

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

JEANYNE JAMES, ROBIN COLBERT,
WENDELL CARPENTER, JANE
DREVO, SAM DREVO, BROOKE EDGE
AND BILL EDGE, SR., LORI FOWLER,
IRIS HAMPTON, JAMES HOLLAND,
RACHELLE MCMASTER, KRISTINA
MONTROYA, NORTHWEST RIVER
GUIDES, LLC, JEREMY SIGEL,
SHARIENE STOCKTON and KEVIN
STOCKTON, individually and on behalf
of all others similarly situated,

Plaintiffs,

v.

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

Defendants.

Case No. 20CV33885

OPINION AND ORDER GRANTING
PLAINTIFFS' MOTION FOR ISSUES CLASS
CERTIFICATION

INTRODUCTION

The matter before the court is plaintiffs' motion for issues class certification. This case arises from wildfires during the 2020 Labor Day weekend when "a powerful windstorm swept through PacifiCorp's entire Oregon service territory." (Mot at 4.) Plaintiffs allege that PacifiCorp's various acts or omissions "caused or contributed to fires that damaged or destroyed the homes and property of plaintiffs and the proposed class." (*Id.*) Plaintiffs seek to certify a class defined as:

All (A) owners or residents, as of September 7, 2020, of any (1) privately owned real property; (2) that is wholly or partially within the boundary of the maximum extent of burn for the Echo Mountain (including the fire formerly known as the Kimberling Fire), South Obenchain, or 242 fires, or the Santiam Canyon fires [that] is wholly or partially within the boundary in Figure 1 below; and (3) experienced fire activity during those fires; or (B) owners of a motorhome, residential trailer, manufactured dwelling, other mobile home, or any other personal property that as of September 7, 2020, was located on any property (1) wholly or partially within the boundary of the maximum extent of burn for the Echo Mountain (including the fire formerly known as Kimberling Fire), South Obenchain, or 242 fires, or for the Santiam Canyon fire [that] is within the boundary in Figure 1 below; that (2) experienced fire activity during those fires; and (3) whose motorhome, residential trailer, manufactured dwelling, other mobile home, or any other personal property, experienced fire damage during those fires. (10/27/21 Second Amended Class Action Compl (“2nd Compl”), ¶¶ 208-09.)

Figure 1 below shows the portion of the Santiam Canyon fire (below the redline) that plaintiffs allege were caused or contributed to by PacifiCorp. (*Id.*)



Plaintiffs allege that their class is ascertainable because it is defined based on: (1) geographic boundary, (2) ownership classification, and (3) fire activity. (Mot at 21.) Plaintiffs further allege that the class consists of 2,454 private properties across the four fires named

above. (*Id.*) PacifiCorp did not dispute that plaintiffs' proposed class is sufficiently ascertainable. *See generally* (PacifiCorp's Opp.)

Here, plaintiffs move to certify the liability issues common to all class members for class treatment. (Mot at 23.) Plaintiffs propose the following class issues:

1. What was defendants' level of culpable conduct in the operation of its utility infrastructure?
2. Was defendants' operation of their utility infrastructure ultrahazardous or abnormally dangerous?
3. Was defendants' conduct a cause of harm to the class?
4. If defendants' conduct was a cause of harm to the class, was that harm reasonably foreseeable?
5. Did defendants' action or inaction cause or contribute to the cause of the wildfire or cause or contribute to the spreading of the wildfire?
6. Did the fire originate on land used or capable of being used for growing forest tree species regardless of the existing use of the land?
7. Did defendants' action or inaction bring about an unauthorized entry into property in the exclusive possession of another?
8. Did defendants' culpable conduct cause the trespass or, alternatively, did defendants act intentionally, knowing that a trespass would result from their actions – and a trespass did indeed occur as a result of those actions?
9. Did defendants know, or have reason to know, that their electric utility infrastructure created an objectionable condition?
10. Did defendants realize, or should they have realized, that the objectionable condition created an unreasonable risk of substantial interference with the use and enjoyment of the class members' property?

11. Was the utility of maintaining the objectionable condition slight compared with the risk?
12. Did defendants fail to exercise reasonable care to eliminate the risk?
13. Were the defendants acting under authority of law when they caused damage to class members' real or personal property?
14. Was the damage to class members' property the necessary, certain, predictable, or inevitable result of defendants' actions?

(Mot at 24.)

Plaintiffs also propose a bifurcated proceeding. (*Id.* at 25; *see also* 10/8/21 Mot Consolidating Cases and Bifurcating Issues (“Consolidation Mot”).) For phase one, plaintiffs submit that the jury will decide the 14 common liability questions above on a class-wide basis and the amount of damages for the class representatives, and the court will resolve plaintiffs' injunctive relief claims. (*Id.*) In phase two, individual damages as a result of defendants' liability, if any, will be decided for each class member, with the form of those proceedings to be determined, *e.g.*, mini-trials, bellwether, contested claims process, appointment of a special master, or some other procedure. (*Id.*)

PacifiCorp raises two primary reasons for denial of plaintiffs' motion for issues class certification: (1) “[p]laintiffs cannot satisfy the superiority requirement of ORCP 32 B because questions of law or fact common to the members of the class do not predominate over questions affecting individual members in wildfire cases and this case in particular[,]” and (2) “the named plaintiffs are far too different to be typical or adequate class representatives under ORCP 32 A.” (Opp at 12.) For the reasons below, plaintiffs' motion for issues class certification is conditionally granted.

