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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)
20CV37430, 21CV33595,
22CV13946, 22CV26326,
22CV29694, 22CV29976,
22CV30450, 22CV41640

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

Assigned to: Hon. Steffan Alexander

Trial Date: January 8, 2024
Verdict Rendered: January 22, 2024

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1 **UTCR 5.050 STATEMENT**

2 Pursuant to UTCR 5.050, PacifiCorp requests oral argument on this motion, and
3 estimates that 90 minutes will be required. Official court reporting services are requested.

4 **MOTIONS**

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

8 **Motion to Vacate Jury Verdict for Lack of Jurisdiction:** PacifiCorp moves to
9 vacate the jury verdict in its entirety for lack of jurisdiction due to the pending appeal.

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

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

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

16 **MEMORANDUM OF LAW**

17 **I. INTRODUCTION**

18 The Phase II trials have proven fundamentally flawed for a host of reasons. Many of
19 these defects echo flaws from the Phase I trials or that PacifiCorp has otherwise raised in
20 prior briefing: This Court lacks jurisdiction over these claims because PacifiCorp has
21 appealed the Phase I judgment; Plaintiffs are not entitled to noneconomic damages; and the
22 class here must be decertified.

23 But there are also numerous reasons that the Phase II trials in particular are improper.
24 Three are central here: (1) the damages Plaintiffs seek are outside the scope of the Phase I
25 trial; (2) the structure of the Phase II trials violates PacifiCorp's due process and jury trial
26

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rights by allowing a second jury to re-examine the Phase I jury's findings; and (3) the various categories of noneconomic damages sought by Plaintiffs are impermissible.

First, as this Court has repeatedly recognized, the Phase I trial defined the scope of the Phase II trials. (*See*, *e.g.*, Jan 2, 2024 Order on Defs.' Mot. in Limine No. 1 ("plaintiffs have not presented a sufficient factual basis that … Phase II plaintiffs' standalone bodily injuries fall within the scope of the jury's Phase I findings"); Phase II Trial Tr. 789:5–9 ("To the extent I allowed questioning it was questioning … within the scope of the types of damages that the jury would be allowed to assess and award.").) Yet the evidence Plaintiffs put forward at Phase II—and the conclusions they invited the jury to draw—diverged dramatically from Phase I's scope. At the Phase I trial, the jury was only told that certain parcels of property within the class boundary had experienced "low soil burn severity." There was no evidence that every class member experienced any other injury; no evidence connecting "low soil burn severity" to every injury of each class member; and no evidence that PacifiCorp caused any such injury to every class member. Yet in the Phase II trial, Plaintiffs sought a wide array of damages, including for harm to pets, smoke and ash damage, evacuation-related losses, and harm to their sense of community or identity.

The Phase I verdict did not establish that PacifiCorp had specifically caused or was liable for any of these damages. Yet the Court's instructions to the Phase II jury told the jury that PacifiCorp's liability for these injuries was already established, and that the only thing for the Phase II jury to do was determine the *amount* of damage. This was error. Because the Phase I jury did not determine that PacifiCorp was liable for and caused any of the damages that were presented in Phase II, the jury should have been instructed that it had to find PacifiCorp was liable for and caused each of the damages that it awarded the Phase II class members. Because the Court failed to do that, the Phase II damages award should be vacated. (*See infra* at 8–14.)

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Second, the structure of the Phase II trial violated PacifiCorp's due process and jury trial rights. Both the federal and Oregon constitutions prohibit re-examination of a verdict rendered by one jury by a second jury. Or Const, Art VII, § 3. Practically, that rule prohibits juries from reconsidering the same claims or the same overlapping issues that a prior jury already considered. *See, e.g.*, *Gasoline Prods. Co. v. Champlin Refining Co.*, 283 US 494, 500 (1931); *In re Rhone-Poulenc Rorer, Inc.*, 51 F3d 1293, 1303 (7th Cir 1995); *State v. Burke*, 126 Or 651, 682, 270 P 756 (1928). Here, when PacifiCorp pointed out that the Court had erroneously restricted the scope of the trial by finding causation of the particular damages presented by the Phase II Plaintiffs was already pre-determined, the Court responded that it was allowing the Phase II jury to consider causation anew. (*See*, *e.g.*, Pre-Trial Hearing Tr. 90:13–92:22 ("You keep telling me … I've restricted the scope of the trial … with respect to … causation and I keep telling you that I haven't … I never in this case at all in any stage said that causal link has been established as a matter of law by the jury's findings.").) But that means that the Phase II jury was reconsidering causation issues that were already presented to the Phase I jury. To be sure, the Phase I jury did not find that PacifiCorp caused the particular injuries that the Phase II plaintiffs presented here—but the Phase I jury did consider whether PacifiCorp caused *some* injury to the class. Once the Phase I jury made findings about whether PacifiCorp caused injury to the entire class, the Phase II jury could not be asked to consider whether PacifiCorp caused injury to particular class members without revisiting the first jury's findings.

All of this underscores a fundamental problem: It is simply impossible under the state and federal constitutions to have a Phase I trial where the jury is asked to determine whether PacifiCorp caused harm to *all* class members, and a Phase II trial where the jury is asked to determine whether PacifiCorp caused harm to *particular* class members—the second phase necessarily involves reconsidering issues presented in the first phase. And this reconsideration of Phase I issues in the Phase II trials is constitutionally impermissible. *See*

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Blyden v. Mancusi, 186 F3d 252, 269 (2d Cir 1999); *Chisolm v. TranSouth Fin Corp.*, 194 FRD 538, 552 (ED Va 2000).

Third, the noneconomic damages Plaintiffs sought in the Phase II trial were based on mental distress that is not compensable under Oregon law. In addition to the general prohibition on recovering noneconomic damages arising from injuries to property due to fire, *see Meyer v. 4-D Insulation Co.*, 60 Or App 70, 72–73, 652 P2d 852 (1982), Oregon law prohibits recovery of noneconomic damages for injuries to personal property or pets, harms resulting from the impact on family and friends, loss of community or sense of identity, evacuation-related stress, loss of aesthetic value of land or property owned by others, and financial loss or inconvenience. (*See infra* at 23–28.) Plaintiffs still presented evidence of, and sought compensation for, these injuries. This contravened established Oregon law. Accordingly, the award of noneconomic damages must be vacated.

Other errors are detailed below, and all underscore the fundamental unfairness that permeated the Phase II trials. For all these reasons, the Court should vacate the Phase II trials, enter judgment in favor of PacifiCorp, order a new trial, and/or decertify the class.

II. MOTION TO VACATE

As PacifiCorp explained in its prior motion to vacate or stay the Phase II trial court proceedings, this Court must vacate the Phase II trials and the Phase II verdict for lack of jurisdiction. (*See* Jan. 4, 2024 Def.'s Mot. to Vacate; *see also* Jan. 15, 2024 Def.'s Mot. for Directed Verdict ("DV Mot.") 48–51). After the Phase I trial, Plaintiffs moved for and obtained a judgment on the claims of "the entire class." PacifiCorp appealed that judgment. The notice of appeal deprived the trial court of jurisdiction over all the claims encompassed by the judgment—including the claims of the entire class that were at issue in Phase II. *See*, *e.g.*, *Stachlowski v. 1000 Broadway Bldg. Ltd. P'ship*, 305 Or App 174, 186, 470 P3d 376 (2020); DV Mot. 49–50.

/ / /

Plaintiffs have insisted that the Limited Judgment did not strip this Court of jurisdiction to hold damages trials on the class claims because the judgment did not adjudicate the *damages* of the class. But this makes no sense under Oregon law. The Limited Judgment states that it is granting judgment on the "claim[s]" of "[p]laintiffs and the entire class." (Limited Judgment ¶ 1 at 4) ("Plaintiffs and the entire class shall have judgment in their favor and against Defendants."). And this means the *entirety* of the claims of the class are on appeal—not just *part* of the claims, like liability. A limited judgment must adjudicate the *entirety* of at least one claim (or all the claims relevant to at least one party). *See* ORS 18.005; ORCP 67 B (defining a "limited judgment" as one that disposes of "claims or parties"); *Interstate Roofing, Inc. v. Springville Corp.*, 347 Or 144, 157 (2009) (a judgment must reflect a "concluding decision ... on one or more requests for relief" (cleaned up)). The applicable rules "give[] no discretion to the trial court to treat as final ... an adjudication of fewer than all the grounds alleged in support of a single claim." *May v. Josephine Mem'l Hosp., Inc.*, 297 Or 525, 530, 686 P2d 1015 (1984). Put simply, "[a] portion of a claim may not be disposed of by a limited judgment." *Steele v. Mayoral*, 231 Or App 603, 611, 220 P3d 761 (2009).

To be sure, the Limited Judgment is defective, because it grants judgment on the claims of the "entire class" before all the elements of those claims, including damages, have been adjudicated. But this does not matter from a jurisdictional perspective. Even if a judgment or order is defective, an appeal of that judgment or order divests the trial court of jurisdiction until the Court of Appeal rules: "[O]nce a notice of appeal has been filed, the appellate court has jurisdiction and the trial court does not, until there is a final determination on the merits or a determination that the appellate court lacks jurisdiction." *Murray Well-Drilling v. Deisch*, 75 Or App 1, 9, 704 P2d 1159 (1985) (emphasis omitted).

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1 Because the Phase II trial that just occurred was held after PacifiCorp filed its notice
2 of appeal—and thus after jurisdiction over the class claims was transferred to the Court of
3 Appeal—the trial was held without jurisdiction, and its verdict must be vacated.

4 **III. MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT**

5 **A. Legal Standard**

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

10 **B. Plaintiffs have not proven each element of their claims.**

11 This Phase II trial has proceeded on a fundamentally flawed premise—that the Phase
12 I trial adjudicated liability and causation as to every element of Plaintiffs' claims and every
13 category of Plaintiffs' claimed damages. In a bifurcated proceeding, "liability *must* be
14 resolved before the question of damages is reached." *Guzman v. City of Chicago*, 689 F3d
15 740, 745 (7th Cir 2012). That is particularly true here, because the Phase II jury was
16 instructed that liability and causation for all of the Plaintiffs injuries had already been
17 determined, and that the *only* thing for the Phase II jury to do was determine the *amount* of
18 damages. But there is a fundamental and unbridgeable gap between Phase I and Phase II.
19 Based on the proof presented at Phase I, the Phase I jury found only that PacifiCorp was
20 liable for igniting fires in the four areas at issue and that certain parcels within the defined
21 boundaries suffered at least low soil burn severity. The Phase I jury did not and could not
22 determine whether and to what extent a particular fire caused a particular item of damage,
23 especially when the item of damage is something other than damage to a parcel—such as a
24 person's individual evacuation experience, smoke and ash damage, or anything else.

25 The Phase I trial thus did not establish liability or specific loss causation with respect
26 to Plaintiffs in this case, and it did not establish that PacifiCorp was liable for, or caused, the

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specific kinds of damages that the Phase II Plaintiffs claimed they suffered. Relying on the defective Phase I verdict as a shortcut to establish the causation of certain categories of damages during Phase II was improper and a violation of PacifiCorp's due process rights because it allowed the Phase II jury to adjudicate damages without a valid finding of liability.

1. Plaintiffs failed to establish class-wide liability or causation during Phase I.

The Phase I verdict did not establish causation of *any* of the injuries that Plaintiffs claimed damages for in Phase II. Indeed, the Court's original class certification order explicitly left certain issues to be resolved during the bifurcated phase two proceedings, including PacifiCorp's ability to test the "specific causation of each class member's damages." (May 23, 2022 Class Certification Order at 21.) The Court went on to explain that "the phase one inquiry is for cause of harm to the properties in the class over a defined geographic area, *not harm to each individual property*." (*Id.* at 19 (emphasis added).) But during Phase II, the Court allowed Plaintiffs to skip the necessary step of proving that PacifiCorp specifically caused each item of claimed damages. Although the Court correctly recognized that certain categories of damages—including bodily injuries, damage to hiking areas in the Santiam Canyon outside of the class boundary, and certain "overbilling" damages related to the post-fire upgrade of electrical equipment—fell outside of the scope of the Phase I verdict, the problem was that the Court nonetheless allowed Plaintiffs to pursue other categories of damages—including real and personal property loss, erosion damage, evacuation-related injuries, and emotional distress—on the basis that the Phase I verdict did establish causation as to those categories of damages. That was error.

A practice that "abrogate[s] … a well-established common-law protection against arbitrary deprivations of property" is presumptively a due process violation. *Honda Motor Co. v. Oberg*, 512 US 415, 430 (1994). One of those well-established common-law protections is that damages cannot be awarded unless there is a finding of liability—particularly where, as here, compensable injury is an element of the underlying claim. *See*,

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e.g., *Bell v. Burson*, 402 US 535, 542 (1971) ("a hearing which excludes consideration of an element essential to the decision … does not meet [the due process] standard"); *Guzman*, 689 F3d at 745; *see also* Phase I Post-Trial Br. 5–14, 20–40. The failure of proof at Phase I renders the Phase II verdicts invalid and a violation of PacifiCorp's due process rights.

