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 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-Respondents,

v.

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

Defendants-Appellants.

CA No. A183140

Multnomah County Circuit Court
Case No. 20CV33885

APPELLANTS' REPLY IN SUPPORT OF MOTION TO STAY TRIAL COURT PROCEEDINGS

EMERGENCY MOTION UNDER ORAP 7.35

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I. INTRODUCTION

PacifiCorp has demonstrated how this case and the trial court's unprecedented case management order ("CMO No. 11") are extraordinary on several levels and justify this Court's immediate intervention. CMO No. 11 imperils the operations of an essential public utility on which millions of customers depend by setting an impossible schedule that would undermine PacifiCorp's fundamental rights and impose crushing financial burdens. It places groups of 10-19 plaintiffs on 180-day litigation timelines in advance of two-week trials—week-after-week, month-after-month for over two years. Moreover, it requires that PacifiCorp simultaneously investigate, vet, and defend against unique complaints filed every week alleging between $250 million and $390 million in noneconomic damage alone. And it requires that PacifiCorp undertake this uniquely daunting task without all the tools available to it under the Oregon Rules of Civil Procedure to mount a defense and making it practically impossible to do so.

The foundation for that unprecedented use of judicial and party resources is the trial court's decision to allow this case to proceed as a class action for noneconomic damages arising from property loss, notwithstanding the fact PacifiCorp was not responsible for any class-wide damage in the largest area, the Santiam Canyon, and the lack of any precedent for allowing unrestricted noneconomic damages arising out of property damage. Unless this

Court enters a stay, CMO No. 11 will require the adjudication of billions of dollars in damages in 160 jury trials involving over 1,900 plaintiffs in the next two-and-a-half years—all while this Court resolves the legal questions at the core of Phase I—questions that not only go to the outcome of this case and affect the parties, but have statewide importance to public utilities, Oregon businesses, and the status of Oregon law. Reversal or modification of the Phase I judgment in any respect would impact every one of those trials, rendering the entire process a nullity. Only action by this Court—an immediate stay of the trials scheduled under CMO No. 11 and prompt resolution of PacifiCorp's appeal as soon as possible (briefing will be completed within 60 days)—can avoid that result and effectively move this case toward final resolution.

Plaintiffs-Respondents' Response in Opposition to Appellants' Motion to Stay Trial Court Proceedings ("Pl. Opp.") offers nothing sufficient to alter that conclusion. Plaintiffs cite no precedent—no case in Oregon or anywhere else in the country—establishing anything close to a similar case schedule under circumstances that are remotely on par with CMO No. 11. Plaintiffs also fail to show that CMO No. 11 can reasonably move the case toward final resolution, or demonstrate why a pause in proceedings and prompt resolution of the appeal is not the most—indeed only—reasonable path forward. Instead, Plaintiffs' Opposition underscores that the only result of CMO No. 11's trial

schedule is to pile on more judgments, more appeals, and more costs in the hope of forcing PacifiCorp or some affiliated company to fund a settlement.

Indeed, Plaintiffs state that PacifiCorp is a "multibillion" dollar company, and that Berkshire Hathaway—a company with no identified relationship to this litigation—is a "trillion-dollar conglomerate." (Pl. Opp. at 2, 33.) Plaintiffs' gratuitous reference to PacifiCorp's and Berkshire's balance sheets is only meant to suggest that the Court should ignore all of the issues, questions, and problems outlined in PacifiCorp's Opening Brief and Motion, with the vague assurance that those problems will evaporate if a corporation with sufficient resources accedes to Plaintiffs' unlimited demands. They hope that the monumental pressure of CMO No. 11 will be so great that it will overwhelm PacifiCorp's ability to a defend itself against billions of dollars in potential liability, forcing PacifiCorp to choose between its right to pursue an appeal and to present a full defense to individualized claims for damages, or its ability to continue providing power to hundreds of thousands of Oregonians.

That frank admission is precisely why this Court must act now. This Court has jurisdiction and the authority to stay the damages trials scheduled under CMO No. 11. Plaintiffs' jurisdictional and procedural arguments should be rejected. Given the circumstances of this case, which Plaintiffs ignore, the governing statute, ORS 19.270, this Court's precedents, and Supreme Court authority all support this Court's ability to act. Nor is PacifiCorp's Motion a

disguised, unauthorized interlocutory appeal of CMO No. 11. Rather, it takes CMO No. 11 at its word, and the only issue is whether, in light of that order, this Court should grant relief.

Finally, the factors cited by PacifiCorp represent common-sense and reasonable considerations that should govern this Court's determination of whether to grant a stay. As outlined below, each of those factors supports a stay here. PacifiCorp has demonstrated a likelihood of success on the merits, as well as irreparable harm, and the balance of interests tips decidedly in favor of a stay.

