

03/03/2021 2:49:38 PM

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

7
8 **STATE OF WASHINGTON**
9 **THURSTON COUNTY SUPERIOR COURT**

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

13 Plaintiff,

14 v.

15 FOWLER NAT D. AND MARY M.
16 DBA FARM BOY DRIVE IN

17 Defendant.

NO. 20-2-02460-34

DEPARTMENT'S *COMBINED*
RESPONSE TO FEBRUARY 8
MOTION TO DISMISS AND
VACATE AND FEBRUARY 22
SUPPLEMENT TO MOTION TO
DISMISS AND VACATE

TABLE OF CONTENTS

1

2 I. INTRODUCTION..... 1

3 II. FACTS 2

4 A. COVID-19 Can Cause Serious Illness or Death..... 2

5 B. The Governor Issued Proclamations to Protect Washingtonians From COVID-
6 19 and L&I Acted to Protect Workers 2

7 C. The Constitution’s Enablers, the Legislature, and L&I Have Acted to Protect
8 Workers..... 3

9 D. The Court Acted Multiple Times in This Case..... 4

10 III. ARGUMENT 6

11 A. RCW 49.17.130 and .170 Allows L&I to Seek Enforcement of an Order of
12 Immediate Restraint by Petition and Does Not Require a Summons 6

13 1. An agency need not initiate an action enforcing an agency order by a
14 summons..... 6

15 2. Farm Boy waived any challenge on personal jurisdiction grounds 8

16 3. Due process does not require a summons regarding agency-related actions
17 9

18 B. L&I Showed Both That Irreparable Harm Would Occur as a Result of Farm
19 Boy’s Disregard of the Law and Also That Actual and Substantial Injury Will
20 Result 10

21 C. The Matter Is Not Moot Because Farm Boy Was Held in Contempt for
22 Violating the Temporary Restraining Order 14

23 D. Farm Boy’s Belated Evidentiary Objections Should Be Rejected 14

24 E. There Was No Due Process Violation for Basing an Order of Contempt Before
25 There Was a Hearing on the Temporary Restraining Order 16

26 F. The Merits of the Governor’s Proclamation Is Not Before This Court, and In
Any Event, the Proclamations Are Within the Governor’s Discretion..... 16

G. No Violation of Any Right to Employment..... 19

IV. CONCLUSION 19

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23

I. INTRODUCTION

This brief incorporates the Department’s response to Farm Boy’s supplemental motion. In the interest of ease to the Court, the Department of Labor & Industries’ (L&I’s) response to the original motion is combined with the response to the supplemental pleading.¹

Farm Boy has appeared before this Court many times, fully litigating its opposition to the temporary restraining order issued under RCW 49.17.130 and .170, and to L&I’s motions for orders of contempt. Now Farm Boy argues that there was improper service, but it has waived that argument by fully participating in the matter. Farm Boy also argues about the factual and evidentiary grounds for the TRO that have already been rejected by this Court. Finally, Farm Boy raises new evidentiary and constitutional arguments, failing to explain why these have not been raised previously. Those arguments, in any event, fail on their merits.

Pervading Farm Boy’s motions is the belief that L&I had to show that an employee at Farm Boy actually contracted COVID-19 or that to show harm under the TRO standard there must be a reporting of death from the virus. This is not so; the *threat* of contracting COVID-19, leads to actual and substantial injury demanding a TRO for three reasons. First, actual and substantial injury in the TRO context for a WISHA violation has been defined by statute: a TRO may be granted if “there is a substantial probability that death or serious physical harm could result to any employee immediately.” RCW 49.17.170. The “statute’s ‘substantial probability’ language refers to the likelihood that, should harm result from the violation, that harm could be death or serious physical harm.” *Potelco, Inc. v. Dep’t of Labor & Indus.*, 166 Wn. App. 647, 656, 272 P.3d 262 (2012) (quotations omitted). In other words, if a worker contracts COVID-19, there was a probability that the harm could be death or serious physical

24
25
26

¹ L&I files this brief in response to Farm Boy’s supplemental motion filed February 22, 2021. Farm Boy’s supplemental motion amended its February 8, 2021 motion (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 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. Another agreed motion was filed to correct that error.

1 harm. *Id.* at 557.

2 Second, Farm Boy presented no credible evidence that COVID-19 is not highly
3 contagious and not spread by contact in close quarters like restaurants. Farm Boy likewise
4 presents no evidence that there are not serious health problems that can result from COVID-19,
5 and it does not deny that death can occur. Both facts show the actual and substantial injury to
6 workers.