STANDARD FOR ISSUES CLASS CERTIFICATON

The standards that govern class certification are set out in ORCP 32. Under that rule, a class certification determination divides into two basic inquiries. *Pearson v. Philip Morris, Inc.*,

358 Or 88, 106 (2015). First, the trial court must determine if the action meets five prerequisites: (1) the class must be so numerous that simple joinder is impracticable (“numerosity”); (2) there must be questions of law or fact common to the class (“commonality”); (3) the named representatives’ claims must be typical of those of the class (“typicality”); (4) the named representatives must be individuals who will adequately protect the interests of the class (“adequacy”); and (5) prelitigation notice requirements must have been complied with (“notice”). *Id.*; ORCP 32 A(1)–(5). If any one of the five requirements is not satisfied, the case cannot go forward as a class action. *Id.*; ORCP 32 B.

If, however, all five requirements are met, the second basic inquiry comes into play: whether “a class action is superior to other available methods for the fair and efficient adjudication of the controversy.” *Id.*; ORCP 32 B. Again, the plaintiff must prevail on the superiority question before the action may be maintained as a class action. *Id.* The rule identifies eight factors “pertinent” to assessing superiority. *Id.*

When appropriate, an action may be brought or ordered maintained as a class action with respect to particular claims or issues or by or against multiple classes or subclasses. ORCP 32 G, *see also* ORCP 32 C(1). A plaintiff seeking class certification has the affirmative burden to demonstrate that the requirements of ORCP 32 are satisfied. *Pearson*, 358 Or at 107. Although a class certification decision is not a trial on the merits, the issues that must be resolved for the class certification determination frequently overlap with the merits of a plaintiffs’ class claim; “the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff’s cause of action”. *Id.* (internal citations omitted). The Oregon Supreme Court has noted that a “trial court’s determination that [an] action may proceed as a class action ‘is largely a decision of judicial administration * * * [and, in] making such decisions the trial court is customarily granted wide latitude’”. *Pearson*, 358 Or at 107 (citation omitted); *see also Bernard v. First Nat. Bank of Oregon*, 275 Or 145, n3 (1976) (noting that the

stated purpose of Federal Rule 23(b)(3) was to “achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bring about other undesirable results.”).

LEGAL ANALYSIS

I. Application of the ORCP 32 A requirements.

1. Numerosity.

Plaintiffs allege that the class is so numerous, consisting of more than 1,000 members, that joinder of all members is impracticable. (2nd Compl, ¶ 210.) Plaintiffs also presented a declaration that their proposed class consists of approximately 2,454 owners or residents of private properties, within specified geographic boundaries, that experienced fire activity. (Decl of Preusch, Ex B (Buckley, Expert Report) at 6, ¶ 17, Exs 6, 9, 12, 15.) Defendants did not argue that the proposed class fails to meet the numerosity requirement. To the extent necessary, the court concludes that plaintiffs have satisfied the numerosity requirement. *See Liborio v. Del Monte Fresh Produce N.A.*, 2008 WL 8257750 (Or Cir Aug 08, 2008) (concluding that numerosity is satisfied where plaintiffs alleged the members of the class “exceed 50 persons.”); *cf Pearson*, 358 Or at 141 (recognizing that “[t]he particular claim or issue to be certified for class treatment must satisfy all prerequisites for class certification under ORCP 32(A)(1) except numerosity—*i.e.*, commonality, typicality, adequacy, and notice.”); *see also* ORCP 32 G (providing that “[e]ach subclass must separately satisfy all requirements of this rule except for subsection A(1).”).

2. Commonality.

Plaintiffs allege that there are fourteen issues related to liability that are common to all class members. (Mot at 23-24; *see also* 2nd Compl, ¶ 211.) Commonality asks only if *there are* questions of law or fact common to the class. *Pearson*, 358 Or at 110. It does not test how central the common questions are to the resolution of the action. *Id.* Nor does it take into

account the nature of the proof required to litigate those common issues. *Id.* Defendants did not contest plaintiffs' satisfaction of the commonality requirement. For those reasons, and the reasons detailed below under the predominance analysis, the court concludes that the fourteen class issues include common questions of law or fact common for the class sufficient to satisfy ORCP 32 A(2).

3. Typicality.

Plaintiffs allege that their claims are typical of the claims of all class members, and that they will fairly and adequately protect the interests of the class. (2nd Compl, ¶ 214.) One of the defendants' main arguments against issues class certification is that the named plaintiffs are far too different to be typical or adequate class representatives under ORCP 32A because their claims do not arise from the same alleged event, practice, or course of conduct, and their injuries and losses significantly vary. (Opp at 12.)

Under Oregon law "a plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of members and his or her claims are based on the same legal theory." *Newman v. Tualatin Dev. Co.*, 287 Or 47, 50 (1979) (citation omitted).

Here, the court finds that the class representatives allege essentially the same or similar claims against PacifiCorp arising from the 2020 Labor Day fires as the other potential class members in this case, as well as the plaintiffs in the *Allen* and *Salter* cases that are proposed for consolidation.¹ In addition, the court finds that the class representatives have shown that their claims are based on the same factual theories and common proof as the whole class, as detailed below. Under Oregon law, the fact that damages may differ among individual plaintiffs or that some plaintiffs may have suffered no damages does not render the claims atypical. *Alea*

¹ See *Allen, et al. v. PacifiCorp*, case no. 20CV37430 and *Salter, et al. v. PacifiCorp*, case no. 21CV33595, alleging claims for negligence, negligence per se, gross negligence, private nuisance, public nuisance, trespass, and inverse condemnation. (Consolidation Mot at 5.)

