

No. 10-2173

**United States Court of Appeals
For the First Circuit**

SAMUEL BARTLEY STEELE; BART STEELE PUBLISHING; STEELE RECORDZ
Plaintiffs - Appellants

v.

VECTOR MANAGEMENT; MLB ADVANCED MEDIA, L.P.
Defendants - Appellees

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 COMPANY; MAJOR LEAGUE BASEBALL PROPERTIES, INC.; MLB PRODUCTIONS, A & E; A & E/AETV; BON JOVI; AEG LIVE, LLC; MARK SHIMMEL MUSIC; 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; THE AMERICAN SOCIETY OF COMPOSERS; FOX TELEVISION STATIONS, INC.; ISLAND RECORDS, a/k/a Island Def Jam Records; THE BIGGER PICTURE CINEMA CO.
Defendants

**APPEAL FROM THE U.S. DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

**BRIEF OF APPELLANTS SAMUEL BARTLEY STEELE; BART
STEELE PUBLISHING; STEELE RECORDZ**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed.R.App.P. 26.1, appellants Samuel Bartley Steele, Bart Steele Publishing and Steele Recordz state that Bart Steele Publishing and Steele Recordz are unincorporated businesses wholly owned by Samuel Bartley Steele. No corporation owns stock in Bart Steele Publishing or Steele Recordz.

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I. REASONS WHY ORAL ARGUMENT SHOULD BE HEARD.

The written record in this case is more than sufficient to enable the Court to conduct a full and fair analysis of the facts and law and provide Steele with the relief sought. However, given the grave nature of the facts presented in the record - and the serious repercussions for Appellants, Defendants, and, indeed, their counsel when their conduct is finally, fully – and fairly - addressed, a hearing is, respectfully, a necessity.

This appeal – at this point - transcends the underlying copyright claim and goes to the good faith and honesty of the parties and counsel and, more importantly to the basic integrity of the courts within the First Circuit Court of Appeals. This Court should question counsel – the undersigned included – directly, with the immediacy and intimacy not possible with written submissions, to better weigh the serious issues raised by this appeal. Likewise, counsel should be heard on these grave issues; to be there, in person, to make their arguments and defenses and, of course, to answer the panel's questions.

II. JURISDICTIONAL STATEMENT

The United States District Court for the District of Massachusetts had original jurisdiction over this copyright infringement action pursuant to the copyright statute, 17 U.S.C. § 101 et seq. and 28 U.S.C. §1338(a). Appellants asserted additional claims, which the district court dismissed on April 3, 2009, leaving only appellants' copyright claims. The First Circuit Court of Appeals already has jurisdiction over the first appeal of Steele v. TBS, et al., 08-11727-NMG (D.Mass), Appeal No. 09-2571 (1st Cir.) based on the district court's final judgment dismissing appellants' copyright claims as to all then-known remaining defendants as matter of law on August 19, 2009. The instant appeal is based on the district court's subsequent denial, on September 27, 2010, of appellant's post-judgment Motions for Entry of Default as to appellees MLB Advanced Media and Vector Management. On September 30, 2010 Appellants filed an Amended Notice of Appeal (seeking to amend its notice as to Appeal No. 09-2571 (1st Cir.)). This Court, on October 6, 2010, informed the district court of its intent to use the Amended Notice of Appeal as a new case. Accordingly, Steele's Notice of Appeal was timely filed, whether considered filed on September 30, 2010 or October 6, 2010.

III. STATEMENT OF ISSUES PRESENTED FOR REVIEW

FIRST ISSUE:

The district court found that MLBAM and Vector defaulted. The district court nonetheless denied Steele's Rule 55(a) Motions for Entry of Default pursuant to the Rule 55(c) "good cause" standard despite overwhelming and undisputed evidence that MLBAM and Vector: (1) defaulted willfully, (2) defaulted in bad faith for improper purposes, (3) denied, then fabricated explanations for their defaults (4) lack any meritorious defense; and where their defaults, (5) severely prejudiced Steele by their nearly two years of obstruction, fraud, and collusion; where (6) the amount of money involved is enormous; and where (7) Steele's Motions were brought immediately upon discovery of the defaults, which MLBAM and Vector had actively concealed from the district court and *pro se* Steele by their counsel's fraud on the court, false appearance on behalf of similar-sounding proxies, and misrepresentations throughout the proceedings.

Was this an abuse of discretion or error of law pursuant the Rule 55(c) "good cause" factors?

SECOND ISSUE:

In the First Circuit, may a party willfully default, in bad faith, and for illegal purposes; conceal its default through fraud on the Court, including the filing of false evidence and false appearances, and making material misrepresentations to the Court and opponent, as well as by deceiving and abusing its opponent, without risk of default entering, if the defaulting party successfully conceals its default until judgment enters against its co-defendants?

Put another way, does preclusion – and the larger principle of “finality” – ultimately trump “fraud on the court” and the larger principle, the faith, that one wronged, who acts honestly and in good faith, despite facing unrelenting dishonesty, bad faith, and malevolent machinations from one’s opponent, can obtain relief through the judicial system?

IV. STATEMENT OF THE CASE

A. Nature of The Case

This is a copyright infringement case.

B. Course of Proceedings

On October 8, 2008 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-31. Steele, unable to retain counsel despite diligent efforts, proceeded *pro se*. Defendants were, and are, virtually all represented by the law firm of Skadden, Arps, Slate, Meagher & Flom LLP ("Skadden") during nearly all of the pertinent times.¹ The district court entered final judgment dismissing appellants' copyright claims as a matter of law on August 19, 2009 and appearing to dispose of all claims as to all parties.

However, Steele discovered, post-judgment, that two parties – MLB Advanced Media, LLP and Vector Management - had been named and served but never appeared, defaulting. Steele also discovered evidence that their defaults were engineered as part of an effort to improperly shield them from this case. Steele moved

¹ With the exception of Proskauer Rose, which is representing Vector Management LLC in this appeal as successor to defendant Vector Management.

for entry of default as to MLBAM and Vector, which the district court denied on September 27, 2010.

C. Disposition Below

The district court denied Steele's Motions for default as to MLBAM and Vector on September 27, 2010, despite the enormous amount of evidence of MLBAM and Vector's defaults being intentional as part of a larger collusion amongst Defendants and their counsel, Skadden, as well as two unserved parties who voluntarily appeared as defendants – falsely stating that Steele had “misidentified” the parties. It turns out these parties were proxies improperly substituted for the proper parties in order to conceal the served parties defaults and to shield them from the litigation entirely.

V. STATEMENT OF FACTS

A. Preliminary Statement on Parties' Names

The various names used by defendants and the district court for Appellees MLBAM and Vector, their clients (i.e., Bon Jovi, Bongiovi) and the proxies who appeared on Appellees' behalf to conceal their defaults, MLB and Vector 2, are crucial

components of Steele's appeal. They also present a potential source of confusion; certainly Steele - and the district court - were confused.²

Appellees' disappearance - and substitution by their proxies - at the outset of the district court proceedings, followed by Appellees' re-appearance at the close of proceedings, and representation of all four (two Appellees and two proxies) by the same counsel during the proceedings, often moving on behalf of all "defendants," makes identification of a responsible party *during the proceedings* difficult.

Accordingly, and because Steele's appeal is based on undisputed facts of collusion between Appellees, their proxies, and their counsel, Steele defines the names used herein as follows:

"MLBAM" refers to Appellee MLB Advanced Media LLP and/or MLB.com and, likewise, MLB.com, where used, refers to MLBAM. MLBAM conducts business as "Major League Baseball" and "MLB.com." MLBAM claims "Major League

² For example, Vector's Opposition at various times refers to the following: "Vector;" "Vector Management;" "Vector Management LLC;" "A Management Company Known As Vector Management LLC;" "Vector 2;" "Vector 2 LLC;" "Vector Two;" "Vector Two LLC;" "Vector Entity;" "The Entity That was Bon Jovi's Manager;" and "the Company Which Performs Management Services on Behalf of John Bongiovi." App-894-895. As to Vector's former client, Vector's Opposition refers to: "The Recording Artist Jon Bon Jovi;" "Bon Jovi;" "Jon Bon Jovi;" "John Bongiovi," and "John Francis Bongiovi, Jr." App-895.

Baseball” and “MLB” are “MLBAM Properties” within the digital domain. App-204, 458-59

"MLB" refers to "Major League Baseball," neither of which was ever defined as a defendant or corporate entity by Appellees or by the district court.

"MLBP" refers to Major League Baseball Properties, Inc., which was an unserved and voluntarily appearing defendant and MLBAM's proxy. MLBP did not identify itself using a naming convention prior to the district court's order for summary judgment, but only identified itself when defending MLBAM's default, as "MLB Properties." App-258.

"Vector" refers to Appellee Vector Management, LLC and its predecessor when served, Vector Management.

"Vector 2" refers to Vector Two LLC, which was an unserved and voluntarily appearing defendant and Vector's proxy.

"Defendants" refers collectively to those defendants in the district court proceedings which, where referenced below, take collective action, e.g., filing a motion. Because of the false proxy appearances, unity of counsel, and the collusion involved, it is Steele's position that certain collective actions in the district court were

taken surreptitiously on behalf of the concealed, defaulting appellees, despite their names not appearing in the caption.

"Skadden" refers to the law firm Skadden, Arps, Slate, Meagher & Flom, LLC, which represented Appellees and their proxies at all pertinent times.

"Proskauer" refers to the law firm Proskauer Rose, LLC?, which entered its appearance for Vector only recently in opposing Steele's Motion for Default as to Vector and representing Vector in this appeal.

"Steele" refers collectively to Appellants Samuel Bartley Steele, Bart Steele Publishing, and Steele Recordz.

Finally, this appeal follows Steele's first appeal in the underlying case, First Circuit No. 09-2571. References to that appeal are referenced as "Steele Appeal I."

B. THE PARTIES

1. Plaintiff/Appellant Steele

Mr. Steele, as this Court is aware from Steele Appeal I, is a songwriter, musician, and producer who wrote and recorded a Red Sox anthem ("Steele Song") in September 2004. App-31. See also Steele Opening Brief, Steele Appeal I. Steele filed suit against various defendants, including Appellees MLBAM and Vector, for copyright infringement of the Steele Song on October 8, 2008 (No. 08-11727-NMG,

D. Mass.). See *Id.* Steele approached several attorneys but ultimately proceeded *pro se* because every attorney he approached either had a conflict or was unwilling to undertake "litigation against such wealthy and powerful defendants and Skadden Arps, on a contingent fee basis," nor could Steele afford to pay an attorney. App-244.

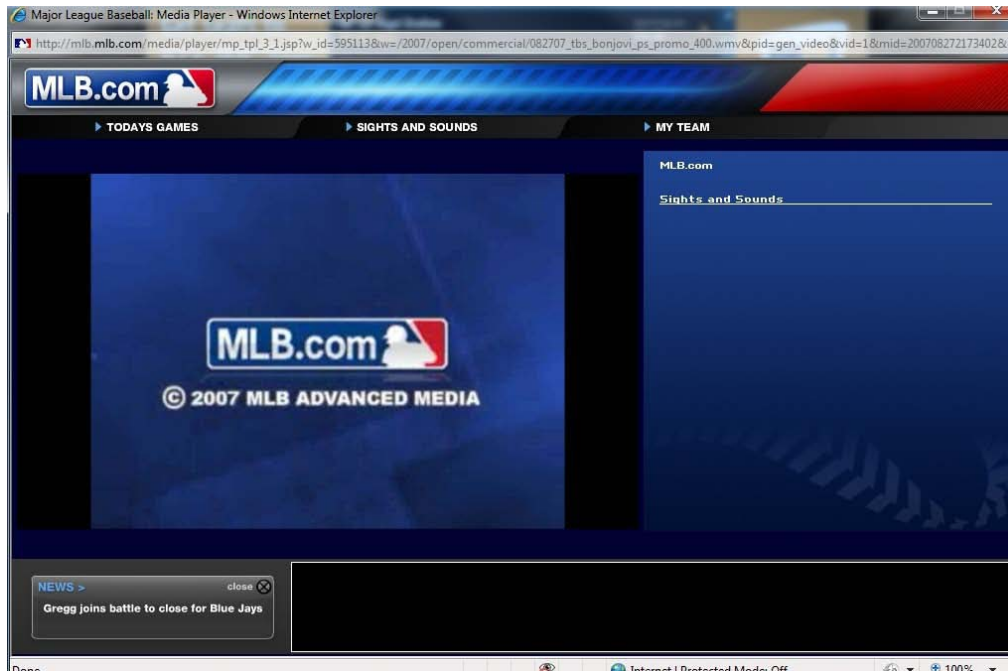
On June 18, 2010, Steele Moved for Entry of Default as to MLBAM ("Steele's Motion"). App-148.

2. *First Party in Default: MLBAM*

MLBAM is a multimedia company with its headquarters at 75 Ninth Avenue, 5th Floor, New York, NY 10011. App-439; App-985. MLBAM, according to its own recently-filed corporate disclosure statement in a companion case, "has no parent corporation." See November 5, 2010 MLBAM Corporate Disclosure Statement, No. 10-11458-NMG (D.Mass.), Docket No. 31.

MLBAM owns and operates MLB.com, as well as all Major League Baseball teams' websites, including RedSox.com. App-153, 440, 444. MLBAM is also involved in a number of non-baseball business enterprises, including, for example, operating and promoting Bon Jovi's official website, and cross-promotions with Bon Jovi and other entertainers App33-34, 38. App-443-444 .

MLBAM owns the infringing work in the underlying case, the audiovisual advertisement promoting the 2007 and 2008 playoffs on TBS with a soundtrack performed by Bon Jovi. See, e.g., Steele Appeal I Opening Brief at 39 (showing final frame of audiovisual advertisement):



MLBAM does business as, and enters into legal relationships as "MLB.com." App-439-440. MLBAM is also known as "Major League Baseball." App-458-459. MLBAM claims "Major League Baseball" and "MLB" are "MLBAM Properties" in the digital domain. App-204, 458-59. According to MLBAM's Chief Executive Officer, Bob Bowman, "MLBAM's nature is stealthy by design," because "MLB.com" - not "MLBAM" - is "the only brand that matters." App-440.

MLBAM was properly served with process on November 17, 2008. App-196, 439, 985. MLBAM failed to respond or defend, defaulting. App-152-154 985. The district court found that MLBP did “not deny that MLBAM failed to appear or otherwise defend.” App-985. Nor did MLBAM defend its default, but instead relied on stand-in MLBP. App-258.

3. *MLBAM's Proxy: MLBP*³

According to MLBP's Senior Vice President and General Counsel, Ethan Orlinsky, in his Declaration filed with MLBP's Opposition to Steele's Motion (seeking entry of default as to MLBAM *not* MLBP), MLBP is a New York Corporation that, among other things, is "responsible for managing consumer product licensing activities, cultivating sponsorship opportunities... growing the game and the business of baseball outside the United States and creating national marketing programs..." App-280.

³ The district court adopted the “MLB” shorthand for “Major League Baseball,” neither of which Defendants or the court ever defined as a defendant or entity. App-977. “MLB” was used by Steele in his pleadings without a formal naming convention. For accuracy herein, Steele refers to MLB entities and parties MLBAM and MLBP, and cites to Major League Baseball and MLB as intended in their original (various) contexts.

MLBP's main office is at 245 Park Ave, 31st Floor, New York, NY 10167.

App-199. According to MLBP's Orlinsky, MLBP and MLBAM are "completely separate" legal entities. App-280, 261-262.⁴

MLBP evaded service of process on the same day - November 17, 2008 - that MLBAM was properly served. App-151-152, 199.

Nonetheless, on December 8, 2010, MLBP voluntarily appeared and defended - nominally - itself, but also "the interests" of MLBAM, despite MLBAM's failure to respond to the properly served summons and complaint. App-43, 151-152, 292-293, 265, 985.

MLBP twice moved, again nominally only on its own behalf, to dismiss Steele's complaints and successfully moved for summary judgment, all the while "defend[ing] the interests" of MLBAM without MLBAM ever actually appearing. App-1, 43, 290-294. As the district court noted, after MLBAM "technically" defaulted it "remain[ed] unclear why MLB has (figuratively) picked up its banner". App-985.

⁴ Also according to MLBP's Orlinsky, and in apparent contradiction to MLBAM's recently-filed corporate disclosure statement referenced above (in No. 10-11458-NMG (D.Mass.), Docket No. 31), MLBAM does have a parent corporation, being owned by MLB Media Holdings, L.P. and MLB Advanced Media, Inc. App-280.

MLBP's three dispositive motions each attached as exhibits an allegedly "true and correct" version of the infringing work – the audiovisual advertisement – from which MLBAM's copyright notice (the image above) had been removed. App-245, 443. See also Steele Reply Brief, Steele I Appeal, at 8-14.

