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**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

ERIC GLATT, ALEXANDER FOOTMAN,
EDEN ANTALIK, and KANENE GRATTS, on
behalf of themselves and all others similarly
situated,

Plaintiffs,

v.

FOX SEARCHLIGHT PICTURES INC. and
FOX ENTERTAINMENT GROUP, INC.,

Defendants.

No. 11 Civ. 6784 (WHP) (AJP)

PLAINTIFFS' NOTICE OF MOTION FOR PARTIAL SUMMARY JUDGMENT

For the reasons set forth in Plaintiffs' Memorandum of Law in Support of Motion for Partial Summary Judgment, Plaintiffs' Statement of Undisputed Material Facts Pursuant to Local Civil Rule 56.1, and the Declaration of Rachel Bien and the exhibits attached thereto, Plaintiffs respectfully request that the Court enter an Order granting partial summary judgment pursuant to Fed. R. Civ. P. 56 that:

(1) Plaintiffs Eric Glatt, Alexander Footman, and Kanene Gratts ("Plaintiffs") were covered employees under the Fair Labor Standards Act, New York Labor Law, and/or California Labor Code;

(2) Plaintiffs were not trainees under the Fair Labor Standards Act, New York Labor Law, and/or California Labor Code; and

(3) Defendant Fox Searchlight Pictures, Inc. employed Plaintiffs.

Dated: February 15, 2013
New York, New York

Respectfully submitted,

By: /s/ Rachel Bien
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**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL
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PRELIMINARY STATEMENT

Plaintiffs Eric Glatt, Alexander Footman, and Kanene Gratts (“Plaintiffs”) worked as interns on Fox Searchlight Pictures, Inc. (“Searchlight”) film productions building sets and performing administrative and accounting functions in the productions’ offices. Like the many other interns who worked for Searchlight and its parent, Defendant Fox Entertainment Group, Inc., Plaintiffs were not paid for the productive labor they contributed to Defendants’ business of making motion pictures.

Plaintiffs respectfully move this Court for an order granting them partial summary judgment with respect to two issues. First, they seek an order that they were “employees” as that term is broadly defined by the Fair Labor Standards Act (“FLSA”) and the applicable state wage and hour laws. The undisputed evidence demonstrates that Searchlight “suffered or permitted” Plaintiffs’ labor by facilitating its productions and reducing its labor costs through the benefit of uncompensated work. Searchlight also cannot raise a genuine issue of material fact that Plaintiffs fell under the narrow exception for “trainees” that the U.S. Supreme Court defined more than 65 years ago for participants in a short-term training program. Here, there is no dispute that Plaintiffs did not participate in a training program but instead performed productive work alongside paid production assistants and construction crew members, providing an “immediate advantage” to Searchlight.

Second, Plaintiffs seek an order holding Searchlight liable as Plaintiffs’ employer. Searchlight was closely involved in every aspect of the film productions on which Plaintiffs worked, including financing the films, determining their budgets, approving wage rates, monitoring their operations on a daily basis, hiring and approving the hire of the production personnel who supervised Plaintiffs, setting the terms and conditions of crew members’

employment, defining the films' intern hiring policy, taking over the production assets when filming finished, and much more. Searchlight's claim that the "single-purpose" corporations with which it contracted – legal fictions created for the sole purpose of producing each film – which lack assets and cease operations once the film is completed, were Plaintiffs' employers is comparable to arguments that garment manufacturers made in the early 20th century to avoid liability and that prompted Congress to adopt, in the FLSA, "the broadest definition [of 'employ'] that has ever been included in any one act." *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 69 (2003) (quoting *U.S. v. Rosenwasser*, 323 U.S. 360, 363 n.3 (1945)). Since that time, courts in this Circuit, as well as the U.S. Supreme Court, have rejected such "subterfuge[s]" designed to "evade the FLSA or other labor laws" and have routinely held defendants that outsource work to a third party liable for unpaid wages owed to employees. *Id.* at 72.

PROCEDURAL HISTORY

Plaintiffs Eric Glatt and Alexander Footman filed a Class Action Complaint on September 28, 2011, on behalf of themselves and all other unpaid interns who worked for Searchlight. ECF No. 1 (Compl.) ¶¶ 39, 50. On September 5, 2012, Plaintiffs sought leave to amend the Complaint, *inter alia*, to add Kanene Gratts as a named Plaintiff, to add Fox Entertainment Group, Inc. as a Defendant, and to expand the class and collective of unpaid interns to include all interns who worked in Defendants' corporate offices. ECF No. 27. The Court granted Plaintiffs' motion in large part, *see* ECF No. 46, and Plaintiffs filed a First Amended Complaint on October 19, 2012. ECF No. 58 (1st Am. Compl.).

To date, the parties have completed merits discovery, except with respect to damages and Defendants' good faith affirmative defense. *See* ECF No. 76. On February 15, 2013, Plaintiffs intend to file a motion for class and collective certification with respect to the interns who

worked in Defendants' corporate offices. Following the completion of all discovery and depending on the outcome of the class and collective certification motion, Plaintiffs anticipate moving for summary judgment with respect to the corporate interns.

STATEMENT OF FACTS

I. Plaintiffs Performed Productive Work for Searchlight Film Productions that Displaced Paid Employees.

Plaintiffs performed work that directly contributed to the production of films that Searchlight financed, produced, and later distributed. They functioned as integral members of the films' production teams, performing tasks alongside paid crew members and that otherwise would have been performed by paid crew members.

A. Eric Glatt

Eric Glatt worked for Searchlight in the Accounting Department of *Black Swan* from approximately December 2009 through February 2010, five days a week from 9 a.m. to 7 p.m. SOF¹ ¶ 188. His responsibilities included tracking and reconciling purchase orders, invoices and petty cash; reviewing personnel files for required paperwork; creating spreadsheets to track personnel file documents; communicating with cast and crew members regarding their personnel files; making deliveries to the film set and production payroll company; and scanning, photocopying, filing, and emailing accounting documents. *Id.* ¶¶ 190-91. Glatt also worked in the Post-Production Department two days a week from approximately March 2010 through August 2010, from 11 a.m. to approximately 6 or 7 p.m. *Id.* ¶ 194. He did administrative work, such as filing, photocopying, errands, and preparing binders of materials to be sent to Searchlight. *Id.* ¶¶ 195-98. If Glatt had not performed this work during the production and post-production of *Black Swan*, a paid crew member would have had to work more hours do it, or a

¹ Plaintiffs' Statement of Undisputed Material Facts Pursuant to Local Civil Rule 56.1 ("SOF").

paid assistant would have had to have been hired. *Id.* ¶ 192.

Glatt did not receive any training on *Black Swan*. *Id.* ¶ 199. The supervision that he received was the same as that provided to paid employees and consisted of on-the-job instructions about how to perform his tasks. For example, his supervisors told him which personnel documents had to be maintained in employee personnel files so that he could properly maintain the files. *Id.* ¶ 187.

Glatt hoped that his internship and the film credit he expected to receive would lead to paid employment in the film production industry. *Id.* ¶¶ 201-02. Even though he believed that he should have been paid wages for his work, he did not believe that he had the ability to bargain over the terms and conditions of his internship. *Id.* ¶ 203.

B. Alexander Footman

Alexander Footman worked for Searchlight in the Production Office of *Black Swan* from approximately October 2009 through February 2010, between 25 to 50 hours a week, on a schedule set by his supervisor based on the needs of the Production Office. *Id.* ¶¶ 214, 216. Footman and approximately four other unpaid interns performed work similar to the work performed by the office's paid Production Assistant. *Id.* ¶ 222. Footman's responsibilities included picking up and setting up office furniture at the beginning of the production; arranging lodgings in hotels and apartments for the cast and crew; compiling lists of local vendors; taking out the trash; taking lunch orders; answering and transferring phone calls; watermarking scripts; drafting daily call sheets; photocopying; making coffee; making deliveries to and from the film production set, rental houses, and payroll services; receiving packages and deliveries to the office; admitting guests into the office; breaking down, removing, and selling office furniture and supplies at the end of the production; internet research; and sending invitations to the "wrap

party.” *Id.* ¶¶ 223-25.

During his internship, Footman did not receive training or educational instruction. *Id.* ¶¶ 227, 230. His supervision was limited to instruction on how to perform his day-to-day tasks. *Id.* ¶ 228. For example, Footman’s supervisor explained how to watermark documents using Adobe Acrobat, which enabled the production to print the names of cast and crew members on their scripts and to trace any scripts that were “leaked.” *Id.* ¶¶ 228-29. Footman agreed to work for no financial compensation because he hoped that his internship would lead to paid employment in the film production industry. *Id.* ¶ 231.

C. Kanene Gratts

Kanene Gratts worked for Searchlight in the Art Department of *500 Days of Summer* from approximately April 2008 through August 2008, approximately 20-25 hours a week, according to a set schedule. *Id.* ¶¶ 250-53. Gratts performed her work alongside paid members of the construction crew who performed the same tasks that she performed. *Id.* ¶ 239. Her responsibilities included constructing sets; preparing the sets for film shoots by arranging props and furniture; keeping the sets neat during shooting; and restoring the film location to its original, pre-production state once filming was complete. *Id.* ¶¶ 244-49. Gratts did not receive any training or educational instruction. The supervision that she received was limited to instruction from her supervisors about how to perform her day-to-day duties, such as how to use particular pieces of construction equipment to build set pieces. *Id.* ¶ 240.

Gratts expected to be paid for her internship because Steven Fox, the Construction Foreman on *500 Days of Summer*, told her that she would be paid when production concluded. *Id.* ¶¶ 257-58. Gratts continued to work for Searchlight with that understanding. *Id.* When she was not paid, she called the *500 Days of Summer* production office and left messages about her

paycheck. *Id.* ¶ 259. When she did not receive a response, she went to the Fox Studios lot in Los Angeles to speak to someone in person about her unpaid wages, but the security guard did not permit her to enter the premises. *Id.*

II. Searchlight Financed, Closely Monitored, and Set Employment Conditions on its Film Productions.

A. Searchlight Had the Power to Hire and Approve Key Production Staff.

Searchlight entered into detailed Production-Finance-Distribution Agreements (“PFD Agreements”) with the single-purpose companies with which it contracted that set forth its right to control significant aspects of the films’ productions. SOF ¶¶ 13-17, 24-27. The PFD Agreements gave Searchlight the power to hire and approve key production department heads, including the Unit Production Manager, who supervised the entire production; the Production Accountant, who supervised the Accounting Department; the Production Designer, who supervised the Art Department (props, set dressing, and construction); the Cinematographer, who supervised the camera crew, grips, and electrical crew; the Costume Designer, who supervised the Costume Department; and the Editor, who supervised the post-production staff. *Id.* ¶¶ 15, 25, 60, 63-64, 67-68. These crew members hired and directly supervised Plaintiffs. *Id.* ¶¶ 185, 208, 236.

Searchlight also exercised its hiring and approval authority. For example, Searchlight hired the *500 Days of Summer* Line Producer, chose that film’s production department heads, and checked their references before hiring them. *Id.* ¶¶ 65-66. Searchlight explicitly reserved the right to replace any personnel on *Black Swan* and *500 Days of Summer* if, “in its sole reasonable discretion,” it decided to take over the production entirely. *Id.* ¶¶ 17, 27.

B. Searchlight Closely Supervised the Work on the Productions on a Daily Basis.

Searchlight monitored the progress of its productions and the amounts spent on the productions on a daily basis. Searchlight required the productions to send it daily “call sheets,” which contained information about the scenes that were to be filmed the next day and the time each employee was to arrive to work, and allowed Searchlight to monitor any changes to the production schedule. *Id.* ¶¶ 78-82. Production interns, including Glatt and Footman, were often copied on emails sent to Searchlight attaching call sheets. *Id.* ¶ 86. Searchlight also received and used “Crew Lists,” containing contact information for all production personnel, including Plaintiffs and other interns. *Id.* ¶ 165. Searchlight required the productions to send it daily production reports and “wrap reports,” which contained detailed information about where filming took place, which scenes were scheduled, which of those scenes were filmed or not filmed, and employees’ hours of work. *Id.* ¶¶ 83-84. *500 Days of Summer* production reports included the names of interns who worked on the production. *Id.* ¶ 85. Searchlight’s Executive Vice President of Production, Elizabeth Sayre, who was responsible for overseeing the physical production of its films, reviewed the call sheets, production reports, wrap reports, and cost reports on a daily or weekly basis to ensure that the productions were operating within the budget and production schedule that Searchlight had set. *Id.* ¶¶ 84, 89.

In addition, Searchlight required film production employees to call Sayre or a member of her staff each morning to tell them the time of the first film shot of the day, and each evening to tell them the time that shooting for the day had wrapped, to ensure that the production complied with the production schedule. *Id.* ¶ 90.

C. Searchlight Determined the Budgets Under Which the Productions Operated.

Searchlight determined the overall amount allocated to each film's budget and approved how much would be allocated to each budget line item, including for labor. *Id.* ¶¶ 32-34, 36-37, 39. Searchlight did not permit the production to incur overages, or cost overruns, without its prior approval. *Id.* ¶ 119. Searchlight's control over the budget determined how many crew members could be hired and what their pay would be. *Id.* ¶¶ 50-51, 56-58, 124, 153.

Searchlight also determined the reimbursement or "box rental" rates for employees who used their personal equipment, such as computers and cell phones, for work-related purposes. *Id.* ¶¶ 52, 163. Searchlight required the productions to send it weekly cash flow schedules that showed the amount of money spent. *Id.* ¶¶ 101-04. The productions were also required to submit weekly cost reports detailing how the production spent money with respect to each budget line item, including labor, so that Searchlight could monitor the production's expenditures on wages. *Id.* ¶¶ 105-110. Searchlight also required the productions to sell props and other physical property that they did not return to Searchlight when filming concluded, and required purchasers sign a "Sale of Prop Assets Agreement" that listed Twentieth Century Fox Film Corporation as the seller. *Id.* ¶¶ 129-130. Footman assisted with selling this property. *Id.* ¶ 129.

D. Searchlight Required Crew Members to Sign its Form Employment Agreements.

Searchlight required crew members to sign form employment agreements or "deal memos" that it drafted, confidentiality agreements, and box rental reimbursement forms. *Id.* ¶¶ 146-156, 161-64. Film production employees would not be paid until they provided signed deal memos to Searchlight. *Id.* ¶ 151. On *Black Swan*, even though some employees had already signed deal memos before Searchlight became involved in the production, Searchlight required

them to sign new ones on its approved forms. *Id.* ¶¶ 154-56. One of Glatt’s responsibilities was to collect deal memos from film production employees. *Id.* ¶¶ 156-57.

E. Searchlight Set and Expected the Productions to Enforce its Intern Policy.

Searchlight expected the productions to follow its intern policy under which interns could only be hired without pay if they were able to obtain academic credit. *Id.* ¶¶ 133-34. Searchlight was aware that interns worked on its productions. *Id.* ¶ 138. Interns’ names were listed on production reports, which set forth the names of individuals who were scheduled to work; interns received film credits, which Searchlight approved; and interns were listed on crew lists, which the productions submitted to Searchlight and which Searchlight used. *Id.* ¶¶ 139-141, 172, 178. Searchlight also heard about interns working on its productions from production crew members. For example, *Black Swan*’s Line Producer copied Sayre on an email in which she alerted Sayre and others that a union representative had been on set and complained that an intern was doing work that should have been assigned to a “loader,” a union position responsible for loading film in the movie camera. *Id.* ¶ 142. Searchlight also approved the inclusion of interns on the credits of *500 Day of Summer*. *Id.* ¶ 178. Glatt’s supervisors told him that Searchlight had authorized his hire even though Glatt could not receive academic credit for his internship. *Id.* ¶¶ 143-45. Searchlight approved Glatt’s request to list him in the *Black Swan* film credits as a “post-production assistant.” *Id.* ¶¶ 176-77. Searchlight’s current policy is that interns who work on its productions must be paid. *Id.* ¶ 137.