II. ARGUMENT

A. The Court Must Act Promptly.

Plaintiffs misapprehend the facts by claiming that PacifiCorp's Motion raises no emergency because the trials contemplated by CMO No. 11 "do not begin until 2026." (Pl. Opp. at 12.) That characterization ignores the ongoing obligations of CMO No. 11, including the cascading series of deadlines that, even now, are being triggered. (*See* PacifiCorp's Motion at 23–27.) As of the date of this Reply, nearly 60 complaints have been filed, with dozens more on the way in weeks, meaning that depositions and discovery must begin immediately and will continue to pile up, along with all of the other pretrial tasks and work necessary to defend against over $200 million in liability (and counting). Given the impasse of the parties, and the trial court's determination

to proceed on the current untenable path, immediate action by this Court is necessary.

Plaintiffs also fail to address the fundamental threshold issue that requires immediate intervention. An avalanche of work and commitment—by the parties, the court, and the judicial system—is beginning now and only increasing, but there is no dispute that there is a substantial possibility that all of that work will be wasted and have to be re-done if PacifiCorp succeeds even in part on its appeal.

Although Plaintiffs suggest that this is a simple case of jury-determined liability and an overwhelming need for immediate compensation, the record presents a different picture in multiple key respects.[1] PacifiCorp outlined the numerous ways in which that verdict was the product of a fundamentally flawed process, from class certification to instructional error and multiple decisions in between. (PacifiCorp's Op. Brief at 32–90; PacifiCorp's Motion at 38–42.) As just one example, class-wide causation evidence regarding the Santiam Canyon—common proof that PacifiCorp caused property loss within

[1] These are not the only disagreements with Plaintiffs' description of the background and evidence. For example, Plaintiffs' claims that PacifiCorp "failed to de-energize its power lines" (PacifiCorp did de-energize throughout the Santiam Canyon, as the ODF concluded); that "[o]ther utilities in the same areas proactively shut off power in anticipation of the extreme conditions" (they did not, and 35 other utilities in Oregon did not either); and that PacifiCorp "destroyed most of the physical evidence" (it did not) are not supported by the full record.

the entire class area without the need for individual inquiries—was non-existent, which is why Plaintiffs tactically waited until the end of their case-in-chief (after four weeks of trial and the testimony from 16 class representatives) to reveal that they had no evidence of a single point of origin in the Santiam Canyon, no evidence of fire progression or rate of spread in the canyon, and no evidence of any fires occurring within miles of significant portions of the canyon. (*See* PacifiCorp Op. Brief at 44-63.) It is therefore unsurprising that the Oregon Department of Forestry ("ODF") concluded after an exhaustive investigation that PacifiCorp was not responsible for the class-wide damage in the Santiam Canyon, given the undisputed presence and destructive path of the massive lightning-caused Beachie Creek Fire.

Plaintiffs also argue that continued trials are necessary because "scores" of class members are in "substantially the same condition" as they were on Labor Day. (Pl. Opp. at 2.) Undoubtedly, the 2020 Labor Day Fires—17 total fires, including five "megafires," with a variety of causes and that were fueled by an unprecedented windstorm—had a significant impact on the lives of Oregonians. But as PacifiCorp explained in its Opening Brief and Motion, the effects of the four fires at issue in this case were highly individualized and variable, with some class members losing vacation homes; some class members only suffering smoke damage to their property, some class members being absent during Labor Day; some class members losing only personal

property; and so on. (PacifiCorp's Motion at 14–18.) Evidence from the Phase II trials to date demonstrates that the vast majority of class members (many of whom had insurance) have rebuilt and replaced much of their property. Yet, as a result of the trial court's legal rulings, every class member is continuing to seek $25 million in unrestricted noneconomic damages arising solely from property loss, regardless of how and what extent their lives were disrupted, and the nature and amount of property loss they suffered. And, as PacifiCorp explained in its Motion, it has settled approximately 2,600 other claims related to the Labor Day 2020 fires and other wildfires, which demonstrates its willingness to resolve reasonable claims for compensation.

Plaintiffs also mistakenly point to the alleged assets of PacifiCorp (or, irrelevantly, Berkshire) as justifying the extraordinary expense (and risk of complete wastefulness) that CMO No. 11 represents. In so doing, however, Plaintiffs fail to address the combined impact of CMO No. 11—the number of class members per trial, the hundreds of millions of dollars in liability to be adjudicated each month on an expedited schedule, or the scope and prejudicial impact of the overlapping trial schedule in light of all the other restrictions on discovery and the pretrial process. (PacifiCorp's Motion at 23–28.) As PacifiCorp outlined, no defendant has ever been put in such a position no matter what assets and liabilities may exist on their balance sheet.

B. PacifiCorp's "Appeal Tactics" Were Not "Dilatory."

Plaintiffs argue that PacifiCorp unduly delayed this appeal. Those contentions are both irrelevant and unfounded.