MLBP's defense of MLBAM's "interests" continued when opposing Steele's effort to have MLBAM's default entered. App-255. The district court noted MLBP's curious defense of MLBAM in its Memorandum and Order. App-984 ("MLB responds on behalf of MLBAM despite the fact that it maintains that they are separate entities... [Steele argues that MLB and MLBAM] are collaborating to shield MLBAM from this lawsuit. Indeed, it is worth noting that MLB filed the opposition to Steele's motion to default MLBAM and yet claims that MLBAM is a separate entity").

The district court rejected MLBP's argument on MLBAM's behalf that "any attempt... to sue MLB.com would fail as a matter of law" because MLB.com was an "Internet domain name, not a legal entity," App-262, finding that "MLB admits" that "MLB.com" is "an entity for which MLBAM is responsible," and that MLBAM was properly served on November 17, 2008 with a summons that included the name "MLB.com" App-985.

The district court rejected MLBP's arguments opposing MLBAM's default that: (1) MLBAM was never served with process, App-262, and (2) MLBAM "had no notice that Steele intended to name it as a defendant until June 18, 2010," App-265. App-984-985.

In June and July 2010, Steele twice inquired in writing as to whether MLBP's counsel, Skadden, was also representing, or had, at any time during the proceedings, represented MLBAM. App-511 (specifically at page 13, App-523); App-559 (specifically at page 6, App-564). Skadden declined to say whether it represented MLBAM as well as MLBP. App-552.⁵

Ultimately, MLBP conceded, implicitly, that it was MLBAM's proxy, arguing that default should not enter *against MLBAM* because "MLB Properties filed a notice of appearance and defended the interests of Major League Baseball entities." App-265, 440-441. MLBP did not define "Major League Baseball entities," nor what "interests" it had defended for such "entities." *Id.*

⁵ Steele also repeated his earlier request (first made – and ignored by Skadden – while he was *pro se* during the district court proceedings) for the “FINAL 1” version of the audiovisual advertisement, which Skadden again ignored – while the primary work at issue still remains at large. App-563. See Gregerson v. Vilana Financial, Inc., 2008 WL 451060 at *7 (D.Minn. 2008) (failure to produce digital evidence creates inference in favor of Plaintiff § 1202(b)(1) claim.

4. *Second Party in Default: Vector*⁶

Vector, founded in 1986 by Jack Rovner and Ken Levitan, is a talent management company located at 1607 17th Avenue S., Nashville, TN 37212. App-596, 605-606. Vector and its Principal, Jack Rovner, managed Bon Jovi from 2005 to 2010. Id.⁷

Vector had direct and detailed knowledge of Steele's infringement claims against it starting at least eight months prior to Steele filing his complaint on October 8, 2008, when Steele sought to resolve the dispute informally. App-596, 600-605.

Specifically, Steele *personally* spoke with, e-mailed, and sent letters to Vector and/or Jack Rovner in February and April. App-596, 602-604, 620-626. In addition, Vector was aware of Steele's claims through Vector's clients' and their counsel, which sent e-mails and letters to Vector and Jack Rovner during the same period, as well as through ASCAP (the American Society of Composers, Authors, and Publishers), during the same time frame. App-596, 600-605.

⁶ "Vector Management LLC," a Delaware company, registered to do business in Tennessee at the above address on October 29, 2009, App-707, more than ten months after Vector was properly served, and is successor to "Vector Management" (each further referenced herein as "Vector"). App-900.

⁷ "Bon Jovi" refers to the band, not the individual defendant John Bongiovi.

At 2:40 p.m. on December 8, 2008, Vector's General Manager Joel Hoffman personally accepted service at the above address. App-596, 617. Vector failed to respond and defaulted; the district court found that Vector "does not deny that it has not appeared or otherwise defended" against Steele's complaint and "should have responded before the amended complaint was filed almost four months later" and that Vector, therefore, defaulted. App-983-984; App-891.

5. *Vector's Proxy: Vector 2*

Also on December 8, 2008 - the day Vector was served - Skadden filed their appearances for an entity called "Vector 2 LLC" in conjunction with their first motion to dismiss. App-43-45. Skadden's stated they were appearing for "Vector 2, LLC (misidentified in the Complaint as "Vector Management")." Id.

Vector 2 was not named in Steele's complaint or any summons, nor was service attempted on them; their appearance was entirely voluntary. App-31, 67-68. Steele, in fact, had never heard of Vector 2 until then. App-893-896.

Steele believed that Skadden could not - and would not - intentionally substitute an entirely different company for the defendant - Vector - he had named and served. App-893. Steele took Skadden at its word when it represented to the

Court that *Vector Management* was actually called Vector 2 - and that Steele had "misidentified" Vector 2 as "Vector Management." *Id.*

Vector 2, is, in fact, a wholly owned subsidiary of Vector. App-49, 700.

Vector 2 does not have (and has never had) any connection (at least publically known) to Bon Jovi or their manager at the time, Jack Rovner of Vector 2's parent company, Vector. App-598-599. Vector, on the other hand, is extensively connected to Bon Jovi and Jack Rovner. *Id.* As recently as June 20, 2010, both Vector and Bon Jovi's lead singer John Bongiovi confirmed that Vector and Jack Rovner (*not* Vector 2) acted, until that date, as Bon Jovi's manager. App-599.

At the time, Steele, *pro se*, trusting that the party he had sued and served was the same party that appeared, and with no publically information available linking Vector 2 to Bon Jovi or Jack Rovner, App-598-599, Steele simply replaced the name "Vector Management" with "Vector 2 LLC" in his January 30, 2009 Amended Complaint. App-75.⁸

Specifically, Steele only knew, and could only reasonably know, what had been widely publicized - including by Bon Jovi and Vector themselves - that Vector managed Bon Jovi and therefore was intimately involved in creation of both the

⁸ By this time, unbeknownst to Steele, Vector was already in default. App-983-984.

infringing audiovisual and infringing song. App-598-599, 602, 605-607. Once Vector 2 "stepped in" for Vector, however, Steele's ability to research - never mind allege - facts relating to Vector 2's involvement with the infringing works (of which there are none available) was fatally crippled. App.-598-599. This was not by chance - Vector maintains to this day that Vector 2 was the proper party, despite all evidence, including Vector's own statements, to the contrary. See Id. Accordingly, Steele's Amended Complaint included the straightforward allegation that "Vector 2 LLC is a company which performs management services on behalf of John Bongiovi." App-75.⁹

C. DEFENDANTS' BAD FAITH, FRAUD ON THE COURT, AND MISCONDUCT RELATED TO THE DEFAULTS AND CONCEALMENT THEREOF

1. *Defendants Filed False and/or Spoliated Audiovisual Evidence; Made Material Misrepresentations to the Court*

⁹ Steele's understanding that Vector – the proper Vector – was in the case throughout and was never “dropped” or “omitted” is evidenced in his Opposition to Defendants’ Motion to Dismiss the Amended Complaint wherein Defendants argued that Steele had added parties to his Amended Complaint: “Defendants also state that I have added and dropped parties. I added my record label... The only new defendant added to the amended complaint is the Boston Red Sox... I therefore ask the Court to consider everything in both my original and amended complaint, and to require all defendants...to respond to my allegations.” See Steele No. 61, at 2.

Steele's papers filed in Steele Appeal I provided undisputed facts of Defendants' filing of false evidence - three times in the district court and once in this Court - in the form of the "altered audiovisual." See Steele Appeal I Opening Brief at 18-19, 39-41 (No. 09-2571) (1st Cir.); See also Steele Appeal I Reply Brief at 8-19 (No. 09-2571) (1st Cir).

Steele's Appeal I papers provide numerous examples of Defendants' willful misrepresentations to the district court and to this Court. See Steele I Opening Brief at 38-42 (No. 09-2571) (1st Cir.).

Defendants' false evidence, misrepresentations, and other misconduct were repeatedly raised in Steele's Motions for Default subject to this appeal. App-442-444, 892-901, 903-905, 922-976.

Skadden recently conceded that the audiovisual evidence they filed in the District Court and this Court were not "true and correct" copies, as Skadden attorney Scott Brown swore to in his three Declarations. See Addendum at 18 and 29, respectively, of which this Court may take judicial notice. See Airframe Sys., Inc. v. Raytheon Co., 601 F.3d 9, 11-12 (1st Cir. 2010).

Removal of the copyright notice of the owner of the infringing work in a copyright infringement lawsuit - in which the copyright owner was properly named

and served but defaulted and concealed its default with a false appearance by proxy - is pertinent to willfulness, good faith, and explanation, if any, for default. See Id.

In particular, Exhibit 1, Addendum at 18, is a series of letters attempting to negotiate a voluntary dismissal of Steele v. Bongiovi, et al., 1:10-cv-11218-DPW (D.Mass.). See Id. Defendants concede knowingly submitting the false and altered audiovisual evidence to the district court, under penalty of perjury, by removing the MLBAM copyright notice from it. See Id., Exhibit 1.

2. *Skadden's Retaliatory Bad Faith Rule 11 Motions On Behalf Of Vector And MLABAM*

On June 28, 2010 the undersigned wrote Skadden, addressing the altered audiovisual, MLBAM's willful default, and other instances of misconduct. App-922-935. The Letter to Skadden – 14 single-spaced pages, plus exhibits - described, in great detail, Skadden and their clients' *then-known* misconduct that appeared to violate Rule 11.¹⁰ See Id.

The Letter stated Steele's intent to serve a Rule 11 Motion for Sanctions. See Id. The Letter requested any information correcting or clarifying the misconduct described, including MLBAM's default, to *avoiding* the need for a Rule 11 Motion. App-923-924, 935.

¹⁰ Vector's willful default had yet to be uncovered.

On July 1, 2010 Skadden replied. App-963-968. Skadden failed to explain the misconduct described in the Letter to Skadden. See Id. Skadden did, however, threaten to file a retaliatory Rule 11. App-963-964.

The undersigned sent a follow-up letter on July 3, 2010 regarding Skadden's failure to provide any meaningful information, reiterating several of my prior requests and addressing their threatened retaliation. App-970-976.

Skadden failed to reply. Ultimately, Steele refrained from filing a Rule 11 motion.

Skadden, however, later served on Steele and the undersigned two Rule 11 Motions. See Docket Nos. 131, 134; App-28-29. Skadden's Rule 11 Motions were ostensibly based on Steele's Motions for Default as to MLBAM and Vector. See Id. See also App-908-919; Addendum at 29.¹¹

Skadden's Rule 11 Motions failed to provide any factual or legal bases indicating that Steele's Motions for Default in any way violated Rule 11. See Id.

Notably, consistent with Skadden's and Defendants' ongoing defenses-by-proxy, neither Motions was filed on behalf of the defaulting parties. See Id.

¹¹ Originally Attached as Exhibit 1 to Plaintiff's Opposition to the Moving Defendants' Motion to Dismiss and for Other Relief, Docket No. 16, Steele v. Ricigliano, et al., No. 10-11458-NMG (D.Mass, September 20, 2010).

Prior to the Rule 11 Motions being filed, the undersigned, pursuant to Rule 11's "safe harbor" provision, had requested the specific factual and legal bases for their Rule 11 Motions. App-908-919 See also Addendum at 29.

After several attempts to obtain meaningful information from Skadden, it became obvious they were unable to support their Rule 11 allegations. Id.

The court denied Skadden's Rule 11 Motions without seeing Steele's oppositions thereto, which had not yet been filed. App-1.

3. *The Skadden "Sting"*

On August 31, 2010, Skadden attorney Christopher Clark called the undersigned and made a 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-NMG (D.Mass.), until this Court's determination of Steele's first Appeal, No. 09-2571 (1st Cir.). Clark agreed that Skadden would either refrain from filing or, alternatively would file and agree to be held in abeyance, a motion to dismiss Steele III on behalf of two of their clients.

I immediately called my client and he quickly agreed to this reasonable offer.

However, over the next several days, Skadden began a subtle but continuous and gradual changing of their stipulation conditions; specifically, Skadden demanded

more concessions while offering nothing to Steele and, 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.

Addendum at 38.

I soon realized Skadden's terms had become impossible to accept but, if rejected, Skadden would have something to point to when claiming "bad faith." I realized, belatedly, I had been set-up – caught in "Catch-22." See Id.

My client nonetheless asked that I attempt a final good faith counter-proposal based upon the terms originally discussed with Attorney Clark. Before I could, however, 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 Id.

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

See Id.

Skadden did not reply.

VI. SUMMARY OF ARGUMENT

What began as a copyright infringement case is now a case about a well-planned and well-executed collusion among Defendants and their counsel to secretly remove two defendants from this case through extra-judicial – and illegal – means.

Unfortunately, Defendants' scheme was so well-executed against the *pro se* Steele that it was not until Steele obtained counsel and a thorough review of the record revealed an incredible story of fraud on the court, false appearances, false evidence, abusive and dishonest tactics and, as it relates to this appeal, willful default. There is a virtual encyclopedia of the most brazenly dishonest maneuvers undertaken in court proceedings.

Steele's post-judgment motions were denied, for the most part, because defendants' scheme was designed to remain secret to everyone outside of the perpetrators; the district court relied on the poisonous fruits of Defendants' – including MLB Advanced Media, LP and Vector Management – fraudulently obtained judgment in denying entry of default.

The district court further erred in pointing to Steele's complaints as lacking, without considering that they were lacking because two defendants had been removed – and replaced with two similar-sounding proxies to help conceal their defaults.

VII. ARGUMENT

A. Standard of Review

This Court's review of the district court's Rule 55(c) good cause ruling is deferential. See Indigo v. Big Impressions, LLC, 597 F.3d 1, 3-4 (1st Cir. 2010). The district court's factual findings are reviewed for clear error and its balancing of good cause factors is reviewed for an abuse of discretion. See Id. (citations omitted)

Where there is a "paucity of findings" as to certain factors, or where the district court does not explain its decision, the Court will "proceed to examine the relevant factors ourselves." See Id. (citing Coon v. Grenier, 867 F.2d 73, 76-78 (1st Cir. 1988)).

The district court's discretion is broad, but not absolute; abuse of discretion "occurs when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed, but the court makes a serious mistake in weighing them." See McKinnon v. Kwong Wah Restaurant, 83 F.3d 498, 503 (1st Cir. 1996) (citing Coon at 78).

The Court conducts a *de novo* review of "strictly legal issues" on an appeal from a good cause ruling. See Conetta v. National Hair Care Centers, 236 F.3d 67, 75 (1st Cir. 2001).

MLBAM and Vector shouldered the burden of “demonstrating good cause” to set aside their defaults. See Indigo v. Big Impressions, LLC, 597 F.3d 1, 3 (1st Cir. 2010).

B. “Good Cause:” The Significance of Willful Default

The Court's review of (and its own) good cause analyses reference factors to be weighted, sometimes three, and commonly seven, but the Court always emphasizes that there is no "precise formula" and that "each case must necessarily turn on its own unique circumstances." See Coon v. Grenier, 867 F.2d 73, 76 (1st Cir. 1988).

A review of the decisions over the past twenty-plus years reveals that several related factors loom large in every decision or appeal: whether the default was willful, the defaulting party's explanation, and the good faith of the parties.

C. Entry of Default in Far Less Egregious Cases of Willfulness Are Regularly Upheld

In Coon, the Court found entry of default improper largely because there were no findings or even an "inference" of willful default because the defendant was never served nor had actual notice of the lawsuit. See Coon 867 F.2d at 76-77.

Where failure to appear was based on defendant's reasonable reliance on another's statement, the Court found that “[defendant] had much to lose and nothing to gain from a willful default,” and reversed the denial of defendant's motion to

remove the default. See F.D.I.C. v. Francisco Invest. Corp., 873 F.2d 474, 478 (1st Cir. 1989).

The Court upheld default judgment based on willful default where defendants were (1) served with the complaint, (2) aware of their pending legal problem, and (3) capable of retaining legal counsel, but failed to answer the complaint. See McKinnon 83 F.3d at 503-504.

The finding of willful default was based on defendants' failure to "exhibit the good faith necessary to justify the court's lifting of the default judgment" as "well-supported" because defendants were aware of their legal problem but "hoped that it would all go away." See Id. at 504.¹²

The Court upheld entry of default where defendant "decided to ignore [the complaint]" to avoid dealing with a "nuisance." See Conetta 236 F.3d at 75. The Court's decision ultimately rested on defendant's lack of good faith by intentionally failing to defend the case "for improper reasons." See Id. at 75.¹³

¹² Addressing defendants' counsel the district court stated: "What the defendants have done in their actions... speaks so loudly that I have difficulty hearing your voice today in this proceeding." See Id. at 503.

¹³ Significantly, the Court also found it manifestly unfair that plaintiffs should be forced to litigate liability issues that defendant "failed to contest in a timely fashion." See Id.

