UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 10-2173

SAMUEL BARTLEY STEELE; BART STEELE PUBLISHING; STEELE RECORDZ,

Plaintiffs-Appellants,

v.

VECTOR MANAGEMENT; MLB ADVANCED MEDIA, L.P.,

Appellees.

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

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

JOINT BRIEF OF APPELLEES

Jeremy P. Oczek
Michael R. Hackett
PROSKAUER ROSE LLP
One International Place
Boston, Massachusetts 02110
(617) 526-9600

Counsel for Appellee
Vector Management LLC

Clifford M. Sloan
Matthew J. Matule
Scott D. Brown
Christopher G. Clark
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
One Beacon Street
Boston, Massachusetts 02108
(617) 573-4800

Counsel for Appellee
MLB Advanced Media, L.P.

Dated: January 10, 2011

CORPORATE DISCLOSURE STATEMENTS PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 26.1

MLB ADVANCED MEDIA, L.P.

Major League Baseball Advanced Media, L.P. has no parent corporation. No publicly traded company owns 10% or more of the stock of MLB Advanced Media, L.P. or its partners.

VECTOR MANAGEMENT LLC

Vector Management LLC's ultimate parent company is Live Nation Entertainment, Inc. Liberty Media Corporation owns 10% or more of Live Nation Entertainment, Inc.'s stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE(S)**

REASONS WHY ORAL ARGUMENT NEED NOT BE HEARD

Pursuant to Rule 34(a) of the Federal Rules of Appellate Procedure and First Circuit Local Rule 34.0(a), Appellees respectfully submit that no oral argument is necessary because the District Court applied settled principles of law in denying Appellants' motions for entry of default, and because the facts and legal arguments are adequately presented in the briefs and record.

In addition, Appellants concede in their opening brief that "[t]he 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." (Appellants' Br. at 10.)

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Whether the District Court abused its discretion in denying Plaintiffs-Appellants' two post-judgment motions for entry of default against Appellees MLB Advanced Media, L.P. and Vector Management LLC reasoning that entry of default would be futile given that

(a) the Complaint and the Amended Complaint fail to state a claim upon which relief can be granted because they contain no substantive allegations against either Appellee,

(b) the doctrine of issue preclusion bars Plaintiffs-Appellants' claims against Appellees as a matter of law,

(c) there was no evidence of record that any defendant or its attorneys acted in bad faith or committed fraud, and

(d) entry of default as to Appellee Vector Management LLC would violate its Due Process rights?

INTRODUCTION

This is Appellants' (collectively "Steele") second appeal to this Court in this lawsuit. The District Court previously dismissed all of Appellants' claims on the merits by written memoranda and orders resolving a motion to dismiss and a subsequent motion for summary judgment. At the time of dismissal, there were approximately 20 defendants. Appellants have appealed several of those prior rulings, and that fully-briefed appeal remains pending. (1st Cir. Case No. 09-2571.)

The sole issue presented on this second appeal is whether the District Court abused its discretion when it denied two post-judgment motions for entry of default against Appellees MLB Advanced Media, L.P. ("MLBAM") and Vector Management LLC ("Vector Management"), separate motions that Steele filed nearly one year after the District Court entered final judgment in favor of all defendants on all claims. (September 27, 2010 Order at A977-93.)

Appellees respectfully submit that this Court should affirm the District Court's well-reasoned decision denying as futile Steele's motions for entry of default, particularly so in light of the highly-deferential "clearly wrong" standard of review applicable on this appeal. KPS & Assocs., Inc. v. Designs By FMC, Inc., 318 F.3d 1, 12 (1st Cir. 2003). First, the District Court applied the correct legal standard, citing and relying on this Court's opinion in KPS setting forth the standards to be applied. Second, the District Court correctly found that

entry of default would be futile because there were no substantive allegations -- in either of Steele's two complaints -- against MLBAM or Vector Management. Specifically, the District Court found that "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." (September 27, 2010 Order at A988.) This fundamental pleading deficiency is dispositive, and this Court need go no further to affirm the District Court.

Third, the District Court correctly concluded that entry of default would be futile because Steele's claims are barred as a matter of law by the doctrine of issue preclusion. In a prior decision dated August 19, 2009, the District Court held in granting summary judgment that Steele could not successfully maintain a copyright infringement claim because there was no substantial similarity between Steele's song and the works challenged as infringing. Steele is therefore precluded from attempting to relitigate the necessary element of substantial similarity which, consequently, precludes Steele from asserting a viable copyright infringement claim against either Appellee (or, for that matter, any defendant with regard to the works at issue).

This preclusion bar provides another basis upon which the District Court did not abuse its discretion when it concluded that entry of default as to

MLBAM or Vector Management would be futile. Moreover, Steele has never explained (in the District Court or in his opening brief on this appeal) how the inability to have two additional defendants in the lawsuit, where there were already 20 others, could have "crippled the pro se Steele in his ability to better state his claims" (see Appellants' Br. at 49) or would have made any difference in the analysis of the issue of the substantial similarity, or lack thereof, between the creative works at issue.

Fourth, entry of default judgment against Vector Management would violate its Due Process rights because it was not named in the Amended Complaint. As the District Court correctly noted, "[w]hen 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. Vector Management is entitled to such an assumption." (September 27, 2010 Order at A986 (citation omitted).)