7 And third, Farm Boy does not deny it violated L&I's rule or the Order of Immediate
8 Restraint, and that such a violation could result in actual and substantial injury to L&I's ability
9 to enforce its important safety regulations. RCW 49.17.130 and .170 recognize that such
10 violations constitute a sufficient basis to obtain a TRO. This Court should deny Farm Boy's
11 motion to dismiss and motion to vacate.

12 Finally, it should be noted that Farm Boy has appealed several of the referenced orders
13 to the Court of Appeals. Per RAP 7.2, this Court may only change its prior orders with
14 permission of the Court of Appeals.

15 II. FACTS

16 A. COVID-19 Can Cause Serious Illness or Death

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

25 B. The Governor Issued Proclamations to Protect Washingtonians From COVID-19

1 **and L&I Acted to Protect Workers**

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

8 On November 15, 2020, the Governor issued Proclamation 20-25.8, which modified the
9 the prior proclamations and provided among other things that restaurants and bars are closed
10 for “indoor dine-in service.” Soiza Decl. 3. In January 2021, the Governor issued his “Healthy
11 Washington” recovery plan. In mid-January, the Governor issued his “Open Air and Outdoor
12 Seating Requirements” guidance, which did allow for indoor dining at 25 percent capacity
13 provided that certain circumstances were met not present here. (This guidance post-dated the
14 last contempt date of January 7, 2021 at issue.) On January 28, 2021, Thurston County entered
15 Phase II, effective February 1, 2021, which allowed Farm Boy to open at 25 percent capacity.
16 Hall Decl. (3/3/21) Ex. 1.

17 **C. The Constitution’s Enablers, the Legislature, and L&I Have Acted to Protect**
18 **Workers**

19 Both the Constitution and the Legislature have recognized of the importance of
20 protecting workers from workplace hazards. *Martinez-Cuevas v. DeRuyter Bros. Dairy, Inc.*,
21 475 P.3d 164, 171 (Wash. 2020); *Afoa v. Port of Seattle*, 176 Wn.2d 460, 470, 296 P.3d 800
22 (2013). The Washington State Constitution mandates protection of workers. *Bayley Constr. v.*
23 *Washington State Dep’t of Lab. & Indus.*, 10 Wn App. 2d 768, 781, 450 P.3d 647 (2019),
24 *review denied*, 195 Wn.2d 1004 (2020). Art. II, § 35.

25 WISHA’s purpose is to assure “safe and healthful working conditions for every man
26 and woman working in the state of Washington,” and to “create, maintain, continue, and

1 enhance the industrial safety and health program of the state.” RCW 49.17.010; *Afoa*, 176
2 Wn.2d at 470. L&I is mandated to adopt rules to protect workers from harmful airborne
3 transmissions. RCW 49.17.050. RCW 49.17.060(2) requires employers to follow the safety
4 and health standards adopted by the Department. *Afoa*, 176 Wn. 2d at 471. Businesses,
5 including restaurants, must follow WAC 296-800-14035, which provides: “(1) Where a
6 business activity is prohibited by an emergency proclamation an employer shall not allow
7 employees to perform work.”

8 RCW 49.17.130 allowed the Department to issue an order of immediate restraint for
9 Farm Boy’s violation of this rule, and both it and RCW 49.17.170 allowed for a temporary
10 restraining order to enforce that order of immediate restraint provided “there is a substantial
11 probability that death or serious physical harm could result to any employee immediately.”

12 **D. The Court Acted Multiple Times in This Case**

13 On December 7, 2020, L&I acted under RCW 49.17.130 to issue an order of immediate
14 restraint because Farm Boy was providing indoor dining services in violation of WAC 296-
15 800-14035 and the Governor’s Proclamation. Farm Boy has never denied this fact during these
16 proceedings.

17 On December 15, 2020, L&I filed a “Petition for Order Compelling Compliance with
18 Agency Order of Immediate Restraint Pursuant to RCW 49.17.130 and for Injunctive Relief
19 Under RCW 49.17.170.” L&I pleaded irreparable harm if a TRO was not granted. *Soiza Decl.*
20 11. On December 15, 2020, this Court granted a temporary restraining order prohibiting indoor
21 dining services at Farm Boy and set a show cause hearing for December 22, 2020. The TRO
22 issued because by offering indoor dine in services, Farm Boy was violating the Governor’s
23 COVID-19 proclamations and WAC 296-800-14035. The Sheriff served the TRO on Farm
24 Boy on December 17, 2020. *Hall Decl. (1/13/21) 1*; *Hall Decl. (3/3/21) Ex. 2*. On December
25 22, 2020, attorney Jason Celski filed a notice of appearance for Nat D. Fowler and Mary M.
26 Fowler, dba Farm Boy Drive In, without reservation of procedural claims such as improper

1 service of process.