In a copyright infringement case, the Court upheld default where defendant was properly served but "intentionally did not appear in the case until more than a year after the filing of the complaint and ten days after default judgment was entered." See Venegas-Hernandez v. Sonolux Records, 370 F.3d 183, 187 (2004). Defendant was "well aware of the ongoing litigation," because it was "a major multi-million dollar copyright infringement action that could not have been easily ignored, and that the district court was justified in rejecting defendant's excuse. See Id.

Recently, this Court re-affirmed the general rule that it "ordinarily will uphold a refusal to vacate a default judgment entered against a willfully defaulting party." See Ungar v. PLO 599 F.3d 79, 84 (1st Cir. 2010) (finding exception to the ordinary rule based on "extraordinary circumstances" this nation's relations in the Middle East).

D. The District Court's Fundamental Misunderstanding of KPS

The district court relied on KPS & Assoc., Inc. v. Designs by FMC, Inc., 318 F.3d 1 (1st Cir. 2003) ("KPS") in denying Steele's Motion, citing the First Circuit's list of seven "non-exhaustive list of factors that courts may consider when determining whether good cause exists to set aside a default judgment." App-982-983.

KPS is unquestionably controlling authority. The district court, however, misapplied the KPS factors to the instant facts and, more to the point, ignored altogether the crucial reasoning and fundamental holding of KPS.

The Court's conclusion in KPS was that defendant and its counsel's fraud on the court - their "fabrication and bad faith" - justified refusal to set aside the default pursuant to its inherent authority, even where the district court's analysis of the "good cause" factors was very limited. See Id. at 15.

The KPS defendant's "fabrication and bad faith" pale in comparison to MLBAM and Vector's *two years and counting* of fraud on the court, bad faith, and abuse of opponents, counsel, and the court.

1. KPS: *Willful Default and Good Faith of the Parties*

In KPS, defendant failed to timely file an answer and plaintiff moved for entry of default. See Id. The clerk entered default. See Id at 9.

Defendant faxed a letter to the district court claiming he had timely mailed an answer and attempted to explain why it did not arrive. See Id. at 9, 13. Defendant moved to set aside the default. See Id. at 9.

Plaintiff submitted an affidavit showing why defendant's explanation was unlikely to be true. See Id. at 13. The affidavit also stated that defendant, in a parallel New York action had "engaged in bad-faith dilatory tactics." See Id.

At the hearing, defendant argued all three of the Coon factors: willfulness, meritorious defense, and lack of prejudice. See Id. at 14. See also Coon v. Grenier, 867 F.2d 73 (1st Cir. 1989). Defendant maintained his story but offered no evidence in support and was contradicted by plaintiff's affidavit. See Id. at 13-14.

The district court, from the bench, stated she "was not impressed" calling defendant's behavior "stonewalling." See Id. at 14. The district court's ruling from the bench stated: "because I do not credit these stories, because I do not find there to be good cause to remove the default, the motion to remove the default is denied." See Id. at 15.

The ruling was based on defendants' overall course of conduct leading up to his default, including defendant's "inconsistencies" and "implausibilities" in his representations about the late answer, other representations the district court found "incredible," and defendant's "intransigence" in the New York litigation. See Id. at 14.

Despite the district court's limited analysis, this Court found affirmed. See Id. at 14. "[defendant] had the burden to demonstrate a lack of willfulness. When the district court rejected [defense counsel's] explanation, [defendant] was effectively left with *no* explanation for the default. See Id. at 14.

This Court, inferred from the court's comment on defendant's "stonewalling" to mean defendant lacked a meritorious defense, "trying to postpone the inevitable." See Id. at 14-15.

The district court also did not make any findings as to prejudice. See Id. This Court examined the facts before the district court and found that "no indication" of prejudice to plaintiff arising from the dangers accompanying delay, i.e., "loss of evidence, increased difficulties of discovery, or an enhanced opportunity for fraud or collusion." See Id. at 15.

This Court upheld the district court's ruling because she "correctly gave significant weight to two other factors - the nature of [defendant's] explanation for the default, and the good faith of the parties." See Id.

2. KPS: *Willful Default Compounded by Fraud on the Court*

The district court found that defense counsel "had fabricated his explanation regarding the filing of an answer - a finding that goes to the nature of the explanation as well as to [defendant's] good faith." See Id. (emphasis supplied).

The Court referenced its "inherent power to dismiss an action when a party has willfully deceived the court and engaged in conduct utterly inconsistent with the orderly administration of justice," quoting Aoude v. Mobil Oil Corp., 892 F.2d 1115, 1119 (1st Cir.1989). See Id. at 15.

The Court concluded: "In light of these determinations of fabrication and bad faith, and its consideration of other salient factors, the district court did not abuse its discretion in refusing to set aside the default." See Id.

In KPS, one fabrication, several inconsistencies and implausibilities, and intransigence in another jurisdiction, based upon opposing counsel's affidavit, was enough for this Court to find defendant's default willful; and, in turn, the bad faith and "fabrication" associated with his willful default and explanation thereof was enough for this Court to make willfulness determinative in refusing to set aside the default. See Id.

Contrasted to the encyclopedic list of bad faith actions compiled during Vector, MLBAM, Defendants, and Skadden's carefully planned collusion amongst numerous

defendants and their counsel, executed over a period of months, now years, against the *pro se* Steele, the undersigned counsel, and, of course, the district court and this Court, the KPS defendant's actions would barely fit a page.

It really need not be said, but nonetheless: if the Court found the defendant's conduct and bad faith in KPS warranted upholding default, what of the conduct of the Defendants' and their counsel in this action?

E. The District Court's Flawed KPS Analysis

The district court, cited KPS, listing the seven factors that may be considered in the Rule 55(c) "good cause" analysis in determining whether to remove a default:

(1) whether the default was willful; (2) whether setting it aside would prejudice the adversary; (3) whether a meritorious defense is presented; (4) the nature of the defendant's explanation for the default; (5) the good faith of the parties; (6) the amount of money involved; (7) the timing of the motion. App-902-903.

1. *The District Court Failure to Balance*

The district court's Memorandum and Order purported to analyze five of the seven factors, disregarding, factor six (amount of money involved) and factor seven (timing of the motion). App-986-990.

Despite the Order's point headings listing KPS factors 1-5, the court's analysis focused on Steele's complaints and the court's prior orders, ignoring the actual, documented, and undisputed bad faith misconduct related to MLBAM and Vector's defaults. The district court ignored overwhelming evidence that MLBAM and Vector's defaults were intentional – indeed, calculated – done for the improper purpose of concealing themselves from the litigation. See Conetta 236 F.3d at 75 (“critical factor” in upholding entry of default was defendant’s knowledge of complaint and deliberate decision to ignore it “for improper reasons”).

The court also ignored the unchallenged evidence that MLBAM’s and Vector’s defaults were, in turn, themselves “covered up” by immediately having similar-sounding proxies falsely appear explicitly on their behalf, with the fabricated story – designed to “grease the skids” of the illicit substitution - that Steele had “misidentified” them. See KPS 318 F.3d at 15. (defense counsel "fabricated his explanation regarding the filing of an answer - a finding that goes to the nature of the explanation as well as to [defendant's] good faith," district court’s refusal to set aside default warranted).

MLBAM and Vector’s actions belied their arguments and evaporated any possibility of meeting their burden of credibly asserting “good faith,” that their

defaults were not willful, or of having a reasonable “explanation” for their defaults.

See McKinnon 83 F.3d at 503-504.¹⁴

2. *The Two Omitted Factors: Delay and Amount*

The district court twice found it pertinent to note that Steele’s Motions were filed 18 months his Amended Complaint was filed, App-979, 986, but did not expressly directly address the relevant factor - number seven (timing of the motion to set aside the default – reasonably related to the timing of the motion for entry of default).

The district court stated that “Steele’s attorney... does not explain why he did not file the motion against Vector Management earlier,” App-980, instead finding that Steele’s Motion for Default as to Vector was filed 18 months after Steele’s “amended complaint from which Vector Management was omitted.” App-986 (emphasis supplied). The district court accepted and regurgitated Defendants’ implication of untoward delay on Steele’s part without addressing the issue directly, that is, what specifically caused the “18 month delay.” App-785, 789; 979; 986.

¹⁴ Addressing defendants’ counsel at an evidentiary hearing the district court stated: “What the defendants have done in their actions, [counsel], speaks so loudly that I have difficulty hearing your voice today in this proceeding.” See Id. at 503.

In fact, Steele explained in excruciating detail that the “delay” was brought about by MLBAM and Vector’s concealment of their defaults through the proxy appearances of MLBP and Vector 2 (as well as submitting false evidence, making misrepresentations to the district court, and abusing Steele and counsel considering taking his case). App-156-157, 244-254, 440-452, 888-890, 892-894, 902.

Defendants’ primary argument in opposing default was based on the presumption that Steele’s failure to move for default earlier constitutes some sort of waiver, despite that it was Vector and MLBAM’s illegal and deceptive and illegal substitution of parties - *specifically designed to go unnoticed* – that caused the delay.

As to factor six (money involved), the facts unequivocally weigh in Steele’s favor, as the infringing audiovisual and derivative Bon Jovi song generated staggeringly large amounts of money – hundreds of millions of dollars (on the low side) – for defendants. App-33-34, App-421.

3. *The Remaining Factors: Referenced but Improperly Weighed*

The court’s Order begins accurately, noting MLBAM and Vector's "failure to respond," App-983-985. The Order next examines the form, content, and filing dates of Steele's initial and amended complaints and looks at the district court's prior

orders. App-986-990. The district court's conclusions, irrespective of its passing references to the KPS factors, may be summarized as follows:

1. Steele properly named MLBAM and Vector in their summonses and properly served them with process. Accordingly, they "technically" defaulted. App-983-985.

However, entry of default would be futile because:

2. Steele's complaints - even when read together - misnamed and/or did not adequately "give notice" to MLBAM and Vector, which excused their defaults. App-986-987
3. Steele's complaints, as a result of misnaming and/or not giving "notice" of his allegations, do not state claims against MLBAM and Vector. App-987-989.
4. Steele's claims against MLBAM and Vector are barred by issue preclusion. App-989-990.
5. Steele "offers no evidence of bad faith on the part of the Defendants." App-990.

Accordingly, the district court's conclusions, taken as a whole, excused MLABM and Vector's defaults on the basis of futility insofar as they (1) did not

willfully default (App-986-987), (2) had good explanations for their defaults (App-986-989), (3) had meritorious defenses (App-987-990), and (4) acted in good faith (App-990).

The district court's reasoning was fatally flawed, an abuse of its discretion, and riddled with legal errors as to each KPS factor weighed (and not weighed), and which – in the facts of this case – are all inextricably intertwined. The factors of willfulness, explanation, and good faith - which weigh definitely in Steele's favor – are all related to MLBAM, Vector, and their proxies' misconduct, particularly their collusive actions, e.g., false appearances by proxy, material misrepresentations, and outright fraud on the court.

Overall, the record before this Court, shows irrefutable evidence of intentional default as part of a larger improper scheme to conceal MLBAM and Vector from this litigation. Unfortunately, the district court did not consider Steele's forceful, undisputed, and repeated arguments in this regard, brushing them off in conclusory fashion. App-985, 986-990.

As to a meritorious defense, there are three obstacles MLBAM and Vector failed to overcome in attempting to meet their “good cause” burden. See Indigo 597 F.3d at

3. Unfortunately, the district court failed to adequately address the three issues - though repeatedly argued by Steele in his Motion papers.

As to the supposed deficiencies in Steele's complaints – which relate to the district court's findings relating to “notice” and stating a claim – any deficiencies were fraudulently induced and caused by the deceptive and illegal acts of MLBAM, Vector, Defendants, and Skadden, concealing the defaults by voluntarily filing false appearances of unserved parties with similar-sounding names to the defaulters. See Id.

The intentional confusion these false appearances caused crippled the *pro se* Steele in his ability to better state his claims as to MLBAM and Vector. Nonetheless, when read together, and taking into account Defendants' diversionary and deceptive tactics, the complaints clearly stated claims.

Under the circumstances, however, Steele submits he should not have to burden of proving today that he stated a claim two years ago while subject to Defendants' sophisticated – but illegal and certainly improper - disinformation campaign.

As to “notice,” the same underlying facts apply: namely, it was exactly *because* MLBAM and Vector had *months* of actual pre-suit notice that Steele was planning to sue that Defendants and Skadden engineered the plan to file proxy appearances. It

was similarly *because* MLBAM and Vector were later *properly named and served*, that the Defendants and Skadden put their plan into action for the specific – and improper – purpose *of concealing* MLBAM and Vector’s defaults.

Accordingly, the district court’s examination of Steele’s allegations under a microscope and with 20/20 hindsight, without taking into account Defendants’ intentional and bad faith efforts designed to stifle Steele’s ability to state a claim was an abuse of discretion, if not a legal error. The district court, looking at Steele’s complaints in a vacuum - and even then contradicting his own decision to read them together - simply got it backwards.

Indeed, the very fact that the district court found itself – in the context of a motion to default *two* defendants – analyzing Steele’s allegations as to *four* defendants – without further inquiry as to why - makes plain the district court’s fundamental underlying error: failing to give analyze, much less weigh in its calculations, the fact that two extra parties – unserved - *appeared voluntarily* and *falsely claimed to be the defaulting parties*.

Finally, as to the “meritorious defense” of issue preclusion, the district court’s legal analysis was erroneous. Although the district court’s substantial similarity currently remains the law of the case for now, it is now beyond question that it was a

decision poisoned by the fraud and deceit, which – looking back – permeating the entire proceedings. The district court was a victim – along with Steele – of unprecedented fraud on the court. The district court should have been guided by a timeless legal principle, as applicable today as ever.¹⁵

The district court’s judgment, based upon fraud on the court, is – or should be - rendered impotent, with no preclusive effect. The district court could – and should – have realized what was – and still is – happening and put a stop to it. See Chambers v. NASCO, Inc., 501 U.S. 32, 44, 111 S.Ct. 2123 (1991) (courts have a “historic power of equity to set aside fraudulently begotten judgments”).

Fraud on the court impeaches the judgment obtained by such fraud. See Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 244-45 (1944).¹⁶ See also Simon v. Navon, 116 F.3d 1, 6 (1st Cir. 1997) (“the power of a court to set aside a judgment for fraud upon the court is not limited by [Rule 60]”); George P. Reintjes Co., Inc. v. Riley Stoker Corp., 71 F.3d 44, 47 (1st Cir. 1995) (“under certain

¹⁵ *Nemo ex dolo suo proprio relevetur, aut auxilium capiat*. “No one is relieved or gains an advantage by his own fraud.”

¹⁶ “[W]here the occasion has demanded, where enforcement of the judgment is ‘manifestly unconscionable’ [Courts] have wielded the power without hesitation... setting aside the judgment to permit a new trial, altering the terms of the judgment, or restraining the beneficiaries of the judgment from taking any benefit whatever from it.” See Id.

circumstances, one of which is after-discovered fraud, relief will be granted against judgments regardless of the term of their entry”).

Nonetheless, we now stand before this Court, which has the power, the *obligation*, to ensure the integrity of judicial proceedings, and not only here and now, but as to all future cases in the courts of the First Circuit. Fraud on the court is larger than any single party, case, or court and when it presents, it *requires* a court to act. The district court failed to do so.

Steele respectfully implores *this* Court to act to protect not only Steele’s rights – after two years of dancing to Skadden’s poison tipped bullets – but those of *all parties*, whether *pro se* or Professional Corporation, who appear before the honorable and just courts of the First Circuit of the United States.

F. The District Court’s Errors of Law and Abuse of Discretion: Form over Fraud, and Inconsistent at That

The district court’s Order made numerous errors, including relatively minor – but also major, determinative - factual errors, gross legal errors, and errors in application of law to fact. As an initial matter, the district court erred in stating that Steele “now moves for entry of default judgment,” App-979, against MLBAM and Vector and specifically citing Rule 55(b)(2), App-982. Steele’s Motions were, in fact, for entry of default pursuant to Rule 55(c). App-148, 592.

1. *ERRORS AS TO MLBAM*

The district court's reference to "Major League Baseball ('MLB')" failed to identify to which legal or corporate MLB entity the court is referring, or to which defendant or party.¹⁷ App-977. The district court presumably referred to MLBP, though it had no reason – without inquiry or explanation, and against undisputed facts on record – to make this assumption since in hindsight there was not one, but two, Major League entities with skin in the game.¹⁸ The district court's confusion as to the true identities of "Major League Baseball" and "MLB" is understandable – if not excusable – given Appellees' studied practice at keeping the court – and Steele – in the dark.

Appellees not once in their pleadings have ever clarified or defined - using standard naming conventions - the legal or corporate or party identity of "Major

¹⁷ The district court introduced "Major League Baseball" and "MLB" in a shroud of doubt in its first opinion and order, providing no legal or corporate identification for these Major League entities, nor any reference to specific defendant or party. App-82, 84.