This Court can also affirm the District Court's denial of Steele's motion for entry of default as to Vector Management by concluding that Steele's initial Complaint was rendered a legal nullity upon the filing of the Amended Complaint (which does not contain any references to Vector Management). Under clear First Circuit authority, "[a]n amended complaint normally supersedes 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 quotation marks omitted).

Finally, the District Court found as a matter of fact that there was neither bad faith nor fraud, on the part of defendants or their counsel, a finding that also is entitled to a high degree of deference. The record, moreover, contains no evidence of any such conduct, and Appellants' strident, repeated and hyperbolic assertions to the contrary cannot possibly overcome the absence of such evidence.

In sum, the District Court applied settled First Circuit precedent and properly exercised its discretion in denying Steele's motions. Accordingly, Appellees respectfully submit that the District Court's September 27, 2010 Order should be summarily affirmed.

STATEMENT OF FACTS AND PROCEEDINGS BELOW

The general background facts underlying the claims asserted in this litigation are set forth at length in the Brief Of Defendants-Appellees dated March 29, 2010 filed in First Circuit Case No. 09-2571, as well as the District Court's Orders of April 3, 2009 (granting in part defendants' motions to dismiss) (A82-94), August 19, 2009 (granting defendants' motion for summary judgment dismissing copyright claim) (A128-43) and September 27, 2010 (denying Steele's post-judgment motions for entry of default) (A977-93). Appellees present the following additional facts relevant to the resolution of the limited issue on this appeal.

1. Steele Files A Lawsuit Against Approximately 20 Named Defendants And Seeks Statutory Damages In Excess Of $400 Billion

On October 8, 2008, Steele filed a pro se Complaint. (A31-40.) Steele named approximately 20 defendants[1] and sought statutory damages in excess of $400 billion relating to the alleged misuse and infringement of his copyrighted song about the Boston Red Sox. (Id.)

As the District Court summarized Steele's theory: "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." (September 27, 2010 Order at A978.)

Steele identified as "primary defendants" Turner Broadcasting System, Inc. and Time Warner Inc.; "[o]ther defendants" included, among others, "Major League Baseball/MLB Productions" and "Vector Management." (A31.) The individuals and entities named in Steele's initial Complaint included several broadcasting and entertainment media companies, members of the popular rock

[1] Appellees use the word "approximately" because it is difficult to make a precise determination from the face of the Complaint.

band Bon Jovi, the Boston Red Sox, and scores of other individuals and entities not identified by name, including "the owners of every ballpark that the ad at issue was played in," television "[n]etworks that played the ad in more than 74 countries," and "parties responsible for playing the ad on the internet." (A31 ¶¶ 2-3.) Steele's initial Complaint lacked a caption. (See id.)

2. The MLB Entities

Steele's initial Complaint named as one of the defendants "Major League Baseball/MLB Productions." (A31 ¶ 2.) Notwithstanding the backslash (indicating that Steele intended to indicate one defendant), Steele filled out two separate summons forms for the U.S. Marshals Service to serve, one for "MLB Productions/MLB.com" (A53-54) and one for "Major League Baseball" (A55-56). One of those summonses was subsequently served by the Marshals. (See A53.) As the District Court specifically found, Steele's initial Complaint does not reference, and contains no allegations against, MLBAM. (September 27, 2010 Order at A987.)

On December 8, 2008, MLB Properties filed an appearance in the District Court on behalf of "Major League Baseball Properties, Inc. (misidentified in the Complaint as 'Major League Baseball/MLB Productions')." (A43-46.)[2] Also on December 8, 2008, MLB Properties filed a corporate disclosure statement

[2] As set forth in further detail at Part I.E.1 infra, Major League Baseball Productions is a division of MLB Properties. (A268-80.)

as required by the Federal Rules of Civil Procedure and the Local Rules for the District of Massachusetts. (A47-48.) MLB Properties and other defendants also filed a motion to dismiss the Complaint on that date. (A13-14.) Steele did not object or raise any issues in response to the appearance of MLB Properties as a defendant.

On January 30, 2009, Steele filed an Amended Complaint. (A73-81.) That pleading, which now included a caption, named "Major League Properties, Inc." as a defendant. (A73 (emphasis added).) In paragraph 14 of the Amended Complaint, Steele alleged "Defendant Major League Properties, Inc. (MLB) is a company located at Linthicum, Maryland. They are the parent of MLB Advanced Media & MLB.COM." (Id. ¶ 14 (emphasis added).)

As the District Court specifically found, the Amended Complaint contains no other references -- and no factual allegations -- against MLBAM. (September 27, 2010 Order at A987.)

3. The Vector Entities

In his initial Complaint, Steele listed "Vector Management" among "other defendants," but never mentioned "Vector Management" or any Vector entity again in the Complaint. (See A31-40.) Steele filled out a summons form for the Marshals to serve for "Vector Management c/o Jack Rovner" (A67-68). That summons was served by the Marshals (but not on Mr. Rovner). (A67.)

As explained below, although the Complaint did not further describe "Vector Management," it seems apparent from the allegations set forth therein that Steele was seeking to name as a defendant the management company that acted as the personal manager to the recording artist Jon Bon Jovi.

