No. 09-2571

United States Court Of Appeals
For the First Circuit

SAMUEL BARTLEY STEELE; BART STEELE PUBLISHING; STEELE RECORDZ

Plaintiffs – Appellants

v.

TURNER BROADCASTING SYSTEM, INC.; TIME WARNER, INC.; JON BONGIOVI, individually and d/b/a Bon Jovi Publishing; RICHARD SAMBORA, individually and d/b/a Aggressive Music; WILLIAM FALCONE, individually and d/b/a Pretty Blue Songs; FOX BROADCASTING CO.; MAJOR LEAGUE BASEBALL PROPERTIES, INC.; MLB PRODUCTIONS, A&E; A&E/AETV; BON JOVI; AEG LIVE, LLC; MARK SHIMMEL MUSIC; VECTOR MANAGEMENT; AGGRESSIVE MUSIC, a/k/a Sony ATV Tunes; BON JOVI PUBLISHING; UNIVERSAL MUSIC PUBLISHING GROUP; UNIVERSAL POLYGRAM INTERNATIONAL PUBLISHING, INC., PRETTY BLUE SONGS; SONY ATV TUNES; KOBALT MUSIC PUBLISHING AMERICA, INC.; BOSTON RED SOX

Defendants – Appellees

THE AMERICAN SOCIETY OF COMPOSERS; FOX TELEVISION STATIONS, INC.; ISLAND RECORDS, a/k/a Island Def Jam Records; BIGGER PICTURE CINEMA CO.,

Defendants

APPELLANTS' MOTION FOR SANCTIONS

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I. Introduction

Plaintiffs/appellants Samuel Bartley Steele, Bart Steele Publishing, and Steele Recordz ("Steele") move this Honorable Court for Sanctions against defendants/appellees ("Defendants") and their counsel, Skadden, Arps, Slate, Meagher & Flom LLP, ("Skadden") individually and jointly, pursuant to this Court's inherent authority to prevent, punish, and deter fraud on the Court generally and this Court specifically; to maintain the integrity of proceedings before this Court; and to address willful and bad faith misconduct in this Court, in the United States District Court for the District of Massachusetts, and outside of Court that bears directly on Court proceedings.

II. Sanctions Sought

Steele respectfully requests the following sanctions:

1. An Order vacating the District Court's Summary Judgment Order and remanding this case to District Court;

2. An Order that default judgment be entered against all Defendants which are parties to this appeal;

3. An Order that default judgment be entered against all Defendants in de-facto default, including, but not limited to, Major League Baseball Advanced Media,

L.P. ("MLBAM") and Vector Management (and Vector Management LLC as successor in interest to Vector Management) ("Vector").

4. An Order that default judgment be entered against any defendants dismissed prior to the District Court's Summary Judgment and which participated in Defendants' fraudulent scheme including, but not limited to, Vector Two LLC, also known as Vector 2 LLC.

5. An Order for a hearing on assessment of damages.

6. An Order vacating all of the District Court's Orders on dispositive motions whether appealed or not, given the pervasive reach of Defendants' fraud on the entirety of the District Court's proceedings;

7. An Order awarding costs and attorneys' fees to Steele for all proceedings to date in the District Court (No. 08-11727) and this appeal (No. 09-2571).

8. An Order disqualifying Skadden from further participation in this or any related cases or matters arising from the underlying transactions and occurrences of this case.

9. Any additional Orders that this Honorable Court deems just and necessary in light of the unprecedented - and ongoing - fraud and bad faith exhibited by Skadden, including, if and as this Court so deems appropriate, referral of this

matter to the appropriate disciplinary authorities of this Court, the District Court, and the Massachusetts Supreme Judicial Court.

Finally, Steele and the undersigned counsel respectfully request that this Honorable Court hold a hearing in this Court, given the gravity of the allegations. Testimony taken under oath from the parties and their counsel, including Steele and the undersigned, will enable the Court, respectfully, to better assess the parties' and counsel's credibility and ensure all involved parties are given a full and fair opportunity to be heard.

