

The Honorable MARSHA J. PECHMAN

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

TRUEBLOOD *et al.*

Plaintiffs,

v.

WASHINGTON STATE DEPARTMENT OF
SOCIAL AND HEALTH SERVICES *et al.*,

Defendants.

NO. C14-1178 MJP

DEFENDANTS' RESPONSE TO
PLAINTIFFS' FOURTH MOTION
FOR TEMPORARY RESTRAINING
ORDER

Contrary to Plaintiffs' assertions, the stairways and railings at the Maple Lane Competency Restoration Program (MLCRP) do not pose a serious and immediate risk of irreparable harm to class members. Given the multiple layers of assessment and screening to select patients not at risk for self-harming behaviors, the stringent requirements for staff monitoring, staff training on suicide prevention, extensive physical plant changes to the stairwells, and licensure by the state body tasked with upholding Washington health and safety standards for residential treatment facilities (RTFs), Plaintiffs cannot meet their burden under the relevant legal standard. Their request to enjoin use of the stairwells, thereby prohibiting access to competency restoration beds (and creating actual harm to class members in the form of longer wait times) should be denied.

I. COUNTERSTATEMENT OF FACTS

Plaintiffs paint an unfairly bleak picture of the Department of Social and Health Services' (DSHS) efforts to care for the needs of Washington citizens in its care, misconstruing and mischaracterizing the evidence of DSHS's many mitigation efforts. Not only have Plaintiffs provided outdated information to advance their claim, but they have failed to provide any evidence to support their allegations of "serious risks", resting only on the assertion that the mere presence of stairs creates a risk of irreparable harm. The record and evidence demonstrate that these claims fail as a matter of fact.

A. Procedural History and Scope of Injunction

More than twenty-one months ago, Plaintiffs filed their complaint seeking relief from alleged constitutional violations related to their pre-trial detention. ECF #1, Complaint at 16-18. Throughout the pendency of the case and the trial, Plaintiffs reiterated that they challenged only the duration of pre-trial confinement, not the conditions in which class members were held or treated. Trial Exhibit 187, p. 26. After a lengthy trial, this Court ruled that substantive due process required evaluation for competency within 7 days of a court order directing that an evaluation take place and that where patients were evaluated as incompetent they be admitted for restoration within 7 days. ECF #131, April 2, 2015 Order. An injunction was entered against DSHS requiring the agency to meet those timeframes. *Id.* Importantly, the order did not restrict competency restoration to the state hospitals. *Id.* Nor did the order dictate what constituted a therapeutic environment. *Id.* This is because neither the nature nor sufficiency of the treatment to be provided was ever pled or proved by the Plaintiffs to be inadequate and the issue was not litigated before this Court. For that reason alone, the nature of the program and its operations are outside the scope of the Court's injunction and review. Under prevailing case law, DSHS staff retain the ability to exercise professional judgment to determine how to manage and operate its own facilities. DSHS staff, in conjunction with its contractors and other state agencies, has appropriately exercised that judgment to develop a

1 robust and comprehensive competency restoration program outside the state hospitals that is
2 safe for class members.

3 **B. Development Of The Maple Lane Competency Restoration Program**

4 Consistent with its long term plan, in early 2015 DSHS identified that it would develop
5 competency restoration beds outside the state hospitals. Declaration of Carla Reyes (Reyes
6 Decl.), ¶ 3; *see* ECF #164. DSHS took a number of steps to jumpstart the use of alternative
7 facilities outside of the state hospitals. DSHS worked to develop a competency restoration
8 program with Comprehensive Mental Health (Comprehensive) to open a Yakima location.,
9 while simultaneously laying the groundwork that allowed for the opening of MLCRP in Spring
10 2016 Reyes Decl. ¶ 5, 7. DSHS initiated the permitting and labor processes early, even
11 though there were not concrete plans to use the Maple Lane campus for competency restoration
12 in the near term. *Id.* DSHS began the labor notification processes that were necessary to allow
13 contracting in May 2015. *Id.* In June 2015 DSHS also posted notices in local publications to
14 begin the 90-day public comment period required to obtain a special use permit for Maple
15 Lane. *Id.* DSHS also communicated with the county in June 2015 to discuss zoning and
16 permitting requirements. *Id.* This proved critical when actions by the Centers for Medicare and
17 Medicaid Services (CMS) regarding Western State Hospital (WSH) in October 2015 resulted
18 in the decision to delay utilizing new restoration beds. *Id.* DSHS underwent an extensive and
19 careful process to identify the appropriate contractor to provide services at both alternate
20 facilities. Reyes Decl. ¶ 6. Even after Correct Care Recovery Solutions (CCRS) was identified
21 as the contractor for MLCRP, DSHS did additional vetting and review. *Id.* Further, DSHS
22 conducted additional follow-up after receiving concerns from the Court Monitor and the
23 Plaintiffs regarding CCRS's parent agency, Correct Care, LLC, all of which was detailed in a
24 December 2015 letter to the Court Monitor. Reyes Decl., ¶6, Attachment A.

25 DSHS and CCRS are now operating a 30 bed therapeutic competency restoration
26 program which is licensed by the state Department of Health (DOH) as a RTF. Declaration of

1 Timothy Hunter (Hunter Decl.) ¶ 6; Reyes Decl. ¶ 9. MLCRP is also certified as a RTF by the
 2 Division of Behavioral and Health Recovery within DSHS. Hunter Decl. ¶ 6, Reyes Decl. ¶ 9.