Accordingly, on December 8, 2008, Vector 2 LLC filed an appearance in the District Court on behalf of "Vector 2 LLC (misidentified in the Complaint as 'Vector Management')."[3] (A43-46.) Vector 2 LLC is and was a wholly owned subsidiary of Vector Management LLC. (A49-50.) Also on December 8, 2008, Vector 2 LLC filed a corporate disclosure statement. (A49-50.) Vector 2 LLC and other defendants also filed a motion to dismiss the Complaint. (A13-14.) Steele did not object or raise any issues in response to Vector 2 LLC's appearance.

In his Amended Complaint, Steele removed the few references to "Vector Management." (See A73-81.) The Amended Complaint caption named "Vector 2 LLC" as a defendant and, in paragraph 18, alleges that "Defendant Vector 2 LLC is a company which performs management services on behalf of John Bongiovi." (A73, 75 ¶ 18.) The Amended Complaint contains no other references -- and no factual allegations -- against any Vector entity or Vector

[3] Appellees acknowledge that the use of the numerical "2" instead of the word "Two" was a typographical error, and that the correct entity name is Vector Two, LLC. That typographical error has no bearing on the issues raised in the District Court or on this appeal.

individual (Vector Management, Vector 2 LLC, Jack Rovner or otherwise). (See A73-81.)

4. The District Court Grants The Defendants' Dispositive Motions And Enters Final Judgment In Favor Of All Defendants On All Claims

Following several rounds of dispositive motion practice, the District Court dismissed all of Steele's claims against all defendants.[4] On April 3, 2009, the District Court dismissed Steele's Lanham Act and Massachusetts consumer protection statute claims on a motion to dismiss, but denied the defendants' motion to dismiss the copyright infringement claim. (A82-94.) With respect to Vector 2 LLC, the District Court specifically noted the lack of any factual allegations against that entity in Steele's initial Complaint or Amended Complaint: "Two of the defendants (Sony and Vector), apart from being identified as such, are not mentioned anywhere in either [the initial or the amended] complaint." (A89.)[5] The District Court thus dismissed the case as to Vector 2 LLC. (A94.)

---

[4] In light of Steele's pro se status, at Steele's request the District Court considered both his "original and amended complaints together." (A87.)

[5] Steele did not appeal the District Court's dismissal of Vector 2 LLC. (Appellants' Reply Brief, 1st Cir. No. 09-2571, at 7 ("Appellees . . . correctly observe[] that Steele does not appeal the dismissal of his 93A and Lanham Act Claims as to all defendants and that Steele does not appeal the Rule 12(b)(6) dismissal of the copyright claims of . . . Vector 2 LLC . . . .").) Nevertheless, Steele now has sued Vector Management LLC, Vector 2 LLC, and Jack Rovner in other lawsuits, e.g., Steele v. Ricigliano, No. 10-11458-NMG (D. Mass. filed Aug. 25, 2010); Steele v. Boston Red Sox Baseball Club Limited Partnership, No. 10-

After a period of limited discovery on the issue of substantial similarity, approximately 20 defendants moved for summary judgment on the copyright infringement claim. On August 19, 2009, the District Court granted the defendants' motion for summary judgment on the merits and entered final judgment "in favor of defendants." (A128-44.) Thereafter, the District Court case was closed. On August 28, 2009, Steele filed a motion for reconsideration of the District Court's August 19, 2009 order, which the District Court denied on October 13, 2009. (A26.)

5. Steele Hires An Attorney After The District Court Dismissed The Lawsuit On The Merits

On November 6, 2009, attorney Christopher A.D. Hunt filed a notice of appearance in the District Court on behalf of Steele and filed a notice of appeal to the U.S. Court of Appeals for the First Circuit. (A26.) That appeal, First Circuit Case No. 09-2571, has been fully briefed since April 2010.

6. Steele Files Two Post-Judgment Motions For Entry Of Default Against MLBAM And Vector Management

On June 18, 2010 -- more than 18 months after the Amended Complaint was filed, nearly 10 months after entry of final judgment in the District Court, and after Steele's initial First Circuit appeal was fully briefed -- Steele filed

3418-E (Mass. Super. Ct. filed Aug. 26, 2010). To date, Steele has commenced four trial court lawsuits against more than 40 defendants related to the same alleged infringement and misuse of his copyrighted song.

a motion in the District Court seeking entry of "default" against MLBAM. (A148-254.) In that motion, Steele argued, among other things, that the District Court's "August 19, 2009 ruling and Judgment did not apply to MLBAM because . . . MLBAM failed to appear, failed to move for summary judgment, and this Court's ruling and Judgment excluded MLBAM." (A151 n.1.) Steele argued that MLB Properties "was not successfully served, but later appeared voluntarily" in the District Court proceeding. (A151 (emphasis in original).) After Steele's motion for entry of default as to MLBAM was fully briefed, on August 12, 2010, Steele filed a second motion for entry of default, this time against "Vector Management." (A592-775.)

7. The District Court Denies Steele's "Ill-Advised" Default Motions

On September 27, 2010, the District Court entered a Memorandum & Order denying both of Steele's motions for entry of default. (A977-93.) As set forth in more detail below, the District Court found that MLBAM and Vector Management technically defaulted, but denied "the motions for entry of a default because such a determination would be futile." (A985.) First, the District Court found that "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" because Steele's two complaints did not contain substantive allegations against those entities. (A988.) Second, the District

Court correctly recognized that "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," an essential element of Steele's copyright infringement claim. (A989.) Finally, the District Court further held that entry of default against Vector Management would violate its Due Process rights because "it [was] entitled to conclude that it [had] no obligation to answer the complaint or defend against the lawsuit." (A986.)[6]

On September 30, 2010, Steele filed an Amended Notice of Appeal. (A994-96.) This appeal followed.

