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IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF LANE

| BRIGADOON VINEYARDS, LLC, a domestic business corporation,<br><br>Plaintiff,<br><br>vs.<br><br>PACIFICORP, an Oregon corporation; PACIFIC POWER, an Oregon registered electric utility and assumed business name of PACIFICORP, and DOES 1-50,<br><br>Defendants. | No. 23CV28149<br><br>DEFENDANTS PACIFICORP AND PACIFIC POWER'S MOTION TO DISMISS |
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**UTCR 5.010 AND 5.050 STATEMENT**

No conferral is required for the motion to dismiss for failure to state a claim under UTCR 5.010. Pursuant to UTCR 5.050, Defendants PacifiCorp and Pacific Power (collectively, "PacifiCorp") request telephonic oral argument and estimate that 40 minutes will be required for the hearing. PacifiCorp requests official court reporting services.

**MOTION**

Under ORCP 21 A(1)(h), PacifiCorp moves to dismiss Plaintiff's claims for inverse condemnation, negligence, gross negligence, nuisance, "spoliation of evidence," and injunction, as well as Plaintiff's requests for treble damages. This Motion is supported by the following points and authorities and Declaration of Reilley D. Keating in Support of Defendant PacifiCorp's Motion to Dismiss ("Keating Decl."), filed contemporaneously herewith.

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1 **POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 The 2020 Labor Day windstorm caused at least 17 separate wildfires across Oregon
4 and burned more than 1 million acres.[1] Nearly three years later, one wine producer brings
5 this lawsuit claiming that PacifiCorp ignited five fires that caused smoke particles to travel
6 across the state to damage Plaintiff's vineyard and grapes it purchased from other vineyards.
7 (Compl. ¶¶ 37-41.) Plaintiff takes a scattershot approach to pleading, alleging eight claims
8 for negligence, gross negligence, inverse condemnation, private nuisance, public nuisance,
9 trespass, "spoliation of evidence," and injunction.

10 Even setting aside the obvious factual problem of proving that any smoke damage to
11 Plaintiff's grapes resulted from PacifiCorp equipment dozens or even hundreds of miles
12 away rather than from any of the other dozen or more wildfires burning over Labor Day
13 weekend 2020—a problem that pervades every claim in this case—Plaintiff's claims fail, as
14 pleaded, as a matter of law. Plaintiff is or should be well aware of these fatal flaws. Over the
15 course of the last three years, similar claims have been dismissed with prejudice or
16 voluntarily withdrawn by parties represented by Plaintiff's counsel in parallel suits in
17 Douglas County Circuit Court, where only the negligence claims are proceeding to trial.
18 There is no reason why these same claims can withstand dismissal here, just because they are
19 filed by a different client in this count. The Court should reject that tactic and dismiss each
20 of Plaintiff's claims.

21 *First*, Plaintiff's claim for inverse condemnation fails on every element. To state a
22 claim for inverse condemnation, Plaintiff must allege that (1) "the government" (2)
23 "intentionally" acted "in a manner that necessarily caused" the injury to Plaintiff's property
24 (3) for a "public use," in the case of claims under Article I, Section 18, or by a corporation

25

26 [1] See Oregon Forest Resources Institute, "The 2020 Labor Day Fires," available online at https://oregonforests.org/2020-labor-day-fires (last visited August 21, 2023).

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1 acting under authority of law in the case of claims under Article XI, Section 4. *Dunn v. City*
2 *of Milwaukie*, 355 Or 339, 358, 328 P3d 1261, 1272 (2014). PacifiCorp is not the
3 government, and there is no allegation anywhere in the complaint that PacifiCorp acted
4 "under authority of law" in any relevant way. Nor does Plaintiff allege ultimate facts
5 sufficient to show that any of PacifiCorp's "intentional" acts were inevitable or "substantially
6 certain" to cause smoke damage to Plaintiff's vineyards. Just as occurred in the Douglas
7 County case arising from one of the same fires at issue here, the Court should dismiss the
8 inverse condemnation claim with prejudice.
9 *Second*, Plaintiff's other claims should be dismissed based on similar flaws. For
10 example, take only the requirement that Plaintiff alleges that the harm it suffered was a
11 "foreseeable risk" of negligent conduct. *Fazzolari By & Through Fazzolari v. Portland Sch.*
12 *Dist. No. 1J*, 303 Or 1, 17, 734 P2d 1326 (1987). Plaintiff offer no factual allegations—
13 whatsoever—to show that smoke damage to vineyards dozens or hundreds of miles away
14 was a foreseeable risk of Plaintiff's allegation that PacifiCorp was negligent in not installing
15 "insulated[] distribution line conductors" months or years prior to Labor Day 2020 or any of
16 Plaintiff's other allegations of negligent conduct. (Compl. ¶ 33.) As described more below,
17 each of Plaintiff's other claims suffers from similar legal flaws.
18 *Third*, Plaintiff's requested multiple damages are unavailable as a matter of law. As
19 just one example, Plaintiff relies on ORS 756.185, which permits treble damages if a utility
20 violates Oregon utility law in a grossly negligent or willful way. ORS 756.185(1). But the
21 statute explicitly "does not apply with respect to the liability of any public utility for personal
22 injury or property damage." ORS 756.185(4). That clause forecloses trebling damages here,
23 among other issues discussed below.
24 *Fourth*, Plaintiff's claim for "spoliation of evidence" fails. Even if Oregon law
25 recognized a freestanding claim for spoliation—and it does not—the Oregon Court of
26 Appeals has expressly rejected bringing claims for spoliation unless a party "first br[ings] the

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underlying claim and los[es] or suffer[s] diminution in its value." *Classen v. Arete NW, LLC*, 254 Or App 216, 221, 294 P3d 520, 523 (2012). Though Plaintiff ultimately will lose, that will not be the result of any purported spoliation. And in any event, it has not happened yet—a prerequisite for a spoliation claim.

*Fifth*, Plaintiff seek a facially absurd injunction requiring, among other things, PacifiCorp to "refrain from re-energizing powerlines on red flag warning days" and to "withhold distribution payments to its parent company, Berkshire Hathaway Energy, until PacifiCorp can certify it is sufficiently compliant with Oregon tree trimming laws." (Compl. ¶ 109.) Oregon law does not recognize a freestanding claim for an injunction. *Johnson v. Brown*, 567 F Supp 3d 1230, 1236 n2 (D Or 2021) ("Plaintiff's purported fifth claim for relief, labeled 'Injunction,' is a remedy and not an independent cause of action."). Even if it did, an injunction that effectively would permit Plaintiff's counsel to run Oregon's second-largest utility, substituting their own judgment for that of the Oregon Public Utility Commission ("PUC"), usurps the PUC's statutory and regulatory authority, and is barred by the doctrines of exclusive and primary jurisdiction.

## II. BACKGROUND

PacifiCorp delivers electricity to around 773,000 customers, including around 596,000 customers in Oregon under the Pacific Power brand. (*See* Compl. ¶ 13.) PacifiCorp is regulated by the PUC, which has established comprehensive regulations regarding vegetation management practices, public safety power shutoffs ("PSPS"), and many other aspects of running an electric utility in Oregon.

Plaintiff produces wine from grapes grown within the Willamette Valley and from grapes grown elsewhere. (*See* Compl. ¶¶ 11.) Plaintiff sells its bottled wine at wineries and via wholesale and retail wine distribution systems. (*Id.*)

Plaintiff alleges damages in Willamette Valley from smoke and soot that allegedly traveled there specifically from the Santiam Fire (located in the Santiam Canyon), the Echo

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1 Mountain Fire (located near Otis and Lincoln City), the Archie Creek Complex Fire (located
2 near Glide), the 242 Fire (located near Chiloquin), and the South Obenchain Fire (located
3 near Eagle Point). (*See* Compl. ¶¶ 1, 6.) Plaintiff alleges that after Labor Day, it harvested
4 and purchased grapes and turned those grapes into wine. (Compl. ¶¶ 37-39.) Plaintiff sold its
5 wine into the marketplace but alleges its wine sales were "reduced or damaged." (Compl. ¶
6 38-41.)

