IN THE COURT OF APPEALS OF THE STATE OF OREGON

JEANYNE JAMES, *et al.*, individually and on behalf of all others similarly situated,

Plaintiffs-Respondents, Cross-Appellants,

v.

PACIFICORP and PACIFIC POWER,

Defendants-Appellants, Cross-Respondents.

Court of Appeals No. A183140

Multnomah County Circuit Court Case No. 20CV33885

APPELLANT PACIFICORP AND PACIFIC POWER'S COMBINED REPLY BRIEF AND ANSWERING BRIEF TO CROSS APPEAL

Appeal from the Limited Judgments of the
Multnomah County Circuit Court
The Hon. Steffan Alexander

Counsel listed on following page

October 2025

Per A. Ramfjord, OSB No. 934024
Brad S. Daniels, OSB No. 025178
Reilley D. Keating, OSB No. 073762
STOEL RIVES LLP
760 S.W. 9th Ave., Suite 3000
Portland, Oregon 97205
Telephone: (503) 224-3380
Email: per.ramfjord@stoel.com
brad.daniels@stoel.com
reilley.keating@stoel.com

Alison L. Plessman
Rajan S. Trehan
Stephanie W. Xiao
Khoa D. Nguyen
HUESTON HENNIGAN LLP
523 West 6th Street, Suite 400
Los Angeles, California 90014
Telephone: (213) 788-4340
Email: aplessman@hueston.com
rajan.trehan@hueston.com
sxiao@hueston.com
knguyen@hueston.com

Douglas J. Dixon
Craig A. Fligor
HUESTON HENNIGAN LLP
620 Newport Center Drive, Suite 1300
Newport Beach, California 92660
Telephone: (949) 229-6840
Email: ddixon@hueston.com
cfligor@hueston.com

Blaine H. Evanson, *pro hac vice*
GIBSON, DUNN & CRUTCHER LLP
3161 Michelson Drive
Irvine, California 92612
Telephone: (949) 451-3800
Email: bevanson@gibsondunn.com

Attorneys for Defendants-Appellants, Cross-Respondents

Keith A. Ketterling, OSB No. 913368
Timothy S. DeJong, OSB No. 940662
Cody Berne, OSB No. 142797
Emily A. Johnson, OSB No. 183791
Erin E. Roycroft, OSB No. 184371
STOLL STOLL BERNE LOKTING
& SHLACHTER P.C.
209 SW Oak Street, Suite 500
Portland, Oregon 97204
Telephone: (503) 227-1600
Email: kketterling@stollberne.com
tdejong@stollberne.com
cberne@stollberne.com
ejohnson@stollberne.com
eroycroft@stollberne.com

Nicholas A. Kahl, OSB No. 101145
NICK KAHL, LLC
209 SW Oak St., Suite 400
Portland, Oregon 97204
Telephone: (971) 231-1342
Email: nick@nickkahl.com

Matthew J. Preusch, OSB No. 134610
KELLER ROHRBACK L.L.P.
1129 State Street, Suite 8
Santa Barbara, California 93101
Telephone: (805) 456-1496
Email: mpreusch@kellerrohrback.com

Yoona Park, OSB No. 980904
Sarah R. Osborn, OSB No. 222119
KELLER ROHRBACK L.L.P.
805 SW Broadway, Suite 2750
Portland, Oregon 97205
Telephone: (971) 253-4600
Email: ypark@kellerrohrback.com
sosborn@kellerrohrback.com

Daniel Mensher, OSB No. 074636
Natida Sribhibhadh
KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, Washington 98101
Telephone: (206) 623-1900
Email: dmensher@kellerrohrback.com
mpreusch@kellerrohrback.com
natidas@kellerrohrback.com

Rafey S. Balabanian
Brandt Silver-Korn
Todd Logan
EDELSON PC
150 California Street, 18th Floor
San Francisco, CA 94111
Telephone: (415) 212-9300
Email: rbalabanian@edelson.com
bsilverkorn@edelson.com
tlogan@edelson.com

Nicholas Rosinia
Amy Hausmann
Zoe Seaman-Grant
Landon Webster
Megan Delurey
Alexander Glenn Tievsky, *pro hac vice*
EDELSON PC
350 North LaSalle Street, 14th Floor
Chicago, Illinois 60654
Telephone: (312) 589-6370
Email: nrosinia@edelson.com
abhausmann@edelson.com
zseaman-grant@edelson.com
lwebster@edelson.com
mdelurey@edelson.com
atievsky@edelson.com

Derek C. Johnson, OSB No. 882340
Marilyn A. Heiken, OSB No. 923308
JOHNSON JOHNSON LUCAS & MIDDLETON, PC
975 Oak Street, Suite 1050
Eugene, Oregon 97401
Telephone: (541) 484-2434
Email: djohnson@justicelawyers.com
mheiken@justicelawyers.com

Attorneys for Plaintiffs-Respondents

Denise Fjordbeck, OSB No. 822578
Senior Assistant Attorney General
OREGON DEPARTMENT OF JUSTICE
400 Justice Building
1162 Court St., NE
Salem, Oregon 97301-4096
Telephone: (503) 378-4402
Email: denise.fjordbeck@doj.oregon.gov

Attorneys for Creditor-Respondent

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REPLY BRIEF

The judgment below contravened settled class action principles—cobbling together a heterogeneous amalgamation of plaintiffs with different harms from different fires with different causes. It violated established remedies law—awarding hundreds of millions of dollars (and climbing) in noneconomic damages for emotional harm from property damage in violation of Oregon common law and the legislature's limitations on wildfire-damages. And it flunked basic causation requirements—excusing Plaintiffs' failure to establish that PacifiCorp caused each class member harm, and ignoring the fact that the Beachie Creek Fire burned down class properties before any PacifiCorp fire arrived. The Oregon Department of Forestry has exonerated PacifiCorp and confirmed that the billions in liability exposure imposed on PacifiCorp simply has no basis in what happened during the Labor Day Fires. Nothing in Plaintiffs' response saves the verdicts below. This Court should reverse.

I. COMBINED ARGUMENT ON CLASS CERTIFICATION (FIRST, SECOND, AND FIFTH ASSIGNMENTS OF ERROR)

The trial court's certification decisions cannot stand. The certified class consists of thousands of people living hundreds of miles apart, affected by different fires, caused by different occurrences. Most egregiously, in the Santiam Canyon, the Beachie Creek Fire indisputably burned through the area both before and after the powerline activity, brush fires, or ignitions occurred

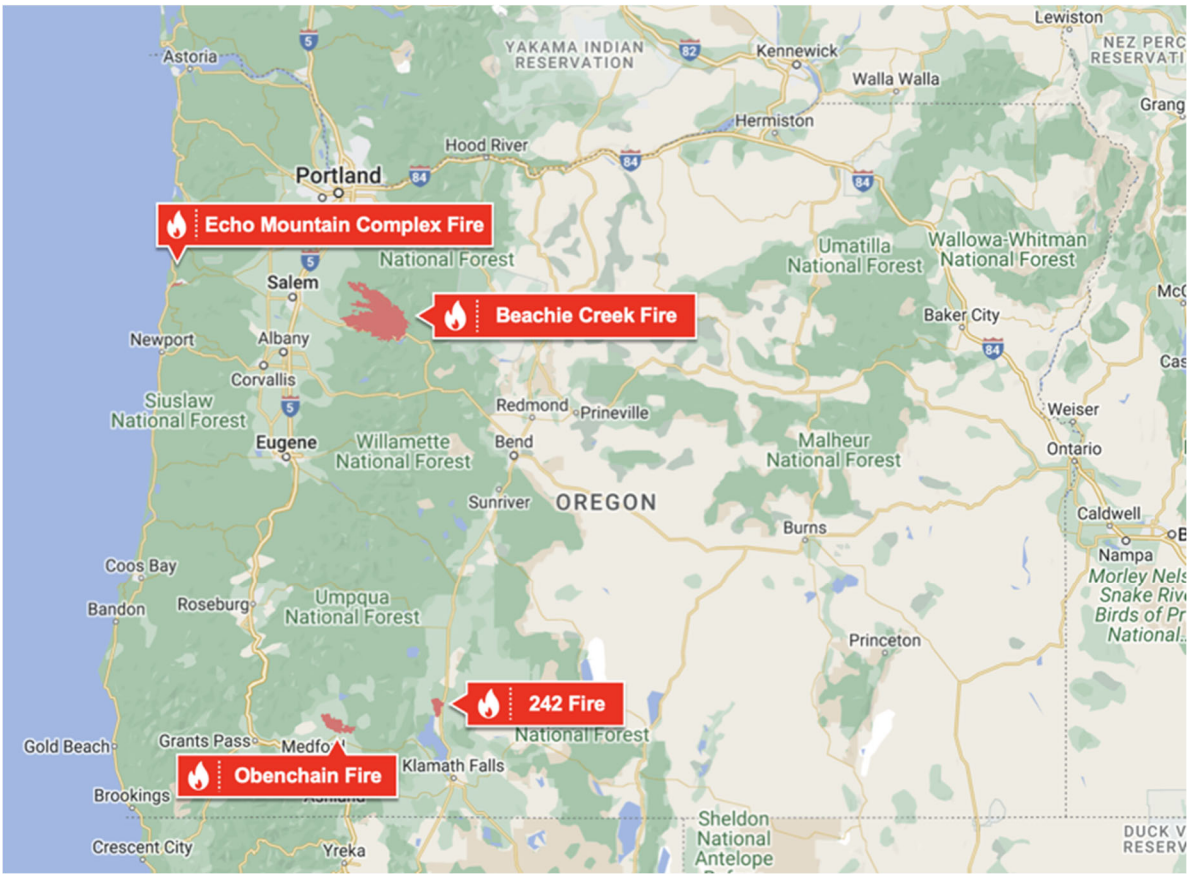
(many of which were extinguished). (*See, e.g.*, Tr-4398:25-4399:04, 4403:5-4409:15; 4414:2-7; 4530:22-4531:21; *see also* ER-833-53 (ODF Report).) Nothing short of a property-by-property inquiry could ever determine liability and causation for the class members.

A. The Trial Court's Flawed Predominance Analysis Requires Reversal.

Plaintiffs seek to insulate the trial court's flawed certification reasoning by arguing that predominance is "[o]ne factor" among many. (Answering Brief (AB)-32.) But the trial court's decision was expressly and primarily premised on the legal conclusion that "plaintiffs have established that common issues predominate over individual questions." (ER-73.) Because predominance played the central role in the class certification order, any flaws in its predominance analysis are fatal to certification as a whole. *See Pearson v. Philip Morris, Inc.*, 358 Or 88, 114, 361 P3d 3 (2015). Plaintiffs further argue that "this Court need only review the circuit court's post-trial order denying the motion to decertify." (AB-34.) But the decertification order contains no independent reasoning and expressly "incorporates [the trial court's] prior rulings and orders." (ER-320.)

1. Culpability Was Not Susceptible to Common Proof.

This case involved numerous different fires, in different locations, with different causes.



(TCF-03/17/2023 (Motion to Decertify).) Plaintiffs could not present a unified theory of culpability—and abandoned classwide liability for a fire-by-fire verdict form. (OB-1; ER-290-312.) Plaintiffs conceded that PacifiCorp's purported wrongdoing varied across each of the many ignition points in the class area—inadequate vegetation management, failure to shut off power sooner, failure to adequately monitor the windstorm, and other fire-specific conduct. As a result, there was simply no way that proof of culpability as to one ignition point could prove culpability as to another. Plaintiffs try to hide these differences by claiming the jury had a "binary choice about PacifiCorp's liability"—PacifiCorp was liable for all the fires, or none of them. (AB-42.) But the trial court's

decision to force such a "binary choice"—by certifying a class involving distinct fires and highly individualized claims by disparately situated class members—violated class-action rules and due-process safeguards.

As for de-energization, Plaintiffs ignore the fact that conditions at each ignition point—miles apart from one another—required a separate weighing of the competing justifications for de-energization, such as the different electricity needs of first responders in different fire areas (including the Santiam Canyon). (Tr-7259:4-14; Tr-6573:3-9, 7527:11-7528:25, 7537:13-7538:8, 7595:7-20.) And as Plaintiffs admit, "decisions about 'reactive' de-energizations were left to the people on the ground." (AB-40.)

As for vegetation management and pre-windstorm preparations, high-level, generic policy choices about resource allocation cannot show that vegetation management or preparations in a *particular* location were deficient—particularly because vegetation management and specific preparation measures in different areas varied. (*See* Tr-4983:25-4984:7.) Each specific fire location must be considered individually, which destroys the notion that common proof could decide classwide liability in one fell swoop.

