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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

DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTION TO ENTER CASE MANAGEMENT ORDER NO. 10

ORAL ARGUMENT REQUESTED

Assigned to: Hon. Steffan Alexander

I. INTRODUCTION

PacifiCorp objects to nearly every aspect of Plaintiffs' Proposed Case Management Order No. 10, and PacifiCorp will be submitting an alternative Proposed Case Management Order No. 10 for the Court's consideration shortly.

Plaintiffs' proposal would require PacifiCorp to litigate the claims of up to 50 class members per month (Pl. Proposed CMO No. 10 ¶ 5.a), over the course of 35 trial days (*id*. ¶ 4.a), based on check-the-box complaints collectively alleging up to ***$30 billion*** in damages. (*Id*. ¶ 5.b.) Those trials would be preceded by (at most) 30 days of discovery, a single 3.5-

1 hour medical exam and a single 2.5-hour deposition of the plaintiff 20 days before trial, no
2 third-party discovery, and no meaningful opportunity to address any discovery deficiencies
3 or possibility to adjudicate any pretrial motions. (*Id.* ¶ 6.) And Plaintiffs' allegations will be
4 a moving target up to 14 days before trial. (*Id.* ¶ 5.b.)
5 Plaintiffs' proposed plan reads not as a fair and efficient proposal, but rather as a
6 completely one-sided punishment for Defendant's insistence on their right to a fair trial by
7 jury on each plaintiff's claim. (*See* Pls.' Mot. to Enter Case Mgmt. Order No. 10 at 4 ("As
8 before, PacifiCorp continues to assert its right to trial by jury for the determination of each
9 class member's damages.").) And, as Plaintiffs candidly admit, their proposal is solely
10 designed to advance expediency and speed to the exclusion of all else. (*Id.* at 2 (court "must
11 emphasize expediency"). Plaintiffs' astonishing and unprecedented proposal is practically
12 infeasible, unlawful, and unauthorized.
13 It is also based on a false premise. Plaintiffs posit that PacifiCorp's disagreement
14 with their view regarding the availability (or unavailability) of non-economic damages in
15 wildfire matters has prevented a "mediated settlement," and that only an avalanche of
16 additional trials involving as many as "600 claims per year" can break the impasse. (*Id.* at 4-
17 7.) Plaintiffs' logic is sorely mistaken.
18 As an initial matter, no number of additional trials can resolve the disagreement
19 between Plaintiffs and PacifiCorp regarding the availability of non-economic damages. That
20 is a legal issue now before the Court of Appeals.
21 More importantly, PacifiCorp's position has not prevented it from settling the claims
22 of 434 individuals and businesses related to the very same fires in this case. No additional
23 trials were necessary to accomplish what counsel for those plaintiffs described as bringing
24 "meaningful compensation to those affected, enabling them to rebuild and recover from"
25 these fires. (*See* Pacific Power June 3, 2024, Press Release, available at
26 https://www.pacificorp.com/about/ newsroom/news-releases/settlement-plantiffs-2020-labor-

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day-fires.html.) Indeed, in the past two years, PacifiCorp has resolved the wildfire claims of over 1,500 individuals and business without a single trial.

Here, Plaintiffs chose a different approach. They sought certification of an "issues class" involving numerous different wildfires, with different alleged causes, affecting people in different ways—a first in wildfire litigation. They then insisted on trying PacifiCorp's class-wide liability for those different fires in a single trial. That liability trial and the damages trials since then have resulted in judgments where noneconomic damages represent 89 percent of over $160 million in principal damages awarded. No amount of additional damages trials will bring clarity to these issues or determine whether Plaintiffs' approach was correct. Indeed, to the extent PacifiCorp prevails on appeal, any additional damages trials would result in a significant drain and waste of the Court's and parties' resources.

PacifiCorp will soon propose a case management order that charts a fair and reasonable path forward. Accordingly, the Court should deny Plaintiffs' Motion to Enter Case Management Order No. 10.

II. ARGUMENT

A. Plaintiffs' Proposed CMO No. 10 Is Impractical, Unfair, and Impedes, Rather than Furthers, Efficient and Fair Resolution of This Case.

