

No. 14-15408

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
(CV 13-05807-RMW)

**NOTICE OF ERRATA TO NOTICE OF NON-OPPOSITION TO
APPELLANTS' MOTION TO STAY APPEAL; APPELLANTS'
UNOPPOSED MOTION FOR EXTENSION OF TIME TO FILE OPENING
BRIEF; DECLARATION OF ANNA M. BARVIR**

C. D. Michel (S.B.N. 144258)
Clinton B. Monfort (S.B.N. 255609)
Sean A. Brady (S.B.N. 262007)
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Counsel for Plaintiffs-Appellants

TO THE COURT AND TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that Appellants Leonard Fyock, Scott Hochstetler, William Douglas, David Pearson, Brad Seifers, and Rod Swanson hereby submit the following notice of errata concerning Appellants' Notice of Non-opposition to Appellants' Motion to Stay Appeal; Appellants' Unopposed Motion for Extension of Time to File Opening Brief; Declaration of Anna M. Barvir. A corrected version of that filing is attached hereto.

Due to a calendaring oversight, Appellants inadvertently stated that the City had not timely filed an opposition to Appellants' Motion to Stay Appeal. Portions relating to the City's response to Appellants' Motion to Stay Appeal are hereby withdrawn. The corrected version reflects the following changes:

- Any reference to "Appellants' Notice of Non-opposition to Appellants' Motion to Stay Appeal; Appellants' Unopposed Motion for Extension of Time to File Opening Brief; Declaration of Anna M. Barvir" should read "Appellants' Unopposed Motion for Extension of Time to File Opening Brief; Declaration of Anna M. Barvir."
- On page 2, "Although the City initially informed Appellants' counsel that it would oppose Appellants' request, the City did not file an opposition with the Court," should state "The City intends to file an opposition on or before April 17, 2014."
- On page 6, paragraph 2 of the Declaration of Anna M. Barvir should read: "Appellants filed a Motion to Stay Appeal on April 4, 2014. Counsel for the City has informed me that it intends to file an

opposition to that motion on or before April 17, 2014. The Court has not issued a ruling on that pending motion.”

Further, on page 4 and also paragraph 9 of Anna M. Barvir’s Declaration, “*McKay v. Hutchens*, No. 12-57049,” should read as “*Rando v. Harris*, No. B254060.” The attached Motion reflects this correction.

Dated: April 16, 2014

MICHEL & ASSOCIATES, P.C.

/s/ C. D. Michel

C. D. Michel

Attorney for *Plaintiffs-Appellants*

Leonard Fyock, Scott Hochstetler, William Douglas, David Pearson, Brad Seifers, and Rod Swanson

CERTIFICATE OF SERVICE

I hereby certify that on April 16, 2014, an electronic PDF of **NOTICE OF ERRATA TO NOTICE OF NON-OPPOSITION TO APPELLANTS' MOTION TO STAY APPEAL; APPELLANTS' UNOPPOSED MOTION FOR EXTENSION OF TIME TO FILE OPENING BRIEF; DECLARATION OF ANNA M. BARVIR** 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: April 16, 2014

MICHEL & ASSOCIATES, P.C.

/s/ C. D. Michel
C. D. Michel
Attorney for *Plaintiffs-Appellants*
Leonard Fyock, Scott Hochstetler,
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“ATTACHMENT”

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**APPELLANTS' UNOPPOSED MOTION FOR EXTENSION OF TIME TO
FILE OPENING BRIEF; DECLARATION OF ANNA M. BARVIR**

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Counsel for Plaintiffs-Appellants

APPELLANTS' UNOPPOSED MOTION
FOR EXTENSION OF TIME TO FILE OPENING BRIEF

On April 4, 2014, due to the high likelihood that *Jackson v. City and County of San Francisco*, No. 12-17803, *United States v. Chovan*, No. 11-50107, *Peruta v. County of San Diego*, No. 10-56971, *Richards v. Prieto*, No. 11-16255, and/or *Baker v. Kealoha*, No. 12-16258, will be reheard or reheard en banc by the Ninth Circuit, Appellants filed a motion to stay appellate proceedings. Decl. Anna Barvir Supp. Mot. Ext. Time ("Barvir Decl.") ¶ 2. The City intends to file an opposition to that motion on or before April 17, 2014. Barvir Decl. ¶ 2. A ruling on that motion is still pending. Barvir Decl. ¶ 2.