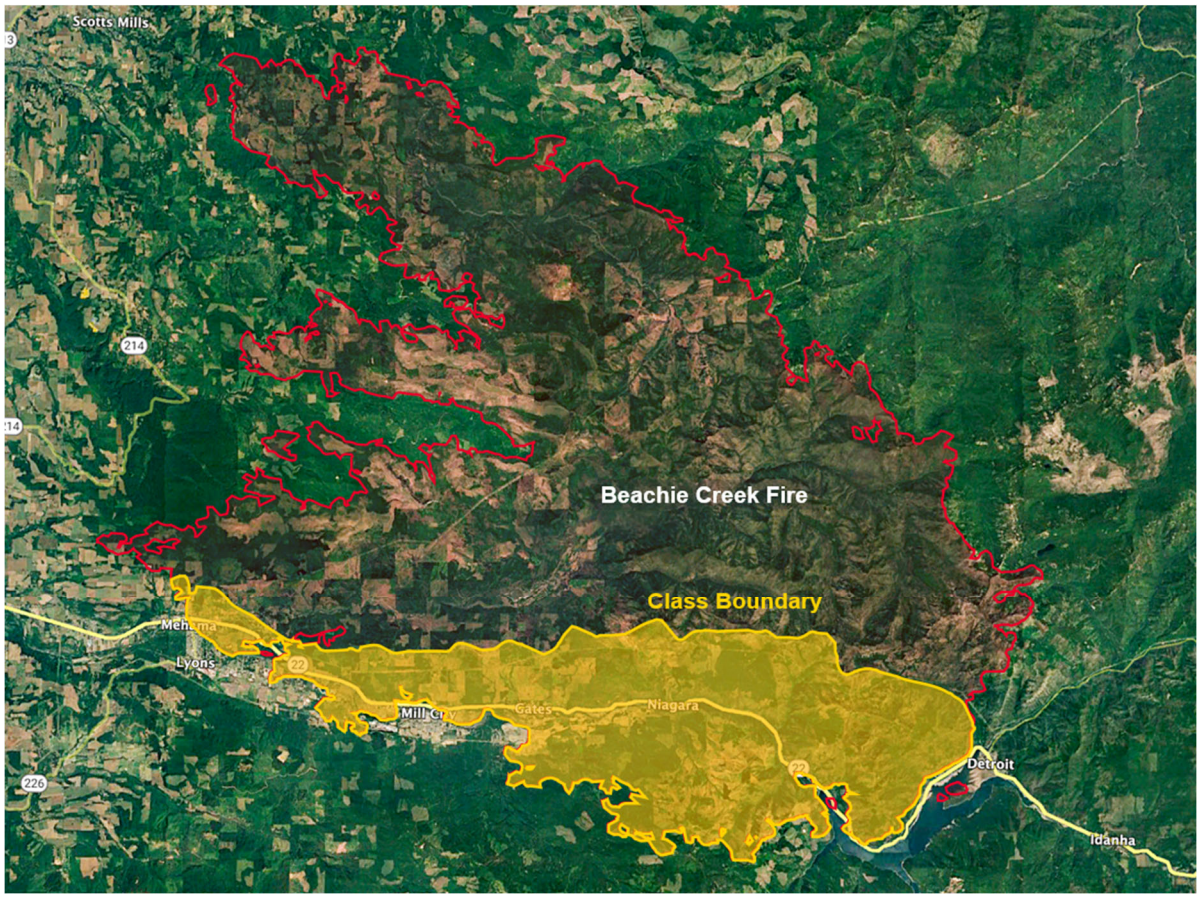
And while Plaintiffs fixate on the fact that the fire areas were all outside of "proactive de-energization zones," even Plaintiffs concede that PDZs presented just one de-energization mode, and "[o]utside PDZs," PacifiCorp could "implement an 'ad hoc' proactive power shutoff"—which turns on

individualized, fire-specific decisionmaking. (AB-40.) Plaintiffs also point to PacifiCorp's supposedly uniform policy with respect to "reclosers," but they fail to demonstrate that every single fire they attribute to PacifiCorp could have been prevented if reclosers were turned off.

Given these considerations, it is hardly surprising that Plaintiffs are unable to cite a single other wildfire case that was certified as a class—much less a case, like this one, that involved numerous *different* wildfires in *different* locations.

2. Causation in the Santiam Canyon Was Not Susceptible to Common Proof.

Plaintiffs' failure to offer the type of common proof required for class certification was particularly apparent within the Santiam Canyon class boundary, which substantially overlapped with the area burned by the Beachie Creek Fire.



(Tr-8374:23-8376:2.) Plaintiffs never presented any *common* proof that PacifiCorp's conduct caused burn or smoke damage to all of the properties in the area that overlapped with the Beachie Creek Fire—no common proof of a single (or combined) utility-caused fire; no common proof regarding where and when fire-fighters allegedly evacuated to leave that class area "defenseless"; and no common proof of where "destroyed" evidence was or what it would have shown. That failure is fatal to Plaintiffs' case for class certification—under both class-action rules and due-process safeguards.

Instead of offering common proof, Plaintiffs rely on a false binary choice—"either PacifiCorp started numerous fires that burned huge portions of

the Santiam Canyon and impeded the ability of firefighting personnel to protect the Canyon," "or PacifiCorp started a handful of ultimately harmless fires." (AB-46.) Plaintiffs simply assume that the jury could decide whether PacifiCorp was the single cause of harm in the Canyon or it was not. But there is no basis for that assumption. *Even if* Plaintiffs had presented evidence that PacifiCorp-caused fires burned "huge portions" of the canyon—they did not and ODF expressly found otherwise—and *even if* there were evidence that PacifiCorp "impeded" firefighting *somewhere*, that is *by definition* not common proof that would permit a finding that PacifiCorp is liable to all class members within the Santiam Canyon class boundary in one fell swoop. *See Pearson*, 358 Or at 111.

Plaintiffs also wave away their abandonment of Nicole Brewer, the fire-spread expert they relied on for their class certification, but they miss the point. (AB-48.) The trial court's certification decisions were expressly premised on her testimony; the court's order quotes nearly a full page, single spaced, from Brewer's opinion. (ER-64-65; *see also* ER-320.) But once Plaintiffs had convinced the trial court they had an expert who could show that PacifiCorp spot fires caused damage throughout the Santiam Canyon, they abandoned the charade at trial—knowing that she could not provide what Plaintiffs had promised. This left an evidentiary void with nothing but an empty promise to support the finding of causation throughout the Santiam Canyon—an empty

promise that was confirmed by Plaintiffs' counsels' attempt to ex-out nearly half of the area within the class boundary at the close of evidence.

(ER-256, 259.)

Plaintiffs' after-the-fact attempts to justify classwide causation by pointing to purported eyewitness accounts of electrical activity, sparks, or spot fires in a limited portion of the Santiam Canyon, claimed diversion of resources, and spoliation do nothing to alter this conclusion. (AB-50.) The trial court did not cite a single one of these purported evidentiary sources Plaintiffs now rely on in deciding to certify the class. For good reason—these alternative bases all require individualized inquiries.

For instance, no eyewitness could have possibly testified to fires throughout the entire canyon. Rather, Plaintiffs would have had to put on evidence as to fire spread for every one of the properties in the canyon—which is far beyond any percipient witness's capacity, and in fact, was not proved at trial. As outlined below, Plaintiffs could only muster evidence of various powerline or electrical activity at various times within a portion of the class area (the towns of Gates and part of Mill City), without demonstrating that any one of those sparks, activity, or ignitions (or any combination of them) went anywhere at all. And while Plaintiffs invoke the purported diversion of firefighters, no Oregon court has ever held that indirectly causing the diversion of public services can serve as a basis for liability, let alone on a classwide basis. Even if it were valid, such a diversion theory should have required individualized analysis of where the firefighters were located, and whether they would have been able to protect each and every property in the canyon. No such analysis was done, and no such evidence was put forward.

Finally, spoliation is not the cure-all Plaintiffs claim. The jury was instructed that if it believed evidence was destroyed, PacifiCorp would bear the "burden of proving the evidence * * * would not have been adverse." (ER-274.) But spoliation itself requires evidence—the jury could not just assume that evidence of unidentified PacifiCorp-caused fire ignitions had been destroyed across the entire canyon when there was no evidence that such canyon-wide

powerline ignitions in fact occurred. And the jury was not authorized to punitively find canyon-wide causation based on evidence lost at one, or even many, ignition points. Nor would lost evidence relating to an *ignition* source justify an inference that any ensuing fire actually spread throughout the entire canyon.[1]

B. A Class Action Is an Inferior Method of Adjudicating These Cases in Light of Each Plaintiff's Substantial Interest in Pursuing Individual Claims.

The procedural shortcut of a class action is intended primarily for those cases involving claims "insufficient in the amounts" to justify standalone claims. ORCP 32 B(8).

Given the need for individualized trials on damages, there is simply no justification to try these substantial cases based on unsupported classwide assumptions. *See* OBI Amicus 11. Non-class trials would be simple and efficient. They could include small groups of plaintiffs whose homes were allegedly damaged by the *same* fire—greatly simplifying proof as to liability and causation and protecting PacifiCorp's fundamental due process right to not be forced to pay for damage to homes that it did not cause. And without the

[1] PacifiCorp did not abandon its challenge to the inclusion of the eastern portion of the canyon by objecting to Plaintiffs trying to redefine the class mid-trial. (AB-55 n 2.) PacifiCorp's position has always been that certification is improper, and no exclusions—certainly not mid-trial—can remedy the defects in the class.

overwhelming hydraulic pressure of a several-thousand-member class, reaching a settled resolution would be far more achievable and effective.

PacifiCorp has already paid over a billion dollars in fire claims and settled over two thousand cases outside of this class action. This class action has provided the *opposite* of what class actions are designed to achieve—it has been inefficient, adjudication has been slow, and the aggregation of claims coupled with the trial court's ruling on noneconomic damages have made the claims impossible to settle. It should be promptly decertified.

II. COMBINED ARGUMENT ON NONECONOMIC DAMAGES (SIXTH THROUGH TENTH ASSIGNMENTS OF ERROR)

A. Oregon Common Law Prohibits Noneconomic Damages.

Unintentional property damage from a fire cannot support noneconomic damages under Oregon common law—and certainly not the expansive and categorical classwide noneconomic damages mandated by the trial court here. Noneconomic damages are limited to cases involving (1) physical harm, (2) malicious intent, or (3) violation of a special, legally protected interest recognized by caselaw. *Philibert v. Kluser*, 360 Or 698, 703-04, 385 P3d 1038 (2016). None of those factors are present here—and every Oregon court to address the issue has rejected the availability of noneconomic damages for unintentional damage to property from fires. *See, e.g.*, *Meyer v. 4-D Insulation Co., Inc.*, 60 Or App 70, 652 P2d 852 (1982); *Bailey v. Polygon Nw. Co., LLC*,

2022 WL 17184309, at *7 (D Or Aug. 23, 2022) (You, M.J.), *report and recommendation adopted in relevant part*, 2022 WL 17178268 (D Or Nov. 23, 2022) (Hernandez, D.J.). Plaintiffs ask this Court to create an entirely new and ill-defined category of noneconomic damages—based on "Plaintiffs' serious emotional harms" and "PacifiCorp's heightened culpability." (AB-82 (bold omitted).) That invitation to reinvent and expand Oregon tort law should be rejected, and the noneconomic damages mandated by the trial court should be reversed.

1. Plaintiffs' Approach—Noneconomic Damages for Serious Harms and Heightened Culpability—Is Not the Law.

Plaintiffs' approach has been rejected by every Oregon court to consider the issue. Plaintiffs' theory is barred by *Meyer*—which expressly held that noneconomic damages were unavailable for unintentional property damage from a fire (even when serious harms resulted). *Meyer*, 60 Or App at 72, 79. Plaintiffs say *Meyer* was a one-time fire. (AB-90.) But so was the one-time fire here—which was not "repeated." *Meyer*, 60 Or App at 75-76. Plaintiffs also say *Meyer* involved different claims. (AB-89-90.) But both cases involved claims for property damage and emotional distress from an unintentional fire. *Meyer*, 60 Or App at 79-80. Because each of Plaintiffs' supposed distinctions fails, their noneconomic damages should be rejected based on *Meyer* alone.

Plaintiffs nonetheless suggest the general rule has "long permitted" recovery of noneconomic damages. (AB-81-85.) But it does not, absent bodily injury (none here), intentional misconduct (none here), or invasion of a special, legally protected interest (none here). Indeed, *Meyer* specifically rejected noneconomic damages for the type of unintentional, one-time fire-damage at issue here. And Oregon law beyond *Meyer* prohibits several categories of noneconomic damages that tainted the jury verdicts here—including loss of community, harm to a sense of identity or loss of personal attachment to property or pets. (Opening Brief (OB)-86-87.)

