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THE CITY OF NEW YORK
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October 1, 2012

VIA EMAIL and FIRST CLASS MAIL

John Siegal, Esq.
Baker & Hostetler LLP
45 Rockefeller Plaza
New York, New York 10111

Re: In re McCray, et al.
03 Civ. 9685 (DAB)(RLE)

Dear Mr. Siegal:

Defendants in the above-referenced matter write in response to your letter dated September 25, 2012, regarding the subpoena served on Florentine Films, dated September 12, 2012. As an initial matter, defendants request that Florentine Films, its principals, agents or assigns, including but not limited to Ken Burns, Sarah Burns or David McMahon (hereinafter referred to collectively as "Florentine Films"), maintain any and all materials responsive to the subpoena, including but not limited to Electronically Stored Information, pending agreement or a judicial determination regarding the discoverability of the materials described therein. Please confirm in writing that Florentine Films consents to this preservation request.

A. The Scope of the Subpoena

Notwithstanding and without waiving the above request that Florentine Films preserve any and all materials responsive to the subpoena as written, defendants can agree to limitations on the scope of the subpoena as described herein, in an effort to avoid judicial intervention.

First, defendants are prepared to accept your representation, as counsel for Florentine Films, that "there is no, and has never been any, financial arrangement between Florentine Films and the plaintiffs or their attorneys."¹ Accordingly, defendants withdraw that

¹ Defendants accept this representation for the limited purpose of revising the scope of the subpoena, and do not in any way intend to waive or limit their rights to seek discovery directly from plaintiffs or any other third-party regarding any and all profits to plaintiffs or expenses incurred by plaintiffs in connection with the production and distribution of "The Central Park Five."

aspect of the subpoena that calls for documentation of compensation provided to plaintiffs by Florentine Films, or to Florentine Films by plaintiffs.

Second, defendants are aware that a number of individuals were interviewed in connection with the film who are not eye witnesses to the events at issue or to plaintiffs' alleged damages, and whose opinions and insights are likely based entirely on second-hand information. As such, the outtakes or raw footage of these interviews are of limited relevance to the issues in this civil case. At the outset, defendants are willing to exclude from the scope of the subpoena any and all footage of interviews with the following individuals who appear in the film: Jim Dwyer, Ed Koch, David Dinkins, Craig Steven Wilder, Lynnell Hancock, Calvin Butts, Natalie Byfield, Saul Kassir, and Ronald Gold.

Defendants request that Florentine Films provide this office with a list of individuals interviewed in connection with the film, particularly those who are eyewitnesses to the events at issue or witnesses to plaintiffs' alleged damages, which defendants may use for the purpose of further narrowing the scope of the subpoena. Defendants believe that these limitations remedy any concern regarding the breadth of the subpoena, as raised in your September 25th letter.

B. The Journalists' Privilege Does Not Bar the Requested Discovery

It is apparent, however, that certain of the materials sought by the subpoena are discoverable. Even assuming, *arguendo*, the applicability of the qualified journalists' privilege, these materials are relevant to significant issues in this case, and are not reasonably obtainable from other available sources. Specifically, to the extent Florentine Films conducted interviews with plaintiffs, their agents or assigns, including but not limited to: Antron McCray, Linda McCray, Kevin Richardson, Grace Cuffee, Connie Richardson, Valerie Cuffee, Crystal Cuffee, Angela Cuffee, Raymond Santana, Jr., Raymond Santana, Sr., Joann Santana, Kharey Wise, Michael Wise, Victor Wise, Yusef Salaam, Sharonne Salaam, Aisha Salaam, Shareef Salaam and/or their current or former counsel and/or experts retained by plaintiffs in this litigation, these materials are discoverable notwithstanding the assertion by Florentine Films of the qualified journalists' privilege.

In the first instance, the person seeking to invoke the qualified journalists' privilege must have acted in the role "favored by the public interest that motivates the privilege - the role of the independent press." Chevron Corp. v. Berlinger, 629 F.3d 297, 307 (2d Cir. 2011). The purpose of the privilege is to support the press in "seeking out and revealing truthful information." Id. at 308. If the publication is intended to promote the interests of another, the public interest is not served, regardless of the quality of the work. Id. In considering the nature of the journalist, an individual who 'reports' on his or her own clients, who have paid the journalist for services, is less likely to be considered independent within the meaning of the privilege. In re Fitch, Inc., 330 F.3d 104, 109 (2d Cir. 2003).

Here, defendants contest the true independence of Florentine Films, at least in the context of this film. As you are likely aware, Sarah Burns, writer, producer and co-director of "The Central Park Five," was employed as a researcher and paralegal at Moore & Goodman, LLP, from approximately June, 2004 through May, 2006, during the pendency of this litigation. To date, Jonathan C. Moore, Esq., formerly of Moore & Goodman, and presently a partner in the law firm Beldock, Levine, & Hoffman, LLP, represents the McCray, Santana and Richardson plaintiffs in this action. Ms. Burns has publicly represented that her interest in the subject matter

of this film arose during the course of her employment with plaintiffs' counsel, where she gathered information in her capacity as a paralegal and researcher specifically for use by plaintiffs in this pending civil litigation. Thus, Ms. Burns has performed services for the subjects of the film, and has received monetary compensation for doing so.

