

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 Advanced Media, L.P.; 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' RESPONSE TO APPELLEES' REPLY TO  
APPELLANTS' MOTION FOR SANCTIONS**

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Appellees offer no facts disputing their fraud, misconduct, and bad faith.

Rather, Appellees seek to distract from the only issue raised in Steele's Motion:

Appellees' conduct.

First, Appellees simultaneously assert that there is "no evidence" supporting Steele's allegations while bemoaning Steele's "700 pages" of such evidence.<sup>1</sup>

Second, Appellees point out that Steele previously alerted this Court to Appellees' fraud - when Steele addressed the altered audiovisual in Steele's appellate papers - but do not deny the underlying fact of alteration of the audiovisual.

Third, Appellees turn the District Court's decision on its head, claiming the District Court "rejected [Steele's] allegations concerning purported defaults" when, in fact, the District Court did the opposite, confirming Steele's allegations that two defendants were properly served and did, in fact, default. The District Court's decision, therefore, greatly eases Steele's burden with respect to the instant Motion.

Fourth, defendants claim this Court does not have authority to impose "unprecedented" sanctions on Appellees and that none of Steele's cited cases are

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<sup>1</sup> Appellees also deride Steele's post-appeal claims and motions, which were all prompted by Appellees' own misconduct (with one exception, a non-copyright claim in Superior Court) and, in any event, have no bearing whatsoever on the subject of Steele's Motion, that is, Appellees' conduct, not Steele's.

"factually analogous to the current case." This Court is aware of its authority; there are no factually analogous cases because Appellees' misconduct is unprecedented.

I. Appellees' Orwellian Claim: "700 Pages" of Evidence equals "No Evidence"

Appellees lament the sheer volume of Steele's evidence against them.<sup>2</sup>

Appellees contradict themselves, strenuously asserting - and asking this Court to take on faith - that Steele's "700 pages" provide no evidence against them.<sup>3</sup>

This is highly motivated wishful thinking that leaves the obvious question intentionally unanswered: if there is "no evidence" supporting Steele's Motion, what exactly is in the "700 pages of exhibits" and why are Appellees so intent on diverting this Court's attention from them?

The answer requires no "speculation" (Reply at 9) for it is contained in the record itself, as Steele first emphasized in his Motion ("the record better speaks for

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<sup>2</sup> Complaining, for example, of Steele "burdening this Court" with a "20-page motion" and "700 pages of exhibits" (Reply at 1); Steele's "20 page" submission (Reply at 1, 9); Steele's "120 pages of [appellate] briefing" (Reply at 4); Steele's "collateral filings far exceed the record" (Reply at 5); "Steele's fifth filing" after the merits briefing (Reply at 1).

<sup>3</sup> For example asserting Steele's Motion contains "dozens of unsubstantiated accusations and hyperbolic speculation;" (Reply at 2); that Steele has "failed to submit any evidence or grounds to support [Steele's] fantastical accusations and ever-more elaborate conspiracy theories." (Reply at 6, n.4); has submitted "no underlying evidence of any such alleged improper conduct" beyond "speculation" (Reply at 9).

itself." ). See Steele Motion at 7.

The mere fact that there are hundreds of pages of evidence in support of Steele's allegations - that remain undisputed - apriori cannot support Appellees' assertions that such evidence is lacking. Quite the contrary.<sup>4</sup> Appellees apparently hope the First Circuit will not bother to analyze undisputed evidence of fraud and misconduct within and upon itself and the District Court.

Proving Appellees' far-reaching and widespread fraud required thousands of hours of research and investigation, which produced evidence - thousands of pages of evidence - a small portion of which Steele attached as exhibits. Failure to support Steele's allegations in this most grave of motions would not only have been self-defeating but could have made it appear frivolous. Certainly Appellees would so argue had Steele filed anything less.<sup>5</sup>

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<sup>4</sup> Steele's "700 pages of exhibits" include many "pages" of Appellees' arguments in defense of their conduct, e.g., Appellees' oppositions to Steele's default motions (and exhibits thereto) and detailed correspondence attempting to explain Appellees' conduct. Steele's good faith inclusion of a number of Appellees' own papers - in order to present this Court with a fair and complete record - obviously contributed to the page count.