1. The Unilateral Plaintiff Selection Process Impedes Resolution

Plaintiffs' Proposed CMO No. 10 is shot through with practical problems. First, PacifiCorp opposes the unilateral selection process for trial participants proposed by Plaintiffs. As PacifiCorp has previously explained, a unilateral selection process through which Plaintiffs alone are allowed to cherry-pick their strongest claims and most impactful stories for trials does nothing to further the efficient resolution of this case. To the contrary, the continued use of a unilateral selection process will only generate additional unrepresentative and unusable data points. As much as Plaintiffs might prefer to extrapolate these initial high-value damages awards to every single remaining absent class member, that

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is simply not realistic. Data points derived from Plaintiffs' unilateral approach do not facilitate productive settlement discussions—and have, in fact, driven the parties to an impasse—because the ongoing problem with these trials has been that they are ***not*** representative, and they do ***not*** provide usable and reliable data for settlement purposes.

A truly valuable process should start with representative plaintiffs and claims that are not hand-selected by one party. That process has not occurred in any of the trials that have been held to date, and it is no surprise that this litigation alone continues to evade out-of-court resolution even as many other 2020 Labor Day fire cases have been successfully resolved. The answer is ***not*** to schedule even ***more*** expedited trials with minimal discovery and cherry-picked plaintiffs. The answer—as PacifiCorp will explain further in its affirmative motion to enter an alternative Proposed Case Management Order No. 10—is to conduct a series of true and fair bellwether trials that will generate informative and trustworthy data points that can be used to facilitate settlement discussions.

2. The Short-Form Complaints Are Unauthorized and Inadequate.

PacifiCorp also opposes the continued reliance on the current version of the short-form complaints, and PacifiCorp will be submitting a proposed alternative to be adopted for future trials. For the reasons outlined in PacifiCorp's Motion to Strike Mass Short-Form Complaint #1 (TCF 05/10/2023), the short-form complaints do not comply with the Oregon Rules of Civil Procedure. Equally important, from a practical perspective, they are almost useless as pleadings and do not advance the resolution of this case. The short-form complaints simply create a pool of 1,365 potential individual plaintiffs with nothing more than basic identifying information, over-inclusive, check-the-box damage allegations, and $30,000,000 demands for each plaintiff that do not have any basis in past verdicts or actual damages and are unsupported by any factual allegations. (*See* TCF 05/10/2023 (PacifiCorp's Motion to Strike Mass Short-Form Comp. # 1).)

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1 The short-form complaints filed to date underscore those points. All plaintiffs allege
2 multiple categories of damages; hundreds of individual plaintiffs allege damage to timber or
3 trees; and dozens allege lost profits or business income. In any other circumstance, those
4 complaints would be deficient on their face and subject to motions to dismiss, strike, and
5 make more definite and certain. Yet, under Plaintiffs' proposal, once the 60-day clock starts
6 ticking, PacifiCorp would have no meaningful notice or opportunity to address those
7 pleading deficiencies, much less analyze and engage its own experts to explore those claims
8 or gather adequate information in preparation for trial. And PacifiCorp cannot take the
9 complaints on face value either, given that they allege the same damage categories and same
10 amounts across the board—whether the plaintiff is a minor who owns no property, a family
11 member whose economic damages claim has already been adjudicated, or other plaintiff who
12 seeks the same amount of damages regardless of the nature and extent of their individual
13 experiences and property.
14 Although nothing in ORCP 13 (or its companion, FRCP 7) refers to or authorizes
15 "master" and "short-form" complaints, courts in multi-district litigation or other mass-filing
16 cases have adopted the process of filing a master complaint followed by short-form
17 complaints or other opt-in complaints as a case management tool. In those cases, however,
18 short-form complaints are accepted as a substitute because they signal the *beginning* of the
19 process of identifying potential claimants and are only accepted as adequate when combined
20 with other mechanisms for early exchange of information. *See, e.g., In re Philips Recalled*
21 *CPAP, Bi-Level PAP, & Ventilator Products Litig.*, 2:21-MC-1230, 2023 WL 7019287, at *6
22 (WD Pa Sept 28, 2023), *report accepted in part, rejected in part sub nom. In re Philips*
23 *Recalled CPAP, Bi-Level PAP, & Mech. Ventilator Products Litig.*, MC 21-1230, 2024 WL
24 278641 (WD Pa Jan 24, 2024) (requiring the submission of fact sheets within 45 days of
25 short-form complaints with "specific information" that was necessary to state a cause of
26 action); *Daniel v. Sanofi S.A.*, 2:23-CV-1464-ACA, 2024 WL 1514450, at *4 (ND Ala Apr 8,

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2024) (concluding, on remand from MDL, that short-form complaint did not plead individual allegations of fraud and general allegations in master complaint were insufficient).

