron Tonkin Chevrolet Co.*, 298 Or 127, 140, 690 P2d 488 (1984) (similar under prior common law standard).

It is axiomatic that a defendant's *compliance* with social norms and standard methods of operation cannot coexist with Oregon's heightened *mens rea* for punitive damages. *Drabik* illustrates this point well: There, the Eighth Circuit vacated a jury's punitive damages award against a nail-gun manufacturer under Missouri's analogous "willful indifference" or "utter disregard for the safety of others" standard after finding that the manufacturer's at-issue design was "the standard in the industry." 997 F2d at 510. The court concluded this evidence negated a finding of the "conscious disregard" required for punitive damages as a matter of law, requiring vacatur of the jury's punitive damages award. *Id.*

The Fourth Circuit has reached the same conclusion that a defendant's compliance with industry standards would be clearly "probative" as to the availability of punitive damages where these damages required a "wanton, willful, or malicious" act—as Oregon's punitive damages statute necessitates. *Reed v. Tiffin Motor Homes, Inc.*, 697 F2d 1192, 1198 (4th Cir 1982). And the United States Supreme Court has likewise recognized that "[w]here * * * agency guidance" permits or authorizes a defendant's conduct, "it would defy history and current thinking to treat [that] defendant * * * as a knowing or reckless violator" of a legal standard—as would be required to support punitive damages under Oregon law as well. *Safeco Ins. Co. of Am. v. Burr*, 551 US 47, 70 n.20 (2007).

The Oregon Supreme Court has likewise recognized that the heightened *mens rea* that punitive damages requires is contradicted by evidence of a defendant's compliance with social norms. In *Weigel*, the Court vacated the jury's punitive damages award, recognizing that Oregon law has long required *more* than the mere reckless violation of a legal duty for such damages. *Weigel*, 298 Or at 138. Because the plaintiff additionally had to show a "recklessly

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substandard method[] of operation" that evinced a "high degree of social irresponsibility," and there was no evidentiary showing of such irresponsibility in the record, the jury's punitive damages award had to be "eliminate[d]," even though the jury received a general instruction that it had to find a "grievous violation of societal interests." *Id.* at 138–39.

The same is true here. The jury was never instructed on the legal significance of PacifiCorp's evidence that it had complied with—indeed, exceeded—both industry standards and regulatory guidance despite PacifiCorp's requests for a special instruction. (Tr. 8979:3–8984:24.) Nor did the Court adequately explain that such compliance is indicative that PacifiCorp acted objectively reasonably, which negates the requisite *mens rea* for punitive damages. PacifiCorp demonstrated that it had complied with all OPUC regulations, developed an industry-exceeding PSPS plan, and followed the available regulatory guidance in determining how to mitigate fire risk and respond to each fire. (Tr. 7080:4–19.) This showing was more than sufficient to support an instruction explaining PacifiCorp's theory of the case to the jury—namely, that a defendant's compliance with industry standards and regulatory guidance vitiated the "conscious disregard" necessary for punitive damages. *Ossanna*, 365 Or at 217 (recognizing "that in presenting the law of a case to the jury[,] the court must instruct on the law applicable to all theories of the case that are supported by any competent evidence"). The critical omission of this instruction further precluded the jury from even considering PacifiCorp's well-supported theory. Indeed, the evidence at trial demonstrated that PacifiCorp acted reasonably, rendering the award of punitive damages improper even apart from the failure to instruct on industry standards.

The court's general jury instruction defining "reckless" conduct did not even *mention* that standard's relation to industry customs or regulatory compliance. This is particularly problematic because due process requires that "that a person receive fair notice * * * of the conduct that will subject him to punishment." *State Farm*, 538 US at 417; *Goddard v. Farmers Ins. Co. of Or.*, 344 Or 232, 251, 179 P3d 645 (2008). PacifiCorp's compliance with industry

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standards and regulatory guidance would ordinarily preclude punishment. Yet the jury nevertheless issued a punitive damages award because it was not properly instructed. This deprived PacifiCorp of "fair notice" that its conduct might "subject [it] to punishment." *State Farm*, 538 US at 417.

Because "the substance of the instruction" requested by PacifiCorp on industry standards and regulatory compliance was not "covered fully by other jury instructions given," *Yeatts v. Polygon Nw. Co.*, 313 Or App 220, 232, 496 P3d 1060 (2021), *rev den*, 369 Or 338 (2022), PacifiCorp was prejudiced by the denial of its opportunity to have the jury fairly consider its theory of the case. *Id.* (rejecting argument that a "general" instruction on legal duty was sufficient to cover a more specific, related issue that defendant had sought to raise). In the context of punitive damages, this is especially problematic because the failure to provide "proper standards that will cabin the jury's discretionary authority * * * may deprive a defendant of 'fair notice * * * of the severity of the penalty that a State may impose." *Philip Morris USA v. Williams*, 549 US 346, 352 (2007).

2. The Jury Improperly Awarded Punitive Damages Using a Multiplier.

The jury awarded punitive damages based on a uniform multiplier, rather than an amount of damages based on individual evidence. While courts have "broad discretion" with respect to "the imposition of * * * punitive damages, the Due Process Clause of the Fourteenth Amendment to the Federal Constitution imposes substantive limits on that discretion." *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 US 424, 433 (2001). Specifically, it "prohibits the imposition of * * * arbitrary punishments on a tortfeasor." *State Farm*, 538 US at 416–17. Because the jury's multiplier is arbitrary and unsupported by any evidence, it runs afoul of this constitutional limit and requires a new trial. *See* ORCP 64 B(6).

