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FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Jul 15, 2020

SEAN F. MCAVOY, CLERK

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON**

SLIDEWATERS LLC,

Plaintiff,

v.

WASHINGTON STATE DEPARTMENT
OF LABOR AND INDUSTRIES, and
GOVERNOR JAY INSLEE, in his official
capacity,

Defendants.

No. 2:20-cv-00210-TOR

**NOTICE OF APPEAL BY
PLAINTIFF SLIDEWATERS LLC**


PLAINTIFF'S NOTICE OF APPEAL
No. 2:20-cv-00210-TOR



P.O. Box 552, Olympia, WA 98507
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1 NOTICE IS HEREBY GIVEN that Plaintiff, Slidewaters LLC, appeals to the
2 United States Court of Appeals for the Ninth Circuit, this Court's July 14, 2020,
3 Judgment in a Civil Action [ECF No. 25] and this Court's Order Denying Preliminary
4 and Permanent Injunction [ECF No. 24], and dismissing the case with prejudice, of
5 the same date, incorporating Plaintiff Slidewaters LLC's Motion for Preliminary
6 Injunction [ECF No. 10], Defendants' Response in Opposition to Plaintiff
7 Slidewaters' Motion for Preliminary Injunction [ECF No. 18], and Plaintiff's Reply
8 in Support of Motion for Preliminary Injunction [ECF No. 23]. The Judgment and
9 Order are attached hereto.
10
11

12 DATED this 15th day of July, 2020.
13

14 
15 By: _____
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DECLARATION OF SERVICE

I certify that I electronically filed the above document with the Clerk of the Court using the CM/ECF system and that there are no additional parties to be notified. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

DATED this 15th day of July, 2020, at Olympia, Washington.

s/ Sydney Phillips
Sydney Phillips, WSBA #54295



UNITED STATES DISTRICT COURT
for the
Eastern District of Washington

SLIDEWATERS LLC,

Plaintiff

v.

WASHINGTON DEPARTMENT OF
LABOR AND INDUSTRIES and

GOVERNOR JAY INSLEE, in his official capacity,

Defendant

Civil Action No. 2:20-CV-0210-TOR

JUDGMENT IN A CIVIL ACTION

The court has ordered that (check one):

[] the plaintiff (name) recover from the
defendant (name) the amount of
dollars (\$), which includes prejudgment
interest at the rate of % , plus post judgment interest at the rate of % per annum, along with costs.

[] the plaintiff recover nothing, the action be dismissed on the merits, and the defendant (name)
recover costs from the plaintiff (name)

[x] other: Plaintiff's Complaint is dismissed with prejudice. Judgment is entered in favor of Defendants.

This action was (check one):

[] tried by a jury with Judge presiding, and the jury has
rendered a verdict.

[] tried by Judge without a jury and the above decision
was reached.

[x] decided by Judge THOMAS O. RICE on motion for
Preliminary Injunction converted to a request for Permanent Injunction (ECF Nos. 10)

Date: July 14, 2020

CLERK OF COURT

SEAN F. McAVOY

s/ Linda L. Hansen

(By) Deputy Clerk

Linda L. Hansen

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

SLIDEWATERS LLC,

Plaintiff,

v.

WASHINGTON DEPARTMENT OF
LABOR AND INDUSTRIES and
GOVERNOR JAY INSLEE, in his
official capacity,

Defendants.

NO. 2:20-CV-0210-TOR

ORDER DENYING PRELIMINARY
AND PERMANENT INJUNCTION

BEFORE THE COURT is Plaintiff's Motion for Preliminary Injunction (ECF No. 10). This matter was considered without oral argument. The Court has reviewed the record and files herein, and is fully informed. For the reasons discussed below, Plaintiff's Motion for Preliminary Injunction (ECF No. 10) is DENIED.