Veneer, Inc. v. State, 117 Or App 42, 53 (1992), *aff'd in part, rev'd in part*, 318 Or 33 (1993); *see also* 1 Newberg on Class Actions § 3:60 (recognizing that “[t]he size of a plaintiff’s individual claim as compared to those of other class members is immaterial to the adequacy inquiry under Rule 23.”). Moreover, the individual inquiries into comparative fault and mitigation of damages, or variations in the type or amount of individual damages likely would not arise until after the issues class questions are resolved under a bifurcated or phased litigation approach. For these reasons, the court concludes that plaintiffs have made a sufficient showing that the claims of the named plaintiffs are typical of the class.

4. Adequacy.

In Oregon, the interests of the class can be adequately protected if (1) there are no disabling conflicts of interest between the class representatives and the class; and (2) the class is represented by counsel competent to handle such matters. *Alsea Veneer, Inc.*, 117 Or App at 53. The record does not identify any disabling conflicts of interest between the class representatives and the class, and the variations in harm and losses do not rise to that level for the reasons stated under the typicality analysis. Defendants did not dispute that plaintiffs’ counsel are competent to represent the proposed class. Based on the foregoing reasons, the court concludes that plaintiffs have satisfied the adequacy of representation requirement under ORCP 32 A(4).

5. Notice.

Plaintiffs allege that they sent defendants a notice and demand on September 30, 2020, pursuant to ORCP 32 H, before commencing a class action for damages. (2nd Compl, ¶ 217.) Defendants did not contest this factor. Accordingly, the court concludes that the class representatives have complied with the prelitigation notice provisions of ORCP 32 H. *See* (Decl of Preusch, (9/30/2020 Letter), Ex K.)

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II. Application of the ORCP 32 B requirements.

PacifiCorp’s primary argument against certification of an issues class is that plaintiffs cannot satisfy the superiority requirement because common issues, if any, do not predominate over individual questions affecting each potential member of the class under ORCP 32 B(3).

(Mot at 12.)

1. Predominance – ORCP 32 B(3).

a. The predominance legal standard.

The predominance factor is one that frequently drives class certification decisions: “[t]he extent to which questions of law or fact common to the members of the class predominate over any questions affecting only individual members.” *Pearson*, 358 Or at 106; ORCP 32(B)(3).

The predominance inquiry asks—how central are the common questions, and will common proof resolve them? *Id.* at 110. To test whether common issues of fact or law predominate over individual ones, the trial court must assess whether it is “likely” that the final determination of the action will require separate adjudications to resolve factual or legal questions regarding the individual class members and, if so, how many individual adjudications would be required. *Id.*

The predominance criterion requires the trial court to predict how the issues will play out at trial by considering whether the adjudication can be resolved with evidence common to the class, or whether it will entail separate inquiries for the individual class members. *Id.* In practical terms, the inquiry is designed to determine if proof as to one class member will be proof as to all, or whether dissimilarities *among the class members* will require individualized inquiries. *Id.* at 111 (emphasis added). The inquiry looks not only to how a plaintiff can prove its *prima facie* case; it considers, as well, the nature of the plaintiff’s claim more generally, the defenses to the claim, the legal and factual issues framed by the parties’ positions, and the record made on the disputed issues of fact. *Id.* at 114 (citation omitted).

Oregon law recognizes that a defendant cannot defeat the predominance of common issues by “dreaming up a theoretical defense requiring individual inquiries for which there is little basis in fact.” *Id.* (citation omitted). On the other hand, if the record suggests legitimate and legally material factual differences among the class members that a defendant is entitled to expose through individualized inquiries, *i.e.*, “fatal dissimilarities” among the class—the predominance inquiry must take those individualized inquiries into account. *Id.*

Neither the “predominance” factor nor any of the other seven superiority factors, however, is controlling. *Id.* at 106. Rather, the trial court has considerable discretion in weighing all of the factors that apply in a given case and determining if a class action will be a superior means of litigating the class issues. *Id.*; *see also Shea v. Chicago Pneumatic Tool Co.*, 164 Or App 198, 207 (1999) (explaining that, unlike the federal rule, ORCP 32 B(3) “includes the predominance of common questions of law and fact as a ‘pertinent’ matter that the trial court must consider. It does not *require* predominance as a *sine qua non* of certification of any class.”).

b. Plaintiffs’ claims generally.

Plaintiffs assert the following claims: common law negligence, negligence per se, gross negligence, private nuisance, public nuisance, trespass, inverse condemnation, accounting, and injunctive relief. (2nd Amended Compl ¶¶ 226-291.) Plaintiffs’ primary allegations related to liability for each claim are, in whole or in part, that:

- a. defendants failed to reasonably inspect their power line infrastructure for hazardous conditions;
- b. defendants failed to reasonably clear vegetation around power line infrastructure to mitigate the risk of fire;
- c. defendants failed to de-energize power lines during critical and extremely critical fire conditions, when defendants knew or in the exercise of reasonable care should have known that the then-present fire conditions would cause energized lines to fall or otherwise contact vegetation, structures, and objects;
- d. defendants failed to reasonably de-energize power lines during the then-present critical and extremely critical fire conditions even after defendants had knowledge that some power lines had fallen or otherwise come into contact with vegetation, structures, and objects;
- e. defendants failed to reasonably de-energize power lines even after fires had been ignited by their power line infrastructure;

- f. defendants failed to reasonably implement policies and procedures, and use equipment, to avoid igniting or spreading fire; and
- g. defendants failed to reasonably adjust their operations despite warnings about weather conditions that could cause rapid and dangerous fire growth and spread on and after Labor Day.

