

No. 14-15408 [DC# CV 13-05807-RMW]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LEONARD FYOCK, et al.,
Plaintiffs-Appellants,

v.

CITY OF SUNNYVALE, et al.,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

**APPELLANTS' OPPOSITION TO THE MOTION OF THE CITY AND
COUNTY OF SAN FRANCISCO AND THE CITY OF LOS ANGELES FOR
LEAVE TO FILE AN *AMICI CURIAE* BRIEF IN SUPPORT OF
AFFIRMANCE; DECLARATION OF CLINTON B. MONFORT**

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Counsel for Plaintiffs-Appellants

INTRODUCTION

Appellants do not ordinarily object to submissions from “friends of the court.” In this instance, however, Appellants must oppose the Motion of the City and County of San Francisco (“San Francisco”) and the City of Los Angeles (“Los Angeles”) for leave to file an *amici* brief in support of Defendants-Appellees, the City of Sunnyvale (“Sunnyvale”), *et al.*

San Francisco and its counsel have admittedly entered into a joint defense agreement with Sunnyvale to jointly litigate the defense of this case. As co-counsel to Sunnyvale, counsel for San Francisco is restricted from filing an *amicus curiae* brief in this matter. Because San Francisco’s counsel authored this brief, the proposed *amici* cannot in good faith disclose that the brief was not authored in whole or part by counsel in this litigation, as required by Federal Rules of Appellate Procedure Rule 29(c)(5)(A). If the proposed brief were to be accepted, this would effectively allow counsel in this case to circumvent page limitations in violation of the Federal Rules of Appellate Procedure Rule 32(a)(7).

Accordingly, the Court should deny the cities’ Motion.

ARGUMENT

I. The Role of *Amicus Curiae*

The function and purpose of *amicus curiae* is to “assist 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 Telephone Co.*, 339 F.3d 542, 545 (7th Cir. 2003). For purposes of an *amicus* brief, "*amicus curiae*, means, literally, 'friend of the court,' serving for the benefit of the court and for the purpose of assisting the court in cases of general public interest." *United States v. Gotti*, 755 F.Supp. 1157, 1158 (E.D.N.Y.1991).

"An *amicus curiae* is not a party to litigation." *Miller-Wohl Co., Inc. v. Comm'r of Labor and Indus. State of Mont.*, 694 F.2d 203, 204 (9th Cir. 1982); *Alexander v. Hall*, 64 F.R.D. 152, 155 (D.S.C. 1974); *Clark v. Sandusky* 205 F.2d 915, 917 (7th Cir. 1953). Just as a party cannot be an *amicus curiae*, counsel in the litigation cannot also be counsel for *amicus curiae*. "*Amicus curiae* are not advocates for either party" *Alexander*, 64 F.R.D. at 155. "An *amicus* is not a party and 'does not represent the parties but participates only for the benefit of the court.'" *Alliance of Automobile Mfrs. v. Gwadowsky*, 297 F.Supp.2d 305, 306-07 (D. Me. 2003) (citing *Resort Timeshare Resales, Inc. v. Stuart*, 764 F.Supp. 1495, 1501 (S.D.Fla.1999).)

II. San Francisco's Counsel Is Already Counsel in This Litigation

San Francisco's counsel is co-counsel in this case. San Francisco and its counsel have expressly acknowledged that they entered into a joint defense

agreement with Sunnyvale to assist in the litigation of this case. Accordingly, San Francisco is neither an independent actor, nor a true *amicus curiae* or “friend of the court.”

On multiple occasions, San Francisco has shielded documents from disclosure under the California Public Record Act on the grounds that “the City and County of San Francisco has entered into a joint defense agreement with the City of Sunnyvale to assist in the defense” of this matter. Decl. of Clinton B. Monfort (“Monfort Decl.”), ¶¶ 2-3, Ex. A. San Francisco further explained that this joint defense agreement “enabl[es] its counsel to communicate about matters of common interest without destroying the attorney-client or work product privileges” Mot. 4. In its Motion to this Court, San Francisco affirms that it “has entered into a joint defense agreement with the City of Sunnyvale” Mot. 4. Shortly before filing this opposition, Appellants obtained a copy of the City’s joint defense agreement in response to a public records request for the same.¹ Monfort Decl. ¶¶ 6-8. That agreement is attached as Exhibit E for the court’s reference.

¹ In this most recent response, San Francisco suggests that it is representing its own interest in this case and not Sunnyvale’s. Monfort Decl. ¶ 7, Ex. D. But that cannot overcome the fact that San Francisco’s counsel is co-counsel to Sunnyvale and jointly litigating the case for Sunnyvale.

By entering into a joint defense agreement with Sunnyvale and by claiming that its attorneys hold an attorney-client and work product relationship with Sunnyvale in this case, San Francisco has disqualified itself from being considered an *amicus curiae*. See *Alexander*, 64 F.R.D. at 155 (finding that “*Amicus curiae* are not advocates for either party”); *Automobile Mfrs.*, 297 F.Supp.2d at 306-07 (“An *amicus* is not a party and ‘does not represent the parties but participates only for the benefit of the court.’”). An *amici curiae* brief authored in whole or in part by counsel in this litigation should not be admitted.