As PacifiCorp explained in its Phase I post-trial briefing, Plaintiffs were required—but failed—to prove each element of the claims of the entire class during Phase I. *See Pearson v. Philip Morris, Inc.*, 358 Or 88, 110–11, 361 P3d 3 (2015). It was Plaintiffs' burden to establish that PacifiCorp caused the injury of each individual plaintiff and every member of the class. *See, e.g.*, *Chapman v. Mayfield*, 358 Or 196, 205, 361 P3d 566 (2015) (causation is element of negligence claim); *Daniels v. Johnson*, 306 Or App 252, 255, 473 P3d 1133 (2020) (nuisance); *Martin v. Reynolds Metals Co.*, 221 Or 86, 90, 342 P2d 790 (1960) (trespass). Plaintiffs failed to do so.

There was no evidence that PacifiCorp specifically caused harm to every member of the class in the myriad ways that the Plaintiffs testified to, and abundant evidence that class member homes (and their other injuries) were damaged by other causes. In the Santiam Canyon alone, there were dozens of spot fires, many of which were not attributed to PacifiCorp. (*See* Phase I Post-Trial Br. 6; Phase I Post-Trial Reply 14–15.) On top of that, the lightning-caused Beachie Creek fire destroyed much of the eastern portion of the Santiam Canyon before any PacifiCorp-caused fire could have reached that area. (*See* Phase I Post-Trial Br. 8–10; Phase I Post-Trial Reply Br. 15–16.) Indeed, at Phase I, Plaintiffs offered no class-wide evidence regarding the direction of spread of *any* PacifiCorp-caused fire—and offered no evidence that could have established causation on a class-wide basis. (*See* Phase I Post-Trial Br. 8–14; Phase I Post-Trial Reply Br. 14–16.)

In their post-trial briefing, Plaintiffs tried to claim that they had proved PacifiCorp somehow caused harm to every member of the class because some firefighter resources were dedicated to fighting PacifiCorp-caused fires. But this theory has no basis in law or the

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evidence. Oregon law does not allow a plaintiff to show causation merely by showing that some public resources (like firefighters) were dedicated to addressing an emergency allegedly caused by the defendant. (*See* Phase I Post-Trial Reply Br. 17–19.) Even putting aside the lack of legal support for such a theory, it also lacks any basis in the Phase I trial record. (*See id*.) There is simply no evidence that firefighters were redirected *because of* a PacifiCorp-caused fire and that their departure *caused* every single class member's home to burn (or *caused* every single class members to experience evacuation-related injuries or emotional distress). Rank speculation is insufficient to sustain a verdict, yet that is the only thing that supported the Phase I verdict.

In addition to failing to prove causation, Plaintiffs did not establish class-wide harm at Phase I, making it unfair and impermissible to adjudicate the value of any damages in the Phase II trials. Each of Plaintiffs' claims requires each class member to prove that they suffered more than de minimis harm. *See Paul v. Providence Health Sys.-Or.*, 351 Or 587, 595, 273 P3d 106 (2012) (negligence); *Frady v. Portland Gen. Elec. Co.*, 55 Or App 344, 350, 637 P2d 1345 (1981) (trespass); *Swanson v. Warner*, 125 Or App 524, 528, 865 P2d 493 (1993) (nuisance). During the Phase I trial, Plaintiffs relied solely on the testimony of their expert, Mark Buckley, to prove class-wide injury. But his testimony was insufficient to support a class-wide finding of injury. He merely testified that some portion of certain parcels had "low soil burn severity." (Phase I Post-Trial Br. 28–29.) Neither Buckley nor any other Phase I witness offered any evidence establishing that such "low soil burn severity" amounts to compensable harm, as required for Plaintiffs' negligence, trespass, and nuisance claims. (*Id.*)

For these reasons, and all the reasons set forth in PacifiCorp's Phase I briefing and its Directed Verdict Motion, Plaintiffs failed to prove either causation or injury to the entire class during the Phase I trial. Because of that failure of proof, the Phase I verdict should not have been used as a basis for finding that PacifiCorp is liable to the Phase II Plaintiffs for *any*

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1 *of their* injuries. Each Phase II Plaintiffs should have been required to prove that
2 PacifiCorp's conduct (as opposed to other sources like the Beachie Creek Fire) specifically
3 caused *each* of the categories of damages that they claimed—including property damage,
4 emotional distress, and everything in between.

5 The class action mechanism cannot alter substantive rights, so every class member
6 must be able to establish every element of their claims to recover. *See Pearson*, 358 Or at
7 110–11; *Bernard v. First Nat'l Bank of Or.*, 275 Or 145, 159–60, 550 P2d 1203 (1976). That
8 did not occur here. The Phase II Plaintiffs relied on the Phase I verdict to establish, among
9 other things, causation and damages on their behalf. But as explained in PacifiCorp's prior
10 briefing, Plaintiffs failed to put forward sufficient evidence during the Phase I trial to sustain
11 such a result. By relying on that flawed result here, Plaintiffs have effectively prevailed in
12 trials where not all elements of a claim were established. This is impermissible, and requires
13 granting judgment to PacifiCorp on the claims of the Phase II Plaintiffs.

14 **2. Plaintiffs cannot recover damages not established in Phase I.**

15 Even if the Phase I liability verdict did support *some* categories of injuries claimed in
16 the Phase II trials such as burn damage to real and personal property (it did not, for the
17 reasons explained above), Plaintiffs were nonetheless allowed to pursue several other
18 categories of damages during Phase II that were never resolved by the Phase I jury and that
19 were therefore not supported by the Phase I liability verdict.

20 The Court's Phase II jury instructions told the jury that the only issue it was to
21 determine was the *amount* of damages, not whether PacifiCorp caused any damage or was
22 properly held liable for that damage. Because the Phase II jury was strictly limited to
23 calculating the amount of certain class members' damages, its findings could only support
24 judgment for those class members if every other element of their claims were already
25 proven—i.e., if the Phase I jury had already found that PacifiCorp was liable for the specific
26 damages the class members were alleging, and the only issue left unresolved after the Phase I

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trial was the amount of those damages. As the Court recognized (and as PacifiCorp explained in its directed verdict motion), Plaintiffs may not recover damages outside the scope of the Phase I verdict. (*See* Dec. 22, 2023 Order Granting Defs.' Mot. for Partial Summary Judgment; DV Mot. 4–13.) The Phase I jury heard limited evidence and made limited findings, especially with respect to causation and damages. The *only* evidence of class-wide injury put forward by Plaintiffs at Phase I was Buckley's testimony that parcels of land within the class boundaries experienced "low soil burn severity." (*See* DV Mot. 4.) There was no evidence that PacifiCorp caused any other injury to the class. Nevertheless, during the Phase II trial, Plaintiffs offered evidence of a range of other injuries—including a landlord's decision to withhold a deposit on a temporary rental home, smoke and ash damage, soil erosion, harm to pets, emotional distress, and evacuation-related injuries. (*See id.* at 5–11.) As explained in PacifiCorp's directed verdict motion, the Phase I jury did not find that any of these injuries were caused by PacifiCorp; accordingly, none are within the scope of the Phase I verdict, so none can form the basis of a damages award at Phase II. (*See id.*)

Because the Phase I jury did not find that PacifiCorp caused any harm to class members aside from causing "low soil burn severity" to soil, all of the Phase II damages awards, which involved damages for *other* injuries not adjudicated in Phase I, were unsupported. And the Court could not conclude for itself that the evidence at the Phase I trial established that PacifiCorp was liable for the myriad damages presented at the Phase II trial. It has long been established that "a judge cannot … usurp the functions of a jury, or substitute his verdict or judgment for theirs." *Fiore v. Ladd*, 29 Or 528, 533, 46 P 144 (1896). But that is what the Court has done here to reconcile the Phase I verdict with the scope of the Phase II trial. (*See* DV Mot. 14.) Although the evidence, instructions, and verdict form at Phase I said nothing about smoke and ash, soil erosion, harm to pets, emotional distress, or evacuation-related injuries, the Court concluded that such injuries were

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within the scope of the Phase I verdict. In other words, the Court found that these types of injuries had all been proven or established for all class members, without any basis in the actual jury verdict for doing so. This was improper. Because the Phase I verdict did not establish that PacifiCorp was liable for the specific damages claimed in the Phase II trial, judgment should be granted to PacifiCorp on the Phase II Plaintiffs' claims.

3. The Phase I verdict was defective because the class was certified only as an issues class, yet the verdict was for liability.

As discussed in PacifiCorp's Phase I post-trial brief, the class certified by the Court was not the class presented to the jury at trial. (*See* Phase I Post-Trial Br. 79–81.) The class certification order certified an *issues* class, and the class notice stated that the class would resolve "the Certified Issues only"—not liability. (*See* Phase I Post-Trial Reply Br. 61–62.) At the Phase I trial, however, the jury was asked to adjudicate liability, not the discrete issues certified by the Court. As explained in PacifiCorp's Phase I post-trial brief, this means that the Phase I verdict violates Rule 32 and due process, because the liability class presented to the jury was not properly certified under Rule 32, notice of the new liability class was not given, and PacifiCorp was not given notice that it would need to defend against a liability class until the end of trial. (*See* Phase I Post-Trial Br. 79–81.) This defect also tainted the Phase II trials. Because class-wide liability was never properly adjudicated at Phase I (because liability was not properly part of the certified class), the Phase I verdict could not support the damages determinations in Phase II. These Phase II trials are outside the scope of the court's class certification order and violate due process because there was no predicate finding of liability that would have allowed these trials to proceed. *See Richards v. Jefferson Cnty., Ala.*, 517 US 793, 797 (1996) ("extreme applications of the doctrine of res judicata may be inconsistent with a federal right that is 'fundamental in character'"). The verdict should be rejected for that reason as well.

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1 C. **The two-phase trial structure employed here violated PacifiCorp's due process and jury trial rights.**

2

3 The Phase II proceedings—which permitted two different juries to decide the same
4 issues and claims—violate PacifiCorp's due-process and jury-trial rights. The Oregon state
5 constitution follows the federal constitution in prohibiting a second jury or court from
6 reexamining issues, facts, and claims tried in the first stage of the proceedings. Or Const, Art
7 VII, § 3 (providing that "right of trial by jury shall be preserved, and no fact tried by a jury
8 shall be otherwise re-examined in any court of this state, unless the court can affirmatively
9 say there is no evidence to support the verdict"); *see also, e.g.*, *Horton v. Oregon Health &*
10 *Sci. Univ.*, 359 Or 168, 250–53, 376 P3d 998 (2016) (explaining that Oregon's jury-trial right
11 is rooted in the "history leading up to and surrounding the adoption of the Seventh
12 Amendment" and that the provision preserved the traditional prohibition on reexamination of
13 a jury's verdict); US Const, Amend. VII (providing that the "right of trial by jury shall be
14 preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the
15 United States"). This constitutional prohibition on "re-examination" safeguards the "right to
16 have triable issues determined by the first jury impaneled to hear them (provided there are no
17 errors warranting a new trial), and not reexamined by another finder of fact." *In re Rhone-*
18 *Poulenc Rorer*, 51 F3d at 1303 (holding bifurcated class-action trial plan unconstitutional);
19 *see also, e.g.*, *Gasoline Prods. Co.*, 283 US at 500.[1] Where the claims are the same, or where
20 the "question of damages" is "so interwoven with that of liability that the former cannot be
21 submitted to the jury independently of the latter without confusion and uncertainty," a second
22 jury cannot reexamine the findings of the first. *Gasoline Prods.*, 283 US at 500. The Phase

23

[1] Although the Seventh Amendment to the United States Constitution does not generally
24 apply to state courts, Oregon courts have long recognized that Article VII, Section 3 of the Oregon Constitution generally tracks the Seventh Amendment in meaning and effect. *See*
25 *Van Lom v. Schneiderman*, 187 Or 89, 98–99, 210 P2d 461 (1949), *overruled on other grounds by Oberg v. Honda Motor Co.*, 320 Or 544, 549, 888 P2d 8 (1995); *Parrott v. Carr*
26 *Chevrolet, Inc.*, 331 Or 537, 558 n.15 (2001).

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1 II proceedings are thus flawed for two reasons: they permitted the Phase II jury to (1) review
2 the same claims decided at Phase I, and (2) to adjudicate interwoven issues addressed at
3 Phase I.

4 *First*, the Phase II proceedings permitted the Phase II juries to resolve the same
5 claims that were already litigated in Phase I. That judgment entered judgment for "Plaintiffs
6 and the entire class" on five separate "claims" for relief (Limited Judgment ¶ 1 at 4.) As
7 explained above and in PacifiCorp's previously filed motion to vacate/stay, the judgment
8 necessarily adjudicated (albeit defectively) entire claims for the entire class, not just pieces of
9 claims. (*See supra* at 6–7.) But now—even though these claims were resolved at Phase I,
10 and even though these claims are on appeal—Plaintiffs have sought in Phase II to press the
11 same "claims" for the same class-member "plaintiffs" covered by the Phase I Limited
12 Judgment. That is a plain violation of the rule against a second jury reexamining issues (let
13 alone full claims) resolved by the first jury impaneled. *See, e.g.*, *Rhone-Poulenc*, 51 F3d at
14 1303 (a court may not "divide issues between separate trials in such a way that the same
15 issue is reexamined by separate juries"); *Blyden*, 186 F3d at 268 (a "given issue may not be
16 tried by different, successive juries"). Thus, the Phase II proceedings impermissibly
17 encompass the same claims as the Phase I judgment, in violation of PacifiCorp's
18 constitutional jury trial rights.