(2nd Amended Compl ¶¶ 227, 232, 239, 245, 255, 281.)

c. Plaintiffs' general factual theories.

Plaintiffs advance three separate factual theories for defendants' tort liability. First, "facing extreme fire conditions, PacifiCorp did not de-energize its equipment anywhere." (Mot at 25.) Next, PacifiCorp failed to act despite knowing a windstorm would hit Oregon during critical fire conditions. (*Id.*) Finally, PacifiCorp knew its history of vegetation management violations, unsafe equipment and operations, and years of indifference meant the storm would cause its equipment to ignite uncontrollable fires. (*Id.* at 25-26.)

d. Plaintiffs' specific negligence claims.

To establish liability for their negligence claims, plaintiffs must prove that (1) the defendants' conduct was negligent, (2) the defendants' negligent conduct was a cause of harm to the plaintiffs, and (3) the harm was reasonably foreseeable. UCJI 20.01. PacifiCorp does not dispute that the substantial factor causation standard may apply to some proposed class members where multiple factors may have concurrently contributed to the injuries but contends that the standard may not apply uniformly for the class and cannot be used to avoid individual inquiries. (Defendants' Supp Brief at 7-8.) Under substantial factor causation, many factors or things may operate either independently or together to cause harm. UCJI 23.02; *see Joshi v. Providence Health Sys. of Oregon Corp.*, 342 Or 152, 161 (2006) (explaining that substantial factor causation applies when "two causes concur to bring about an event, and either one of them, operating alone, would have been sufficient to cause the identical result[.]"). In such a case, each may be a cause of the harm even though the others by themselves would have been sufficient to cause the same harm. UCJI 23.02. If the trier of fact finds that the defendants' act or omission

was a substantial factor in causing the harm to the plaintiffs, then they may find that the defendants' conduct caused the harm even though it was not the only cause. *Id.* A substantial factor is an important factor and not one that is insignificant. *Id.* In the court's view, substantial factor causation will likely apply because plaintiffs' factual theories are predicated on multiple separate points of origin or ignition locations for each of the four fires, with at least two separate origins for the Echo Mountain fire, the South Obenchain fire, and the 242 fire, and 12 separate origins for the Santiam fire, among other reasons identified by the parties.

e. Plaintiffs' evidence in support of issues class certification.

Plaintiffs' evidence in support of issues class certification for the foregoing theories and claims include declarations by the following expert witnesses: (i) Nicole Brewer, who is a fire investigator for Envista Forensics, (ii) Dr. Mark Buckley, who is employed by ECONorthwest, a Portland-based economic firm, and (iii) Cameron Azari, who is the director of legal notice for Hilsoft. (Mot at 2.) For the Santiam Canyon Fire, Brewer's preliminary opinion is that:

Based on the evidence currently available, errant electrical activity associated with the power equipment maintained and controlled by PacifiCorp, very likely contributed to, or directly caused the large-scale destruction of property in the towns of Gates, Mill City, and Lyons, OR * * * While severe weather conditions certainly contributed to the rapid spread of these fires, weather was not the direct cause of the fires that spread through the towns of Gates, Mill City, Lyons, Mehama and throughout the Santiam Canyon. Brewer also noted that a full detailed exam of the Santiam fires will still need to be conducted to identify the specific causes of these fires. (Decl of Preusch, Ex A (Brewer, Interim Fire Report) at 27.)

Brewer states that at least five of the 12 fires started on Labor Day in 2020 occurred in the immediate vicinity of PacifiCorp's power equipment. (*Id.* at 8.) Brewer opines that PacifiCorp was aware of the danger and the increased risks associated with fire in the urban interface environment. (*Id.*) Brewer's opinion is based, in part, on previous utility ignitions in California and Oregon, the weather forecasts leading up to Labor Day, and PacifiCorp's Wildfire Mitigation Plan, which included a Public Safety Power Shut Off (PSPS) measure, *i.e.*, "proactively turning off power during extreme and dangerous weather conditions that can result in catastrophic wildfires." (*Id.* at 14-17.) Brewer also considered PacifiCorp's vegetation management within the context of an Oregon Public Utility Commission's Utility Safety Report that noted hundreds of citations for the previous year related to PacifiCorp's vegetation management program and the needs for improvement to ensure safety compliance. (*Id.* at 19.) Brewer's class boundary for the Santiam Canyon fire identifies an approximate geographic area impacted by the Santiam

Fires – before those fires merged with the Beachie Creek Fire, which the expert believed was initially caused by lighting.

(*Id.* at 38, figure 34.)

Brewer’s preliminary opinions about what caused or contributed to the Echo Mountain Fire, the South Obenchain Fire, and the 242 Fire are based on similar theories for the cause of the Santiam Canyon Fire, except that the expert only identified one or two origins for those fires.

