IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LEONARD FYOCK, et al., Plaintiffs/Appellants vs. CITY OF SUNNYVALE, et al., Defendants/Appellees.	No. 14-15408 U.S. District Court No. CV 13-05807-RMW

REPLY BRIEF OF THE CITY AND COUNTY OF SAN FRANCISCO AND THE CITY OF LOS ANGELES IN SUPPORT OF MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF IN SUPPORT OF AFFIRMANCE; REPLY DECLARATION OF CHRISTINE VAN AKEN

On Appeal from the United States District Court
for the Northern District of California

The Honorable Ronald M. Whyte

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Appellant Leonard Fyock objects to the proposed *amici curiae* brief submitted by the cities of Los Angeles and San Francisco in this case because, he claims, San Francisco's counsel also represents Sunnyvale. The support for his assertion of joint representation? A joint defense agreement that *eschews* any creation of an attorney-client relationship and states that it *does not* affect the separate and independent representation of San Francisco and Sunnyvale.

Fyock's objection goes far astray. The Sunnyvale-San Francisco agreement makes clear that no attorney-client relationship exists, and case law establishes that joint defense agreements do not create attorney-client relationships or fiduciary duties. At the end of the day, San Francisco's counsel does not represent Sunnyvale, and the brief San Francisco and Los Angeles seek to file was drafted solely by counsel for those cities. Because Fyock's objection is baseless, and because Fyock does not dispute that the brief is relevant and makes an argument not made in any of the party briefs, this Court should grant leave to San Francisco and Los Angeles to file their brief as *amici curiae*.

I. The Sunnyvale-San Francisco Agreement Disclaims Any Attorney-Client Relationship

Sunnyvale and San Francisco have nearly identical large-capacity ammunition magazine bans, and each faced nearly identical lawsuits, brought by Michel & Associates representing different plaintiffs. It is little wonder that the lawyers for Sunnyvale and San Francisco decided that their respective clients' interests would be served by cooperating in the defense of those separate lawsuits. Thus, they entered into a joint-defense agreement.

That agreement states that San Francisco is self-represented and that Sunnyvale is represented by the firm of Farella Braun & Martel. *See* Dkt. 69 at 26.[1] The agreement allows San Francisco's and Sunnyvale's counsel to share information in confidence, giving each the duty to safeguard information shared by the other. Dkt. 69 at 28. But it does not *oblige* them to share any information, or to take any affirmative steps to assist each other. Dkt. 69 at 29. More importantly, it expressly disclaims that this voluntary information-sharing gives rise to any attorney-client relationship. Instead, the agreement expressly provides:

> Nothing in this agreement is intended to alter or affect the **separate and independent representation of any Party by its respective legal counsel**, according to what its counsel believes to be in its client's best interest. Except as otherwise provided in this Agreement, the fact that a Party's attorney has agreed to be bound by this Agreement **does not preclude that attorney from advocating a position that may be adverse to other Parties** . . . . **Nothing in this Agreement shall be construed to create a common representation of the Parties** by the legal counsel representing each Party respectively, or to make counsel representing one of the Parties an intermediary between the Parties, except as the Parties may otherwise agree by separate, written agreement. Further, **because of the separate and independent representation of each Party by its respective legal counsel**, no counsel shall be deemed to be impartial, but rather serves as an advocate and legal representative of its respective client that is a Party to this Agreement, except as the Parties may otherwise agree by separate, written Agreement.

Dkt. 69 at 29 (emphasis added).

In short, the Sunnyvale-San Francisco agreement could hardly be clearer that it does not create an attorney-client relationship. It is fatuous for Fyock to rely on this agreement for his claim that San Francisco's lawyers represent Sunnyvale.

Fyock also apparently contends that because San Francisco's counsel would not hand over billing records to his lawyers in response to a Public Records Act

[1] All page references to ECF documents are to the document's ECF pagination, not its internal pagination.

request, this amounts to an admission that San Francisco's counsel is also representing Sunnyvale. Dkt. 69 at 4-5. But the funder of the Fyock and San Francisco large-capacity magazine lawsuits, the National Rifle Association, has represented that its dismissal of the case against San Francisco is nothing more than "temporary" while it pursues this appeal. Dkt. 69 at 15. It is no wonder that San Francisco still views its case as pending for purposes of opening its books to Fyock's lawyers, or that it takes an active interest in the outcome of Sunnyvale's appeal. Contrary to Fyock's claim, San Francisco has not "claim[ed] that its attorneys hold an attorney-client and work product relationship with Sunnyvale in this case." Dkt. 69 at 5. Instead it has refused to reveal to Fyock's lawyers the work product that its lawyers shared in confidence with Sunnyvale's lawyers. The two are not equivalent, as discussed in the following section.

II. A Joint Defense Agreement Does Not Create Joint Representation

Even if the Sunnyvale-San Francisco agreement did not disclaim any attorney-client relationship, the result here would be the same. Case law establishes that joint-defense agreements are a vehicle to allow the sharing of confidential attorney-client communications or work product with attorneys for third parties who have a common interest. In brief, they extend the attorney-client duty of confidentiality to third parties, but they do not create the other fiduciary duties of loyalty and care that characterize attorney-client relationships. *United States v. Stepney*, 246 F. Supp. 2d 1069, 1074-75, 1079-80 (N.D. Cal. 2003).