III. Procedural Background

On October 8, 2007 plaintiff Steele filed this copyright infringement lawsuit in United States District Court in Boston. See Steele v. TBS, et al. No. 08-11727-NMG. App-11. Steele, unable to retain counsel despite diligent efforts, proceeded *pro se*. Defendants were, and are, represented by the law firm of Skadden, Arps, Slate, Meagher & Flom LLP ("Skadden").[1] Steele's case was dismissed by the District Court as a matter of law, and Steele filed his Notice of Appeal to this Court on November 6, 2009. App-22.

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[1] With the exception of Proskauer Rose, which filed an appearance in the District Court for Vector Management LLC, successor to defendant Vector Management, on August 25, 2010.

IV. The First Circuit's Inherent Authority to Impose Sanctions for Fraud, Bad Faith, and Misconduct

This Court's inherent authority allows for – and here, respectfully, requires – the severest of sanctions to punish and deter unprecedented fraud on the Court, bad faith, and misconduct, and to preserve the integrity of judicial process in the First Circuit. See Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 246 (1944) (litigant submitted false documentary evidence to district court; Supreme Court held that circuit courts have inherent power in equity to address false evidence on appeal, despite opponent's failure to raise issue earlier; "This matter does not concern only private parties. There are issues of great moment to the public in a patent suit... Furthermore, tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society.").

Steele respectfully submits that this Court has the duty to sanction Defendants and Skadden for their brazen, calculated, and unrepentant fraud, bad faith, and misconduct "throughout the course of the litigation." See Chambers v. NASCO, Inc., 501 U.S. 32, 54, 56-57 (1991) (sanctions properly imposed for party's conduct

during litigation, including the "fraud [] perpetrated on the court and the bad faith [] displayed toward both [the party's] adversary and the court throughout the course of the litigation"... defendant part of "sordid scheme of deliberate misuse of the judicial process" designed to "defeat [plaintiff's] claim"); See also Hazel-Atlas Glass Co., 322 U.S. 238 at 249-250 (1944), n.5 (circuit court had "duty and power" to vacate judgment based in part on willfully submitted false documents and noting that responsible party "never questioned" the documents' falsity).

Default judgment is an appropriate sanction, in addition to monetary sanctions, when- as here - conduct amounts to fraud on the Court. See Aoude v. Mobil Oil Corp, 892 F.2d 1115, 1119, 1122 (1st Cir. 1989) (Court may "order dismissal or default where a litigant has stooped to the level of fraud on the court," when party intentionally submitted false evidence; party "chose to play fast and loose with [opponent] and with the district court. He was caught out..." Party's "brazen conduct merited so extreme a sanction;" the Court, "jealous of its integrity and concerned about deterrence, was entitled to send a message, loud and clear").

The purpose of sanctions, including the sanction of default judgment, is to punish bad acts and deter future similar acts and sanctions need not be strictly proportional to the severity of the bad acts. See also John's Insulation, Inc. v. L.

Addison and Assoc., 156 F.3d 101, 109 (1st Cir. 1998) (default judgment on counterclaim appropriate sanction for misconduct, noting "[t]he purpose of sanctions, moreover, is not merely to penalize violations of court procedures, but also to deter future violations by other parties, and thus sanctions do not have to be strictly proportional to the severity of a given party's violations.").

V. Statement Regarding This Motion and Exhibits

In the several months since this appeal was docketed and briefed, the undersigned counsel - retained only at the conclusion of the District Court proceedings - has uncovered irrefutable evidence of large-scale fraud and bad faith misconduct by Defendants and Skadden. In addition, Defendants and Skadden have, since first confronted with their malfeasance, perpetuated and compounded their prior transgressions with their recalcitrance and continuing bad faith and misconduct.

Steele has researched and extensively briefed each of these matters in great detail in two post-appeal motions currently pending in the District. Defendants have had a full and fair opportunity to challenge or refute the facts and allegations contained therein, and have timely filed their responsive papers in the District Court.

Accordingly, Steele attaches as exhibits hereto, and incorporates by reference, those filings as indicated below. It is Steele's position that the parties' - and their

respective counsel's - assertions in said filings for the most part speak for themselves and that a full and fair analysis of Defendants' acts requires examination of counsel's own words relating to the matters addressed herein.

In addition, the undersigned and Skadden have exchanged correspondence on several occasions, post-appeal, relating to the allegations made herein, which provide additional direct evidence of Defendants' and Skadden's bad faith and misconduct. Those letters are attached as exhibits where indicated below.