The punitive damages multiplier the jury awarded treats each absent class member uniformly, assuming without evidence that each person's unknown harm necessarily gives rise to the same proportional punitive damages. Such a uniform multiplier, by its very nature,

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impermissibly prevented the jury from making any individualized determination with respect to each class member's actual and proven harm where, as here, no evidence of that harm has even been produced.

The punitive damages multiplier is therefore wholly arbitrary. Constitutional guardrails require a class-wide punitive damages award be supported by an individualized examination of each person's actual harm in relation to an appropriate punitive damages award. *See, e.g.*, *Comcast Corp. v. Behrend*, 569 US 27, 38 (2013) ("The first step in a damages study is the translation of the *legal theory of the harmful event* into an analysis of the economic impact *of that event*.") (emphasis in original). A punitive damages award "must be based upon the facts and circumstances of the defendant's conduct and the harm *to the plaintiff*"—not mere speculation. *State Farm*, 538 US at 425 (emphasis added); *Gore*, 517 US at 575 (punitive damages award must assess "the disparity between the harm or potential harm suffered by [the claimant] and his punitive damages"). Yet the jury in this case was incapable of making such an individualized assessment, as required "[i]n almost every class action," because the jurors had no evidence of the scope and scale of that individualized harm and how it should justify or relate to any punitive damages. *Levya v. Medline Indus., Inc.*, 716 F3d 510, 513–14 (9th Cir 2013); *see also Blackie v. Barrack*, 524 F2d 891, 905 (9th Cir 1975) ("The amount of damages [in a class action] is invariably an individual question.").

This failure to assess individualized harms further prevented PacifiCorp from presenting its defenses with respect to the damages claims of absent class members. But "[d]ue process requires that there be an opportunity to present every available defense." *Lindsey*, 405 US at 66. The untested assumptions about unnamed class members' damages used to calculate a punitive damages award fails that test here.

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3. During the Punitive Damages Phase, Plaintiffs Introduced Evidence of the Cause and Origin of Fires Not at Issue in This Case.

PacifiCorp is also entitled to a new trial on punitive damages because the Court allowed Plaintiffs to call two fire cause-and-origin experts, Nicole Brewer and Mike Schulz, to parrot inadmissible hearsay evidence about the *potential* causes and origins of seven unrelated fires.[8]

Upon learning of Plaintiffs' intention to call Brewer and Schulz to testify about the causes of other fires not at issue here, PacifiCorp objected. (Tr. 9075:10–9079:5.) Plaintiffs acknowledged that neither expert would offer "an opinion based on their own independent origin and cause investigation of [any] fires." (Tr. 9114:2–4.) Instead, both experts would merely use "State and Federal agency investigative reports and [] other information that they've obtained" to restate "that *those documents* show that PacifiCorp caused these other fires." (Tr. 9113:20–9114:4 (emphasis added).) The Court found that Brewer and Schulz were simply "parroting the work of others" and that these witnesses had "not laid an adequate foundation to testify as to actual cause and origin of these unrelated fires." (Tr. 9149:5–13.) The Court therefore should have excluded Brewer and Schulz from testifying in their *entirety.* Yet the Court allowed both to testify that PacifiCorp's equipment was a potential cause of other fires not at issue in this case.

The effect of the Court's line-drawing was that the *only* remaining function of Brewer and Schultz was to repeat the conclusions of hearsay investigative reports to the jury. Their testimony contained no independent expert analysis. Indeed, the experts themselves conceded

[8] In addition, PacifiCorp had no meaningful opportunity to develop defenses to these unrelated fires (which, in any event, would have required numerous improper minitrials). During the pretrial conference, Plaintiffs represented to the Court that they would not present evidence of causation of other fires during trial. Specifically, Plaintiffs stated in open court that they "do not intend to argue at trial that PacifiCorp caused all these other fires." (Mar. 31, 2023, Pre-Trial Tr. at 65:16–66:08.) PacifiCorp relied on Plaintiffs' representation that "nobody's going to come here and argue about causation of other fires," and as a result, PacifiCorp did not seek any additional stipulation or further motion *in limine* to preclude this causation evidence. (*Id*.)

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that they had conducted no independent cause-and-origin investigations of their own in relation to the other fires. (*See, e.g.*, Tr. 9214:3–9235:23.)[9]

OEC 703 allows an expert to "*base* his or her opinion on inadmissible facts and data of the type reasonably relied on by experts in a particular field." *Kahn v. Pony Express Courier Corp.*, 173 Or App 127, 153, 20 P3d 837 (2001) (emphasis in original). But "[n]othing in OEC 703 suggests that otherwise inadmissible evidence is admissible simply because it was the basis for the expert's opinion." *Id.* (quoting *Stevens v. Horton*, 161 Or App 454, 465, 984 P2d 868 (1999)). "In particular, although OEC 703 'recognize[s] that experts often rely on facts and data supplied by third parties,' the rule 'does not give *carte blanche* to admitting otherwise inadmissible hearsay.'" *Id.* (quoting *Mission Ins. Co. v. Wallace Sec. Agy., Inc.*, 84 Or App 525, 528–29, 734 P2d 405 (1987)); *see also State v. Thomas*, 279 Or App 98, 107–08, 379 P3d 731 (2016) (affirming exclusion of certain studies as inadmissible hearsay, even though they purportedly supported the defense expert's opinion, because "the information was offered as direct evidence, simply repeated by [the defense expert], about a particular medical procedure that was the foundation for the conclusions of someone else"). Yet that is precisely what happened here. And this error was prejudicial. *See* OEC 103(1); *see also Faro*, 326 Or at 323. Brewer and Schulz were two of the three live witnesses Plaintiffs called during the punitive damages phase. Their testimony was indisputably central to Plaintiffs' case, as Plaintiffs admitted. (*See* Tr. at 9082:9–19 ("Your Honor, defendants never followed up following the pretrial conference to seek leave to file another motion in limine as to causation of other fires * * *. *Plaintiffs have relied on that to prepare their punitive damages case. And it would be prejudiced if that evidence is now excluded and they're unable to present it in the punitives phase*." (emphasis added)).)