III. Counsel in This Litigation Authored the Proposed Brief

In its Motion to this Court, San Francisco expressly identifies its counsel as an author of the proposed brief. Mot. 4, 5. (“San Francisco and Los Angeles attest [that] their counsel are the sole authors of the brief”). Moreover, evidence suggests that San Francisco not only actively contributed to the brief, but that San Francisco’s counsel drafted a substantial portion of the brief, if not the entire brief, without Los Angeles’ assistance. Los Angeles only expressed interest in signing onto the brief after Appellants notified San Francisco that it would be inappropriate for San Francisco to file an *amicus* brief given its counsel’s status as co-counsel for Sunnyvale. Monfort Decl., ¶¶ 4-5, Exs. B, C. And when seeking Appellants’ permission to file an *amici curiae* brief, Los Angeles indicated that it

would be seeking to “join the amicus curiae brief of the City and County of San Francisco.” *Id.* at ¶ 5, Ex. C.

In any event, the Federal Rules of Appellate Procedure counsel against the filing of any brief that was authored “in whole *or in part*” by an attorney disqualified from participating as *amicus* counsel. Fed. R. App. P. 29(c)(5)(A) (emphasis added). So while it appears likely that counsel in this case authored this brief in large part or in full, the brief should be rejected regardless of Los Angeles’ post hoc request to join the brief.

In sum, because the proposed *amici curiae* brief was authored in whole or in part by co-counsel to Defendants-Appellees, it should not be admitted.

IV. The Motion Must Be Denied to Preserve Judicial Economy and Prevent Prejudice

To allow counsel in this litigation to file an *amici* brief would effectively permit Appellees to file two briefs on the merits. This would violate Rule 32(a)(7)(A) of the Federal Rules of Appellate Procedure which expressly limits the length of a party’s brief. The Supreme Court was weary of this when it amended Rule 29 of the Federal Rules of Appellate Procedure Rule to add the disclosure requirement assuring that any counsel for a party in the case did not author the brief. This disclosure requirement was enacted to “deter counsel from using an

amicus brief to circumvent page limits on the parties' briefs." *See* Fed. R. App. P. 29 Advisory Committee's note: 2010 Amendments, Subdivision (c)(5) (citing *Glassroth v. Moore*, 347 F.3d 916, 919 (11th Cir. 2003) (noting the majority's suspicion "that amicus briefs are often used as a means of evading the page limitations on a party's briefs"))).

To allow San Francisco and Los Angeles to file an *amici curiae* brief—which is admittedly authored by counsel that is jointly litigating the merits of this case— would run counter to judicial economy, prejudice Appellants who are bound by mandated page limits, and open the door for parties to sidestep court-imposed rules. *See Voices for Choices*, 339 F. 3d at 544 (finding that there are several reasons for limiting permission to file *amicus curiae* briefs, including case load management and stopping the circumvention of court-imposed page limits).

CONCLUSION

For the foregoing reasons, Appellants respectfully request that the Court deny the Motion for leave to file an *Amici Curiae* brief in this case.

Date: July 3, 2014

MICHEL & ASSOCIATES, P.C.

/s/ C. D. Michel
C. D. Michel
Attorney for *Plaintiffs-Appellants*

DECLARATION OF CLINTON B. MONFORT

I, Clinton B. Monfort, declare as follows:

1. I am an attorney at law duly licensed to practice in the State of California, and admitted to practice in the Ninth Circuit Court of Appeals. I am an associate at Michel & Associates, P.C., attorneys of record for Plaintiffs-Appellants Leonard Fyock, Scott Hochstetler, William Douglas, David Pearson, Brad Seifers, and Rod Swanson (“Appellants”). I have personal knowledge of the facts set forth herein and if called as a witness I could and would competently testify thereto.

2. On or about May 1, 2014, my office submitted a Public Records Act request to San Francisco requesting public information relating to an inactive case, *San Francisco Veteran Police Officers Association, et al., v. City & Cnty. of San Francisco*, N.D. Cal. Case No. C 13-05351 WHA.

3. On or about May 5, 2014, Gabriel Zitrin, Deputy Communications Director for San Francisco, responded to Appellants’ May 1, 2014 Public Record Act request. Mr. Zitrin stated that San Francisco was withholding responsive documents related to *Veteran Police Officers Association v. City & Cnty. of San Francisco* on grounds that

the Second Amendment issues plaintiffs raised in [*Veteran Police Officers Association v. City & County of San Francisco*] are still at issue in *Fyock et al. v. City of Sunnyvale*, Case No. 14-15408, and the City and County of San Francisco has entered into a joint-defense agreement with the City of Sunnyvale to assist in the defense [of this matter].