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

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

21 Despite the TRO and the show cause order, Farm Boy continued to offer indoor dining
22 services in violation of the Governor’s proclamations and WAC 296-800-14035. On January
23 13, 2021, therefore, L&I moved for a second order of contempt. On that same day, Farm Boy
24 filed the “Defendant’s Response to Preliminary Injunction and Motion to Dismiss Case and
25 Vacate Restraining Order on Constitutional Grounds.” Like all of its other pleadings, Farm
26 Boy’s motion to dismiss did not argue there was a service issue.

1 On January 19, 2021, the Court considered Farm Boy’s motion to dismiss and L&I’s
2 motion for a second order of contempt. The Court rejected an argument that L&I did not prove
3 that actual and substantial injury will result by allowing Farm Boy to continue to offer indoor
4 dining services. Although Farm Boy raised several arguments, none of them concerned service,
5 and at the close of the hearing, the Court granted L&I’s motion and denied Farm Boy’s. As a
6 contempt sanction, the Court entered judgment for L&I on February 8, 2021, in the amount of
7 \$42,000—the total \$2,000 per day sanction from December 18, 2020, through January 7, 2021.

8 On February 8, 2021, Farm Boy filed several pleadings, including a motion to dismiss
9 this action and vacate all orders that the Court had entered. Farm Boy obtained an ex parte
10 show cause on the same date, but did not provide any of its pleadings to counsel for L&I until
11 February 11. In its motion to dismiss, for the very first time, Farm Boy raised personal
12 jurisdiction as an issue. On February 22, 2021, Farm Boy filed a supplemental motion to
13 dismiss and vacate, attaching internet documents that were not supported by a declaration.

14 III. ARGUMENT

15 A. RCW 49.17.130 and .170 Allows L&I to Seek Enforcement of an Order of 16 Immediate Restraint by Petition and Does Not Require a Summons

17 1. An agency need not initiate an action enforcing an agency order by a 18 summons

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

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

1 The civil rules do not apply to commencement of an action if the Legislature has
2 established an alternative method. Three such statutes apply here, two under WISHA and one
3 under the APA—any of which independently provides authority for initiating proceedings
4 without a summons. First, RCW 49.17.130 provides that if an order of immediate restraint has
5 been issued, L&I may “request the attorney general to make an application to the superior
6 court of the county wherein such condition of employment or practice exists for a temporary
7 restraining order or such other relief as appears to be appropriate under the circumstances.”
8 Second, under RCW 49.17.170, L&I may seek a TRO initiated by a petition. And, third, RCW
9 34.05.578 allows an agency to seek enforcement of its order by filing a petition for civil
10 enforcement in superior court. “The petition must name as respondent each alleged person
11 against whom the agency seeks to obtain civil enforcement.” RCW 34.05.578(4). None of
12 these proceedings contemplates the issuance of a summons.

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

24 Rules about service do not apply under the APA (*Diehl*, 153 Wn.2d at 215), including
25 RCW 34.05.578, which allows for civil enforcement of an agency order. This is because the
26 APA has specified when the civil rules apply. *Id.* For enforcing an agency order, RCW

1 34.05.390 incorporates the ancillary procedures that the civil rules may address. RCW
2 34.05.510(2), for example, provides for use of civil rules in “intervention, class actions,
3 consolidation, joinder, severance, transfer, protective orders, and other relief from disclosure of
4 privileged or confidential material, are governed, to the extent not inconsistent with this
5 chapter, by court rule.” These provisions do not include use of a summons and complaint.
6 Countless APA petitions of various sorts are filed each year, but Farm Boy can cite no case
7 that has required a summons. That’s because it is in a different context than a “civil action”
8 commenced under CR 3. Rather, it is action at the agency level that is then enforced at the
9 superior court level.

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

20 **2. Farm Boy waived any challenge on personal jurisdiction grounds**

21 Farm Boy is incorrect that if there were a defect in service (and there was not) this
22 means that the Court must dismiss the matter and vacate all of its previous orders. Suppl. Mot.
23 12. A party waives a claim of lack of personal jurisdiction when a party takes action
24 inconsistent with a personal jurisdiction defense. More specifically, a party waives the claim of
25 lack of personal jurisdiction by “consent[ing], expressly or impliedly, to the court’s exercising
26 jurisdiction.” *In re Marriage of Steele*, 90 Wn. App. 992, 997–98, 957 P.2d 247 (1998).