In sum, while Steele's argument follows, the record better speaks for itself.

VI. FRAUD ON THE COURT

A. Spoliation of the Infringing Work

This Court is a witness to – and, with the District Court and Steele, a victim of - Defendants' and Skadden's fourth *known* willful and intentional filing of spoliated evidence, a materially-altered version of the primary infringing work at issue in this case (the "MLB Audiovisual"). App-511.[2] See Steele Appellate Brief at 38-41 ("Steele Brief"); and Steele Reply at 8-19 ("Steele Reply").

The alterations changed the work's length, previously identical to that of

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[2] Defendants and Skadden submitted to the District Court - on three occasions – their altered version of MLB Audiovisual, falsely attested to by Skadden as being "true and correct." App-46, 174, 459.

Steele's work and removed some material elements from the soundtrack while adding others, all of which affected the District Court's substantial similarity analysis; Defendants further removed the copyright notice of the MLB Audiovisual's copyright owner, MLB Advanced Media, L.P. ("MLBAM").[3] See Steele Brief at 38-41; Steele Reply at 8-19.

Defendants' and Skadden's failure to take corrective action as to the altered MLB Audiovisual is a perpetuation of the fraud and has left the record in the District Court and this Court without an accurate copy of the infringing work. See Id.

Skadden further advanced their fraud with two subtle misrepresentations - and one blatant one - to the District Court that, until recently, appeared, in and of themselves, to be minor transgressions.

With MLBAM's Copyright notice deleted from the MLB Audiovisual, Skadden further shielded MLBAM - the work's owner - by characterizing the MLB Audiovisual as: "what we'll call the Turner promo" App-395; and, "[t]hat work will be referred to herein as the "Turner Promo." App-46.

The District Court adopted Skadden's nomenclature. App-377, 767.

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[3] Unauthorized and intentional removal of copyright management information to knowingly conceal infringement is a separate violation of copyright law, specifically the Digital Millennium Copyright Act. See 17 U.S.C. §§ 1202(b), 1203(a).

Skadden also referenced the soundtrack to the MLB Audiovisual as a "song," which was not only legally incorrect, but intentionally misleading as it implied, incorrectly, Bon Jovi ownership of the soundtrack. App-46, 394, 400, 785-87; Steele Brief at 34-38, 41-43; Steele Reply at 28-30, 40.

The District Court adopted Skadden's language, incorrectly referring to the MLB Audiovisual soundtrack as a "song." App-377, 394, 414, 773-74, 767, 781.

Skadden also - this time not subtly - misrepresented that: "In [the Bon Jovi] song, there is not a single reference to the game of baseball." App-470 (emphasis original); "There is not a single reference to baseball…in the Bon Jovi Song." App-53; "[T]he Bon Jovi Song (which, it must be emphasized again, has nothing whatsoever to do with baseball)…" App-185.

MLBAM's earlier public statements belie Skadden's false claim: "Bon Jovi and TBS are friendly faces… [t]he band that has now crossed generations greets you with a baseball video that even includes a 'Say Hey' reference to Willie Mays." App-786-787; a "piece of music that represent[s]…baseball and the teams" Id., App-646; "[The Bon Jovi] song captures the essence of the game." App-786-87.

The District Court again took Skadden at face value: "the Bon Jovi Song… is [not] about baseball"; and "[W]ithout the video, there would be no connection to

baseball." App-775-76 (citation omitted).

Worse, Skadden and Defendants furthered their fraudulent concealment of MLBAM by attempting to covertly - and illegally - remove it from the case altogether and replace it with a proxy.

B. MLBAM's Willful Default

MLBAM was served and failed to appear or otherwise defend - it defaulted. See Steele Memorandum in Support of Motion for Entry of Default as to MLBAM ("Motion for MLBAM Default") at 3-5, attached as Exhibit 1.

To conceal MLBAM's default, Skadden filed a voluntary appearance for the un-served Major League Baseball Properties, Inc. ("MLBP"), falsely claiming that MLBP had been "misidentified as [MLBAM]" [4] See Id. at 2-3; see also Steele's Reply to MLBP Opposition to MLBAM Default ("Reply to MLBP Opposition") attached as Exhibit 3, at 9-11.