F. Searchlight Contracted with Single-Purpose Corporations to Produce its Films.

Searchlight contracted with “single-purpose” corporations to produce its films. *Id.* ¶¶ 10-11, 13, 20, 24. “Single-purpose” corporations, which are common in the film industry, are legal fictions created solely to facilitate the production of a particular film, do not have any

independent purpose other than the making of the film, and cease operations after the film is completed. *Id.* ¶¶ 11, 18-20, 28, 129-32. The “single-purpose” companies that produced *Black Swan* and *500 Days of Summer*, Lake of Tears, Inc. and 500DS Films Corp., respectively, did not retain any assets, maintain employment records, keep any physical property, or conduct any other business after production ended and were required to transmit all of their assets to Searchlight. *Id.* ¶¶ 18-19, 28, 129-32.

STANDARD OF REVIEW

A party is entitled to summary judgment where it shows “that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); *Zheng*, 355 F.3d at 76-77. “Material facts” are those that, under the applicable substantive law, “might affect the outcome of the suit.” *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute over a “material fact” is “genuine” only if “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Id.*

Although Plaintiffs bear the initial burden of establishing that they were “employees” within the meaning of the FLSA and state laws, once they have made this prima facie showing, Searchlight bears the burden of establishing its defense that they fell under the narrow exception for “trainees” set forth in *Walling v. Portland Terminal Co.*, 330 U.S. 148 (1947). *See Martin v. Malcolm Pirnie, Inc.*, 949 F.2d 611, 614 (2d Cir. 1991) (noting that, because the FLSA is a remedial act, the employer bears the burden of proving that employees fall within an exempted category).

The Court must determine whether Searchlight employed Plaintiffs based on the “totality of the circumstances,” and in light of “the ‘economic reality’ of [the] particular employment situation” and “the factual challenges posed by [the] particular case[.]” *Barfield v. New York*

City Health & Hosps. Corp., 537 F.3d 132, 141-42 (2d Cir. 2008). Summary judgment is appropriate when “the record as a whole compel[s] the conclusion” that an employment relationship existed even if “isolated factors point against [it].” *Zheng*, 355 F.3d at 77; *Barfield*, 537 F.3d at 143-44 (acknowledging the “fact-intensive character of a determination of joint employment,” but holding that summary judgment for plaintiffs is appropriate where the defendant’s status as an employer “is established as a matter of law”).

ARGUMENT

I. Plaintiffs Are Covered Employees Under the FLSA and State Labor Laws.

A. The FLSA’s Remedial and Humanitarian Goals Require the Court to Interpret its Coverage Expansively.

The FLSA seeks to combat unemployment and protect workers from abusive working conditions. *See Brooklyn Sav. Bank v. O’Neil*, 324 U.S. 697, 707 n.18 (1944). The Act’s coverage is necessarily broad, to ensure that it “aid[s] the unprotected, unorganized and lowest paid of the nation’s working population . . . who lack[] sufficient bargaining power to secure for themselves a minimum subsistence wage.” *Id.* “A broader or more comprehensive coverage of employees . . . would be difficult to frame” and there is “no doubt as to the Congressional intention to include all employees within the scope of the Act unless specifically excluded.” *U.S. v. Rosenwasser*, 65 S. Ct. 295, 296 (1945).

To further its remedial and humanitarian goals, the FLSA broadly defines “employ” as “to suffer or permit to work” and defines an “employee” as “any individual employed by an employer.” 29 U.S.C. § 203(d), (e)(1); *Zheng*, 355 F.3d at 66. “Employer” is also defined expansively as “any person acting directly or indirectly in the interest of an employer in relation

to an employee[.]”² 29 U.S.C. § 203(d). “Work” is any “physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer.” *Alvarez v. IBP, Inc.*, 339 F.3d 894, 902 (9th Cir. 2003), *aff’d*, 546 U.S. 21 (2005). Moreover, work is compensable under the FLSA even if the employer does not request it, is unaware of it, or turns a blind eye to it, because it is the employer’s duty “to exercise its control and see that the work is not performed if it does not want it to be performed. It cannot sit back and accept the benefits [of workers’ labor] without compensating [] them.” 29 C.F.R. § 785.13.

The FLSA’s broad definitions of employ, employee, and employer are meant to ensure that commercial businesses do not obtain an unfair competitive advantage in the marketplace by employing individuals who voluntarily work for no wage. *See* 29 U.S.C. § 202(a)(3) (declaring Congress’s intention to correct “detrimental” labor conditions that create “an unfair method of competition in commerce” through passage of the FLSA); *see also Tony & Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 299, 301 (1985) (“*Alamo Found.*”) (“exceptions to [FLSA] coverage . . . exert a general downward pressure on wages in competing businesses”). “If an exception to the Act were carved out for employees willing to testify that they performed work ‘voluntarily,’ employers might be able to use superior bargaining power to coerce employees to make such assertions, or to waive their protections under the Act.” *Alamo Found.*, 471 U.S. at 302. Broad, non-waivable coverage ensures that employers pay their workers lawful wages without “fear that

² The New York Labor Law’s definition of employee is nearly identical to the FLSA’s definition. *See* N.Y. Lab. Law § 651(5) (an employee is “any individual employed or permitted to work by an employer in any occupation”). Similarly, the definition of “employ” under the California Labor Code is substantially similar to the FLSA. *See Martinez v. Combs*, 49 Cal. 4th 35, 63-64 (Cal. 2010) (“employ” means “to exercise control over the wages, hours or working conditions,” “to suffer or permit to work,” or “to engage, thereby creating a common law employment relationship”).

[they] will be required by law to observe wage and hour standards higher than those applicable to [their] competitors.” *Brooklyn Savs. Bank*, 324 U.S. at 710 n.7.

B. Plaintiffs Glatt, Footman, and Gratts Performed Work that Searchlight Suffered or Permitted.

Plaintiffs Glatt, Footman, and Gratts fall comfortably within the broad definition of “employee” under the FLSA. Searchlight “suffered or permitted” the work that Plaintiffs performed on its film productions, which included accounting and administrative work and set-building and decorating. SOF ¶¶ 190-91, 195-98, 222-25, 244-49. Moreover, Searchlight cannot turn a blind eye to the work that Plaintiffs performed because it knew that interns were working on its films without pay, or had reason to know that they were, because interns, including Plaintiffs, were listed on crew lists and call sheets that the productions sent to Searchlight and that Searchlight reviewed, were given film credits that Searchlight approved, and were supervised by film crew members that Searchlight approved and/or hired and with whom it regularly communicated. SOF ¶¶ 47, 138-145, 172, 176-78, 185, 208, 236. *See Gulf King Shrimp Co. v. Wirtz*, 407 F.2d 508, 512-13 (5th Cir. 1969) (employer “suffered or permitted” labor of underage workers because it had the “opportunity to acquire knowledge” of them); *Sandoz v. Cingular Wireless, LLC*, 769 F. Supp. 2d 1047, 1056-57 (W.D. La. 2010) (employer has a duty “to inquire into the conditions prevailing in his business” and may not “rid himself of that duty because the extent of the business may preclude his personal supervision, and compel reliance on subordinates”) (internal quotation marks omitted).

Furthermore, the fact that Plaintiffs lacked film production experience does not deprive them of protection under the FLSA. In fact, the FLSA specifically provides a mechanism for employers to apply to the Secretary of Labor for a certificate authorizing them to pay “learners” who are “being trained for an occupation” and “who, when initially employed produce[] little or

nothing of value” at 95% of the minimum wage for up to 240 hours of work.³ *See* 29 U.S.C. § 214(a); 29 C.F.R. § 520.300; 29 C.F.R. § 520.408(a). Section 214 appropriately balances the need for inexperienced workers who would otherwise be unemployable to gain job experience while preventing the “wholesale evasions” of the minimum wage laws that would result from “a blanket exemption” for inexperienced workers. *See Walling*, 330 U.S. at 151. Nothing in the FLSA allows employers to do what Searchlight has done here – employ entry-level workers for no wages at all. This is exactly the kind of “wholesale evasion” that Congress sought to prevent by enacting Section 214. *See id.* at 151-52.

II. Searchlight Cannot Show that Plaintiffs Were Trainees Who Were Part of a Bona Fide Internship Program.

A. *Walling’s* Narrow Exception for Trainees Does Not Apply to Plaintiffs.

The FLSA does not define the word “intern” and there is no exception for “interns” anywhere in the statute. In 1947, the U.S. Supreme Court in *Walling* carved out a narrow exception to the definition of an employee for “trainees” to whom railroad companies provided seven to eight days of “the same kind of instruction” offered by a “public or private vocational school.” 330 U.S. at 152-53. Central to the Court’s decision, it was “undisputed” that “the railroads receive[d] *no* ‘immediate advantage’ from any work done by the trainees,” the trainees worked “*solely* for [their own] personal purpose or pleasure,” and their “work serve[d] *only* [their] own interest.” *Id.* at 152-53 (emphasis added).

Walling’s outcome would have been different if the railroads had obtained an immediate advantage from the trainees because the test that the Court purported to apply was the FLSA’s

³ To obtain such a permit, the employer must demonstrate that “[r]easonable efforts [] have been made to recruit workers paid at least the minimum wage in those occupations in which certificates to employ learners at subminimum wages have been requested.” 29 C.F.R. § 520.404(e).

“suffer or permit” standard. *See id.* at 152. Under that standard, when an employer “suffer[s] or permit[s]” work, it obtains a direct or immediate benefit from the work and must compensate the worker for it.⁴ *See id.* The Court cautioned future courts to be wary of circumstances where “an employer has evasively accepted the services of beginners at pay less than the legal minimum[.]” *Walling*, 330 U.S. at 153. Heeding *Walling*, courts and the U.S. Department of Labor have refused to extend the trainee exception beyond *Walling*’s narrow circumstances to excuse employers from paying workers whose work benefits them.

In *Alamo Foundation*, the U.S. Supreme Court held that individuals who themselves claimed to be “volunteers” with no expectation of compensation were employees and unlike the trainees in *Walling*. 471 U.S. at 300-01. The volunteers were unlike trainees because they actually staffed the Foundation’s commercial businesses from which it derived most of its income. *Id.* at 292. The fact that the volunteers “vehemently protest[ed]” any expectation of compensation was not dispositive because “the purposes of the [FLSA] require that it be applied even to those who would decline its protections.” *Id.* at 302.

In *Archie v. Grand Central Partnership, Inc.*, a court in this district found that homeless individuals participating in a “Pathways to Employment” employment training program who performed outreach, food service, maintenance, and administrative tasks for a social services agency were employees because they “d[id] work that had a direct economic benefit for the defendants.” 997 F. Supp. 504, 507, 533 (S.D.N.Y. 1998). In addition to performing productive work, the plaintiffs also benefited the defendants by providing them with services “at below market rates,” thereby giving them a competitive advantage over businesses that paid minimum

⁴ In fact, an employer can “suffer” work even where the employee does not affirmatively perform any tasks, such as when an employer requires an employee to be “on call” in case the need for work arises. *Singh v. City of New York*, 524 F.3d 361, 368 (2d Cir. 2008); *Pabst v. Oklahoma Gas & Elec. Co.*, 228 F.3d 1128, 1134-35 (10th Cir. 2000).

wages. *Id.* at 507, 533. The court held that the “trainee” exception did not apply *even though* the plaintiffs “benefitted enormously from the work opportunities provided by the defendants” by, for example, gaining “basic job skills and the ability to create an employment history.” *Id.* at 533-35.

In *Okoro v. Pyramid 4 Aegis*, although the plaintiff “wanted to learn and indeed did learn” about the defendant’s business, that did not transform her into a trainee because “the nature of the work that she performed, such as cleaning, picking up prescriptions, appearing in court on behalf of clients at the facility, and calling in hours for caregivers to Paychex, was undeniably of substantial assistance to [the company].” No. 11 Civ. 267, 2012 WL 1410025, at *10 (E.D. Wis. Apr. 23, 2012).

In *Donovan v. New Floridian Hotel, Inc.*, the Eleventh Circuit held that former mental patients who performed assigned tasks during a post-release placement in a retirement home were covered employees under the FLSA. 676 F.2d 468, 471 (11th Cir. 1982). Although the defendants claimed that the tasks were merely “to keep [the plaintiffs] occupied,” the Circuit court held that the plaintiffs were employees because their work “was of economic benefit” to the defendants. *Id.* at 470-71. The fact that the plaintiffs may have performed their tasks poorly did not matter because “the evidence indicate[d] that the[y] perform[ed] meaningful work” that was compensable even if “someone else could have performed the duties better or in less time.” *Id.* at 475 n.3.

In *Wirtz v. Wardlaw*, the Fourth Circuit held that high school students who performed office tasks in an insurance company were employees despite the defendant’s claim that the purpose of the work was to help them “determine whether they would be interested in preparing for careers in the insurance business after completion of their high school courses.” 339 F.2d

785, 787 (4th Cir. 1964). The Circuit court held that the students' work, which included preparing and mailing newspaper clippings, monthly newsletters, and business cards to customers benefited the defendant "no less than [the students] themselves," in that their work furthered the company's promotional activities. *Id.* at 787-88.⁵

Here, the work that Plaintiffs performed during their internships provided an immediate advantage to Searchlight because it contributed to the day-to-day running of the productions' operations and would have been performed by paid crew members if Plaintiffs did not do it. *See* SOF ¶¶ 187-88, 190-92, 194-98, 214, 222-25, 227-230, 239-40, 244-253.

B. Searchlight Cannot Satisfy the Department of Labor's Six-Factor Test for Unpaid Interns.

Searchlight cannot show that the U.S. Department of Labor's ("DOL's") six-factor test, which sets forth the circumstances under which *Walling's* trainee exception applies to interns, is met.⁶ *See* Ex. 34 (U.S. Dep't of Labor Fact Sheet #71) ("DOL Factors").⁷ Following *Walling*,

⁵ *See also* *McLaughlin v. Ensley*, 877 F.2d 1207, 1209-10 (4th Cir. 1989) (snack food distribution "trainees," who accompanied and assisted full-time employees during a week-long orientation period, were employees; even though they learned on the job, their work driving trucks, loading and unloading trucks, restocking retail store shelves and vending machines, and performing simple paperwork benefited the defendant); *Bailey v. Pilots' Ass'n for the Bay & River Delaware*, 406 F. Supp. 1302, 1305, 1307 (E.D. Pa. 1976) (although apprentice river boat driver obtained "some educational benefit" from his apprenticeship and "did not contemplate compensation for the apprenticeship period," he performed the duties of a regular crew member and thus should have been paid); U.S. Dep't of Labor Op. Letter, 2002 WL 32406599, at *2-3 (Oct. 7, 2002) (students who bagged groceries for tips and donations were employees of a supermarket); U.S. Dep't of Labor Op. Letter, 1994 WL 1004761, at *1-2 (Mar. 25, 1994) (interns who worked at a youth hostel assisting in its daily operations were employees).