<sup>5</sup> It goes without saying that if Appellees possessed hundreds, or dozens, or even several "pages" of exculpatory evidence, they would have filed them with this Court. By pointing to Steele's wealth of evidence Appellees highlight their own dearth of evidence

Nonetheless, out of an abundance of caution, Steele points to the following exemplars from the record as representative of the depth and breadth of undisputed facts proving Appellees fraud and misconduct:

1. Steele's Three Sworn Affidavits Regarding Appellee's Conduct<sup>6</sup>
2. Appellees' Sworn Statements<sup>7</sup>
3. Counsels' Correspondence Directly Addressing Misconduct<sup>8</sup>

The remaining Exhibits are primarily Motion papers and exhibits relating to Steele's Motions for Default as to Vector and MLBAM, but which explain and

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<sup>6</sup> See Steele Affidavit of August 10, 2010 (see Exhibit 4, affidavit attached as Exhibit C thereto); Steele Affidavit of June 18, 2010 (see Exhibit 1, affidavit attached as Exhibit 13 thereto); Steele Affidavit of September 15, 2009 (see Id. (affidavit appended to Exhibit 13)).

<sup>7</sup> Appellees have offered no sworn testimony directly addressing their misconduct, but see December 8, 2008 Declaration of Appellees' Counsel Scott Brown in Support of Motion to Dismiss of Major League Baseball Properties, L.P. ("MLB") (see e.g., Exhibit 1 at 3). Brown's Declaration, which is not attached to Steele's Motion but is already part of the Appellate Record (App. 65), was the first instance of Appellees' three submissions of the false audiovisual, each of which Attorney Brown swore, in his Declaration, was a "true and correct" copy.

<sup>8</sup> See June 28, 2010 Letter to Sloan (see Exhibit 7); July 1, 2010 Letter to Hunt (see Exhibit 8); July 3, 2010 Letter to Plevan and Sloan (see Exhibit 9); September 2, 2010 Letter to Matule, Plevan, and Sloan (see Exhibit 12); September 2, 2010 Letter to Hunt (see Id.); September 3, 2010 Letter to Matule, Plevan, and Sloan (see Id.); September 4, 2010 Letter to Hunt (see Id.); September 10, 2010 Letter to Clark (see Exhibit 13); September 13, 2010 Letter to Hunt (see Id.); September 1, 2010 Letter to Hunt it (see Exhibit 14); September 3, 2010 Letter to Hunt (see Exhibit 15); September 4, 2010 Letter to Clark (see Exhibit 16).

substantiate facts showing the larger context of Appellees' attempts to hide the aforementioned defendants from Steele and the District Court.<sup>9</sup>

The only "burden," then, on this Court comes not from Steele's exhibits but from Appellees' fraud on the Court - the worst kind of "burden" - and their misconduct, without which there would be no Motion for Sanctions, no actions in other courts, and likely not this Appeal.

## II. The District Court's September 27, 2010 Order Confirms Defaults

The District Court's September 27, 2010 Order ("Order") on Steele's Motions for Entry of Default as to Vector Management ("Vector") and MLB Advanced Media, L.P. ("MLBAM") found as a factual matter that both Vector and MLBAM defaulted, but excused their defaults as a legal matter, thus denying Steele's Motion for entry of their de-facto Defaults.<sup>10</sup>

The District Court's factual findings do not help Defendants as to the instant Motion, which is for sanctions, not entry of default.

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<sup>9</sup> Steele's motions for default necessarily attached exhibits showing service and default which appear - finally - undisputed, given the District Court's Order confirming those facts.

<sup>10</sup> See Order at 7-8, 9-14. Steele moved for entry of default - a ministerial matter - pursuant to Rule 55(a), not default judgment - a substantive matter - pursuant to Rule 55(b)(2) as the District Court incorrectly stated. See Order at 3, 6.

In fact, the Order strengthens Steele's Motion insofar as the District Court found that MLBAM and Vector were parties to this case and defaulted. See Order at 5-6, 9.<sup>11</sup> Prior to the Order, Appellees strenuously denied - despite all evidence to the contrary - that Vector and MLBAM had played any role in this case, much less that they were properly served and had also, in fact, defaulted.

