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RECEIVED

APR 22 2014

April 21, 2014

OSH Appeals Board

Via Facsimile (916) 274-5785

Monique Newsom

~~Division of Industrial Relations~~

Occupational Safety and Health Appeals Board

2520 Venture Way, Suite 300

Sacramento, CA 95833

Re: Request for Stay of Appeal of Citations
IMIS#: 35317230167

Dear Ms. Newsom,

This correspondence will confirm that this law firm has been retained to represent Three Frogs, Inc. (Three Frogs) in regards to the civil penalty/citations issued by the Division of Occupational Safety and Health in the above matter.

We are in receipt of your Request for Additional Documents, dated April 17, 2014, and respectfully request a continuance to respond with an appeal form within thirty days, or until the criminal charges brought by the San Diego County District Attorney's Office against Three Frogs have resolved. Please see the attached indictment issued by the San Diego County District Attorney's Office. The indictment directly relates to the allegations in the citations in the above matter. See also the case law cited below in support of granting a stay for responding to the citations with an appeal form.

"Courts have constructed th[e] principle to permit the privilege of self-incrimination to be asserted 'in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory.'" *Pacers, Inc. v. Superior Court*, 162 Cal. App.3d 686, 688 (1984) (quoting *Kastigar v. United States*, 406 U.S. 441, 444 (1972)). As in *Pacers*, Three Frogs is a civil defendant facing possible criminal prosecution involving the same facts as the civil citations. The Occupational Safety and Health Commission has created precedent in which the Commission defers civil proceedings pending the completion of parallel criminal prosecutions "when the interests of justice seemed to require such action," provided that the request for a stay of the civil proceedings is not for an indefinite amount of time. *C & S Erectors, Inc.*, 18 O.S.H. Cas. (BNA) ¶ 1052 (O.S.H.R.C. Sept. 9, 1997).

The Ninth Circuit articulated a test to determine when to exercise its discretion to "stay civil proceedings in the face of a parallel criminal proceeding." *Keating v. Office of Thrift Supervision*, 45 F.3d 322, 324 (9th Cir. 1995). The decision-maker should consider the extent to which the defendant's Fifth Amendment rights are implicated. *Id.* In addition, the court should generally consider (1) the interests of plaintiff in proceeding expeditiously, and consequent prejudice in any delay; (2) the burden which any aspect of the proceeding may

place on the defendant; (3) the convenience of the court and efficient management of resources; (4) interests of persons not parties to the litigation; and (5) the interest of the public. *Id.*

In regards to this case, a temporary stay of a response/appeal to the citations will not prejudice the Department of Industrial Relations, and would in fact "ensur[e] effective enforcement of the civil and criminal provisions" of Cal/OSHA, and provide for "efficient use of government resources by precluding relitigation of issues resolved in the criminal proceeding." *C & S Erectors, Inc.*, 18 O.S.H. Cas. (BNA) ¶ 1052 (O.S.H.R.C. Sept. 9, 1997). The burden placed on Three Frogs to respond to the citations while defending itself against criminal charges would be substantial, including the potential violation of Three Frogs' Fifth Amendment right against self-incrimination, which is a significant factor to consider when determining whether to grant a stay of the civil proceedings, which would include the appeals process. *See, e.g., Keating*, 45 F.3d at 326.

Please notify this office as soon as possible regarding the status of this request.
Thank you.

Very Truly Yours,

A handwritten signature in black ink, appearing to read "Scott A. Wilson". The signature is stylized with a large, sweeping loop at the end.

Scott A. Wilson

SAW/dcg

cc: Three Frogs, Inc.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO
CENTRAL DIVISION

F I L E D

Superior Court

APR 14 2014

A. Munoz

THE PEOPLE OF THE STATE OF CALIFORNIA,
 Plaintiff,

v.
 DAVID SCOTT WOLFE, ✓
dob 03/27/66;

JONATHAN D. COX,
dob 08/21/79;

JOHN MURPHY,
dob 03/13/78;

THREE FROGS, INC.,
dob;

Defendants

CT No. CD255289
 DA No. ADQ872

COMPLAINT-FELONY

INFORMATION

Date: _____

COPY

PC296 DNA TEST STATUS SUMMARY

Defendant	DNA Testing Requirements
WOLFE, DAVID SCOTT	DNA sample required upon conviction
COX, JONATHAN D.	DNA sample required upon conviction
MURPHY, JOHN	DNA sample required upon conviction
THREE-FROGS, INC	DNA sample required upon conviction

CHARGE SUMMARY

Count	Charge	Issue Type	Sentence Range	Special Allegations	Allegation Effect
1	LC6425(a) WOLFE, DAVID SCOTT THREE-FROGS, INC	Felony	16-2-3/\$250,000		
2	UI2118.5 WOLFE, DAVID SCOTT COX, JONATHAN D. MURPHY, JOHN	Felony	16-2-3		

CHARGE SUMMARY (cont'd)