As well, Ms. Burns has authored editorials demanding that the City settle this civil litigation, brought by the clients of her former employer. (Sarah Burns, *New York wrongfully convicted 5 young men of raping the Central Park jogger -- and now won't settle*, N.Y. DAILY NEWS, April 17, 2011). Similarly, Ken Burns has represented that the theatrical release of "The Central Park Five," is first and foremost "to make a difference" and "amplify pressure on the city to settle," and that the purpose of the film was "first and foremost ... the settlement of the civil suit that is now nine years old." (Dave McNary, *Ken Burns: Cannes the 'Grand Canyon' of cinema: Docu filmmaker screens 'Central Park Five' out of competition*, VARIETY, May 24, 2012, <http://www.variety.com/article/VR1118054608>; Annette Insdorf, *The Central Park Five Premieres in Cannes*, HUFFINGTON POST, May 26, 2012, http://www.huffingtonpost.com/annette-insdorf/the-central-park-five-_b_1547745.html). Ken Burns further stated, "I would love it if some wise soul would whisper in the mayor's ear, 'Just settle.' To have these men made whole again in some way would be great." (Kenneth Turan, *Cannes 2012: Ken Burns' 'Central Park Five' explores famous crime*, L. A. TIMES, May 25, 2012, <http://latimesblogs.latimes.com/movies/2012/05/cannes-2012-ken-burns-documentary-central-park-five-famous-rape-case.html>). Co-director David McMahon has also publicly expressed his desire for the film to affect the outcome of the civil litigation, stating "[w]e'd hope for some kind of harmonic convergence, where this story could be spread on the eve of the trial and potentially affect the outcome." (Gregg Goldstein, *Exclusive: Inside the New Ken Burns Documentary The Central Park Five*, TV GUIDE, Apr. 24, 2012, <http://www.tvguide.com/News/Central-Park-Five-1046380.aspx>).

Apart from these public statements evidencing a primary litigation-related purpose behind the film, years before the film was released Mr. Burns also privately demanded that the City settle this case via letter addressed to Michael Bloomberg, Mayor of the City of New York.

Accordingly, Florentine Films cannot be fairly characterized as "independent press," which lessens, if not eradicates, the applicability of the qualified journalists' privilege to the materials sought by subpoena. Notably, given Florentine Films' expressed desire for the City to resolve this litigation, it is surprising that Florentine Films would attempt to withhold evidence that could impact the litigation.

Even assuming, *arguendo*, that Florentine Films could establish journalistic "independence," the interviews with these individuals and/or their agents are not 'confidential press materials.' The federal common law corollary to New York State's "Shield Law" "protects journalists from contempt for refusing to comply with a nonparty subpoena when the subpoena seeks to discover information conveyed to the journalist *in confidence*." *In re Fitch, Inc.*, 330 F.3d 104, 109 (2d Cir. 2003) (citing N.Y. Civ. Rights Law § 79-h(b) (McKinney 2002)). "While nonconfidential press materials are protected by a qualified privilege, the showing needed to overcome the privilege is less demanding than the showing required where confidential materials are sought." *Gonzales v. NBC*, 194 F.3d 29, 36 (2d Cir. 1999). If the information sought is not confidential, and the journalist is not protecting the identity of sources, the stronger privilege does not apply. *United States v. Treacy*, 639 F.3d 32, 42 (2d Cir. 2011); see also *Sokolow v.*

PLO, 04 Civ.397 (GBD)(RLE), 2012 U.S. Dist. LEXIS 127040 (S.D.N.Y. Sept. 6, 2012) (“the standard for overcoming the journalist privilege for non-confidential information is much less stringent”). Rather, defendants must only show that the materials sought “are of likely relevance to a significant issue in the case, and are not reasonably obtainable from other available sources.” Gonzales, 194 F.3d at 36.

Defendants in this case seek outtakes and raw footage of interviews with plaintiffs, or current and former counsel to plaintiffs, in a federal civil rights case where allegations of vast police and prosecutorial misconduct have already been laid bare in a public forum. Indeed, the subject matter of the film is virtually identical to the subject matter of the instant public litigation, both in terms of the underlying events and plaintiffs’ alleged damages. Moreover, these individuals are not “sources,” and cannot be said to have conveyed information to Florentine Films about the events of April 19, 1989 and their aftermath “in confidence.” In fact, certain plaintiffs have already disclosed in discovery the nature of their communications with Florentine Films in connection with the film. By way of example, plaintiff Kharey Wise averred in sworn discovery responses that he discussed “his early childhood, his wrongful arrest, trial and incarceration and the effect of those events on his life,” with Sarah Burns and her staff. All of these subjects are at issue in this litigation, as they bear upon both liability and plaintiffs’ alleged damages.