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

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

21 **3. Due process does not require a summons regarding agency-related actions**

22 Farm Boy also shows no due process concern. *Asahi Metal* looks to traditional notions
23 of fair play and whether it would be unreasonable to assert personal jurisdiction. 480 U.S. at
24 113. In that case, it was unreasonable to make a defendant from Japan appear in California. A
25 situation far different than presented here where actual notice of a proceeding was given and
26

1 the forum was in the same county as the company’s business site. Farm Boy does not and
2 cannot rationally argue that it was prejudiced in any way by the lack of a summons.

3 It would be extremely surprising that APA petitions, which are not initiated by
4 summons, would not confer personal jurisdiction on the parties. Likewise, due process does not
5 prohibit a proceeding from being initiated by a WISHA application or a petition as long as
6 notice is provided to the party. The statutes provided for a petition and application process
7 provide notice; the form in which that notice is provided is not constitutionally mandated.
8 Farm Boy cites no case that says that an agency action in superior court needs to be initiated by
9 a summons to satisfy due process

10 **B. L&I Showed Both That Irreparable Harm Would Occur as a Result of Farm**
11 **Boy’s Disregard of the Law and Also That Actual and Substantial Injury Will**
12 **Result**

13 Farm Boy argues that the TRO should not have been granted. Its main argument in this
14 context is a claim that L&I did not show actual injury to justify a TRO without written notice.
15 The TRO was initially granted without written notice to Farm Boy on a showing that
16 “immediate and irreparable injury” would occur. CR 65(b). The declaration of the top
17 workplace safety expert in the state, former Assistant Director Anne Soiza, stated that “[T]he
18 advent of SARS-CoV-2 that caused COVID-19 has presented unique challenges for protecting
19 workers. COVID-19 is a serious workplace hazard that creates a substantial risk of injury or
20 death.” Soiza Decl. 3. It is spread by contact in close quarters, including restaurants. Soiza
21 Decl. 4-5, 7. Assistant Director Soiza stated in her declaration supporting the petition to
22 enforce the order of immediate restraint that “irreparable injury” will occur from continued
23 contact:

24 Irreparable injury will occur if Farm Boy Drive In does not cease in-door dining
25 operations and follow masking and social distancing requirements immediately.
26 Every day it operates workers and the public are at risk of contracting COVID-
19. Contracting the disease will be irreparable if the condition becomes
symptomatic with serious health consequences and potential death. This will

1 harm the State of Washington as it has a deep founded obligation to protect its
2 citizens and workers from bodily harm or death.

3 Soiza Decl. 11; *see also* Lindquist Decl.

4 After the TRO was granted, written notice was given to Farm Boy’s attorney so
5 irreparable harm standard no longer applied. Instead, the ordinary standard of showing “actual
6 and substantial injury” applied. *See Tyler Pipe Indus., Inc. v. Dep’t of Revenue*, 96 Wn 2d 785,
7 792, 638 P.2d 1213 (1982). More specifically, as defined in RCW 49.17.130, “actual and
8 substantial injury” is defined as when “there is a substantial probability that death or serious
9 physical harm could result to any employee,” and in RCW 49.17.170, which allows a TRO
10 when “there is a substantial probability that death or serious physical harm could result to any
11 employee immediately.” These standards do not require actual harm but instead the “statute’s
12 ‘substantial probability’ language refers to the likelihood that, should harm result from the
13 violation, that harm could be death or serious physical harm.” *Potelco*, 166 Wn. App. at 656
14 (quotations omitted). Even Farm Boy does not deny that if a worker contracted COVID-19,
15 there was a substantial probability that the harm could have resulted in death or serious
16 physical harm. *Id.* at 557.