19 *Second*, the Phase II proceedings are defective because they allow the Phase II jury to
20 decide issues that were already resolved by and are interwoven with the Phase I judgment.
21 PacifiCorp had a right "to have juriable issues determined by the first jury ... not reexamined
22 by another finder of fact." *Rhone-Poulenc*, 51 F3d at 1303. *Rhone-Poulenc* is particularly
23 instructive here. There, the court concluded that a two-phase trial plan to adjudicate a mass
24 tort violated the Seventh Amendment. *Id.* at 1303–04. At the first phase, one jury would
25 decide whether the defendants were generally negligent; at the second phase, other juries
26 would decide individual issues, such as proximate causation or comparative negligence. *Id.*

at 1303. But because "proximate cause" is an element of negligence, the court concluded that this impermissibly allowed a subsequent jury to reexamine the finding of the first jury. *Id.*

So too here. The Phase I jury entered a verdict finding that PacifiCorp was liable to and a "cause of harm to the entire class." (Phase I Limited Judgment, Ex. B.) To be sure, these findings did not actually determine that PacifiCorp caused the specific injuries the Phase II Plaintiffs claimed they suffered, particularly when the only evidence Plaintiffs provided of class-wide injury in Phase I concerned "low soil burn severity." (*See supra* at 11–13.) But the Phase I jury was nevertheless asked to determine whether PacifiCorp caused harm to every class member—which necessarily overlapped with the Phase II jury's consideration of whether particular class members suffered compensable harm (an element of all of the claims decided at Phase I, *see supra* at 9–12) and whether PacifiCorp caused that harm (also an element of those claims, *see supra* at 12–14). The Phase II trials thus effectively required a second jury to impermissibly re-examine the same claim elements—violating the principle that a second jury should have not been permitted to re-examine overlapping or intertwined issues. *See, e.g.*, *Blyden*, 186 F3d at 269; *Chisolm*, 194 FRD at 552 ("The proposed trial plans delay litigation of damages and reliance until Phase Two, before a different factfinder than Phase One. Permitting this treatment of elements required to determine liability violates the Seventh Amendment in allowing the Phase Two factfinder to re-examine issues presented at Phase One."); *Castano v. American Tobacco Co.*, 84 F3d 734, 750–51 (5th Cir 1996) (bifurcation impermissible because negligence and comparative negligence had factual and legal overlap). The overlap in the causation and damages issues renders the Phase II proceeding unconstitutional.

All of this underscores a fundamental problem: The issues in Phase I and Phase II, including injury and causation, overlap and intertwine such that having separate juries for the two phases violates PacifiCorp's constitutional rights. It is simply impossible to have a

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Phase I trial where the jury is asked to determine whether PacifiCorp caused harm to all class members, and a Phase II trial where the jury is asked to determine what particular harm PacifiCorp caused to particular class members—the second phase necessarily involves reconsidering issues presented in the first phase. This reconsideration of Phase I issues in the Phase II trials is constitutionally impermissible. *See Blyden*, 186 F3d at 269; *Chisolm*, 194 FRD at 552. Accordingly, judgment must be entered for PacifiCorp on the Phase II verdict. *See, e.g.*, *Castano*, 84 F3d at 752 (remedy for second jury re-examining first jury's findings is dismissal).

D. The Court should limit the economic damages award.

1. Plaintiffs cannot double count by recovering damages that are already encompassed within the calculation of ORS 477.089(1)(a)(A).

a. ORS 477.089(1) defines two mutually exclusive categories of damages.

Setting aside the parties' previous disputes about the scope of ORS 477.089, Plaintiffs are now pursuing economic damage theories that expressly contravene the legislature's intent when it passed that statute. ORS 477.089(1)(a) provides:

> (a) "Economic and property damage" means the *sum* of:
> (A) The lesser of the difference in the fair market value of property immediately before and immediately after a wildfire or the cost of restoring property to the condition the property was in immediately before a wildfire; *and*
> (B) Any *other* objectively verifiable monetary losses.

(Emphases added.)

By its terms, the statute establishes a two-step framework for calculating economic and property damages, which are "the exclusive remedies for damages or injury to property caused by a wildfire." ORS 477.089(4). Pursuant to subsection (A), for real property subject to a valuation by a state-certified appraiser, the plaintiff receives the lesser of the diminution in fair market value or the cost of restoration. Those are the two standard and alternative measures of loss in the real estate valuation context—diminution in value or cost to cure.

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1 *See, e.g.*, *Agapion v. United States*, 167 Fed Cl 761, 772 (2023) ("The government may pay
2 the cost to cure when it is less than the property's reduction in fair market value. In other
3 words, the cost to cure is usually an alternative to the reduction in value for determining just
4 compensation."). As one treatise explains:

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> It must be cautioned that the cost to cure, while admissible for the purpose of establishing just compensation, does not create individual rights to damages. Rather, it is merely evidence of the effect of the taking on market value, and therefore on diminution in value of the remainder. The cost to cure approach is available only to the extent that the actual cost to cure is less than or equal to the diminution in value of the remainder, such that evidence of the cost to cure is admissible only when the cost to cure is no greater than the diminution in value of the remainder if the condition is left uncured.

11 4A Julius L. Sackman, *Nichols on Eminent Domain* § 14A.04[2][a] (3d ed. 2013) (footnotes
12 omitted).

13 In that way, Subsection (A) was expressly designed to define—and limit—the
14 damages recoverable for real property damage caused by a wildfire, including damage to
15 land, homes, timber, and fixtures.

16 Only after performing the subsection (A) analysis, and calculating the lesser of those
17 two numbers, do the parties then proceed with addressing "other" objectively verifiable
18 monetary losses—i.e., losses not already covered by subsection (A). By permitting the
19 plaintiff to recover "other" objectively verifiable monetary losses, the legislature recognized
20 that there may be additional economic damages that were not and could not be encompassed
21 within diminution in value or cost to cure, such as loss of income or damages to personal
22 property. *See* ORS 31.705(2)(a) (defining "economic damages").

23 **b. Plaintiffs are double counting damages.**

24 The crux of the parties' current dispute is whether Plaintiffs should be permitted to
25 include certain damages measurable under subsection (A) as "other objectively verifiable
26 monetary losses" under subsection (B). For example, Plaintiffs argue that they should

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recover certain costs associated with repairing the property (cost of restoration) *in addition to* property damages measured by diminution in value.

The text, context, and legislative history of ORS 477.089, however, prohibit Plaintiffs' double counting approach—recovering both diminution in value *and* costs of restoration. Instead, as the plain text of the statute indicates, the damages under subsection (A) and (B) are calculated independently, with measurable real property damages coming first. That is evident from the use of the connector "and" rather than "or," and the directive that the two categories be summed together.

In addition, the legislature qualified the subsection (B) damages with the critical word "other." As the Supreme Court has explained,

> "[t]he word 'other' is one of common usage, and its meaning generally is understood. The dictionary defines the word "other," in part, as
>
> "being the one (as of two or more) left: not being the one (as of two or more) first mentioned or of primary concern: REMAINING … being the ones distinct from the one or those first mentioned or understood … SECOND … DIFFERENT, DISTINCT … MORE, ADDITIONAL."

Groshong v. Mut. of Enumclaw Ins. Co., 329 Or 303, 312, 985 P2d 1284, 1289 (1999).

As that plain meaning indicates, "*other* objectively verifiable monetary losses" are damages distinct from, or in addition to, the damages calculated pursuant to subsection (A). That is, the use of the word "other" in subsection (B) indicates that the phrase "other objectively verifiable monetary losses" as used therein must be construed to mean objectively verifiable losses that are something *other than* losses described in and calculated pursuant to subsection (A). Plaintiffs' interpretation distorts the statutory text and would read the term "other" out of the statute.

Plaintiffs' interpretation is also inconsistent with the legislative history. As PacifiCorp has explained previously, SB 709 (2013) was spurred by the 2007 "Moonlight Fire," where the United States Department of Justice claimed "$709 million for damages" for

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1 injuries to federal timber land valued at approximately $20 million on the open market. The
2 defendant timber company ultimately settled for $55 million accompanied by the "transfer of
3 approximately 22,500 acres of land."

4 As reflected in the Senate and House bill summaries, the goal of the legislation was to
5 "clarif[y] how to calculate damages in the event of a wildfire" in light of criticism that the
6 U.S. Department of Justice's damages claims far exceeded the "market value" of the
7 damaged land. (*Id.*) And as the bill's sponsors recognized and as the Oregon Department of
8 Forestry and industry sponsors testified in support of the bill, that meant "restrict[ing] any
9 undue windfalls" that "creative lawyers" might seek.

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10 For all of the above reasons, the following restoration costs are not recoverable as
11 "other" objectively verifiable losses under the statute:

12 - Plaintiff Cuozzo: $31,600 in losses for fencing, $13,000 in expenses for
13 pump repairs, and $6,400 in "tree work" (Ex. 514.)
14 - Plaintiff Giller: $200,000 promissory note from his partner that he used to
15 rebuild his property. (Ex. 516.)
16 - Plaintiff Staniforth: $13,800 for stump removal, $3,000 for reseeding,
17 $54,000 for erosion control, $40,000 for road repair, $30,000 for fencing, and
18 $33,000 for tree removal and brush cleanup. (Ex. 648.)
19 - Plaintiff Nielsen: $46,950.48 in remediation expenses that Plaintiffs may
20 claim as "other" expenses despite claiming approximately $60,000 in costs as
21 real property damages. (Ex. 645.)

22 As to Plaintiff Cuozzo, for example, his economic damages for the diminution in
23 value were calculated to be $90,000. That diminution in value, however, encompasses (or
24 should have encompassed) the loss of all the fixtures that were later added to that amount—
25 the fencing, pumps, and trees. Once the value of the fixtures is encompassed in the
26 subsection (A) analysis through the difference in fair market values, Plaintiffs cannot also

1 recover for the loss of those fixtures under subsection (B). Doing so inappropriately mixes
2 and matches two mutually exclusive categories.
3 Any other result would "allow the exception to swallow the rule," and Oregon courts
4 routinely interpret statutes to "harmonize different sections of a single act whenever
5 possible" to avoid that result. *See 100 Friends of Oregon v. Land Conserv. And Dev.*
6 *Comm'n*, 303 Or 430, 441, 737 P2d 607 (1987) (en banc). Because subsection (A) requires
7 taking the lesser of diminution in value or cost to cure, any recovery for a purported
8 "objectively verifiable monetary loss" that is already being "counted" under either of the first
9 two prongs would permit a Plaintiff to recover more than the legislature intended and would
10 also render the legislature's choice of valuation methods surplusage—because any loss
11 would be increased by the amount of losses deemed "objectively verifiable," rather than
12 taking the "lesser" of the two permissible valuation methods. Oregon law does not permit
13 that result. *See, e.g., Strawn v. Farmers Ins. Co. of Oregon*, 353 Or 210, 227, 297 P3d 439
14 (2013) (party may not employ a "form of double-counting" to increase recoverable fees).
15 Plaintiff Giller's $200,000 promissory note is an even clearer example of double-
16 counting. The promissory note is a cost that he incurred to restore his property—to create a
17 replica of his house. Allowing Giller to recover that restoration cost on top of diminution in
18 value is directly contrary to ORS 477.089's command that a plaintiff gets either diminution
19 in value ***or*** cost to restore, not both. Whether Plaintiff Giller self-funded rebuilding his
20 home, received loans from partners or family members, or received insurance payments, he is
21 not entitled to recover for both the loss *and* whatever loans or promissory notes he incurred
22 to rebuild. He may recover one or the other, but not both.
23
24 **2. Retail replacement is not a proper measure of damages for lost personal property under Oregon common law or ORS 477.089.**
25 "[W]here the lost or damaged property is a fungible commodity with a viable market
26 … , replacement value is likely not appropriate because 'fair market value will … provide[ ]

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1 the most reliable measure of … the full loss sustained by a victim.'" *United States v.*
2 *Frazier*, 651 F3d 899, 908 (8th Cir 2011). This rule applies in Oregon, where courts have
3 stated that "where property is destroyed, the measure of damages is generally the market
4 value of the property." *Portland Gen. Elec. Co. v. Taber*, 146 Or App 735, 739, 934 P2d 538
5 (1997); *Barber v. Motor Inv. Co.*, 136 Or 361, 366, 298 P 216, 218 (1931) ("Ordinarily the
6 market value of the property meets the requirement of just compensation.").
7 That rule makes sense because "[u]sing retail value as market value would grant the
8 plaintiff recovery for his cost of doing business and a profit." *Mock v. Terry*, 251 Or 511,
9 513, 446 P2d 514, 515 (1968). To avoid that issue, courts have limited the use of retail value
10 as the measure of damages only if a plaintiff can "prove that [retail value] would have been
11 realized if defendant had not damaged his property." Id. "In the absence of such proof, such
12 items of damage are not recoverable." Id. (emphasis added). Plaintiffs have provided no
13 such proof. None of their appraiser experts have explained that the retail value of any
14 particular item "would have been realized if defendant had not damaged his property." Id.
15 ORS 477.089 provides further support. As discussed above, ORS 477.089 provides
16 that the measure of damages for property damaged or destroyed during a wildfire is the lesser
17 of the difference in fair market values or the cost to restore property to the condition it was in
18 before. (ORS 477.089(1)(a)(A).) Because few items of lost property would be in truly
19 brand-new condition before a fire, retail replacement will necessarily always exceed both the
20 diminution in value and the cost to restore like-for-like property. The statute does not say
21 that it applies only to real property or that personal property is exempt from the ordinary
22 ORS 477.089 damages analysis. The Court has recognized that ORS 477.089 applies to
23 personal property damages in its jury instructions in this case.
24 Accordingly, the Court should strike Plaintiffs' request for retail replacement value
25 for personal property damages.
26 / / /

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1 **E. The Court should vacate the noneconomic damages award.**

2 The Court should vacate the entirety of the noneconomic damages award—and, at the
3 very least, vacate the noneconomic damages for specific categories of claims. First, Oregon
4 law does not permit any of the noneconomic damages awarded here—they are barred by
5 statute and inconsistent with the common law. Second, even if some noneconomic damages
6 are available here (they are not), Oregon law prohibits recovery for certain categories of
7 noneconomic damages awarded by the verdict here.