[9] Schulz acknowledged that he was simply "relying on reporting the results of such investigations by others." (Tr. 9138:21–22.) Indeed, when asked if he was "just reading the results of that investigation," Schulz responded, "I am. I'm taking – I'm taking – I'm relying – I'm taking that data and making it part of my analysis." (Tr. 9146:23–25.)

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4. Plaintiffs' Improper Argument During the Punitive Damages Phase Warrants a New Trial on Punitive Damages.

Plaintiffs were allowed to present several improper arguments during the punitive damages phase over PacifiCorp's objections. Each of these improper arguments warrants a new trial on punitive damages.

Improper Reference to Appeal. Plaintiffs repeatedly referenced PacifiCorp's intention to appeal the liability-phase verdict—which PacifiCorp is legally entitled to do—as evidence of PacifiCorp's alleged failure to accept responsibility and refusal to accept the verdict. (*See* Tr. 9343:12–9345:12; 9395:2–25.) In response, PacifiCorp made an oral motion for a mistrial and, in the alternative, requested both a limiting instruction and a parallel jury instruction advising that the jury was not to consider a party's intentions with respect to appeal. (*Id*. at 9400:21–9401:18.) The Court denied PacifiCorp's requests for a mistrial and a limiting instruction, but left open the question of a parallel jury instruction. (*Id*. at 9403:20–9404:17.) The Court explained that Plaintiffs' "theory" had been "PacifiCorp's unwillingness to accept responsibility or accountability for its actions." (*Id*. at 9403:25–9404:6.) Later, PacifiCorp renewed its request for a jury instruction, offering the following proposed instruction: "A party in a civil case has an absolute legal right to file an appeal after a trial. You're not to consider in any way a party's statements regarding a potential appeal as part of your deliberations in this case." (*Id*. at 9488:25–9489:11.) The Court denied the request. (*Id*. at 9491:13–9493:15.) The Court also admitted into evidence a press release containing a statement referencing PacifiCorp's intent to appeal the liability-phase verdict, again over PacifiCorp's objections. (*Id*. at 9495:10–9496:9.) These rulings were legal error.

A party in a civil case has the right to appeal a jury verdict. Here, Plaintiffs in effect encouraged the jury to draw an adverse inference from PacifiCorp's stated intent to exercise its right to appeal. Such encouragement was highly prejudicial and inappropriate, and the Court's allowance of such argument and evidence constituted legal error warranting a new

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trial. Moreover, the Court reasoned that the intent to appeal was being raised "in the context of PacifiCorp's unwillingness to accept responsibility or accountability for its actions," which it deemed relevant to the punitive damages analysis. (*See id.* at 9403:3–6.) But that is not the right inquiry. Reprehensibility and acceptance of responsibility of the conduct at issue in the litigation are relevant to punitive damages. Those inquiries, however, cannot be based on consideration of improper argument or evidence—namely, PacifiCorp's legal right to pursue an appeal of the jury's liability-phase verdict. No law anywhere supports a view that a jury may punish a defendant for exercising (or intending to exercise) its right to appeal an adverse verdict.

Improper Presentation of Out-of-State Harm-to-Others Evidence. Over PacifiCorp's objections, Plaintiffs were also allowed to present expert testimony related to the out-of-state McKinney fire, which indisputably ignited in California in September 2022, two years after the conduct at issue in this case. (June 12, 2023, Tr. 9209:25–9211:2.) PacifiCorp does not dispute that harm-to-others evidence is generally relevant to the punitive damages inquiry, but out-of-state harm-to-others evidence may only be considered as part of the reprehensibility inquiry if it is (1) reasonably related to the conduct of the defendant directed toward the plaintiffs in Oregon, and (2) similar to the conduct upon which the jury found the defendant liable to the plaintiffs. (*See* UCJI No. 75.02A.)

Because the McKinney fire ignited in a different state two years after the fires in this case, there was no basis to suggest that the McKinney fire had any logical or legal relationship to PacifiCorp's conduct as to Plaintiffs in this case. (Tr. 9484:6–15.) The unavoidable result of introducing McKinney fire evidence was to allow the jury to impermissibly punish PacifiCorp for unrelated out-of-state conduct that had no nexus whatsoever with the harm to the Plaintiffs in this case. (Tr. 9157:15–9158:10.) *See State Farm*, 538 US at 421 ("Nor, as a general rule, does a State have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State's jurisdiction."); *White v. Ford*

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Motor Co., 312 F3d 998, 1020 (9th Cir 2002) (reversing punitive damages award that "unconstitutionally allowed a Nevada jury to punish Ford for out-of-state conduct").

