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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' AMENDED MOTION TO STAY CMO NO. 11 DAMAGES TRIALS Assigned to: Hon. Steffan Alexander

UTCR 5.050 STATEMENT

Defendants PacifiCorp and Pacific Power (collectively, "PacifiCorp") request oral argument on this motion and estimate that 30 minutes will be required. Pursuant to the Court's Order Granting, in Part, Defendants' Expedited Emergency Motion to Stay CMO No. 11 Damages Trials dated April 9, 2026 (the "April 9 Order Granting CMO 11 Stay"), the Court previously scheduled an in-person hearing on this motion for Friday, May 22, 2026, at 3:00 p.m. Official court reporting services are requested.

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MOTION

In *James v. PacifiCorp*, 348 Or App 347, __ P3d __ (2026) (the "Court of Appeals Decision"), the Court of Appeals reversed and remanded the Phase I limited judgment and Phase II, Trials 1 and 2 limited judgments. Based on the Court of Appeals Decision, and consistent with the Court's April 9 Order Granting CMO 11 Stay, PacifiCorp moves for a stay of all proceedings under the Court's Case Management Order No. 11 ("CMO 11"), including all ongoing and scheduled damages trials and all associated deadlines (including with respect to any limited judgments not yet entered), except with respect to the following specific matters: (1) motions to offset economic damages awards for any CMO 11 damages trials that have been completed to date; (2) mandatory mediation as set forth in CMO 11; and (3) limited perpetuation depositions and related discovery on an as needed basis as determined by the parties or the Court for selected absent class members who have filed Short Form Complaints as of the date of this motion and who also qualify as "Priority Plaintiffs" as defined in CMO 11..

PacifiCorp requests that the stay remain in place until either (1) the issuance of an appellate judgment following the denial of Plaintiffs' petition for review in the Oregon Supreme Court, (2) the issuance of an appellate judgment following a decision on the merits of the Oregon Supreme Court affirming the decision by the Oregon Court of Appeals, or (3) at least fourteen (14) days following a decision on the merits by the Oregon Supreme Court reversing the Oregon Court of Appeals, at which point the Court should schedule a case management conference to allow the parties an opportunity to submit further briefing regarding whether an extension of the stay is appropriate.

This Motion is supported by the following points and authorities, the pleadings and papers on file, and the record in this action, as well as the Declaration of Brad S. Daniels in Support of Defendants' Amended Motion to Stay CMO No. 11 Damages Trials ("Daniels Decl."), filed herewith.

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POINTS AND AUTHORITIES

I. INTRODUCTION

On April 8, 2026, the Court of Appeals issued its opinion on PacifiCorp's appeal from the Phase I liability trial (and the first two damages trials). The court reversed and remanded, holding that the Court's erroneous class action jury instruction prejudiced PacifiCorp and required reversal of the judgment. *See* Court of Appeals Decision, copy attached as Appendix A. The Court of Appeals' opinion is comprehensive and unequivocal. The liability verdict on which all CMO 11 damages trials are proceeding has been reversed. Absent that liability verdict, no class member has a legally valid claim for damages on which they can proceed under CMO 11.

Based on the Court of Appeals Decision, all proceedings under CMO 11, including all ongoing and scheduled damages trials and all associated deadlines with limited exceptions discussed below, should be stayed until there is a clear path for resolving Plaintiffs' claims. Issuing such a stay is clearly within the Court's power. Indeed, "the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. Am. Co*., 299 US 248, 254, 57 S Ct 163 (1936). Moreover, in the context of class actions, courts are expressly authorized to "make appropriate orders * * * [d]ealing with * * * procedural matters." ORCP 32 E(5). A stay is just such a "procedural" order authorized under ORCP 32 E(5).

Issuing a stay is also the right and just thing to do. The Court of Appeals Decision has completely removed the liability verdict supporting all the pending CMO 11 damages trials. There is no longer any legitimate legal basis on which to conduct further damages trials. To ignore this fact and continue to try CMO 11 damages trials would significantly harm the interests of the parties and the public. It would also result in an enormous expenditure of judicial resources that could be better used to decide claims that are not

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legally defective on their face. If absent class members have a legitimate need to preserve their testimony, those needs can and should be met through perpetuation depositions and related discovery as opposed to by subjecting the parties, the public and the court system to the enormous burden of dozens of jury trials that will almost certainly be for naught.

Plaintiffs' suggestion that the Court of Appeals Decision may be reviewed and reversed does not alter this conclusion. The likelihood of review and reversal is remote, particularly where, as here, the opinion is extensively documented, well-reasoned *and* unanimous. Nor would reversal automatically restore the legal footing of the pending CMO 11 trials. At most, it would send the case back to the Court of Appeals for consideration of PacifiCorp's other assignments of error, including whether class certification was appropriate—an issue that the Court of Appeals explicitly suggested should be revisited before the case moves forward. The parties, the public and the court system should not be subjected to the overwhelming burden of more CMO 11 damages cases based on Plaintiffs' speculation that subsequent appellate rulings will fully reinstate the Phase I liability verdict.

For all of these reasons, explained more fully below, the Court should continue its current stay of CMO 11 proceedings until either (1) the issuance of an appellate judgment following the denial of Plaintiffs' petition for review in the Oregon Supreme Court, (2) the issuance of an appellate judgment following a decision on the merits of the Oregon Supreme Court affirming the decision by the Oregon Court of Appeals, or (3) at least fourteen (14) days following a decision on the merits by the Oregon Supreme Court reversing the Oregon Court of Appeals.

II. PROCEDURAL BACKGROUND

A. The Court of Appeals Decision

The Court of Appeals' unanimous 40-page opinion reversed the Phase 1 liability verdict on grounds that the instruction allowing the jury to "simply 'assume that the evidence at trial applied to all class members'" was erroneous and prejudiced PacifiCorp. *James*, 348

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Or App at 371. According to the Court of Appeals, this instruction, which was emphasized by Plaintiffs' counsel in both their closing and rebuttal arguments, improperly allowed the jury to "assume" that evidence related to one fire at a specific location in the Santiam Canyon (for example) applied to "a different plaintiff, whose property was destroyed miles away, in a different part of the Santiam Canyon, due to a different fire caused by a different ignition." *Id.* at 372. Highlighting this problem, the Court of Appeals explained that "evidence that an individual saw an ignition on Echo Mountain * * * and had property destroyed by the Echo Mountain Complex Fire" could not be "'assumed' to apply to plaintiffs over a hundred miles away whose property was destroyed by a different wildfire entirely." *Id*. Nor could it be "assumed" that "evidence that PacifiCorp caused fires that forced firefighters to evacuate the Santiam Canyon has any application to PacifiCorp's liability to plaintiffs in, for example, the South Obenchain Fire boundary." *Id*.

In reaching this conclusion, the Court of Appeals contrasted this case from other class actions, where "a tortious act * * * was uniform and without material variation." *Id*. at 373. Unlike in those instances, this case "involved multiple wildfires" and "much of the evidence introduced during the Phase I trial, particularly regarding causation, related to particular issues concerning particular wildfires—and for the Santiam Canyon, to particular ignitions at particular locations in the approximately 71 square mile Santiam Canyon." *Id*. Therefore, "it could not just be 'assumed' that [the evidence] applied * * * 'to all class members.'" *Id*.

The Court of Appeals then went on to explain that the problems caused by the instruction were "compounded, not improved" by the trial court's further instruction that there was a "*single* class." *Id*. at 374 (emphasis in original). Explaining this point, the Court of Appeals stated:

> "Given that instruction defining the single class that was certified—which appeared in the jury instructions immediately prior to the 'Class Questions Defined' jury instruction PacifiCorp challenges on appeal—the jury could have understood the instruction, 'You may assume that the evidence at the trial applies

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> to all class members,' to mean that evidence demonstrating that plaintiffs were harmed in one wildfire due to PacifiCorp could be 'assumed' to be applicable to plaintiffs who were harmed in a different wildfire entirely; after all, the jury was instructed that every class member was a part of one, big, single class."

Id. at 375.

The Court of Appeals also specifically concluded that the erroneous instruction was prejudicial to PacifiCorp. *Id*. at 377-78. In so doing, it squarely addressed—and rejected—Plaintiffs' arguments that any potential harm from the instruction was remedied by the structure of the verdict form (including its "class questions"), in part because the jury was instructed that there was only a single class and told to "'answer the class questions based on evidence that applies to the class as a whole' and also that it could 'assume that the evidence at the trial applies to all class members.'". *Id*. at 376. It also found that the prejudice caused by the instruction was

> "amplified by plaintiffs' counsel arguing to the jury that it could find PacifiCorp liable for the harm in the Santiam Canyon if PacifiCorp was 'a cause of the harm that night,' and that PacifiCorp 'admit[ted] they cause[d] harm in the Santiam Canyon' because PacifiCorp 'admit[ted] they started fires in the Santiam Canyon.' That is, if the jury was permitted to 'assume that the evidence at the trial applies to all class members,' as the trial court instructed it, it could also assume that PacifiCorp's admission to starting any particular fire in the Santiam Canyon was sufficient to determine that it caused harm to every plaintiff in the Santiam Canyon, as plaintiffs' counsel's argument suggested."

Id. at 377-78.

The Court of Appeals Decision was not only unanimous, but sound, well-reasoned, and amply supported by Oregon law. It appropriately recognized that the challenged instruction allowed the jury to make a class wide liability finding without requiring Plaintiffs to prove that PacifiCorp caused harm to each class member and found that under the facts of the Phase 1 trial, that error significantly prejudiced PacifiCorp.

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In the concluding section of its decision, the Court of Appeals also raised serious questions about the propriety of the certification of a single class given the varied evidence presented at trial. *See, e.g.*, *id*. at 374 (explaining that much of the evidence presented at trial could not be assumed to apply to all class members "in part because * * * the trial court certified a single class consisting of the owners of thousands of parcels of property, some of whom live over 100 miles away from one another and whose properties were affected by different wildfires that ignited under different circumstances."). The Court of Appeals also strongly suggested that this Court could potentially remedy such issues on remand:

> "We also emphasize that, with the benefit of knowing how the Phase I trial developed, including plaintiffs' eleventh-hour motion to amend the boundary for the Santiam Canyon Fire, the trial court has the authority on remand to reconsider its class certification decision and reconsider whether a single class is appropriate in this case. *See* ORCP 32 C(1) (class certification order 'may be altered or amended before the decision on the merits')."

Id. at 380. By including these points in its opinion, the Court of Appeals essentially invited a reset of this case. It also signaled that there is another path forward—one that would *not* include the certification of a single class across all four fires.

B. Potential Supreme Court Review

During the hearing on PacifiCorp's Emergency Motion to Stay, Plaintiffs stated that they intend to seek review of the Court of Appeals Decision with the Oregon Supreme Court. Assuming Plaintiffs' petition for review is timely filed on May 13, 2026, PacifiCorp will have 14 days within which to respond to the petition. There is no reply. The Supreme Court typically resolves petitions for review within six to eight weeks after the petition is fully briefed, depending on the workload of the court and staff, and when the petition is set for the Justices' weekly conference.

Assuming the Supreme Court does not diverge from normal practice, the denial of a petition for review would occur by approximately mid- to late July 2026. The case would

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then return to the Court of Appeals, and the State Court Administrator ("Administrator") would issue an appellate judgment no less than 28 days later (allowing sufficient time for a petition for fees and costs to be filed). ORAP 14.05(3)(c).

