IN THE COURT OF APPEALS OF THE STATE OF OREGON

JEANYNE JAMES, ROBIN COLBERT, JANE DREVO, SAM DREVO, BROOKE EDGE AND BILL EDGE, SR., LORI FOWLER, IRIS HAMPTON, JAMES HOLLAND, RACHELLE MCMASTER, KRISTINA MONTOYA, NORTHWEST RIVER GUIDES, LLC, SHARIENE STOCKTON AND KEVIN STOCKTON, VICTOR PALFREYMAN, PALFREYMAN FAMILY TRUST, DUANE BRUNN,
individually and on behalf of all other similarly situated,

Plaintiffs-Respondents,

v.

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

Defendants-Appellants.

CA No. A183140

Multnomah County Circuit Court
Case No. 20CV33885 (Lead)

**PLAINTIFFS-RESPONDENTS' RESPONSE IN OPPOSITION TO APPELLANTS' MOTION TO STAY TRIAL COURT PROCEEDINGS**

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## INTRODUCTION

PacifiCorp's emergency motion requests reconsideration of this Court's February 14, 2024 order declining to halt the damages trials for thousands of Oregonians whose lives were upended by PacifiCorp's wildfires on Labor Day weekend of 2020. PacifiCorp offers no reason for the Court to depart from its prior ruling.

The Court does not have appellate jurisdiction to stay trials that—as this Court concluded in its earlier denial of a stay—are wholly within the jurisdiction of the circuit court. Even if the Court somehow had the discretionary authority to issue a stay, PacifiCorp has provided no reason to exercise that authority here. That is particularly true given that many of PacifiCorp's arguments—including dubious ones regarding its financial condition—are raised here for the first time.

In any event, a stay would be inequitable. PacifiCorp's reckless and willful conduct resulted in devastating fires that burned thousands of homes and left thousands of Oregonians homeless, struggling to make ends meet, and traumatized. The trial testimony in the cases on appeal demonstrates that scores of those class remembers remain in substantially the same condition. PacifiCorp,

by contrast, largely complains that it would be financially inconvenient for its corporate parent, which has more than three hundred billion dollars of cash on hand and is worth more than one trillion dollars, to have to continue litigating against the Oregonians whose lives PacifiCorp upended. And it was *PacifiCorp*, not the plaintiffs, who made the decision in this litigation to demand jury trials on each victim's claims for damages, and who continues to refuse even to consider the possibility that their appellate arguments lack merit and may not prevail.

PacifiCorp may now regret that it delayed filing a brief for 15 months after noticing this appeal, but that regret neither creates an emergency nor entitles PacifiCorp to demand that all class members be forced to sit and wait—and in numerous cases, die—while it takes its time briefing this appeal. Its motion for reconsideration should be denied.

## RELEVANT BACKGROUND

### A. The Labor Day 2020 Fires

This case arises from the catastrophic Labor Day 2020 wildfires that devastated communities across Oregon. During a windstorm that began on September 7, 2020, PacifiCorp's power lines and

electrical equipment ignited fires in four parts of Oregon: the 242 Fire, the South Obenchain Fire, the Echo Mountain Complex Fire, and the Santiam Canyon Fire. These fires destroyed thousands of homes and businesses, forcing entire communities to evacuate with little warning.

### B. Class Certification and the Two-Phase Trial Structure

In 2021, Plaintiffs moved to certify an issues class to litigate PacifiCorp's liability for these four fires. The circuit court granted the motion, certifying a class defined as owners or residents whose private property experienced fire activity within defined areas where the fires burned.

The circuit court adopted a two-phase process to resolve class members' claims. In Phase I, the class representatives would present class-wide proof pertaining to common issues, which would determine liability and causation for the class. In Phase II, individual class members would prove their specific damages in separate proceedings. The circuit court observed that "[a]ny phase two mini-trial or similar proceeding would be akin to a dispute in which a defendant has admitted liability and proceeded to trial on only damages." (ER-71.) PacifiCorp sought interlocutory review of

the class certification order, but this Court denied review. *See James v. PacifiCorp*, 323 Or App 764, 524 P3d 506 (2023).[1]

### C. The Phase I Liability Trial and Verdict

The Phase I liability trial commenced in May 2023 and lasted seven weeks. The jury heard extensive evidence regarding PacifiCorp's preparations for and actions during the windstorm. The evidence showed, among other things, that despite days of warnings about extreme fire danger, PacifiCorp failed to de-energize its power lines, failed to disable its reclosers (devices that automatically restore power after faults), and took no meaningful action as its equipment caused fires throughout Oregon. Other utilities in the same areas proactively shut off power in anticipation of the extreme conditions. PacifiCorp did not. PacifiCorp also destroyed most of the physical evidence despite corporate policies that required it to preserve evidence and despite PacifiCorp claiming that it was investigating the fires.

On June 14, 2023, after hearing nearly two months of evidence, the jury returned a verdict finding PacifiCorp liable for all four fires.