Plaintiffs also argue that the causes of action they brought (public nuisance, private nuisance, and trespass) categorically entitle them to noneconomic damages. (AB-86-91.) But remedies law is not a labeling game. It is the *factual substance* of the claim (not the *title* of the cause of action) that determines whether it satisfies Oregon's tripartite noneconomic damages test. And under that test, one-time, unintentional fire-damage to property—as opposed to repeated and intentional misconduct—cannot support noneconomic damages. *Meyer*, 60 Or App at 79; *see also, e.g.*, *Bailey*, 2022 WL 17184309, at *7 (nuisance—no noneconomic damages); *Melton v. Allen*, 282 Or 731, 736, 580 P2d 1019 (1978) (unintentional trespass—no noneconomic damages).

2. Plaintiffs' Reconceptualization of Noneconomic Damages Is Sweeping and Ill-Defined—and Should Not Be Adopted as Oregon Law.

Plaintiffs defend the sweeping noneconomic damages mandated by the trial court for the class by arguing that the class has (1) suffered "serious emotional harms," and (2) shown "heightened culpability" (by which they mean purported recklessness, not intentional conduct). (AB-82.) But these justifications provide no legitimate support for the radical expansion of noneconomic damages Plaintiffs propose—much less the sweeping and categorical classwide noneconomic damages awards mandated by the trial court here.

Plaintiffs have sought and received noneconomic damages without any meaningful limitation, based on factors such as: emotional attachment to personal property; emotional attachment to pets or animals; emotional attachment to homes, second or vacation homes, and campsites; loss or grief over the environment, views, and sense of community; inconvenience arising from smoke damage and property clean up, and any other aspect about their experience related to the fire.[2]

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[2] (*See* Tr-2892:2-13, 2931:21-2932:4, 2975:8-2980:13 (Stockton-related testimony), ER-308 (verdict), ER-368-71 (judgment); Tr-3126:17-3130:11, 3195:8-3196:24, 3200:14-3201:6 (Montoya-related testimony); ER-308-09 (verdict), ER-395-98 (judgment); Tr-3596:10-3597:16, 3620:20-3625:15, 3631:9-3632:19 (Colbert-related testimony), ER-308-09 (verdict); Phase 2, Trial

Exemplar Class-Member Noneconomic Damages				
Plaintiff	**Economic Damages**	**Noneconomic Damages**	**Location**	**Property**
Stockton	$97,000	$3,000,000	Out-of-State (Virginia)	Loss of personal property
Montoya	$119,000	$3,000,000	Out-of-Town (Salem)	Smoke damage to building, loss of cats
Colbert	$20,000	$4,500,000	Class Area	Loss of personal property, cat
Nielsen	$327,000	$4,500,000	Class Area	Smoke and ash damage to building, loss of personal property (e.g., linens, trees)
Bigness	$70,000	$1,750,000	Class Area	Smoke and ash damage to rented building, loss of personal property (e.g., dartboard, pool tables)
Turnbull	$3,000	$1,750,000	Class Area	Minor smoke damage to building provided by job,

1, Tr-724-776, 912 (Nielsen-related testimony); ER 487 (verdict); ER 566-70 (judgment); Phase 2, Trial 2 Tr-781, 790, 821-22, 830-32 (Bigness-related testimony); ER 518 (verdict); ER 713-16 (judgment); Trial 2, Tr-913, 923, 982-92 (Turnbull-related testimony); ER 524 (verdict); ER 736-39 (judgment).)

				loss of personal property

But these noneconomic damages are overbroad and flawed—and the trial court erred by mandating such noneconomic damages for the class.

Serious Harm. "Serious harm" alone is not sufficient for noneconomic damages. Oregon law prohibits noneconomic damages for many serious harms (and harms well beyond many of the class-members' harms here)—including death of a husband (based on a 9-1-1 operator's error) (*Hammond v. Cent. Lane Commc'ns Ctr.*, 312 Or 17, 22, 816 P2d 593 (1991)), brain damage to a mother (based on negligent medical care) (*Norwest v. Presbyterian Intercommunity Hospital*, 293 Or 543, 586, 652 P2d 318 (1982)), serious harm to a family member (while a relative watched) (*Philibert*, 360 Or at 711-14), and the death of a pet (based on pit bulls mauling a cat) (*Lockett v. Hill*, 182 Or App 377, 379, 51 P3d 5 (2002)).

Even if serious harm alone were sufficient, it would not support the undifferentiated and categorical awards ordered by the trial court. Oregon courts have prohibited noneconomic damages for the same types of serious harms (e.g., burned homes) arising from the same types of causes (i.e., unintentional fires) underlying Plaintiffs' claims. *See Meyer*, 60 Or App at 73. And no Oregon court has permitted what Plaintiffs want here—noneconomic damages *categorically* available to *all* class members that experienced property damage.

Plaintiffs' approach cannot be the law—and is plainly overbroad. First, it requires noneconomic damages regardless of whether the class members were even present during the fires. (*See, e.g.*, ER-306-308 (Plaintiff Stockton in Virginia—learned about fire from calls); ER-308-09, 395-98 (Plaintiff Montoya in Salem—learned about fire the day after).) Second, it requires noneconomic damages for several categories of harm—loss of community, harm to a sense of identity or loss of personal attachment to property or pets—that are not allowed, even absent *Meyer*. (OB-85-87.) Third, it requires noneconomic damages regardless of the severity of the property damage or emotional harm—including those who suffered relatively minor damages (e.g., vacation-property damage, minor smoke/ash-damage to buildings, and destruction of dartboards, pool tables, and washcloths). *Supra* 14-15. Such an approach necessarily fails because it is both categorical and sweeping—and if anything, underscores the fissures and differences between members of the class. The trial court's order mandating categorical noneconomic damages is plainly overbroad—and plainly flawed.

Heightened Culpability. Plaintiffs' "heightened culpability" argument (AB-82) also fails because it is directly at odds with the long-settled principle in Oregon law that the only level of "culpability" sufficient to justify noneconomic damages (in the absence of personal injury or invasion of specially protected legal interests) is *intentional* misconduct. *See, e.g.*, *Meyer*, 60 Or App at 79;

Moody v. Or. Comm. Credit Union, 371 Or 772, 784, 542 P3d 24 (2023) ("intentionally caus[ing] the emotional distress"). That limitation is sound; it gives Oregon citizens and businesses assurance that even if a jury may second-guess their conduct and find they were negligent or reckless (and thus liable for *economic* damages), they will not be liable for practically limitless *noneconomic* damages as long as they do not act with malicious intent. Plaintiffs' attempt to erode this rule and allow the award of noneconomic damages based on recklessness ignores the blurriness of the distinction between negligent and reckless conduct (particularly in the minds of juries) and would put practically any defendant at risk of an enormous noneconomic damages award.

The noneconomic damages authorized by the trial court directly conflict with Oregon's broader approach to noneconomic damages. Oregon courts have been "reluctant" to recognize new categories of noneconomic damages, and the "limited circumstances" justifying new noneconomic damages in Oregon have sought both to avoid "creating 'indeterminate and potentially unlimited liability,'" and to ensure that "the interest in question is 'sufficiently important' and sufficiently circumscribed to support the imposition of liability for emotional distress damages." *Moody*, 371 Or at 784; *see also, e.g.*, OADC Amicus 2-6 (collecting cases). Plaintiffs' approach violates these principles—and the damages awards here (roughly twelve times the economic damages for

property loss) provide a stark illustration of why adhering to them is so important.

Incremental. Oregon courts have held that any expansion of noneconomic damages must "proceed incrementally, looking at our past decisions" to ensure "stability and consistency" in the law—and "changes" must be "'marginal, incremental, and clearly foreshadowed by our prior decisions.'" *Moody*, 371 Or at 370. Disregarding these principles, Plaintiffs' approach would allow noneconomic damages in any case where emotional damages are "serious"—which could be true in *any* case. It would also impose noneconomic damages remedies that have never been recognized by either "Oregon statute" or Oregon "common-law actions"—violating the principle that noneconomic damages should proceed "incrementally" based on "past decisions." *Id.* at 790, 800. Plaintiffs' rule invites boundless exposure for any individual or business that might happen to operate in Oregon—and here, it threatens billions in liability that will likely ruin Oregon's largest public utility. *See* AEISL Amicus 6-10; EEI Amicus 15-20. Such "indeterminate and potentially unlimited liability" is far out of step with Oregon law. *Moody*, 371 Or at 790.

Important. Plaintiffs' approach—requiring noneconomic damages for any class member with property damage—also ignores the principle that such damages should be limited to interests that are "sufficiently important." *Moody*, 371 Or at 790. Plaintiffs eschew any attempt to establish importance by

precedent. They provide no basis in "Oregon statute[s]" or Oregon "common-law actions," *id.* at 790, 800, that would limit the scope or show the importance of their new categories of special, legally protected interests, *id.* at 800. Nor could they. Plaintiffs' categorical request—noneconomic damages for all class-members with property damage—is not limited to those interests that are "sufficiently important" to warrant such damages. *Id.* at 790. As summarized above, Plaintiffs in this case have been awarded millions of dollars in noneconomic damages for fire damage to vacation homes, smoke or ash damage to buildings, and damage to properties when Plaintiffs were out of town. It blinks reality to suggest that these losses are "sufficiently important" to justify the award of noneconomic damages.

Circumscribed. Plaintiffs' proposed expansion of noneconomic damages also fails because it is not "sufficiently circumscribed." *Moody*, 371 Or at 790. To the contrary, Plaintiffs' proposed approach would make noneconomic damages potentially available in nearly *every* case. It would eliminate well-defined rules restricting noneconomic damages to a limited class of suits and replace them with porous standards permitting noneconomic damages for indefinitely serious harms and indefinitely culpable conduct. That is no limiting principle at all. Practically *any* dispute could—with creative lawyering—give rise to "serious" emotional distress and the kind of "culpable" conduct that could be portrayed as either negligent *or* reckless, in the eye of the beholder. The only

certainty promised by Plaintiffs' ill-defined approach is unpredictability—with indeterminate liability exposure and bankrupting jury verdicts that transform litigation into a jury lottery. PacifiCorp is entitled to judgment as a matter of law—or at least a new trial with proper jury instructions and proper evidentiary exclusions that ensures respects for Oregon's traditional noneconomic damages law.

3. The Noneconomic Damages Decisions Below Require Vacatur—Or At Least a New Trial.

The noneconomic damages awards should be vacated for the reasons already stated. But even if some of the claimed categories of noneconomic damages are deemed allowable in principle, they should be allowed only after a new trial with proper jury instructions (OB 76-77) and proper evidentiary exclusions (OB 77-78). The noneconomic damages theory Plaintiffs pursued was sweeping and categorical—plainly overbroad, plainly flawed. (OB 79, 94.) The trial court permitted the jury to award noneconomic damages for any class member with property damage, regardless of the extent of the property damage, whether the class member actually owned the property, or even whether the class member was present during the fires. The trial court also permitted the jury to award noneconomic damages (and hear evidence) on several categories of noneconomic damages that were plainly out of bounds—such as loss of community, harm to a sense of identity, or loss of personal attachment to property

or pets. *Supra* 14-15. The noneconomic damages awards allowed in the class trial—and mandated for each successive wave of class members (with liability exposure stretching into the billions)—are categorical, sweeping, and ultimately overbroad. Because the noneconomic damages awards meted out, the instructions to the jury, and the damages evidence allowed at trial were all in error, PacifiCorp is entitled—at the very least—to a new trial.

B. Oregon's Wildfire-Damages Statute Bars Noneconomic Damages.

Every source of statutory meaning—text, context, and purpose—shows that Oregon's wildfire-damages statute bars the noneconomic damages awards here. That statute was passed after the California Moonlight Fire litigation to prevent surprising and boundless wildfire liability verdicts from occurring in Oregon. (TCF-10/27/2022 (Chase Decl., Ex. 5 at 1).) It provides that "economic and property damages" are the "exclusive remedies for damages or injuries to property caused by a wildfire." ORS 477.089(2)(a)-(b) & (4); *see also* OFIC Amicus 6-20. Plaintiffs' noneconomic damages claims are barred because they fall squarely outside such exclusive remedies and violate the entire point of the wildfire-damages statute: bringing stability and limits to wildfire damages.

1. The Wildfire-Damages Statute Bars the Noneconomic Damages Awards.

Plaintiffs fail to square their noneconomic damages claims with the plain text of the wildfire-damages statute. Plaintiffs argue that they do not seek

remedies here for damage to property caused by a wildfire. But Plaintiffs' claims are expressly based on property damage—if they had no property damage, they would not be class members and they would have no claims. (*See* ER-463-39 (jury instructions—all claims based on property damage); ER-53-77 (certifying class—purportedly unified by property damage).) Plaintiffs' suggestion that they are seeking recovery for emotional distress (not property damage) is sophistry—they are seeking noneconomic damages as a *remedy* for their claims, but the *claims themselves* are indisputably based on "injur[ies] to property caused by a wildfire." ORS 477.089(2)(a)-(b).