17 Farm Boy appears to argue that L&I cannot get a TRO to benefit workers, stating,
18 “Plaintiff, ‘statewide,’ can do whatever it wants and that is legal.” Suppl. Mot. 18. Farm Boy
19 misses the point both legally and factually. A government agency can seek injunctive relief for
20 violations of state law. *Dep’t of Ecology v. Anderson*, 94 Wn.2d 727, 730, 620 P.2d 76 (1980)
21 (when a governmental body seeks to enjoin the commission of acts made illegal by statute,
22 jurisdiction of court may be invoked). RCW 49.17.130 and .170 explicitly contemplate L&I
23 acting to protect workers by seeking a TRO for violation of an order of immediate restraint.
24 This allows L&I to act on the behalf of workers to protect them. Factually, Farm Boy’s action
25 in disregarding WAC 296-800-14035 directly impaired L&I’s ability to protect the workers at
26

1 Farm Boy. The TRO process authorized in RCW 49.17.130 and RCW 49.17.170 are what
2 authorized the TRO.²

3 Farm Boy makes a series of arguments also that no specific facts show “immediate and
4 irreparable injury, loss, or damage.” Suppl. Mot. 17. It argues that citing studies that say people
5 “*could* get infected or sick” does not support a TRO. Suppl. Mot. 15. It argues that there is no
6 irreparable harm because “Not one person has been sick at Farm Boy or injured in any way.”
7 Suppl. Mot. 18. And it argues that because the death rate is low in Thurston County and
8 Washington state that “[t]he likelihood of any employee dying from COVID-19 at Farm Boys
9 is basically zero.” Suppl. Mot. 19.

10 These arguments lack merit. First, the law does not require that someone be sick at
11 Farm Boy before the Court may issue a TRO. What is required is that there be a violation of an
12 order of immediate restraint and that “there is a substantial probability that death or serious
13 physical harm could result to any employee.” The standard is that it “could” result, not that it
14 has already resulted, and all the Court has to do is follow the statute. “Where an injunction is
15 authorized by statute, and the statutory conditions are satisfied as in the facts presented here,
16 the agency to whom the enforcement of the right has been entrusted is not required to show
17 irreparable injury.” *United States v. Odessa Union Warehouse Co-op*, 833 F.2d 172, 175 (9th
18 Cir. 1987). Of course, notwithstanding the compliance with the requirements of the statute,
19 L&I proved both irreparable injury under CR 65 and “either resulting in or will result in actual
20 and substantial injury” under *Tyler Pipe*. 96 Wn 2d at 792. One injury is having its rule
21 violated, which undermines enforcement efforts for L&I. *See Dep’t of Ecology*, 94 Wn.2d at
22 730. A second injury is that L&I proved that COVID-19 is an easily transmitted disease in

23
24 ² Farm Boy points out that another department of L&I limits workers’ compensation claims to a showing
25 of work-relatedness. Suppl. Mot. 18 n.7. Workers’ compensation claims require a different legal standard.
26 *Compare* RCW 49.17.130 (giving L&I the ability to seek a TRO for a violation of its rules if “there is a
substantial probability that death or serious physical harm could result to any employee.”) *with* *Dennis v. Dep’t of
Labor & Indus.*, 109 Wn.2d 467, 481, 745 P.2d 1295 (1987) (workers’ compensation coverage only if illness
results from distinctive conditions of employment as compared to all employment); RCW 51.08.140.

1 close quarters like restaurants that can cause harmful health consequences. Lindquist Decl. 4-7;
2 Soiza Decl. 7-8.

3 Second, the law does not require the Department to wait until a worker becomes sick—
4 or dies—before taking action to protect the worker. Such standard would gut WISHA’s
5 protective enforcement mandate, which is to *prevent* unnecessary illness or death. In the
6 context of citations of WISHA, the courts have long rejected the need to prove actual injury.
7 *E.g., Potelco*, 166 Wn. App. at 656.

8 Third, Farm Boy appears to believe that death is the only measure of harm, and there
9 are not enough deaths to warrant state action. But L&I acts to prevent any avoidable workplace
10 illness, injury, or death. And COVID-19 can cause respiratory symptoms, high fever, nausea,
11 fatigue, and neurological symptoms. Lindquist Decl. 2. Complications leading to death may
12 include respiratory failure, acute respiratory distress syndrome, sepsis and septic shock,
13 thromboembolism, and multiorgan failure, including injury of the heart, liver, or kidneys.
14 Lindquist Decl. 2. L&I acted appropriately by enforcing its rules to prevent such terrible harms
15 to workers. The facts show a substantial probability of injury, and the competing equities
16 (*Tyler Pipe*, 96 Wn.2d at 793)—protecting against injury or death versus allowing indoor
17 dining despite the threat of injury or death—show the issuance of the TRO and later orders was
18 warranted.

