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Linda Myhre Enlow
Thurston County Clerk

1 EXPEDITE
2 No Hearing Set
3 Hearing is Set:
4 Date: 3/12/2021
5 Time: 9:00 am
6 Hon. Chris Lanese

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8 **STATE OF WASHINGTON**
9 **THURSTON COUNTY SUPERIOR COURT**

10 DEPARTMENT OF LABOR AND
11 INDUSTRIES OF THE STATE OF
12 WASHINGTON

Plaintiff,

v.

13 FOWLER NAT D. AND MARY M.
14 DBA FARM BOY DRIVE IN

15 Defendant.

NO. 20-2-02460-34

RESPONSE TO FEBRUARY 8, 2021
MOTION TO DISMISS AND
MOTION TO VACATE

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I. INTRODUCTION

Farm Boy has appeared before this Court multiple times in this case, and it has never asserted a lack of personal jurisdiction. Its attempt to do so at this late date must fail for two reasons. First, no summons and complaint is necessary to initiate an order to enforce an agency action under either the Administrative Procedure Act (APA) or the Washington Industrial Safety and Health Act (WISHA). Such proceedings are separate and distinct from the cases that Farm Boy relies on, which involve issues such as dissolutions, product liability, and insurance. Second, Farm Boy repeatedly appeared and argued the merits of the Department of Labor and Industries' (L&I's) claims and as such has waived any claim of lack of personal jurisdiction. This Court should deny Farm Boy's motion.¹

II. FACTS

A. COVID-19 Can Cause Serious Illness or Death

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As this Court has recognized, COVID-19 presents a grave public health emergency in Washington State. *See* Streuli Decl. Ex. A at 1; Lindquist Decl. 3. A highly virulent virus causes COVID-19, and COVID-19 is a serious workplace hazard that creates a substantial risk of illness and death. Soiza Decl. 3; *see also* Lindquist Decl. Ex. B; Lindquist Decl. 2. Restaurants are high-risk environments and are powerful contributors to the spread of COVID-19. Soiza Decl. 8; Lindquist Decl. Ex. E; *see also* Lindquist Decl. 3, 5-7. The primary control of the COVID-19 virus is to avoid close contact with others and maintain a safe distance when interaction is required. Lindquist Decl. 5.

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¹ L&I files this brief in response to Farm Boy's motion filed February 8, 2021, and emailed to counsel to L&I on February 11. Hearing on that motion was scheduled for March 12, 2021. On February 22, Farm Boy filed a supplemental motion raising several new issues, along with an agreed proposed order continuing the March 12 hearing to April 9. In an apparent typographical error, the Court issued an order continuing the March 12 hearing to March 12.

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If the March 12, 2021 hearing is not continued L&I would object to the new issues in the supplemental motion being considered at that time. L&I received a copy of the supplemental motion on February 22, 2021. Because it is a dispositive motion, Farm Boy needed to file it 28 days before hearing, giving L&I 14 days to respond. TCLR 5(d)(D); CR 56.

1 **B. The Governor Issued Proclamations to Protect Washingtonians From COVID-19**
2 **and L&I Acted to Protect Workers**

3 Responding to the health crisis and acting under the authority provided by RCW
4 43.06.220, the Governor has issued a series of emergency proclamations following the best
5 scientific and medical analysis available in terms of limitation of contact. Streuli Decl. 2-6.
6 L&I has issued emergency rules, codified at WAC 296-800-14035, to enforce the Governor’s
7 proclamations. Under WAC 296-800-14035, “[w]here a business activity is prohibited by an
8 emergency proclamation an employer shall not allow employees to perform work.”