(*Id.* at 28, 36, 38.) Overall, Brewer concludes that:

Based on the information available to date, including, but not limited to, witness statements, physical evidence, emergency dispatch records, and PacifiCorp’s own records and emails; there is a very high probability that errant electrical activity associated with the power equipment operated, maintained and controlled by PacifiCorp, contributed to, or directly caused, the Echo Mountain Fire, the South Obenchain Fire, the Santiam Fires and the 242 Fire, which in turn caused, massive destruction of property and natural resources. While hot, dry, and windy weather conditions certainly contributed to the rapid spread of fire through these areas, weather conditions did not provide the initial ignition sources that sparked these fires into existence; and had they been utilized; Public Safety Shutoffs could have eliminated the sources of ignition that very likely caused, and or contributed to the fires.

(*Id.* at 41.)

In conjunction, plaintiffs submitted declarations from Dr. Buckley who concluded that class membership and parcel-specific class members can be determined using publicly-available data and are identified within a reasonable degree of data reliability and scientific certainty.

(Decl of Preusch, Ex B (Buckley, Expert Report), ¶ 43.) Dr. Buckley specifically concluded that class members can be identified by merging parcel-level property ownership data with fire damage data. (*Id.* ¶ 16.) Further, the magnitude of physical damage to properties and structures from the fires can be estimated using a combination of satellite remote-sensing and aerial imagery data. (*Id.*) Dr. Buckley considered literature that identified three pathways for structures to be affected by fires: (i) direct flame contact, where flames are close enough to structures for ignition events, (ii) radiant exposure, where flames from a fire could ignite homes 130 feet away, and (iii) firebrands (embers), that can directly ignite structures or ignite nearby material that in turn ignites structures, and have been found to be transported 9 kilometers away

Opinion and Order Granting Plaintiffs’ Motion for Issues Class Certification Page 13 of 25

from active flames. (*Id.* ¶ 31.) Dr. Buckley observed that the proximity of identified private parcels satisfying the specified criteria for occurrence within the fire boundaries and experiencing at least low severity fire provides strong evidence that a private parcel did experience damages from one of the fires of concern. (*Id.* ¶ 32.) Dr. Buckley identified 1,345 properties within the class for the Santiam Canyon Fire, 600 properties within the class for Echo Mountain Fire, 324 properties within the class for the South Obenchain Fire, and 185 properties within the class for the 242 fire. (*Id.* ¶ 40.) Dr. Buckley also opines that the same methodology can be used to identify individuals who lost personal property on publicly owned properties within the geographic boundaries of the class. (*Id.* ¶ 42.)

f. Predominance analysis – common questions can be resolved by common proof on a class-wide basis.

In the court's view, plaintiffs' proffered evidence and expert opinions could potentially prove a prima facie case of defendants' tort liability – as framed by plaintiffs' factual theories – for the class issue questions related to: (i) defendants' culpable conduct or omissions, (ii) causation under a theory of substantial factor causation, and (iii) foreseeability, *i.e.*, class issues nos. 1, 2, 3, 4, and 5.² *See Shea*, 164 Or App at 207 (affirming the underlying trial court's certification of an issues class where the underlying court concluded that common questions of law and fact did not predominate the action; involving claims for strict liability, negligence, and wanton misconduct, and class issues regarding whether defendant was negligent in its design and negligent in its testing of the product.). Additionally, plaintiffs' remaining class issues nos. 6-14 are comprised of similar questions related to defendants' action or inactions, causation, and foreseeability type questions that could be resolved through the same common proof as the other issues, under plaintiffs' factual theories. *See* (Mot at 36-27.); *see also Hurt v. Midrex Div. of*

² Plaintiffs acknowledge that the class issues will be based on the uniform jury instructions and utilize a special verdict. (Mot 23-24.) Accordingly, some modifications to the form of the class issues may be required to conform with the applicable laws, jury instructions, and appropriate special verdict questions. For example, class issue no. one as currently phrased assumes defendants' culpability, but will likely be rephrased for a jury as: was the defendants' conduct in the operation of its utility infrastructure negligent?

Midland Ross Corp., 276 Or 925, 930 (1976) (viewing a case where there were common issues involving an action for intentional trespass as typical of the kind contemplated by the legislature as being proper for a class action.). As important, this dispute also does not have the same individual state of mind questions necessary to establish liability that was present in *Bernard* and negated class treatment. *See Bernard*, 275 Or at 162 (concluding that plaintiffs did not prove the predominance of common questions where it appears “probable that many *claimants’ knowledge* will legitimately be in issue and that separate adjudications of the claims of numerous members of the class will be required to dispose of the question of defendants’ liability.”) (emphasis added).

In sum, the court concludes that plaintiffs have sufficiently established that their factual theories can be proven by evidence applicable both to the individual class members and to all class members as a whole, *e.g.*, expert witnesses; county, tax lot, zoning, and building footprint GIS (geographic information system) data; soil burn severity (SBS) GIS files; Burned Area Emergency Response (BAER) processes and ground-truthing; satellite photos; witness statements; physical evidence; emergency dispatch records; and PacifiCorp’s own records and emails. (Decl of Preusch, Ex A (Brewer, Interim Fire Report) at 3-6, 41, and Ex B (Buckley, Expert Report) at 15.)

g. Predominance analysis – individual inquiries are not fatal.

Defendants respond that even if some of plaintiffs’ proposed class issues could be resolved using common proof, a host of individual inquiries would remain before liability could be resolved for each class member. (Opp at 12.)