Accordingly, if the Supreme Court denies review (which is the most likely outcome), the appellate judgment would be mailed and this Court would assume jurisdiction on remand in or around August or September 2026. *See* ORS 19.270(6) ("Jurisdiction of the appellate court over a cause ends when a copy of the appellate judgment is sent by the State Court Administrator to the court from which the appeal was taken pursuant to ORS 19.450 * * *.").

Should review be granted (a far less likely outcome), briefing on the merits would occur within 70 days, absent extensions. Oral argument likely would be scheduled within three months, and a final decision likely would be issued by the Oregon Supreme Court within six months to a year thereafter. According to the most recent budget document submitted by the Chief Justice:

> "The Supreme Court strives to issue more than 50 percent of its written decisions within six months of argument or submission, with no decisions issued more than one year after argument or submission. For the most part, in recent years, the court has released more than 55 percent of its decisions within the six month timeframe, with a few decisions past the one-year timeframe."

Oregon Judicial Department, Chief Justice's Recommended Budget, 2025-27 Biennium, at 125, www.courts.oregon.gov/about/Documents/2025-27CJBudget.pdf (last visited April 17, 2026).

Assuming the Supreme Court affirms the Court of Appeals, the appellate judgment would issue immediately following expiration of the 28-day reconsideration waiting period described above, and this Court would assume jurisdiction thereafter. If, on the other hand, the Supreme Court reverses the Court of Appeals, the court would not issue an appellate judgment, but a judgment on remand, which would send the case back to the Court of Appeals for resolution of PacifiCorp's remaining assignments of error and Plaintiffs' cross-appeal.

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III. ARGUMENT

A. This Court Has Authority to Stay the CMO 11 Proceedings Based on the Court of Appeals Decision.

Oregon courts have long recognized that trial courts have authority to "stay or dismiss an action for prudential reasons as an exercise of their inherent power to administer justice." *Espinoza v. Evergreen Helicopters, Inc.*, 359 Or 63, 90, 376 P3d 960 (2016). For example, in *Helms Groover & Dubber Co. v. Copenhagen*, 93 Or 410, 416, 177 P 935 (1919), the Oregon Supreme Court explained that "[i]t is the general rule that either the lower or appellate court, according to the circumstances, has inherent power to grant a stay of proceedings pending an appeal even where there is no statute entitling a party to such stay." Similarly, in *Espinoza*, the Oregon Supreme Court reiterated that "'*courts of general jurisdiction* * * * have the *inherent power* to do whatever may be done under the general principles of jurisprudence to insure to the citizen *a fair trial*, whenever his life, liberty, property or character is at stake.'"[1] 359 Or at 90 (italics and omission in original) (quoting *State ex rel. Ricco v. Biggs*, 198 Or 413, 430, 255 P2d 1055 (1953)). Moreover, given that this is a class action, the court expressly is authorized to "make appropriate orders * * * [d]ealing with * * * procedural matters," including a stay (which is a "procedural" order). ORCP 32 E (5).

When considering whether to "place[] cases into abeyance pending the outcome of other proceedings," Oregon courts have found "instructive" "the following factors identified by federal courts in determining whether to stay a civil proceeding in the face of criminal

[1] Notably, Plaintiffs themselves relied on *Espinoza* in their Motion to Consolidate and Stay Related Case in *Dietrich v. PacifiCorp*, No. 22CV29187, filed on October 17, 2022. In that motion, Plaintiffs argued that "absent a stay" of *Dietrich*, "there will be inevitable duplication between the actions, and this Court (or another court) will likely be forced to hear and decide nearly identical issues and disputes in parallel. To preserve judicial resources, promote efficiency, and reduce the burden on the Court and the parties, the Court should therefore stay *Dietrich* pending completion of the issues class trial in *James*." (*Id*. at 5.) The same reasons support a stay of all CMO 11 proceedings and deadlines in this case—even more so now given the Court of Appeals Decision.

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proceedings," which "can be summed up as (1) the interests of the parties, (2) the convenience of the court and the efficiency of its processes, and (3) the [i]nterests of nonlitigants and other members of the public." *Seneca Sustainable Energy, LLC v. Dep't of Revenue*, TC 5323, 2018 WL 1413794 at *1–2 (Or Tax Mar. 7, 2018).

Applying these and similar factors, both Oregon and federal courts have routinely "placed cases into abeyance" pending the outcome of other proceedings, even where such other proceedings are not dispositive of the case being stayed. *Id.* at *1 (granting plaintiff's "request to place th[e] case into abeyance" pending the outcome of another case before the Oregon Supreme Court); *see also Dependable Highway Express, Inc. v. Navigators Ins. Co.*, 498 F3d 1059, 1066 (9th Cir 2007) (holding that a trial court may "'find it is efficient for its own docket and the fairest course for the parties to enter a stay of an action before it, pending resolution of independent proceedings which bear upon the case'" (citation omitted)); *Nationstar Mortg., LLC v. RAM LLC*, No 2:15-CV-01776-KJD-CWH, 2017 WL 1752933 at *1–2 (D Nev May 4, 2017) (granting a stay pending certiorari petitions in related cases "[t]o save the parties from the need to invest resources preparing for trial," where Supreme Court review had "the potential to be dispositive of this case or major discrete issues presented by it"); *Stone Container v. Fryman*, 112 Or App 8, 9, 827 P2d 205 (1992) (per curiam) (noting that, "[a]t the request" of a party, "the case was held in abeyance pending the court's decision in a case presenting similar issues"); *Goldhammer v. Adult & Fam. Servs. Div.*, 63 Or App 587, 589 n 1, 666 P2d 268 (1983) (noting that the case, "together with several others, has been held in abeyance pending our resolution of two other attorney fee cases remanded to us for reconsideration by the Supreme Court").

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B. Granting a Stay Would Serve the Interests of the Parties, the Court and the Community.

1. The Interests of the Parties

Based on the foregoing factors, a stay is plainly appropriate in this case. To begin with, a stay would serve the interests of the parties by permitting the Court to consider dispositive and controlling issues prior to incurring the time and expense of trying cases that would almost certainly have to be retried after the appellate review process is complete.

The Court of Appeals has already reversed the dispositive liability determination on which the CMO 11 trials are based, leaving no legitimate legal basis on which to conduct further damages trials. Assuming the Oregon Supreme Court denies review or affirms the Court of Appeals Decision, the case will be remanded to this Court for potential reconsideration of class certification and a new determination of liability, which may result in multiple liability trials that may well lead to different results. And even under the far less likely scenario that the Court of Appeals Decision is reversed, further appellate proceedings are certain to follow and may well, on their own, lead to reconsideration of the class certification decision and potentially different class configurations on retrial.

Given these circumstances, a stay of further damages trials is entirely appropriate. Even assuming reversal, neither "the interests of the parties," the Court or "the public interest," are served by prematurely deciding issues when "the outcome of the Supreme Court appeal will substantially affect the proceedings in this case[;]" rather, "[i]t is in the interests of the parties to find out the required starting point before spending resources" on litigation. *Seneca*, 2018 WL 1413794 at *2.

The specific benefits of such a stay to the parties are obvious. For PacifiCorp, the benefits would not only include being spared the expense of having to litigate and defend itself against dozens of damages trials, each of which would expose it to $250 million or more in potential liability, but also the potential entry of additional limited judgments

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requiring the issuance of costly bonds pending appeal—all based on a liability determination that has been reversed.

The class members awaiting trial would also benefit from avoiding damages trials that are likely to be for naught. While Plaintiffs' counsel may argue (as they have in the past) that any delay associated with a stay would prejudice absent class members, the ordeal of having to prepare for and go through not just one, but two trials would be far worse. Each class member who testifies would be forced to testify not just once, but twice—an experience that comes with its own disruption, stress, and costs. It is not in their best interests, nor does it protect their rights, to march ahead with more CMO 11 damages trials that will result in more verdicts and limited judgments that cannot stand once the appellate judgment is final.

None of this is to deny that some class members may be impacted by the passage of time on their memories or ability to testify. But the appropriate way to address any such impacts is not to hold additional trials with no legal foundation, but to engage in perpetuation depositions and discovery incident to perpetuation depositions for those who have such need so their claims can be properly presented once the legal landscape is defined with greater certainty. That is why PacifiCorp's proposed stay would allow perpetuation depositions and related discovery of absent class members who have filed Short Form Complaints as of the date of the *James* decision and who also qualify as "Priority Plaintiffs" as that term is defined in CMO 11, to the extent such discovery is mutually agreed upon by the parties or ordered by this Court.

2. The Interests of the Court

A stay would also serve the interests of the Court. The Phase II damages trials under CMO 11 have imposed unprecedented burdens on the Multnomah County Circuit Court system. Even Plaintiffs' counsel was forced to acknowledge this fact during the April 9 hearing, admitting that he "recognize[s] the burden on the court as a whole with respect to these trials." (Daniels Decl., Exhibit 1 at 5:24-25 [4/9/26 hearing transcript].) By its terms,

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CMO 11 contemplates holding approximately 160 jury trials involving more than 1,900 class members over 2026 and 2027. Each trial is set for up to nine days, meaning that it contemplates that counsel for both PacifiCorp and the class members will be in jury trials virtually every day for the rest of this year and all of next year. CMO 11 also requires Plaintiffs to file at least 10 amended short form complaints per week, all while the parties are engaging in ongoing document discovery and scheduling and taking hundreds of plaintiff and third-party depositions, not to mention locating and working with experts, and filing pre-trial and trial motions. Given the sheer breadth of these demands, both sides have been forced to recruit new teams of lawyers who were not involved in either the Phase I liability determination or the initial damages trials. And the Multnomah County Circuit Court system has been forced to assign multiple additional judges to handle the overwhelming flow of cases, all of whom are being compelled to digest and apply an extraordinarily complex and ever-growing set of pre-trial and evidentiary rulings that have evolved over the trials to date.

Given the Court of Appeals Decision, there is no legitimate basis to continue to impose such unprecedented burdens on the court system unless and until the legal foundation for the class members' claims is clarified. Contrary to Plaintiffs' contentions, the mere fact that the CMO 11 trials have already been scheduled does nothing lessen the burden. Absent a proper legal foundation, there is no basis to continue to try cases merely because they've been scheduled. This is particularly true within an already congested court system, where trying such cases will continue to take up valuable time that the Court and the other Multnomah County Circuit Court judges could be spending on *other* civil cases, cases for which an appellate court has *not* already determined are premised on legally erroneous liability findings. Indeed, if there ever was a case for when a stay is necessary to preserve (and avoid wasting) judicial resources, this is it.

Imposing a stay would also allow the Court to escape potentially difficult practical problems associated with implementing CMO 11 after the Court of Appeals Decision,

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including issues related to discovery, jury instructions and preservation. For example, the Court of Appeals Decision arguably opens the door to broader discovery from each of the class members beyond that limited to their damages, including discovery related to the underlying liability issues (such as, for example, any Santiam Canyon plaintiffs' experiences with the lightning-caused Beachie Creek Fire).

There would also be questions about what jury instructions should be given in light of the Court of Appeals Decision. Would the Court continue to instruct CMO 11 juries that the Phase I jury found that PacifiCorp was "the cause" of harm to the entire class? Would the Court continue to instruct CMO 11 juries that PacifiCorp's conduct was found to be grossly negligent, reckless and willful, even though the Phase 1 liability finding has been reversed? Those instructions are not aligned with the Court of Appeals Decision, but would they be given anyway? And how could such instructions be crafted without creating even more potential grounds for reversal?

Continued adjudication of the CMO 11 trials also would present preservation concerns. How would PacifiCorp ensure that all of its arguments and defenses against entry of any limited judgments are preserved, and how would the Court substantively address such arguments? This issue alone likely would result in even more briefing—and therefore require the expenditure of more time and resources—than already has been required.