9 On November 15, 2020, the Governor issued Proclamation 20-25.8, which modified the
10 provisions of the prior proclamations and provided among other things that restaurants and
11 bars are closed for “indoor dine-in service.” Soiza Decl. 3. In January 2021, the Governor
12 issued his “Healthy Washington” recovery plan, which allowed restaurants to operate at 25
13 percent capacity subject to air flow requirements once they reached Phase II of the plan. Hall
14 Decl. (1/13/21) Ex. 4. On January 28, 2021, Thurston County entered Phase II.²

15 **C. The Court Acted Multiple Times in This Case**

16 On December 7, 2020, L&I acted under RCW 49.17.130 to issue an order of immediate
17 restraint because Farm Boy was providing indoor dining services in violation of WAC 296-
18 800-14035 and the Governor’s Proclamation. On December 15, 2020, L&I filed a “Petition for
19 Order Compelling Compliance with Agency Order of Immediate Restraint Pursuant to RCW
20 49.17.130 and for Injunctive Relief Under RCW 49.17.170.” L&I pleaded irreparable harm if a
21 TRO was not granted. Soiza Decl. 11. On December 15, 2020, this Court granted a temporary
22 restraining order prohibiting indoor dining services at Farm Boy and set a show cause hearing
23 for December 22, 2020. The TRO issued because by offering indoor dine in services, Farm
24 Boy was violating the Governor’s COVID-19 proclamations and WAC 296-800-14035. The
25 Sheriff served the TRO on Farm Boy on December 17, 2020. Hall Decl. (1/13/21) 1. On

26 ² <https://www.thurstoncountywa.gov/phss/Coronavirus>.

1 December 22, 2020, attorney Jason Celski filed a notice of appearance for Nat D. Fowler and
2 Mary M. Fowler, dba Farm Boy Drive In, without reservation of procedural claims such as
3 improper service of process.

4 There were several hearings after the TRO was granted. On an order to show cause
5 about the temporary restraining order, the Court held a hearing on December 22, 2020. Farm
6 Boy did not claim that was a defect in service at that hearing but did request a continuance,
7 which the Court granted to January 5, 2021. In the meantime, Farm Boy ignored the TRO and
8 L&I moved for an order of contempt. Farm Boy filed a series of declarations in response to the
9 motion for contempt, none of which alleged a service issue, on December 28, 2020. After a
10 hearing on December 29, 2020, during which Farm Boy opposed the contempt motion but
11 again did not allege a service issue, this Court entered an order finding the restaurant in
12 contempt and imposing sanctions of \$2,000 per day from December 18, 2020, through the date
13 Farm Boy purged its contempt.

14 Farm Boy continued to submit pleadings, filing its “Response to Order to Show Cause
15 and Temporary Restraining Order” on December 31, 2020. The response cited various statutes
16 and cases but did not raise any service issues. On January 5, 2021, the Court considered the
17 show cause motion and on January 12 issued an order extending the TRO until “otherwise
18 ordered by this Court or Farm Boy is permitted to resume offering indoor dining services
19 pursuant to the Governor’s COVID-19 proclamations, whatever occurs first.” The show cause
20 order also set a preliminary injunction hearing for January 19, 2021. During the January 5
21 hearing, Farm Boy raised no concerns with service.

22 Despite the TRO and the show cause order, Farm Boy continued to offer indoor dining
23 services in violation of the Governor’s proclamations and WAC 296-800-14035. On January
24 13, 2021, therefore, L&I moved for a second order of contempt. On that same day, Farm Boy
25 filed the “Defendant’s Response to Preliminary Injunction and Motion to Dismiss Case and
26 Vacate Restraining Order on Constitutional Grounds.” Like all of its other pleadings, Farm

1 Boy’s motion to dismiss did not argue there was a service issue.

2 On January 19, 2021, the Court considered Farm Boy’s motion to dismiss and L&I’s
3 motion for a second order of contempt. The parties presented argument, none of which
4 concerned service, and at the close of the hearing, the Court granted L&I’s motion and denied
5 Farm Boy’s. As a contempt sanction, the Court entered judgment for L&I on February 8, 2021
6 in the amount of \$42,000—the total \$2,000 per day sanction from December 18, 2020, through
7 February 8, 2021.