In other words, a short-form complaint is designed to be used for initial claimant identification, and it is followed by a process of individualized pleadings and process—including a detailed fact sheet or other pleading—ensuring that the nature and scope of the claim and damages are adequately disclosed in advance of discovery and trial. Here, under Plaintiffs' proposal, the facially deficient, short-form complaints would be the full extent of the pleadings provided to PacifiCorp. PacifiCorp would receive no other information until (perhaps) a voluntary document production 30 days before trial and likely not even at that time. Plaintiffs cite no precedent for eliminating the basic pleading procedure in that way.

In other Labor Day fire cases where PacifiCorp has received adequate claim information from the plaintiffs, PacifiCorp has settled over 1,500 claims. In the most recent example, PacifiCorp settled over 400 claims from plaintiffs that opted out of the *James* class. The resolution of those claims was made possible by the production of claim information, not trench warfare and rapid-fire trials. Here, by contrast, Plaintiffs continue to refuse to provide fulsome information to facilitate settlement. The first time PacifiCorp learned the names and addresses of the 1365 plaintiffs reflected in the mass short-form complaints is when class counsel filed those complaints. However, the mass complaints still do not provide any damages information beyond both over-inclusive and under-inclusive checked boxes that do not allege the level of detail required to even begin to resolve these claims. Continuing to evade the fundamental requirement of providing sufficient damages information will continue to delay reasonable settlement in this case. The full and complete disclosure of all information is critical for the resolution of claims in an expeditious and reasonable manner.

3. Plaintiffs' Default Trial Plan Is Fundamentally Flawed and Unfair.

Because Plaintiffs are (1) solely empowered with the ability to identify 5, 10, or up to 50 plaintiffs for a trial to occur within 60 days (Pl. Proposed CMO No. 10 ¶ 5.a) and (2) in

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sole possession of actual detailed information about the claims and damages of each absent class member, the result is a completely unlevel playing field in which Plaintiffs would have months to prepare their witnesses and trial presentation, engage experts, and complete their trial preparation, all before actually selecting plaintiffs from a pool of 1,365 potential trial plaintiffs. They then could "drop the bomb" on PacifiCorp and the Court. At that point, PacifiCorp would have to arrange for document and deposition discovery and do everything else necessary to prepare for one or more trials at which $300 million in damages is alleged. And the Court would have to accommodate Plaintiffs' request as well, with little more than two months advance notice to set aside up to five judges' calendars for 35 total trial days.

Plaintiffs do not explain how this schedule is feasible even for the first wave of plaintiffs. But it becomes absurd when one considers the successive waves of plaintiffs. Plaintiffs do not explain how PacifiCorp can be expected to try up to five cases and spend up to 35 trial days in those cases at the same time that it has 30 days (or less) to take discovery and prepare for the next group of 50 plaintiffs, or how the court would manage pre-trial and trial proceedings on that schedule. Even if the Court and its colleagues can accommodate that extraordinary request, PacifiCorp's counsel cannot. And Plaintiffs' counsel offer no explanation of how witnesses and damages experts who can and should be efficiently shared across cases are to avoid needing to be in five courts at once.

As a practical matter, Plaintiffs propose forcing PacifiCorp to defend itself from at least one (and likely more) trials—including at least 10 different class members—every month, meaning that in any given month it will have to (1) litigate one trial, (2) review documents, conduct examinations, and depose class members for the next trial (given that it only has 30 days of discovery), (3) investigate insurance payments and draft offset motions (which are due 10 days before each trial), (4) prepare any motions *in limine* (which must be presented orally at the start of each trial), and (5) litigate the already ongoing appeals.