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1 **BACKGROUND**

2 **A. Procedural History**

3 This case concerns Plaintiff’s ability to operate its business while subject to
4 state emergency restrictions put into place due to the COVID-19 pandemic. On
5 June 4, 2020, Plaintiff filed the Complaint in Chelan County Superior Court. ECF
6 No. 1-4. On June 8, 2020, Defendants removed the case to federal court. ECF No.
7 1. On that same date, Plaintiff filed a Motion for Temporary Restraining Order
8 (“TRO”). ECF No. 3. The Court considered the parties’ briefing and, on June 12,
9 2020, denied Plaintiff’s Motion for TRO. ECF No. 8. On June 26, 2020, Plaintiff
10 filed the instant Motion for Preliminary Injunction. ECF No. 10. On July 6, 2020,
11 the Court gave the parties notice that it intended to consolidate hearing on
12 Plaintiff’s Motion for Preliminary Injunction with a hearing on the merits, pursuant
13 to Fed. R. Civ. P. 65(a)(2). ECF No. 17.

14 **B. Factual Background**

15 The following facts are drawn from Plaintiff’s Complaint and remain largely
16 unchanged since the Court’s consideration of Plaintiff’s Motion for TRO, except
17 where noted.

18 Plaintiff Slidewaters LLC is a family-owned waterpark in Lake Chelan,
19 owned by cousins Burke and Robert Bordner. ECF No. 1-4 at 2, ¶ 4.1. Plaintiff
20 employs approximately 150 seasonal employees and four year-round employees.

1 ECF No. 1-4 at 2, ¶¶ 4.5, 4.7. Plaintiff operates seasonally for an approximately
2 100-day window that starts the Saturday prior to Memorial Day weekend and ends
3 at Labor Day. ECF No. 1-4 at 3, ¶¶ 4.8-4.9. Plaintiff makes nearly all of its
4 income that sustains its business throughout the year during this 100-day period.
5 ECF No. 1-4 at 3, ¶ 4.10. Plaintiff depends on being open during this 100-day
6 period to ensure that it can survive during the “off-season.” ECF No. 1-4 at 3, ¶
7 4.13. Plaintiff previously made a business decision to expand the park, with the
8 goal of having the 2020 season recoup the money expended during the three-year
9 expansion project. ECF No. 1-4 at 3, ¶ 4.14. Plaintiff has taken on substantial
10 business debt for the expansion project in reliance upon being able to operate
11 during the 2020 season. *Id.*

12 On February 29, 2020, in response to the COVID-19 pandemic, Defendant
13 Governor Jay Inslee proclaimed a State of Emergency for all counties in
14 Washington, referred to as the “Stay Home, Stay Healthy” order, or “Proclamation
15 20.05.” ECF No. 1-4 at 3, ¶ 4.16. Governor Inslee issued Proclamation 20.05
16 pursuant to RCW chapters 38.08, 38.52, and 43.06. ECF No. 1-4 at 3, ¶ 4.17.
17 Governor Inslee proclaimed that COVID-19 is a “public disaster.” ECF No. 1-4 at
18 4, ¶ 4.19. Governor Inslee also proclaimed that the Washington State
19 Comprehensive Emergency Management Plan be directed, and that state agencies
20 and departments were directed to utilize state resources and do everything

1 reasonably possible to assist affected counties to respond to and recover from
2 COVID-19. ECF No. 1-4 at 4, ¶¶ 4.22-4.23.

3 On May 4, 2020, Governor Inslee sent a letter to the Washington State
4 legislature requesting an extension of statutory waivers and suspensions ordered by
5 Proclamation 20.05. ECF No. 1-4 at 4, ¶ 4.24. On May 9, 2020, the four
6 legislative caucus leaders sent a letter in response to Governor Inslee, in which
7 they granted an extension of the requested proclamations until May 31, 2020,
8 pursuant to RCW 43.06.220(4). ECF No. 1-4 at 4, ¶ 4.25.