Defendants argue that each potential class member’s claims will require proof that: (a) their alleged injuries can physically be traced back to a particular fire ignition, (b) the particular fire ignition can physically be traced back to a piece of PacifiCorp equipment, (c) the ignition itself was caused by some combination of PacifiCorp acts or omissions, (d) that combination of

Opinion and Order Granting Plaintiffs’ Motion for Issues Class Certification

acts or omissions, such as a decision to leave a particular section of power line energized, was unreasonable, (e) there were no superseding or intervening causes of their alleged injuries, and (f) there are no applicable defenses. (*Id.* at 14.) Defendants further argue that each of the foregoing questions require individualized analyses.

Here, defendants' questions (a)-(c), and (e) are related to plaintiffs' proof of causation. In the court's view, plaintiffs have established that it is likely that their factual theories for origin of the fires at issue involve two to a dozen specific ignition locations and each individual class member will use common proof, applying a substantial factor causation analysis. Even if defendants' inquiries are appropriate, they go towards the individual origin or ignition locations under plaintiffs' theories that defendants' acts or omissions were a substantial factor that caused fires to spread from those specific locations, across specified geographic boundaries, during a limited 3–4-day window, not inquiries of each individual class member. Defendants also do not identify any particularized superseding or intervening causes (or other specific defenses to liability) that could not be resolved for the class as a whole. Regardless, the lightning strike was taken into account by plaintiffs' experts. (Decl of Preusch, Ex A (Brewer, Interim Fire Report) at 20, 38, Fig 34.) The impact of the lightning strike, if any, can likely be addressed in the substantial factor causation analysis on a class-wide basis. *See Joshi*, 342 Or at 161. Plus, defendants' question related to whether PacifiCorp's energization of its powerlines was unreasonable (*see* question (d)) would not likely preclude resolution of whether PacifiCorp's conduct was negligent for not de-energizing its powerlines because plaintiffs' factual theory is that PacifiCorp failed to do so anywhere within the geographic areas at issue, not particular sections of powerlines. (Decl of Berne, Exs 37, 38, 39, 40, 49.) So, there would be no material difference among each individual class member for this issue. In sum, it is unlikely that defendants' inquiries identified in (a)-(f) above would preclude resolution of whether plaintiffs

can establish defendants' negligent conduct, substantial factor causation, and foreseeability, or whether defendants can assert legitimate defenses, on a class-wide basis.

Defendants also argue that plaintiffs' factual theories and claims are not subject to common proof because there is no uniformly applicable theory to explain whether or in what ways defendants' various acts or omissions interacted with one another to ignite fires, along with differences in the fact-specific causes for each of the four geographic fire areas at issue. (Opp at 16-18.) In the court's view, defendants' concerns do not impede resolution of the class issues on a class-wide basis and can likely be addressed at trial by plaintiffs identifying or electing which factual theories support each of the four geographic fire areas or the court providing a concurrence instruction to the jury, if appropriate.

In addition, it is unlikely that defendants would be precluded from making fact-specific inquiries about vegetation management practices surrounding the two to a dozen specific origin or ignition locations upon which plaintiffs rely in support of their substantial factor causation theories, in each of the four geographic fire areas, and under plaintiffs' factual theories, but individual inquiries of each class member would not yield material differences. (Decl of Berne, Exs 15, 16.) For the same reasons, the wind speeds, topography, and condition of equipment at each of the two to a dozen separate origin or ignition locations would not prevent resolution of substantial factor causation under plaintiffs' factual theories and evidence. Defendants also urge that individual inquiries apply for different fact-specific (wind speed, humidity, temperature, vegetation moisture content, terrain, on-the-ground observations, and public safety risks) and location-specific considerations related to de-energization decisions in multiple locations at different times. (Opp at 18-19.) Plaintiffs' factual theories and offer of proof from expert Brewer considered the weather conditions, but nevertheless opined that PacifiCorp's de-energization decisions or omissions caused or contributed to the fires at issue. The court does not foresee defendants being precluded from testing or negating those opinions with evidence

related to fact-specific weather conditions, and it is likely that resolution of those issues can be achieved for all class members with common proof without need for individual inquiries of each class member. As previously noted, location-specific considerations are not material under plaintiffs' factual theory that PacifiCorp failed to de-energize its powerlines anywhere within the geographic areas at issue.

Defendants also raise concerns that issues of foreseeability will require fact-specific analysis for each individual alleged utility ignition and that the location of each individual plaintiff's real or personal property will require individual analyses related to foreseeability and causation. In this case, plaintiffs' theories and evidence related to foreseeability can likely be shown using common proof, such as, expert testimony related to weather forecasts, prior utility ignitions, and PacifiCorp's Wildfire Mitigation Plan; it is, therefore, unlikely that defendants would be precluded from fact-specific inquiries related to those theories on an individual origin or ignition location basis, or that there would be a legitimate need for inquiries of each individual class member to resolve those issues. Furthermore, any variance in the specific location or distance from a particular origin or ignition location is subject to common proof under plaintiffs' theories and evidence including, without limitation, expert evidence that "PacifiCorp was aware of the danger and the increased risks associated with fire in the urban interface environment," identifying two to a dozen specific origin or ignition locations within each of the four geographic fire areas, and identifying each private parcel, within those specified geographic boundaries, that experienced at least low burn severity from one of the four geographic fires areas. As a result, resolution of foreseeability or causation for the class as whole is not precluded. Under those common factual theories, it is likely that defendants' causation can be resolved for the class as a whole under a substantial factor analysis. *See Joshi*, 342 Or at 161; *see also Haas v. Est. of Carter*, 316 Or App 75, 82 (2021), *review allowed*, 369 Or 675 (2022) (recognizing that "[i]n cases involving multiple causes of a plaintiff's injury * * * it can be more useful to think of

