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☐ EXPEDITE
☐ No Hearing Set
☑ Hearing is Set:
Date: 4/23/2021
Time: Without Oral Argument
Hon. Chris Lanese

STATE OF WASHINGTON
THURSTON COUNTY SUPERIOR COURT

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON Plaintiff, v. FOWLER NAT D. AND MARY M. DBA FARM BOY DRIVE IN 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 (RENOTED VERSION)

ATTORNEY GENERAL OF WASHINGTON
Labor & Industries Division
PO Box 40121
Olympia, WA 98504-0121
(360) 586-7707
FAX: (360) 586-7717

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ATTORNEY GENERAL OF WASHINGTON
Labor & Industries Division
PO Box 40121
Olympia, WA 98504-0121
(360) 586-7707
FAX: (360) 586-7717

I. INTRODUCTION

This brief responds to Farm Boy's motion to dismiss dated February 8, 2021 and its supplemental motion dated February 22, 2021. In the interest of ease to the Court, the Department of Labor & Industries' (L&I's) response is combined with the response to the supplemental pleading.

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 harm. *Id.* at 557.

Second, Farm Boy presented no credible evidence that COVID-19 is not highly

ATTORNEY GENERAL OF WASHINGTON
Labor & Industries Division
PO Box 40121
Olympia, WA 98504-0121
(360) 586-7707
FAX: (360) 586-7717

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

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

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

II. FACTS

A. COVID-19 Can Cause Serious Illness or Death

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.

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

Responding to the health crisis and acting under the authority provided by RCW 43.06.220, the Governor has issued a series of emergency proclamations following the best

ATTORNEY GENERAL OF WASHINGTON
Labor & Industries Division
PO Box 40121
Olympia, WA 98504-0121
(360) 586-7707
FAX: (360) 586-7717

scientific and medical analysis available in terms of limitation of contact. Streuli Decl. 2-6. L&I has issued emergency rules, codified at WAC 296-800-14035, to enforce the Governor's proclamations. Under WAC 296-800-14035, "[w]here a business activity is prohibited by an emergency proclamation an employer shall not allow employees to perform work."

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

C. The Constitution's Enablers, the Legislature, and L&I Have Acted to Protect Workers

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

WISHA's purpose is to assure "safe and healthful working conditions for every man and woman working in the state of Washington," and to "create, maintain, continue, and enhance the industrial safety and health program of the state." RCW 49.17.010; *Afoa*, 176 Wn.2d at 470. L&I is mandated to adopt rules to protect workers from harmful airborne transmissions. RCW 49.17.050. RCW 49.17.060(2) requires employers to follow the safety

ATTORNEY GENERAL OF WASHINGTON
Labor & Industries Division
PO Box 40121
Olympia, WA 98504-0121
(360) 586-7707
FAX: (360) 586-7717

and health standards adopted by the Department. *Afoa*, 176 Wn. 2d at 471. Businesses, including restaurants, must follow WAC 296-800-14035, which provides: "(1) Where a business activity is prohibited by an emergency proclamation an employer shall not allow employees to perform work."

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

D. The Court Acted Multiple Times in This Case

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

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

There were several hearings after the TRO was granted. On an order to show cause about the temporary restraining order, the Court held a hearing on December 22, 2020. Farm

ATTORNEY GENERAL OF WASHINGTON
Labor & Industries Division
PO Box 40121
Olympia, WA 98504-0121
(360) 586-7707
FAX: (360) 586-7717

Boy did not claim there was a defect in service at that hearing but did request a continuance, which the Court granted to January 5, 2021. In the meantime, Farm Boy ignored the TRO and L&I moved for an order of contempt. Farm Boy filed a series of declarations in response to the motion for contempt, none of which alleged a service issue, on December 28, 2020. After a hearing on December 29, 2020, during which Farm Boy opposed the contempt motion but again did not allege a service issue, this Court entered an order finding the restaurant in contempt and imposing sanctions of $2,000 per day from December 18, 2020, through the date Farm Boy purged its contempt.