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1 Plaintiffs also do not address whether trials will be double-tracked, overlapping, or
2 otherwise scheduled within the time frame provided by the proposal.
3 In particular, Plaintiffs would require PacifiCorp to waive the presentation of any
4 motion in *limine* in writing, instead forcing both the parties and the trial court to address
5 significant evidentiary issues "on the fly" without any opportunity for review of supporting
6 authorities, review of evidence in camera, or other procedural protections. Given that the
7 bulk of potential "new" evidentiary issues to be raised prior to each of these trials will almost
8 certainly involve testimony and evidence from Plaintiffs that PacifiCorp seeks to exclude,
9 this is yet another attempt by Plaintiffs to limit PacifiCorp's ability to effectively defend
10 itself in favor of maximizing class counsel's own recovery and minimizing class counsel's
11 costs. As Phase II, Trial 2 demonstrated, PacifiCorp must be allowed to present new
12 evidentiary issues in writing and comprehensively explain why certain pieces of new
13 evidence should be excluded under the Court's prior rulings—of which there are many to
14 keep track of—as well as under caselaw and other rules.
15 **4. The Extreme Limitations on Discovery Are Unfair and Unfeasible.**
16 Plaintiffs' proposed solution to the unworkable trial schedule described is to set
17 unprecedented limitations on PacifiCorp's ability to conduct discovery. What Plaintiffs
18 actually propose is no meaningful discovery at all. Document discovery would be limited to
19 what occurred in advance of the first two damages trials with no individualized requests
20 permitted absent "good cause," regardless of a plaintiff's individual experiences, damages, or
21 other circumstances. (Pl. Proposed CMO No. 10 ¶ 6.a.) Plaintiffs would only be required to
22 "endeavor" to produce documents "(if any)" 30 days before trial, with no obligation to
23 actually produce documents by that deadline. (*Id.* ¶ 6.b.) As a practical matter, PacifiCorp
24 would have no ability to compel additional document production and no ability to obtain
25 documents from third-parties identified in a plaintiff's document production, given the
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subpoena and notice rules. Any deficient or untimely discovery responses or productions would be impossible to raise and address within the time period.

And this is a real concern and likely scenario. In advance of Phase II, Trial 1 and Phase II, Trial 2, Plaintiffs did not come close to complying with the mandatory deadlines in CMO No. 8. (*See* CMO No. 8 ¶ 5.b (setting deadlines for document discovery).) Instead, Plaintiffs continued producing documents up to immediately before trial. That failure likely is the source of Plaintiffs' proposal to "endeavor" to produce documents 30 days before trial (and nowhere close to before any deposition). Plaintiffs are aware that they will be unable to meet any firm deadline, with PacifiCorp suffering the consequences.

As for depositions, unless PacifiCorp waives its ability to obtain and review documents, depositions of up to 10 plaintiffs (and only plaintiffs) would have to occur in less than a week. Even assuming Plaintiffs comply with the non-mandatory, aspiration of producing relevant documents 30 days before trial, any depositions of any individual plaintiffs would have to be completed 20 days before trial, and PacifiCorp would have 10 days to receive and review documents, schedule depositions, and take depositions of every plaintiff—all in a case involving up to $300 million in alleged damages.

Not only that, but Plaintiffs have further shortened the length of depositions from 4 hours—which was already insufficient to cover the ground necessary to meaningfully explore both the economic and noneconomic aspects of each these $30 million claims—to a mere 2.5 hours. That limitation is a nonstarter. Each plaintiff is different. Those differences must be fully explored. And especially when coupled with Plaintiffs' repeated obstruction and attempts to delay other legitimate discovery avenues, PacifiCorp must be allowed sufficient time in depositions to fully explore all aspects of each of these claims. To name just one example out of many, Plaintiffs have repeatedly taken the position that personal property inventories created by Plaintiffs themselves for the purpose of providing to experts are privileged. But the ***facts*** surrounding which items of personal property were lost and how