7 Plaintiff filed this eight-count Complaint on July 14, 2023 and served PacifiCorp on
8 July 21, 2023. In addition to this case (*Brigadoon Vineyards, LLC v. PacifiCorp, et al.*, No.
9 23CV28149), multiple other groups of winery Plaintiffs have filed suits against PacifiCorp
10 alleging smoke damage from the same fires. Each winery case is brought by the same counsel
11 currently litigating a negligence-only case in Douglas County Circuit Court.

12 **III. LEGAL STANDARD**

13 To avoid dismissal, a complaint must state facts sufficient to constitute a cognizable
14 claim for relief. *See* ORCP 18 A; ORCP 21 A(1)(h). Conclusory allegations or legal
15 conclusions are insufficient. *See, e.g.*, *Zehr v. Haugen*, 318 Or 647, 656, 871 P2d 1006
16 (1994); *Lourim v. Swensen*, 328 Or 380, 384, 977 P2d 1157 (1999). A court must "accept as
17 true all well-pleaded allegations and all reasonable inferences that may be drawn therefrom,
18 but disregard any allegations that are conclusions of law." *Huang v. Claussen*, 147 Or App
19 330, 332, 936 P2d 394 (1997), *rev den,* 325 Or 438 (1997) (citations omitted). When a
20 pleaded claim is legally deficient, it must be dismissed. *See Fuhrer v. Gearhart-By-The-Sea,*
21 *Inc.*, 306 Or 434, 441-42, 760 P2d 874 (1988).

22 **IV. ARGUMENT**

23 **A. Plaintiffs' Inverse Condemnation Claim Fails as a Matter of Law**

24 Multiple trial courts in Oregon have dismissed similar inverse condemnation claims,
25 including some brought by Plaintiff's attorneys, in cases arising out of the Labor Day fires.
26

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(*See* Keating Decl., Exs. A-G.) Here too, Plaintiff's Third Claim for Relief for inverse condemnation is subject to dismissal for multiple reasons.

Typically, a taking begins with a formal eminent domain proceeding. However, governments and corporations acting under authority of law may also "take[] property interests through [their] actions without first initiating condemnation proceedings." *Dunn v. City of Milwaukie*, 355 Or 339, 347, 328 P3d 1261 (2014). In those cases, a property owner may recover under the doctrine of inverse condemnation. In short, when the government or a corporation acting under authority of law "takes property, it must pay for it." *Dunn*, 355 Or at 347.

The Oregon Constitution has two takings clauses. Article I, section 18 prohibits the government from taking "private property" for "public use" without "just compensation." Article XI, section 4 states in full that "[n]o person's property shall be taken by any corporation under authority of law, without compensation being first made, or secured in such manner as may be prescribed by law." Here, Plaintiff does not state under which clause it asserts its Third Claim for Relief for inverse condemnation.

Plaintiff cannot satisfy the elements of either clause as a matter of law. *First*, Plaintiff cannot meet the intent requirement applicable to all Oregon takings claims: that the defendant "intentionally undertook its actions and that the inevitable result of those actions, in the ordinary course of events, was the invasion of the plaintiff's property that is the basis for the plaintiff's inverse condemnation claim." *Dunn*, 355 Or at 358-59. *Second*, Plaintiff cannot show either that PacifiCorp is a "governmental defendant" or that it took their property "for a public use" as required by Article I, section 18. *Third*, Plaintiff cannot show that PacifiCorp acted "under authority of law" as required by Article XI, section 4 in any relevant respect to their claims here. Because none of these problems can be fixed by amendment, Plaintiff's inverse condemnation claim should be dismissed with prejudice.

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1 **1. Plaintiffs Fail to Allege that PacifiCorp Intentionally Undertook to Act in a Manner that Necessarily Caused Plaintiffs' Injuries**

2

3 Absent evidence of "specific intent" to take property, a plaintiff may maintain an
4 inverse condemnation by proving that the government "intentionally undertook * * *
5 actions," the "inevitable result" of which, "in the ordinary course of events, was the invasion
6 of the plaintiff's property that is the basis for the * * * inverse condemnation claim." *Dunn*,
7 355 Or at 358-59; *see also Morrison v. Clackamas Cnty.*, 141 Or 564, 569, 18 P2d 814
8 (1933) (a defendant "intend[s] to do those things which are the natural and ordinary
9 consequences of his act"). While that "burden is less than specific intent would make it, it is
10 still exacting." *Dunn*, 355 Or at 358. If Plaintiff's evidence shows that the invasion of their
11 property was a "less than certain consequence—such as a conceivable, possible, or plausible
12 outcome, or one that otherwise might or might not occur—that is not enough." *Id.* at 359.
13 Nor can "negligence alone * * * support a claim for inverse condemnation." *Id.* at 352; *see*
14 *also Vokoun v. City of Lake Oswego*, 335 Or 19, 27, 56 P3d 396 (2002) ("[A] takings claim
15 cannot be based on * * * 'negligent government conduct.'" (citation omitted)).

16 *Dunn* illustrates the high standard Plaintiff must meet. In that case, the Oregon
17 Supreme Court rejected a plaintiff's inverse condemnation claim arising out of the City of
18 Milwaukie's hydrocleaning program—a process that "can cause water in the sewer lines to
19 backflow" if lateral sewer lines are kept at too low a pressure. *Dunn*, 355 Or at 341-42. The
20 plaintiff argued that she had "sufficiently proved the city's intent by showing that the
21 flooding of her house was the direct result of the city's purposeful act of hydrocleaning"—in
22 other words, that because the city intended the public improvement, it intended any "'natural
23 and ordinary consequence[]'" of that improvement, and so was liable for inverse
24 condemnation. *Id*. at 345-46 (citation omitted). The Oregon Supreme Court rejected that
25 formulation, and instead held that if a governmental entity is liable any time its public
26 improvements are the "but-for" cause of damage, that would effectively "eliminate[] the

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requirement of intent altogether" and fail to "adequately distinguish between governmental negligence and intentional takings." *Id.* at 358. In short, under *Dunn*, it is not enough that the government intends some public improvement that *risks* damaging property or in fact causes damage—instead, Plaintiff must show that the "*inevitable* result of those actions, in the ordinary course of events, was the invasion of the plaintiff's property." *Id.* (emphasis added).

Under *Dunn*, Plaintiff cannot allege that it was inevitable that a fire might ignite "somewhere," or could spread to Plaintiff's property. Instead, Plaintiff must allege that the invasion "into [Plaintiffs'] [property] was the necessary, certain, predictable, or inevitable result" of PacifiCorp's conduct: each step of the causal chain from PacifiCorp's conduct to Plaintiff's damages must have been "'substantially certain'" to occur. *Dunn*, 355 Or at 360-61.

In *Worman v. Columbia Cnty.*, 223 Or App 223, 236, 195 P3d 414 (2008), a plaintiff sued the county, alleging that the county negligently conducted a roadside spray operation and damaged their property. The Oregon Court of Appeals affirmed the trial court's conclusion that the Plaintiff failed to state an inverse condemnation claim because the Plaintiff had not alleged (nor offered evidence) that the county spray program for roadside ditches "would naturally and ordinarily cause damage to Plaintiff's property in particular, or, for that matter, that the spray program, properly carried out, would naturally or ordinarily cause damage to any property." *Id.* (emphasis omitted). The court rejected the plaintiff's inverse condemnation theory premised on their arguments that "had the county not performed those spray operations in a negligent manner, Plaintiff's property would not have been harmed," and concluded that such allegations were insufficient to establish that the county had designed and carried out a project for public use that would damage the plaintiff's property as a natural and ordinary consequence of the project. *Id.*

Courts have rejected recent attempts to use an inverse condemnation claim against utility companies for wildfire damages, including in cases brought by Plaintiff's attorneys. In

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rejecting inverse condemnation claims against a utility for wildfire damages, Judge Johnson of the Douglas County Circuit Court recognized that *Dunn* requires a plaintiff asserting inverse condemnation in the context of a wildfire to allege facts sufficient to show both that "1. The intentional act by Defendants was substantially certain to cause a fire; and 2. The fire was substantially certain to cause damage to property owned by Plaintiffs." (Keating Decl., Ex. E at 4.)