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

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

On January 19, 2021, the Court considered Farm Boy's motion to dismiss and L&I's motion for a second order of contempt. The Court rejected an argument that L&I did not prove that actual and substantial injury will result by allowing Farm Boy to continue to offer indoor

ATTORNEY GENERAL OF WASHINGTON
Labor & Industries Division
PO Box 40121
Olympia, WA 98504-0121
(360) 586-7707
FAX: (360) 586-7717

dining services. Although Farm Boy raised several arguments, none of them concerned service, and at the close of the hearing, the Court granted L&I's motion and denied Farm Boy's. As a contempt sanction, the Court entered judgment for L&I on February 8, 2021, in the amount of $42,000—the total $2,000 per day sanction from December 18, 2020, through January 7, 2021.

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

III. ARGUMENT

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

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

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

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

The civil rules do not apply to commencement of an action if the Legislature has established an alternative method. Three such statutes apply here, two under WISHA and one under the APA—any of which independently provides authority for initiating proceedings without a summons. First, RCW 49.17.130 provides that if an order of immediate restraint has

ATTORNEY GENERAL OF WASHINGTON
Labor & Industries Division
PO Box 40121
Olympia, WA 98504-0121
(360) 586-7707
FAX: (360) 586-7717

been issued, L&I may "request the attorney general to make an application to the superior court of the county wherein such condition of employment or practice exists for a temporary restraining order or such other relief as appears to be appropriate under the circumstances." Second, under RCW 49.17.170, L&I may seek a TRO initiated by a petition. And, third, RCW 34.05.578 allows an agency to seek enforcement of its order by filing a petition for civil enforcement in superior court. "The petition must name as respondent each alleged person against whom the agency seeks to obtain civil enforcement." RCW 34.05.578(4). None of these proceedings contemplates the issuance of a summons.

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

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

ATTORNEY GENERAL OF WASHINGTON
Labor & Industries Division
PO Box 40121
Olympia, WA 98504-0121
(360) 586-7707
FAX: (360) 586-7717

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

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

2. Farm Boy waived any challenge on personal jurisdiction grounds

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

Consent may be established by proceeding and arguing the case on its merits. *See In re Marriage of Maddox*, 41 Wn. App. 248, 250-52, 703 P.2d 1062 (1995); *see also Nw. Cascade, Inc. v. Unique Const., Inc.*, 187 Wn. App. 685, 694, 351 P.3d 172 (2015). In *Maddox*, the defendant did not ask for an immediate ruling by the trial court on the issue of personal

ATTORNEY GENERAL OF WASHINGTON
Labor & Industries Division
PO Box 40121
Olympia, WA 98504-0121
(360) 586-7707
FAX: (360) 586-7717

jurisdiction and submitted an affidavit and memorandum of authorities refuting the merits of his wife's position. 41 Wn. App. at 250-52. This activity was enough to waive a claim of a lack of personal jurisdiction.

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

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

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

It would be extremely surprising that APA petitions, which are not initiated by summons, would not confer personal jurisdiction on the parties. Likewise, due process does not prohibit a proceeding from being initiated by a WISHA application or a petition as long as

ATTORNEY GENERAL OF WASHINGTON
Labor & Industries Division
PO Box 40121
Olympia, WA 98504-0121
(360) 586-7707
FAX: (360) 586-7717

notice is provided to the party. The statutes provided for a petition and application process provide notice; the form in which that notice is provided is not constitutionally mandated. Farm Boy cites no case that says that an agency action in superior court needs to be initiated by a summons to satisfy due process

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

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

> Irreparable injury will occur if Farm Boy Drive In does not cease in-door dining operations and follow masking and social distancing requirements immediately. 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 harm the State of Washington as it has a deep founded obligation to protect its citizens and workers from bodily harm or death.