⁶ A version of the test, replacing the word "intern" for "trainee" and "internship" for "training period" "has appeared in Wage and Hour Administrator opinions since at least 1967." *Reich v. Parker Fire Prot. Dist.*, 992 F.2d 1023, 1026 (10th Cir. 1993). *See, e.g., Archie*, 997 F. Supp. at 531-32 (citing 1980 U.S. DOL Wage & Hour Manual).

⁷ California follows the DOL Factors. *See* Ex. 36 (Cal. DLSE Op. Letter, Apr. 7, 2011). The New York Department of Labor's internship criteria ("NYSDOL Factors") incorporate the DOL Factors and add others. *See* Ex. 35 (N.Y. Dep't of Labor, Wage Requirements for Interns in For-Profit Businesses).

the DOL's exception is "narrow" and presumes that internships in the "for-profit" private sector will most often be viewed as employment[.]" *See id.* at 1. Courts have held that the DOL Factors are entitled to deference as a reasonable application of the FLSA and *Walling*. *See Archie*, 997 F. Supp. at 532. The DOL's commentary on the factors, as set forth in Fact Sheet #71, also reasonably interprets the FLSA and *Walling* and similarly warrants deference. *See Exxon Mobil Corp. v. C.I.R.*, 689 F.3d 191, 200 n.13 (2d Cir. 2012).

According to the DOL, an employer must meet all of the factors to show that an intern is a "trainee" outside the protections of the FLSA:

- (1) The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;
- (2) The internship experience is for the benefit of the intern;
- (3) The intern does not displace regular employees, but works under close supervision of existing staff;
- (4) The employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded;
- (5) The intern is not necessarily entitled to a job at the conclusion of the internship; and
- (6) The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

Ex. 34 (DOL Factors) at 1.

1. Plaintiffs' Internship Was Not Similar to Training Which Would Be Given in an Educational Environment and Benefited Searchlight.

Searchlight cannot satisfy the first, second, and fourth factors because Plaintiffs' internships were not structured around a classroom or academic experience and were entirely structured to benefit the productions' actual operations. *See* Ex. 34 (DOL Factors) at 2 ("The more that an internship program is structured around a classroom or academic experience as

opposed to the employer's actual operations, the more likely the internship will be viewed as an extension of the individual's educational experience"); *Archie*, 997 F. Supp. at 507 (defendant did not "structure a training program as that concept is understood in case law and regulatory interpretations but instead structured a program that required the plaintiffs to do work that had a direct economic benefit for the defendants"). Plaintiffs worked alongside paid employees, often performing the same work that their paid co-workers performed and doing assignments that were integral to the production's operations. SOF ¶¶ 190-92, 195-98, 217, 222-25, 239, 244-49. Moreover, their work facilitated the production and in no way impeded it. *Id.* Where, as here, interns perform "the routine work of the business on a regular and recurring basis" by "engag[ing] in the operations of the employer or . . . performing productive work (for example, filing, performing other clerical work, or assisting customers)," the interns are not trainees and must be paid. Ex. 34 (DOL Factors) at 2; *see Archie*, 997 F. Supp. at 532-33.

The fact that Plaintiffs may have learned some skills on-the-job during their internships is not sufficient to satisfy the first and second factors because on-the-job learning is not similar to that provided by an educational environment and because the fruits of any on-the-job learning benefited Searchlight. Ex. 34 (DOL Factors) at 2 ("[T]he fact that [interns] may be receiving some benefits in the form of a new skill or improved work habits will not exclude them from the FLSA's minimum wage and overtime requirements because the employer benefits from the interns' work"); *see Archie*, 997 F. Supp. at 533 (although trainees gained basic job skills that might help them in the job market, such on-the-job training was not similar to that which would be provided in a vocational school and benefited the defendant by allowing it to offer its services at below market rate); *Okoro*, 2012 WL 1410025, at *10 ("the nature of the work that [the trainee] performed, such as cleaning, picking up prescriptions, appearing in court on behalf of

clients at the facility, and calling in hours for caregivers to Paychex,” was not akin to the “course of practical training” that the railroad trainees in *Walling* received, because “one hardly needs to be trained in how to clean a facility, how to pick up prescriptions, and how to call in hours for caregivers” and “was undeniably of substantial assistance to [the company]”).⁸

2. Plaintiffs Performed the Same Work as Paid Employees and Were Supervised as if They Were Regular Employees.

Searchlight also cannot satisfy the third factor because Plaintiffs performed the work that paid employees would otherwise have performed. In fact, Plaintiffs worked alongside paid employees who performed the same or similar duties that they performed. SOF ¶¶ 190-92, 195-98, 217, 222-25, 239, 244-49. Interns must be paid if employers use them as substitutes for regular workers or to augment their existing workforce. *See* Ex. 34 (DOL Factors) at 2. If an employer “would have hired additional employees or required existing staff to work additional hours had interns not performed the work, then the interns will be viewed as employees and entitled to compensation under the FLSA.” *Id. See also Archie*, 997 F. Supp. at 533 (where defendant used the services provided by the alleged trainees and avoided having to pay others at market rates, alleged trainees were employees covered by the FLSA).

Plaintiffs also did not “shadow[]” their supervisors or train under their “close and constant” supervision. Ex. 34 (DOL Factors) at 2. To the extent that they were supervised at all, Plaintiffs “received the same level of supervision as [the production’s] regular workforce.” *Id.*;

⁸ Because Searchlight did not operate an educational training program, *see* SOF ¶¶ 199, 227, 230, 240, it also cannot meet the additional NYSDOL Factors. *See, e.g.*, Factor 7 (persons providing “clinical training” must be competent to “fulfill the educational goals and requirements of the training program”); Factor 9 (“training that is specific to the employer and its operations is conclusive evidence that an employment relationship exists”). Searchlight’s internship postings also did not “discuss education or training” (Factor 11), and Searchlight “mix[ed] recruiting of employees and interns”) (Factor 10). *See* SOF ¶¶ 179-83, 204-06, 232-34.

see also Archie, 997 F. Supp. at 516-17 (plaintiffs did not receive “close supervision” where they were left to perform their tasks alone after receiving initial instruction).

3. Plaintiffs Expected Compensation and Opportunities for Paid Employment in Exchange for Their Work.

Searchlight cannot satisfy the fifth and sixth factors because Plaintiffs had an expectation that they would be paid for their work, even if the pay that they expected was in the form of in-kind compensation. *See Alamo Found.*, 471 U.S. at 292, 301 (a compensation agreement can be “implied” or “express” and could involve the payment of in-kind benefits, such as housing or food, rather than money) (citing *Walling*, 330 U.S. at 152). Plaintiffs Glatt and Footman each expected compensation in the form of film credits and job references in exchange for their work and expected that the connections that they made would lead to paid employment. SOF ¶¶ 201-203, 231. Plaintiff Gratts expected to be paid money in exchange for her work, based on her supervisor’s promise at the outset of the internship. *Id.* ¶ 257-59.⁹

III. Important Public Policies Support Paying Interns.

There are important public policy justifications that support paying interns for their labor, including many of the same reasons that led to the FLSA’s passage many years ago. Young workers face unprecedented unemployment. Unemployment for young adults aged 20-24 is close to double that of the national average.¹⁰ Despite record unemployment, a significant number of young people are actually working in unpaid internships in corporate America, which

⁹ The FLSA does not permit an employer to choose an alternate in-kind method of compensation in lieu of wages. *Alamo Found.*, 471 U.S. at 301.

¹⁰ ECONOMIC NEWS RELEASE, DEP’T OF LABOR (Feb. 1, 2013), *available at*: <http://www.bls.gov/news.release/empst.t15.htm> and UNEMPLOYMENT RATES BY AGE <http://www.demos.org/data-byte/unemployment-rates-age-december-2012> (last visited Feb.13, 2013).

have exploded in the last three decades.¹¹ In 2008, a study found that 50 percent of graduating students that year had held internships, up from 17 percent sixteen years before.¹² Of these internships, experts approximate that half are unpaid.¹³ Commentators and scholars have dubbed this phenomenon, the “Intern Economy.”¹⁴

The prevalence of unpaid internships has resulted in detrimental social costs.¹⁵ First, as companies hire more interns for free, they hire fewer paid workers, especially entry-level workers.¹⁶ “Paid workers are thereby indirectly replaced, or not hired in the first place. These displaced workers then have to find other jobs, and they may draw on unemployment insurance or even welfare benefits.”¹⁷ Second, hiring interns to work for free undermines minimum wage laws to the detriment of the labor market and social welfare policy because it

¹¹ Nantiya Ruan, *Same Law, Different Day: A Survey of the Last Thirty Years of Wage Litigation and Its Impact on Low Wage Workers*, Hofstra Lab. & Emp. J. (forthcoming 2013) (Ex. 47); see also Steven Greenhouse, *Jobs Few, Grads Flock to Unpaid Internships*, N.Y. Times, May 5, 2012, available at: http://www.nytimes.com/2012/05/06/business/unpaid-internships-dont-always-deliver.html?pagewanted=all&_r=0 (“[w]hile unpaid internships have long existed in the film and nonprofit worlds, they have recently spread to fashion houses, book and magazine publishers, marketing companies, public relations firms, art galleries, talent agencies – even to some law firms”) (last viewed Feb. 13, 2013).

¹² See Steven Greenhouse, *The Unpaid Intern, Legal or Not*, N.Y. Times, Apr. 2, 2010, available at: <http://www.nytimes.com/2010/04/03/business/03intern.html?pagewanted=all> (last viewed Feb. 13, 2013).

¹³ David C. Yamada, *The Employment Law Rights of Student Interns*, 35 Conn. L. Rev. 215, 218 (2002) (citing authorities).

¹⁴ *Id.* (citing Jim Frederick, *Internment Camp: The Intern Economy and the Culture Trust*, THE BAFFLER, 1997, No. 9, at 51-58) (discussing the exploitation of unpaid interns and restructuring of the labor market by unpaid internships).

¹⁵ See, e.g., Ross Perlin, *INTERN NATION: HOW TO EARN NOTHING AND LEARN LITTLE IN THE BRAVE NEW ECONOMY*, Verso Publishers (2012).

¹⁶ See David L. Gregory, *The Problematic Employment Dynamics of Student Internships*, 12 Notre Dame J.L. Ethics & Pub. Pol’y 227, 242 (1998).

¹⁷ Jessica L. Curiale, Note, *America’s New Glass Ceiling: Unpaid Internships, the Fair Labor Standards Act, and the Urgent Need for Change*, 61 Hastings L. J. 1531, 1537 (2010) (citing authorities).

prevents “the best people [from] finding the jobs best suited for their talents.”¹⁸ Third, heavy reliance on unpaid internships has led to “an ideal system for perpetuating and increasing inequality” among the economically advantaged and disadvantaged jobseekers in our society.¹⁹ Young people who cannot afford to work for free or bear the additional costs associated with most internships, including purchasing academic credit, transportation, and housing, are left out in the cold.

“Slippery slope” arguments advanced to shield employers from their minimum wage obligations to interns are also meritless. Requiring employers to pay interns will not end internships. To the contrary, there are employers who pay interns at or above the minimum wage, including Fox itself, which now compensates interns who work in its corporate offices at \$8 an hour.²⁰ There is also no reason to fear that paying interns who work in the private sector will require charitable, humanitarian, and religious not-for-profits to pay their volunteers because volunteer “work” is generally not covered by the FLSA. *See Alamo Found.*, 471 U.S. at 302 (rejecting this argument and holding that individuals whose work benefited a nonprofit religious organization’s “business activities” – *not* its religious activities – were not volunteers who fell under the FLSA’s volunteer exception).²¹

¹⁸ Andrew Mark Bennett, *Unpaid Internships & the Department of Labor: The Impact of Underenforcement of the Fair Labor Standards Act on Equal Opportunity*, 11 U. Md. L.J. Race, Religion, Gender & Class 293, 299 (2011) (quoting Anya Kamenetz, Op-Ed., *Take This Internship and Shove It*, N.Y. Times, May 30, 2006, at A19).

¹⁹ *Id.* at 297 (quoting Daniel Akst, Op-Ed., *Unpaid Internships? File Under “Hypocrisy,”* L.A. Times, Jun. 15, 2010, at A15, available at <http://articles.latimes.com/2010/jun/15/opinion/la-oe-akst-internships-20100615>; *see also* Curiale, *supra* note 17, at 1537; Yamada, *supra* note 13, at 218-19).

²⁰ *See Bennett*, *supra* note 18, at 309-10 (noting that some companies have converted their unpaid internship programs to paid programs in the face of greater scrutiny by the Department of Labor and the media).

²¹ The U.S. Department of Labor takes the position that individuals who volunteer their time on a short-term basis to religious, charitable, civic, humanitarian, or similar non-profit

IV. Searchlight Employed Plaintiffs.

The Second Circuit employs a “non-exclusive” multi-factor test “based on the circumstances of the whole activity” and “viewed in light of economic reality” to determine whether an employment relationship exists. *Zheng*, 355 F.3d at 71, 75 (internal quotation marks and citation omitted). An employment relationship can exist both where the alleged employer exercises “formal control” over working conditions and where it exercises “functional control” but does not physically control the performance of the work. *See id.* at 72. In every case, the ultimate question is whether the alleged employer “possessed the power to control” the workers in question. *Herman v. RSR Sec. Servs., Ltd.*, 172 F.3d 132, 139 (2d Cir. 1999). Here, under either a formal or functional analysis, Searchlight “possessed the power to control” Plaintiffs’ working conditions and exercised its power through its control over the films’ budgets, by setting the terms and conditions of work on the films, and by regularly monitoring employees’ work as the film productions progressed on a daily basis. *See id.*

A. Searchlight Exercised Formal Control over Plaintiffs.

The formal control factors all weigh in favor of a finding that Searchlight employed Plaintiffs. These non-exhaustive factors include whether the alleged employer: (1) had the power to hire and fire employees; (2) supervised and controlled employee work schedules or conditions of employment; (3) determined the rate and method of payment; and (4) maintained employment records. *See Herman*, 172 F.3d at 139. Courts consider any additional factors if

organizations as a public service are not covered by the FLSA, so long as they volunteer freely without contemplation or receipt of compensation and do not displace paid workers or perform work that would otherwise be performed by employees. *See U.S. Dep’t of Labor Op. Letter*, 2006 WL 561849, at *1 (Jan. 27, 2006).

they are relevant to understanding the economic reality of the employment situation. *Id.*

Plaintiffs satisfy the first factor because Searchlight had the right to hire and fire production personnel and exercised this power. For example, Searchlight hired the *500 Days of Summer* Line Producer, and chose that film's production department heads. SOF ¶¶ 65-66. Searchlight also approved the hire of the *Black Swan* Director's assistant. *Id.* ¶ 124. Moreover, the production crew members whom Searchlight hired or whose employment Searchlight approved directly supervised Plaintiffs. *Id.* ¶¶ 47, 185, 208, 236. Although Searchlight's hiring "involved mainly managerial staff, the fact that [it] hired individuals who were in charge of [Plaintiffs] is a strong indication of control." *Herman*, 172 F.3d at 140; *see also Torres v. Gristede's Operating Corp.* No. 04 Civ. 3316, 2011 WL 4571792, at *2 (S.D.N.Y. Sept. 23, 2011) (that defendant hired managerial employees and delegated his supervisory powers to them supported finding of employer status).