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[1] This was not the first time PacifiCorp sought to involve Oregon's appellate courts. PacifiCorp also petitioned the Supreme Court for mandamus in 2021, which was denied.

The jury determined that PacifiCorp's conduct was negligent, grossly negligent, reckless, and willful, and that it constituted public nuisance, private nuisance, and trespass. The jury awarded the class representatives compensatory damages and found that punitive damages were warranted. The circuit court entered a limited judgment in favor of Phase I named plaintiffs, which PacifiCorp appealed.

### D. PacifiCorp's Failed Attempts to Stay the Phase II Trials

Following the Phase I judgment, PacifiCorp immediately began efforts to delay the Phase II damages trials. After the circuit court denied its request to stay all damages trials pending resolution of this appeal, PacifiCorp sought an emergency stay from this Court. It argued both that its appeal of the Phase I limited judgment deprived the circuit court of jurisdiction to conduct the Phase II damages trials and that it would be inefficient and unfair to require it to participate in damages trials while the class liability verdict was being reviewed.

After the Appellate Commissioner denied PacifiCorp's stay request, PacifiCorp sought review from the Court. On February 14, 2024 the Court issued a comprehensive order denying PacifiCorp's

motion for stay pending appeal. The Court held that because the class members' claims were not properly included in the limited judgment on appeal, "the appeal does not operate to deprive the [trial] court of jurisdiction to resolve the remaining issues with respect to the class members' claims." (Feb 14, 2024 Order ("Feb 14 Order") at 4.) The Court explained that its jurisdiction was "'limited to the matters' properly decided by the limited judgment, and the trial court retains jurisdiction to decide the remaining issues with respect to the class members' claims," including the Phase II damages trials. (*Id.*)

The Court then turned to PacifiCorp's request for a discretionary stay. The Court first expressed doubt whether it even had authority to grant such a stay, noting it was "far from clear that this court's jurisdiction on appeal of a limited judgment encompasses the power to stay trial court proceedings pertaining to matters unrelated to those resolved by the limited judgment." (*Id.* at 5.) The Court observed that ORS 19.270(7)'s "express statutory limitation on the court's jurisdiction would appear to preclude the court from granting a stay of those proceedings over which the trial court retains jurisdiction, and over which this court lacks jurisdiction."

(*Id.*) Assuming without deciding that it had inherent authority to issue a stay, the Court concluded that, "having considered the parties' respective arguments for and against a discretionary stay, [it was] not persuaded that a stay is warranted under the circumstances of this case." (*Id.*)

### E. The First Phase II Damages Trials and PacifiCorp's Dilatory Appeal Tactics

The first Phase II damages trial commenced in January 2024, addressing the claims of nine class members. The second trial followed in February 2024, resolving the claims of ten additional class members.

After the first two Phase II damages trials, instead of filing new notices of appeal from each judgment, PacifiCorp improperly filed amended notices of appeal. *Cf.* ORAP 2.20 (permitting amended notices of appeal only for supplemental judgments for attorneys' fees or costs, not for subsequent limited judgments). This approach, combined with PacifiCorp's submission of hundreds of corrections to non-material typographical errors in the Phase I trial transcript, delayed transcript preparation for the Phase I appeal by months. After over a year of delay, PacifiCorp *still* requested and obtained an extension of time to file its opening brief. As a result, even though

this appeal was opened in January 2024, PacifiCorp did not file its overlength opening brief until April 2025.

### F. Case Management Order No. 10 and Continued Phase II Trials

In October 2024, the circuit court entered Case Management Order No. 10 (TCF 10/02/2024) ("CMO 10") to govern Phase II damages trials 3 through 11. CMO 10 established a comprehensive framework for administering and adjudicating the individual claims of absent class members. Under CMO 10, Phase II damages trials continued through 2025.

### G. The ODF Report and PacifiCorp's Motion to Stay

On March 19, 2025—nine months after the Phase I jury verdict and nearly five years after the fires—the Oregon Department of Forestry ("ODF") released an investigation report on the Santiam Canyon Fire. The ODF report concluded that any power-line ignitions in the Santiam Canyon were extinguished before they spread. (ER-837.) Ignoring the seven weeks of evidence from the Phase I trial, and the jury's verdict (which is not even mentioned in the report), ODF stated that "no evidence" pointed to PacifiCorp's powerlines as the cause of fire in the Santiam Canyon. (ER-848.) ODF also declined to consider PacifiCorp's evidence destruction. (ER-

838.) The report relied entirely of hearsay statements from witnesses rather than first-hand observations by investigators, making it inadmissible under OEC 803(8)(c)—the same evidentiary rule PacifiCorp had successfully invoked during Phase I to exclude other governmental investigation reports. (*See* Tr 2237-40.)