3. The Interests of the Community

The interests of the community and the prospective jurors of Multnomah County would also be furthered by imposing a stay. As noted above, the intense trial calendaring required by CMO 11 takes time away from other civil litigants being able to "have their day in court" and get resolution of their cases. A stay would protect the rights of parties and persons who are *not* part of these proceedings so they can have timely access to the courts.

Moreover, a stay would protect the rights and interests of prospective jurors. It would be unfair and a waste of the jurors' time to require them to participate in damages trials and

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render verdicts that cannot stand under the Court of Appeals Decision. This is particularly true given the amount of juror time involved; for each of the dozens of weekly trials at least 50 jurors are required to sit through a full day of voir dire, after which at least 14 are seated for the trial and 12 are required to follow through with deliberations.

In sum, continuing to adjudicate the CMO 11 damages trials is not beneficial to any of the relevant entities. It would not serve the interests of the parties, the Court or the community, but instead would impose enormous burdens—without any legitimate justification.

C. Plaintiffs' Arguments Against a Stay Are Without Merit and Should Be Rejected.

PacifiCorp does not know precisely what justification Plaintiffs will offer in support of their opposition to a stay of CMO 11 damages trials and proceedings. However, at the April 9, 2026 hearing on PacifiCorp's Emergency Motion for Stay, Plaintiffs suggested at least two potential reasons not to grant the stay requested by PacifiCorp: (1) because the Court of Appeals Decision has not been reduced to an appellate judgment, it has no legal effect and should be ignored; and (2) there is no reason to halt the CMO 11 trials because the Court of Appeals Decision may be reviewed and reversed. Neither of these arguments has any merit.[2]

Plaintiffs' first argument—that the Court of Appeals Decision is of no effect because it has not been reduced to an appellate judgment—elevates form over substance and is nothing more than a bid for delay. To be sure, Oregon law on appellate decision-making distinguishes between a "decision" and an "appellate judgment." ORS 19.450(1) defines a

[2] Presumably, Plaintiffs also may argue that the class members whose damages claims have not yet been tried will be prejudiced by further delay of having their "day in court." For the reasons explained above, this argument does not justify continued adjudication of the CMO 11 damages trials as it is not in anyone's best interest to proceed towards entry of more verdicts and limited judgments that are likely to be reversed. And any concerns about the preservation of claims and memories can be resolved by allowing limited discovery (*i.e.*, perpetuation depositions) during the pendency of the stay.

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"[d]ecision" as "a memorandum opinion, an opinion indicating the author or an order denying or dismissing an appeal." A decision also designates the prevailing party or parties, states whether the prevailing party is awarded costs and, if so, states who is to pay the costs. ORAP 14.05(1)(b). Most importantly, it is the ***decision*** of the appellate court "that is the resolution of the case or controversy presented on appeal." *State v. Moore*, 308 Or App 724, 727, 482 P3d 222 (2021). The appellate judgment, in turn, is merely "the mechanism to enforce [the appellate court's] resolution" of the case. *Id*.

Consistent with this fact, Oregon appellate courts do not allow parties to gain procedural advantages because of an interim period between the issuance of a decision and the issuance of an appellate judgment. *See id*. (declining appellant's motion to dismiss appeal, which was filed in an attempt to circumvent appellate decision). Nor is there any basis to do so here. The Court of Appeals is the only appellate court to substantively address the legality of the Phase I verdict, and it determined that the limited judgment must be reversed. In deciding how to proceed, this Court should focus on the *actual* status of the case and act in a manner that is consistent with the Court of Appeals Decision. A stay of the CMO 11 proceedings and damages trials *is* consistent with that decision; continuing to adjudicate damages trials premised on an invalid liability verdict is not. Plaintiffs' suggestion that the decision should be ignored because it has not yet been reduced to a judgment is an invitation to gamesmanship that the Court should decline.

Plaintiffs' further suggestion that the Court of Appeals Decision is subject to review and could be reversed is similarly unavailing. As already discussed, the likelihood of review and reversal is remote, particularly given the reasoned nature of the Court of Appeals Decision. Plaintiffs can only speculate that the Oregon Supreme Court will both accept review *and* reverse, and the parties, the Court and the public should not be subjected to the burdens of continued constant CMO 11 damages trials based on speculation.

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Nor would reversal automatically restore the legal footing for the pending CMO 11 trials as Plaintiffs suggest. Rather, it would merely send the case back to the Court of Appeals for consideration of PacifiCorp's other assignments of error, including whether class certification was appropriate. As discussed above, the Court of Appeals explicitly suggested that class certification should be revisited before the case moves forward. For all of these reasons, there is no reasonable likelihood that the Oregon Supreme Court will simply restore the status quo (as it existed before the Court of Appeals Decision) so the CMO 11 trials can continue unabated. Moreover, the Court should not rely on any such assumption to expose the parties, the public and the court system to the overwhelming burden of continuing to try CMO 11 damages cases.

D. The Stay Should Extend to and Include the Entry of Any Additional Limited Judgments for Completed Phase II Damages Trials.

Plaintiffs may also contend, as they did during an April 10, 2026 hearing on an unrelated motion, that the Court should not extend the stay to post-trial matters for the CMO 11 damages trials that have been conducted to date, including with respect to the entry of limited judgments. There is no basis for such an exception. Fundamentally, it makes no sense and would contradict the Court of Appeals Decision to enter more limited judgments that, foundationally, are based on an invalid liability verdict. The Court of Appeals has determined that the Phase I and Phase II, Trial 1 and 2 limited judgments should be reversed, and it serves no purpose for this Court to enter additional limited judgments that are also almost certain to be reversed.

The entry of such judgments would also impose additional and unnecessary burdens on the parties and the court system by triggering other deadlines and required actions. For example, ORCP 63 D(1) and ORCP 64 F(1) establish deadlines for the filing of motions for judgment notwithstanding the verdict and for new trial based on the date of "entry of the judgment sought to be set aside," and if those motions are not heard or determined within 55

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days, they are deemed denied. The decision or deemed denial of those post-trial motions then trigger a deadline for the filing of a notice of appeal. *See* ORS 19.255(2). None of this is necessary given the current state of the case and would cause further waste of the parties' and the Court's resources.

Allowing the entry of additional limited judgments may also require PacifiCorp to post additional bonds at great expense to PacifiCorp and possible liability to Plaintiffs if those costs are awarded on appeal. To date, Plaintiffs have declined to waive or reduce the supersedeas bond requirement, and so PacifiCorp has been forced to post bonds totaling millions and millions of dollars to stay execution of each and every one of the limited judgments. There is no legitimate basis to subject PacifiCorp to those burdens or that harm given the Court of Appeals Decision.

IV. CONCLUSION

For the foregoing reasons, the Court should stay *all* proceedings under CMO 11, including all ongoing and scheduled damages trials and all associated deadlines—including the entry of any additional limited judgments—subject to the specific exceptions below, until either (1) the issuance of an appellate judgment following the denial of Plaintiffs' petition for review in the Oregon Supreme Court, (2) the issuance of an appellate judgment following a decision on the merits of the Oregon Supreme Court affirming the decision by the Oregon Court of Appeals, or (3) at least fourteen (14) days following a decision on the merits by the Oregon Supreme Court reversing the Oregon Court of Appeals, at which point the Court should schedule a case management conference and to allow the parties an opportunity to submit further briefing regarding whether an extension of the stay is appropriate. The foregoing stay should be subject to the following specific exceptions: (1) motions to offset economic damages awards for any CMO 11 damages trials that have been completed to date; (2) mandatory mediation as set forth in CMO 11; and (3) limited perpetuation depositions and related discovery on an as needed basis as determined by the parties or the Court for

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absent class members who have filed Short Form Complaints as of the date of this motion and who also qualify as "Priority Plaintiffs" as defined in CMO 11.

DATED: April 23, 2026

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FILED: April 8, 2026

IN THE COURT OF APPEALS OF THE STATE OF OREGON

Jeanyne James; Robin Colbert; Jane Drevo; Sam Drevo; Brooke Edge and Bill Edge, Sr.; Lori Fowler; Iris Hampton; James Holland; Rachelle McMcaster; Kristina Montoya; Northwest River Guides, LLC; Shariene Stockton and Kevin Stockton, Victor Palfreyman; Palfreyman Family Trust; Duane Brunn, individually and on behalf of all others similarly situated; Alfred Cuozzo; Deborah Jo Fawcett; David Giller, Sr.; Richard Jensen; Scott Johnson; Frank King, individually and in his capacity as trustee of the King Revocable Trust; Stephen David Nielsen; Cory Staniforth; and Deborah Tank,
Plaintiffs-Respondents
Cross-Appellants,

and

Mary Kathleen Becherer et al.,
Plaintiffs,

and

Oregon Department of Justice,
Creditor-Respondent,

v.

Pacificorp, an Oregon Corporation, and Pacific Power an Oregon registered electric utility and assumed business name of Pacificorp,
Defendants-Appellants
Cross-Respondents.

Multnomah County Circuit Court
20CV33885

A183140

Steffan Alexander, Judge.

Argued and submitted on February 04, 2026.

Theodore J. Boutrous, Jr., California, argued the cause for appellants-cross-respondents. On the briefs were Per A. Ramfjord, Brad S. Daniels, Reilley D. Keating, and Stoel Rives LLP; Alison L. Plessman, Rajan S. Trehan, Stephanie W. Xiao, Khoa D. Nguyen, and Hueston Hennigan LLP, California; Douglas J. Dixon, Craig A. Fligor, and Hueston Hennigan LLP, California; and Blaine H. Evanson and Gibson, Dunn & Crutcher LLP, California.

Erin Roycroft and Nicholas Rosinia, Illinois, argued the cause for respondents-cross-appellants. Also on the answering brief and opening brief on cross-appeal were

Alexander G. Tievsky, Megan Delurey, Schuyler Daum, Landon Webster, and Edelson PC, Illinois; Todd Logan and Edelson PC, California; Matthew J. Preusch and Keller Rohrback L.L.P., California; Daniel Mensher, Natida Sribhibhadh, and Keller Rohrback L.L.P., Washington; Yoona Park, Sarah R. Osborn, and Keller Rohrback L.L.P.; Keith A. Ketterling, Timothy S. DeJong, Cody Berne, Emily Johnson, and Stoll Stoll Berne Lokting & Shlachter P.C.; and Nicholas A. Kahl and Nick Kahl, LLC. Also on the reply brief were Lydia Anderson-Dana; Rafey Balabanian and Brandt Silver-Korn, and Edelson PC, California; Amy Hausmann, Zoë Seaman-Grant, and Edelson PC, Illinois; Derek C. Johnson, Marilyn A. Heiken, and Johnson Johnson Lucas & Middleton, PC.

Matthew J. Kalmanson and Hart Wagner LLP and Meghana D. Shah, John S. Pruitt, and Eversheds Sutherlands (US) LLP filed the brief *amicus curiae* for Associated Electric & Gas Insurance Services Limited.

Jeremy C. Rice and Parks Bauer LLP filed the brief *amicus curiae* for Oregon Association of Defense Counsel.

Irion Sanger, John Maxwell Greene, and Sanger Law, P.C., filed the brief *amicus curiae* for Oregon People's Utility Districts.

J. Aaron Landau and Harrang Long P.C. and Jeremy C. Marwell and Vinson & Elkins LLP, District of Columbia, filed the brief *amicus curiae* for Edison Electric Institute.