¹⁸ With MLBAM in default as of December 30, 2008; and concealed from Steele and the court throughout the proceedings by Defendants' and counsel's fraud on the court; and by being known publicly as "Major League Baseball;" and claiming ownership of digital-"MLB;" and where MLBP evaded U.S. Marshal's before appearing voluntarily in the "interests" of big league baseball, any reference to "Major League Baseball" or "MLB" without reasonable clarification or identification is necessarily dubious.

League Baseball” or “MLB.” See App-1, Docket Nos. 18, 49, 93, 103. March 31, 2009 Transcript of hearing at 30 (App-124); App-262.

Due to Appellees’ and counsel’s bad faith representation of “Major League Baseball” entities, one of whom – the main subject of litigation- was absent in default, the district court proceedings were fraught with uncertainty regarding the legal and corporate identities of “Major League Baseball” and “MLB” and their standing as party defendants, resulting in the district court’s clear error of law and abuse of discretion.

*a) Steele Identifies and Names the Major League Baseball Entity
He Reasonably Believes Owns the MLB Audiovisual*

Steele’s Complaint focused primarily on the MLB Audiovisual. App-38. Steele faced these facts when drafting his Complaint:

In 1987 the Major League Baseball Promotion Corporation became Major League Baseball Properties, Inc., with a division Major League Baseball Productions, owned by Major League Baseball Enterprises, Inc., promoted by MLB Advanced Media, L.P., owner of MLB.com, owned by MLB Media Holdings, L.P. and MLB Advanced Media, Inc.

See App-204-210, 214, 216-18, 71-73, 75-78, 79-80, 440.

Steele after due diligence attributed MLB Audiovisual ownership – and culpability – to a Major League Baseball entity he referred to in the caption of his Complaint as “Major League Baseball / MLB Productions,” and in his primary substantive allegations as “MLB.” App-31, 33-34, 38. Steele alleged repeated pre-litigation contact with ‘MLB’ through its website, MLB.com. App-32. Steele effected service upon ‘MLB’ at its headquarters by a summons to “MLB Productions / MLB.com.” App-53-54. Steele’s caption, Complaint, and allegations alternately and equally referred to “Major League Baseball,” “MLB,” “MLB.com,” and “MLB Advanced Media.” App-31, 31 (Ex. A); see also Docket No. 42 at 8.

Pursuant to KPS factors 1, 3, 4, and 5, the district court held Steele’s combined Complaint and Amended Complaints sufficiently lacked substantive allegations against MLBAM to put them on notice and to justify their dismissal for failure to state a claim.¹⁹ App-987-88.

On the contrary, the district court’s blind spot to MLBAM resulted in a clear error of fact and abuse of discretion by inconsistent application of the misnomer

¹⁹ Citing the First Circuit’s liberality in construing pro se pleadings, the district court “accommodat[ed] Steele’s request and read[] his original and amended complaints together.” App-87.

doctrine to Steele's summons and complaints. App-985, 87-88. See McKinnon, 83 F.3d at 503.

b) Clear Error of Fact

As a factual matter, the court defied the record when it declared MLBAM was “not mentioned in either complaint...but for the oblique reference in the amended complaint to its corporate relationship with MLB Properties.” See Docket No. 42 at 8; App-74, 988.

In fact, in “Plaintiff's Amended Complaint And Opposition To Motion To Dismiss,” Steele stated, apart from and above any so-called ‘oblique reference’: “Let's get the record straight, MLB Advanced Media and MLB.COM claimed copyright for the audio visual and not TBS.” See Docket No. 42 at 8 (emphasis supplied). This emphatic and substantive allegation represents for the district court a clear error of fact. See Indigo v. Big Impressions, LLC, 597 F.3d 1, 3-4 (1st Cir. 2010) (trial court's factual findings on default motions reviewed for clear error).

c) The Misnomer Doctrine

More to the point, the district court's crowning abuse of discretion is the conclusory assumption – absent clarification, evidence, or analysis – and indeed contrary to facts on record App-204, 458-59 – that any reference in the proceedings

to “Major League Baseball” or “MLB” should be synonymous with MLBP – and not MLBAM. App-987-88. Especially when – unbeknownst to Steele and the court, but certainly not MLBP – there was another “MLB entity” at-large in the case, concealed in default, and in fact the owner of the accused work.

The district court’s stringent demands for “MLBAM” nomenclature from Steele – amidst such uncertainty about the “MLB” identity, compounded by Defendants’ lack of forthrightness²⁰ – betray the principles of misnomer the court had but moments before applied to MLBAM’s default. App-985.

In failing to apply the misnomer doctrine to Steele’s complaints, thus finding deficiency in Steele’s “substantive allegations,” the district court abused its discretion pursuant to KPS factors 1, 3, 4, and 5 in setting aside default holding MLBAM had “insufficient...notice that it must respond or defend itself in its own right” App-987; and “would be dismissed for failure to state a claim upon which relief can be granted.” App-988.

The misnomer doctrine is “most obviously appropriate in cases where the plaintiff has sued a corporation but misnamed it.” See Roberts v. Michaels, 219 F. 3d 775, 778 (8th Cir. 2000) (acknowledging the “well-recognized distinction between a

²⁰ See App-1, Docket Nos. 18, 49, 93, 103. March 31, 2009 Transcript of hearing at 30 (App-124); App-262.

complaint that sues the wrong party, and a complaint that sues the right party by the wrong name”).

Misnomer doctrine applies to summons and “other step[s] in a judicial proceeding” if the party misnamed could not have been, or was not, misled. See U.S. v. A.H. Fischer, 162 F.2s 872, 873 (4th Cir. 1947). A defendant can be misnamed yet receive proper notice “if the allegations made in the body of the complaint make it plain that the party is intended as a defendant.” See Callahan v. Wells Fargo & Co., -- F.Supp.2d ----, 2010 WL 4290243 at *3 (D.Mass 2010); quoting Barsten v. Department of Interior, 896 F.2d 422, 423 (9th Cir. 1990) (misnomer immaterial where complaint and related materials clearly identify defendant).

As an initial matter, Appellee MLBAM, owner and copyright holder of the MLB Audiovisual, owns, and/or is also known as the following trade names: “MLB Advanced Media LP,” “MLB.com,” “Major League Baseball,” and “MLB.” App-204, 458-59.

Steele properly identified MLBAM as the owner of the MLB Audiovisual and prime target of his litigation, properly served MLBAM with a summons and

Complaint, within which Steele identified MLBAM by all four of its trade names²¹
See Docket No. 42 at 8, App-31 (Ex. A), 31, 263, respectively. See Scipar Inc. v. Chubb Corp., 2010 WL 3894982, *2 (W.D.N.Y. Sept.30, 2010) (plaintiff's intentions were determinative of proper party, based on complaint).

Furthermore, Steele's complaints, summonses, and pleadings primarily and steadfastly alleged infringement against the MLB Audiovisual and its owner(s). App-31, 33, 34-36, 38, 39, 77-79, Docket No. 42 at 2-9, 11, 13. See Godfrey v. Eastern Gas, 71 F.Supp. 175, 177 (D. Mass. 1947) (plaintiff, trying to sue owner of property, made it "reasonable to conclude that he meant to sue... whichever was the [property] owner" and owner, properly served, could not "avoid its rightful obligation" through plaintiff's "technical error" where defendant "had notice of plaintiff's claim from the outset.").

Additionally Steele submitted evidence to support his substantive allegations of infringement against a MLB entity, i.e., a version of the MLB Audiovisual displaying the owner's name and copyright logo. App-38 (Ex. 1). See Rice v. Hamilton Air Force

²¹ MLBP, on the other hand, to whom the district court presumably attributed all references to "Major League Baseball" or "MLB," points to no evidence in the record or pleadings which factually or legally defines MLBP as "Major League Baseball" or "MLB," or vice-versa.

Base Commissary, 720 F.2d 1082, 1085-86 (9th Cir. 1983) (court found proper defendant was named, based on complaint and supporting documents).

Steele's principal target was not lost on the district court: "Steele's claim for copyright infringement arose from an advertisement produced and aired...during the 2007 Major League Baseball [] post-season." App-977. Nor were Defendants unaware of Steele's primary allegation: "Plaintiffs allege that the Turner Promo is substantially similar to music and expressions of ideas encompassed in the plaintiff's copyrighted work." Docket No. 49 at 3. See U.S. v. Davis, 261F.3d 1, 33 n. 25 (1st Cir. 2001) (defendants' argument foundered when there was "no question that [defendant] received adequate notice that it was being sued, and that it owned the [property] from which the liability at issue here stemmed").

Steele clearly and consistently voiced substantive allegations in his complaints against the MLB entity which owned the MLB Audiovisual, the central work at issue: "MLB did not have the right to claim copyright for an audio visual that was illegally made from my copyrighted work." See Docket No. 42 at 8. See 2 Moore's Federal Practice 2d Ed., Sec. 4.44 at 1042 (as cited in Grandey v. Pacific Indemnity, 217 F.2d 27, 29 (5th Cir. 1954) (misnomer applies where "it is reasonable to conclude that the

plaintiff had in mind a particular entity or person, merely made a mistake as to the name, and actually served the entity or person intended”).

In fact, Steele named MLBAM point-blank: “MLB Advanced Media and MLB.COM claimed copyright for the audio visual and not TBS.” Docket No. 42 at 8. See Callahan, 2010 WL 4290243 at *3 (“Once the proper party is identified, the court may turn to the substantive legal issues in the case.”).

In short there was no question which Major League Baseball entity Steele intended to sue: the one which owned the infringing MLB Audiovisual, i.e., MLBAM. The district court – due to MLBAM’s default – proceeded with tunnel vision, attributing Steele’s allegations to a proxy party who does not own the MLB Audiovisual. See Roberts, 219 F. 3d at 779 (misnomer applied where defendant “created the potential for confusion” by conducting business under a false name, “compounded the confusion” by participating in legal proceedings using wrong corporate name, and “prolonged [plaintiff]'s confusion by filing an answer” that was misleading as to employer's identity). See U.S. v. A.H. Fischer, 162 F.2s 872, 873 (4th Cir. 1947) (“A suit at law is not a children's game, but a serious effort on the part of adult human beings to administer justice; and the purpose of process is to bring parties into court. If it names them in such terms that every intelligent person

understands who is meant, as is the case here, it has fulfilled its purpose; and courts should not put themselves in the position of failing to recognize what is apparent to everyone else.”).

Given the factual and legal accuracy of Steele’s caption and complaint, in light of the assorted corporate incantations of “MLB;” and because Steele contacted MLB at MLB.com repeatedly prior to litigation; and Steele served MLBAM at its headquarters by its proper trade name; and Steele’s Complaints are unequivocal and steadfast in their allegations against the MLB entity which owns the MLB Audiovisual; and because Steele identified “MLB Advanced Media” as owner of the MLB Audiovisual in his complaints and in his evidence; and because Steele’s complaints identified MLBAM by its four trade names on record; and because the misnomer doctrine clearly applies to Steele’s complaints, allowing for “substantive allegations” against MLBAM with each of Steele’s mentions of “MLB,” Steele unquestionably met his burden to put MLBAM on notice and to state a sufficient claim against them.

Therefore, as the district court’s factual bases were clearly flawed, and the court abused its discretion in unevenly applying the law and weighing the facts, the district

court erred in setting aside MLBAM's default for good cause pursuant to KPS factors 1, 3, 4, and 5. See McKinnon, 83 F.3d at 503.

2. *ERRORS AS TO VECTOR MANAGEMENT*

The district court states that Steele's Amended Complaint, "in which he named Vector 2 instead," normally render Vector a non-party but "the Court proceeds on the basis that Vector Management is named as a defendant in a viable complaint." App-981-982.

Nonetheless, the district court relied on the differences between the two complaints in excusing Vector's default. The district court stated that "Steele removed Vector Management from the caption and pleadings and replaced it with 'Vector 2 LLC,'" App-983.²² The district court characterized Steele's Amended Complaint as having "omitted" Vector, despite its own ruling that the complaints were to be read together. App-986.

The district court's errors at this juncture are multiple and render the remainder of the Order untenable, if not nonsensical. First, the district court correctly points out that Steele's claims against Vector were based on their management of Bon

²²The district court also noted that Vector failed to appear or defend (and did not deny its failure to do so) "technically" in a timely manner and, "therefore, defaulted." App-983-984.

Jovi from 2005-2010, that Vector was properly served on December 8, 2008, and that on that same day Vector 2 filed its appearance. App-983. However, the district court, in the same sentence states that Vector 2 "informed Steele that he had incorrectly named Vector Management." See Id. The district court bases this on Vector 2's corporate disclosure form. See Id. Vector 2's corporate disclosure form "informed" Steele of no such thing. App-49. In any event, the voluntary appearance of Vector 2 - a subsidiary of Vector - in no way provides legal cover for Vector's default (though it did successfully - and illegally - conceal Vector's default until recently). See F.D.I.C. v. Francisco Invest. Corp., 873 F.2d 474, 478 (1st Cir. 1989) ("[u]pon proper notification of pending action parties must respond diligently, or face the concededly harsh consequences of a judgment resulting not from the consideration of the merits, but from the parties own inaction. This determination would normally suffice to decide the case"); see also Venegas-Hernandez v. Sonolux Records, 370 F.3d 183, 187 (2004) (affirming district court's finding that "plaintiff's suit was a major multi-million dollar copyright infringement action that could not have been easily ignored, that defendant was given proper notice of the suit, and that it was defendant's

obligation to learn the specifics of the suit and keep informed of its progress." See Id.²³

The district court next states that Vector "allegedly told Steele that it had no connection to Bon Jovi and that the correct target for Steele's allegations was Vector 2, which had acted as a personal manager for Bon Jovi." App-983. This is simply incorrect - by a country mile. Vector (and Vector 2) made no efforts whatsoever to explain their substitution (or default) to the then *pro se* Steele until a year after judgment entered and then only when forced, when faced with Steele - now with counsel - filing his Motion for Default. App-894-901.

Worse - much worse - Vector's sloppy attempts to explain its willful default, intentional deception, and illegal substitution lead it to give two directly contradictory explanations for Vector 2's proxy appearance. See Id. First, on August 25, 2010, Vector attempted to explain that Vector 2 appeared for Vector because "it was apparent [from Steele's Complaint]... that Steele was seeking to hold liable the management company that acted as the personal manager to the recording artist Jon Bon Jovi" and that "the correct name of the management company that acted as

²³ The Court noted that defendant's "decision not to appear" also may have prejudiced plaintiff's ability to obtain sufficient evidence on which to prove damages, including defendant's profits. See Id.

personal manager for Jon Bon Jovi, and which obviously was the target of Steele's allegations when he named Vector Management, is a company known as Vector Two LLC." App-897-898 (quoting Vector's Opposition to Steele's Motion for Default).

Not two weeks later, On September 4, 2010, however, Vector stated that it illegally substituted Vector 2 because "it was determined that Mr. Steele intended to name the Vector entity that served as the manager of the Bon Jovi band." App-898 (quoting correspondence from Skadden).

As an initial legal matter, it was not up to Vector to unilaterally assume Steele's "intentions" or who "Steele was seeking to hold liable" and to proceed to willfully default and file a proxy appearance based on such assumptions. See, e.g., McKinnon 83 F.3d at 503-504.

While this would be improper in any circumstance, it is particularly improper here, where Vector made no effort whatsoever to either clarify from Steele what his actual intentions were or to at least inform Steele that he had sued the wrong party

(which, of course, he hadn't).²⁴ Of course the reason Vector failed to attempt any such clarifications was because there was never any doubt: Steele had named and served exactly the correct party. App-896. All of Vector and Vector 2's subsequent efforts focused not on determining the correct party, but on concealing the correct party. See Anderson v. Cryovac, 862 F.2d 910, 924 (1st Cir. 1988) (“[L]itigant who engages in misconduct will not be permitted the benefit of calculation, which can be little better than speculation, as to the extent of the wrong inflicted upon his opponent”).

More to the point, Vector's contradictory long overdue post-facto attempts to explain its default and concealment thereof with Vector 2's appearance cannot both be true, at least as a logical matter. If we may apply a little common sense, given that Steele had already successfully named, sued, and served his intended target, Bon Jovi's management company, Vector Management (not Vector 2) both explanations are pure fabrications seeking to justify the willful default of the proper party; they are

²⁴ If Vector was truly not the "correct" defendant, why didn't it simply move to dismiss on this basis? Or, as is often the practice, simply call Steele, tell him he's got the wrong party (offering to prove it, of course) and ask him to voluntarily dismiss (and leave it up to him to determine the right party)? Or move the Court for leave to substitute Vector 2 for Vector openly and honestly? There are many actions a party acting in good faith could have done had it truly been sued and served in error. Willfully defaulting and putting up a proxy is not one of them.

misrepresentations to the court; they are part of Vector's *ongoing* fraud on the court.