The day after ODF issued the report, PacifiCorp filed a motion to stay all remaining Phase II damages trials. (SER-149.) PacifiCorp's motion contained no legal citations or authority. (SER-151.) Plaintiffs opposed the motion, noting that the Phase I jury had already determined PacifiCorp's liability for causing the fires and that the Phase II juries were not asked to determine causation but only whether plaintiffs had sustained harm as a result of the liability established in Phase I. The circuit court held a hearing on April 18, 2025, and denied PacifiCorp's motion, finding that PacifiCorp had made an insufficient showing that a stay was warranted. (SER-167.)

The Phase II damages trials continued as scheduled following the circuit court's denial of the stay motion. The circuit court has now conducted eight damages trials, with each jury awarding damages to plaintiffs consistent with the Phase I liability findings. Trials 9, 10,

and 11 under CMO 10 are scheduled for September through December 2025.

### H. Case Management Order No. 11 and the Path Forward

With no negotiated resolution in sight, the circuit court asked the parties for input on a plan to continue damages trials after 2025. Class Counsel proposed a schedule that would complete all damages trials by the end of 2027. PacifiCorp filed an alternative proposal seeking to limit the schedule to one trial per month. At that pace, damages trials for the more than 1,500 Plaintiffs waiting for their day in court would not be finished until 2039.

After hearing argument on the competing proposals (Declaration of Alexander G. Tievsky ("Tievsky Decl"), Ex A, May 9, 2025 Hr'g Tr), the circuit court entered Case Management Order No. 11 (TCF 07/28/2025) ("CMO 11") (Tievsky Decl, Ex B) to govern the remaining damages trials. The order schedules four jury trials per month beginning in February 2026, increasing to eight trials per month starting in January 2027. Each trial will include three to eight households comprising approximately ten class members, maintaining the manageable structure that worked effectively throughout 2024 and 2025. CMO 11 also streamlines the trial

process while maintaining due process protections. It incorporates the court's rulings from the first eleven Phase II trials, eliminating the need for repetitive motions and preserving judicial resources. The order maintains the 180-day discovery cycles established under CMO 10 but prohibits new summary judgment motions without leave of court, recognizing that the legal issues have now been thoroughly litigated. It also requires mandatory global mediation every other month, with the objective of facilitating resolution of remaining claims.

PacifiCorp has now filed what it terms a motion to "stay" CMO 11, but the relief it requests would effectively vacate it. Because none of the class members who have trials scheduled under CMO 11 have judgments in their favor, they are not parties to this appeal and have no ability to file an opposition. The class representatives, who are not themselves parties to any of the CMO 11 trials, oppose PacifiCorp's request as part of their fiduciary duty to class members.

## ARGUMENT

### I. There Is No Emergency.

PacifiCorp has filed this motion as an emergency motion, but there is no emergency. It fails to identify the need for this Court's

action within 21 days, as required by ORAP 7.35(a). No relevant circumstance regarding this year's trials has changed since the circuit court entered CMO 10 on October 2, 2024. And the trials set by the order PacifiCorp challenges, CMO 11, do not begin until 2026.

## II. This Court Lacks Jurisdiction Over—And So Cannot Stay—the Ongoing Proceedings in the Circuit Court.

The threshold question, which PacifiCorp fails to mention until the tail end of its brief, is whether this Court has the jurisdiction to stay trials in the circuit court even though those trials have yet to occur and the plaintiffs in those trials are not parties to this appeal. As the Court forecasted the last time PacifiCorp requested the same relief, the answer is no. This Court's "jurisdiction is not plenary; it is created and limited by statute." *City of Eugene v. Smyth*, 239 Or App 175, 181, 243 P.3d 854 (2010)**.** Unless there is a statutory source for appellate jurisdiction, the circuit court retains exclusive authority to exercise judicial power. *Owen v. City of Portland*, 368 Or 661, 683, 497 P3d 1216 (2021) (quoting *State v. Terry*, 333 Or 163, 186, 37 P3d 157 (2001)) ("Under the Oregon Constitution, circuit courts have subject matter jurisdiction over all actions unless a statute or rule of law divests them of jurisdiction.") Because no Oregon statute grants

this Court the authority to modify, vacate, stay, or otherwise review CMO 11, that power remains exclusively with the circuit court.

### A. CMO 11 Is an Unappealable Interlocutory Order.

Although framed as a motion to "stay," PacifiCorp's motion is, at bottom, a request that the Court review CMO 11 the circuit court's most recent in a line of orders regarding the scheduling and conduct of damages trials, and reverse it. The circuit court has determined that the damages trials are to take place in a particular order and on specific dates. PacifiCorp argued to the circuit court that requiring it to defend those trials would be improper or otherwise unfair, but the circuit court disagreed and entered CMO 11. PacifiCorp has now asked this Court to review the circuit court's order and, in effect, come to a different conclusion and reschedule the damages trials.

The usual way to secure appellate jurisdiction would be to file a notice of appeal. However, PacifiCorp has not appealed CMO 11, because it cannot. CMO 11 is an unappealable interlocutory order and not a final judgment. As an initial matter, then, PacifiCorp cannot obtain what much of its motion appears aimed at: direct appellate review of CMO 11's provisions.