9 On May 26, 2020, Defendant Department of Labor and Industries (“LNI”)
10 filed an emergency rule, WAC 296-800-14035, with the Washington Office of
11 Code Reviser. ECF No. 1-4 at 4, ¶ 4.26. The emergency rule states, “Employers
12 must not allow employees to perform work where a business activity is prohibited
13 by an emergency proclamation.” ECF No. 1-4 at 26. The emergency rule cites, in
14 part, Proclamation 20.05 as the basis for its rulemaking authority. ECF No. 1-4 at
15 5, ¶ 4.28. LNI posted a notice on its website which stated, “If employers are found
16 to be defying the Governor’s order, they’ll be informed and directed to close or
17 adjust operations immediately. If they do not, they’ll face a workplace safety
18 citation that could carry a fine of nearly \$10,000 or more.” ECF No. 1-4 at 5, ¶
19 4.29.

1 On May 31, 2020, Governor Inslee announced Proclamation 20-25.4,
2 “Transition from ‘Stay Home – Stay Healthy’ to ‘Safe Start – Stay Healthy’
3 County-By-County Phased Reopening.” ECF No. 1-4 at 31-35. Proclamation 20-
4 25.4 utilizes a four-phase plan for opening the State of Washington. ECF No. 1-4
5 at 6, ¶ 4.36. Each county must, in accordance with the plan, independently
6 demonstrate that they meet a number of specific criteria to move into a new phase.
7 ECF No. 1-4 at 6, ¶ 4.41.

8 Chelan County was, as of the filing of the Complaint, in phase one of the
9 four-phase plan. ECF No. 1-4 at 6, ¶ 4.40. Chelan County has since entered a
10 “modified phase one,” or “Phase 1.5.” ECF No. 10 at 3. At the earliest, Plaintiff
11 would be eligible to begin moderate operations in phase three of Proclamation 20-
12 25.4. ECF No. 1-4 at 6, ¶ 4.39. Plaintiff has not yet been able to open for its 2020
13 season and expects it will unlikely be able to open for the entire 2020 season. ECF
14 No. 1-4 at 6, ¶¶ 4.42-4.43. Plaintiff now faces increased competition from out-of-
15 state water parks such as Silverwood’s water park in Idaho, which opened on May
16 30, 2020. ECF No. 1-4 at 7, ¶ 4.48. Plaintiff has created a “Clean & Safe” plan for
17 its water park to assist patrons, guests, and staff in being able to maintain
18 cleanliness, health, and necessary social distancing measures. ECF No. 1-4 at 7, ¶¶
19 4.49-4.50; *see* ECF No. 10-1. But for the Proclamations and the emergency rule,
20 Plaintiff would be open for its normal season. ECF No. 1-4 at 8, ¶ 4.53.

1 On June 18, 2020, after the Court denied Plaintiff’s Motion for TRO, a
2 representative of the Chelan-Douglas Health District (“CDHD”) inspected
3 Plaintiff’s COVID-19 safety manual and park facility and signed an inspection
4 form stating that the “[f]acility is permitted to operate effective today 6/18/20.”
5 ECF No. 10 at 4. On June 19, 2020, the CDHD clarified that it did not have
6 authority to override the Governor’s orders, which did not permit operation of
7 waterslide parks. ECF No. 19-1 at 6. Since the filing of this suit, COVID-19 cases
8 continue to trend upward statewide. ECF No. 19-1 at 18. On July 8, 2020, Chelan
9 County, where Plaintiff is located, reported 192.6 positive COVID-19 cases per
10 100,000 people in the prior two weeks. ECF No. 19-1 at 20.

11 DISCUSSION

12 A. Permanent Injunction Standard

13 Pursuant to Federal Rule of Civil Procedure 65, the Court may grant
14 preliminary injunctive relief in order to prevent “immediate and irreparable
15 injury.” Fed. R. Civ. P. 65(b)(1)(A). Rule 65 also states that “[b]efore or after
16 beginning the hearing on a motion for a preliminary injunction, the court may
17 advance the trial on the merits and consolidate it with the hearing.” Fed. R. Civ. P.
18 65(a)(2).