[6] In its September 27, 2010 Order, the District Court also denied two motions for Rule 11 sanctions against Steele and Hunt, commenting that "[a]lthough, in retrospect, the filing of plaintiff's [default] motions was ill-advised and perhaps unnecessary, the Court declines to find them so frivolous as to warrant the imposition of sanctions." (A992.) The District Court added this admonition: "Plaintiff and his counsel are, however, forewarned that any further motion practice in this regard will be looked upon askance." (Id.) Appellees are not appealing the District Court's denial of Rule 11 sanctions.

SUMMARY OF ARGUMENT

The sole issue before this Court is whether the District Court abused its discretion in denying Steele's two "ill-advised" and "perhaps unnecessary" post-judgment motions for entry of default against MLBAM and Vector Management. At the outset, it is important to emphasize the highly deferential "clearly wrong" standard of review applicable on this appeal. Appellees respectfully submit that there are multiple, independently sufficient bases upon which this Court can (and should) affirm the District Court's well-reasoned decision denying as futile Steele's motions for entry of default.

First, there is no dispute that the District Court applied the correct legal standard in denying Steele's motions. KPS & Assocs., Inc. v. Designs By FMC, Inc., 318 F.3d 1, 12, 15 (1st Cir. 2003); Appellants' Br. at 39.

Second, the District Court correctly found that entry of default would be futile because there are no substantive allegations in either of Steele's complaints against MLBAM or Vector Management. (September 27, 2010 Order at A988.) That pleading deficiency is fatal to Steele's motions.

Third, the District Court correctly concluded that entry of default would be futile because Steele's claims are barred by the doctrine of issue preclusion. Steele is bound by the District Court's August 19, 2009 decision finding on summary judgment that there is no substantial similarity between

Steele's song and the infringing works at issue. Therefore, Steele cannot assert a viable copyright infringement claim against MLBAM or Vector Management.

Fourth, there is no basis on which to second guess the District Court's factual finding that Steele failed to establish an evidentiary basis demonstrating any bad faith or any fraud by any defendant or any defendant's counsel.

Fifth, entry of default judgment against Vector Management would violate its Due Process rights because it was not named in the Amended Complaint, and therefore was entitled to conclude that it has no obligation to answer the Complaint or defend against the lawsuit. Additionally, Steele's original Complaint remains today as it did upon the filing of the Amended Complaint -- legally inoperable -- and it is axiomatic that no default can enter on this basis.

Based on the foregoing, Appellees respectfully submit that an objective reading of the September 27, 2010 Order confirms that the District Court correctly applied settled First Circuit precedent and properly exercised its discretion in denying Steele's motions for entry of default.

In addition, this Court can affirm the District Court by concluding that, notwithstanding the District Court's findings, MLBAM and Vector Management did not technically default. Accordingly, Appellees respectfully submit that this Court should affirm the District Court.

ARGUMENT

I. THE DISTRICT COURT'S DECISION DENYING STEELE'S MOTIONS FOR ENTRY OF DEFAULT SHOULD BE AFFIRMED

A. Standard Of Review

This Court reviews a district court's "denial of a Rule 55(c) motion for abuse of discretion, while [it] review[s] any factual findings underlying that decision for clear error." KPS & Assocs., Inc. v. Designs By FMC, Inc., 318 F.3d 1, 12, 15 (1st Cir. 2003). See also Indigo Am., Inc. v. Big Impressions, LLC, 597 F.3d 1, 5 (1st Cir. 2010) (applying an abuse of discretion standard of review); McKinnon v. Kwong Wah Rest., 83 F.3d 498, 502 (1st Cir. 1996) (same); Coon v. Grenier, 867 F.2d 73, 76, 78 (1st Cir. 1989) (same). This Court has held that it "will not disturb the district court's decision [on a Rule 55(c) motion] unless it is 'clearly wrong.'" KPS, 318 F.3d at 12; Bond Leather Co. v. Q.T. Shoe Mfg. Co., 764 F.2d 928, 938 (1st Cir. 1985) (recognizing that the First Circuit has "said on numerous occasions" that a district court decision on a default motion "should not be disturbed unless it is "clearly wrong").[7]

In addition, this Court may affirm a district court decision "on any independently sufficient ground made manifest by the record." Hodgens v. Gen.

[7] Steele acknowledges in his opening brief that this Court's review of the District Court's decision "is deferential" and that "KPS is unquestionably controlling authority." (Appellants' Br. at 35, 39.)

Dynamics Corp., 144 F.3d 151, 173 (1st Cir. 1998) (internal quotation marks omitted).

B. The District Court Identified And Applied The Correct Legal Standard In Resolving Steele's Default Motions

The District Court correctly stated and applied the legal standard required by this Court's controlling precedent in KPS. (September 27, 2010 Order at A982-90.) The District Court stated that in assessing a motion pursuant to Fed. R. Civ. P. 55, "[t]he 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.'" (Id. at A982 (quoting KPS, 318 F.3d at 12).) In addition, the District Court stated:

> 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. A983-84 (alteration in original).) Finally, the District Court correctly noted that "[i]n 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." (Id. at A982.)