### B. PacifiCorp's Appeal of the Limited Judgment Does Not Grant the Court Authority to Stay Class Members' Damages Trials.

Instead, PacifiCorp contends that the Court somehow has jurisdiction to grant the relief it requests because PacifiCorp noticed an appeal from the limited judgment entered in favor of the named plaintiffs after the first trial. Even accepting PacifiCorp's characterization that it seeks only "a stay of trial court proceedings" and not full-fledged appellate review of an interlocutory order, the court lacks jurisdiction to entertain the request.

This Court's jurisdiction on an appeal of a limited judgment is governed by ORS 19.270(7), which provides:

> If a limited or supplemental judgment is appealed, the jurisdiction of the appellate court is limited to the matters decided by the limited or supplemental judgment, and the trial court retains jurisdiction over all other matters in the proceeding.

PacifiCorp suggests that the statute's first use of "matters" in ORS 19.270(7)—defining appellate court jurisdiction—must be read extremely broadly to encompass "the whole sweep of legal issues that continue to dictate how the Phase II damages trials are proceeding." (Mot at 51.) But that argument cannot be squared with the statute's text or the Court's order.

First, the Court has already determined the scope of the "matters decided by the limited or supplemental judgment" here, and it is far narrower than PacifiCorp suggests. That scope is limited to the merits of the "claims of the individually named plaintiffs" for whom there is a final determination of liability and damages. (Feb 14 Order at 2-3.) ("[T]his court has jurisdiction over the appeal to address the merits of the claims properly resolved by way of the limited judgment."). Specifically excluded from that scope are "the claims of the class members" who have not yet had damages trials, because they "were not properly included in the limited judgment and, thus, are not properly before this court." (*Id.* at 4.)

The concern is not merely a technical defect. The class members who are affected by CMO 11—and therefore would be affected by PacifiCorp's stay request—are not parties to this appeal. Some of them are not even represented by the same attorneys who represent the appellees here. It would be unfair and prejudicial to enter an order that curtails their rights under CMO 11 as part of an appeal that they are not participating in. *See Jeffries v. Mills*, 165 Or App 103, 113, 995 P2d 1180 (2000) (holding that failure to name an

adverse party in a notice of appeal was prejudicial and a fatal jurisdictional flaw).

Second, applying ORS 19.270(7), the Court already concluded that its own "jurisdiction is 'limited to the matters' properly decided by the limited judgment, and the trial court retains jurisdiction to decide the remaining issues with respect to the class members' claims." (Feb 14 Order at 4 (citing ORS 19.270(7)).) There is no ambiguity in the Court's order. The claims of class members who have not yet had damages trials are not part of a limited judgment and not part of this appeal. Therefore, any issue that remains to be decided with respect to those claims falls into the category of "other matters in the proceeding" that under ORS 19.270(7) "the trial court retains jurisdiction to decide." *Id.* Those issues necessarily include the procedural matters covered by CMO 11, such as when those class members' claims will be tried and how the proceedings will be conducted. Both ORS 19.270(7) and this Court's prior order leave those determinations squarely within the trial court's authority.

### C. This Court Does Not Have Inherent Authority to Stay Trial Court Proceedings.

To the extent PacifiCorp contends that the Court of Appeals has the "inherent authority" to issue a stay of pending trial court

proceedings, (Mot at 50), that might be true in some jurisdictions, but it is not true here in Oregon. The "Court of Appeals does not possess 'general' jurisdiction. This court was created by the legislature, and it possesses only the jurisdiction granted it by the legislature." *Snider v. Prod. Chem. Mfg., Inc.*, 221 Or App 593, 597, 191 P.3d 691 (2008) (citations omitted). The Oregon Constitution vests all other authority over pending circuit court proceedings exclusively in the circuit court. Until the legislature says otherwise, this Court does not have any authority at all to override the trial scheduling order of the circuit court in a case properly pending before that court.

And here, the legislature has not said otherwise, although it could have. Indeed, in the statute that permits discretionary review of otherwise non-appealable class certification orders, the legislature expressly granted this Court authority to stay proceedings in the circuit court. *See* ORS 19.225. If this Court already had such authority simply by virtue of reviewing a matter related to class certification, there would have been no need for the express grant. Further, the express grant of stay authority in ORS 19.225 strongly suggests that in other types of appeals involving class cases—such as

appeals from a limited judgment—the legislature did not intend to give this Court the power to stay circuit court proceedings.

* * *

In sum, the Court's observation in its prior order was accurate: ORS 19.270(7)'s "express statutory limitation on the court's jurisdiction would appear to preclude the court from granting a stay of those proceedings over which the trial court retains jurisdiction, and over which this court lacks jurisdiction." (Feb 14 Order at 5.) The fact that the Court's decision with respect to class certification may affect the damages trials does not override the statutory and constitutional limitations on this Court's jurisdiction.