Should the Court deny Appellants' request for a stay, Appellants alternatively request an extension to file their Opening Brief for the reasons set forth below. Appellants thus submit this motion for an additional thirty-day extension, through and including June 2, 2014, pursuant to Federal Rule of Appellate Procedure 26(b) and Ninth Circuit Rule 31-2.2(b). The City has indicated that it does not oppose this motion. Barvir Decl. ¶ 12. Because time is of the essence, as explained further below, Appellants respectfully request this Court issue an order on this matter at its earliest convenience.

Appellants' Opening Brief was originally due on April 2, 2014. Barvir Decl.

¶ 3. Appellants initially filed a motion for a thirty-day extension to file their Opening Brief, which the Court granted. Now Appellants' Opening Brief is scheduled to be filed on or before May 2, 2014. Barvir Decl. ¶ 3. Due to a combination of events, Appellants' counsel will face great difficulty in preparing the Opening Brief by May 2, and thus have a substantial need for further extension of that deadline.

In addition to the current May 2 deadline to file the Opening Brief, Appellants' counsel, who also represent the plaintiffs-appellants in *Jackson v. City and County of San Francisco*, must file a petition for rehearing or rehearing en banc on or before May 8, 2014. Barvir Decl. ¶ 5. Because of the proximity of the deadlines for the petition in *Jackson* and the Opening Brief in this case, Appellants' counsel must work on these filings simultaneously. Barvir Decl. ¶ 6.

Due to a sudden family emergency, Appellants' lead counsel, Clinton B. Monfort, began an indefinite leave of absence on March 17, 2014. Barvir Decl. ¶ 4. His emergency was unforeseeable and unavoidable. Barvir Decl. ¶ 4. Although Mr. Monfort tentatively returned to work on March 31, 2014, he is regularly out of the office to assist with the continued care of an immediate family member. Barvir Decl. ¶ 4. As a result, Ms. Anna M. Barvir is now the attorney primarily responsible for preparing both Appellants' Opening Brief and the Petition for

Rehearing or Rehearing en banc in *Jackson*. Barvir Decl. ¶¶ 4-5.

Unfortunately, on April 9, 2014—after Appellants filed their request for a stay—Ms. Barvir learned that she would be undergoing a necessary operation on April 25, 2014. Barvir Decl. ¶ 7. In the week leading up to her procedure, she has several pre-surgery appointments that will keep her out of the office. Barvir Decl. ¶ 7. And she will be out of the office for at least three weeks, during which she must remain at home on bed rest and will be largely unable to work. Barvir Decl. ¶ 7. Consequently, Ms. Barvir will be on leave from April 17 until May 17, 2014. Barvir Decl. ¶ 7. She thus has precious few days left to work on the Opening Brief before she goes on leave. Barvir Decl. ¶ 7. The scheduling of this procedure during the time in which Ms. Barvir must prepare Appellants’ Opening Brief to meet the current May 2 deadline was unexpected and unavoidable. Barvir Decl. ¶ 7.

Since the Court granted Appellants’ first motion for extension of time, Ms. Barvir has been spending the majority of her time diligently preparing the Opening Brief in this case, the petition for rehearing or rehearing en banc in *Jackson*, a reply brief in *Rando v. Harris*, No. B254060, that was due on April 9, 2014, and an opposition to three motions to intervene in *Peruta v. County of San Diego*, No. 10-56971, that was due on April 2, 2014. Barvir Decl. ¶ 9. Ms. Barvir has spent

the remainder of her time performing her duties as a local legislative and policy analyst, specifically researching, drafting, and distributing opposition memorandums to the Pleasant Hill Planning Commission and Los Angeles Public Safety Committee. Barvir Decl. ¶ 10.

The above reasons preclude Appellants' counsel from filing Appellants' Opening Brief by the current deadline of May 2, 2014, without significantly impairing its quality. Barvir Decl. ¶ 11. Since Mr. Monfort and Ms. Barvir have the most intimate knowledge of this case since its inception, it would not be in Appellants' best interest to have another attorney take over the appeal at this stage. Barvir Decl. ¶ 8. Appellants' request for an extension is made in good faith and not for the purpose of delay. Barvir Decl. ¶ 14. Thus, if the Court does not grant Appellants' Motion to Stay Appeal, Appellants request this Court grant a thirty-day extension, through and including June 2, 2014, for Appellants to file their Opening Brief.

Date: April 15, 2014

MICHEL & ASSOCIATES, P.C.