PacifiCorp filed its notice of appeal within a day after the Phase I judgment was entered.[2] After the assigned transcribers sought extensions of time (which were understandable), PacifiCorp promptly reviewed the voluminous record and filed its Motion to Correct the Transcript (including corrections to clear errors in case names and statutory citations). Rather than meet and confer to resolve any specific issues with the proposed corrections, Plaintiffs—in an unprecedented tactic—opposed PacifiCorp's Motion to Correct the transcript in its entirety, arguing that every single proposed correction was wrong. That meritless opposition delayed resolution of the Motion to Correct until September 2024.

After extended problems with the assigned transcribers that were outside of PacifiCorp's control (*see* Motion—Other (11/27/2024)), the Court issued its order on January 14, 2025, setting an opening brief deadline—over 12 months after the notice of appeal was filed. PacifiCorp then filed its opening brief on

[2] Plaintiffs again argue that PacifiCorp improperly amended its notice of appeal after additional limited judgments were entered following the first two Phase II damages trials. (Pl. Opp. at 7.) Plaintiffs are wrong, and the Appellate Commissioner has rejected their interpretation of the relevant judgment statutes and rules.

April 1, 2025, the deadline set in the Court's order granting it leave to file an extended brief and after seeking an initial extension of time. And, notwithstanding leveling the dilatory accusation against PacifiCorp, Plaintiffs themselves sought multiple extensions and filed their Answering Brief on August 21, 2025.

C. The Court Has Jurisdiction to Order a Stay of the Phase II Damages Trials.

1. The Court Has Jurisdiction of the Liability and Damages Issues Affecting the Entire Class.

Contrary to Plaintiffs' arguments, this Court has jurisdiction to grant a stay. PacifiCorp's principal appeal, Case No. A183140, was from the Phase I limited judgment (which included all of the class-wide rulings and findings) and the Phase II, Trial Nos. 1 and 2 limited judgments (which demonstrate the extent to which Phase II relies on, and is intertwined with, Phase I). Although the Phase I and Phase II limited judgments could not fully adjudicate the "claims" of the non-representative, unnamed class members (because they did not take the final step of resolving those class members' damages), those judgments depended on all of the class-wide and other rulings leading up to that point: the trial court's class certification order; the trial court's post-certification legal rulings (including rulings regarding allowable damages) applicable to the entire class; the adjudication of class-wide liability questions; and the instructional, evidentiary, and other rulings leading up to the jury's

verdicts in Phase I and Phase II, Trial Nos. 1 and 2. *See* ORS 19.425 ("Upon an appeal, the appellate court may review any intermediate order involving the merits or necessarily affecting the judgment appealed from"); *Gillespie v. Kononen*, 310 Or. 272, 797 P.2d 361 (1990) (discussing review of prejudgment orders); *Robinson v. Children's Servs. Div.*, 140 Or App 429, 433, 914 P2d 1123, 1126 (1996) (discussing party's right to assign error on appeal to legal issues resolved before trial).

This Court acquired jurisdiction of "the cause" when PacifiCorp filed its notice of appeal. ORS 19.270. This Court's jurisdiction necessarily encompasses the whole sweep of legal issues on which the Phase II damages trials depend and that are inseparable from those trials, including how those juries are being instructed, what evidence and argument is being heard, and type of damages recoverable.

The fact that the trial court is continuing to exercise its own jurisdiction to conduct further proceedings does not suggest that this Court's jurisdiction is limited in any way. Indeed, that is the whole premise of an appellate court's authority to issue a stay (an authority that, as outlined below, this Court unquestionably has). Appellate courts issue stays precisely because the trial court is continuing to act, and the fact that they have done so repeatedly supports the Court's exercise of that authority here.

That conclusion makes practical sense as well, particularly given the circumstances of this case. Unlike other class actions in Oregon, the parties are potentially years away from a general judgment following a finding of class liability, because individual damages issues remain to be adjudicated. Concluding that this Court lacks the jurisdiction even to consider a stay request in this situation would potentially limit this Court's ability to intervene in cases of statewide importance.

2. The Court's Exercise of Jurisdiction Is Consistent with ORS 19.270(7).

ORS 19.270(7) does not change that conclusion. Although phrased as a limitation, the statutory text is expansive. It includes the "matters decided" by that limited or supplemental judgment, which—in this case—include the class certification and liability matters on which the CMO No. 11 trials are based. *See* ORS 19.270(7) ("If a limited or supplemental judgment is appealed, the jurisdiction of the appellate court is limited to the matters decided by the limited or supplemental judgment, and the trial court retains jurisdiction over all other matters in the proceeding."). Nor has this Court ever interpreted ORS 19.270(7) in a manner that would narrow its jurisdiction in a way relevant to this situation. On the contrary, at most, the court has drawn a line between matters decided in a limited and supplemental judgment and matters resolved in another judgment document that is not appealed. *See Laack as Tr. of Laack*

Family Tr. v. Botello, 338 Or App 333 (2025) ("In applying ORS 19.270(7), we have concluded that, when jurisdiction is vested by an appeal of a limited or supplemental judgment, we lack jurisdiction to decide specific issues memorialized in other judgments that were not appealed."). And, as PacifiCorp explained, the relevant legislative history is consistent with that view. ORS 19.270(7) was intended not to unduly limit the appellate court's jurisdiction and authority to act, but to avoid jurisdictional arguments at the trial court level in the event a limited or supplemental judgment was appealed, similar to other circumstances when the trial court retains jurisdiction retains jurisdiction for specific purposes.