Plaintiffs satisfy the second factor because Searchlight supervised and controlled employee work schedules and conditions of employment on a daily basis. Searchlight required the productions to send it daily call sheets, production reports, and wrap reports, all of which informed Searchlight of the daily on-goings of the production and workers' schedules. SOF ¶¶ 78-84, 87, 89, 90, 165. Searchlight's Executive Vice President of Production, Elizabeth Sayre, who was responsible for overseeing the physical production of Searchlight's films, reviewed the reports sent by the productions on a daily basis to see whether work was completed on schedule and within budget. *Id.* ¶¶ 81, 84, 89. Searchlight also required productions to send it weekly cost reports detailing how the production spent money with respect to each budget line item, including labor, so that it could monitor the production's expenditures on wages. *Id.* ¶¶ 101-24. The productions were also required to call Sayre or a member of her staff each morning to tell

them what time the first film shot was taken, and each evening to tell them when shooting for the day wrapped. *Id.* ¶ 90.

Plaintiffs satisfy the third factor because Searchlight set and expected the productions to enforce its policy that interns who were hired need not be paid if they obtained academic credit for their internships. *Id.* ¶¶ 143-45. It also “de facto” set wages for production workers, including Plaintiffs, through its control over the films’ budgets. *Zheng*, 355 F.3d at 72 (citing *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 726, 730 (1947)). In particular, Searchlight decided how much money to allocate to each budget line item, including wages. SOF ¶¶ 32-34, 36-37, 39. It also decided how many crew members could be hired into particular positions within the allocated budget. *Id.* In addition to wages, Searchlight determined the reimbursement or “box rental” rates available to workers who provided their own computers, cell phones, and other equipment to perform their jobs. *Id.* ¶ 52.

Plaintiffs satisfy the fourth factor because Searchlight maintained employment records. It required crew members to sign form employment agreements that it drafted, including “deal memos,” confidentiality agreements, and box rental reimbursement forms. *Id.* ¶¶ 146-56, 161-64. The productions were required to send crew deal memos to Sayre, who reviewed and approved them. *Id.* ¶¶ 151, 153. Searchlight also set and enforced a policy that film production employees would not be paid until they completed and returned Searchlight’s deal memos. *Id.* ¶ 151. On *Black Swan*, even though some employees had already signed deal memos before Searchlight acquired the film, Searchlight required them to sign new ones on its approved forms. *Id.* ¶¶ 154-56. In fact, one of Glatt’s responsibilities was to collect deal memos from film production employees. *Id.* ¶ 157.

B. Searchlight Employed Interns Under the Functional Control Test.

Searchlight also exercised functional control over Plaintiffs. The functional control test looks beyond “an entity’s formal right to control the physical performance of another’s work” to “give[] content to the broad ‘suffer or permit’ language in the statute.” *Zheng*, 355 F.3d at 69, 76. Under this broad test, “an entity can be a joint employer under the FLSA even when it does not hire and fire its joint employees, directly dictate their hours, or pay them.” *Zheng*, 355 F.3d at 70 (citing *Rutherford*, 331 U.S. at 724-25). Courts consider the following relevant factors: (1) whether the alleged joint employer’s premises and equipment are used for the work; (2) whether the business to which the work was subcontracted is one that could or did shift as a unit from one alleged joint employer to another; (3) whether the workers perform a discrete line-job integral to the alleged joint employer’s process of production; (4) whether responsibility under the alleged joint employer’s contracts could pass from one subcontractor to another without material changes; (5) the degree to which the alleged joint employer or its agents supervises the work; and (6) whether the workers work exclusively or predominantly for the alleged joint employer. *See Zheng*, 355 F.3d at 72 (citing *Rutherford*, 331 U.S. at 724-25).

The factors address circumstances, like those here, where an alleged employer creates a business relationship with a third party and then attempts to obscure its obligations under the FLSA to avoid liability. *See Zheng*, 355 F.3d at 72. Here, Searchlight contracted with “single-purpose” production entities to produce its films. *See* SOF ¶¶ 10-11, 13, 20, 24. These entities are legal fictions that are created solely to facilitate the production of a particular film, do not have any independent purpose other than the making of the film, and cease operations after the film is completed. *Id.* ¶¶ 11, 18-20, 28, 129-32. The entities that produced *Black Swan* and *500 Days of Summer*, Lake of Tears, Inc. and 500DS Films Corp., respectively, did not retain any

assets, maintain employment records, or keep any physical property after production ended and, in fact, were required to transmit all of their assets to Searchlight. *Id.* ¶¶ 18-19, 28, 129-32.

They are the film-industry equivalents of the fly-by-night sub-contractors that Congress had in mind when it broadly defined an “employer” to cover both (judgment-proof) subcontractors and the wealthier contractors that principally benefited from the work. *See Zheng*, 355 F.3d at 72, 76 (“the ‘economic reality test’ [] is intended to expose outsourcing relationships that lack a substantial economic purpose” because they are actually “a subterfuge meant to evade the FLSA or other labor laws”).

Plaintiffs meet each factor here. First, all expenses incurred for the films were funded by Searchlight and within the budget it set. SOF ¶¶ 32-34, 36-37, 39. Searchlight did not permit the productions to incur overages, or cost overruns, without its prior approval. *Id.* ¶ 119. A putative employer’s provision of “premises and equipment may support the inference that [it] has functional control over the plaintiffs’ work.” *Zheng*, 355 F.3d at 72. In addition to providing funding for equipment and work locations, Searchlight exercised control over these assets by requiring production employees to send it detailed weekly cash flow schedules, cost reports of expenditures made on equipment and locations, and to confer with it about spending decisions that would impact the budget. SOF ¶¶ 95-96, 101-110. Searchlight also required the productions to resell or return all physical property to it when filming concluded, which was one of Footman’s responsibilities at the end of his internship. *Id.* ¶¶ 129-32.

Second, the single-purpose corporations did not shift from one joint employer to another. Instead, each was formed to create a single film and ceased operations after that film was completed. SOF ¶¶ 10-11, 18-19, 20, 28. *See Zheng*, 355 F.3d at 72 (“a subcontractor that seeks business from a variety of contractors is less likely to be part of a subterfuge arrangement than a

subcontractor that serves a single client”).

Third, the work that Plaintiffs performed was integral to the creation of Searchlight’s product – motion pictures. Under *Zheng* and *Rutherford*, work “integral to the putative joint employer’s process of production” includes that “which constitutes an essential step in the producer’s integrated manufacturing process.” *Zheng* 355 F.3d at 73 (citing *Rutherford*, 331 U.S. at 729-30). Here, the production of Searchlight’s films was integral to its business and Plaintiffs’ work as fully-integrated members of their departments contributed to the films’ production.

The fourth factor – whether responsibility under the alleged joint employer’s contracts could pass from one subcontractor to another without material changes – derives from the Supreme Court’s observation in *Rutherford* that, “even when [the subcontractor’s] supervisor abandoned his position and another supervisor took his place, [] the same employees would continue to do the *same* work in the *same* place.” *Zheng*, 355 F.3d at 74 (citing *Rutherford*, 331 U.S. at 725, 730). Under these circumstances, “it is difficult *not* to draw the inference that a subterfuge arrangement exists” because the “employees are tied to [the putative joint employer] rather than to an ostensible direct employer such as the [subcontractor].” *Zheng*, 355 F.3d at 74. Here, Searchlight explicitly reserved the right to approve or replace key production personnel, such as the Line Producer, the Production Accountant, the Production Designer, the Director of Photography, the Costume Designer, and the Editor, and to replace any personnel if, “in its sole reasonable discretion,” it decided to take over the production entirely. SOF ¶¶ 15-17, 25-27. This shows that the production workers, including Plaintiffs, were at least as closely tied to Searchlight as they were to their direct supervisors. *See id.*

The fifth factor – the degree to which Searchlight supervised the work – also favors Plaintiffs. As discussed above, Searchlight closely supervised the film production through weekly cost reports, daily call sheets, production reports, crew lists, and wrap reports. SOF ¶¶ 78-84, 86, 89, 90, 125, 165. This supervision weighs in favor of joint employment because “it demonstrates effective control of the terms and conditions of the plaintiff’s employment.” *Zheng*, 355 F.3d at 75; *see also Rutherford*, 331 U.S. at 730 (“[t]he managing official of the [putative employer] kept close touch on the operation”). Searchlight’s control over production schedules directly impacted the hours that Plaintiffs worked. Searchlight also hired the individuals who directly supervised Plaintiffs, gave them assignments, set their schedules, and reported to Searchlight on a daily basis. SOF ¶¶ 47, 71, 95, 185, 208, 236; *see Herman*, 172 F.3d at 140.

As to the sixth factor, whether the purported joint employees worked exclusively or predominantly for the putative joint employer, each Plaintiff worked exclusively for one Searchlight production during his or her internship according to a set schedule of between 25 and 50 hours a week. SOF ¶¶ 188, 194, 214, 250-53. The single-purpose corporations also did not perform work for any other film production. *See id.* ¶¶ 10-11, 20.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Court grant their Motion for Partial Summary Judgment.

Dated: New York, New York
February 15, 2013

Respectfully submitted,

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**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

ERIC GLATT, ALEXANDER FOOTMAN,
EDEN ANTALIK, and KANENE GRATTS, on
behalf of themselves and all others similarly
situated,

Plaintiffs,

v.

FOX SEARCHLIGHT PICTURES INC. and
FOX ENTERTAINMENT GROUP, INC.,

Defendants.

No. 11 Civ. 6784 (WHP) (AJP)

**PLAINTIFFS' STATEMENT OF UNDISPUTED MATERIAL FACTS
PURSUANT TO LOCAL CIVIL RULE 56.1**

I. Fox Searchlight Pictures, Inc. Produces, Finances, and Distributes Films.

1. Fox Searchlight Pictures, Inc. (“Searchlight”) is a specialty film division of Fox Filmed Entertainment, a division of Fox Entertainment Group, Inc. Films financed by Searchlight have enjoyed critical acclaim and commercial success. Answer, ECF No. 6 (“Ans.”) ¶¶ 1, 16.

2. Searchlight is a Delaware Corporation and is registered with the New York State Department of State as an Active Foreign Business Corporation. Ans. ¶ 15.

3. Searchlight is a covered employer within the meaning of the Fair Labor Standards Act (“FLSA”). Ans. ¶ 18.

4. Searchlight engages in interstate commerce, produces goods for interstate commerce, or handles, sells, or works on goods or materials that have been moved in or produced for interstate commerce. Ans. ¶ 18.

5. Searchlight has an annual gross sales volume of at least \$500,000. Ans. ¶ 18.

6. *Black Swan* and *500 Days of Summer* are two films that Searchlight produced, financed, and distributed (together, “the Films”). Ex. 1¹ (Sayre Tr.) 12:20-23; 14:16-19; 15:2-8; Ex. 22 (*Black Swan* Production-Finance-Distribution Agreement); Ex. 23 (*500 Days of Summer* Production-Finance-Distribution Agreement).

7. Plaintiff Eric Glatt worked as an unpaid intern on *Black Swan* from approximately December 2, 2009 through the end of February 2010. Ex. 3 (Glatt Tr.) 78:3-80:3.

8. Plaintiff Alexander Footman worked as an unpaid intern on *Black Swan* from approximately September 29, 2009 through approximately late February or early March 2010. Ex. 4 (Footman Tr.) 15:9-22.

¹ All exhibits are attached to the Declaration of Rachel Bien in Support of Plaintiffs’ Motion for Summary Judgment (“Bien Decl.”).

9. Plaintiff Kanene Gratts worked as an unpaid intern on *500 Days of Summer* from approximately May 2008 through approximately August 2008. Ex. 5 (Gratts Tr.) 39:14-20; 119:15-19; 120:16-18.

II. Searchlight’s Rights and Responsibilities for the Films Were Set Forth in Production-Finance-Distribution Agreements that It Signed with Single-Purpose Production Companies.

A. Searchlight’s Relationship with the Single-Purpose Production Company with Which It Contracted to Produce *Black Swan*.

10. In the film industry, a so-called “single-purpose corporation” is a company created for the purpose of producing a particular film. Ex. 2 (Franklin Tr.) 16:5-14; 18:25-19:13; Ex. 1 (Sayre Tr.) 28:6-30:8.

11. Lake of Tears, Inc. was created in the summer of 2009 for the sole purpose of producing *Black Swan*. Ex. 2 (Franklin Tr.) 15:10-16:8.

12. Searchlight decided to finance *Black Swan* in approximately November 2009, after the financiers that had initially committed to finance *Black Swan* fell through. Ex. 2 (Franklin Tr.) 16:24-17:25; Ex. 1 (Sayre Tr.) 24:24-25:24; 27:20-28:3; Ex. 9 (Au Decl.) ¶¶ 5.

13. In or around November 2009, Searchlight executed a Production-Finance-Distribution Agreement (“PFD Agreement”) with Lake of Tears, Inc., which set forth the parties’ agreements regarding the production, financing, and distribution of *Black Swan*. Ex. 2 (Franklin Tr.) 34:23-35:7; Ex. 9 (Au Decl.) ¶ 5; Ex. 1 (Sayre Tr.) 27:20-28:3; 122:9-11; Ex. 22 (*Black Swan* PFD Agreement).

14. The *Black Swan* PFD Agreement is a 16-page document entitled “PFD Term Sheet Agreement,” followed by a 25-page document entitled “Standard Terms and Conditions.” Ex. 22 (*Black Swan* PFD Agreement).

15. Pursuant to the PFD Term Sheet Agreement, Searchlight had the “right of approval with respect to key elements” of *Black Swan*, including but not limited to:
- a. The final approved budget;
 - b. The final draft of the screenplay;
 - c. All principal cast members;
 - d. The director; the Individual Producer(s) and Co-Producer(s);
 - e. The key crew members, including the film editor, director of photography, production designer, unit publicist, and sound editor;
 - f. The film’s production schedule, post-production schedule, and locations of principal photography and post-production;
 - g. The material terms of all principal cast agreements and agreements for the engagement of the director, Individual Producer, composer and key crew members.

Ex. 22 (*Black Swan* PFD Agreement) ¶ 2(d), at D0004359.

16. Searchlight had the irrevocable right to take over the development, production, and/or post-production of *Black Swan*. Ex. 22 (*Black Swan* PFD Agreement) ¶ 6(a), at D0004367.

17. Searchlight had the irrevocable right, “in its sole reasonable discretion,” to assume complete and sole control over all matters regarding *Black Swan*, including the right to abandon or complete *Black Swan*, all creative elements, and replacement of personnel. Ex. 22 (*Black Swan* PFD Agreement) ¶ 6(a), at D0004367.

18. From the time that *Black Swan* was completed in or around August or September 2010, Lake of Tears, Inc. has not been in operation. Ex. 2 (Franklin Tr.) 23:13-23.

19. Lake of Tears, Inc. is still a corporation today only because its corporate officers, Scott Franklin and Darren Aronofsky, have not dissolved it, but they plan to do so. Ex. 2 (Franklin Tr.) 23:7-12.