Plaintiffs' remaining textual arguments also fail. Plaintiffs rely on the statute's title ("Recovery for property damage"), the statute's calculation method ("fair market value"), and the statute's focus (on "property") to argue that the statute limits only property damage. (AB-96-97.) But these statutory elements merely explain how the statute's exclusive economic and property damage remedies are calculated and do nothing to open the door to noneconomic damages remedies. Plaintiffs also argue that the legislature should have been clearer if it wanted to bar noneconomic damages—and attempt to manufacture ambiguity with a dizzying whipsaw of confused constructions. (AB-93-98, 98-100.) But the plain text is clear that "economic and property damages" are the "exclusive remedies" available—and the legislature was not required to use

Plaintiffs' "magic words." *Doe v. Silverman*, 287 Or App 247, 253, 401 P3d 793, 796 (2017).

Plaintiffs also toss out various interpretive canons—including, *inter alia*, the absurdity canon. (AB-98, 100.) But none helps them. There is nothing "truly absurd," for instance, about a damages cap—a common feature of tort reform. *LandWatch Lane Cnty. v. Lane Cnty.*, 364 Or 724, 741, 441 P3d 221 (2019). Plaintiffs assert that the damages cap would have absurd consequences by relying on inapplicable hypotheticals—for example, barring noneconomic bodily injury damages for bodily injury while escaping a burning house. (AB-102.) But absurdity cannot rest on fanciful hypotheticals; noneconomic damages remain available for bodily-injury damages, and any such claims are irrelevant here since Plaintiffs (to support class certification) abandoned any bodily injury claims in favor of purportedly less individualized property-based claims. In any event, there is nothing "truly ambiguous" about the statute here—which, as explained, makes plain that "economic and property" damages are the "*exclusive*" remedies for "damages or injur[ies] to property." *Supra* 22.

Plaintiffs also argue that the unprecedented noneconomic damages awards here are in harmony with the Oregon legislature's purposes. They are not. The "extant circumstances that [gave] rise to the need for the legislation" were not simply the need for clarity on how to calculate property damages, but the need to impose limits and predictability on runaway wildfire damages. *Oregon*

AFSCME Council 75 v. Oregon Judicial Dept. - Yamhill Cnty., 304 Or App 794, 826 n 27, 469 P3d 812, 832 (2020). The Oregon legislature, responding to criticism that the Moonlight Fire damages far exceeded the "market value" of the burned land, passed the wildfire-damages statute to "define[] the legal exposure for wildfire damages," ensure that "Oregon's landowners would not "face legal claims of such massive scale that they are forced to choose between gambling the company and settling for outrageous sums," and prevent "undue windfalls" secured by "creative lawyers." (TCF-10/27/2022 (Chase Decl., Ex. 1 at 3-5; Ex. 5 at 1; Ex. 4 at 2; Ex. 5 at 1, 3-5.); *see* OFIC Amicus 6-23 (canvassing the legislative history).) The noneconomic damages here reflect the same mischiefs—damages far exceeding market value (check), boundless and bankrupting liability for landowners (check), and windfall verdicts for clever lawyers (check). The wildfire-damages statute was designed to provide stability and predictability and save business owners from potentially catastrophic wildfire liability—a goal that would be directly undermined by upholding the noneconomic damages verdicts here.

Plaintiffs' crabbed interpretation of the legislature's work violates the basic principle that a court should construe the statute to "effectuate the intention of the legislature." *City of Portland v. Bartlett*, 304 Or App 580, 585, 468 P3d 980, 984 (2020). "In fact, the 'paramount' goal of statutory interpretation is 'discerning the legislature's intent.'" *Belshaw v. Farmers Ins. Co. of Oregon*,

373 Or 307, 328, 567 P3d 434, 445 (2025) ("legislature's policy goals" relevant to "interpreting statutes").

This Court should not allow Plaintiffs' attempts to discount the legislature's intent in favor of a dizzying shell game of constructive canons and disjointed constructions. While those attempts fail, this Court should not lose the forest for the trees: the wildfire-damages statute was made by the legislature to prevent the very mischiefs on display here—boundless liability, bankrupting verdicts, and billion-dollar-plus cases that enrich lawyers but ruin landowners.

2. The Wildfire-Damages Statute Is Constitutional.

Plaintiffs argue that if the Oregon wildfire-damages statute rules out their noneconomic damages, then it is unconstitutional. But there is "always a presumption in favor of the constitutionality of a legislative enactment"—and "until the contrary is shown beyond a reasonable doubt, it is the duty of the courts to assume that the challenged statute is valid." *Wright v. Blue Mountain Hosp. Dist.*, 214 Or 141, 144, 328 P2d 314, 316 (1958). Plaintiffs have not established that the damages statute is unconstitutional under the remedy clause in Article I, Section 10, of the Oregon Constitution. *See, e.g.*, *Horton v. Or. Health & Sci. Univ.*, 359 Or 168, 376 P3d 998 (2016).

As a threshold matter, the remedy clause only protects existing common-law remedies. *Horton*, 359 Or at 221. No Oregon court has recognized noneconomic damages for property damage caused by unintentional, one-time

fires—consistent with the broader common-law tradition. OFIC Amicus 5, 27. And every Oregon court until now has rejected such damages. *See, e.g.*, *Meyer*, 60 Or App at 74; *see also* OFIC Amicus 5. Plaintiffs seek noneconomic damages never before recognized in the history of Oregon and thus cannot complain about any *existing* common law remedy that the wildfire-damages statute abrogates.

Even if there was such abrogation, the remedy clause permits reasonable, give-and-take legislative modifications to common-law rules and remedies. *Horton*, 359 Or at 164, 221-22. And the wildfire-damages statute strikes such a *quid pro quo*: In exchange for making it clear that the only recoverable damages for wildfire property damage are "economic and property damages," the statute granted "doubled damages" in cases of gross negligence or higher degrees of culpability. ORS 477.089(2)(a)-(b). Plaintiffs want to have their cake and eat it too: They want a windfall by avoiding the statute's bar on noneconomic damages, while still enjoying double economic damages. That would disrupt the "careful balance" struck by the legislature, which, "like lawmakers in sister states," recognized a "substantial, but not unlimited, remedy." OBI Amicus 6; OFIC Amicus 56-64.

Plaintiffs also suggest that the statute raises constitutional questions that should be avoided (by adopting Plaintiffs' preferred reading), even if the statute is not *actually* unconstitutional. But the statute's legislative compromise is constitutional as applied here, so there is "no basis for applying the canon of

constitutional avoidance." *Rodriguez v. Robbins*, 715 F3d 1127, 1140 (9th Cir 2013).

III. COMBINED ARGUMENT ON CAUSATION (THIRD, FOURTH, AND ELEVENTH THROUGH THIRTEENTH ASSIGNMENTS OF ERROR)

A. Plaintiffs Failed to Establish That PacifiCorp Caused Harms to Each and Every Member of the Class.

Plaintiffs were required to provide evidence—not "speculation and conjecture"—establishing that every member in the class was harmed because of PacifiCorp's conduct. *Feist v. Sears & Roebuck*, 267 Or 402, 407, 517 P2d 675 (1973); *Pearson*, 358 Or at 111. Here, Plaintiffs failed to offer any proof that PacifiCorp caused harm to every member of the class, particularly in the Santiam Canyon.

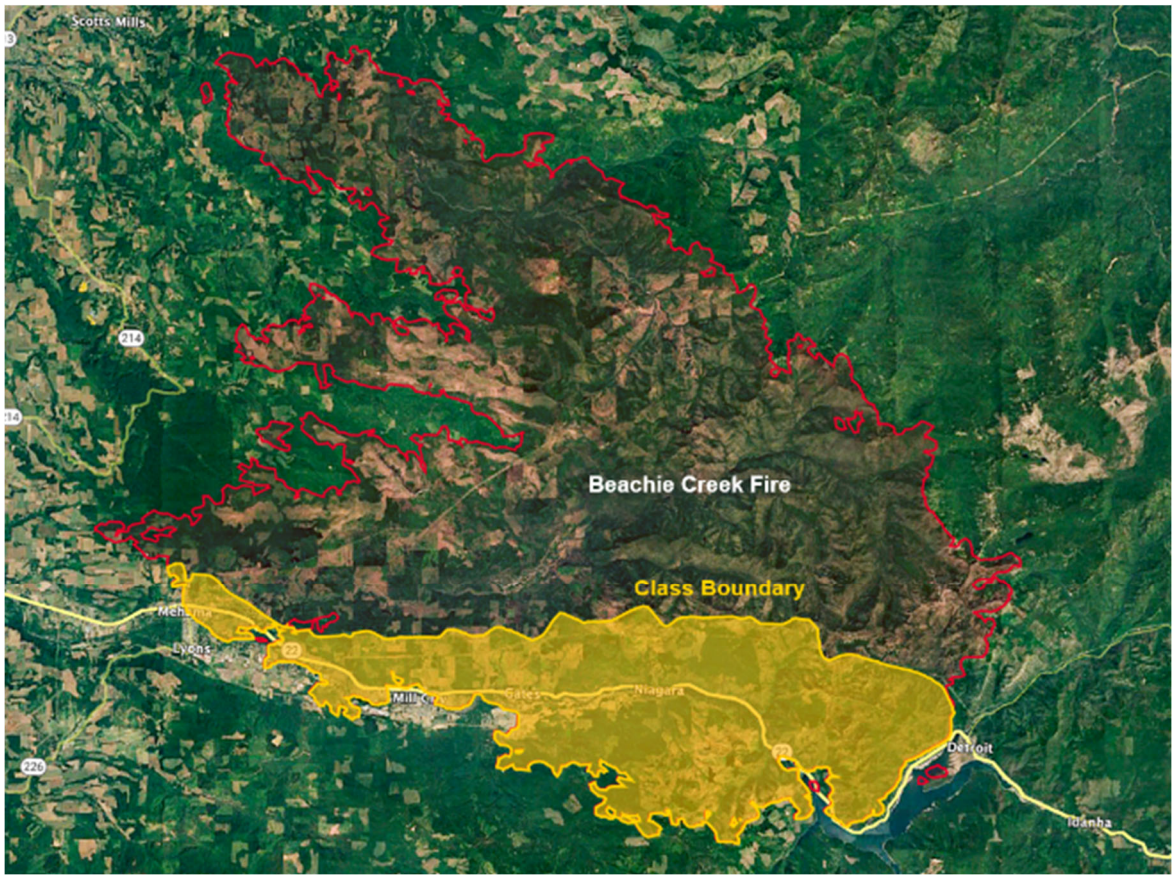
1. Plaintiffs Failed to Establish Causation.

Plaintiffs' central causation argument is that PacifiCorp started "several fires" in the Santiam Canyon—and because "at least some [of these fires] were not contained," the jury could suppose that PacifiCorp "caus[ed] harm to all class members." (AB-58-61.) But as explained, it is not enough for Plaintiffs to claim that a *subset* of class members in the Santiam Canyon were harmed. They needed to prove causation for each and every one.

Plaintiffs never even came close. They offered no evidence that PacifiCorp harmed the entire class. (AB-48-58.) And they functionally