MLBP's appearance to hide MLBAM's willful default was another step - consistent with deletion of the MLBAM copyright notice - to fraudulently screen MLBAM from liability by, in fact, hiding it from this litigation altogether. See Id. at 11-15.

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[4] MLBP's Opposition to Motion for MLBAM Default is attached as Exhibit 2.

Also consistent was MLBAM's failure to oppose Steele's Motion for MLBAM Default, which was instead opposed by MLBAM's proxy, MLBP. See Id. at 14-15.

C. Vector Management's Willful Default

As with MLBAM, Vector was served and failed to appear or otherwise defend, defaulting. See Memorandum in Support of Steele's Motion for Default as to Vector Management ("Motion for Vector Default") attached as Exhibit 4, at 2-6, 11-15. Vector Management LLC's Opposition to Steele's Motion for Vector Default is attached as Exhibit 5.

Skadden's *modus operandi* with Vector's default was the same as with MLBAM's willful default: Skadden appeared for an unserved – but similar sounding – entity, this time "Vector 2 LLC," claiming it had been "misidentified" as Vector Management. See Exhibit 4, at 2-6, 13-15; See also Steele's [Proposed] Reply to Vector's Opposition to Motion for Vector Default ("Steele's [Proposed] Reply to Vector Opposition"), attached as Exhibit 6, at 1-6.[5]

D. Skadden's Retaliatory Bad Faith Rule 11 Motions

On June 28, 2010 the undersigned wrote to Skadden's lead counsel, Clifford

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[5] Steele's Motion for Leave to File his Reply to Vector's Opposition is pending in the District Court.

M. Sloan, addressing the altered audiovisual, MLBAM's willful default, and several other instances of misconduct. See June 28, 2010 Letter to Sloan ("Letter to Sloan") attached as Exhibit 7. The Letter to Sloan – 14 single-spaced pages, plus exhibits - described, in great detail, the *then-known* misconduct that appeared to violate Rule 11.[6]

The Letter to Sloan stated Steele's intent to serve Skadden with a Rule 11 Motion for Sanctions on Monday, July 5, 2010. See Id. The Letter to Sloan requested, in the meantime, any information correcting or clarifying the misconduct described, with the goal of *avoiding* the need for a Rule 11 Motion. See Id., at 2, 3, 14.[7]

On July 1, 2010 Skadden replied. See July 1, 2010 Letter to Hunt, attached as Exhibit 8. Skadden's reply failed to provide any information addressing or explaining the misconduct described in the Letter to Sloan. See Id. Skadden did, however, threaten to file a retaliatory Rule 11. See Id.

The undersigned sent a follow-up letter on July 3, 2010 regarding Skadden's

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[6] Vector's default had yet to be uncovered.

[7] The letter was a professional courtesy, allowing Skadden an additional opportunity and extra time to show Steele he was mistaken or, alternatively, to ameliorate Skadden's sanctionable conduct *prior to* and *in addition to* the 21 days Skadden would have following service pursuant to Rule 11's "safe harbor" provision.

failure to provide any meaningful information, reiterating several of my prior requests and addressing their threatened retaliation. See July 3, 2010 Letter to Plevan and Sloan, attached at Exhibit 9.

Of particular significance, I pointed out the following:

> Your conclusory assertion that my client and I have no "good faith basis for believing in the veracity" of the very specific and detailed contentions in my June 28, 2010 letter and Steele Affidavits attached thereto ("Letter"), rings hollow without reference to contrary facts. Further, imputing improper motive or bad faith and threatening a groundless retaliatory Rule 11 motion merely underscores the points made in my Letter. The idea that my client - *pro se* - or I, a solo practitioner, by seeking clarification of apparent misconduct, is "harassing" Skadden Arps is not credible.

See Id. at 1-2.

Skadden did not reply with any further letters. Ultimately, Steele refrained from filing a Rule 11 motion.

Skadden, nevertheless, later served on Steele and the undersigned two Rule 11 Motions. See Skadden Rule 11 Motion as to MLBAM's Default, attached as Exhibit 10; see also Skadden Rule 11 Motion as to Vector's Default, attached as Exhibit 11 (collectively, "Rule 11 Motions"). Skadden's Rule 11 Motions were ostensibly based on Steele's Motions for Default as to MLBAM and Vector. See Id.