Finally, the outtakes and raw footage sought by defendants are not reasonably obtainable from other available sources. While these plaintiffs have been or will be deposed in the civil case, the depositions are unlikely to adequately substitute for this footage. First, upon information and belief, these plaintiffs gave versions of events to Florentine Films that directly contradict materials aspects of their prior sworn testimony, giving the raw footage a demonstrably high impeachment value. Independent of the impeachment value, the footage may be admissible at trial as party admissions under Federal Rule of Evidence 801(d)(2), to the extent the speakers are parties or their agents.

As well, plaintiffs’ counsel, including but not limited to Michael Joseph and Michael Warren, were interviewed in connection with this film. It is plausible that, in doing so, Mr. Joseph and/or Mr. Warren (or plaintiffs’ themselves) waived attorney-client privilege or attorney work product. Defendants are entitled to discover whether the privilege was waived, which would then entitle defendants to additional discovery in this case.

Furthermore, complete footage of the interviews with the plaintiffs should be available to the expert witness(es) so that they can conduct thorough forensic evaluations of the plaintiffs. Such evaluations are relevant to plaintiffs’ claims that their confessions were “coerced,” ultimately resulting in conviction and incarceration, allegedly causing severe and permanent emotional injuries. Defendants would be prejudiced if the weight of defense experts’ testimony were limited by the lack of availability of relevant interview footage for expert review.

For these reasons, defendants urge Florentine Films to reconsider its blanket objection to defendants’ original subpoena. In an effort to reach an agreement regarding the scope of the subpoena, and to avoid any undue burden to Florentine Films, enclosed herein

please find an amended subpoena, reflecting the limitations described herein.² If you are not authorized to accept this subpoena on behalf of Florentine Films, please advise upon receipt of this letter, so that the subpoena can be served on the proper party.

Lastly, defendants accept the offer of Florentine Films to provide this office with a DVD copy of "The Central Park Five."

Please contact me at your earliest convenience to discuss whether Florentine Films will comply with the revised subpoena for the reasons set forth herein.

Very truly yours,



Elizabeth M. Daitz
Senior Counsel

² This subpoena remains subject to further revision, should Florentine Films provide additional information, as requested, about who was interviewed on camera in connection with the film.

United States District Court

SOUTHERN

DISTRICT OF

NEW YORK

In re McCray, et al. Litigation

AMENDED SUBPOENA IN A CIVIL CASE

CASE NUMBER: 03CV9685

TO: **FLORENTINE FILMS – BURNS**
875 Avenue of the Americas
Suite 1101
New York, New York 10001

YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case

<small>PLACE OF TESTIMONY</small>	<small>COURTROOM</small>
	<small>DATE AND TIME</small>

YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case

<small>PLACE OF DEPOSITION</small>	<small>DATE AND TIME</small>

YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below: Copies of audio and/or video materials documenting interviews with the following subjects, their agents or assigns, recorded in connection with the book and/or film "The Central Park Five," including any and all outtake/raw footage: plaintiffs Antron McCray, Linda McCray, Kevin Richardson, Grace Cuffee, Connie Richardson, Valerie Cuffee, Crystal Cuffee, Angela Cuffee, Raymond Santana, Jr., Raymond Santana, Sr., Joann Santana, Kharey Wise, Michael Wise, Victor Wise, Yusef Salaam, Sharonne Salaam, Aisha Salaam, Shareef Salaam, and/or their current or former counsel and/or experts retained by plaintiffs in this litigation; witnesses to the events at issue in this litigation, including but not limited to Matias Reyes, and any and all witnesses who were present during and/or participated in the events of April 19, 1989, the subsequent investigation, arrest or prosecution of plaintiffs.

<small>PLACE</small> 100 Church Street New York, NY 10007	<small>DATE AND TIME</small> November 1, 2012 10:00 am
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YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

<small>PREMISES</small>	<small>DATE AND TIME</small>

Any organization not a party to this suit that is subpoenaed for the taking of a deposition shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. Federal Rules of Civil Procedure, 30(b)(6).

<small>ISSUING OFFICER SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT)</small> Assistant Corporation Counsel Attorney for Defendants	<small>DATE</small> 10/2/12
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ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

Elizabeth M. Daitz
 N.Y.C. Law Department, 100 Church Street, Rm. 3-218
 New York, New York 10007 (212) 788-0775

(See Rule 45, Federal Rules of Civil Procedure, Parts C & D on Reverse)

PROOF OF SERVICE

SERVED	DATE	PLACE
SERVED ON (PRINT NAME)		MANNER OF SERVICE
SERVED BY (PRINT NAME)		TITLE

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the forgoing information contained in the Proof of Service is true and correct.

Executed on _____
DATE

SIGNATURE OF SERVER

ADDRESS OF SERVER

Rule 45, Federal Rules of Civil Procedure, Parts C & D:

(c) PROTECTION OF PERSONS SUBJECT TO SUBPOENAS.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2)(A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3)(A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded

to travel from any such place within the state in which the trial is held, or

- i. requires disclosure of privileged or other protected matter and no exception or waiver applies, or
- ii. subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) DUTIES IN RESPONDING TO SUBPOENA.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.