Judge Conover of Lane County dismissed inverse condemnation claims against the Eugene Water & Electric Board and Lane Electric Cooperative, Inc. arising out of Labor Day 2020 wildfires, specifically finding "that there was no intent by either defendant to damage the Plaintiff's properties." (Keating Decl., Ex. C at 30 (p. 71 of the transcript); *see also* Ex. D at 1.) Although Judge Conover allowed the Plaintiff in that case a chance to amend their complaint, Judge Conover recently dismissed the amended inverse condemnation claims with prejudice. (Keating Decl., Ex. B.)

In another case, Judge Johnson of Douglas County recently dismissed inverse condemnation claims against PacifiCorp in the *Roseburg Resources* case, Douglas County Circuit Court Case No. 22CV09346. (Keating Decl., Ex. A.) Judge Johnson dismissed the original complaint, granting leave to replead if the Plaintiff could allege ultimate facts that the damage to their property "was an inevitable or natural result of [PacifiCorp's] intentional act that was not dependent on other intervening factors." (*Id.*) Plaintiff repleaded, and Judge Johnson dismissed the inverse condemnation claim again, without leave to amend. (Keating Decl., Ex. G.) In reaching that conclusion, Judge Johnson found that the Plaintiff's allegations about the "hazard," "risk," and "danger" that a fire would start and the alleged "certainty to the fire will spread, and the predictability of that spread, once a fire ignites" were insufficient to allege "any facts from which one could conclude that the fire was substantially certain to occur as opposed to at a high risk of occurring." (*Id.*)[2]

[2] On February 2, 2023, Multnomah County Circuit Court Judge Beth A. Allen issued an order denying PacifiCorp's motion to dismiss inverse condemnation claim brought pursuant

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1 Plaintiff here cannot allege that any of the necessary causal steps from PacifiCorp's
2 actions to Plaintiff's damaged grapes were "substantially certain" to occur. Plaintiff
3 conclusorily alleges that "the damages caused to Plaintiff's lands and grapes, by each of the
4 Santiam, Echo Mountain, Archie Creek Complex, 242 and South Obenchain Fires' harmful
5 smoke was the inevitable result of PacifiCorp's actions," but Plaintiff have pled no facts to
6 support this. (Compl. ¶ 76.) Plaintiff alleges PacifiCorp was negligent in nine potential ways,
7 including: trimming vegetation adjacent to electrical lines, replacing electrical equipment
8 with "strong and safe parts," including the Santiam Canyon, North Umpqua Canyon, and
9 Echo Mountain in areas "designated for a power shutoff program," turning off power in "the
10 service area adjacent to the Willamette Valley," and ensuring "operations personnel
11 understood and knew how and when to de-energize power lines during high-wind, high-fire
12 conditions. (Compl. ¶ 33.) But this generalized list of actions does not support the
13 conclusions that fires would inevitably start, those fires would inevitably grow large enough
14 to create harmful smoke, that smoke would inevitably travel many miles to Plaintiff's grapes,
15 and that those grapes would inevitably no longer be viable for wine making after the smoke
16 exposure. Plaintiff's allegations amount to a "conclusion[] of law," and do not suffice to
17 state "ultimate facts" entitling Plaintiff to relief. *Huang*, 147 Or App at 332.
18
19

20 to Article XI, section 4 arising out of a different 2020 Labor Day fire (the Pike Road wildfire in Tillamook County). *See Stroh Coastal Holdings LLC v. PacifiCorp*, Multnomah County
21 Circuit Court Case No. 22CV29695. Based on the facts alleged in that complaint, Judge Allen concluded that the requirements of *Dunn* were sufficiently pled and that there was a
22 sufficient nexus between PacifiCorp's eminent domain authority and the fire damages under Article XI, section 4. Although PacifiCorp does not concede that the *Stroh* allegations were
23 legally sufficient (they were not), *Stroh* is distinguishable because of the unique and highly unusual allegations in that case. As the court recounted, the plaintiff in *Stroh* alleged that
24 wildfire damage to the plaintiff's property was substantially certain because it had specifically alleged that PacifiCorp maintained a utility line easement across the plaintiff's
25 property (i.e., the plaintiff's property was right under a powerline), that the Pike Road fire ignited due to power facilities contacting a hazard tree "just adjacent to [that] easement," and
26 that the plaintiff had personally put PacifiCorp on actual notice of that specific hazard tree prior to the fire. (Keating Decl., Ex. F at 7-8.)

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1 Plaintiff has not alleged any other specific facts supporting a finding of "substantial
2 certainty." Rather, Plaintiff centers its factual allegations on fire "risk" because Plaintiff
3 cannot allege that there was a substantial certainty of Plaintiff's specific smoke damage. The
4 Complaint refers to "risk" or "fire risk" more than ten times. (*See, e.g.*, Complaint ¶¶ 8, 18,
5 21, 23, 24, 25, 32, 42, 45.) The reason Plaintiff focuses on "risk" is that it is the best it can
6 do; it is implausible (at best) to suggest that PacifiCorp's alleged actions were *certain* to
7 ignite a fire when other intervening causes (competent ignition source, wind events, dry
8 weather, wind direction and strength to carry the smoke, etc.) are necessary for Plaintiff's
9 alleged damages to occur.

10 As federal decisions have long explained, allegations of fire "risk" are not sufficient
11 to state a claim for inverse condemnation—and the Oregon Supreme Court has explicitly
12 instructed Oregon courts to look to federal inverse condemnation decisions. *See Dunn*, 355
13 Or at 357 (explaining that the "natural and ordinary consequences" test is "consistent with"
14 the "natural and ordinary consequences" test that federal courts use to evaluate inverse
15 condemnation claims). In *Cary v. United States*, 552 F3d 1373 (Fed Cir 2009), Plaintiffs
16 challenged the United States Forest Service's fire management policies, alleging that the
17 government was "aware" that its policies "created a significant risk that a wildfire * * *
18 would spread to adjacent landowners' properties." *Id.* at 1377. The court rejected Plaintiffs'
19 argument that mere heightened fire "risk" could satisfy the requirement that a plaintiff's
20 injuries must be the "'direct, natural, or probable'" result of government conduct to state a
21 claim. *Id.* at 1378 (citation omitted). As the court explained, "[t]aking a calculated risk, or
22 even increasing a risk of a detrimental result, does not equate to making the detrimental result
23 direct, natural, or probable." *Id.* For that reason, "[l]iability for damage caused by" fire "has
24 traditionally been determined under tort law," not inverse condemnation. *Thune v. United*
25 *States*, 41 Fed Cl 49, 53 (1998); *see also Dunn*, 355 Or at 356 n 13 (citing *Thune* with
26 approval).