Paul S. Stewart and Paine Hamblen, P.S., Washington, filed the brief *amicus curiae* for Pacific Northwest Investor-Owned Utilities.

Iván Resendiz Gutierrez, KC Lynne Hovda, and Miller Nash LLP filed the brief *amicus curiae* for Oregon Business & Industry Association.

Sara Kobak and Andrew J. Lee filed the brief *amicus curiae* for Oregon Forest Industries Council.

Matthew Kirkpatrick and Oregon Consumer Justice Law P.C.; and Elizabeth Savage and Elizabeth Savage Law LLC filed the brief *amicus curiae* for Oregon Consumer Justice and Oregon Trial Lawyers Association.

No appearance for respondent Oregon Department of Justice.

Before Ortega, Presiding Judge, Joyce, Judge, and Hellman, Judge.

JOYCE, J.

Reversed and remanded.

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Appellants

[ ] No costs allowed.
[X] Costs allowed, payable by Respondents.

JOYCE, J.

This class action proceeding arises from devastating wildfires that occurred in Oregon around Labor Day in 2020 during the course of what plaintiffs' counsel described in the trial court as a "historic windstorm."

A jury determined that defendant, PacifiCorp, a public utility providing electricity in various parts of Oregon, engaged in tortious acts or omissions in relation to certain of those wildfires and that those tortious acts or omissions caused plaintiffs to suffer both economic and noneconomic damages. PacifiCorp appeals the resulting limited judgments against it, raising thirteen assignments of error. Plaintiffs cross-appeal, raising two cross-assignments of error.

In this opinion, we address PacifiCorp's fourth assignment of error, which, with one exception noted below, is dispositive as to the issues before us on appeal. In that assignment, PacifiCorp contends that the trial court erred in instructing the jury that in determining whether PacifiCorp was liable to plaintiffs it could "assume that the evidence at the trial applies to all class members." We agree with PacifiCorp that the trial court erred in giving that instruction to the jury. We conclude that, given this particular class action proceeding--that is, the nature of the class the trial court certified, the evidence presented, and plaintiffs' theories of causation--that instruction was legally erroneous, because certain evidence at trial, particularly related to causation, did not necessarily apply to every class member. We further conclude that giving the instruction was prejudicial to PacifiCorp. Consequently, we reverse and remand.

I. INTRODUCTION

Prior to turning to the facts of this case, to put the jury instruction that is at issue in PacifiCorp's fourth assignment of error and the facts of this case in their proper context, we summarize the legal framework under which class certification occurs in Oregon. We also provide an overview of the class that was certified in this case and plaintiffs' theories of causation at trial.

"The standards that govern class certification are set out in ORCP 32." *Pearson v. Philip Morris, Inc.*, 358 Or 88, 106, 361 P3d 3 (2015). Under ORCP 32, "a class certification determination divides into two basic inquiries." *Id.*

First, "the trial court must determine if the action meets five prerequisites" set forth in ORCP 32 A:

> "[1] The class must be so numerous that simple joinder is impracticable ('numerosity'); [2] there must be questions of law or fact common to the class ('commonality'); [3] the named representatives' claims must be typical of those of the class ('typicality'); [4] the named representatives must be individuals who will adequately protect the interests of the class ('adequacy'); and [5] prelitigation notice requirements must have been complied with ('notice')."

Pearson, 358 Or at 106 (quoting ORCP 32 A). If any one of the five requirements is not satisfied, the case cannot go forward as a class action. *Id.*

Second, the trial court must determine whether "a class action is superior to other available methods for the fair and efficient adjudication of the controversy," ORCP 32 B, by looking to the factors identified in ORCP 32 B. That rule identifies eight "factors 'pertinent' to assessing superiority." *Pearson*, 358 Or at 106 (quoting ORCP 32

B). The third of those factors, "predominance"--*i.e.*, "the extent to which questions of law or fact common to the members of the class predominate over any questions affecting only individual members," ORCP 32 (B)(3)--is one that "frequently drives class certification decisions," though neither "the 'predominance' factor nor any of the other seven [factors] is controlling," *Pearson*, 358 Or at 106.

Predominance, "[i]n effect, * * * asks: What do the individual class members have in common, what don't they have in common, and how much will those similarities and dissimilarities matter in litigating the case?" *Id.* at 110-11. The inquiry is "designed to determine if proof as to one class member will be proof as to all, or whether dissimilarities among the class members will require individualized inquiries." *Id.* at 111; *Delgado v. Del Monte Fresh Produce, N. A., Inc.*, 260 Or App 480, 491, 317 P3d 419, *rev den*, 355 Or 380 (2014) (noting that "the class certification question requires us to look at whether the claimed common issues are susceptible to and appropriate for proof by common evidence"); *accord Black Lives Matter Los Angeles v. City of Los Angeles*, 113 F4th 1249, 1264 (9th Cir 2024) (holding that a class cannot be certified when plaintiffs "merely alleg[e] that a policy applies class-wide--and that a common question thus exists--without showing how common evidence can be used to prove their claims across the class members").

The predominance inquiry is a "pragmatic" one, turning on the evidence predicted to be presented at trial:

> "whether common issues predominate in a particular case for purposes of class certification depends on a pragmatic assessment of how a case, if

> fairly and fully tried, is likely to be litigated. The point of asking whether common issues predominate is to predict the degree to which litigation of the controversy will require delving into individualized proof or, conversely, the degree to which the issues lend themselves to resolution through common proof--that is, proof for one individual class member will be proof for all."

Pearson, 358 Or at 114.

The question of "the degree to which the issues lend themselves to resolution through common proof," *id.*, is important, because to prevail, the plaintiffs in a class action must prove their claims as to all class members. *See Strawn v. Farmers Ins. Co.*, 350 Or 336, 358, 258 P3d 1199, *adh'd to on recons*, 350 Or 521, 256 P3d 100 (2011), *cert den*, 565 US 1177 (2012) (noting that, to "prevail in a class action for fraud, the class plaintiff must prove reliance on the part of all class members"); *accord Bowerman v. Field Asset Servs., Inc.*, 60 F4th 459, 479 (9th Cir 2023) (holding that "a putative employer cannot be liable to an entire class of putative employees for failing to reimburse their business expenses and pay them overtime unless the putative employer in fact failed to do so *for each of them*" (emphasis added)).

The decision to certify a class is generally forward-looking; a prediction of how a case is "likely to be litigated." *Pearson*, 358 Or at 114. But trial courts retain the authority under ORCP 32 C(1) to "alter or amend" class certification decisions at any time "before the decision on the merits." *See also James v. PacifiCorp*, 323 Or App 764, 777-78, 524 P3d 506 (2023) (noting, in declining to exercise our discretion to accept an interlocutory appeal in this case of the trial court's class certification decision, that the trial court may "rescind or amend its certification order at any point prior to a decision on

the merits, if the litigation does not pan out the way the court expects").

Indeed, "because the results of class proceedings are binding on absent class members," federal courts considering the parallel Federal Rule of Civil Procedure concerning the alteration or amendment of class certification orders, FRCP 23(c)(1)(C), have held that the district court has not just the authority to alter or amend class certification orders when necessary but an "*affirmative duty* of monitoring its class decisions in light of the evidentiary development of the case."[1] *Mazzei v. Money Store*, 829 F3d 260, 266-67 (2d Cir 2016), *cert den*, 580 US 1198 (2017) (emphasis added; internal quotation marks omitted); *see Barnes v. Am. Tobacco Co.*, 161 F3d 127, 140 (3d Cir 1998), *cert den*, 526 US 1114 (1999) ("Under Rule 23(c)(1), District Courts are required to reassess their class rulings as the case develops.").

Ultimately, as federal courts have recognized, the ability of trial courts to revisit class certification decisions in light of how a case develops protects "absent class members['] * * * due process rights (and defendants') by ensuring that any class claim that proceeds to final judgment--and thus binds them--is fairly and appropriately the subject of class treatment." *Mazzei*, 829 F3d at 268.

In this case, as explained in more detail below, the trial court certified a single issues class and specified "fourteen issues" for "classwide treatment."[2]

---

[1] FRCP 23(c)(3)(C) provides, "An order that grants or denies class certification may be altered or amended before final judgment."

[2] Among the fourteen issues certified for class-wide treatment were:

Nevertheless, at the end of the trial, it ultimately submitted to the jury the question of PacifiCorp's liability for the various causes of action alleged in plaintiffs' complaint.

The single class in this case included the owners of over 2,000 parcels of property that were damaged by at least four different wildfires--the 242 Fire, the South Obenchain Fire, the Echo Mountain Complex Fire, and the Santiam Canyon Fire--certain of which were separated by well over a hundred miles. For each of those four wildfires, the trial court identified a "boundary" based on what its certification order termed the

---

> "1. What was PacifiCorp's level of culpable conduct in the operation of its utility infrastructure?
>
> "* * * * *
>
> "3. Was PacifiCorp's conduct a cause of harm to the class?
>
> "4. If PacifiCorp's conduct was a cause of harm to the class, was that harm reasonably foreseeable?
>
> "5. Did PacifiCorp's action or inaction cause or contribute to the cause of the wildfire or cause or contribute to the spreading of the wildfire?
>
> "* * * * *
>
> "7. Did PacifiCorp's action or inaction bring about an unauthorized entry into property in the exclusive possession of another?
>
> "8. Did PacifiCorp's culpable conduct cause the trespass or, alternatively, did PacifiCorp act intentionally, knowing that a trespass would result from their actions--and a trespass did indeed occur as a result of those actions?
>
> "* * * * *
>
> "14. Was the damage to Class Members' property the necessary, certain, predictable, or inevitable result of PacifiCorp's actions?"

"maximum extent of burn" for each wildfire.

For three of the wildfires--the 242 Fire, the South Obenchain Fire, and the Echo Mountain Complex Fire--plaintiffs' theory at trial was that a particular, identifiable ignition started a wildfire, which burned throughout that particular wildfire's boundaries, and that "but for" PacifiCorp's tortious acts and omissions, the wildfire would not have occurred, and plaintiffs would not have been harmed.

Plaintiffs' theory was different for the largest of those four wildfires: the Santiam Canyon Fire. For that wildfire--unlike the other wildfires--plaintiffs did not have a single, unified theory of causation as to how plaintiffs within the Santiam Canyon Fire boundary were harmed by PacifiCorp. Instead, they argued that the evidence permitted a finding that plaintiffs who owned property in the Santiam Canyon were harmed either by (1) one of any number of PacifiCorp-caused fires, when those fires destroyed plaintiffs' property in the Santiam Canyon directly, or (2) alternatively, for some of the plaintiffs in the Santiam Canyon, by a lightning-caused wildfire, which was burning to the northeast of the Santiam Canyon before Labor Day 2020 and swept through the Santiam Canyon after the PacifiCorp-caused fires were ignited in the Santiam Canyon. In making the latter argument--that the lightning-caused wildfire burnt plaintiffs' property--plaintiffs' theory was that certain fires in the Santiam Canyon caused by PacifiCorp's power equipment caused firefighters who were stationed in the Santiam Canyon to evacuate the Santiam Canyon, leaving it "defenseless." Additionally, for the Santiam Canyon Fire, the trial court instructed the jury that PacifiCorp was liable if its

acts or omissions were a "substantial factor" in causing harm to the plaintiffs.