3 Like the state hospitals, MLCRP is a secure facility because it is charged with the
 4 responsibility of safely housing and treating patients with mental illness who are actively
 5 involved with the criminal justice system. Hunter Decl. ¶ 5. MLCRP is staffed by trained
 6 mental health professionals offering mental health treatment in a therapeutic milieu which is
 7 focused on competency restoration. Zolnikov Decl. ¶ 19.

8 **C. DSHS Has Taken Great Care To Mitigate Safety Risks And To Respond To**
 9 **Concerns At MLCRP**

10 Plaintiffs erroneously assert that DSHS has failed to remediate risks, has refused to take
 11 mitigation steps, and has gambled with the safety and health of class members. These
 12 allegations wholly misrepresent how DSHS has responded to and remediated issues at
 13 MLCRP. DSHS has made many efforts to ensure the safety of patients and staff working in
 14 and using MLCRP. Hunter Decl. ¶ 9; see ECF #245_1. These efforts have occurred over a
 15 number of months, both prior to and since opening MLCRP. *Id.* DSHS continues to review
 16 and evaluate the program at MLCRP. *Id.* As with any treatment program, issues and concerns
 17 about safety for staff and patients are dynamic ones. *Id.* They are issues that DSHS continually
 18 reviews and improves at all of its facilities, including the state hospitals and MLCRP. *Id.*

19 DSHS has taken a number of proactive steps in addressing safety concerns for class
 20 members at MLCRP, not related to the stairwells. Hunter Decl., ¶ 13. DSHS has not sat idly
 21 by when safety issues have presented themselves and has dealt with issues assertively. *Id.* For
 22 example, prior to admitting any patients to MLCRP, all staff, both state and contracted, were
 23 provided with three full weeks of training. *Id.* All training on interacting with patients was
 24 based on principles of trauma informed care. *Id.* Training addressed topics such as
 25 understanding suicide risk, de-escalation of psychiatric patients, and helping patients with
 26 problem solving. *Id.* All staff completed Psychiatric Emergency Response Team (PERT)

1 training. *Id.* DSHS also made early efforts to create appropriate admissions screening
 2 criterion so that only individuals appropriate for MLCRP would be admitted. *Id.*; Zolnikov
 3 Decl. ¶ 8-11.

4 DSHS has also taken a number of steps in response to concerns expressed by the Court
 5 Monitor, her experts, and Plaintiffs' counsel including: creating a quiet room and unstructured
 6 sitting areas; making a significant modification to the location of the seclusion and restraint
 7 room; immediately remediating concerns about strip searches by developing new protocols and
 8 retraining staff; addressing privacy concerns at intake; adjusting the lighting in patients' rooms;
 9 developing policies and procedures for emergency situations; making changes to policies and
 10 procedures in regards to medications; and substantial physical plants modifications. Hunter
 11 Decl. ¶ 14; *see also* ECF #245_1. It is simply untrue that DSHS has refused to take any steps
 12 to mitigate risks at MLCRP. DSHS has taken multiple steps to provide a safe and therapeutic
 13 environment for patients at MLCRP. Hunter Decl. ¶ 15.

14 **D. Changes To The Physical Plant, Additional Staff Monitoring, And Multiple**
 15 **Layers Of Screening Make The MLCRP Stairwells Safe**

16 The physical plant of the former juvenile rehabilitation cottage at Maple Lane has
 17 undergone extensive remodeling to increase safety for patients. Hunter Decl., ¶ 10;
 18 Declaration of Bryan Zolnikov (Zolnikov Decl.) ¶ 18. After Dr. Debra Pinal's November 2015
 19 report, but before patients ever arrived at MLCRP, DSHS constructed barriers at the tops of
 20 each stairwell which significantly reduced risks to class members. Hunter Decl. ¶ 10; Zolnikov
 21 Decl. ¶ 18. This was reflected in an early remodeling plan and reported to Dr. Pinal in
 22 DSHS's February 1 and March 9, 2016 reports to the Court Monitor. Hunter Decl. ¶ 10.
 23 Renovations were completed just prior to MLCRP opening. Zolnikov Decl. ¶ 18. DSHS, also
 24 based on recommendations of Dr. Pinal, has undertaken to enclose all gaps between the plexi-
 25 glass and the railings on each of the stairwells. *Id.* The architecture, however, is not the key
 26

1 element; rather it is the therapeutic program and approach, including staffing and clinical
 2 assessments, that is far more important to setting a safe tone for the program. Zolnikov Decl.
 3 ¶¶ 3-4.

4 The stairs leading to the second floor of MLCRP are under constant monitoring and
 5 supervision. Zolnikov Decl. ¶ 15. Four cameras view the stairwells, and four additional
 6 cameras are focused on the upper level wings. *Id.* Those cameras are monitored by Control
 7 Booth Operators at all times. *Id.* Control Booth Operators are specifically prohibited from
 8 leaving the control booth without being relieved, for any reason, and are required to
 9 immediately alert floor security staff of any issues. Zolnikov Decl. ¶ 15, Attach. G. This
 10 monitoring procedure has been incorporated fully in the Standard Operating Procedures (SOP)
 11 for DSHS security staff working in the control booth at MLCRP. *Id.*

13 MLCRP has implemented stringent procedures regarding patient monitoring. Staff
 14 perform “face checks” every 15 minutes for the first 72 hours after a patient is admitted to
 15 the facility. Zolnikov Decl. ¶ 13. A “face check” is when a staff member has a structured
 16 routine of checking on the patient and ensuring that the patient appears alive and safe. *Id.*
 17 Thereafter, face checks are performed every 30 minutes. *Id.* In the event that increased
 18 supervision is clinically indicated, such supervision can be provided by a physician’s order or
 19 by the direction of nursing supervisory staff. *Id.* Increased supervision can include 1:1
 20 monitoring, close observation, or observation on 15 minute intervals. *Id.*