1 Even if Plaintiff could allege that PacifiCorp's conduct was "substantially certain" to
2 ignite a fire (and it cannot), Plaintiff makes no effort to allege the next step of the required
3 causal chain: that the alleged ignition was "substantially certain" to result in the "invasion of
4 the plaintiff's property that is the basis for the plaintiff's inverse condemnation claim." *Dunn*,
5 355 Or at 358-59. At best, Plaintiff alleges that PacifiCorp's actions were substantially
6 certain to cause ignitions that were the but-for cause of fires that were the but-for cause of
7 smoke, that was the but-for cause of Plaintiff's damages. But as the Oregon Supreme Court
8 explained in *Dunn*, "[u]nder the natural and ordinary consequences test" the defendant is
9 required "to have intended *the invasion of plaintiff's property*, and not just the acts that, in
10 some causal way, led to or contributed to that invasion." *Id.* at 361 (emphasis added).
11 Plaintiff has not alleged that the fire ignitions here were substantially certain to result in
12 invasions to Plaintiff's properties in particular, and it cannot do so.
13 Plaintiff's allegations about computer modeling and analysis do not save their inverse
14 condemnation claim from dismissal. (*See* Compl. ¶ 17 ("Responsible electric utilities use
15 computer modeling and analysis on a regular basis as part of their de-energization programs
16 to predict how a weather pattern will evolve, and how a fire would be spread amidst such
17 winds, heat, and lack of humidity").) Plaintiff does not allege that computer modeling and
18 analysis would have predicted fires igniting at any particular point, let alone the particular
19 points of ignition alleged in the Complaint. Nor does Plaintiff allege any facts to show that
20 fire was "necessary, inevitable, or otherwise certain" to ignite at any particular point on the
21 hundreds (indeed, thousands) of miles of powerlines maintained by PacifiCorp, much less in
22 sufficient proximity to Plaintiff such that any computer modeling would have predicted the
23 fire would invade Plaintiff's land. *Id.* at 351.
24 Fires spread unpredictably with constant opportunities for intervening causes based
25 on winds, firefighting, and myriad other factors. *See City of Austin v. Liberty Mut. Ins.*, 431
26 SW3d 817, 825-26 (Tex App 2014) (describing seven-step chain of causation required for a

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utility-caused fire to damage plaintiff's property, most of which were not "almost certain" to occur, foreclosing takings claim). Even with an "intentionally set fire[]" that "escape[d] because of intervening winds" or other causes, liability for fire damage "has traditionally been determined under tort law," not inverse condemnation. *Thune*, 41 Fed Cl at 53. Because Plaintiff does not and cannot allege that any alleged fire caused "certain and inevitable" damage to Plaintiff in particular "for purposes of a takings claim," Plaintiff fails to state a claim for inverse condemnation. *Dunn*, 355 Or at 356 n 13.

**2. Any Alleged Article I, Section 18 Inverse Condemnation Claim Fails because PacifiCorp Is Not a Public Entity and Did Not Take Property for Public Use**

**a. PacifiCorp Is Not a Public Entity**

Oregon law has long been clear that "a claim for inverse condemnation" under Article I, section 18 "requires a showing that the *governmental defendant* intended to take private property for a public use." 335 Or at 27-29 (emphasis added); *see also Dunn*, 355 Or at 358 (same); *Boise Cascade Corp. v. Bd. of Forestry*, 325 Or 185, 197, 935 P2d 411 (1997) (same). PacifiCorp is aware of no Oregon appellate case applying inverse condemnation against a private entity, and the Court should not accept Plaintiff's invitation to be the first. *See Motes v. PacifiCorp*, 230 Or App 701, 706, 217 P3d 1072 (2009) (rejecting "without discussion" a plaintiff's appeal of a dismissed inverse condemnation claim against PacifiCorp). Indeed, Judge Alexander in Multnomah County recognized that as a matter of law, a plaintiff cannot state an inverse condemnation claim under Article I, section 18 against a private entity like PacifiCorp. (*See supra* at n 1.) Similarly, Judge Conover in Lane County, in dismissing the inverse condemnation claims against Lane Electric, specifically found that "Lane Electric is not a government actor." (Keating Decl., Ex. C at 30 (transcript pp. 70-71); *see also* Ex. D at 1.)

Plaintiff may cite cases showing that private entities may be involved in *direct* condemnation actions, as plaintiffs have done in other cases. *See, e.g.*, *Grande Ronde Elec.*

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1 *Co. v. Drake*, 46 Or 243, 78 P 1031 (1905). But the fact that corporations may have a
2 *statutory* right to condemnation (*see* ORS 35.245) says nothing about whether corporations
3 may be liable for *constitutional* inverse condemnation claims. *See City of Keizer v. Lake*
4 *Labish Water Control Dist.*, 185 Or App 425, 432, 60 P3d 557 (2002) ("[I]t does not
5 necessarily follow that, because the [defendant] may have violated the [condemnation]
6 statutes, the proper remedy is an action for damages in inverse condemnation.").

7 Dismissing any Article I, section 18 claim also makes sense from a policy
8 perspective, because PacifiCorp is unlike governmental entities that can unilaterally spread
9 the cost of public improvements by raising taxes. PacifiCorp may only raise rates if the PUC
10 finds that a rate increase would be "fair, just and reasonable." ORS 757.210(1)(a). PacifiCorp
11 would also not qualify as a "[g]overnment body" under Oregon's tort claim statute. ORS
12 30.260(4) ("'Public body' means * * * [a] public body as defined in ORS 174.109[.]"); ORS
13 174.109 ("[A]s used in the statutes of this state 'public body' means state government bodies,
14 local government bodies and special government bodies."); ORS 174.117(1) (special
15 government bodies are, among other things, "school district[s]," entities that are "created by
16 statute, ordinance or resolution," or "intergovernmental bod[ies]"). Plaintiff's Complaint
17 alleges no facts to rebut either point. Because only "governmental defendants" are liable for
18 inverse condemnation, the Court should dismiss Plaintiff's Article I, section 18 claim.
19 *Vokoun*, 335 Or at 28.

20 **b. Plaintiffs Do Not Allege that PacifiCorp Took Property for**
21 **"Public Use"**

22 Any Article I, section 18 inverse condemnation claim also fails for the independent
23 reason that Plaintiff cannot demonstrate that its property was taken "for a public use."
24 *Vokoun*, 335 Or at 23; *see also Worman*, 223 Or App at 236 (Plaintiff could not state an
25 inverse condemnation claim where "no reasonable juror could conclude that a county
26 employee who intentionally and maliciously sprays herbicide onto private property is acting

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'for a public use'"). As the Court of Appeals has explained, the term "public use" requires an "intimate relationship between the public and an item of property which has been acquired"; the "public's use and occupation of the property must be direct." *Mossberg v. Univ. of Oregon*, 240 Or App 490, 500-01, 247 P3d 331 (2011), *rev den,* 351 Or 216 (2011) (internal quotation marks and citation omitted). In other words, Plaintiff must allege that PacifiCorp took their property "intending to put that property" *itself* "to public use." *Id*. Judge Conover of Lane County recently dismissed inverse condemnation claims against Eugene Water & Electric Board and Lane Electric Cooperative, Inc., arising out of similar Labor Day wildfires, noting: "I find that there were no facts established of the intent to take the property for public use, nor that the alleged taking by wild fire was for a public use or public purpose. * * * further, there was no intent to put the Plaintiff's property to public use." (Keating Decl., Ex. C at 30 (p. 71 of the transcript); *see also* Ex. D at 1.)

Plaintiff's only allegation here is that "PacifiCorp has the statutory power to condemn property in the State of Oregon and utilizes such property in the operation of its utility for a public use." (Compl. ¶ 74.) Plaintiff has not alleged that any supposed taking was for public use or that PacifiCorp used the property in the operation of its utility. Plaintiff must meet the test for public use set forth in *Mossberg*: it must allege that "the government took private property intending to put that property to public use." 240 Or App at 501. Because Plaintiff cannot make that showing and makes no effort to do so, it fails to state an inverse condemnation claim under Article I, section 18 of the Oregon Constitution.

**3. Plaintiffs' Inverse Condemnation Claim under Article XI, Section 4 Fails Because Plaintiffs Do Not and Cannot Allege that PacifiCorp Acted under Authority of Law**

Any Article XI, section 4 inverse condemnation claim also has a separate fatal flaw: Plaintiff cannot allege that PacifiCorp acted "under authority of law" in allegedly igniting the fires that Plaintiff contend damaged them. By its own terms, the takings clause in Article XI, section 4 only applies to a "corporation under authority of law." Plaintiff attempts to meet

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this requirement by alleging that PacifiCorp has a general power of condemnation, (Compl. ¶ 74), or that it operates as a public utility, (Compl. ¶ 73). (*See* Compl. ¶ 77 (alleging PacifiCorp "took the Plaintiff's property via color of its State law monopoly and utility rights").) But Plaintiff fails to allege that any of PacifiCorp's alleged *conduct* was "under authority of law." Because it cannot do so, the inverse condemnation claim under Article XI, section 4 fails.