8 **1. The noneconomic damages award should be vacated in its entirety.**

9 Oregon law does not permit any of the noneconomic damages awarded here for two
10 independent reasons: they are unavailable under the common law, and they are barred by
11 statute. (*See, e.g.*, Phase I Post-Trial Br. 14–19; DV Mot. 31–37.)

12 As previously explained in PacifiCorp's post-trial briefing and directed verdict
13 motion, the common law does not permit recovery for noneconomic damages for
14 unintentional fires that do not cause bodily injury. (*See, e.g.*, Phase I Post-Trial Br. 17–19;
15 DV Mot. 27–37.) The Court of Appeals has held that unintentional fire damage to property
16 cannot be the basis for noneconomic damages—explaining that "[i]t is difficult to imagine a
17 circumstance in which damage to any property does not directly, naturally and predictably
18 result in some emotional upset," and that as "a policy matter," distress from non-intentional
19 fire damage is not compensable. *Meyer*, 60 Or App at 74–75. *Meyer*'s rule was followed in
20 *Bailey*—where two federal judges, both of whom previously served as Oregon state-court
21 judges, recently held that plaintiffs whose homes were destroyed in a massive 2019 fire in
22 Wilsonville were barred by *Meyer* from recovering noneconomic damages. *See Bailey v.*
23 *Polygon Nw. Co., LLC*, 2022 WL 17184309, at *7 (D Or Aug. 23, 2022) (You, M.J.), *report*
24 *and recommendation adopted in relevant part*, 2022 WL 17178268 (D Or Nov. 23, 2022)
25 (Hernandez, D.J.).

26 / / /

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This reasoning applies here with full force. Like the plaintiffs in *Meyer* and *Bailey*, this case is a property-damages-only case, and the class is, and always has been, defined by reference to injuries to property. Like the plaintiffs in *Meyer* and *Bailey*, Plaintiffs cannot rely on damage to their real property as a result of a single fire to support noneconomic damages. Nothing in these Phase II proceedings—which did not involve any proof of bodily injury claims (*see* Jan. 2, 2024 Order on Defs.' Mots. in Limine at 2)—permits Plaintiffs to escape Oregon's traditional common-law limitations on noneconomic damages. Plaintiffs have not identified any legally protected interest that would support diverging from the established common-law bar on noneconomic damages in the absence of physical injury. (DV Mot. 27–31 (citing, *inter alia*, *Moody v. Or. Comm. Credit Union*, 371 Or 772, 784, --- P3d --- (2023).)

ORS 477.089 likewise bars the award of noneconomic damages here. (*See, e.g.*, Phase I Post-Trial Br. 14–17.) Under Oregon law, "in a civil action for property damage caused by a wildfire, the recoverable damages are … economic and property damages"—and these are the "exclusive remedies for damages" "to property caused by a wildfire." ORS 477.089(2), (4). This unequivocal bar plainly applies here: This case is squarely on the property side of the line. Indeed, the Court prohibited the introduction of evidence about bodily injuries in this trial; the Court defined the class by reference to property damages, not bodily injuries; and all of the noneconomic injuries are bound up with and derive from Plaintiffs' alleged wildfire-property claims. (*See* DV Mot. 46–48.)

2. The Court should vacate the noneconomic damages in part.

Noneconomic damages are not available in this case at all. But even if noneconomic damages *could* be available, Plaintiffs presented evidence about mental distress arising from *non-compensable* categories of noneconomic damages—including injury to personal property, pets and animals, the emotional impact of the fires on their family and friends, and the loss of their senses of community and self. As explained below, and as PacifiCorp

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1 explained in its directed verdict motion, *all* of Plaintiffs' evidence regarding mental distress
2 concerned non-compensable mental distress, and thus judgment should be granted to
3 PacifiCorp on Plaintiffs' noneconomic damages claims. (DV Mot. 37–45.) At a minimum,
4 Plaintiffs' presentation of evidence about their non-compensable mental distress requires
5 vacating the verdict and holding a new trial, untainted by this evidence. *See, e.g.*, *Carpenter*
6 *v. Kraninger*, 225 Or 594, 603, 358 P2d 263 (1960) (finding "reversible error" where
7 impermissible testimony allowed to "inflame" and "prejudice" jury against defendant); *State*
8 *v. O'Key*, 321 Or 285, 321, 899 P2d 663 (1995) (explaining that prejudicial evidence has an
9 "undue tendency to suggest a decision on an improper basis, commonly although not always,
10 an emotional one").

11 ***Injury to Personal Property.*** Oregon law does not permit noneconomic damages
12 caused by damage to or destruction of personal property, no matter the sentimental value of
13 that property. In *Lockett v. Hill*, for example, the Court of Appeals determined that harm to
14 personal property (namely, a cat) could not support an award of noneconomic damages
15 because it did not create an independent basis of liability apart from simple negligence. 182
16 Or App 377, 382–83, 51 P3d 5 (2002). For these reasons, and the reasons set forth in
17 PacifiCorp's directed verdict motion, Plaintiffs are not entitled to recover noneconomic
18 damages caused by the destruction or damage to personal property, including personal
19 property carrying sentimental value. (DV Mot. 37–39.) Nor may Plaintiffs recover
20 noneconomic damages resulting from the impact of the loss of those items on their sense of
21 self, well-being, or emotional state.

22 ***Injury to Animals***. Oregon law also does not permit a plaintiff to recover
23 noneconomic damages caused by the death of or injury to an animal. *Lockett*, 182 Or App at
24 382–83. In *Lockett*, the defendant's dogs negligently mauled and killed the plaintiffs' cat in
25 the plaintiffs' presence. 182 Or App at 379. The plaintiffs sought damages for emotional
26 distress and loss of companionship related to the death of their cat, but the trial court held

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1 that as a matter of law the plaintiffs could not recover those damages. *Id.* The Court of
2 Appeals affirmed the trial court and confirmed that a plaintiff is not entitled to recover
3 noneconomic damages resulting from the loss of, or harm to, a pet stemming from a
4 defendant's negligence. *Id.* at 382–83. The court held that the destruction of an animal is not
5 "an interest that is protected by something beyond negligence law." *Id.* Plaintiffs are thus
6 not entitled to recover noneconomic damages stemming from the loss of, or harm to, pets or
7 other animals. (*See* DV Mot. 39–40.)

8 ***Impact on Friends or Family***. The Oregon Supreme Court has adopted strict
9 limitations on when a plaintiff can recover noneconomic damages suffered by observing or
10 experiencing harm to another person. In *Philibert v. Kluser*, 360 Or 698, 385 P3d 1038
11 (2016), the court explained that a bystander who is not physically injured can recover
12 noneconomic damages only if (1) the bystander witnesses a sudden, serious physical injury to
13 a third person caused by the defendant's negligence, (2) the emotional distress was itself
14 serious, (3) the bystander perceived the events causing injury as they occurred, and (4) the
15 injured person was a close family member. *Id.* at 712–14. During the trial, Plaintiffs told the
16 jury about mental distress based on the impact of the fires on the physical or emotional
17 condition of class members' family or friends. (*See*, *e.g.*, Phase II Trial Tr. 326:4–7 ("Q:
18 And was your daughter's emotional state affecting you? A: It was, because in your mind you
19 are like, it's happening."; 689:15–16 (Plaintiff describes how seeing her dad affected was
20 "the worst part of everything").) But none of the Plaintiffs introduced evidence sufficient to
21 satisfy the narrow parameters for bystander liability in Oregon—there was no evidence that
22 any Plaintiff witnessed a sudden injury to a close family member. As a result, Plaintiffs are
23 not entitled to recover noneconomic damages from the impact of the fire on family or friends.
24 (*See* DV Mot. 41–42.)

25 ***Miscellaneous Other Harms.*** Plaintiffs also presented testimony about mental
26 distress allegedly resulting from the loss of community and sense of home and identity

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caused by the fires, their fear or stress of evacuating, and their sadness at seeing their neighbors' property and public land destroyed. None of these experiences provides a basis for recovering noneconomic damages. "No Oregon court has recognized that a person's interest in a sense of identity is legally protectible." *Lockett*, 182 Or App at 382. Nor have Plaintiffs identified any case recognizing a legally protected interest sufficient to award noneconomic damages for the stress, fear, or inconvenience associated with evacuating from a fire—because there are none. Indeed, Oregon law expressly prohibits noneconomic damages for "inconvenience, annoyance, and discomfort" resulting from fires, because such harms are "adequately compensated" through economic damages. *Meyer*, 60 Or App at 80 n 6.

Oregon law likewise does not allow for recovery of noneconomic damages arising out of harm to the general loss of community, recreational sites, or aesthetic value of land.[2] To recover for injuries to vegetation on real property, a plaintiff must prove "ownership of the land." *Kline v. Elkins*, 207 Or 179, 181, 294 P2d 1118 (1956). There is no basis for any damages claim by the Plaintiffs associated with damage to property owned by others. Moreover, recovery for these types of damages is impermissible because it would lead to the type of "unlimited claims or damages" that Oregon courts have taken pains to prevent. *Philibert*, 360 Or at 708; *see also Moody*, 371 Or at 785. Thus, to award noneconomic damages, the court requires both that the plaintiff have a specific and narrowly defined legally protected interest and that the emotional distress claimed of foreseeably resulted from the defendant's interference with that particular interest. *Moody*, 371 Or at 784–85. To hold otherwise would untether the emotional distress from the legally protected harm and open the door to the type of unbounded liability that Oregon courts have sought to prevent. Plaintiffs'

[2] The Court did sustain several of PacifiCorp's after-the-fact objections to testimony about damage to property owned by others and damage to public property, but the problem is that the jury was nonetheless exposed to this type of testimony and argument throughout the trial.

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effort to recover noneconomic damages associated with these interests—none of which have been recognized by any Oregon court—must be rejected. (*See* DV Mot. 42–45.)

IV. 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, 688, 687–92 (cleaned up). 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

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under 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 III (Motion for Judgment Notwithstanding the Verdict), as well as the reasons outlined below in this Part IV.

C. The Court erroneously instructed that PacifiCorp was "the cause" of the fires—not just "a cause."

The Phase I jury concluded in its verdict that PacifiCorp was "*a* cause of harm to the Plaintiffs." (Phase I Judgment, Ex. B.) Nevertheless, in instructing the jury at Phase II, the Court stated that PacifiCorp was "*the* cause." (Phase II Trial Tr. 30:15–32:24.) That was error.

"[T]he parties in a civil action are entitled to jury instructions on their theory of the case if their requested instructions correctly state the law, are based on the current pleadings in the case, and are supported by evidence." *Hernandez v. Barbo Machinery Co.*, 327 Or 99, 106, 957 P2d 147 (1998). "A trial court commits reversible error when it incorrectly instructs the jury on a material element of a claim or defense and that instructional error, in light of the other instructions given, permits the jury to reach a legally erroneous result." *State v. Morales*, 307 Or App 280, 288, 476 P3d 965 (2020) (cleaned up).

As discussed above, the Phase II trial should have been strictly bound by the findings of the Phase I verdict—the Court could not engage in judicial fact-finding and draw its own conclusions from the Phase I trial aside from the conclusions that the jury set forth in its verdict. *See Fiore v. Ladd*, 29 Or 528, 533, 46 P 144 (1896). Yet although the Phase I jury found only that PacifiCorp was "*a* cause" of harm, the Court went beyond the scope of the jury's verdict and instructed the jury that PacifiCorp was "*the* cause" of harm. This was judicial fact-finding, unsupported by the verdict itself, and was thus erroneous.

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And this error was prejudicial. At the Phase I trial, there were a host of different potential causes of Plaintiffs' injuries presented. The jury heard at length about the Beachie Creek fire, which swept through the Santiam Canyon area, about numerous spot fires that damaged homes and could not be connected to PacifiCorp equipment, and utility fires from *other* utilities. Had the Phase I jury been asked whether PacifiCorp was *the* cause of the class's injuries—rather than merely *a* cause—its verdict would likely have been different.[3] Likewise, during the Phase II trials, one of the central issues was the question of causation—i.e., whether PacifiCorp caused Plaintiffs' harm or whether Plaintiffs were harmed by something else. If the jury had been properly instructed that the Phase I jury found only that PacifiCorp was "a" cause of injury to the class, the jury could have determined that at least some of the particular injuries that Plaintiffs alleged in the Phase II trial were not caused by PacifiCorp, but by another source. But the Court's erroneous instruction effectively told the jury that PacifiCorp had no defense as to causation because it was *the* cause of any harm Plaintiffs suffered. During their opening statements, Plaintiffs relied on the fact that the Phase I jury "found that PacifiCorp's conduct was *the* cause of the harm." (Phase II Trial Tr. 263:20–24 (emphasis added); *see also id.* at 264:1–3 ("PacifiCorp started the fires and caused the harm.").) This caused the Phase II jury to erroneously conclude that the Phase I jury had already definitively held that PacifiCorp was the cause of all Plaintiffs' harms, and there was nothing for the jury to do but determine the amount of damage. A new trial should be granted so that the jury can be properly instructed on the Phase I findings and not operate under the misimpression that PacifiCorp has already been adjudicated to be the sole cause of all of the Plaintiffs' injuries.