## III. A Discretionary Stay Would Not Be Appropriate Even If the Court Had Jurisdiction to Grant It.

Even if the Court determines that it does have jurisdiction to review CMO 11 or otherwise stay proceedings in cases that are not on appeal, there is no basis to grant PacifiCorp's motion. First, even if CMO 11 were properly on appeal, there would be no basis to reverse or vacate it based on the arguments PacifiCorp raised below. And second, to the extent the Court deems it appropriate to consider the new arguments PacifiCorp presents for the first time here, a stay is still not warranted.

### A. If CMO 11 Were Properly Before the Court, There Would Be No Basis to Find an Abuse of Discretion.

As discussed in detail above, this Court has no jurisdiction to review CMO 11. Nevertheless, PacifiCorp devotes nearly its entire motion to arguments that have little to do with the pending appeal and more to do with PacifiCorp's general disagreement with CMO 11. (*See, e.g.*, Mot at 2 ("It violates PacifiCorp's due process rights, imperils its very existence, and unnecessarily risks PacifiCorp's ability to supply power, thereby disrupting the daily lives of over two million people across six western states."); *id.* at 14-29 (setting forth fifteen pages of argument that do not mention the pending appeal).) Even if the Court did have jurisdiction to review CMO 11 in this manner—and it does not—the arguments PacifiCorp made below would not merit reversal.

"[I]t is well-established that trial courts generally possess broad discretion to ensure that the proceedings before them are orderly and expeditious." *State v. Harrell*, 353 Or 247, 261, 297 P3d 461 (2013). "[A] trial court has broad authority to rule on a motion to postpone trial," so when the Court has jurisdiction to review the denial of such a motion, that review is for abuse of discretion only. *DaMota v. Jahnig*, 329 Or App 746, 752–53, 542 P3d 497 (2023). "Whether a

denial of a continuance is improper depends on the particular circumstances of the case and the reasons presented to the court at the time the request is denied." *State v. Hickey*, 79 Or App 200, 203, 717 P2d 1287 (1986).

Thus, if this Court eventually does review CMO 11 as part of an appealable judgment, that review will be limited to whether the circuit court abused its discretion by entering CMO 11 in light of PacifiCorp's threadbare arguments in favor of a stay or alternative case management order. Plaintiffs respectfully submit that is an exceedingly unlikely outcome. In its written opposition to the entry of CMO 11, PacifiCorp cited no cases, no statutes, and no constitutional provisions. (Tievsky Decl, Ex C, PacifiCorp's Opposition to Plaintiffs' Motion to Enter Case Management Order No. 11 and Motion for Entry of Alternative Case Management Order No. 11.) It did not contend that CMO 11 would supposedly violate due process until oral argument, and then it did so in only cursory form. (*See id.*; Tievsky Decl, Ex A, Hr'g Tr at 52.) It did not come close to even *suggesting* that entering CMO 11 would "threaten[] the company's very existence" as it does before this Court. (Mot at 44.) PacifiCorp did not

submit the declaration attached to its stay motion, or anything like it, to the trial court when it opposed CMO 11.

PacifiCorp had ample opportunity to tell the circuit court that a different schedule would threaten the very existence of the company, but it did not. Instead, it offered a competing set of procedural proposals and asked that only one trial be scheduled per month. (Tievsky Decl, Ex C at 2 ("PacifiCorp proposes setting no more than ***one trial each month***.") (double emphasis in original).) Those proposals concerned routine litigation matters such as how the trial slates should be determined, how document production and discovery should take place, and whether there should be written motion *in limine* practice. (*See generally* Tievsky Decl, Ex C.)

The circuit court even gave PacifiCorp the opportunity to respond after explaining that conducting one trial a week was feasible from the judiciary's perspective and observing that among the dozens of defense attorneys from three different law firms, "two attorneys to try one trial each week is certainly well within what I am seeing in front of me so far." (Tievsky Decl, Ex A at 85:14-86:11.) PacifiCorp's attorney did not use that opportunity to paint the picture of financial ruin that appears in its motion, or even to seek

the opportunity to file a declaration like the one it has attached here. Instead, it merely said that "PacifiCorp wants to ensure that it can devote the resources necessary to defend itself." (*Id.* at 87:23-25.)

If CMO 11 eventually does reach this Court as part of a final judgment, there will be no basis to conclude that the circuit court abused its discretion based on the arguments actually presented.

### B. The Factors That Might Hypothetically Apply to a Request for a Discretionary Stay Do Not Support PacifiCorp's Position.

If this Court decides to consider arguments that are presented here for the first time, there is *still* no basis to grant PacifiCorp's motion.

This court has not set out a standard for discretionary stays of trial proceedings after a limited judgment because it does not have jurisdiction to issue such stays. PacifiCorp tries to invoke ORS 19.350, but it admits that statute is "addressed to a stay of a judgment rather than a discretionary stay of further trial proceedings" and provides no reason to think that the legislature intended for it to apply in this context. (Mot at 31.) *See also Nat'l Mortg. Co. v. Robert C. Wyatt, Inc.*, 154 Or App 306, 961 P2d 894

(1998) (declining to apply statutory factors to a stay of trial court proceedings).