22 MLCRP has also taken extensive precautions to monitor for suicidal ideation or
 23 behaviors. Zolnikov Decl. ¶ 14. All staff who have patient contact are trained in suicide
 24 prevention techniques. *Id.* Training is conducted as part of new employee orientation, and
 25 mock suicide emergency drills are conducted every quarter. *Id.* Upon suspicion that a patient
 26

1 is exhibiting suicidal ideation or actions, staff must immediately remove any dangerous items
 2 from a patient's possession, refer the patient for an evaluation, and continuously observe the
 3 patient until the patient can be assessed by mental health staff. *Id.*

4 MLCRP has multiple layers of assessment and screening to determine appropriate
 5 placement of class members. Patients at MLCRP have been extensively reviewed for clinical
 6 issues related to the risk for engaging in endangering behavior and have shown a low level of
 7 risk for suicide, physical aggression towards others, and various other forms of endangering
 8 behaviors. Zolnikov Decl. ¶ 9; *see also* ECF #203_11. DSHS conducts centralized screening
 9 of candidates for MLCRP prior to making an offer of admission. *Id.* Specific criteria excludes
 10 persons who are actively self-harming, are at relatively higher risk of suicidal behaviors, or are
 11 an active risk of harm to others. *Id.* Patients that meet the admission criteria are at a very low
 12 risk of engaging in endangering behaviors that place themselves and others at risk of harm. *Id.*

13 After admission, staff at Maple Lane performs an additional assessment to identify
 14 particular risk factors. Zolnikov Decl. ¶ 10. In particular, MLCRP policy requires either a
 15 psychiatrist or a psychiatric ARNP to complete a CCRS Risk Assessment Instrument to
 16 identify any acute psychiatric conditions that could be life threatening or otherwise requiring
 17 immediate attention, including assessing risk of suicide, self-harm, homicide, or assault. *Id.*
 18 When indicated, the intake assessment must also include the Dynamic Assessment of
 19 Situational Aggression (DASA), which involves rating irritability, impulsivity, unwillingness
 20 to follow directions, negative attitudes, verbal threats, sensitivity to perceived provocation, and
 21 whether the patient is easily angered when requests are denied. *Id.* This assessment further
 22 informs whether the patient's clinical presentation lends itself to behaviors that may require
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1 additional attention. *Id.* In the event that a patient starts displaying signs of high acuity such as
 2 aggression, suicidality, or self-harm such that they should not remain at MLCRP, the patient
 3 will be transferred to WSH for further stabilization and treatment. Zolnikov Decl. ¶ 16.

4 MLCRP has also adopted a policy that requires all patients to initially be admitted to
 5 the lower level bedrooms of the facility. Zolnikov Decl. ¶ 11. Patients remain on the first floor
 6 for at least seven days, until their first Treatment Team review. *Id.* At the review, a Registered
 7 Nurse (RN) presents an assessment to the treatment team as to clinical and medical factors that
 8 influence whether the patient is appropriate for a move to the second floor. *Id.* If a patient has
 9 any history of prior suicide attempts, or is assessed as a suicide risk using the Columbia Risk
 10 Assessment, they are precluded from residing on the second floor. *Id.*

11 DSHS has made every reasonable effort to create a safe and therapeutic restoration
 12 program at MLCRP. Given the multiple levels of assessment and screening to identify risk of
 13 self-harm behaviors, the stringent expectations of staff monitoring, extensive training on
 14 suicide prevention, constant monitoring of the stairwells, extensive efforts to monitor patient
 15 safety, and extensive physical plant changes to the stairwells, MLCRP is safe to house the low
 16 to medium risk patients it is intended to serve.

17
 18
 19 **E. Plaintiffs Present No Evidence That The Stairwells At MLCRP Are Substantially**
 20 **Similar To The Stairs At Yakima**

21 This Court has previously ruled that “[n]o class member may be housed on, or allowed
 22 access to, the second floor of the Yakima alternative restoration facility” due to the Court’s
 23 findings that the Yakima staircase posed a “serious and unacceptable risk of irreparable harm.”
 24 ECF #216 at 3, 6. The Court’s decision was based on agreement by Dr. Danna Mauch and Dr.
 25 Pinals that a “real and immediate risk of serious harm” existed due to the stairs. *Id.* at 5.
 26 Plaintiffs advance this Court’s findings regarding the Yakima facility as dispositive of how the

1 Court should rule regarding the MLCRP stairwells, but present no evidence to support this
 2 assertion. ECF #244 at 1, 7. The stairwells at MLCRP, and the experts' comments on those
 3 stairwells, differ in significant ways from the stairs at Yakima.

4 The stairs at MLCRP have a number of physical distinctions from the stairs at the
 5 Yakima Competency Restoration Program (Yakima). Hunter Decl., ¶ 12. At Yakima, the
 6 stairs had a continuous opening along the side railing. *Id.* In addition, the height of the stairs
 7 at Yakima is significantly higher than the stairs at MLCRP. These physical differences, as
 8 well as the changes made by DSHS to mitigate safety concerns, are well documented. Hunter
 9 Decl., ¶ 10, Attachment D; ¶ 12, Attachment E.