Later, PacifiCorp requested a curative jury instruction to address the McKinney fire evidence that had been presented during trial. (Tr. 9476:11–9477:11; 9478:5–9481:4.) Specifically, PacifiCorp proposed a modified version of Uniform Civil Jury Instruction 75.02A, which would include the addition of two sentences: (1) "You are not authorized to impose punitive damages to protect people outside of Oregon," and (2) "You are not to consider in any way evidence related to the McKinney Fire in California in your deliberations related to punitive damages." (*Id*. at 9480:15–9481:4.) The Court denied PacifiCorp's requested instruction. (*Id*. at 9486:7–9488:20.) That denial, too, was error for the reasons explained above. *See State Farm*, 538 US at 421; *White*, 312 F3d at 1020.

Improper Reference to Litigation Reserves. Plaintiffs were allowed to introduce evidence of PacifiCorp's litigation reserves as evidence of PacifiCorp's ability to pay a punitive damages award. (June 12, 2023, Tr. 9096:20–23; 9252:12–14.) This ruling was error.

Plaintiffs provided no support for their argument that litigation reserves are relevant to the ability-to-pay analysis. To the contrary, it is well established that only current information on a party's net worth is relevant to a punitive damage claim. Litigation reserves "are mere guesses at the outcome of litigation based on conservative accounting principles." *Fed. Realty Inv. Tr. v. Pac. Ins. Co.*, 760 F Supp 533, 540 (D Md 1991) (excluding evidence of reserves because "the probative value of [reserves], if any, is substantially outweighed by its prejudicial aspects"). Because litigation reserves are the result of estimation, they typically are not presented to the jury out of concerns that they will result in confusion amongst the jury and lead to a "wasteful and unnecessary debate regarding the nature and accuracy of loss reserves." *Estate of Mali v. Fed. Ins. Co.*, 2011 WL 2516246 at *2 (D Conn June 17, 2011); *Hart v. RCI Hospitality Holdings, Inc.*, 90 F Supp 3d 250, 278–79 (SDNY 2015) (explaining that loss reserve evidence would "essentially hold against defendants their own business prudence").

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In sum, allowing the jury to consider PacifiCorp's intention to appeal, evidence of out-of-state harm, and PacifiCorp's litigation reserves was improper.

III. RENEWED MOTION TO DECERTIFY

A. Background

On May 23, 2022, the Court certified a class of 2,454 private properties allegedly impacted by four different fires scattered across Oregon for the purpose of resolving 14 discrete class issues. (*See* May 23, 2022, Op. & Order Granting Plffs' Mot. for Issues Class Certification ("Class Certification Order").) PacifiCorp had previously moved to decertify that class on March 17, 2023, and so moved again at the close of Plaintiffs' case and close of evidence, after it became clear that the verdict form would make no reference to the certified class issues. Now that the trial is complete and the jury has reached a verdict, PacifiCorp renews its motion to decertify on the grounds previously stated and for the reasons outlined below.

B. Legal Standard

A class may only be certified if it satisfies certain requirements, including whether "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." *Pearson v. Philip Morris, Inc.*, 358 Or 88, 106, 361 P3d 3 (2015); ORCP 32 B. A class certification order "may be conditional, and may be altered or amended before the decision on the merits." ORCP 32 C; *see also Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds*, 568 US 455, 479 n.9 (2013) (class certifications "are not frozen once made"). A trial court has "the affirmative duty of monitoring its class decisions." *Mazzei v. Money Store*, 829 F3d 260, 266 (2d Cir 2016) (quotation marks and citation omitted). And a court must "'reassess * * * class rulings as the case develops'" in order to "ensure continued compliance" with class requirements. *Amara v. CIGNA Corp.*, 775 F3d 510, 520 (2d Cir 2014). A trial court need not "consider each and every one of the listed" ORCP 32 B factors in deciding to decertify a class so long as it considers the factors "relevant to a determination in this case."

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Belknap v. U.S. Bank Nat'l Ass'n, 235 Or App 658, 667, 234 P3d 1041 (2010) (affirming decertification). A district court can decertify a class it previously certified if the issues underlying certification are "more 'nuanced' than the district court had initially considered." *Webb v. Exxon Mobil Corp.*, 856 F3d 1150, 1156 (8th Cir 2017). Indeed, "[a] district court may decertify a class at any time." *Rodriguez v. West Publ'g Corp.*, 563 F3d 948, 966 (9th Cir 2009). Faced with a decertification motion, Plaintiffs must marshal evidence demonstrating that class-certification requirements remain satisfied. *See*, *e.g.*, *Marlo v. United Parcel Serv., Inc.*, 639 F3d 942, 947–48 (9th Cir 2011); *Mazzei*, 829 F3d at 270.

C. Litigating the Claims on a Class-Wide Basis Did Not Comply with ORCP 32 and Denied PacifiCorp Its Due Process Right to Present Individualized Defenses.

The Court's instruction to the jury that it may "assume" that individual evidence applies to the entire class violated PacifiCorp's federal constitutional rights, as it relieved Plaintiffs of their burden of proof and denied PacifiCorp its due process right "to present every available defense." *Lindsey*, 405 US at 66; *see supra* at 48–51. As discussed above, Plaintiffs' failure to meet their burden as to the class warrants judgment notwithstanding the verdict, and the improper instruction warrants a new trial. In addition, the fact that it was impossible to litigate Plaintiffs' claims and PacifiCorp's defenses without altering the substantive law—glossing over the requirements of Plaintiffs' claims and foreclosing PacifiCorp from fully defending itself—requires decertification of the class, because proceeding as a class action violated PacifiCorp's due process rights and ORCP 32.

