

No. 10-2173

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

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

v.

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

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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

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

**PETITION FOR PANEL REHEARING AND REHEARING EN BANC OF  
APPELLANTS SAMUEL BARTLEY STEELE; BART STEELE PUBLISHING;  
STEELE RECORDZ**

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## STATEMENT PURSUANT TO FED. R. APP. P. 35(b)

The Panel's February 10, 2012 Judgment ("Judgment") affirming the district court's decision by reference to the district court's reasoning – but without a written decision – affirms rulings that directly conflict with Supreme Court, First Circuit, and other circuit court holdings. Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944); Ungar v. PLO, 599 F.3d 79 (1st Cir. 2010); Venegas-Hernandez v. Sonolux Records, 370 F.3d 183 (1<sup>st</sup> Cir. 2004); KPS & Assoc., Inc. v. Designs by FMC, Inc., 318 F.3d 1 (1<sup>st</sup> Cir. 2003); Conetta v. National Hair Care Centers, 236 F.3d 67 (1<sup>st</sup> Cir. 2001); McKinnon v. Kwong Wah Restaurant, 83 F.3d 498 (1<sup>st</sup> Cir. 1996); FDIC v. Francisco Inv. Corp., 873 F.2d 474 (1<sup>st</sup> Cir. 1989); Aoude v. Mobil Oil Corp., 892 F.2d 1115 (1st Cir.1989); Zocaras v. Castro 465 F.3d 479 (11th Cir. 2006).

### THE JUDGMENT OVERLOOKS MANIPULATION OF THE JUDICIAL PROCESS AND FRAUD ON THE COURT

The Judgment's affirmation of the district court's decision and reasoning represents endorsement of counsel and party fraud and misconduct that so grossly departs from the accepted and usual course of judicial proceedings as to demand the rare and extraordinary exercise of this Court's supervisory powers and duties.

Specifically, left intact, the Judgment upholds that:

(1) A properly served party may willfully default provided it conceals its default until entry of favorable judgment. Venegas-Hernandez, 370 F.3d at 187 (default judgment upheld against copyright infringement defendant that intentionally failed to appear in multi-million dollar copyright infringement action); FDIC, 873 F.2d at 478 (“upon proper notification of pending action parties must respond diligently” or face “harsh consequences”); Ungar, 599 F.3d at 84; McKinnon, 83 F.3d at 503-504.

(2) The defaulting party and counsel may designate another, unserved, legally distinct proxy to appear “in lieu of” the defaulting party (September 27, 2010 District Court Decision (“Decision”) at 16), without notice or leave of court. Hazel-Atlas, 322 U.S. at 246-247; Conetta, 236 F.3d at 75; Zocaras, 465 F.3d at 484 (appearing in a case “under a false name deliberately, and without sufficient justification, certainly qualifies as flagrant contempt for the judicial process and amounts to behavior that transcends the interests of the parties in the underlying action”).

(3) The unserved proxy may misrepresent its appearance by falsely claiming that it is the defaulting party. Hazel-Atlas, 322 U.S. at 246-247; KPS, 318 F.3d at 14 (refusal to set aside default judgment based on defendant's overall course of conduct including defendant's "inconsistencies" and "implausibilities" as well as defendant's "intransigence" in related litigation); Aoude, 892 F.2d at 1118-1119; Zocar, 465 F.3d at 484.

(4) Counsel for the defaulting party and its proxy may file a spoliated digital 'version' of plaintiff's primary evidence, accompanied by a false counsel declaration, from which the defaulting party's identification – name, copyright notice, logo – was deleted. Hazel-Atlas, 322 U.S. at 246-247; KPS, 318 F.3d at 15 (defendants and their counsel's fraud on the court – their "fabrication and bad faith" justified refusal to set aside default pursuant to district court's inherent authority); Aoude, 892 F.2d at 1118-1119.

(5) A district court has the discretion to hold that willful defaults concealed by false proxy appearances and gross fraud on the court are "justified," "understandable," and "not done willfully or in bad faith," Decision at 11. Hazel-Atlas, 322 U.S. at 246-247; 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"); KPS, 318 F.3d at 15; Aoude, 892 F.2d at 1118-1119.