PacifiCorp then quickly pivots to the factors used in federal courts, which Oregon has never adopted. Those factors are "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Cal. ex rel. Harrison v. Express Scripts, Inc.*, 139 F4th 763, 768 (9th Cir 2025). If the court were to consider the federal factors, they would weigh against granting a stay here.

**First**, PacifiCorp has not made a strong showing that it is likely to succeed on the merits. Most of its argument on this point is directed toward its disagreement with the circuit court's grant of class certification. This court has already determined that "certification order is not manifestly erroneous" and that "reasonable minds could differ" about the key issue of predominance. *James*, 323 Or App at 777-78. Those conclusions hardly point to a strong likelihood of success on the merits.

The fact that the Oregon Department of Forestry came to a different conclusion about PacifiCorp's responsibility than the jury—after applying different standards and examining a different set of evidence in a non-adversarial context—does not impact the validity of the Court's prior decision. Article I, section 17 of the Oregon Constitution provides for trial by jury, not trial by forester. Even if the report had existed at the time of the liability trial, it is layers upon layers of hearsay and would not have been admissible. Further, the evidence and witnesses considered by the Oregon Department of Forestry were available for PacifiCorp to use during the 2023 Phase I trial. And PacifiCorp based its defense at trial on the same theories the Oregon Department of Forestry adopted, but the Phase I jury rejected.

PacifiCorp's only other argument for likelihood of success on the merits is its contention that noneconomic damages are unrecoverable. On this point, even its basic legal argument is wrong. It tells the Court that Plaintiffs did not meet the "test" for availability of noneconomic damages for emotional harm, even though the Oregon Supreme Court specifically held that it has not "not devised a 'test'" for that purpose. *Moody v. Or. Cmty. Credit*

*Union*, 371 Or 772, 790, 542 P3d 24 (2023). Rather, the analysis requires "an application of judgment" to determine whether a plaintiff has alleged a violation of a legally protected interest—and accompanying harm—"sufficiently important and sufficiently circumscribed to support the imposition of liability for emotional distress damages." *Id.* (internal quotation marks omitted).

Here, for example, a statute provides that an uncontrolled wildfire is a public nuisance, ORS 477.064, and the jury determined that PacifiCorp's wildfire was such a nuisance that caused harm to all of the Plaintiffs. After hearing testimony from the plaintiffs about the severe mental anguish they suffered during and after PacifiCorp's wildfire nuisance forced them to flee while their homes burned to the ground, the juries awarded noneconomic damages. PacifiCorp's citation of a 1982 case in which a minor house fire caused $1,200 in furniture and carpet damage does not translate to a strong showing of success on the merits. *See Meyer v. 4-D Insulation Co.*, 60 Or App 70, 72 & n 1, 652 P2d 852 (1982).

Nor does ORS 477.089 bar noneconomic damages. That statute, in fact, is completely silent about noneconomic damages. Instead, its language limits only "remedies for damages or injury *to property*

caused by a wildfire." ORS 477.089(4) (emphasis added). More broadly, all relevant signs—text, context, and legislative history—point in one direction: the statute's purpose was to curb inflated property damage valuations, not to eliminate long-standing common-law remedies for emotional distress.

**Second**, PacifiCorp has not demonstrated irreparable harm. First PacifiCorp argues that its due process rights will be violated if CMO 11 is allowed to take effect. Setting aside that it failed to raise these purported due process issues in any meaningful form in the trial court, PacifiCorp fails to identify any actual or threatened deprivation of its constitutional rights.

Instead, it complains that it cannot present a defense because of the circuit court's order that "PacifiCorp will not be allowed to take more than two third-party witness depositions associated with a plaintiff unless that plaintiff intends to call more than two witnesses at trial[.]" (Mot at 27-28.) No such order exists. The circuit court ordered that if PacifiCorp wants to take more than two depositions, it has to seek leave. (Ex B, CMO 11, § 4(f) ("Defendants may take no more than two depositions of a third-party witness associated with a particular Plaintiff in connection with each trial *absent leave of*

*court*[.]") (emphasis added).) Having to ask permission before taking an extra deposition is not a calamity of constitutional proportions. *Cf. Weatherford v. Bursey*, 429 US 545, 559, 97 S Ct 837, 51 L Ed 2d 30 (1977) (explaining that even in a criminal case, "the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded").

PacifiCorp also argues that the trial schedule deprives it of its constitutional right to counsel of its choice. (Mot at 33-34.) But PacifiCorp has not explained how CMO 11 would deprive it of its choice of counsel, and any such assertion is not plausible. Its stay motion alone lists *eleven* attorneys from three different law firms. Those firms, which PacifiCorp selected itself, collectively employ hundreds more attorneys. One of them is among the largest law firms in the world.