A true and correct copy of San Francisco's May 5, 2014 Public Records Act response is attached hereto as Exhibit A.

4. San Francisco's Deputy Attorney Christine Van Aken requested Appellants' consent to file an *amicus* brief in this matter on June 03, 2014. I responded to Ms. Van Aken's e-mail on June 3, 2014 and notified her that Appellants were compelled to deny the request. In my e-mail, I explained that Appellants were unable to grant San Francisco's request because "San Francisco is already litigating the defense of this case and has entered into a join-defense [sic] agreement with the City of Sunnyvale, as reflected in the City's correspondence of May 5, 2014 to our office." True and correct copies of San Francisco's June 3, 2014 e-mail requesting Appellants' consent to file an *amicus* brief, and of my June 3, 2014 responsive e-mail denying the request, are collectively attached hereto as Exhibit B.

5. On June 20, 2014, Debra Gonzales, Assistant City Attorney for the City of Los Angeles ("Los Angeles") sought Appellants' consent to "join the

amicus curiae brief of the City and County of San Francisco.” On June 22, 2014, I sent an e-mail to Ms. Gonzales notifying her that Appellants could not consent to a brief jointly authored by San Francisco. I notified Ms. Gonzales that San Francisco “entered into a joint defense agreement with Sunnyvale in this case,” therefore Appellants could not consent to the filing of a joint brief authored by Los Angeles and San Francisco. True and correct copies of Los Angeles’ June 20, 2014 e-mail requesting Appellants’ consent to join San Francisco’s *amicus* brief, and my June 22, 2014 response denying the request and explaining the conflict, are attached hereto as Exhibit C.

6. On or about June 24, 2014, my office submitted a Public Records Act request on behalf of Appellants to San Francisco requesting any and all records relating to the joint defense agreement between the City of San Francisco and the City of Sunnyvale.

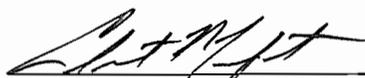
7. On or about July 1, 2014, Gabriel Zitrin, Deputy Communications Director for San Francisco, responded to Appellants’ June 24, 2014 Public Record Act request. A true and correct copy of San Francisco’s July 1, 2014 response is attached hereto as Exhibit D.

8. The response provided a copy of the joint defense agreement between the City of San Francisco and the City of Sunnyvale. A true and correct copy of

that joint defense agreement is attached hereto as Exhibit E.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed the 3rd day of July, 2014, in Long Beach, California.



Clinton B. Monfort

CERTIFICATE OF SERVICE

I hereby certify that on July 3, 2014, an electronic PDF of APPELLANTS' OPPOSITION TO THE MOTION OF THE CITY AND COUNTY OF SAN FRANCISCO AND THE CITY OF LOS ANGELES FOR LEAVE TO FILE AN *AMICI CURIAE* BRIEF IN SUPPORT OF AFFIRMANCE; DECLARATION OF CLINTON B. MONFORT was uploaded to the Court's CM/ECF system, which will automatically generate and send by electronic mail a Notice of Docket Activity to all registered attorneys participating in the case. Such notice constitutes service on those registered attorneys.

Date: July 3, 2014

MICHEL & ASSOCIATES, P.C.

/s/ Clint B. Monfort

Clint B. Monfort

Attorney for *Plaintiffs-Appellants*

EXHIBIT A

CITY AND COUNTY OF SAN FRANCISCO

OFFICE OF THE CITY ATTORNEY



DENNIS J. HERRERA
City Attorney

GABRIEL ZITRIN
Deputy Communications
Director

ATTN: Matthew D. Cubeiro
Michel & Associates, P.C.
180 East Ocean Blvd.
Suite 200
Long Beach, CA 90802
(sent via email) MCubeiro@michellawyers.com

May 5, 2014

Re: Public Records Request Dated May 1, 2014

Dear Mr. Cubeiro:

I write on behalf of the San Francisco City Attorney's Office in response to your Public Records Request dated May 1, 2014, which our Office received via fax on that date.

In your request, you note that on April 28 our Office responded to your April 15th public records request seeking attorney time and billing information relating to any litigation involving firearms or ammunition during the prior five years. As part of that response, we identified *San Francisco Veteran Police Officers Association v. City & County of San Francisco*, N.D. Cal. Case No. C 13-05351 WHA as one such matter, and explained that because the issues in that case are still being litigated, the records you requested are exempt from disclosure under the Public Records Act's pending litigation exemption. Additionally, we explained that the records are exempt from disclosure because they constitute attorney work product and contain communications protected by the attorney-client privilege.