Notwithstanding that the single class in this case consisted of plaintiffs who were located in the "maximum extent of burn" for four different wildfires, which burnt in four different geographic locations in Oregon, and that plaintiffs' theory of causation as to one of those wildfires--the Santiam Canyon Fire--was different than the others, ultimately, plaintiffs requested a jury instruction based on California Civil Jury Instructions (CACI), Instruction No. 115, "Class Action Defined[.]" That instruction told the jury that, "You may assume that the evidence at the trial applies to all class members." And plaintiffs' counsel argued to the jury that it could "assume that the evidence that came in applies to the class members as a whole." It is that jury instruction that PacifiCorp challenges in its fourth assignment of error.

We conclude that given the particular class that the trial court certified in this case and the evidence and theories at trial, the trial court erred in instructing the jury that it could "assume that the evidence at the trial applies to all class members." Although that instruction might be appropriate in some class actions--where every important issue is truly capable of proof through common evidence--it was erroneous to give in this case, where much of the evidence introduced during the trial related to particular issues concerning particular wildfires (and for the Santiam Canyon Fire, to particular ignitions at particular locations in the Santiam Canyon). We also conclude that that error was prejudicial to PacifiCorp.

Consequently, we reverse and remand.

II. HISTORICAL AND PROCEDURAL FACTS

With that context, we turn to the historical and procedural facts, first discussing the complaint and the certified class, then turning to plaintiffs' theories of PacifiCorp's tortious conduct and causation during trial, plaintiffs' request for the jury instruction that PacifiCorp challenges in its fourth assignment of error, plaintiffs' mid-trial motion to reduce the boundary for the Santiam Canyon Fire, and, finally, we turn to plaintiffs' closing argument and the verdict form.

Further, we set those items out in some detail, because in assessing whether an erroneous jury instruction caused prejudice, we must consider "the record as a whole" in "the light of the parties' theories at trial." *Purdy v. Deere & Co./Norton*, 311 Or App 244, 259, 492 P3d 99, *rev den*, 369 Or 110 (2021).

A. *The Complaint and the Certified Class*

As noted, numerous devastating wildfires burned in Oregon around Labor Day in 2020. Plaintiffs' complaint asserted that PacifiCorp's tortious acts and omissions caused four of those wildfires, which were referred to in the trial court as (1) the 242 Fire, which burnt approximately 13,829 acres near Chiloquin, (2) the Echo Mountain Complex Fire (made up of two separate fires, the Echo Mountain Fire and the Kimberling Fire), which burnt approximately 1,890 acres near Lincoln City, (3) the South Obenchain Fire, which burnt approximately 29,531 acres near Eagle Point, and (4) the Santiam Canyon Fire, which burnt approximately 45,660 acres in the Santiam Canyon.

As relevant here, in the operative complaint, plaintiffs asserted claims

against PacifiCorp for negligence, gross negligence, public nuisance, private nuisance, and trespass in relation to those wildfires. The operative complaint identified 17 named plaintiffs--one within the boundary of the 242 Fire, four within the boundary of the Echo Mountain Complex Fire, two within the boundary of the South Obenchain Fire, and 10 within the boundary of the Santiam Canyon Fire.

Plaintiffs moved for class certification. The trial court ultimately certified an "issues class" consisting of "owners or residents" of "privately owned real property" within the "boundary of the maximum extent of burn" for the 242 Fire, the Echo Mountain Complex Fire, the South Obenchain Fire, and the Santiam Canyon Fire, whose properties experienced "fire activity during those fires." Additionally, the class included "owners of a motorhome, residential trailer, manufactured dwelling, other mobile home, or any other personal property" that was located on any property within the "boundary of the maximum extent of burn" for the 242 Fire, the Echo Mountain Complex Fire, the South Obenchain Fire, or the Santiam Canyon Fire who "experienced fire activity during those fires," and "whose motorhome, residential trailer, manufactured dwelling, other mobile home, or any other personal property, experienced fire damage during those fires."

The trial court's class certification order bifurcated the case into two phases: During Phase I, the jury would decide certain liability questions on a class-wide basis, and, assuming PacifiCorp was found liable, determine the amount of damages due to the 17 named class representatives. Phase II would consist of individual damages

proceedings for the absent class members.

The trial court ultimately instructed the jury that a single class was certified, and as to the composition of that class, the court instructed the jury as follows:

> **"CLASS DEFINED**
>
> "* * * * *
>
> "* * * In this case, the class consists of all:
>
> "(1) owners or residents, as of September 7, 2020, of any (a) privately owned real property; (b) that is wholly or partially within the boundary of the maximum extent of burn for the Echo Mountain Fire, the Kimberling Fire, the South Obenchain Fire, the 242 Fire, or the Santiam Canyon Fire; and (c) experienced fire activity during those fires; or (2) owners of a motorhome, residential trailer, manufactured dwelling, other mobile home, or any other personal property that as of September 7, 2020, was located on any property (a) wholly or partially within the boundary of the maximum extent of burn for the Echo Mountain Fire, the Kimberling Fire, the South Obenchain Fire, the 242 Fire, or the Santiam Canyon Fire; that (b) experienced fire activity during those fires; and (c) whose motorhome, residential trailer, manufactured dwelling, other mobile home, or any other personal property, experienced fire damage during those fires."[3]

(Boldface and uppercase in original.)

B. *Plaintiffs' Theories of Tortious Conduct and Causation*

Following class certification, the Phase I trial began. During the trial, plaintiffs pointed to what they viewed as myriad tortious failures on PacifiCorp's part

---

[3] Because the trial court's class certification order bifurcated the case into two "phases"--one involving questions of liability and one involving damages--it bears mentioning that "[a] class action is not inappropriate simply because each class member will have to make an individualized showing to recover damages." *Migis v. AutoZone, Inc.*, 282 Or App 774, 787, 387 P3d 381 (2016), *adh'd to on recons*, 286 Or App 357, *rev den*, 362 Or 300 (2017) (internal quotation marks omitted).

which, in their view, resulted in the 242 Fire, the Echo Mountain Complex Fire, the South Obenchain Fire, and the Santiam Canyon Fire. They contended, for example, that, for each of those wildfires, PacifiCorp tortiously failed to ensure vegetation was a safe distance from electrical equipment, failed to shut off power before and during the Labor Day 2020 windstorm, and failed to adequately monitor the windstorm.[4]

---

[4] More specifically, in the final jury instructions, the jury was instructed that plaintiffs had alleged that, "for each of the four fires in this case":

> "a. Defendant failed to reasonably inspect their power line infrastructure for hazardous conditions.
>
> "b. Defendant failed to reasonably clear vegetation around power line infrastructure to mitigate the risk of fire.
>
> "c. Defendant failed to reasonably de-energize power lines during critical and extremely critical fire conditions, when Defendant knew or in the exercise of reasonable care should have known that the then-present fire conditions would cause energized lines to fall or otherwise contact vegetation, structures, and objects.
>
> "d. Defendant failed to reasonably de-energize power lines during the then-present critical and extremely critical fire conditions even after Defendant had knowledge that some power lines had fallen or otherwise come into contact with vegetation, structures, and objects.
>
> "e. Defendant failed to reasonably de-energize power lines even after fires had been ignited by their power line infrastructure.
>
> "f. Defendant failed to disable reclosers during critical and extremely critical fire conditions.
>
> "g. Defendant failed to reasonably implement policies and procedures, and use equipment, to avoid igniting or spreading fire.
>
> "h. Defendant failed to reasonably adjust their operations despite warnings about weather conditions that could cause rapid and dangerous fire growth

With respect to causation, as discussed above, plaintiffs presented different theories of causation regarding the 242 Fire, the Echo Mountain Complex Fire, and the South Obenchain Fire, on the one hand, and the Santiam Canyon Fire, on the other.

1. *The 242 Fire, the South Obenchain Fire, and the Echo Mountain Complex Fire--"but for" causation*

Plaintiffs' theory at trial regarding the 242 Fire, the South Obenchain Fire, and the Echo Mountain Complex Fire (both the Kimberling ignition and the Echo Mountain ignition) was that those wildfires were started when vegetation came into contact with PacifiCorp's energized power lines at particular locations, and that vegetation came into contact with PacifiCorp's energized power lines because PacifiCorp had tortiously acted or failed to act.

More specifically, for each of the 242 Fire, the South Obenchain Fire, the Kimberling Fire, and the Echo Mountain Fire, plaintiffs identified a single ignition point and presented evidence from which the jury could find that that ignition started a fire, which spread throughout the particular wildfire's boundary, causing harm to the property of the plaintiffs in that particular wildfire's boundary.

---

and spread on and after Labor Day.

"i. The fires ignited by Defendant on Labor Day diverted crucial resources from the fire areas.

"j. Defendant failed to obtain granular weather information to evaluate shutting off the power outside of limited areas designated Fire High Consequence Areas * * * or Proactive De-energization Zones * * *."

PacifiCorp, for its part, presented evidence from which the jury could find that neither the South Obenchain Fire nor the Echo Mountain Fire were started when vegetation came into contact with PacifiCorp power lines at the purported ignition points identified by plaintiffs. With respect to the 242 Fire, PacifiCorp acknowledged that the cause of the 242 Fire was vegetation coming into contact with PacifiCorp power lines, but it asserted that it was not tortious in failing to identify the particular tree that caused the wildfire as a hazardous tree. PacifiCorp also did not dispute that the Kimberling Fire was caused when vegetation came into contact with electrical equipment.

With regard to the 242 Fire, the South Obenchain Fire, and the Echo Mountain Complex Fire, given plaintiffs' theory of causation, the trial court instructed the jury on the "but for" causation standard:

> **"CAUSATION--'BUT FOR'**
>
> "Your determination of 'cause' in this case for the Echo Mountain Fire, the Kimberling Fire, the South Obenchain Fire, and the 242 Fire may be made by using what is known as the 'But For' causation standard, which is defined as follows:
>
> "The defendant's conduct is a cause of the plaintiffs' harm if the harm would not have occurred but for that conduct; conversely, the defendant's conduct is not a cause of the plaintiffs' harm if that harm would have occurred without that conduct."

(Boldface and uppercase in original.)

2. *The Santiam Canyon Fire--"substantial factor" causation*

Plaintiffs' theory as to how PacifiCorp caused the fire damage within the Santiam Canyon Fire boundary--which, as noted, is approximately 45,660 acres (*i.e.*,

approximately 71 square miles)--was markedly different, both factually and legally, than their theory as to the 242 Fire, the South Obenchain Fire, and the Echo Mountain Complex Fire.

That is at least in part because prior to fires in the Santiam Canyon that plaintiffs attributed to PacifiCorp, to the northeast of the Santiam Canyon, another wildfire was burning: the Beachie Creek Fire. The Beachie Creek Fire was ignited by lightning, not PacifiCorp. And it is undisputed that at some point around Labor Day 2020 the Beachie Creek Fire burned through Santiam Canyon where class members had property. At trial, the disputes with respect to the Beachie Creek Fire were largely (1) when, in particular, the Beachie Creek Fire burned through the Santiam Canyon, and (2) whether PacifiCorp's power equipment or embers from the Beachie Creek Fire were responsible for certain ignitions within the Santiam Canyon itself.

Specifically, at trial, regarding the Santiam Canyon Fire, plaintiffs presented evidence that a number of ignitions that occurred in the Santiam Canyon were attributable to PacifiCorp, but it did not seek to identify them all, instead telling the jury "we'll never know just how many fires [PacifiCorp] started in the canyon that night."[5] The particular fires that plaintiffs identified and attributed to PacifiCorp included fires at particular locations in the Santiam Canyon--*e.g.*, at the Gates School, at Potato Hill, at

[5] In advancing their argument in the trial court, plaintiffs highlighted a spoliation instruction that had been given to the jury based on PacifiCorp purportedly destroying evidence after the fires in the Santiam Canyon. On appeal, PacifiCorp does not assign error to the trial court giving that instruction.