10 The Court, in regards to the Yakima facility, stated that "monitoring cannot prevent
 11 suicide from jumping or hanging in many instances because of the speed with which people
 12 intent on harming themselves might accomplish those actions." ECF #216 at 4. Plaintiffs
 13 point to the Court's statement as evidence that any monitoring imposed at MLCRP must also
 14 be deficient. However, Plaintiffs provide no evidence to support this claim. MLCRP has more
 15 staff than Yakima and there is DSHS security staff, in addition to clinical staff, available on the
 16 unit. Hunter Decl., ¶ 12. So the staffing and monitoring patterns are quite distinct. In
 17 addition, MLCRP operates with a centralized control booth and nurse's station with 360 degree
 18 views of the stairwells as well as having multiple cameras directed at the stairwells. Zolnikov
 19 Decl. ¶ 18.

20 Furthermore, the evidence suggests that the harms the Court is concerned about are
 21 rare, even in the state hospitals where there is less monitoring of class members at certain times
 22 of day. At WSH, class members are allowed free access to stairwells in the Treatment
 23 Recovery Center (TRC) without escort or supervision. Zolnikov Decl. ¶ 7. Class members
 24 access these stairs without constant monitoring. *Id.* Based on the multiple layers of screening
 25 of patients at MLCRP, their psychiatric acuity is lower than class members receiving
 26 competency services at the state hospitals and their risk for self-harming behaviors is

1 significantly less. *Id.* And at WSH, with less monitoring and higher acuity levels, the
 2 incidence of all injuries related to stairs, including accidents, slips, trips, etc., among all
 3 forensic patients (class members and insanity acquittees) is at most, less than 1%¹. Zolnikov
 4 Decl. ¶ 6-7.

5 Finally, experts have not opined similarly regarding the MLCRP stairwells as they did
 6 in commenting on the Yakima facility. Plaintiffs point to statements in reports by the Court
 7 Monitor and Dr. Pinals, in December 2015 and January 2016, both of which occurred prior to
 8 the completion of significant construction and mitigation work around the stairwells which was
 9 reported in the February and March 2016 monthly reports. Hunter Decl. ¶ 10; Zolnikov Decl.
 10 ¶ 18. DSHS has continued to make changes and improvements to the stairwells following the
 11 initial remodeling efforts. Hunter Decl. ¶ 10-11; Zolnikov Decl. ¶ 18. No formal opinions
 12 have been provided by the Monitor or her experts that suggest a “serious and immediate risk of
 13 harm to class members” is present at MLCRP². ECF #216 at 5. On May 19, 2016, just hours
 14 before Plaintiffs filed their TRO motion, the Court Monitor sent the parties a letter regarding
 15 MLCRP. In it, she requested additional information about the stairs at MLCRP, but made no
 16 mention of any “serious and imminent risk” to class members due to the stairwells nor did she
 17 make any statement that the risks are so great that the stairwells should be closed. Indeed, she
 18 only asked for updates and additional detail about the ongoing mitigation efforts regarding the
 19 stairwells at MLCRP³. Plaintiffs cannot assert that they have the same agreement among
 20 experts regarding the likelihood of risk to class members as the Court found existed regarding
 21 the Yakima facility. As such, absent evidence that the “experts agree” MLCRP “is dangerous

22
 23 ¹ The injuries noted at WSH varied widely in seriousness, from simple slips or trips to more serious
 harms such as self-injurious behaviors. Zolnikov Decl. ¶ 7.

24 ² The Monitor did comment on the MLCRP stairwells at the May 11, 2016 status conference, but offered
 no opinion on any immediate risk of serious harm.

25 ³ Dr. Mauch’s letter states, “[p]lease provide additional information on your consideration of the risks
 26 associated with the plan to mitigate all risks associated with the stairwell and railings to the second floor at the
 Maple Lane facility with remote visual monitoring. For example, what is the plan for continuous monitoring if the
 security staff members are called to assist program staff with an incident occurring elsewhere in the facility?”
 Leaders Decl. ¶ 2, Attach. A.

1 and presents a real and immediate risk of serious harm”, Plaintiffs cannot sustain their claims
 2 that the concerns regarding MLCRP mirror the findings by the Court regarding Yakima. ECF
 3 #216 at 5.

4 **F. Professionals Are Exercising Clinical And Administrative Judgment To Develop**
 5 **These Alternate Programs Closure Of Which Will Be Detrimental To Class**
 6 **Members**

7 Clinical professionals, administrators and DSHS contractors have exercised significant
 8 professional judgment to develop this competency restoration program. Zolnikov Decl., ¶¶ 8-
 9 14; Hunter Decl., ¶¶ 8-12; Reyes Decl., ¶¶ 6, 8-10. They have consulted with the Court
 10 Monitor and her experts, considered their input and responded to or adopted those
 11 recommendations. Hunter Decl. ¶¶ 10-11, 14.

12 In addition to DSHS professionals, MLCRP has also been reviewed by the state agency
 13 tasked with maintaining health and safety standards for RTFs as established by state law:
 14 DOH. DOH has licensed MLCRP. Hunter Decl. ¶ 6. DOH, as the state licensing body, does
 15 an initial inspection and conducts subsequent annual inspections of RTFs. Hunter Decl. ¶ 7.
 16 DOH reviews clinical aspects of a facility and environment of care issues, and contracts with
 17 the state fire marshal to inspect for fire, life, and safety hazards. *Id.* Further, DOH is
 18 governed by state statutes and regulations that direct what inspections and licensure must
 19 entail. *See* Wash. Rev. Code §71.12; Wash Admin. Code 246-337; Wash. Admin. Code 246-
 20 215. In addition to DSHS exercising its professional judgment in opening and operating
 21 MLCRP, DOH has also done so in its licensure of the facility.