PacifiCorp also explained how this case differs from other cases in which multiple judgments divide the "matters" under consideration on appeal. Unlike in those cases, here there is no general judgment, and there cannot be a general judgment until the claims of all class members are resolved. *See* ORCP 32 L. Instead, individual class members' claims for damages will continue to be resolved in individual trials, and limited judgments will be entered. As in the past, each of those limited judgments will incorporate and rely on the Phase I verdicts and class-wide findings—all of which are the subject of the current appeal over which this Court has jurisdiction.

Plaintiffs' Opposition does not address, much less rebut, those points. Although Plaintiffs assert that PacifiCorp's arguments "cannot be squared with

the statute's text," Plaintiffs make no argument as to how PacifiCorp's argument is inconsistent with the text of the statute, its context, this Court's past interpretations of ORS 19.270, or the circumstances of this case, where the pending appeals certainly include the "matters"—the class certification and liability rulings—upon which the CMO No. 11 process depends. This Court unquestionably has jurisdiction over the trial court's rulings on class certification, class liability and class causation, the scope of allowable damages, and all other matters that go to the entitlement and scope of damages being litigated—matters that, in fact, PacifiCorp has been precluded from re-litigating in the pending Phase II trials. That jurisdiction encompasses this Court's ability to stay further proceedings that depend on resolution of those matters and issues.

None of the cases cited by Plaintiffs show otherwise. *City of Eugene v. Smyth*, 239 Or App 175, 243 P3d 854 (2010), involved a challenge to a conviction in municipal court. After observing that the Court of Appeals does not have "plenary" jurisdiction, the court stated that, under ORS 221.360, "when a defendant has been convicted in municipal court, and then convicted in circuit court following a trial *de novo*, we have jurisdiction to review the circuit court judgment only if the defendant is challenging the constitutionality of the ordinance he was convicted of violating." *Id*. at 181. Similarly, in *Owen v. City of Portland*, 368 Or 661, 683, 497 P3d 1216 (2021), the court

considered whether a private cause of action provision divested circuit courts of jurisdiction to hear certain tenant disputes. Rejecting the defendant's divestment argument, the Supreme Court observed that circuit courts have subject matter over all actions. As the facts of both cases make clear, they did not address or consider whether the Court of Appeals has jurisdiction to grant a stay in a bifurcated class action like this one.

3. This Court's February 2024 Order Did Not Resolve the Jurisdictional Question.

Plaintiffs rely on language from this Court's February 2024 order in an effort to narrow the "matters" under consideration in the pending appeals and this Court's jurisdiction. (Pl. Opp. at 15.) But the portions of the February 2024 Reconsideration and Stay Order that Plaintiffs quote address a different question—whether the limited judgment properly included language resolving the "claims" of the individual class members whose damages were not resolved in Phase I. (Reconsideration and Stay Order at 2-4.) In that discussion, the Court concluded that a limited judgment purporting to resolve the claims of the entire class was not proper, because it did not resolve the whole claims of the absent class members. (*Id*. at 3.) Contrary to Plaintiffs' argument, nothing in that portion of the Reconsideration and Stay Order purported to interpret the jurisdictional sweep of ORS 19.270 or to decide the matters over which the Court had jurisdiction for purposes of issuing a stay.

Plaintiffs' assertion of unfairness and prejudice to the absent class members rings hollow. As Plaintiffs recognized, and as their Answering Brief further confirms, this Court is already reviewing the orders outlined above—all of which affect the entire class and are the subject of the pending appeal involving the class representatives. The absent class members cannot simultaneously rely on the class-wide findings, rulings, and orders over which this Court has jurisdiction, but insist that this Court's jurisdiction should not extend to "enter[ing] an order that curtails their rights under CMO 11," because they are not individually named in any pending appeal. (Pl. Opp. at 15.) And, as Plaintiffs' Opposition (and the absence of any motion to intervene) demonstrates, the absent class members' interests are being vigorously represented on appeal.