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1 much each item cost and other details about each item are not privileged. PacifiCorp must be
2 allowed to explore those facts through depositions.
3 More broadly, of course, depositions are the only meaningful way for PacifiCorp to
4 fill in the multiple and sizable gaps left by the check-the-box short form complaints. It is
5 only through depositions, for example, that PacifiCorp is able to learn the timeline of what
6 each plaintiff personally experienced on Labor Day 2020—the crux of each of the $25
7 million noneconomic damages demands.
8 In addition, Plaintiffs' Proposed CMO No. 10 eliminates, for all practical purposes,
9 the ability to take any third-party discovery. Depositions of any spouse or third party would
10 be functionally impossible under the schedule described above. Assuming, for example, that
11 documents produced 30 days before trial or a deposition on the 22 days before trial revealed
12 an essential third-party witness, PacifiCorp would be unable to secure the testimony of any
13 spouse or third party before the deadline for doing so (also 20 days before trial). (Pl.
14 Proposed CMO ¶ 5.c.) That assumes that Plaintiffs agree to the taking of such a deposition
15 in the first instance. If Plaintiffs oppose it, and PacifiCorp must demonstrate good cause to
16 the Court (*id.* ¶ 5.c), then the deadlines become impossible to meet. As a practical matter,
17 PacifiCorp will have no ability to depose any third-party witnesses who may have relevant
18 information about a plaintiff's property, experience, or damages.
19 With respect to medical providers specifically, Plaintiffs have consistently put up
20 roadblocks to PacifiCorp's subpoenas to medical providers for documents, and they signal in
21 Proposed CMO No. 10 an intent (contrary to the other aspects of the plan) to insist on strict
22 compliance with the Oregon Rules of Civil Procedure. Given the practical reality of third
23 parties' inability to produce documents swiftly, adherence to the subpoena rules alone would
24 not allow for any documents to be obtained until after trial began, if ever. *See* ORCP 55 C
25 (requiring that subpoena allow for at least 14 days for production of documents); ORCP 55 D
26 (outlining requirements for production of confidential health information). Thus, in cases

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alleging $25 million in noneconomic damages associated with emotional distress, Plaintiffs have no obligation to obtain any medical records (Pl. Proposed CMO No. 10 ¶ 6.f), and PacifiCorp has no ability to obtain them either.

* * * * *

It was Plaintiffs who sought to certify this case as an issues class, recognizing from the outset that individual plaintiffs would have to present their damages claims in separate, individual proceedings. Thus, adjudication of individualized damages claims was always in this case's future. And, as Plaintiffs' counsel recognized from the outset, filing individual claims—either in one circuit court or in multiple courts—was a possibility that they themselves raised. Plaintiffs cannot now use that outcome as a basis for such an impractical and unfair proposal.

The key to resolving class claims is the fulsome exchange of claim information, not fast-tracking the trial process with unprecedented, costly, time-consuming, and ultimately unproductive litigation. PacifiCorp objected to expedited trials in this case and in fact, requested a stay of all trials until the appellate courts rule on several key foundational rulings made by this court. To proceed expeditiously with blinders is an exercise in futility. If this Court is going to proceed with damage trials, then truly representative, fair, and meaningful trials must be pursued, preceded by the production of full and complete plaintiff claim information.

B. Plaintiffs' Proposed CMO No. 10 Violates ORCP 1 B, the Oregon Constitution, and Due Process

1. The Oregon Rules of Civil Procedure; Article I, section 10; and the Due Process Clause All Require That a Defendant Be Afforded an Adequate Opportunity to Present a Defense

ORCP 1 B states that the Oregon Rules of Civil Procedure "shall be construed to secure the just, speedy and inexpensive determination of every action." *Mount Hood Cmty. Coll. ex rel. K & H Drywall, Inc. v. Fed. Ins. Co.*, 199 Or App 146, 155-56, 111 P3d 752

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1 (2005) (ORCP 1 B provides context for interpreting Oregon Rules of Civil Procedure and its
2 directive must be followed). That rule's first directive is that any construction of the
3 procedural rules must secure the "just" resolution of an action. Allowing a party to
4 fundamentally change the processes and protections of the rules to advance their own
5 interests in speed or efficiency is inconsistent with that mandate. *See id*. at 156 (rejecting
6 interpretation of rules that would be "patently unfair").

7 Article I, section 10, of the Oregon Constitution similarly provides that "justice shall
8 be administered * * * completely and without delay." That clause ensures fundamental
9 fairness in judicial proceedings to all parties. *See Smothers v. Gresham Transfer, Inc*., 332
10 Or 83, 94, 23 P3d 333, 340 (2001), *overruled by Horton v. Oregon Health & Sci. Univ*., 359
11 Or 168, 376 P3d 998 (2016) (discussing history of Article I, section 10); *Brewer v. Dept. of*
12 *Fish & Wildlife*, 167 Or App 173, 183, 2 P3d 418, 424 (2000), rev den, 334 Or 693 (2002)
13 (Landau, J. concurring) (same). As with ORCP 1 B, Article I, section 10 requires fair and
14 complete, not just swift, justice.