In your current request, you indicate that your "records and current case filings indicate that [*San Francisco Veteran Police Officers Association*] is indeed concluded and is no longer an active case." On that basis, you request that our Office provide:

1. *Any and all records indentifying hours spent by the City and County of San Francisco, including hourly rates of each city attorney or other employee, involved in the matter of San Francisco Veteran Police Officers Association, et al., v. City & County of San Francisco, et al., Case No. C 13-05351 WHA;*
2. *Any and all records indentifying pro bono work, including number of hours and costs waived, if any by any outside attorneys or firms, including the firm of [sic] involved*

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in the matter of San Francisco Veteran Police Officers Association, et al. v. City & County of San Francisco, et al., Case No. C 13-05351 WHA;

3. *Any and all records identifying costs associated with the matter of San Francisco Veteran Police Officers Association, et al. v. City & County of San Francisco, et al., Case No. C 13-05351 WHA. This includes but is not limited to any internal or outside attorney's billing records, time entries, invoices, billing statements, and requests for payment.*

As your firm is aware, after the district court denied the plaintiffs' request for a preliminary injunction in *San Francisco Veteran Police Officers Association*, the plaintiffs voluntarily dismissed that action. However, the Second Amendment issues plaintiffs raised in that case are still at issue in *Fyock et al. v. City of Sunnyvale*, Case No. 14-15408, and the City and County of San Francisco has entered into a joint-defense agreement with the City of Sunnyvale to assist in the defense of Sunnyvale's large-capacity magazine prohibition. Moreover, your clients have represented that the dismissal of the case against San Francisco is "temporary" and that the case will be re-filed upon resolution of the Sunnyvale lawsuit.¹ Accordingly, *San Francisco Veteran Police Officers Association* remains a pending matter for purposes of your public records request.

As explained in our April 28 response, attorney billing information for pending cases is not subject to disclosure under the pending litigation exception of the Public Records Act, which protects from disclosure "[r]ecords pertaining to pending litigation to which the public agency is a party . . . until the pending litigation or claim has been finally adjudicated or otherwise settled." Cal. Gov't Code § 6254(b). As courts have repeatedly recognized, "the obvious purpose of this exemption is to prevent a litigant from obtaining a greater advantage against the governmental entity than would otherwise be allowed through normal discovery channels." *City of Los Angeles v. Superior Court (Axelrad)*, 41 Cal. App. 4th 1083, 1090 (1996); *see also Fairley v. Superior Court*, 66 Cal. App. 4th 1414, 1421-22 (1998). Because the legal issues raised in *San Francisco Veteran Police Officers Association* continue to be litigated, the pending litigation exemption applies and the records and information you have requested are not subject to disclosure at this juncture.

Further, attorney time and billing records are not subject to disclosure because such records constitute privileged attorney work product and/or attorney-client communications. *See* S.F. Admin. Code § 67.21(k) (release of records under the San Francisco Sunshine Ordinance governed by the California Public Records Act in particulars not addressed by the Sunshine Ordinance); Cal. Gov't Code § 6254(k) (providing an exemption for records protected from disclosure under federal or state law, including provisions of the Evidence Code relating to privilege); Cal. Evidence Code § 954 (communications between attorneys and their clients are privileged); Cal. Code of Civil Pro. § 2018.030 (protecting from disclosure any writing that reflects an attorney's impressions, conclusions, opinion, or legal research or theories). *See also* Cal. Gov't Code § 6276.04 (cross-referencing in the Public Records Act the attorney-client and

¹ *See* <http://www.nraila.org/legislation/state-legislation/2014/4/california-san-francisco-magazine-confiscation-begins-on-monday,-april-7-protect-yourself-and-your-property!.aspx>.

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attorney work product privileges). Because the records you have requested are covered by attorney work product and/or attorney-client privileges, they are also exempt from disclosure on these grounds.

Please do not hesitate to call me at (415) 554-4653 if you have any questions about this matter.

Thank you.

Sincerely,

Gabriel Zitrin
Deputy Communications Director

EXHIBIT B

Clint B. Monfort

From: Clint B. Monfort
Sent: Tuesday, June 03, 2014 3:02 PM
To: 'Christine Van Aken'
Cc: Anna M. Barvir
Subject: RE: Fyock v. Sunnyvale, 9th Circuit No. 14-15408: amicus consent request

Hi Christine,

While we would normally consent to an amicus filing, we are unable to do so in this instance given that San Francisco is already litigating the defense of this case and has entered into a join-defense agreement with the City of Sunnyvale, as reflected in the City's correspondence of May 5, 2014 to our office.

Clint

<p>Clint B. Monfort Attorney</p>  <p>MICHEL & ASSOCIATES, P.C. Attorneys at Law Environmental - Land Use - Firearms - Employment Law Civil Litigation - Criminal Defense</p>	<p>Direct: (562) 216-4456 Main: (562) 216-4444 Fax: (562) 216-4445 Email: CMonfort@michellawyers.com Web: www.michellawyers.com</p> <p>180 E. Ocean Blvd. Suite 200 Long Beach, CA 90802</p>
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From: Christine Van Aken [<mailto:Christine.Van.Aken@sfgov.org>]
Sent: Tuesday, June 03, 2014 12:03 PM
To: Clint B. Monfort; Anna M. Barvir; TSchoenberg@fbm.com; Roderick M. Thompson
Subject: Fyock v. Sunnyvale, 9th Circuit No. 14-15408: amicus consent request

Counsel,

The City and County of San Francisco plans to submit an amicus brief in the Fyock case in support of Sunnyvale. Please let me know whether you consent to this filing. Thanks.