Skadden's Rule 11 Motions made several conclusory "arguments" asserting bad faith, but failed to provide any factual or legal bases indicating that Steele's Motions

for Default in any way violated Rule 11. See Id.[8]

Consistent with Skadden's and Defendants' ongoing concealment of MLBAM and Vector, neither of Skadden's Rule 11 Motions was filed on behalf of the defaulting parties. See Id.[9]

In response to Skadden's Rule 11 Motions, the undersigned, in order to make a reasoned, informed, and good faith decision as to whether to withdraw Steele's Motions for Default pursuant to Rule 11's "safe harbor" provision, requested the specific factual and legal bases for their Rule 11 Motions. See Hunt Letters to Skadden regarding Rule 11 Motions as to Steele's Motion for Vector Default and Skadden's responses, attached as Exhibit 12. See also Hunt Letters to Skadden regarding Rule 11 Motions as to Steele's Motion for MLBAM Default and Skadden's response, attached as Exhibit 13.

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[8]Skadden's argument throughout is based on the idea that Steele's failure to file his Motions for Default earlier precludes their filing now. See Exhibit 11 at 1-4, 9-10. Of course, it was Skadden's deceptive substitution of parties, *specifically designed* to go unnoticed for a long time - forever, in fact - that caused the delay. In any event, Steele's Motions for Default - arising from Skadden's illegal substitution of parties, i.e., fraud on the Court that neither Steele nor any party can waive - hardly constitute Rule 11 violations. See, e.g., Hazel-Atlas Glass Co., 322 U.S. at 246.

[9] Vector's successor, Vector Management LLC, represented by Proskauer Rose, filed an appearance the day after Skadden served its Rule 11 Motion as to Steele's Vector Motion for Default. Proskauer Rose neither joined Skadden's Rule 11 Motion nor filed their own.

After several fruitless attempts to obtain meaningful information from Skadden, it became obvious they were either unable or unwilling to show good faith bases for their Rule 11 allegations. See Exhibits 12 and 13.[10]

Skadden's most recent reply, on September 13, 2010, not only failed to provide any factual or legal bases for their Rule 11 Motions, but made a clumsy attempt to turn the tables claiming the undersigned acted in "bad faith" for even making such a request. See Exhibit 13 (September 13, 2010 Letter to Hunt). Skadden also cried "bad faith" for Steele's use of their own words in his Proposed Vector Reply Brief. See Exhibit 13.[11]

Skadden's recent attempts to label Steele's every word as "bad faith" appears part of their latest "strategy:" to invent or contrive the appearance of "bad faith" on

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[10] The undersigned wrote, for example: "It is inherent to Rule 11 and the good faith practice of law and, in fact, axiomatic in my opinion, that any good faith motion, and in particular a Rule 11 Motion, filed with the Court provide the necessary supporting facts and law. Anything less is, by definition, improper. That I have to even request such information from you - and that you resist providing it - raises disturbing questions. For one, why would you hesitate to provide me with information necessary to consider 'withdraw[ing]' or taking other 'correct[ive]' action pursuant to Rule 11?" See Exhibit 12 at 7 (i.e., page 2 of September 3, 2010 Letter to Skadden).

[11] Specifically, Skadden's attempted explanation for their substitution of Vector 2 for Vector was directly contradicted by Vector's new counsel, Proskauer Rose. See Steele's [Proposed] Reply to Vector's Opposition, Exhibit 6, at 11-13.

the part of Steele or the undersigned.

Skadden's most elaborate effort in this regard began two weeks ago.

E. Skadden's Attempt to Manufacture "Bad Faith"

Steele had, until very recently, refrained from seeking sanctions despite nearly two years of Skadden's non-stop bad faith and abuse.

Skadden's actions between August 31 - September 4, 2010, however, were of such calculated, repelling, and cowardly bad faith that Steele – no longer with even a remote expectation of good faith from Skadden - was finally forced to seek this Court's intervention.