In view of the limited and distinct duties imposed by joint-defense agreements, it is no surprise that "[c]ourts have consistently viewed the obligations created by joint defense agreements as distinct from those created by actual

attorney-client relationships." *Stepney*, 246 F. Supp. 2d at 1080. As one district court explained,

> A joint defense agreement is not synonymous with joint representation. While common representation creates an attorney-client relationship between common counsel and each defendant being represented by them, a joint defense agreement is a mechanism designed to provide confidentiality for communications made during joint defense strategy sessions. *See United States v. Almeida*, 341 F.3d 1318, 1323 (11th Cir. 2003) (citing *Wilson P. Abraham Const. Corp. v. Armco Steel Corp.*, 559 F.2d 250, 253 (5th Cir. 1977); *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989)). Each defendant, however, retains his own attorney, and the duty of loyalty only extends from each attorney to the defendant which he represents. *Id.; United States v. Stepney*, 246 F.Supp.2d 1069, 1083 (N.D. Cal.2003).

Beras v. United States, 99 CR. 75 (SWK), 2007 WL 195352, at *2 (S.D.N.Y. Jan. 24, 2007); *see also Noe v. United States*, 601 F.3d 784, 789-90 (8th Cir. 2010) (declining to infer "'constructive' joint representation" from two defendants' entry into a joint defense agreement); *United States v. Jones*, CRIM.A. 11-261, 2011 WL 4923415, at *5 (E.D. Pa. Oct. 17, 2011) (declining to accept waiver to allow for joint representation by two criminal defendants because of potential conflicts but finding that their "stated desire to act in concert" can still be "accomplish[ed] through a joint defense agreement"); *United States v. Iannarella*, 992 F. Supp. 766, 772 (E.D. Pa. 1997) ("the employment of a joint defense strategy does not establish an attorney-client relationship between every defense attorney and every defendant in a case");[2] Restatement (Third) of Law Governing Lawyers, § 76,

[2] Many of these cases arise in the criminal context. Federal Rule of Criminal Procedure 44(c)(2) requires a trial court to inquire into the fairness of joint representation by one lawyer of more than one co-defendant, and to take steps to ensure effective assistance of counsel where joint representation occurs. If Fyock's theory were correct that sharing confidential information between lawyers triggers joint representation, then the duties of trial courts under Rule 44(c)(2) would expand dramatically. This is all the more true since joint defense agreeements need not be written and instead may be inferred. *See, e.g., United States v. Gonzalez*, 669 F.3d 974, 979 (9th Cir. 2012) ("no written agreement is required, and . . . a JDA may be implied from conduct and situation").

cmt. b (2000) ("Although joint defense of a pending lawsuit is a common situation in which courts have applied the doctrine, its rationale and the Section apply equally to two or more *separately represented persons* whatever their denomination in pleadings and whether or not involved in litigation") (emphasis added).

It is true that there is some authority in this Circuit—not cited or mentioned by Fyock—suggesting that joint-defense agreements create attorney-client relationships. But a close look at that case shows that it was referring only to the duty of confidentiality and not to the fiduciary duties of loyalty and care. In *United States v. Henke*, this Circuit stated in a per curiam opinion that a joint defense agreement created an implied attorney-client relationship between a defendant and his co-defendant's attorneys. 222 F.3d 633, 637 (9th Cir. 2000). In that case, three defendants were accused of securities fraud. *Id.* at 636. Before trial, they participated in joint defense meetings in which they discussed confidential information. *Id.* at 637. When one of the defendants, Gupta, accepted a plea agreement and promised to testify for the prosecution, counsel for the other two defendants sought to withdraw because of a conflict of interest: they had a duty of confidentiality toward Gupta pursuant to their joint defense agreements, so they could not use information they learned from confidential meetings to cross-examine Gupta, yet they had a duty to their clients to cross-examine Gupta. *Id.* The trial court denied counsel's motions to withdraw, but this Court reversed, finding that because the attorneys could not effectively cross-examine Gupta at trial using information they knew from joint defense meetings, they were irrevocably conflicted. *Id.* at 637-38.

But a closer examination of *Henke* reveals that its statement finding an implied attorney-client relationship between Gupta and the attorneys for his co-

defendants speaks only to the duty of confidentiality implied by the joint-defense agreement and not to the other duties that are embodied in an attorney's representation of a client, such as duties of loyalty and care. In *United States v. Stepney*, the district court had to decide whether attorneys who were parties to joint-defense agreements were conflicted when a co-defendant turned prosecution witness—even though the attorneys had no confidential information from that witness, but claimed a conflict arising only from a duty of loyalty to that witness. 246 F. Supp. 2d at 1072. The court further analyzed some proposed joint defense agreements that purported to create a duty of loyalty in signing attorneys. *Id.* at 1072-73. In a lengthy and scholarly opinion, Judge Patel concluded that there was no duty of loyalty or attorney-client relationship created by a joint-defense arrangement. Instead, such arrangements only extended the duty of confidentiality to third parties with common interests. *Id.* at 1074-75. Judge Patel noted that some courts have analogized the joint-defense relationship to attorney-client relationships, but that "[t]hose statements should not be taken out of context, but must be examined in light of the issues decided by the particular court." *Id.* at 1080 n.6.