<u>Count</u>	<u>Charge</u>	<u>Issue Type</u>	<u>Sentence Range</u>	<u>Special Allegations</u>	<u>Allegation Effect</u>
2	UI2118.5 THREE-FROGS, INC	Felony	16-2-3		
3	UI2117.5 WOLFE, DAVID SCOTT COX, JONATHAN D. MURPHY, JOHN THREE-FROGS, INC	Felony	16-2-3		
4	LC3700.5(a) WOLFE, DAVID SCOTT COX, JONATHAN D. MURPHY, JOHN THREE-FROGS, INC	Misdemeanor	1 Yr\Fine		
5	LC6423 WOLFE, DAVID SCOTT THREE-FROGS, INC	Misdemeanor	6 mos/\$5,000		

PC1054.3

INFORMAL REQUEST FOR DISCOVERY

The undersigned, certifying upon information and belief, complains that in the County of San Diego, State of California, the Defendant(s) did commit the following crime(s):

CHARGES

COUNT 1 - VIOLATION OF OSHA CAUSING DEATH OR GREAT BODILY INJURY

On or about and between November 10, 2013 and November 13, 2013, DAVID SCOTT WOLFE and THREE FROGS, INC., being an employer and employee having direction, management, control and custody of an employment, place of employment, and of another employee, did unlawfully and willfully violate an occupational safety and health standard, order, special order, and Section 25910 of the Health and Safety Code, and that violation caused death to an employee, and caused prolonged impairment of the body of an employee, in violation of LABOR CODE SECTION 6425(a).

CHARGES (cont'd)

COUNT 2 - FAILURE TO PAY TAX

On or about and between January 1, 2013 and January 4, 2014, DAVID SCOTT WOLFE, JONATHAN D. COX, JOHN MURPHY, and THREE FROGS, did willfully and unlawfully fail to collect and account for and pay over a tax required by law, in violation of UNEMPLOYMENT INSURANCE CODE SECTION 2118.5.

COUNT 3 - FAILURE TO FILE A RETURN IN A TIMELY MANNER

On or about and between January 1, 2013 and January 1, 2014, DAVID SCOTT WOLFE, JONATHAN D. COX, JOHN MURPHY, and THREE FROGS, INC., within the time required by this code, did willfully and unlawfully fail to file a return and report, and to supply information with intent to evade a tax imposed by this code, and did willfully, unlawfully and with like intent, make, render, sign, and verify a false and fraudulent return, report, and statement and did supply false and fraudulent information, in violation of UNEMPLOYMENT INSURANCE CODE SECTION 2117.5.

COUNT 4 - FAILURE TO SECURE PAYMENT OF COMPENSATION

On or about and between April 14, 2013 and November 13, 2013, DAVID SCOTT WOLFE, JONATHAN D. COX, JOHN MURPHY, and THREE FROGS, INC., persons who knew or because of his knowledge and experience should be reasonably expected to know of the obligation to secure the payment of compensation, did fail to secure the payment of compensation as required by this article, in violation of LABOR CODE SECTION 3700.5(a).

COUNT 5 - VIOLATION OF OSHA

On or about and between November 10, 2013 and November 13, 2013, DAVID SCOTT WOLFE and THREE FROGS, INC. an employer, officer, management official, and supervisor having direction, management, control, and custody of any employment, place of employment, and of any other employee, did knowingly and negligently violate an occupational safety and health standard, order, and special order, and any provision of Division 5 of the Labor Code, and of any part thereof, and authorized by, this part the violation of which is deemed to be a serious violation pursuant to Section 6432, in violation of LABOR CODE SECTION 6423.

NOTICE: Any defendant named on this complaint who is on criminal probation in San Diego County is, by receiving this complaint, on notice that the evidence presented to the court at the preliminary hearing on this complaint is presented for a dual purpose: the People are seeking a holding order on the charges pursuant to Penal Code Section 872 and simultaneously, the People are seeking a revocation of the defendant's probation, on any and all such probation grants, utilizing the same evidence, at the preliminary hearing. Defenses to either or both procedures should be considered and presented as appropriate at the preliminary hearing.

NOTICE: Any defendant named on this complaint who is on Mandatory Supervision in San Diego County is, by receiving this complaint, on notice that the evidence presented to the court at the preliminary hearing on this complaint is presented for a dual purpose: the People are seeking a holding order on the charges pursuant to Penal Code Section 872 and simultaneously, the People are seeking a revocation of the defendant's Mandatory Supervision pursuant to Penal Code Sections 1170(h)(5)(B) and 1203.2, on any and all such grants, utilizing the same evidence, at the preliminary hearing. Defense to either or both procedures should be considered and presented as appropriate at the preliminary hearing.

Pursuant to PENAL CODE SECTION 1054.5(b), the People are hereby informally requesting that defendant's counsel provide discovery to the People as required by PENAL CODE SECTION 1054.3.

Sheriff's records indicate that as of the booking date one or more defendants have not yet provided a DNA sample to the DOJ database. Pursuant to Penal Code Section 296(e), the court shall order collection of DNA from the defendant(s) if advised by the prosecuting attorney that a sample is required but has not been provided by the defendant. Pursuant to Penal Code sections 296/296.1, if not already required from a past conviction, any defendants who have not done so will be required to provide a sample upon conviction of this felony offense.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT AND THAT THIS COMPLAINT, CASE NUMBER CD255289, CONSISTS OF 5 COUNTS.

Executed at City of San Diego, County of San Diego, State of California, on April 14, 2014.

COMPLAINANT

INFORMATION

BONNIE M. DUMANIS
District Attorney
County of San Diego
State of California
by:

Date

Deputy District Attorney