App-894-901. See KPS 318 F.3d at 13 (default tool "furnishes an invaluable incentive for parties to comply with court orders and rules of procedure. It encourages the expeditious resolution of litigation and promotes finality." .

In sum, as Steele made plain during his pre-suit communications and throughout the proceedings, Steele attempted to - and succeeded in - suing the company that manages the band Bon Jovi, which is Vector Management, not Vector

2. Steele had never heard of Vector 2 (unsurprisingly, given that there is no information about them online, App-896), and, in any event, all publically available information - including Vector's and Bon Jovi's own public statements - confirms that Vector - not Vector 2 - manages Bon Jovi. App-599. See Anderson v. Cryovac, 862 F.2d 910, 927 (1st Cir. 1988) ("the record contains... overwhelming evidence, to call a spade a spade – that appellee engaged in what must be called misconduct under the applicable legal standard... There is no need for us to determine how many angels dance on the head of that particular pin, however, for what transpired thereafter was unarguably in dereliction of appellee's duty")

The district court's analysis proceeded from fundamentally flawed premises: that Vector 2 "informed" Steele of anything when it appeared (it did not); that Vector

2 specifically "informed" Steele that Vector 2 was the correct party (which it was not); and that Steele made the conscious and informed decision to drop Vector from the lawsuit in favor of Vector 2 (which he did not).

The district court next held that Vector was "entitled" to assume it had no obligation to "answer the complaint or defend against the lawsuit" because it was "not mentioned" in Steele's Amended Complaint. App-986. The district court cites to Connectu v. Zuckerberg, 522 F.3d 82, 91 (1st Cir. 2008) to state "when a party is omitted from the complaint, it is entitled to conclude that it has no obligation to answer the complaint or defend against the lawsuit." App-986. The crucial distinction in Connectu, however not noted by the court, is that the Connectu plaintiff "amended its complaint before the defendants filed a responsive pleading," whereas here defendants not only appeared and defended against the original Complaint, but Appellees defaulted on the original Complaint, before Steele filed his (then clouded) amended complaint.

The district court's analysis retroactively excuses Vector's default based on something that hadn't happened yet: Steele's January 30, 2009 filing of his Amended Complaint, App-73, by which point Vector had already been in default for over a month (having been served on December 8, 2008). App-891. See Anderson v.

Cryovac, 862 F.2d 910, 924 (1st Cir. 1988) (“[S]ince parties ought not to benefit from their own mis-, mal-, or nonfeasance, uncertainties attending the application of hindsight in this area should redound to the movant’s benefit”).

The district court further justifies Vector’s default insofar as Vector “could not have been expected to question its own status” until the district court held, in its April 3, 2009 Memorandum and Order, that the complaints would be read together. App-986. This justification is fatally flawed as well because Steele’s Amended Complaint was never served on Vector. App-1.

Accordingly, the only complaint of which Vector was aware (using the district court’s logic) was the one properly served on – and ignored by - Vector, that is, Steele’s initial complaint, which named Vector in both its caption and body. App-31. See also Exhibit A to Steele Complaint (retained by clerk and not uploaded to ECF/PACER as “too voluminous”). Therefore, Vector never had “notice” of the amended complaint that allegedly “omitted” it, and cannot now rely on it to excuse its failure to respond to the original complaint.²⁵

²⁵The district court’s conclusion that Steele’s “eight months of correspondence with Vector Management” prior to filing suit did not “constitute legal notice,” App-987, is born of identical logic: Either notice is legal or it is not. Vector’s only “legal notice” was Steele’s original complaint.

The district court further states that its April 3, 2009 Order dismissed all claims against Vector's proxy, Vector 2 "and Steele did not thereafter suggest that any claims were still pending against Vector Management." App-986. This makes no sense: while the April 3, 2009 Order may have dismissed Vector 2, Vector was still in default. Neither the district court nor Vector (nor Vector 2) cite any authority for the proposition that Steele had the burden of not only revealing Vector 2's false appearance for what it was – an attempt to act for, and conceal, Vector, as its proxy - and "timely" uncover Vector's well-concealed default, and also to make additional allegations to "suggest that any claims were still pending" as to the still-in-default Vector, lest Vector be deemed dismissed as well.

The district court next cites its earlier decision which held that "Vector 2 was not mentioned anywhere in either complaint," App 986, now finding that "[t]he same is true for Vector Management, no mention of which is made in the text of either complaint." App986-987.²⁶

²⁶ The district court applies identical reasoning as to Vector's failure to respond to service of process, App-10-11, and as to whether Steele's facts state a claim, App-11-12.

First, the district court is mistaken insofar as Vector Management is named in Steele's original complaint, both in the body and in Exhibit A thereto, which additionally lists Vector's Principal, Jack Rovner. See Exhibit A to App-31.

More fundamentally, the district court failed to take into consideration Vector's willful default and Vector 2's simultaneous false proxy appearance, both of which fraudulently – and intentionally – induced Steele to name Vector 2 in his amended complaint rather than Vector. Steele neither “dropped” Vector nor “added” Vector 2; based on Skadden's representations, which Steele unfortunately believed, Steele reasonably assumed Vector 2 was Vector, the difference being one of name only.

Putting aside for a moment that the behavior of Vector, Vector 2, and Skadden constituted fraud on the court of the highest magnitude and is – and should be – sanctioned by entering default judgment against the perpetrators, Steele's allegations as to Vector in his complaint and Vector 2 in his amended complaint, when read together as the district court ordered, clearly state a claim. App-31, 73-75.

Under any fair reading, given the duplicity and deception of Vector and Skadden towards Steele, Vector, as Bon Jovi's management company, is clearly implicated as an infringing party. See Id.

Of course, at this late date – nearly two years after Defendants’ and Skadden’s fraudulent scheme began with their December 8, 2008 false appearance for Vector 2 on the day Vector was served (and, incidentally, the first time Skadden filed their falsely sworn-to audiovisual evidence) – what Steele stated in his complaint is simply not of the moment. The First Circuit is faced here with a far, far more vexing issue: how to stop, address, and prevent such broad conspiratorial scheming against judicial process in its own courts.

The district court’s statements – that “Vector Management’s failure to respond or defend was understandable and was not done willfully or in bad faith,” App-987 – and second, that “regardless of the substitution of Vector 2 for Vector Management... the allegations against the former were insufficient to state a claim...,” App-989, merely underscore the toxicity of Defendants’ insidious acts. App-987, 989 (emphasis supplied). That the district court, with the record it had before it, drew such such conclusions, speaks volumes.

G. Defendants’ Fraud on the Court Trumps Preclusive Effect of Defendants’ Fraudulently Obtained Judgment

The district court held that entry of default would be futile because Steele’s claims against Vector and MLBAM, if allowed, would be barred by issue preclusion. App-989. However, Vector and MLBAM’s fraud on the court and other misconduct

described herein, in fact, bars the application of issue preclusion as to the fraudulently obtained judgment. See George P. Reintjes Co., Inc. v. Riley Stoker Corp., 71 F.3d 44, 47 (1st Cir. 1995); Tri-Cran, Inc., v. Fallon (In re Tri-Cran, Inc.), 98 B.R. 609, 616 (Bankr.D.Mass. 1989); Medina v. Chase Manhattan Bank, N.A., 737 F.2d 140, 144 (1st Cir. 1984); Indian Head Nat. Bank of Nashua v. Brunelle, 89 F.2d 245, 249 n.8 (1st Cir. 1982).

H. Defendants' Fraud on the Court and Abuse of Judicial Process Transcends Any "Good Cause" Analysis and Warrants Sanctions, including Default Judgment Against Defendants

Independent of the equity involved in defeating preclusion, fraud in and of itself is a basis for entry of judgment, or default judgment as to MLBAM, Vector, and, indeed, all culpable Defendants and their counsel, particularly with the unprecedented scope of fraud herein. This Court possesses the inherent power to "deny the court's processes to one who defiles the judicial system by committing a fraud on the court." See Aoude v. Mobil Oil Corp., 892 F.2d 1115, 1118 (1st Cir. 1989) (claim dismissed after plaintiff and attorney conspired to present falsified evidence committing fraud on the court).

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").

VIII. RELIEF REQUESTED

Appellant Steele respectfully requests that this Honorable Court:

1. Reverse the district court's September 27, 2010, August 19, 2009, and April 3, 2009 Orders and issue an Order to Show Cause why sanctions should not be imposed against all Defendants pursuant to Local Rule 38 of the Federal Rules of Appellate Procedure and the inherent power of this Court in the form of an order directing the district court to:

- A. Enter judgment in favor of Steele as to all Defendants;
- B. Conduct a hearing as to damages;
- C. Conduct a hearing requiring all counsel and pertinent parties, including Steele and the undersigned, to give sworn testimony, on the existence and extent of Defendants and their counsel's violations of law and/or standards

of practice arising from their conduct during this case and, where necessary, refer to the matter to the appropriate authority for investigation;²⁷

2. Disqualify all current and former Defendants' counsel from further participation in any further proceedings upon remand of this case and from any other current or future cases or matters arising from the underlying facts of this case;

IX. FIRST ALTERNATIVE RELIEF REQUESTED

In the first alternative, Steele respectfully requests that this Honorable Court:

1. Reverse the district court's September 27, 2010 Order and direct the district court to enter judgment for Appellant Steele as to Appellees MLBAM and Vector and to conduct a hearing as to damages;

2. Reverse the district court's August 19, 2009 Order and direct the district court to enter judgment for Appellant Steele as to all Defendants subject to said order and to conduct a hearing as to damages;

3. Reverse the district court's April 3, 2009 Order and direct the district court to enter judgment for Appellant Steele as to all Defendants subject to said order and to conduct a hearing as to damages;

²⁷ See Anderson 862 F.2d at 932 (district court ordered, on remand, to conduct evidentiary hearing to determine whether appellee knowingly or intentionally concealed evidence and whether it acted alone or in concert with other parties).

4. Disqualify all current and former Defendants' counsel from further participation in any further proceedings upon remand of this case and from any other current or future cases or matters arising from the underlying facts of this case;

and,

5. Direct the district court to conduct a hearing requiring all counsel and pertinent parties, including Steele and the undersigned, to give sworn testimony, on the existence and extent of Defendants and their counsel's violations of law and/or standards of practice arising from their conduct during this case and, where necessary, refer to the matter to the appropriate authority for investigation;

X. SECOND ALTERNATIVE RELIEF REQUESTED

In the second alternative, Appellant Steele respectfully requests that this Honorable Court:

1. Reverse the district court's September 27, 2010 Order and direct the district court to enter default judgment as to Appellees MLBAM and Vector and to conduct a hearing as to damages;

2. Reverse the district court's August 19, 2009 and April 3, 2009 Orders and direct the district court to proceed with the case in a manner consistent with this Court's Opinion;

3. Disqualify all current and former Defendants' counsel from further participation in any further proceedings upon remand of this case and from any other current or future cases or matters arising from the underlying facts of this case;

and,

4. Direct the district court to conduct a hearing requiring all counsel and pertinent parties, including Steele and the undersigned, to give sworn testimony, on the existence and extent of Defendants and their counsel's violations of law and/or standards of practice arising from their conduct during this case and, where necessary, refer to the matter to the appropriate authority for investigation;

XI. CONCLUSION

WHEREFORE, Steele respectfully requests that this Honorable Court reverse the district court's September 27, 2010 Order and remand this case with an order for judgment in favor of Steele as outline in the above Relief Requested sections.

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Dated: December 6, 2010

CERTIFICATE OF SERVICE

I, Christopher A.D. Hunt, hereby certify that on December 6, 2010, I caused this Brief of Appellants Samuel Bartley Steele, Bart Steele Publishing, and Steele Recordz, filed through the ECF system, to be served electronically by the Notice of Docket Activity upon the ECF filers listed below. On December 6, 2010, copies of the appendix were sent to the clerk of the First Circuit Court of Appeals and to counsel for appellees, Christopher G. Clark, at the address listed below.

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No. 10-2173

**United States Court of Appeals
For the First Circuit**

SAMUEL BARTLEY STEELE; BART STEELE PUBLISHING; STEELE RECORDZ
Plaintiffs - Appellants

v.

VECTOR MANAGEMENT; MLB ADVANCED MEDIA, L.P.
Defendants - Appellees

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 COMPANY; MAJOR LEAGUE BASEBALL PROPERTIES, INC.; MLB PRODUCTIONS, A & E; A & E/AETV; BON JOVI; AEG LIVE, LLC; MARK SHIMMEL MUSIC; 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; THE AMERICAN SOCIETY OF COMPOSERS; FOX TELEVISION STATIONS, INC.; ISLAND RECORDS, a/k/a Island Def Jam Records; THE BIGGER PICTURE CINEMA CO.
Defendants

**ADDENDUM TO BRIEF OF APPELLANTS SAMUEL BARTLEY
STEELE; BART STEELE PUBLISHING; STEELE RECORDZ**

Christopher A.D. Hunt
The Hunt Law Firm LLC
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United States District Court
District of Massachusetts

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SAMUEL BARTLEY STEELE, BART)	
STEELE PUBLISHING, STEELE)	
RECORDZ,)	
Plaintiffs,)	Civil Action No.
)	08-11727-NMG
v.)	
)	
TURNER BROADCASTING SYSTEM,)	
INC.,)	
Et al,)	
Defendants.)	
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)	
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MEMORANDUM & ORDER

GORTON, J.

Plaintiff Samuel Bartley Steele ("Steele") brought this case against numerous defendants for copyright infringement. He claimed that a song he wrote about the Boston Red Sox was unlawfully copied and used to create a promotion for post-season baseball telecasts.

I. Factual Background

Steele's claim for copyright infringement arose from an advertisement produced and aired by the defendant Turner Broadcasting System, Inc. ("TBS") during the 2007 Major League Baseball ("MLB") post-season ("the TBS Promo"). The TBS Promo features a song by the popular band Bon Jovi entitled "I Love

This Town" ("the Bon Jovi Song") along with baseball video footage. In addition to TBS, Steele's complaint named Bon Jovi front-man John Bongiovi and guitarist Richard Sambora as defendants. Also named in the amended complaint were William Falcone, Time Warner Corporation, Major League Baseball Properties, the Red Sox, A&E Television Networks, AEG Live, Mark Shimmel Music, Universal Music Publishing, Universal Polygram International Publishing, The Bigger Picture Cinema Co., Island Def Jam Records, Kobalt Music Publishing America, Inc., Fox Broadcasting Company, Sony ATV Tunes LLC and Vector 2 LLC ("Vector 2").

Steele asserts that the Bon Jovi Song and the TBS Promo infringe his copyright. With respect to the TBS Promo, Steele contends that it was unlawfully derived from his work through a method called "temp tracking." According to Steele, that term refers to the use of a song as a template to create an audiovisual work which, in turn, is used to create a final soundtrack. According to Steele, much of the visual portion of the TBS Promo is derived from his song and the Bon Jovi Song was then based upon that Promo, the Steele Song or both.

II. Procedural History

Steele filed his initial complaint pro se on October 8, 2008 (“Steele I”). On April 3, 2009, the Court dismissed his Lanham Act and Chapter 93A claims, as well as all claims against several defendants. Steele v. Turner Broad. Sys., Inc., 607 F. Supp. 2d 258 (D. Mass. 2009). The Court declined to dismiss the copyright infringement claims and instead permitted limited discovery related to those claims. Id. at 265. After that discovery, in a Memorandum and Order dated August 19, 2009, the Court granted summary judgment to the Defendants finding no substantial similarity between Steele’s song and that of the Defendants. Steele v. Turner Broad. Sys., Inc., 646 F. Supp. 185 (D. Mass. 2009). On October 13, 2009, the Court denied Steele’s motion for reconsideration. Steele then appealed to the First Circuit Court of Appeals this Court’s orders allowing Defendants’ motions to dismiss and for summary judgment and denying Steele’s motion for reconsideration. That appeal remains pending.

Steele has since hired an attorney and now moves for entry of default judgments against MLB Advanced Media, L.P. (“MLBAM”) and Vector Management. Those motions were filed 18 months after the filing of the amended complaint. Steele explains that he did not move for entry of default judgment against MLBAM earlier because, as a pro se plaintiff, he was unfamiliar with the possibility of a default judgment and did not notice MLBAM’s

failure to appear in the case. His newly retained counsel was unaware of MLBAM's default until June 12, 2010, six days before he filed the motion for entry of default, when he was reviewing the district court docket and case file. Steele's attorney states that he filed that motion as soon as he discovered the default but does not explain why he did not file the motion against Vector Management earlier.

On September 15, 2010, all of the Defendants named in the amended complaint moved for Rule 11 sanctions against the plaintiff based on Steele's filing of a motion for entry of default against Vector Management. The Defendants served the motion for sanctions on Steele and his attorney on August 24, 2010, stating that the motion would be filed on or after September 15, 2010 if Steele did not withdraw the motion for entry of default against Vector Management. Steele, therefore, was afforded the requisite 21 days to withdraw his motion. Instead, he opposed the Rule 11 motion in writing.