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[3] To be clear, the evidence did not support a verdict finding that PacifiCorp was merely *a* cause of injury to all class members, which is why judgment should have been granted to PacifiCorp following the trial.

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1 **D. The refusal to give PacifiCorp's requested Phase I jury instructions requires a new trial.**
2
3 **1. Failing to inform the jury of the Phase I jury's imposition of punitive damages and doubled economic damages prejudiced PacifiCorp.**
4
5 The jury in the January trial was only given half the story, to the prejudice of
6 PacifiCorp. At Plaintiffs' insistence, the jury was instructed regarding the Phase I jury's
7 findings of gross negligence, recklessness, and willfulness. Plaintiffs repeatedly emphasized
8 those findings throughout the trial, most significantly during opening and closing argument.
9 (Phase II Trial Tr. at 263-64, 277, 397, 1451, 1532, 1536.)
10 It is also clear that failing to give the jury the full context encouraged the jury to
11 punish PacifiCorp. The jury was told—repeatedly and in the strongest terms—that
12 PacifiCorp (often referred to as a "company" or "corporation" that "burned down people's
13 homes") was a grossly negligent and reckless actor that needed to be "held accountable."
14 (Phase II Trial Tr. at 264-65 ("The first jury found that PacifiCorp was responsible, but in
15 this trial, you get to hold PacifiCorp accountable for its actions on Labor Day 2020."); *id*. at
16 277 ("It happened because PacifiCorp refused to be accountable on Labor Day 2020 to
17 Oregonians across the state. And now through your verdict in this case, you have the power,
18 the opportunity, to hold them accountable for what happened that night.").) Plaintiffs
19 repeatedly blew the punishment dog whistle—suggesting, without saying so directly, that it
20 was this jury's job to act on the first jury's findings of recklessness and willfulness. Coupled
21 with Plaintiffs' counsel repeatedly crossing the line in questioning and argument, it simply
22 blinks reality to suggest that the jury was not influenced by those arguments.
23 Furthermore, the jury had the means of punishing PacifiCorp through the imposition
24 of noneconomic damages. It is well settled that noneconomic damages can be a vehicle for
25 punishment. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 US 408, 426, 123 S Ct 1513,
26 1525, 155 L Ed 2d 585 (2003) ("Compensatory damages, however, already contain this

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punitive element."); *Wangen v. Ford Motor Co*., 294 NW2d 437, 447 (Wis. 1980) ("[I]t is generally recognized … that juries give vent to their desire to punish the wrongdoer under the guise of increasing the compensatory damages[.]"); *Restatement (Second) of Torts* § 908, cmt c, at 466 (1977) ("In many cases in which compensatory damages include an amount for emotional distress, such as humiliation or indignation aroused by the defendant's act, there is no clear line of demarcation between punishment and compensation and a verdict for a specified amount frequently includes elements of both"). Indeed, plaintiffs in the upcoming trial have expressly stated that they are seeking to punish PacifiCorp through their requests for noneconomic damages. Those facts and context required the Court to give the jury the full picture—that the Phase I jury had already imposed punitive damages and that the consequence of the recklessness finding was a doubling of economic damages. *Hernandez v. Barbo Mach. Co*., 327 Or 99, 106–07, 957 P2d 147 (1998) ("The party requesting an instruction is prejudiced if the trial court's failure to give the requested instruction probably created an erroneous impression of the law in the minds of the members of the jury, and if that erroneous impression may have affected the outcome of the case.").

Plaintiffs will likely point to the bifurcation of Phase I as justification for keeping the fact of punitive damages (and doubling of damages) from the Phase II jury. The purpose of bifurcation, however, is to exclude the types of arguments that were both expressly and implicitly made in the Phase II trial from a trial involving liability—that the jury should hold the "big" and wealthy corporation accountable by imposing punitive damages. In the Phase II trial, liability was no longer an issue, and Plaintiffs opened the door by arguing that the jury should use its finding of damages to hold PacifiCorp accountable for "what happened that day" to "Oregonians." The law, due process, and fundamental fairness required the jury to have been told that punishment already had been imposed by the first jury and that the statutory mechanism of doubling economic damages was the legal consequence of the first jury's recklessness finding.

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2. The jury should have been instructed that PacifiCorp's conduct was unintentional.

Plaintiffs' counsel also emphasized the instructions defining willfulness, including the portion of the definition indicating that person "acts willfully when the person knows what they are doing, intends to do what they are doing, and is a free agent." (Phase II Trial Tr. at 1407, 1448.) Given that context, the Court should have instructed the jury that PacifiCorp's conduct was not intentional, consistent with the Phase I jury's findings on inverse condemnation. Failing to give that instruction left the jury with a confusing picture and suggested the PacifiCorp intentionally ignited the Labor Day fires.

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

1. Repeated Unsupported and Prejudicial Questions and Arguments on Redirect, Closing, and Rebuttal Required a Mistrial.

Throughout trial, Plaintiffs' counsel repeatedly utilized redirect examination as a vehicle for improper jury argument, including by asking questions that incredulously suggested PacifiCorp had wronged Plaintiffs just by litigating this case. Plaintiffs then doubled down on these improper tactics in their rebuttal argument at the end of the case, at which point PacifiCorp had no ability to correct the record. "[J]ustice demands that arguments be factual and not inflammatory." *State Highway Comm'n v. Callahan*, 242 Or 551, 558, 410 P2d 818 (1966). Yet inflammatory arguments and questioning is precisely what Plaintiffs' counsel engaged in—repeatedly—throughout this trial. The cumulative effect of these improper lines of questioning and argument was incurable prejudice to PacifiCorp, and a new trial is warranted.

For example, Plaintiffs' counsel repeatedly asked witnesses on redirect about the experience of being cross-examined by PacifiCorp at trial:

- "Mr. Staniforth, do you have an approximation how many questions defense counsel… [*Objection sustained*]"

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1 • "Mr. Staniforth, my question is, can you estimate for the jury how many
2 questions PacifiCorp just asked you about economic damages when at the
3 beginning of this trial they told the jury they weren't going to contest it?
4 [*Objection sustained*]"
5 • "Mr. Staniforth, how many questions do you think defense counsel just asked
6 you…[*Objection sustained*]"
7 • "Mr. Staniforth, did you know that PacifiCorp was going to come in here and
8 ask you questions about your economic damages? [*Objection sustained*]"
9 (Phase II Trial Tr. 997:4-19.)
10 On one occasion in particular, Plaintiffs' counsel asked Plaintiff Deborah Tank a
11 series of increasingly hostile, harassing, argumentative—and objectionable—redirect
12 questions, all the while raising his voice at Plaintiff Tank:
13 • "Is it easy to sit in a courtroom full of strangers and talk about this?"
14 • "What does it feel like when PacifiCorp comes up here and starts horse
15 trading on your life? [*Objection sustained*]"
16 • "Ms. Tank, did PacifiCorp do you a favor in burning down your home?
17 [*Objection sustained*]"
18 • "Ms. Tank, has PacifiCorp ever taken any accountability to you for what they
19 put you through beginning on September 7 of 2020?"
20 (Phase II Trial Tr. 708:9-25.) At the end of the examination, as she left the courtroom,
21 Plaintiff Tank was visibly in tears in clear view of the jury. Later, during his rebuttal
22 argument, Plaintiffs' counsel attributed the results of his own questioning to PacifiCorp,
23 telling the jury to not "forget when they bullied Deborah Tank while she was on the stand
24 reliving the worst experience of her life." (Phase II Trial Tr. 1531:20-22.)
25 Plaintiffs' counsel did the same thing with Plaintiff David Giller, affirmatively raising
26 the topic of suicide during his direct examination. (Phase II Trial Tr. 450:19-451:3.) Then,

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on redirect, he again shifted the blame to PacifiCorp, asking Plaintiff Giller how it felt "to be 85 years old and have the corporation that burned down your home ask you about suicide in this courtroom." (Phase II Trial Tr. 481:25-482:3.) Counsel then violated the Court's motion in *limine* rulings during his rebuttal argument by asserting that Plaintiff Giller "now suffers from depression and anxiety" in direct violation of the Court's prior evidentiary rulings. (Phase II Trial Tr. 1533:16-21).

Plaintiffs' counsel doubled down on the criticism of PacifiCorp's cross examinations during his rebuttal argument: "It was the same approach that allowed them to call Mr. Giller a liar. Don't forget that. Don't forget. PacifiCorp cross-examined Mr. Giller about the emails he sent to his cousin Hal. Don't forget while they bullied Deborah Tank while she was on the stand reliving the worst experience of her life." (Phase II Trial Tr. 1531:16-22.) He then expressly encouraged the jury to award compensation for "PacifiCorp's failure to take responsibility, that PacifiCorp's choices three and a half years ago, that *PacifiCorp's choices in this courtroom have caused these people to experience*," again casting blame on the fact that PacifiCorp cross examined Plaintiffs at all. (Phase II Trial Tr. 1532:13-17 (emphasis added).) These lines of questioning and argument improperly suggested that the act of cross examination is itself wrong or objectionable, and that the jury should punish PacifiCorp for simply exercising its right to question witnesses—which is incorrect.[4]

[4] *See, e.g.*, *Zimmerman v. Direct Fed. Credit Union*, 262 F3d 70, 79 (1st Cir 2001) ("[T]he heavy weight of authority holds that litigation-induced stress is not ordinarily recoverable as an element of damages. … Sound policy reasons support this rationale: as a general rule, a putative tortfeasor should have the right to defend himself without risking a more munificent award of damages merely because the strain inherent in an actual or impending courtroom confrontation discomfits the plaintiff."); *Stoleson v. United States*, 708 F2d 1217, 1223 (7th Cir 1983) ("It would be strange if stress induced by litigation could be attributed in law to the tortfeasor."); *Sch. Dist. No. 1, Multnomah Cnty. v. Nilsen*, 271 Or 461, 485–86, 534 P2d 1135, 1146 (1975) ("The other pressures of which she complains came about principally from the bringing of the legal proceedings and are the normal results of being a litigant, particularly if the litigation is a matter of interest to a considerable number of people. She did not suffer any anxiety or emotional distress for which the law usually allows damages, since these types of stress are inherent in most litigation. It can be argued that she should not have been placed in a position where she had to assert her rights, but the same can be said of

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Beyond just improperly casting aspersions on PacifiCorp's trial strategy, Plaintiffs' counsel also made repeated inflammatory arguments that were unsupported by any factual basis or anything in the evidentiary record. For example, Plaintiffs waited until rebuttal to embark on a lengthy unsupported attack on PacifiCorp's property inspections, suggesting—with no evidentiary support—that PacifiCorp hired investigators to doctor the property photographs:

> "You'll recall hearing from people like Fred Cuozzo, Steve Nielsen when they saw photos of their properties for the first time during this trial and weren't sure where those photos had come from. Well, those are photos that PacifiCorp's investigators came out and took. Those are photos that if the investigator stands at just the right location…[*objection sustained*]…If you take those photos that PacifiCorp just showed you and if you stand at just the right spot and you tilt the camera at just the right angle and maybe if you go into Photoshop later and adjust the lighting…[*objection sustained*]…you can make it look like these places and these homes are just fine."

(Phase II Trial Tr. 1539:25-1540:23 (emphases added).)

Plaintiffs' counsel similarly waited until rebuttal to tell the jury that PacifiCorp's suggestions of reasonable amounts of noneconomic damages constituted "business as usual for PacifiCorp" because "[t]hese people [] are line items on a spreadsheet to them." (Phase II Trial Tr. 1544:08-13.) Plaintiffs' counsel continued arguing that "[t]his is an amount of money that they're happy to write on a board because it does not matter to them. It is insignificant." (*Id.*) These references—and in particular the suggestions that PacifiCorp's noneconomic damages offers were insignificant—were especially prejudicial because (1) Plaintiffs deliberately saved them for closing argument and rebuttal argument when PacifiCorp lacked any ability to rebut those arguments with evidence that the offers ***were*** significant in light of PacifiCorp's overall financial condition, ability to pay, and other

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the successful plaintiff in any case. Awards of damages of this kind are usually limited to malicious prosecution and similar actions.").

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necessary expenditures, and (2) even if PacifiCorp had the opportunity to respond, any potential evidence that PacifiCorp would have marshalled in response would have been precluded by prior evidentiary stipulations and rulings.