B. Searchlight's Relationship with the Single-Purpose Corporation with Which It Contracted to Produce *500 Days of Summer*.

20. 500DS Films, Inc. is a single-purpose corporation created in connection with production of *500 Days of Summer*. Ex. 10 (Hansen Decl.) ¶ 3.

21. 500DS Films, Inc. was incorporated on March 26, 2008. Ex. 10 (Hansen Decl.) ¶ 3.

22. Joan Hansen was the Assistant Secretary of 500DS Films, Inc. In that capacity, she had the power to bind 500DS Films, Inc. and to speak on its behalf. Ex. 10 (Hansen Decl.) ¶¶ 1-2.

23. Searchlight became involved with *500 Days of Summer* before the pre-production phase had begun. Ex. 1 (Sayre Tr.) 53:5-54:5.

24. The terms of Searchlight's relationship with 500DS Films, Inc. are set forth in a PFD Agreement, dated March 27, 2008. Ex. 10 (Hansen Decl.) ¶ 4; Ex. 23 (*500 Days of Summer* PFD Agreement).

25. Pursuant to the *500 Days of Summer* PFD Agreement, Searchlight had the "right of approval with respect to key elements" of *500 Days of Summer*, including but not limited to:

- a. The final approved budget;
- b. The final draft of the screenplay;
- c. All writers engaged to draft the screenplay;
- d. All principal cast members;
- e. The director and the Individual Producer(s);

- f. The key crew members, including the film editor, director of photography, production designer, unit publicist, and sound editor;
- g. The title of the film;
- h. The film's production schedule, post-production schedule, and locations of principal photography and post-production;
- i. The material terms of all principal cast agreements and agreements for the engagement of the director, Individual Producer, composer and key crew members
- j. The production accountant, including the accounting system and computer software.

Ex. 23 (*500 Days of Summer* PFD Agreement) ¶ 2(f), at D0004384.

26. Searchlight had the irrevocable right to take over the development, production and/or post-production of *500 Days of Summer*. Ex. 23 (*500 Days of Summer* PFD Agreement) ¶ 18(a), at D0004400.

27. Searchlight had the irrevocable right, "in its sole reasonable discretion," to assume complete and sole control over all matters regarding *500 Days of Summer*, including the right to abandon or complete *500 Days of Summer*, all creative elements, and replacement of personnel. Ex. 23 (*500 Days of Summer* PFD Agreement) ¶ 18(a), at D0004400-01.

28. 500DS Films, Inc. no longer conducts business. Ex. 10 (Hansen Decl.) ¶ 3.

III. Searchlight Financed and Set the Budgets of the Films.

A. Searchlight Determined How Much Money to Spend on the Films' Production.

29. Searchlight's Executive Vice President of Production, Elizabeth Sayre, oversaw the physical production of films financed by Searchlight, including *Black Swan* and *500 Days of Summer*. Ex. 1 (Sayre Tr.) 12:20-23; 14:16-19; 15:2-8.

30. Sayre's duties overseeing physical production involve working with Searchlight creative executives to develop the scripts, assisting in transitioning the script into an actual movie, and putting together the production teams who produce its films. Ex. 1 (Sayre Tr.) 14:20-15:1.

31. Typically, after Searchlight's creative executives have developed a script that they think will make a good movie, Sayre becomes involved in preparing a plan to produce it. Ex. 1 (Sayre Tr.) 17:19-18:5.

32. The first step in the film production process is obtaining financial approval from the Presidents of Searchlight, Nancy Utley and Steve Gilula, and Claudia Lewis, the President of Production at Searchlight, who set an overall budget amount for the film. Ex. 1 (Sayre Tr.) 17:9-18:19; 19:11-21; 43:18-44:11; 52:23-25; 71:8-10.

33. Usually, Utley, Gilula, and Lewis decide how much Searchlight will spend on a particular film production, and Sayre decides how the funds will be allocated to particular budget line-items. Ex. 1 (Sayre Tr.) 19:11-21; 43:18-44:11; 64:25-65:10.

34. After Utley, Gilula, and Lewis determine an overall budget number for a particular film, Sayre is responsible for putting together a production team to produce it, including hiring a Line Producer. Ex. 1 (Sayre Tr.) 14:16-15:1; 18:6-19:10.

35. Searchlight funds film production in one of two ways. For some films, Searchlight uses a “direct cash flow” process, in which the film’s Production Accountant makes a request to Searchlight for funds, which then transfers the funds to the production bank account. For other films, Searchlight procures a bank loan for the production, and the Production Accountant makes requests to the bank for funds, which then transfers the money to the production’s bank account once it has obtained Searchlight’s approval. Ex. 1 (Sayre Tr.) 126:1-22; Ex. 22 (*Black Swan* PFD Agreement) ¶ 5, at D0004365; Ex. 23 (*500 Days of Summer* PFD Agreement) ¶ 8, at D0004391.

B. Searchlight Had the Power to Approve and Did Approve Detailed Budgets for the Films, Including Their Labor Budgets.

36. To ensure that a film can be produced for the amount of money set forth in the budget set by Searchlight, Sayre works with a film’s Line Producer to make key decisions about how the film will be made. These decisions include where to shoot the film and the number of days to allot to shooting the film. Ex. 1 (Sayre Tr.) 17:9-19:21; 64:25-65:10.

37. Sayre and the Line Producer draft a detailed budget within the overall budget parameters set by Searchlight. Ex. 1 (Sayre Tr.) 18:6-19:15.

38. As part of this process, Sayre engages in a back-and-forth with the Line Producer regarding proposed items in the budget. Ex. 1 (Sayre Tr.) 170:18-23.

39. Once the items in the budget are set, it is “locked.” A locked budget represents Searchlight’s agreement to pay for the items in the budget, either alone or in conjunction with a co-financier. Ex. 1 (Sayre Tr.) 40:22-41:8.

40. Sayre used the Fox Feature Budgeting Guidelines in her role overseeing the physical production of the Films. Ex. 1 (Sayre Tr.) 179:13-24, Ex. 31 (Fox Feature Budgeting Guidelines).

41. The Fox Feature Budgeting Guidelines require the production company to make a binding, legal commitment to “produce the motion picture within the limitations and parameters set forth in the final approved budget.” Ex. 31 (Fox Feature Budgeting Guidelines) at D0086078.

42. Searchlight required the productions that it financed to include “certain Fox charges” in the budget. These included:

- a. Mandatory “fringe” rates for the employer’s share of FICA tax on crew members’ wages, calculated as a specific percentage of the employee wage budget;
- b. Fees associated with the production’s third-party payroll service provider; and
- c. Fees associated with workers’ compensation coverage for crew members.

Ex. 31 (Fox Feature Budgeting Guidelines) at D0086082-83.

43. Insurance for the productions was covered by the budget that Searchlight set, according to specific terms that Searchlight dictated. Ex. 1 (Sayre Tr.) 79:9-23; Ex. 22 (*Black Swan* PFD Agreement) ¶ 17, at D0004376; Ex. 23 (*500 Days of Summer* PFD Agreement) ¶ 9, at D0004393; Ex. 31 (Fox Feature Budgeting Guidelines), at D0086085-89.

Black Swan Budget

44. Before Searchlight executed the *Black Swan* PFD Agreement, *Black Swan* already had a budget in place. Ex. 1 (Sayre Tr.) 33:21-34:6.

45. After the *Black Swan* PFD Agreement was executed in November 2009, Searchlight and the *Black Swan* production revised the budget to incorporate cost increases. Ex. 2 (Franklin Tr.) 51:11-52:20; Ex. 13 (Emails, dated Nov. 19, 2009, regarding “Black Swan budget analysis”).

46. Searchlight's approval was required in order to increase the *Black Swan* budget. Ex. 2 (Franklin Tr.) 51:11-52:20.

47. The *Black Swan* Production Accountant, Theodore Au, participated in meetings with Searchlight representatives in which the *Black Swan* budget and financing were discussed. Ex. 9 (Au Decl.) ¶ 8.

48. Searchlight approved the revised budget for *Black Swan*. Ex. 2 (Franklin Tr.) 35:18-37:5.

49. The *Black Swan* budget that Searchlight approved is attached to the Bien Decl. as Exhibit 12. Ex. 12 (*Black Swan* Budget).

50. The budget for *Black Swan* contained line items for the amount of wages each person on the cast and crew would be paid each day or week, including low-level positions like assistants. Ex. 2 (Franklin Tr.) 37:6-24; Ex. 9 (Au Decl.) ¶ 8; Ex. 12 (*Black Swan* Budget), at D0083276-78.

51. Searchlight had the power to decide how much money was allocated for line-items in the *Black Swan* budget, including the amounts budgeted to pay the crew's wages, within union standards governing how much crew members can be paid. Ex. 9 (Au Decl.) ¶ 8.

52. The *Black Swan* budget also set limits for reimbursement of certain business expenses, known as "box rentals," which is the film industry term for reimbursements to crew members for their work-related use of personal items like cell phones and computers. Ex. 9 (Au Decl.) ¶ 8; Ex. 12 (*Black Swan* Budget), at D0083279.

53. Searchlight financed *Black Swan* by making periodic deposits into a designated "Production Account" in accordance with a "Cash Flow Schedule" that Searchlight set. Searchlight required that all funds deposited into the Production Account be used to pay *Black*

Swan's Direct Production Costs that Searchlight had approved in the *Black Swan* budget. Ex. 22 (*Black Swan* PFD Agreement) ¶ 5(b), at D0004365.

54. Searchlight and Cross Creek, another film production company with which Searchlight contracted to provide financing for the *Black Swan* production, provided Lake of Tears, Inc. with the money used to make *Black Swan*, including film crew wages. Ex. 2 (Franklin Tr.) 80:12-16.

55. If Searchlight or another financier had not financed *Black Swan*, it would not have been possible to make the film because Lake of Tears, Inc. did not have any funds to do it. Ex. 2 (Franklin Tr.) 48:6-12.

500 Days of Summer Budget

56. Sayre suggested changes to the *500 Days of Summer* budget, such as whether the film had too many crew members for certain jobs. Ex. 1 (Sayre Tr.) 36:16-37: 25.

57. Sayre finalized the *500 Days of Summer* budget before filming began. Ex. 1 (Sayre Tr.) 24:14-23; 53:5-54:5.

58. The *500 Days of Summer* budget, which contains line-items for every member of the crew, including low-level positions like set and office production assistants, is attached to the Bien Decl. as Exhibit 39. Ex. 39 (*500 Days of Summer* budget), at D0018791-92.

59. Searchlight financed *500 Days of Summer* by making periodic deposits into a designated "Production Account" in accordance with a "Cash Flow Schedule" that Searchlight set. Searchlight required that all funds deposited into the Production Account be used to pay *500 Days of Summer*'s Direct Production Costs that Searchlight had approved in the *500 Days of Summer* budget. Ex. 23 (*500 Days of Summer* PFD Agreement) ¶ 8(b), at D0004391.

IV. Searchlight Had the Power to Hire, Approve, and Fire Film Production Personnel.

60. With respect to the films that it finances, Searchlight has the right to hire or approve the hire of key department heads, which are the Line Producer; the Production Accountant, who oversees the Accounting Department; the Production Designer, who oversees the film's Art Department, including props, set dressing, and construction; the Cinematographer or Director of Photography, who oversees the camera crew, grips, and electric departments; the Costume Designer, who oversees the Costume Department; and the Editor, who oversees the film's editing and post-production phase. Ex. 1 (Sayre Tr.) 17:11:6-19:11; 21:18-20; 55:25-57:9; 124:7-23; Ex. 22 (*Black Swan* PFD Agreement) ¶ 4, at D0004343; 2(d), at D0004359; Ex. 23 (*500 Days of Summer* PFD Agreement) ¶ 2(f), at D0004384.

61. The terms "Production Manager" and "Unit Production Manager" or "UPM" are sometimes used to refer to the Line Producer role. Ex. 1 (Sayre Tr.) 124:7-23; 154:9-11.

62. The Line Producer's role on the film productions that Searchlight finances is to act as the point person between the Director, Creative Producers, and Searchlight to produce the film on a timely basis within the budget set by Searchlight. Among other things, the Line Producer helps create the film production plan, hires the crew, chooses shooting locations, and supervises most of the crew on the film. Ex. 1 (Sayre Tr.) 21:4-17.

63. Searchlight had the right to approve the hiring and replacement of the Line Producer and the Production Accountant on *Black Swan*. Ex. 1 (Sayre Tr.) 124:7-23; Ex. 22 (*Black Swan* PFD Agreement) ¶ 2(h), at D0004361.

64. Searchlight had the irrevocable right to require Lake of Tears, Inc. to fire anyone rendering services on *Black Swan*. Ex. 22 (*Black Swan* PFD Agreement) ¶ 6(a), at D0004367.

65. Sayre hired the Line Producer on *500 Days of Summer*. Ex. 1 (Sayre Tr.) 22:5-11.

66. Sayre chose other key department heads on *500 Days of Summer*. She checked the references of individuals whom Searchlight and the film's director suggested for particular positions and obtaining Searchlight's approval to hire those individuals. Ex. 1 (Sayre Tr.) 53:5-55:12.

67. Searchlight had the right to designate and replace the Line Producer and the Production Accountant on *500 Days of Summer*. Ex. 23 (*500 Days of Summer* PFD Agreement) ¶ 2(j), at D0004387.

68. Searchlight had the irrevocable right to require 500 DS Films to fire anyone rendering services on *500 Days of Summer*. Ex. 23 (*500 Days of Summer* PFD Agreement) ¶ 18(a), at D0004400.

V. Searchlight Closely Supervised the Pre-Production Phase of the Films.

69. Searchlight's involvement in the physical production of films usually begins before the film's actual production begins. Ex. 1 (Sayre Tr.) 23:17-23.

70. Pre-production is typically a six to eight-week period of time prior to the film shooting phase, in which Sayre and key production personnel put the production plan in motion. This involves hiring the crew, setting the locations, finalizing the budget, and hiring the cast. Ex. 1 (Sayre Tr.) 24:14-23.

71. Sayre's role in obtaining Searchlight's approval of the *Black Swan* production plan included working with Jennifer Roth, the Unit Production Manager/Line Producer, Franklin, a producer, and Aronofsky, the Director, to determine the shooting schedule, the time needed to shoot the dance sequences, the designs for the sets, the visual effects, and the adequacy of the budget. Ex. 1 (Sayre Tr.) 33:11-20; Ex. 2 (Franklin Tr.) 9:22-10:17; 31:9-33:20; 34:1-35:16.

72. Before Searchlight approved the *Black Swan* production plan, Sayre was provided with a script, a schedule, and a budget for *Black Swan*, which she reviewed to determine whether the script was reflected properly in the schedule and whether the schedule and the script were reflected properly in the budget. Once she had reviewed these materials, she communicated to others at Searchlight her determination that the schedule and the budget properly reflected the script. Ex. 1 (Sayre Tr.) 33:11-35:1.

73. Before filming on *500 Days of Summer* began, Searchlight created several budgets for the film and worked to determine where to shoot the film and how to produce it within the financial framework that Searchlight had targeted. Ex. 1 (Sayre Tr.) 53:5-19.

74. Once Searchlight determined how to make the film within the budget, Sayre worked with Steven Wolfe, the *500 Days of Summer* Line Producer, as well as other producers, to determine where to shoot the film and how to execute the production plan. Ex. 1 (Sayre Tr.) 53:20-54:2.