19 In its other arguments, Farm Boy argues that no notice was given to Mary Fowler
20 before the TRO was obtained ex parte. Suppl. Mot. 17. But Farm Boy admits that L&I notified
21 Farm Boy. Suppl. Mot. 17. Farm Boy is the employer and was properly notified under RCW
22 49.17.130. RCW 49.17.130 permits service on the “employer.” And Mary Fowler was doing
23 business as Farm Boy and is the employer. Farm Boy also argues that the initial TRO is invalid
24 because it did not state when it would expire, but it admits that the TRO lists a show cause
25 hearing date. Suppl. Mot. 19.

1 **C. The Matter Is Not Moot Because Farm Boy Was Held in Contempt for Violating**
2 **the Temporary Restraining Order**

3 Farm Boy argues the case is moot because Thurston County entered Phase 2 of the
4 Governor’s plan, and indoor dining is now available at 25 percent capacity. Suppl. Mot. 12.
5 Authorization to operate at 25 percent capacity occurred when the open air indoor dining
6 guidance was issued in mid-January, but it violated the Court’s TRO order before that and was
7 properly held in contempt. Hall Decl. (3/3/21) Ex. 1. Thus, for behavior before February 1,
8 2021, the issue is not moot.³

9 **D. Farm Boy’s Belated Evidentiary Objections Should Be Rejected**

10 Farm Boy’s belated evidentiary objections should be rejected. Farm Boy argues that for
11 hearsay and personal knowledge reasons the L&I safety expert’s declaration about Farm Boy’s
12 remain opening for indoor dining services should be struck. Suppl. Mot. 13. It appears to argue
13 that it is in dispute as to whether it was open. Suppl. Mot. 15. The Court has already rejected
14 these arguments at the January 5, 2021 hearing and the subsequent contempt hearings. In any
15 event, admissions of Farm Boy support that it was open as it openly revealed this on Facebook
16 as documented in exhibits filed with the petition to enforce the order of immediate restraint.
17 Hall Decl. (12/15/20) Ex. 1. And on December 23, 2020, L&I safety expert Lyndsey Banks
18 drove by and saw that the restaurant was open with unmasked individuals inside. Banks Decl.
19 (12/23/20) 1. Declarations submitted by Farm Boy corroborate work at Farm Boy. *E.g.*,
20 Carrothers Decl. 1. The workers signed waivers that acknowledged they were working at Farm
21 Boy. *E.g.*, Carrothers Decl. Ex.

22 Farm Boy argues that L&I’s declarations do not present firsthand knowledge that “any
23 employee or person from Farm Boy suffers from COVID-19 or that anyone is actually sick or
24 actually being harmed.” Suppl. Mot. 13. But again, L&I need not show that someone is sick
25 from COVID-19 to show that there is the probability of someone becoming ill. The whole

26 ³ L&I agrees that beyond those time there is no need for a TRO or a preliminary injunction.

1 point of pandemic response is to *avoid* infection in an emergency, not to create futile after-the-
2 fact restrictions.

3 Farm Boy argues that there is a violation of *Frye* because L&I experts allegedly have
4 no firsthand knowledge of the studies they cite. Mot. 14. This argument has no merit because
5 experts can rely on studies that need not be admissible into evidence. ER 703. In its *Frye*
6 argument, Farm Boy argues that there is no testimony about the underlying scientific principles
7 and the technique employing that principle. Mot 14. What Farm Boy does not challenge,
8 however, is the validity of the studies themselves on which L&I's experts relied.

9 A *Frye* challenge is not to the scientific weight of the evidence but rather the method to
10 obtain the scientific opinion. *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 597, 603,
11 260 P.3d 857 (2011) (citing *Frye v. United States*, 54 App. D.C. 46, 293 F. 1013 (1923)). Farm
12 Boy has not made a *Frye* motion supported by any declaration from an expert that would show
13 there was a disagreement over the scientific methods employed by L&I's expert nor has it
14 raised anything more than concerns that go to the weight of the evidence. Instead, Farm Boy
15 references COVID-19 response in Sweden, North Dakota, and China, with no declarations
16 supporting any scientific disagreement about underlying methods of scientific inquiry. Suppl.
17 Mot. 14. As this Court ruled on January 12, scientific assertions without evidentiary support
18 are not considered.

19 Farm Boy argues that it was speculative that there was a harm, again raising a series of
20 arguments that all go to the same theme: that L&I had to show someone being sick at Farm
21 Boy. Suppl. Mot. 15. There is no such requirement.