22 Having restoration programs outside the hospital has always been a component of the
 23 state’s strategy, as memorialized in the long term plan since July 2015, to meet the timeframe
 24 of the court’s injunction. ECF #164. In the July 2015 long term plan, DSHS describes its
 25 concern that the planned expansion of state hospital bed capacity will not be sufficient to meet
 26 this Court’s order and discusses contracting with other entities. *Id.* Having beds outside the

1 hospital became even more critical after the CMS actions regarding the hospital in October
 2 2015 resulted in the decision to delay operation of new restoration beds at WSH. Reyes Decl.,
 3 ¶ 7. Without the additional beds at MLCRP, class members will wait in jail for a longer
 4 period of time. Reyes Decl., ¶ 10. Plaintiffs' request should be denied.

5 6 II. ARGUMENT

7 This Court should deny Plaintiffs' TRO request because they have failed to satisfy the
 8 four *Winter* factors required to obtain such relief.⁴ *Winter v. Natural Resources Defense*
 9 *Council, Inc.*, 555 U.S. 7, 20 (2008). Additionally, Plaintiffs' requested relief exceeds the
 10 permissible scope of a TRO. Each argument will be addressed in turn.

11 A. Plaintiffs Do Not Meet the Requirements for a Temporary Restraining Order

12 Plaintiffs have failed to meet their burden for obtaining a TRO. A preliminary
 13 injunction is “ ‘an extraordinary and drastic remedy, one that should not be granted unless the
 14 movant, by a clear showing, carries the burden of persuasion.’ ” *Lopez v. Brewer*, 680 F.3d
 15 1068, 1072 (9th Cir. 2012) (quoting *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997)).

16 A plaintiff seeking a preliminary injunction must establish “ ‘that he is likely to succeed
 17 on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief,
 18 that the balance of equities tips in his favor, and that an injunction is in the public interest.’ ”
 19 *Id.*, (quoting *Winter*, 555 U.S. at 20); *see also Stuhlbarg Intern. Sales Co. v. John D. Brush and*
 20 *Co.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001) (stating that the “analysis is substantially identical

21 ⁴ DSHS also re-asserts two arguments made previously in responding to Plaintiffs' prior TRO request.
 22 First, the requested TRO exceeds the scope of the underlying lawsuit, which focused solely on the reduction of
 23 class member wait times in county jails. This Court should not allow Plaintiffs to raise new claims and litigate the
 24 adequacy of treatment conditions post-judgment in the present case. *See* ECF #201 at 10-11.

25 Second, the proper remedy for any violation of this Court's April 2, 2015 permanent injunction order is a
 26 contempt order, not a procedurally improper TRO. Here, the rights and obligations of the parties have been fully
 adjudicated and a permanent injunction has been entered, rendering a TRO needless. The four *Winter* factors for
 assessing whether to grant preliminary injunctive relief require, inter alia, a showing of likely success on the
 merits at a future proceeding, *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008), but there
 is no proceeding pending before this court on the conditions of treatment. *See* ECF #201 at 11-13.

This Court did not address either of these arguments in its last order partially granting Plaintiffs' request
 for TRO. (ECF #216)

1 for the injunction and the TRO”). The party requesting injunctive relief bears the burden of
 2 making a showing as to all four prongs. *Alliance for the Wild Rockies v. Cottrell*,
 3 632 F.3d 1127, 1135 (9th Cir. 2011).

4 **1. Plaintiffs cannot establish a likelihood of success on the merits under a**
 5 **contempt standard, or the proper *Youngberg* standard**

6 Recognizing that the *Winter* test for establishing an entitlement to *preliminary*
 7 injunctive relief requires a showing of likely success on the merits at some future proceeding,
 8 Plaintiffs have shoehorned in a future contempt proceeding against which to assess the merits.
 9 Even assuming this were permissible, Plaintiffs cannot show a likelihood of success at a future
 10 contempt proceeding or under the *Youngberg* professional judgment standard.

11 **a. Plaintiffs cannot show a likelihood of success at a future contempt**
 12 **proceeding because it cannot establish that the stairways at MLCRP**
 13 **violate this Court’s April 2, 2015 order.**

14 Plaintiffs assert that DSHS could be held in contempt for violating one clause of the
 15 Court’s April 2, 2015 order: that class members be admitted to state hospitals “without
 16 sacrificing the therapeutic environment of a psychiatric hospital.” ECF #131, at 22:19-20.
 17 Plaintiffs claim that DSHS should be held in contempt for permitting class members to access
 18 the stairways at MLCRP.

19 “The standard for finding a party in civil contempt is well settled: The moving party has
 20 the burden of showing by clear and convincing evidence that the [non-moving party] violated a
 21 specific and definite order of the court.” *FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1239
 22 (9th Cir.1999) (quoting *Stone v. City & Cnty. of San Francisco*, 968 F.2d 850, 856 n. 9
 23 (9th Cir.1992)). The contempt “need not be willful, and there is no good faith exception to the
 24 requirement of obedience to a court order.” *In re Dual-Deck Video Cassette Recorder*
 25 *Antitrust Litig.*, 10 F.3d 693, 695 (9th Cir.1993). “But a person should not be held in contempt
 26 if his action appears to be based on a good faith and reasonable interpretation of the court’s
 order.” *Id.* (internal formatting and quotation marks omitted). “ ‘Substantial compliance’ with

1 the court order is a defense to civil contempt, and is not vitiated by ‘a few technical violations’
 2 where every reasonable effort has been made to comply.” *Id.* (citing *Vertex Distrib., Inc. v.*
 3 *Falcon Foam Plastics, Inc.*, 689 F.2d 885, 891 (9th Cir.1982)). The party moving for a civil
 4 contempt order must show by clear and convincing evidence that the alleged contemnor
 5 violated the court's order. *Id.*; *United States v. Ayres*, 166 F.3d 991, 994 (9th Cir.1999).