Christine Van Aken
Deputy City Attorney
San Francisco City Attorney's Office
City Hall Room 234
One Dr. Carlton B. Goodlett Pl.
San Francisco, CA 94102
Tel (415) 554-4633
Fax (415) 554-4699

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EXHIBIT C

Clint B. Monfort

From: Clint B. Monfort
Sent: Sunday, June 22, 2014 11:30 AM
To: 'Debra Gonzales'; Anna M. Barvir
Cc: James Clark
Subject: RE: Leonard Fyock v. City of Sunnyvale - Consent to File Amicus Brief

If the City of Los Angeles does not have a privileged relationship with San Francisco or Sunnyvale regarding the issues in this case, we typically would not object to the City of Los Angeles participating as an amicus. As you may be aware, however, because the City of San Francisco has entered into a joint defense agreement with Sunnyvale in this case, we cannot consent to the filing of this brief and we intend to oppose any request for leave to file it.

Regards,

Clint

<p>Clint B. Monfort Attorney</p>  <p>MICHEL & ASSOCIATES, P.C. Attorneys at Law Environmental - Land Use - Firearms - Employment Law Civil Litigation - Criminal Defense</p>	<p>Direct: (562) 216-4456 Main: (562) 216-4444 Fax: (562) 216-4445 Email: CMonfort@michellawyers.com Web: www.michellawyers.com</p> <p>180 E. Ocean Blvd. Suite 200 Long Beach, CA 90802</p>
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From: Debra Gonzales [<mailto:debra.gonzales@lacity.org>]
Sent: Friday, June 20, 2014 1:03 PM
To: Clint B. Monfort; Anna M. Barvir
Cc: James Clark
Subject: Leonard Fyock v. City of Sunnyvale - Consent to File Amicus Brief

Dear Mr. Monfort and Ms. Barvir,

The City of Los Angeles intends to join the amicus curiae brief of the City and County of San Francisco. Under Rule 29(a) of the Federal Rules of Appellate Procedure, amicus curiae may file a brief only by leave of court or if all parties have consented to its filing. Please advise if you give consent to the City of Los Angeles to file an amicus curiae brief in support of the City of Sunnyvale. As any amicus briefs must be filed with the court on Monday, June 23, 2014, I would very much appreciate your prompt response. Thank you.

--

Debra L. Gonzales
Assistant City Attorney
Public Safety General Counsel
Los Angeles City Attorney's Office
(213) 978-8391, Fax (213) 978-8787
Debra.Gonzales@lacity.org

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EXHIBIT D

CITY AND COUNTY OF SAN FRANCISCO



DENNIS J. HERRERA
City Attorney

OFFICE OF THE CITY ATTORNEY

GABRIEL ZITRIN
Deputy Communications
Director

ATTN: Anna M. Barvir
Michel & Associates, P.C.
180 East Ocean Blvd.
Suite 200
Long Beach, CA 90802
(sent via email) abarvir@michellawyers.com

July 1, 2014

Re: Public Records Request Dated June 24, 2014

Dear Ms. Barvir:

I write on behalf of the San Francisco City Attorney's Office in response to your Public Records Request dated June 24, 2014, which our Office received via fax on that date.

In your request, you seek the following records:

1. *Any and all records relating to a joint-defense agreement, as referred to in a response to a previous public records requested dated May 5, 2014 . . . , in which your office stated, "However, the Second Amendment issues plaintiffs raised in that case are still at issue in Fyock . . . , and the City and County of San Francisco has entered into a joint-defense agreement with the City of Sunnyvale to assist in the defense of Sunnyvale's large-capacity magazine prohibition."*
2. *Any and all records of any other joint-defense agreement entered into with the Brady Campaign to Prevent Gun Violence, the Brady Center to Prevent Gun Violence, Mayors Against Illegal Guns, the Law Center Against Violence, the Law Center to Prevent Gun Violence, Violence Policy Coalition, Million Mom March, Everytown for Gun Safety, or any other group or organization whose purpose is to promote gun control within the last five (5) years.*

With respect to Item No. 1 of your Request, we have attached a copy of the agreement. Your Request quotes language from my prior letter concerning the agreement stating that "the City and County of San Francisco has entered into a joint-defense agreement with the City of Sunnyvale to assist in the defense of Sunnyvale's large-capacity magazine prohibition." To clarify that statement, San Francisco entered into a joint defense agreement with Sunnyvale because it and Sunnyvale "have a common interest with respect to the investigation and defense

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of the *Fyock* Case and the *San Francisco Veteran Police Officers Assoc. Case*” in light of the “common factual and legal issues” raised by both of those cases. (Agreement p. 1.) However, nothing in the agreement created any obligation by San Francisco or its counsel to assist Sunnyvale independently of San Francisco’s pursuit of its own interests. To the contrary, “[n]othing in this Agreement is intended to alter or affect the separate and independent representation of any Party by its respective legal counsel . . .” and “[n]othing in this Agreement shall be construed to create a common representation of the Parties by the legal counsel representing each Party respectively”

As to Item No. 2 of your Request, there are no responsive records.