Kelly Lumber, at Fishermen's Bend, at Gates Bridge East, and at 832 North Santiam Highway. Those ignitions included two ignitions--the one at the Gates School and the one at Fishermen's Bend--that plaintiffs argued forced the evacuation of wildland firefighting crews who otherwise could have combatted the fires in the Santiam Canyon. As plaintiffs put it, the evacuation of those crews left the "entire Santiam Canyon[ ] defenseless against fires both already there and those that come that night."

Plaintiffs also presented evidence from which the jury could find that some of those fires grew quite large--highlighting during their closing argument that the fire at the Gates School had flames that were "50 feet in the air," that the fire at Fisherman's Bend caused the campground to be "engulfed in flames," and that the fire at Kelly Lumber was "hundreds of acres."[6]

Plaintiffs also presented the testimony of a fire progression expert with respect to the Beachie Creek Fire. That expert testified, as plaintiffs put it on appeal, that the Beachie Creek Fire "did not reach the Canyon until after midnight"--*i.e.*, until after PacifiCorp's power lines had, in plaintiffs' view, started numerous fires in the Santiam Canyon and caused the evacuation of firefighters.

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[6] Given the particular evidence at trial and arguments made below and on appeal, the precise number of fires plaintiffs attributed to PacifiCorp's equipment igniting in the Santiam Canyon is difficult to pin down--in their briefing, plaintiffs contend that their expert "identified over a dozen ignitions in the Santiam Canyon on the evening of September 7" attributable to PacifiCorp; at oral argument, plaintiffs' counsel noted "10 or 15 fires" started in the Santiam Canyon by PacifiCorp; and in its response to PacifiCorp's directed verdict motion in the trial court, plaintiffs noted their expert testified to "about 16 fires associated with PacifiCorp's power infrastructure."

Having presented evidence of certain fires that were started by PacifiCorp in the Santiam Canyon, that those fires caused firefighters to evacuate, and that those fires started prior to the Beachie Creek Fire reaching the Santiam Canyon, plaintiffs' theory regarding PacifiCorp's culpability for harm to individuals whose property in the Santiam Canyon was damaged by fire was that (1) PacifiCorp's conduct during Labor Day weekend (and before) was tortious, and caused numerous fires throughout the Santiam Canyon prior to the arrival in the Santiam Canyon of the Beachie Creek Fire; (2) the fires that PacifiCorp caused in the Santiam Canyon resulted in firefighters who were stationed in the Santiam Canyon to fight the Beachie Creek Fire evacuating; and (3) some combination of either PacifiCorp-caused fires and/or the Beachie Creek Fire (which firefighters were unable to stop because they evacuated) resulted in harm to the class members in the Santiam Canyon.[7]

PacifiCorp, for its part, disputed that it was responsible for many of the fires in the Santiam Canyon that plaintiffs argued it was responsible for, although it did acknowledge that it was responsible for the fire at the Gates School. PacifiCorp instead

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[7] As plaintiffs put it on appeal with respect to the Beachie Creek Fire, "the jury could have concluded that firefighting personnel would have been in a position to contain the Beachie Creek Fire before it reached class member properties but for the fact that a power-line fire caused these personnel to evacuate the Canyon." And as plaintiffs explained to the trial court in a response to PacifiCorp's motion to stay the Phase II damages trials during the pendency of this appeal, "even setting aside the destruction PacifiCorp's own fires caused, the jury considered that people in the Santiam Canyon unnecessarily lost their homes and businesses *from the Beachie Creek Fire* because of PacifiCorp's gross negligence that night." (Emphasis in original.)

pointed to embers from the Beachie Creek Fire as the cause of many of the "spot fires" in the Santiam Canyon, and PacifiCorp presented its own fire progression expert who testified that the Beachie Creek Fire burned through the Santiam Canyon earlier than plaintiffs contended. PacifiCorp also presented evidence that certain fires that plaintiffs identified as having been caused by PacifiCorp did not spread widely. Finally, PacifiCorp presented evidence that its service area did not include the eastern part of the Santiam Canyon.

Ultimately, given plaintiffs' theory of PacifiCorp's culpability for harm to individuals whose property in the Santiam Canyon was damaged as a result of wildfires, the trial court instructed the jury on the "substantial factor" causation standard regarding that wildfire:

> **"CAUSATION--'SUBSTANTIAL FACTOR'**
>
> "Your determination of 'cause' in this case for Santiam Canyon Fire may be made by using what is known as the 'Substantial Factor' causation standard, which is defined as follows:
>
> "Many factors or things may operate either independently or together to cause harm. In such a case, each may be a cause of the harm even though the others by themselves would have been sufficient to cause the same harm.
>
> "If you find that the defendant's act or omission was a substantial factor in causing the harm to the plaintiffs, you may find that the defendant's conduct caused the harm even though it was not the only cause. A substantial factor is an important factor and not one that is insignificant."

(Boldface and uppercase in original.)

C. *Plaintiffs' Proposed Special Jury Instruction--"You may assume that the evidence at the trial applies to all class members."*

With that understanding of the evidence presented and plaintiffs' theories of causation, we now turn to the jury instruction at issue in defendant's fourth assignment of error.

During the trial, plaintiffs requested the jury be instructed with special jury instructions concerning class actions. One of plaintiffs' requested special instructions included a sentence reading, "You may assume that the evidence at the trial applies to all class members except as I specifically tell you otherwise," which was based on CACI No. 115, "Class Action Defined."[8] PacifiCorp objected to use of that instruction, and proposed its own special jury instructions.

In arguing that the trial court should provide their special jury instruction, plaintiffs contended that the instruction explained to the jury that plaintiffs could "use class-wide proof" to prove their claims, and that they did not need "to go door-to-door,

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[8] CACI No. 115 provides:

> "A class action is a lawsuit that has been brought by one or more plaintiffs on behalf of a larger group of people who have similar legal claims. All of these people together are called a 'class.' [Name of plaintiff] brings this action as the class representative.
>
> "In a class action, the claims of many individuals can be resolved at the same time instead of requiring each member to sue separately. Because of the large number of claims that are at issue in this case, not everyone in the class will testify. You may assume that the evidence at this [stage of the] trial applies to all class members [except as I specifically tell you otherwise]. All members of the class will be bound by the result of this trial."

(Brackets in original.)

property-to-property to prove [their] case." PacifiCorp took the position that the instruction was improper, noting that, "[w]hatever the manner of proof, whether it's common or individualized, [plaintiffs] still have their burden of proving their case as to the entire class and each of its members."

The trial court ultimately adopted plaintiffs' instruction, with slight modifications, concluding:

> "The plaintiffs' instruction, in part, is more aligned with CACI 115. The correct sentence for plaintiffs' instructions is a direct quote from CACI 115.
>
> "You may assume that the evidence at trial applies to all class members, except as I specifically tell you otherwise."

Later in the proceedings, PacifiCorp again took exception to the special instruction plaintiffs had proposed, moving the trial court to strike the sentence, "You may assume that the evidence at the trial applies to all class members, except as I specifically tell you otherwise." PacifiCorp argued that the instruction is an "unnecessary comment on the evidence," it "doesn't fit with this case, at a minimum, because we have four different fires," and it "suggests to the jury that the Court is going to give them further instruction about the evidence, which the parties aren't contemplating."

The trial court granted PacifiCorp's motion, in part, striking the portion of the sentence reading "except as I specifically tell you otherwise," but otherwise kept the special jury instruction. In doing so, the trial court noted again that the remainder of the sentence--"Assume that the evidence at the trial applies to all class members"--is "a direct quote from" CACI No. 115.

Ultimately, in instructing the jury, the trial court provided the following special instruction:

> **"CLASS QUESTIONS DEFINED**
>
> "Only some questions on the verdict form are common to all class members. Those questions are called the class questions. The class questions will be specified on the verdict form that you will use in the jury room. In answering the class questions, you must determine the answer as to the class. *Because the case is a class action, you can answer the class questions based on evidence that applies to the class as a whole*. There is no requirement that individual class members appear in court to prove their case. *You may assume that the evidence at the trial applies to all class members*. You should interpret the class questions according to these instructions and the verdict form, understanding that for the purposes of these class questions, the class is considered the plaintiff. Each class question is broken down by fire."

(Boldface and uppercase in original; emphases added.)

D. *Plaintiffs' Motion to Modify the Boundary for the Santiam Canyon Fire*

Given how the trial developed, after plaintiffs had presented their rebuttal case and the trial court had instructed the jury, but before closing argument, plaintiffs made a motion to reduce the size of the class area in the Santiam Canyon so as to "conform the class * * * boundary to the evidence presented at trial[.]" Plaintiffs presented the trial court with a "rough" map that reduced the size of the Santiam Canyon Fire boundary by what appears to be over half.

That map, which follows, proposed excising from the Santiam Canyon Fire boundary the section of the map below that plaintiffs' counsel drew Xs through:

Plaintiffs explained to the trial court that they proposed a new boundary for the Santiam Canyon Fire class area because the area to the west of the vertical black line was the area that "evidence suggests is predominant to the class[.]" Plaintiffs further told the court that the vertical black line "signifies a predominance line." That is, plaintiffs told the trial court that by excising the eastern half of the Santiam Canyon Fire from the class boundary, the new boundary on the eastern end, which was "adjacent to Potato Hill," would reflect the "eastern most predominant boundary indicated during trial."

We understand plaintiffs' counsel to have drawn the line near Potato Hill as the fire at Potato Hill, along with other fires close to Potato Hill, were the easternmost fires in the Santiam Canyon that plaintiffs' "cause and origin" expert identified as being

attributable to PacifiCorp.

PacifiCorp opposed the motion, arguing among other points, that it would be prejudicial to change the boundary after it had built its "whole case" and "closing" around the "evidence that has come in[.]" The trial court denied the motion.

E. *The Verdict Form, Closing Argument, and the Verdict*

Finally, we turn to the structure of the verdict form in this case as well as aspects of plaintiffs' closing argument that have bearing on our analysis.

1. *The verdict form*

The verdict form that the trial court provided to the jury asked the jury, for each claim, (1) whether defendant's conduct was tortious as to plaintiffs and the entire class, and it required a separate response to that question for each of the four wildfires, (2) whether that tortious conduct was a cause of harm to the named plaintiffs, and, again, required a separate response for each of the four wildfires, and finally, (3) whether the tortious conduct was "a cause of harm to the entire class," and, again, required a separate response for each of the four wildfires.

2. *The closing argument and the verdict*

Both in their closing argument and rebuttal closing argument to the jury, plaintiffs emphasized the jury instruction that PacifiCorp now challenges on appeal.

In their closing, plaintiffs told the jury:

> "[Y]ou can assume--this is in your jury instructions--that the evidence at trial applies to all class members. It's not as though each and every class member is required to be in this courtroom and to explain what happened that night to you. That would be unreasonable. So you can

assume based on the evidence. And the class questions allow you to do that."

Then, in their rebuttal closing argument, plaintiffs again relied on the instruction that PacifiCorp now challenges on appeal, this time pointing to specific named plaintiffs who were harmed by specific fires in the Santiam Canyon, as well as pointing to a particular plaintiff who lived near Echo Mountain, and encouraged the jury to apply that evidence to "the class members as a whole":

> "You can assume that the evidence that came in applies to the class members as a whole. The Judge has instructed that you don't need to hear from each and every class member to say there's a fire that harmed my property, et cetera. You can assume the evidence applies to the class as a whole.
>
> "And there's no better example if you're thinking about who was harmed by the fires. For example, [one of the named plaintiffs] at Fisherman's Bend. No dispute there's a fire at Fisherman's Bend. It destroys everything [that plaintiff] has ever known, has ever possessed in this world.
>
> "[Two other plaintiffs] live right across the street from the ignition at 832 North Santiam Highway. [Another plaintiff was] right by the fire at Gates Hill Road. [Two other plaintiffs] live right by Echo Mountain. They see the ignition."