Judge Conover's ruling in Lane County similarly reinforces that Plaintiff cannot state an Article XI, section 4 claim. In that case, Lane Electric Cooperative moved to dismiss the Plaintiff's Article XI, section 4 inverse condemnation claim on precisely this point and the court specifically agreed, finding "Lane Electric did not act under authority of law to the extent" there was in fact "a taking of the Plaintiff's property." (Keating Decl., Ex. C at 30 (p. 71 of the transcript); *see also* Ex. D at 1.) Similarly, Douglas County Circuit Court Judge Johnson dismissed Plaintiff's Article XI, section 4 claim, stating that the Court had "serious reservations that any amount of evidence would support, or any statement of ultimate facts could be made, that would support a claim that all property damaged as a result of the fire was taken under authority of law." (Keating Decl., Ex. G.)

Nor can Plaintiff cite any binding authority to the contrary. Article XI, section 4 is rarely invoked. To PacifiCorp's knowledge, the only Oregon appellate authority interpreting its provisions in any depth in the context of a takings claim since the 1930s—*City of Keizer v. Lake Labish Water Control District*—expressly did not consider the question presented here: whether a plaintiff must allege that a taking itself was committed "under authority of law," or whether a plaintiff may state a claim by simply alleging that a defendant generally operates with legal authority (as Plaintiff allege).[3] *City of Keizer v. Lake Labish Water*

[3] A handful of other modern cases have addressed Article XI, section 4 takings claims but like *City of Keizer* did not interpret the meaning of "under authority of law." *See, e.g.*, *Nw. Nat. Gas Co. v. City of Portland*, 300 Or 291, 312-13, 711 P2d 119 (1985) (no liability under either Article I, section 18 or Article XI, section 4 because revocation of a right-of-way was not a taking); *Home Builders Ass'n of Metro. Portland v. City of W. Linn*, 204 Or App 655, 671, 131 P3d 805



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Control Dist., 185 Or App 425, 443 n5, 60 P3d 557 (2002), *rev den,* 336 Or 60 (2003) (noting that the water district did "not contend that, when it decided to take the action that resulted in the flooding of city property, it was not acting 'under authority of law,' as that phrase is used in Article XI, section 4").

The only Oregon cases permitting Article XI, section 4 claims to go forward have involved a direct connection between a corporation's exercise of legal authority and the alleged taking. The primary cases applying Article XI, section 4 were decided in the late 19th and early 20th centuries and involved railroads that took property pursuant to a municipal ordinance or council grant explicitly authorizing the activities claimed to constitute a taking. *See Tooze v. Willamette Valley S. Ry. Co.*, 77 Or 157, 159, 150 P 252 (1915) (railroad's "right to construct a trestle [was] based upon an ordinance passed by the city council of Oregon City"); *Kurtz v. S. Pac. Co.*, 80 Or 213, 215, 155 P 367 (1916) (railroad's construction activities authorized by "an ordinance * * * to build the switch"); *McQuaid v. Portland & V. Ry. Co.*, 18 Or 237, 239, 22 P 899 (1889) (the railroad at issue was "constructed in pursuance of authority granted by the common council of the city of East Portland"). PacifiCorp is not aware of any Oregon appellate authority holding that a corporation acts "under authority of law" whenever it is generally subject to regulation or holds eminent domain power—no matter how disconnected its conduct is from the corporation's eminent domain authority or from the corporation's affirmative compliance with regulations.

"Under authority of law" must require a direct connection between a corporation's legal authority and the alleged taking because unlike Article I, section 18's takings clause, Article XI, section 4 contains no textual "public use" requirement. The "under authority of law" requirement fulfills the same limiting function in distinguishing private torts from

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(2006), *rev den,* 341 Or 80 (2006) (rejecting Article XI, section 4 claim in passing, and collecting cases doing the same thing).

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compensable takings. If the theory advanced by Plaintiff were correct, a broad scope of conduct by corporations subject to state regulation (effectively every corporation) or holding the power of eminent domain would support a takings claim, no matter how disconnected from those regulations or from a corporation's exercise of eminent domain power. That interpretation "'would be absurd to attribute to the framers'" of the Oregon Constitution, and the Court should reject it. *City of Keizer*, 185 Or App at 430 (quoting *Tomasek v. State*, 196 Or 120, 147, 248 P2d 703 (1952)).[4]

The Court also may look to the analogous federal state action doctrine, which leads to the same result. In *Jackson*, a customer brought constitutional claims against a utility, arguing that the utility was subject to the Fifth Amendment because it was "subject to extensive state regulation" and held eminent domain power. *Jackson v. Metro. Edison Co.*, 419 US 345, 350, 346, 95 S Ct 449, 42 L Ed 2d 477 (1974). The Supreme Court rejected this argument and found that the utility was not a state actor because it did not "*exercise* * * * some power delegated to it by the State * * * such as eminent domain" in deciding to discontinue service (the conduct that formed the basis of the plaintiff's complaint). *Id.* at 353 (emphasis added). Although the federal and state takings clauses are not coextensive in all cases, Oregon courts have looked to federal constitutional decisions in determining the scope of the Oregon takings clause. *See, e.g.*, *Lincoln Loan Co. v. State Hwy. Comm'n*, 274 Or 49, 52 n 2, 545 P2d 105 (1976) ("Article I, § 18, of our Oregon Constitution is identical in language and meaning with the Fifth Amendment of the Constitution of the United States."); *cf. Suess Builders Co. v. City of Beaverton*, 294 Or 254, 259 n 5, 656 P2d 306 (1982).

[4] If the Court interprets Article XI, section 4's "under authority of law" provision to only require a loose connection between legal authority and the alleged taking, then, in the alternative only, the Court should infer a public use requirement into Article XI, section 4—and Plaintiff's claim would then fail for the same reason that their Article I, section 18 claim fails, as described above. *See, e.g.*, *Thompson v. Tualatin Hills Park & Recreation Dist.*, 496 F Supp 530, 539 (D Or 1980), *aff'd,* 701 F2d 99 (9th Cir 1983) (Article XI, section 4 "has been construed by the Oregon Supreme Court to have the same meaning as Article I section 18" (citing *MacVeagh v. Multnomah Cnty.*, 126 Or 417, 270 P 502 (1928)).

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Plaintiff cannot claim that PacifiCorp acted "under authority of law" in allegedly igniting the fires at issue here, nor does Plaintiff even attempt to do so. Plaintiff does not allege that PacifiCorp's conduct in *following* state regulations led to the alleged fires. In fact, Plaintiff specifically alleges that PacifiCorp was "not authorized under any state law or regulation to take the actions that it took causing ignition of each of the Santiam, Echo Mountain, Archie Creek Complex, 242, and/or South Obenchain Fires and Plaintiff's resulting damages." (Compl. ¶ 77.) Plaintiff similarly does not allege that PacifiCorp used the power of eminent domain to take its property, nor to take any relevant land at issue in this case. The most Plaintiff alleges is that PacifiCorp generally has the "power of eminent domain"—not that PacifiCorp used that power in any relevant way vis-à-vis their takings claim. (Compl. ¶ 74.) Absent a direct connection between the exercise of PacifiCorp's eminent domain power and the alleged taking, similar to those present in *Tooze*, *Kurtz*, and other Oregon cases, Plaintiff's inverse condemnation claim under Article XI, section 4 claim fails as a matter of law.

**4. Plaintiffs Do Not Allege Any Facts Concerning the Extent of the Alleged Damage**

Finally, Plaintiff's claim for inverse condemnation should be dismissed because it fails to allege any facts concerning the extent to which Plaintiff's property was damaged. Indeed, a fair reading of the Complaint is that even read in the light most favorable to Plaintiff, Plaintiff has alleged only an inactionable "damaging" and not an actionable "taking."