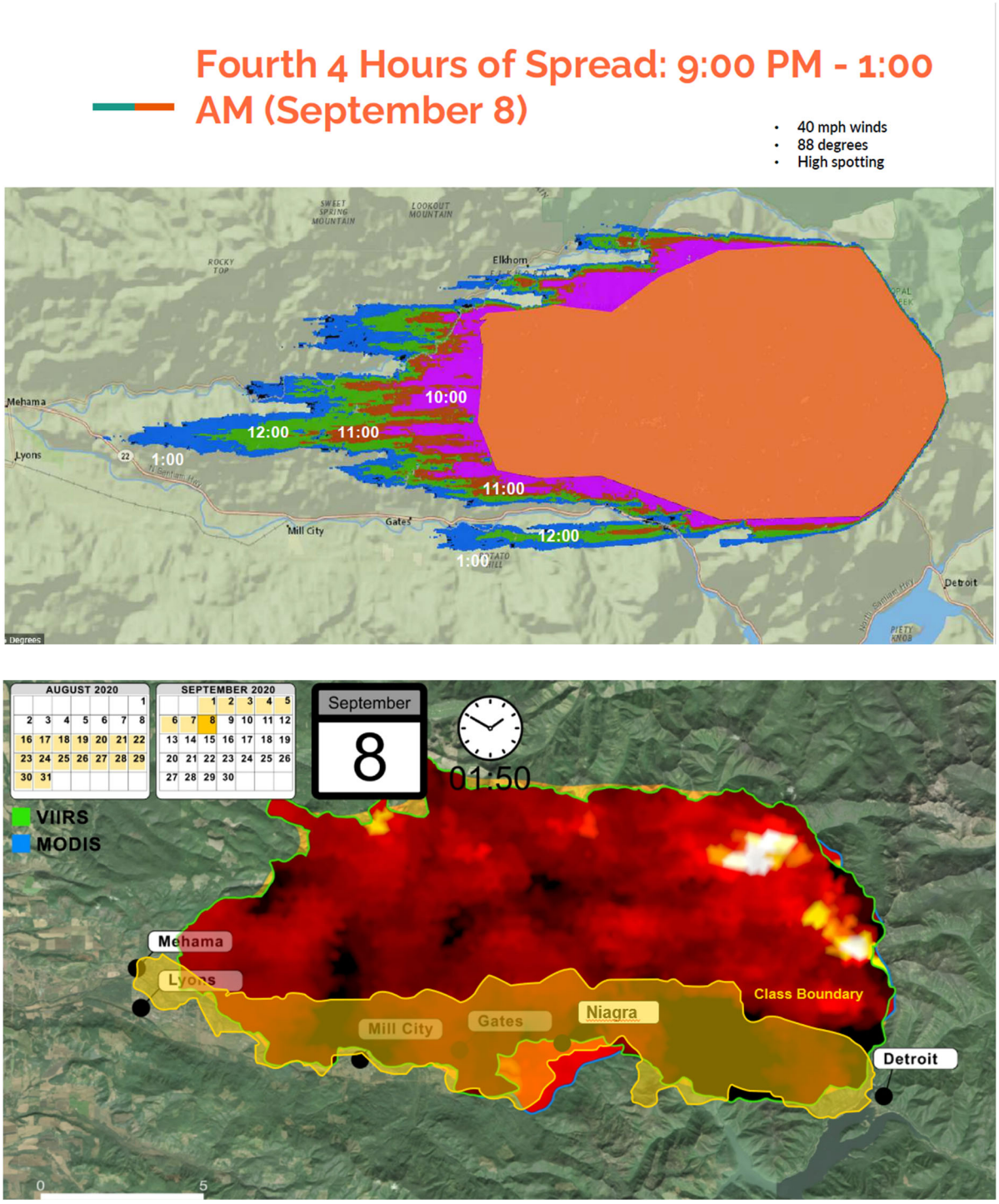
conceded PacifiCorp could *not* have harmed the entire class when they tried—and failed—to exclude the entire eastern half of the Santiam Canyon from the class definition. (OB-57.) There was no evidence of PacifiCorp fires in many locations, and there was evidence that PacifiCorp fires were put out where they started; PacifiCorp fires were never shown to have burned each class member's property. (AB-54-56.) And—perhaps most critically—they have no answer to the Beachie Creek Fire, which *preceded* any fire or electrical activity that Plaintiffs identified (AB-48-54), and the ODF Report, which exonerated PacifiCorp in the Santiam Canyon (ER-848-850).

Overlap. It is undisputed that there was *overlap* and not natural separation between the Beachie Creek Fire perimeter and the Santiam Canyon class boundary drawn freehand by Plaintiffs' counsel—as explained above (*supra* 5-6—discussing such overlap).



(Tr-8374:23-8376:2; *see also* ER-50.)

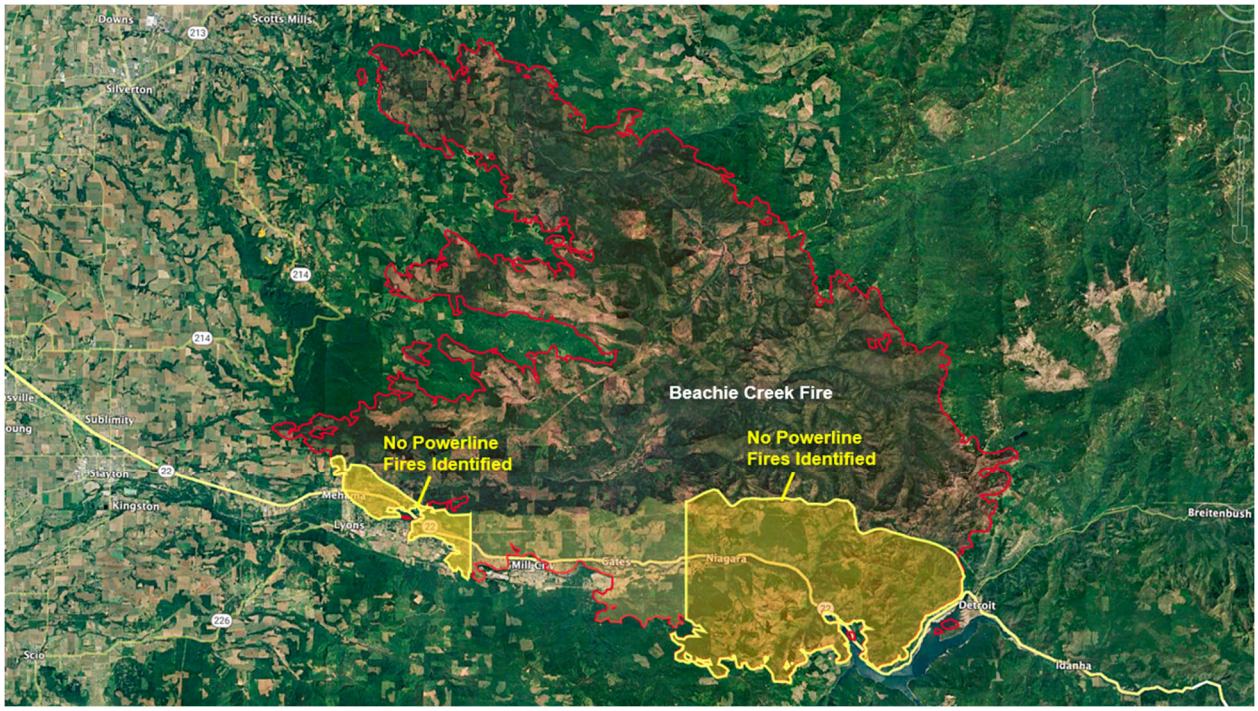
Timing. Unrebutted evidence also showed that the Beachie Creek Fire swept through Plaintiffs' class boundary—*before* any PacifiCorp-caused fire. (*See, e.g.*, ER-188-91; Tr-3894:1-20, 3897:10-25.)



(ER-190-91; Tr-3897:18-21, 3899:9-3900:10, 3905:14-15.) Such evidence established that the Beachie Creek Fire arrived, within some parts of the class boundaries, *before* any fires allegedly caused by PacifiCorp (and that the Beachie

Creek Fire burned class properties before any powerline-caused fire even started). (*Compare* Tr-3896:23-3898:13 *with* Tr-4400:13-19 (Beachie Creek Fire consumed class property by 8:00 pm—even though Plaintiffs alleged no PacifiCorp-caused fire before 8:37 pm).)

Powerlines. While Plaintiffs blamed PacifiCorp powerlines, it is undisputed that many of the burned areas were devoid of PacifiCorp powerlines. (ER-848-49, *see also* Tr-2438:10-19 (PacifiCorp did not service many areas).) There was also no evidence that any of the locations identified by Plaintiffs caused fires that then spread throughout the canyon—many were put out where they started and others started after the Beachie Creek Fire entered the canyon. (ER-848, 948-50.)



(Tr-8376:9-25.)

ODF Report. ODF reached the same conclusion. It considered all the evidence—including the trial testimony—and concluded that (1) powerline ignitions did not contribute to the Santiam Canyon fires, (2) powerline ignition fires were suppressed, and (3) the lightning-caused Beachie Creek Fire alone caused harm throughout the Santiam Canyon—which means that PacifiCorp did not cause the Santiam Canyon fire damage. (ER-848-49.) Plaintiffs provide no substantive response to these conclusions and simply suggest this Court should turn a blind eye. (AB-23-24.) But ODF's judicially noticeable findings confirmed what PacifiCorp has asserted all along and should not be ignored.

2. Plaintiffs' Excuses for Failing to Establish Causation Fail.

Plaintiffs claim that the classwide verdict was justified because PacifiCorp supposedly impeded firefighters (AB-61-64), but that is not a valid legal theory, and there is no classwide evidence either that firefighters were diverted or that every property burned because of such diversion. No Oregon court has ever held that a defendant can be liable for harm to a third party merely because emergency responders were responding to the defendant's emergency—a threshold issue for which Plaintiffs have *no* response. And Plaintiffs ignore that several class properties burned before any powerline activity allegedly started any fire—so firefighter "diversion" cannot be a cause of injury to all class members. (*See, e.g.*, Tr-4400:3-19.) Plaintiffs also rely on several speculative inferences—including that PacifiCorp caused the firefighters to move, and that the

firefighters would have otherwise stopped the fire—but such inferences are not supported by actual evidence. (*See, e.g.*, Tr-3027:17-3028:5.)

Plaintiffs argue the classwide causation verdict was justified because PacifiCorp destroyed evidence and the jury could assume causation. (AB-64-69.) But there was no evidence that any spoliation was intentional (Tr-4471:2-23), that PacifiCorp spoliated anything outside the Gates area (Tr-4468:4-4469:11), or that PacifiCorp spoliated anything in the eastern part of the Santiam Canyon (which it did not even service) (Tr-242:9-11, 7482:24-7483:23). Alleged spoliation cannot cure Plaintiffs' failure to prove causation.

B. The Trial Court's Erroneous Instructions Relieved Plaintiffs of Their Burden to Prove Causation.

At a minimum, the Court should order a new trial because the jury was improperly instructed in a way that relieved Plaintiffs of their burden to prove causation. The requirement that each plaintiff must establish causation—and that a defendant is entitled to litigate "defenses to individual claims"—"derive[s] from both class-action rules and principles of due process." *Duran v. U.S. Bank Nat'l Ass'n*, 325 P3d 916, 935 (Cal 2014). It is also necessary to protect the right to a jury trial, which remains applicable in class proceedings. *See Cimino v. Raymark Indus., Inc.*, 151 F3d 297, 312 (5th Cir 1998) ("the applicability of the Seventh Amendment is not altered simply because the case is * * * [a] class action").

In Phase I, the trial court told jurors to simply "assume" Plaintiffs' evidence applied classwide. And in Phase II, the trial court prevented PacifiCorp from defending itself on causation and erroneously told jurors that Phase I established that PacifiCorp was the "sole cause" of harm to all the class members. These flawed instructions not only violated basic "class action rules" requiring each Plaintiff to prove causation, but PacifiCorp's "due process" right to defend itself against each Plaintiff. *Id.*; *see also Wal-Mart Stores, Inc. v. Dukes*, 564 US 338, 366-67 (2011).

1. The Trial Court Erred by Telling the Jury It Could "Assume" Evidence Applied Classwide.

While Plaintiffs had the burden of proving PacifiCorp was a cause of the harm for each and every class member, the trial court relieved Plaintiffs of that burden by telling jurors to "*assume* that the evidence at trial applies to all class members." (OB at 75 (emphasis added).) That broad instruction invited the jury to ignore Plaintiffs' evidentiary shortcomings. Plaintiffs had to prove causation as to every class member—but the instruction told jurors that if they thought the evidence proved causation for one class member, they could assume the evidence would have proved it for all the others. It also violated PacifiCorp's due process right to defend itself against every claim; the instruction told the jurors they could reject such defenses by assumption. Courts in "[c]ivilized nations" cannot "require defendants to pay out millions of dollars without proof

that they are responsible for the alleged injuries." *Osorio v. Dole Food Co.*, 665 F Supp 2d 1307, 1345 (SD Fla 2009).

Plaintiffs argue the jury instruction "simply" told "the jury that not every class member needs to appear in the witness box" to prove liability in a class action. (AB-76.) But that is not what the instruction said—it told the jury it could "assume" *any* evidence, no matter how individualized, "applie[d]" to the whole class.

Plaintiffs also insist that classwide causation could be assumed. But a common-evidence "inference [cannot] arise" unless the evidence presented is "without material variation to the members of the class" and affects class members "to the same degree and in the same way." *Strawn v. Farmers Ins. Co. of Oregon*, 350 Or 336, 359 (2011). Here, there was no such common proof for the reasons already stated, and Plaintiffs could not have shown how PacifiCorp was *a* cause of harm to every class member without a property-by-property assessment. By ignoring these "material variation[s] to the members of the class," the trial court erroneously issued a common inference instruction. *Id.* at 359.

Plaintiffs maintain PacifiCorp's right to present its defenses was not harmed because it was "permitted to explore potential individual issues" involving the named Plaintiffs. (AB-79.) But that argument misses the point—regardless of any individual issues PacifiCorp identified for the few named

Plaintiffs, the jurors were told to assume that evidence applied to all class members anyway, in violation of "class-action rules and principles of due process." *Duran*, 325 P3d at 935; *see Wal-Mart*, 564 US at 366.

2. The Trial Court Erred by Telling Jurors PacifiCorp Was the "Sole Cause" of All Fire-Related Injuries and Preventing PacifiCorp from Presenting Contrary Evidence.