The District Court also correctly stated that "default judgments are ordinarily disfavored" and "[c]ourts should decide cases upon the merits whenever reasonably possible." (Id. (internal quotation marks omitted).) See also Coon, 867 F.2d at 79 (recognizing that "doubts should be resolved in favor of adjudicating contested claims on the merits").

C. The District Court Rigorously And Appropriately Applied The KPS Factors And Correctly Held That Entry Of Default Would Be Futile As To Both Appellees

The District Court properly denied Steele's motions for entry of default after applying the facts of this case to the controlling KPS framework. In its analysis, the District Court expressly considered five of the seven KPS factors, and the remaining two KPS factors, if anything, further support the District Court's decision to deny Steele's motions. (See Part I.E.3, infra (addressing Steele's analysis of KPS factors six and seven).)[8]

The District Court held that "[e]ven though [MLBAM and Vector Management] 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

[8] Notwithstanding Steele's argument to the contrary (see Appellants' Br. at 43), this Court's precedent makes clear that the District Court was not required to consider every KPS factor. See KPS, 318 F.3d at 6, 12.

good cause pursuant to Fed. R. Civ. P. 55(c)." (September 27, 2010 Order at A985-86.) Indeed, the District Court held that several of the KPS factors "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." (Id. at A987-88.)

1. Entry Of Default Is Futile Because Steele's Initial Complaint And Amended Complaint Do Not Assert Any Substantive Allegations Against MLBAM Or Vector Management

In its analysis of KPS factors 1, 4 and 5 (whether the default was willful, the nature of the defendants' explanation for the default, and the good faith of the parties), the District Court found that, on the factual record before it, "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." (Id. at A988.)[9] The District Court also found that "MLBAM is not listed in the caption of Steele's original or amended complaints," and "neither complaint refers to MLBAM . . . in substantive allegations." (Id. at A987.) Accordingly, the District Court concluded

[9] The District Court also expressly rejected Steele's argument 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" because "correspondence before the filing of a lawsuit does not constitute legal notice." (September 27, 2010 Order at A987.)

that any "failure to respond or defend was understandable and was not done willfully or in bad faith." (Id.)

Based on the scant references to Appellees in Steele's two complaints, the District Court concluded that "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." (Id. at A988.) In this regard, the District Court recognized the black letter principle that "[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 a matter of law, the facts as alleged fail to state a claim upon which relief can be granted." (September 27, 2010 Order at A988.) See also Rodriguez v. Craig, Civ. A. No. 91-10665-RWZ, 1994 WL 561999, at *2 (D. Mass. Sept. 29, 1994) (dismissing complaint against defaulted defendants and recognizing that "[t]he fact that defaults have issued does not bar such a dismissal" where "the complaint clearly fails to state a claim" as a matter of law).

This fundamental pleading deficiency -- by itself -- is a sufficient basis upon which to affirm the District Court. See generally Ashcroft v. Iqbal, 556 U.S. __, 129 S. Ct. 1937, 1949 (2009) (holding that a complaint "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible

on its face"); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 562 (2007) (recognizing that there is no duty for "courts to conjure up unpleaded facts that might turn a frivolous claim . . . into a substantial one" (internal quotation marks omitted)). Steele does not persuasively address this dispositive pleading failure in his opening brief (see Appellants' Br. at 52-73), nor does he explain how his default motions (and this appeal) are not facially meritless in light of the complete absence of substantive allegations against MLBAM and Vector Management in either complaint.

2. Entry Of Default Is Futile Because It Would Violate Vector Management's Due Process Rights

The District Court also credited Vector Management's Due Process argument. Steele makes no claims to have served Vector Management with a copy of the Amended Complaint or to have otherwise notified Vector Management that it was Steele's intention to pursue claims against it even though Steele had dropped any mention of Vector Management in both the caption and the body of the Amended Complaint. Nor can Steele point to anything in the record, served or not served on Vector Management, in which he purported to be maintaining an action against Vector Management as opposed to Vector 2 LLC. Thus, to the extent that Steele gave Vector Management notice of anything it was that Steele had dropped Vector Management from the lawsuit, was pursuing claims against Vector 2 LLC instead, and there was nothing for Vector Management to defend against.

The District Court properly recognized that to enter a default against Vector Management in the face of these undeniable facts would be a violation of Vector Management's Due Process rights: "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. Vector Management is entitled to such an assumption." (September 27, 2010 Order at A986 (citation omitted).) See also Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) (holding that "the fundamental requisite of due process of law is the opportunity to be heard," and that the "right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest").

This reasoning presents yet another basis upon which to affirm the District Court's September 27, 2010 Order denying Steele's motion for entry of default as to Vector Management.