75. Sayre usually communicated with the Line Producer on the Films on a daily basis during the pre-production phase by phone and email. Ex. 1 (Sayre Tr.) 42:21-43:10.

76. The Films' production staff was required to send Sayre pre-production calendars so that Sayre could oversee the pre-production process. Ex. 1 (Sayre Tr.) 77:3-25.

77. Exhibit 11 is an example of a pre-production calendar for *Black Swan*. Ex. 2 (Franklin Tr.) 25:23-26:19; Ex. 11 (Pre-Production Calendar).

VI. Searchlight Closely Supervised the Production Phase of the Films.

78. During the production phase, on a daily basis, Sayre was sent call sheets, cost reports, and production reports for *Black Swan* and *500 Days of Summer*. Ex. 1 (Sayre Tr.) 46:21-50:18; 51:2-5.

79. A call sheet is a document prepared by the production every day. It reflects the work that is to be done the following day and includes locations, scene numbers, brief descriptions of the scenes, the actors and extras appearing in the scenes and when they are to arrive on set, and what time crew members are to arrive to work. It also contains information about special equipment needed on set, such as camera equipment, costumes, or props. The call sheet also usually includes an “advance” that describes in brief what will be shot in the next several days. Ex. 1 (Sayre Tr.) 46:24-47:12; Ex. 2 (Franklin Tr.) 64:7-13; Ex. 38 (*Black Swan* Call Sheet).

80. Call sheets were typically drafted by the film’s Assistant Director and Line Producer. Ex. 1 (Sayre Tr.) 48:11-18.

81. Searchlight employees, including Sayre, reviewed call sheets the productions sent to them because they allowed Searchlight to monitor any changes to the schedule. Ex. 1 (Sayre Tr.) 47:16-48:7; 58:11-59:10; Ex. 2 (Franklin Tr.) 64:4-18.

82. In addition to Sayre, Zola Mashariki, a Searchlight Creative Executive who oversaw the creative side of the *Black Swan* production, as well as a Searchlight estimating executive, received call sheets from *Black Swan*. Ex. 1 (Sayre Tr.) 52:11-25; 70:20-71:4; 71:17-21.

83. Production reports contain information similar to the information on call sheets, except that production reports describe what actually happened on a particular day, while call sheets describe what is scheduled to happen. Ex. 1 (Sayre Tr.) 50:11-18.

84. Searchlight reviewed production reports to monitor the production’s adherence to the production schedule and to ensure that the hours the crew worked were within the budget. Ex. 1 (Sayre Tr.) 50:11-51:1; 58:11-25; Ex. 37 (*500 Days of Summer* Production Reports).

85. *500 Days of Summer* production reports listed several interns who worked on the film. Ex. 37 (*500 Days of Summer* Production Reports), at D0001824, D0001844.

86. Plaintiffs Glatt and Footman received emails each day attaching call sheets for *Black Swan*. Approximately five to ten Searchlight employees, including Sayre, were also copied on these emails. Ex. 1 (Sayre Tr.) 47:21:13-15; 59:25-60:10; 71:17-21; Ex. 3 (Glatt Tr.) 245:2-22; Ex. 4 (Footman Tr.) 124:5-22.

87. Searchlight required the film productions to send it “wrap reports” at the conclusion of each day of shooting. A wrap report is a snapshot of the prior day’s work that summarizes the detailed information contained in the production report including the hours of work, the location where shooting took place, the scenes that were scheduled to be shot, and the scenes that actually were shot. If the film was shot on film, the wrap report also stated the number of feet of film that were used. Ex. 1 (Sayre Tr.) 81:18-82:16.

88. Searchlight required the productions to send it wrap reports in Searchlight’s template format. Ex. 41 (Emails, dated Dec. 8, 2009, among Sayre, L. Feldman, and J. Melton).

89. Sayre reviewed wrap reports to see whether the production completed the work that was scheduled to take place and the hours the crew worked. Ex. 1 (Sayre Tr.) 82:11-16.

90. Searchlight required the production staff to call or email Sayre or Janice Melton, Searchlight’s Feature Coordinator and Sayre’s subordinate, each morning to tell them what time the first film shot of the day took place and at the end of each day to tell them when the last film shot took place. This was so that Searchlight could determine whether the production complied with the day’s plan to start shooting at a particular time and to wrap for the day at a particular time, as set forth on the daily call sheet. Ex. 1 (Sayre Tr.) 83:3-22.

91. On *500 Days of Summer*, Sayre worked with the Line Producer and the other producers to make sure that the production plan was executed properly. Ex. 1 (Sayre Tr.) 58:11-17.

92. Sayre monitored the making of *Black Swan* because it was her job and responsibility to oversee and understand the filmmakers' and Searchlight's visions for the script and the film in order to "to make sure that we are all making the same movie." Ex. 1 (Sayre Tr.) 31:24-32:25; Ex. 2 (Franklin Tr.) 41:25-42:17.

93. Sayre's day-to-day involvement during the production of *500 Days of Summer* was similar to her involvement in *Black Swan*. Ex. 1 (Sayre Tr.) 58:11-25.

94. During the production of the Films, Sayre communicated with the Line Producer by phone and email once a day. Ex. 1 (Sayre Tr.) 42:21-43:10; 58:11-25.

95. For example, on *Black Swan*, Sayre and Roth discussed "everything having to do with the production" during their daily communications. They discussed how the day was going and whether the production team was going to complete the work as scheduled. If they were not going to complete the work as scheduled, Sayre and Roth discussed what the remedy would be. They also discussed whether there was anything unusual happening on the set that day or coming up in the next several days. Sayre also discussed with Roth how the department heads, such as the Cinematographer, the Costume Designer, and the Production Designer, were managing within their budgets. Ex. 1 (Sayre Tr.) 44:12-45:3; 45:16-46:20.

96. Sayre and Roth also regularly discussed specific spending decisions that would impact the *Black Swan* budget. For example, on one occasion, they discussed whether to shoot a scene on-location or build a set for it. Ex. 1 (Sayre Tr.) 45:23-46:20.

97. On a daily basis, during the production of *Black Swan*, production staff sent Searchlight film footage. Ex. 2 (Franklin Tr.) 41:14-24.

98. Lewis, Searchlight's President of Production, provided the *Black Swan* production staff with creative feedback, including notes, after reviewing the daily footage of the film. Ex. 2 (Franklin Tr.) 41:9-24.

99. Franklin and Lewis discussed the following issues related to the *Black Swan* production: whether an actor's hair should be dyed to eliminate grey, whether to shoot the ballet scenes in the film on 35 millimeter film as opposed to super 16 film, and whether the production was going to finish shooting on schedule. Ex. 2 (Franklin Tr.) 43:6-15.

100. As part of their discussions regarding whether *Black Swan* would finish shooting on schedule, Franklin and Lewis discussed whether more time or money were required. Ex. 2 (Franklin Tr.) 43:16-44:1.

VII. Searchlight Exercised Tight Control Over Expenditures on the Films.

A. Cost and Budget Reporting Requirements.

Cash Flow Schedules

101. Searchlight required the Films to send it weekly cash flow schedules, which showed the amount of money spent on the production. Ex. 1 (Sayre Tr.) 125:1-25; Ex. 22 (*Black Swan* PFD Agreement) ¶ 5(a)-(b), at D0004365; Ex. 23 (*500 Days of Summer* PFD Agreement), ¶ 8(a)-(b) at D0004391.

102. Searchlight used the cash flow schedules to determine whether to approve periodic requests for funding by the productions. Ex. 1 (Sayre Tr.) 165:16-22; 125:1-126:20.

103. Searchlight required the Films to obtain its approval of all cash flow requests to continue to receive funding. Ex. 1 (Sayre Tr.) 166:8-20.

104. Detailed instructions about Searchlight's cash flow reporting procedures and software are outlined in the Twentieth Century Fox Feature Accounting Manual that David Kim ("Kim"), Searchlight's Executive Director of Finance, sent to Theodore Au ("Au"), *Black Swan*'s Production Accountant. Ex. 6 (Glatt Decl.) Ex. B (Accounting Manual) at P0003271-73.

Weekly Cost Reporting

105. The *Black Swan* and *500 Days of Summer* productions submitted cost reports to Searchlight, which Sayre reviewed. Ex. 1 (Sayre Tr.) 48:19-49:19; 51:2-21; Ex. 29 (Email, dated Mar. 22, from Sayre to Au).

106. Cost reports reflect the costs of the production from the prior week, broken down by every account. They reflect the budget and how the budget is being spent on a weekly basis. Ex. 1 (Sayre Tr.) 48:24-49:2.

107. Exhibit 27 is an example of a cost report for *Black Swan*. Ex. 1 (Sayre Tr.) 161:19-163:1; Ex. 27 (*Black Swan* cost report).

108. As part of her review, Sayre checked to make sure that there were adequate funds left in the productions' accounts, including the accounts designated to pay the salaries of the crew, and to make sure the spending had not gone over-budget. Ex. 1 (Sayre Tr.) 49:11-50:3; 51:2-21.

109. Sayre reviewed the cost reports that Au drafted for *Black Swan* and approved their release for distribution to other financiers and the bond company. Ex. 1 (Sayre Tr.) 175:5-176:8; Ex. 29 (Email, dated Mar. 22, 2010, from Sayre to Au).

110. Searchlight also required the Films to send it original receipts and other documentation to substantiate the expenditures made on the productions within three weeks of withdrawing funds from bank accounts designated for production costs. Ex. 1 (Sayre Tr.) 127:3-

19; Ex. 22 (*Black Swan* PFD Agreement) ¶ 5(f), at D0004365-66; Ex. 23 (*500 Days of Summer* PFD Agreement) ¶ 8(f), at D0004392.

B. Accounting Policies.

111. The Production Accountant was responsible for keeping Searchlight fully advised as to the development, production, post-production, and delivery of the Films. Ex. 22 (*Black Swan* PFD Agreement) ¶ 2(h), at D0004361-62; Ex. 23 (*500 Days of Summer* PFD Agreement) ¶ 2(j), at D0004387.

112. Searchlight had the right to designate the computer software program that the Production Accountant used to submit cost reports. Ex. 22 (*Black Swan* PFD Agreement) ¶ 2(d), at D0004359, ¶ 2(h), at D0004361-62; Ex. 23 (*500 Days of Summer* PFD Agreement) ¶ 2(j), at D0004387.

113. Kim sent Au the Twentieth Century Fox Feature Accounting Manual (“Fox Accounting Manual”) on November 24, 2009, which Au forwarded to Glatt. Ex. 6 (Glatt Decl.) Ex. B (Fox Accounting Manual); Ex. 9 (Au Decl.) ¶ 6 & Ex. A.

114. Au was required to follow the procedures set forth in the Fox Accounting Manual in performing his accounting duties on *Black Swan*. Ex. 1 (Sayre Tr.) 175:5-11; Ex. 9 (Au Decl.) ¶¶ 1, 6 & Ex. A.

115. Detailed instructions about Searchlight’s cost reporting procedures and deadlines are outlined in the Fox Accounting Manual. Ex. 6 (Glatt Decl.) Ex. B (Accounting Manual) at 29-39.

116. Au generally communicated with either Kim or Steve Timinskas, Searchlight’s Executive Director of Feature Accounting, when questions came up about budget reporting matters. Ex. 6 (Glatt Decl.) Ex. B (Accounting Manual), at 1; Ex. 9 (Au Decl.) ¶ 12.

C. Overage Policies.

117. Searchlight required the Director, Producers, Line Producer, and Unit Production Manager to sign a “budget sign-off” document that set forth the production budget and the production schedule. Ex. 1 (Sayre Tr.) 176:25-177:18.

118. Searchlight’s policy with respect to budget overages is set forth in the budget sign-off document. Ex. 1 (Sayre Tr.) 176:25-179:8; Ex. 30 (Budget sign-off document).

119. Under Searchlight’s overage policy, Searchlight would not approve any expenditure that did not fit within the signed-off budget plan. Ex. 1 (Sayre Tr.) 177:22-179:5; Ex. 30 (Budget sign-off document).

120. Neither the Films’ Producers nor the Unit Production Manager had the authority to approve expenses that exceeded the expenses that were signed off on in the budget. Ex. 1 (Sayre Tr.) 177:22-179:5, Ex. 30 (Budget sign-off document).

121. Funds could not be moved from one budget account to another without Searchlight’s approval. Ex. 1 (Sayre Tr.) 177:22-179:5, Ex. 30 (Budget sign-off document).

122. Searchlight’s approval was required in order for the productions go over budget. Ex. 1 (Sayre Tr.) 177:22-179:5, Ex. 30 (Budget sign-off document).

123. *Black Swan*’s Director did not have authority to exceed the budget for without obtaining Searchlight’s approval. Ex. 1 (Sayre Tr.) 202:9-13.

124. For example, *Black Swan*’s Director could not pay his assistant without first obtaining approval from Searchlight. Ex. 1 (Sayre Tr.) 173:10-175:4, Ex. 28 (Email, dated Mar. 19, 2010).

D. Wrap Procedures.

125. Searchlight required the Films to send it a final “wrap memo” that identified where production documents, props, set dressings, and other elements of the production would be sent after the production office closed. The purpose of the final wrap memo was to let Searchlight know where everything that was used on the film would be located in the event that additional photography was required and because all of the assets belonged to Searchlight. Ex. 1 (Sayre Tr.) 116:18-117:8.

126. The *Black Swan* final wrap memo advised Searchlight of any outstanding debts or liabilities associated with equipment and locations that had been rented for the Films. Ex. 1 (Sayre Tr.) 121:14-17; Ex. 42 (*Black Swan* Wrap Memo) at D0085024-25; D0085028.

127. Lindsay Feldman, the Production Office Coordinator for *Black Swan*, was responsible for sending the *Black Swan* wrap memo to Searchlight and reporting to it on the progress of the production wrap. Ex. 40 (Emails, dated Mar 5, 2010, between L. Feldman and Melton); Ex. 42 (*Black Swan* Wrap Memo and cover email, dated Mar. 8, 2010).

128. When the filming of *Black Swan* was complete, Au was responsible for generating portions of the *Black Swan* wrap memo. The wrap memo explained what Au did to wind down the production’s financial and accounting affairs. Ex. 9 (Au Decl.) ¶ 13.

129. Footman and other members of the *Black Swan* Production Office were responsible for selling props and equipment when the production ended. All sales of props on the production of *Black Swan* required a signed agreement between Twentieth Century Fox Film Corporation and the buyer. Ex. 7 (Footman Decl.) ¶ 2, Ex. C (Sale of Props Assets Agreement).

130. Unsold property and other documents were shipped back to Searchlight at the conclusion of the *Black Swan* production. Ex. 42 (*Black Swan* Wrap Memo), at D0085031-34.

131. 500DS Films, Inc. did not retain production-related documents for *500 Days of Summer* after the film was completed. The documents were either shipped to Searchlight or discarded if they were no longer needed. Ex. 10 (Hansen Decl.) ¶ 5.

132. 500DS Films, Inc. also did not retain physical items that were rented or purchased for *500 Days of Summer*. Items purchased for the production (e.g., wardrobe pieces, props, etc.) were sent to Searchlight, kept by crew members, donated, or discarded. Ex. 10 (Hansen Decl.) ¶ 6.