At the end of the day, attorneys are "allowed to comment on the evidence and to draw all legitimate inferences therefrom, such argument provided the limits of professional duty and propriety are not transcended." *State v. Gill*, 3 Or App 488, 497, 474 P2d 23 (1970). But here, the questioning and argument by Plaintiffs' counsel repeatedly crossed that line. Although PacifiCorp was often able to interpose objections, many of which were sustained by the Court, these after-the-fact objections were far from a cure-all solution for these inflammatory exchanges. The damage was done as soon as the words were said. Indeed, PacifiCorp's objections *themselves* were leveraged against PacifiCorp by Plaintiffs during rebuttal when, following a series of sustained objections, Plaintiffs' counsel improperly commented: "And PacifiCorp *won't even let us talk* about these people's experiences." (Phase II Trial Tr. 1539:25-1540:23 (emphases added).) The only sufficient solution at this stage is to order a new trial.

2. Repeated Violations of the Court's Motion in *Limine* Rulings Required a Mistrial.

Throughout the course of trial—including three days of witness examinations of the individual plaintiffs and during closing and rebuttal argument—Plaintiffs repeatedly and blatantly elicited and introduced testimony that violated the Court's January 2, 2024 Orders on Motions in *Limine*. These violations occurred despite numerous protective mechanisms that the Court imposed—including (1) seeking and receiving confirmation from Plaintiffs' counsel on January 10, 2024 that they had communicated the Court's evidentiary rulings to their clients (Phase II Trial Tr. at 553:12-15 ("The Court: So for the plaintiffs that plan to testify today, have you instructed them about the Court's motions in limine rulings?" Mr. Berne: Yes, your Honor."), (2) reading a cautionary instruction to Plaintiffs Staniforth and

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Johnson prior to their testimony on the third and final day of Plaintiffs' case-in-chief, and (3) sustaining numerous of PacifiCorp's in-the-moment objections in response to many of the violations. These protective mechanisms, while appreciated, were not enough to prevent (or cure) the prejudice to PacifiCorp. The damage was done. In light of these repeated and cumulative evidentiary violations, the only appropriate and, indeed, sufficient remedy is a new trial.

Other Industry Actors. For example, the Court excluded "comparisons to other industry actors, including Portland General Electric, Consumers Power, and San Diego Gas & Electric" and *specifically* barred "plaintiff Nielsen's proffered testimony regarding another utility company shutting off power." (Jan. 2, 2024 Order on PacifiCorp's Motion in *Limine* Nos. 16 and 17.) Yet—in direct contravention of this order—Plaintiff Nielsen testified: "I actually, through the weekend, expected -- I expected a public safety power shutoff by Pacific Power like PGE and Consumers Power did and it never happened." (Phase II Trial Tr. 723:4-7.)

Damage to Property Owned By Others. The Court excluded Plaintiffs from offering "evidence or argument related to damage to property owned by others," including "loss of aesthetics and recreation" for others' lost property. (Jan. 2, 2024 Order on PacifiCorp's Motion in *Limine* No. 12; *see also* Phase II Trial Tr. 407:19-21.) But Plaintiffs' counsel asked Plaintiff Nielsen, "when you got back into the canyon, what was it like?" He responded that the "surrounding landscape" was "scorched earth, complete devastation." (Phase II Trial Tr. 746:21-23.) Plaintiffs' counsel asked Plaintiff Tank repeated questions about her parents' property loss. (Trial Tr. 684:19; 691:25-692:1; 694:11-12 ("Did your parents also lose their home?), her parents' emotional distress ("What was it like to not only see your parents struggling [but] to see your husband struggling[?]"), and how her parents' burned property has changed ("[Y]our parents' home before the fire, is it the same for you as it was before the fire?").) Plaintiffs' counsel asked Plaintiff Fawcett to describe what she

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1 saw as she "drove back to the canyon." Plaintiff Fawcett described it as "apocalyptic" and
2 "like a wasteland." (Phase II Trial Tr. 333:21.) During opening, Plaintiffs' counsel
3 repeatedly referenced the "lush green forests and sprawling open spaces" that "defined" the
4 Santiam Canyon, a community "passed down through generations." (Phase II Trial Tr.
5 265:19-266:10.) During his direct examination, Plaintiff Staniforth repeatedly made
6 references to damage to neighboring properties, and at one point, Plaintiff Staniforth testified
7 that he "apologized to a handful of the other neighbors that lost their house." (Phase II Trial
8 Tr. 83:11-12.)
9 ***Bodily Injuries.*** The Court excluded all "evidence of standalone bodily injury,"
10 included "burn injury," "smoke inhalation," and "mental health diagnoses." (January 2, 2024
11 Order on PacifiCorp's Motion in *Limine* No. 1.) Plaintiffs repeatedly violated this order. For
12 example, Plaintiffs' counsel drew out significant testimony from Plaintiff Giller about his
13 doctor's treatment of his depression (Q: "When you see your doctor, what does she ask you
14 at every visit?" A: "Are you thinking about suicide." Q: "Why is your doctor asking you that
15 question, Mr. Giller?" A: "Because that's one of the threats that depression gives you.").
16 When Defendant asked Mr. Giller on cross whether he "told [his] doctor that [he] would not
17 act on any thoughts of suicide"—a question that did not call for information about medical
18 diagnosis—Mr. Giller specifically mentioned that he was "diagnosed with depression."
19 (Phase II Trial Tr. 50:19-25; 461:23-24.) Plaintiffs' counsel then exacerbated the problem
20 when he asked on redirect, "what does it feel like to be 85 years old and have the corporation
21 that burned down your home ask you about suicide in this courtroom?" (Phase II Trial Tr.
22 481:25-482:03.) Similarly, Plaintiff King testified that he "ended up in the hospital a couple
23 of times," including one hospital visit when he "was breathing funny and just felt terrible"
24 (Phase II Trial Tr. 374:6-11), in direct violation of the Court's order prohibiting testimony
25 related to smoke inhalation.
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Absent Class Member Damages. The Court excluded evidence of "specific harm to absent class members and the number of persons impacted by the 2020 Labor Day fires at issue." (Jan. 2, 2024 Order on PacifiCorp's Motion in *Limine* No. 3.) But Plaintiffs' counsel violated this order when he directly asked Plaintiff Staniforth if he was "worried about what might happen to other people." (Phase II Trial Tr. 922:15-16.) Plaintiff Staniforth separately offered up testimony about his neighbor's property (Phase II Trial Tr. 929:14-23.) And despite numerous sustained objections, Plaintiff Staniforth continued to offer up testimony about the emotional impact of the fire on his father, who "buckled to his knees," and then Plaintiffs' counsel dug in deeper by asking Mr. Staniforth: "When you say [your father] buckled to his knees, what do you mean?" (Phase II Trial Tr. 932:20-933:03.). These same violations occurred during Plaintiff Tank's testimony when Plaintiffs' counsel asked Plaintiff Tank repeated questions about her parents' property loss ("Did your parents also lose their home?), her parents' emotional distress ("What was it like to not only see your parents struggling but to see your husband struggling[?]"), and how her parents' burned property has changed ("[Y]our parents' home before the fire, is it the same for you as it was before the fire?"). (Phase II Trial Tr. 684:19-20; 691-25-692:1; 694:11-12.)

Deaths. The Court excluded "argument or evidence of deaths or fatalities to third parties," opinions that this "should be a manslaughter trial," or any reference to a plaintiff as a "victim" of the fires. (Jan. 2, 2024 Order on PacifiCorp's Motion in *Limine* No. 21.) But Plaintiffs repeatedly testified about well-known wildfires associated with mass destruction and death, in particular the Paradise Fire where 85 people died as a result of wildfires associated with a different utility's equipment, to harbor up images of death and comparisons with these wildfires. For example, Plaintiff Tank testified that she had watched a documentary regarding the Paradise Fire and stated that "this is going to happen. We're going to die." (Phase II Trial Tr. 678:4-9.) Plaintiff Cuozzo similarly connected his experience in the Labor Day Fires to the Paradise Fire to help cement the idea of deaths in

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the jury's mind. (Phase II Trial Tr. 621:25.) Plaintiff Staniforth did the same thing. (Phase II Trial Tr. 916:03-12 ("Q. In your years as a lineman, Mr. Staniforth, did you respond to parts of our country that had been destroyed by fire before this fire at issue here? A. Yeah. I have responded to the majority of all major fires that have hit the West Coast in the last 5 to 10 years. Some as an example for people that remembers, Santa Rosa, Paradise, Camp."). Plaintiffs' counsel repeatedly referred to the Plaintiffs as "survivors."

These cumulative and persistent violations of prior evidentiary orders were incurably prejudicial to PacifiCorp—even with the benefit of in-the-moment objections—and the only appropriate solution would have been a mistrial or a new trial.

3. Permitting Plaintiffs to Rely on "Accountability" and "Failure to Accept Responsibility" as "Permissible Trial Themes" Was Error.

It was error to permit Plaintiffs to rely on "accountability" and "failure to accept responsibility" as permissible trial themes during Phase II because the main (if not only) use of those concepts was to invite the jury to punish PacifiCorp for its conduct—which was indisputably outside of the permissible scope of these Phase II trial. Specifically, in ruling on PacifiCorp's Motion in *Limine* No. 23, the Court noted that accountability and responsibility were "permissible trial themes for a Phase II plaintiff's experiences in their own contested trials," though the Court also cautioned that responsibility and accountability in the context of "defendants' liability in Phase I for which refusal of responsibility is now foreclosed by the jury's findings, at least in the context of Phase II trials." (Jan. 2, 2024 Order on PacifiCorp's MIL No. 23.) The problem, which became starkly apparent during trial, was that it was practically impossible to maintain any proper boundary between, on the one hand, "accountability" and "responsibility" and, on the other hand, using those words as an avenue to explicitly or implicitly encourage the jury to punish PacifiCorp. It was error to allow Plaintiffs to persistently cross the line into using accountability and responsibility as signals to punish PacifiCorp, and a new trial is therefore warranted.

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Specifically, throughout the trial, Plaintiffs used the concepts of accountability and responsibility in three distinct improper and prejudicial ways—all without explicitly referencing the word "punishment" but nonetheless heavily signaling at punitive ends: (1) Plaintiffs raised "accountability" and "responsibility" as a way to criticize PacifiCorp for refusing to acknowledge its conduct in causing the fires—which PacifiCorp is not allowed to talk about during Phase II—and for refusing to acknowledge the Phase I jury's liability findings; (2) Plaintiffs used "accountability" and "responsibility" as a backdoor to blame PacifiCorp for causing the three-year delay between Labor Day 2020 and the Phase II trials; and (3) Plaintiffs implicitly and explicitly conflated accountability with punishment.

First, Plaintiffs repeatedly invoked the concept of accountability to suggest that PacifiCorp was in the wrong for failing to acknowledge that it started the fires, that it was liable for gross negligence and recklessness and willfulness (and that that was what this case was about), that it burned down homes and forced people to evacuate—notwithstanding the fact that all of those facts *had* already been established during Phase I and, as a result of the Phase I liability verdict, PacifiCorp itself has been precluded from revisiting those Phase I rulings during the Phase II trial:

- "PacifiCorp comes here and pretends to be accountable, but what it will not say is that it did it. It started these fires. It put these people through the worst experience of their lives and it will be accountable to them for it. (Phase II Trial Tr. 1531:23-1532:3.)
- "Instead it says, some other jury said that we were found responsible. Some other jury said we were grossly negligent, reckless, willful. How quickly can they say those things and act like that's not what this case is about." (Phase II Trial Tr. 1532:4-9.)
- "Where is the recognition and acknowledgement that they put Mr. Johnson and his wife Mary Beth in that river? Why won't they say it? We did it. We

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were reckless. We were consciously indifferent. We did a horrible, terrible thing. We acknowledge it. We own it. They won't, they haven't, and they seem just incapable of doing that." (Phase II Trial Tr. 1538:24-1539:7.)

- "It's about the injury and the harm that they caused to these people and just continue to refuse to just say we did it. We burned down your home. We sent you into that pickup off the road trapped. We caused you to think you were going to die. We did it. We were grossly negligent. We were consciously indifferent. We were reckless." (Phase II Trial Tr. 1536:5-12.)

Second, Plaintiffs also leveraged the language of accountability and responsibility to sneak in arguments blaming PacifiCorp for delaying resolution of these cases, notwithstanding the Court's prior ruling on January MIL No. 24 expressly "excluding argument that defendants are liable for the passage of time between the Labor Day 2020 fires and the Phase II trial":

- "PacifiCorp's failure to take responsibility, that PacifiCorp's choices three and a half years ago, that PacifiCorp's choices in this courtroom have caused these people to experience" (Phase II Trial Tr. 1532:13-17.)
- "It's burn down these people's homes, burn down their lives, come in three and a half years later, and do this." (Phase II Trial Tr. 1541:15-18.)
- "There was just no ownership of it and that is why we continue to be here today three and a half years later." (Phase II Trial Tr. 1536:12-14.)
- "It could have taken accountability at any point. It has consistently, for three and a half years, chosen not to." (Phase II Trial Tr. 1461:1-4.)

Third, Plaintiffs' intent to improperly conflate accountability with punishment was brought to the forefront when counsel specifically asked Plaintiff Cory Staniforth whether accountability meant "just money," or whether it meant "something more":

Q. What is this trial about, Mr. Staniforth?
A. Accountability.

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> Q. What does that mean? Does that mean just money, *or is it something more than that*?
> A. It's principle. It's not about the dollar amount. It's much more. It's the principle.