Please do not hesitate to call me at (415) 554-4653 if you have any questions about this matter.

Thank you.

Sincerely,

Gabriel Zitrin
Deputy Communications Director

EXHIBIT E

PRIVILEGED AND CONFIDENTIAL
JOINT DEFENSE MATERIAL

COMMON INTEREST and JOINT DEFENSE AGREEMENT

This Common Interest and Joint Defense Agreement (the "Agreement") is executed by and among the City of Sunnyvale ("Sunnyvale"), including its employees, officers, agents, servants, contractors or attorneys, and the City and County of San Francisco ("San Francisco"), including its employees, officers, agents, servants, contractors or attorneys, with respect to the case of *Leonard Fyock, et al. v. City of Sunnyvale, et al.*, United States District Court for the Northern District of California, San Jose Division, Case No. CV-13-05807 (RMW) and any appeals therefrom ("*Fyock Case*") and *San Francisco Veteran Police Officers Association, et al. v. City and County of San Francisco, et al.*, United States District Court for the Northern District of California No. CV-13-5351 (WHA) and any appeals therefrom ("*San Francisco Veteran Police Officers Assoc. Case*"). This Agreement refers to the undersigned parties collectively as the "Parties" and to each one individually, as a "Party".

RECITALS

WHEREAS, in the *Fyock Case*, plaintiffs have sued Sunnyvale challenging the constitutionality of Sunnyvale's prohibition on the possession of large-capacity ammunition magazines;

WHEREAS, in the *San Francisco Veteran Police Officers Assoc. Case*, the San Francisco Veteran Police Officers Association, et al. have sued San Francisco challenging the constitutionality of San Francisco's prohibition on the possession of large-capacity ammunition magazines;

WHEREAS, the *Fyock Case* and the *San Francisco Veteran Police Officers Assoc. Case* raise certain common factual and legal issues;

WHEREAS, the Parties have a common interest with respect to the investigation and defense of the *Fyock Case* and the *San Francisco Veteran Police Officers Assoc. Case*;

WHEREAS, San Francisco will be representing itself in defense of the *San Francisco Veteran Police Officers Assoc. Case*;

WHEREAS, Sunnyvale will be represented by Farella Braun & Martel in the *Fyock Case*;

WHEREAS, open and privileged communications between the Parties and their counsel are necessary to permit the best representation possible in the *Fyock Case* and the *San Francisco Veteran Police Officers Assoc. Case*, respectively, for each of the Parties;

WHEREAS, the Parties believe that sharing certain confidential, privileged and other "Joint Defense Information," as defined below, among themselves and their counsel in strict confidence and on a reciprocal basis, as deemed appropriate by each Party, is necessary to best defend each Party in the *Fyock Case* and the *San Francisco Veteran Police Officers Assoc. Case*;

PRIVILEGED AND CONFIDENTIAL
JOINT DEFENSE MATERIAL

WHEREAS, the sharing of Joint Defense Information between the Parties and among their counsel is not intended to constitute, and shall not constitute a waiver or diminution of the protections against the discovery, disclosure, or misuse of Joint Defense Information under any applicable privilege or protection, including but not limited to, the attorney-client privilege, the attorney work product doctrine, the common interest doctrine, the joint defense doctrine, or any other privilege, protection, doctrine, or exemption recognized by state or federal courts;

WHEREAS, the Parties believe that necessary communication among the Parties and counsel will not occur if the communications are not and cannot remain confidential and protected by the attorney-client privilege, the attorney work product doctrine, the common interest doctrine, the joint defense doctrine, or any other privilege, protection, doctrine, or exemption recognized by state or federal courts;

WHEREAS, the Parties acknowledge that, notwithstanding that there may be potential for adverse interests between them on certain issues, they share an overriding common interest in their joint investigation and defense of the *Fyock* Case and the *San Francisco Veteran Police Officers Assoc.* Case; and

WHEREAS, without admitting any fact, responsibility, fault, or liability in connection with the *Fyock* Case and the *San Francisco Veteran Police Officers Assoc.* Case, the Parties wish to establish a formal framework for the investigation and defense of the *Fyock* Case and the *San Francisco Veteran Police Officers Assoc.* Case;

AGREEMENT

NOW, THEREFORE, in consideration of the foregoing recitals, which are hereby adopted as terms of this Agreement, the promises and the mutual covenants herein contained, and for other good and valuable consideration, the receipt and sufficiency of which is individually acknowledged by each Party, each Party to this Agreement hereby covenants and agrees as follows:

1. Joint Defense Information Defined

For purposes of this Agreement, "Joint Defense Information" includes, without limitation, oral and written statements, documents, drafts, records, information, notes, memoranda, electronic materials (such as diskettes, e-mails, computer memory, etc.), videos, photographs, interview and debriefing memoranda and legal research, relating to the *Fyock* Case and the *San Francisco Veteran Police Officers Assoc.* Case, received by any Party from any other Party for which a claim might be made of attorney-client privilege, attorney work product or any other applicable privilege or rule of confidentiality or protection from disclosure, including under applicable provisions of the California Evidence Code or California Government Code sections 6250 *et seq.* Joint Defense Information that is not otherwise privileged will not gain the protection of any privilege by virtue of being designated as Joint Defense Information and exchanged among the Parties, however, the Parties shall treat as privileged and confidential the fact that any such information was, or has been, exchanged under this Agreement.

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2. Limitations on Use and Disclosure of Joint Defense Information

(a) Each Party agrees to receive and hold in strictest confidence any Joint Defense Information disclosed to it by any other Party, to use the information so disclosed solely for the purpose of defending the Party with respect to the *Fyock* Case and the *San Francisco Veteran Police Officers Assoc.* Case and not for any other purpose, and to take all steps necessary to maintain the privileged and confidential nature of the Joint Defense Information. Unless ordered to disclose Joint Defense Information pursuant to Paragraph 3(a) below, the recipient of Joint Defense Information shall only disclose such information to its counsel, authorized representatives, insurers, and those of its elected officials, directors, officers, department leaders, employees, agents or independent contractors who have a need to know such information in order to defend the Party against the *Fyock* Case and the *San Francisco Veteran Police Officers Assoc.* Case. Each Party agrees that it will notify its independent contractors and/or agents, who need to know Joint Defense Information, of the terms of this Agreement and will require that they agree in writing to keep all Joint Defense Information confidential in accordance with the terms of this Agreement.

(b) Notwithstanding the provisions of Section 3, this Agreement does not prevent any counsel for one of the Parties from disclosing to any third party Joint Defense Information obtained solely from that Party's own or its counsel's own independent investigation or work, including information received from anyone other than the other Party, or its attorneys and agents.

(c) No Party to this Agreement may disclose or use any Joint Defense Information in connection with any dispute not relating to the *Fyock* Case and the *San Francisco Veteran Police Officers Assoc.* Case; provided, however, that this Agreement does not preclude a Party from seeking or using information obtained through discovery, from public records or the Party's or its counsel's independent investigation or work product, which may then be used without the restrictions imposed by this Agreement.

(d) Response to Third Party Requests for Joint Defense Information

If any third party requests or demands Joint Defense Information, by discovery request, Public Records Act California Government Code sections 6250 *et seq.* and San Francisco Administrative Code section 67 in the City and County of San Francisco request (PRA request) or otherwise, the Party receiving the disclosure request shall immediately notify the other Party, who shall have the right to seek a court order protecting the information from disclosure. In responding to a PRA request, the receiving Party may assert any claim of exemption from disclosure relating to attorney-client privilege, attorney work product or any other applicable privilege or rule of confidentiality that the receiving Party, in its sole discretion, determines exists, but the receiving Party shall promptly give notice to each of the other Parties if no claim of exemption from disclosure will be asserted in response to such request. The responsibility for seeking a court order protecting Joint Defense Information from disclosure rests with the Party seeking to prevent disclosure. Absent a court order prohibiting disclosure, each Party shall disclose documents in accordance with the Public Records Act. Disclosure of

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documents as required by law shall not constitute a violation of this Agreement.

3. Exchange of Joint Defense Information

Either Party may exchange or disclose Joint Defense Information with another Party to this Agreement in furtherance of their common interest in investigation and defense against the *Fyock* Case and the *San Francisco Veteran Police Officers Assoc.* Case. Such materials will be, stamped or otherwise marked "Privileged" or "Confidential." Material not so marked will not lose its confidentiality or privilege; however, lack of such designation will be relevant to determining compliance with this Agreement. The Parties agree that such exchanges or disclosures of Joint Defense Information are intended to, and will, be confidential and protected by the attorney-client privilege, attorney work product doctrine or any otherwise available privilege or rule of confidentiality and do not or will not constitute a waiver of any attorney-client privilege, attorney work product doctrine or any otherwise available privilege or rule of confidentiality.

4. No Requirement to Share Information

Any Party may choose not to share any particular information with the other Parties. The failure of any Party to disclose such information to other Parties shall in no way affect the validity of this Agreement or the application of its terms to the signatory Parties.

5. Reservation

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, and advocacy of an adverse position shall not be used as the sole basis for seeking to disqualify any counsel from representing any other Party in any proceeding. 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. Moreover, nothing in this Agreement shall be construed as an agreement to indemnify or represent any other Party beyond any existing contractual relationships.