8 On February 8, 2021, Farm Boy filed numerous pleadings, including a motion to
9 dismiss this action and vacate all orders that the Court had entered. Farm Boy obtained an ex
10 parte show cause on the same date, but did not provide any of its pleadings to counsel for L&I
11 until February 11. In its motion to dismiss, for the very first time, Farm Boy raised jurisdiction
12 as an issue.

13 III. ARGUMENT

14 A. An Agency Need Not Initiate an Action Enforcing an Agency Order by a 15 Summons

16 Farm Boy argues that L&I needed to serve a summons to commence the TRO action,
17 and it alleges the Court lacks personal jurisdiction because there was none. Mot. 3. It relies on
18 CR 4 and CR 12 for this assertion. Mot. 3.

19 CR 3 provides that “a civil action is commenced by service of a copy of a summons
20 together with a copy of a complaint, as provided in rule 4 or by filing a complaint.” CR 4
21 provides the form of the summons and procedures for its service. CR 12(b)(2) allows for
22 dismissal if there is a lack of personal jurisdiction, and CR 12 contemplates a service of a
23 summons to trigger motions under that rule. CR 12(a).

24 The civil rules do not apply to commencement of an action if the Legislature
25 contemplates an alternative method. Three such statutes apply here, two under WISHA and
26 one under the APA—any of which independently provides authority for initiating proceedings

1 without a summons. First, RCW 49.17.130 provides that if an order of immediate restraint has
2 been issued, L&I may “request the attorney general to make an application to the superior
3 court of the county wherein such condition of employment or practice exists for a temporary
4 restraining order or such other relief as appears to be appropriate under the circumstances.”
5 Second, under RCW 49.17.170, L&I may seek a TRO initiated by a petition. And, third, RCW
6 34.05.578 allows an agency to seek enforcement of its order by filing a petition for civil
7 enforcement in superior court. “The petition must name as respondent each alleged person
8 against whom the agency seeks to obtain civil enforcement.” RCW 34.05.578(4). None of
9 these proceedings contemplates the issuance of a summons.

10 Farm Boy cites CR 4 and case law about it to argue that there needs to be a summons in
11 every superior court action. But a summons only applies to an original civil action as
12 contemplated by the court rules. The cases cited by Farm Boy to argue there needs to be a
13 summons do not involve agency-related action in superior court, but rather typical civil actions
14 like dissolutions, product liability, and insurance. *Mot. 3* (citing *Powell v. Nolan*, 27 Wash.
15 319, 346, 68 P. 389 (1902); *Asahi Metal Indus. Co. v. Superior Court of California, Solano*
16 *Cty.*, 480 U.S. 102, 113, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987); *Prof'l Marine Co. v. Those*
17 *Certain Underwriters at Lloyd's*, 118 Wn. App. 694, 703-04, 77 P.3d 658 (2003)). In contrast,
18 no summons is required in the agency order context. See *Diehl v. W. Wash. Growth Mgmt.*
19 *Hearings Bd.*, 153 Wn.2d 207, 216, 103 P.3d 193 (2004).

20 Rules about service do not apply under the APA (*Diehl*, 153 Wn.2d at 215), including
21 RCW 34.05.578, which allows for civil enforcement of an agency order. This is because the
22 APA has specified when the civil rules apply. *Id.* For enforcing an agency order, RCW
23 34.05.390 incorporates the ancillary procedures that the civil rules may address. RCW
24 34.05.510(2), for example, provides for use of civil rules in “intervention, class actions,
25 consolidation, joinder, severance, transfer, protective orders, and other relief from disclosure of
26 privileged or confidential material, are governed, to the extent not inconsistent with this

1 chapter, by court rule.” These provisions do not include use of a summons and complaint.
2 Countless APA petitions of various sorts are filed each year, but Farm Boy can cite no case
3 that has required a summons. That’s because it is in a different context than a “civil action”
4 commenced under CR 3. Rather, it is action at the agency level that is then enforced at the
5 superior court level.

