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6 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
7 IN AND FOR THE COUNTY OF THURSTON

8 DEPARTMENT OF LABOR & INDUSTRIES
9 FOR THE STATE OF WASHINGTON,

10 Plaintiff/Petitioner

11 NAT D FOWLER and MARY M FOWLER,
12 dba FARMBOY DRIVE IN,

13 Defendant/Respondent
14

No. 20-2-02460-34

Response to Order to Show Cause
and Temporary Restraining Order

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16 COMES NOW Jason Celski of CELSKI LAW FIRM P.L.L.C., Attorney for
17 Defendant/Respondent and answers the Order to Show Cause regarding a Temporary Restraining
18 Order as follows:

19 1. RESPONSE TO PLAINTIFFS MOTION

20 The State of Washington and the Department of Labor and Industries allege in their petition
21 that, pursuant to RCW 49.17.130 and RCW 49.17.170 that they are entitled to a Restraining order
22 and Injunctive relief restraining the Defendants from in door dining services because it is a violation
23 of safety regulations and putting workers in danger of serious injury or death and continuing to
24 violate public health regulations that endanger employees. RCW 49.17.170 states the following:
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2 **RCW 49.17.170**

3 **Injunctions—Temporary restraining orders.**

4 (1) In addition to and after having invoked the powers of restraint vested in the director as
5 provided in RCW 49.17.130 the superior courts of the state of Washington shall have jurisdiction
6 upon petition of the director, through the attorney general, to enjoin any condition or practice in
7 any workplace from which there is a substantial probability that death or serious physical harm
8 could result to any employee immediately or before the imminence of such danger can be
9 eliminated through the enforcement procedures otherwise provided by this chapter. Any order
10 issued under this section may require such steps to be taken as may be necessary to avoid,
11 correct, or remove such danger and prohibit the employment or presence of any individual in
12 locations or under conditions where such danger exists, except individuals whose presence is
13 necessary to avoid, correct, or remove such danger or to maintain the capacity of a continuous
14 process operation to resume normal operation without a complete cessation of operations, or
15 where a cessation of operations is necessary, to permit such to be accomplished in a safe and
16 orderly manner.

17 (2) Upon the filing of any such petition the superior courts of the state of Washington
18 shall have jurisdiction to grant such injunctive relief or temporary restraining order pending the
19 outcome of enforcement proceedings pursuant to this chapter, except that no temporary
20 restraining order issued without notice shall be effective for a period longer than five working
21 days.

22 (3) Whenever and as soon as any authorized representative of the director concludes that
23 a condition or practice described in subsection (1) exists in any workplace, he or she shall inform
24 the affected employees and employers of the danger and may recommend to the director that
25 relief be sought under this section.

26 (4) If the director arbitrarily or capriciously fails to invoke his or her restraining authority
under RCW 49.17.130 or fails to seek relief under this section, any employee who may be injured
by reason of such failure, or the representative of such employees, may bring an action against
the director in the superior court for the county in which the danger is alleged to exist for a writ
of mandamus to compel the director to seek such an order and for such further relief as may be
appropriate or seek the director to exercise his or her restraining authority under RCW 49.17.130.

The State also relies on RCW 49.17.130 which states the following:

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2 **RCW 49.17.130**

3 **Violations—Dangerous conditions—Citations and orders of immediate restraint—Restraints—**
4 **Restraining orders.**

5 (1) If upon inspection or investigation, the director, or his or her authorized
6 representative, believes that an employer has violated a requirement of RCW 49.17.060, or any
7 safety or health standard promulgated by rules of the department, or any conditions of an order
8 granting a variance, which violation is such that a danger exists from which there is a substantial
9 probability that death or serious physical harm could result to any employee, the director or his or
10 her authorized representative shall issue a citation and may issue an order immediately
11 restraining any such condition, practice, method, process, or means in the workplace. Any order
12 issued under this section may require such steps to be taken as may be necessary to avoid,
13 correct, or remove such danger and prohibit the employment or presence of any individual in
14 locations or under conditions where such danger exists, except individuals whose presence is
15 necessary to avoid, correct, or remove such danger or to maintain the capacity of a continuous
16 process operation in order that the resumption of normal operations may be had without a
complete cessation of operations, or where a cessation of operations is necessary, to permit such
to be accomplished in a safe and orderly manner. In addition, if any machine or equipment, or
any part thereof, is in violation of a requirement of RCW 49.17.060 or any safety or health
standard promulgated by rules of the department, and the operation of such machine or
equipment gives rise to a substantial probability that death or serious physical harm could result
to any employee, and an order of immediate restraint of the use of such machine or equipment
has been issued under this subsection, the use of such machine or equipment is prohibited, and a
notice to that effect shall be attached thereto by the director or his or her authorized
representative.

17 (2) Whenever the director, or his or her authorized representative, concludes that a
18 condition of employment described in subsection (1) of this section exists in any workplace, he
or she shall promptly inform the affected employees and employers of the danger.