Judge Patel addressed in particular *Henke*'s statement that a joint defense agreement establishes an implied attorney-client relationship, *id.* at 1080-83, stating that "[t]he conflict addressed by the *Henke* court resulted from the attorney's duty to protect specific confidential information revealed during the course of a joint defense meeting, not from a broader duty of loyalty owed to the cooperating witness." *Id.* at 1081. "[T]he *Henke* court specifically noted that joint defense meetings in and of themselves are not disqualifying. [Citation.] This refusal to extend a *per se* rule would not be possible if a general duty of loyalty existed to a cooperating former-co-defendant, because the interests of the testifying

witness in cooperating effectively would always be adverse to the interests of the remaining defendants in preventing or minimizing the witness's testimony." *Id.* at 1082. Thus, *Henke* should not be read to hold that a joint-defense agreement creates joint representation. *Id.*

Stepney has been cited with approval by this Court. *See United States v. Gonzalez*, 669 F.3d 974, 981 (9th Cir. 2012). Moreover, in *Gonzalez*, this Court distinguished joint-representation cases from joint-defense cases, stating that the latter involved co-defendants who "were *not* co-clients with the same counsel." *Id.* at 982 (emphasis added). Thus, *Henke* does not call into question the general rule that "[a] joint defense agreement is not synonymous with joint representation." *Beras*, 2007 WL 195352, at *2.

III. The Purposes of Rule 29 Are Served By Giving San Francisco And Los Angeles Leave To File Their Proposed *Amici Curiae* Brief

"[T]he relevance of matters asserted by an amicus is ordinarily the most compelling reason for granting leave to file." Fed. R. App. P. 29, comment on 1998 amendment to subdivision (b). While this Court has broad discretion in deciding which briefs to grant leave to file, Judge Posner of the Seventh Circuit has stated the view that "the criterion for deciding whether to permit the filing of an amicus brief should be . . : whether the brief will assist the judges by presenting ideas, arguments, theories, insights, facts, or data that are not to be found in the parties' briefs." *Voices for Choices v. Illinois Bell Tel. Co.*, 339 F.3d 542, 545 (7th Cir. 2003).

Fyock does not contest what San Francisco and Los Angeles asserted in their motion for leave to file their brief: that the brief asserts relevant matter and offers an argument not found in the parties' briefs. Nor does Fyock contest that these

cities represent the interests of 5.5 million Californians who live in jurisdictions where large-capacity magazine prohibitions are either in place or proposed, as they argued in their motion. Dkt. 47-1 at 5-6.

The *amici curiae* brief that San Francisco and Los Angeles seek to file was drafted exclusively by counsel for those cities. The party brief that Sunnyvale submitted was not drafted in any respect by counsel for San Francisco or Los Angeles. *See* Reply Declaration of Christine Van Aken ¶ 3. And San Francisco's counsel is not counsel to Sunnyvale, as discussed above. Thus, Fyock's accusation that Sunnyvale is merely attempting to "sidestep court-imposed rules" by "circumvent[ing] page limits on the parties' briefs," Dkt. 69 at 7 (internal quotation marks omitted), is completely baseless. San Francisco and Los Angeles respectfully request that this Court permit them to participate as *amici*.

Dated: July 10, 2014

Respectfully submitted,

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REPLY DECLARATION OF CHRISTINE VAN AKEN

I, Christine Van Aken, declare as follows:

1. I am a Deputy City Attorney for the City and County of San Francisco. The matters within this declaration are true of my personal knowledge or, where stated otherwise, upon information and belief. I personally retrieved the exhibits attached to this declaration.

2. I do not represent the City of Sunnyvale, nor upon information and belief does any attorney employed by the San Francisco City Attorney's Office represent the City of Sunnyvale, in connection with the lawsuit brought by Leonard Fyock et al. against Sunnyvale or in connection with this appeal.

3. The City and County of San Francisco and the City of Los Angeles have sought this Court's permission to file an *amici curiae* brief in this matter. Dkt. 47-1. The *amici curiae* brief that San Francisco and Los Angeles seek to file was drafted exclusively by counsel for those cities.

4. To my knowledge, the party brief that Sunnyvale submitted was not drafted in any respect by counsel for San Francisco or Los Angeles.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 10th day of July, 2014, at San Francisco, California.

s/Christine Van Aken
Christine Van Aken

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the following with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 10, 2014.

REPLY BRIEF OF THE CITY AND COUNTY OF SAN FRANCISCO AND THE CITY OF LOS ANGELES IN SUPPORT OF MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF IN SUPPORT OF AFFIRMANCE; REPLY DECLARATION OF CHRISTINE VAN AKEN

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Executed July 10, 2014, at San Francisco, California.

s/*Pamela Cheeseborough*
Pamela Cheeseborough