19 To obtain a permanent or final injunction, a plaintiff must demonstrate: “(1)
20 actual success on the merits; (2) that it has suffered an irreparable injury; (3) that

1 remedies available at law are inadequate; (4) that the balance of hardships justify a
2 remedy in equity; and (5) that the public interest would not be disserved by a
3 permanent injunction.” *Indep. Training & Apprenticeship Program v. California*
4 *Dep’t of Indus. Relations*, 730 F.3d 1024, 1032 (9th Cir. 2013). Plaintiff must
5 satisfy each element for injunctive relief. “The standard for a preliminary
6 injunction is essentially the same as for a permanent injunction with the exception
7 that the plaintiff must show a likelihood of success on the merits rather than actual
8 success.” *Id.* (quoting *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 546
9 n.12 (1987)). Accordingly, the Court’s analysis remains largely the same as if it
10 were considering the Plaintiff’s original motion for preliminary injunction.

11 **B. Success on the Merits**

12 Plaintiff’s Complaint raises claims that may be categorized by three main
13 arguments: (1) Governor Inslee does not have the authority to issue the emergency
14 proclamations; (2) LNI does not have authority to issue an emergency rule based
15 on the Governor’s unlawful emergency proclamations; and (3) Defendants’ actions
16 have violated Plaintiff’s substantive due process rights. ECF No. 1-4 at 8-13, ¶¶
17 5.1-5.42. Plaintiff’s present legal arguments are largely identical to those raised at
18 the TRO stage of the case. ECF No. 10 at 5-9.

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1 1. *Governor’s Authority*

2 Plaintiff argues that the Proclamations exceed Governor Inslee’s statutory
3 authority because the COVID-19 pandemic does not constitute one of the
4 statutorily authorized purposes for which a governor may declare a state of
5 emergency. ECF No. 10 at 5-7. Washington law allows a governor to proclaim a
6 state of emergency “after finding that a public disorder, disaster, energy
7 emergency, or riot exists within this state or any part thereof which affects life,
8 health, property, or the public peace.” RCW 43.06.010(12). “Public disorder,
9 disaster, energy emergency, or riot” are all terms that are not otherwise defined in
10 the statute.

11 As this Court previously explained, federal courts charged with interpreting
12 a state statute should do so according to that state’s principles of statutory
13 interpretation. *Powell’s Books, Inc. v. Kroger*, 622 F.3d 1202, 1209 (9th Cir.
14 2010). “Whenever [the court] faced with a question of statutory interpretation [it
15 looks] to the plain meaning of the words used in the statute.” *State v. Fjermestad*,
16 114 Wash. 2d 828, 835 (1990). “A nontechnical statutory term may be given its
17 dictionary meaning; statutes should be construed to effect their purpose, and
18 unlikely, absurd, or strained consequences should be avoided.” *State v. Smith*, 189
19 Wash. 2d 655, 662 (2017). The dictionary meaning of “disorder” within the state
20 of emergency statute is relevant here. The Oxford English Dictionary defines

1 “disorder” as a “disturbance of the bodily (or mental) functions; an ailment,
2 disease.” Oxford University Press, *disorder, n.*, OED Online (June 2020),
3 <https://oed.com/view/Entry/54859?result=1&rskey=LLoCgB&>. Merriam-Webster
4 similarly defines “disorder” as “an abnormal physical or mental condition.”
5 Merriam-Webster, *Disorder*, Merriam-Webster.com (May 16, 2020),
6 <https://www.merriam-webster.com/dictionary/disorder>. The plain meaning of the
7 governor’s statutory authority to proclaim a state of emergency in the event of a
8 “public disorder” clearly encompasses an outbreak of pandemic disease. RCW
9 43.06.010(12).