(Phase II Trial Tr. 998:7-12.) That exchange left little doubt that Plaintiffs have been interpreting accountability much more broadly than as just an aspect of their own experience for purposes of their "own contested trials," as contemplated by the Court.

There is ostensibly no dispute that the jury may not award any damages other than the economic and noneconomic damages necessary to compensate Plaintiffs. But Plaintiffs' counsel repeatedly asked the jury to hold Defendant "accountable" for its conduct and to do "more" than simply compensate Plaintiffs. (*See* Phase II Trial Tr. 264:24 (Counsel's opening: "In this trial, you get to hold PacifiCorp accountable for its actions on Labor Day 2020."); 276:5-9 (Counsel's opening: "And this is a corporation that should be held accountable…That's why we're here. Because they refused to be accountable for what happened that night, still."); 277:19 (Counsel's opening: "We'll ask that you hold PacifiCorp accountable for what happened on Labor Day 2020."); 273:397:15 (Fawcett: Q. "What was your reaction to the jury verdict when they found PacifiCorp negligent, grossly negligent, reckless, and willful?" A. "I thought that there would finally be accountability and responsibility."); 582:25-583:2 (King: "Corporations and everything are accountable for their actions. We've got to pay the piper when we've done something wrong.").)

In short, it is impossible to disentangle the words "accountability" and "responsibility" from the call to punishment, especially in the ways that Plaintiffs presented those arguments. There is no question that these types of arguments and suggestions improperly influenced the jury into awarding noneconomic damages that surpassed mere compensation to the Plaintiffs and crossed the line into punitive damages territory. The Court should order a new trial.

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4. Permitting Plaintiffs to Repeatedly Reference the "Grossly Negligent," "Reckless," and "Willful" Nature of PacifiCorp's Conduct from the Phase I Trial Was Error.

It was error to permit Plaintiffs to persistently reference the "grossly negligent," "reckless," and "willful" nature of PacifiCorp's Phase I conduct—especially when coupled with the absence of any limiting instructing clarifying that punitive damages had already been awarded for those Phase I findings and that the word "willful" did not mean the same thing as "intentional" (including by informing the Phase II jury that the Phase I jury had rejected the inverse condemnation claim). The trial records is rife with such references. (*See, e.g.*, Phase II Trial Tr. 263:20-24, 270:8-9, 276:15-277:8, 397:15-23.) The problem with allowing Plaintiffs to repeatedly remind the jury of the Phase I jury's culpability findings is that Plaintiffs went into the Phase II trial having already realized the benefits of those Phase I culpability findings—in connection with those heightened culpability findings, the Phase I jury already gave Plaintiffs the benefits of both a punitive damages multiplier and double damages under ORS 477.089. Plaintiffs went into Phase II with punitive damages in their pocket already. Indeed, that is really the only relevance of any references to heightened culpability—to inform the question of whether to assess punitive damages in connection with PacifiCorp's conduct. But because that question had already been resolved during Phase I, there was therefore no legitimate reason for Plaintiffs to remind the jury of those findings throughout Phase II, when punitive damages were ostensibly not at issue and only compensatory damages were to be determined. Coupled with the absence of any limiting or cautionary instruction that the jury should not assess any amount of economic or noneconomic damages for the purpose of punishing PacifiCorp for its Phase I conduct (or even a factual reminder to the jury that the Phase I jury already addressed the heightened culpability findings via its existing award of punitive and double damages), there is almost no question that the jury impermissibly considered the heightened culpability findings in its damages awards. A new trial is required.

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5. Precluding PacifiCorp from Referencing the Beachie Creek Fire to Challenge Causation of Plaintiffs' Property Damage, Emotional Distress, and Evacuation-Related Losses Was Error.

It was error to preclude PacifiCorp from introducing evidence that the Beachie Creek fire caused Plaintiffs' damages—including real and personal property damages, evacuation-related damages, and emotional and mental distress damages—and PacifiCorp incorporates all of the arguments described above (*see supra* at 25–28) for why the Phase I liability verdict failed to establish that the Santiam Canyon Fire, as opposed to the Beachie Creek fire, specifically caused each of the individual categories of claimed damages for each of the individual Santiam Canyon class members. In ruling on Plaintiffs' Motion in *Limine* No. 16 to exclude all references to the Beachie Creek fire, the Court correctly recognized that the Beachie Creek fire might be relevant to challenge causation as to some hypothetical categories of injuries for which there was an insufficient factual basis within the Phase I liability verdict. (*See* Jan. 2, 2024 Order on Plaintiffs' Motion in *Limine* No. 16.) But the Court otherwise granted Plaintiffs' request to preclude PacifiCorp from mentioning the Beachie Creek fire specifically with regard to evacuation-related losses and emotional distress (as well as certain property damage claims). That was error, and PacifiCorp should have been allowed to bring up the Beachie Creek fire to challenge specific loss causation as to each and every item of damages claimed by the Santiam Canyon Plaintiffs. At minimum, a new trial should therefore be held for the Santiam Canyon class members.

6. Precluding PacifiCorp from Discovering and Introducing Plaintiffs' Personal Property Inventories Was Error.

Both before and during trial, Plaintiffs were allowed to misuse the expert discovery process to deprive PacifiCorp of access to basic nonprivileged facts about their personal property losses. Specifically, (1) Plaintiffs were allowed to withhold their personal property inventories from PacifiCorp in discovery as long as they created those personal property inventories to provide to an expert, and (2) when those personal property inventories later

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1 appeared in Plaintiffs' expert discovery files, PacifiCorp was nonetheless prevented from
2 showing or introducing those to the jury. The end result was that Plaintiffs were able to
3 shield nonprivileged facts about their personal property losses using the expert discovery
4 process. That was error, and a new trial is warranted.

5 Before trial, PacifiCorp moved to compel the personal property lists or inventories
6 that Plaintiffs had personally created—even if those lists were created to be provided to an
7 expert. The Court disagreed, holding that such inventories were properly protected by expert
8 privilege. That was error. Such lists—which would have been created by the Plaintiffs
9 themselves—contained purely nonprivileged *facts* that should have been discoverable to
10 PacifiCorp before trial. Indeed, PacifiCorp was not seeking to discovery any inventories
11 created by experts or any other expert analyses or work product. But the underlying facts—
12 just like the facts underlying PacifiCorp's privileged origin and cause investigation from
13 Phase I—should have been discoverable during the fact discovery stage. (Nor did PacifiCorp
14 have any other realistic avenues to explore those underlying facts short of asking Plaintiffs to
15 identify during their depositions every item that they lost, which would not have been
16 possible in light of both the four-hour deposition time limits and the fact that most, if not all
17 Plaintiffs, were unable to recall their losses comprehensively.)

18 Moreover, the Court should have limited all of Plaintiffs' personal property appraisers
19 to testifying only about the values of items for which there existed some record evidence and
20 proper evidentiary foundations. Expert opinions must be based on "facts or phenomena" that
21 are "disclosed either by [the expert's] own testimony or that of other witnesses." *Henderson*
22 *v. Union Pac. Ry. Co.*, 189 Or 145, 180 (1950); *see also Peterson v. Schlottman*, 237 Or 484,
23 487 (1964) (expert opinion testimony "must be supported by evidence in the case" and may
24 not "include the assumption of a fact not in evidence"); *State v. Stringer*, 291 Or 527, 532
25 (1981) (when "material information" "relied upon by the expert" "was not in evidence," the
26 "trial court was correct in excluding the proffered opinion of the expert").

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While an appraiser can testify as to the value of lost items that are already in evidence, it's not appropriate for the Plaintiffs to testify about only a few lost items and have the expert assume not just the existence, but also the pre-fire condition and ultimate destruction, of the remainder—which is what happened during this trial. Indeed, Plaintiffs' theory during trial appeared to be that as long as each Plaintiff testified that they "had a conversation" with the expert about their losses—outside of the jury and not in the trial record—the expert has sufficient foundation to testify about losses. (*See, e.g.*, Phase II Trial Tr. 338:21-339:2 ("Now, you worked with an expert in this case to create a list of things that were lost, is that right?" "I did." "And is that list as accurate and complete as possible?" "Yes.").) That was not sufficient. If an expert offers testimony about the value of a lost item, some plaintiff must first testify "yes, I owned that and it was lost or damaged in the fire." (Or the item's existence, condition, and destruction must otherwise be attested by competent evidence.) Permitting experts to rely on "facts which not only were not in evidence but which could not have been admitted in evidence" (i.e., inadmissible personal property inventories) as evidence of Plaintiffs' ownership of various items, as well as its existence, condition, and destruction, was error. *Henderson*, 189 Or 145, 168 (granting new trial). Plaintiffs' experts should not have relied on those inventories as a basis for testifying about how much Plaintiffs lost. And the fact that "experts often rely on facts and data supplied by third parties" does not "give carte blanche to admitting otherwise inadmissible hearsay" through an expert. *Mission Ins. Co. v. Wallace Sec. Agency, Inc.*, 84 Or App 525, 528 (1987). Inventories supplied by Plaintiffs—and not admissible into evidence—are not "data supplied by third parties," nor do they bear any "extraneous indicia of reliability" such that an expert may rely on the data without risk of substantial inaccuracy. *Id*. The personal property expert opinions should have been excluded for lack of foundation.

Finally, it was also error for the Court to preclude PacifiCorp from introducing to the jury the personal property inventories that the experts relied on—whether created by the

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Plaintiffs themselves, created by the experts with input from Plaintiffs, or created through a collaborative process between Plaintiffs and their experts. These inventories should have been admissible as party admissions and were therefore not hearsay if offered against the Plaintiffs—as PacifiCorp was seeking to do. *See* OEC 801(4)(b)(A). Even to the extent they were created by or contributed to by the experts, the inventories would have still been adoptive admissions because Plaintiffs manifested their adoption or belief in their truth. *See* OEC 801(4)(b)(B). Indeed, Plaintiffs specifically testified during their trial examinations that they aimed to be as accurate and complete as possible in working with their experts, and on a basic level had adopted the experts' analyses as the measure of personal property damages that they are presenting to the jury. *See Pernix Ireland Pain Dac v. Alvogen Malta Operations Ltd.,* 316 F Supp 3d 816, 824 (D Del 2018) ("The rule that the Court derives from the cases construing Rule 801(d)(2)(B), as applied to statements of a party's expert witness that are offered as adoptive admissions of the retaining party, is this: The expert's statements, whether in the form of a deposition, an expert report, or testimony in another proceeding, will be regarded as an adoptive admission and thus not hearsay as to the retaining party if the circumstances in which the statement is made, used, or proposed to be used indicate that the party supports the statement as representing its position."). The inventories would not have been admissible by Plaintiffs, but they should have been admissible by Defendant as party admissions.

7. Permitting Plaintiffs to Tell the Jury That the "Law Says" the Maximum Noneconomic Damages Allowed Is $25 Million Was Error.

It was error to allow Plaintiffs to repeatedly tell the jury that the amount of economic or noneconomic damages requested by Plaintiffs in their Short Form Complaints—often $3 million in economic damages and $25 million in noneconomic damages—was the maximum amount of damages allowed by *the law*. (Phase II Trial Tr. 275:5-11 ("Now, as Judge Alexander will instruct you, you have the discretion to award up to $25 million per survivor

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for the noneconomic damages. That's the limit."); 1459:13-16 (stating that the value cannot exceed $25 million because "[t]hat is the maximum amount that you, the jury, can award."); 1468:9-11 (stating that "[e]ach of these categories together, this is why the law allows you to award up to $25 million to each of them.") These types of arguments misled the jury into thinking that Plaintiffs' unilateral damages demands were supported by the validity or blessing of the law—especially in the absence of any limiting instruction from the Court itself—and a new trial is therefore warranted.

There is no legislative authority or court findings that endorse or reflect a maximum (or a minimum, for that matter) amount of damages that any particular plaintiff in this case may recover. Rather, those maximum amounts exist solely because those are the amounts that Plaintiffs prayed for in their Short Form Complaints. Other than Plaintiffs (and their counsel) electing to plead damages in the amounts stated in the Short Form Complaints, there is no law that specifically entitles Plaintiffs to recover damages up to those amounts.

Meanwhile, Plaintiffs' intent in repeatedly telling the jury that *the law* allows an award up to that manufactured maximum amount was obvious. The effect of allowing Plaintiffs to use phrases like "*the law* allows you to award up to $25 million" was to create the perception that the damages figure Plaintiffs elected to request carried special legal significance, such as a predetermined maximum set by the Court or by statute. Of course, nothing of the sort exists. And for that reason, courts in other jurisdictions have explained that such statements are improper.[5] In short, this tactic was improper, unduly prejudicial, and significantly confusion.

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[5] *See, e.g.*, *Misch v. C. B. Contracting Co.*, 394 SW 2d 98, 102 (Mo App 1965) ("[A]n instruction which suggests an amount which can be recovered, without an explanation to take away the possibility that the jury will accept the amount as one which the judge thinks would be a proper figure, is improper."); *Bond v. St. Louis-San Francisco Ry. Co.*, 315 Mo 987, 1007, 288 SW 777, 785 (1926) ("An instruction on the measure of damages which fixes a maximum amount which the jury may allow, without disclosing any reason why the court has fixed the maximum at the particular figure named, carries to the minds of the jury a clear implication that the court is of the opinion that the evidence warrants an assessment up to the amount specified."); *cf. Range v. Van Buskirk Constr. Co.*, 281 Minn 312, 315, 161 NW2d 645, 647 (1968) ("[A]n instruction stating the statutory maximum amount of recovery may in

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At minimum, the Court should have instructed the jury that those maximum amounts referenced by Plaintiffs arose from the amounts prayed for by the Plaintiffs in their pleadings. The Court should have instructed the jury that the amount prayed for in the pleadings generally sets the threshold for recovery, that it did so in this case, and that the amount prayed for was merely a claim, was not evidence, should not be considered as evidence by the jury, and carried no special legal or factual significance. Such a limiting instruction was necessary to guard against the substantial risk that the jury would place undue weight on the amount prayed for in Plaintiffs' complaints rather than evidence of harm.