PacifiCorp also raises purported financial harms that it will suffer absent a stay. It complains that the legal fees and the supersedeas bonds that will result from conducting the damages trials now "imperils its very existence, and unnecessarily risks PacifiCorp's ability to supply power, thereby disrupting the daily lives of over two million people across six western states." (Mot at 2.)

This is not a credible statement. Just four days before this motion was filed, PacifiCorp's parent company, Berkshire Hathaway Energy, filed its quarterly report with the SEC. The report reassures PacifiCorp's investors that "There have been no significant changes in PacifiCorp's assumptions regarding critical accounting estimates since December 31, 2024," which expressly includes "wildfire loss contingencies[.]" Tievsky Decl, Ex D, at 84. The report discusses CMO 11 but does not suggest that it imperils the company. (*Id.* at 71-72.) Rather, PacifiCorp told its investors that it presently has assets of about $35.9 billion with total non-shareholder liabilities—including wildfire liabilities—of $25.2 billion. (*Id.* at 54-55.) Its "$900 million 364-day unsecured credit facility" remained "fully available" as of June 30, 2025, and it "has regulatory authority from the OPUC and the IPUC to issue an additional $4.15 billion of long-term debt." (*Id.* at 81.)

Credibility aside, PacifiCorp has not identified irreparable harms. To the extent that these purported harms are caused by having to litigate trials, the same federal standard PacifiCorp asks the Court to rely upon teaches that "litigation expense, even substantial and unrecoupable cost, does not constitute irreparable

injury." *F.T.C. v. Standard Oil Co. of Cal.*, 449 US 232, 244, 101 S Ct 488, 66 L Ed 2d 416 (1980) (citation omitted). Oregon law, in other contexts, is in accord. *See, e.g.*, *Kessler v. City of Portland*, 340 Or App 185, 197, 571 P3d 146 (2025) ("Purely economic harm is not irreparable harm."). Rather, "the expense and annoyance of litigation is part of the social burden of living under government." *Standard Oil*, 449 US at 244.

Some of PacifiCorp's financial complaints appear to be about the costs of bonding the judgments entered against it, rather than the cost of the litigation itself. PacifiCorp complains that it will not be able to spend money on its business if it instead has to put aside that money to pay the plaintiffs whose houses it burned down. (Mot at 37-38.) The time to consider that would have been before willfully causing fires that harmed thousands of Oregonians, not after. Delaying the proceedings to calculate exactly how much money PacifiCorp owes as a result of its actions will have no effect on the final bill or the consequences to the company.

In any event, as PacifiCorp points out, it does not have to pay the judgments now because it has elected to post supersedeas bonds instead. It correctly notes that Plaintiffs have declined to risk

consenting to a stay unsecured by a supersedeas bond, but it fails to mention that it has never once asked the circuit court for a stay without a supersedeas undertaking or for a reduction in the amount of the undertaking. If supersedeas bonds really would drive the company irreversibly into bankruptcy, and PacifiCorp could prove it with actual evidence, perhaps the circuit court would have considered a different form of security under ORCP 72 D. Otherwise, the costs of supersedeas bonds are not an irreparable harm. *Cf. Nat'l Broad. Co. v. Niemi*, 434 US 1354, 1356–57 (1978) (Rehnquist, C.J., in chambers) ("A requirement to defend an action such as applicants are now required to defend in the Superior Court, and if unsuccessful there to post a supersedeas bond and prosecute their constitutional claims through the normal appellate process to this Court, is scarcely a comparable example of irreparable injury").[2]

All else aside, PacifiCorp's claim of irreparable harm should not be credited given PacifiCorp's own, intentional delay of this appeal. As recounted above, PacifiCorp strategically delayed filing its

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[2] The parallel citation is intentionally omitted because the version of this sentence printed in the unofficial reporters differs from that published in the U.S. Reports. The definitive U.S. Reports version is available from the Library of Congress at https://www.loc.gov/item/usrep4341354.

opening brief for months longer than necessary by improperly amending its notice of appeal and insisting on non-material corrections to the transcript. Plainly, PacifiCorp thought this delay advantageous between March and October 2024, when no damages trials were on the calendar. Indeed, during that period it issued a press release aimed at convincing class members that they were better off settling for less than a tenth of what juries have awarded than having their day in court. *See* PacifiCorp, *Pacific Power Reaches Settlement with 403 Plaintiffs Related to the 2020 Labor Day Fires* (June 3, 2024), https://cite.law/3DXJ-Z8QK. ("'We are pleased to resolve these claims to provide plaintiffs with some closure,' said Ryan Flynn, Pacific Power president. ' *** Class litigation is costly, complex, takes several years to run its course through the legal system and is a barrier to reasonable outcomes for impacted individuals whose personal experiences vary dramatically.'"). As it turned out, PacifiCorp's gamble that the circuit court would be willing to make class members wait indefinitely for a damages trial was a poor one. *Cf.* Or Const, Art I, § 10. PacifiCorp may now regret that miscalculation, but it cannot reasonably invoke a purported harm—the need for damages trials during the pendency of appeal—

that it invited and contributed to through its lengthy delay in filing appeal.