6 Plaintiffs point to absolutely nothing in the record, let alone clear and convincing
 7 evidence, indicating that the stairways at MLCRP in their present form “sacrifice[es] the
 8 therapeutic environment of a state hospital.” ECF #131, at 22:19-20. DSHS reported
 9 improvements to the stairways and balcony area at MLCRP in the February and March 2016
 10 reports to the Court Monitor, and work was completed just prior to MLCRP opening. Hunter
 11 Decl., ¶ 10; Zolnikov Decl. ¶ 18. In addition, DSHS undertook additional work in April 2016
 12 in response to input from the Monitor’s expert to further enclose gaps around the stairway
 13 railings. *Id.* All of the Plaintiffs’ cited expert reports and commentaries about the stairways
 14 were generated prior to these changes being made. *See* Plaintiffs Br. at 3-4 (most recently
 15 citing Dr. Mauch’s *January 2016* report). DSHS, on the other hand, has created a program
 16 whereby the stairways in their current configuration are clinically appropriate and safe for low
 17 to moderate acuity patients – the entirety of the MLCRP population. Zolnikov Decl., ¶¶ 8, 10,
 18 11-14. As Plaintiffs have offered no evidence that the improved stairways, along with
 19 additional monitoring and screening, and policies made and implemented to date, pose a safety
 20 risk to the MLCRP population, and DSHS’s experts have presented evidence to the contrary,
 21 Plaintiffs have not demonstrated a likelihood of success on the merits of a contempt proceeding
 22 related to the stairways.

23 Plaintiffs seek to enforce a vague and undefined “therapeutic environment” standard,
 24 contrary to the requirement that contempt be premised on a “specific and definite order of the
 25 court.” *Affordable Media, LLC*, 179 F.3d at 1239 (9th Cir.1999). The Court’s April 2, 2016
 26 order is entirely silent on the meaning of the “therapeutic environment” standard Plaintiffs seek

1 to enforce. Plaintiffs are forced to resort to contempt law and the ambiguity of the term
 2 “therapeutic environment” in the Court’s order because under the proper and applicable legal
 3 standard for assessing the constitutionality of treatment conditions, Plaintiffs cannot prevail.

4 Further, even assuming, *arguendo*, Plaintiffs’ interpretation of this Court’s April 2
 5 Order is correct, the recent improvements made to the stairways at MLCRP demonstrate that
 6 DSHS has acted in “good faith and [based upon a] reasonable interpretation of the court’s
 7 order.” *In re Dual-Deck Video Cassette Recorder Antitrust Litig.*, 10 F.3d at 695. Plaintiffs’
 8 unsupported contentions that DSHS has apparently not gone far enough to improve the
 9 stairways does not establish that MLCRP is not a therapeutic environment.

10 Finally, to the extent Plaintiffs argue that the issues in this TRO are identical to the
 11 issues presented regarding the Yakima facility and thus their request must be granted, they fail
 12 to grasp the significant distinctions between the two facilities and the differing records in the
 13 two matters. The stairwells at MLCRP are different than the stairs at Yakima. The physical
 14 layouts are different. The staffing and monitoring is different. And critically, the Court
 15 Monitor and her experts have not provided statements asserting that a serious and immediate
 16 risk of harm to class members exists. These important distinctions are fatal to Plaintiffs’
 17 assertions that this motion should be granted simply because the TRO was granted in regards
 18 to Yakima.

19 **b. Plaintiffs’ claim also fails on the merits because DSHS has satisfied**
 20 **the *Youngberg* professional judgment standard**

21 Plaintiffs make no attempt to explain how the correct legal standard for adjudicating
 22 therapeutic environments can be anything but the constitutional standard set forth in
 23 *Youngberg v. Romeo*, 457 U.S. 307, 324, (1982). The Court’s jurisdiction in this matter is
 24 derived solely from the presence of a federal question arising under constitutional law.
 25 ECF #24, at 2; 28 U.S.C. § 1331; 28 U.S.C. § 1343. Even if Plaintiffs are now allowed to
 26 inject a conditions of confinement issue into this litigation post-judgment, the Court is

1 empowered to do no more than enforce what the Constitution requires. *Jenkins*, 515 U.S. at
 2 88. The “therapeutic environment” language in the Court’s order cannot mean more than what
 3 is required by the Constitution, because this Court’s power is enabled, guided, and limited by,
 4 what the Constitution requires of DSHS. *Id.* Any attempt by Plaintiffs to hold DSHS to any
 5 higher standard must fail, and DSHS clearly satisfies the *Youngberg* standard.

6 Persons committed for mental health treatment, including pretrial detainees confined
 7 for restoration treatment, have a Fourteenth Amendment due process right to be provided with
 8 adequate care and safe confinement conditions. *Youngberg*, 457 U.S. at 323-5; *Ammons v.*
 9 *Washington Dep’t of Social & Health Services*, 648 F.3d 1020, 1027 (9th Cir. 2011).
 10 According to *Youngberg*, the Constitution requires that DSHS, in order to protect a pretrial
 11 detainee’s right to safe conditions and adequate treatment, exercise professional judgment.
 12 *Youngberg*, 457 U.S. at 321-22. This standard is violated only “when the decision [made] by
 13 the professional is such a substantial departure from accepted professional judgment, practice,
 14 or standards as to demonstrate that the person responsible actually did not base the decision on
 15 such a judgment.” *Id.* at 323. The Constitution requires only that the treatment be “minimally
 16 adequate.” *Id.* at 319.