VIII. Searchlight Required Film Production Staff to Follow Its Policies and Procedures.

A. Searchlight Set the Terms and Conditions of Employment for Film Production Staff.

Searchlight's Intern Policy

133. Searchlight's policy with respect to interns who worked on film productions was that interns could not be hired unless they received college credit for their internships and signed a workers compensation waiver. Ex. 1 (Sayre Tr.) 154:13-155:3; Ex. 25 (Email, dated Jan. 11, 2011, between C. Celentano and T. Karn).

134. Searchlight expected the productions to follow its intern policy. Ex. 1 (Sayre Tr.) 206:5-14.

135. Carol A. Celentano, a Senior Vice President of Legal Affairs at Twentieth Century Fox Film Corporation, told Sayre that the rule governing interns was either production companies must pay them wages or the interns must be full-time students who provide documentation from their universities demonstrating they will receive course credit for interning on the film. The two conditions existed, according to Sayre, "because of liability exposure." Ex. 1 (Sayre Tr.) 86:13-87:6; 98:9-23.

136. *Black Swan*'s Director did not have authority to violate Searchlight's policy with respect to interns. Ex. 1 (Sayre Tr.) 202:14-18.

137. Searchlight's current policy is that film productions cannot hire unpaid interns. Ex. 1 (Sayre Tr.) 103:17-104:9.

138. Searchlight was aware that interns worked on the productions of *Black Swan* and *500 Days of Summer*. Ex. 1 (Sayre Tr.) 150:2-151:6; Ex. 3 (Glatt Tr.) 129:15-131:3; 136:5-20; Ex. 9 (Au Decl.) ¶ 15; Ex. 14 (Emails, dated Nov. 18 and 24, 2009); Ex. 24 (Email, dated Dec. 7, 2009 from J. Roth).

139. Interns' names and titles were listed on crew lists that were sent to Searchlight. Ex. 4 (Footman Tr.) 201:17-202:14; Ex. 33 (*Black Swan* Crew List), at P000759-60, P000763, P000763; Ex. 5 (Gratts Tr.) 126:7-24; Ex. 44 (*500 Days of Summer* Crew List), at DS0001925.

140. Interns' names and titles were listed on production reports that were sent to Searchlight. Ex. 37 (*500 Days of Summer* production report).

141. Interns were copied on emails attaching call sheets that were sent on a daily basis to Searchlight. Ex. 3 (Glatt Tr.) 243:24-245:12.

142. Roth sent an email on December 7, 2009 on which Sayre was copied stating that a union representative had visited the set of *Black Swan*, "saw the work our intern was doing," and wanted the production to hire a "loader," a union position responsible for loading film in the movie camera. Ex. 1 (Sayre Tr.) 150:2-152:20; Ex. 24 (Email, dated Dec. 7, 2009, from J. Roth).

143. After Glatt was hired, Au told Glatt in an email, dated November 18, 2009, that he would have to obtain permission from Searchlight to have unpaid interns. Ex. 3 (Glatt Tr.) 129:15-131:13; 136:5-20; Ex. 14 (Emails, dated Nov. 18 and 24, 2009).

144. Au asked Roth whether Searchlight would allow Glatt to work on *Black Swan* as an unpaid intern without receiving credit. Roth told him that she would raise the issue with Searchlight. Ex. 9 (Au Decl.) ¶ 15.

145. David Farr, the First Assistant Accountant, told Glatt in an email, dated November 24, 2009, “It looks like Fox is going to overlook the unpaid/non-college intern thing, so we will be able to start you next week.” Ex. 14 (Emails, dated Nov. 18 and 24, 2009); Ex. 33 (*Black Swan* Crew List).

Deal Memos

146. Searchlight required all paid film production staff to sign “deal memos.” Ex. 1 (Sayre Tr.) 75:24-76:11.

147. A “deal memo” is a document that that sets forth crew member pay. Ex. 1 (Sayre Tr.) 72:11-15; 74:24-75:3.

148. Deal memos were drafted by Searchlight. Ex. 1 (Sayre Tr.) 72:16-73:24.

149. Carol A. Celentano, a Senior Vice President of Legal Affairs at Twentieth Century Fox Film Corporation, was responsible for preparing and distributing deal memos for *Black Swan* and *500 Days of Summer*. Ex. 1 (Sayre Tr.) 86:13-87:6; 114:22-115:23; Ex. 21 (Emails, dated Nov. 18, 2009, regarding *Black Swan* crew deal memos).

150. Searchlight typically transmitted deal memos to the productions for crew members to sign. Ex. 1 (Sayre Tr.) 72:16-73:24.

151. Searchlight’s policy required all crew members to sign deal memos or they would not be paid. Ex. 1 (Sayre Tr.) 75:24-76:11; Ex. 19 (Searchlight Feature Production Department Memorandum), at 1.

152. Searchlight did not allow the Films to alter its deal memo templates without its prior approval. Ex. 1 (Sayre Tr.) 87:11-88:12; Ex. 20 (Interoffice Memo re Crew Deal Memos and Related Forms); Ex. 22 (*Black Swan* PFD Agreement) ¶ 2(g), at D0004361; Ex. 23 (*500 Days of Summer* PFD Agreement) ¶ 2(i), at D0004386-87.

153. Searchlight required the Films to send all signed deal memos to Sayre for her approval. Before approving a deal memo, Sayre ensured that it had been filled out properly and that the wage rate was correct. Ex. 1 (Sayre Tr.) 74:5-20.

154. After executing the *Black Swan* PFD Agreement, Searchlight reviewed and revised the crew deal memos that had been drafted by the *Black Swan* production prior to Searchlight's involvement in the film. Ex. 1 (Sayre Tr.) 115:8-23; Ex. 21 (Emails, dated Nov. 18, 2009, between C. Celentano and J. Roth).

155. Searchlight required members of the *Black Swan* production crew to execute a new version of the crew deal memos that it had revised. Ex. 1 (Sayre Tr.) 115:8-23; Ex. 21 (Emails, dated Nov. 18, 2009, between C. Celentano and J. Roth).

156. The *Black Swan* Accounting Department, including Glatt, was responsible for collecting Searchlight's deal memos and employment agreements from members of the cast and crew. Ex. 3 (Glatt Tr.) 152:25-153:18; Ex. 6 (Glatt Decl.) ¶ 4; Ex. 9 (Au Decl.) ¶ 7.

157. Glatt was responsible for tracking which crew members had signed Searchlight's revised crew deal memos. Ex. 6 (Glatt Decl.) ¶ 4, Ex. C (Deal memo spreadsheet).

Payroll Policy

158. Searchlight required the *Black Swan* film production crew to be paid through Cast and Crew Entertainment Services, which Searchlight designated as "the employer of record" for all employment-related claims. Ex. 3 (Glatt Decl.) Ex. B (Accounting Manual) at P0003277.

159. The Accounting Department was responsible for submitting weekly payroll information to Cast and Crew Entertainment Services. Ex. 9 (Au Decl.) ¶ 7.

160. During his internship, Glatt regularly ran errands to and from Cast and Crew Entertainment Services. Ex. 3 (Glatt Tr.) 173:4-18; 196:15-23.

Box Rental Agreements

161. A box rental is the amount paid to crew members for use of their equipment, including personal computers, during the film production. Ex. 1 (Sayre Tr.) 91:9-24.

162. Searchlight required crew members to sign box rental agreements in order to be compensated for the use of their equipment during the production. Ex. 1 (Sayre Tr.) 91:9-24.

163. Searchlight determined the maximum amounts that the production could pay to crew members for box rentals. Ex. 1 (Sayre Tr.) 91:25-92:20; Ex. 12 (*Black Swan* Budget), at D0083279).

164. Sayre's responsibilities included reviewing and approving production crew member box rental invoices. Ex. 1 (Sayre Tr.) 93:9:20.

Crew Lists

165. The Films were required to send Sayre and Melton crew lists that listed each crew member's cell phone number, email address, and department. Ex. 1 (Sayre Tr.) 43:13-17; 78:1-79:1.

166. Sayre used crew lists to find names and contact information for film production staff. Ex. 1 (Sayre Tr.) 78:1-79:1.

167. Glatt's name, telephone number, and email address were on the *Black Swan* Crew list under "Accounting." Ex. 33 (*Black Swan* Crew List), at P000759.

168. Footman's name, telephone number, and email address were on the *Black Swan* Crew list under "Production." Ex. 33 (*Black Swan* Crew List), at P000759.

169. Gratts's name, telephone number, and email address were on the *500 Days of Summer* Crew List under "Interns." Ex. 5 (Gratts Tr.) 126:7-24; Ex. 44 (*500 Days of Summer* Crew List) at DS0001925.

Film Credits

170. All individual credits on the Films were subject to Searchlight's prior approval. Ex. 1 (Sayre Tr.) 112:15-113:13; Ex. 22 (*Black Swan* PFD Agreement) ¶ 15(d), at D0004349; Ex. 23 (*500 Days of Summer* PFD Agreement) ¶ 2(i), at D0004386-87.

171. Pursuant to its policy, Searchlight did not approve film credits with respect to individuals who worked on a film for less than one or two weeks. Ex. 1 (Sayre Tr.) 157:8-158:13; Ex. 26 (Email, dated Dec. 9, 2008, from J. Lake to S. Hyman).

172. Searchlight reviewed and approved the film credits for the Films. Ex. 1 (Sayre Tr.) 156:11-157:7; Ex. 42 (*Black Swan* Wrap Memo), at D0085029.

173. Glatt's name appeared in the credits for *Black Swan*. Ex. 43 (*Black Swan* Draft End Credits, dated Mar. 8, 2010), at DS0001816.

174. Footman's name appeared in the credits for *Black Swan*. Ex. 43 (*Black Swan* Draft End Credits, dated Mar. 8, 2010), at DS0001816.

175. Gratts's name appeared in the credits for *500 Days of Summer*. Ex. 18 (*500 Days of Summer* End Credits), at D0084244.

176. Jeff Robinson, *Black Swan*'s Post-Production Supervisor, told Glatt that, under Searchlight's policy, he would only be credited once for his work on the film although he had worked in two different roles. Glatt requested that his name appear in the end credits as a "Post-

Production Assistant,” and that is how it appeared. Ex. 3 (Glatt Tr.) 306:7-21; Ex. 6 (Glatt Decl.) ¶ 10, Ex. F (Emails, dated August 2009, between E. Glatt and J. Robinson).

177. A draft of the *Black Swan* End Credits, dated March 8, 2010, listed Glatt as a “Production Intern.” A draft of the *Black Swan* End Credits, dated November 18, 2010, listed Glatt as a “Post-Production Assistant.” Ex. 43 (*Black Swan* Draft End Credits, dated Mar. 8, 2010), at DS0001816; Ex. 45 (*Black Swan* End Credits, dated Nov. 18, 2010), at D0002240.

178. Searchlight authorized all of the *500 Days of Summer* interns to be listed in the film’s credits. Ex. 1 (Sayre Tr.) 157:12-159:10; Ex. 26 (Email, dated Dec. 10, 2008, regarding film credits for interns).

IX. Plaintiffs Performed Work that Directly Contributed to the Films’ Production.

A. Glatt’s Work on *Black Swan*.

Hire

179. To obtain his position on *Black Swan*, Glatt “saw a job posting for unpaid internships on an upcoming Darren Aronofsky film, . . . replied to that job posting, exchanged some e-mails to set up an interview, interviewed for the position, [and] was hired.” Ex. 3 (Glatt Tr.) 45:8-16; Ex. 6 (Glatt Decl.) Ex. A (Emails, dated Sept. 4, 2009, between Glatt and J. Powell).

180. Before Glatt interviewed for the internship, Aronofsky’s assistant, Jeremy Powell, told Glatt that, as an intern on *Black Swan*, he would be required to “be available 7 days a week” and that “the hours can get heavy.” Ex. 6 (Glatt Decl.) ¶ 2, Ex. A (Email, dated Sept. 4, 2009, between Glatt and J. Powell).

181. Glatt and Roth, who interviewed him, discussed Glatt’s qualifications for various positions based on the experience listed on his resume. Ex. 3 (Glatt Tr.) 73:22-74:8.

182. Roth told Glatt that she could not offer him a position in the editing department, because she believed the editors' union would object to having unpaid workers in that department. Ex. 3 (Glatt Tr.) 73:22-74:5.

183. Glatt applied for his position with the post-production department by emailing his resume and a description of his interest in the position to the post-production supervisor, Jeff Robinson. Ex. 3 (Glatt Tr.) 179:20-180:20; 183:7-13; Ex. 16 (Emails, dated Jan. 22, 2010).

Supervision

184. Glatt's direct supervisors in the Accounting Department were Au and Farr. Ex. 3 (Glatt Tr.) 80:23-81:12; 138:3-10.

185. Au supervised three paid employees and Glatt in the Accounting Department. Ex. 9 (Au Decl.) ¶ 4.

186. Glatt received the same level of supervision as his paid co-workers in the Accounting Department. Ex. 3 (Glatt Tr.) 80:16-81:12; 174:13-175:6.

187. Glatt was not closely supervised. The supervision he received consisted of on-the-job instructions about how to perform his tasks. For example, his supervisors told him which personnel documents had to be maintained in employee personnel files so that he could collect documents from crew members to complete them Ex. 3 (Glatt Tr.) 158:4-159:16; 174:13-25.

Assignments

188. Glatt worked on *Black Swan* from approximately 9:00 a.m. to 7:00 p.m. five days a week, from approximately December 2, 2009 through the end of February 2010. Ex. 3 (Glatt Tr.) 78:3-80:3.

189. On December 4, 2009, Au told Glatt to read the Fox Accounting Manual. Ex. 3 (Glatt Tr.) 290:17-291:25; Ex. 9 (Au Decl.) ¶ 6, Ex. A; Ex. 17 (Email, dated Dec. 4, 2009, from T. Au to Glatt).

190. Glatt's responsibilities included: making photocopies and filing documents; scanning documents; tracking and logging purchase orders; transporting paperwork to and from the *Black Swan* film set; reviewing personnel files to make sure they contained necessary paperwork; creating spreadsheets to track missing documents in employee personnel files; requesting missing documents from employees to complete their personnel files; making deliveries from the production office to the set; and answering questions about the Accounting Department. Ex. 3 (Glatt Tr.) 157:13-161:21; 172:6-14; 173:4-174:12; 176:3-16; 192:19-193:14; 199:6-200:21; Ex. 6 (Glatt Decl.) ¶¶ 4-5; Ex. 9 (Au Decl.) ¶ 16; Ex. 15 (Email, dated Jan 15, 2010, from E. Glatt to crew member).

191. Glatt kept logs of payroll records documenting which cast members had deal memos on file. Ex. 3 (Glatt Tr.) 192:19-193:14); Ex. 6 (Glatt Decl.) ¶ 4, Ex. C (Deal memo spreadsheet).

192. If Glatt had not performed the work that he was assigned, another member of Au's staff would have been required to work longer hours to perform the work or a paid assistant would have had to be hired to do it. Ex. 3 (Glatt Tr.) 175:7-18; Ex. 9 (Au Decl.) ¶ 16.

193. Glatt believed that Searchlight was his employer because his supervisors regularly communicated with and sent cost reports to Searchlight, Searchlight personnel were copied on daily call sheet emails he received, Searchlight executives came to New York to meet with film production staff, and *Black Swan* was a Fox production. Ex. 3 (Glatt Tr.) 138:3-20; 243:24-245:12.