3. Entry Of Default Is Futile Because Any Claims Against MLBAM Or Vector Management Are Barred As A Matter Of Law By Issue Preclusion

In its analysis of KPS factors 2 and 3 (whether setting aside the default would prejudice the plaintiff and whether a meritorious defense is

presented), the District Court correctly recognized that "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" -- a dispositive issue on Steele's copyright infringement claim that Steele had lost on an earlier summary judgment motion. (September 27, 2010 Order at A989; August 19, 2009 Order (A128-43).)[10]

As the District Court recognized, "[i]ssue 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.'" (September 27, 2010 Order at A989 (quoting Taylor v. Sturgell, 553 U.S. 880 (2008)).) The District Court correctly reasoned that "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." (Id. at A989.) The District Court also recognized that this Court's binding precedent holds that "[i]ssue preclusion will undermine a plaintiff's claim even against defendants who were not parties to the first litigation." (Id. (quoting O'Neill v. Dell Publ'g Co., 630 F.2d 685, 690 (1st Cir. 1980)).) As a result of the issue preclusion doctrine, Steele's copyright claim is legally insufficient and without merit against any possible defendant with

[10] As the District Court's April 3, 2009 Order dismissed the Vector entity (A89, 94), it did not join in the motion for summary judgment on the copyright claim asserted in the Amended Complaint.

regard to the works at issue. Consequently, "Steele does not have a legal basis for recovery against Vector Management or MLBAM and entry of default would be futile." (Id. at A989-90.)[11]

D. Steele's Arguments Have No Merit

1. Steele's Attempt To Manufacture So-Called "Fraud" Was Rejected By The District Court And, In Any Event, Does Not Affect The Merits Of This Appeal

Steele's opening brief is littered with inflammatory rhetoric and unsubstantiated allegations of purported "fraud on the court, false appearances, false evidence, [and] abusive and dishonest tactics" allegedly committed by Appellees, other defendants in the District Court and their counsel. (See Appellants' Br. at 34.)[12] Because those statements and accusations are irrelevant to

---

[11] The District Court did not reach the issue as to whether Steele's claims against MLBAM and Vector Management also would be barred as a matter of law by the doctrine of res judicata. (September 27, 2010 Order at A990 n.1.) That doctrine also would bar Steele's claims against MLBAM and Vector Management and further justifies affirming the District Court.

[12] See, e.g., Appellants' Br. at 29 ("Skadden recently conceded that the audiovisual evidence they filed in the District Court and this Court were not 'true and correct' copies"); id. at 30 ("Defendants concede knowingly submitting the false and altered audiovisual evidence to the district court, under penalty of perjury."); id. at 32-33 (referencing a so-called "Skadden sting" relating to discussions of a stay of other lawsuits commenced by Steele); id. at 34 ("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"); id. ("an incredible story of fraud on the court, false appearances, false evidence, abusive and dishonest tactics"); id. ("[t]here is a virtual encyclopedia of the most brazenly dishonest maneuvers undertaken in court proceedings"); id. at 72 ("the behavior of Vector, Vector 2, and Skadden constituted fraud on the court of

the resolution of the issue on this appeal, Appellees will not attempt to exhaustively address Steele's assertions except to state that they do not concede the accuracy of Steele's purported statements of "fact" or "evidence."[13]

The District Court considered -- and rejected -- Steele's arguments on this score. For example, the District Court stated:

> 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.

(September 27, 2010 Order at A988-89.) As another example, the District Court considered, but did not credit, Steele's argument that:

> [T]he 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

---

the highest magnitude"); id. at 74 (alleging an "unprecedented scope of fraud"). It is worth noting that Steele has filed a separate lawsuit against several of the defendants named herein and the lawyers representing them relating to the alleged removal of copyright management information on the audiovisual. Steele v. Bongiovi, No. 10-11218-NMG (D. Mass. filed July 20, 2010). A motion by the defendants in that case to dismiss that action in its entirety is pending.

[13] Steele cites as "evidence" letters included in the Addendum to his brief that should not be considered on this appeal. First, several of those letters were written after the District Court issued its September 27, 2010 Order, were not before the District Court, and therefore are not part of the record on appeal. See Ayala-Gerena v. Bristol Myers-Squibb Co., 95 F.3d 86, 96 n.6 (1st Cir. 1996) (refusing to consider documents that were not part of the original motion materials). In addition, all of the letter exchanges were initiated by Steele and his attorney, and therefore give the appearance of a self-serving effort to manufacture evidence.

> 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.

(Id. at A990.)

The District Court rejected Steele's arguments, both because they are plainly irrelevant to the resolution of the focused issue before the District Court and because of the complete lack of genuine evidence supporting Steele's baseless accusations. Indeed, the District Court stated: "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." (Id. at A990.) Steele's arguments that the District Court "ignored overwhelming evidence" and "ignore[d] . . . actual, documented, and undisputed bad faith misconduct[]" (see Appellants' Br. at 44) is a complete distortion of the District Court's analysis.

On the contrary, the District Court concluded that Steele's default motions were "ill-advised," "perhaps unnecessary," and "perhaps unreasonable" because "entry of default is clearly futile." (September 27, 2010 Order at A991-92.) The District Court further admonished Steele and his attorney that "any further motion practice in this regard will be looked upon askance." (Id. at A992.) As the foregoing excerpts demonstrate, the District Court thoughtfully considered Steele's allegations and appropriately exercised its fact-finding authority. Absent a

finding that the District Court's conclusion was "clearly wrong," its conclusion is entitled to deference on this appeal.