On September 21, 2010, the Defendants filed a second Rule 11 motion for sanctions against the plaintiff, this time based on Steele's filing of a motion for entry of default against MLBAM.

III. Analysis

A. Jurisdiction

Vector Management and MLBAM were not parties to the Court's August 19, 2009 Memorandum and Order and, therefore, it is within this Court's jurisdiction to enter a default judgment against them, if warranted, regardless of the First Circuit's decision with respect to the August 19, 2009 Memorandum and Order.

B. Vector Management is Treated as a Party

Steele named Vector Management in the caption of his original complaint but not in his amended complaint, in which he named Vector 2 instead. An amended complaint normally supercedes the original complaint and the earlier complaint "is a dead letter and no longer performs any function in the case."

Connectu LLC v. Zuckerberg, 522 F.3d 82, 91 (1st Cir. 2008) (internal quotations omitted). As a result, any defendants listed in the original complaint but not the amended complaint are considered to have been dismissed as parties to the lawsuit. See id.

Normally, therefore, Vector Management would not be considered a party to the lawsuit and plaintiff's motion for entry of default as to Vector Management would be denied as moot. In its Memorandum and Order of April 3, 2009, however, this Court held that, because of Steele's pro se status, the Court would read his original and amended complaints together. Steele, 607

F. Supp. 2d at 262. Thus, the Court proceeds on the basis that Vector Management is named as a defendant in a viable complaint.

C. Motion for Entry of Default

1. Standard for Entry of Default

Under Fed. R. Civ. P. 55(b)(2), a plaintiff may request that the Court enter a default judgment against a defendant who was served with process and failed to appear or otherwise defend the action. The Court's decision on such a motion is discretionary, however, and default judgments are "ordinarily disfavored". Eitel v. McCool, 782 F.2d 1470, 1472 (9th Cir. 1986). Courts should decide cases upon the merits "whenever reasonably possible." Id.

In deciding whether to enter a default judgment, it is prudent for the Court to consider whether that judgment will subsequently be set aside, thus rendering the entry of default judgment futile. The determination of whether to set aside an entry of default is case-specific and must "be made in a practical, commonsense manner, without rigid adherence to, or undue reliance upon, a mechanical formula." KPS & Assocs., Inc. v. Designs By FMC, Inc., 318 F.3d 1, 12 (1st Cir. 2003) ("KPS"). The First Circuit has laid out a non-exhaustive list of factors that courts may consider when determining whether good cause exists to set aside a default judgment:

- (1) whether the default was willful;
- (2) whether setting it aside would prejudice the adversary;
- (3)

whether a meritorious defense is presented; (4) the nature of the defendant's explanation for the default; (5) the good faith of the parties; (6) the amount of money involved; (7) the timing of the motion [to set aside entry of default].

Id.

2. Application

a. Proper Service and Failure to Respond or Otherwise Defend

(1) Vector Management

Steele's claims against Vector Management are based on his allegation that it was Bon Jovi's manager from 2005 until June 20, 2010. Vector Management's General Manager, Joel Hoffman, personally accepted service in this case on December 8, 2008 at 1607 17th Avenue S., Nashville, Tennessee. On the same day, Vector 2, a wholly owned subsidiary of Vector Management, filed an appearance and, in its corporate disclosure statement, informed Steele that he had incorrectly named Vector Management as a defendant. Vector Management allegedly told Steele that it had no connection to Bon Jovi and that the correct target for Steele's allegations was Vector 2 which had acted as a personal manager for Bon Jovi.

In his amended complaint, Steele removed Vector Management from the caption and pleadings and replaced it with "Vector 2 LLC". Vector Management does not deny that it has not appeared or otherwise defended against Steele's claims and therefore defaulted with respect to the original complaint. Technically,

Vector Management should have responded before the amended complaint was filed almost four months later.

(2) MLBAM

MLB responds on behalf of MLBAM despite the fact that it maintains that they are separate entities. MLB asserts that MLBAM cannot be defaulted because it was never served with process. The docket indicates that, on November 17, 2008, Steele served a summons at MLBAM's headquarters, 75 Ninth Avenue, 5th Floor, New York, New York but the summons was addressed to "MLB Productions/MLB.com" and "Major League Baseball", not MLBAM.

It is unclear from the facts presented in the pleadings what the relationship is between MLB and MLBAM. According to Steele, the name on the summons was correct because MLBAM owns, operates and does business as both MLB Productions and MLB.com. Steele presents evidence that MLBAM is commonly referred to by other names such as "MLB.com" and "Major League Baseball" and argues that MLB and MLBAM are collaborating to shield MLBAM from this lawsuit. Indeed, it is worth noting that MLB filed the opposition to Steele's motion to default MLBAM and yet claims that MLBAM is a separate legal entity.

MLB maintains that MLBAM was not served with process because MLBAM and MLB Productions are entirely separate entities. MLB Properties, Inc. is a New York corporation and is among the defendants in whose favor summary judgment was granted by this

Court. MLB Productions is a division of MLB Properties, Inc. and deals with video and audio production. MLBAM is a Delaware limited partnership owned by MLB Media Holdings, L.P. and MLB Advanced Media, Inc. MLBAM is responsible for MLB.com and various other internet activities of MLB clubs and entities.

An incorrect name on a summons does not necessarily invalidate proper service. In fact, the "misnomer of a corporation in a summons is immaterial if it appears that the corporation could not have been, or was not, misled." In re Pharm. Indus. Average Wholesale Price Litig., 307 F. Supp. 2d 190, 196 (D. Mass. 2004). Thus, because the summons was served at MLBAM's headquarters and used a name that included "MLB.com", which MLB admits is an entity for which MLBAM is responsible, MLBAM was adequately served with process. MLB does not deny that MLBAM failed to appear or otherwise defend. It appears, therefore, that MLBAM did technically default, although it remains unclear why MLB has (figuratively) picked up its banner.

b. Entry of Default Should be Denied Because it is Futile

Even though the subject Defendants were properly served and did not respond or otherwise defend against Steele's claims, the Court will deny the motions for entry of a default because such a determination would be futile. It would be futile because, based on the factors laid out in KPS, an entry of default would subsequently be set aside for good cause pursuant to Fed. R. Civ.

P. 55(c).

(1) Factors 1, 4, 5: Whether the Default was Willful, The Nature of the Defendants' Explanation for the Default and The Good Faith of the Parties

(a) Vector Management

The motion for entry of default was filed 18 months after the filing of the amended complaint from which Vector Management was omitted. Vector Management argues that a default judgment at this time would violate its due process rights because it was not named in the amended complaint. When a party is omitted from the complaint, it is entitled to conclude that it has no obligation to answer the complaint or defend against the lawsuit. See Connectu LLC, 522 F.3d at 91. Vector Management is entitled to such an assumption. It is not mentioned in the amended complaint and only after this Court's April 3, 2009 Memorandum and Order, holding that the original and amended complaints would be read together, could Vector Management have been expected to question its own status. On that same date, this Court dismissed all claims against Vector 2 and Steele did not thereafter suggest that any claims were still pending against Vector Management.

In the same Memorandum and Order, this Court held that the fact that Vector 2 was not mentioned anywhere in either complaint deprives it of clear notice of any allegations against it. Steele, 607 F. Supp. 2d at 263. The same is true for Vector Management, no mention of which is made in the text of either

complaint. Steele contends that his eight months of correspondence with Vector Management before he filed suit put Vector Management on notice that it had to defend against such a suit but correspondence before the filing of a lawsuit does not constitute legal notice. Thus, Vector Management's failure to respond or defend was understandable and was not done willfully or in bad faith.

(b) MLBAM

Even assuming that MLBAM was properly served, its failure to respond or defend is equally justified. MLBAM is not listed in the caption of Steele's original or amended complaints. The original complaint describes "Major League Baseball/MLB Productions" as a defendant. In his amended complaint, Steele names "Major League Properties, Inc." and refers to MLBAM only as a subsidiary of MLB Properties. That allegation is, without further explanation, insufficient to put MLBAM on notice that it must respond or defend itself in its own right. Thus, because neither complaint refers to MLBAM in the caption or in substantive allegations, MLBAM was not required to respond or otherwise defend.

(2) Factors 2 and 3: Whether Setting Aside the Default Would Prejudice the Plaintiff and Whether a Meritorious Defense is Presented

Factors two and three weigh conclusively in favor of denying Steele's motions for entry of default because setting aside a

default judgment would not prejudice the plaintiff and the Defendants have meritorious defenses.

A default judgment bars the defaulting party from denying the factual allegations in the complaint. Bonilla v. Trebol Motors Corp., 150 F.3d 77, 80 (1st Cir. 1998). The defaulting party can still prevail on appeal, however, by demonstrating that, as matter of law, the facts as alleged fail to state a claim upon which relief can be granted. See id. In its April 3, 2009 Memorandum and Order, this Court dismissed all claims against Vector 2 because, although it was identified in the caption of the amended complaint, no specific allegations were made against it in either the original or amended complaint. Steele, 607 F. Supp. 2d at 263.

Likewise, apart from the caption in the original complaint, Vector Management is not mentioned in either complaint, nor is MLBAM but for the oblique reference in the amended complaint to its corporate relationship with MLB Properties. Even if taken as true, that allegation alone is insufficient to state a claim upon which relief can be granted. Thus, even if the motion for entry of default were allowed, Steele's claims against Vector Management and MLBAM would be dismissed for failure to state a claim upon which relief can be granted.

Steele suggests that any deficiency in the amended complaint was caused by the misconduct and fraud of defense counsel and

Vector Management. That argument is unavailing because, regardless of the substitution of Vector 2 for Vector Management, the allegations against the former were insufficient to state a claim upon which relief can be granted. Steele, 607 F. Supp. 2d at 263.

Furthermore, on August 19, 2009, this Court granted summary judgment to the remaining Defendants on the copyright infringement claims because there was no substantial similarity between Steele's song and the one used by the Defendants. Consequently, even if Steele were allowed to proceed against Vector Management and MLBAM, issue preclusion (or collateral estoppel) would bar Steele from re-litigating the issue of substantial similarity. Issue preclusion bars a party from re-litigating an issue of fact or law when that issue has been "actually litigated and resolved in a valid court determination essential to the prior judgment." Taylor v. Sturgell, 553 U.S. 880, 128 S. Ct. 2161, 2171 (2008).

Here, the issue of substantial similarity was 1) actually litigated, 2) resolved in a valid court determination and 3) essential to the judgment on August 19, 2009. See Steele, 607 F. Supp. 2d at 265. Issue preclusion will undermine a plaintiff's claim even against defendants who were not parties to the first litigation. O'Neill v. Dell Publishing Co., 630 F.2d 685, 690 (1st Cir. 1980). Accordingly, Steele does not have a legal basis

for recovery against Vector Management or MLBAM and entry of default would be futile.¹

(3) Factor 5: The Good Faith of the Parties

Steele alleges that the Defendants are 1) colluding to protect MLBAM from the lawsuit, 2) have made a number of misrepresentations to the Court and 3) successfully intimidated an attorney who Steele sought to retain. Steele also alleges that Vector Management misled him into mistakenly naming Vector 2 as a party-defendant and that the Defendants have not acted in good faith in connection with his motions for default.

Steele does not, however, explain how his allegations have any bearing on the Court's decision with respect to these motions and offers no evidence of bad faith on the part of the Defendants. In sum, given the futility of an entry of default, the Court will deny Steele's motions to do so.

3. Steele's Failure to Comply with Local Rule 7.1

MLB argues that the motion for entry of default should be denied because Steele failed to comply with Local Rule 7.1. Under Local Rule 7.1, counsel must confer with opposing counsel before filing a motion for entry of default. D. Mass. R. 7.1(A)(2). Failure to do so may result in sanctions. See,

¹ Steele's claims against Vector Management and MLBAM may also be precluded under the doctrine of res judicata but, because this Court will dismiss these claims on two other grounds, the Court does not address that issue.

e.g., Converse Inc. v. Reebok Intern. Ltd., 328 F. Supp. 2d 166, 171 (D. Mass. 2004) (imposing \$15,000 in sanctions for failure to comply with Local Rule 7.1). Steele maintains that MLB has failed to confer in good faith with him. The Court agrees that prior consultation is an important precursor to motion practice but does not find the breach of that procedure in this case to be controlling.

4. Vector Management's Request for Attorney's Fees, Costs and Expenses Incurred in Opposing the Motion for Entry of Default

Vector Management requests that the Court order Steele's counsel to pay attorney's fees, costs and expenses incurred in opposing the motion for entry of default pursuant to 28 U.S.C. § 1927. Under that statutory provision, the Court may award attorney's fees and costs to the adverse party if an attorney "so multiplies the proceedings in any case unreasonably and vexatiously". It was, perhaps, unreasonable for counsel to file the motion for entry of default against Vector Management because, for the reasons explained above, an entry of default is clearly futile. There is no evidence, however, that Steele filed the motion in bad faith or "vexatiously". Thus, the Court declines to order Steele to reimburse Vector Management for its attorney's fees, costs and expenses incurred in opposing this motion on that basis.

D. Defendants' Motions for Sanctions

The Defendants named in the amended complaint have moved for sanctions pursuant to Fed. R. Civ. P. 11(c)(2). They seek sanctions against Steele and his attorney, Christopher A.D. Hunt, on the purported grounds that Steele's motions for entry of default against Vector Management and MLBAM are frivolous. The Defendants also contend that Steele's motion with respect to MLBAM was filed to harass MLB Properties and the other Defendants. They request that the Court order Steele and his counsel jointly and severally to pay a penalty to the Court and award the Defendants their reasonable attorneys' fees and costs.

Steele responded to the first motion for sanctions, arguing that he did not withdraw his motion for entry of default against Vector Management because the Defendants' counsel refused to provide any additional information about Vector 2's appearance in lieu of Vector Management.

Although, in retrospect, the filing of plaintiff's motions was ill-advised and perhaps unnecessary, the Court declines to find them so frivolous as to warrant the imposition of sanctions. Plaintiff and his counsel are, however, forewarned that any further motion practice in this regard will be looked upon askance.

ORDER

In accordance with the foregoing, Steele's motions for entry of default (Docket Nos. 118 and 125) are **DENIED** and the Defendants' motions for sanctions (Docket Nos. 131 and 134) and request for attorney's fees and costs are **DENIED**.

So ordered.

/s/ Nathaniel M. Gorton
Nathaniel M. Gorton
United States District Judge

Dated September 27, 2010

EXHIBIT 1

THE HUNT LAW FIRM LLC

10 Heron Lane
Hopedale, MA 01747
(508) 966-7300
(508) 478-0595 (fax)
cadhunt@earthlink.net

VIA ELECTRONIC MAIL

October 11, 2010

Clifford M. Sloan, Esq.
Skadden Arps Slate Meagher & Flom LLP
1440 New York Ave., N.W.
Washington, DC 20005-0000

Re: Steele II Status Following Court's September 27, 2010 Order
Steele v. Bongiovi, et al., No. 1:10-cv-11218-DPW (Steele II)

Dear Attorney Sloan:

I write about a fact issue relating to Steele II arising from to the Court's September 27, 2010 Order ("Order") in Steele I (08-11727). Steele II is based on 17 U.S.C. §§ 1202 and 1203, prohibiting removal or alteration of copyright management information, e.g., a copyright notice. The factual basis of Steele II is defendants' unauthorized removal of MLBAM's copyright notice from the MLB Audiovisual:

Defendant[s], without the authority of the copyright owner or law, intentionally removed or altered, or knowingly and materially contributed to the intentional removal or alteration of, copyright management information from the MLB Audiovisual, including information set forth in MLBAM's notice of copyright... See, generally, Steele II Complaint (emphasis supplied).

The Order found that "MLBAM was adequately served with process," Order at 9, leaving open the possibility that MLBAM was aware of, and authorized, removal of the MLBAM copyright notice from the MLB Audiovisual filed with the Court. If MLBAM did, in fact, authorize removal of the copyright notice, Steele, in good faith, would have no choice but to dismiss Steele II.

However, as the record stands, MLBAM's authority or lack thereof is an open question. If MLBAM will confirm in writing that it authorized the removal of its copyright notice from the MLB Audiovisual filed in Steel I, Steele will dismiss Steele II. Out of an abundance of caution, dismissal of Steele II would be without prejudice. However, barring new or newly discovered evidence contrary to MLBAM's confirmation that it authorized removal of the copyright notice (if provided), Steele will not re-file or otherwise assert §§1202 and 1203 violations arising from the MLB Audiovisual filed in Steele I.

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Accordingly, I ask that you provide confirmation that MLBAM authorized removal of its copyright notice from the MLB Audiovisual, if possible, at which point Steele will immediately dismiss Steele II. If, on the other hand, MLBAM did not authorize removal of its copyright notice or if you are unwilling or unable to determine whether MLBAM gave such authorization, please so advise. In that event, Steele will have no choice but to maintain Steele II.