**Third**, PacifiCorp grossly misstates the balance of interests here. True, as PacifiCorp points out, it might win this appeal in a way that requires the damages trials to be redone. But its argument fails to account for the other possibility: it might lose. And if it does lose, the harm to the class members who have been forced to wait will be far greater than the harm PacifiCorp suffers from having to conduct damages trials now.

PacifiCorp complains that it will be harmed by conducting trials now because it has to pay legal fees, or because its bond rating has been downgraded by the rating agencies. Compare that to the uncompensated harm suffered by some of the class members whose trials PacifiCorp wants to delay indefinitely. Shannon McCallie lost her RV in the fire and become homeless. (Tievsky Decl, Ex E, Shannon McCallie Am. Short Form Compl. and Jury Demand at 3.) Justin Redfearn was forced to liquidate his 401(k) and cash out his and his wife's life savings to buy a manufactured home to replace the one that PacifiCorp burned down. (Tievsky Decl, Ex F, Justin Redfearn Am. Short Form Compl. and Jury Demand at 3.)

Eventually, they left Oregon entirely due to their traumatic experiences in the fire. (*Id.*) PacifiCorp is asking them to wait *years* for a calculation of their damages and entry of judgment, because there is a chance that it might win this appeal.

And while PacifiCorp—a multibillion dollar corporation that is part of the Berkshire Hathaway trillion-dollar conglomerate—will probably still be around to conduct those trials, the class members who are waiting for their trials are primarily natural persons. They do not have the luxury to wait indefinitely for a chance to have a trial. Some have already lost the opportunity to see justice done. Bruce McGowan died before his scheduled trial, and so did his wife, Connie. Their estates' claims were tried together. Plaintiffs Rosa Baker and Michael Sellers died before their trials, and their estates, too, will go to trial in October 2025 in their absence. Many other plaintiffs waiting for trials are elderly, sick, or both.

Still, PacifiCorp insists that "additional damages trials are not materially advancing this case toward a final resolution." (Mot at 45.) Not so. PacifiCorp has made clear that it will not pay noneconomic damages as part of a negotiated resolution. (*See* Tievsky Decl, Ex A at 74:12-18, 75:19-22.) As a result, the only way

to advance class members' cases to final resolution is by way of jury trials. The balance of hardships tilts in favor of affording class members the opportunity to have those trials during their lifetimes.

**Fourth**, the final factor is the public interest. Here, that interest is in the administration of justice, "openly and without purchase, completely and without delay[.]" Or Const, Art I, § 10. In any other case where liability and damages were resolved in bifurcated trials, this state's long-standing policy against piecemeal appeals would require the liable defendant to wait for a damages judgment before challenging liability on appeal. *Pearson v. Philip Morris, Inc.*, 208 Or App 501, 513, 145 P3d 298 (2006) ("As a matter of general policy, this court has disapproved the practice of piece-meal appeals for the reason that efficient judicial administration will be better served if a case is required to proceed to final judgment before any appeal is permitted."). That sound policy does not change because this case is a class action, nor does it change because PacifiCorp harmed an unusually large number of people by its reckless and willful actions. Nor does it change because a state government agency adopted a theory that the jury rejected.

Finally, PacifiCorp's contention that it "never had an opportunity to defend" (Mot at 46) against these claims is bizarre and unfounded. That is exactly what trials are for. If PacifiCorp wants to defend against class members' damages claims, then trials are the way to do so.

## CONCLUSION

PacifiCorp's motion should be denied.

RESPECTFULLY SUBMITTED this 29th day of August, 2025.

By s/ Alexander G. Tievsky

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**CERTIFICATES OF FILING AND SERVICE**

I certify that on August 29, 2025, I filed the foregoing **PLAINTIFFS-RESPONDENTS' RESPONSE IN OPPOSITION TO APPELLANTS' MOTION TO STAY TRIAL COURT PROCEEDINGS** and the accompanying **DECLARATION OF ALEXANDER G. TIEVSKY IN SUPPORT OF PLAINTIFFS-RESPONDENTS' RESPONSE IN OPPOSITION TO APPELLANTS' MOTION TO STAY TRIAL COURT PROCEEDINGS** with the Appellate Court Administrator using the Appellate Court's Electronic Filing System.

I further certify that on August 29, 2025 electronic service of the foregoing was accomplished via the Appellate Court's Electronic Filing System at the email addresses as recorded on the date of service in the appellate e-Filing system upon the following registered eFilers: Bradley S. Daniels, Reilley Keating, Per A. Ramfjord, attorneys for Pacific Power and PacifiCorp; Denise Fjordbeck, attorney for Oregon Department of Justice; Matthew Kalmanson, attorneys for *amicus curiae* Associated Electric & Gas Insurance Services Limited; Sara Kobak, attorney for *amicus curiae* Oregon Forest Industries Council; Aaron J. Landau, attorney for *amicus*

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DATED this 29th day of August, 2025.

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