2. Steele Cannot Rely On A Statement In His District Court Legal Brief To State A Claim Against Appellees

In his opening brief, Steele attempts to rely -- for the first time on appeal -- on one sentence in a brief titled "Plaintiff's Amended Complaint And Opposition To Motion To Dismiss" that states "Let's get the record straight, MLB Advanced Media and MLB.COM claimed copyright for the audiovisual and not TBS." (See Appellants' Br. at 56, 61.) There are at least three flaws in this argument.

First, Steele did not raise this argument or cite this document in the District Court and therefore it may not be raised for the first time on appeal. See United States v. Slade, 980 F.2d 27, 30 (1st Cir. 1992) ("It is a bedrock rule that when a party has not presented an argument to the district court, she may not unveil it in the court of appeals."). Steele nowhere cites this "Let's get the record straight" statement in his District Court filings.

Second, this statement is not in a complaint, it is in a brief. In connection with his opposition to the defendants' motion to dismiss, Steele filed two documents: (i) an Amended Complaint (Docket No. 41) and (ii) his opposition brief, which he titled "Plaintiff's Amended Complaint And Opposition To Motion To Dismiss" (Docket No. 42). Accordingly, Steele's assertion that the

District Court "defied the record when it declared MLBAM was not mentioned in either Complaint" (see Appellants' Br. at 56 (internal quotation marks omitted)), is unfounded because his cited statement is not in either the initial Complaint (A31-40) or the Amended Complaint (A73-81).

Third, in any event, even if this one sentence is considered, it alleges only ownership of a copyright -- an allegation that falls far short of asserting wrongdoing sufficient to state a claim against MLBAM. Indeed, Steele nowhere explains how ownership of a copyright could in any way affect the outcome of the District Court's substantial similarity analysis.[14]

Steele also attempts to rely on this one-sentence "allegation" in support of his statement that "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)." (Appellants' Br. at 55.) That statement is demonstrably false and a classic case of bootstrapping. The only reference to "MLB Advanced Media" in the Appendix pages Steele cites is the above-discussed statement in Steele's legal brief -- a document that is not a complaint and, in any event, that one reference is hardly

[14] Even if copyright ownership somehow mattered in the substantial similarity analysis, Steele's opening brief demonstrates that he raised -- and had ample opportunity to argue -- that issue before the District Court. (See Appellants' Br. at 10.) Steele argues that "MLB did not have the right to claim copyright . . . ," but that is only true if the works at issue were substantially similar (an issue not at all affected by a claim of ownership). (See id.)

"equal[]" to the number of times the other three MLB names are referenced in Steele's voluminous filings.

3. Steele's Argument Regarding KPS Factors Six And Seven Is Incorrect

Steele incorrectly asserts that the District Court's analysis is flawed because it "disregard[ed] factor six (amount of money involved) and factor seven (timing of the motion)." (Appellants' Br. at 43.) As an initial matter, this Court's precedent makes clear that a District Court is not required to consider every KPS factor or "any precise formula." KPS, 318 F.3d at 12. Here, the District Court cited, and thoroughly considered, five of the KPS factors. In any event, neither factor six nor factor seven could lead to the conclusion that the District Court committed an abuse of discretion.

As to factor six (the amount of money at issue), Steele suggests "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)." (Appellants' Br. at 46.)[15] Steele forgets, of course, that the District Court previously found that the "infringing" "audiovisual and derivative Bon Jovi song" were not infringing as a matter of law, rendering any conclusory reference to "hundreds of millions of dollars" irrelevant.

[15] This demand for hundreds of millions or hundreds of billions of dollars was against all defendants, including the approximately 20 defendants that the District Court dismissed. (A31-40.)

As to factor seven (the timing of a motion to set aside default), the timing of "the motion" refers to the motion by a defaulting defendant "to set aside entry of default," KPS, 318 F.3d at 12 -- not the timing of a motion by the plaintiff requesting entry of default as Steele erroneously suggests. Accordingly, the arguments presented in Appellants' Brief at pages 45-46 are irrelevant. In fact, KPS factor seven weighs in favor of Appellees because they promptly addressed the issue at length before entry of default (indeed, no default ever entered in this case). (See A255-67, 783-93.)

E. This Court Also Could Affirm The District Court Because Neither Appellee Actually Defaulted

This Court may affirm a district court decision "on any independently sufficient ground made manifest by the record." Hodgens v. Gen. Dynamics Corp., 144 F.3d 151, 173 (1st Cir. 1998) (internal quotation marks omitted).

1. MLBAM Did Not Default Because It Was Never Served With Process

This Court also could affirm the District Court by concluding that the factual record clearly demonstrates that MLB Properties (the defendant who appeared in and defended the District Court proceeding) -- not MLBAM -- was the party served with process. Steele does not dispute that the summons served was addressed to "MLB Productions/MLB.com." (A53.) Steele also does not dispute that MLB Properties, the party that responded to the service of the summons by

appearing as a defendant in the District Court, assumed the name "Major League Baseball Productions." (A268-78 (declaration and supporting Secretary of State filings).) Accordingly, the factual record demonstrates that MLB Properties -- not MLBAM -- was the defendant served with process. As a result, this Court could affirm the District Court by concluding that MLBAM was not served with process and therefore could not have defaulted.

2. Vector Management Did Not Default Because The Filing Of The Amended Complaint Rendered The Initial Complaint A Dead Letter

The District Court acknowledged this Court's binding authority that "[a]n amended complaint normally supersedes 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." (September 27, 2010 Order at A981.) The District Court thus stated that "[n]ormally, 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." (Id.)