In Phase II, the trial court fashioned another improper instruction—telling jurors the Phase I verdict determined PacifiCorp was the *sole* cause of all fire-related injuries. But the Phase I jury was not asked and did not find that PacifiCorp was the *sole* cause of *all* fire-related injuries; the jury was asked whether PacifiCorp was *a* cause of *some* injury from the fires. By erroneously instructing the Phase II juries that PacifiCorp had already been found to be the sole cause of all injury, the court prevented PacifiCorp from presenting evidence about the many injuries that were not caused by PacifiCorp.

Plaintiffs insist Phase II's sole-cause instruction was proper because the "Phase I jury did, in fact, determine whether PacifiCorp's conduct caused the harm that the entire class suffered." (AB-109.) But Plaintiffs ignore the actual question the Phase I jurors were asked—whether PacifiCorp was "*a* cause of harm to the plaintiff." (ER-279 (negligence instruction) (emphasis added); *see also* ER-284 (substantial-factor causation); ER-290-312 ("a cause of harm").) And Plaintiffs also ignore the entire point of bifurcating these proceedings. The "phase one inquiry [wa]s for cause of harm to the properties in the class over a

defined geographic area, *not harm to each individual property*." (ER-71 (emphasis added).)

Plaintiffs concede Phase I's limited scope—explaining the verdict "did not automatically render PacifiCorp liable for damages as to all class members." (AB-110.) But they also acknowledge that in Phase II the trial court ordered summary judgment on liability, preventing PacifiCorp from defending itself before the jury, on the basis that the Phase I verdict already determined PacifiCorp was liable for all injuries—"the Phase II plaintiffs started by moving for summary judgment, arguing that *in light of the class verdict*, there was no material question of fact regarding PacifiCorp's liability to class members for harm caused by the Labor Day 2020 Fires." (AB-110 (emphasis added).)

Plaintiffs argue that "PacifiCorp had *still* failed to come up with any actual evidence" disputing liability "before the first Phase II trial," which is why the "trial court properly granted partial summary judgment." (AB-111.) But that is not true. The reason the trial court gave for granting summary judgment in Phase II on PacifiCorp's liability defense was that the Phase I verdict purportedly foreclosed the possibility that any fire-related damage was *not* caused by PacifiCorp. (ER-346-50.) That is demonstrably false, as a factual matter—that is not what the Phase I jury was asked or found. And denying PacifiCorp the ability to raise defenses as to its liability to individual class members in the Phase II trials usurped the Phase II jury's fact-finding role and denied PacifiCorp its

due process and jury-trial right to test each and every class member's claims. (OB-100 (collecting cases).)

CONCLUSION

The trial court violated established class-action rules—allowing a case to proceed as a class action despite Plaintiffs' inability to present common proof that PacifiCorp caused all of the class members' injuries. It violated established remedial rules—awarding hundreds of millions in noneconomic damages that are prohibited by the common law and barred by statute. And it violated established tort-law principles—failing to require Plaintiffs to prove causation and papering over that failure with erroneous instructions. This Court should reverse.

ANSWERING BRIEF ON CROSS-APPEAL

STATEMENT OF THE CASE ON CROSS-APPEAL

Plaintiffs cross-appeal from the trial court's (1) denial of prejudgment interest on their economic damages and (2) grant of an offset of Plaintiffs' economic damages in the amount Plaintiffs' insurers had already paid toward those economic damages.

I. Nature of the Action

PacifiCorp incorporates by reference the Nature of the Action set forth in its Opening Brief on appeal.

II. Nature of the Judgment

PacifiCorp accepts Plaintiffs' statement.

III. Appellate Jurisdiction

The Court has jurisdiction over this cross-appeal pursuant to ORS 19.205.

IV. Timeliness of Appeal

PacifiCorp accepts Plaintiffs' statement.

V. Questions Presented on Appeal

1. Did the trial court correctly deny Plaintiffs' request for prejudgment interest on their economic damages under ORS 82.010(1)(a)?
2. Did the trial court properly reduce the jury's award of economic damages by the full amount Plaintiffs' insurers paid Plaintiffs for those same

damages, where PacifiCorp had already settled the insurers' subrogation suits to recover the insurance payments?

SUMMARY OF ARGUMENT

The unjustified and unprecedented class-action verdicts—exposing PacifiCorp to billions of dollars in liability for property damage during the Labor Day Fires—were bad enough. The trial court violated settled class-action principles, broke established remedies law, and swept aside critical causation failures. And it provided Plaintiffs with sweeping damages that far surpassed what was needed to make Plaintiffs whole for their property damage—in the largest wildfire verdict in Oregon history. Those damage awards already break Oregon records and will ruin PacifiCorp if upheld. Oregon courts will deal with the fallout for years as the scores of Phase II trials are litigated and then appealed; and Oregon companies will be forced to ask, in each mass-liability case, whether they should bet their businesses on the lottery of jury sensibilities.

But despite the unprecedented verdicts already, Plaintiffs argue on cross-appeal that they are entitled to even more money—under equally unprecedented theories. In particular, Plaintiffs argue that they are entitled to (1) prejudgment interest on the economic damages claims—even though no money was due until judgment, and (2) damages that exclude offsets from insurers—even though they were already partially paid by their insurers. Both arguments fail.

First, Plaintiffs argue that the trial court erred by declining to award them prejudgment interest. But the statutory provision under which Plaintiffs sought prejudgment interest applies only to "transactions" that result in "moneys becom[ing] due." ORS 82.010(1)(a). Because the verdicts below did not arise from any transaction that resulted in money becoming due—at least not until final judgment—the statutory provision on which Plaintiffs rely is simply not applicable. Nor can Plaintiffs legitimately claim that any money was due before the judgments below were entered. Plaintiffs claim that the amount of damages could have been statutorily calculated at the time of the fire, but that is not enough. No money is due under a tort suit until a court actually enters judgment.

Second, Plaintiffs complain that the trial court reduced their damages by the full amount of money they received from their insurers. But that claim is a request to double-dip. It boils down to the argument that PacifiCorp should pay twice for each claim: once to Plaintiffs' insurers, once again to Plaintiffs. Because PacifiCorp paid Plaintiffs' insurers for their property loss, PacifiCorp cannot be forced to pay Plaintiffs again for the same property loss. At bottom, each of Plaintiffs' requests for more money—on top of the billions they are requesting through the ongoing Phase II trials—fails as a matter of law and common sense.

Because neither of Plaintiffs' arguments has merit, the Court should affirm the judgment below only in these two limited respects.

STATEMENT OF FACTS

Prejudgment Interest. On August 25, 2023, Plaintiffs moved for entry of limited judgment and asked the court to award prejudgment interest on their economic damages. (Plaintiffs' SER-71-74.) Plaintiffs argued then, as they do now, that they are entitled to prejudgment interest because they introduced evidence of their economic damages at trial and because the time from which interest should run was ascertainable—namely, that prejudgment interest should run from the date of the Labor Day 2020 fires. (*Id.*) PacifiCorp opposed Plaintiffs' motion, explaining that prejudgment interest under ORS 82.010(1)(a) is generally not permissible for tort damages, like those sought by Plaintiffs. (TCF-09/11/2023 (Defendants' Opposition to Plaintiffs' Motion for Entry of Limited Judgment).) PacifiCorp also argued that Plaintiffs had not adequately pleaded a right to prejudgment interest because they did not plead the exact amount claimed or the date from which prejudgment interest should run. (*Id.* at 10-11.)

The trial court agreed with PacifiCorp and denied Plaintiffs' motion for prejudgment interest. (Plaintiffs' SER-125.) Plaintiffs renewed their requests for prejudgment interest at the end of each Phase II trial. The court rejected both of those requests. (ER-543-44, 813-14.)

Damages Offset. After the Labor Day 2020 fires, Plaintiffs sought and obtained prompt payment from various insurance companies. For example,

Jeanyne James received nearly $500,000 in insurance payments. (TCF-08/30/2023, Larsen Decl., Ex. 1.) The Edges received over $350,000. (*Id.* Ex. 2.) Jane Drevo received north of $560,000, and James Holland received over $490,000. (*Id.* Exs. 3-4.) Many of these payments were made within weeks or months of the fires. (*See id.* Exs. 1-4.)

The insurance companies that paid out these sums then turned around and sued PacifiCorp in August and September 2022 to recover the value of the insurance payments made. *See Allstate et al. v. PacifiCorp*, No. 22CV29976; *21st Century Centennial et al. v. PacifiCorp*, No. 22CV26326. In April 2023, the insurance companies were joined as necessary parties to the Phase I trial, and, in May 2023, PacifiCorp settled with the insurance companies, fully resolving their claims.

At the Phase I trial a month later, Plaintiffs asked the jury to award them compensation for economic damages that the insurance companies had already covered, which the jury did. Two months after the completion of the Phase I trial, PacifiCorp moved to offset the economic damages award based on the insurance payouts, which PacifiCorp established both through documentary evidence reflecting those insurance payments and Plaintiffs' own deposition testimony. (TCF-08/30/2023 (Defendants' Motion to Offset Economic Damages Award).) Specifically, PacifiCorp submitted copies of payment letters and statements from Plaintiffs' insurers that had been produced in discovery that

detailed the payments made to certain Plaintiffs and the insured item to which the payments related. (TCF-08/30/2023 (Larsen Decl., Exs. 1-5).)

Because PacifiCorp had settled with the insurance companies regarding claims based on the Labor Day 2020 fires, PacifiCorp had effectively already paid Plaintiffs economic damages—the money just went through Plaintiffs' insurers. The trial court agreed, allowing PacifiCorp to offset payments it had made to the insurance companies for injuries arising out of the fire against Plaintiffs' economic damages. When PacifiCorp moved to offset insurance payments against economic damages in the Phase II trials, the trial court again allowed PacifiCorp to do so.

I. ARGUMENT ON FIRST CROSS-ASSIGNMENT OF ERROR

A. Preservation of Error

PacifiCorp agrees that the claimed error is preserved.

B. Standard of Review

A trial court's denial of prejudgment interest is reviewed "for errors of law." *Spaid v. 4-R Equip., LLC*, 252 Or App 228, 229, 287 P3d 1138 (2012).

C. Argument

The trial court properly denied Plaintiffs' request for prejudgment interest because ORS 82.010(1)(a) does not apply to routine tort suits. Plaintiffs seek prejudgment interest under a statutory provision applicable only to "transactions" that result in "moneys becom[ing] due." As Oregon courts

recognize, this provision exists so that debtors will pay their debts on time or else compensate the creditor for the lost value of the time in which the money was wrongfully withheld. But ORS 82.010(1)(a) does not apply here. There was no "transaction," and there was no money "due" until the judgment. And every indicia of statutory meaning—the statute's plain text, existing caselaw, and common sense—establish that tort claims do not satisfy ORS 82.010(1)(a) because no money is due until a court enters a judgment. *See Erickson Air-Crane Co. v. United Techs. Corp.*, 87 Or App 577, 582, 743 P2d 747 (1987) (holding prejudgment interest was unavailable for a tort where "there was no agreed or established amount of damages until the jury returned its verdict").

Prejudgment interest is the exception, not the norm. It is only available when expressly authorized by "contract or a statutory provision." *Strawn v. Farmers Ins. Co. of Or.*, 353 Or 210, 239, 297 P3d 439 (2013). And courts may only award prejudgment interest when "the exact amount" of money due is "ascertainable or easily ascertainable" along with "the time from which interest should run." *Patton v. Mut. of Enumclaw Ins. Co.*, 296 Or App 266, 275-76, 438 P3d 441 (2019) (quotation marks omitted). Here, Plaintiffs' only purported source of authority for prejudgment interest is ORS 82.010(1)(a), which provides: "The rate of interest for the following transactions, if the parties have not otherwise agreed to a rate of interest, is nine percent per annum and is payable on * * * [a]ll moneys after they become due; but open accounts bear

interest from the date of the last item thereof." Thus, on its face, the statute only reaches "transactions" that result in moneys "becom[ing] due." Plaintiffs cannot satisfy either requirement.

First, there was no "transaction." The Supreme Court has noted in other contexts that the ordinary definition of "transact" is "to prosecute negotiations" or to "carry on business." *In re Conduct of DuBoff*, 370 Or 720, 727, 525 P3d 62 (2023) (quoting *Webster's Third New Int'l Dictionary* 2425 (unabridged ed 2002)). None of Plaintiffs' tort claims—whether sounding in negligence, nuisance, trespass, gross negligence, or inverse condemnation—involved any sort of business or bargain between PacifiCorp and Plaintiffs. Plaintiffs do not attempt anywhere in their brief to identify the "transaction" from which moneys became due. The reason is simple: destruction of property is not a transaction.