22 Finally, Farm Boy argues that admission of the alleged hearsay violates the
23 confrontation clause, but it admits this applies in the criminal context. Suppl. Mot. 16. It also
24 argues that due process was violated by admitting alleged hearsay, but it does not show that it
25 did not have notice and an opportunity to be heard before this Court, and cites no authority
26 suggesting that an evidentiary claim like hearsay underpins a constitutional claim in a civil

1 case. Farm Boy has also undermined its own arguments throughout these proceedings by
2 submitting articles and studies that it claims support its positions, but do not vitiate against the
3 Governor's Proclamations.

4 **E. There Was No Due Process Violation for Basing an Order of Contempt Before**
5 **There Was a Hearing on the Temporary Restraining Order**

6 Farm Boy argues that there was a due process right to a hearing on the temporary
7 restraining order before it could be held in contempt of such order. Suppl. Mot. 21. But due
8 process only requires notice and hearing on the contempt motion. *See Nielsen v. Nielsen*, 38
9 Wn. App. 586, 589, 687 P.2d 877 (1984). There was a hearing on both contempt motions and
10 there was a hearing on the merits before the second order. The contempt order was for
11 violating the Court's TRO. RCW 7.21.010(1)(b) prohibits a party from intentionally
12 disobeying an order of the court. A court order must be obeyed, even if the party believes that
13 it were erroneous. *State v. Turner*, 98 Wn.2d 731, 739, 658 P.2d 658 (1983). It need only not
14 be followed if the order was void because there was a lack of personal or subject matter
15 jurisdiction. *Id.* Farm Boy does not contest that there was subject matter jurisdiction under
16 RCW 49.17.170, which vests jurisdiction in the Court a TRO under RCW 49.17. As explained
17 above, its claim of a lack of personal jurisdiction lacks merit and has been waived.

18 **F. The Merits of the Governor's Proclamation Is Not Before This Court, and In Any**
19 **Event, the Proclamations Are Within the Governor's Discretion**

20 Farm Boy's arguments about the validity of Governor's Proclamation are not properly
21 before this Court. Farm Boy ignores that it has not contested the validity of the WAC 296-800-
22 14035 in a rules challenge and cannot challenge it now. RCW 49.17.040 gives L&I authority to
23 enact safety and health regulations; RCW 49.17.060 gives the Department the mandate to
24 enforce them. Farm Boy has not filed a rules challenge against WAC 296-800-14035, and
25 cannot raise in these proceedings an argument that the Department's rule is invalid. *See Kettle*
26 *Range Conservation Grp. v. Dept of Nat. Res.*, 120 Wn. App. 434, 458, 85 P.3d 894 (2003)
(party must bring "a petition for declaratory judgment in Thurston County Superior Court" to

1 challenge a rule’s adequacy); RCW 34.05.570(2). Rules have the force and effect of law.
2 *Wingert v. Yellow Freight Sys., Inc.*, 146 Wn.2d 841, 848, 50 P.3d 256 (2002).⁴

3 Setting aside the procedural posture and the lack of authority supporting the
4 constitutional claim, if the Court decides to reach the argument on the merits, Farm Boy
5 appears to dispute the authority to issue a proclamation in the first place, arguing it should be
6 left to the Legislature. Suppl. Mot. 24. Besides the fact that the law—RCW 43.06.220—allows
7 the Governor to issue emergency proclamations, the Washington Legislature adopted a
8 concurrent resolution that ratifies the Governor’s authority to respond to COVID-19 using
9 emergency authority. S.C.R. 8402, 67th Leg., Reg. Sess. (Wash. 2021).

10 Farm Boy’s argument that there is no emergency taking place at Farm Boy, Thurston
11 County, or the State lacks merit. The Governor has wide discretion to declare an emergency.
12 *Cougar Bus. Owners Ass’n v. State*, 97 Wn.2d 466, 474, 647 P.2d 481 (1982), *abrogated in part*
13 *on other grounds by Yim v. City of Seattle*, 194 Wn.2d 682, 694, 451 P.3d 694 (2019). Courts must
14 give the Governor’s declaration of emergency every favorable presumption and defer to its
15 judgment unless it is obvious that the declaration of emergency is false. *CLEAN v. State*, 130
16 Wn.2d 782, 812, 928 P.2d 1054 (1996), *as amended* (Jan. 13, 1997) (considering a legislative
17 declaration of emergency). The Legislature has delegated the authority to make such proclamations
18 to the Governor. The proclamation must be “deemed conclusive” unless it is “obviously false and a
19 palpable attempt at dissimulation.” *CLEAN*, 130 Wn.2d at 808.