This case is unique. The trials and process envisioned by CMO No. 11 depend entirely on the matters resolved by the trial court up to and including the Phase I trial. Neither ORS 19.270(7) nor any case cited by Plaintiffs indicate that this Court lacks jurisdiction to issue a stay pending appeal

4. Ordering a Stay Is Not Equivalent to Interlocutory Review.

Plaintiffs seek to recharacterize PacifiCorp's Motion as seeking "direct appellate review" of a non-appealable order and to recharacterize this Court's standard of review. (Pl. Opp. at 13, 19–20.) PacifiCorp's Motion, however, does not necessarily or by implication seek "full-fledged appellate review" of

CMO No. 11. (Pl. Opp. at 14.) Appellate review of the interlocutory order would require review of the order for consistency with statutory or constitutional provisions and would request reversal or modification of its provisions in whole or in part. But deciding PacifiCorp's Motion does not require this Court to conclude that CMO No. 11 is or is not authorized by statute or otherwise lawful or unlawful. PacifiCorp does not seek reversal or modification of the terms of CMO No. 11 itself or review of the trial court's decision to enter it. Thus, by moving to stay, PacifiCorp is not seeking interlocutory review of CMO No. 11 but seeking a stay of further trial proceedings pending appellate determination of critical legal issues that necessarily will apply across all such proceedings.

Obviously, PacifiCorp's arguments address CMO No. 11 because it is the order under which such further trial proceedings will be conducted and because its unprecedented terms, which require 160 jury trials involving over 1,900 plaintiffs and billions of dollars in damages, violate PacifiCorp's due process rights, imperil its existence, and unnecessarily risk its ability to supply power to two million people across six western states. In that way, PacifiCorp's Motion takes CMO No. 11 at its word and assumes that, unless stayed by this Court, all of the provisions in CMO No. 11 will be implemented. Thus, the question for this Court is, assuming that CMO No. 11 is implemented according to its terms, whether a stay is warranted. That question is distinct

from appellate review of CMO No. 11. Plaintiffs cite no authority or principle to the contrary.

D. This Court Has Authority to Issue a Stay.

As the Supreme Court has made clear, "'[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 not statute entitling a party to such stay.'" *State ex rel. Walraven v. Dep't of Corr.*, 358 Or 71, 86, 362 P3d 1163 (2015) (quoting *Helms Groover & Dubber Co. v. Copenhagen*, 93 Or 410, 416, 177 P 935 (1919)). Plaintiffs try to avoid this conclusion by arguing that the Court of Appeals does not possess general jurisdiction and can only exercise the specific authority granted to it by statute (which does not include the authority to issue a stay) (Pl. Opp. 16-17), but they do nothing to rebut the Supreme Court's holding, which clearly states otherwise and has stood for more than a century.

Plaintiffs also mistakenly argue that if this Court had the inherent authority to stay trial court proceedings, there would have been no need for the legislature to "expressly" grant it such authority when authorizing discretionary review of otherwise non-appealable orders in class actions under ORS 19.225. (Pl. Opp. 17-18.) But that argument rests on a fundamental misreading of ORS 19.225, which does not include any express grant of authority to stay proceedings but *merely acknowledges this Court's inherent authority to do so*.

Indeed, the language on which Plaintiffs rely provides that an application for appeal under ORS 19.225 will not automatically stay the trial court proceedings "unless the circuit court judge or the Court of Appeals or a judge thereof shall so order." In other words, it merely clarifies that applications authorized by ORS 19.225 are subject to this Court's inherent stay authority, which is consistent with the Court's authority when any notice of appeal is filed. As a result, the statutory language is entirely consistent with the Oregon Supreme Court's rulings in *Walraven* and *Helms*, which affirmed that authority, and does nothing to undermine PacifiCorp's position.

E. The Court Should Issue a Stay Based on All of the Relevant Factors.

Oregon courts have previously stated the factors to guide an appellate court when determining whether to exercise its authority to stay further trial proceedings. *See Evans v. Or. State Penitentiary*, 87 Or App 514, 523, 743 P2d 168 (1987) ("primary standard to govern the granting of stays involves a balancing of interests"—including considerations of judicial efficiency and comparative party burdens); *Von Weidlein Int'l, Inc. v. Young*, 16 Or App 81, 88, 515 P2d 936, 937 (1973) (citing factors; "[g]uided by these statements of other courts, we conclude that the primary standard to govern the granting to stays involves a balancing of interests"). ORS 19.350 outlines a list of non-exclusive factors to be considered when addressing the stay of a judgment. Federal authorities also describe a similar standard, which includes a common-

sense four-factor analysis mirroring the standard used in determining whether to grant other forms of injunctive relief, namely: "'(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.'" *Lair v. Bullock*, 697 F3d 1200, 1203 (9th Cir 2012) (citing *Nken v. Holder*, 556 US 418, 434, 129 S Ct 1749, 173 L Ed 2d 550 (2009)).

Plaintiffs quibble with the applicability of those factors, but they do not even attempt to argue that the factors themselves are improper or that they fail to address the relevant considerations. Nor do they rebut PacifiCorp's showing that it satisfies each of the factors.