At this point, the Steele II summonses have not yet been forwarded to the U.S. Marshal's office for service of process. Given the Order, Steele decided that, without providing MLBAM the opportunity to clarify its authority or lack thereof, Steele could not pursue Steele II in good faith.

Accordingly, I request that you respond at your earliest convenience. If we do not hear from you by Thursday, October 14, 2010, we will have no choice but to assume MLBAM did not authorize removal of its copyright notice and will proceed with service of process. If you need additional time to procure MLBAM's written confirmation, please so advise as soon as possible and we will endeavor to accommodate any reasonable request.

In the meantime, if you need any further clarification or have any questions, please do not hesitate to contact me.

Thank will you for your attention to this matter.

Very truly yours,



Christopher A.D. Hunt

cc: Kenneth A. Plevan, Esq. (via e-mail)
Scott D. Brown, Esq. (via e-mail)
Matthew J. Matule, Esq. (via e-mail)
Christopher G. Clark, Esq. (via e-mail)

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October 14, 2010

BY EMAIL AND FIRST CLASS MAIL

Christopher A.D. Hunt, Esq.
The Hunt Law Firm LLC
10 Heron Lane
Hopedale, Massachusetts 01747

RE: Steele II

Dear Mr. Hunt:

This letter responds to your October 11, 2010 letter, addressed to my colleague Clifford M. Sloan, regarding *Steele v. Bongiovi*, No. 10-11218-DPW (D. Mass. filed July 20, 2010) (Woodlock, J.) ("*Steele II*").

While your letter purports to outline a course of action that could result in the withdrawal of *Steele II* without prejudice, in our view your letter was not sent in good faith. This is because the letter repeatedly *assumes* that a copyright notice was removed from the version of the "Turner Promo" submitted by defendants to Judge Gorton in "*Steele I*."¹ Indeed, your two-page letter employs the word "removal" ten times. However, as we have previously advised you,² no copyright notice was in fact removed from said version of the Turner Promo,

¹ *Steele v. Turner Broadcasting System, Inc.*, No. 08-11727-NMG (D. Mass. filed Oct. 8, 2008) (Gorton, J.)

² See, e.g., Letter dated September 13, 2010 from Kenneth Plevan to Christopher A.D. Hunt at 2 ("[N]either this firm, nor any of its attorneys, removed an MLBAM copyright notice, or any other copyright notice, from what we had referred to as the 'Turner Promo' submitted to and considered by the Court in granting summary judgment dismissing Plaintiffs' copyright claim. Nor, to the knowledge of this firm and its attorneys, did any defendant 'remove' any copyright notice from the Turner Promo.").

Christopher A.D. Hunt, Esq.
October 14, 2010
Page 2

notwithstanding your repeated and baseless assertions to the contrary. Accordingly, having not removed any copyright notice, there was no occasion for any defendant in *Steele II* to have considered whether the consent of a copyright owner should be solicited or was required.

We note next that in connection with the series of *Steele* lawsuits, you have sent numerous such letters to one or more defendants. You then place each, and their responses, in the public record, leading us to conclude that (i) none have been sent in good faith, but in an effort to seek to gain a tactical advantage, and (ii) the letters are part of the effort by you and Mr. Steele to harass defendants with baseless litigation tactics.

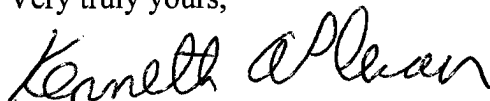
Next, we note that the so-called alteration/removal issue has been raised by plaintiffs in *Steele I* no less than *five times*. (See, e.g., Motion for Entry of Default as to MLBAM at 7-8; Reply Memorandum of Law in Support of Motion for Entry of Default as to MLBAM at 6; First Circuit Opening Brief at 18-19; First Circuit Reply Brief at 8-9; First Circuit Motion for Sanctions at 7-8.) You have never provided any proper rationale for using that allegation as the basis for an independent lawsuit.

Next, as you also know, after considering several of your filings raising the removal/alteration issue, the *Steele I* District Court concluded that although “Steele alleges that the Defendants . . . have made a number of misrepresentations to the Court Steele does not, however, explain how his allegations have any bearing on the Court’s decision with respect to these motions and offers no evidence of bad faith on the part of the Defendants.” (Memorandum & Order dated September 27, 2010 (Docket No. 136). That express rejection of Steele’s baseless removal/alteration allegation further confirms that *Steele II* is on its face meritless as a matter of law.

In conclusion, we note that there are several additional grounds for the dismissal of *Steele II* on the face of the Complaint as a matter of law, however, no useful purpose would be served by outlining them here.

You note that process in *Steele II* has not been served. You should withdraw *Steele II* with prejudice, as it is completely without merit and constitutes the kind of improper conduct regarding which you and Mr. Steele have now been “forewarned” by Judge Gorton. Defendants reserve the right to seek sanctions if the lawsuit is not promptly withdrawn with prejudice.

Very truly yours,



Kenneth A. Plevan

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VIA ELECTRONIC MAIL

October 20, 2010

Kenneth A. Plevan, Esq.
Skadden Arps Slate Meagher & Flom LLP
Four Times Square
New York, NY 10036-6522

Re: Steele v. Bongiovi, et al., No. 1:10-cv-11218-DPW (Steele II)

Dear Mr. Plevan:

This will respond to your October 14, 2010 letter replying to my offer to conditionally withdraw Steele II.

Steele II does not allege that the MLBAM copyright notice was removed from "the version of the 'Turner Promo' submitted by defendants to Judge Gorton in '*Steele I*,'" or that a "copyright notice was in fact removed from said version of the Turner Promo," or that the notice was removed "from what [you] had referred to as the 'Turner Promo' submitted to and considered by the Court." See October 14, 2010 letter, 1-2, and 1 n.2 (emphasis supplied). Obviously, that "version" did not contain the MLBAM copyright notice, so there was nothing to "remove;" denying that the copyright notice was "removed" from a "version" that did not contain the copyright notice is meaningless.

The infringing audiovisual at issue in Steele I, and therefore in Steele II, is the actual final, published, and public audiovisual that Steele (and millions of others) saw beginning on August 27, 2007 at MLB.com and that was played at thousands of theaters, ballparks, and other public venues nationally and around the world. It displays the MLBAM copyright notice.

The infringing audiovisual at issue is not, and by definition could not be, the draft, unpublished, and non-public audiovisual dated August 20, 2007 and titled "VERSION: FINAL 2," which did not contain the MLBAM copyright notice, and which Defendants filed - and represented to the Court as a "true and correct" copy of the infringing audiovisual - with the Court in Steele I.¹

¹ For clarity, I will refer to the infringing work at issue in Steele I and Steele II as the "MLB Audiovisual" and to the audiovisual Defendants filed in Steele I as "Defendants' Audiovisual."

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The issue in Steele II, therefore, is simple: whether Defendants submitted an accurate ("true and correct") copy of the infringing work at issue, i.e., the MLB Audiovisual, which, by definition, includes the MLBAM copyright notice. The answer is clearly no, which you now concede by referring only to the "version" (not copy) Defendants filed with the Court.

However, at the time of filing, Defendants represented - in Declarations (made under penalty of perjury) and in numerous other Court filings - that their Audiovisual was a "true and correct" copy of the MLB Audiovisual. Defendants never once represented to the Court that their Audiovisual was a "version" rather than a copy of the MLB Audiovisual, as Defendants now argue.

For example, In your December 8, 2008 filings in support of Defendants' Motion to Dismiss, Defendants refer to Steele's allegations that "Turner allegedly created an 'ad,'" and state that because "Steele has not included a copy of the allegedly infringing Turner Promo in his Complaint exhibits, it is submitted with the Brown Declaration as Exhibit 1 thereto." See Defendants Memorandum of Law in Support of Motion to Dismiss (Docket entry 18) at 3 and at 3 n.3.

The February 18, 2009 Declaration of Scott D. Brown in support of Defendants' Motion to Dismiss (Docket entry 50), states the following:

A true and correct copy of an audiovisual file of the promotional video (referred to by plaintiffs in the Amended Complaint as an "ad") that Defendant Turner Broadcasting System Inc. is alleged in paragraph 27 of the Amended Complaint to have created to promote the 2007 postseason (the "TBS Promo") is contained in the DVD submitted herewith as Exhibit 1.

See February 18, 2009 Brown Declaration at 2, ¶ 2.

Paragraph 27 of Steele's Amended Complaint (Docket entry 41) refers to the announcement of the "full length promo" of the audiovisual. See Steele Amended Complaint at ¶ 27. The "full-length promo" of the audiovisual as described in Paragraph 27 of Steele's Amended Complaint is, of course, the MLB Audiovisual, which contains the MLBAM copyright notice.

The June 10, 2009 Declaration of Scott D. Brown contains nearly identical language, identifying the enclosed DVD- Exhibit 6 - as containing a "true and correct copy" of the "promotional video" identified by Steele in paragraph 27 of his Amended Complaint to have been

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created by "Defendant Turner Broadcasting System, Inc." See June 10, 2009 Brown Declaration, ¶11.

The same June 10, 2009 Brown Declaration states that Exhibit 1 to Steele's original Complaint "comprised of an overlay of the TBS Promo visuals with Steele's song." See Id. at ¶12 (emphasis supplied). The "visuals" to the "TBS Promo" (as defined by Defendants), contained in Exhibit 1 to Steele's original Complaint and referenced in the June 10, 2009 Brown Declaration, were visuals of the MLB Audiovisual, which contained the MLBAM copyright notice.

Defendants' Audiovisual would necessarily have to include all elements of the MLB Audiovisual, including the MLBAM copyright notice, in order to be a copy, rather than merely a "version."²

Defendants' Audiovisual, therefore, was not a "true and correct" copy of the MLB Audiovisual. The lack of MLBAM's copyright notice on Defendants' Audiovisual is the primary basis of Steele II. Whether the MLBAM copyright notice was deleted, omitted, or never a part of Defendants' Audiovisual is irrelevant to Steele II.³

What is relevant is that Defendants' Audiovisual did not contain the copyright management information "conveyed in connection with [a copy]" of the MLB Audiovisual, pursuant to §1202(c). Accordingly, the copyright management information (or lack thereof) conveyed in Defendants' Audiovisual was *de jure* removed and otherwise false. See 17 U.S.C. §§1202(a)(1), (b)(1), (c), (c)(1), (c)(3).

Accordingly, Steele rejects your attempt to sidestep the issue by referencing different "versions" of the audiovisual. Putting aside the inherent fraud of filing a materially different "version" with the Court - which you now not only explicitly acknowledge (in direct contradiction to your false representations of it as a "true and correct copy"), but brazenly attempt to use your false filing to defend Steele II - 17 U.S.C. §1202 is concerned with "copies," not "versions."

² Section 1202(c) defines the term "copyright management information" as information "conveyed in connection with copies" of a work identifying the work or the copyright owner of the work, including information contained in a copyright notice. See 17 U.S.C. §§1202(c), (c)(1), 1202 (c)(3).

³ Though it certainly would have been relevant during the litigation of Steele I.

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In sum, that Defendants' Audiovisual conveyed false and/or removed copyright management information "in connection with copies" of the MLB Audiovisual is incontrovertible. Your October 14, 2010 letter's attempt to improperly reframe the issue as one of different "versions" rather than one of "copies" merely confirms this fact.

Nonetheless, I now reiterate my offer to withdraw Steele II without prejudice if you provide a written statement from MLBAM confirming their authorization of Defendants' filing of Defendants' Audiovisual without MLBAM's copyright notice in Steele I. I am sure you realize that if MLBAM did authorize the filing of Defendants' Audiovisual, but for whatever reason you are unwilling to provide proof of that authorization now - and such evidence is later discovered - you will have forced unnecessary litigation upon the Steele II Defendants and the Court and wasted judicial resources, which is sanctionable conduct.

Conversely, if MLBAM did not authorize Defendants' filing of Defendants' Audiovisual, then the Steele II Defendants violated 17 U.S.C. §1202, and Steele II will be pursued in good faith.

If I do not hear from you by 5:00 p.m. today, I will assume MLBAM did not authorize Defendants' filing of the MLB Audiovisual and will commence service of process in Steele II.

The remaining issues raised in your letter of October 14, 2010 have little or no relevance to Steele II or my request, but nonetheless compel a response.

First, I take issue with your assertion that my letter and offer are not made in good faith. As with each and every prior correspondence to you requesting information, my purpose is to avoid unnecessary litigation, whether in the form of a new claim, as here, or attempting to avoid

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unnecessary motion practice, as with my prior letters. I will continue, where appropriate, to seek information from you that may help avoid or minimize litigation, now or in the future.⁴

Second, as you point out, Steele has raised the issue of the missing MLBAM copyright notice several times ("no less than *five times*," according to your October 14 2010 letter). Defendants, of course, have also failed to explain the absence of the MLBAM copyright notice each of the "no less than *five times*" Steele has raised the issue.⁵

Finally, as to the Court's September 27 2010 Order, you are simply wrong. The Court made no "express" findings as to the issue of the removed MLBAM copyright notice whatsoever.

Thank you for your attention to this matter.

Very truly yours,



Christopher A.D. Hunt

- cc: Clifford Sloan, Esq. (via e-mail)
- Scott D. Brown, Esq. (via e-mail)
- Matthew J. Matule, Esq. (via e-mail)
- Christopher G. Clark, Esq. (via e-mail)

⁴ As to any "tactical advantage" to Steele I can only say that any such advantage gained by Steele is the result of Defendants' inability or unwillingness to provide information in support of Defendants' claims and defenses, which Steele seeks solely to move this litigation to an expedient - but fair - conclusion. As to your claim of "harassment," you have the right - and have exercised the right - to ignore Steele's good faith requests; you also have the reciprocal right to request information or clarification from Steele. Seeking to avoid unnecessary litigation or motion practice is not "harassment," but is, in fact, lauded by the Courts.

⁵ Steele has also explained in detail in previous court filings the significance the omitted MLBAM copyright notice. In particular that it is consistent with MLBAM's default (confirmed by the Court's September 27, 2010 Order) and other facts showing an effort to improperly remove MLBAM from Steele I and to otherwise conceal infringement.

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October 20, 2010

BY EMAIL

Christopher A.D. Hunt, Esq.
The Hunt Law Firm LLC
10 Heron Lane
Hopedale, MA 01747

RE: Steele, et al. v. Turner Broadcasting System, Inc., et al., No. 08-11727-NMG (D. Mass.)

Dear Mr. Hunt:

Responding briefly to your letter of today, October 20, 2010, you still have failed to explain how a copyright notice is either (i) part of a work of authorship protected by copyright, or (ii) would have in any way impacted Judge Gorton's analysis of the copyright infringement claim in *Steele I*. We can only surmise that the "removal" issue is one contrived by you post-dismissal, in a misguided effort to try to make an "end-run" around Judge Gorton's complete dismissal of Mr. Steele's copyright claims. The *Steele II* Complaint remains, in our view, meritless as a matter of law.

Very truly yours,


Kenneth A. Plevan

EXHIBIT 2

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VIA E- MAIL AND FIRST CLASS MAIL

September 10, 2010

Christopher G. Clark, Esq.
Skadden, Arps, Slate, Meagher & Flom LLP
One Beacon Street
Boston, MA 02108

Re: MLB's Rule 11 Motion for Sanctions
"Safe Harbor"/Local Rule 7.1 Request for Information and Clarification
Steele v. Turner Broadcasting System, Inc., et al., No: 08-11727

Dear Mr. Clark:

This is to request information pertaining to MLB's August 26, 2010 Motion for Rule 11 Sanctions ("Rule 11 Motion") Based on Steele's Motion for Default as to Major League Baseball Advanced Media, L.P. ("MLBAM"). Based on our recent exchange regarding your Rule 11 Motion as to Steele's Motion for Default as to Vector, I will confirm, in advance, that there is no rule obligating you to provide me with the necessary information to understand the bases of your Rule 11 Motion.

Local Rule 7.1's requirements, however, are a little more specific insofar as you must certify that you "have conferred and have attempted in good faith to resolve or narrow the issue." Your Rule 11 Motions both state that you have served them "in a good faith attempt to resolve or narrow the issue." To anticipate your response on this, let me be clear: I am not saying you have violated Rule 7.1. I am suggesting - and requesting - that on this particular issue you might make more of a "good faith attempt to resolve or narrow the issues" given that the motion at issue is pursuant to Rule 11.