20 When considering an emergency declaration, Courts do not undertake their own “inquiry as
21 to the facts, but must consider the question from what appears upon the face of the act, aided by its
22 judicial knowledge.” *Id.* at 807-08 (quoting *State ex rel. Humiston v. Meyers*, 61 Wn.2d 772, 778,
23 380 P.2d 735 (1963)). Farm Boy cannot show that the present emergency is “obviously false.” The

24 ⁴ Farm Boy also argues that L&I admitted in an April 2020 document that predates L&I’s position that it
25 could not enforce the Governor’s proclamation because it didn’t have a rule. Suppl. Mot. 23. It then asserts that
26 L&I has “declared authority to essentially do whatever it wants” by citing employers for not being in compliance
of the proclamation. Suppl. Mot. 23-24. It ignores that L&I adopted an emergency rule to reference the
Governor’s Proclamation as a safety standard because this is necessary to protect workers.

1 unique dangers posed by COVID-19 are widely recognized by virtually all of the nation’s leading
2 health officials and experts. The state of facts that can be known or reasonably assumed, *Cougar*,
3 97 Wn.2d at 478, support the existence of a state of emergency in all counties at the time of the
4 order of immediate restraint, the TRO, and the contempt proceedings. COVID-19 remains highly
5 transmissible, particularly through asymptomatic transmission. Farm Boy offers only rhetoric to
6 say it isn’t necessary to have the proclamations to “help preserve and maintain life, health,
7 property, or public peace.” RCW 43.06.220(g). L&I presented extensive evidence about the
8 dangers of COVID-19 and its spread. Farm Boy relies on its argument that there is a low death
9 rate per population. It cites no authority that the measure of an emergency demanding a
10 proclamation is a certain death rate. In any event, any death is serious.

11 Farm Boy also points out that the RCW 43.06.210 requires that the “the governor must
12 terminate state of emergency proclamation when order has been restored in the area of
13 affected.” From this, it argues that “[o]rder has been restored if it was ever lacking. The
14 fundamental rights of employment, property rights, and public peace exponentially outweigh
15 the COVID-19 and dying.” Suppl. Mot. 24 (emphasis omitted). Continuing the rhetoric, it
16 argues that “the continuation of these authoritarian, tyrannical proclamations are the only thing
17 that is jeopardizing ‘life’ and ‘health.’” Suppl. Mot. 24.

18 It lies in the Governor’s discretion when to decide that the emergency has ended. The Court
19 in *Cougar* held that the discretion enjoyed by the Governor about the termination of an emergency
20 “is the same” as about the declaration; the decision to declare the end of an emergency is a “policy
21 decision, consciously balancing risks and advantages.” 97 Wn.2d at 472 (quoting *King v. Seattle*,
22 84 Wn.2d 239, 246, 525 P.2d 228 (1974)); see also *Roussio v. State*, 170 Wn.2d 70, 92, 239 P.3d
23 1084 (2010) (“It is the role of the [L]egislature, not the judiciary, to balance public policy interests
24 and enact law.”). The Legislature has committed these executive decisions to the Governor’s “sole
25 discretion” and they are generally thus “not amenable to review.” *Cougar*, 97 Wn.2d at 476. Again,
26 the Governor’s determination that a state of emergency continues to exist may be overturned only

1 if it is patently false, not in good faith, and otherwise not supported by any set of facts that is
2 known or can be assumed.

3 It is not for Farm Boy to decide what is and is not an emergency in the State of
4 Washington. It has not shown that the Governor's Proclamations have any statutory or
5 constitutional defect.

6 **G. No Violation of Any Right to Employment**

7 Finally, Farm Boy re-raises its argument about a right to employment. Suppl. Mot. 22.
8 This Court rejected this argument, and L&I rests on the briefing already provided on this issue.
9 *See Reply to Resp. to Prel. Inj. and Mot. to Dismiss* 4-6 (Jan. 15, 2021).

10 **IV. CONCLUSION**

11 This Court should deny Farm Boy's motion to vacate previous orders and to dismiss
12 (but the TRO should be terminated as of February 1, 2021). The Court should enter findings of
13 fact and conclusions of law that support its granting of a temporary restraining order and
14 subsequent preliminary injunction in support of the February 8, 2021 judgment finding
15 contempt.

16 DATED this 3rd day of March 2021.

17 ROBERT W. FERGUSON
18 Attorney General

19 

20 MICHAEL HALL, WSBA No. 19871
21 Assistant Attorney General