6 As noted, RCW 49.17.130 provides an independent basis for not using a summons.
7 RCW 49.17.130 allows for agency action in the form of an order of immediate restraint. The
8 plain language of RCW 49.17.130 does not require that initiation of an action to enforce the
9 order of immediate restraint to be commenced by a summons; instead it is commenced by an
10 “application to the superior court of the county wherein such condition of employment or
11 practice exists for a temporary restraining order or such other relief as appears to be
12 appropriate under the circumstances.” This provision for an application does not require the
13 agency to file a summons and complaint under CR 3. Instead, an agency order is being
14 enforced. Likewise, under RCW 49.17.170 the proceedings are initiated by a petition. If the
15 Legislature wanted a summons and complaint, it would have specified so.

16 **B. Farm Boy Waived Any Challenge on Personal Jurisdiction Grounds**

17 A party waives a claim of lack of personal jurisdiction when a party takes action
18 inconsistent with a personal jurisdiction defense. A party waives the claim of lack of personal
19 jurisdiction by “consent[ing], expressly or impliedly, to the court’s exercising jurisdiction.” *In*
20 *re Marriage of Steele*, 90 Wn. App. 992, 997–98, 957 P.2d 247 (1998).

21 Consent may be established by proceeding and arguing the case on its merits. *See In re*
22 *Marriage of Maddox*, 41 Wn. App. 248, 250-52, 703 P.2d 1062 (1995); *see also Nw. Cascade,*
23 *Inc. v. Unique Const., Inc.*, 187 Wn. App. 685, 694, 351 P.3d 172 (2015). In *Maddox*, the
24 defendant did not ask for an immediate ruling by the trial court on the issue of personal
25 jurisdiction and submitted an affidavit and memorandum of authorities refuting the merits of
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1 his wife’s position. 41 Wn. App. at 250-52. This activity was enough to waive a claim of a lack
2 of personal jurisdiction.

3 Farm Boy appeared (without reserving procedural objections) and filed myriad
4 pleadings without alleging a defect in service. It defended against L&I’s motion for contempt,
5 which is certainly a defense on the merits. And it filed a motion titled, “Defendant’s Response
6 to Preliminary Injunction and Motion to Dismiss Case and Vacate Restraining Order on
7 Constitutional Grounds.” In this affirmative pleading, Farm Boy argued that the Court’s TRO
8 violated the constitution on right to employment and equal protection theories. Resp. 2, 6.
9 Farm Boy also argued that L&I’s scientific assertions were inaccurate and did not show
10 substantial probability that death or serious physical harm would occur. Resp. 4-5. It objected
11 to every material finding in the temporary restraining order. Resp. 5. It filed declarations about
12 Farm Boy’s restaurant practices. In not one of these pleadings did Farm Boy mention service
13 as an issue. By producing evidence and challenging the merits and not claiming a defect in
14 service, Farm Boy waived any claim that there was no personal jurisdiction.

15 **C. Due Process Does Not Require a Summons Regarding Agency-Related Actions**

16 Farm Boy also shows no due process concern. *Asahi Metal* looks to traditional notions
17 of fair play and whether it would be unreasonable to assert personal jurisdiction. 480 U.S. at
18 113. In that case, it was unreasonable to make a defendant from Japan appear in California. A
19 situation far different than presented here where actual notice of a proceeding was given and
20 the forum was in the same county as the company’s business site. Farm Boy does not and
21 cannot rationally argue that it was prejudiced in any way by the lack of a summons.

22 It would be extremely surprising that APA petitions, which are not initiated by
23 summons, would not confer personal jurisdiction on the parties. Likewise, due process does not
24 prevent a proceeding to be initiated by a WISHA application or a petition as long as notice is
25 provided to the party. The statutes provided for a petition and application process provide
26 notice; the form in which that notice is provided is not constitutionally mandated. Farm Boy

1 cites no case that says that an agency action in superior court needs to be initiated by a
2 summons to satisfy due process.

3 **IV. CONCLUSION**

4 This Court should deny Farm Boy's motion to dismiss.

5 DATED this 26th day of February 2021.

6 ROBERT W. FERGUSON
7 Attorney General

8 

9 MICHAEL HALL, WSBA No. 19871
10 Assistant Attorney General