10 Plaintiff “disputes” the Court’s prior plain meaning analysis and instead
11 asserts that “disorder” should be interpreted generally to mean a lack of social
12 cohesion or the presence of unruly behavior. ECF No. 10 at 5. However, “statutes
13 should be construed so that all of the language used is given effect, and no part is
14 rendered meaningless or superfluous.” *City of Bellevue v. Lorang*, 140 Wash. 2d
15 19, 25 (2000) (internal quotation and citation omitted). If Plaintiff’s proposed
16 interpretation of “disorder” were adopted, it would render the statute’s
17 authorization of emergency declarations in the event of a “riot” superfluous.
18 Plaintiff’s argument is unpersuasive.

19 Plaintiff also contends that the Governor no longer retains emergency
20 declaration powers because “order” has been restored. ECF No. 10 at 6-7.

1 Plaintiff's argument is in clear contradiction with the rising number of confirmed
2 COVID-19 cases in Washington. *See* ECF No. 19-1 at 18-23. Plaintiff's claim
3 that the Governor does not have the legal authority to issue an emergency
4 proclamation in response to the COVID-19 pandemic fails on the merits.

5 *2. LNI Rulemaking Authority*

6 Plaintiff's current argument regarding LNI's rulemaking authority cites to no
7 legal authority. ECF No. 10 at 7. Instead, Plaintiff frames LNI's rulemaking
8 authority as dependent on the Governor's emergency proclamation. *Id.* As
9 explained *supra*, Plaintiff's argument that the Governor does not have the authority
10 to issue the emergency proclamation fails. Additionally, as the Court explained in
11 its Order Denying Plaintiff's Motion for TRO, LNI lawfully promulgated its rule
12 pursuant to its statutory authority under RCW 49.17.040 and 49.17.050, among
13 other provisions. ECF No. 8 at 9. Plaintiff's policy preference that LNI exercise
14 its authority in different ways does not establish a violation of LNI's rulemaking
15 authority. ECF No. 10 at 7. This claim fails on the merits.

16 *3. Substantive Due Process*

17 Plaintiff contends the Proclamations and emergency rule infringe on
18 Plaintiff's protected liberty interest in its right to pursue a common calling and to
19 use and dispose of private property. ECF No. 3 at 7-9. "The substantive
20 component of the Due Process Clause forbids the government from depriving a

1 person of life, liberty, or property in such a way that ... interferes with rights
2 implicit in the concept of ordered liberty.” *Engquist v. Oregon Dep’t of Agric.*,
3 478 F.3d 985, 996 (9th Cir. 2007) (quotation and citation omitted); *see also Yim v.*
4 *City of Seattle*, 194 Wash. 2d 682, 686 (2019) (unless Washington courts adopt
5 “heightened protections as a matter of independent state law, state substantive due
6 process claims are subject to the same standards as federal substantive due process
7 claims.”).

8 As the Court previously explained, it is well settled that state governments
9 have the authority to enact “quarantine laws and ‘health laws of every
10 description”” pursuant to their police powers. *Jacobson v. Commonwealth of*
11 *Massachusetts*, 197 U.S. 11, 24-25 (1905). “[T]he liberty secured by the
12 Constitution of the United States to every person within its jurisdiction does not
13 import an absolute right in each person to be, at all times and in all circumstances,
14 wholly freed from restraint.” *Id.* at 26. So long as a public health law is
15 reasonable and not overly broad or unequally applied, it is permissible even where
16 it infringes on other protected interests. *Id.* at 28.