causation in terms of whether a particular defendant’s negligence contributed to the injury in an important or material way—*i.e.*, whether that negligence was a “substantial factor” in causing the harm.”). *Sullivan v. Mountain States Power Co.*, 139 Or 282, 304 (1932) (analyzing the degree of care for a power company and concluding that “a reasonably prudent person, should have known that the tree and the wires would come into contact in a manner that would endanger the safety of others or their property.”). While defendants may still examine and test the reach and scope of plaintiffs’ fire progression theories, it is unlikely that a “property-by-property” assessment is material or necessary in phase one because plaintiffs’ issues class question is limited to resolution of whether “PacifiCorp caused the fires at issue and that those fires spread to the properties included in the Class.” (Plaintiffs’ Supp Brief at 3-4.) In other words, the phase one inquiry is for cause of harm to the properties in the class over a defined geographic area, not harm to each individual property.

Defendants raise variations of the effects the fires had on different properties, *e.g.*, houses that suffered only smoke damage as opposed to houses that were destroyed. (Opp at 23-24.) Defendants also note differences among potential plaintiffs who successfully fought off the fires by watering their property versus those that may have contributed to the fire harm for their individual properties or failed to mitigate their damages by evacuating. (*Id.*) In the court’s view, the foregoing potential property and plaintiff specific variations are related to damages issues that can be resolved in a bifurcated second phase and do not preclude resolution of the class issues as a whole in phase one, or inquiry into individual damages in phase two to determine whether each plaintiff’s damages are a result of PacifiCorp’s fault and the amount of legally cognizable damages, if any. Any phase two mini-trial or similar proceeding would be akin to a dispute in which a defendant admitted liability and proceeded to trial on only damages. That is not an unusual occurrence and the instructions in an admitted liability trial still require a plaintiff to establish specific damages, if any, as a result of the defendant’s conduct. It is likely that the

same would be true in this dispute for any phase two proceedings where each individual class member would be required to prove their specific damages, if any, as a result of any proven tortious conduct. *See e.g.* UCJI 15.02 (“***The issue for you to determine is whether the plaintiff sustained any injury in this accident and, if so, the amount of damages to be awarded to the plaintiff.”); *see e.g.* UCJI 70.01 (“If you find that the defendant is at fault, then you must decide whether the defendant has been damaged and, if so, the amount of his or her damages. The fact that I am instructing you with respect to damages is not to be considered by you as an attempt by the court to suggest or indicate that you should or should not award damages * * * Of these two types of damages, you should consider those which you find to have been sustained by the plaintiff as a result of the defendant’s fault.”). PacifiCorp identifies prejudice and inefficiency as reasons to preclude resolution of individualized damages in phase two of a bifurcated proceeding. (Defendants’ Supp Brief at 6.) But such prejudice is theoretical and does not outweigh the utility of resolving the proposed 14 issues on a class wide basis as opposed to numerous individual trials, each lasting approximately two months and repeating all of the same evidence and issues related to defendants’ alleged tortious conduct, foreseeability, and substantial factor causation. Plus, the specific prejudice identified by PacifiCorp related to plaintiff Fowler’s damages is minimized by plaintiffs’ proposal to resolve individual damages, if any, for the named class representatives in phase one of the bifurcated proceedings.

In support of their arguments against certification, defendants’ also place significant reliance on two unpublished California appellate cases *Downing* and *Cortez*. *Downing v. San Diego Gas & Elec. Co.*, 2010 WL 4233033, at *1 (Cal. Ct. App. Oct. 27, 2010); *Cortez v. San Diego Gas & Elec. Co.*, 2010 WL 4233034, at *1 (Cal. Ct. App. Oct. 27, 2010). But those cases are distinguishable for several non-exhaustive reasons. First, predominance is required under California law, as opposed to being only one of several factors under the superiority analysis under Oregon law. *Downing* and *Cortez* also involved multiple potential defendants. *Id.* (stating

that related wildfire lawsuits were “seeking recovery of property damages or other compensation from numerous defendants, chiefly the utility providers, defendants and respondents San Diego Gas & Electric Company and its parent company, Sempra Energy (together SDG & E or Defendants).”). Plus, in this dispute, plaintiffs of the proposed consolidated cases and their counsel support an issues class and bifurcated proceeding, while numerous plaintiffs in *Downing* and *Cortez* raised objections to class certification. *Id.* at 2 (observing that many individual and business plaintiffs who were separately represented by legal counsel, were pursuing their own separate complex coordinated actions against defendants and did not wish to join the class.). Moreover, in *Downing*, the appellate court (and underlying trial court) appeared to place significant weight on the fact that proof of specific causation of each class member’s damages would require individual inquiries and treated those questions as a necessary part of the liability analysis to arrive at its conclusion that the common questions did not predominate, rather than for determination in a separate bifurcated proceeding as proposed in this dispute. *Downing*, 2010 WL 4233033, at *8–9 (expressing that “[a] finding of causation of the fires is not equivalent to causing each class member’s damages * * * [t]he court would have to entertain additional trials on the issues of damages, further complicating an already complex procedure. Plaintiffs have provided no guidelines as to how this could be accomplished more efficiently or simply than individual cases.”).