On the evening of August 31, 2010, Skadden attorney Christopher Clark called the undersigned and in a civil - even friendly - tone, made an eminently reasonable proposal in the form of a *quid pro quo*: Steele would agree to an abeyance of Steele's recently filed claim, Steele v. Ricigliano, et al., No. 10-11458, until this Court's determination in the instant Appeal.[12] Clark agreed that Skadden would either refrain from filing or, alternatively would file and agree to be held in abeyance, their planned

[12] The referenced action is a copyright infringement case, pending in the U.S. District Court in Boston, arising from Steele's exclusive "SR" (Sound Recording) copyrights, i.e., reproduction, which were, by order, expressly excluded from the District Court proceedings in this case. Nonetheless, the cases are obviously related, and an abeyance made practical sense.

motion to dismiss Steele v. Ricigliano.[13]

I called my client and he immediately agreed to enter into this reasonable agreement.

However, the following day, Skadden began a subtle but continuous and gradual changing of their stipulation conditions, with a letter on September 1, 2010, a teleconference later the same day, and an e-mail on September 2, 2010 with a proposed stipulation attached. See Clark September 1, 2010 Letter and Proposed Stipulation (sent September 2, 2010), attached as Exhibit 14. Skadden demanded additional concessions while offering nothing to Steele; in fact adding a condition that Steele *waive certain legal rights*, namely refraining from any additional motion practice and from initiating new claims during the effective period of the stipulation. See Exhibit 14.

The only terms Skadden did not reduce to writing were those made verbally on August 31, 2010 – the simple *quid pro quo* that I presented to Steele and to which Steele was willing to agree: the "bait." Unfortunately, I failed to confirm our August 31, 2010 conversation in writing prior to receiving Clark's September 1, 2010

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[13] Clark's proposal was in the context of a Local Rule 7.1 Mandatory Conference relating the Motion to Dismiss.

Letter.[14]

By September 3, 2010, I realized Skadden's terms had become impossible to accept but, if rejected, Skadden would point to the rejection and claim "bad faith!" I realized, belatedly, I had been set-up – caught in "Catch-22."

Aware of Skadden's manipulation, Steele nonetheless asked that I attempt a final good faith counter-proposal based upon the terms originally discussed with Attorney Clark on August 31, 2010. Before I could, however, Skadden showed their hand: Attorney Clark sent a letter withdrawing the stipulation, feigning surprise and righteous indignation over a non-issue, and, as expected, claiming "bad faith" on our part. See September 3, 2010 Letter to Hunt Law Firm, attached as Exhibit 15.

Clark's September 3, 2010 letter, however, not only failed in its hurried attempt to manufacture bad faith, it, in fact, *confirmed* Skadden's false pretenses, their ruse, as I explained in my September 4, 2010 letter – Exhibit 16 - in reply:

> [Y]our letter simply confirms without question that this entire charade was nothing but a set-up to enable you to have something - anything - to argue bad faith on our part when defendants' day of reckoning comes. As with altering the audiovisual evidence, willfully defaulting defendants to improperly conceal others, and a slew of other instances of egregious misconduct on your part, this too shall eventually be fully and fairly redressed by the Court. Your gambit, reeking of scandal

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[14] I did, however, confirm the events later, on September 4, 2010, as noted below, which Skadden has not disputed.

and crafted in desperation, will be revealed for what it was: a dishonest and unscrupulous attempt to manufacture a record of a "bad faith" act on Steele's and my part. Your failed hope was to provide a fig leaf for a "balancing the equities" argument when the Court finally takes you and your clients to task for the unconscionable way you have acted in this litigation.

See September 4, 2010 Letter to Clark, attached as Exhibit 16.

Skadden has yet to reply.

VII. CONCLUSION

WHEREFORE, Plaintiffs Samuel Bartley Steele, Bart Steele Publishing, and Steele Recordz respectfully request that this Honorable Court allow Steele's Motion for Sanctions and Order the relief requested in Section II of this Motion.

/s/Christopher A.D. Hunt
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CERTIFICATE OF SERVICE

I, Christopher A.D. Hunt, hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing and paper copies will be sent to those indicated as non-registered participants on September 15, 2010.

Dated: September 15, 2010

/s/ Christopher A.D. Hunt
Christopher A.D. Hunt