Notwithstanding this binding First Circuit precedent, the District Court nevertheless concluded that "Vector Management is named as a defendant in

a viable complaint" because "in its Memorandum and Order of April 3, 2009 [] this Court held that, because of Steele's [then] pro se status, the Court would read his original and amended complaints together." (Id.) The District Court cites no authority supporting its departure from this Court's binding precedent.

Vector Management is not, however, named as a defendant in a viable complaint. In deciding defendants' motion to dismiss, the District Court, in deference to Steele's then-pro se status, read Steele's original and amended Complaints together as it endeavored to find any allegations in either Complaint that could keep Steele's claims alive. (A82-94.) By reading the Complaints together, however, the District Court cannot resurrect Steele's original Complaint. Steele's original Complaint remains today as it did upon the filing of the Amended Complaint -- legally inoperable -- and it is thus axiomatic that no default can enter on the basis thereof. See Connectu, 522 F.3d at 82 (and cases cited therein).

Accordingly, this Court could affirm the District Court's denial of Steele's motion for entry of default as to Vector Management by concluding that Steele's initial Complaint was rendered a legal nullity upon the filing of the Amended Complaint (which does not contain any references to Vector Management).

3. The Proper Parties -- MLB Properties And Vector 2 -- Appeared And Defended Against Steele's Claims

Steele's reliance on the misnomer doctrine is misplaced. (See Appellants' Br. at 57-59.) The doctrine does not apply because in this case there is evidence of "confusion by the misnomer," see In re Pharm. Indus. Average Wholesale Price Litig., 307 F. Supp. 2d 190, 196 (D. Mass. 2004) -- MLB Properties, believing that it was the party named in the summons served, appeared and defended the action. Moreover, the fact that the defendants and the District Court recognized that Steele's complaint centered on "an advertisement produced and aired . . . during the 2007 Major League Baseball [] post-season" (Appellants' Br. at 60 (alteration in original)) does not lead to the conclusion that "Steele's principal target" (id.) was MLBAM, and not the entity that appeared in and successfully defended the lawsuit (MLB Properties).

Likewise, although the original Complaint did not further describe "Vector Management," it is apparent from the allegations set forth therein that Steele was seeking to name as a defendant the management company that acted as the personal manager to the recording artist Jon Bon Jovi. Vector 2 LLC, believing that it was the proper party to defend against Steele's allegations, thus appeared and defended the action. The alternative would have been for Vector Management to answer, deny the allegations and then force Steele to proceed

against a party that had nothing to do with the dispute while the statute of limitations continued to run regarding the proper party -- Vector 2 LLC. Thus, in good faith, Vector 2 LLC appeared and successfully defended the lawsuit.

Here, the record shows that Steele's initial Complaint was complicated and ambiguous, and that where there were ambiguities in the identification of defendants, the defendants attempted in good faith to appear on behalf of the entities they believed were implicated in the pro se plaintiff's lengthy and often confusing allegations. Further, those defendants promptly and unambiguously disclosed to Steele the precise legal entities that were appearing in the District Court. This good faith action fulfills, not flaunts, the spirit of the misnomer doctrine.

* * *

As the above arguments demonstrate, the District Court applied the correct legal standard and properly exercised its discretion in denying Steele's motions for entry of default as to MLBAM and Vector Management. Accordingly, this Court should affirm the District Court.[16]

[16] In several sections addressing his "Relief Requested," Steele asks this appellate court to order a wide range of overreaching relief, including entering a default judgment against Appellees, holding an evidentiary hearing in this Court, awarding fees and costs, and disqualifying undersigned counsel. The relief Steele seeks is unprecedented and clearly unwarranted.

CONCLUSION

For the foregoing reasons, the District Court's September 27, 2010 Order should be affirmed.

Dated: January 10, 2010
Boston, Massachusetts

Respectfully submitted,

/s/ Clifford M. Sloan
Clifford M. Sloan (1st Cir. No. 60920)
Matthew J. Matule (1st Cir. No. 60698)
Scott D. Brown (1st Cir. No. 109415)
Christopher G. Clark (1st Cir. No. 122617)
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
One Beacon Street
Boston, Massachusetts 02108
(617) 573-4800

Counsel for Appellee
MLB Advanced Media, L.P.

/s/ Jeremy P. Oczek
Jeremy P. Oczek (1st Cir. No. 76230)
Michael R. Hackett (1st Cir. No. 1143574)
PROSKAUER ROSE LLP
One International Place
Boston, Massachusetts 02110
(617) 526-9600

Counsel for Appellee
Vector Management LLC

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a)

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type-Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 8,170 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in Times New Roman, 14 point.

Dated: January 10, 2011

/s/ Christopher G. Clark
Christopher G. Clark

CERTIFICATE OF SERVICE

I, Christopher G. Clark, hereby certify that on January 10, 2011 I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that the following parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system: Christopher A.D. Hunt, The Hunt Law Firm LLC, 10 Heron Lane, Hopedale, Massachusetts 01747, cadhunt@earthlink.net, counsel of record for Plaintiffs-Appellants Samuel Bartley Steele, Bart Steele Publishing, and Steele Recordz.

Dated: January 10, 2011

/s/ Christopher G. Clark
Christopher G. Clark