17 This *Youngberg* “professional judgment standard” essentially provides that whether an
 18 administrator has violated a person’s constitutional rights is determined by whether the
 19 administrator actually exercised professional judgment. If DSHS’s clinicians exercised such
 20 judgment, even if other professionals disagree with the conclusion, no constitutional violation
 21 arises. *Id.*

22 Using professional judgment, DSHS and its contractor have developed, and are now
 23 operating, MLCRP in a manner that complies with the Constitution. The Supreme Court
 24 recognizes that such decisions are best left to those with the requisite knowledge and
 25 experience, concluding that “decisions made by the appropriate professional are entitled to a
 26 presumption of correctness.” *Youngberg*, 457 U.S. at 324. Plaintiffs put forth complaints

1 premised on outdated circumstances, and have failed to demonstrate that the persons in charge
 2 of implementing MLCRP failed to exercise professional judgment, or even that the Court
 3 Monitor or her experts currently believe that DSHS has failed to exercise professional
 4 judgment. This is because DSHS has in fact exercised a considerable degree of professional
 5 judgment regarding the stairways at this facility. This includes extensive screening of patients,
 6 significantly changing the physical plant, refining policies, increasing staffing monitoring and
 7 offering significant training to staff. Hunter Decl., ¶¶ 8-12. Plaintiffs fail to establish that
 8 these decisions were a substantial departure from professional judgment.

9 MLCRP is licensed as a residential treatment facility (just like 90 other behavioral
 10 health facilities around the state) by DOH. Hunter Decl., ¶ 7. Licensors are clinicians and
 11 public health advisers who are assessing safety risk. *Id.* DOH's careful review of the facility
 12 before authorizing it to open is further evidence that DSHS exercised professional judgment.

13 Plaintiffs present no expert evidence that the stairways at MLCRP in their present
 14 configuration are a substantial departure from professional judgment. This alone must be fatal
 15 to their request. Plaintiffs rely exclusively on outdated comments, suggestions, and concerns
 16 set forth by the Court Monitor and the experts she has retained. The facts presented by DSHS
 17 establish that 1) that Defendants are not in contempt of the directive to provide treatment in a
 18 therapeutic environment and 2) that Defendants have exercised professional judgment in
 19 regard to the stairways at MLCRP. Accordingly, Plaintiffs will be unable to succeed on the
 20 merits of their claim for contempt and thus the Plaintiffs' request for a TRO must fail.

21 **2. Denying the TRO Will Not Cause Plaintiffs to Suffer Irreparable Harm.**

22 Plaintiffs claim that "Defendants have failed to remediate the stairwell at Maple Lane
 23 and instead rely on ... their contracted providers' monitoring alone [to] fully mitigate the risk"
 24 ECF # 244 at 7, but fail to acknowledge that DSHS has made significant improvements to the
 25 stairways in addition to more robust monitoring. Hunter Decl., ¶¶ 8-12; Zolnikov Decl. ¶ 18.
 26 Plaintiffs rely completely on outdated reports by the Court Monitor and Dr. Pinals in

1 suggesting that the stairways present a risk of irreparable harm to class members, and
 2 accordingly present insufficient evidence to carry their burden of showing irreparable harm.
 3 Plaintiffs are apparently relying, although without saying directly, on the fact that simply
 4 because there was a stairwell issue, as determined by this Court, in Yakima, the same issue
 5 must be present at MLCRP. But MLCRP is not Yakima. Between the already-detailed
 6 improvements made to the stairways, increased staffing, constant supervision of the stairways
 7 by treatment staff, and DSHS's policy of repeatedly screening the MLCRP population to
 8 ensure their appropriateness for the facility, this Court cannot conclude that MLCRP patients
 9 face a clear risk of irreparable harm. Zolnikov Decl., ¶¶ 8-15; Hunter Decl., ¶¶ 8-12.

10 Motions for preliminary injunctive relief require a presentation of evidence showing a
 11 likelihood of irreparable harm, and may not rely on mere allegations. *See Herb Reed*
 12 *Enterprises, LLC v. Florida Entertainment Management, Inc.*, 736 F.3d 1239, 1251 (9th Cir.
 13 2013) (recognizing that, "Those seeking injunctive relief must proffer evidence sufficient to
 14 establish a likelihood of irreparable harm.") Plaintiffs offer no such evidence here, relying
 15 instead on conclusory allegations.

16 Washington DOH has licensed MLCRP as ready to admit and treat patients. Hunter
 17 Decl., ¶¶ 6-7. There is extensive monitoring of patients. Zolnikov Decl., ¶¶ 13, 15. DSHS
 18 staff developed and use multiple extensive screening tools to limit the likelihood that someone
 19 intent on harming him or herself would even be at the facility. Zolnikov Decl., ¶¶ 8-10, 16.
 20 The remote possibility that a patient would not be screened out under the MLCRP admission
 21 criteria, escape all observation and monitoring by mental health staff, overcome the risk
 22 mitigation work that has been performed, and cause harm to themselves, does not rise to the
 23 necessary legal standard: a *likelihood* that such an irreparable harm *will* occur. Indeed, the
 24 state hospitals themselves are not completely free from risk of harm, which is what Plaintiffs
 25 seem to require in the alternative restoration facilities of MLCRP and Yakima, yet Plaintiffs
 26 assert placement within the state hospitals is what they seek. Zolnikov Decl. ¶ 6-7, 20.