Additionally, plaintiffs argued to the jury that, for the Santiam Canyon Fire, in view of the "substantial factor" causation instruction, the jury could find that PacifiCorp was liable based on PacifiCorp being "a cause" of the harm in the Santiam Canyon (which, as noted above, was over 70 square miles):

> "For the Santiam Canyon, the question is simply, were they a cause of the harm that night; not the cause, not the only cause, but a cause of the harm. Of course they were a cause of the harm. They admit they started fires in the Santiam Canyon. They admit they caused harm in the Santiam Canyon."

After deliberating, the jury returned verdict in favor of plaintiffs on their claims of negligence, gross negligence, public nuisance, private nuisance, and trespass.

III. ANALYSIS OF PACIFICORP'S FOURTH ASSIGNMENT OF ERROR

With that background, we turn to our analysis of PacifiCorp's fourth assignment of error. As noted, in its fourth assignment of error, PacifiCorp contends that the trial court erred when it instructed the jury that the jury could "assume that the evidence at the trial applies to all class members."

A. *Legal Standard*

For claims of instructional error, "we review a trial court's decision to give a particular instruction primarily to determine whether the instruction, when read together with the other instructions given, completely and accurately stated the law applicable to the case and, if not, whether any error in giving the instruction was prejudicial to the party opposing the instruction." *Sherertz v. Brownstein Rask*, 288 Or App 719, 722, 407 P3d 914 (2017). As the Supreme Court has explained:

> "'The parties to any jury case are entitled to have the jury instructed in the law which governs the case in plain, clear, simple language. The objective of the mold, framework and language of [jury] instructions should be to enlighten and to acquaint the jury with the applicable law. Everything which is reasonably capable of confusing or misleading the jury should be avoided. Instructions which mislead or confuse are ground for a reversal or a new trial.'"

Id. (quoting *Williams et al. v. Portland Gen. Elec.*, 195 Or 597, 610, 247 P2d 494 (1952) (brackets in *Sherertz*)).

If the trial court's giving of a particular jury instruction was erroneous, in

assessing whether giving the instruction was "prejudicial," the question for us is "whether--in an important or essential manner--the error had a detrimental influence on a party's rights." *Id.* at 727 (internal quotation marks omitted). To make that assessment, "[w]e review the record to assess the likelihood that the error permitted the jury to reach an incorrect result." *Id.*

If there "is 'little likelihood' that an error affected the verdict, we may not reverse; if there is 'some' likelihood or a 'significant' likelihood that the error influenced the jury's verdict, we must reverse." *Id.* And "[i]n the context of instructional error, that standard will generally be met if, when the instructions are considered as a whole in light of the evidence and the parties' theory of the case at trial[,] there is some likelihood that the jury reached a legally erroneous result." *Id.* at 727-28 (internal quotation marks omitted).

B. *The Parties' Arguments*

On appeal, PacifiCorp argues that the instruction was erroneous because "by allowing the jury to apply the evidence relating to some individual class members to ***all*** class members," the trial court "expressly relieved Plaintiffs of their evidentiary burden of presenting evidence and proving their claims as to each individual class member." (Boldface and emphasis in PacifiCorp's brief.)

PacifiCorp acknowledges that there may be "circumstances where a jury may infer that individual evidence applies to the whole class" but contends that "for that inference to arise and be reasonable, the same conduct must have occurred without

material variation to the members of the class." (Internal quotation marks, brackets, and emphasis omitted.) That was not the circumstance here according to PacifiCorp, because "the jury needed to consider four different sets of liability and causation evidence applicable to the four different fire areas within the class boundary" and "even *within* each of the fire areas--and in particular within the Santiam Canyon--there was substantial variation." (Emphasis in PacifiCorp's brief.)

PacifiCorp also argues that the instruction "deprived PacifiCorp of its due process right to present every individual defense." PacifiCorp contends that "by instructing the jury that it could simply 'assume' that the evidence as to the individual class representatives applied to the entire class, the trial court violated PacifiCorp's due process rights, including the right to require each class member to individually prove each of its claims and PacifiCorp's right to contest liability."

Plaintiffs respond that "the trial court's instruction accurately stated the law, and worked no prejudice to PacifiCorp." In so contending, plaintiffs point out that "PacifiCorp takes issue only with one sentence" in the "Class Questions Defined" jury instruction, "which closely tracks a sentence in the California model instruction," CACI No. 115. And in plaintiffs' view, the purpose of the instruction was "simply to tell the jury that not every class member needs to appear in the witness box and tell their story in order for the class to prevail."

Further, relying on *Strawn* and *Tyson Foods, Inc. v. Bouaphakeo*, 577 US 442, 136 S Ct 1036, 194 L Ed 2d 124 (2016), plaintiffs argue that the instruction was

proper because "the whole point of class certification is that a handful of class members can litigate some or all of a claim (here, liability) on the entire class's behalf, so that everyone does not need to individually prove their claim."

Finally, plaintiffs contend, among other points, that no juror could have interpreted the instruction in the manner that PacifiCorp contends, because "the verdict form instructed the jury to give separate answers for each of the four fires" and the verdict form's "class questions" asked the jury whether "[p]laintiffs had proven their case as to 'the entire class' within the class boundaries."

C. *The trial court erred in instructing the jury.*

Having considered the parties' arguments, we conclude that the trial court erred in instructing the jury that it could simply "assume that the evidence at the trial applies to all class members."

As an initial matter, as explained above, notwithstanding that this case was certified as a class action, plaintiffs had the burden of proving their claims as to all class members. *See Strawn*, 350 Or at 358 (noting that, to "prevail in a class action for fraud, the class plaintiff must prove reliance on the part of all class members"); *see also Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, 559 US 393, 408, 130 S Ct 1431, 176 L Ed 2d 311 (2010) ("A class action, no less than traditional joinder (of which it is a species), merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits. And like traditional joinder, it leaves the parties' legal rights and duties intact and the rules of decision unchanged.").

That meant proving that PacifiCorp's tortious acts or omissions "caused" each of the class member's harm. Specifically, for the Echo Mountain Complex Fire, the 242 Fire, and the South Obenchain Fire, it meant plaintiffs had to prove that the harm to the plaintiffs within those class boundaries "would not have occurred but for" PacifiCorp's tortious conduct. And for the Santiam Canyon Fire, plaintiffs had to prove that PacifiCorp's tortious conduct "was a substantial factor in causing the harm to the plaintiffs."

The difficulty with use of the challenged jury instruction in this case is that much of the evidence introduced during the Phase I trial related to particular issues concerning particular wildfires--and for the Santiam Canyon, to particular ignitions at particular locations in the Santiam Canyon, such as Potato Hill and Kelly Lumber--and the jury could not, in our view, simply "assume" that that evidence applied "to all class members." For example, it is not apparent that the jury could "assume" that evidence of the fire at "832 North Santiam Highway," which plaintiffs emphasized to the jury in connection with the jury instruction PacifiCorp now challenges, also "applies" to, for example, a different plaintiff, whose property was destroyed miles away, in a different part of the Santiam Canyon, due to a different fire caused by a different ignition. In so observing, we emphasize that the Santiam Canyon class area is over 70 square miles, the Beachie Creek Fire undisputedly burned through the Santiam Canyon, and the jury was not required to credit plaintiffs' account of the timing of the Beachie Creek Fire burning through the Santiam Canyon.

Nor do plaintiffs explain how evidence that an individual saw an ignition on Echo Mountain, as plaintiffs' closing emphasized, and had property destroyed by the Echo Mountain Complex Fire, can be "assumed" to apply to plaintiffs over a hundred miles away whose property was destroyed by a different wildfire entirely. Nor, for example, do we see how evidence that PacifiCorp caused fires that forced firefighters to evacuate the Santiam Canyon has any application to PacifiCorp's liability to plaintiffs in, for example, the South Obenchain Fire boundary.

In reaching our conclusion that the trial court erred in instructing the jury, "You may assume that the evidence at the trial applies to all class members," we note that it is true, as we understand plaintiffs to contend, that in certain class action proceedings certain evidence can apply "classwide," to resolve certain issues. Indeed, as explained above, a fundamental aspect of class certification is a trial court's consideration of predominance; that is, the trial court making a determination of the "degree to which litigation of the controversy will require delving into individualized proof or, conversely, the degree to which the issues lend themselves to resolution through common proof--that is, proof for one individual class member will be proof for all." *Pearson*, 358 Or at 114.

Thus, in *Strawn*, on which plaintiffs rely, the court recognized that "to prevail in a class action for fraud, the class plaintiff must prove reliance on the part of all class members," but determined that "[d]irect evidence of reliance by each of the individual class members is not always necessary." 350 Or at 358. Instead, it explained that reliance can be inferred from "circumstantial evidence" if "the same

misrepresentation [was made] without material variation to the members of the class" and the "misrepresentation [was] of a nature that the class members logically would have had a common understanding of the misrepresentation, and naturally would have relied on it to the same degree and in the same way." *Id.* at 358-59.

This case is not a circumstance like that discussed in *Strawn*, where a tortious act (in *Strawn*, a misrepresentation) was uniform and without material variation. In this case, which involved multiple wildfires, because much of the evidence introduced during the Phase I trial, particularly regarding causation, related to particular issues concerning particular wildfires--and for the Santiam Canyon, to particular ignitions at particular locations in the approximately 71 square mile Santiam Canyon--it could not just be "assumed" that it applied to "to all class members."

In *Tyson Foods, Inc.*, on which plaintiffs also rely, the United States Supreme Court held that plaintiffs in a class action could prove their Fair Labor Standards Act (FLSA) claim using "representative evidence," where "each class member could have relied on that [representative evidence] to establish liability if [they] had brought an individual action" and the representative evidence "could have sustained a reasonable jury finding as to hours worked in each employee's individual action." 577 US at 455. The Court noted, however, that "[w]hether a representative sample may be used to establish classwide liability will depend on the purpose for which the sample is being introduced and on the underlying cause of action." *Id.* at 460; *see also id.* at 460 (noting that in "FLSA actions, inferring the hours an employee has worked from a study

[*i.e.*, representative evidence] * * * has been permitted by the Court so long as the study is otherwise admissible," but that the "fairness and utility of statistical methods in contexts other than those presented here will depend on facts and circumstances particular to those cases").

Plaintiffs' reliance on *Tyson Foods, Inc.* does not assist them because the Supreme Court cautioned that the case "provide[d] no occasion" to adopt "broad and categorical rules governing the use of representative and statistical evidence in class actions," and, in any event, it does not appear all of the evidence central to important issues in this class action proceeding could have been used by "each class member * * * to establish liability if he or she had brought an individual action." *Id.* at 455, 459-60.

Put another way, although for some evidence--such as evidence of PacificCorp's purported failure to "obtain granular weather information to evaluate shutting off the power outside of limited areas designated Fire High Consequence Areas"--it may be fair to say "applies to all class members," that is not the case for much of the evidence presented at trial regarding causation. And that is in part because, as described above, the trial court certified a single class consisting of the owners of thousands of parcels of property, some of whom live over 100 miles away from one another and whose properties were affected by different wildfires that ignited under different circumstances.