Rather than prove their claims with evidence of specific harm to individual properties or specific conduct by PacifiCorp that actually harmed each discrete parcel, Plaintiffs bypassed any distinction between the properties of the class members. Plaintiffs did not offer any evidence of class-wide causation or class-wide damages—because none exists. They relied on generalizations about, for example, PacifiCorp's vegetation management program or emergency operations plans. Or they relied on Buckley's testimony about soil burn severity.

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But this evidence was not class-wide evidence. None of the evidence established that PacifiCorp's equipment caused *every* fire that affected *every* class member. None of the evidence even established that *every* class member experienced actual damage. Instead, the evidence presented only established certain elements of certain individual plaintiffs' claims.

This approach changed the substantive law that would be applicable in individual actions and deprived PacifiCorp of the right to raise individualized defenses, in violation of due process. *See Carrera v. Bayer Corp.*, 727 F3d 300, 307 (3d Cir 2013), *reh'g den en banc*, 2014 WL 3887938 (3d Cir 2014) ("A defendant in a class action has a due process right to raise individual challenges and defenses to claims, and a class action cannot be certified in a way that eviscerates this right or masks individual issues."); *Bernard*, 275 Or at 159–60. Plaintiffs did not present evidence of the claims for each of the absent class members; they presented something far less than they would have in individual actions. And PacifiCorp could not present individualized defenses with respect to causation or damage as to each specific parcel belonging to absent class members, because no evidence was submitted with respect to those parcels or class members. PacifiCorp could not defend against particular fires causing particular harm, because there was no class-wide evidence. Rather, Plaintiffs relied only on purportedly representative evidence, and the jury was told it could assume that evidence also applied to the absent class members.

Such representative evidence disregards the myriad differences between the circumstances each class member presented, such as the specific fire at issue or the actual damage to each individual plaintiff's property caused by any fire. Plaintiffs' reliance on the class action mechanism and on the presumption that individual evidence could apply to the class made it impossible for PacifiCorp to litigate these claims on an individualized basis. Plaintiffs used the structure of the class action trial to avoid their obligation to present specific evidence of causation and damage, leaving PacifiCorp with the impossible task of shadowboxing with an unproven case.

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Given the potential differences between fires, ignition points, conduct, and location (among other factors), PacifiCorp was "entitled" to mount a defense (affirmative or otherwise) with individualized evidence. *Pearson*, 358 Or at 114, 132. And that was simply not possible in a class action. Forcing the jury to find causation, harm, and damage as to everyone or no one based on evidence that was relevant to only a small subset of the class impermissibly eviscerated PacifiCorp's due process rights. And, critically, it effectively changed the substantive law applicable to the case. Instead of finding causation, substantial interference, or "special" harm, the jury was able to reach its verdict without affirmative evidence of *any* of those elements. Due process prohibits such a result. *See Carrera*, 727 F3d at 307; *Duran v. U.S. Bank Nat'l Ass'n*, 59 Cal4th 1, 35 (2014). The class cannot stand.

D. The Court Improperly Shifted the Class from an Issues Class to a Liability Class Without Undergoing the Rule 32 Analysis for a Liability Class.

When Plaintiffs filed their Motion for Issues Class Certification on October 27, 2021, they sought certification of a class defined as "owners and residents" within the "boundar[ies] of the maximum extent of burn for the Echo Mountain[], South Obenchain," "242," and "Santiam Canyon" fires. (Oct. 27, 2021, Motion for Issues Class Certification ("Plaintiffs' Class Certification Motion") at 20.) Plaintiffs' Class Certification Motion proposed that the jury would resolve 14 "common liability issues," such as "Was defendants' operation of their utility infrastructure ultrahazardous or abnormally dangerous?"; "If defendants' conduct was a cause of harm to the class, was that harm reasonably foreseeable?"; and "Did defendants' action or inaction cause or contribute to the cause of the wildfire or cause or contribute to the spreading of the wildfire?" (Class Certification Order at 3.)

The Court granted Plaintiffs' Motion on May 23, 2022. The Court accepted Plaintiffs' plan to try certain "class issue questions related to[] (i) defendants' culpable conduct or omissions, (ii) causation under a theory of substantial factor causation, and (iii) foreseeability," while noting that Plaintiffs' proposed "special verdict" would require some "modifications to

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the form of the class issues." (Class Certification Order at 14 & n.2.) The approved class notice included each of the 14 certified issues. The approved class notice also explained that this case "is a class action as to the Certified Issues only," that the Court "has scheduled an Issues Trial to decide the fourteen Certified Issues for all members of the Class," and that Plaintiffs' counsel "will have to prove at trial that some or all of the Certified Issues should be answered in Plaintiffs' favor." *Id.*

But the jury instructions and verdict form ultimately provided to the jury did not ask them to resolve any of the 14 ***issues*** set forth in Plaintiffs' certification motion, this Court's order, and the class notice. Instead, it asked the jury to resolve ***liability*** for each claim, both as to the individual Plaintiffs and on a class-wide basis. This shift from an ***issues*** class to a ***liability*** class, without properly certifying such a class, providing notice to the class members, and allowing them to opt out, violated Rule 32 and due process.

First, the liability class that was ultimately the class at trial was never certified, violating Rule 32. Certain prerequisites must be satisfied before a class action may proceed. *See* ORCP 32 A, B. And that determination must be made by written order, with specific findings and conclusions, *before* the decision on the merits. *See* ORCP 32 C. No such determination was ever made with respect to the liability class here. No order issued justifying the shift from an issues class to a liability class. Indeed, there was no order at all with respect to the actual class that proceeded at trial. This plainly violates the Court's duty under ORCP 32 to issue such an order "[a]s soon as practicable."