Based on the above, the court concludes that plaintiffs have established that common issues predominate over individual questions.

2. Application of the remaining ORCP 32 B requirements.

a. ORCP 32 B(1).

This factor primarily focuses on the extent to which the prosecution of separate actions by individual members of the class creates a risk of inconsistent adjudications. Here, there is already some risk of inconsistent adjudications because there are cases arising from the 2020

Labor Day fires being litigated in different forums. Nevertheless, the court finds that issues class certification can minimize the risks of inconsistencies among potential class members pursuing litigation in Multnomah County Circuit Court because they are relying on the same factual theories of liability with common proof. For example, if individual members pursued separate lawsuits, a jury could determine that defendants' conduct of not de-energizing its power lines as alleged was not negligent, while a different jury could conclude that the same conduct is negligent under the same theories and common proof, but an issue class on the topic of negligent conduct would make it less likely for such variance. For these reasons, this factor slightly favors a finding that an issues class is superior.

b. ORCP 32 B(2).

This factor considers the extent to which the relief sought would take the form of injunctive relief for the class as a whole. Plaintiffs have alleged injunctive relief on a class-wide basis seeking an order (i) enjoining defendants from leaving power lines energized in areas of Oregon experiencing extreme critical fire conditions, and (ii) requiring defendants to use tools and technologies to mitigate the risk of fire, among other injunctive relief. (Second Amended Compl ¶¶ 287-90.) Defendants counter that plaintiffs' primary relief sought is money damages and contest the viability of the injunctive relief sought. In the court's view, plaintiffs' relief is primarily for money damages, and the extent to which they also seek injunctive relief is incidental to their primary relief. This factor does not favor a finding of superiority.

c. ORCP 32 B(4).

This factor looks at the interest of members of the class in individually controlling the prosecution of separate actions. This factor favors a finding of superiority because an issues class resolution of liability will promote efficient resolution of the claims for each potential class member and those that wish to pursue distinct claims, such as wrongful death, are free to do so.

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d. ORCP 32 B(5).

This factor considers any litigation already commenced by members of the class. The record does not contain any information that plaintiffs' attorneys are pursuing essentially the same claims against defendants in other jurisdictions where the litigation is well-developed. The record is also devoid of any factions among the potential class members pursuing litigation in Multnomah County. Moreover, this case has progressed through pleadings, motion practice has advanced, and discovery is ongoing. Therefore, this factor favors superiority.

e. ORCP 32 B(6).

This factor takes into account the desirability or undesirability of concentrating the litigation of the claims in the particular forum. The proposed class consists of approximately 2,454 owners or residents of private properties related to the 4 geographic fire areas at issue in this case. The majority of potential class members have already filed suit in Multnomah County Circuit Court, and the court has already denied PacifiCorp's motion to transfer venue. Additionally, the defendants' principal place of business is located in Multnomah County. (Reply at 28.) Discovery depositions are also taking place in Multnomah County and some witnesses reside in Multnomah County. (Mot at 39.) For these reasons, the court finds that litigation in this forum favors superiority.

f. ORCP 32 B(7).

This factor involves the difficulties likely to be encountered in the management of a class action that will be eliminated or significantly reduced if the controversy is adjudicated by other available means. The court finds that resolution of motions, discovery issues, and the liability issues on a class-wide basis is more manageable for the court's judicial resources, and more efficient for the litigants than resolving those issues on a plaintiff-by-plaintiff basis. Accordingly, judicial management, efficiency, and economy support a liability issues class and

bifurcated trial phases over the prospect of fully adjudicating hundreds of individual proceedings.

g. ORCP 32 B(8).

This factor considers whether or not the claims of individual class members are insufficient in the amounts or interests involved, in view of the complexities of the issues and the expenses of the litigation, to afford significant relief to the members of the class. Plaintiffs' claims and legal theories involve the use of multiple experts, complex motions, extensive research, and significant discovery. Based on the foregoing, the court finds that the complexity of the case and expense of litigation support issues class certification over pursuit of claims on an individual basis.

Overall, the court concludes that plaintiffs have made a sufficient showing that an issues class is superior to other available methods for the fair and efficient adjudication of this case under ORCP 32 B. The court concludes that the best and most efficient way to resolve the victims' claims is plaintiffs' proposed issues class, along with consolidation and bifurcation as opposed to multiple bellwether trials that have no preclusive effect or guarantee of settlement for all class members in a timely manner. *See 4 Newberg on Class Actions* §11.3 (recognizing that "bifurcation often enables a case to proceed as a class action by ensuring that the common liability issues predominate while the individualized damages issues are addressed in some other manageable fashion."); *see also* *Manual for Complex Litigation* § 22.751 (4th ed) (providing that in mass tort litigation "issues classes have been used to establish liability elements, such as general causation, negligence, or breach of warranty.").

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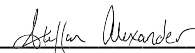
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CONCLUSION

For the reasons stated above, plaintiffs have satisfied the requirements of ORCP 32 and their motion for issues class certification is conditionally granted, subject to the condition that individual damages for the non-class representatives will be addressed in phase two of a bifurcated proceeding. This opinion and order shall constitute the court's finding and conclusions as required by ORCP 32 C(1) and is subject to alteration or amendment as provided by the rule.

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Circuit Court Judge Steffen Alexander