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

After the TRO was granted, written notice was given to Farm Boy's attorney so irreparable harm standard no longer applied. Instead, the ordinary standard of showing "actual and substantial injury" applied. *See Tyler Pipe Indus., Inc. v. Dep't of Revenue*, 96 Wn 2d 785,

ATTORNEY GENERAL OF WASHINGTON
Labor & Industries Division
PO Box 40121
Olympia, WA 98504-0121
(360) 586-7707
FAX: (360) 586-7717

792, 638 P.2d 1213 (1982). More specifically, as defined in RCW 49.17.130, "actual and substantial injury" is defined as when "there is a substantial probability that death or serious physical harm could result to any employee," and in RCW 49.17.170, which allows a TRO when "there is a substantial probability that death or serious physical harm could result to any employee immediately." These standards do not require actual harm but instead 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*, 166 Wn. App. at 656 (quotations omitted). Even Farm Boy does not deny that if a worker contracted COVID-19, there was a substantial probability that the harm could have resulted in death or serious physical harm. *Id.* at 557.

Farm Boy appears to argue that L&I cannot get a TRO to benefit workers, stating, "Plaintiff, 'statewide,' can do whatever it wants and that is legal." Suppl. Mot. 18. Farm Boy misses the point both legally and factually. A government agency can seek injunctive relief for violations of state law. *Dep't of Ecology v. Anderson*, 94 Wn.2d 727, 730, 620 P.2d 76 (1980) (when a governmental body seeks to enjoin the commission of acts made illegal by statute, jurisdiction of court may be invoked). RCW 49.17.130 and .170 explicitly contemplate L&I acting to protect workers by seeking a TRO for violation of an order of immediate restraint. This allows L&I to act on the behalf of workers to protect them. Factually, Farm Boy's action in disregarding WAC 296-800-14035 directly impaired L&I's ability to protect the workers at Farm Boy. The TRO process authorized in RCW 49.17.130 and RCW 49.17.170 are what authorized the TRO.[1]

[1] Farm Boy points out that another department of L&I limits workers' compensation claims to a showing of work-relatedness. Suppl. Mot. 18 n.7. Workers' compensation claims require a different legal standard. *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.

ATTORNEY GENERAL OF WASHINGTON
Labor & Industries Division
PO Box 40121
Olympia, WA 98504-0121
(360) 586-7707
FAX: (360) 586-7717

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

These arguments lack merit. First, the law does not require that someone be sick at Farm Boy before the Court may issue a TRO. What is required is that there be a violation of an order of immediate restraint and that "there is a substantial probability that death or serious physical harm could result to any employee." The standard is that it "could" result, not that it has already resulted, and all the Court has to do is follow the statute. "Where an injunction is authorized by statute, and the statutory conditions are satisfied as in the facts presented here, the agency to whom the enforcement of the right has been entrusted is not required to show irreparable injury." *United States v. Odessa Union Warehouse Co-op*, 833 F.2d 172, 175 (9th Cir. 1987). Of course, notwithstanding the compliance with the requirements of the statute, L&I proved both irreparable injury under CR 65 and "either resulting in or will result in actual and substantial injury" under *Tyler Pipe*. 96 Wn 2d at 792. One injury is having its rule violated, which undermines enforcement efforts for L&I. *See Dep't of Ecology*, 94 Wn.2d at 730. A second injury is that L&I proved that COVID-19 is an easily transmitted disease in close quarters like restaurants that can cause harmful health consequences. Lindquist Decl. 4-7; Soiza Decl. 7-8.

Second, the law does not require the Department to wait until a worker becomes sick—or dies—before taking action to protect the worker. Such standard would gut WISHA's protective enforcement mandate, which is to *prevent* unnecessary illness or death. In the

ATTORNEY GENERAL OF WASHINGTON
Labor & Industries Division
PO Box 40121
Olympia, WA 98504-0121
(360) 586-7707
FAX: (360) 586-7717

context of citations of WISHA, the courts have long rejected the need to prove actual injury. *E.g.*, *Potelco*, 166 Wn. App. at 656.