**UNDISPUTED FACTS THAT JUDGMENT AFFIRMS SHOW  
"NO EVIDENCE OF BAD FAITH"**

Plaintiff presented a number of facts, each long-undisputed, unchallenged, and never addressed by defendants; each painstakingly documented in the district court record (and appendix to this appeal), comprised largely of defendants' own statements, documents, and exhibits. The district court's decision, upheld by the Panel's adoption thereof without a written decision, held that these facts – a selection of which are listed below - provided "no evidence of bad faith on the part of the Defendants," Decision at 14:

1. On December 8, 2008, defendants filed materially altered evidence, namely a false version of the indispensable evidence at issue in plaintiff's original copyright case (Appeal No. 09-2571), the infringing audiovisual produced by primary defendant MLB Advanced Media, L.P. ("MLBAM").

2. Defendants deleted MLBAM's name, copyright notice, and logo, as well as protectable material relevant to a substantial similarity analysis, from the

audiovisual, misattributed its ownership to other defendants, and misrepresented the legal status and ownership of the work.

3. The altered audiovisual was accompanied by a sworn declaration of counsel stating under oath that it was a “true and correct copy” of the audiovisual; defendants later conceded that it was a “version,” but failed to explain or correct their alterations or sworn declaration of counsel.

4. Two defendants intentionally defaulted as part of a scheme to remove them from the case through unilateral, covert, and extrajudicial means; their willfulness is established by the simple fact that each was served and took affirmative – and improper – steps to defend themselves without appearing, to wit, arranging for unserved, discrete entities with similar names to file unauthorized ‘proxy’ appearances, falsely claiming to be the defaulting defendants.

Specifically,

5. The primary defendant, MLBAM - claimed copyright holder of the infringing audiovisual work - was properly served (as noted by the district court, Decision at 9), but defaulted, willfully and surreptitiously, while defendants and counsel acted to conceal MLBAM’s default.

a. On the same day defendants filed MLBAM's altered audiovisual, December 8, 2008, their counsel filed an appearance for an unserved, unrelated, and similarly-named entity, Major League Baseball Properties, Inc. ("MLBP"), which falsely claimed *it* was MLBAM, while MLBAM failed to appear.

b. The altered audiovisual ended showing the logo of another defendant, Turner Broadcasting System, Inc. ("TBS"), whereas the unaltered version had ended showing MLBAM's name, copyright notice and logo.

c. Defendants misrepresented the audiovisual to the district court as the "Turner Promo" and "TBS Promo," despite MLBAM's proclaimed, persistent, and publically displayed copyright notice on the unaltered audiovisual; the district court adopted defendants' misleading nomenclature.

d. Once past the pleadings stage, counsel for defendants never again referenced MLBAM (until compelled to address the issue after the formerly *pro se* plaintiff retained counsel, who discovered MLBAM's default).

e. MLBAM and other defendants have filed numerous contradictory, false, and yet-uncorrected corporate disclosure statements with the district court and this Court.

6. Principal defendant Vector Management (“Vector”) was served on December 8, 2008 (Decision at 7); that same day, concurrent with MLBP’s false appearance as MLBAM’s proxy and counsel’s false evidentiary submission, defense counsel filed a second appearance for an unserved entity – “Vector 2 LLC” (“Vector 2”) - which falsely claimed that *it* was defendant Vector (yet was later discovered to be a wholly independent subsidiary of Vector).

7. Vector, concealed by the false appearance of its proxy - Vector 2 - willfully and surreptitiously defaulted; additionally, Vector 2 misrepresented *itself*, using a false name in its appearance and subsequent filings.<sup>1</sup>

8. MLBP opposed plaintiff’s motion for entry of default as to MLBAM; the district court remarked that it was “unclear” why MLBP was taking up MLBAM’s defense, Decision at 9.

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<sup>1</sup> Its proper name, as later conceded by counsel, is “Vector Two LLC.”



9. Vector appeared to oppose plaintiff's motion for entry of default with a series of evolving, contradictory, and, ultimately, demonstrably false arguments:

a. Vector first denied it existed at all – as a “legal entity” – and so could not have been served, then recanted by claiming the issue of “what entity” was served was “inherently ambiguous.”

b. Vector then conceded that it was properly served but claimed that its ad hoc substitution of “Vector 2” was proper.