Nor did any moneys "become due" within the meaning of ORS 82.010(1)(a) because PacifiCorp did not owe Plaintiffs anything until the trial court entered its judgment. As the Supreme Court has explained, the statute usually applies where "the person has failed to pay money when due or wrongfully retained money." *McDowell Welding & Pipefitting, Inc. v. U.S. Gypsum Co.*, 345 Or 272, 287, 193 P3d 9 (2008). The statute "imposes a duty to pay interest only in those cases in which the law recognizes a duty to pay a certain sum at a certain time and such a payment has not been made." *United Farm Agency v. McFarland*, 243 Or 124, 133-34, 411 P2d 1017 (1966). In other

words, the statute's reach is confined to situations where one party has a preexisting obligation to pay a *specific amount* on a *specific date*, and the very act of failing to pay by that date is "wrongful[]." *McDowell*, 345 Or at 287.

PacifiCorp had no such prejudgment duty to pay Plaintiffs. Before the jury's finding of liability and the trial court's entry of judgment, PacifiCorp had no preexisting "duty to pay a certain sum at a certain time," *United Farm*, 243 Or at 133-34, and nothing had "become due" to Plaintiffs. The court's decision in *Strawn v. Farmers Insurance Company of Oregon* is instructive: There, the court held that prejudgment interest was not authorized on an award of attorneys' fees since the award had not yet been converted into an obligation to pay via entry of judgment. 353 Or at 240-41. The court explained that "entry of judgment creates a monetary obligation that does not exist until that event occurs," and thus "the legal obligation to pay arises only once the court's appellate judgment is entered in the register." *Id.* at 240. So too here. Plaintiffs do not (and cannot) point to any legal obligation for PacifiCorp to pay them other than the trial court's judgment. In the absence of an independent obligation, no money had "become due" to Plaintiffs until the entry of judgment. *See id.*

For that reason, Plaintiffs are wrong to argue (AB-122) that they are entitled to prejudgment interest beginning on the first day on which each Plaintiff's property had been damaged because that is the date on which the money "became due." Plaintiffs may have been damaged by that date, but at the

time PacifiCorp was not legally responsible for that harm because there was no judgment and no other source of legal obligation to pay. Unlike a contract with a liquidated damages provision, on which the money becomes due the day the contract is breached, "physical injuries do not take on a pecuniary character until the jury by its verdict says they do." *See SDS Lumber Co. v. Allendale Mut. Ins. Co.*, 563 F Supp 608, 610-11 (D Or 1983). And the statute cannot be stretched beyond its text when "nothing in the statute requires the accrual of interest on sums not yet due." *United Farm*, 243 Or at 133-34.

Plaintiffs are likewise wrong to suggest (AB-121-22) that their damages were readily ascertainable simply because Oregon law provides a formula to calculate economic damages. *See* ORS 477.089. Damages are not ascertainable merely because the legislature has provided guidelines for their calculation. Rather, damages are ascertainable when some source of authority, whether a contract or a settled practice between the parties, makes the measure of damages definite even before a jury reaches its verdict, even if some factfinding is ultimately still left for the jury. *See Bollam v. Fireman's Fund Ins. Co.,* 76 Or App 267, 274-76, 709 P2d 1095 (1985), *rev'd on other grounds,* 302 Or 343, 730 P2d 542 (1986).

Oregon courts have rejected Plaintiffs' interpretation of the statute before. In *Erickson Air-Crane Co. v. United Technologies Corporation*, the plaintiff brought a negligence claim arising out of the loss of a helicopter the defendant

manufactured. 87 Or App at 743. The plaintiff argued that prejudgment interest was available "because there is a date certain on which the loss of the helicopter occurred and the jury determined the helicopter to be worth $10,000,000." *Id*. at 582. The court rejected that argument, explaining that the prejudgment interest was inappropriate because the defendant's liability was not "for an established amount." *Id.* Rather, the parties had "fiercely contested" the amount of damages and "there was no agreed or established amount of damages until the jury returned its verdict." *Id.* The same is true here—the parties contested damages extensively during trial, and the fact that the jury ultimately reached a verdict by employing a statutory formula is irrelevant to whether those damages were readily ascertainable from the start.

Plaintiffs do not even purport to cite a case granting prejudgment interest on similar facts. Tort claims for property damage are far from rare. Presumably, if Oregon law allowed prejudgment interest on such claims, Plaintiffs would cite examples.

At bottom, Plaintiffs' argument turns on its head the "general rule" that "prejudgment interest is not available in most tort actions, because the damages are usually not ascertainable until judgment is entered." *Erickson Air-Crane Co.*, 87 Or App at 582. Under Plaintiffs' theory, almost all tort plaintiffs would be entitled to prejudgment interest. The only requirement would be that a jury could ultimately reach a damages figure and trace the injury to a particular

time—which is the case in almost all tort suits. That is not the law in Oregon. Nor should it be.

II. ARGUMENT ON SECOND CROSS-ASSIGNMENT OF ERROR

A. Preservation of Error

PacifiCorp agrees that the error is preserved.

B. Standard of Review

A trial court's grant of a motion to offset damages is reviewed "for errors of law." *Koenig v. State Farm Mut. Auto. Ins. Co.*, 315 Or App 28, 32, 500 P3d 68 (2021).

C. Argument

PacifiCorp was entitled to offset its damages because it settled with the insurers as Plaintiffs' subrogees—and the trial court properly reduced Plaintiffs' damages by the full amount of money that they received from the insurers. Plaintiffs' contrary argument boils down to the contention that PacifiCorp should have to pay twice on the same claim—once to the Plaintiffs' insurers, who brought subrogated claims against PacifiCorp after paying out to Plaintiffs, and once again directly to Plaintiffs. But that contention flies in the face of Oregon's subrogation law, which transfers all the rights and remedies of the subrogor to the subrogee. Having paid out to the insurers for Plaintiffs' property loss, the law does not allow PacifiCorp to be forced to do so again.

1. PacifiCorp Is Entitled to an Offset Because Oregon Law Does Not Require Total Overlap Between Injuries.

It is "established law" in Oregon "that an insurance company paying a [property] loss is subrogated to all the rights and remedies of the insured against the parties whose wrongful act is responsible for the loss." *Nat'l Fire Ins. Co. v. Mogan*, 186 Or 285, 295, 206 P2d 963 (1949). Subrogation occurs "as a matter of law" when the insurer pays the insured's loss, meaning the insurer is automatically left "standing in the shoes of the insured" and able to assert the insured's rights as its own. *Nelson v. Liberty Ins. Corp.*, 314 Or App 350, 359, 498 P3d 861 (2021) (quotation marks omitted); *accord State ex rel. Healy v. Smither*, 290 Or 827, 832, 626 P2d 356 (1981). Here, because Plaintiffs' insurers made payments to Plaintiffs for their economic losses, any claim for the covered losses transferred from Plaintiffs to their insurers as a matter of law.

Subrogation also ensures that defendants need only defend against and satisfy a claim one time. As the Supreme Court has explained, the "defendant is entitled to assurance that it will be required to defend against this claim only once." *Furrer v. Yew Creek Logging Co.*, 206 Or 382, 389, 292 P2d 499 (1956); *see also Transp. Indem. Co. v. BB & S, Inc.*, 63 Or App 392, 397, 664 P2d 1115 (1983) ("[T]he concern in *Furrer* was that a defendant not be required to defend against or pay the *same underlying* claim more than once." (emphasis original)). Yet Plaintiffs advocate for the opposite, claiming that PacifiCorp must pay *both*

Plaintiffs' insurers *and* Plaintiffs for the same claim—i.e., Plaintiffs' property damage from the fires. They fail to reckon with the fundamental nature of subrogation, which is that that subrogation transfers a claim from the insured to the insurer—it does not multiply it and give both a claim. *See Nelson*, 314 Or App at 359.

Plaintiffs cannot avoid this conclusion by arguing that PacifiCorp should be required to show total overlap between the damages Plaintiffs' insurance covered and the jury's award of economic damages in order to obtain an offset. The only authority Plaintiffs cite in support of this argument is *Maduff Mortgage Corp. v. Deloitte Haskins & Sells*, 98 Or App 497, 779 P2d 1083 (1989). (AB-128.) But *Maduff* does not create such a rule, and would not make sense if it did.

To start, *Maduff* is not a subrogation case. *Maduff* involved Deloitte's attempt to offset its damages with those the plaintiff obtained from a third party, Huget, that had committed similar but distinct misconduct. *Maduff*, 98 Or App at 506. The court denied the offset because Deloitte and Huget caused distinct damages that did not fully overlap. *Id.* at 507. In particular, the timeframes for each defendant's misconduct were different—Deloitte injured the plaintiff between 1982 and 1983, whereas Huget did so primarily in 1981. *Id.* at 508. Thus, Deloitte was not entitled to offset its own damages with what Huget had paid to the plaintiff.

Maduff has no applicability here because this case does not involve different claims by different parties over different time periods. By its nature, subrogation transfers the *same claim* from the insured to the insurer after the insurer compensates the insured for its injury. *See Mogan*, 186 Or at 295. Here, the insurers brought suit against PacifiCorp to recover for the damage to their insured's property from the fires—the same injury at issue in Plaintiffs' suit. (*See* Plaintiffs' SER-116.) The same conduct, injury, and damages are present in PacifiCorp's offsets. None of that was true in *Maduff*, which simply did not address a subrogation claim. Plaintiffs cite no other case, whether from Oregon or elsewhere, to support their position.

Nor would Plaintiffs' total overlap requirement make any sense in practice. Plaintiffs do not even attempt to explain the ramifications of the legal rule they propose, but arguments they made to the trial court show the absurdity of their position. For example, Plaintiffs argued that PacifiCorp should be denied any offset for Plaintiff Drevo because he received insurance payments for "additional living expenses" but did not produce evidence at trial to seek damages for those expenses. (TCF-09/14/2023, at 7 (Plaintiffs' Opposition to Motion to Offset (Sealed)).) But if that were enough to defeat an offset, as Plaintiffs suggest, then any plaintiff could unilaterally prevent an offset by deciding not to present evidence at trial of a small subset of damages for which

it had received an insurance payout. The availability of an offset would be left purely in the control of the plaintiff, which is plainly not the law in Oregon.

Plaintiffs' arguments (AB-129-31) about the admissibility and content of PacifiCorp's evidence supporting its offsets are irrelevant because Plaintiffs only make them in support of their nonexistent *Maduff*-derived "total overlap" rule. Regardless, the relationship between the offsetting damages (the insurance payouts for property damage) and the damages being offset (the jury award) is clear and flows necessarily from the fact that the insurers brought their suits against PacifiCorp as subrogees. Plaintiffs cannot deny that both sets of damages were for the same asserted injury—the loss of Plaintiffs' property. PacifiCorp produced ample proof of the amount Plaintiffs recovered from their insurers, which came both from the insurers and Plaintiffs themselves in their depositions. Plaintiffs' challenge to this evidence, particularly with respect to the depositions, is so underdeveloped that the Court should not even consider it. Plaintiffs' bare record citations and unsupported conclusions do not sufficiently present their argument. *See S. Valley Bank & Tr. v. Colo. Dutch, LLC*, 291 Or App 175, 187, 420 P3d 653, 659 (2018).

2. The Collateral Source Doctrine Does Not Require Double Payment for the Same Claims.

Plaintiffs next argue (AB-134) that the collateral source rule entitles Plaintiffs to "their full economic damages, without regard to any insurance

payments," but that argument finds no support in Oregon caselaw and distorts the purpose of the collateral source rule. Plaintiffs cite a few general cases about the purpose of the collateral source rule: ensuring tortfeasors pay for the damages they caused and ensuring they do not get away with paying nothing through an offset. But they cannot support the starkly different proposition Plaintiffs advance—that PacifiCorp should have to pay *twice* for the same claim. No Oregon case has ever held as much, and other jurisdictions routinely reject that argument. The collateral source doctrine is intended to ensure the defendant pays *once* for its injury (and does not use a collateral source offset to get off the hook). But that rule is inapplicable where, as here, the defendant *has already paid* for the injury. *See Transp. Indem. Co*, 63 Or App at 397 ("[A] defendant [should] not be required to defend against or pay the same underlying claim more than once.") (emphasis omitted).

Plaintiffs rely on *White v. Jubitz Corp.* but place more weight on that case than it can bear. 347 Or 212, 219 P3d 566 (2009). In *Jubitz*, the court explained that, under the common law collateral source doctrine, a tortfeasor may generally not offset its damages if the plaintiff receives compensation from a third-party source. Rather, "[t]ortfeasors that cause the same injuries are responsible for the same damages, irrespective of the plaintiffs' receipt of benefits from, or legal relationships with, third-party benefit providers." *Id.* at 221-22. That is an uncontroversial proposition as a general matter, but *Jubitz*—which involved the

interaction of a *statutory* collateral source rule with Medicare benefits—is far afield from the facts here. Plaintiffs cite no case where the defendant had already compensated the plaintiffs by paying the insurers' subrogated claims.