194. Glatt performed unpaid work in the post-production department of *Black Swan* two days a week from approximately March 2010 to approximately August 2010, from approximately 11:00 a.m. until approximately 6:00 or 7:00 p.m. Ex. 3 (Glatt Tr.) 93:21-94:25; 178:23-179:6.

195. In the post-production department, Glatt was responsible for administrative work, such as drafting cover letters for mailings, organizing filing cabinets, filing paperwork, making photocopies, keeping the take-out menu books for the editors' rooms up-to-date and organized, and bringing documents to and from Trevanna Post, the company that handled payroll during *Black Swan*'s post-production. Ex. 6 (Glatt Decl.) ¶ 7.

196. Glatt was also responsible for running errands to make photocopies or pick up supplies for crew who worked in the Black Swan editing room. Ex. 6 (Glatt Decl.) ¶ 8, Ex. E (Email, dated Mar. 5, 2010, from J. Robinson to E. Glatt).

197. When shooting concluded, Glatt was responsible for making photocopies and preparing binders of the final "production wrap" materials, which were sent to Searchlight. Ex. 6 (Glatt Decl.) ¶ 9.

198. During his time as a post-production intern, Glatt was required to run errands for Aronofsky, including buying him a non-allergenic pillow to use in the editing room. Ex. 6 (Glatt Decl.) ¶ 8, Ex. E.

Training

199. Glatt did not receive formal training or educational instruction on the *Black Swan* production. Ex. 3 (Glatt Tr.) 121:4-11; 305:25-306:6.

200. Glatt received the same benefits from his work experience on *Black Swan* that his paid co-workers received. Ex. 3 (Glatt Tr.) 126:24-127:2-7.

Expectation of Compensation

201. Glatt hoped that his internship would lead to paid employment in the film production industry. Ex. 3 (Glatt Tr.) 113:23-114:23.

202. Glatt hoped to receive a film credit for his work that accurately described his responsibilities on *Black Swan*. Ex. 3 (Glatt Tr.) 113:23-114:23.

203. Glatt did not believe that he had the ability to bargain over the terms and conditions of his internship, even though he believed that he should have been paid for his work from the outset. Ex. 3 (Glatt Tr.) 115:7-117:7.

B. Footman's Work on *Black Swan*.

Hire

204. The job posting for the internship to which Footman responded read, “we’re looking for FULL TIME production interns to interview ASAP [sic] to work on our upcoming film *Black Swan*” and “we’re looking to fill needs in virtually all departments.” It also advised applicants that the position would be a “full time commitment.” Ex. 4 (Footman Tr.) 62:19-63:13; Ex. 32 (Email, dated Sept. 2, 2009, from J. Powell).

205. Before Footman interviewed for the internship, Aronofsky’s assistant, Jeremy Powell, explained to Footman that an internship on *Black Swan* was a “full commitment for 4-5 months w[ith] possible 7 day a week availability.” He also said that “the very nature of it being a full time commitment makes it difficult for students.” Ex. 4 (Footman Tr.) 65:5-22; Ex. 32 (Email, dated Sept. 2, 2009, between Footman and J. Powell).

206. Footman interviewed for the Production Office internship with the Unit Production Manager, Jennifer Roth. Ex. 4 (Footman Tr.) 19:16-25; 90:4-15; 205:5-15.

Supervision

207. There were approximately 10 staff members in the *Black Swan* Production Office: four paid staff and approximately four to six interns, including Footman. Ex. 4 (Footman Tr.) 79:14-80:4; 89:21-90:20.

208. The paid staff who were primarily responsible for giving Footman assignments and tasks included Jennifer Roth, Lindsay Feldman, Jodi Arneson, the Assistant Production Office Coordinator, Michael Winn Lewis, the Production Office Secretary, and Ben Lusthaus, a Production Office Assistant. Ex. 4 (Footman Tr.) 28:3-22; 73:15-22; 92:5-23; Ex. 33 (*Black Swan* Crew List).

209. Feldman's supervisory responsibilities with respect to paid and unpaid staff, including Footman, included setting their work schedules, giving them assignments, and emailing daily call sheets and prep schedules to the entire cast and crew. Ex. 4 (Footman Tr.) 28:14-22; 90:21-91:20.

210. Production Office interns were instructed to refer to a "status board" for new tasks when they finished their other assignments. Ex. 4 (Footman Tr.) 200:3-17.

211. Footman's supervisor's job did not involve any kind of teaching. Ex. 4 (Footman Tr.) 222:3-5.

212. Footman's supervisor was always "swamped" with her own work. Ex. 4 (Footman Tr.) 222:5-8.

Assignments

213. Footman worked as an unpaid intern in the Production Office of *Black Swan* from approximately September 29, 2009 through approximately late February or early March 2010. Ex. 4 (Footman Tr.) 15:9-22.

214. From the beginning of his internship until approximately November 2009, Footman worked five days a week. Beginning in approximately November 2009, Footman began working approximately three days a week. He worked an average of ten hours per day. Ex. 4 (Footman Tr.) 80:5-23.

215. Footman worked approximately eight to twelve hours a day. Ex. 4 (Footman Tr.) 80:20-23.

216. When Footman's schedule changed from five to three days a week, another intern was hired to fill in for him because the Production Office was so busy. Ex. 4 (Footman Tr.) 43:3-9; 174:14-24.

217. The Production Office's role on the *Black Swan* production was to coordinate the departments located in the Production Office and the film set. Production Office staff also maintained files, processed purchase orders, sent out schedules, call sheets, scripts, and other documents to the entire cast and crew, found lodging for out-of-town cast and crew, made sure the production office kitchen was stocked, made deliveries between the set and the production office departments, coordinated transportation of cast and crew members between the production office and film set, furnished the production office before the film production commenced, cleaned out the production office and sold off its furniture when filming wrapped, and planned the wrap party. Ex. 4 (Footman Tr.) 74:11-78:4.

218. The Production Office also housed the Producers' offices and several other departments. Ex. 4 (Footman Tr.) 74:11-75:3.

219. The work of the Production Office was vital to the *Black Swan* film production. Ex. 4 (Footman Tr.) 78:5:11.

220. Lusthaus, the Office Production Assistant, had the same responsibilities as Production Office interns. Ex. 4 (Footman Tr.) 73:19-74:10; 92:24-93:6.

221. Production Office Assistants are typically responsible for office paperwork, like sending emails, printing call sheets, and distributing paperwork. Ex. 2 (Franklin Tr.) 67:11-19.

222. Footman and other production office interns performed the tasks of a Production Office Assistant. Ex. 4 (Footman Tr.) 57:14-23; 73:19-74:3; 92:24-93:6.

223. Footman's responsibilities included picking up and setting up office furniture at the beginning of the production; arranging lodgings in hotels and apartments for various cast and crew; taking out the trash; taking lunch orders; answering and transferring phone calls; watermarking scripts; drafting daily call sheets; photocopying; making coffee; making deliveries to and from the film production set, rental houses, and Cast and Crew payroll services; receiving packages and deliveries to the office; admitting guests into the office; compiling lists of local vendors, breaking down, removing and selling office furniture and supplies at the end of production; internet research; sending invitations to the wrap party; and other similar tasks and errands. Ex. 4 (Footman Tr.) 19:3-6; 41:4-42:5; 81:9-83:2; 187:5-188:12; 190:17-193:6; 214:9-215:12; Ex. 7 (Footman Decl.) ¶ 1, Exs. A, B.

224. Footman and other Production Office interns photocopied documents related to the production, collated documents, and stapled documents and put them into a bin in the Production Office for the production staff. Ex. 4 (Footman Tr.) 38:8-40:21.

225. Footman ran errands during his internship. For example, he transported tea to Aronofsky and dropped off a DVD of *Black Swan* footage at Aronofsky's apartment. Ex. 4 (Footman Tr.) 69:9-24.

226. Footman believed that Searchlight was his employer because individuals with Fox email addresses were copied on email communications, Searchlight employees were involved in budget meetings, film production staff referred to *Black Swan* as a Searchlight film, and Searchlight had final say over the budget, personnel decisions, and pay decisions. Ex. 4 (Footman Tr.) 127:12-129:6.

Training

227. Footman did not receive training during his internship on *Black Swan*. Ex. 4 (Footman Tr.) 140:4-10; 221:25-222:3.

228. Footman did not learn skills that he did not already know. He learned how to do rote tasks specific to his job on *Black Swan*, such as how to use the office printer and how to watermark scripts. Ex. 4 (Footman Tr.) 35:9-37:20; 96:12-97:5; 162:14-163:11; 173:23-174:13.

229. Watermarking scripts involved using Adobe Acrobat to print the name of a cast or crew member on each page of the script. Each person provided with a copy of the script received a version with his or her name watermarked on it. The purpose of watermarking scripts was to make it possible to trace any copies of publicly-leaked scripts back to the source of the leak. Ex. 4 (Footman Tr.) 35:9-37:20; 162:14-163:11.

230. Footman received the same benefits from his work experience on *Black Swan* that his paid co-workers received. Ex. 4 (Footman Tr.) 93:7-97:10.

Expectation of Compensation

231. Footman agreed to work for no financial compensation because he hoped that his internship would lead to paid employment in the film production industry. Ex. 4 (Footman Tr.) 89:6-16; 101:14-102:3; Ex. 32 (Emails, dated Sept. 2, 2009, between A. Footman and J. Powell).

C. Gratts's Work on *500 Days of Summer*.

Hire

232. Gratts applied for her internship by responding to an advertisement on Craigslist and submitting her resume. Ex. 5 (Gratts Tr.) 57:14-22.

233. Before she started her internship, Gratts received an email from Paula Thompson, the Art Department Coordinator, stating, "Let me know if you are available for the next 5-6 days – we're in the process of building our sets, then we'll be dressing. Lots of painting, fabric stapling, finishing, etc. Hard work, but we have a fun crew!" Ex. 46 (Email correspondence, dated April 30, 2008, from P. Thompson to K. Gratts).

234. On Gratts's first day of her internship, she was asked to provide her driver's license, social security card, and fill out an I-9 Employment Eligibility Verification form. Ex. 5 (Gratts Tr.) 62:9-14.

235. On her first day, Gratts was told that she would be paid for her internship. Ex. 5 (Gratts Tr.) 66:12-19; 69:12-70:24

Supervision

236. Laura Fox, the Production Designer, and Charles Varga, the Art Director, supervised Gratts's work on *500 Days of Summer*. Ex. 5 (Gratts Tr.) 84:6-85:8; 86:24-87:4; Ex. 8 (Varga Decl.) ¶ 8; Ex. 44 (*500 Days of Summer* Crew List).

237. Gratts was one of several interns hired to work in the *500 Days of Summer* Art Department. Ex. 8 (Varga Decl.) ¶ 8.

238. Gratts's work was not closely supervised. Ex. 5 (Gratts Tr.) 84:6-85:8; 88:10-90:13.

239. Throughout her internship, Gratts worked alongside paid employees and performed the same kinds of tasks that they performed. Ex. 5 (Gratts Tr.) 80:6-81:20; 88:10-90:13.

240. The supervision Gratts received was limited to instruction from her supervisors about how to perform her day-to-day duties, such as using construction equipment to build set pieces. Ex. 5 (Gratts Tr.) 88:10-89:18.

Assignments

241. Gratts interned on *500 Days of Summer* from approximately May 2008 through approximately August 2008. Ex. 5 (Gratts Tr.) 39:14-20; 119:15-19; 120:16-18.

242. Gratts worked in the Art Department as an intern on *500 Days of Summer*. Ex. 5 (Gratts Tr.) 40:12-16.

243. Gratts did not receive wages for the work that she performed on *500 Days of Summer*. Ex. 5 (Gratts Tr.) 73:23-74:19.

244. As an intern in the Art Department, Gratts helped prepare the set for scenes by identifying which props were needed, which fabrics were needed to match the design created by the set designer, and by arranging furniture. Ex. 5 (Gratts Tr.) 82:22-84:5; 170:18-171:12.

245. Gratts helped build sets for *500 Days of Summer*, including office cubicles, an apartment, an elevator, the boss's office, and two creative offices for card designs. Ex. 5 (Gratts Tr.) 76:2-10; 83:10-13.

246. To build sets, Gratts had to saw wood, cut and pull fabrics, spray glue and attach fabric to construct realistic-looking environments such as cubicles. Ex. 5 (Gratts Tr.) 80:14-18; 81:17-20, 88:10-23; 171:17-172:7.

247. Gratts helped to dismantle sets that were built and to restore the shooting location to its state before production began. Ex. 5 (Gratts Tr.) 76:25-77:12.

248. To dismantle sets, Gratts removed the props and furniture, took the pictures down from the walls, and stripped the fabric from the sets. Ex. 5 (Gratts Tr.) 156:10-157:11.

249. During the shooting of *500 Days of Summer*, Gratts made sure that the sets were neat and that all the props were in place. Ex. 5 (Gratts Tr.) 91:11-92:10.

250. Gratts worked approximately 20-25 hours a week during her internship. Ex. 5 (Gratts Tr.) 180:14-23.

251. During the period when she built sets, before shooting began, Gratts worked approximately 3 to 4 days a week, from approximately 9:00 or 10:00 a.m. to approximately 3:00 or 4:00 p.m. Ex. 5 (Gratts Tr.) 90:5-22.

252. During the shooting of *500 Days of Summer*, Gratts worked approximately 3 to 4 days a week, from approximately 11:00 a.m. to 3:00 p.m. Ex. 5 (Gratts Tr.) 92:22-93:5.

253. During the period when Gratts helped to dismantle sets, she worked a total of approximately five days for approximately five to six hours a day. Ex. 5 (Gratts Tr.) 96:18-97:6; 158:16-18.

254. Gratts believed that everyone who was working on the production was employed by Searchlight, including the interns, because she responded to an advertisement on Craigslist that referenced Searchlight, and understood that *500 Days of Summer* was a new movie that Searchlight was producing. Ex. 5 (Gratts Tr.) 115:5-10; 169:21-170:9.

Training

255. Gratts did not receive any training or instruction during her internship. Ex. 5 (Gratts Tr.) 179:7-10.

256. From her work on *500 Days of Summer*, Gratts learned how to “use my hands a lot and make [a set] look neat.” Ex. 5 (Gratts Tr.) 89:4-7.

Expectation of Compensation

257. Gratts expected to be paid for her work as an intern. Ex. 5 (Gratts Tr.) 61:10-62:14; 66:12-67:2; 69:12-70:24; 149:19-25.

258. Steven Fox, the Construction Foreman on *500 Days of Summer*, told Gratts that she would be paid when the film production concluded, and Gratts continued to work for Searchlight with that understanding. Ex. 5 (Gratts Tr.) 66:12-19; 69:12-70:24; 149:19-25.

259. After the *500 Days of Summer* production wrapped, Gratts did not receive a check with payment of her wages as Steven Fox had promised. To claim her wages, she called the *500 Days of Summer* production office several times and left messages inquiring about the status of her paycheck. When she did not receive a response to these inquiries, Gratts went to the Fox Studios lot in Los Angeles, California to speak to someone in person about her unpaid wages, but the security guard did not permit her to enter the premises. Ex. 5 (Gratts Tr.) 74:6-19; 185:11-186:6; 193:21-194:15.

Dated: New York, New York
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Respectfully submitted,

/s/ Rachel Bien

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