8. 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 improper, inadmissible, and inflammatory testimony and arguments while denying PacifiCorp the right to fully respond. The end result was a thinly veiled re-trial on PacifiCorp's conduct, the clear effect of which was to re-inflame the jury and re-encourage the jury to improperly insert a punitive component into the noneconomic damages awards in this case. There's little doubt the effect of these rulings "may have affected the outcome of the case." *Faro*, 326 Or at 323. The Court should order a new trial.

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some situations have the tendency to induce verdicts which are near the maximum amount because a jury may believe the legislature intended that the surviving next of kin should have such amount.").

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1 **F. The nonjoinder of Plaintiffs' spouses, businesses, and family members violated ORCP 29.**
2
3 Defendant renews and reincorporates its motion to dismiss Plaintiffs' claims for
4 failure to join indispensable parties (i.e., Plaintiffs' associated spouses, family members, and
5 businesses).
6 "A plaintiff must attempt to have all claims against a defendant arising out of one
7 transaction adjudicated in one court in one proceeding." *Rennie v. Freeway Transp.*, 294 Or
8 319, 327, 656 P2d 919 (1982). Plaintiffs have not followed that rule. ORCP 29 governs the
9 joinder of necessary persons to an action. When joinder is feasible, ORCP 29 A applies and
10 requires joinder of the necessary absentee. When joinder is not feasible, ORCP 29 B applies
11 and requires courts to determine whether the necessary absentee is also indispensable such
12 that the action should be dismissed.
13 "A party is a necessary party to a proceeding under ORCP 29 A if complete relief
14 cannot be accorded without the party, if the party's absence may impair their ability to
15 protect their interest, or if their absence may leave other parties subject to inconsistent or
16 multiple obligations." *Klamath Irrigation Dist. v. Oregon Water Res. Dept.*, 321 Or App
17 581, 591, 518 P3d 970, 976 (2022), *rev den*, 371 Or 21 (2023). Specifically, ORCP 29 A
18 requires joinder of an absent person "who is subject to service of process" in two separate
19 scenarios. The first scenario is where "in that person's absence complete relief cannot be
20 accorded among those already parties." ORCP 29 A(1). The second scenario is where the
21 absent person "claims an interest relating to the subject of the action and is so situated that
22 the disposition in that person's absence may (a) as a practical matter impair or impede the
23 person's ability to protect that interest or (b) leave any of the persons already parties subject
24 to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by
25 reason of their claimed interest." ORCP 29 A(2). In either of those two scenarios, "the court
26 shall order that such person be made a party." ORCP 29 A (emphasis added).

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1 The spouses are necessary parties because proceeding without them leaves PacifiCorp
2 "subject to a substantial risk of incurring double, multiple, or otherwise inconsistent
3 obligations." ORCP 29 A(2); *Klamath Irrigation Dist*, 321 Or App at 591. The parties'
4 stipulation does not resolve the fundamental problem: by splitting up Plaintiffs' claims from
5 those of their spouses, Plaintiffs will get to tell effectively the same story twice, to two
6 different juries, seeking two awards for the same basic claims and events. Many Plaintiffs
7 evacuated with their spouses. Plaintiff Scott Johnson and his wife, for example, had a
8 harrowing escape that left them wading across a cold river with their cat. Plaintiff Richard
9 Jensen and his wife escaped from Fishermen's Bend apparently minutes before a wall of
10 flame consumed their fifth wheel RV. The same is true for Plaintiff Stephen Nielsen and his
11 wife. Proceeding as-is means Plaintiffs will present the story of "me and my wife" in this
12 trial followed by the spouse presenting "me and my husband" in the next.
13 Plaintiffs' trial presentation bore this issue out. Plaintiff Scott Johnson, for example,
14 testified about his and his wife's harrowing evacuation story. Plaintiff Deborah Fawcett
15 testified about the impact of the fires on her daughter. Plaintiff Staniforth testified about
16 significant work done on his property by his company, which may maintain a separate
17 lawsuit against Defendant. Federal courts interpreting the corresponding federal rule to
18 ORCP 29 regularly find that spouses are indispensable parties who must be joined, and if
19 joinder is impossible, the claims in their entirety must be dismissed. *Torres-Gomez v. Litton*
20 *Loan Servicing*, 2010 WL 2280508, at *3 (D Ariz June 7, 2010) ("If Plaintiff's wife is not
21 joined as a plaintiff in this case, Defendants run a substantial risk of incurring double or
22 otherwise inconsistent obligations"); *Henson v. Air Nat. Guard Air Force Reserve Command*
23 *Test Ctr.*, 2007 WL 2903993, at *6 (D. Ariz. Sept. 28, 2007) ("If Plaintiff elects not to join
24 her husband as a plaintiff, all claims against Defendants * * * should be dismissed."); *Rook v.*
25 *First Liberty Ins. Corp.*, 591 F Supp 3d 1178, 1181 (N.D. Fla. 2022) (same); *Bickoff v. Wells*
26 *Fargo Bank, N.A.*, 2012 WL 3637381, at *3 (SD Cal Aug 20, 2012) (same).

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1 "[W]here, as here, a defendant has timely voiced objections to … Plaintiff[s']
2 simultaneous prosecution of multiple actions"—i.e., separate trials for Plaintiffs and their
3 spouses—the "onus is upon the plaintiff[s] not the defendant to accomplish any necessary
4 joinder." *Rennie*, 294 Or at 329. PacifiCorp timely raised this objection, and the
5 consequences are Plaintiffs' counsel's to own. *Navas*, 122 Or App at 199 (motions
6 enumerated in ORCP 21 G(3), including a motion to dismiss for failure to join indispensable
7 parties, may be brought up to and even during trial).

8 **V. RENEWED MOTION TO DECERTIFY**

9 **A. Legal Standard**

10 A class may only be certified if it satisfies certain requirements, including whether "a
11 class action is superior to other available methods for the fair and efficient adjudication of the
12 controversy." *Pearson v. Philip Morris, Inc.*, 358 Or 88, 106, 361 P3d 3 (2015); ORCP 32
13 B. A class certification order "may be conditional, and may be altered or amended before the
14 decision on the merits." ORCP 32 C; *see also Amgen Inc. v. Connecticut Ret. Plans & Tr.*
15 *Funds*, 568 US 455, 479 n.9 (2013) (class certifications "are not frozen once made"). A trial
16 court has "the affirmative duty of monitoring its class decisions." *Mazzei v. Money Store*,
17 829 F3d 260, 266 (2d Cir 2016) (quotation marks and citation omitted). And a court must
18 "'reassess … class rulings as the case develops'" in order to "ensure continued compliance"
19 with class requirements. *Amara v. CIGNA Corp.*, 775 F3d 510, 520 (2d Cir 2014) (cleaned
20 up). A trial court need not "consider each and every one of the listed" ORCP 32 B factors in
21 deciding to decertify a class so long as it considers the factors "relevant to a determination in
22 this case." *Belknap v. U.S. Bank Nat'l Ass'n*, 235 Or App 658, 667, 234 P3d 1041 (2010)
23 (affirming decertification). A district court can decertify a class it previously certified if the
24 issues underlying certification are "more 'nuanced' than the district court had initially
25 considered." *Webb v. Exxon Mobil Corp.*, 856 F3d 1150, 1156 (8th Cir 2017). Indeed, "[a]
26 district court may decertify a class at any time." *Rodriguez v. West Publ'g Corp.*, 563 F3d

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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.

B. For all the reasons set forth in PacifiCorp's Phase I Post-Trial Brief, the class must be decertified.

The first Phase II trial further demonstrated that the class should be decertified, for several reasons.

No Presentation of Individualized Defenses. PacifiCorp has a due process right "to present every available defense." *Lindsey*, 405 US at 66 (cleaned up); *see also* Phase I Post-Trial Br. 77–79; Phase I Post-Trial Reply Br. 59–61. It could not do so at Phase II. The Court instructed the jury that PacifiCorp was "the cause" of the harm to Plaintiffs (*see supra* at 29–31), effectively denying PacifiCorp the right to present individualized defenses with respect to each class member. This approach—in addition to the flawed Phase I trial, *see* Phase I Post-Trial Br. 77–79; Phase I Post-Trial Reply Br. 59–61—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) ("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. The combination of the shortcomings in the Phase I proceeding and the Court's instruction at Phase II allowed Plaintiffs to evade their evidentiary burden and present 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 the Court foreclosed that opportunity by instructing the jury that

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1 "liability," including issues of foreseeability, had already been decided. The class cannot
2 stand.
3 ***Class Claims Too Individualized.*** As the first Phase II trial has now demonstrated,
4 individualized issues predominated over class issues. (*See* Phase I Post-Trial Br. 81–84.)
5 The predominance inquiry "is designed to determine if proof as to one class member will be
6 proof as to all, or whether dissimilarities among the class members will require
7 individualized inquiries." *Pearson*, 358 Or at 111. As the Phase II trial made clear,
8 ascertaining whether each Plaintiff was harmed, to what degree, and by what cause was an
9 individualized enterprise not susceptible to class treatment. The plaintiffs all sought different
10 types of damages: some claimed injuries from harm to pets, some claimed smoke and ash
11 damage, and all claimed injuries that are necessarily individualized, such as aesthetic harms
12 or evacuation-related injuries. To be sure, none of these injuries are within the scope of the
13 Phase I verdict and are thus improper. (*See supra* at 9–14.) But the fact that each Plaintiff's
14 experience of the wildfires was so vastly different that they are not even seeking the same
15 types of damages underscores that individualized issues predominated here. This is
16 especially true because all of Plaintiffs' claims require proof of individualized harm or
17 causation. *See Piazza ex rel. Piazza v. Kellim*, 271 Or App 490, 516, 354 P3d 698 (2015)
18 (negligence); *Martin*, 221 Or at 90–94 (trespass); *Mark v. State Dep't of Fish & Wildlife*, 158
19 Or App 355, 360, 974 P2d 716 (1999) (private nuisance); *Smejkal v. Empire Lite-Rock, Inc.*,
20 274 Or 571, 574, 657 P2d 1363 (1976) (public nuisance). These are necessarily
21 individualized injuries unique to each plaintiff, as the Phase II trials have now demonstrated.
22 Further, the evidence of causation varied from parcel to parcel and from person to
23 person (in the case of noneconomic harms). This was especially true with regard to the
24 Santiam Canyon class: with the dozens of spot fires and the looming Beachie Creek fire,
25 there were property-specific explanations for why fire damage occurred and there were
26 person-specific explanations for why evacuation-related injuries and other emotional and

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1 noneconomic harms occurred. Given the plethora of potential alternative causes of harm,
2 individualized issues ultimately predominated over class issues. (*See* Phase I Post-Trial Br.
3 81–84; Phase I Post-Trial Reply Br. 63–65.)

4 ***Not Ascertainable.*** Although Plaintiffs have arbitrarily selected a handful of class
5 members to proceed with the Phase II trials, they have not cured the fundamental issue that
6 the class is not ascertainable. (*See* Phase I Post Trial Br. 87–88; Phase I Post-Trial Reply Br.
7 68.) Classes must be "sufficiently ascertainable." *Bernard*, 275 Or at 156. The class here
8 was defined by reference to those who "experienced fire activity" or "experienced fire
9 damage." Plaintiffs still have not put forward any way of determining *ex ante* who falls
10 within this category—the only way to determine class membership is through the trial of
11 individual prospective class members' claims, to determine whether they *actually*
12 "experienced fire activity." This failure of ascertainability requires decertification. (*See*
13 Phase I Post Trial Br. 87–88; Phase I Post-Trial Reply Br. 68.)

14 ***Fail-safe Class.*** Phase II has also underscored why the class as defined is an
15 impermissible fail-safe class. (*See* Phase I Post Trial Br. 88–89; Phase I Post-Trial Reply Br.
16 68–69.) A "fail-safe class" is one that is defined by whether a person has a valid claim.
17 *Messner v. Northshore Univ. HealthSystem*, 669 F3d 802, 825 (7th Cir. 2012). The class
18 here is determined by whether an individual experienced "fire damage." But that is itself an
19 element of Plaintiffs' claims. If PacifiCorp were to prevail at a Phase II trial and the jury
20 were to find a Plaintiff experienced no damage, that Plaintiff would be defined out of the
21 class. This is the very definition of a fail-safe class. The class here must therefore be
22 decertified.

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1 **VI. CONCLUSION**

2 For the foregoing reasons, the Court should vacate the Phase II jury verdict, enter

3 judgment in favor of PacifiCorp, order a new trial, and/or decertify the class.

4 DATED: February 12, 2024

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CERTIFICATE OF SERVICE

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

☐	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(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.

Service List Attached

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