Unable to rely on caselaw to support their theory, Plaintiffs fall back to the policy argument that the collateral source doctrine should apply because it will prevent PacifiCorp from "offload[ing] the full cost of its misconduct, thereby weakening its incentive to take due care in the future." (AB-133.) But while that may be one general rationale behind the collateral source rule, it is inapplicable here. PacifiCorp is not seeking to "offload" anything. PacifiCorp has already settled and paid the exact claims at issue here—claims for the loss of Plaintiffs' property brought by Plaintiffs' insurers standing in Plaintiffs' shoes. As discussed, when the insurers paid Plaintiffs for their property losses, the insurers "as a matter of law" were left "standing in the shoes of the insured" and therefore were able to assert Plaintiffs' rights against PacifiCorp to recover their insurance payouts. *Nelson*, 314 Or App at 359 (quotation marks omitted); *see also Smither*, 290 Or at 832. It cannot be said that PacifiCorp is failing to internalize the costs of its conduct when PacifiCorp's offsets are for damages that it already paid.

While Oregon courts have not addressed this exact situation, many other courts have, and they consistently find that the collateral source rule is not meant to make a tortfeasor pay twice. For instance, as the Seventh Circuit explained

while applying Indiana law, the collateral benefit rule "has always had an exception for subrogation cases" because the rule "is not intended to make the tortfeasor pay twice; that would result in overdeterrence [to the tortfeasor] as well as overcompensation" to the plaintiff. *Thomas v. Shelton*, 740 F2d 478, 484-85 (7th Cir 1984); *see also Phillips v. W. Co. of N. Am.*, 953 F2d 923, 931 (5th Cir 1992). Accordingly, other courts routinely find that "[w]hen the insurance carrier becomes subrogated to the claim of an insured against a third party tortfeasor, the payment of insurance proceeds is no longer a collateral source." *Garbell v. Conejo Hardwoods, Inc.*, 193 Cal App 4th 1563, 1572 (2011) (cleaned up); *accord Ferrellgas, Inc. v. Yeiser*, 247 P3d 1022, 1028 (Colo 2011) ("The collateral source doctrine is inapplicable to bar the setoff of payments that are in some way 'attributable' to the defendant."). The reasoning of these other courts is entirely consistent with Oregon's general rule in the context of subrogation that a defendant should not have to "defend against or pay the same underlying claim more than once." *Transp. Indem. Co*, 63 Or App at 397 (emphasis removed).

In sum, Plaintiffs cite no case to support its radical expansion of the collateral source doctrine, and applying it here would inequitably cause PacifiCorp to pay the same claims twice.

3. The Trial Court Correctly Granted a Full Offset, Not a Partial Offset, Because Subrogation Is Substitutionary.

When PacifiCorp settled the insurers' subrogation suits against it, it settled the full value of their subrogation claims. That is, the insurers accepted the settlement value in lieu of the actual amounts that they paid out to Plaintiffs and thereby extinguished any claim to further damages for those losses. The insurers reached that settlement while standing in Plaintiffs' shoes as their subrogees and applying Plaintiffs' rights and remedies, which had transferred to them as a matter of law. It follows that PacifiCorp was entitled to offset the full value of the claims it settled, *i.e.*, the amount Plaintiffs received from insurance, and not just the amount PacifiCorp paid to settle the claims.

Plaintiffs argue (AB-134) that PacifiCorp should have received, at most, an offset in the amount it paid to each Plaintiff's insurer to settle that Plaintiff's claim. Lacking any Oregon law to support their position, Plaintiffs devote most of their time to an extended hypothetical comparing different offsets before citing a few out-of-state cases that devote little reasoning to their decisions with respect to the offset question.

But Plaintiffs' argument, while an open question in Oregon, runs contrary to Oregon's conception of subrogation and good policy. In Oregon, "[s]ubrogation is a doctrine of *exact substitution*, under which the subrogee acquires the position, rights and liabilities of the subrogor." *Rusher v. Bunker*,

99 Or App 303, 311, 782 P2d 170 (1989). As a matter of equity, the subrogee "stands in the shoes" of the injured party and takes on that party's rights and remedies. *Smither*, 290 Or at 832 (quotation marks omitted). It stands to reason, then, that when a subrogee settles a claim, it extinguishes the full value of the claim. Limiting any offset for the defendant to less than the value of the claim would in effect allow the plaintiff to revive a claim that its subrogee settled and extinguished.

Adopting Plaintiffs' rule would also make bad policy because it would undermine subrogation and discourage settlement. Defendants settle subrogation claims for the same reason they settle other claims—to resolve claims by paying a sum certain, in exchange for knowing they will never again be exposed to the full value of the claim. But if the entire claim is not extinguished by a settlement, the settling defendant has effectively paid for nothing, leaving no reason to settle. If defendants are not going to receive the benefit of their bargain with subrogees because they remain exposed to further damages for the same claims that they settled, they will simply not settle with subrogees.

Well-reasoned cases from other courts have reached the same conclusion. In *Ferrellgas, Inc. v. Yeiser*, for instance, the Colorado Supreme Court held that an offset for the full value of the settled claim, not just the amount actually paid to settle, was appropriate given that the case was "governed by the law of

subrogation in the context of insurance." 247 P3d at 1027. The court explained that since the subrogee "stand[s] in [the] shoes" of the injured party, then the injured party no longer has a right to any portion of the subrogated claim. *Id.* at 1208. A subrogee is therefore free to settle and "extinguish[ ]" the claim for any amount, but the full value remains attributable to the subrogor. *Id.*; *accord Garbell*, 193 Cal App 4th at 1572 & n 3. The Alaska Supreme Court has similarly held that an offset for the full value of the claim is appropriate because a subrogee is "free to settle its subrogation claims for any amount." *Brinkerhoff v. Swearingen Aviation Corp.*, 663 P2d 937, 942 (Ak 1983). The Court should follow these authorities, which recognize as Oregon does that subrogation is a substitutionary doctrine. Only a full offset is consistent with that understanding of subrogation.

CONCLUSION

For the foregoing reasons, the trial court properly denied prejudgment interest and offset Plaintiffs' damages by the full amounts they received from their insurers. To the extent the Court allows the verdicts to stand, the trial court's judgment should be affirmed in these respects.

DATED: October 17, 2025

STOEL RIVES LLP

s/ Brad S. Daniels

Per A. Ramfjord, OSB No. 934024
per.ramfjord@stoel.com
Brad S. Daniels, OSB No. 025178
brad.daniels@stoel.com
Reilley D. Keating, OSB No. 073762
reilley.keating@stoel.com
Telephone: (503) 224-3380

and

Alison L. Plessman, *pro hac vice*
aplessman@hueston.com
Rajan S. Trehan, *pro hac vice*
rajan.trehan@hueston.com
Stephanie W. Xiao, *pro hac vice*
sxiao@hueston.com
Khoa D. Nguyen, *pro hac vice*
knguyen@hueston.com
HUESTON HENNIGAN LLP
523 West 6th Street, Suite 400
Los Angeles, CA 90014
Telephone: (213) 788-4340

Douglas J. Dixon, *pro hac vice*
ddixon@hueston.com
Craig A. Fligor, *pro hac vice*
cfligor@hueston.com
HUESTON HENNIGAN LLP
620 Newport Center Drive, Suite 1300
Newport Beach, CA 92660
Telephone: (949) 229-6840

and

Blaine H. Evanson, *pro hac vice*
bevanson@gibsondunn.com
GIBSON, DUNN & CRUTCHER LLP
3161 Michelson Drive
Irvine, California, 92612
Telephone: (949) 451-3800

Attorneys for Defendants-Appellants PacifiCorp and Pacific Power

CERTIFICATE OF COMPLIANCE

The court granted a motion to exceed the length limit for this brief. The order granting that motion was dated October 8, 2025, and limits a brief to 7,500 words for the reply and 6,700 words for the cross-appeal response. I certify that (1) this brief complies with that order and (2) the word count of this brief is 7,498 words for the reply and 5,156 words for the cross-appeal response.

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes.

s/ Brad S. Daniels

BRAD S. DANIELS, Bar No. 025178
brad.daniels@stoel.com

Attorneys for Defendants-Appellants

CERTIFICATE OF FILING AND SERVICE

I certify that on 17, 2025, I filed the APPELLANT PACIFICORP AND PACIFIC POWER'S COMBINED REPLY BRIEF AND ANSWERING BRIEF TO CROSS APPEAL with the Appellate Court Administrator by the Court of Appeals' eFiling system.

I further certify that on October 17, 2025, I caused true copies of this APPELLANT PACIFICORP AND PACIFIC POWER'S COMBINED REPLY BRIEF AND ANSWERING BRIEF TO CROSS APPEAL to be served upon the parties listed via e-service on the Oregon Court of Appeals website.

Keith A. Ketterling
Timothy S. DeJong
Cody Berne
Emily A. Johnson
Erin E. Roycroft
Stoll Stoll Berne Lokting & Shlachter P.C.
209 SW Oak Street, Suite 500
Portland, Oregon 97204

Matthew J. Preusch
Keller Rohrback L.L.P.
1129 State Street, Suite 8
Santa Barbara, California 93101

Alexander Glenn Tievsky
Nicholas Rosinia
Amy Hausmann
Zoe Seaman-Grant
Landon Webster
Megan Delurey
Edelson PC
350 North LaSalle Street, 14th Floor
Chicago, Illinois 60654

Derek C. Johnson
Marilyn A. Heiken
JOHNSON JOHNSON LUCAS & MIDDLETON, PC
975 Oak Street, Suite 1050
Eugene, Oregon 97401

Attorneys for Plaintiffs-Respondents

Denise Fjordbeck
Senior Assistant Attorney General
Oregon Department of Justice
400 Justice Building
1162 Court St., NE
Salem, Oregon 97301-4096

Attorney for Creditor-Respondent

J. Aaron Landau
HARRANG LONG P.C.
800 Willamette Street, Suite 770
Eugene, OR 97401-2991

Attorneys for Amicus Curiae
Edison Electric Institute

Iván Resendiz Gutierrez
KC Lynne Hovda
MILLER NASH LLP
1140 SW Washington Street, Suite 700
Portland, OR 97205

Attorneys for Amicus Curiae
Oregon Business & Industry Association

Sara Kobak
Andrew J. Lee
SCHWABE, WILLIAMSON
& WYATT, PC
1211 SW Fifth Ave., Suite 1900
Portland, OR 97204

Attorneys for Amicus Curiae
Oregon Forest Industries Council

Matthew J. Kalmanson
HART WAGNER LLP
1000 SW Broadway, Ste. 2000
Portland, OR 97205

Attorneys for Amicus Curiae
Associated Electric & Gas Insurance
services Limited

Irion Sanger
SANGER LAW, P.C.
4031 SE Hawthorne Blvd.
Portland, OR 97214

Attorneys for Amici Curiae
Central Lincoln Public Utility District,
Clatskanie Public Utility District,
Columbia River Public Utility District,
Northern Wasco Public Utility District,
Tillamook People's Utility District

Paul S. Stewart
PAINE HAMBLEN PS
717 W Sprague Ave., Ste. 1200
Spokane, WA 99201

Attorneys for amicus curiae
Pacific Northwest Investor-Owned
Utilities

I further certify that on October 17, 2025, I directed that true copies of this **APPELLANT PACIFICORP AND PACIFIC POWER'S COMBINED REPLY BRIEF AND ANSWERING BRIEF TO CROSS APPEAL** to be served upon the parties listed via U.S. Mail:

Nicholas A. Kahl
Nick Kahl, LLC
209 SW Oak St., Suite 400
Portland, Oregon 97204

Yoona Park
Sarah R. Osborn
Keller Rohrback L.L.P.
805 SW Broadway, Suite 2750
Portland, Oregon 97205

Daniel Mensher
Natida Sribhibhadh
Keller Rohrback L.L.P.
1201 Third Avenue, Suite 3200
Seattle, Washington 98101

Attorneys for Plaintiffs-Respondents

John Pruitt
Meghana Shah
EVERSHEDS SUTHERLAND (US) LLP
The Grace Building, 40th Floor
1114 Avenue of the Americas
New York, NY 10036

Attorneys for Amicus Curiae
Associated Electric & Gas Insurance Services Limited

Jeremy Marwell
VINSON &ELKINS LLP
2200 Pennsylvania Avenue, NW Suite 500 West
Washington, DC 20037

Attorneys for Amicus Curiae
Edison Electric Institute

John Maxwell Greene
SANGER LAW, P.C.
4031 SE Hawthorne Blvd.
Portland, OR 97214

Attorneys for Amici Curiae
Central Lincoln Public Utility District,
Clatskanie Public Utility District,
Columbia River Public Utility District,
Northern Wasco Public Utility District,
Tillamook People's Utility District

Jeremy C. Rice
PARKS BAUER LLP
570 Liberty St SE, Suite 200
Salem, OR 97301

Attorneys for Amicus Curiae
Oregon Association of Defense Counsel

s/ Brad S. Daniels

BRAD S. DANIELS, OSB No. 025178
brad.daniels@stoel.com

Attorneys for Defendants-Appellants