/s/ C. D. Michel

C. D. Michel

Attorney for *Plaintiffs-Appellants*

Leonard Fyock, Scott Hochstetler, William Douglas, David Pearson, Brad Seifers, and Rod Swanson

DECLARATION OF ANNA M. BARVIR

I, Anna M. Barvir, declare:

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

2. Appellants filed a Motion to Stay Appeal on April 4, 2014. Counsel for the City has informed me that it intends to file an opposition to that motion on or before April 17, 2014. The Court has not issued a ruling on that pending motion.

3. Appellants' Opening Brief was originally due on April 2, 2014. On March 20, 2014, Appellants asked for one thirty-day extension of time due to substantial need. The Court granted that request on March 25, 2014. Appellants' Opening Brief is now due on or before May 2, 2014.

4. Due to an unexpected family emergency, Appellants' lead counsel, Clinton B. Monfort, began an indefinite leave of absence on March 17, 2014. His abrupt absence was unforeseeable and unavoidable. Though Mr. Monfort has

returned to work, his return is tentative and, as he continues to care for an immediate family member, he is frequently out of the office. As a result, I am now the attorney primarily responsible for preparing Appellants' Opening Brief.

5. For the same reason, I am also now the attorney primarily responsible for drafting the petition for rehearing or rehearing en banc in *Jackson v. City and County of San Francisco*, No. 12-17803, due on or before May 8, 2014.

6. Because of the proximity of the deadlines for the petition in *Jackson* and the Opening Brief in this case, I am currently preparing, researching, and drafting these documents simultaneously.

7. I learned on April 9, 2014, that I will be undergoing necessary surgery on April 25. The week before this procedure, I must attend several pre-surgery appointments that will keep me out of the office. And then I will be out of the office for at least three weeks following the procedure, during which time I will on bed rest and largely unable to work. As a result, I will be out of the office from April 17 until May 17. If neither the motion to stay appeal nor this motion is granted, I will only have a few days to finalize the Opening Brief before I go on leave. The scheduling of this procedure during the time in which I must prepare Appellants' Opening Brief to meet the current May 2 deadline was unexpected and unavoidable.

8. Because Mr. Monfort and I are the attorneys with the most intimate knowledge of this case, it would not be in Appellants' best interest to have another attorney take over the appeal at this stage.

9. Since the Court granted Appellants' first motion for extension of time, I have been spending the majority of my time preparing the Opening Brief in this case, the petition for rehearing or rehearing en banc in *Jackson*, a reply brief in *Rando v. Harris*, No. B254060, that was due on April 9, 2014, and an opposition to three motions to intervene in *Peruta v. County of San Diego*, No. 10-56971, that was due on April 2, 2014.

10. I have spent the remainder of my time performing my duties as a local legislative and policy analyst, specifically researching, drafting, and distributing opposition memorandums to the Pleasant Hill Planning Commission and Los Angeles Public Safety Committee.

11. The above reasons preclude Appellants' counsel from filing Appellants' Opening Brief by the current deadline of May 2, 2014, without significantly impairing its quality. As such, Appellants request a thirty-day extension of time from the currently scheduled May 2, 2014 deadline to file their Opening Brief.

12. I contacted Mr. Anthony P. Schoenberg, counsel of record for the

City, via e-mail on April 14, 2014, regarding any objection to Appellants' request for an extension of time to file their Opening Brief. Mr. Schoenberg responded on April 15, 2014, indicating that the City does not oppose this motion.

13. Counsel for Appellants have at all times exercised diligence to provide this Court timely and professional briefing. The requested extension of time will enable counsel to continue to do so, while at the same time fulfilling their obligations in other courts and other matters.

14. This motion is made in good faith and for the reasons of actual need set forth herein and not for the purpose of delay. In fact, it is in Appellants' interest to expedite a resolution of this matter, but not at the expense of the quality of their Opening Brief.

15. To my knowledge, the requested extension will not prejudice any party.

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

Executed the 15th day of April, 2014, at Long Beach, California.

/s/ Anna M. Barvir
Anna M. Barvir
Attorney for *Plaintiffs-Appellants*
Leonard Fyock, Scott Hochstetler,
William Douglas, David Pearson,
Brad Seifers, and Rod Swanson

CERTIFICATE OF SERVICE

I hereby certify that on April 15, 2014, an electronic PDF of **APPELLANTS' UNOPPOSED MOTION FOR EXTENSION OF TIME TO FILE OPENING BRIEF; DECLARATION OF ANNA M. BARVIR** 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: April 15, 2014

MICHEL & ASSOCIATES, P.C.

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