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

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

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

Farm Boy argues the case is moot because Thurston County entered Phase 2 of the Governor's plan, and indoor dining is now available at 25 percent capacity. Suppl. Mot. 12. Authorization to operate at 25 percent capacity occurred when the open air indoor dining guidance was issued in mid-January, but it violated the Court's TRO order before that and was

ATTORNEY GENERAL OF WASHINGTON
Labor & Industries Division
PO Box 40121
Olympia, WA 98504-0121
(360) 586-7707
FAX: (360) 586-7717

properly held in contempt. Hall Decl. (3/3/21) Ex. 1. Thus, for behavior before February 1, 2021, the issue is not moot.[2]

D. Farm Boy's Belated Evidentiary Objections Should Be Rejected

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

Farm Boy argues that L&I's declarations do not present firsthand knowledge that "any employee or person from Farm Boy suffers from COVID-19 or that anyone is actually sick or actually being harmed." Suppl. Mot. 13. But again, L&I need not show that someone is sick from COVID-19 to show that there is the probability of someone becoming ill. The whole point of pandemic response is to *avoid* infection in an emergency, not to create futile after-the-fact restrictions.

Farm Boy argues that there is a violation of *Frye* because L&I experts allegedly have no firsthand knowledge of the studies they cite. Mot. 14. This argument has no merit because experts can rely on studies that need not be admissible into evidence. ER 703. In its *Frye* argument, Farm Boy argues that there is no testimony about the underlying scientific principles

[2] L&I agrees that beyond those time there is no need for a TRO or a preliminary injunction.

ATTORNEY GENERAL OF WASHINGTON
Labor & Industries Division
PO Box 40121
Olympia, WA 98504-0121
(360) 586-7707
FAX: (360) 586-7717

and the technique employing that principle. Mot 14. What Farm Boy does not challenge, however, is the validity of the studies themselves on which L&I's experts relied.

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

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

Finally, Farm Boy argues that admission of the alleged hearsay violates the confrontation clause, but it admits this applies in the criminal context. Suppl. Mot. 16. It also argues that due process was violated by admitting alleged hearsay, but it does not show that it did not have notice and an opportunity to be heard before this Court, and cites no authority suggesting that an evidentiary claim like hearsay underpins a constitutional claim in a civil case. Farm Boy has also undermined its own arguments throughout these proceedings by submitting articles and studies that it claims support its positions, but do not vitiate against the Governor's Proclamations.

ATTORNEY GENERAL OF WASHINGTON
Labor & Industries Division
PO Box 40121
Olympia, WA 98504-0121
(360) 586-7707
FAX: (360) 586-7717

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

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

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

Farm Boy's arguments about the validity of Governor's Proclamation are not properly before this Court. Farm Boy ignores that it has not contested the validity of the WAC 296-800-14035 in a rules challenge and cannot challenge it now. RCW 49.17.040 gives L&I authority to enact safety and health regulations; RCW 49.17.060 gives the Department the mandate to enforce them. Farm Boy has not filed a rules challenge against WAC 296-800-14035, and cannot raise in these proceedings an argument that the Department's rule is invalid. *See Kettle 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

ATTORNEY GENERAL OF WASHINGTON
Labor & Industries Division
PO Box 40121
Olympia, WA 98504-0121
(360) 586-7707
FAX: (360) 586-7717

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

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

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

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

[3] Farm Boy also argues that L&I admitted in an April 2020 document that predates L&I's position that it could not enforce the Governor's proclamation because it didn't have a rule. Suppl. Mot. 23. It then asserts that 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.

ATTORNEY GENERAL OF WASHINGTON
Labor & Industries Division
PO Box 40121
Olympia, WA 98504-0121
(360) 586-7707
FAX: (360) 586-7717

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

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

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

ATTORNEY GENERAL OF WASHINGTON
Labor & Industries Division
PO Box 40121
Olympia, WA 98504-0121
(360) 586-7707
FAX: (360) 586-7717

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

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

G. No Violation of Any Right to Employment

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

IV. CONCLUSION

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

DATED this 5th day of March 2021.

ROBERT W. FERGUSON
Attorney General

MICHAEL HALL, WSBA No. 19871
Assistant Attorney General

ATTORNEY GENERAL OF WASHINGTON
Labor & Industries Division
PO Box 40121
Olympia, WA 98504-0121
(360) 586-7707
FAX: (360) 586-7717