Oregon courts have long held that "[p]roperty is not 'taken' if it is simply damaged." *Moeller v. Multnomah Cnty.*, 218 Or 413, 425-27, 345 P2d 813 (1959). Rather, the test is whether "there has been a 'substantial' interference with property rights." *Hawkins v. City of La Grande*, 315 Or 57, 68, 843 P2d 400 (1992) (citing *Lincoln Loan v. State Hwy Comm.*, 274 Or 49, 57, 545 P2d 105 (1976)). Plaintiff conclusorily alleges that PacifiCorp "took the Plaintiff's property" (Compl. ¶ 77), but it pleads no facts about the extent of the damage to

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Plaintiff's grapes—and indeed, the Complaint explicitly pleads that Plaintiff did not even believe many of the grapes were damaged *at all* until after making wine and bottling it (*see, e.g.*, Compl. ¶ 38). Whether or not Plaintiff can prove that smoke taint resulting from PacifiCorp's alleged conduct damaged their grapes, damage—even damage that amounts to monetary harm—is not sufficient; Oregon law only permits inverse condemnation claims for takings.

**B. Plaintiffs' Negligence and Gross Negligence Claims Fail as a Matter of Law**

Plaintiffs has failed to state a claim for negligence or gross negligence. In particular, Plaintiff has not pled its alleged harm was a foreseeable result of PacifiCorp's alleged actions. It is also not clear whether Plaintiff intends to plead a claim for negligence *per se* or otherwise claim that PacifiCorp violated ORS 757.020 in relation to its claims. If Plaintiff does so, that claim fails for independent reasons.

**1. Plaintiffs Have Not Stated a Claim for Negligence or Gross Negligence Because They Have Not Pled Injury to their Wine Was Reasonably Foreseeable**

Plaintiffs cannot plead a claim for negligence or gross negligence because it has not suffered a foreseeable harm. When a defendant's duty is not defined by a special relationship, as here,[5] a plaintiff must plead that the harm it suffered was a foreseeable risk of defendant's conduct. *Fazzolari By & Through Fazzolari v. Portland Sch. Dist. No. 1J*, 303 Or 1, 17, 734 P2d 1326 (1987) ("the issue of liability for harm actually resulting from defendant's conduct properly depends on whether that conduct unreasonably created a foreseeable risk to a

[5] Plaintiff pleads that "statutes and regulations regulating utilities" create a "special relationship" between Plaintiff and PacifiCorp. (Compl. ¶ 61.) Such conclusory allegations must be dismissed because they fail to state from which "statutes and regulations" this "special relationship" arises and what duty it entails. However, even if the Court were to find that PacifiCorp has a special statutory or regulatory duty, it could not be a duty to these Plaintiff entirely or largely outside of PacifiCorp's service territory for unforeseeable harm. *See Allstate Ins. Co. v. Tenant Screening Servs., Inc.*, 140 Or App 41, 50, 914 P2d 16, 21 (1996) ("where the special relationship does not prescribe the scope of the duty, common law principles of reasonable care and foreseeability of harm are relevant.") (internal quotation marks and citation omitted).



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1 protected interest of the kind of harm that befell the plaintiff"). This means a plaintiff must
2 plead "harms that a reasonable factfinder, applying community standards, could consider
3 within the range of foreseeable possibilities." 303 Or at 13.

4 "To gauge the reasonable foreseeability of the harm that occurred to plaintiffs,
5 [courts] must consider whether 'the person harmed is one of the general class threatened' by
6 defendants' conduct and whether the harm resulting from the conduct is 'of the general kind
7 to be anticipated from the conduct.'" *McPherson v. State ex rel. Dep't of Corr.*, 210 Or App
8 602, 614, 152 P3d 918, 924 (2007) (quoting *Stewart v. Jefferson Plywood Co.*, 255 Or 603,
9 609, 469 P2d 783 (1970)). A claim for gross negligence also must consider the probability of
10 the harm. *WSB Investments, LLC v. Pronghorn Development Co., LLC*, 269 Or App 342,
11 360, 344 P3d 548, 560 (2015) ("Gross negligence' generally means negligence characterized
12 by near total disregard or indifference to the rights of others or the probable consequences of
13 a course of conduct."). Where no reasonable juror could find that the kind of harm that befell
14 the plaintiff was the foreseeable result of the defendant's alleged negligent act, the harm is
15 unforeseeable as a matter of law. *Buchler v. State By & Through Oregon Corr. Div.*, 316 Or
16 499, 509, 853 P2d 798 (1993).

17 Here, wineries are not of the general class threatened by PacifiCorp's alleged conduct
18 and the unmarketability of Plaintiff's wine is not the general kind of harm a reasonable
19 factfinder would anticipate. In *Chapman v. Mayfield*, 358 Or 196, 218 P3d 566 (2015), for
20 example, the Oregon Supreme Court rejected allegations that bad acts were the foreseeable
21 result of serving alcohol to a visibly intoxicated person. The court explained that even though
22 it may be "common knowledge that intoxicated people often have impaired judgment and
23 may, therefore, act improperly," such acts are not foreseeable without more specific
24 allegations. *Id.* at 361. Similarly, while it may be common knowledge that smoke results
25 from fire, that is all Plaintiff can allege. Without more, it is not reasonably foreseeable that
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smoke would travel dozens or hundreds of miles to damage grape harvests months or years after a wildfire. "Hindsight . . . is not foreseeability." *Id.*

Plaintiff has not pled that the fires were on adjacent property or even that PacifiCorp operates within the Willamette Valley or on Plaintiff's land—and indeed, they were not; the furthest fires were more than 200 miles away. (Compl. ¶ 1.)

The tainting of wine made from grapes grown miles away from a fire is not a general way in which injuries occur and is not reasonably foreseeable. Even Plaintiff itself, and its winemaking professionals, apparently did not foresee the harm to its wines. Despite knowing of the Labor Day fires, Plaintiff proceeded to harvest and cleanse grapes and, thinking the grapes were untainted, turn them into wine. (Compl. ¶¶ 37-39.) What is more, Plaintiff purchased some of the allegedly damaged grapes only after the fires. (Compl. ¶ 37.) Plaintiff sold the wine into the marketplace. (Compl. ¶¶ 37-39.) If Plaintiff, and its professional grape growers and wine makers, did not know the risk the fires posed to its grapes, the alleged damage cannot be reasonably foreseeable by a reasonable person, a non-expert in wine making.

### 2. To the Extent Plaintiffs Allege Negligence *Per Se* or Otherwise Pursue a Claim Based on Violations of ORS 757.020, Oregon Law Forecloses Relying on General Safety Statutes like ORS 757.020

It is not clear whether Plaintiff intends to pursue a negligence *per se* claim. There is no separately labeled count. But Plaintiff cites and relies on ORS 757.020 several times throughout the complaint, including to support its request for multiple damages. (*See, e.g.*, Compl. ¶ 71.) Because ORS 757.020 cannot support a negligence *per se* claim and does not set out a standard of care that can be violated, Plaintiff's claims (if any) based on ORS 757.020 should be dismissed.