Specifically:

c. Vector argued that it had determined whom plaintiff actually “intended” to sue and had – unilaterally, covertly, and without the court's permission or plaintiff's assent - substituted “Vector 2” for itself to ensure plaintiff sued the proper party “while the statute of limitations continued to run.”

d. Vector offered two flatly contradictory and equally unlikely explanations as to why its substitution of Vector 2 was proper:

- i. Vector argued that Vector 2 was the proper defendant because plaintiff “intended” to specifically sue the manager of the *person* “Bongiovi,” i.e., the singer of the band Bon Jovi.
  - ii. Vector argued that Vector 2 was the proper defendant because plaintiff “intended” to specifically sue the manager of the *band* Bon Jovi.
- e. Notwithstanding Vector’s mutually exclusive positions, as a matter of undisputed public record both arguments were false; according to numerous well-publicized statements of Vector and Mr. Bongiovi, Vector, not Vector 2, was manager of the band Bon Jovi, which was a named defendant; moreover, no available records – at least via Google search – show an entity called “Vector 2” or “Vector Two” related in any way to Bongiovi/Bon Jovi; in an attempt to explain Vector 2’s appearance, counsel identified three parties using sixteen different names within two pages of their opposition to entry of default, without explanation or apparent reason.

f. Nonetheless, Vector's counsel maintained, without any supporting evidence, and contrary to all the evidence, that "Vector neither has nor had any connection with Bon Jovi."

10. MLBAM and Vector (and their falsely appearing proxies) were, at all pertinent times, represented by the same counsel (other than a brief appearance by separate counsel for Vector, post-judgment, to oppose entry of default).

11. Counsel employed the same illicit methodology on their clients' behalf, i.e., willful default concealed by false proxy appearance, in the related case underlying Appeal No. 11-1675.

12. Defendants and counsel willfully directed this Court to and misrepresented spoliated evidence in appellate briefing, Appeal No. 11-1674, specifically a materially altered website from which MLBAM's name, copyright notice, and logo had been removed, along with material elements bearing on substantial similarity.

The above undisputed facts – on their face – show an exceptionally gross departure from the accepted rules, norms, and customs of attorney conduct, which, plaintiff respectfully submits, requires this Court to abide its duty and exercise its

inherent supervisory powers. Hazel-Atlas, 322 U.S. at 246-247; Aoude, 892 F.2d at 1118-1119.

## CONCLUSION

For the reasons stated above, the Judgment conflicts with Supreme Court, First Circuit, and other circuit court decisions, involves an issue of exceptional importance, and overlooks and misapprehends material facts and law. Plaintiff respectfully requests a rehearing by the Panel and a rehearing *en banc*.

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Dated: February 23, 2012

## CERTIFICATE OF SERVICE

I, Christopher A.D. Hunt, hereby certify that on February 23, 2012, I caused this Petition for Panel Rehearing and Rehearing En Banc of Appellant Samuel Bartley Steele, filed through the ECF system, to be served electronically by the Notice of Docket Activity upon the ECF filers listed below.

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Dated: February 23, 2012

/s/ Christopher A.D. Hunt  
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# United States Court of Appeals For the First Circuit

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No. 10-2173

SAMUEL BARTLEY STEELE, ET AL.,

Plaintiffs, Appellants,

v.

VECTOR MANAGEMENT, ET AL.,

Defendants, Appellees,

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TURNER BROADCASTING SYSTEM, INC., ET AL.,

Defendants.

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Before

Boudin, Howard and Thompson,  
Circuit Judges.

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JUDGMENT

Entered: February 10, 2012

Plaintiff-Appellant Samuel Bartley Steele ("Steele") appeals from the judgment of the district court denying his motions for default judgment against defendants Vector Management and MLB Advanced Media, L.P.

After our own careful review of the record and the briefs of the parties, we find no error or abuse of discretion in the district court's careful and thorough reasoning in support of its decision to deny the request for default judgments. KPS Assocs., Inc. v. Designs By FMC, Inc., 318 F.3d 1, 12 (1st Cir. 2003). Thus, for substantially the same reasons set forth in the district court's

memorandum and order of September 27, 2010, we affirm the judgment of the district court.

By the Court:

/s/ Margaret Carter, Clerk.

cc:

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