15 In addition, it is axiomatic that, under the Due Process Clause, a defendant must be
16 afforded a full and fair opportunity to defend itself in a fair trial. *See, e.g.*, *Murray's Lessee*
17 *v. Hoboken Land & Improvement Co.*, 59 US (18 How) 272, 280 (1855); *Owenby v. Morgan*,
18 256 US 94, 111 (1921) ("right to be heard"); *Lindsey v. Normet*, 405 US 56, 66 (1972)
19 ("present every available defense"). To effectuate that basic principle, the Supreme Court
20 has held that a "myopic insistence upon expeditiousness in the face of a justifiable request for
21 delay" violates a defendant's constitutional right to due process. *See, e.g.*, *Ungar v. Sarafite*,
22 376 US 575, 589 (1964); *see also, e.g.*, *Price v. Wei Zhang*, 521 P3d 795, 799 (Okla 2022)
23 (explaining that "[w]hile a trial court may control its docket, it may not be done at the
24 expense of a litigant's due process rights"); *Faison v. Turner*, 858 A2d 1244, 1247 (Pa Super
25 Ct 2004) (noting that it has been "repeatedly held that a trial court's legitimate interest in
26 controlling its docket should not unnecessarily infringe upon a litigants' right to a fair

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trial"—and explaining that "lawsuits are more than numbers or punches in computer cards"); Wright & Miller, § 832 *Continuances*, 3B Fed. Prac. & Proc. Crim. § 832 (4th ed.) (explaining circumstances in which additional time may be necessary).

More specifically, a defendant does not have constitutionally adequate time to prepare a defense when it does not have ample time to review evidence and consult with an expert on complex issues—like the cause and extent of the injuries allegedly suffered by the plaintiffs here. *See, e.g.*, *Lee v. Winston*, 717 F2d 888, 897-98 (4th Cir 1983) (defendant's due process rights were violated when his counsel only had a few days to review documents and did not have enough time to consult with an independent expert before a hearing); *Anderson v. Sheppard*, 856 F2d 741, 745 (6th Cir 1988) (defendant must have sufficient time to prepare an adequate defense); *see also Hellstrom v. United States Dep't of Veterans Affairs*, 201 F3d 94, 97 (2d Cir 2000) (nonmoving party "must have … the opportunity to discover information that is essential to [its] opposition"); *Jenkins v. McKeithen*, 395 US 411, 429 (1969) ("right to present evidence is, of course … required by the Due Process Clause"); *Wolff v. McDonnell*, 418 US 539, 566 (1974) ("right to present evidence is basic to a fair hearing" and "chief among the Due Process minima" (cleaned up)).

2. Plaintiffs' Proposed CMO No. 10 Is Unlawful and Unconstitutional.

As outlined above, Plaintiffs' Proposed CMO No. 10 eliminates fundamental pleading requirements, effectively prohibits discovery and, coupled with truncated short-form complaints, prevents PacifiCorp from adequately preparing for trial or mounting a defense to the cause and extent of each plaintiff's claimed damages. And it requires PacifiCorp to litigate simultaneous claims and trials involving hundreds of millions of dollars in exposure on rolling 30-day timelines. This extraordinary and unprecedented process will prevent PacifiCorp from adequately preparing for each trial and prevent it from exercising its constitutional right to defend itself from each plaintiff's claims. For at least those reasons, Plaintiffs' Proposed CMO No. 10 violates ORCP 1B and the state and federal constitutions.

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Under Plaintiffs' plan, for example, plaintiffs will "endeavor" (but apparently not be required) to produce documents 30 days before trial, and PacifiCorp will be limited to (1) a single 3.5-hour medical exam of the plaintiff 25 days before trial, and (2) a single 2.5-hour deposition of the plaintiff only 20 days before trial. PacifiCorp cannot depose any other witness (or secure any additional time to depose the plaintiffs) without obtaining leave of Court. This proposal would leave PacifiCorp with a minimal, truncated opportunity to examine and question the plaintiffs only, and likely mean that PacifiCorp will either have no documents when it does so, or, at best, have only a few days to examine the produced documents before questioning the plaintiffs.

And PacifiCorp will have no opportunity whatsoever to test plaintiffs' assertions about their injuries by deposing other witnesses. It will have no opportunity to ask plaintiffs' physicians or other health professionals about plaintiffs' injuries, and it will have no opportunity to ask other witnesses—family members or others—about those alleged injuries. It will have no opportunity to obtain documents from any third parties, particularly medical or other treating providers, given Plaintiffs' resistance to the disclosure of any medical records and insistence that procedural rules must be followed. (*See* Pl. Proposed CMO No. 10 ¶ 5.f; ORCP 55 H.)