Second, by shifting the class from an issues class to a liability class, the Court deprived class members of notice and opportunity to opt out, violating Rule 32 and federal due process. ORCP 32 E(2) requires that notice be given to class members "for [their] protection." This includes providing class members with the opportunity "to be excluded from the class." ORCP 32 E(2). This mirrors the requirements of federal due process, which gives absent class members the right to notice of the scope and content of class claims, as well as an

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accompanying right to opt out of the class. *See Phillips Petroleum Co. v. Shutts*, 472 US 797, 812 (1985). Whenever a class definition is amended, these requirements must be satisfied anew. *See Bobadilla-German v. Bear Creek Orchards, Inc.*, 2009 WL 1726342 at *2 (D Or June 17, 2009). Here, the verdict form and jury instructions effectively revised the class definition, shifting the scope of the class adjudication from issues to liability. That required a new notice and a fresh opportunity to opt out. The failure to do so violated both ORCP 32 and due process.

Third, PacifiCorp went to trial expecting to defend against specific issues, but ultimately found out (mid-trial, when the verdict form and jury instructions were finalized), that it had to defend against liability. This switch violated PacifiCorp's due process rights. "Notice of a claim, and the opportunity to respond to and prepare to defend against a claim, is basic due process to which [d]efendant[s] [are] entitled." *Forte v. Schwartz*, 2018 WL 684825 at *1 (ED Cal Feb. 2, 2018); *see also Goldberg v. Kelly*, 397 US 254, 267–68 (1970). PacifiCorp was deprived of that fundamental right. After already litigating this case in front of a jury for weeks, PacifiCorp faced a shifting landscape, where the specific issues listed in the Court's certification decision were not what was presented to the jury. Instead, the jury was asked to decide the much broader and less discrete question of liability. That deprived PacifiCorp of the opportunity to properly prepare for and defend itself.

In sum, the violations of ORCP 32 and due process require that the class either be decertified or new class notices mailed out and a new trial held.

E. The Class Claims Were Too Individualized for Class Treatment.

As the full trial has now demonstrated, individualized issues predominated over class issues. While predominance is just one factor to consider in finding that a class action is superior to other available methods of adjudication, *see* ORCP 32 B, where "the trial court's superiority assessment was driven by the predominance conclusion," predominance becomes the central factor to review in assessing the propriety of class certification, *see Pearson*, 358

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Or at 109. The Court's Class Certification Order makes clear that predominance was the primary basis for the Court's finding as to superiority. *See* Class Certification Order at 9–21.

The predominance inquiry "is designed to determine if proof as to one class member will be proof as to all, or whether dissimilarities among the class members will require individualized inquiries." *Pearson*, 358 Or at 111. The Court implicitly recognized in its Class Certification Order that class certification is inappropriate to address property-by-property liability within the proposed class boundaries because individual issues necessarily predominate. *See Webb v. Exxon Mobil Corp.*, 856 F3d 1150, 1156–57 (8th Cir 2017) (class certification inappropriate when determining whether pipeline breached easements "would necessarily devolve into a parcel-by-parcel analysis"); *Ebert v. Gen. Mills, Inc.*, 823 F3d 472, 479 (8th Cir 2016) (necessity of "property-by-property assessment" means that individualized issues predominate); *Parko v. Shell Oil Co.*, 739 F3d 1083, 1085 (7th Cir 2014) (individual resolution of issues of liability, causation, and damages to property precluded certification). Specifically, the Court concluded that the class questions were limited to whether PacifiCorp caused the fires at issue, *not* whether PacifiCorp caused "harm to each individual property." (Class Certification Order at 19.) As trial made clear, this limitation in the Class Certification Order was necessary; telling Plaintiffs' stories was a property-specific enterprise.

1. The Fires at Issue Could Not Be Joined in a Single Class.

As certified, the class here joins together individuals within the boundaries of four different fire areas—Echo Mountain, South Obenchain, 242 and Santiam Canyon. And within those areas, Plaintiffs claimed at trial there were many different fires.

To meet the predominance requirement, Plaintiffs were required to use common proof to resolve the common questions of causation and injury that were central for every class member. *See*, *e.g.*, *Pearson*, 358 Or at 111; *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 US 455, 460 (2013) (certification requires that class claims "will prevail or fail in unison"); *Wal-Mart,* 564 US at 350. The trial demonstrated that Plaintiffs' evidence and theories differed

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across the fires. For example, the Court instructed the jury to apply a "substantial factor" causation standard with the respect to the Santiam Canyon fire *only*, and a "but-for" causation standard for the other three fires. Among the other fires, the precise mechanism that supposedly triggered ignition differed between them. In short, there was no class-wide evidence of causation or injury that applies to all fires, rendering the Court's certification order joining the four fires impermissible.

2. The Elements of Plaintiffs' Claims Require Individualized Inquiries.

Each claim Plaintiffs presented involved a host of individualized evidence.

Negligence and gross negligence require proof that PacifiCorp's "conduct was a cause of the plaintiff's harm." *Piazza ex rel. Piazza v. Kellim*, 271 Or App 490, 516 (2015). The specific negligent conduct identified by Plaintiffs includes the failure to install covered conductors, cut more trees, or have more weather stations installed. But establishing that any particular conduct or failure *caused* damage to each individual plaintiff is necessarily an individualized inquiry, depending on (1) whether PacifiCorp was negligent in any particular instance in failing to cover particular conductors, cut trees, or build weather stations, (2) whether such an act of negligence caused a fire, *and* (3) whether that fire damages a particular plaintiff's property.