Only statutes and regulations that "so fix[] the legal standard of conduct that there is no question of due care left for a factfinder to determine" can establish a claim for negligence *per se*. *Shahtout By & Through Shahtout v. Emco Garbage Co., Inc.*, 298 Or 598, 601, 695

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P2d 897 (1985). In *Kim v. Multnomah Cnty. ex rel. Multnomah Cnty. Cmty. Dep't of Cmty. Corr.*, 328 Or 140, 153, 970 P2d 631 (1998), the Plaintiff sued for negligence *per se* based on several statutes governing the conduct of probation officers. After the trial court granted summary judgment to the defendants and the Oregon Court of Appeals affirmed, the Oregon Supreme Court noted that even if Plaintiff had established predicate facts for the negligence *per se* claim to proceed, the relevant statutes failed to support negligence *per se* as a matter of law. *Id*. at 152-53. None of the relevant statutes "establish[ed] a standard of care." *Id.* at 153. At most, those statutes required the defendants to "exercise reasonable care." *Id.* And as the Supreme Court explained, general statutes and regulations that instruct parties to do no more than "exercise reasonable care" do not "provide a foundation for Plaintiff's negligence *per se* claim" as a matter of law. *Id.*

The same problem exists here: Plaintiff relies on ORS 757.020, which does not fix the standard of care in any meaningful way. (Compl. ¶ 61.) The statute offers only general guidance that PacifiCorp must operate "safely" and requires only that public utilities "furnish adequate and safe service, equipment, and facilities." ORS 757.020. Just as a statute that "merely provides that probation officers have such duties as may be provided by regulation[] does not establish a standard of care," *Kim*, 328 Or at 153, the direction in ORS 757.020 to "furnish adequate and safe service" does not "so fix[] the legal standard of conduct that there is no question of due care left for a factfinder to determine." *Shahtout*, 298 Or at 601. As a matter of law, the statute does not support a negligence *per se* claim under Oregon law. The Court should dismiss any references to ORS 757.020 in Plaintiff's Complaint and the negligence claim.

For the reasons explained above, Plaintiff cannot remedy the deficiencies in its claim through repleading because the claim fails as a matter of law. But to the extent Plaintiff contends that it should be granted leave to replead its claim and the Court is inclined to allow

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it to do so, Plaintiff must do so with specificity. PacifiCorp cannot marshal a defense without knowing what statutes, regulations, and special relationship Plaintiff alleges.

**C. Plaintiffs Cannot Plead a "Spoliation of Evidence" Claim as a Matter of Law**

Plaintiff also cannot maintain its Seventh Claim for Relief, titled "Spoliation of Evidence." Oregon courts repeatedly have refused to state whether a freestanding claim for spoliation even exists under Oregon law. *See Marcum v. Adventist Health Sys./W.*, 215 Or App 166, 191, 168 P3d 1214, 1228 (2007), *rev'd,* 345 Or 237 (2008) (noting that the parties "vehemently dispute" whether a spoliation claim is cognizable, but not deciding the issue); *Classen v. Arete NW, LLC*, 254 Or App 216, 221, 294 P3d 520, 523 (2012) (same). This Court should reject Plaintiff's invitation to be the first.

But whether or not an independent claim for "spoliation of evidence" exists under Oregon law, Plaintiff has not pled it. As the Oregon Court of Appeals explained in *Classen*, whether or not a claim for spoliation even exists, the bare minimum is that Plaintiff must "first br[ing] the underlying claim and los[e] or suffer[] diminution in its value." *Classen*, 254 Or App 216. Showing actual diminution in a claim's value from "actually los[ing]" is necessary because without such a showing any claim is "purely speculative and uncertain." *Id.* (citations omitted). Plaintiff has not (yet) lost its claims as a result of any spoliation. Its claim is directly foreclosed by *Classen*.

**D. Plaintiffs Cannot State a Private Nuisance Claim as a Matter of Law**

Oregon law is clear: smoke is cognizable only as trespass, not as nuisance. A private nuisance "is an unreasonable *non-trespassory* 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), *rev den,* 329 Or 479 (1999) (emphasis added); *see also State ex rel. Rudd v. Ringold*, 102 Or 401, 404-05, 202 P 734 (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)). But, in Oregon, smoke is considered a trespassory intrusion.

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*See Ream v. Keen*, 112 Or App 197, 200, 828 P2d 1038, 1040 (1992), *aff'd,* 314 Or 370 (1992) (concluding that smoke is a trespass as a matter of law). That makes sense. Plaintiff's theory of the case is that smoke caused by wildfires entered its land and damaged its grapes. Because Plaintiff alleges only the trespassory invasion of smoke and soot, it has failed to allege a non-trespassory interference and the private nuisance claim must fail as a matter of law.

**E. The Public Nuisance Claim Fails as a Matter of Law**

To state a claim for public nuisance, Plaintiff must 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 plaintiff of a special character distinct and different from that suffered by the public generally. *See Raymond v. S. Pac. Co.*, 259 Or 629, 634, 488 P2d 460 (1971). "Public 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] suffers the same" injury as "everyone else." *Id.* Plaintiff plead no specific damages and no injury that is distinct and different from that suffered by the public generally. Plaintiff plead only the legal conclusion that it has "suffer[ed] a special injury distinct from the general public." (Compl. ¶ 90.) With no specific allegations, and no special injury, the public nuisance claim must fail.

**F. Plaintiffs' Injunction Claim Is Barred as a Matter of Law**

The Court should dismiss Plaintiff's final claim for relief for "injunction" because an injunction is not an independent cause of action and the PUC has primary jurisdiction over the claim.

**1. An Injunction Is a Remedy, Not an Independent Cause of Action**

The Court must dismiss Plaintiff's Eighth Claim for Relief for "Injunction" because an injunction is a remedy not an independent cause of action. *See Chief Aircraft, Inc. v. Grill*,

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288 Or App 729, 731 n. 1, 407 P3d 909 (2017) (reciting acknowledgment by party that injunction "is a remedy, not a claim, under Oregon law"); *Johnson v. Brown*, 567 F Supp 3d 1230, 1236 n2 (D Or 2021) ("Plaintiff's purported fifth claim for relief, labeled "Injunction," is a remedy and not an independent cause of action."); *Harney v. Associated Materials, LLC*, 3:16-CV-1587-SI, 2018 WL 468303, at *8 (D Or Jan 18, 2018) ("The Court agrees, however, that Plaintiff's requests for declaratory and injunctive relief are remedies for the Court to determine, and not independent claims. They should be pleaded as such in any future amended pleading."). Because "injunction" is not a cognizable claim, this claim for relief should be dismissed with prejudice.

**2. The PUC Has Primary Jurisdiction over the Claim**

The Court should go further and dismiss Plaintiff's request for injunctive relief, whether styled as a claim or as simply prayed-for relief. Plaintiff's proposed injunction purporting to dictate how PacifiCorp operates Oregon's second-largest utility is barred because the Oregon PUC has primary jurisdiction over how utilities operate. *See Dreyer v. Portland Gen. Elec. Co.*, 341 Or 262, 285, 142 P3d 1010, 1022 (2006).

Three criteria determine whether an agency has primary jurisdiction: "(1) the extent to which the agency's expertise makes it the preferable forum; (2) the need for uniform resolution of the issue; and (3) the potential that judicial resolution of the issue will have an adverse effect on the agency's responsibilities." *Portland Gen. Elec. Co. v. Duncan, Weinberg, Miller & Pembroke, P.C.*, 162 Or App 265, 279, 986 P2d 35, 44 (1999). All three are easily satisfied here. Plaintiff asks this Court to compel PacifiCorp to undertake actions in five broad categories. Those actions include compelling PacifiCorp to:

- "trim and remove trees that are within its right of way and capable of contacting or falling into its powerlines,"

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- "inspect and replace its broken, obsolete, and defective electrical equipment where it has reason to know that such equipment has previously been associated with fire ignitions or may be associated with fire ignitions"
- "refrain from re-energizing powerlines on red flag warning days during fire season until all sections of line to be re-energized have been inspected to be clear of hazards"
- "evaluate actual real-time evidence for the purpose of turning off the power in territory subject to a red flag warning during fire season if government officials, including the Oregon Department of Forestry's Fire Protection Chief, warn the utility of the risk of starting fires without such a power turn off, like what happened on Labor Day 2020"
- "withhold distribution payments to its parent company, Berkshire Hathaway Energy, until PacifiCorp can certify it is sufficiently compliant with Oregon tree trimming laws pertaining to its powerlines and has completed deferred maintenance pertaining to wildfire mitigation, including but not limited to inspecting wedge connectors, on its powerlines."

(Compl. ¶ 109.)