19 (3) At any time that a citation or a citation and order restraining any condition of
20 employment or practice described in subsection (1) of this section is issued by the director, or his
or her authorized representative, he or she may in addition request the attorney general to make
21 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.

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26 The Plaintiff additionally indicates in their motion that by continuing indoor dining,
Farm Boy in Is (In itself) endangering the health safety of its employees, employees at other

1 jobsites, and the general public and is violating RCW 49.17.060 and WAC 296-800-14035 and
2 WAC 296-800-11005. See Petition for Order Compelling Compliance with Agency Order Page
3 4, Section 3.14 and Section 3.13 (The second 3.13). RCW 49.17.060 Reads as follows:

3 **RCW 49.17.060**

4 **Employer—General safety standard—Compliance.**

5 Each employer:

6 (1) Shall furnish to each of his or her employees a place of employment free from
7 recognized hazards that are causing or likely to cause serious injury or death to his or her
8 employees: PROVIDED, That no citation or order assessing a penalty shall be issued to any
9 employer solely under the authority of this subsection except where no applicable rule or
10 regulation has been adopted by the department covering the unsafe or unhealthful condition of
11 employment at the workplace; and

12 (2) Shall comply with the rules, regulations, and orders promulgated under this chapter.

13 WAC 296-800-14035 States the following:

14 WAC 296-800-14035 2019 Novel coronavirus prohibited business activities and
15 compliance with conditions for operations (effective 12/16/2020 through 4/15/2021) (1) Where a
16 business activity is prohibited by an emergency proclamation an employer shall not allow
17 employees to perform work. (2) Employers must comply with all conditions for operation
18 required by emergency proclamation issued under RCW 43.06.220, including Safe Start phased
19 reopening requirements for all business and any industry specific requirements. (3) An
20 “emergency proclamation” means a proclamation that is in effect, including proclamation
21 amendments and conditions, and issued under RCW 43.06.220 and is in effect at the time the
22 emergency rule was adopted.

23 WAC 296.800.11005 States the following:

24 WAC 296-800-11005 Provide a workplace free from recognized hazards. You must
25 provide your employees a workplace free from recognized hazards that are causing, or are likely
26 to cause, serious injury or death.

The Department of Labor and Industries of the State of Washington has indicated that they

1 are only trying to stop Defendant Farm Boy from allowing in door dine in service. The Plaintiff
2 indicates that by allowing individuals to dine in, they are creating a serious hazard and endangering
3 their employees which could subject them to potentially substantial injury or death. Where is their
4 evidence? There is NONE!

5 The Defendant Farm Boy, along with other restaurants, are allowed to have individuals inside
6 to order take out food, have their employees be in close contact with individuals from the general
7 public during this process, are allowed to remain open and yet, somehow if somebody sits down in
8 their restaurant is subjecting everyone to death? Farm Boy has submitted numerous pages of
9 declarations from ALL their employees indicating that they are wearing masks, social distancing
10 and sanitizing regularly. ALL of their employees are also working at will and understand the
11 severity, or lack there of, from Covid-19. This scenario is no different than any other McDonalds,
12 Wal-Mart, Costco or gas station and their employees. This scenario is, using the Plaintiff's logic,
13 more safe than sitting on an airplane for 3 hours next to a full plane of 130 individuals, not wearing
14 masks while eating or any continued sanitization during that time. In fact, It is public knowledge
15 that a Costco in Yakima/Union Gap, Washington just had over 150 employees test positive for
16 Covid-19 and yet they remain open.

17 There is no proof that by the simple act of having an individual sit down and eat somehow
18 creates a deadly risk to the employee. The employee, even when serving to go food would still
19 come in contact with the general public and expose themselves to the same amount of risk as they
20 would had the general public be allowed to sit down at the restaurant. Farm Boy has gone above
21 and beyond what was expected prior to November 16, 2020 by posting the following on their front
22 door (See attachment). With the fact that all of Farm Boy employees are continuing to wear
23 masks, are continually and regularly sanitizing and are only allowing individuals who have not
24 contracted the Covid-19 disease to enter, the Department of Labor and Industries of Washington
25 State cannot prove by any amount of evidence that Farm Boy is allowing their employees to have
26 any exposure to Covid-19 and thus, cannot meet the burden of proof required in a restraining order.

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REQUEST FOR RELIEF

Due to the fact that there is no evidence of any substantial injury or death that Farm Boy has created by allowing in door dining, Farm Boy asks this Court to Order the following:

1. A dismissal of the Temporary Restraining Order;
2. An award of Attorney fees and costs;
3. Any other award the Court deems appropriate.

DATED this 12/31/2020 day of _____, 2020.

CELSKI LAW FIRM PLLC

DocuSigned by:

Jason Celski

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Jason A. Celski WSBA No. 37848
Attorney for Petitioner