Similarly, trespass and private and public nuisance all require proof of individualized harm to a particular plaintiff. Trespass requires intrusion on a particular parcel. *See Martin*, 221 Or at 90–94. Private nuisance requires "interference with another's private use and enjoyment of land." *Mark v. State Dep't of Fish & Wildlife*, 158 Or App 355, 360, 974 P2d 716 (1999). And public nuisance requires injury "of a special character distinct and different from that suffered by the public generally." *Smejkal v. Empire Lite-Rock, Inc.*, 274 Or 571, 574, 657 P2d 1363 (1975). These are necessarily individualized injuries unique to each plaintiff and each property, since the nature of the intrusion, interference, or "special character" of the injury, respectively, cannot be adjudicated with class-wide evidence.

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There was no evidence of causation offered as to every single parcel within the defined class boundaries. Plaintiffs' scant evidence of damage by reference to "low" "soil burn severity" says nothing about misconduct, causation or actual harm to property, all of which must be established for purposes of proving PacifiCorp's liability. Indeed, as discussed above, Plaintiffs effectively conceded that they failed to establish class-wide liability when they sought to amend the Santiam Canyon fire class boundary. *See supra* at 10.

Putting aside these claim-specific failings, there are also other explanations specific to individual properties for why fire damage occurred, such as spot fires unrelated to utility-caused ignitions or the rapid advance of the lightning-caused Beachie Creek fire. Given the plethora of potential alternative causes of harm, Plaintiffs offered no evidence upon which the jury could conclude that PacifiCorp was liable to *all* class members. Put plainly, individualized issues ultimately predominated over class issues.

F. The Punitive Damages Class Was Improper.

The jury was instructed to—and did—award punitive damages on a class-wide basis. This violates the due process prohibition on "the imposition of grossly excessive or arbitrary punishments." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 US 408, 416 (2003). In reviewing a punitive damages award, courts consider: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties." *Id.* at 418 (citing *BMW of N. Am., Inc. v. Gore*, 517 US 559, 575 (1996)). To assess "reprehensibility," factfinders consider multiple factors, including whether "the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident." *Id.* at 419.

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Because the Court allowed the jury to award punitive damages on a class-wide basis, these factors were necessarily not adequately considered. Compensatory damages were only awarded to the named Plaintiffs, but such damages have not yet been determined with respect to absent class members. Put plainly, the jury decided what the punitive damages for the absent class members should be *without* first finding what the absent class members' compensatory damages were or whether they are financially vulnerable. But these factors must be considered prior to issuing a permissible award of punitive damages. *See id.* at 425 ("The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff."). Indeed, given that the goal of punitive damages is "punishment or deterrence," they can only be awarded after compensatory damages are determined so that any added penal or deterrent effects can be properly assessed. *See id.* at 419. Moreover, the reprehensibility standard takes into account factors specific *to the plaintiff*, such as whether harm was physical or economic. *See id*. By permitting a punitive damages class to proceed even though the trial focused on facts specific to the named plaintiffs and omitted information regarding the remaining class members, the Court erred. The jury simply did not have all the information necessary to determine if punitive damages were appropriate. *See id.* at 426 (propriety of punitive damages award is based on whether it is "both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered."); *Johnson v. Nextel Commc'ns Inc.*, 780 F3d 128, 149 (2d Cir 2015) ("[T]he propriety of the ratio can be meaningfully assessed only when comparing the ratio to the amount of compensatory damages awarded.").

Johnson is particularly instructive. There, the defendant appealed the trial court's trial plan, which called for the "determination of punitive damages on a classwide basis, prior to an assessment of compensatory damages." 780 F3d at 136. The *Johnson* trial plan, like the trial here, called for the phase II jury to determine a punitive damages ratio, which would then be applied to each class member's compensatory damages as determined in phase III. The court

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rejected this approach as inconsistent with due process because determining a "punitive damages ratio based on an amalgam of the actual damages to only the *named* plaintiffs and defendants' conduct toward the entire class" would lead to a verdict based on a "lack [of] any conception of the actual damages to the members of the class to whom the ratio would subsequently be applied." *Id.* at 149. So too here: asking the jury to "determin[e] a punitive damages ratio without any grounding in a compensatory damages award [was] impracticable and fail[ed] to give the jury an adequate basis for determining what measure of punitive damages [was] appropriate." *Id.*

Furthermore, PacifiCorp was denied an opportunity to present individualized arguments explaining why it did not owe punitive damages to class members. "[T]he Due Process Clause prohibits a State from punishing an individual without first providing that individual with 'an opportunity to present every available defense.'" *Philip Morris USA v. Williams*, 549 US 346, 353 (2007) (quoting *Lindsey*, 405 US at 66). In *Williams*, the Supreme Court held that a jury may not punish a defendant for harm caused to nonparties "who are, essentially, strangers to the litigation." *Id.* at 357. The Supreme Court reasoned that awarding punitive damages based on harm to nonparties would not allow for a full defense and that the jury would be left to speculate about the seriousness and circumstances of a plaintiff's injury. *Id.* at 353–54. Similarly, applying a punitive damages ratio on a class-wide basis here raises due process concerns. The jury has not yet considered all of the evidence regarding damages to the absent class members because the evidence thus far has been limited to the named parties. Thus the jury is "left to speculate," raising due process concerns including "risks of arbitrariness, uncertainty, and lack of notice." *Id.* at 354.