1. PacifiCorp Has Demonstrated It Is Likely to Succeed on the Merits

PacifiCorp's Opening Brief outlines numerous errors by the trial court, most of which would undo the entire Phase II process. But two errors in particular deserve attention and demonstrate that PacifiCorp is likely to succeed on the merits.

a. Class Certification

First, PacifiCorp is likely to succeed on its argument that common evidence could not show that PacifiCorp caused damage to *every* homeowner in the class as necessary to maintain this case as a class action. *See Pearson v.*

Philip Morris, Inc., 358 Or 88, 110–11, 361 P3d 3 (2015). Plaintiffs' burden was to establish that sufficient common evidence would show that PacifiCorp's conduct caused harm to *all* class members. Plaintiffs failed to meet that burden. (PacifiCorp's Op. Brief 48-62.) In so doing, Plaintiffs confirmed what PacifiCorp had explained when opposing certification and moving to decertify: this case could not possibly be "resolved with evidence common to the class," and requires numerous "separate inquiries for the individual class members." *Pearson*, 358 Or at 110.

Plaintiffs' reliance on this Court's decision not to review the trial court's initial class certification ruling on an interlocutory basis fails to rebut this point. *James v. PacifiCorp*, 323 Or App 764, 524 P3d 506, 510 (2023). As PacifiCorp notes in its Opening Brief, that decision was premised on Plaintiffs' claim, in their class certification briefing, that they would "use common evidence"—namely, the testimony of expert witness Nicole Brewer—to show a single "conflagration" that was all caused by PacifiCorp and spread to all "the properties included in the class." (PacifiCorp's Op. Brief at 22.) But Plaintiffs failed to present any such evidence in the Phase I trial, particularly with regard to the Santiam Canyon. Indeed, Brewer did *not* testify about *any* of the fires at issue in the Santiam Canyon, nor did Plaintiffs offer any other expert to support the assertions that they made in their class certification motion, including their assertions that PacifiCorp-caused fires spread and burned the entire canyon.

(PacifiCorp's Op. Brief at 25–30.) In its opinion on PacifiCorp's interlocutory appeal, this Court recognized that precise potential, noting that the trial court's certification order contemplated that the first phase of the trial could litigate issues of causation without "a 'property-by-property' analysis, but that the trial court could "rescind or amend its certification order * * * if the litigation does not pan out the way the court expects." *James*, 323 Or App at 776, 777–78. In other words, this Court recognized that class certification depended on the exact type of common proof that Plaintiffs failed to present.

Plaintiffs' attacks on PacifiCorp's reference to the ODF report are similarly misguided. The ODF report directly confirms the failures in Plaintiffs' proof in the Santiam Canyon that should have prevented class certification and mandated decertification. As ODF explained, (1) "wildland fire starts caused by down powerlines * * * were suppressed by local residents and/or local municipal fire departments," (2) there was "no evidence of powerline ignitions contributing to the spread of the fire in the Santiam Canyon," and (3) the "most probable explanation" for "other ignitions in areas where no roads or powerlines was present" was "spot fires from the main Beachie Creek Fire." (ER-850.) The consistency of these findings with the evidence Plaintiffs' presented at trial only underscores the trial court's errors in allowing the case to proceed as a class action and instructing the jury to "assume" that evidence about individual Plaintiffs and individual fires

somehow proved the claims of every other class member—an instruction that essentially gave the jury carte blanche to overlook the failures in Plaintiffs' proof that the spot fires actually caused harm to all such class members. *See* PacifiCorp Op. Brief at 63–69; *Pearson*, 358 Or at 114; *Carrera v. Bayer Corp.*, 727 F3d 300, 307 (3d Cir 2013).

b. Noneconomic Damages

PacifiCorp is also likely to succeed on its argument that the trial court erred in allowing class members to obtain noneconomic damages based solely on their property experiencing fire-related damage. The Supreme Court has only allowed such damages in three situations: (1) when the defendant "physically injures the plaintiff"; (2) when the defendant "intentionally causes" distress; or (3) when a special, "legally protected" interest is invaded. *Moody v. Oregon Community Credit Union*, 371 Or 772, 784, 542 P3d 24 (2023). Plaintiffs cannot argue that either of the first two situations are applicable and the only potential "legally protected interest" they cite to suggest the third situation is applicable is the fact that an uncontrolled wildfire is a public nuisance. But this Court already rejected precisely the same nuisance argument in *Meyer v. 4-D Insulation Co.*, 60 Or App 70, 75–76, 652 P2d 852 (1982), finding that a one-time fire cannot constitute the kind of "nuisance" that supports noneconomic damages.

Nor can Plaintiffs simply sweep *Meyer* aside because it involved a smaller fire or because juries in this case have already awarded noneconomic damages. In *Meyer*, the court clearly held that noneconomic damages are not available as a matter of law; that conclusion is consistent with other Supreme Court opinions and opinions from this Court, including opinions regarding the availability of noneconomic damages for damage to personal property; and the legal issue of when such damages may be awarded is for the court, not the jury, to determine.