The District Court's confirmation of Steele's long-standing assertions that MLBAM and Vector were properly served and defaulted is consistent with and corroborates defendants' other undisputed actions to conceal MLBAM and Vector (and obscure their factual defaults).<sup>12</sup> As the District Court acknowledged, but did not address, "MLBAM... technically default[ed], although it remains unclear why MLB has (figuratively) picked up its banner." See Order at 8-9.

The Court's legal finding that formal entry of default would be futile, on the other hand, has little or no bearing on the instant Motion - which seeks sanctions, not entry of default into the docket - and which does not rely upon entry of default, but rather presents the facts of default as part and parcel of Appellees' improper attempts

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<sup>11</sup> The District Court found Vector to be a "party" explicitly (Order at 5-6) and MLBAM as having been "adequately served with process" (Order at 9).

<sup>12</sup> E.g., deletion of MLBAM's copyright notice, substitute appearances by unserved proxies with similar names (claiming "misidentification"), and defense of MLBAM and Vector by those proxies.

to hide MLBAM and Vector.

To the extent the District Court addresses the "Good Faith of the Parties," it concludes - without reference to the record - that Steele "offers no evidence of bad faith on the part of the defendants." See Order at 14. This line is dicta, not a finding of fact, given its conclusory nature, lack of specificity, and its failure to address a single pertinent fact proffered by Steele.<sup>13</sup>

The District Court, moreover, considered the issue of good faith amongst the parties marginally relevant, at best, in light of its finding the "futility" issue dispositive.<sup>14</sup> Steele's instant Motion, on the other hand, is based entirely on the good or bad faith and conduct of the parties, requiring a thorough analysis of the record in that regard.

The facts of Appellees' fraud and misconduct are established and Appellees provide no basis in law or fact to deny Steele's Motion. Denying Steele's Motion in these circumstances would not only tacitly condone Appellees' fraud and misconduct

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<sup>13</sup> Most glaringly, the District Court makes no reference whatsoever to the altered audiovisual or how deletion of MLBAM's copyright notice - as with MLBAM's default, MLB's appearance for and defense of MLBAM by proxy - furthered Appellees' attempt to conceal MLBAM.

<sup>14</sup> Indeed, the sentence following the "no evidence of bad faith" sentence concludes: "in sum, given the futility of an entry of default, the Court will deny Steele's motions to do so." See Order at 14.



in this case, but risks sending a message to future litigants that the First Circuit tolerates tactics such as: (1) intentionally submitting materially altered false evidence; (2) deceptively substituting parties, without leave of Court and at a litigant's discretion, in order to improperly shield the proper party from litigation; (3) misrepresenting facts and law to the Court without consequence; (4) untruthfulness towards the litigant's opponent.

### **III. This Court Has Clear Authority and Precedent to Allow Steele's Motion**

Appellees' assertion that this Court lacks jurisdiction to address Appellees' conduct and that there is an "absence of legal authority" to sanction Appellees' misstates well-established and longtime Supreme Court and First Circuit precedent. See Steele's Motion at 4-6. Sanctions may be imposed for fraud on the court and a party's conduct during litigation, including showing bad faith towards one's adversary. See, e.g., Chambers v. NASCO, Inc., 501 U.S. 32, 54, 56-57 (1991).<sup>15</sup> See also Sheppard v. River Valley Fitness One, L.P., 428 F.3d 1, 9 (1st Cir. 2005)

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<sup>15</sup> Such conduct necessarily includes conduct outside of Court or in other Courts affecting the parties' rights in this Court, for example, the reprehensible - and undisputed - attempt to set up Steele which, contrary to Appellees' claim, sought to suppress Steele's rights in this case as part of a "stipulation" in "Steele III." See Steele Motion at 16-19, Appellees' Reply at 7, n.5.

(misrepresentation in attorney letter to opposing counsel proper basis for sanctions in light of counsel's "duty of truthfulness" to both the Court and others, citing N.H. Rules of Professional Conduct, R. 4.1, and ABA Model Code Comments (2000)).

As to putting counsel under oath - volunteered by Steele, mocked by Appellees - this Court unquestionably also has the authority to conduct an independent investigation into whether it has been the victim of fraud. See Chambers, 501 U.S. at 44. Steele respectfully states that such an investigation - in the form of a hearing or otherwise - is not only within this Court's inherent authority, but is entirely justified under the circumstances.

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.

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October 5, 2010

**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 October 5 , 2010.

Dated: October 5, 2010

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