1 Plaintiffs must show something more than mere allegations of risks exist; they must present
 2 evidence showing a likelihood the irreparable harm they allege will inevitably occur. They
 3 have not done so.

4 The irony is that Plaintiffs' requested relief poses a greater risk of harm to class
 5 members than the stairways at MLCRP. To halt admissions to the competency restoration
 6 beds available on the second floor of MLCRP will harm class members by leaving them in the
 7 very environments this Court has found to be so harmful: the jail. ECF #131. There are
 8 individual defendants waiting right at this moment for restoration services, who have been
 9 assessed as eligible candidates to receive services at MLCRP. Enjoining DSHS from admitting
 10 them would prevent those individual defendants from entering into restoration treatment
 11 quickly, and further deplete the high-demand forensic beds at the state hospitals because that
 12 individual still must receive restoration treatment somewhere. Reyes Decl., ¶ 10. The
 13 allegation that the stairways at MLCRP are currently unsafe has zero support in the record and
 14 does not rise to the standard required to demonstrate a likelihood of irreparable harm.
 15 Zolnikov Decl., ¶¶ 8-15; Hunter Decl., ¶¶ 8-12. Plaintiffs' argument on this point cannot
 16 succeed.

17 **3. The balance of equities weighs in favor of allowing DSHS to reduce wait**
 18 **times by operating the second floor of MLCRP.**

19 In exercising their sound discretion, courts of equity should pay particular regard
 20 to the public consequences in employing the extraordinary remedy of an injunction. *Winter v.*
 21 *Natural Resources Defense Council, Inc.* 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008). The
 22 consequences to the public of the requested injunctive relief are significant. It will slow the
 23 forward progress being made by DSHS in timely admitting class members for restoration
 24 treatment. These MLCRP beds will relieve pressure on the burdened state hospitals and allow
 25 for some class members to escape the harmful environment of city and county jails. ECF
 26 #131. Without these beds at MLCRP there will be slower relief for those on the waitlist,

1 meaning the proposed relief will have negative consequences for all class members. Reyes
 2 Decl., ¶ 10. To deny admission of class members to MLCRP would result in other
 3 incompetent defendants being delayed in their admissions. Equity requires the Court to pay
 4 particular regard to the public consequences, and the public consequences here are severe. The
 5 balance of equities tips in favor of allowing DSHS to continue to fully operate this therapeutic
 6 alternative to beds at the state hospitals for those who meet the admission criteria.

7 **4. Plaintiffs' requested TRO would be contrary to the public interest.**

8 “[When] an injunction is asked which will adversely affect a public interest ... the court
 9 may in the public interest withhold relief until a final determination of the rights of the parties,
 10 though the postponement may be burdensome to the plaintiff.” *Weinberger v. Romero–*
 11 *Barcelo*, 456 U.S. 305, 312-13 (1982). In fact, “courts . . . should pay particular regard for the
 12 public consequences in employing the extraordinary remedy of injunction.” *Id.*, at 312. When
 13 the public is impacted, it is appropriate to withhold relief, even if postponement is burdensome
 14 to the plaintiff. *Id.*, at 312-13. As discussed above, the proposed relief will have negative
 15 consequences for class members. Cutting the capacity of MLCRP in half would negatively
 16 impact those on the waitlist by forcing them to wait longer. Reyes Decl., ¶ 10. Further, the
 17 relief requested would require class members to spend more time languishing in city and
 18 county jails.

19 **B. Plaintiffs Inappropriately Request A Temporary Restraining Order In Excess of**
 20 **Fourteen Days**

21 A temporary restraining order may last for only fourteen days unless extended for good
 22 cause or on agreement of the parties. FRCP 65(b)(2); *H-D Michigan, LLC v. Hellenic Duty*
 23 *Free Shops S.A.*, 694 F.3d 827, 843 (7th Cir. 2012) (“Rule 65 dictates that under ordinary
 24 circumstances a temporary restraining order cannot exceed 14 days” and cannot be extended by
 25 the court beyond 28 days); *Tooele Cty. v. United States*, No. 15-4062, 2016 WL 1743427, at *2
 26 (10th Cir. May 3, 2016) (“[t]emporary restraining orders can last no more than fourteen days”).

1 Plaintiffs request that this Court enter a temporary restraining order lasting until the Court
 2 Monitor makes a “determination that the stairwell and railings no longer create an
 3 unreasonable risk to class members.” ECF #244 at 1. Because such an order would not
 4 necessarily be limited to fourteen days, it is contrary to FRCP 65(b)(2). In the event this Court
 5 determines that a TRO is appropriate, such relief should be entered for no longer than fourteen
 6 days.

7 This Court has likewise recognized that TROs must expire within a short period of time
 8 unless extended. *See* ECF #216 at 7 (ordering that the TRO remain in effect for no longer than
 9 ten days and giving leave for Plaintiffs to file an extension). If the court determines to grant
 10 the TRO, it should impose a similar limitation on the duration of the TRO.

11 III. CONCLUSION

12 This Court should deny all of the relief requested. The Plaintiffs are not entitled to a
 13 TRO.

14 RESPECTFULLY SUBMITTED this 21st day of May 2016.

15 ROBERT W. FERGUSON
 16 Attorney General

17 /s/ Amber L. Leaders

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CERTIFICATE OF SERVICE

Beverly Cox, states and declares as follows:

I am a citizen of the United States of America and over the age of 18 years and I am competent to testify to the matters set forth herein. I hereby certify that on this 21 day of May 2016, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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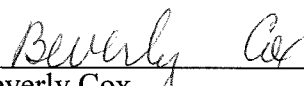
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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Dated this 21 day of May 2016, at Olympia, Washington.


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