Further, "when read together with the other instructions," *Sherertz*, 288 Or App at 722, we think the difficulties with the instruction that PacifiCorp challenges are

compounded, not improved. As noted above, the trial court instructed the jury that there was a *single* class, which was defined in the jury instructions as all:

> "(1) owners or residents, as of September 7, 2020, of any (a) privately owned real property; (b) that is wholly or partially within the boundary of the maximum extent of burn for the Echo Mountain Fire, the Kimberling Fire, the South Obenchain Fire, the 242 Fire, or the Santiam Canyon Fire; and (c) experienced fire activity during those fires; or (2) owners of a motorhome, residential trailer, manufactured dwelling, other mobile home, or any other personal property that as of September 7, 2020, was located on any property (a) wholly or partially within the boundary of the maximum extent of burn for the Echo Mountain Fire, the Kimberling Fire, the South Obenchain Fire, the 242 Fire, or the Santiam Canyon Fire; that (b) experienced fire activity during those fires; and (c) whose motorhome, residential trailer, manufactured dwelling, other mobile home, or any other personal property, experienced fire damage during those fires."

Given that instruction defining the single class that was certified--which appeared in the jury instructions immediately prior to the "Class Questions Defined" jury instruction PacifiCorp challenges on appeal--the jury could have understood the instruction, "You may assume that the evidence at the trial applies to all class members," to mean that evidence demonstrating that plaintiffs were harmed in one wildfire due to PacifiCorp could be "assumed" to be applicable to plaintiffs who were harmed in a different wildfire entirely; after all, the jury was instructed that every class member was a part of one, big, single class.

In seeking a different result, plaintiffs point out that the verdict form's "class questions" asked the jury whether "[p]laintiffs had proven their case as to 'the entire class' within the class boundaries" and that "the verdict form instructed the jury to give separate answers for each of the four fires." And, in the "Class Questions Defined"

jury instruction, the trial court instructed the jury to interpret the "class questions" according "to these instructions *and the verdict form*." (Emphasis added.) As noted, the "Class Questions Defined" jury instruction, which contains the sentence that PacifiCorp challenges on appeal, provided, in full:

> "Only some questions on the verdict form are common to all class members. Those questions are called the class questions. The class questions will be specified on the verdict form that you will use in the jury room. In answering the class questions, you must determine the answer as to the class. *Because the case is a class action, you can answer the class questions based on evidence that applies to the class as a whole*. There is no requirement that individual class members appear in court to prove their case. *You may assume that the evidence at the trial applies to all class members*. *You should interpret the class questions according to these instructions and the verdict form*, understanding that for the purposes of these class questions, *the class is considered the plaintiff*. Each class question is broken down by fire."

(Emphases added.)

Ultimately, we do not think the structure of the verdict form and its "class questions" remedy the difficulties arising from the instruction that PacifiCorp challenges on appeal. That is because, as set forth above, in the "Class Questions Defined" jury instruction, the trial court told the jury that it should "answer the class questions based on evidence that applies to the class as a whole," and also that it could "assume that the evidence at the trial applies to all class members." The court also instructed the jury that there was only a single class. And, finally, the court instructed the jury that it was to "interpret the class questions according to *these instructions* and the verdict form." (Emphasis added.)

Put another way, in the "Class Questions Defined" jury instruction the jury

was instructed to follow its instructions, and those instructions stated, in essence, that in answering the "class questions," all the evidence was applicable to all class members.

Thus, we do not think the instructions as a whole--including consideration of the verdict form as referenced in those instructions--"completely and accurately stated the law applicable to the case." *Id.* at 725.

Additionally, because both the trial court and plaintiffs highlighted repeatedly that the instruction that PacifiCorp challenges tracks a sentence in CACI No. 115, we note that, with regard to Oregon's uniform jury instructions, we have stated that an "instruction's inclusion as a uniform instruction lends it no special credence or presumed accuracy." *Sherertz*, 288 Or App at 725 n 2. We can discern no reason why we would lend any "special credence or presumed accuracy" to a model instruction of another state.

Moreover, the "user guide" for the Judicial Council of California Civil Jury Instructions recognizes that the instructions therein, including CACI No. 115, are not appropriate for use in every case. The "user guide" for those instructions states that the model instructions were "drafted for the common type of case and can be used as drafted in most cases," but that parties will need to adapt them when "unique or complex circumstances prevail." *Judicial Council of California Civil Jury Instructions* 2 (ed 2026), *available at* https://courts.ca.gov/system/files/file/judicial_council_of_california_civil_jury_instructions_2026.pdf (accessed Mar 24, 2026). This class action proceeding presents both unique and complex circumstances.

Thus, in sum, we conclude that the trial court erred in instructing the jury, "You may assume that the evidence at the trial applies to all class members."

D. *The erroneous instruction was prejudicial to PacifiCorp.*

That brings us to prejudice. Considering the record as a whole and in the light of the parties' theories at trial, we conclude that the instructional error "gave rise to some likelihood that the jury reached an erroneous result." *Purdy*, 311 Or App at 259 (stating standard for prejudice due to erroneous jury instruction).

Here, not only was the instruction erroneous, but the risk of the jury misunderstanding its task based on the instruction, and relying on the instruction during its deliberations, was amplified by plaintiffs' counsel's closing argument to the jury emphasizing that, based on that instruction, the jury could "assume that the evidence that came in applies to the class members as a whole." *See Elan v. Tate*, 294 Or App 76, 86–87, 430 P3d 179 (2018) (prejudice to defendant where plaintiff's attorney "emphasized" erroneous instructions in his closing argument creating "some likelihood that the jury relied on the erroneous instructions and, consequently, reached a legally erroneous result"); *see also Purdy*, 311 Or App at 259 (considering counsel's closing argument assessing prejudice caused by erroneous jury instruction).

And the risk was further amplified by plaintiffs' counsel arguing to the jury that it could find PacifiCorp liable for the harm in the Santiam Canyon if PacifiCorp was "a cause of the harm that night," and that PacifiCorp "admit[ted] they cause[d] harm in the Santiam Canyon" because PacifiCorp "admit[ted] they started fires in the Santiam

Canyon." That is, if the jury was permitted to "assume that the evidence at the trial applies to all class members," as the trial court instructed it, it could also assume that PacifiCorp's admission to starting any particular fire in the Santiam Canyon was sufficient to determine that it caused harm to every plaintiff in the Santiam Canyon, as plaintiffs' counsel's argument suggested.

Finally, although, as articulated by plaintiffs, the verdict form's "class questions" asked the jury whether "[p]laintiffs had proven their case as to 'the entire class' within the class boundaries" and "the verdict form instructed the jury to give separate answers for each of the four fires," as explained above, the "Class Questions Defined" jury instruction instructed the jury, in essence, that in answering the "class questions," all the evidence was applicable to all class members. Thus, contrary to plaintiffs' argument, the verdict form's "class questions" did not render the erroneous jury instruction nonprejudicial.

Because we conclude that the trial court erred in instructing the jury and that the erroneous instruction was prejudicial to PacifiCorp, we reverse and remand.[9]

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[9] In this opinion, we have explained how, given the class that was certified, the evidence at trial, and plaintiffs' arguments to the jury concerning causation, the instruction that is the subject of PacifiCorp's fourth assignment of error was erroneous and was prejudicial to PacifiCorp.

We observe, however, that nothing in the erroneous instruction that PacifiCorp challenges--*i.e.*, "You may assume that the evidence at the trial applies to all class members"--limited the assumption that the jury was instructed that it could make to evidence of causation. As a result, given the erroneous instruction, the jury was permitted to "assume" that evidence of PacifiCorp's tortious conduct as to one plaintiff or group of plaintiffs was "applicable" as to the class as a whole. That too, on this record,

IV. PACIFICORP'S OTHER ASSIGNMENTS OF ERROR

As noted at the outset, there is one assignment of error for which our disposition as to PacifiCorp's fourth assignment of error is not dispositive. That assignment of error is PacifiCorp's third assignment of error. In that assignment of error, PacifiCorp contends that the trial court "erred when it failed to grant judgment to PacifiCorp on the class claims, given the absence of evidence that a PacifiCorp-caused fire harmed every member of the class." As we understand it, PacifiCorp contends that the trial court should have granted PacifiCorp's motions for directed verdict and judgment notwithstanding the verdict, due to a lack of evidence regarding causation.

As to that assignment of error, having considered the record and the parties' arguments, viewing the evidence in the light most favorable to plaintiffs, we conclude that the trial court did not err in denying the motions that are the subject of PacifiCorp's third assignment of error. *See Johnson v. Keiper*, 308 Or App 672, 678, 481 P3d 994 (2021) ("[A] directed verdict is appropriate only in the exceptional case where reasonable people could draw only one inference and that inference is that defendant was not liable."); *Currier v. Washman, LLC*, 276 Or App 93, 97, 366 P3d 811 (2016) (noting that, "on appeal from the denial of a motion for directed verdict, we review the evidence and any resulting inferences in the light most favorable to the party that obtained a favorable verdict, and the verdict cannot be set aside unless we can affirmatively say that there is

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seems problematic.

no evidence from which the jury could have found the facts necessary to support the verdict" (internal quotation marks omitted)); *see also Golik v. CBS Corp.*, 306 Or App 202, 225, 472 P3d 778 (2020) (noting, on "the rare occasion when we review the denial of a" motion for judgment notwithstanding the verdict, we "view the evidence in the light most favorable to the party who prevailed before the jury * * * and examine the record to ascertain whether it contains evidence which supports the verdict" (internal quotation marks omitted)).

As for PacifiCorp's other assignments of error, our resolution of PacifiCorp's fourth assignment obviates the need to address them. In reaching that determination, we highlight that, at oral argument, PacifiCorp's counsel acknowledged that, should we reverse on PacifiCorp's fourth assignment of error, we need not reach PacifiCorp's first or second assignments of error, in which it contends, respectively, that the trial court erred in certifying the class in this case and erred in failing to decertify the class in this case.[10]

V. CONCLUSION

In sum, we conclude that the trial court erred when it instructed the jury that it could "assume that the evidence at the trial applies to all class members." We also

[10] We also note that, in PacifiCorp's sixth through tenth assignments of error, it challenges various trial court rulings related to the availability of noneconomic damages. At oral argument, PacifiCorp's counsel encouraged us to address the issue of the availability of noneconomic damages even if we agreed with PacifiCorp as to its fourth assignment of error. But because we do not know how this case will develop on remand, we decline to address PacifiCorp's sixth through tenth assignments of error.

conclude that that error was prejudicial to PacifiCorp.

In reaching that conclusion, we emphasize that special jury instructions can be proper and are even perhaps necessary in class actions. But the instruction that was given in this case, which PacifiCorp challenges on appeal, was erroneous in view of the class that was certified, the evidence at trial, and plaintiffs' theories of causation. That is, the error is not in CACI No. 115 in the abstract, but in giving it in this case, because, in view of how this case developed, aspects of causation were not proven through use of common evidence.

We also emphasize that, with the benefit of knowing how the Phase I trial developed, including plaintiffs' eleventh-hour motion to amend the boundary for the Santiam Canyon Fire, the trial court has the authority on remand to reconsider its class certification decision and reconsider whether a single class is appropriate in this case. *See* ORCP 32 C(1) (class certification order "may be altered or amended before the decision on the merits").

Reversed and remanded.

CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing document titled **DEFENDANTS' AMENDED MOTION TO STAY CMO NO. 11 DAMAGES TRIALS** 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 November 21, 2025, consenting to service via email. *orfiresleadcounsel@kellerrorhback.com*
☐ 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

DATED: April 23, 2026

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