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6. Withdrawal From Agreement

(a) A Party may withdraw at any time from this Agreement immediately upon written notice to the other Parties. In the event of withdrawal of a Party from this Agreement, the former Party and the remaining Parties shall continue to be bound by the attorney-client privilege and the attorney work product doctrine protecting Joint Defense Information under this Agreement, and by the provisions governing the disclosure and use of Joint Defense Information under this Agreement, with respect to any Joint Defense Information which was exchanged prior, and up to, the effective date of the Party's withdrawal.

(b) If a Party withdraws from this Agreement, or if the Parties dissolve this Agreement, the former Party or Parties and the remaining Parties, if any, shall continue to be subject to the provisions regarding the disclosure and use of Joint Defense Information, which are set forth in paragraphs 2 and 3 above, with respect to any Joint Defense Information which was shared or exchanged prior to the effective date of the removal or withdrawal of the Party from this Agreement.

(c) Upon request at any time, specifically identified documents and materials exchanged, including any copies, will be returned to the Party who originally furnished the specific documents and materials. However, if a Party is required by law to retain such documents and materials for a period of time, that Party shall return the documents and materials when the retention period expires. This provision shall not apply to information from documents or materials that have been incorporated into other public records and cannot legally or reasonably be removed.

7. Duration of Agreement

To the extent possible under law, the Parties intend and agree that the contents of this Agreement shall be confidential. This Agreement, including its provisions on the use and confidentiality of Joint Defense Information, shall remain in full force and effect notwithstanding any settlement or resolution of the *Fyock* Case and the *San Francisco Veteran Police Officers Assoc.* Case. The provisions of this Agreement governing the use and confidentiality of Joint Defense Information shall continue to apply to any employee of any Party or its counsel who ceases to be employed by that Party, and to any expert, consultant, terminated counsel, agent or contractor who worked on behalf or under the direction of any Party or its counsel.

8. Return of Joint Defense Information at Termination

Following termination of this Agreement as defined herein, if requested by the disclosing Party, each Party (including its respective counsel and its respective terminated counsel, if any) and their counsel, shall promptly return all Joint Defense Information (including all copies) received pursuant to the Agreement from such disclosing Party. However, if a Party is required by law to retain such documents and materials for a period of time that Party shall return or destroy the documents and materials when the retention period expires.

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9. Equitable Remedies

The Parties agree that the rights, privileges and interests that fall within this Agreement are unique and any violation of this Agreement may result in irreparable harm and injury to the other Parties. The Parties specifically agree that either Party may enforce the terms of this Agreement through appropriate injunctive relief, specific performance or other equitable relief, in addition to monetary damages. The Parties further agree that this paragraph is not intended to limit the rights or remedies of the Parties to this Agreement.

10. Termination of Agreement

This Agreement shall terminate as to the Parties upon final settlement or resolution of both of the *Fyock* Case and the *San Francisco Veteran Police Officers Assoc.* Case, including all appeals, or sooner if agreed by all Parties. The obligations of confidentiality and nondisclosure under this Agreement shall survive the termination of this Agreement as set forth specifically above.

11. No Joint Venture, Partnership, or Compensation for Parties

This Agreement does not form a joint venture or partnership by or among the Parties. Unless otherwise expressly agreed to in writing by the Parties, no Party shall be entitled to compensation or reimbursement from any other Party for the participation of its employees, officers, agents, servants, contractors or attorneys in the defense of any threatened or asserted claims subject to this Agreement or for the costs of participation in this Agreement.

12. Modifications

All modifications of this agreement must be in writing and signed by an authorized representative of each Party.

13. Authority to Bind Party

All signatories to this agreement specifically represent that he or she is authorized to bind the Party for which he or she signs to the terms of this Agreement.

14. Successors, Assigns and Affiliates

This Agreement shall bind, and shall inure to the benefit of, the Parties, and their successors.

15. Severability of Agreement

If any provision of this Agreement is found invalid or unenforceable, then the balance of this Agreement shall remain in full force and effect.

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16. Counterparts and Facsimiles

This Agreement may be executed in counterparts with the same force and effect as if executed in one complete document by the Parties to the Agreement. This Agreement may be executed by facsimile signature, and a facsimile signature shall have the same force and effect as an original.

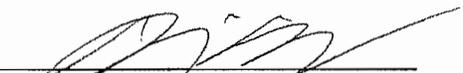
17. Integrated Agreement

The Parties hereby merge and integrate into this Agreement their prior and contemporaneous conversations, negotiations and possible or alleged agreements regarding the *Fyock* Case and the *San Francisco Veteran Police Officers Assoc. Case*.

AGREED:

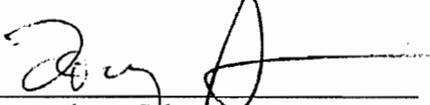
DATED: 1/3/14

CITY AND COUNTY OF SAN FRANCISCO

By: 
Christine Van Aken
Deputy City Attorney

DATED: 1/3/14

THE CITY OF SUNNYVALE

By: 
Anthony Schoenberg
Counsel for City of Sunnyvale