17 Plaintiff argues that *Jacobson* is not applicable here because COVID-19 is
18 not prevalent in Chelan County. ECF No. 10 at 8. Plaintiff’s argument is
19 unavailing for several reasons. First, Plaintiff’s focus on Chelan County’s
20 infection rate is not persuasive because the emergency proclamation and the

1 Governor's authority to issue it are matters of statewide concern which are not
2 considered on a county-by-county basis. Second, the threat of COVID-19 clearly
3 poses an ongoing risk to the people of Washington. ECF No. 19-1 at 18-23.
4 Indeed, the full transcript of a public health official's deposition, which Plaintiff
5 provides to support its argument that the risks posed by COVID-19 are low,
6 actually supports the conclusion that COVID-19 poses serious individual and
7 public health risks. *See* ECF No. 10-2 at 19-44. Case numbers continue to climb
8 around Washington despite mitigating measures like social distancing, hand
9 sanitizing, and mandates to wear facial coverings in public. ECF No. 19-1 at 18-
10 23.

11 Even if Plaintiff has identified a constitutionally protected interest¹ upon
12 which the emergency proclamation infringes, the infringement is justified by the
13 ongoing public health emergency caused by COVID-19. *Jacobson*, 197 U.S. at 28.
14 That Plaintiff and a representative of the local health district believe that Plaintiff
15 can operate its business in a way that minimizes the spread of COVID-19 does not
16 establish that the Governor's emergency proclamation is unreasonable, overly

17
18 ¹ The Court notes that Slidewaters LLC is the only named Plaintiff in this
19 case. Plaintiff cites no authority to establish that the identified constitutional
20 interests extend to the LLC itself rather than the individual business owners.

1 broad, or unequally applied. *Id.* It is not the Court’s role to second-guess the
2 reasoned public health decisions of other branches of government. *Id.*

3 **C. Remaining Injunction Factors**

4 The Court finds it is unnecessary to consider the remaining factors of
5 irreparable injury, balancing of the equities, and the public interest. All of
6 Plaintiff’s claims fail on the merits, and Plaintiff is therefore not entitled to any
7 injunctive relief regardless of how the other factors are weighed. Because
8 Plaintiff’s Complaint only seeks declaratory and injunctive relief based on legal
9 arguments that this Court has rejected, the five claims raised in Plaintiff’s
10 Complaint are hereby dismissed with prejudice.

11 **D. Counterclaim Jurisdiction**

12 Defendants’ Answer raises a counterclaim under state law against Plaintiff.
13 ECF No. 12 at 24-25, ¶¶ 9.1-9.7. “Federal courts are courts of limited
14 jurisdiction.” *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377
15 (1994). After a case has been removed from state court, “[i]f at any time before
16 final judgment it appears that the district court lacks subject matter jurisdiction, the
17 case shall be remanded.” 28 U.S.C. § 1447(c). This case was removed to federal
18 court on the basis of federal question jurisdiction over Plaintiff’s federal
19 constitutional claims. ECF No. 1 at 2. Because the Court has denied Plaintiff’s
20 requested relief on its federal constitutional claims, the Court has no basis to

1 exercise supplemental jurisdiction over Defendants' state law counterclaim and
2 declines to do so under 28 U.S.C. § 1367(c). Because the basis for federal question
3 jurisdiction has been dismissed, and because the parties are not alleged to be of
4 diverse citizenship, there is no basis for continued federal subject-matter
5 jurisdiction in this case. Consequently, this matter shall be remanded to state
6 court. 28 U.S.C. § 1447(c).

7 **ACCORDINGLY, IT IS HEREBY ORDERED:**

8 1. Plaintiff's Motion for Preliminary Injunction (ECF No. 10), converted to
9 a request for a Permanent Injunction, is **DENIED**. Plaintiff's Complaint
10 is **dismissed with prejudice**.

11 2. This case is hereby **REMANDED** to Chelan County Superior Court for
12 all further proceedings concerning Defendants' state law counterclaim
13 (former Chelan County Superior Court No. 20-2-00389-04).

14 The District Court Executive is directed to enter this Order and Judgment for
15 Defendants accordingly, furnish copies to counsel, mail a certified copy of this
16 Order to the Clerk of the Chelan County Superior Court, and **CLOSE** the file.

17 **DATED** July 14, 2020.



Thomas O. Rice
THOMAS O. RICE
Chief United States District Judge