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October 3, 2012

BY E-MAIL AND HAND DELIVERY

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Re: *In re McCray, et al.*, SDNY Case No. 03-9685

Dear Ms. Daitz:

Thank you for your letter of yesterday withdrawing the subpoena to Florentine Films dated September 12. The City's narrowing of its requests is a preliminary though insufficient step in the right direction. We are reviewing the new requests contained in the amended subpoena served yesterday, and will be back to you for further discussions of the issues once we complete our review. In addition, as you requested, a copy of the film "The Central Park Five" is enclosed.¹

The City's position "contest[ing] the true independence of Florentine Films" and contending that the filmmakers somehow sacrificed their "journalistic 'independence'" by expressing an opinion on the story they reported and advocating outside the film that the City settle with the falsely convicted individuals is deeply troubling and contrary to well-established law and customary civic norms for at least four basic reasons.

First, it is contrary to New York's Shield Law and governing case law. The filmmakers are indisputably "professional journalists" under New York's Shield Law, Civil Rights Law § 79-h. Your letter contains nothing to the contrary: the filmmakers were not reporting on their own clients, *cf. In re Fitch, Inc.*, 330 F.3d 104, 109 (2d Cir. 2003); nor were they acting at the behest of or as agents of the plaintiffs' lawyers who had absolutely no editorial control or influence over the film. *Cf. Chevron Corp. v. Berlinger*, 629 F.3d 297, 307 (2d Cir. 2011). Sarah Burns'

¹ The enclosed DVD is being produced without waiver of any objections to the amended subpoena. Florentine Films, Ken Burns, Sarah Burns and David McMahon hereby expressly preserve all rights with respect to the amended subpoena. In addition, I am confirming that the subpoena recipients are complying with their preservation obligations.

BY E-MAIL AND HAND DELIVERY

Elizabeth M. Daitz, Esq.
October 3, 2012
Page 2

summer job as a paralegal on the case, before she began researching this story for her college dissertation and before Florentine Films later decided to produce a film on it, does not somehow "eradicate" the reporter's privilege that applies to her work with Florentine Films as a professional journalist acting completely independently of the plaintiffs' lawyers. Our representation that "there is no, and has never been any financial arrangement between Florentine Films and the plaintiffs or their attorneys," which the City has accepted, should put an end to this line of attack by the City. Surely, the City is not going to adopt the aggressive litigation tactics of a multinational oil company and try to stretch the *Chevron v. Berlinger* decision beyond its factual context in determining the scope of reporters' rights to protect their work product from unreasonable and unnecessary intrusion in the course of civil litigation to which the reporters are not parties.

Second, the City is overreaching its appropriate governmental powers by claiming that the filmmakers have somehow waived their journalists' protections by expressing an opinion on the injustice done to the "Central Park Five." Citing advocacy journalism published by the filmmakers as a basis for "eradicating" the Shield Law protection is a constitutionally impermissible content-based determination by a municipal government that has no business taking a litigation position based on the First Amendment protected expression of the reporters whose files it is seeking to inspect. Municipal decision-making based on the political viewpoints expressed by its citizens is beyond the pale of our civic discourse. See *Brooklyn Institute of Arts and Sciences v. City of New York*, 64 F. Supp. 2d 184 (E.D.N.Y. 1999) (enjoining the City from penalizing the Brooklyn Museum due to the Mayor's distaste for an exhibited painting). Worse yet, by citing Ken Burns' letter to the Mayor petitioning the City to do justice toward the falsely convicted individuals who served full state prison terms for a crime they did not commit as a justification for broadly subpoenaing the protected property of a citizen, who happens to be a professional journalist, the City is raising the abusive specter of governmental retaliation for First Amendment protected advocacy that may be unpopular in certain departments of City government.

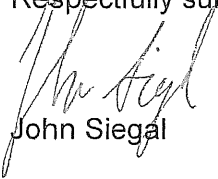
Third, by seeking to undermine the reporters' privilege through an unwarranted expansion of the limited holding in *Chevron v. Berlinger*, the City is acting contrary to the rights and interests of a vital New York City industry. In a media industry capital whose municipal culture has always featured a robust and opinionated press, advocacy journalism cannot consistent with governing law and civic norms be appropriately cited by City government as a reason to overcome the reporters privilege. See *Blumenthal v. Drudge*, 186 F.R.D. 236 (D.D.C. 1999) (applying reporter's privilege to advocacy journalist). It would be shocking for the City to subpoena the internal work product of a newspaper editorial board or a columnist's notes because the newspaper or columnist advocated a position on a pending City matter. The City would never contend that a newspaper sacrifices its journalistic privilege because a publisher speaks to the Mayor about a public matter. And, it is no less reprehensible when the City acts similarly toward documentary filmmakers who run an acclaimed production company in the documentary film capital of America. See Center for an Urban Future, "New York by the Numbers," Feb. 2012, v. 5, issue 1 (New York-based documentary film companies consistently outpace Hollywood for Oscar nominations in documentary film). For a City government whose chief executive made billions as the owner of a media and information company which regularly publishes opinions on matters it covers to take this position is surprising and saddening.

BY E-MAIL AND HAND DELIVERY

Elizabeth M. Daitz, Esq.
October 3, 2012
Page 3

Fourth, and fundamentally, one could fairly construe the City's position as impugning the integrity of filmmakers who have worked for decades to establish a reputation as documentarians, historians, and reporters of the truth. Such a position by the City is unnecessary to resolve the issue of whether and to what extent the filmmakers' materials can appropriately be subject to subpoena in the *McCray* litigation, and we expect that the City will desist from this gratuitous approach to the matter.

Respectfully submitted,



John Siegal

Enclosure

cc: Ken Burns (by e-mail)
Sarah Burns (by e-mail)
David McMahon (by e-mail)
Hon. Michael Bloomberg (by hand w/out enc.)
Michael A. Cardozo, Esq. (by e-mail and hand w/out enc.)