Plaintiffs do not cite any authority supporting their demand for their extreme limitations on discovery. And limiting PacifiCorp to a single medical exam and brief 2.5-hour remote deposition—without an opportunity to ask the witness about their documents, obtain documents, consult with an expert before the medical exam, or depose any witnesses other than the class members themselves—would leave it with "insufficient time to prepare [its] case" and prevent it from developing its defenses to each class member's claims of injury. *See Lee*, 717 F2d at 897 (giving counsel a few days "to review the medical record" and "interview" medical witnesses was insufficient time to fully prepare, particularly in the absence of a compelling reason to insist on an expedited schedule). PacifiCorp must be

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allowed to develop the factual record and examine and depose class members—and other witnesses—after having time to review documents and consult with experts. Plaintiffs' extraordinarily truncated discovery proposals—which hamstring PacifiCorp's ability to develop and to test the real-world facts necessary for its defense—fail to afford PacifiCorp this necessary right.

The pre-trial and trial aspects of Plaintiffs' proposal exacerbate that unfairness. As a result of the timelines, which are counted as calendar days including weekends and holidays, PacifiCorp is denied the opportunity to file any motion for summary judgment and cannot file any other motion raising any other dispute. Plaintiffs would prohibit PacifiCorp from even filing any motion *in limine* in writing, forcing both the parties and the trial court to address significant evidentiary issues without any written authorities or argument.

As several courts have recognized, the size of a case does not provide a basis for dispensing with procedural and evidentiary rules for the sake of resolving cases quickly. *See, e.g.*, *Watson v. Shell Oil Co.*, 979 F.2d 1014, 1020 (5th Cir 1992), *on reh'g*, 53 F3d 663 (5th Cir 1994) ("The secondary source quoted by the district court offers no credible support for the proposition that our rules of evidence and procedure may be altered or diminished in any manner, in actions of this kind, other than those recognized to be within the sound discretion of the district court"); *Little v. Kia Motors Am., Inc.*, 233 A3d 377, 391 (NJ 2020) ("A class action does not dispense with traditional burdens of proof in the name of efficiency; to the contrary, it leaves the parties' legal rights and duties intact and the rules of decision unchanged. Just as due process principles mandate that a court permit the plaintiff to prove her case subject to the court rules, the Rules of Evidence, and other relevant law, due process requires that there be an opportunity to present every available defense within the same constraints."); *Able Supply Co. v. Moye*, 898 SW2d 766, 772 (Tex 1995) (recognizing that, in case involving 3,000 plaintiffs, "a denial of discovery going to the heart of a party's case may

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render an appellate remedy inadequate" and providing critical information only 30 days before trial was "such a denial of their rights as to go to the heart of the case").

Plaintiffs' completely one-sided proposal does just that. In every respect, it is designed to minimize, and effectively eliminate, PacifiCorp's ability to discover necessary facts, prepare for trial, and present a defense, all while maximizing Plaintiffs' tactical advantages and serving Plaintiffs' interests in ramming their $30 million claims through trial as fast as possible. Indeed, Plaintiffs are candid about that goal. (Pl. Motion for Entry of CMO No. 10 at 5-6.) Their proposal violates ORCP 1 B and the due process guarantees of the state and federal constitutions.

C. No Authority Supports Plaintiffs' Proposal

Plaintiffs have cited no persuasive authority for their proposal, and there is none. As an initial matter, as to Plaintiffs' request for a special purpose docket, only the presiding judge has the power to regulate the administrative business of the court. ORS 1.171(2). Plaintiffs do not explain under what power or circumstances this Court has the authority to manage the administrative functions, dockets, or caseload of the Multnomah County Circuit Court, or to assign cases to other judges. Perhaps Plaintiffs anticipate that the Presiding Judge will either delegate that power to the Court, ORS 1.171(4), or exercise that power *sua sponte*. Plaintiffs' proposal, however, is vague on that threshold point.