Each of these broad proscriptions require utility expertise to administer, and are already governed by existing PUC regulations. *See* OAR 860-024-0011 (requiring detailed inspections of overhead facilities with special rules for High Fire Risk Zones); OAR 860-024-0016 (setting standards for conductor clearances from vegetation); OAR 860-024-0020 (mandating utilities to implement Wildfire Mitigation Plans and protocols for the de-energization of power lines). Even something so apparently simple as tree trimming requires specialized knowledge, outside of a court's expertise, to know what is "capable of contacting or falling into [] powerlines." The PUC's expertise makes it a preferable forum. The "PUC's primary role is to regulate the conduct of utilities." *Portland Gen. Elec. Co.*, 162 Or App at

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280 (denying the PUC's primary jurisdiction when "the underlying issue in th[e] case [was] not utility regulation"); *see also Dreyer*, 341 Or at 285 ("PUC's specialized expertise in the field of ratemaking gives it primary, if not sole, jurisdiction over one of the remedies contemplated"). Since all of the requested relief concerns utility regulation, the agency is best situated to decide what should be required. The PUC is the proper body to make uniform decisions and avoid conflict and confusion between agency requirements and court decisions.

### G. Plaintiffs' Requests for Treble Damages under ORS 756.185 and 105.810 Fail as a Matter of Law and Must Be Dismissed

Plaintiffs seeks three forms of multiple damages in the complaint: double damages under ORS 477.089 (which PacifiCorp does not challenge in this motion, but reserves the right to challenge later), treble damages under ORS 756.185, and treble damages under ORS 105.810. Because the two forms of treble damages Plaintiff seeks do not apply to this case as a matter of law, the Court should dismiss them.

#### 1. ORS 756.185 Does Not Apply to Plaintiffs' Claims for Property Damage

ORS 756.185 provides that a plaintiff may recover "treble the amount of damages" if a public utility[6] violated any of "ORS chapter 756, 757 or 758" and the "wrong or omission was the result of gross negligence or willful misconduct." ORS 756.185(1). But ORS 756.185 explicitly "does not apply with respect to the liability of any public utility for personal injury or property damage." ORS 756.185(4). Instead, the statute permits recovery in non-personal injury, non-property damage cases such as when a utility charges an impermissible rate. *See, e.g.*, *Dreyer v. Portland Gen'l Elec. Co.*, 300 Or App 414, 417, 453 P3d 580 (2019) (affirming dismissal of claim on other grounds, but noting use of ORS 756.185).

[6] ORS 768.185(4) bars Plaintiff's claims for treble damages whether or not the Court agrees PacifiCorp is not a governmental entity subject to inverse condemnation, because the statutory term "public utility" explicitly encompasses "any corporation" responsible for furnishing heat, light, water, or power regardless of whether it is publicly or privately owned. *See* ORS 757.005.



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Plaintiff seeks compensation for property damage. (*See, e.g.*, Compl. ¶ 10 ("*All of [Plaintiff's] claims* arise from defendants' willful, reckless, grossly negligent, and negligent conduct, igniting the Santiam, Echo Mountain, Archie Creek Complex, 242 and South Obenchain Fires, whose smoke and soot each *damaged plaintiff's property*.") (emphasis added).) Every category of damages that Plaintiff seeks stems from the underlying damage to Plaintiff's property. (Compl. ¶ 41, 90.) Plaintiff's claims for special, incidental, and/or consequential damages are resulting losses due to the alleged damage to the grapes. (*Id.*) As a result, ORS 756.185 is inapplicable and cannot serve as a basis for treble damages.

**2. ORS 105.810 Does Not Apply to the Alleged Fires because the Allegations Support that the Fires Were Statutory Wildfires**

Oregon's produce and timber trespass statue, ORS 105.810, also does not apply. In certain circumstances, ORS 105.810, allows for treble damages "whenever any person, without lawful authority, willfully injures or severs from the land of another any produce thereof." ORS 105.810(1). ORS 105.810 does not apply for at least three reasons.

*First*, claims under ORS 105.810 do not apply to statutory wildfires governed by Oregon's wildfire statutes, ORS 477.089 and 477.092. As a matter of law, all of the wildfires at issue here are covered. ORS 477.089 provides for recovery for property damage caused by wildfire and does not allow for treble damages. The statute defines a wildfire as a fire that "[o]riginated on land used or capable of being used for growing forest tree species regardless of the existing use of the land." ORS 477.089(1)(e)(B). The legislative history supports that ORS 477.089(1)(e)(B) covers fires that start on most land besides urban areas. Heath Curtiss of the Oregon Forest Industries Council in answer to senator questions before the Senate Committee on the Judiciary testified that the bill was to "deal[] only with forest fires" and not address downtown areas. Transcript, Senate Committee on Judiciary, Public Hearing on S.B. 709, Mar. 21, 2013, at 8-9.

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To avoid being subject to Oregon's comprehensive wildfire liability scheme, Plaintiff conclusorily alleges—without factual basis—that one fire ignition, the "Gates School Fire," was not a statutory wildfire. Plaintiff completely fails to plead any facts about the "Gates School Fire" that suggest that it did not originate on land capable of being used for growing forest tree species.

*Second*, ORS 105.810 does not apply because Plaintiff has not alleged a sufficient interest in the grapes. Plaintiff produces its wine in part from grapes "purchase[d] from other vineyards and wineries located in the Willamette Valley and elsewhere." (Compl. ¶ 11.) Plaintiff purchased these grapes after the Labor Day fires and makes no allegations about what percent of grapes it purchased or grew. (*See* Compl. ¶ 37.) The statute does not require that the plaintiff holds a possessory interest in the land, but Plaintiff must hold a right to the produce. *Pedro v. January*, 261 Or 582, 601, 494 P2d 868, 878 (1972). Plaintiff has pled no interest in at least some of the allegedly injured grapes. Its interest in these grapes developed only when Plaintiff purchased them, which was after the fires and alleged damage. Because Plaintiff's allegations lack sufficient specificity, ORS 105.810 is inapplicable.

*Third*, ORS 105.810 does not apply because smoke damage to produce is not the kind of damage encompassed by the statute. In a pair of seminal cases, the Oregon Supreme Court limited ORS 105.810 in cases involving chemical spray that drifted onto a plaintiff's land, damaging crops. *See Meyer v. Harvey Aluminum*, 263 Or. 487, 501 P.2d 795 (1972); *Chase v. Henderson*, 265 Or. 431, 509 P.2d 1188 (1973). The Supreme Court concluded that ORS 105.810 does not "apply to the kind of damages assessed" in cases involving substances that drift onto produce, damaging them. As the Oregon Court of Appeals recently summarized, *Meyer* and *Chase* "stand for the proposition that damages for injuries to fruit crops and trees resulting from chemical drift are not the type of damages that are trebled under ORS 105.810." *Worman*, 223 Or App at 240. In contrast, the plaintiff in *Worman* could recover because the defendant engaged in "direct spraying of herbicide on trees and shrubs—conduct

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that is a 'deliberate trespass such as involved in cutting standing timber.'" *Id*. (citation omitted). Plaintiff's attempts to use ORS 105.810 are directly foreclosed by *Worman*, *Meyer*, and *Chase*.

## V. CONCLUSION

For the foregoing reasons, PacifiCorp respectfully requests that the Court dismiss Plaintiff's claims.

DATED: August 21, 2023

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*<u>/s/ Reilley D. Keating</u>*

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## CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing document titled DEFENDANTS PACIFICORP AND PACIFIC POWER'S MOTION TO DISMISS on the following named person(s) or party(ies) on the date and by the method(s) indicated below.

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|---|---|---|---|
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If by mail or overnight delivery, a true copy of the above referenced document(s) was served upon said person(s) or party(ies), contained in a sealed envelope or package, addressed to said person(s) or party(ies) at their last-known address(es) indicated below.

**Please see attached Service List.**

DATED: August 21, 2023.

*/s/ Reilley D. Keating*
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