Plaintiffs' attempts to dismiss the statutory limitation on noneconomic damages created by ORS 477.089(4) are equally unavailing. Plaintiffs argue that the statute is silent on noneconomic damages because it only limits "remedies for damages or injury *to property* caused by a wildfire," ORS 477.089(4) (emphasis added). But that argument ignores that the statue provides that economic damages are "the *exclusive* remedies" for such damage or injury to property. *Id.* (emphasis added). By making economic damages the exclusive remedy for such property losses, the statute necessarily excludes other remedies, including noneconomic damages—a point confirmed by the legislative history. *See* PacifiCorp's Op. Brief at 91–94; Brief of *Amicus Curiae* Oregon Forest Industries Council at 6–20.

2. PacifiCorp Has Demonstrated Irreparable Harm

The irreparable harm to PacifiCorp is evident. Without a stay, PacifiCorp's due process rights will be irreparably harmed by having to litigate 160 jury trials involving over 1,900 plaintiffs and billions of dollars in damages on a compressed schedule and without adequate tools and procedures to mount an adequate defense. (PacifiCorp Motion at 32–36.) PacifiCorp will also suffer irreparable financial harm—expenses both to defend itself and to bond an avalanche of massive adverse judgments simply to preserve its right to appeal. Indeed, assuming the schedule laid out in CMO No. 11 and the current average verdicts to date, PacifiCorp would be subject to limited judgments averaging approximately ***$277,100,000 per month***. (*Id.* at 37.) Such a burden is unsustainable on its face and would directly harm PacifiCorp's ability to continue to provide safe and reliable power to hundreds of thousands of individuals, businesses and governments in both Oregon and other states. In fact, the limited judgments to date have already adversely impacted PacifiCorp, including rating agency downgrades.

Rather than engaging with these arguments, Plaintiffs trivialize them, claiming that (1) PacifiCorp's due process concerns are limited to having to seek court approval for third-party witness depositions or having to ask their current law firms to add lawyers to their defense team, and (2) PacifiCorp's financial concerns should be disregarded given statements in its parent

company's most recent quarterly financial report and the fact that litigation expenses are ordinarily insufficient to demonstrate irreparable harm. (Pl. Opp. 26-30.) Neither of these claims has any merit.

On the first point, Plaintiffs ignore that it is the ***combined*** impact of CMO No. 11's compressed timeline and substantive limitations with the context of this litigation—not just the limitation on third-party depositions or PacifiCorp's ability to select the counsel of its choice—that is relevant in assessing due process implications and the resulting irreparable harm from this case proceeding as constructed. It is having to try the cases of 10-19 class members, each of whom is alleging claims in excess of $25 million, on a weekly basis, week-after-week, month-after-month through 2028, while simultaneously investigating the claims of hundreds of other class members on an expedited 180-day schedule, all pursuant to an unprecedented order that not only limits third-party depositions, but restricts the use of requests for admissions and requests for productions, as well as prohibiting motions for summary judgment and limiting the use of depositions at trial absent good cause and leave of court. *See* PacifiCorp Motion at 32–34; *Lindsey v. Normet*, 405 US 56, 66, 92 S Ct 862, 870, 31 L Ed 2d 36 (1972) (due process requires "an opportunity to present every available defense" (internal citations and quotations omitted)). PacifiCorp is unaware of—and Plaintiffs do not identify, in Oregon or elsewhere—any other defendant ever having been ordered to

litigate so many claims with such high damage amounts on a similarly compressed schedule with the same degree of procedural restrictions, a fact that is hardly surprising given the due process implications of such an order.

Plaintiffs' attempt to discount PacifiCorp's financial concerns are equally unfounded. Plaintiffs contend that PacifiCorp's claims of financial harm are not "credible" because its parent company, Berkshire Hathaway Energy, recently issued a quarterly report including comments regarding PacifiCorp's current assets and liabilities and the absence of any significant changes in PacifiCorp's assumptions regarding critical accounting estimates (Pl. Opp. 27-28). Plaintiffs, however, ignore that the same report also underscores the impact of the wildfire litigation and notes that "[i]t is reasonably possible that PacifiCorp will incur material additional losses beyond the amounts accrued for the Wildfires that could have a material adverse effect on PacifiCorp's financial condition." (Tievsky Decl. Ex D at 24.) Plaintiffs also ignore the impact that even the existing judgments are having on PacifiCorp's credit rating and the impact of future judgments on its operations.

Plaintiffs' related argument—that merely being forced to pay litigation expenses cannot establish irreparable harm (Pl. Opp. 28-29)—ignores the sheer magnitude of the litigation expenses at issue and the potential that they may be wasted if its appeal is successful. Where, as here, litigation-related expenses

may not be recoverable, they can in fact constitute irreparable injury. *See Nieberding v. Barrette Outdoor Living, Inc.*, No. 12-2353-DDC-TJJ, 2014 WL 5817323, at *4 (D Kan Nov 10, 2014) ("The Court concludes that Defendants have shown that they will be harmed if they are required to incur significant costs in proceedings that may result in duplicative and wasteful litigation if the Tenth Circuit decertifies or alters the class."); *CGC Holding Co., LLC v. Hutchens*, 965 F Supp 2d 1277, 1279 (D Colo 2013) ("The injury that defendants will sustain if a stay is not granted, discovery proceeds, but the Tenth Circuit rules in a manner that ends the case, is monetary. That could be 'irreparable' if, as I am willing to assume, they cannot recoup that monetary loss from the plaintiffs.").