Based on your responses to my request for information relating to Vector Management's default and your corresponding Rule 11 Motion, and reading the Rules together, cognizant of their salutary purpose, I fail to see how withholding information that could lead to the withdrawal of Steele's Motion for Default is helpful. Certainly it is not helpful to me, but neither does it seem helpful to your client. The proposition seems self-evident, but I nonetheless point to the spirit of Rule 11's "safe harbor" provision, the purpose of which is to avoid unnecessary motion practice, and

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to Rule 7.1's requirement that we confer in good faith to try to *resolve or narrow the issue*. The issue here is whether Steele's Motion is sanctionable under Rule 11.

Accordingly, in good faith and in order to make an informed decision on whether to withdraw Steele's Motion, I respectfully request the following information. As you requested in our prior correspondence regarding Vector Management, this is a final "consolidated list of queries."¹

1. Please direct me to the *specific* "factual allegations without evidentiary support or the likely prospect of such support" that you claim "Steele and Hunt" have made.²
2. What is the "discernable pattern of improper conduct" to which you refer on page 2 of your Motion?
 - a. Given your statement that it is a "discernable pattern," please describe each act of misconduct constituting the "pattern."
3. How have Steele and I "disregard[ed] the Court's prior rulings"?
 - a. Which rulings and how have my client or I disregarded them?
4. What "claims" has Steele made as to MLBAM in his Motion for Default, i.e., necessarily other than those contained in Steele's original pleadings, that you argue are "interposed for an improper purpose?"
 - a. What is Steele's alleged "improper purpose?"
 - b. How does Steele's Motion for Default as to MLBAM "harass MLB Properties and the other defendants?"
5. Has Skadden represented MLBAM in connection with this case?

¹ I ask that you please provide me with the following information at your earliest convenience, but in no event later than Monday, September 13, 2010, given the running of the 21 day safe harbor period. In light of your Rule 11 certification, this should be plenty of time to provide information already in your possession.

² In the absence of specificity, your statement violates the very proposition it cites.

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- a. If so, when did said representation begin (and, if pertinent, end)?
6. Does MLBAM have an office at 75 9th Avenue, 5th Floor, New York, NY 10011?
7. Given your claim (MLB Opposition at 5) that MLBAM was "never served with process in this case," on whom or what was service made at 3:00 p.m. on November 17, 2009 at 75 9th Avenue, 5th Floor, New York, NY 10011?
8. Does the entity, if not MLBAM, which was served on November 17, 2009 at the above address have any connection to MLBAM or MLB.com?
9. Has the entity that was served on November 17, 2009 at the above address filed an answer or otherwise defended this case?
10. Do you or have you represented the entity served on November 17, 2009 at the above address in connection with this case?
11. Was MLB.com served on that date (or any other date)?
12. What is the basis for your position, as stated in your Opposition at 5 n.3, that "MLB.com" is incapable of being sued or served (given published reports of MLB.com entering into business deals or other relationships)?
13. If MLB.com is incapable of being sued or served, how is MLB.com able to enter into contracts and otherwise act as a legal entity in conducting its business?
14. Was Major League Baseball Properties, Inc. ("MLB") ever served?
 - a. If not, why did MLB file an appearance on December 8, 2008?
15. Does MLBAM interact with MLB on a regular basis (daily or weekly) in conducting their respective business operations?
 - a. For example, does MLBAM communicate with MLB regarding licensing issues?
 - b. Does MLB communicate with MLBAM regarding multimedia issues, e.g., individual team website content, MLBPA issues regarding content, etc?

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- c. If so, how is it possible that MLBAM did not have notice of Steele's suit against it until June 18, 2010?
16. Who or what, exactly, are the "Major League Baseball entities" whose interests MLB has been defending in this case, as described in MLB's Opposition at 8?
17. What "interests" has MLB defended as to each?
18. How is MLB's defense of the "Major League Baseball entities," as described in MLB's Opposition at 8, pertinent to the issue of whether MLBAM defaulted?
19. Is MLBAM one of those interests?
 - a. If so, how is it possible that MLBAM did not have notice of Steele's suit against it until June 18, 2010?
20. Is MLB.com one of those interests?
 - a. If so, how is it possible that MLBAM did not have notice of Steele's suit against it until June 18, 2010?
21. Did MLBAM authorize the removal of the MLBAM copyright notice from the MLB Audiovisual Skadden filed with the District Court?
 - a. If so, how is it possible that MLBAM did not have notice of Steele's suit against it until June 18, 2010?
 - b. If not, who did?

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22. Under what legal authority do you base your assertion that Steele's Motion constitutes a "later claim" in a "later suit," subject to claim or issue preclusion?

I look forward to your reply and to clarifying these pivotal issues as soon as possible.

Very truly yours,



Christopher A.D. Hunt

cc: Cliff Sloan, Esq. (via e-mail only)
Kenneth A. Plevan, Esq. (via e-mail only)
Matthew J. Matule, Esq. (via e-mail only)
Jeremy P. Oczek, Esq. (via e-mail only)
Michael R. Hackett, Esq. (via e-mail only)

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September 13, 2010

BY EMAIL

Christopher A.D. Hunt, Esq.
The Hunt Law Firm LLC
10 Heron Lane
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RE: Steele, et al Steele v. Turner Broadcasting System, Inc., et al., No. 08-11727-NMG (D. Mass.)

Dear Mr. Hunt:

I have your letter of September 10, 2010 (“Letter”). Said Letter relates to the Rule 11 motion for sanctions served by Major League Baseball Properties, Inc. (“Properties”) in response to Plaintiff’s Motion for a default judgment against non-party MLB Advanced Media, L.P. (“MLBAM”) in the above-noted lawsuit (“Steele I”).

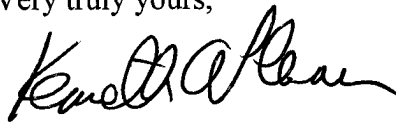
We do not accept that your Letter was sent in good faith. We note that you sent a comparable letter regarding Plaintiffs’ motion in Steele I similarly seeking a default against “Vector Management” (“Vector Letter”). In response to the Vector Letter, defendants in Steele I undertook in good faith to provide substantive answers. Your only response was to file those letters as part of Plaintiffs’ proposed Reply, filed September 10, 2010 (Document No. 130-2), to characterize the position of defendants in opposition to Plaintiff’s “Vector Management” motion for a default as a “farce” (see “Plaintiffs’ Motion,” Document No. 130, at 1), and to characterize our responses to the Vector Letter as constituting “fraud, bad faith, and misconduct.” (See Plaintiffs’ [Proposed] Reply, Document No. 130-1, at 17, n. 15.) Accordingly, no useful purpose would be served by providing a substantive response to the Letter, as it is apparent that the Letter is simply a stratagem designed to try to deflect attention from the fact that Plaintiffs’ positions on their default motions are completely without legal or factual merit.

Christopher A.D. Hunt, Esq.
September 13, 2010
Page 2

Further evidence of Plaintiffs' bad faith is the construction of the questions in the Letter. The Letter's question 21, for example, erroneously assumes a material fact rather than asks about it – it assumes that an MLBAM copyright notice was removed from what you refer to as the "MLB Audiovisual." In fact, neither this firm, nor any of its attorneys, removed an MLBAM copyright notice, or any other copyright notice, from what we had referred to as the "Turner Promo" submitted to and considered by the Court in granting summary judgment dismissing Plaintiffs' copyright claim. See 646 F. Supp. 2d 185, 192-3. Nor, to the knowledge of this firm and its attorneys, did any defendant "remove" any copyright notice from the Turner Promo. Rather, Plaintiffs have simply assumed that there was such "alteration" without a good faith basis for doing so.¹

If, as you have been previously advised, Plaintiffs' motion is not withdrawn by September 20, 2010, we will file the Rule 11 motion on September 21, 2010.

Very truly yours,



Kenneth A. Plevan

cc: Jeremy P. Oczek, Esq.
Michael R. Hackett, Esq.
By Email

¹ Moreover, as pointed out elsewhere, the presence or absence of a copyright notice has no bearing on the analysis of substantial similarity.

EXHIBIT 1

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VIA E- MAIL AND FIRST CLASS MAIL

September 4, 2010

Christopher G. Clark, Esq.
Skadden, Arps, Slate, Meagher & Flom LLP
One Beacon Street
Boston, MA 02108

Re: Steele v. Ricigliano al., No: 10-11458

Dear Mr. Clark:

When you first called on August 31, 2010, to have a Rule 7.1 conference by telephone, as opposed to e-mail, I was pleasantly surprised. When you casually mentioned the possibility of a stipulation putting the above case, Steele III, in abeyance, pending the outcome of the appeal – 09-2571 – and pending motions in the same case’s District Court proceedings, I was even more surprised. It was a reasonable proposal, given that the First Circuit’s ruling certainly may affect proceedings in Steele III.

As a matter of fact, my client and I, earlier this summer, had even discussed approaching you to see if you would agree to exactly such an abeyance. Our thinking was that the two cases were, in fact, related and our preference was to file and consolidate Steele III with Steele I upon its remand. However, as the summer wore on, and August 27, 2010 approached, that is, three years after the MLB Audiovisual was released on MLB.com, we filed to preserve the claim as to any statute of limitations defense. This was a prudent precaution despite defendants’ earlier false assertion that the so-called “TBS Promo” was released by TBS on August 31, 2010 (in truth it was released by MLBAM on August 27, 2007) and despite the fact that my client did not discover the infringement until early October 2007.

I called my client and, as I expected, he was willing to give this idea a try. This – Steele’s willingness to negotiate, after months turning to years, of misrepresentations to him, to the Court, and dozens of other instances of inequitable conduct doled out by you and your firm to his detriment – was the “hallmark” of my client’s good faith, honesty, and fairness towards all since the outset of this case. Without hesitation, my client reminded me that he has *always* attempted to deal with you fairly and honestly – as the long record attests - and, despite the ugly treatment he received in return, he asked me to take a good look at what you were proposing.

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Back to the present. The day after our call, on September 1, 2010, I received your letter, which, in a much sharper tone, added to the previous night's discussion the resolution of client's 17 U.S.C. § 1202 claim (Steele II) as another condition for lifting the Steele III abeyance. I'm sure you recall that during the previous night's conversation, in your "hey, were just talking casually here" tone, I first referenced Steele II, to which you replied "yeah, and we have that going on as well, do we really need to deal with all of these at once" or something to that effect. There was absolutely no suggestion whatsoever that Steele II would be part of any stipulation during that conversation – despite the clear opportunity to do so when I mentioned it.

And this was no small condition you asked me to contemplate; litigation of Steele II would certainly take months, at a minimum, possibly a year or longer, during which time I would have hamstrung my client from pursuing Steele III, while allowing the limitations period to run and being subject to defensive litigation from all but two defendants. And then there's the fact that Skadden – and you, personally – are defendants in Steele II.

Your additional and unilateral "condition" to the limited agreement we discussed the prior evening was an unwelcome surprise, to say the least. I began to sense that things may not be as they appear.

You may also recall that, the first thing I requested from you when we spoke on September 1, 2010 was assurance that you were either representing or otherwise had the authority to speak on behalf of all defendants and bind them to an abeyance of Steele III. You immediately told me that no, you did not, and that in fact the agreement would only be on behalf of defendants Red Sox and TBS. Of course I wondered – aloud, in fact – how only three parties could stay the entire case as to all parties. I pondered whether a Court order could even be crafted so as to toll the statute of limitations as to all parties, and you quickly replied (correctly, of course) that "the stipulation would not bind non-parties."

I left it at that, thought now I was a bit more suspicious, but I knew my client was willing to bend over backwards to act in good faith to any reasonable proposal, as he has throughout this litigation, and it was my duty to present him with defendants' – or rather, the Red Sox and TBS's - modified proposal.

So, at this point, my client's stay of his prosecution of Steele III would apply to all defendants whereas only the Red Sox and TBS would be obligated by the service and limitations tolling provisions and, indeed, the stay of the Steele III litigation. As I considered the "evolving" terms of your offer, my suspicion increased: first, why hadn't you mentioned these crucial "tidbits"

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of information during the prior evening's discussion? In fact, you hadn't mentioned Steele II at all until I raised it, and then failed to disclose the soon-to-come additional demand; second, what incentive was there for my client to agree to stop proceedings against all defendants, yet allow all but two defendants to continue to litigate freely against him? Or not litigate and simply attempt to run out the statute of limitations – which is exactly what had prompted my question to you on September 1, 2010 as to the scope of your authority in the first place.

When I reasonably inquired as to whether you could nonetheless obtain the remaining defendants' assent to the abeyance – looking back, my naiveté is almost funny – you first said you weren't sure which ones you did or were going to represent in Steele III. When I reminded you that you had already represented many of them in Steele I and its appeal, you fell back to your usual “brush off:” it would take too long for you to get all the other defendants' assent.

Now, that was interesting, so I mentioned to you that I had, in the past, defended multiple large corporations (sometimes dozens) in a single action, and even at the small (compared to Skadden) firm where I worked, we had a communications procedure that allowed decisions to be made, or at least considered, fairly quickly. And based on defendants' litigation of this case to date, there does not seem to be a cumbersome decision process when it comes to actions on defendants' behalf, but rather only when defendants are asked in good faith for something in return.

In addition, given that you filed your motion to dismiss Steele III moments after we got off the phone, clearly some time had been put into its drafting. The papers even include a declaration of Anthony Ricigliano – who, to my knowledge, you have never represented. The limiting of the abeyance to only two defendants was, I began to realize, intentional; there would never be additional defendants subject to its terms because it was not part of your plan. Almost as an afterthought, I also realize now that there was no reason to rush to any of this given that Steele III was docketed just a week prior.

In the midst of these rapid-fire demands, I stated that it might make sense to apply the abeyance to defendants' Rule 11 Motions. You replied without hesitation, “I won't do that.” Of course, as it turned out, all concessions were to come from Steele; all demands from defendants (or just the Red Sox and TBS where it suited defendants).

But the best is yet to come. On September 1, 2010, you also added a rather bizarre demand that my client agree to not file additional motions in Steele I and not to file any additional suits during the abeyance. Now this was getting truly confusing. As I told you right off the bat, I did not see how I could, as an ethical matter, prospectively waive any rights my client may have relating to

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future motions or claims. You had an answer at the ready: I could simply move for leave from the Court. In retrospect, given the slow but steady unearthing of valid and good faith claims arising from defendants' course of conduct against the *pro se* Steele in the District Court, it's hard not to wonder what else defendants may be hiding.

I left it at that, telling you that I had to run this all by my client. You "gave" me 45 minutes to get back to you, or you would go ahead and file the motion to dismiss. I scrambled to find and speak with my client, not realizing at the time that your threat was nonsense: you were filing the motion to dismiss regardless of whether we came to terms on a stipulation of abeyance.

Looking back, of course, this is all clear, and I blame myself for being victim to such a transparent and clumsy "bait and switch." I mean think about it: Steele was to make enormous concessions for what, exactly? You were filing the motion regardless. In other words, for nothing.

Amazingly, however, Steele was not willing to reject your increasingly outrageous proposal. And so we waited to see how it looked on paper. How it looked, of course, was like a proposal designed to fail.

You had managed to draw me into discussions about a stipulation, but by the time the proposed agreement reached my desk yesterday it was patently obvious that this was nothing but a set-up. The terms as laid out in the proposed stipulation gave all benefits to defendants while giving nothing – in fact taking away rights from my client.

It would have been extremely ill-advised – if not malpractice – for me to agree to it. But if I didn't, you would have something to show the Court – any Court – down the road and argue "unclean hands!" It was a win/win for defendants and a catch-22 for my client. At least that was your plan.

If I had any lingering doubts about your motives, your letter of today dispelled them. Steele was, in fact, intending to make a reasonable counter-proposal along the lines of what we had discussed the evening of August 31, 2010, but your letter beat me to the punch. The most revealing part of which is, of course, your contrived indignation about Steele IV.

You knew about Steele IV before calling me on August 31, 2010. In fact, it was likely the impetus for the set-up. Chris – I'm sure you remember, but would rather forget – you slipped during our last conversation when discussing what claims Steele would be agreeing to not file. You said "state claims" during our back and forth and quickly changed the subject, as any good attorney

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is trained to do. But I heard you, Chris, and when we hung up shortly thereafter I was left wondering just what was really going on.

But putting aside your verbal gaffe, we both know that Skadden monitors dockets in large exposure cases like these on behalf of their large corporate defendants – particularly during the approach of the first arguable date on which the limitations period would expire. The proof is in your own letter: you did learn about Steele IV – and not from me. How? When? Your letter implies – but of course does not directly state, because it not be true – that you just now found out about it and my failure to tell you is the “hallmark of bad faith.”

On the contrary, your 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 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.

No small irony that Steele IV is based on an equitable claim – and that you have used it to further your inequitable conduct.

Your ruse has not only failed, it has deepened your predicament.

I request that all substantive future communications with me be made in writing.

Very truly yours,



Christopher A.D. Hunt

cc: Cliff Sloan, Esq. (via e-mail only)
Matthew J. Matule, Esq. (via e-mail only)
Kenneth A. Plevan, Esq. (via e-mail only)