None of the cited statutes and rules authorize Plaintiffs' plan either. ORCP 1 B does not authorize completely discarding the procedural rules governing civil actions. And this stage of the bifurcated case is no longer subject to ORCP 32 E. As explained in PacifiCorp's Motion for Entry of Case Management Order: Phase II Damages Trials, the plaintiffs who seek damages at this stage are doing so as individual plaintiffs, not as class representatives or in a class proceeding. They are not asserting damages claims that were part of a certified damages class. The remaining civil rules cited by Plaintiffs—ORCP 36 and 46—permit

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some limitations on the scope of discovery, but not the wholesale reconfiguration of pleading, discovery, and pre-trial procedure that Plaintiffs' proposal represents.

That leaves the Court's inherent authority. As the Supreme Court has cautioned, "[b]ecause of their very potency, inherent powers must be exercised with restraint and discretion." *Chambers v. NASCO, Inc.*, 501 US 32, 44 (1991). Although the Court has inherent authority to manage its docket, there are limitations, and that inherent authority cannot be a basis on which to ignore the express directives of the Oregon Rules of Civil Procedure or Oregon and federal constitutions. *See State v. Spainhower*, 251 Or App 25, 32, 283 P3d 361, 366 (2012) (court's inherent contempt power "is, necessarily, both functionally and constitutionally, subject to a temporal constraint"). Indeed, a court's inherent authority must be exercised consistent with, not in contravention of, existing statutes and rules. *United States v. Hall*, 214 F3d 175, 178 (DC Cir 2000) ("[Inherent] power may only be exercised when it does not run afoul of an express and unambiguous Rule to the contrary."); *G. Heileman Brewing Co., Inc. v. Joseph Oat Corp.*, 871 F2d 648, 652 (7th Cir 1989) ("Obviously, the district court, in devising means to control cases before it, may not exercise its inherent authority in a manner inconsistent with rule or statute."); *Landau & Cleary, Ltd. v. Hribar Trucking, Inc.*, 867 F2d 996, 1002 (7th Cir 1989) ("[W]here the rules directly mandate a specific procedure to the exclusion of others, inherent authority is proscribed."). Plaintiffs' proposal goes far beyond case management or filling in the gaps and is expressly contrary to numerous directives and rules. Inherent authority cannot justify such a stark departure from basic procedural protections.

D. Plaintiffs' Remaining Arguments Should Be Rejected

Ultimately, Plaintiffs' main argument in favor of their proposed plan is that it is the only option to provide immediate relief for members of the *James* class. Those arguments should be rejected for at least two reasons.

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First, not surprisingly, many courts have managed hundreds, thousands, and, in some cases, tens of thousands of individual claims without sacrificing basic procedural protections, imposing an undue burden on the court system, and in a manner that ultimately furthers resolution of the claims. To suggest that the Court only has one option, and it must follow Plaintiffs' one-sided and untested "novel" proposal, is simply not true.

Second, Plaintiffs essentially contend that the claims of persons impacted by the Labor Day 2020 wildfires should take precedence—over the claims of other persons within the court system, due process, or fundamental procedural protections—as a result of some plaintiffs' individual circumstances and, without mentioning it directly, because they view PacifiCorp's conduct as particularly odious, and its positions unjustified. Plaintiffs cite no authority for that type of necessity argument. Undoubtedly, the civil court system has always been faced with adjudicating the claims of persons who demand justice and accountability. Those demands and claims, however, are only one side of an equation that always has been balanced. Every case is important to the plaintiff and their counsel who brings it. Every defendant, no matter how unsympathetic they are in others' eyes, has a right to present a defense consistent with due process and established procedure. It is a decidedly slippery slope to conclude that *these* plaintiffs' economic or other circumstances merit the type of wholesale changing of the rules for which Plaintiffs advocate in Proposed CMO No. 10. And while the Court can and should address the case management challenges with measures designed to promote efficient resolution of these cases, the Court should decline Plaintiffs' request to simply bludgeon Defendant and the Court because they want to punish PacifiCorp for not acceding to their settlement demands, or its executives for expressing their opinions.

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1 **III. CONCLUSION**

2 For the foregoing reasons, Defendants respectfully request that the Court reject

3 Plaintiffs' Proposed CMO No. 10.

4 DATED: June 17, 2024

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CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing document titled **DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTION TO ENTER CASE MANAGEMENT ORDER NO. 10** on the following named person(s) or party(ies) on the date and by the method(s) indicated below.

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

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

Service List Attached

DATED: June 17, 2024

s/ Brad S. Daniels
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