Along the same lines, Plaintiffs' suggestion that PacifiCorp's claims of harm from being forced to bond hundreds of judgments under CMO No. 11 should be rejected. Whether and how the trial court could "perhaps" consider a different source of security is entirely speculative. What is not speculative is the fact that Plaintiffs have not been willing to waive the bond requirement, and they have even opposed the sufficiency of PacifiCorp's bond securing the Phase II, Trial No. 4 judgment, despite that the fact that the bond secures that judgment through July 2027. (TCF 08/28/2025 (Plaintiffs' Reply in Support of Motion for Hr'g on Objection to Original Supersedeas Undertaking).)

Finally, Plaintiffs' suggestion that PacifiCorp's claim of irreparable harm should not be credited given its supposed delay of this appeal (Pl. Opp. 30-32) is nonsensical. Plaintiffs' attempts to blame PacifiCorp for any delay in this appeal are wrong for the reasons already stated. But even putting that aside, any delays that may have occurred to date have nothing to do with the impossible burden of now being forced to litigate so many claims with such high damage amounts on such a compressed schedule with diminished procedural protections, particularly when even a partial win on appeal could require relitigating so many of the same claims.

3. PacifiCorp Has Demonstrated that the Balance of the Interests Favors a Stay.

Plaintiffs acknowledge that the potential that PacifiCorp could prevail on appeal is a factor that could shift the balance of interests in favor of granting a stay. Nonetheless, they argue that if PacifiCorp does not prevail, the harm to some of the class members, who would not be compensated in the interim, would be worse. (Pl. Opp. 32.) But there is no reasonable scenario under which any class members will be compensated while the appeal is pending. Moreover, a final resolution of the appeal—even if PacifiCorp does not prevail—would almost certainly facilitate a negotiated resolution without the necessity of additional trials. Indeed, Plaintiffs themselves argue that a negotiated resolution of their claims has been made difficult by PacifiCorp's

reluctance to pay noneconomic damages—a reluctance that is obviously driven by PacifiCorp's view that noneconomic damages are not allowable as a matter of law for wildfire-caused property damage. Final resolution of that issue would remove that fundamental impediment.

Plaintiffs also overlook the extraordinary harm that PacifiCorp would incur by having to move forward with the current trial schedule while the appeal is pending. Continuing the status quo for PacifiCorp would force it to endure unprecedented burdens—all just to preserve its rights as this Court decides controlling issues on appeal. Plaintiffs try to minimize such concerns by suggesting that PacifiCorp is affiliated with another company, Berkshire Hathaway, which is a "trillion-dollar conglomerate." (Pl. Opp. 33.) But to state the obvious, Berkshire is not a party to this litigation. There was no evidence presented to the jury or this Court regarding Berkshire or its actions or inactions, and certainly no evidence that Berkshire could or would assist PacifiCorp in weathering the significant and crippling financial impacts facing PacifiCorp if it is forced to continue litigating under CMO No. 11 pending the outcome of this appeal. Certainly, the hundreds of thousands of individuals, businesses and governments that PacifiCorp serves in both Oregon and other states should not be forced to take that risk.

4. PacifiCorp Has Demonstrated That A Stay is in the Interest of Justice.

Finally, PacifiCorp has also demonstrated that a stay is in the interest of justice. PacifiCorp's appeal is well taken and will affect every judgment entered in this case even if it is only partly successful. Indeed, absent a stay, the parties will expend an unprecedented level of judicial resources litigating thousands of claims that will likely need to be relitigated in whole or part.

Plaintiffs' only response to this point is to cite the general policy against piece-meal appeals of liability issues while bifurcated damages claims are still pending. (Pl. Opp. 34.) But as Plaintiffs themselves note, that policy is based on the premise "that efficient judicial administration will be better served if a case is required to proceed to final judgment before any appeal is permitted." *Pearson v. Philip Morris, Inc.*, 208 Or App 501, 513, 145 P3d 298 (2006). And PacifiCorp has demonstrated that fundamental premise does not apply in this case, where efficient judicial administration will be directly undermined by expending such an extraordinary level of judicial resources on claims that may well have to be relitigated (or that could potentially be resolved) depending on the outcome of this appeal.

III. CONCLUSION

For all of the above reasons, PacifiCorp's Motion to Stay should be granted.

DATED: September 5, 2025

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CERTIFICATE OF FILING AND SERVICE

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