Finally, class-wide treatment of punitive damages is not superior under Oregon law. ORCP 32 B provides that a class action is maintainable where it "is superior to other available methods for the fair and efficient adjudication of the controversy." ORCP 32 B. In determining the superiority of a class action, courts consider the interest of class members in

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individually controlling separate actions and whether individual claims would be sufficient to afford relief. ORCP 32 B(4), B(8). Here, each class member has the potential for substantial damages, incentivizing individuals to pursue their own claims; class-wide treatment is therefore not superior.

G. The Certified Class Is Not Ascertainable.

ORCP 32 requires courts to determine if putative classes may be maintained as class actions. This decision must be made "[a]s soon as practicable after the commencement of an action." ORCP 32 C(1). "The purpose of defining the class at the outset is to determine to whom notice must be sent and to facilitate the court's determination on the manageability of the action." *Bernard*, 275 Or at 156. "While it is not necessary that every potential member be identifiable, the class must be sufficiently ascertainable for these functions to be fulfilled." *Id.*

The evidence at trial demonstrated that the class certified is not ascertainable. Rather than offering class-wide evidence of damage or causation, Plaintiffs relied on evidence that parcels within large swaths of the state experienced "low soil burn severity." *See supra* at 13–14, 30–31. This says nothing about who is actually in the class because it does not prove the central question of whether the owner of that parcel suffered compensable harm. To this day—after a verdict has been rendered—neither the parties nor the Court know the identities of the members of the class.

The evidence here is akin to what the Court deemed inadequate in *Bernard*. There, the Court concluded that a class definition "which depends on the 'state of mind' of the prospective members" was not ascertainable because mental state cannot be determined *ex ante*. *Bernard*, 275 Or at 156. The Court specifically noted that "the class, where possible, should be defined upon the basis of *the manner in which the defendant acted toward an ascertainable group of persons.*" *Id.* at 156–57.

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The class certified here was not so defined. Instead, this Court certified a class based on persons who "experienced fire activity" or "experienced fire damage." (Class Certification Order 2.) Not only does the Court's guidance in *Bernard* suggest the class here was improper from the start, but Plaintiffs' evidence has confirmed that the class as certified was not ascertainable because its members could not be determined before the jury rendered its verdict. Nor have Plaintiffs provided a consistent way of adjudicating who has "experienced fire damage" and who has not. This failure of ascertianability requires decertification.

H. The Certified Class Was an Impermissible Failsafe Class.

The evidence at trial has demonstrated that the certified class was essentially a failsafe class. A "fail-safe class" is one where the class is defined by "whether the person has a valid claim." *Messner v. Northshore Univ. HealthSystem*, 669 F3d 802, 825 (7th Cir 2012). Such classes are "improper because a class member either wins or, by virtue of losing, is defined out of the class and is therefore not bound by the judgment." *Id.*; *see also Taylor v. Universal Auto Grp. I, Inc.*, 2014 WL 6654270 at *21–22 (WD Wash Nov. 24, 2014). "A failsafe class is * * * palpably unfair to the defendant." *Taylor*, 2014 WL 6654270 at *22.

That is precisely the type of class that was certified here: class members had to "experience fire activity" and either own property "within the boundary of the maximum extent of burn for" the fires at issue, or "experience[] fire damage during those fires." (Class Certification Order 2.) As explained above, for Plaintiffs' negligence, trespass, and nuisance claims, damage is an element of those claims. *See supra* at 36–40. Accordingly, to the extent the class is defined as those who "experienced fire damage," the class is defined such that all class members necessarily were harmed and, if a class member was not harmed, they fall out of the class. Likewise, to the extent the class definition encompasses property "within the boundary of the maximum extent of burn," it likewise connects class definition to experiencing damage. And, critically, the evidence at trial—and particularly the testimony from Buckley regarding damage based on "low soil burn severity"—effectively set the "maximum extent of

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burn" as all parcels that were burned. That is impermissible. Assuming that Buckley's evidence was sufficient to actually establish that a property was harmed by fire (and, to be sure, it was not for the reasons set forth above), his testimony was the only evidence Plaintiffs put forth that showed which parcels were within the "maximum extent of burn" and which were not. In other words, Buckley's testimony was offered to establish both the "extent of burn"—and, therefore, the definition of the class—*and* to establish actual damage. Thus, if a Plaintiff's property was burned, they are in the class; if it was not, they are not. This approach means that the class definition is coterminous with those who suffered damage, which is the very definition of a failsafe class. *See Messner*, 669 F3d at 825. Accordingly, it should be decertified. *See Walney v. SWEPI LP*, 2019 WL 1436938 at *14 (WD Pa Mar. 31, 2019) (decertifying impermissible failsafe class).

IV. CONCLUSION

For the foregoing reasons, the Court should enter judgment in favor of PacifiCorp, order a new trial, or decertify the class.

DATED: August 11, 2023

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CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing documents titled DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, MOTION FOR A NEW TRIAL, AND RENEWED MOTION FOR DECERTIFICATION on the following named person(s) on the date indicated below by

☐ mailing with postage prepaid.	☐ email. (courtesy copy only)
☐ hand delivery.	☒ email pursuant to agreement among parties/counsel dated October 29, 2020, consenting to service via email. (*Plaintiffs James, et al. only)*
☐ overnight delivery.	☐ eService via OJD eFile. (if registered)

If by mail or overnight delivery, a true copy of the above referenced document was served upon said persons, contained in a sealed envelope or package, addressed to said persons or at their last-known addresses indicated below.

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